

IOWA FINANCE AUTHORITY[265]

Regulatory Analysis

ARC 2128C: Iowa Administrative Code 265—Chapter 9, “Title Guaranty Program”

I. Summary.

This Regulatory Analysis has been prepared by the Iowa Finance Authority (IFA) and its division, Iowa Title Guaranty (Title Guaranty or ITG), in response to a request made by the Iowa Land Title Association (ILTA) pursuant to Iowa Code section 17A.4A. This analysis addresses certain statutorily prescribed questions concerning the impact of a rule making proposed by ITG and IFA amending Chapter 9 of IFA’s administrative rules, Notice of which was published on September 2, 2015, in the Iowa Administrative Bulletin as **ARC 2128C**. ILTA’s request for the Regulatory Analysis was set forth in ILTA’s letter, dated September 15, 2015, providing public comment on the noticed rules (ILTA Letter). A copy of the ILTA Letter appears herein as Exhibit A (reproduced as submitted).

This Regulatory Analysis pertains to a proposed amendment of the rules governing the Title Guaranty program, a program created by the legislature to provide a viable alternative to title insurance in the state of Iowa. The program is administered by ITG. The proposed amendment was noticed in the Iowa Administrative Bulletin on September 2, 2015, as **ARC 2128C**. The amendment would strike the entire Chapter 9 and adopt a revised Chapter 9 in its place. Herein, “current rules” refers to the rules currently in effect, and “noticed rules” refers to the rules as proposed in the amendment.

By way of background, the Regulatory Analysis begins by laying out the history of the Title Guaranty program, and explains what the requirements of the program are and what is meant by such important terms as “40-year title plant,” “abstract,” and “waiver.” The Regulatory Analysis goes on to identify and describe pertinent legal precedent concerning the program and the principal issues that have been raised in connection with the current Notice of Intended Action.

The subject matter of the analysis is dictated by Iowa Code section 17A.4A(2)“b,” which requires the agency to address the following five specific questions:

- a. Would it be feasible and practicable to establish less stringent compliance or reporting requirements in the rule for small business?
- b. Would it be feasible and practicable to establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business?
- c. Would it be feasible and practicable to consolidate or simplify the rule’s compliance or reporting requirements for small business?
- d. Would it be feasible and practicable to establish performance standards to replace design or operational standards in the rule for small business?
- e. Would it be feasible and practicable to exempt small business from any or all requirements of the rule?

On the first question, the analysis notes that in this case, unusually, the party requesting the analysis, ILTA, is on the record as requesting more stringent compliance requirements than those proposed in the noticed rules. The analysis nevertheless proceeds to enumerate the factors in favor of more stringent compliance requirements and those in favor of less stringent compliance requirements. The analysis concludes that there are more factors in favor of the noticed rules, which state that title plant inspections

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“may” be performed on any title plant, than there are in favor of the current rules which state that title plant inspections “shall” be performed on a small subset of title plants. The analysis does not reach a definite conclusion, however, as there is still a lengthy period during which public comment will be received, and IFA and ITG will consider all comments received before making a final determination on the issue.

On the second question, whether it would be feasible and practicable to establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business, the analysis notes that there are very few deadlines imposed by the noticed rules. The analysis does note that there is at least one deadline that could pose a burden to small businesses: the deadline for applying for waivers. The rules, under certain circumstances, could require a waiver request to wait for nearly six months after the request is filed before it is considered by the ITG Board. The analysis concludes that IFA and ITG are open to the possibility of shortening that time period to reduce the burden on small businesses, and the analysis invites public comment on that issue.

The third statutorily prescribed question of the analysis is: Would it be feasible and practicable to consolidate or simplify the rule’s compliance or reporting requirements for small business? The analysis notes that in their written comments on the noticed rules, some of the affected parties, the operators of 40-year title plants, have come out largely in favor of more extensive compliance requirements (i.e., mandatory inspections), that there have been no comments stating that the compliance requirements are too complex or difficult, and that the noticed rules impose no “reporting requirements.” The analysis concludes that it does not appear that it would be either feasible or practicable to consolidate or simplify the noticed rules’ compliance or reporting requirements for small business.

The fourth question of the analysis is: Would it be feasible and practicable to establish performance standards to replace design or operational standards in the rule for small business? The analysis notes that establishing performance standards to replace design or operational standards is what the title plant waiver process does. The analysis notes that the “operational standard” is the requirement, set by Iowa Code section 16.91, that each abstractor utilize an up-to-date 40-year title plant, and that the “performance standard” is the creation of a proper abstract.

The legislature in 1992 foresaw that it would not be possible or practicable in every situation to require the use of a 40-year title plant. For example, to this day there are Iowa counties with no functioning 40-year title plant; consequently, the legislature created the waiver process and made it available to both attorneys and abstractors to allow businesses, small or large, to abstract without a title plant if (a) the title plant requirement would pose a hardship, and (b) the waiver would be clearly in the public interest or be absolutely necessary to ensure availability of title guaranties throughout the state. Iowa Code § 16.91(5)“b.”

The attorneys and abstractors working without a title plant must of course still meet the applicable performance standards; specifically, they must still produce an abstract that shows all of the relevant interests in and restrictions on the subject piece of property, but they are allowed to do it in a different manner, such as the direct search method described below. Accordingly, there is no reason to attempt to establish performance standards to replace design or operational standards in the rules for small business because the legislature has already done that in the Iowa Code.

The fifth and final question of the analysis is: Would it be feasible and practicable to exempt small business from any or all requirements of the rule? On this point the analysis notes that nearly all of the abstractors who participate in the Title Guaranty program meet the definition of “small business” set forth in Iowa Code section 17A.4A. The approach of ITG and IFA in creating the noticed rules was to assume that all of the businesses to which the noticed rules would apply would be small businesses. It would be very inefficient to have one set of rules that apply to most abstractors and another set that applies to only a very few, if any. In short, IFA and ITG believe it would not be feasible and practicable to exempt small business from any or all requirements of the noticed rules.

Overall, as will be seen below, the issues raised by ILTA in its Talking Points Memo and in the ILTA Letter bear relatively little in common with the questions required to be addressed in the requested Regulatory Analysis. Indeed, on certain issues the Talking Points Memo and the ILTA Letter, on one hand, and the request for a regulatory analysis, on the other, appear to be at cross purposes. For example,

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ILTA and its members appear to be advocating for more stringent compliance requirements while the Regulatory Analysis expressly requires the agencies to consider requiring less stringent compliance.

II. Introduction.

Pursuant to Iowa Code section 17A.4A, the request for a regulatory analysis automatically extends the time for making public comment on the rule making and the opportunity for a public hearing until the date that is 20 days after the date on which a summary of this analysis is published in the Iowa Administrative Bulletin. A hearing as noticed in the Iowa Administrative Bulletin was conducted on September 22, 2015, to receive public comment; that hearing has been extended, and the concluding portion of the hearing will be held at the offices of the Iowa Finance Authority, located at 2015 Grand Avenue, Des Moines, Iowa, from 1:30 to 2:30 p.m., on December 15, 2015.

Public comment on the noticed rules will be accepted until 4:30 p.m. on December 15, 2015. Comments may be addressed to Tara Lawrence, Director, Iowa Title Guaranty, 2015 Grand Avenue, Des Moines, Iowa 50312. Comments may also be faxed to Tara Lawrence at (515)725-4901 or e-mailed to tara.lawrence@iowa.gov. Copies of this Regulatory Analysis may be obtained online at www.iowatitleguaranty.gov or at IFA's offices located at the address set forth above.

III. Background.

a. Legislative History.

Iowa law prohibits the writing of title insurance within the state of Iowa. See Iowa Code § 515.48(10). The Iowa Supreme Court affirmed this prohibition in Chicago Title Ins. Co. v. Huff, 256 N.W.2d 17 (1977). Because lenders typically sell mortgages on the secondary market, which requires title insurance, "title insurance frequently is sold across the state line to insure interests in property located in Iowa." 1 Patton and Palomar on Land Titles, § 42 (3d. ed.).

Title insurance generally provides more coverage to its insured than a title opinion or abstract. For example, title insurance generally covers forgeries in public records affecting title to a parcel of real estate, while title opinions exclude coverage for forgeries. Id., § 41.

i. Creation of the Title Guaranty Program.

This need for title insurance for mortgages sold on the secondary market prompted the Iowa legislature to create the Title Guaranty program in 1985 as an alternative to title insurance. When creating the Title Guaranty program, the legislature found that "title guaranties will facilitate mortgage lenders' participation in the secondary market and add to the integrity of the land-title transfer system in the state." Iowa Code § 16.3(15).

The legislature created the Title Guaranty Division as a division of IFA. Iowa Code § 16.91(1); see also, Iowa Land Title Association v. Iowa Finance Authority (and also concerning Charles W. Hendricks), 771 N.W. 2d 399, 401 (2009). The legislature also directed ITG to develop "a guaranty contract acceptable to the secondary market." Iowa Code § 16.91(3). With certain exceptions, title guaranty certificates generally provide coverage similar to the coverage provided by title insurance while preserving the attorney title opinion and abstracting process. Pursuant to Iowa Code section 16.91, rules for the Title Guaranty program are "established" by the Title Guaranty Division and "adopted" by IFA.

ii. The Iowa Code's 40-Year Title Plant Requirement.

In 1992, the legislature imposed a requirement that participating abstractors must maintain what is known as a 40-year title plant and tract index ("40-year title plant" or "title plant"), unless ITG waives

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that requirement. 1992 Iowa Acts, ch. 1090. Iowa Code section 16.91(5) establishes the 40-year title plant requirement and, at the same time, grants ITG the power to waive this requirement:

Additionally, each participating abstractor is required to own or lease, and maintain and use in the preparation of abstracts, an up-to-date abstract title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division. The tract indices shall contain a reference to all instruments affecting the real estate which are recorded in the office of the county recorder, and shall commence not less than forty years prior to the date the abstractor commences participation in the title guaranty program. . . .

The division may waive the requirements of this subsection pursuant to an application of an attorney or abstractor which shows that the requirements impose a hardship to the attorney or abstractor and that the waiver clearly is in the public interest or is absolutely necessary to ensure availability of title guaranties throughout the state. (Emphasis added.)

Thus, the Iowa Code raises two threshold questions: What exactly is a title plant and what is an abstract? This analysis will address each of these questions in turn.

What is a title plant? In broad terms, a title plant refers to a method of organizing copies of public documents that affect real estate. A title plant includes two groups of documents: (1) the property index, and (2) the general index. Charles B. Sheppard, Assurances of Titles to Real Property Available in the United States: Is a Person Who Assures a Quality of Title to Real Property Liable for a Defect in the Title Caused by the Assured?, 79 N.D. L.Rev. 311, 335 (2003).

The property index includes documents that both affect title to real property and include a legal description of the affected property. Id. An abstractor creates a property index for a tract by searching the documents using the geographic description of the property in question and then by reviewing each document found to determine if the document affects the property in question. Deeds, mortgages, leases, options to purchase, rights of first refusal, and releases are examples of documents included in a property index. Id. Conversely, the general index includes documents that affect title but do not include a legal description of the property. Id. General index documents include judgment liens, tax liens, and bankruptcy petitions. Id.

As an alternative to using a title plant to create an abstract, an abstractor can perform direct searches, using either a physical search of public records or a search of electronic records, or both. Grandfathered or waived attorneys who are participating abstractors generally use this method instead of a title plant.

What is an abstract? An abstractor uses the documents found in the title plant to prepare an abstract of title. An abstract of title gives the prospective purchaser or mortgagee of land “a simplified and convenient method of ascertaining the condition of title to the land without having to make a painstaking search of all of these various records.” Marlin M. Volz, Jr., 1 Ia Prac., Iowa Methods of Practice, § 1:1 (2007 ed.) An abstract of title “consists of a series of pages, each of which contains a summary of the material parts of a recorded or filed instrument affecting title to the property covered by the abstract.” Id. The abstract also includes information about the searches the abstractor performed with respect to judgments, taxes, mechanics’ liens, and other matters of record affecting titles to real property. Id.

Pursuant to Iowa Code section 16.91(5), an abstractor ordinarily must maintain a 40-year title plant to participate in the Title Guaranty program; however, the law also expressly provides that ITG may waive the title plant requirement. The ITG Board may waive the title plant requirement if an attorney or abstractor establishes two conditions: (1) the requirement imposes a hardship; and (2) the waiver clearly is in the public interest or is absolutely necessary to ensure the availability of title guaranties. The ITG Board has long allowed for two kinds of waivers — permanent waivers and provisional waivers. Provisional waivers allow an abstractor to abstract while building a 40-year title plant. The allowance of provisional waivers, while not specifically mentioned in the Iowa Code, is of long standing and is not controversial; ILTA’s policy, for example, is to support provisional waiver requests. See, ILTA Letter, p. 1.

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The law also allows “grandfathered attorneys,” attorneys who provided abstracting services from 1986 to the date of the attorney’s application to participate in the Title Guaranty program, to abstract without a title plant. Iowa Code section 16.91(5). Thus, while the law appears, in the first instance, to require a 40-year title plant in order to abstract within the Title Guaranty program, it actually allows at least six types of abstractors:

- Abstractors with 40-year title plants,
- Abstractors with provisional waivers,
- Attorneys with provisional waivers,
- Grandfathered attorneys,
- Attorneys with permanent waivers, and
- Abstractors with permanent waivers.

As of the date of this analysis, there are 136 participating abstractors with 40-year title plants, 8 abstractors with provisional waivers who are in the process of building a title plant, 0 attorneys with provisional waivers, 38 grandfathered attorneys, 11 attorneys with permanent waivers, and 0 non-attorney abstractors with permanent waivers. Working with these 193 individuals and entities, in the last fiscal year ITG issued 63,881 title guaranty certificates for real estate transactions totaling over \$10.4 billion in the aggregate. Of those certificates, approximately 23 percent were issued based on abstracts prepared without the use of a title plant.

b. Relevant Case Law.

Since the creation of the Title Guaranty program, there have been at least two appellate cases decided that have interpreted the statutes underlying the program. These decisions affect how those statutes may be implemented in the administrative rules.

In Berger v. Iowa Finance Authority, 593 N.W.2d 136, (Iowa 1999), the Iowa Supreme Court addressed the issue of geographic limitations on grandfathered attorneys. That issue appears to be noncontroversial at this point and is not at issue in the current rule making.

Subsequently, in Iowa Land Title Association v. Iowa Finance Authority (and also concerning Charles W. Hendricks), 771 N.W. 2d 399 (2009), the Supreme Court interpreted the waiver provision of Iowa Code section 16.91(5). In that case, ILTA challenged the ITG Board’s approval of a statewide title plant waiver for attorney Charles Hendricks. The primary issue on appeal was whether the ITG Board correctly construed the waiver provisions of §16.91(5). Hendricks at 401.

The terms “hardship” and “public interest” were not defined in the Title Guaranty program rules until after the Hendricks litigation was underway. First the Court determined that since the legislature did not modify the word “hardship” in the statute, an applicant can show a hardship by the word’s ordinary definition. The Court looked in Webster’s dictionary and Black’s Law Dictionary to determine the meaning of hardship. The Court concluded that hardship “...means suffering, privation, or adversity. A financial hardship alone can create privation, suffering, or adversity.” Hendricks at 403.

The Court in Hendricks then reviewed the definition of “public interest,” which, like the term “hardship,” was not defined in the rules until after the Hendricks litigation started. The Court again looked to the statute and found that the legislature did not define the term. Hendricks at 403. However, after reviewing the legislative findings for the purpose of the Title Guaranty program (§16.3(15)) and the mission statement of ITG, the Court found the ITG Board’s interpretation of public interest to be consistent with the intent of the legislature. Id. The Court stated that making title guaranty more competitive with title insurance serves the public interest by decreasing the use of title insurance. Hendricks at 404.

c. Current Rule Making.

On August 5, 2015, the Iowa Finance Authority Board of Directors approved a Notice of Intended Action to begin the process of revising the rules governing the Title Guaranty program. The Title Guaranty Division had determined that the ITG rules needed to be updated due to inconsistencies in

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the rules and inconsistencies between the rules and the Iowa Code. The rules had been amended over the years, and had begun to suffer from a lack of internal consistency, and they failed to address certain issues, such as whether legal entities, as opposed to individuals, are eligible to apply for title plant waivers.

The proposed amendment was published in the Iowa Administrative Bulletin on September 2, 2015, as **ARC 2128C**; the noticed amendment would strike the entire Chapter 9 and adopt a revised Chapter 9 in its place. The Notice of Intended Action was addressed at the Administrative Rules Review Committee's meeting on September 8, 2015. Following publication of the Notice, IFA began to receive public comments. On September 22, 2015, as noticed in the Iowa Administrative Bulletin, a public hearing was held to receive additional public comment.

The principal issues that have generated public comment with respect to this rule making are the definitions of the terms "hardship," "public interest," and "participating abstractor" and the change of language that says ITG "shall" conduct title plant inspections in certain cases to language that says ITG "may" conduct title plant inspections. IFA has received numerous comments from ILTA members on these points, most of which have been consistent with a "talking points" memo circulated by ILTA to its membership on or about September 16, 2015 (Talking Points Memo).

Public comment has also been received from abstractors and attorneys who are generally in favor of the proposed changes; some of the public comments proposed various modifications. The written public comment received by IFA regarding the noticed rule making is posted to ITG's Web site at www.iowafinanceauthority.gov/TitleGuaranty/DocumentSubCategory/145 under the heading "Public Notices."

A summary of the principal issues raised in the public comments received so far may be helpful to an understanding of the issues overall and of this analysis:

i. The Definitions of "Hardship" and "Public Interest."

Despite the fact that in 2009 ILTA lost the Hendricks case it had filed, and regardless of the Iowa Supreme Court's ruling therein, it is still the policy of ILTA to oppose all requests for statewide waivers. ILTA Letter, p. 1. Likewise, ILTA continues to insist that the terms "hardship" and "public interest," as used in the rules and in Iowa Code section 16.91(5), should be defined more stringently. ILTA Letter, pp. 2-3. However, the definitions of those terms were expressly addressed by the Iowa Supreme Court in Hendricks. See, 771 N.W.2d 402-403.¹ While ILTA specifically urges IFA to define "hardship" to have the same meaning as the term "undue hardship" used in Iowa Code section 17A.9A (see, ILTA Letter, pp. 2-3 – urging adoption of the reasoning of a 2007 Iowa District Court decision), that interpretation was expressly considered and rejected in 2009 by the Iowa Supreme Court in Hendricks, and unless the legislature amends Iowa Code section 16.91(5), IFA and ITG are simply not free to disregard the Iowa Supreme Court's decision.

The position of IFA and ITG on this point is consistent with a document posted on ILTA's Web site entitled "Written remarks provided to ILTA by Attorney James Gilliam regarding the decision filed by the Supreme Court of Iowa on August 21, 2009 (No. 08-0133)" [i.e., the Hendricks case]. Mr. Gilliam represented ILTA in the Hendricks case. The document states in part:

The primary focus of our appeal, to get the court to define the terms "hardship" and "public interest", were purely legal issues. . . . Unfortunately, the court sided with ITG on that part of the appeal. . . .

Going forward, ILTA's only remedy on the statutory interpretation issue is legislative. That is, I doubt that there are any circumstances under which the Supreme Court would reverse its decision on the meaning of the terms "hardship" or ["public interest", so you would need the legislature to tighten up that loophole. . . .

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See, <http://www.iowalandtitle.org/documents/Gilliams%20Remarks%20on%20Ruling%20090409.pdf> (Retrieved by Google search, October 6, 2015).

Given that ILTA has previously appealed this issue to the Iowa Supreme Court and lost, and that its own attorney apparently has advised ILTA that its only remedy is legislative, it is difficult to understand the basis on which ILTA continues to insist that the noticed rule's definitions of "hardship" and "public interest" are incorrect or that, in the absence of new legislation, ITG and IFA even have the option to adopt the definitions ILTA is putting forward.

ii. The Definition of "Participating Abstractor."

The noticed rules change the definition of "participating abstractor." In the current rules the definition reads as follows:

"Participating abstractor" means an abstractor who is authorized to participate in the title guaranty program and who is in full compliance with the abstractor's participation agreement, the Code of Iowa, these rules, the manual, staff supplements, and any other written or oral instructions or requirements given by the division.

In the noticed rules the following definition is set forth:

"Participating abstractor" means a person who is authorized by the division to prepare abstracts for division purposes.

Additionally, the noticed rules propose a definition for the term "person," based on section 4.1(20) of the Iowa Code:

"Person" means an individual or legal entity, including corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

The objection to these proposed changes by ILTA and at least some of its members is summed up in ILTA's Talking Points Memo, which states, in part:

The rule making re-defines "participating abstractor"

- Changes the definition from "abstractor" to "person" which is defined in the rule and by Code to include "legal entity, including corporation, limited liability company, partnership", allowing for an entity to now receive a waiver – prior to now, waivers have been primarily given to individual attorneys

Many of the comments that have been received to date deal with the issue of corporate entities receiving waivers. The Talking Points Memo is only partially correct in its assertion that previously waivers have been primarily given to individual attorneys. Specifically, permanent waivers have been given primarily to attorneys; however, dozens of provisional waivers have been granted to corporate entities over the years. The Iowa Code provision that allows for waivers, section 16.91(5), makes it clear that waivers may be given to both attorneys and abstractors. As far as IFA and ITG are aware, all of the non-attorney abstractors in this state, including all of ILTA's non-attorney abstractor members, operate as corporate entities (including LLCs) and not as individuals.

Because non-attorney abstractors are invariably organized as corporate entities, it would be illogical to interpret Iowa Code section 16.91(5), which specifically allows the ITG Board to grant a waiver to "an attorney or abstractor," to exclude corporate entity abstractors, because there effectively are no non-attorney abstractors who are not corporate entities. Until recently, the ITG Board had never been faced with a request for a waiver from a non-attorney abstractor, but the provision allowing the granting of waivers to an attorney or abstractor has been part of the Iowa Code since 1992.

iii. Mandatory Versus Discretionary Title Plant Inspections.

Another issue raised in ILTA's Talking Points Memo, and by a number of its members in their public comments, is the change to the language dealing with title plant inspections for abstractors granted provisional waivers.² Current 265—subrule 9.7(10) states: "*Title plant certification.* For applicants granted a provisional waiver, an inspection of the title plant shall be performed by division staff or a designee of the title guaranty director." (Emphasis added.) Noticed 265—subrule 9.6(12) provides: "An inspection of a title plant may be performed by the division or its designee to determine if the title plant meets the criteria set forth in paragraph 9.7(1) 'a'." (Emphasis added.) Thus, the current rules mandate title plant inspections while the noticed rules make such inspections optional on the part of ITG. Notably, unlike the current subrule, the noticed subrule is not limited to abstractors with provisional waivers, but would apply to all abstractors with title plants.

ILTA's Talking Points Memo asserts that "[t]he rule making eliminates inspections of title plants," and both ILTA and many of the comments received from ILTA's membership on this issue are opposed to the "elimination" of the title plant inspections. As will be discussed below, this opposition places ILTA and some of its members in the odd position of insisting on more regulation and compliance inspection than proposed by the rule-making agency. Needless to say, this is an unusual position to be taken by an organization that represents small businesses. Also, it should be pointed out that the rule making does not "eliminate" inspections; it merely makes them optional.

It is also worth noting that, as disclosed in ILTA's Talking Points Memo, ILTA is currently under contract with ITG to perform the title plant inspections and would presumably lose revenue if fewer inspections were performed. However, as discussed below, it is by no means clear that fewer inspections would be performed under the noticed rules than under the current rules. Finally, a number of abstractors have informed the ITG Director that they are in favor of the noticed change, so it would appear that ILTA is not speaking for all of its membership in raising this particular "talking point."

IV. Statutory Requirements of the Regulatory Analysis.

Section 17A.4A of the Iowa Code provides for two different forms of regulatory analyses that must be performed under certain conditions. The first is pursuant to Iowa Code section 17A.4A(2) "a." This form of regulatory analysis must be performed if requested by the Administrative Rules Review Committee or the Administrative Rules Coordinator. The other form of regulatory analysis, pursuant to Iowa Code section 17A.4A(2) "b," must be created if requested in writing by the Administrative Rules Review Committee, the Administrative Rules Coordinator, at least twenty-five persons signing that request who each qualify as a small business, or by an organization representing at least twenty-five such persons.

Here, because ILTA, which IFA and ITG believe represents at least twenty-five small businesses, has requested a regulatory analysis, the form of regulatory analysis prescribed by Iowa Code section 17A.4A(2) "b" is required. That form of regulatory analysis is limited to a discussion of five specific questions set forth in that subsection of the Iowa Code. These questions will be considered in turn below.

V. Analysis.

It should be noted at the outset that the rules in question are not "regulatory" in the normally understood sense of that word, as no one is required to comply with them in order to abstract. The rules apply only if an abstractor wishes to do business with ITG by participating in the Title Guaranty program. Abstractors in Iowa can and do prepare abstracts in many contexts outside that program, such as for title insurance companies that sell across the state line (although ITG is obviously not in favor of that practice), for attorneys foreclosing on property, for sales of agricultural land, and so forth. The noticed rules would not apply to abstractors in any of those situations. Thus, the rules are voluntary in that any abstractor can simply choose not to participate in the program.

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Moreover, it is not clear that the noticed rules will have a “substantial impact” on small businesses, as the noticed rules are in most respects consistent with the current rules and do not impose any burdens on small businesses that are not required or strongly implied by the Iowa Code. If a non-attorney abstractor is granted a permanent waiver, for example, ITG would maintain that it is not because of the noticed rules, but rather because of language that has been part of the Iowa Code since 1992. Nevertheless, in order to avoid any more delays to the rule-making process, and in the interest of openness, IFA has prepared this Regulatory Analysis as if the noticed rule making would have a substantial impact on small businesses. The five statutory questions, and IFA’s analysis of each, are as follows:

a. Would it be feasible and practicable to establish less stringent compliance or reporting requirements in the rule for small business?

The noticed rules have only one relatively short subrule 9.6(12) that deals with compliance and, in its entirety, states as follows:

9.6(12) Compliance. Participants shall comply with the Code of Iowa, these rules, the participation agreement, manuals, and any other written or oral instructions of the division. The division may audit the participant, with or without notice, for verification of compliance. An audit may include, but not be limited to, a review of the participant’s commitment and certificate issuance procedures, a test of title plants and tract indices, and a review of closing policies and procedures and escrow account details. An inspection of a title plant may be performed by the division or its designee to determine if the title plant meets the criteria set forth in paragraph 9.7(1) “a.”

As noted above, the most significant change of this noticed subrule from the current subrule is to eliminate mandatory inspections of title plants operating pursuant to a provisional waiver in favor of optional (on the part of ITG) inspections of all title plants. Clearly, inspections that “may” take place have the potential to prove less burdensome to small businesses than inspections that “shall” take place.

ITG and IFA believe (though they do not possess information to determine with certainty) that the vast majority of abstractors participating in the Title Guaranty program meet the definition of “small business” set forth in Iowa Code section 17A.4A(8). If different compliance standards were created for small businesses and non-small businesses, the latter standard might apply to only a few or perhaps no abstractors. Adopting one set of rules for abstractors who are small businesses and another set for other abstractors would likely not be a feasible and practicable method of ensuring compliance because creating and maintaining a standard that would never or almost never apply would be an inefficient use of resources, particularly when no one has complained that the current standard is too strict or burdensome.

An analysis of whether it would be “feasible and practicable” to establish less stringent compliance requirements that would apply to all abstractors, including small businesses, requires weighing several factors. Among the factors in favor of retaining the current subrule on compliance (265—subrule 9.7(10)), which states that in the case of abstractors with provisional waivers, “an inspection of the title plant shall be performed by division staff or a designee... (currently ILTA),” are the following:

- There have been no complaints that the current requirement is excessive or overly burdensome. The inspections are performed with as little disruption as possible to the abstractor’s business.
- The mandatory language of the current subrule could potentially result in more inspections being performed (at least for the abstractors covered thereby), which would increase the likelihood of detecting defects in abstractors’ methods or their work product for the abstractors whose plants are inspected.
- There would be less likelihood of claims associated with the inspected title plants and, thus, greater protection of the public.

It should be emphasized, however, that the current title plant inspection requirement applies only to abstractors with provisional waivers who are in the process of building a title plant (currently there are eight such provisional waivers in effect), whereas the noticed subrule would permit (but not mandate) inspections of any participating abstractor with a title plant. Therefore, there is the potential that the noticed subrule could conceivably result in more inspections than under the current subrule. The

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limitation of the current subrule to abstractors with provisional waivers also means that the majority of title plants undergo no inspection at all under the current subrule. An additional consideration to take into account is the possibility that more stringent inspection requirements could induce abstractors to seek a waiver of the title plant requirement and thereby avoid the inspection requirement altogether.

The factors in favor of adopting the noticed subrule are as follows:

- No commenters have stated that they think the compliance requirements set forth in noticed subrule 9.6(12) are excessive, and the requirements of the noticed subrule appear to be generally regarded by the public commenters as a relaxation of the requirements of the current rules.

- Having the option to inspect could allow ITG to focus its compliance resources on newer title plants or those that have been shown to have problems of some sort, rather than performing mandatory inspections of title plants where there is no reason to suspect any problem. This factor may make this option more practicable.

- The noticed subrule would also allow ITG to choose from a much larger pool of title plants when deciding where to conduct inspections.

- Iowa Code section 17A.4A(2)“b,” which sets out the regulatory analysis process, appears to indicate a legislative preference for less stringent compliance requirements for small businesses where such are feasible and practicable. As noted, the consensus among the public commenters appears to be that the noticed subrule is less stringent than the current subrule, and would therefore tend to be more in line with the legislative preference of minimal compliance requirements where feasible.

IFA and ITG will consider all of these factors, as well as any additional written or oral public comment that is received (the request for the Regulatory Analysis automatically extends the comment period), but currently it would appear that the factors in favor of adopting the noticed subrule outnumber those in favor of retaining the current subrule.

b. Would it be feasible and practicable to establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small business?

The noticed rules do not set any particular schedule for compliance. Neither the current rules nor the noticed rules, for example, dictate how frequently or by what time the title plant inspections referred to in the preceding section should be commenced or completed. Further, there have been no complaints that schedules or deadlines for compliance or reporting requirements under the noticed rules are too stringent.

In fact, the only “deadlines” in the rules that can be considered as being in some way related to compliance or reporting are the filing dates associated with the title plant waiver application process in noticed paragraph 9.7(1) “d”(4)“4.” That paragraph in the noticed subrule states:

If a complete application is received at least 90 days prior to the next scheduled division board meeting, the application shall be placed on the agenda for that division board meeting. The division shall receive public comments up to 45 calendar days prior to that division board meeting.

The 90-day time frame set forth in this part of the noticed subrule is not a true deadline, in that if it is missed, the would-be applicant is not barred from applying; the applicant merely must wait until the next scheduled ITG Board meeting to receive a ruling on its application. However, because the ITG Board generally meets only once per quarter, the 90-day lead time could be burdensome to some small businesses requesting a waiver.

There have been no complaints received that the 90-day period is too long, but as a result of performing this analysis, ITG and IFA have concluded they should consider looking into ways to shorten that time line to eliminate some of the burden to small businesses associated with applying for a title plant waiver. Iowa Code section 17A.4A(2) “c” provides that:

IOWA FINANCE AUTHORITY[265](cont'd)

The agency shall reduce the impact of a proposed rule that would have a substantial impact on small business by using a method discussed in paragraph “b” if the agency finds that the method is legal and feasible in meeting the statutory objectives which are the basis of the proposed rule.

In other words, if, as here, a Regulatory Analysis is requested and the rule-making agency finds that it could reduce a substantial impact on small business by adopting one of the five methods discussed in Iowa Code section 17A.4A(2) “b,” then the agency must adopt that method. IFA and ITG look forward to reviewing any public comment that may be received on this point during the extended public comment period. A possible consequence of easing the deadline for applying for a waiver is that more businesses will apply, which could result in a greater percentage of participating abstractors abstracting without a title plant.

c. Would it be feasible and practicable to consolidate or simplify the rule’s compliance or reporting requirements for small business?

As noted above, the compliance requirements of the rules, both current and noticed, are not extensive, and the affected parties, the operators of 40-year title plants, have come out largely in favor of more extensive compliance requirements (i.e., mandatory inspections). There have been no comments stating that the compliance requirements are too complex or difficult. The compliance requirements (title plant inspections) are not amenable to consolidation or to simplification in any event, and there are no “reporting requirements” set forth in the noticed rules, and a reporting requirement cannot be made any simpler than that. Accordingly, it does not appear that it would be either feasible or practicable to consolidate or simplify the noticed rules’ compliance or reporting requirements for small businesses.

d. Would it be feasible and practicable to establish performance standards to replace design or operational standards in the rule for small business?

Establishing performance standards to replace design or operational standards is precisely what the title plant waiver process is about. The operational standard in this case is the requirement that each abstractor “own or lease, and maintain and use in the preparation of abstracts, an up-to-date abstract title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division.” That operational standard is set by Iowa Code section 16.91. The legislature in 1992 seemingly anticipated this analysis question by essentially allowing performance standards to apply in lieu of the operational norm (i.e., the 40-year title plant) in certain cases. In other words, the legislature foresaw that it would not be possible or practicable in every situation to require the use of an abstract created from a 40-year title plant. For example, to this day there are Iowa counties with no functioning 40-year title plant.

Because creating a title plant is an expensive and lengthy proposition, it is a substantial burden for a small business to create one, although certainly there are small businesses that continue to do so. The legislature, in 1992, at the same time it created the title plant “requirement,” also created the waiver process and made it available to both attorneys and abstractors to allow businesses, small or large, to abstract without a title plant if (a) the title plant requirement would pose a hardship, and (b) the waiver would be clearly in the public interest or be absolutely necessary to ensure availability of title guaranties throughout the state. Iowa Code § 16.91(5) “b.” Of course, the attorneys and abstractors working without a title plant must still meet the applicable performance standards and must still produce an abstract that shows all of the relevant interests in and restrictions on the subject piece of property; however, they are allowed to do so in a different manner, such as the direct search method described above. Thus, here the “performance standard” is the creation of a proper abstract.

Accordingly, while IFA and ITG will continue to consider all public comment on the issue, it appears there is no reason to attempt to establish performance standards to replace design or operational standards in the rules for small business in this case, because the legislature has already done that in the Iowa Code.

IOWA FINANCE AUTHORITY[265](cont'd)

The role of IFA and ITG is to implement that legislation in the administrative rules. The law plainly allows waivers for both attorneys and abstractors. While until recently the ITG Board had considered permanent waiver requests only from attorneys, that fact does not change the fact that the law expressly allows abstractors to apply for a waiver. The noticed rules simply clarify that non-attorney abstractors (which are invariably set up as corporate entities) may apply, as the current rules are not clear on that point.

e. Would it be feasible and practicable to exempt small business from any or all requirements of the rule?

To the best of IFA's and ITG's knowledge, nearly all of the abstractors who participate in the Title Guaranty program meet the statutory definition of "small business" set forth in Iowa Code section 17A.4A. Accordingly, it would not make sense to adopt one set of standards for small businesses and another for other businesses as the latter standards would likely apply to very few abstractors, if any. The approach of ITG and IFA in creating the noticed rules was to assume that all of the businesses to which the noticed rules would apply would be small businesses. None of the public comment received to date has suggested that small businesses should be exempted from any of the noticed rules. Simply put, IFA and ITG believe the answer to this question is "no."

VI. Conclusion.

As a result of this analysis, ITG and IFA shall consider, subject to further public comment received, the possibility of including mandatory title plant inspections (at least in some circumstances) and possibly easing the time line for requesting a waiver of the title plant requirement in the noticed rules upon final adoption. For the reasons stated above, ITG and IFA do not at this time plan to attempt to consolidate or simplify the compliance or reporting requirements of the noticed rules for small business or to exempt small business from any or all requirements of the noticed rules. Also as noted above, ITG and IFA believe it is unnecessary to attempt to establish performance standards to replace design or operational standards in the noticed rules for small business because the statutorily provided waiver process does that already.

The short-term consequences of the noticed rules should be increased clarity and ease of understanding. While some aspects of the noticed rules dealing with title plant waivers are unpopular with some stakeholders, the fact is that those aspects are consistent with the Iowa Code. The Iowa Supreme Court has already ruled that the definitions of "hardship" and "public interest" set forth in the noticed rules are correct. The availability of title plant waivers to abstractors has been expressly provided for in the Iowa Code since 1992. While the Iowa Code does not expressly state that corporate entities may receive waivers, neither does it proscribe such waivers. Moreover, non-attorney abstractors are invariably set up as corporate entities, so it would be nonsensical to state that abstractors may receive waivers, but corporations or LLCs may not. The noticed rules will also allow ITG to perform title plant inspections on all participating title plants instead of just those being operated pursuant to a provisional waiver, which should lead to better service for lenders and homebuyers.

The long-term consequences of the noticed rules should be greater conformance with the Iowa Code provisions dealing with ITG as passed by the legislature. For example, previously the title guaranty rules did not address waiver requests by abstractors even though the Iowa Code has for many years expressly provided that abstractors may be given waivers. The lack of rules in that area likely had an inhibiting effect on abstractors and is likely at least part of the reason why there are no abstractors with permanent waivers at this time.

¹ The Supreme Court's decision on these points is quoted in pertinent part below:

V. Construing the Term "Hardship."

IOWA FINANCE AUTHORITY[265](cont'd)

The [ITG] board determined the term “hardship,” as used by the legislature in section 16.91(5), did not require a “hardship of an extraordinary magnitude or type.” Consequently, it found a “financial hardship alone can constitute hardship.” The association [ILTA] claims something more than a financial hardship is required.

Neither the Iowa Code nor the Administrative Code in place at the time of the board’s decision defined the term “hardship” as used in section 16.91(5). When the legislature used the term “hardship” in section 16.91(5), it did not qualify the term. The legislature knows how to modify the word, “hardship,” and has done so in many instances. *See, e.g.*, Iowa Code §§ 2C.18 (referring to a “needless hardship”), 13.15 (referring to a “financial hardship”), 17A.9A(2)(a) (referring to an “undue hardship”), 138.12(2) (referring to an “unnecessary hardship”), 232.69(3) (e) (referring to a “significant hardship”), 425.37 (referring to an “unreasonable hardship”), 554.3513(2) (referring to an “economic hardship”), 607A.6 (referring to an “extreme hardship”), 815.9(1) (b) (referring to a “substantial hardship”), 904.902 (referring to a “physical hardship”). Without any modification of the word “hardship” by the legislature, we must assume the legislative intent in section 16.91(5) was to allow the board to grant a waiver if the applicant can show a “hardship” in the sense that the word is ordinarily used and understood.

“Hardship” as defined in the dictionary means privation or suffering. *Webster’s Third New International Dictionary* 1033 (unabr. ed. 2002). Black’s Law Dictionary defines “hardship” as privation, suffering, or adversity. *Black’s Law Dictionary* 734 (8th ed. 2004). Therefore, “hardship” as contained in this section means suffering, privation, or adversity. A financial hardship alone can create privation, suffering, or adversity. Thus, we agree with the board’s construction of section 16.91(5) that a financial hardship is a hardship sufficient to justify a waiver under the statute.

VI. Construing the Meaning of “Public Interest.”

The Code allows the board to grant a waiver of the requirement that a participating abstractor have a title plant upon a showing of hardship and a showing that the waiver clearly is in the public interest. Iowa Code § 16.91(5). The board determined the granting of the waiver in this case was clearly in the public interest. The board identified five public interests that granting this waiver would effectuate. First, granting the waiver would increase competition among abstractors. Second, it would encourage the use of the title guaranty program throughout Iowa. Third, it would make the title guaranty program more competitive with out-of-state insurance. Fourth, it would improve the quality of the land title system. Fifth, it would protect consumers.

The association claims the legislature did not contemplate these public interests as reasons to waive the title plant requirement. Therefore, it claims, the board misinterpreted the statute when it relied upon these public interests to waive the title plant requirement.

The legislature did not define “public interest” when it enacted the title guaranty program. It did indicate, however, the purpose of the program in its legislative findings. Iowa Code § 16.3(15). The legislature stated:

The abstract-attorney’s title opinion system promotes land title stability for determining the marketability of land titles and is a public purpose. A public purpose will be served by providing, as an adjunct to the abstract-attorney’s title opinion system, a low cost mechanism to provide for additional guaranties of real property titles in Iowa. The title guaranties will facilitate mortgage lenders’ participation in the secondary market and add to the integrity of the land-title transfer system in the state.

Id. Consistent with these legislative findings, the Iowa Title Guaranty Division declared its mission

IOWA FINANCE AUTHORITY[265](cont'd)

is to operate a program that offers guaranties of real property titles in order to provide, as an adjunct to the abstract-attorney's title opinion system, a low-cost mechanism to facilitate mortgage lenders' participation in the secondary market and add to the integrity of the land-title transfer system in the state.

Iowa Admin. Code r. 265 — 9.2.

After our review of the legislative findings and the mission statement of the division, we agree that the public interests as set forth by the board were consistent with the intent of the term "public interest" under section 16.91(5). By increasing competition among abstractors, the title guaranty program can drive down prices of abstracts making Iowa's abstract-attorney's title opinion system more cost efficient. Encouraging the use of the title guaranty program adds to the integrity of the land-title transfer system, thereby helping its consumers. Making the title guaranty program more competitive with out-of-state title insurance serves the public interest by decreasing the use of title insurance. Improving the quality of the land-title system serves the public by adding to the integrity of the title guaranty program and better serving its customers. Finally, protecting consumers serves the public interest.

Accordingly, we agree with the board's construction of the meaning of "public interest."

² On this point, the Talking Points Memo stated:

The rule making eliminates inspections of title plants

- Changes from "shall" in old rule 9.7(10) to "may" in new rule 9.6(12)
- If Iowa Title Guaranty decides to make no inspections, how is the public served or protected?
- If title plants are not inspected, this increases the State's claims exposure
- **Full disclosure:** *ILTA has a three-year contract w/Iowa Title Guaranty Division to inspect title plants*

Exhibit A



Iowa Land Title Association

P.O. Box 444 • Carroll, IA 51401 • 800.778.3789 • ILTA@austin.rr.com

September 15, 2015

Tara Lawrence
Iowa Title Guaranty
2015 Grand Ave.
Des Moines, IA 50312

RE: Notice of Intended Action to amend Chapter 9, "Title Guaranty Division," Iowa Administrative Code

Dear Ms. Lawrence:

I am writing to you on behalf of the board of directors of the Iowa Land Title Association, which represents 140 members throughout Iowa. The purpose of this letter is to comment upon the proposed amendments to Title 265, Chapter 9, Iowa Administrative Code.

General and Introductory Comments on Proposed Rules

It is the policy of the ILTA to oppose any applications for statewide waivers, and to support applications for provisional waivers for people that are building a title plant for a specified county. This position is unlikely to change.

As you know, the legislature specifically required that a title plant be used and maintained for the issuance of title guaranty certificates.¹ We agree with the sentiment expressed in the proposed rules that "the 40-year title plant as the preferred method of providing title evidence for the purpose of issuing commitments and certificates."²

We understand that there are limits upon Iowa Title Guaranty's authority to interpret the law.³ This does not mean that the agency cannot define terms, but rather, it means that a court may correct "errors at law," if there are errors to be found. Iowa Title Guaranty successfully convinced the Iowa Supreme Court that it had not made such errors,⁴ but the court-approved definitions remain substantively lacking. While the Division has used application forms to draw out some information, the Iowa Administrative Rules should be used to describe the evidence necessary to sustain a waiver.

Having applied criteria that have been sustained by the courts does not mean that the terms cannot be further refined. The primary problem with the old rules and the new rules, which are nearly identical with respect to the hardship and public interest tests, is that they lack any metrics or method of analyzing the metrics to decide whether the tests and definitions are satisfied. Respectfully, we believe that Iowa Title Guaranty has not adequately set out important definitions or provided adequate guidelines for obtaining a title plant waiver.

The Iowa Land Title Association believes that the proposed rules do not adequately or accurately set out the elements required to obtain a title plant waiver. The lack of metrics and the lack qualitative analysis required in order to sustain or deny an application will allow board decisions based on unspecified facts on title plant waivers that expose the board to future litigation over these waivers on the grounds that they are essentially arbitrary and contrary to law.⁵

Specific Comments on Proposed Rules

The Iowa Land Title Association has the following specific comments and issues with the proposed rules:

1. The proposed rules do not describe the types of information necessary to sustain an application for a title plant waiver. Proposed Rule 9.7(1)(d)(3)(8) leaves entirely to the applicant to propose “relevant facts that the applicant believes would justify a waiver.”⁶ Proposed Rule 9.7(1)(d)(3) omits from the list of factors any type of information that would tend to show, for example, (a) the conditions in the market; (b) full disclosure of applicant’s financial situation, (c) the actual costs of the title plant requirement, and (d) an analysis of effects on other regulated parties.
2. The proposed rules do not describe the type and degree of “substantial evidence” necessary to sustain an application for a title plant waiver. Proposed Rule 9.7(1)(d)(6)(4) leaves the “final decision on whether the circumstances justify the granting of a waiver ... at the sole discretion of the division board upon consideration of all relevant factors.” The relevant factors include “the facts and circumstances set out in the application.” Nowhere in the rules is there a set of qualitative or quantitative factors that the Iowa Title Guaranty staff or board is to apply.
3. Proposed Rule 9.7(1)(d) appears to adopt an improper new balancing test: “The division must weigh the benefits of the traditional title plant with other alternatives to ensure buyers and lenders high quality of certificates throughout the state, rapid service, and a competitive price.” This new test is contrary to the expressed statutory preference for a title plant,⁷ and should be stricken out. The only expressed purpose of the title guaranty program is “providing, as an adjunct to the abstract-attorney’s title opinion system, a low cost mechanism to provide for additional guaranties of real property titles in Iowa. The title guaranties will facilitate mortgage lenders’ participation in the secondary market and add to the integrity of the land-title transfer system in the state.”⁸
4. Proposed Rule 9.7(1)(d)(6)(4) lacks reference to the proper standards for considering the proposed waivers and should be revised to incorporate these expressly. As required under the Administrative Procedures Act and district court rulings, the board must conduct qualitative analysis of the “substantial evidence” particularly applying the “clear and convincing evidence.”⁹
5. Proposed Rule 9.7(1)(d)(5)(3) is inadequate in its description of what is and is not acceptable and substantial evidence of “hardship” under the statute. Specifically:
 - 5.1. The proposed rule should expressly adopt the statutory requirement of proof of an “undue hardship.”¹⁰ Iowa Code § 17A.9A(2)(a) unequivocally requires the board to use a higher standard that it has traditionally applied.

- 5.2.** The proposed rule should expressly adopt a statement that the mere existence of costs of the creation or maintenance of a title plant is not sufficient evidence of hardship. Given the board's previous interpretation that a financial hardship alone may be deemed sufficient, the lack of a specific statement in the rule creates a false assumption that any capital outlay may be deemed a hardship. This is contrary to the law.¹¹ As one court has said: "Business start-up costs are unavoidable and in our free market cannot be characterized as imposing an undue hardship merely because they are somewhat high. Rather it must be shown that the costs are so great that they will cause an excessive or unwarranted deprivation to the person incurring the cost."¹²
- 5.3.** Furthermore, the rule should require that the qualitative and quantitative analyses be provided for each county for which a waiver is sought. Adoption of this standard is necessary to address those applicants that would hold up the cost of obtaining a title plant in two or 99 counties as an impediment to complying with the statute.

We have attached to this letter as Exhibit A, a proposed revision to Proposed Rule 9.7(1)(d)(5)(3).

- 6.** Proposed Rule 9.7(1)(d)(5)(4) continues to be inadequate in describing the "public interest" test based on six of the seven criteria used previously and cited by the Iowa Supreme Court.¹³ There is no reason that the criteria should not be qualitatively and quantitatively described. The criteria should have substance and weight.
- 6.1.** The last criteria listed, "protecting consumers," should be first and foremost and weighted heavily in favor of consumers, and especially those individuals having little understanding of title matters.
- 6.2.** The criteria of "increasing competition among abstractors" is a meaningless criteria and adds nothing to the analysis of whether public interest will be served. Our members do not need protection from competition. There is healthy competition in small markets and large markets throughout the state. Nevertheless, every applicant can state unequivocally that the applicant will increase competition if the applicant commences operations. The condition will be true in every case. That meaningless criteria should be stricken and replaced with a qualitative analysis of whether the market conditions are somehow demonstrably in need of change and the statutorily required analysis of how that change will affect other regulated parties.¹⁴
- 6.3.** The criteria of "improving the quality of land titles" is nebulous and should be replaced with an analysis of how the applicant can ensure the integrity of land titles. This is the expressed legislative intent of the attorney-abstract system.¹⁵ The applicant should describe, in detail, how the applicant will ensure that proper abstracting standards can and will be upheld in the absence of a title plant.
- 6.4.** Furthermore, the rule must require that applicant produce evidence for each county for which a waiver is sought. Conditions vary greatly across the state, and the board cannot reasonably act upon a waiver application that treats all of the counties in the state or region as the same.

We have attached to this letter as Exhibit B, a proposed revision to Proposed Rule 9.7(1)(d)(5)(4).

IOWA FINANCE AUTHORITY[265](cont'd)

7. Proposed Rule 9.1 inappropriately changes the definition of “participating abstractor” broadening the scope of the definition. Iowa Land Title Association believes that the present rule is correct. We suggest that the proposed rule be modified as follows:

“Participating abstractor” means AN ABSTRACTOR—a person who IS ENGAGED IN THE PRACTICE OF SEARCHING PUBLIC RECORDS FOR THE PURPOSE OF CREATING ABSTRACTS OF TITLE TO REAL PROPERTY IN IOWA AND WHO is authorized by the division to prepare abstracts for division purposes.

8. Proposed Rule 9.7(1)(d)(7) lacks a mechanism for accountability for waivers. It is fundamental to the mission of Iowa Title Guaranty to provide title assurance while controlling risk. Iowa Land Title Association does not favor any change in the rules allowing for waivers to an entity, but if a waiver were considered, it would have to be tied to a principal individual abstractor and ensuring that the waiver will be reviewed. It is necessary to tie a waiver to an individual because a waiver granted to an entity, in theory, lasts forever. We suggest that the proposed rule be modified as follows:

Conditions. A waiver is unique to the recipient and is nontransferable AND CONDITIONED UPON THE ON-GOING, ACTIVE EMPLOYMENT OF A SPECIFIED PRINCIPAL INDIVIDUAL (THE “PRINCIPAL”) WHO ALSO IS QUALIFIED AS A PARTICIPATING ABSTRACTOR. A waiver recipient AND THE PRINCIPAL shall be accountable to the division for abstracts prepared for division purposes. The division may require a waiver recipient AND PRINCIPAL to provide a guarantee, performance bond, or other form of indemnification, as assurance for abstracts prepared by the waiver recipient on behalf of the division. The division WILL ~~may~~ review the waiver ~~recipient~~ annually and may require a renewal, modification or addition to any required assurances. THE RECIPIENT SHALL NOTIFY THE DIVISION OF THE DEATH, DISABILITY, OR DISSOCIATION OF THE PRINCIPAL FROM THE RECIPIENT. UPON THE DEATH, DISABILITY, OR DISSOCIATION OF THE PRINCIPAL, A RECIPIENT SHALL DISCONTINUE ABSTRACTING.

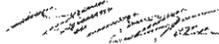
Request for Regulatory Analysis

Pursuant to section 17A.4A, Code of Iowa (2015), Iowa Land Title Association, which represents at least 25 small businesses that may be affected by the rule-making, hereby requests that Iowa Title Guaranty conduct a regulatory analysis.¹⁶ We believe, quite frankly, that the proposed rules would have a substantial impact on small abstracting businesses all over the State of Iowa.

Request for Hearing

We understand that Iowa Title Guaranty will conduct a hearing on September 22, 2015. In the event that the hearing is cancelled or otherwise not held, Iowa Land Title Association requests that the Division hold a hearing on the proposed rules. We will have members present at the presently scheduled hearing or any other substituted hearing.

Sincerely,



Mike McLain, President
Iowa Land Title Association Board of Directors

Exhibit A**Suggested form of Hardship Rule 9.7(1)(d)(5)(3):**

For purposes of subrule 9.7(1)“d”, THE TERM “hardship,” AS REQUIRED BY SECTIONS 16.91(5) AND 17A.9A(2), CODE OF IOWA, means CLEAR AND CONVINCING EVIDENCE OF EXCESSIVE OR UNWARRANTED deprivation, suffering, adversity, or long-term adverse financial impact in complying with the title plant requirement that is more than minimal when considering all the circumstances. THE TERM “HARDSHIP” MAY MEAN AND INCLUDE A FINANCIAL HARDSHIP ALONE. AN APPLICANT MUST DEMONSTRATE HARDSHIP UNDER THE “CLEAR AND CONVINCING” STANDARD BY SUBSTANTIAL EVIDENCE THAT INCLUDES FOR EACH COUNTY FOR WHICH A WAIVER IS SOUGHT A QUALITATIVE ANALYSIS OF AN APPLICANT’S FINANCIAL SITUATION AND THE ACTUAL COSTS OF THE TITLE PLANT REQUIREMENT. EVIDENCE OF UNAVOIDABLE BUSINESS START-UP COSTS AND NORMAL ON-GOING MAINTENANCE COSTS WITHOUT OTHER EVIDENCE IS NOT SUBSTANTIAL EVIDENCE OF HARDSHIP.

Exhibit B**Suggested form of Public Interest Rule 9.7(1)(d)(5)(4):**

For purposes of subrule 9.7(1)“d”, THE TERM “public interest” means that which is beneficial to the public as a whole CONSISTENT WITH THE LEGISLATIVE FINDINGS AND MANDATES OF SECTION 16.91, including THE TERM “PUBLIC INTEREST” MAY MEAN AND INCLUDE, but is not limited to, (A) PROTECTING CONSUMERS, PARTICULARLY THOSE INDIVIDUALS HAVING LITTLE UNDERSTANDING OF TITLE MATTERS, increasing competition among abstractors, (B) ENSURING THE INTEGRITY OF THE LAND TITLE SYSTEM, (C) IMPROVING THE TITLE ASSURANCE SYSTEM AND DECREASING THE RISK EXPOSURE OF THE DIVISION AND PUBLIC FUNDS, (D) encouraging the use of certificates throughout the state, (E) making certificates more competitive than out-of-state title insurance, increasing the division’s market share, improving the quality of land titles, and protecting consumers, AND (F) IMPROVING FREE MARKET CONDITIONS. IN ACCORDANCE WITH SECTIONS 16.91(5) AND 17A.9A(2), CODE OF IOWA, AN APPLICANT MUST DEMONSTRATE PUBLIC INTEREST UNDER THE “CLEAR AND CONVINCING” STANDARD BY SUBSTANTIAL EVIDENCE THAT INCLUDES FOR EACH COUNTY FOR WHICH A WAIVER IS SOUGHT QUALITATIVE AND QUANTITATIVE ANALYSES FOR EACH COUNTY IN WHICH A WAIVER IS SOUGHT OF EXISTING AND PROJECTED MARKET CONDITIONS, A STATEMENT OF WHETHER THE WAIVER WOULD AFFECT THE SUBSTANTIAL LEGAL RIGHTS OF ANY PERSON, AND A STATEMENT OF WHETHER AND HOW THE WAIVER WILL AFFORD SUBSTANTIALLY EQUAL PROTECTION OF PUBLIC WELFARE BY MEANS OTHER THAN REQUIRED BY SECTION 16.91(5), CODE OF IOWA, AND THESE RULES.

Notes

¹ Iowa Code § 16.91(5)(a)(2) ("each participating abstractor is required to own or lease, and maintain and use in the preparation of abstracts, an up-to-date abstract title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division").

² Proposed Rule 9.7(1)(d).

³ Iowa Code § 17A.19(10)(c); Iowa Land Title Ass'n v. Iowa Fin. Auth., 771 N.W.2d 399, 402 (Iowa 2009).

⁴ Iowa Land Title Ass'n v. Iowa Fin. Auth., 771 N.W.2d 399, 402 (Iowa 2009).

⁵ Iowa Code § 17A.19(10)(n).

⁶ Proposed Rule 9.7(1)(d)(3)(8).

⁷ Iowa Code § 16.91(5)(a)(2) ("each participating abstractor is required to own or lease, and maintain and use in the preparation of abstracts, an up-to-date abstract title plant including tract indices for real estate for each county in which abstracts are prepared for real property titles guaranteed by the division").

⁸ Iowa Code § 16.4C.

⁹ See Des Moines County Abstract Company v Iowa Finance Authority, Des Moines County Equity case No. CVEQ 006 597 (slip op. ¶ 23 at p. 8-9) (the applicant "must have shown by clear and convincing evidence, that the requirement would cause [the applicant] to suffer an excessive or unwarranted deprivation.").

¹⁰ Iowa Code § 17A.9A(2)(a). Des Moines County Abstract Company v Iowa Finance Authority, Des Moines County Equity case No. CVEQ 006 597 (slip op. ¶ 23 & 24 at p. 8-9) (the applicant "must have shown by clear and convincing evidence, that the requirement would cause [the applicant] to suffer an excessive or unwarranted deprivation.").

¹¹ Iowa Code § 17A.9A(2)(a). Des Moines County Abstract Company v Iowa Finance Authority, Des Moines County Equity case No. CVEQ 006 597 (slip op. ¶ 23 at p. 8-9) (the applicant "must have shown by clear and convincing evidence, that the requirement would cause [the applicant] to suffer an excessive or unwarranted deprivation.").

¹² Des Moines County Abstract Company v Iowa Finance Authority, Des Moines County Equity case No. CVEQ 006 597 (slip op. ¶ 24 at p. 9).

¹³ 265 Iowa Admin. Code § 9.7(2).

¹⁴ Iowa Code § 17A.9A(2)(b).

¹⁵ Iowa Code § 16.4C.

¹⁶ Iowa Code § 17A.4A.