

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE BOARD OF ACCOUNTANCY

In the Matter of the Proposed Permanent
Rules of the State Board of Accountancy
Relating to the Licensing and Regulation
of Accountants, *Minnesota Rules*, Chapter
1105.

**ORDER ON REVIEW OF
RULES UNDER MINNESOTA
STATUTES, SECTION 14.26**

The Minnesota Board of Accountancy ("Board" or "Agency") is seeking review and approval of the above-entitled rules, which were adopted by the agency without a hearing. Review and approval is governed by Minn. Stat. § 14.26. On July 21, 2008, the Office of Administrative Hearings received the documents that must be filed by the agency under Minn. Stat. § 14.26 and Minn. R. 1400.2310.

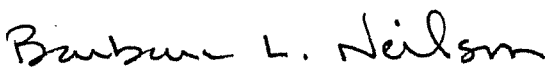
On August 4, 2008, the Board was notified by the Office of Administrative Hearings of its disapproval of rule part 1105.2450, item C, and its suggested technical corrections, as set forth below. This Order confirms that discussion.

Based upon a review of the written submissions and filings, and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED:

1. The agency has the statutory authority to adopt the rules.
2. The rules were adopted in compliance with all procedural requirements of Minnesota Statutes, chapter 14, and Minnesota Rules, chapter 1400.
3. The following provision of the adopted rules is **DISAPPROVED** as not meeting the requirements of Minnesota Rules, Part 1400.2100, items D and E: rule part 1105.2450, item C. All other rule parts are approved.
4. Pursuant to Minnesota Statutes, section 14.26, subdivision 3(b), and Minnesota Rules, part 1400.2300, subpart 6, the rules will be submitted to the Chief Administrative Law Judge for review.

Dated: August 6, 2008



BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

Pursuant to Minnesota Statutes, section 14.26, the agency has submitted these rules to the Administrative Law Judge for a review as to legality. The rules adopted by the Office of Administrative Hearings¹ identify several types of circumstances under which a rule must be disapproved by the Administrative Law Judge or the Chief Administrative Law Judge. These circumstances include situations in which a rule was not adopted in compliance with procedural requirements unless the judge finds that the error was harmless in nature and should be disregarded; the rule is not rationally related to the agency's objectives or the agency has not demonstrated the need for and reasonableness of the rule; the rule is substantially different than the rule as originally proposed and the agency did not comply with required procedures; the rule grants undue discretion to the agency; the rule is unconstitutional² or illegal; the rule improperly delegates the agency's powers to another entity; or the proposal does not fall within the statutory definition of a "rule."

In the present rulemaking process, the Administrative Law Judge has found one defect in the rules. The Administrative Law Judge has also recommended six technical corrections, as discussed below. The technical corrections do not reflect defects in the rules, but are merely recommendations for clarification to the rules that the Board may adopt if it chooses to do so. All other rule parts are approved.

Defects under Minn. R. 1400.2100, Items D and E

The Administrative Law Judge has identified one defect in the rules based upon vagueness or undue discretion, which is discussed below:

Minn. R. 1105.2450, item C

Item C of this rule part lists three factors that the Board **may** consider in determining rehabilitation of moral character of an applicant. As written, item C is overly vague and grants the Board undue discretion as to whether or not it will consider the three listed factors. The proposed standard would not give regulated parties any way of knowing for certain what criteria the Board is considering as to an applicant's rehabilitation.

To correct the defect, the Administrative Law Judge recommends that the agency replace "may" with "shall" so that the three criteria are considered in every case where rehabilitation is an issue. Changing the proposed language in accordance with the recommendation of the Administrative Law Judge is needed and reasonable, and will not make rule part 1105.2450 substantially different than originally proposed.

¹ Minnesota Rules part 1400.2100.

² To be constitutional, a rule must be sufficiently specific to provide fair warning of the type of conduct to which the rule applies. *Cullen v. Kentucky*, 407 U.S. 104, 110 (1972); *Thompson v. City of Minneapolis*, 300 N. W.2d 763, 768 (Minn. 1980).

Recommended Technical Corrections

The following discussion does not relate to defects in the rules, but merely outlines recommendations for clarification to the rules that the Board may adopt if it chooses to do so. In each instance, adoption of the suggested approach would be needed and reasonable and would not make the rule part substantially different than the rule as originally proposed.

Minn. R. 1105.0100, subpart 12

The Administrative Law judge recommends that the Board clarify the last sentence of subpart 12 in two places, as follows:

The reviews must be conducted according to standards approved by the board in part 1105.4700 by a person or persons who hold certificates with an active status and who are not affiliated with the licensee or CPA firm being reviewed or by reviewers approved by the board as specified in this chapter.

The recommended changes provide clarification as to exactly which standards apply to quality reviews and the criteria used by the Board to approve reviewers.

Minn. R. 1105.0250, items A and E

Item E of this rule part identifies the July 2007 revision of Government Auditing Standards. However, item A incorporates by reference the *January 2007* revision of the document. The Board has indicated that it seeks to incorporate by reference the July 2007 revision and has agreed to modify item A accordingly.

Minn. R. 1105.0600, item Q

The Administrative Law Judge recommends that the Board correct the following typographical error: "renewal of CPA firms firm permits for firms that have one or more offices located in another state, \$68 per year." This change will maintain consistency across the language of the rule.

Minn. R. 1105.4000, item I

The Administrative Law Judge proposes, and the Board agrees to make, the following change to item I: "The application for a firm permit shall contain a representation from the firm that it has complied with part 1105.7850, item F, and that it has verified compliance of its partners, members, managers, shareholders, directors, or officers resident in this state with items D, E, and F." The proposed change maintains consistent and parallel language throughout the rule text.

Minn. R. 1105.4150, item A

The Administrative Law Judge proposes the following change to item A to clarify the meaning and significance of subitems (1)-(4):

For purposes of part 1105.4200 and Minnesota Statutes . . . , a client is considered to have its headquarters in this state if the location specified by the client as the address to which a service is directed is located in this state. In addition, a client is considered to have its headquarters in this state if

This recommended change ensures that the reader understands that subitems (1)-(4) are some examples of when a client is considered to have its headquarters in this state.

Minn. R. 1105.7900, item D

Based upon a review of the changes made to Minn. Stat. § 326A.14, subd. 1, during the 2008 legislative session, the Administrative Law Judge recommends that the Board verify whether the citation in proposed item D to Minn. Stat. § 326A.03, subds. 2, 4, and 6 should really be to subds. 3, 4, and 6. If appropriate, the Administrative Law Judge recommends that the Board make this change. The proposed change would make item D consistent with Minn. Stat. § 326A.14.

B. L. N.