

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed New Rules of  
the Board of Accountancy Governing  
Temporary Military Certificates and Proposed  
Amendments to Rules Relating to Firm  
Permit Renewal and Housekeeping Updates

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Jim Mortenson for a rulemaking hearing on October 8, 2015. The public hearing was held in Suite 295, Golden Rule Building, 85 East Seventh Place, Saint Paul, Minnesota.

The Minnesota Board of Accountancy (Board) proposes to add a new rule governing the provision of temporary military certificates. The Board also proposes amendments to Minnesota Rules chapter 1105 (2015) to address a language change, to remove a provision permitting oral examinations, and to change the requirements for renewing firm permits.<sup>1</sup>

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.<sup>2</sup> The Minnesota Legislature has designed this process to ensure that state agencies and boards have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted to permit Board representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The Board must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.<sup>3</sup>

The Board panel at the public hearing included: Michael Vekich, Board Member; Doreen Frost, Executive Director; and Andrea Barker, Assistant Executive Director. The Panel was accompanied by its counsel, Assistant Attorney General Christopher Kaisershot.

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<sup>1</sup> Exhibit (Ex.) D at 1 (Statement of Need and Reasonableness – “SONAR”).

<sup>2</sup> Minn. Stat. §§ 14.131-.20 (2014).

<sup>3</sup> Minn. Stat. §§ 14.05, .131, .23, .25 (2014).

Approximately 20 people attended the hearing and 12 signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Five members of the public made statements during the hearing.

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another eight calendar days – until October 16, 2015 – to permit interested persons and the Board time to submit written comments. Following the initial comment period, the hearing record was open an additional five business days to permit interested parties and the Board an opportunity to reply to earlier-submitted comments.<sup>4</sup> The hearing record closed on October 23, 2015.

## **SUMMARY OF CONCLUSIONS**

The Board has established that it has the statutory authority to adopt the proposed rules, that it complied with applicable procedural requirements, and that the proposed rules are needed and reasonable.

Based upon the record in this case, including the filings, testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

### **I. Regulatory Background to the Proposed Rules**

1. On December 5, 2014, a quorum of the Board passed a resolution that authorized Doreen Frost, the Executive Director of the Board, to initiate possible rulemaking governing statutorily required expedited licensing of veterans and housekeeping updates.<sup>5</sup>

2. The proposed rules include new rule language, based on direction from the legislature that pertains to active duty military members, their spouses, and veterans who have received an honorable discharge within two years prior to application for certification, which requires expedited license processing and permits a temporary six month permit while the applicant completes the application process.<sup>6</sup>

3. One of the housekeeping updates to the rules is a proposal to change the requirement that 100 percent of an accounting firm's licensees must be renewed before the firm's permit will be renewed, to requiring two-thirds of individual licensees be renewed by the deadline, while the remaining licensees within the firm must perfect their renewals within 60 days of the initial deadline.<sup>7</sup>

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<sup>4</sup> See, Minn. Stat. § 14.15, subd. 1.

<sup>5</sup> Ex. K 1.

<sup>6</sup> Ex. D at 1, 4 (SONAR).

<sup>7</sup> *Id.*

4. The proposed rules include two non-controversial housekeeping amendments which eliminate the option of applying an oral examination to an applicant, something not done in decades, and replacing the term “quality review” with “peer review,” consistent with statutory language.<sup>8</sup>

## **II. Rulemaking Authority**

5. Minn. Stat. § 197.4552 (2014) specifically provides rulemaking authority for the Board to establish an expedited licensing process and a procedure to issue temporary licenses for active military members and their spouses, as well as veterans who have left the service in the two years prior to the date of the license application and have a confirmation of an honorable or general discharge status.

6. Minn. Stat. § 326A.02, subd. 5(11) (2014), specifically grants the Board authority to adopt “rules regarding the issuance and renewals of certificates, permits, and registrations[.]”

7. Minn. Stat. § 326A.02, subd. 5(13) (2014), specifically grants the Board authority to adopt “rules regarding peer review” and “rules regarding the conduct and content of examination” for accounting license applicants.

## **III. Procedural Requirements of Chapter 14 (2014)**

### **A. Notice**

8. On Tuesday, January 20, 2015, the Board published in the *State Register*, Volume 39, Number 29, Requests for Comments on Possible Amendment to Rules Governing Expedited Licensing for Veterans and Housekeeping Updates.<sup>9</sup> The notice stated that the Board also was requesting “comments on its possible new rules governing application and licensure procedures and requirements.”<sup>10</sup>

9. The Board published its proposed rules and amendments on July 13, 2015, with the approval of the State Revisor of Statutes.<sup>11</sup>

10. On July 17, 2015, the Board requested approval from the Office of Administrative Hearings (OAH) for its Additional Notice Plan and Hearing Notice.<sup>12</sup>

11. On July 23, 2015, the undersigned Administrative Law Judge approved the Additional Notice Plan and Hearing Notice.<sup>13</sup>

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<sup>8</sup> *Id.*, See Minn. Stat. § 326A.01, subd. 12 (2014).

<sup>9</sup> Ex. A.

<sup>10</sup> Ex. A at 1092.

<sup>11</sup> Ex. C.

<sup>12</sup> Letter from Andrea Barker to Tammy Pust, dated July 17, 2015.

<sup>13</sup> Order on Review of Additional Notice Plan and Hearing Notice, dated July 23, 2015.

12. The Board created a Statement of Need and Reasonableness (SONAR), dated July 27, 2015.<sup>14</sup>

13. The SONAR was mailed to the Legislative Reference Library on July 28, 2015.<sup>15</sup>

14. On July 28, 2015, the Board mailed the Notice of Hearing to all persons and associations on its rulemaking mailing list and Additional Notice Plan.<sup>16</sup> The mailing list included 16,960 current certificate holders and 77 individuals and entities on its general mailing list.<sup>17</sup>

15. On July 28, 2015, the Board posted the Notice of Hearing, Proposed Language, and SONAR on the Board's website.<sup>18</sup>

16. On July 29, 2015, the Board mailed a copy of the Notice of Hearing, Proposed Language, and SONAR to the following legislators who are authors or leaders on relevant committees:<sup>19</sup>

- Senator Tam Saxhaug
- Senator Roger Chamberlain
- Senator Patricia Torres
- Senator Dan Hall
- Senator Melissa Franzen
- Representative Tim Sanders
- Representative Michael Nelson
- Representative Sarah Anderson
- Representative Sheldon Johnson
- Representative Erik Simonson
- Representative Paul Rosenthal
- Representative Linda Slocum

17. On July 29, 2015, the Board e-mailed a copy of the Notice of Hearing and SONAR to the Legislative Reference Library.<sup>20</sup>

18. On August 3, 2015, the Board mailed a postcard Notice of Hearing to the two firms located outside of the United States and on the Board's mailing list.<sup>21</sup>

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<sup>14</sup> Ex. D.

<sup>15</sup> Ex. E.

<sup>16</sup> Ex. G; Ex. H1.

<sup>17</sup> Ex. H1.

<sup>18</sup> Ex. K.

<sup>19</sup> *Id.* (The committees include: State Departments and Veterans Budget Division; State and Local Government Committee; Government Operations Committee; and State Government Finance Committee.)

<sup>20</sup> Ex. 18.

<sup>21</sup> Ex. H1.

19. On Monday, August 17, 2015, the Notice of Hearing for the proposed rules was published in the *State Register*, Volume 40, Number 7.<sup>22</sup> The Notice stated the Board intended to adopt rules, that it was following Minn. Stat. §§ 14.131-.20, and the date, time, and location of the public hearing on the proposed rules. The Notice included: the statutory authority for the proposed rules; the proposed changes to Minn. R. ch. 1105; instructions on how to obtain the SONAR and what the SONAR included; a description of how the rules may be further modified and the limits to any modifications; a statement that persons could register with the Board in order to be advised of any future rulemaking; and the signature of Doreen Frost, the Executive Director of the Board.<sup>23</sup>

20. The public hearing was held on October 8, 2015.

21. The comment period closed on October 16, 2015, more than 33 days following August 17, 2015. The rebuttal period closed on October 23, 2015, five working days after the close of the comment period.<sup>24</sup>

22. At the hearing on October 8, 2015, the Board filed copies of the following documents as required by Minn. R. 1400.2220:

- a. the Board's Request for Comments as published in the *State Register* on January 20, 2015;<sup>25</sup>
- b. the proposed rules dated July 13, 2015, including the Revisor of Statutes' approval;<sup>26</sup>
- c. the Board's SONAR;<sup>27</sup>
- d. the Certificate of Mailing the SONAR to the Legislative Reference Library on July 28, 2015;<sup>28</sup>
- e. the Notice of Hearing as mailed and as published in the *State Register* on August 17, 2015;<sup>29</sup>
- f. the Certificate of Mailing the Notice of Hearing to the Board's rulemaking mailing list on July 28, 2015, and the Certificate of Accuracy of the Mailing List;<sup>30</sup>

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<sup>22</sup> Ex. F.

<sup>23</sup> *Id.*

<sup>24</sup> See Minn. R. 1400.2230 (2015).

<sup>25</sup> Ex. A.

<sup>26</sup> Ex. C.

<sup>27</sup> Ex. D.

<sup>28</sup> Ex. E.

<sup>29</sup> Ex. F.

<sup>30</sup> Ex. G.

- g. the Certificates of Additional Notice provided to current certificate holders, firms, and all individuals on the Board's general mailing list, and the posting of the Additional Notice on the Board's website;<sup>31</sup>
- h. the written comments on the proposed rules that the Board received during the comment period prior to the hearing;<sup>32</sup>
- i. additional documents including:<sup>33</sup>
  - Authorizing Resolution to Publish the Request for Comments
  - Comments received following publication of the Request for Comments
  - Correspondence with Minnesota Management and Budget (MMB) (April 20, 2015 letter to MMB and May 22, 2015 letter from MMB)
  - Authorizing Resolution to Publish the Notice of Hearing
  - Certificate of Notifying Certain Legislators under Minn. Stat. § 14.116, dated July 29, 2015; and
- j. Modification to Proposed Rule, September 21, 2015.<sup>34</sup>

## **B. Impact on Farming Operations**

23. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

24. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Board was not required to notify the Commissioner of Agriculture.

## **C. Statutory Requirements for the SONAR**

25. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness.<sup>35</sup> Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;

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<sup>31</sup> Ex. H.

<sup>32</sup> Ex. I.

<sup>33</sup> Ex. K.

<sup>34</sup> Ex. L.

<sup>35</sup> Minn. Stat. § 14.131.

- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals;
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference; and
- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

## 1. The Board's Regulatory Analysis

- (a) **A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

26. The Board determined that the proposed new rules for temporary military certificates will likely affect: active duty military members; spouses of active duty military members; and veterans who have been discharged within two years of application for a certificate.<sup>36</sup>

27. The Board determined that the proposed amendments to the rules concerning the requirements for firm permit renewal will affect licensees employed by firms and their clients.<sup>37</sup>

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<sup>36</sup> Ex. D at 4.

<sup>37</sup> *Id.*

28. The Board determined that the proposed housekeeping rules amendments will affect all applicants, licensees, and firms.<sup>38</sup>

**(b) The probable costs to the Board and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

29. The Board determined that it will have to modify its database, which it projects will cost less than \$1000. No other probable costs to the Board or any other agency are anticipated.<sup>39</sup>

**(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

30. The Board determined that because one purpose of the proposed rules includes statutorily required temporary military certificates, that purpose can be achieved no other way.<sup>40</sup>

31. The Board determined that because another purpose of the proposed rules is to conform existing language to statutorily used language and to eliminate an unused examination option, that purpose can be achieved no other way.<sup>41</sup>

32. The Board determined that because another purpose of the proposed rules is to remove regulatory language that creates the potential for unintended consequences on a firm's permit when a minority of owners' individual licenses are out of compliance, there is no other method to accomplish that goal.<sup>42</sup>

**(d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the Board and the reasons why they were rejected in favor of the proposed rule.**

33. The Board determined that no alternative methods appear to exist.<sup>43</sup>

**(e) The probable costs of complying with the proposed rules.**

34. The Board determined that because fees for applicants, licensees, certificate holders and firms are specified in statute, there are no additional probable costs

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<sup>38</sup> *Id.* at 5.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

for compliance with the proposed rules. The Board determined that no other governmental units or businesses will be affected by the rule modifications.<sup>44</sup>

- (f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

35. The Board determined that if the proposed rules are not adopted, obsolete language and examination techniques, which are not used, will be maintained. Additionally, firm permits for firms larger than two owners may not be renewed based on the late renewal application of a single owner, and the legislative mandate to create a procedure to issue temporary military certificates will not be implemented.<sup>45</sup>

- (g) An assessment of any differences between the proposed rules and existing federal regulation, and a specific analysis of the need for and reasonableness of each difference.**

36. The Board determined that no relationship exists between the proposed rules and any federal regulations.<sup>46</sup>

- (h) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule ... '[C]umulative effect' means the impact that results from incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.**

37. The Board determined that there are no other state or federal regulations related to the specific purposes of the proposed rules.<sup>47</sup>

## **2. Performance-Based Regulation**

38. The Board is eliminating outdated language that, if not changed, may lead to confusion between the Board and licensees due to changes in terminology used in the field.<sup>48</sup>

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 6.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

39. The Board has designed a system for temporary military certificates that enables certain military personnel and their spouses who are licensed as certified public accountants in another jurisdiction to quickly apply for and obtain a temporary permit in Minnesota.<sup>49</sup> Applicants under this system must then follow the “normal” application process required for full certification, ensuring that they can both work under their temporary certificate, based on their existing credentials from another jurisdiction, and demonstrate that they meet Minnesota’s requirements for certified public accountants.<sup>50</sup>

40. The Board has ensured that the firm permit renewal process does not negatively impact employees, compliant owners, and clients, when as few as a single owner fails to timely renew his or her individual license.<sup>51</sup> If the error is not corrected within 60 days, however, the firm’s permit will be revoked, thus ensuring adequate time for correction and protection of the public from a firm with an unlicensed accountant.<sup>52</sup>

### **3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)**

41. On April 20, 2015, the Board sent to MMB for review:

- 1) The Governor’s Office Proposed Rule and SONAR Form (signed by Doreen Frost, Executive Director for the Board);
- 2) The March 31, 2015 Revisor’s draft of the proposed rule; and
- 3) The March 30, 2015 draft of the SONAR.<sup>53</sup>

42. MMB reviewed the Agency’s proposed rules and concluded that because fees for applicants, licensees, certificate holders, and firms is set in statute, “there does not appear to be a significant cost to local units of government.”<sup>54</sup>

### **4. Cost to Small Businesses and Cities under Minn. Stat. § 14.127**

43. The Board determined that the cost of complying with the proposed rules in the first year after the rules take effect will not exceed \$25,000 for any small business or small city.<sup>55</sup>

### **5. Adoption or Amendment of Local Ordinances**

44. The proposed rule amendments pertain to individuals and firms applying for licensure or certification by the Board and to individuals and firms who are already licensed or certified by the Board. Compliance is the responsibility of private individuals

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Ex. K3.

<sup>54</sup> *Id.*

<sup>55</sup> Ex. D at 8.

and firms. Enforcement of the rules is the responsibility of the Board. Thus, the Board determined a local government will not be required to adopt or amend any ordinance or other regulation to comply.<sup>56</sup>

#### IV. Rulemaking Legal Standards

45. The Administrative Law Judge must make the following inquiries: (1) whether the agency has statutory authority to adopt the rule; (2) whether the rule is unconstitutional or otherwise illegal; (3) whether the agency has complied with the rule adoption procedures; (4) whether the proposed rule grants undue discretion to government officials; (5) whether the rule constitutes an undue delegation of authority to another entity; and (6) whether the proposed language meets the definition of a rule.<sup>57</sup>

46. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,<sup>58</sup> “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),<sup>59</sup> and the agency’s interpretation of related statutes.<sup>60</sup>

47. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action to be taken.”<sup>61</sup> By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”<sup>62</sup>

48. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.<sup>63</sup> Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.<sup>64</sup>

49. Because the Board suggested changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the

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<sup>56</sup> Ex. D at 8.

<sup>57</sup> Minn. R. 1400.2100 (2015).

<sup>58</sup> *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

<sup>59</sup> *Compare generally, United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>60</sup> *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Petterson*, 347 N.W.2d 238, 244 (Minn. 1984).

<sup>61</sup> *Manufactured Housing Institute*, 347 N.W.2d at 244.

<sup>62</sup> *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm'n*; 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

<sup>63</sup> *Peterson v. Minn. Dep't of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

<sup>64</sup> *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. Ct. App. 1991).

Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2(b). The statute specifies that a modification does not make a proposed rule substantially different if:

the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice;

the differences are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice; and

the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

50. In reaching a determination whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests;

whether the subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing; and

whether the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.<sup>65</sup>

## **V. Rule by Rule Analysis**

### **A. Temporary Military Certificates**

51. Minn. R. 1105.2540 is proposed to be added in order to create a procedure for applying for a temporary certificate to practice public accounting. The temporary certificate is limited by statute to active duty members, spouses of active duty members, and veterans with an honorable or general discharge status within the two years preceding the application for a temporary certificate.<sup>66</sup>

52. Subpart 1 sets forth the information required to apply for a temporary certificate and includes an application, the certificate fee, and the evidence required by statute (military status, current license or certificate in another jurisdiction, and a criminal background study).<sup>67</sup>

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<sup>65</sup> Minn. Stat. § 14.05, subd. 2(c).

<sup>66</sup> Ex. D at 9.

<sup>67</sup> *Id.*

53. Subpart 2 provides that the Board will evaluate the information submitted by the applicant and notify the applicant of the result in writing. If the applicant qualifies for the temporary certificate, the Board will issue the temporary certificate and notify the applicant. If the applicant does not qualify, the Board will give reasons for ineligibility.<sup>68</sup>

54. Subpart 3 defines the period of time for which the temporary certificate is valid. The temporary certificate will expire when the first of the following three things occurs:

- a. The expiration date listed on the certificate (six months after the date of issue);
- b. The Board's determination, based on a review of the applicant's full application, that the applicant is not qualified for certification; or
- c. The Board's determination, based on a review of the applicant's full application, that the applicant is qualified for certification.<sup>69</sup>

55. Subpart 4 requires the applicant to complete the full application required for a CPA certificate, just like any other applicant. If, following the Board's review of the full application, the Board determines that the applicant is eligible for certification, the Board will issue the certificate and notify the applicant.

56. The proposal for Temporary Military Certificates has not been challenged.

## **B. Firm Permits**

57. Paragraph D of Minn. R. 1105.4000 is proposed to be split into two sub-items to differentiate between requirements for certificates for individuals at firms seeking an initial permit and those at firms seeking renewal of an existing permit. In order for a firm to be issued an initial permit, all of its partners, members, managers, and shareholders, directors, and officers (owners) who are required to hold a certificate and whose principal place of business is in Minnesota must individually hold a certificate with an active status. This does not change the original rule, but does clarify the definition of a manager to be consistent with Minn. Stat. § 326A.01 (2014).<sup>70</sup>

58. The second sub-item, concerning renewal of an existing firm permit, requires a two-thirds majority of owners to have completed their own renewals, including the firm's managing partner and the signer of the firm permit renewal application.<sup>71</sup> If these conditions are not met, the firm's permit cannot be renewed. The current rule requires 100 percent of the owners to timely renew before the firm permit can be renewed. Because there are a variety of reasons any one individual's permit may not be timely renewed, such as an incomplete application or incorrect fee payment, the Board determined it was not fair to jeopardize the work of the entire firm and their clients for

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 10.

<sup>71</sup> The proposed requirement regarding the managing partner and signer of the application has subsequently been changed, as noted in paragraph 64 below.

such an error. The rule modification gives the firm 60 days from December 31 to see to it that the individual certificate errors are corrected before the firm permit is cancelled. The rule modification does not give the individual who is out of compliance additional time, and that person will still be unable to practice accounting, and subject to any discipline, including late-fees, related to the non-compliance. If, after 60 days, all of the owners have not renewed their certificates, the Board will automatically revoke the firm's permit by following the established procedure and giving proper notice of due process.<sup>72</sup>

59. This proposal was challenged and that critique is addressed in section VI, below.

### **C. Housekeeping Modifications**

60. Minn. R. 1105.0100 is proposed to include a language change from "quality review" to "peer review" based on statutory language and industry language used.<sup>73</sup>

61. The proposed language change from "quality review" to "peer review" also appears in the following rules: Minn. R. 1105.3100, 1105.3600, 1105.4300, 1105.4600, 1105.4700, 1105.4800, 1105.4900, 1105.5100, 1105.5200, 1105.5300, 1105.5400, 1105.5500, 1105.5600, 1105.7100, 1105.7400, and 1105.7800.<sup>74</sup>

62. Minn. R. 1105.1800, subpart 3, concerning oral examinations of applicants, is proposed to be deleted because the discretionary oral examination has not been used in many years, and the use of oral examinations is inherently subjective, unnecessary, and costly to both write and defend. The Board relies on the valid and reliable, psychometrically-defensible Uniform Certified Public Accountant (CPA) Examination to establish competency in public accounting. The CPA Examination and the American Institute of Certified Public Accountants Ethics Examination will continue to be required for certification.<sup>75</sup>

63. The Housekeeping Modifications were not challenged.

### **D. Minor change to the Proposed Rules**

64. At its meeting on September 21, 2015, the Board made a minor change to the proposed rules.<sup>76</sup> The change was to remove the requirement in proposed Minn. R. 1105.4000 which required a firm managing partner and the signer of the firm permit to be among the two-thirds of owners who must renew.<sup>77</sup> This change was necessary to avoid unintended consequences of the originally proposed rule. Firm managing partners and the individual signing the firm's renewal application are not required to be licensed by statute or rule, so requiring them to renew could thwart the firm's renewal process.

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<sup>72</sup> Ex. D at 10.

<sup>73</sup> *Id.* at 9; see Minn. Stat. 326A.02, subd. 5(8), (13).

<sup>74</sup> *Id.* at 8-9.

<sup>75</sup> *Id.* at 9.

<sup>76</sup> Testimony (Test.) of Michael Vekich; Ex. L.

<sup>77</sup> *Id.*

Further, there is no additional protection to the public by requiring the managing partner and the person signing the firm permit to be licensed.<sup>78</sup>

65. This change to the proposed rules has not been challenged.

## **VI. Critiques by Stakeholders**

66. Prior to and during the October 8, 2015, rulemaking hearing, one organization, the Minnesota Association of Public Accountants (MAPA), advised that it opposed the proposed rules regarding renewal of firm permits because:

- MAPA feels that the language proposed is unnecessary as it is looking to solve a non-existent problem. According to MAPA, no firm in Minnesota has ever had its firm permit revoked as a result of problems with renewal certificates;
- Giving two-thirds of a firm's partners and other specified members special exemptions creates an unfair advantage for larger firms, and so creates special rules for firms based on their size;
- The proposed language creates a public perception that the industry cannot meet licensure deadlines set by the state. In an industry that operates around deadlines, the proposed language sends a mixed message to the public and does not help instill confidence in clients; and
- The proposed language creates confusion around whom and when professionals must have their certificates renewed to operate. The changes do nothing to help create reasonable rules for the industry.<sup>79</sup>

67. On February 2, 2012, an accounting firm received a letter from the Board regarding the firm's 2012 CPA Firm Permit renewal. The Board informed the firm that one of the firm's members had not timely renewed his CPA certificate, so the firm's permit had expired on December 31, 2011. As a result, the firm was prohibited from providing services until the matter was resolved. The matter was resolved the same day.<sup>80</sup>

68. By changing the requirement that 100 percent of a firm's partners, members, managers, shareholders, directors, and officers have their licenses timely renewed before the firm's permit can be renewed, the Board is seeking to prevent significant disruption to firms and their clients resulting from what may be a clerical mistake. Whether this is a real or potential problem is immaterial where the Board has a rational basis for its proposed rule.

69. The proposed rule does not create an unfair advantage to large firms and does not create special rules for firms based on their size. The rule remains that all

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<sup>78</sup> *Id.*

<sup>79</sup> Ex. I.

<sup>80</sup> Test. of Robert Georges; Letter from Georges to Mortenson, dated October 12, 2015; Letter from Oehrlein to Katzenmaier, dated February 2, 2012.

licensees must timely renew their licenses. The proposed rule simply attempts to mitigate a larger problem of an entire firm ceasing operations when a minority of members fail to timely renew their licenses. These errors must be corrected in a timely manner or the firm will shut down as a consequence. Individual accountants are not permitted to practice when they lack a timely received license. This approach is within the discretion of the Board.

70. The proposed rule has no greater likelihood of creating a negative public perception of the industry than the current rule. Under the current rule, a negative public perception could be created about the industry when an entire firm serving a large number of clients, must stop work as a result, for example, of a clerical error. The selection of the approach to take is within the discretion of the Board.

71. The proposed rule does not create confusion about the deadline to renew. The deadline remains the 1<sup>st</sup> of the year, for both individuals and the firm. Only when an individual renewal is late does a new deadline occur in which to correct the error. The individual cannot practice accounting after his or her license expires and before it has been renewed. This approach is within the Board's discretion.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Minnesota Board of Accountancy gave proper notice to interested persons in this matter.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 ensuring all affected interests have been afforded the opportunity to participate in the rulemaking process, and all other procedural requirements of law or rule.
3. The Board has fulfilled its additional notice requirements.
4. The Board has statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05-.381.
5. The Notice of Hearing, the proposed rules, and the Statement of Need and Reasonableness complied with Minn. R. 1400.2080, subp. 5 (2015).
6. The Board has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, consultation with the Commissioner of Minnesota Management and Budget, and a determination that

local ordinances will not require amendment or adoption.<sup>81</sup> The Administrative Law Judge approves the Board's determination under Minn. Stat. § 14.128.

7. The Board has made the determination required by Minn. Stat. § 14.127 regarding the cost of complying with the proposed rules in the first year after the rules take effect and the Administrative Law Judge approves.

8. The Board has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, .50.

9. The modification to the proposed rules suggested by the Board after publication of the proposed rules in the *State Register* are not substantially different from the proposed rules as published in the *State Register*, within the meaning of Minn. Stat. §§ 14.05, subd. 2, .15, subd. 3.

10. The proposed rules are grounded in the administrative record and the Board has shown they are needed and reasonable.

11. There are no defects in the rules as proposed and there are no other impediments to preclude the adoption of the proposed rules.

12. There have been no errors or defects in the rulemaking proceedings. If there was an error or defect in the rulemaking proceedings, the error or defect was harmless because it did not deprive anyone of the opportunity to participate in the process.<sup>82</sup>

13. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Board from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rulemaking record.

Based upon the foregoing Conclusions of Law, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted.

Dated: November 4, 2015

s/Jim Mortenson  
JIM MORTENSON  
Administrative Law Judge

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<sup>81</sup> See Minn. Stat. §§ 14.002, .128.

<sup>82</sup> See Minn. Stat. §§ 14.15, subd. 5.

Reported: Digital Recording  
No Transcript Prepared

### **NOTICE**

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.