

September 21, 2017

**VIA E-FILING ONLY**

Andrea Barker  
Minnesota Board of Accountancy  
85 E Seventh PI Ste 125  
Saint Paul, MN 55101  
[andrea.barker@state.mn.us](mailto:andrea.barker@state.mn.us)

**Re: In the Matter of Proposed Permanent Rules Regarding Fees, Peer Reviews, Education, and Housekeeping Updates  
OAH 8-9035-34406; Revisor R-4392**

Dear Ms. Barker:

Enclosed herewith and served upon you is the **REPORT OF THE ADMINISTRATIVE LAW JUDGE** in the above-entitled matter. The Administrative Law Judge has determined there are no negative findings in these rules.

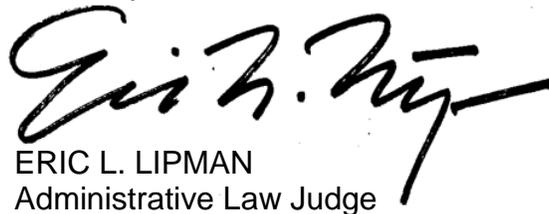
The Office of Administrative Hearings has closed this file and is returning the rule record so that the Minnesota Board of Accountancy can maintain the official rulemaking record in this matter as required by Minn. Stat. § 14.365. Please ensure that the board's signed order adopting the rules is filed with our office. The Office of Administrative Hearings will request copies of the finalized rules from the Revisor's office following receipt of that order. Our office will then file four copies of the adopted rules with the Secretary of State, who will forward one copy to the Revisor of Statutes, one copy to the Governor, and one to the board for its rulemaking record. The Board will then receive from the Revisor's office three copies of the Notice of Adoption of the rules.

The Board's next step is to arrange for publication of the Notice of Adoption in the State Register. Two copies of the Notice of Adoption provided by the Revisor's office should be submitted to the State Register for publication. A permanent rule with a hearing does not become effective until five working days after a Notice of Adoption is published in the State Register in accordance with Minn. Stat. § 14.27.

Andrea Barker  
September 21, 2017  
Page 2

If you have any questions regarding this matter, please contact Katie Lin at (651) 361-7911 or [katie.lin@state.mn.us](mailto:katie.lin@state.mn.us).

Sincerely,

A handwritten signature in black ink, appearing to read "Eric L. Lipman", with a long horizontal stroke extending to the right.

ERIC L. LIPMAN  
Administrative Law Judge

Enclosure

cc: Office of the Governor  
Legislative Coordinating Commission  
Revisor of Statutes

STATE OF MINNESOTA  
 OFFICE OF ADMINISTRATIVE HEARINGS  
 ADMINISTRATIVE LAW SECTION  
 PO BOX 64620  
 600 NORTH ROBERT STREET  
 ST. PAUL, MINNESOTA 55164

**CERTIFICATE OF SERVICE**

In the Matter of Proposed Permanent Rules Regarding Fees, Peer Reviews, Education, and Housekeeping Updates	OAH Docket No. 8-9035-34406 Revisor R-4392
---	---

Sheena Denny certifies that on September 21, 2017, she served a true and correct copy of the attached **REPORT OF THE ADMINISTRATIVE LAW JUDGE**; by courier service, by placing it in the United States mail with postage prepaid, or by electronic mail, as indicated below, addressed to the following individuals:

<p><b><u>VIA E-FILING ONLY</u></b>          Andrea Barker          Minnesota Board of Accountancy          85 E Seventh PI Ste 125          Saint Paul, MN 55101  <a href="mailto:andrea.barker@state.mn.us">andrea.barker@state.mn.us</a></p>	<p><b><u>VIA E-MAIL ONLY</u></b>          Merone Melekin          Office of Governor Mark Dayton  <a href="mailto:Merone.Melekin@state.mn.us">Merone.Melekin@state.mn.us</a></p>
<p><b><u>VIA E-MAIL ONLY</u></b>          Legislative Coordinating Commission  <a href="mailto:lcc@lcc.leg.mn">lcc@lcc.leg.mn</a></p>	<p><b><u>VIA E-MAIL ONLY</u></b>          Paul Marinac          Office of the Revisor of Statutes  <a href="mailto:paul.marinac@revisor.mn.gov">paul.marinac@revisor.mn.gov</a></p>

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of Proposed Permanent Rules of  
the Board of Accountancy Governing Fees,  
Peer Reviews, Education, and Housekeeping  
Updates, *Minnesota Rules* Chapter 1105

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge Eric L. Lipman for a rulemaking hearing on July 26, 2017. The public hearing was held in Room 295 of the Golden Rule Building, 85 East Seventh Place, Saint Paul, Minnesota.

The Minnesota Board of Accountancy (Board or Agency) proposes to amend its administrative rules so as to clarify education requirements for initial certificates, align peer review and continuing education requirements with national standards, update filing and operational practices, reduce certain filing fees, and repeal obsolete rules.<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 so as to ensure that state agencies have met all of the requirements that our law requires for adopting rules.

The hearing was conducted to permit agency 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 within the Board's statutory authority, are necessary and reasonable, and follow from compliance with the required procedures. In addition, the Board must show that any modifications that it 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 agency panel at the public hearing included the Honorable Michael Vekich, CPA, Secretary-Treasurer of the Board; Doreen Frost, Executive Director of the Board; and Andrea Barker, Assistant Executive Director and Rules Coordinator for the Board.<sup>4</sup>

---

<sup>1</sup> Ex. D at 3-4.

<sup>2</sup> See Minn. Stat. §§ 14.131 - 14.20 (2016).

<sup>3</sup> Minn. Stat. §§ 14.05, 14.23, 14.25 and 14.50 (2016).

<sup>4</sup> Digital Recording, OAH Docket No. 8-9035-34406 (July 26, 2017).

Four members of the public attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups, or associations had an opportunity to be heard concerning the proposed rules. All four members of the public made statements or asked questions during the hearing.<sup>5</sup>

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until August 15, 2017 – to permit interested persons and the Board 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>6</sup> The hearing record closed on August 22, 2017.<sup>7</sup>

## **SUMMARY OF CONCLUSIONS**

The Board has established that it has the statutory authority to adopt the proposed rules; the rules were adopted in compliance with the procedural requirements of Minnesota Statutes, Chapter 14 (2016), and Minnesota Rules, Chapter 1400 (2017); and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

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

1. This rulemaking sets out to update the Board's rules of procedure as to four key areas: Fees, Educational Requirements, Peer Review and Operational Practices.<sup>8</sup>

### **II. Rulemaking Authority**

2. The Board cites Minn. Stat. § 326A.02, subd. 5 (2016) as its source of statutory authority for these proposed rules. This statute grants the Board the authority to “adopt rules governing its administration and enforcement of this chapter and the conduct of licensees and persons registered under section 326A.06, paragraph (b)....”<sup>9</sup>

3. The Administrative Law Judge concludes that the Board has the statutory authority to adopt the proposed rules, which relate to the administration of Chapter 326A and the conduct of persons licensed or registered under Minn. Stat. § 326A.06 (2016).

---

<sup>5</sup> Hearing Roster, at 1; Digital Recording, *supra*.

<sup>6</sup> See Minn. Stat. § 14.15, subd. 1.

<sup>7</sup> Minn. Stat. § 14.15, subd. 2.

<sup>8</sup> See Ex. D at 3-4.

<sup>9</sup> Minn. Stat. § 326A.02, subd. 5.

### III. Procedural Requirements of Chapter 14

#### A. Publications

4. On April 18, 2016, the Board published a Request for Comments in the *State Register* seeking feedback on potential regulatory reforms. Specifically, the Board identified the need to clarify education requirements for initial certificates, align peer review and continuing education requirements with national standards, update filing and operational practices, and reduce certain filing fees.<sup>10</sup>

5. On May 15, 2017, the Board requested approval of its Notice of Intent to Adopt Rules With or Without a Hearing (Dual Notice) and Additional Notice Plan.<sup>11</sup>

6. By way of an Order dated May 18, 2017, the Administrative Law Judge approved the Board's Dual Notice and Additional Notice Plan.<sup>12</sup>

7. The Dual Notice of Intent to Adopt Rules, published in the June 12, 2017, *State Register*, set July 12, 2017, as the deadline for comments or to request a hearing.<sup>13</sup>

8. On May 31 and June 5, 2017, the Board sent a copy of the Dual Notice and Additional Notice Plan to all persons and associations identified in the additional notice plan. On June 7, 2017, the Board mailed a copy of the Dual Notice to all persons and associations who had registered their names with the Board for the purpose of receiving such notice.<sup>14</sup>

9. On June 7, 2017, the Board mailed a copy of the Dual Notice and the statement of need and reasonableness (SONAR) to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the operations and budget of the Board.<sup>15</sup>

10. On June 1, 2017, the Board mailed a copy of the SONAR to the Legislative Reference Library to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.<sup>16</sup>

11. The Dual Notice identified the date and location of the hearing in this matter.<sup>17</sup>

---

<sup>10</sup> Ex. A; 40 *State Register* 1421-22 (April 18, 2016).

<sup>11</sup> Order on Review of Additional Notice Plan and Dual Notice, OAH Docket No. 8-9035-34406, at 1 (May, 18, 2017).

<sup>12</sup> *Id.*

<sup>13</sup> Ex. F; 41 *State Register* 1423 (June 12, 2017).

<sup>14</sup> Exs. G-1, G-3, H-1, H-3.

<sup>15</sup> Ex. K-5; see also Section III (C)(2) Notice to Legislators, *infra*.

<sup>16</sup> Ex. E.

<sup>17</sup> Ex. F; 41 *State Register* 1421.

12. At the hearing on July 12, 2017, 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 April 18, 2016;<sup>18</sup>
- (b) the proposed rules dated May 2, 2017, including the Revisor's approval;<sup>19</sup>
- (c) the Board's SONAR;<sup>20</sup>
- (d) the Certificate of Mailing the SONAR to the Legislative Reference Library on June 1, 2017;<sup>21</sup>
- (e) the Dual Notice as mailed and as published in the *State Register* on June 12, 2017;<sup>22</sup>
- (f) the Certificate of Mailing the Dual Notice to the rulemaking mailing list on June 7, 2017, and the Certificate of Accuracy of the Mailing List;<sup>23</sup>
- (g) the Certificate of Giving Additional Notice Pursuant to the Additional Notice Plan on May 31 and June 5, 2017;<sup>24</sup>
- (h) the written comments on the proposed rules that the Board received during the comment period that followed the Dual Notice;<sup>25</sup>
- (i) the Certificate of Sending the Dual Notice and the Statement of Need and Reasonableness to Legislators on June 7, 2017;<sup>26</sup> and,
- (j) a June 1, 2017, electronic mail message from Shawn Kremer, Executive Budget Officer of the Minnesota Management and Budget (MMB), in which Mr. Kremer addresses "the fiscal impact and fiscal benefits of the proposed rule on units of local government."<sup>27</sup>

---

<sup>18</sup> Ex. A; 40 *State Register* 1421-22 (April 18, 2016).

<sup>19</sup> Ex. C.

<sup>20</sup> Ex. D.

<sup>21</sup> Ex. E.

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

<sup>23</sup> Exs. G-1, G-3.

<sup>24</sup> Exs. H-1, H-3.

<sup>25</sup> Ex. I-1.

<sup>26</sup> Ex. K-5.

<sup>27</sup> Ex. K-3; Minn. Stat. § 14.131.

## **B. Additional Notice Requirements**

13. Minnesota Statutes §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the Board must detail why these notification efforts were not made.

14. Between May 31 and June 12, 2017, the Board provided the Dual Notice in the following manner, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

- (a) The Dual Notice was posted on the Board's website on June 1, 2017 and the Board has maintained these materials on the website continuously after they were posted.<sup>28</sup>
- (b) Notice of the rulemaking was sent by first class mail to:
  - i. state and national associations representing accountants;
  - ii. more than 60 colleges and universities in Minnesota that offer degree programs in accounting; and,
  - iii. all holders of permits and certificates issued by the Board.<sup>29</sup>

## **C. Notice Practice**

### **1. Notice to Stakeholders**

15. On June 9, 2017, the Board provided a copy of the Dual Notice to its official rulemaking list (maintained under Minn. Stat. § 14.14).<sup>30</sup>

16. The comment period on the proposed rules expired at 4:30 p.m. on July 12, 2017.<sup>31</sup>

17. There are 33 days between June 9, 2017 and July 12, 2017.

18. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, under Minn. R. 1400.2080, subp. 6 (2017), to mail the Dual Notice "at least 33 days before the end of the comment period ...."

19. On June 7, 2017, the Board sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators as required by Minn. Stat. § 14.116.<sup>32</sup>

---

<sup>28</sup> Ex. H-2.

<sup>29</sup> Ex. H-1, H-3.

<sup>30</sup> Ex. G-1.

<sup>31</sup> 41 *State Register* 1422.

<sup>32</sup> Ex. K-5.

## 2. Notice to Legislators

20. Minnesota Statute § 14.116 requires the Board to send a copy of the Notice of Intent to Adopt and the SONAR to certain legislators on the same date that it mails its Dual Notice to persons on its rulemaking list and pursuant to its Additional Notice Plan.<sup>33</sup>

21. Specifically, the statute instructs that “[w]hen an agency mails notice of intent to adopt rules under section 14.14 or 14.22, the agency must send a copy of the same notice and a copy of the statement of need and reasonableness to the chairs and ranking minority party members of the legislative policy and budget committees with jurisdiction over the subject matter of the proposed rules ....”<sup>34</sup>

22. To the extent that the proposed rules relate to the Board’s filing practices, operations and fee structures, the legislative policy and budget committees with jurisdiction over the subject matter of those rules are the Government Operations Committee and the State Government Finance Committees of the Minnesota House of Representatives and the Minnesota Senate. The Board made timely and complete submissions to the leadership of those committees.<sup>35</sup>

23. Moreover, the statutory changes that obliged some of the administrative rules now being proposed were enacted by way of these same committees through amendments to the Omnibus State Government Finance Bill.<sup>36</sup>

24. For these reasons, the Administrative Law Judge concludes that the Board fulfilled its statutory responsibilities to mail the Dual Notice to the designated legislators “at least 33 days before the end of the comment period ....”<sup>37</sup>

25. However, to the extent that the proposed rules also touch upon appropriate credentialing, training, and practice privileges of accountants, the better practice would have been to reach out to the leadership of the House and Senate Commerce Committees. For this reason, the Administrative Law Judge also makes the non-binding technical suggestion that the Board staff contact the key legislators of those committees and brief them regarding this rulemaking before the Board takes final action on adoption of the proposed rules.<sup>38</sup>

## 3. Notice to the Legislative Reference Library

26. Minnesota Statute § 14.23 requires the Board to send a copy of the SONAR to the Legislative Reference Library when the Dual Notice is mailed.

---

<sup>33</sup> Minn. Stat. § 14.116; Minn. R. 1400.2080, subp. 6.

<sup>34</sup> Minn. Stat. § 14.116 (b).

<sup>35</sup> See Ex. K-5.

<sup>36</sup> See 2015 Laws of Minnesota, ch. 77 art. 2 §§ 64, 65; House File 744 (2015); Senate File 802 (2015).

<sup>37</sup> Minn. R. 1400.2080, subp. 6.

<sup>38</sup> See *generally* Minn. Stat. § 14.001 (1) (2016) (A key purpose of the Minnesota Administrative Procedure Act is “to provide oversight of powers and duties delegated to administrative agencies”).

27. On June 1, 2017, the Board sent a copy of the SONAR to the Legislative Reference Library.<sup>39</sup>

28. The Administrative Law Judge concludes that the Board fulfilled its responsibilities, to mail the Dual Notice “at least 33 days before the end of the comment period ....”<sup>40</sup>

#### **D. Impact on Farming Operations**

29. Minnesota Statute § 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*.

30. 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.

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

31. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its SONAR. 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;
- (2) 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;
- (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 Board 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

---

<sup>39</sup> Ex. E.

<sup>40</sup> Minn. R. 1400.2080, subp. 6.

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 and reasonableness of each difference.<sup>41</sup>

## **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.**

32. The Board asserts that to the extent it is proposing a streamlined fee structure, filing practice, peer review process and continuing educational requirements, exam candidates, licensees, and all members of the public are likely to benefit from the proposed rules.<sup>42</sup>

33. The Board does not project an "increase in the cost to comply with, or enforce, [the proposed] rules."<sup>43</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.**

34. The Board does not project that implementation and enforcement of the proposed rules will result in additional costs to the Board or any other state agency. This is because the Minnesota Legislature recently acted to increase Board-imposed licensure fees. The Board projects that this increase will offset the corresponding reductions in revenue from eliminating the fees associated with verifying the examination or licensure status of its licensees.<sup>44</sup>

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

35. A key purpose of the proposed rulemaking is to carrying out the statutory directive to revise its rules so that "the standards for attesting... are consistent with the standards of general applicability recognized by national accountancy organizations,

---

<sup>41</sup> Minn. Stat. § 14.131.

<sup>42</sup> Ex D at 4-5.

<sup>43</sup> *Id.* at 5.

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

including the American Institute of Certified Public Accountants and the Public Company Accounting Oversight Board ....<sup>45</sup>

36. The only method to undertake the needed updates and clarifications, maintains the Board, is to revise the current rules through a rulemaking process.<sup>46</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.**

37. Because the only method to undertake the needed updates and clarifications was a rulemaking process, the Board could not identify methods other than rulemaking to make the need changes.<sup>47</sup>

- (e) 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.**

38. The Board estimates that as a result of its streamlining proposals, none of its stakeholders are likely to face increased compliance costs – with most stakeholders enjoying either lower costs, increased choice and flexibility, or both.<sup>48</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.**

39. The Board maintains that a failure to implement its streamlining and reform proposals will likely result in higher out-of-pocket costs for licensees; higher regulatory compliance costs; reduced flexibility in obtaining accreditation for continuing professional education; and increased risks of harm to the public from undetected licensee misconduct.<sup>49</sup>

---

<sup>45</sup> Ex. D at 5; 2015 Laws of Minnesota, ch. 77 art. 2 § 65.

<sup>46</sup> Ex. D at 5.

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

<sup>48</sup> *Id.* at 5-6.

<sup>49</sup> *Id.* at 6.

- (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.**

40. The Board asserts that the licensure and accreditation of accountants is not a matter regulated by the federal government.<sup>50</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.**

41. The Board asserts that the licensure and accreditation of accountants is not a matter regulated by the federal government.<sup>51</sup>

## **2. Consultation with the Commissioner of MMB**

42. As required by Minn. Stat. § 14.131, by way of an electronic mail message on June 1, 2017, Shawn Kremer, an Executive Budget Officer of MMB, noted that he had reviewed the Board's proposed rules and had "no concerns" about the fiscal impacts of the proposed rule on units of local government.<sup>52</sup>

## **3. Performance-Based Regulation**

43. The Administrative Procedure Act also requires an agency to describe how it has considered and implemented the legislative policy supporting performance-based regulatory systems. A performance-based rule is one that emphasizes superior achievement in meeting the Board's regulatory objectives and maximum flexibility for the regulated party and the Board in meeting those goals.<sup>53</sup>

44. The Board maintains that its proposed rules promote superior achievement and flexibility by removing outdated, confusing, and inflexible language in the existing regulations. The Board asserts that the proposed rules will reduce regulatory complexity, stakeholder confusion, licensee error, compliance costs, and rates of noncompliance.<sup>54</sup>

## **4. Summary**

45. The Administrative Law Judge finds that 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, and the fiscal impact on units of local government.

---

<sup>50</sup> *Id* at 7.

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

<sup>52</sup> Ex. K-3; Minn. Stat. § 14.131.

<sup>53</sup> Minn. Stat. §§ 14.002, 14.131.

<sup>54</sup> Ex. D at 7-8.

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

**Minnesota Statute § 14.127, requires the Board to “determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees.” The Board must make this determination before the close of the hearing record. The Administrative Law Judge must review the determination and approve or disapprove it.<sup>55</sup>**

46. The Board determined that the cost of complying with the proposed rule changes will not exceed \$25,000 for any business or any statutory or home rule charter city.<sup>56</sup>

47. The Administrative Law Judge finds that the Board has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

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

48. Under Minn. Stat. § 14.128, the Board must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The Board must make this determination before the close of the hearing record. The Administrative Law Judge must review the determination and approve or disapprove it.<sup>57</sup>

49. The Board concluded that no local government will need to adopt or amend an ordinance or other regulation to comply with the proposed rules. The Board’s proposed rules should not require local governments to adopt or amend those more general ordinances and regulations.<sup>58</sup>

50. The Administrative Law Judge finds that the Board has made the determination required by Minn. Stat. § 14.128 and approves that determination.

#### **IV. Rulemaking Legal Standards**

51. The Administrative Law Judge must make the following inquiries: whether the Board has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the Board has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.<sup>59</sup>

---

<sup>55</sup> Minn. Stat. § 14.127, subs. 1 and 2.

<sup>56</sup> Ex. D at 11.

<sup>57</sup> Minn. Stat. § 14.128, subd. 1 (A determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions.); Minn. Stat. § 14.128, subs. 2, 3.

<sup>58</sup> Ex. D at 11.

<sup>59</sup> See Minn. R. 1400.2100 (2017).

52. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the Board must establish the need for, and reasonableness of, a proposed rule by an affirmative presentation of facts. In support of a rule, the Board may rely upon materials developed for the hearing record,<sup>60</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>61</sup> and the Board’s interpretation of related statutes.<sup>62</sup>

53. A proposed rule is reasonable if the Board can “explain on what evidence it is relying and how the evidence connects rationally with the Board’s choice of action to be taken.”<sup>63</sup> By contrast, a proposed rule will be deemed arbitrary and capricious where the Board’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”<sup>64</sup>

54. 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 Board is a rational one.<sup>65</sup> Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the Board’s selection will be approved if it is one that a rational person could have made.<sup>66</sup>

55. Because the Board suggests changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed.

56. In both prehearing submissions and posthearing comments, the Board detailed the revisions that it would make to the proposed rules in response to the stakeholder feedback.<sup>67</sup>

57. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

- (1) 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;

---

<sup>60</sup> See *Manufactured Housing Institute v. Pettersen*, 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>61</sup> Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>62</sup> See *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>63</sup> *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>64</sup> See *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 251 N.W.2d 350, 357-58 (Minn. 1977).

<sup>65</sup> *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. Ct. App. 1999).

<sup>66</sup> *Minnesota Chamber of Commerce*, 469 N.W.2d at 103.

<sup>67</sup> See Exs. L, M; see also Initial PostHearing Comments of the Board, OAH Docket No. 8-9035-34406 (August 10, 2017).

- (2) the differences are a logical outgrowth of the contents of the...notice of hearing, and the comments submitted in response to the notice; and
- (3) the notice of hearing provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.

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

- (1) persons who will be affected by the rule should have understood that the rulemaking proceeding...could affect their interests;
- (2) 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
- (3) the effects of the rule differ from the effects of the proposed rule contained in the ... notice of hearing.<sup>68</sup>

## V. Rule-by-Rule Analysis

59. Several sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Board's regulatory choice or which otherwise requires closer examination.

60. Further, in this context, the role of the Administrative Law Judge is not to fashion requirements that the judge regards as best suited for the regulatory purpose, but rather to determine whether the Board has made a reasonable selection among the regulatory options it had. The delegation of rulemaking authority is from the Minnesota Legislature to the Board, and not to the Judge.<sup>69</sup> In this instance, the revisions that the Board made to the proposed rules as detailed in its corrected post-hearing submission on August 10, 2017, are needed and reasonable.

61. Additionally, as to those modifications, the Board's action in revising the text does not result in a substantial change from the rule as originally proposed. In each

---

<sup>68</sup> See Minn. Stat. § 14.05, subd. 2.

<sup>69</sup> See generally *Citizens Advocating Responsible Dev. v. Kandiyohi Cty. Bd. of Comm'rs*, 713 N.W.2d 817, 832 (Minn. 2006) ("Our role when reviewing agency action is to determine whether the agency has taken a 'hard look' at the problems involved, and whether it has 'genuinely engaged in reasoned decision-making'") (quoting *Reserve Mining Co. v. Herbst*, 256 N.W.2d 808, 825 (Minn. 1977)); *Manufactured Hous. Inst.*, 347 N.W.2d at 244 ("Agencies must at times make judgments and draw conclusions from suspected, but not completely substantiated, relationships between facts, from trends among facts, from theoretical projections from imperfect data, from probative preliminary data not yet certifiable as fact, and the like") (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 28 (D.C. Cir.), cert. denied, 426 U.S. 941 (1976)).

instance, the revisions involve editorial and clarifying changes to the phrasing of the original proposal.<sup>70</sup>

## **V. Additional Actions Urged By Stakeholders**

62. Leading up to the rulemaking hearing, and during the hearing itself, the Board received stakeholder feedback on the proposed educational requirements for initial licensure and maintaining licensure. Two key critiques are addressed below.

### **A. Minn. R. 1105.2600 (D) (2017) – Experience Requirements for Issuance of an Initial Certificate**

63. A commentator urged the Board to move away from the requirement, found in the existing rule, that applicants for issuance of an initial certificate have completed 2,000 hours of “services or advice using accounting, attest, compilation, management advisory, financial advisory, tax, or consulting skills.”<sup>71</sup> The commentator maintained that requiring one full calendar year of work in the accounting field would be both a clearer and more sensible requirement when compared to the existing rule’s reference to a 2,000-hour minimum.<sup>72</sup>

64. The Board declined the commentator’s invitation to revise Minn. R. 1105.2600 (D); not only because such a proposal was not announced in the Dual Notice, but also because the Board was unpersuaded that a reduction in the number of work hours would be administratively easier or substantively equivalent to the current eligibility standard.<sup>73</sup>

65. The Administrative Law Judge finds that declining to modify the minimum number of hours required for issuance of an initial certificate was an appropriate regulatory choice for the Board to make.

### **B. Minn. R. 1105.3100, subp. 4(C) (2017) – Limitation on Hours for Nontechnical Learning Activities**

66. One of the witnesses at the rulemaking hearing urged the Board to revise the limitation of hours for “nontechnical learning activities,” for which an accountant may receive continuation professional education credit, so as to permit licensees to obtain a greater number of accredited hours for these activities. The existing rule limits accreditation to 24 credit hours within a three-year reporting period.<sup>74</sup>

67. In its posthearing comments the Board agreed. The Board concluded that an increase in the number of permitted credit hours – from 24 to 60 – would both respond to current training needs within the profession and align closely with the Model

---

<sup>70</sup> See Initial Post-hearing Comments of the Board, *supra*.

<sup>71</sup> Minn. R. 1105.2600 (A), (D) (2017).

<sup>72</sup> Initial Posthearing Comments of the Board, *supra*, at 4.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 9-10; Digital Recording, *supra*.

Rule on this same subject issued by the National Association of State Boards of Accountancy.<sup>75</sup>

68. The Board's action revising the text is needed and reasonable and would not be a substantial change from the rule as originally proposed.

69. The Administrative Law Judge finds that the Board has demonstrated, by an affirmative presentation of facts, the need for and reasonableness of all of the proposed rule provisions.

70. Further, the Administrative Law Judge finds that each of the proposed rules are authorized by statute and that there are no other defects that would bar the adoption of those rules.

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 Board gave proper notice to interested persons.
2. The Board has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.
3. The Administrative Law Judge concludes that the Board has fulfilled its additional notice requirements.
4. The Board has demonstrated its 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, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).
5. The Notice of Hearing, the proposed rules, and SONAR complied with Minn. R. 1400.2080, subp. 5.
6. 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 and 14.50.
7. The modification to the proposed rules suggested by the Board after publication of the proposed rules in the *State Register* is not substantially different from the proposed rules as published in the *State Register* within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.
8. The modifications to the proposed rules suggested by the Administrative Law Judge 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 and 14.15, subd. 3.

---

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

9. As part of the public comment process, a number of stakeholders urged the Board to adopt other revisions to Minn. R. Part 1105. In each instance, the Board's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

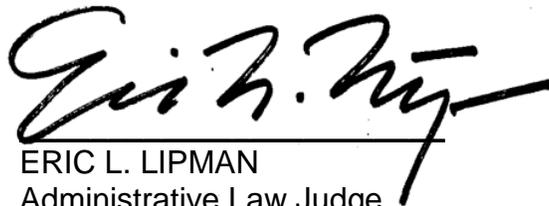
10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude, and should not discourage, the Board from further modification of the proposed rules – provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

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

### **RECOMMENDATION**

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

Dated: September 21, 2017

  
ERIC L. LIPMAN  
Administrative Law Judge

### **NOTICE**

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



**Mailing Address:**  
P.O. Box 64620  
St. Paul, Minnesota 55164-0620

Voice: (651) 361-7900  
TTY: (651) 361-7878  
Fax: (651) 539-0310

September 21, 2017

**TO: ALL INTERESTED PERSONS**  
**RE: In the Matter of Proposed Permanent Rules Regarding Fees, Peer Reviews, Education, and Housekeeping Updates R-4392; OAH Docket No. 8-9035-34406**

The Report of the Administrative Law Judge in the above-entitled matter has been submitted to the Minnesota Board of Accountancy. Please note that the Report is a recommendation only and that the Minnesota Board of Accountancy may not take any final action on the proposed rule(s) until at least five working days have expired.

During that time, the Minnesota Board of Accountancy and the Office of Administrative Hearings will make a copy of the Report available for review by any interested individual.

A downloadable copy of the final report will be posted to the Office of Administrative Hearings website (<http://mn.gov/oah>) where it is accessible **at no charge**.

Alternately, paper copies of the final report may be requested from the Office of Administrative Hearings for a copying charge of 25 cents per page, or a total of **\$4** for each paper copy of the report. Please use the enclosed order form when submitting a request for a paper copy of this report.

Likewise, in accordance with the Americans with Disabilities Act, this document will be made available in alternative format upon request (for example, large print or CD). Please contact Katie Lin at (651) 361-7911 or [katie.lin@state.mn.us](mailto:katie.lin@state.mn.us) if you need this service.

Finally, a copy of the Report will also be filed with the Legislative Reference Library for public review.

TO: STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
PO BOX 64620  
ST. PAUL, MINNESOTA 55164-0620

Please send me \_\_\_\_\_ paper copy (copies) of the Report of the Administrative Law Judge in Docket No. 8-9035-34406. I have enclosed a check in the amount of \$\_\_\_\_\_ made payable to: State Treasurer - Administrative Hearings Account.

\_\_\_\_\_  
(Name)

\_\_\_\_\_  
(Address)

\_\_\_\_\_  
(City, State, Zip Code)  
(Please type or print the above information clearly).

RE: In the Matter of Proposed Permanent Rules Regarding Fees, Peer Reviews, Education, and Housekeeping Updates R-4392; Docket No. 8-9035-34406

\$4 per copy

If ordering this document in alternative format (paragraph two of attached letter), please first contact Katie Lin at (651) 361-7911 or [katie.lin@state.mn.us](mailto:katie.lin@state.mn.us). Alternative order:

Large type \_\_\_\_\_

CD \_\_\_\_\_

Other \_\_\_\_\_