

## **Proposed administrative rules regarding plant waivers public comment period**

The public comment period for the proposed administrative rules regarding plant waivers ended on September 16, 2008. The following pages include the written and oral comments received by the public comment deadline.

August 27, 2008

Winneshiek Title & Abstract Company  
P.O. Box 319  
Decorah, IA 52101  
Title Guaranty No. 8203

Loyd Ogle, Director  
Title Guaranty Division of  
The Iowa Finance Authority  
2015 Grand Avenue  
Des Moines, IA 50312

Dear Loyd,

*We at Winneshiek Title & Abstract Company strongly object to the definition of hardship under the proposed amendments to the title plant waiver subrules for the following reasons:*

*Every legitimate abstract company in the State of Iowa expends time, effort and financial resources every working day that go far beyond minimal in the on-going task of building and maintaining a current title plant. If we limited our efforts to the minimal, then every real estate title would be in jeopardy, as they very well could be if waivers are granted to applicants who need not trouble themselves to rise above such a meager standard.*

*Every genuine abstract company devotes approximately half of each working day to the tasks of gathering newly recorded instruments and proceedings which affect title to real estate, evaluating them, overseeing the process of posting them into our tract indices and other retrieval systems and meticulously proofing everything to ensure accuracy. These things constitute our first and highest priority. When these things are accomplished, then, and only then, would we presume to begin abstracting. It's easy to see how an individual might be able to produce a product, reliable or maybe not so much, a little faster and a little cheaper without being held (to borrow a phrase) to standards of excellence, or purporting to do so without actually doing so.*

*Anybody who has a fleeting acquaintance with the present method of real estate title evidencing in Iowa understands that even with a full title plant behind us, and after collective multiples of decades of experience, every once in a while an error or omission will occur. It's inevitable. Granting waivers to those who, for whatever reason, will not undertake the effort and expense to build and maintain a title plant and then to seek to justify the practice by labeling it hardship is not only grossly unfair, but exponentially increases the probability that serious mistakes will be made.*

*It seems to us that one of the definitions of hardship would be to find that we are losing business to an individual who has been granted a waiver to make abstracts and searches with minimal effort, and without benefit of a forty-year title plant. As I have stated in previous correspondence, there is a term within our industry which applies to such a practice. It is called curbstoning and it has always been considered to be unethical.*

*We would suggest the following language to define hardship:*

*Hardship means deprivation, suffering, adversity, or extraordinary, long term, adverse financial impact in complying with the title plant requirement that greatly exceeds the expenditure of time, effort and financial resources which would reasonably be expected to be invested by any person, company, or other legal entity in the building and maintenance of a complete, current, forty-year title plant. Financial circumstances alone do not constitute hardship.*

*Winneshiek Title & Abstract Company*

A handwritten signature in black ink, appearing to read 'Mark Goulson', with a long horizontal flourish extending to the right.

*Mark Goulson, Abstracter*

September 2, 2008

Winneshiek Title & Abstract Company  
P.O. Box 319  
Decorah, IA 52101  
Title Guaranty No. 8203

Loyd Ogle, Director  
Title Guaranty Division of  
The Iowa Finance Authority  
2015 Grand Avenue  
Des Moines, IA 50312

Dear Loyd,

*In studying the "Definitions" portion of the proposed amendments to the plant waivers sub-rules, we find that we are intrigued by the words "manifest intent" as it is employed in paragraph 9.7 (2). We have run across this term before in our business dealings and acknowledge that this is a legal term, a very murky legal term, which in the worst of circumstances might be thought of as being, for lack of a better term, weasel words. We would like to know the exact, precise meaning of this term as it is used in this specific context. Could we, just as one example, awaken one morning to find that waivers have been granted to every living Iowa attorney in accordance with definitions which have been derived from the invocation of this mysterious concept? Once we know what these words mean in this specific context, who then determines manifest intent and under what circumstances? This term needs to be clarified by adding defining language, and further, we would request an explanation of how such a concept might function, when and if put into force. We do not offer any alternative phrasing of this portion of the amendments because we don't really have a clue except to suggest that it might say we can do whatever we want, whenever we want, because we say so, as afforded by manifest intent.*

*The "availability of title guaranties" paragraph is syntactically inadequate- too may thoughts, not enough words. Also, why is it a requirement that there be two or more abstracters (which, by the way, is spelled correctly with the suffix - er, not - or) in each county? Since the vast majority of counties in Iowa have only one abstract company, does this reference literally mean two abstracters, whether or not they are employed by the same company, or does it imply that there must needs be two or more competing entities in each county? If the latter is the case, then it pretty much mandates the establishment of a competitor, and practically speaking, the only way that this will be accomplished is through the granting of waivers. We certainly hope this is not the implication. Either way, this passage of the proposed amendments needs expansion and clarification.*

*We would suggest the following language to define Availability of title guaranties:*

*Availability of title guaranties means that title guaranties are as uniformly accessible as possible under the prevailing conditions and that they will be issued based upon the examination of Abstracts of Title and/or Reports of Ownership and Liens of the highest possible quality and which are furnished by participating abstracters in a timely fashion, as governed by market conditions, and for a fair and reasonable price, which may vary according to the specific circumstances attributable to each, unique real estate title.*

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*We have discussed the meaning of hardship in previous correspondence, but after re-reading this section of the proposed amendments, find that we have a further concern. To state that "financial hardship alone may constitute hardship" is redundant at best, but in addition, whether intended or not, this statement belies a certain, adverse predisposition on the part of the drafters.*


*For the sake of accuracy, we would suggest that the heading for the paragraph captioned "public interest" if allowed to stand as presently written, should be changed to "the Division's interest". We would substitute this self-serving paragraph with the following:*

*"Public Interest" means that which is beneficial to the public as a whole, including but not limited to encouraging the use of title guaranties throughout the State of Iowa in circumstances under which they would stand in the place of commercial title insurance policies, improving the quality of land titles by ensuring that Abstracts and Reports of Title are of the highest quality possible and are procured for fair and reasonable fees, making title guaranties more competitive than out-of-state title insurance, encouraging the maximum participation of participating abstracters and participating title examiners and increasing the Division's market share while at the same time taking care to inform consumers, when appropriate, that not every real estate transaction requires the expense of a title guaranty policy.*

*The paragraph with the heading "Title Plant" is written with a bias that implies that title plants exist to serve The Division. This simply is not the whole truth and we do not want to see this expression codified. We suggest the following:*

*"Title Plant" means a complete and up-to-date set of tract indices, or their equivalent, and other retrieval systems necessary for making lien searches, all as utilized in the compilation of Abstracts of Title, Reports of Ownership and Liens, Personal Lien Searches and other miscellaneous reports in which information from the public record is certified to be complete and accurate, given the inherent limitations of each product. The tract indices shall contain a reference to all instruments affecting real estate titles which are recorded in the office of the county recorder and shall commence not less than forty years from the present.*

Winneshiek Title & Abstract Company

  
By Mark Goulson,  
Abstracter

September 5, 2008

Winneshiek Title & Abstract Company  
P.O. Box 319  
Decorah, IA 52101  
Title Guaranty No. 8203

Loyd Ogle, Director  
Title Guaranty Division of  
The Iowa Finance Authority  
2015 Grand Avenue  
Des Moines, IA 50312

Dear Loyd,

Once we get past the definitions portion of the proposed amendments to the plant waivers sub-rules, and laboring under the assumption that numerous, substantial alterations will be made, most of the rest of the provisions of the proposed amendments are acceptable to us here at Winneshiek Title & Abstract Company. However, we would suggest the following changes to 9.7(8):

- a. Provisional Waivers. The Division may grant a provisional waiver of one year, or less, to an applicant who is in the process of building a title plant, as certified to the board by an inspection committee composed of three abstracters in good standing with the Iowa Land Title Association, who have been appointed by the board of the Iowa Land Title Association for that specific purpose upon the written request of the Division. If such time period proves insufficient to build a complete, up-to-date title plant the applicant may re-apply to the Division for an extension of the waiver up to one additional year, and upon certification that diligent effort has been applied and that a reasonable amount of progress has been made in the building of the title plant to warrant extension, as determined by an inspection committee composed of three abstracters in good standing with the Iowa Land Title Association, who have been appointed by the Board of the Iowa Land Title Association for that specific purpose, upon the written request of the Division, the extension of the waiver may be granted. This procedure may be repeated on a year-to-year basis, if necessary.

The Division Board may grant a provisional waiver when the applicant provides the following:

1. Evidence that a title plant is being built, as described above, for a specified county;

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2. Evidence that the public would derive significant benefit which would not otherwise be realized in the absence of the granting of a waiver;
3. Evidence that the applicant has a minimum of five years experience as an abstracter, which is the traditional, recognized standard for ownership within the industry;
4. Evidence that the provisional waiver is necessary in order to produce a revenue stream to justify the expense associated with the building of a title plant.

We do not understand why an attorney would not be limited to a certain geographical area, as stated in 9.7(8)b.

9.7(8)c. sanctions the practice which is known within our industry as curbstoning. The definition of curbstoning is making abstracts of title, without the benefit of a forty-year title plant, and usually without any investment whatsoever, other than the gasoline necessary to drive to a neighboring courthouse. We emphatically state once again, curbstoning is unethical. From our perspective, the Title Guaranty Division's Standards in Excellence program appears, in large measure, to be an attempt to control the product we produce, turn-around times and pricing. 9.7(8)c.(2)(a) seems to take another run at this goal. We object to 9.7(8)c. in its entirety and move that it be stricken from these proposed amendments.

What, exactly, is the confidential information which may be redacted under 9.7(11)?

Winneshiek Title & Abstract Company



By Mark Goulson  
Abstracter

-----Original Message-----

**From:** Mcac@marshallnet.com [mailto:mcac@marshallnet.com]

**Sent:** Friday, September 05, 2008 9:01 AM

**To:** Ogle, Loyd [IFA]

**Subject:** Waivers

Mr. Ogle,

I have been abstracting for about five years now; certainly not a long time in the over all history of the industry. One thing though that was apparent from the beginning was the need to provide clients with the most accurate and complete property search possible. How this is done without making an actual visit to the court house in the county of the search, I have found to be impossible. Information such as special assessments and tax sales cannot be found by looking at a web site.

If an entity such as Title Guaranty is going to issue a policy that is supposed to guaranty the cleanliness of a title, I would think they would want the most accurate information possible. The fact of the matter is, this information cannot be assessed just by viewing on line information, or through the use of "Curb Stoners"; admittedly not a most flattering term.

It may be that law provides for the allowance of waivers to Title Plants but I don't feel the spirit of the law was intended for this.

For these reasons I must disagree with the allowance of "hardship" waivers. It doesn't seem to me that this is in the best interest of the abstracting industry. I would not like to think that that is actually part of the idea.

Sincerely,  
Steven Lang, Manager  
Marshall County Abstract Company  
Marshalltown, IA

The

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## IOWA STATE BAR ASSOCIATION



**Mark Otto**  
Real Estate Section Chair  
211 First Avenue West  
P.O. Box 726  
Newton, IA 50208-0726  
Telephone: 641-792-4160  
Facsimile: 641-792-2410  
e-mail: motto@brierlylaw.com

September 16, 2008

Loyd Ogle, Director  
Title Guaranty Division of the Iowa Finance Authority  
2015 Grand Avenue  
Des Moines, IA 50312

RE: Written Comments of Mark A. Otto, Chair of the Real Estate & Title Law Section  
of the Iowa State Bar Association regarding ARC 7115B Iowa Finance Authority  
[265] Notice of Intended Action

Dear Mr. Ogle:

Proposed new Iowa Administrative Rule 265-9.7(16) provides clarity to the application, filing, administrative hearing, and ruling in the process of application for waiver of the title plant requirements of Section 16.91(5) of the Iowa Code. In addition, clarification is provided in the standards for the grant of provisional and permanent waivers, specifically the factors and evidentiary considerations that the Board evaluates, and the weight attributed to those items.

The current administrative rules of Section 265-9.7(16) provide a basic statement of the process and it is apparent that the proposed clarifications are the result of evolution and experience.

From the perspective of judicial review of agency action of the Board, this clarified process provides the Court definable standards for evaluation and review. The rules provide time periods for the process of hearing, notice and transmission of the ruling. No timeline for the issuance of a Board ruling is provided and this would be a desirable addition if it does not create an undue hardship on the Board. Perhaps at a minimum, a suggested time frame for issuance of the ruling would be advisable. Our District Courts of the state are required to submit rulings and decisions within sixty (60) days of submission.

Additional comment is submitted regarding the rule content in proposed new Section 9.7(9)(b) that the final decision of the Board as to waiver shall be at the "sole discretion" of the Board. "Sole discretion" language is generally used to connote final nonreviewable

## Iowa State Bar Association

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action. Section 9.7(9)(d) makes clear, however, that the decision of the Board is final agency action subject to appeal to and review by the Polk County District Court. The language thus appears to intend that the final action is that of the Board alone and not that of the division's director. I believe that intent is complete by striking "at the sole discretion of" and simply substituting the word "by". This will avoid any ambiguity concerning the "sole discretion" language and still fulfill the purpose of this rule.

Sincerely yours,

Mark A. Otto  
Real Estate Section Chair

September 16, 2008

Walter G. Murphy  
P.O. Box 345  
New Hampton IA 50659

Loyd Ogle, Director  
Title Guaranty Division of the  
Iowa Finance Authority  
Board Members of the Iowa Finance Authority  
Board Members of the Title Guaranty Division

To All.

I am a current board member of the Title Guaranty Division. I was appointed to represent the segment of the board designated as an abstracter.

I have been an active abstracter for 42 years serving as an employee in a large county and as an owner/abstracter in two smaller counties. As such I have knowledge of the advantages and challenges facing us today.

I am dismayed that these proposed rules circumvent the intent and reasoning of the Code of Iowa in establishing guaranty of titles in Iowa. The legislature recognized that the reason for the history of safe titles in Iowa was the use of tract indices to provide the evidence used in producing abstracts. They also recognized that some counties did not have an established set of tract indices and that in other counties attorneys produced abstracts as a part of their practice.

Thus the legislature adopted language incorporating the tract indice system and allowing a waiver for attorneys who were providing a service for their clients. The waiver was personal in nature and it was assumed that tract indices would be available at the time the grandfathered attorney either retired from the practice or passed away.

In a twist of logic the Division now proposes to waive any attorney or individual from owning or leasing a title plant abandoning the time tested recipe for success in producing safe, accurate titles in Iowa.

Abstracters in Iowa who own and maintain plants have a considerable financial investment in their plants. No such requirement is imposed on a waived entity. In fact the startup costs (usual to any business) are considered by the Division to be a hardship and a reason for granting a waiver.

Abstracters in Iowa who own plants are restricted to providing services in only the county in which they have

a plant. No such geographical limitation is imposed upon waived entities.

Abstracters in Iowa who own plants must have Errors and Omissions insurance for each county in which they operate. No such requirement is imposed upon the waived attorney.

Abstracters in Iowa who own plants must be a Title Guaranty member in each county and pay a separate fee to Title Guaranty. No such requirement is imposed upon waived entities.

Abstracters in Iowa who own plants must maintain their plants to qualify as an approved Title Guaranty abstractor. There is no such requirement for waived entities. The Director of Title Guaranty has estimated it would cost \$25-30,000 to maintain a mid-sized plant annually<sup>1</sup>. That expense plus a most modest return on plant investment easily would account for 25% of annual gross receipts. The waived entity has no such expense.

Most abstracters in Iowa who own plants can produce a root of title from their plant which must extend back a minimum of 40 years for a conveyance root and back to government entry to find unexpired leases and easement. The waived entity would take an inordinate amount of time to produce this minimum requirement under Iowa Code.

Abstracts produced without a plant using the Grantor/Grantee indices in the County Recorder's Office or on the internet are inferior to the tract index produced abstract. The fact is that all items affecting title are not given in the name of the record title holder i.e. a name change by marriage or dissolution, unrecorded contract owners, beneficiaries and heirs at law in probate matters had in another county, zoning etc.). All these items are discovered in a tract index search, but not in searches using the Grantor/Grantee methods.

Approving these rules means the Division is heading toward using the same inferior evidencing standards as some commercial title insurance underwriters. The Division's losses are minimal-often below 1%. "According to federal filings, out-of-state title underwriters are reporting losses in excess of 20%"<sup>1</sup> There is no reason why the Division should expect a different loss experience. The fact that an attorney is involved in Division transactions is meaningless if the evidence he/she examines is insufficient.

The criteria for granting a waiver are so minimal that the Board would be hard pressed to find a reason to deny any entity a waiver. There are acquired methods and specific practices necessary to produce a quality abstract. Those are not acquired by examining an abstract or operating a computer.

Some waived attorneys operate an abstract company as a separate corporate entity and not a part of their usual practice. The waiver allows them to operate a commercial business and to avoid the expenses and regulations imposed by the Code of Iowa.

The Division has lost market share over the last fifteen years. It is losing market share by increasing percentages more recently. Lowering the quality of the product surely will not increase confidence in the product and certainly not increase market share. Remember that the Division is guarantying these inferior titles.

The adoption of these rules would create two unequal classes of abstracters. Those with plants would be required to put forth a substantial financial investment; the waived would not. The plant owner is required to maintain that investment; the waived would not. The plant owner is restricted to one county; the waived is not. The plant owner must have separate Errors and Omission insurance for each county; the waived attorney does not. The plant owner must pay a fee to the Division for each county in which it prepares abstracts; the waived pay one fee.

There is no upside for the Division or the citizens of Iowa if these rules are adopted. Sacrificing quality of titles and loss of confidence by the public to attempt to gain market share is no bargain.

Please listen to these warnings of severe problems to be inflicted upon the public and the Division. This is a time for more regulation for the safety of our homes, not weakening the safeguards. I might mention that the abstracters in Iowa have been warning of identity theft for over two years due to the documents in the County Recorder Offices being on the internet. Only when the Governor's social security number appeared on the internet did anyone pay attention. I make a similar warning in this matter. Good titles in Iowa are in jeopardy and having insurance or guaranty won't help much.

I would have appreciated presenting this in person and answering any questions you may have. However, unexpected family concerns require my presence here.

Sincerely,

*Walter G. Murphy*

Walter G. Murphy

1) Loyd Ogle presentation Iowa State Bar Association Board of Governors Ad Hoc Legislative Committee 12/20/07.

September 12, 2008

Mr. Loyd Ogle, Director  
Title Guaranty Division of the Iowa Finance Authority  
2015 Grand Avenue  
Des Moines, IA 50312

RE: Administrative Rules Regarding Title Plant Waivers

Dear Mr. Ogle:

Thank you for the opportunity to provide written comments and requested revisions regarding the administrative rules on title plant waivers. Enclosed are revisions submitted by the Iowa Land Title Association (ILTA) Board of Directors.

The document has been edited with specific language changes, and comments to support those revisions. Wording that has been identified for omission is in red with a strikethrough; additional or replacement language is in blue.

We appreciate the Title Guaranty Board giving serious consideration to the revisions submitted by ILTA. We believe that these revisions are in the best interest of the public and the overall integrity of the title industry in Iowa.

If you have questions, please contact me at [ILTA@austin.rr.com](mailto:ILTA@austin.rr.com) or Bill Blue, ILTA President, at [bill.blue@iowalandtitle.org](mailto:bill.blue@iowalandtitle.org).

Sincerely,

Jan Gemar  
Executive Director  
Iowa Land Title Association

Enc.

## IOWA FINANCE AUTHORITY [265]

### Notice of Intended Action

**Twenty-five interested persons, a governmental subdivision, an agency or association of 25 or more persons may demand an oral presentation hereon as provided in Iowa Code section 17A.4(1)“b.”**

**Notice is also given to the public that the Administrative Rules Review Committee may, on its own motion or on written request by any individual or group, review this proposed action under section 17A.8(6) at a regular or special meeting where the public or interested persons may be heard.**

Pursuant to the authority of Iowa Code section 17A.3(1)“b” and Iowa Code Supplement section 16.5(1)“r”, the Iowa Finance Authority proposes to amend Chapter 9, “Title Guaranty Division,” Iowa Administrative Code.

These amendments replace current title plant waiver subrules with new subrules. These proposed amendments update and clarify the existing administrative rules needed to administer Iowa Code §16.91(5), and to conform the rules to correspond to Iowa Code §16.91(5) as amended by 2008 Iowa Acts, Senate File 2320, which was signed by the Governor and became effective on July 1, 2008. The amendments also update the rules generally.

The Authority will receive written comments on the proposed administrative rules until 4:30 p.m. on September 16, 2008. Comments may be addressed to Loyd Ogle, Director, Title Guaranty Division of the Iowa Finance Authority, 2015 Grand Avenue, Des Moines, Iowa 50312.

Comments may also be faxed to Loyd Ogle at (515) 725-4901 or E-mailed to [loyd.ogle@iowa.gov](mailto:loyd.ogle@iowa.gov).

There will be a public hearing on September 16, 2008, at 1:00 p.m. at the Iowa Finance Authority Office, at which time persons may present their views either orally or in writing. The Iowa Finance Authority office is located at 2015 Grand Avenue, Des Moines, Iowa 50312. The public hearing will also be held concurrently through various satellite ICN sites across Iowa. These sites will be listed on the Title Guaranty Division website.

The Authority anticipates that it may make changes to the proposed amendments based on comments received from the public.

These amendments are intended to implement Iowa Code Supplement section 16.5(1)“r,” Iowa Code sections 17A.12 and 17A.16, and Iowa Code section 16.91(5) as amended by 2008 Iowa Acts, Senate File 2320.

The following amendments are proposed.

ITEM 1. Delete existing rule 265—9.7(16) and adopt the following **new** rule 265—9.7(16).

9.7(16) Waiver of up-to-date title plant requirement. The division board shall consider an application by an attorney or abstractor for waiver of the use of an up-to-date title plant requirement described in Iowa Code section 16.91(5)“a”2.

9.7(1) Mission. The division is authorized under Iowa Code Chapter 16 to issue title guaranties throughout the state. Title guaranty’s public purpose is to facilitate lenders’ participation in the secondary market and to promote land title stability through use of the abstract-attorney opinion system. The division recognizes the forty year title plant as the preferred method of providing title evidence for the purpose of issuing title guaranties. The division must weigh the benefits of the traditional title plant with other alternatives to ensure buyers and lenders high quality of title guaranties throughout the state., ~~rapid service, and a competitive price.~~ To assist the division in this mission, Iowa Code section 16.91(5)“b” expressly allows the division to waive the up-to-date title plant requirement.

9.7(2) Definitions. The following words and phrases, when used in this rule, shall have the meanings set forth below unless a meaning is inconsistent with the manifest intent or the context of a particular rule:

“Availability of title guaranties” means that title guaranties are uniformly accessible throughout the state to buyers and lenders. ~~at a competitive price, service, and quality and that there are two or more abstractors physically located in all 99 counties.~~

“Exempt attorney-abstractor” as it relates to the title plant requirement means a grandfathered attorney or a waived attorney.

“Grandfathered attorney” means a participating attorney who has been providing abstract services continuously from November 12, 1986, to the date of application to be a participating abstractor, either personally or through persons under their supervision and control, who is exempt from the requirement to own or lease a title plant. This exemption is a personal exemption of the individual participating attorney, is not transferable, and terminates at such time as the participating attorney ceases providing abstracting services or upon the death or incapacity of the participating attorney.

“Hardship” means deprivation, suffering, adversity, ~~or long term adverse financial impact in complying with the title plant requirement that is more than minimal when considering all the circumstances. Financial hardship alone may constitute a hardship.~~ or extraordinary, long term, adverse financial impact in complying with the title plant requirement that greatly exceeds the expenditure of time, effort and financial resources which would reasonably be expected to be

**Comment:** We believe it is not in the best interest of the public, nor should it be the mission or responsibility of Title Guaranty to police competition and pricing in this industry.

**Comment:** Replacement language to more accurately define what may be considered a Hardship.

invested by any person, company, or other legal entity in the building and maintenance of a complete, current, forty-year title plant. Financial circumstances alone do not constitute hardship.

“Interested person” means a person requesting a plant waiver, all division board members, all participating abstractors in the county for which the waiver is requested, the Iowa State Bar Association, the Iowa Land Title Association, and any person requesting such information that an application for waiver has been made to the division.

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

“Public interest” means that which is beneficial to the public as a whole, including but not limited to ~~increasing competition among abstractors, encouraging the use of title guaranties throughout the state, making title guaranties more competitive than out of state title insurance, increasing the division’s market share,~~ improving the quality of land titles, and protecting consumers. ~~and encouraging maximum participation by participating abstractors and participating attorneys physically located in all ninety-nine counties.~~ Each abstract or Title Certificate will be required to state on its face the search method employed to produce the search product. The statement will indicate whether the product has been prepared in compliance with Title Guaranty’s title plant requirement.

**Comment:** This is important for the consumer to be aware of the search method used.

“Title plant” means ~~tract indices or their equivalent as maintained in each county by local custom and practice for real estate in each county in which abstracts are prepared for real property titles guaranteed by the division. The tract indices shall contain a reference to all instruments affecting the real estate which are recorded in the office of the county recorder and shall commence not less than forty years prior to the date the abstractor commences participation in the title guaranty program.~~

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

**Comment:** Replacement language is from Iowa Code 16.91(5).

“Waiver” or “Variance” means an action by the division which suspends in whole or in part the requirement of the use of a current tract index described in Iowa Code section 16.91(5) as applied to an abstractor.

9.7(3) Filing of application. An applicant must submit a plant waiver application in writing to the attention of the director of the Title Guaranty Division of the Iowa Finance Authority, 2015 Grand Avenue, Des Moines, Iowa 50312.

9.7(4) Content of application. Title Guaranty Division may provide an application form on the Division’s website. A plant waiver application shall include, at a minimum, the following information where applicable and known to the applicant :

- The name, business address, e-mail address, and telephone number of the abstractor for whom a waiver is being requested;
- The type of waiver being requested, as described in subrule 9.7(8) below;
- A general description of the applicant’s business;
- Description of intention to develop a 40-year tract index; and
- The relevant facts that the applicant believes would justify a waiver under subrules 9.7(7) and (8) described below. This application shall include a signed statement from the applicant attesting to the accuracy of the facts provided in the application.

9.7(5) Notification and response.

a. The division director shall acknowledge an application upon receipt. All interested persons shall be contacted by first class mail, e-mail and web-site posting, ~~and notice shall be given by United States First Class Mail to any party requesting the same in writing.~~ Notice shall be given within 14 days of the receipt of the application by the division director to the division board, all participating abstractors in the county for which the waiver is requested, the Iowa State Bar Association, the Iowa Land Title Association, and any person requesting such information, that an application for waiver has been made to the division. ~~Notification to an interested person is not a requirement for the division board to consider the waiver, and failure to inform an interested person of an application for waiver shall not void or otherwise nullify any action or decision of the division board.~~

**Comment:** ILTA has 10 companies that do not use email or the internet. Notification by first class mail should not need to be requested.

**Comment:** It is very important that ILTA is notified of waiver applications – as well as all other interested parties.

**Comment:** This sentence nullifies the first part of 9.7 (5) a.

b. Any person may submit a statement in support of or in opposition to the application in writing to the division director. The division director will provide copies of the statements to the division board prior to a vote by the board on the application.

c. The application shall be placed on the agenda for the next scheduled division board meeting which is at least 30 days after the application is filed. ~~unless a special meeting is requested by the chair of the board or by written request of two board members.~~

**Comment:** It should not be permitted that a waiver could be voted on by the board before notices are sent to interested persons.

9.7(6) Board meeting action.

a. The informal review of the waiver is not a contested case proceeding but other agency action wherein the rules of evidence are not applicable.

b. To preserve order, the chair of the board may set reasonable limitations ~~upon the number of persons who may appear before the division board and~~ on the time allotted for presentations both in favor of and against the requested waiver.

**Comment:** A time requirement may be needed under extreme circumstances. Limiting time may be needed, but it should be unacceptable that someone would not be allowed to address the board. Time limitations should alleviate the necessity of denying a person an opportunity to speak.

c. Title guaranty director review. The title guaranty director shall investigate and review the petition and its supporting documentation and, at the waiver meeting before the board, may shall give the board a recommendation to grant or deny the waiver.

**Comment:** If time allotments are needed, the rules should ensure that persons speaking either for or against will be required to adhere to the same time allotment.

d. The board shall consider the application, the criteria and type of waiver set forth below in subrules 9.7(7) and 9.7(8), and then vote on the application.

9.7(7) Criteria for waiver or variance. In response to an application completed pursuant to subrule 9.7(4), the division board may issue a ruling permanently or provisionally waiving the requirement set forth in Iowa Code section 16.91(5)“a”2 of an up-to-date title plant requirement, if the board finds both of the following:

a. The title plant requirement described in Iowa Code section 16.91(5)“a”2 imposes a hardship to the abstractor or attorney; and

b. The waiver is:

- (1) Clearly in the public interest; or
- (2) Absolutely necessary to ensure availability of title guaranties throughout the state.

9.7(8) Type of waiver or variance granted. Provisional and permanent waivers described in this subsection may be granted by the division board. Guidelines for provisional and permanent waivers are as follows:

a. Provisional waivers. The division board may grant a provisional waiver of one year or less to an applicant intending to build a title plant. If such time period is not sufficient, the applicant may reapply to the division board for an extension of the waiver up to one additional year at the discretion of the division board. The division board may grant a provisional waiver when the applicant provides the following:

- (1) Evidence that a title plant will be built for a specified county;

- (2) Evidence of significant financial loss due to the inability to provide abstracts for the division;
- (3) Evidence the provisional waiver is necessary in order to produce a revenue stream to justify the expense associated with building a title plant; and
- (4) Professional references from two licensed Iowa attorneys or one participating plant-abstractor attesting to the applicant's ability to abstract

b. Permanent waivers for attorneys. The division board may grant a permanent waiver to an Iowa licensed attorney.

(1) Attorneys granted a permanent waiver hold the same status as grandfathered attorneys and absent express legislative authority to the contrary, the board will not limit geographically an attorney's ability to abstract for Title Guaranty. However, the applicant may by contract with the Division Board agree voluntarily to limit the applicant's abstracting for the division to one or more specified counties.

(2) A permanent waiver is personal in nature and non-transferable. An attorney granted a permanent waiver shall be personally liable for abstracting conducted on behalf of the division. Although an attorney may abstract through a separate entity, such liability cannot be transferred to a corporate entity nor may an attorney utilize a corporate structure which would shield the attorney from personal liability.

(3) Permanent waivers are predicated upon the attorney retaining an Iowa license to practice law. An attorney whose license is suspended shall reapply to the division director upon reinstatement by the Iowa Supreme Court. The division director has the discretion to refer the matter to the division board.

(4) The division board may grant a permanent waiver to an ~~There are two circumstances when an attorney may be granted a permanent waiver: (a) For~~ attorney applicants with experience abstracting under the supervision and control of an exempt attorney-abstractor. The board shall consider, at a minimum, the following:

**Comment:** Part B eliminated.

~~(a) i. The applicant's abstract experience. The board shall give considerable weight to an applicant's experience abstracting under the personal supervision and control of an exempt attorney-abstractor. with whom the applicant has had a close working relationship, or is a legal partner or associate.~~

**Comment:** The considerations listed for the attorney waiver section refers more than once to considerable weight. There is no such reference in the abstractor waiver section (non-attorney). These changes and the change to (f) and the addition of (g) helps make the two sections more consistent. This should help the board in their decision making process for waiver requests if the requirements are consistent regardless of who has submitted the application.

~~(b) ii. Professional references. The board shall give considerable weight to a recommendation~~ from the exempt attorney-abstractor or grandfathered attorney who personally supervised the applicant's abstracting for a period of two years or more and is able to attest in writing or in person before the division board regarding the applicant's ability to abstract.

~~(c) iii. Samples of abstracts prepared by the applicant.~~

~~(d) The applicant's business plan;~~

~~(e) Evidence of clients and volume of additional transactions that will be brought into the title guaranty abstract/attorney system as a result of the waiver;~~

~~(f) iv. The Division Board shall give consideration to the number, availability, service and quality of other abstractors available to perform abstracting and whether the grant of a permanent waiver will adversely impact the business of other participating abstractors. of participating~~

~~abstractors physically located in the county or counties where the applicant seeks to abstract in determining whether a waiver should be granted.~~

~~(g) Their degree of participation in the title guaranty division standards in excellence program.~~

~~(b). For attorney applicants without experience working under the supervision and control of an exempt attorney abstractor, the board shall consider, at a minimum, the following:~~

- ~~i. The applicant's abstract experience;~~
- ~~ii. Professional references;~~
- ~~iii. Samples of abstracts prepared by the applicant;~~
- ~~iv. The applicant's business plan;~~
- ~~v. Evidence of clients and volume of additional transactions that will be brought into the title guaranty abstract/attorney system as a result of the waiver;~~
- ~~vi. The number, availability, service and quality of other abstractors available to perform abstracting and whether the grant of a permanent waiver will adversely impact the business of other participating abstractors;~~
- ~~vii. Whether the applicant demonstrates the inability to abstract under the supervision and control of an exempt attorney.~~

**Comment:** Elimination of Part B in its entirety removes the provision for this type of waiver.

c. Permanent waivers for ~~abstractors non-attorneys.~~

(1) The division board may grant a permanent waiver ~~with limitations as to county, and/or transaction type.~~ (2) ~~In determining whether to grant a waiver,~~ to an abstractor applicant.

The board shall consider, at a minimum, the following:

~~(a) The applicant's abstract experience; their maintenance of a title plant in any other county, and their degree of participation in the title guaranty division standards in excellence program;~~

(a) The applicant's abstract experience;

(b) Professional references;

(c) Samples of abstracts prepared by the applicant;

(d) The applicant's business plan;

(e) Evidence of clients and volume of additional transactions that will be brought into the title guaranty abstract/attorney system as a result of the waiver;

(f) The number, availability, service and quality of other abstractors available to perform abstracting and whether the grant of a permanent waiver will adversely impact the business of other participating abstractors.

(g) Their maintenance of a title plant in any other county;

(h) Their degree of participation in the title guaranty division standards in excellence program.

**Comment:** Iowa Code 16.91(5) refers to attorney or abstractor.

9.7(9) Ruling. The division board shall direct the division director to prepare, or cause to be prepared, a proposed written ruling setting forth the board's rationale for granting or denying the waiver. Action to adopt or direct changes to the proposed ruling will be taken by the division board at a subsequent meeting. However, if the board directs the division director to prepare a proposed ruling granting the waiver, the applicant may start abstracting while the ruling is being prepared, and staff shall issue a new participating abstractor number to the applicant immediately.

a. The ruling granting or denying a waiver shall contain a reference to the particular applicant, discuss the application of subrules 9.7(7) and (8) above, and describe how granting the waiver

would or would not advance the division’s statutory mission described above in subrule 9.7(1). The ruling will summarize the relevant facts and reasons upon which the action is based and include a description of the precise scope and duration of the waiver if the waiver contains limitations, restrictions or requirements.

- b. The final decision on whether the circumstances justify the granting of a waiver shall be made at the sole discretion of the division board upon consideration of all relevant factors. Relevant factors to be considered are the unique circumstances set out in the application, presentations given before the board, the professional knowledge and expertise of the board members and division staff, and any other resources available to the entire division board. Consideration should be afforded to rulings on prior plant waiver requests, but the division board shall not be bound by such rulings.
- c. Within seven days of its issuance, any ruling issued under this subsection shall be transmitted to the applicant, the Iowa State Bar Association and the Iowa Land Title Association.
- d. The decision of the division board shall be final agency action and all appeals shall be filed with the Iowa District Court for Polk County.

9.7(10) Title plant certification. For applicants granted a provisional waiver, the division shall inspect the title plant and certify to the division board that the title plant is complete before the board may grant up-to-date title plant status to the applicant. Upon certification of up-to-date title plant status, the applicant must obtain approval from the division to conduct business under a name other than the entity to which the provisional waiver was granted. Any transfer of a title plant must be approved by the division in order for the title plant to be a title guaranty abstractor.

9.7(11) Public availability. Applications for waivers and rulings on waiver applications are public records under Iowa Code chapter 22. The board minutes of each waiver hearing shall contain a summary of the proceedings including questions, comments and answers of each participant, including the applicant, proponents and opponents, board members and staff, or a transcript of the proceedings by a certified court reporter. Said minutes or transcript shall be available to each board member at least three (3) days prior to the issuing of a ruling referred to in 9.7(9). Some applications or rulings may contain information the division is authorized or required to keep confidential. The division may accordingly redact confidential information from applications or rulings prior to public inspection or dissemination.

**Comment:** Additional language to ensure full disclosure in the ruling process.

9.7(12) Voiding or cancellation. ~~A waiver or variance is voidable if material facts upon which the petition is based are not true or if material facts have been withheld.~~ A waiver or variance issued by the division board pursuant to this subsection may be withdrawn, canceled, or modified if, after appropriate notice and meeting, the division board issues a ruling finding any of the following:

**Comment:** Redundant – covered in a.

- a. That the petitioner or the applicant who was the subject of the waiver ruling withheld or misrepresented material facts relevant to the propriety or desirability of the waiver; or
- b. That the alternative search method assuring that the public interest will be adequately protected after issuance of the ruling has been demonstrated to be insufficient; or
- c. That the subject of the waiver ruling has failed to comply with all conditions contained in the ruling.

**Respectfully submitted,**

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**Bret L. Mills, Executive Director**  
**By Authority of the Board of the Iowa Finance Authority**

\_\_\_\_\_, 2008  
**Date**

## **Oral comments from the public hearing on the proposed administrative rules for plant waivers held on September 16, 2008:**

### ***Chris Hoegh, Marion County Title Services***

Mr. Hoegh made a plea to continue to use the requirement of the 40-year title plant and to use the waiver as a minimum last effort. The title plant method of searching (which could be referred to better as the geographic search), versus an alphabetical search, is the preferred method of Title Guaranty. It was so when the program was created about 20 years ago. It is still the preferred method today. He has attended several waiver hearings over the past three or four years. The common thread of those meetings is not that the alphabetical search was better than the geographic search, it was that it could be done. Typically, the reason for doing the alphabetical search over the geographic search is the expense associated with creating and maintaining a title plant.

Mr. Hoegh said with today's financial crisis in this country, everyone who points a finger of blame points it at the mortgage or real estate industry. It's because of the lack of standards in those industries. He thought the standards were lowered because of greed. It's "How can I sell my properties?" "How can I sell more mortgages?" Management did that without standards, or certainly lowering those standards. There is a parallel between that and the abstracting industry. If we continue to lower standards for title evidencing in Iowa, he thinks we will see a degradation of our public records in Iowa, and we are going to see problems in future claims in the industry. He urged not to lower those standards, to keep those standards high. He thinks it is important that we raise the standards or set the bar, and he thinks it includes the title plant and abstractor certification and licensing. He thinks they go hand in hand.

Mr. Hoegh said it would be "shame on us" if we let what's happened in the mortgage industry happen to the abstracting industry here in Iowa. It would be a disservice to Iowa by lowering those standards. He said he was here today to urge to use the plant waiver requirement as a last step.

### ***Bill Blue, American Abstract & Title Company; also president of the Iowa Land Title Association***

Mr. Blue said he was here to represent the industry at large. He thanked Loyd Ogle and the Title Guaranty Division for the process and the opportunity to speak. He emphasized how important title plants are to Iowans as a public service. Since the last statewide waiver about a year ago was granted, he has been keeping track of the abstracts he sees that were prepared by waived attorneys. There are types of things that are being omitted from their abstracts that are fairly consistent. They are missing corrective deeds from previous titleholders, easements, preliminary special assessments, and condominium amendments. He said one thing that should be of significant concern to Title Guaranty is they see consistently missing mortgages that are amended, adding property by

amendment. Their concern is for the health of their industry and for the people who have invested the time and resources that go into title plants. He appreciated that Title Guaranty has gone to the effort of trying to set some ground rules for the waiver process because they were coming into a period where the Supreme Court Berger decision changed the ground rules.

Mr. Blue said something that came to light a couple of weeks ago was the Claris issue, with the Iowa Land Records Web site being unavailable. That underscored the necessity of some title plants around the state. Abstractors were able to carry on business as usual except in a few cases where they were buying copies they could have gotten for free. That shows there is a place for title plants. No one knows if this gets cleaned up and redacted, and there are certain kinds of documents that have cancelled checks attached to them, certain types of documents that have paper records with account numbers on them. You can keep redacting and there will still be stuff that probably should not be there. How sensitive everyone will be about that, he does not know. He thinks this story is just in the first few chapters.

Mr. Blue said probably the biggest issue for them in the title industry, for the Iowa Land Title Association, is the hardship issue. He feels that bar is set unrealistically low. There should be something more than just there is no money.

Mr. Blue said one thing he feels is very important if they move forward with waivers is there will be different kinds of waivers. It is important to have honest disclosure of how the search product is created. They put some language in their version, a simple statement to say that the search was prepared with or without a title plant. He noted when he explains to people that the title companies they have never heard of are waived and are making abstracts without a title plant, especially in a large county, they are shocked. He said he thought full disclosure will go a long way.

Mr. Blue said ultimately he is unclear of the goal. He did not know if the goal is to add more and more abstractors through the waiver process, or if the goal was to not lose any through the grandfathered attorneys retiring or passing away. He believed there was a mix. They do not want to lose what they have, but he thought it came out in the last statewide waiver that maybe they were looking for more abstractors in the state through the waiver process.

Mr. Blue said in the case of an attorney getting a waiver, there should be the apprenticeship under a waived attorney. It is not an easy task to abstract. Expertise in one area does not equate to expertise in another area.

Mr. Blue said they would like to see the minutes of each waiver hearing transcribed so they can have some history going forward.

***Walter Murphy, G.T. Murphy Abstracter, and TGD Board Member***

Matt White, TGD Deputy Director, read out loud a letter written by Mr. Murphy, who could not attend the hearing. The letter is posted as part of the written comments.