

PLANT WAIVER RULES DRAFT



Chester J. Culver
Governor

Fatty Judge
Lt. Governor

Bret L. Mills
Executive Director

Lloyd W. Ogle
Title Guaranty Director

TO: Title Guaranty Board of Directors

FROM: Loyd Ogle, Director

RE: Proposed Administrative Rules regarding title plant waivers

Attached is a draft of administrative rules regarding the waiver process. The rule draft describes the process of how the waiver application proceeds through the system to come before the board, examples of the factors that the board looks at to make its ruling, and what happens after the board makes its ruling.

Based on your individual prerogatives and public input, you as Board members may want to make these proposed rules more restrictive, or more liberal in how waivers are addressed. To accommodate developing the language for these different proposals TGD legal staff will be assigned to assist you in the drafting of the alternative language proposals.

For the most part this draft parallels the process that has been used in the past—an application (draft attached) is sent to the TGD director, the Board and various parties are notified, the waiver is scheduled as part of the agenda at an upcoming Board meeting, the application, materials and testimony are given to the Board, the Board makes its determination, staff then writes a proposed written ruling, and that is brought back to the Board for approval or modification. There is in the draft a first effort to define the three areas that have not been defined through administrative rule: hardship, availability of Title Guaranty, and public interest. The draft is a starting point for discussion.

The draft contains an explanation of the types of waivers that have been granted in the past. It describes “provisional waivers”, where the applicant is in the process of or intending to build a title plant and that the waiver was for less than one year. The rules describe two types of “permanent waivers” for attorneys, one where the attorney has been abstracting under the supervision and control of an exempt participating abstractor, and the other alternative being a tougher standard where they have not been working under an exempt attorney.

This process will take several months and that there will be ample opportunity for both formal and informal input from the real estate industry. After review, discussion and receipt of the public comments, the TGD Board would be asked at a future board meeting to decide if they can recommend that the IFA board notice the draft Administrative Rules. This would set in motion the formal rule making process. The TGD Board would at a future meeting need to recommend to the IFA board final adopted rules after we have had public comments and proposed changes.

**2015 Grand Avenue
Des Moines, Iowa 50312**

**515.725.4900
800.432.7230
fax 515.725.4901**

DISCLOSURE: This draft is for discussion purposes only and does not reflect the opinion of the title guaranty board, director or staff.

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).

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 a competitive price, rapid service, and high quality of title guaranties throughout the state. To assist the division in this mission, Iowa Code section 16.3(15) 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 subrule, 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.

"Hardship" means privation, suffering, adversity, or financial cost exceeding income in complying with the title plant requirement that is more than minimal when considering all the circumstances.

"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.

"Title plant" means tract indices referencing all instruments affecting real estate in the county which are recorded in an office of the county recorder, commencing not less than forty years prior to the date the abstractor commences participation in the title guaranty program.

“*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, at least 30 days before the division board meeting where the application will be reviewed.

9.7(4) *Content of application.* A plant waiver application shall include, at a minimum, the following information where applicable and known to the applicant (for an example of a plant waiver application, see Exhibit A at the end of this chapter):

- a. The name, business address, e-mail address, and telephone number of the abstractor for whom a waiver is being requested;
- b. The type of waiver being requested, as described in subrule 9.7(8) below;
- c. A general description of the applicant’s business;
- d. Description of intention to develop a 40-year tract index; and
- e. 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. Within 14 days of the receipt of the application the division director shall contact by e-mail and web-site posting the applicant, 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.

b. Any interested person may submit a statement in support of or in opposition to the application in writing.

c. The application shall be placed on the agenda for the next scheduled division board meeting unless a special meeting is requested by the chair of the board or by written request of two board members.

9.7(6) Waiver meeting.

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 the time allotted for presentations in favor of and against the proposed waiver.

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 Iowa Code section 16.91(5) up-to-date plant requirement, if the board finds the following:

a. The plant requirement described in Iowa Code section 16.91(5) imposes a hardship to the abstractor; 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 have been 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. The division board may grant a provisional waiver when the applicant provides the following:

(1) Evidence that a title plant has been substantially built or 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 and one participating plant-abstractor attesting to the applicant's ability to abstract,

b. Permanent waivers. The legislature recognized in Iowa Code section 16.91(5) that a participating attorney providing abstract services could be exempt from the title plant requirement. Based upon the premise that a participating attorney may have the expertise to abstract without a title plant, the division board may grant a permanent waiver to an Iowa licensed attorney.

(1) Attorneys granted a permanent waiver hold the same status as other exempt attorney-abstractors and absent express legislative authority to the contrary, the board will not limit geographically an attorney's ability to abstract for Title Guaranty.

(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. Such liability cannot be transferred to a corporate entity nor may an attorney utilize a corporate structure which would shield the attorney's abstracting from personal liability.

(3) Permanent waivers are contingent 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) There are two circumstances when an attorney may be granted a permanent waiver:

(a) Attorney applicant abstracting 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. The board shall give considerable weight to an applicant's experience abstracting under the personal supervision and control of a current exempt attorney-abstractor with whom the applicant is a legal partner or associate.

ii. Professional references. The board shall give considerable weight to a recommendation from an exempt attorney-abstractor 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.

iii. Samples of abstracts prepared by the applicant.

(b) Attorney applicant not 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. The applicant demonstrates the inability to abstract under the supervision and control of an exempt attorney.

9.7(9) Title plant certification. The division shall inspect the title plant and certify to the division board as to the completion of the title plant before the board may grant the 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 retain its status as a title guaranty abstractor.

9.7(10) 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.

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 division director has the discretion to present to the division board a recommendation to grant or deny a waiver.

c. 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 division board. Consideration should be afforded to rulings on prior plant waiver requests, but the division board shall not be bound by such rulings.

d. 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.

e. The decision of the division board shall be final agency action and all appeals shall be filed with the Polk County District Court of Iowa.

9.7(11) Public availability. Applications for waivers and rulings on waiver applications are public records under Iowa Code chapter 22. 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.

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:

- 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.

PROVISIONAL ___ PERMANENT ___ PLANT WAIVER APPLICATION

STATE OF _____)

COUNTY OF _____)

TELEPHONE (____) _____

FACSIMILE (____) _____

NAME OF APPLICANT **(individual)** _____

BUSINESS ADDRESS _____

(Street)

(City)

(State)

(Zip)

E-MAIL ADDRESS _____

I, the above-named Applicant, do hereby submit for consideration the following information concerning my request for waiver of participation requirements of the use and ownership of a current 40-year tract index for the Title Guaranty Program pursuant to Iowa Code section 16.91(5):

1. Number of years at present location..... _____
2. Number of years abstracting experience _____
3. Annual volume of business (gross receipts)..... _____
4. Number of abstracts updated last year _____
5. Percent of abstracting business in your trade area _____
6. Turn-around time for completing abstracts _____
7. Number of employees under your supervision..... _____
8. Amount of Errors and Omissions coverage _____
9. Number of abstractors serving the same geographic area who have a current 40-year tract _____
10. Geographic area of Iowa to be affected by the Waiver _____
11. Fully explain the following justifications to support this Plant Waiver Application:
 - A. My intentions to develop a 40-year tract index.
 - B. Hardship that will be created by not participating in the Title Guaranty Program.
 - C. Public interest that will be served by granting a waiver and/or the granting of this waiver is absolutely necessary to ensure availability of title guaranties.

The following affidavits, financial statements, plans, and information are attached to support this waiver:
(list all attachments here)

I affirm that the above information is true and correct.

(Typed Name)

Subscribed and sworn to before me, a Notary Public, in and for said County and State,
This _____ day of _____, 20____.

(Notary Public)

