

MINUTES

SENATE COMMERCE & HUMAN RESOURCES COMMITTEE

DATE: Tuesday, January 15, 2013

TIME: 1:30 P.M.

PLACE: Room WW54

MEMBERS PRESENT: Chairman Tippetts, Vice Chairman Patrick, Senators Cameron, Goedde, Guthrie, Martin, Lakey, Schmidt and Durst

ABSENT/ EXCUSED:

NOTE: The sign-in sheet, testimonies and other related materials will be retained with the minutes in the committee's office until the end of the session and will then be located on file with the minutes in the Legislative Services Library.

CONVENED: **Chairman Tippetts** called the meeting to order at 1:30 p.m. and welcomed the Committee Members to the experience of reviewing the rules.

MOTION: **Senator Patrick** moved, seconded by **Senator Cameron**, to approve the minutes of January 10, 2013. The motion carried by **Voice Vote**.

PASSING OF GAVEL: **Chairman Tippetts** passed the gavel to **Vice Chairman Patrick** to introduce the presenters for the review of the rules being heard.

Rules Review - IADAPA 01 - BOARD OF ACCOUNTANCY - 01.01.01 - Idaho Accountancy Rules.

DOCKET NO. 01-0101-1201 **Kent Absec, Executive Director for the Idaho Board of Accountancy**, said this was a new position for him that he took over in March of 2012. He said he was a native Idahoan from northern Idaho and Boise and that he spent 22 years in the banking industry prior to taking this job. He stated he has been on the other side of the regulatory issues. He described the agency as a seven-member board appointed by the Governor with one office in Boise. He said that since 1917, the Board has licensed and regulated Certified Public Accountants (CPAs) in Idaho. A director and three staff members assist the Board in carrying out its responsibilities. **Mr. Absec** said the Board strives to act swiftly in protecting the public whenever an issue arises with a possible impact upon the citizens of Idaho. Currently, there are approximately 2,700 CPAs and Licensed Public Accountants (LPAs) licensed in the state.

Mr. Absec summarized the rule docket his agency issued and began with Docket No. 01-0101-1201 Idaho Accountancy Rules on pages 3-5. The following is a nontechnical explanation of the substance and purpose of the proposed rulemaking: Amend Rule 004.02 to update the incorporation by reference from 2002 to 2012 for the "Statements on Standards for Continuing Professional Education." The "Statements on Standards for Continuing Professional Education" was jointly approved by the American Institute of Certified Public Accountants (AICPA) and the National Association of State Boards of Accountancy (NASBA) in 2012.

Mr. Absec said continuing education is required for CPAs to maintain their professional competence and provide quality professional services. CPAs are responsible for complying with all applicable Continuing Professional Education Programs (CPE) requirements, rules and regulations of state boards of accountancy, as well as those of membership associations and other professional organizations. The Preamble of the "New Statement on Standards", says the standards are broadly stated in recognition of the diversity of practice and experience among CPAs. They establish a framework for development, presentation, measurement, and reporting of CPE programs to help ensure that CPAs receive the quality learning experience necessary to satisfy their obligations to serve the public interest.

Mr. Absec stated the newly revised standards will provide flexibility for new methods and ideas in learning techniques, and the changing delivery method technologies allow for future considerations around outcome-based learning. Significant revisions are in the areas of group internet-based learning with the addition of standards which were not included in the 2002 standards and self-study programs. There are changes in the issuance requirements for half credits under self-study programs; and alternate methods for calculating CPE credits for self-study programs which are widely used today.

These standards have endured the vetting process of stakeholders from all facets of the CPE community, including but not limited to CPE program sponsors, state boards of accountancy members, state society members, educators, and ultimately being approved by the AICPA and NASBA Board of Directors. CPE program developers and program sponsors are aware of the standards they will be held to in the area of CPE. **Mr. Absec** said our licensees and the general public will benefit from knowing that guidelines have been established around a CPA's continuing professional education which helps promote a quality and effective learning experience. He said this rule has been published through the Office of Administrative Rules. Legislative Services has reviewed the proposed rule and has no objections to the change. We have received no negative feedback from our stakeholders or the general public. He thanked the Committee for the opportunity to address them.

MOTION: **Senator Cameron** moved, seconded by **Senator Goedde**, to adopt Docket No. 01-0101-1201. The motion carried by **voice vote** .

Idaho Department of Finance Rules Review

DOCKET NO. 12-0110-1201 **12.01.10 - Rules Pursuant to the Idaho Residential Mortgage Practices Act, Michael Larsen, Consumer Finance Bureau Chief, Idaho Department of Finance**, explained the reason for adopting the pending rule was to update references to federal laws and regulations from "January 1, 2011" to "January 1, 2013," to correct references to federal regulations. Even though there were no changes to the pending rule as published, the Department inadvertently included the date of "January 1, 2012" instead of "January 1, 2013" in the descriptive summary portion of the Notice of Rulemaking. The proposed rule also included a definition of the Nationwide Mortgage Licensing System and Registry Policy Guidebook. He stated there were no changes to the pending rule and it was being adopted as originally proposed. He indicated the complete text of the proposed rule was published in the October 3, 2012 Idaho Administrative Bulletin, Volume 12-10, pages 211-213. **Mr. Larsen** said they meet regularly with stakeholders and they have thoroughly reviewed the rules with the Mortgage Advisory Board. He said they received no comments or opposition to the rules.

Chairman Tippetts referred **Mr. Larsen** to the language on page 84, to the descriptive summary and the paragraph that starts with "[t]he purpose of" on the second line, "to correct references to federal regulations, and to include a definition of the Nationwide Licensing System and Registry Policy Guidebook". He said, as he actually looks at the rule, it does more than simply provide a definition as mentioned in the summary. **Chairman Tippetts** said it looked to him like, in addition to providing a definition, they are actually incorporating, by reference, this particular document. He said the descriptive summary was deficient in his mind because it did not completely describe the effect of the rules. He stated that **Mr. Larsen** mentioned there was not any opposition. **Chairman Tippetts** asked if those receiving this notice had been aware that it was not actually providing a definition, but actually incorporating this document by reference, and in **Mr. Larsen's** opinion, was there any chance that would generate a controversy. **Mr. Larsen** said the quick answer was "no". He said **Chairman Tippetts** had an excellent point and it took him back to when these were drafted and this was in the definition section. Upon the advice of the rules folks, we transferred that into this section. The Idaho Residential Mortgage Practices Act requires licensees to adhere to the policies of the Nationwide Mortgage Licensing System. He did not think there would be any controversy or objection to this because the licensees adhere to these guidelines and procedures. The descriptive summary should have been adjusted to reflect that. **Chairman Tippetts** clarified with **Mr. Larsen** by asking if the interested parties were well aware that this was more than just including the definition they wrote, but that there was an incorporation of this policy. **Mr. Larsen** answered "yes", this policy guide is adhered to in every jurisdiction and they are familiar with it. He did not think there would be any objection.

Senator Durst thanked **Mr. Larsen** for being there. He said his question was in the same sub-section as **Chairman Tippetts'** question. He asked whether any mortgage entity or mortgage broker may not subscribe to the same set of rules or is this industry standard. **Mr. Larsen** said that every mortgage company licensee has to obtain and maintain a license through the Nationwide Mortgage License System. This was required of states by the Federal SAFE Act, so that policy guidebook grew out of an effort to have uniformity. He stated that this is something the industry is very familiar with.

MOTION: **Senator Durst** moved, seconded by **Senator Goedde**, to adopt Docket No. 12-0110-1201. The motion carried by **voice vote**.

Idaho Bureau of Occupational Licenses Rules Review

DOCKET NO. 24-0101-1201 **24.01.01 - Rules of the Board of Architectural Examiners, Roger Hales, Administrative Attorney.** **Vice Chairman Patrick** indicated this item was pulled from the agenda until further notice at the request of the Bureau of Occupational Licenses. Hopefully, he said, we will get this item resolved by the next meeting.

DOCKET NO. 24-1801-1201 **24.18.01 - Rules of the Real Estate Appraiser Board, Roger Hales, Administrative Attorney** referred to page 132 of the Pending Rule Book and he said, based on the recommendation last year by **Senator Goedde**, they added classroom hours. Last year the Board adopted a temporary rule to make this effective immediately. They are now bringing this pending rule forward to make it permanent. He indicated there was another change on page 136 which included a classroom, conference/seminar, on-line or a virtual classroom. Finally, the only additional change was in Subsection C which clarifies how the course provider can request courses. Essentially, they will have to submit an approval application, along with the fee that was previously established. They have received no comments or opposition.

MOTION: **Senator Goedde** moved, seconded by **Chairman Tippets**, to adopt Docket No. 24-1801-1201. The motion carried by **voice vote**.

DOCKET NO. 24-2501-1201 **24.25.01 - Rules of the Idaho Driving Businesses Licensure Board, Roger Hales, Administrative Attorney** referred the Committee to pages 138 and 139, Rule 225. The board is clarifying the classroom scenario which says a driving business license enables a licensee to operate a driver education business at one principal classroom location as designated in the application. The licensee may also utilize secondary locations for classroom instruction, so long as the business does not conduct driver education at any given secondary location for more than 60 consecutive calendar days in a one-year period. **Mr. Hales** indicated that on page 141 there was a clarification as to how many hours one can teach in a single day. This rule was addressed and published with no comments or opposition.

Senator Goedde asked **Mr. Hales** if he had driving schools that were abusing the six hour rule. **Mr. Hales** said it was his understanding there were a couple of parents who expressed a concern about how long a driver class was on a given day. The Board had a concern that it was inappropriate to teach a course more than six hours a day.

Senator Cameron said he had a question with the wording on page 141 and asked if it would prohibit a class from being given in the evening on one day and the morning of the following day where it says within a 24-hour period of time. **Mr. Hales** said he believed it would, but it was his understanding the courses were typically given at a set time. **Senator Cameron** asked if it would prohibit someone who is offering a class to one group of students at one time, and then not being able to offer it to another set of students or a different set of students the next morning. In other words, if there was a four-hour course, but he was offering it to two separate sets of students, would he be prohibited with that language? **Mr. Hales** said it certainly was not the intent. He said he thought a student could take a class three hours one day and then take another class in the morning on the next day. **Mr. Hales** said the rule is meant to deal with per student. He said he would follow up with the Board to make sure that was their intent.

Chairman Tippets said he could not read that language the same way as **Mr. Hales** because the rule says, "no more than six hours per day in a 24-hour period". He said he didn't know if it said "no more than six hours per day", if you have six hours one day and six hours the next day in the same 24-hour period. **Chairman Tippets** asked, what does that mean when it says no more than a 24-hour period? He said he didn't think they were trying to say "no more than six hours of class in any 24-hour period" because that would prohibit you from teaching six hours a day, starting at 9 o'clock and going until 3, and that would mean you would have the same starting time the next day. He said he thought the wording was very ambiguous and because it says "no more than six hours a day", he did not see the limitation saying that if the class is offered on separate days, one could not teach two six-hour classes on consecutive days within 24 hours. He also had a concern with page 139, number 225 regarding the business license rule, starting with the second sentence, stating "the licensee may utilize secondary locations for classroom instruction, so long as the business does not conduct driver education at any given secondary location for more than 60 consecutive calendar days in a one-year period". What is the reason for limiting the number of days for which they can use a secondary location?

Mr. Hales said there was existing language which provided one could not utilize that secondary location more than 60 days. If one got a license, they could operate in a single business location. The Board recognized one may have an issue with the one business location and one may have to open a branch office for various reasons. The Board's intent was that the secondary business could be operated for a maximum of 60 consecutive days. **Chairman Tippetts** said the way he read this language was that if they are not conducting driver's education on Sunday, for example, one could keep that secondary location in operation throughout the year because of the "consecutive days". He said he assumed that was not the intent, so he asked if the intention was whether or not it really needs to continue like this. **Mr. Hales** said he agreed with the interpretation. He believed the Board's intent was that one cannot operate a full-time secondary business. He said many of the schools operate seven days a week. This was the language the board agreed upon.

Senator Lakey said he wanted to follow up on **Chairman Tippetts** comments. He asked why limit an individual to one location? Why can't they have more than one location? **Mr. Hales** said that typically there are inspections and certain facility requirements that go along with this process, one of which is the requirement of one license per classroom location. If they wanted more than one classroom location, then they were obligated to get more than one license and pay the associated fees. **Senator Lakey** said **Mr. Hales** answered the last part of his question, which was to get another license for another location. **Mr. Hales** said he believed this was correct. He also stated he knew there were some concerns, but they were reviewed by the board and there were no objections or comments. He said the language could be improved and he would take that back to the Board.

Senator Cameron commented that these are somewhat simple rules, but he wished he would have counted the number of times **Mr. Hales** said the intent was different from the actual wording of the rule. **Senator Cameron** encouraged him to make sure the intent was clear. The rules could have been interpreted in different ways, which does not help with the rules. He also commented that he noticed many of the rules were not going through negotiated rule-making and it seemed to him this was a simple adjustment. With regards to the real estate appraiser, just because a rule was discussed in a board meeting, which would qualify as an open meeting, it does not grant it immunity from going through a negotiated rule-making process. If it is a simple rule and everyone agrees, then there is nothing to negotiate. **Senator Cameron** encouraged caution on the part of **Mr. Hales**. **Vice Chairman Patrick** said he would agree, but he assumed these rules are published and open for public comment.

Chairman Tippetts said he felt we had an obligation to make sure that not only statutes, but rules and regulations were clear and they said what they were intended to say. He said he understood the intent, but he was not sure about some of the language on page 139 and was concerned whether this was the intention of the Board.

MOTION:

Chairman Tippetts moved, seconded by **Senator Cameron** that the Committee disapprove Docket No. 24-2501-1201. **Senator Goedde** said there was another way to approach this and he agreed the single location was designed to extract additional fees. He thought a better way to look at the rule may be for an entrepreneur to pay a fee for every location, with the option of rejecting this part of the rule. They could have them start all over again with promulgating the temporary rule and not make that motion, but that would certainly be on the table.

The motion passed by **voice vote**. **Vice Chairman Patrick** stated this rule failed.

**Public Employee Retirement System of Idaho (PERSI)
Rules Review**

**DOCKET NO.
59-0103-1201**

59.01.03 - Contribution Rules of PERSI, Don Drum, Executive Director, referred the Committee to pages 155-159 in the rules. The purpose of this rule was to delay scheduled contribution rate increases for employers and employees. The change presented by these rules is to delay the effective date of the rate increase from July 1, 2012 to July 1, 2013. The contribution rate increase was initially passed by the Board in December of 2009 and that increase was scheduled to begin July 1, 2011. However, based on improvement in the Fund's status, the Board has been able to delay the start of the increase, first to July 1, 2012 and now to July 1, 2013.

Senator Schmidt asked about the empty parentheses. **Joanna Guilfooy, Deputy Attorney General Assigned to PERSI**, explained the empty parentheses were for sine die and they will be filled in at that time.

MOTION:

Senator Goedde moved, seconded by **Senator Schmidt**, to adopt Docket No. 59-103-1201. The motion carried by **voice vote**.

Rules Review - DEPARTMENT OF LABOR 09.01.04 - Unemployment Insurance Benefit Fraud and Overpayment Rules.

**DOCKET NO.
09-0104-1201**

Bob Fick, Communications & Legislative Affairs Manager, said the rule on page 61 clarifies that any information received from a claimant, whether verbally or written, in connection with the claim for benefits is material to those benefits and is used to determine a claimant's eligibility for benefits. He stated a new rule Idaho Administrative Procedures Act, IDAPA 09.01.04.013, is being added to clarify that claimants must repay all benefits received as a result of a willful false statement or willful failure to report a material fact. He stated that primarily people repeatedly failed to report earnings during their unemployment claim, which are earnings that are typically less than half of the benefit they receive.

Senator Lakey asked for a clarification on what the Department receives as opposed to what the Department asks for. **Mr. Fick** said in the case of an appellate review, the claimant may say something gratuitously that would be on the record and that would be part of any material information.

MOTION:

Senator Goedde moved, seconded by **Senator Lakey**, to adopt Docket No. 09-0104-1201. The motion carried by **voice vote**.

Unemployment Insurance Benefits Administration Rules

**DOCKET NO.
09-0130-1201**

Rules Review 09.01.30 - Bob Fick, Communications & Legislative Affairs Manager, said on page 65, third paragraph, brings forth the definition of a corporate officer that is in the tax provisions of the Employment Security Act. This change was necessary because the change that was made two years ago denied benefits to corporate officers. They were given the option of opting out of unemployment insurance coverage. A corporate officer is any individual empowered in good faith by stockholders or directors, in accordance with the corporation's articles of incorporation or by-laws, to discharge the duties of a corporate officer. This provision ensures that people are treated equally for the purpose of benefits and taxes.

MOTION:

Senator Schmidt moved, seconded by **Senator Lakey** to adopt Docket 09-0130-1201. The motion carried by **voice vote**.

09.01.35 - Unemployment Insurance Tax Administration Rules, Bob Fick, Communications & Legislative Affairs Manager, said the rule was located on page 71 and this rule makes clear that members of a limited liability company are treated consistently under both federal income tax law and Idaho's Employment Security Law. Any member of a limited liability company (LLC) that has elected to be treated as a corporation for federal tax purposes, shall be treated as a corporate officer for state Employment Security Law purposes. He pointed out the second part was on page 73, Idaho Administrative Procedures Act (IDAPA) 09.01.35, Subsection 112.04 and was being changed to clarify that one of the factors used in the independently established prong of the independent contractor test only applies to workers with an outside business providing the same type of services the worker provides for the business engaging his services. **Mr. Fick** said it must be proven that the worker is engaged in an independently established trade, occupation, profession or business. In order to be considered an independent contractor, one has to be free of supervision in performance of whatever job one is hired to do. One also has to be the principal of that business and the business has to be relevant to the job one is hired to do. He said there was no controversy and this rule was an attempt to clarify the misclassification of employees.

Senator Durst said he was wondering about the statement that is going to be used, such as a general laborer, and asked what kind of limitations were there on those willing to sell their labor on the free market. **Mr. Fick** said that if someone wanted to create a sole proprietorship, he didn't think there would be any limitations.

Senator Durst asked if he was told to get an ABN (Assumed Business Name) for general labor and an independent contractor or an LLC tried to go out and get a contract with the ABN, one couldn't go out and do drywall. If someone said they were willing to do anything and their ABN was to do general labor, then how would that impact that person's ability to sell their labor? **Mr. Fick** said he had **Michael Johnson, University of Idaho Compliance Chief, Department of Labor**, with him to answer these questions. **Mr. Johnson** said the tests that are given were very specific to determine whether or not one is in business for themselves and that these tests would be applied. If it was a general handyman, then if that is the nature of their business, that's what they would be hired to do. He said what **Mr. Fick** was addressing is the situation where they are being hired to do a specific task, i.e., drywall, but they don't have a drywall business, they have something completely unrelated to it. What happened, he explained, was the Department had people who were trying to qualify their employees and didn't get contractors because they had an Amway or Scentsy business on the side, so they said they were in business for themselves. **Senator Durst** asked if someone is hired as an independent contractor, would they not be able to do the work? **Mr. Johnson** said that is only one test and that would be applied to this individual. They would also have to be completely free from direction and control and meet all of the other criteria of an independent contractor. If the business they have established would allow them to do that in the provisions of their business, he did not see a problem.

Senator Cameron said he wanted to approach the question from the opposite side from that of **Senator Durst**. What he heard **Mr. Fick** say, is that if someone came by and offered to wash his windows for \$50 and he hired them and they were not an independent, they have not filed a corporation and they don't do this customarily, then somehow, he is going to be required to include them as employees. He also gave an example of a Boy Scout troop offering to paint a wall. He queried, is that the intention that we are trying to pinpoint now on who employers are hiring and include them on their unemployment insurance?

Mr. Johnson said that was not the intent of this rule clarification and it comes down to materiality. If one is not in the window cleaning business, this is ancillary and it makes sense that one would hire someone to wash their windows. **Senator Cameron** said, "just to clarify" that if he is the employer and it is not the general duty of his occupation, if we were to hire someone else, regardless of whether they are incorporated or not, regardless of their standing, he would not be required as an employer to list them as an employee. **Mr. Johnson** said that unless the person you hired to replace your carpet is currently one of your employees, then that would be different. So, if you had someone who is already on your payroll and you wanted to hire them under the circumstances described, that person would be picked up as an employee. The purpose of the rule is to clarify the fact that if one is to hire someone as an independent contractor, their business has to be related to what it is you are hiring them to do.

Vice Chairman Patrick said he could relate to this in the agricultural field and that contractors taking laborers around to hoe beans have to be licensed and almost none are. He said he has to do paperwork and pay the taxes on each individual employee. **Mr. Johnson** said they do have statutes in place that require people to follow the existing labor laws, but in cases where people are simply not doing that, all they can do is fight the good fight in regards to enforcement.

Senator Lakey said he had one more question as a follow-up on **Senator Cameron's** comments. With regards to the proposed language on page 73, the focus is not on the employer, the focus is looking at what this individual is doing. **Senator Cameron's** example of the Boy Scouts coming along to do window washing, they are not typically in the business of washing windows. **Senator Lakey** asked if it brought that rule into play. Am I reading it wrong? **Mr. Johnson** said it does not bring the rule into play because they are not holding themselves out to be an independent trade or business. It is a task that is ancillary to your business, so if you hired a Boy Scout troop or the kid down the street to wash your windows, that is an ancillary task that is not part of your general employment. **Mr. Johnson** stated that is not what this rule is going to ask. It is clarifying that an independently established trade or business has to be related to the task being performed. The Boy Scout troop was not holding themselves out to be window washers. They would be a Boy Scout troop that happens to wash the windows that day to raise some money. **Senator Lakey** said he understood the Boy Scout example. The focus, according to the rule, is on the worker versus the employer, he said. The individual that is hired has to be in the business of doing something specific. One could not hire a drywaller who has computer expertise. **Mr. Johnson** explained they were trying to prevent a misunderstanding when people who have legitimate businesses are misclassified or they are not in business for themselves. Employers are trying to classify them as an independent contractor for the sole purpose of tax avoidance.

Senator Durst said he hires people to do data processing for his business since they don't have the internal capacity. It is his understanding that they are independent contractors. Would subcontracting this out be a violation? **Mr. Johnson** said that in the scenario **Senator Durst** just described, you are actually hiring a research firm to do exactly what they are holding themselves out to do and that is to do the research for you. There is no way this can be misconstrued as an employee of yours because I am assuming they would be free from any direction or control as to how they perform their tasks.

MOTION:

Senator Schmidt moved, seconded by **Senator Guthrie** to adopt Docket No. 09-0135-1201. **Senator Schmidt** said by looking at the change as it applies to the whole rule, this makes sense to him and it clarifies one of many considerations, but it is not the sole consideration. The motion carried by **voice vote**.

PASSING OF GAVEL: Vice Chairman Patrick passed the gavel back to Chairman Tippetts. Chairman Tippetts stated the next Committee meeting will be Thursday, January 17, 2013 at 1:30 p.m.

ADJOURNED: There being no further business, Chairman Tippetts adjourned the meeting at 2:42 p.m.

Senator Tippetts
Chairman

Linda Kambeitz
Secretary