

NEBRASKA ADMINISTRATIVE CODE

TITLE 49 - DEPARTMENT OF BANKING AND FINANCE

CHAPTER 5 - RULE OF PROCEDURE FOR DECLARATORY ACTIONS

001 GENERAL.

001.01 This Rule has been promulgated pursuant to authority delegated to the Director in Section 84-912.01 of the APA.

001.02 This Rule sets forth the procedures to be used by any person seeking issuance of a declaratory order by the Department.

001.03 The Department has determined that this Rule is in the public interest.

001.04 The definitions in 49 NAC 1.002 shall apply to the provisions of this Rule, unless otherwise specified.

002 DEFINITIONS. For purposes of this Rule, the following additional definitions shall apply:

002.01 Argument means the oral or written statement of the petitioner or any other party which explains his or her view of the facts and issue(s) to be decided, the law applicable to the question(s) presented, and the reasoning that connects the facts and law.

002.02 Contested case means a proceeding before the Department in which the legal rights, duties, or privileges of specific parties are required by law or constitutional right to be determined after hearing before the Department.

002.03 Declaratory order proceeding means a proceeding initiated by a petitioner seeking issuance of a binding order by the Department as to the applicability of specified circumstances to a statute, rule, or order within the primary jurisdiction of the Department.

002.04 Intervenor means any person who has or claims to have any interest, legal right, duty, privilege, or immunity which would be directly affected by the Department's issuance of a binding declaratory order.

002.05 Necessary party means a person who has a specific interest in the applicability of the statute, rule, or order under consideration, as distinguished from a general interest such as may be the concern of the public at large. A necessary party is one which is or would be adversely affected in a legally cognizable way by the uncertainty sought to be resolved.

002.06 Party means any person subject to the jurisdiction of the Department who is involved in a declaratory order proceeding according to the procedures set forth in this Rule.

002.07 Petition means the document filed in accordance with Section 003 of this Rule to initiate a declaratory order proceeding.

002.08 Petitioner(s) means the party or parties who have filed a petition with the Department seeking issuance of a declaratory order.

002.09 Pleading means any written petition, answer, or motion used in any declaratory order proceeding before the Department as set forth in this Rule.

003 PETITION FOR DECLARATORY ORDER.

003.01 Generally. A request for a declaratory order must be made by a petition that meets the requirements of this Section.

003.02 Who May File. Any person may petition the Department for the issuance of a declaratory order as to the applicability of a specific statute, rule, or order within the primary jurisdiction of the Department to the person's specific circumstances.

003.03 When Orders Are Appropriate. A declaratory order may be requested on the applicability of a statute, rule, or order enforced by the Department. Applicability refers to the appropriateness of the relation of the law to the person, property, or state of facts, or its relevance under the circumstances given. It may include such questions as whether the law applies at all, to whom it applies, when it applies, how it applies, or which law applies. Considerations as to whether issuance of a declaratory order is appropriate include:

003.03A A declaratory order may be requested only on the applicability of existing statutes and rules or an outstanding order.

003.03B A declaratory order may be requested to obtain a determination of proposed conduct, not to obtain a determination of the effect of conduct that has already occurred.

003.03C A declaratory order is not a mechanism for review or appeal of a decision made by the Department in a contested case.

003.03D A declaratory order may not be requested to obtain a declaration by the Department that a statute or rule is unconstitutional or that a rule of the Department is invalid.

003.03E A declaratory order may not be issued by the Department that would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding.

003.04 Form of Petition. A petition for declaratory order shall be in the form of either a pleading or letter which shall contain each of the following:

003.04A A caption, which shall include:

003.04A1 The venue: BEFORE THE DEPARTMENT OF BANKING AND FINANCE, STATE OF NEBRASKA;

003.04A2 A heading specifying the subject matter and the name of the petitioner; and

003.04A3 The name of the pleading: PETITION FOR DECLARATORY ORDER.

003.04B The statements required in Subsection 003.05 of this Rule.

003.04C The signature of the petitioner, or when represented by an attorney, the signature of the attorney.

003.04D The name and address of the petitioner, and when represented by an attorney, the name, address, telephone number, e-mail address if applicable, and Nebraska bar number of the attorney.

003.04E The petition shall be made on white, letter-sized paper (8 1/2 inches x 11 inches) of standard weight.

003.04F The petition must be legible, and may be typewritten, printed, or handwritten, or on a form photostatically reproduced. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing. Petitions must contain an original manual signature of the person requesting the declaratory order or an authorized agent of such person.

003.04G Any documents attached to a petition shall be securely fastened to the pleading and shall meet the requirements of Sections 003.04E and 003.04F and, when possible, be reproduced on white, letter-sized paper (8 1/2 inches x 11 inches) of standard weight or placed in a 9 inches x 12 inches envelope and clearly marked as an attachment to the petition.

003.05 Contents of Petition. To be considered, the petition shall include the following:

003.05A The name and address of the petitioner.

003.05B The name and address of all persons or entities, known to the petitioner, who may have a specific interest in the applicability of the statute, rule, or order or who may be adversely affected by the issue sought to be resolved by the petitioner.

003.05C The statute, rule, or order upon which the petitioner seeks issuance of a declaratory order.

003.05D A detailed statement of all of the material facts and specific circumstances which apply to petitioner's request for issuance of a declaratory order.

003.05E All propositions of law or contentions asserted by the petitioner.

003.05F A demand for an interpretation to which the petitioner alleges entitlement. The petition shall state the petitioner's position as to how the Department should rule and why the Department should rule in the manner requested.

003.05G Any documents pertinent to the petition that the petitioner wishes to be considered by the Department.

003.06 Verification. The petition shall be subscribed and verified by the petitioner. If the petitioner is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the petitioning entity.

003.07 Sample Petition. The petitioner may use the sample form of a petition which is attached as Form 49-5-1 and incorporated herein by reference. The petitioner may also prepare a reasonable facsimile of Form 49-5-1 provided the requirements of Sections 003.04, 003.05, and 003.06 of this Rule are satisfied.

003.08 Written Consents. The petitioner shall attach to the petition any written consents obtained from any necessary party to the declaratory order proceeding.

004 SUBMISSION AND SERVICE OF DECLARATORY ORDER PETITION.

004.01 The original petition for declaratory order shall be filed with the Director by mail or in person during the Department's normal business hours.

004.02 The petition shall be deemed as filed when it is actually received by the Department. The Department shall date stamp all petitions upon receipt.

004.03 Within five (5) days of the date that the petition is filed with the Department, the petitioner shall serve a copy of the petition, by certified mail, return receipt requested, on all necessary parties, including all persons who are known to have or claim any interest, legal right, duty, privilege, or immunity which would be directly affected by issuance of a declaratory order in this matter by the Department. The petitioner may request an alternative means of service if the petitioner can demonstrate that service by certified mail is not feasible and the requested alternative means of services has as great of a likelihood of notification of all necessary parties as certified mail.

004.03A The petitioner shall include a list of the names or categories of entities of all necessary parties to the declaratory action with the petition when filed with the Department. The Department may require the petitioner to notify additional parties if it determines the list has not identified all necessary parties.

004.03B The petitioner shall file with the Department proof of service on all necessary parties identified in the petition.

005 DISPOSITION OF THE PETITION.

005.01 Upon the filing of a petition, the Director may consider the petition, or delegate the matter to a designated hearing officer or Department representative to consider the petition and recommend a decision. In reviewing the petition, the Director or his or her designee may, in his or her discretion, do one or more of the following:

005.01A Require that additional information be submitted before the petition will be further considered;

005.01B Require a petitioner to provide notice to persons not previously notified that a request for a declaratory order has been filed with the Department;

005.01C Schedule a date, time, and location at which the petitioner and any other parties to the proceeding may make an oral presentation on the petition;
or

005.01D Consider the petition and any attachments without oral presentation.

005.02 Within thirty (30) days after the petition is filed, the Department shall, in writing:

005.02A Issue an order declaring the applicability of the statute, rule, or order in question to the specified circumstances; or

005.02B Agree to issue an order by a specified time declaring the applicability of the statute, rule, or order in question to the specified circumstances; or

005.02C Set the matter for specified proceedings as set forth in Section 005.01C of this Rule; or

005.02D Decline to issue a declaratory ruling, stating the reasons for the decision.

005.03 Notwithstanding Section 005.02 of this Rule, the Department may determine at any time that it will not issue a declaratory order if issuance of an order under the circumstances would be contrary to any provisions of Section 009 of this Rule. The Department shall notify the petitioner and, if applicable, any intervenor or necessary party of such decision.

006 INTERVENTION IN DECLARATORY ORDER PROCEEDING.

006.01 Intervention by any person in a declaratory order proceeding shall be allowed when the following requirements are met:

006.01A A petition for intervention is submitted in writing to the Department. Copies must be mailed to all parties to the proceeding.

006.01B The petition complies with the requirements set forth in Section 006.02.

006.01C The Department determines that the interests of justice and the orderly and prompt conduct of the proceedings will not be impaired by allowing the intervention.

006.02 The petition shall be made on white, letter-sized paper (8 1/2 inches x 11 inches) of standard weight.

006.03 The petition must be legible, and may be typewritten, printed, or handwritten or on a form photostatically reproduced. If handwritten, the petition must be written in ink. Only one side of a page shall contain any writing. Petitions must contain an original manual signature of the person requesting intervention in the declaratory action or an authorized agent of such person.

006.04 The petition for intervention shall be submitted to the Department and shall include each of the following:

006.04A The name and address of the intervenor; and when represented by an attorney, the name, address, telephone number, e-mail address if applicable, and Nebraska bar number of the attorney.

006.04B The statute, rule, or order that may apply to or affect the person, property, entity, or facts at issue in the matter.

006.04C A statement of facts sufficient to show the intervenor's interest.

006.04D A statement of facts which demonstrate that the intervenor's legal rights, duties, privileges, immunities, or other legal interests may be substantially affected by the proceeding or that the intervenor may intervene pursuant to a provision of law.

006.04E All propositions of law or contentions asserted by the intervenor;

006.04F A statement of the specific relief requested by the intervenor.

006.04G A demand for the relief to which the intervenor alleges entitlement. The petition shall state the intervenor's position as to how the Department should rule and why the Department should rule in the manner requested.

006.04H Any documents pertinent to the petition that the intervenor wishes to be considered by the Department.

006.04I The signature of the intervenor, or when represented by an attorney, the signature of the attorney.

006.04J The petition shall be subscribed and verified by the intervenor. If the intervenor is a corporation, political subdivision, or other entity, then the petition shall be subscribed and verified by a duly authorized agent of the intervening entity.

006.05 The Department may, at its discretion, invite any person or entity to file a petition for intervention.

006.06 The Department shall grant a petition for intervention if the requirements of Section 006.01 and Section 006.04 are satisfied.

006.07 The Department shall deny a petition for intervention upon determining that the interests of justice or the orderly and prompt conduct of the proceedings would be impaired by allowing the intervention.

006.08 The Department's decision to grant or deny a petition for intervention shall be in writing and served upon all parties.

007 DECLARATORY ORDER PROCEEDINGS.

007.01 Oral argument shall be had only on specific order of the Department. A petitioner, intervenor, necessary party, or the Department may submit a motion for oral argument to the Director. If opportunity for oral argument is granted, then argument shall be scheduled to be conducted not more than thirty (30) days after filing of the petition for declaratory order. Petitioner and all other parties or, when represented, their attorneys, shall be served with a notice of the date, time, and location for oral argument. The Department shall provide each of the parties with notice of the proceeding not less than seven (7) days in advance of the scheduled date. Service shall be made by certified mail, return receipt requested. The Department may allocate the cost of holding oral argument among the parties participating in the declaratory action as it determines appropriate.

007.02 Oral argument will be made before a hearing officer or before any representative of the Department who is authorized to render or to recommend a decision to the Director. The hearing officer or Department representative shall be in control of the proceeding and shall:

007.02A Identify the proceeding and introduce himself or herself and identify each party for the record;

007.02B Hear the oral argument of the petitioner, intervenor, or necessary parties; and

007.02C Close the proceedings.

007.03 At the declaratory order proceeding, Department staff shall have the right to present oral argument.

007.04 The hearing officer or Department representative may impose reasonable time limits on the amount of time allocated to each party for oral argument.

007.05 The parties and Department staff may file briefs in support of their respective positions. The hearing officer may fix the time and order of filing briefs and may direct that briefs be submitted prior to the date of oral argument.

007.06 The oral argument may be conducted either in person or by telephone conference call.

007.07 The Department shall prepare an official record, which shall include testimony and exhibits, in each declaratory action.

007.07A It shall not be necessary to transcribe the record of the proceedings unless requested for purpose of rehearing or appeal, in which event the transcript and record shall be furnished by the Department upon request and tender of the cost of preparation.

007.07B The Department shall maintain an official record of each declaratory action under the APA for at least four years following the date of the final order.

008 ISSUANCE OF DECLARATORY ORDER.

008.01 The Department shall issue its order on the petition for declaratory relief within sixty (60) days of the date on which the petition was filed.

008.02 The order shall be in writing and shall include the following:

008.02A The names of all parties to the proceeding upon which the order is based;

008.02B The facts upon which the order is based;

008.02C The statute, rule, or order at issue in the matter;

008.02D The Department's conclusion as to the applicability of the statute, rule, or order to the facts;

008.02E The Department's conclusion as to the legal effect or result of applying the statute, rule, or order to the facts; and

008.02F The reasons relied upon by the Department to support its conclusions.

008.03 A copy of the order shall be served upon each party by certified mail, return receipt requested.

008.04 An order in a declaratory proceeding shall have the same status and binding effect as an order issued in a contested case.

008.05 If the Department has not issued an order on the petition for declaratory relief within sixty (60) days after the petition has been filed, the petition shall be deemed to have been denied by the Department.

009 CIRCUMSTANCES UNDER WHICH THE DEPARTMENT WILL NOT ISSUE DECLARATORY ORDERS

009.01 Grounds upon which the Department shall refuse to issue a declaratory order include, but are not limited to, the following:

009.01A The petition requests a declaratory order on a matter that is outside the scope of authority of the Department;

009.01B The petition requests review of a decision made by the Department in a contested case;

009.01C The petition requests a declaratory order on the effect of past conduct;

009.01D An investigation for purposes of a formal adjudication, a contested case, or a petition to issue, amend, or repeal rules involving the petitioner on substantially the same or similar facts or issues raised in the petition is pending before the Department;

009.01E The petition seeks a declaration that a statute or rule is unconstitutional or invalid;

009.01F The issue raised in the petition has been settled by a change in circumstances or other means so as to render moot the need for a declaratory order;

009.01G An order would substantially prejudice the rights of a person who would be a necessary party and who does not consent in writing to the determination of the matter by a declaratory order proceeding;

009.01H An order would not resolve the controversy or uncertainty; or

009.01I The question posed or facts presented are not sufficiently specific, are overly broad, or are otherwise inappropriate as a basis upon which to decide the matter.

009.02 Grounds upon which the Department may determine to refuse to issue a declaratory order include, but are not limited to, the following:

009.02A Refusal is necessary to assure adequate allocation of Department resources are available for issuing rulings on petitions raising questions of greater urgency or significance;

009.02B The question presented is of such complexity that the Department has had insufficient opportunity or resources to develop a fully matured ruling; or

009.02C The petitioner fails to submit any additional information requested by the Department or submits such information after the date established by the Department;

010 APPEAL. An order on a petition for declaratory relief is subject to review in the manner provided for review of contested cases by the APA. Specific procedures for appeal are set forth in the APA.

BEFORE THE DEPARTMENT OF BANKING AND FINANCE
STATE OF NEBRASKA

In the matter of
the application of [name]

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)
)
)

PETITION FOR
DECLARATORY ORDER

1. Petitioner's name and address;
2. The name and address of all persons who or entities which may have a specific interest in the applicability of the statute, rule, regulation, or order, or who may be adversely affected by the issue sought to be resolved;
3. All material facts and specific circumstances;
4. All rules of law which apply;
5. Petitioner's demand for relief;

DATED this ____ day of _____, ____.

VERIFICATION

STATE OF)
) ss.
COUNTY OF)

_____[name]_____, being first duly sworn, states that he/she is the petitioner/petitioner's agent in the above entitled matter; that he/she has read the foregoing Petition For Declaratory Order; and that the allegations of fact therein are true.

[Petitioner's signature]

SUBSCRIBED and sworn to before me this ____ day of _____, ____.

NOTARY SEAL.

[Notary signature].