

## NOTICES OF EXEMPT RULEMAKING

The Administrative Procedure Act requires the *Register* publication of the rules adopted by the state's agencies under an exemption from all or part of the Administrative Procedure Act. Some of these rules are exempted by A.R.S. §§ 41-1005 or 41-1057; other rules are exempted by other statutes; rules of the Corporation Commission are exempt from Attorney General review pursuant to a court decision as determined by the Corporation Commission.

### NOTICE OF EXEMPT RULEMAKING

#### TITLE 13. PUBLIC SAFETY

#### CHAPTER 11. BOARD OF FINGERPRINTING

*Editor's Note: The following Notice of Exempt Rulemaking was exempt from Executive Order 2012-03 as issued by Governor Brewer. (See the text of the executive order on page 2571.)*

[R12-193]

#### PREAMBLE

- 1. Sections Affected**

R13-11-102	<u>Rulemaking Action</u>
R13-11-109	Amend
R13-11-113	Amend
- 2. Citations to the agency's statutory rulemaking authority to include the authorizing statute (general) and the statutes the rules are implementing (specific), and the statute or session law authorizing the exemption:**

Authorizing statute: A.R.S. § 41-619.53(A)(2)  
Implementing statutes: A.R.S. §§ 41-619.55, 41-619.56, and 41-619.57  
Exemption: A.R.S. § 41-619.53(A)(2)
- 3. The effective date of the rule and the agency's reason it selected the effective date:**

September 25, 2012
- 4. A list of all notices published in the *Register* as specified in R1-1-409(A) that pertain to the record of the exempt rulemaking:**

None. This rulemaking is statutorily exempt from review under A.R.S. § 41-619.53(A)(2).
- 5. The agency's contact person who can answer questions about the rulemaking:**

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- 6. An agency's justification and reason why a rule should be made, amended, repealed, or renumbered to include an explanation about the rulemaking:**

A.R.S. § 41-619.53(A)(5) authorizes the Board to establish fees, which the Board has done through action at open meetings. The Board's current fee is \$7.00, which is charged as a portion of the fingerprint-clearance-card fee and collected by the Department of Public Safety.

The Legislature recently amended A.R.S. § 41-1008 to further regulate agencies' authority to levy fees. A.R.S. § 41-1008(D) requires agencies to comply with rulemaking provisions to establish or increase a fee, unless the agency has an express exemption from A.R.S. Title 41, Chapter 6 for establishing or increasing a fee. However, the law is unclear about the meaning of "express exemption." The Board believes that it has an express exemption because A.R.S. § 41-619.53(A)(2) specifically exempts from the requirements of the Administrative Procedures Act the Board's authority to implement A.R.S. Title 41, Chapter 3, Article 12, which includes the authority to establish fees. Nonetheless, there

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is value in updating the Board's rules before September 30, 2012, to avoid any confusion or conflict about whether approval by the Governor's Regulatory Review Council is required. Although these rules change the fee from \$3.00 to \$7.00, this update reflects current practice. The Board is not enacting a fee increase through this rulemaking.

In addition, the Board is clarifying references to the word "rules," which can be ambiguous.

A.R.S. § 41-619.53(A)(2) exempts the proposed rules from A.R.S. Title 41, Chapter 6.

7. **A reference to any study relevant to the rule that an agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**  
None
8. **A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**  
Not applicable
9. **The summary of the economic, small business, and consumer impact, if applicable:**  
Not applicable
10. **A description of any changes between the proposed rulemaking, including any supplemental proposed rulemaking, and final rulemaking package (if applicable):**  
Not applicable
11. **An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments, if applicable:**  
Not applicable
12. **Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules. When applicable, matters shall include, but not be limited to:**
  - a. **Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:**  
Not applicable
  - b. **Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than the federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**  
Not applicable
  - c. **Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**  
Not applicable. There were no other matters applicable.
13. **A list of any incorporated by reference material and its location in the rule:**  
None
14. **Whether the rule was previously made, amended, repealed or renumbered as an emergency rule. If so, the agency shall state where the text changed between the emergency and the exempt rulemaking packages:**  
Not applicable
15. **The full text of the rules follows:**

TITLE 13. PUBLIC SAFETY

CHAPTER 11. BOARD OF FINGERPRINTING

ARTICLE 1. BOARD OF FINGERPRINTING

Section

- R13-11-102. Definitions  
R13-11-109. Ex Parte Communications  
R13-11-113. Fees

ARTICLE 1. BOARD OF FINGERPRINTING

**R13-11-102. Definitions**

In this Article, the following definitions apply, unless the context otherwise requires:

1. "Applicant" means a person who applies for good cause exception under A.R.S. § 41-619.55 or a central registry exception under A.R.S. § 41-619.57.

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2. "Board" means the Board of Fingerprinting.
3. "Central registry exception" means notification to the Department of Economic Security or the Department of Health Services, as appropriate, pursuant to A.R.S. § 41-619.57 that the person is not disqualified because of a central registry check conducted pursuant to A.R.S. § 8-804.
4. "Central registry exception application" means all the documents required by A.A.C. R13-11-104(B).
5. "CPS" means Child Protective Services.
6. "DES" means the Department of Economic Security.
7. "DES notice" means the notice of disqualification because of a central registry background check that the Department of Economic Security sends to an applicant under A.R.S. § 8-804(H).
8. "DPS" means the Department of Public Safety.
9. "DPS notice" means the notice of denial or suspension of a fingerprint clearance card that the Department of Public Safety sends to a fingerprint clearance card applicant under A.R.S. § 41-1758.04.
10. "Expedited review" means an examination ~~by the Board, without the applicant being present and~~ in accordance with ~~Board rules R13-11-105, of the documents an applicant submits by the Board without the applicant being present.~~
11. "Good cause exception" means the issuance of a fingerprint clearance card to an applicant under A.R.S. § 41-619.55.
12. "Good cause exception application" means all of the documents required by A.A.C. R13-11-104(A).
13. "Hearing officer" means an administrative law judge or other person appointed by the Board to determine good cause exceptions or central registry exceptions.

**R13-11-109. Ex Parte Communications**

- A. In any good cause exception or central registry exception case, except to the extent required for disposition of *ex parte* matters as authorized by law ~~or these rules of procedure~~:
  1. No interested person outside the Board may make or knowingly cause to be made to any Board members, hearing officer, or other employee or consultant who may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding;
  2. No Board member, hearing officer, or other employee or consultant who is or may be reasonably expected to be involved in the decisional process of the proceeding, may make or knowingly cause to be made to any interested person outside the Board an *ex parte* communication relevant to the merits of the determination.
- B. A Board member, hearing officer, or other employee or consultant who is or may be reasonably expected to be involved in the decisional process of the proceeding, who receives, makes, or knowingly causes to be made a communication prohibited by ~~this rule R13-11-109(A)~~, must place on the record of the proceeding and serve on all parties to the proceeding:
  1. All prohibited written communications;
  2. Memoranda stating the substance of all prohibited oral communications; and
  3. All written responses, and memoranda stating the substance of all oral responses, to the communications described in (1) and (2) of this subsection.
- C. Upon receipt of a communication made or knowingly caused to be made by a party in violation of this Section, the Board or its hearing officer, ~~to the extent consistent with the interests of justice and the policy of the underlying statutes and rules,~~ may require the party to show cause why his or her claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected because of the violation.
- D. The provisions of this Section apply beginning when the application for a good cause exception or central registry exception is filed.
- E. For the purposes of this Section:
  1. "Person outside the Board" means any person other than a Board member, employee or consultant of the Board, or attorney representing the Board in its adjudicatory role.
  2. "*Ex parte* communication" means an oral or written communication not on the administrative record and not the subject of reasonable prior notice to all parties.

**R13-11-113. Fees**

- A. ~~The Department DPS~~ shall collect proper fees for good cause exceptions from all applicants and shall transmit the fees to the state Treasurer. A fee of ~~\$3.00~~ **\$7.00** is established for good cause exceptions ~~and central registry exceptions.~~
- B. Fees shall be paid in addition to and in the same payment as fees paid to ~~the Department DPS~~ for a fingerprint clearance card application. ~~Fees shall be paid by money order, cashier's check, or check drawn on a business account. If a state agency is paying the fees, the state agency may transfer the funds to the Department by using a companion transaction transfer form.~~
- C. ~~If the financial institution does not clear a check offered in payment for services pursuant to subsection (B), the Department shall notify the applicant to pay the fees by money order or cashier's check. If a fingerprint clearance card has been issued, the Department shall suspend the fingerprint clearance card until the fees are paid by money order or cashier's check. If a fingerprint clearance card has not been issued, the Department shall not issue a fingerprint clearance card or the Department's notice until the fees are paid by money order or cashier's check.~~