

**TEMPORARY RULE**  
**RRC STAFF OPINION**

PLEASE NOTE: THIS COMMUNICATION IS EITHER 1) ONLY THE RECOMMENDATION OF AN RRC STAFF ATTORNEY AS TO ACTION THAT THE ATTORNEY BELIEVES THE COMMISSION SHOULD TAKE ON THE CITED RULE AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT RULE. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Code Officials Qualification Board

RULE CITATION: 11 NCAC 08 .0735

RECOMMENDED ACTION:

- X Approve, but note staff's comment
- Object, based on:
- Lack of statutory authority
  - Unclear or ambiguous
  - Unnecessary
  - Failure to comply with the APA

COMMENT:

*Staff recommends approval of the proposed temporary rule because it meets the requirements of G.S. 150B-21.1. G.S. 150B-21.1 sets forth a two-part test to engage in temporary rulemaking: (1) adherence to the notice and hearing requirements of the permanent rulemaking process would be contrary to the public interest; and (2) the immediate adoption of the rule is required by a serious and unforeseen threat to the public health, safety, or welfare. The proposed Rule extends the effective dates of temporary licensure certificates for certain Code Enforcement Officials.*

*Part 1: In April 2020, the Board took action and this Rule went into the Code as an emergency rule. In June 2020, RRC approved this Rule as a temporary rule setting March 12, 2021 as the expiration date for temporary certificates. On October 27, 2020, the agency determined during a meeting that the agency would need to extend temporary certificates for Code Enforcement Officials.*

*If the Code Officials approved a permanent rule at the October 27, 2020 meeting, the earliest possible effective date would have been April 1, 2021, after the expiration of the temporary certificates. G.S. 143-151.13(d) requires the Code Officials Qualification Board to set the period of validity for temporary certificates in its rules and specifically prohibits renewal. As a result, staff thinks it is in the public interest, and specifically in the interest of the Board's licensees, to approve the temporary rule since permanent rulemaking would have caused a lapse in certification for certain Code Enforcement Officials.*

Ashley Snyder  
Commission Counsel

*Part 2: In its Findings of Need Form, the Board cites the “duration of the COVID 19 [sic] pandemic, subsequent worsening of the COVID-19 pandemic during the ‘second wave’ of this past fall and winter, and delays in widespread vaccination” as a serious and unforeseen threat to the public health, safety, or welfare.*

*Since the wording on the findings of need form specifically notes the duration of the pandemic and since the certificates would lapse without temporary rulemaking, staff thinks the immediate adoption of the rule is required by a “serious and unforeseen threat.” As a result, staff recommends approval of the temporary rule.*

**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.

**§ 143-151.13. Required standards and certificates for Code-enforcement officials.**

(d) The Board may provide for the issuance of probationary or temporary certificates valid for such period (not less than one year nor more than three years) as specified by the Board's rules, or until June 30, 1983, whichever is later, to any Code-enforcement official newly employed or newly promoted who lacks the qualifications prescribed by the Board as prerequisite to applying for a standard certificate under subsection (a). No official may have a probationary or temporary certificate extended beyond the specified period by renewal or otherwise. The Board may provide for appropriate levels of probationary or temporary certificates and may issue these certificates with such special conditions or requirements relating to the place of employment of the person holding the certificate, his supervision on a consulting or advisory basis, or other matters as the Board may deem necessary to protect the public safety and health.

1 11 NCAC 08 .0735 is adopted under temporary procedures as follows:

2  
3 11 NCAC 08 .0735 TEMPORARY CERTIFICATE

4 (a) A temporary certificate shall be issued without examination or additional application to any code enforcement  
5 official (CEO) who currently possesses a probationary certificate that expires between March 12, 2020 and ~~December~~  
6 ~~31, 2020.~~ August 31, 2021. The application the CEO initially submitted to obtain the probationary certificate shall  
7 provide the basis for issuing the temporary certificate.

8 (b) A temporary certificate shall authorize the CEO, during the effective period of the certificate, to hold the position  
9 of the type, level, and location that corresponds to the probationary certificate the applicant previously received. The  
10 certificate shall specify the type and level of code enforcement in which the CEO may engage and may be conditioned  
11 upon his or her having supervision from an official with the specified certification or qualifications included on the  
12 CEO's probationary certificate application.

13 (c) The temporary certificate shall be effective ~~for one year only~~ for the period of March 12, 2020 through ~~March 12,~~  
14 ~~2021~~ December 31, 2021 and shall not be renewed. During ~~the one year period,~~ this period of time, the official shall  
15 complete the requirements set forth in 11 NCAC 08 .0706 to qualify for the appropriate standard certificate.

16 (d) A CEO who is issued a temporary certificate that the CEO no longer needs or wants shall return the temporary  
17 certificate, within 30 days, to the Engineering and Codes Division of Department of Insurance for cancellation.

18 (e) A temporary certificate shall remain valid only so long as the person certified is employed by the State or a local  
19 government as a code enforcement official of the type and level indicated on the certificate. If the person certified  
20 leaves such employment for any reason, he or she shall return the certificate to the Board.

21 (f) A CEO with only a temporary certificate and no standard or limited certificate is not required to complete any  
22 continuing education courses.

23  
24 *History Note:* Authority G.S. 143-151.12; 143-151.13;

25 Emergency Adoption Eff. April 20, 2020;

26 ~~[Temporary Adoption Eff. July 1, 2020.]~~ Temporary Adoption Eff. July 1, 2020.

27 Emergency Adoption Eff. ~~[February 25, 2021.]~~ February 25, 2021.

28 Temporary Adoption Eff. April 23, 2021.  
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30

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AGENCY: Code Officials Qualification Board

RULE CITATION: 11 NCAC 08 .0736

RECOMMENDED ACTION:

- ☐ Approve, but note staff's comment
- X     Object, based on:
  - ☐ Lack of statutory authority
  - ☐ Unclear or ambiguous
  - ☐ Unnecessary
- X     Failure to comply with the APA

COMMENT:

*Staff recommends objection to the proposed temporary rule for failing to meet the requirements for temporary rulemaking in G.S. 150B-21.1. G.S. 150B-21.1 sets forth a two-part test to engage in temporary rulemaking: (1) adherence to the notice and hearing requirements of the permanent rulemaking process would be contrary to the public interest; and (2) the immediate adoption of the rule is required by a serious and unforeseen threat to the public health, safety, or welfare. The proposed Rule allows continuing education to be completed via an online course to meet either the 2020 or 2021 continuing education requirements for Code Enforcement Officials.*

*Part 1: On October 27, 2020, the agency discussed during a meeting "for the first time, to potentially offer a one-hour CE course that would be available online through the NDCOI website." On January 26, 2021, the agency filed this Rule as an emergency rule.*

*If the Code Officials approved a permanent rule at the October 27, 2020 meeting, the earliest possible effective date would have been April 1, 2021, prior to the deadline for submission of continuing education requirements on June 30, 2021, though notably after the continuing education period ending June 30, 2020 governed by the proposed Rule. Staff understands the agency would have needed to move quickly for permanent rulemaking to get a rule in place by June 30, 2021 but fails to understand why the public notice and comment required by permanent rulemaking is contrary to the public interest when the continuing education requirements can be put in place after the submission deadline as they are being proposed here for the 2020 continuing education requirements. Therefore, staff recommends objection because the notice and hearing requirements of the permanent rulemaking process are not contrary to the public interest.*

Ashley Snyder  
Commission Counsel

*Part 2: In its Findings of Need Form, the Board cites the “duration of the COVID 19 [sic] pandemic, subsequent worsening of the COVID-19 pandemic during the ‘second wave’ of this past fall and winter, and delays in widespread vaccination” as a serious and unforeseen threat to the public health, safety, or welfare. However, the Board also notes in its form that the Rule was adopted “in response to the effect the COVID-19 global pandemic was having on the ability of Code Enforcement Officials to take the amount of continuing education credits required yearly for each certificate” and “circumstances have continued to prevent many CEOs...from obtaining the amount of CE that is required for them to keep their certificates active.”*

*Staff differentiates this Rule from 11 NCAC 08 .0735 because it contains a new proposal in response to COVID-19. While the duration of the threat may be unforeseen, the existence of the pandemic itself is no longer unforeseen. The need to conduct more business remotely, not the duration of the pandemic, appears to be the driving force behind this proposal. As a result, staff recommends objection because the “immediate adoption” of this Rule is not required in response to a serious and unforeseen threat to the public health and safety.*

**§ 150B-21.1. Procedure for adopting a temporary rule.**

(a) Adoption. - An agency may adopt a temporary rule when it finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required by one or more of the following:

- (1) A serious and unforeseen threat to the public health, safety, or welfare.

1 11 NCAC 08 .0736 is adopted under temporary procedures as follows:

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3 **11 NCAC 08 .0736 FY 2020-2021 SPECIAL CE REQUIREMENT**

4 Every Code Enforcement Official (CEO) [ ~~is required to~~ shall complete a one-hour course titled CS4424 Chapter  
5 160D offered by the NC Department of Insurance on <https://www.ncosfm.gov/> on or before June 30, 2021. A CEO  
6 who has not yet completed the continuing education hour requirement specified in 11 NCAC 08 .0713(c) for the  
7 period ending June 30, 2020 or the period ending June 30, 2021 may [fully] satisfy that requirement for either time  
8 period by completing CS4424 Chapter 160D. Completion of this course [will satisfy] satisfies the annual  
9 professional development program credit hour requirement needed for every standard certificate held by the CEO.  
10 Completion of CS4424 Chapter 160D [will satisfy] satisfies the continuing education hours needed by the CEO for  
11 either the fiscal year ending June 30, 2020 or June 30, 2021, but not both. [Any continuing education hour credits  
12 held by the CEO prior to completion of the CS4424 Chapter 160D can be rolled over and applied towards their 2021  
13 or 2022 continuing education hour requirement.]

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15 *History Note: Authority G.S. 143-151.12; 143-151.13A;*

16 *Emergency Adoption Eff. [February 25, 2021.] February 25, 2021;*

17 *Temporary Adoption Eff. April 23, 2021.*  
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