

Burgos, Alexander N

Subject: FW: Re: RRC/Request for Extension

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Tuesday, December 12, 2023 11:37 AM
To: Baker, Denise <Denise.Baker@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Re: RRC/Request for Extension

Denise,

I reviewed your revised request, and unfortunately, I think my recommendation is unchanged.

First, while I understand that the Commission and the Division just completed the previous report for Subchapter 27G in May 2019, and the full readoption process in 2022, only 2 rules (27G .0207 and .2202) out of approximately 200 were actually readopted. From my review of the May 2019 report, most of those rules have not been touched since the mid-1990s and early 2000s. Almost every rule in this subchapter was classified—permissibly under the then existing law—as necessary without substantive public interest, which meant that these rules were not actually subject to readoption. I’m not saying the Commission or the Division did anything wrong during the prior readoption process, but the fact remains that the vast majority of the rules in Subchapter 27G have not been reviewed in over 20 years. Given that the purpose of readoption is to ensure that all rules are reviewed at least once every 10 years, this is a prime example—in my view—of why the legislature amended G.S. 150B-21.3A to remove the necessary without substantive public interest classification.

Second, I understand your argument that changes will have to be made to Subchapter 27G in the next few years. However, this is not unique to these Rules. Many agencies are in the midst of amending and revising their rules. If this were a justification for revising the schedule, we would likely find ourselves in a perpetual process of revising and reissuing the schedule. To the extent that changes need to be made to Subchapter 27G, those changes can be made as part of the readoption process, and staff will of course work with Division and Commission staff in setting that final deadline.

Thanks,
Brian

Brian Liebman
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Burgos, Alexander N

Subject: FW: Re: RRC/Request for Extension

From: Liebman, Brian R <brian.liebman@oah.nc.gov>
Sent: Friday, December 8, 2023 3:15 PM
To: Baker, Denise <Denise.Baker@dhhs.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Re: RRC/Request for Extension

Denise,

Thanks for emailing – I apologize for not calling earlier, I got drawn into something else when I returned from lunch. I think Monday is fine for any response you'd like to send, and for letting us know who from the agency will address the Commission.

Thanks,
Brian

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From: Baker, Denise <Denise.Baker@dhhs.nc.gov>
Sent: Friday, December 8, 2023 3:10 PM
To: Liebman, Brian R <brian.liebman@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: RE: Re: RRC/Request for Extension
Importance: High

Hi Brian –

I hope this email finds you well. I do plan to submit a response to your decision reflected below and would like to address the RRC, if necessary, regarding the same. Is it ok if I send you my reply on Monday?

I look forward to hearing from you.

Thank you,
Denise

Burgos, Alexander N

From: Liebman, Brian R
Sent: Wednesday, December 6, 2023 2:55 PM
To: Baker, Denise
Cc: Burgos, Alexander N
Subject: Re: RRC/Request for Extension

Follow Up Flag: Flag for follow up
Flag Status: Flagged

Hi Ms. Baker,

I'm in receipt of the joint request for an extension on Subchapter 27G that was filed in advance of the December 2023 RRC meeting. Unfortunately, I will be recommending that the Commission deny your request.

As you note, G.S. 150B-21.3A requires readoption "at least once every 10 years". The statute does not bar the current scheduling arrangement.

Further, it appears that the Commission and the Division may be laboring under a misunderstanding of the readoption process. The schedule referenced in Rule .0211 does not contain the due date for the completion of the full readoption process. Rather, the schedule shows the date the report required by G.S. 150B-21.3A(c)(1)—the first step of the process—is due to RRC. This requires only that you classify each rule in Subchapter 27G as necessary or unnecessary, post the report for at least 60 days of public comment, respond to any comments received, and submit the report, the comments, and your responses to RRC before June 20, 2024 (the filing date for the July 2024 meeting). Please see G.S. 150B-21.3A(c)(1) for more details. Once RRC and APO approve the report, our staff will confer with staff from your agency and determine a date for the completion of the actual readoption itself. Please see G.S. 150B-21.3A(d) and 26 NCAC 05 .0212 for more detail on that process. At that time, the Commission and the Division will have the opportunity to submit written documentation of their planned timeline for readoption and of any rulemaking priorities that are relevant to that timeline, which staff and RRC will take into consideration when setting the final readoption deadline. I cannot say when the final readoption date will be at this point, but given our experience with the last periodic review process, it could be several years down the road from July 2024.

As to the licensure rules that you're planning to adopt, which you mentioned in factor 3 of your request, please be aware that if those rules are not in the Administrative Code on January 1, 2024, they will not be part of the 2024-2034 periodic review process (see 26 NCAC 05 .0202(2)). So those 8 rules, if not effective by 1/1/24, will not be included in the report due in July 2024, or need to be readopted thereafter.

Regardless of my recommendation, you're welcome to address the Commission regarding your request. If you so choose, please let me know who will be appearing, so I can let the Commission know who to expect.

Thank you,
Brian

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