

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: Board of Elections

RULE CITATION: 08 NCAC 17 .0109

RECOMMENDED ACTION:

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

COMMENT:

At its August 2019 meeting, the RRC approved the adoption of multiple temporary rules submitted by the Board of Elections, including this Rule. The temporary rules went into effect on August 23, 2019. Session Law 2019-239 was signed into law on November 6, 2019. The Act becomes effective January 1, 2020 and applies to elections conducted on or after that date. This Session Law amended several general statutes, including G.S. 163-230.1. This temporary rulemaking addresses the changes made by the Session Law.

The Board began the temporary rulemaking process set forth in G.S. 150B-21.1 by submitting the temporary rules to the Codifier on November 27, 2019. The agency held a public hearing on December 12, 2019. The Board closed the comment period on December 12, 2019. Therefore, the agency had a 10-business day comment period, rather than the 15-business day comment period set forth in G.S. 150B-21.1. In addition, the agency adopted on December 12, 2019, and did not give the Codifier or its interested persons the 30-business day notice required by G.S. 150B-21.1(a3)(1) and (2). Instead, the Board provided 10 business days for both.

Amanda J. Reeder
Commission Counsel
Issued December 16, 2019

Staff notes G.S. 150B-21.1(a)(11) states:

§ 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:

(11) The need for the Bipartisan State Board of Elections and Ethics Enforcement to adopt a temporary rule after prior notice or hearing **or upon any abbreviated notice or hearing the agency finds practical** for one or more of the following:

- a. In accordance with the provisions of G.S. 163A-742.
- b. To implement any provisions of state or federal law for which the Bipartisan State Board of Elections and Ethics Enforcement has been authorized to adopt rules.
- c. The need for the rule to become effective immediately in order to preserve the integrity of upcoming elections and the elections process.

Staff notes that the former Bipartisan State Board of Elections and Ethics Enforcement was reconstituted as the Board of Elections in S.L. 2018-146, which became effective on December 27, 2018. Therefore, staff believes that this temporary rulemaking process is governed by G.S. 150B-21.1(a)(11), and the timelines set forth in G.S. 150B-21.1(a2) and (a3) do not apply. The RRC agreed with staff's interpretation of the law when it approved this temporary rule in August 2019, as the Board operated under a truncated timeframe for that temporary rulemaking, as well.

Staff further notes that S.L. 2019-239, section (1.6) authorized the Board to adopt emergency rules to implement the Session Law. However, staff notes that emergency rules are only effective for about 60 days, so they would not remain effective through the primary season if implemented through that rulemaking process. The express exemption in G.S. 150B-1.1(a)(11) from the timeframes in G.S. 150B-21.1 allowed the Board to act nearly as quickly to implement temporary rules and those rules can remain in effect for up to 270 day. Therefore, staff believes the Board has authority to implement this rule change via temporary rulemaking.

Staff recommends approval of the Rule submitted for inclusion in the NC Administrative Code as a temporary rule.

08 NCAC 17 .0109 is proposed for amendment under temporary procedures as follows:

08 NCAC 17 .0109 PHOTO IDENTIFICATION FOR ABSENTEE BALLOTS

~~(a) Definitions. The following definitions apply to this Rule:~~

~~(1) "Readable" means that the name on the identification can be read and that the photograph is not blurry and depicts a person who is distinct and distinguishable from another person.~~

~~(2) "Copy" means a duplicate of an original document, including a photographic copy of the original document. It does not include displaying an image on an electronic device.~~

~~(b) Identification Requirement for Absentee Ballot Request Form. A completed written request form for an absentee ballot shall include a readable electronic or physical copy of the identification required by G.S. 163A-1145.1(a) displaying a name that is the same or substantially equivalent to the name contained in the registration record as provided in 08 NCAC 17 .0101(e)(4). The election official shall make this determination based on the totality of the circumstances, construing all evidence, along with any explanation or documentation voluntarily proffered by the person presenting to vote, in the light most favorable to that person. The election official shall not require any additional evidence outside the four corners of the photo identification. If the name on the identification is substantially similar to the name listed on the registration record and the identification is readable, the county board of elections shall presume that the person depicted in the photograph on the identification provided is the voter. It is not required that the address on the identification match the residential address provided on the request form or the address on the registration record.~~

~~(c) Exceptions. The exceptions provided in G.S. 163A-1145.1(d) for voters voting in person shall apply to absentee by mail voters. The reasonable impediment exception under G.S. 163A-1145.1(d)(2) shall include lack of access to a method to attach an electronic or physical copy of the identification card to the request. The following additional exceptions shall apply to absentee by mail voters:~~

~~(1) Religious Objection Exception. After the voter's ballot is counted, if a voter claims the religious objection exception under G.S. 163A-1145.1(d)(1) and completes the prescribed affidavit, the religious objection exception shall be noted on the voter's registration record. In future elections that voter shall not be required to show photo identification under G.S. 163A-1145.1 or this Rule, or claim an exception under G.S. 163A-1145.1(d), until the voter either:~~

~~(A) notifies the county board of elections in writing that the voter no longer holds a religious objection to being photographed;~~

~~(B) provides photo identification in a future election; or~~

~~(C) claims an exception under G.S. 163A-1145.1(d)(2) or (d)(3) in a future election.~~

~~(2) Annual Requests by Persons with Sickness or Physical Disability. If an applicant for an absentee request form reports in the application that the voter has a sickness or physical disability that is expected to last the remainder of the calendar year pursuant to G.S. 163A-1295(b) and satisfies the photo identification requirement under Paragraph (b) of this Rule or the voter completes an alternative affidavit pursuant to G.S. 163A-1145.1(d), the photo identification requirement shall be~~

1 met for all of the primaries and elections held during the calendar year when the application is
2 received.

3 (3) ~~Applications for Absentee Ballots for Voting in Second Primary or Runoff Election. A voter who is~~
4 ~~automatically issued an application and absentee ballot for a second primary pursuant to G.S. 163A-~~
5 ~~1299 or a runoff election shall not be required to submit a copy of acceptable photo identification~~
6 ~~under Paragraph (b) of this Rule or claim an exception under G.S. 163A 1145(d) with the absentee~~
7 ~~ballot and container return envelope for the second primary or runoff election.~~

8 (4) ~~Covered Voters Under the Uniform Military and Overseas Voter Act. A covered voter who is casting~~
9 ~~a ballot pursuant to Part 2 of Article 21 of Chapter 163A of the General Statutes shall not be required~~
10 ~~to submit a copy of acceptable photo identification under Paragraph (b) of this Rule or claim an~~
11 ~~exception under G.S. 163A 1145(d).~~

12 (d) ~~Delivery of Absentee Ballots and Certification Form. If a voter is confirmed as a registered voter of the county,~~
13 ~~the absentee ballots and certification form shall be mailed to the voter, unless personally delivered in accordance with~~
14 ~~G.S. 163A 1308(b), even if the voter does not provide the identification required by G.S. 163A 1309(a)(4) and this~~
15 ~~Rule with the request. However, the voter shall provide identification or claim an exception under G.S. 163A-~~
16 ~~1145.1(d) prior to the counting of the voter's absentee ballot. If the voter provides the identification required by this~~
17 ~~Rule or claims an exception under G.S. 163A 1145.1(d) with the absentee ballot request form, the voter is not required~~
18 ~~to attach additional documentation to the container return envelope.~~

19 (e) ~~Valid Absentee Ballot Request Forms Requiring Further Action.~~

20 (1) ~~The county board of elections shall include with the absentee ballots and certification form a letter~~
21 ~~notifying the voter that the voter's request is valid under G.S. 163A 1309(a) but that further action~~
22 ~~is needed by the voter to comply with the identification requirements, if any of the following apply:~~

23 (A) ~~The voter does not submit the identification required by G.S. 163A 1309(a)(4).~~

24 (B) ~~The voter does not claim an exception under G.S. 163A 1145.1(d).~~

25 (C) ~~The voter includes an unreadable copy of the identification required by G.S. 163A-~~
26 ~~1309(a)(4).~~

27 (D) ~~The identification does not meet the expiration date requirements under G.S. 163A-~~
28 ~~1145.1(a).~~

29 (E) ~~The voter provides a type of identification not listed under G.S. 163A 1145.1(a).~~

30 (F) ~~The voter provides identification displaying a name that is not the same as or substantially~~
31 ~~similar to the name on the voter record as required pursuant to Paragraph (b) of this Rule.~~

32 (G) ~~The exception affidavit is incomplete, either because there is no signature or, in the case of~~
33 ~~a reasonable impediment exception under G.S. 163A 1145.1(d)(2), the voter did not~~
34 ~~complete the reasonable impediment declaration form under G.S. 163A 1145.1(d1).~~

35 (H) ~~The voter indicates she or he will provide identification at a later time.~~

36 (2) ~~The letter required in Subparagraph (1) of this Paragraph shall provide the voter with the following~~
37 ~~options:~~

1 (A) ~~At any point between the submission of the absentee ballot request form and 5:00 P.M. on~~
2 ~~the day before the county canvass, provide the documentation necessary to comply with~~
3 ~~the identification requirements via email, mail, or in person.~~

4 (B) ~~Attach to the absentee ballot container return envelope the documentation necessary to~~
5 ~~comply with the identification requirements pursuant to G.S. 163A-1307(b)(8).~~

6 ~~(f) Counting of Absentee Ballots. Prior to the transmission of absentee ballots pursuant to G.S. 163A-1308(e), the~~
7 ~~county board of elections shall notate the voter's ID status on the container return envelope for a voter who requires~~
8 ~~further action pursuant to Subparagraph (e)(1) of this Rule. The county board of elections shall, at the first meeting~~
9 ~~held pursuant to G.S. 163A-1308(f) to pass upon applications for absentee ballots after the absentee ballot is received,~~
10 ~~consider whether the voter has complied with the photo identification requirements in G.S. 163A-1145.1(a) and this~~
11 ~~Rule or whether an exception applies under G.S. 163A-1145.1(d). In its determination, the county board shall construe~~
12 ~~all evidence in the light most favorable to the voter. If an exception applies, the county board of elections shall review~~
13 ~~the affidavit provided. Absent any other reason provided by law for disapproving absentee ballots, if the county board~~
14 ~~of elections determines that the registered voter is unable to provide proof of identification and the voter has completed~~
15 ~~the required affidavit in G.S. 163A-1145.1(d), the county board of elections shall find that the absentee ballot is valid~~
16 ~~unless the county board has grounds to believe the affidavit is false. A decision that the absentee ballot is not approved~~
17 ~~because the affidavit provided under G.S. 163A-1145.1(d) is false shall require a unanimous vote by the county board~~
18 ~~of elections. If the voter fails to submit acceptable photo identification pursuant to G.S. 163A-1145.1(a) and this Rule~~
19 ~~or fails to submit a completed alternative affidavit pursuant to G.S. 163A-1145.1(d) with the container return~~
20 ~~envelope, the mailed ballot shall be treated in the same manner as a mail in absentee ballot under G.S. 163A-1144(e).~~

21 ~~(g) Photocopy Requirement. The county board of elections shall allow any person seeking to vote by absentee ballot~~
22 ~~the use of a photocopying device to make one photocopy of the voter's form of photo identification.~~

23 ~~(h) Return of original form of identification. If a voter sends his or her original form of photo identification with either~~
24 ~~the absentee request form or in the container return envelope, the county board of elections shall make a photocopy~~
25 ~~of the identification and mail the identification back to the voter.~~

26 ~~(i) Retention of Copies of Photo Identification and Exception Affidavits. Copies of photo identification and alternative~~
27 ~~affidavits shall be retained according to the same schedule for absentee ballot applications under G.S. 163A-1313,~~
28 ~~except that copies of religious objection affidavits shall be retained in the Statewide computerized voter registration~~
29 ~~system maintained under G.S. 163A-874 until the voter ends this exemption pursuant to the methods listed in Parts~~
30 ~~(e)(1)(A) through (C).~~

31 (a) Definitions. The following definitions apply to this Rule:

32 (1) "Readable" means that the name on the identification can be read and that the photograph is not
33 blurry and depicts a person who is distinct and distinguishable from another person.

34 (2) "Copy" means a duplicate of an original document, including a photographic copy of the original
35 document. It does not include displaying an image on an electronic device.

36 (3) "Verifiable legal guardian" has the same meaning as in G.S. 163-226(e).

37 (4) "Near relative" has the same meaning as in G.S. 163-226(f).

1 (b) Identification Requirement for Absentee by Mail Ballots. Each container-return envelope returned to the county
2 board of elections with application and voted ballots shall include a copy of the identification required by G.S. 163-
3 166.16(a) or an affidavit as described in G.S. 163-166.16(d)(1), (d)(2), or (d)(3). The copy of identification must be
4 readable and must display a name that is the same or substantially equivalent to the name contained in the registration
5 record as provided in 08 NCAC 17 .0101(c)(4). It is not required that the address on the identification match the
6 residential address provided on the request form or the address on the registration record.

7 (c) Incomplete Application for a Photo Identification-Related Reason. If the county board of elections receives an
8 absentee application and voted ballots prior to the deadline provided in G.S. 163-231(b), its staff shall make an initial
9 assessment of whether the voter provided a copy of photo identification and if not, whether the voter completed an
10 alternative affidavit. If, after this initial assessment, the copy of the photo identification is not readable, the voter did
11 not provide a copy of photo identification or an alternative affidavit, or the alternative affidavit is not signed or is
12 otherwise not complete, the county board of elections staff shall notify the voter in writing that the voter, the voter's
13 verifiable legal guardian, or the voter's near relative may mail or bring in person the voter's acceptable photo
14 identification under G.S. 163-166.16(a), a readable copy of the voter's acceptable photo identification, or a completed
15 alternative affidavit, to the county board of elections by the deadline specified in G.S. 163-82.4(f).

16 (d) Exceptions. The exceptions provided in G.S. 163-166.16(d) for voters voting in person shall apply to absentee by
17 mail voters. The reasonable impediment exception under G.S. 163-166.16(d)(2) shall include lack of access to a
18 method to attach a physical copy of the identification card to the request. A covered voter who is casting a ballot
19 pursuant to Part 1 of Article 21A of Chapter 163 of the General Statutes is not required to submit a copy of acceptable
20 photo identification under Paragraph (b) of this Rule or claim an exception under G.S. 163-166.16(d).

21 (e) Counting of Absentee Ballots. The county board of elections shall, at the first meeting held after the ballot is
22 received pursuant to G.S. 163-230.1(f) to pass upon applications for absentee ballots, consider whether the voter has
23 complied with the photo identification requirements as follows:

24 (1) Review of photo identification. The county board of elections shall review the photo identification
25 submitted and shall determine the following:

26 (A) That the photo identification is readable as defined in Subparagraph (a)(1);

27 (B) That the photo identification meets the expiration date requirements provided in G.S. 163-
28 166.16(a); and

29 (C) That the name appearing on the photo identification is the same or substantially equivalent
30 to the name contained in the registration record pursuant to 08 NCAC 17 .0101(c)(4). If
31 the name on the identification is substantially equivalent to the name listed on the
32 registration record, the county board of elections shall presume that the person depicted in
33 the photograph on the identification provided is the voter.

34 In making its determination under this Subparagraph, the county board of elections shall not require any
35 additional evidence outside the four corners of the photo identification and shall make the
36 determination based on the totality of the circumstances, construing all evidence in the light most
37 favorable to the voter. A decision that the absentee ballot is not approved because the name listed

1 on the photo identification is not the same as or substantially equivalent to the name on the
2 registration record shall require a unanimous vote by the county board of elections.

3 (2) Review of alternative affidavit. Absent any other reason provided by law for disapproving absentee
4 ballots, if the voter has completed the required affidavit in G.S. 163-166.16(d), the county board of
5 elections shall find that the absentee ballot is valid unless the county board has grounds to believe
6 the affidavit is false. A decision that the absentee ballot is not approved because the affidavit
7 provided under G.S. 163-166.16(d) is false shall require a unanimous vote by the county board of
8 elections.

9 If the voter fails to submit in the container-return envelope a copy of acceptable photo identification pursuant to G.S.
10 163-166.16(a) or an alternative affidavit under G.S. 163-166.16(d), the copy of the photo identification is not readable,
11 or the alternative affidavit is not signed or is otherwise not complete, the mailed ballot shall be treated in the same
12 manner as a mail-in absentee ballot under G.S. 163-166.12(e). The voter, the voter's verifiable legal guardian, or the
13 voter's near relative may mail or bring in person the voter's acceptable photo identification under G.S. 163-166.16(a),
14 a readable copy of the voter's acceptable photo identification, or a completed alternative affidavit, to the county board
15 of elections by the deadline specified in G.S. 163-82.4(f).

16 (f) Photocopy Requirement. The county board of elections shall allow any person seeking to vote by absentee ballot
17 the use of a photocopying device to make one photocopy of the voter's form of photo identification.

18 (g) Return of original form of identification. If a voter sends his or her original form of photo identification in the
19 container-return envelope, the county board of elections shall make a photocopy of the identification and mail the
20 identification back to the voter.

21 (h) Retention of Copies of Photo Identification and Alternative Affidavits. Copies of photo identification and
22 alternative affidavits shall be retained according to the same schedule for absentee ballot applications under G.S. 163-
23 233. Copies of photo identification associated with the absentee ballot are not public record. The alternative affidavit
24 is a public record, but the voter's signature may only be viewed in the county board of elections office and cannot be
25 retained or traced.

27 *History Note: Authority G.S. 163A-1145.1; 163A-1307; 163A-1309(f); 163A-1319; 163-166.16; 163-230.1; 163-*
28 *233; S.L. 2018-144, s. 1.2.(e), (i); S.L. 2019-239.*

29 *Temporary Adoption Eff. August 23, 2019.*

30 *Temporary Amendment Eff. January 6, 2020.*