

## **REQUEST FOR WAIVER OF RRC RULE**

I request a waiver of RRC Rules 26 NCAC 05 .0108(a).

### **Agency Requesting Waiver:**

North Carolina Real Estate Commission

### **Person Requesting Waiver:**

Janet Thoren, Legal Counsel, and Curtis Aldendifer, Rulemaking Coordinator

### **Reason for Waiver:**

The waiver is necessary to permit the review of Rules 21 NCAC 58A .0110 and 21 NCAC 58E .0102, which have been rewritten to address RRC staff objections, to go into effect, if approved, July 1<sup>st</sup> when the new license year for continuing education begins.

### **Date:**

Submitted on June 13, 2014 for the June 18, 2014 RRC Meeting

Factors to be used in determining whether RRC shall grant a waiver (26 NCAC 05 .0112):

- (1) the necessity for a waiver;
- (2) the amount of notice given to the Commission and its staff, the agency proposing the rule, and interested parties;
- (3) the applicant's responsibility for the conditions creating the need for a waiver;
- (4) the applicant's previous requests for a waiver;
- (5) the applicant's knowledge of or experience with the rulemaking process;
- (6) the precedential value of such a waiver;
- (7) the harm to the applicant if a waiver is not granted;
- (8) the harm to the agency if a waiver is granted when the agency is not the applicant.

List and explain the appropriate factors affecting your request and why the waiver should be granted:

1. These two rules (21 NCAC 58A .0110 and 58E .0102) will bring about a major change in the Real Estate Commission's annual continuing education course requirements for brokers-in-charge ("BICs") and brokers. Presently, BICs are required to take a 4-hour Broker-In-Charge Annual Review course ("BICAR") and the 4-hour annual Update course required of all brokers. These two rules will discontinue the BICAR course and replace it with a new 4-hour Broker-In-Charge Update Course ("BICUP").

The BICUP is designed to combine portions of the BICAR and the annual Update course. This enables BICs to take a 4-hour elective CE course and the BICUP to fulfill their mandatory 8-hour annual CE requirement. This change, allowing BICs the ability to take an elective CE course, will not only broaden BICs' knowledge base but provide for a superior level of supervision to their brokers.

Our continuing education program operates on the license year schedule beginning July 1. The new update courses, the BICUP and the General Update Course, must be in place on July 1 to enable independent continuing education sponsors to offer the courses to all BICs and brokers. If they are not, the resulting confusion may place brokers and BICs at an educational disadvantage. Independent continuing education sponsors will not offer the old BICAR since the CE course requirements will be changing. Instead, it is anticipated that they will offer the new BICUP once the new rules come into effect. This leaves BICs unable to fulfill their Update Course or BICUP requirements. If BICs take the annual update course because the BICUP course is unavailable, they will be required to take an extra 4 hours of CE to fulfill their annual CE requirements once the new rules come into effect. Many of our independent continuing education sponsors have already been instructing their students about this CE requirement change and postponing these rules will lead to confusion amongst BICs and brokers.

2. In addition, there are 8 other Rules in the Real Estate Commission's package that will be affected if Rules 21 NCAC 58A .0110 and 58E .0102 are not approved at the RRC's June 18 meeting. Rules 21 NCAC 58A .1702 and 58E .0202 - .0204 are directly related to the update courses, and Rules 21 NCAC .0601 - .0602 are being repealed in light of the elimination of the BICAR course. It would be inappropriate and confusing to have these changes in place without also having the two update rules in place.

3. It is always our goal to satisfy any objections by RRC prior to the hearing, if at all possible. In this regard, it is our understanding that the technical changes submitted in connection with the two update course rules have satisfied RRC Staff Counsel's objections.
4. The Real Estate Commission has never requested a waiver before, and only does so now out of necessity. For example, we are not requesting a waiver with regard to a third rule that is the subject of a Staff Opinion, Rule 21 NCAC 58A .1709.
5. During the rulemaking process, the Real Estate Commission decided to extend the public comment period an additional 30 days for this rule package to be certain that anyone who had any issues with this or any other change had adequate time to comment. The decision was better for the public, but left us without our planned time frame at the end of the process. All feedback received by the Real Estate Commission staff indicates the change to the continuing education program is overwhelmingly supported by the regulated public.
6. The Real Estate Commission will adjust its rulemaking schedule in the future to provide additional time following the initial RRC hearing date to avoid the need for any waiver requests in the future.
7. The Real Estate Commission apologizes for even having to make this request for a waiver, and greatly appreciates your consideration of this request.

List on a separate sheet of paper any persons you have notified concerning this waiver request.

Note:

All persons who have requested to be on the Commission's email list regarding rule changes were notified of the waiver request on June 10, 2014. Attached is a copy of the Notice of Intention to Request Waiver of Rule 26 NCAC 05 .0108(a) together with a list of interested persons so notified.

Signature:  6/13/2014  
Curtis E. Aldendifer, Rulemaking Coordinator  
North Carolina Real Estate Commission

**Melissa A. Vuotto**

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**From:** North Carolina Real Estate Commission <noreply=ncrec.gov@mail168.atl81.rsgsv.net>  
on behalf of North Carolina Real Estate Commission <noreply@ncrec.gov>  
**Sent:** Tuesday, June 10, 2014 4:14 PM  
**To:** Melissa A. Vuotto  
**Subject:** Notice of Rulemaking



**NOTICE OF INTENTION TO REQUEST WAIVER**  
**OF RULE 26 NCAC 05 .0108(a)**

The Real Estate Commission ("Commission") intends to request a waiver of Rule 26 NCAC 05 .0108(a) for the purpose of enabling the Rules Review Commission ("RRC") to review and take action on rewritten Rules 21 58A .0110 and 58E .0102 at its meeting on June 18, 2014 rather than waiting until its next regular meeting on July 17, 2014 as required by Rule 26 NCAC 05 .0108(a). The text of the rewritten Rules 58A .0110 and 58E .0102 appears on the following pages.

A summary citing the rules changes adopted by the Commission at its special meeting on May 9, 2014, followed by the text incorporating technical changes requested by the RRC for each of the rules to be adopted, amended, or repealed can be found by clicking on the following link:

[http://www.ncrec.gov/Pdfs/Rules/Proposed\\_Rule\\_Making.pdf](http://www.ncrec.gov/Pdfs/Rules/Proposed_Rule_Making.pdf).

Members of the public may submit oral or written inquiries regarding any of the rule changes by contacting the Commission's rulemaking coordinator as follows:

Curtis E. Aldendifer  
North Carolina Real Estate Commission

**P.O. Box 17100**  
**Raleigh, NC 27619**  
**(919) 875-3700 (telephone)**  
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[legal@ncrec.gov](mailto:legal@ncrec.gov)

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North Carolina Real Estate Commission  
1313 Navaho Dr  
Raleigh, NC 27609

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21 NCAC 58A .0110 is amended with changes as published in 28:15 NCR 1730 as follows:

**21 NCAC 58A .0110      BROKER-IN-CHARGE**

(a) When used in this Rule, the term:

- (1) "Office" means any place of business where acts are performed for which a real estate license is required or where monies received by a broker acting in a fiduciary capacity are handled or records for such trust monies are maintained;
- (2) "Principal Office" means the office so designated in the Commission's records by the qualifying broker of a licensed firm or the broker-in-charge of a sole proprietorship; and
- (3) "Branch Office" means any office in addition to the principal office of a broker which is operated in connection with the broker's real estate business.

(b) Except as provided in Paragraphs (d) and (e) of this Rule, every real estate firm, including a sole proprietorship, shall have a broker designated by the Commission as provided in Paragraph (f) of this Rule to serve as the broker-in-charge at its principal office and a broker to serve as broker-in-charge at any branch office. No broker shall be broker-in-charge of more than one office at a time. No office of a firm shall have more than one designated broker-in-charge.

(c) If a firm shares office space with one or more other firms, the same broker may serve as broker-in-charge of multiple firms at that location. All firms at that location having the same designated broker-in-charge shall maintain with the Commission as a delivery address the same delivery address as that of the single designated broker-in-charge.

(d) A licensed real estate firm is not required to have a broker-in-charge if it:

- (1) has been organized for the sole purpose of receiving compensation for brokerage services furnished by its qualifying broker through another firm or broker;
- (2) is treated for tax purposes as a Subchapter S corporation by the United States Internal Revenue Service;
- (3) has no principal or branch office; and
- (4) has no licensed or unlicensed person associated with it other than its qualifying broker.

(e) A broker who is a sole proprietor shall obtain the Commission's designation of himself or herself as a broker-in-charge if the broker engages in any transaction where the broker is required to deposit and maintain monies belonging to others in a trust account, engages in advertising or promoting his or her services as a broker in any manner, or has one or more other brokers affiliated with him or her in the real estate business. Maintenance of a trust or escrow account by a broker solely for holding residential tenant security deposits received by the broker on properties owned by the broker in compliance with G.S. 42-50 shall not, standing alone, subject the broker to the requirement to designate himself or herself as a broker-in-charge.

(f) A broker desiring to be a broker-in-charge shall request in writing his or her designation as broker-in-charge by the Commission on a form provided by the Commission. The form shall include the broker's name, license number, firm affiliation, and a certification that he or she possesses the experience described in Subparagraph (g)(2) of this

1 **Rule.** Upon receipt of notice from the Commission that the broker has been designated as broker-in-charge, the  
2 broker shall assume the duties of broker-in-charge.

3 (g) To qualify to become a broker-in-charge, a broker shall:

- 4 (1) have a license on active status but not on provisional status;
- 5 (2) possess at least two years of full-time real estate brokerage experience or equivalent **four years of**  
6 part-time real estate brokerage experience within the previous five years or real estate **education**  
7 **education, such as the completion of the North Carolina GRI program or other education with a**  
8 **subject matter relating to brokerage practice and the supervision of brokers,** or experience in real  
9 estate transactions that the Commission finds equivalent to such ~~experience;~~ **experience, such as a**  
10 **licensed attorney with a practice that consisted primarily of handling real estate closing and related**  
11 **matters in North Carolina for three years immediately preceding application or full-time, lawful**  
12 **experience selling new homes owned by a corporate homebuilder as a bonafide employee of the**  
13 **corporate home builder for three years immediately preceding the application;** and
- 14 (3) complete the Commission's 12 classroom hour broker-in-charge course either within three years  
15 prior to designation as a broker-in-charge or within 120 days following designation as a broker-in-  
16 charge.

17 Upon the request of the Commission, a broker shall provide **evidence** to the Commission ~~evidence~~ that he or she  
18 possesses the requisite experience. A broker-in-charge designation shall be immediately terminated if a broker-in-  
19 charge fails to complete the broker-in-charge course during the required time period or if the Commission finds the  
20 broker-in-charge does not possess the required experience. A broker who is removed as broker-in-charge for failure  
21 to timely complete the Commission's 12 hour broker-in-charge course must first complete the 12 hour broker-in-  
22 charge course before he or she may again be designated as broker-in-charge.

23 (h) By submission of a broker-in-charge designation request to the Commission, a broker certifies that he or she  
24 possesses the experience required to become a broker-in-charge and upon designation by the Commission, the  
25 broker shall be authorized to act as a broker-in-charge. Upon his or her designation as broker-in-charge and  
26 completion of the broker-in-charge course within the time period prescribed in Subparagraph (g)(3) of this Rule, the  
27 designated broker-in-charge acquires the eligibility to be re-designated as a broker-in-charge at any time in the  
28 future after a period of not actively serving as a broker-in-charge without having to again satisfy the qualification  
29 requirements for initial designation stated in this Paragraph so long as the broker continuously satisfies the  
30 requirements to retain such eligibility described in Paragraph (k) of this Rule.

31 (i) The broker-in-charge shall, in accordance with the requirements of G.S. 93A and the rules adopted by the  
32 Commission, assume the responsibility at his or her office for:

- 33 (1) the retention of current license renewal pocket cards by all brokers employed at the office for  
34 which he or she is broker-in-charge; the ~~proper~~ display of licenses at such office in accordance  
35 with Rule .0101 of this Section; and assuring that each broker employed at the office has complied  
36 with Rules .0503, .0504, and .0506 of this Subchapter;



- (2) the ~~proper~~ notification to the Commission of any change of business address or trade name of the firm and the registration of any assumed business name adopted by the firm for its use;
- (3) the ~~proper~~ conduct of advertising by or in the name of the firm at such office;
- (4) the ~~proper~~ maintenance at such office of the trust or escrow account of the firm and the records pertaining thereto;
- (5) the ~~proper~~ retention and maintenance of records relating to transactions conducted by or on behalf of the firm at such office, including those required to be retained pursuant to Rule .0108 of this Section;
- (6) the ~~proper~~ supervision of provisional brokers associated with or engaged on behalf of the firm at such office in accordance with the requirements of Rule .0506 of this Subchapter;
- (7) the ~~proper~~ supervision of all brokers employed at the office for which he or she is broker-in-charge with respect to adherence to agency agreement and disclosure requirements.

(j) A broker who was the broker-in-charge of a real estate office on April 1, 2006, whose broker-in-charge declaration was received by the Commission prior to that date, and who completed the Commission's broker-in-charge course prior to April 1, 2006 or within 120 days following designation as a broker-in-charge, may continue to serve as a broker-in-charge thereafter until his or her eligibility to serve as a broker-in-charge is terminated as provided in Paragraph (l) of this Rule.

(k) Once a broker has been designated as a broker-in-charge and completed the 12 hour broker-in-charge course as prescribed by Paragraph (g) of this Rule, the broker may maintain broker-in-charge eligibility by timely annual renewal of his or her broker ~~license~~, license and completion each license year of the four hour mandatory continuing education update course ~~prescribed for all brokers and~~ for brokers-in-charge known as the "Real Estate Update Course," "Broker-In-Charge Update [Course,]" Course" described in Rule 58E .0102(b), and ~~completion each license year of the any Commission-approved four hour special continuing education elective course prescribed by the Commission only for brokers in charge and known as the "Broker In Charge Annual Review Course."~~ described in Rule 58E .0305. The Broker-In-Charge Annual Review Update Course ~~must~~ shall be taken initially by a broker-in-charge during the first full license year following the license year in which the broker was designated as a broker-in-charge and ~~must be taken~~ each license year thereafter in order for the broker to maintain broker-in-charge eligibility. ~~The Broker In Charge Annual Review Course shall satisfy the broker's general continuing education elective course requirement, but the broker must also take the mandatory continuing education Real Estate Update Course each license year. The Enrollment in the Broker-In-Charge Annual Review Update Course is reserved shall be limited exclusively for to current brokers-in-charge, and brokers who are not currently acting as a broker-in-charge but who desire to retain their broker-in-charge eligibility. Only these brokers shall receive continuing education elective credit for taking the course~~ Broker-In-Charge Update Course. A broker-in-charge or broker who is broker-in-charge eligible who takes the General Update Course described in Rule .1702 of this Subchapter rather than the Broker-In-Charge Update Course shall receive continuing education update course credit for taking such course only for the purpose of retaining his or her license on active status and shall not be considered to have

1 satisfied the requirement to take the Broker-In-Charge Update Course in order to retain his or her broker-in-charge  
2 status or eligibility.

3 (l) A broker's broker-in-charge eligibility and, if currently designated as a broker-in-charge, his or her broker-in-  
4 charge designation shall be terminated upon the occurrence of any of the following events:

- 5 (1) the broker's license expires or the broker's license is suspended, revoked or surrendered;  
6 (2) the broker's license is made inactive for any ~~reason~~, reason; ~~including failure to satisfy the~~  
7 ~~continuing education requirements described in Rule .1702 of this Subchapter~~;  
8 (3) the broker fails to complete the Broker-In-Charge ~~Annual Review~~ Update Course described in  
9 Paragraph (k) of this Rule; or  
10 (4) the broker is found by the Commission to have not possessed the experience required in Paragraph  
11 (g) of this Rule at the time of either initial designation as a broker-in-charge or re-designation as a  
12 broker-in-charge.

13 (m) When a broker who is a former broker-in-charge desires to be re-designated as a broker-in-charge following  
14 termination of his or her broker-in-charge designation or eligibility, he or she must first have a license on active  
15 status. The broker then must satisfy the experience requirements for initial designation set forth in Paragraph (g) of  
16 this Rule, and the broker must complete the 12 hour broker-in-charge course prior to re-designation as broker-in-  
17 charge.

18 (n) A broker-in-charge shall notify the Commission in writing that he or she no longer is serving as broker-in-  
19 charge of a particular office within 10 days following any such change.

20 (o) A non-resident broker who has been designated by the Commission as the broker-in-charge of an office not  
21 located in North Carolina is not required to complete the broker-in-charge course or the Broker-In-Charge ~~Annual~~  
22 ~~Review~~ Update Course prescribed for brokers-in-charge under Paragraph (k) of this Rule. However, if such broker-  
23 in-charge either becomes a resident of North Carolina or becomes broker-in-charge of an office located within North  
24 Carolina, then he or she must take the 12 hour broker-in-charge course within 120 days of such change, unless he or  
25 she has taken the 12 hour course within the preceding three years. Such broker-in-charge shall take the Broker-In-  
26 Charge ~~Annual Review~~ Update Course prescribed in Paragraph (k) of this Rule during the first full license year  
27 following the change and each license year thereafter so long as the broker-in-charge remains a resident of North  
28 Carolina or continues to manage an office located in North Carolina.

29 (p) A nonresident commercial real estate broker licensed under the provisions of Section .1800 of this Subchapter  
30 shall not act as or serve in the capacity of a broker-in-charge of a firm or office in North Carolina.

31  
32 *History Note:* Authority G.S. 93A-2; 93A-3(c); 93A-4; 93A-4.1; 93A-4.1(c)(8); 93A-4.1(e); 93A-4.2; 93A-9;  
33 93A-9(a).

34 *Eff. September 1, 1983;*

35 *Amended Eff. July 1, 2014; May 1, 2013; July 1, 2010; July 1, 2009; January 1, 2008; April 1,*  
36 *2006; July 1, 2005; July 1, 2004; April 1, 2004; September 1, 2002; July 1, 2001; October 1,*  
37 *2000; August 1, 1998; April 1, 1997; July 1, 1995; July 1, 1994.*

21 NCAC 58E .0102 is amended with changes as published in 28:15 NCR 1746 as follows:

**21 NCAC 58E .0102 UPDATE COURSE COMPONENT**

(a) To renew a license on active status, a real estate broker ~~must shall~~ complete, within one year preceding license expiration and in addition to satisfying the continuing education elective requirement described in Section Rule .0302 of this Subchapter, a Commission-developed ~~update course~~ "General Update Course" described in Paragraph (b) of this Rule consisting of four classroom hours of ~~instruction~~ instruction. ~~[to be known as the "General Update Course."]~~ A broker-in-charge or broker who is broker-in-charge eligible who desires to retain his or her broker-in-charge status or eligibility ~~[must]~~ shall complete in lieu of the "General Update Course" a Commission-developed ~~[update course to be known as the]~~ "Broker-In-Charge Update Course" consisting of four classroom hours of instruction, described in Paragraph (b) of this Rule and [as] prescribed in Rule 58A .0110.

(b) The Commission shall develop annually ~~an update course~~ a General Update Course and a Broker-In-Charge Update Course ~~which that~~ shall be conducted by sponsors approved by the Commission under this Subchapter. The subject matter of ~~this course~~ these courses shall be determined by the Commission, ~~which~~ and shall include instruction on the duties and responsibilities required of brokers by the License Law and Commission rules as well as current trends, standards, or changes affecting the real estate brokerage practice. The Broker-in-Charge Update Course shall also include instruction on the duties and responsibilities required of brokers-in-charge by the License Law and Commission rules. The Commission shall produce instructor and student materials for use by course ~~sponsors, sponsors, and The Commission~~ shall prepare a completely new ~~course~~ courses for each one-year period beginning July 1 and ending the next June 30. Sponsors ~~must shall~~ acquire the Commission-developed course materials and utilize ~~such the~~ materials to conduct the update ~~course~~ courses. The ~~course~~ courses ~~must shall~~ be conducted ~~exactly~~ as prescribed by the rules in this Subchapter and the course materials developed by the Commission. All course materials ~~that are~~ developed by the Commission for use in an update course and that are subject to the protection of federal copyright laws are the property of the Commission. Violation of the Commission's copyright with regard to these materials shall be grounds for disciplinary action. Sponsors ~~must shall~~ provide ~~licensees brokers~~ participating in their classes a copy of the student materials developed by the Commission. With advance approval from the Commission, course sponsors and instructors may make modifications to the update course when the update course is being promoted to and conducted for a group of ~~licensees brokers~~ that specialize in a particular area of real estate brokerage, provided that the modifications relate to the same general subject matter ~~as is~~ addressed in the prescribed update course and the course as modified achieves the same educational objectives as the unmodified course.

(c) ~~Approval of a sponsor to conduct an update course authorizes the sponsor to conduct the update course using an instructor~~ Approved sponsors shall conduct update courses using an instructor who has been approved by the Commission as an update course instructor under Section .0200 of this Subchapter. The sponsor may conduct the update course at any location as frequently as is desired during the approval ~~period, provided that~~ period; however, no courses may be conducted between June 11 and June 30 of any approval period.

1     *History Note:*     *Authority G.S. 93A-3(c); 93A-4.1;*  
2                         *Eff. July 1, 1994;*  
3                         *Amended Eff. July 1, 2014; [July 1, 2014,] April 1, 2006; July 1, 2000.*