

RRC STAFF OPINION

PERIODIC REVIEW AND EXPIRATION OF EXISTING RULES REPORT

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 REPORT AT ITS NEXT MEETING, OR 2) AN OPINION OF THAT ATTORNEY AS TO SOME MATTER CONCERNING THAT REPORT. THE AGENCY AND MEMBERS OF THE PUBLIC ARE INVITED TO SUBMIT THEIR OWN COMMENTS AND RECOMMENDATIONS (ACCORDING TO RRC RULES) TO THE COMMISSION.

AGENCY: Office of State Budget and Management

REPORT: 09 NCAC 03A .0103

RECOMMENDED ACTION:

Approve, but note staff's comment

X Find the comment for Rule 09 NCAC 03A .0103 has merit and designate the Rule as necessary as "Necessary With Substantive Public Interest."

09 NCAC 03A .0103 BUDGET MANUAL

The budget manual sets forth policies and procedures to be followed by state agencies in preparing, monitoring and executing the state's budget. Copies of the budget manual shall be provided to the various departments of state government and are available for public inspection at the Office of State Budget and Management which is located in the Administration Building, 116 West Jones Street, Raleigh, North Carolina.

*History Note: Authority G.S. 143-2;
Eff. February 1, 1976;
Readopted Eff. February 27, 1979;
Amended Eff. April 1, 1989.*

Public Comment:

From: Robert A, (Bobby) Bryan, Jr.

To: Brandon James, OSBM

Subject: comments on 09 NCAC 03 .0103 BUDGET MANUAL

Please accept these comments on the rule, 09 NCAC 03A .0103 BUDGET MANUAL, which is now open for public comment pursuant to G.S. 150B-21.3A, Periodic Review and Expiration of Existing Rules. It is my understanding that your agency has determined that this rule is "necessary without substantive public interest." I would contend that the rule should be designated as "necessary with substantive public interest."

By way of introduction, I am a retired State employee. For over 20 years, I was employed as Commission Counsel for the Rules Review Commission. I am intimately familiar with the Administrative Procedure Act and its requirements for what should be adopted as a rule and the standards that a rule must meet. The rule in question does not meet the standards necessary for Rules Review Commission approval set forth in G.S. 150B-21.9(a).

The rule in question purports to tell what is in the budget manual and provides for its availability. Even though at least part of the budget manual meets the definition of "rule" in G.S. 150B-2(8a), it does not appear that the actual contents of the manual appear anywhere in the North Carolina Administrative Code. The budget manual contains procedures State agencies must use in preparing fiscal notes on rules even though this rule does not address that issue. This violates at least two of the standards set forth in G.S. 150B-21.9(a). It appears that this rule is attempting to incorporate the agency's unadopted and therefore non-binding material into the Administrative Code by reference. This is not allowed by the Administrative Procedure Act. There is no authority granted to the agency by the General Assembly for it to incorporate its own unadopted materials without adopting them pursuant to the procedures set out in the Administrative Procedure Act, and, since the provisions are not in the Administrative Code, it is not clear what the requirements are.

While the authority cited in the history note for this rule, G.S. 143-2, has been repealed, it may well be that there exists statutory authority for the Office of State Budget and Management to adopt the information in the budget manual as a rule. The problem is that the information has not been so adopted. G.S. 150B-2(8a) defines "rule" as "any agency regulation, standards, or statement of general applicability that implements or interprets an enactment of the General Assembly . . ." G.S. 150B-2(8a)b. exempts "[b]udgets and budget policy and procedures issued by the Director of the Budget . . ." from the definition of "rule." This exemption exempts much of what is in the manual from the definition of "rule" and thus the need to be adopted pursuant to the provisions of the Administrative Procedure Act. However, that exemption does not apply to requirements set by the agency in implementing its authority under G.S. 150B-21.4(b1) regarding State agencies preparing fiscal notes on rules with substantial economic impacts and certifying that those rules adhere to the regulatory principles in G.S. 150B-19.1(a)(2), (5) and (6).

"Substantial economic impact" is defined as "an aggregate financial impact on all persons affected

of at least one million dollars (\$1,000,000) in a 12-month period." These requirements are not "[b]udgets or budget policies and procedures." The exemption in G.S. 150B-2(8a)b. relates to certain powers of the Director of the Budget and not to everything the Office of State Budget and Management may do. There is no total exemption for the agency such as could have been given in G.S. 150B-1(d). When the agency creates requirements other than budgets and budget policy and procedures, it is subject to the rulemaking requirements of G.S. 150B. G.S. 150B-18 clearly states that "[a] rule is not valid unless it is adopted in substantial compliance with [Article 2A of the Administrative Procedure Act]. An agency shall not seek to implement or enforce against any person a policy, guideline, or any interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule pursuant to [Article 2A of the Administrative Procedure Act]." Because at least part of what is in the budget manual meets the definition of "rule," that part is not valid or enforceable since it has not been properly adopted. There is no authority given to an agency to adopt a rule implying that a manual not adopted as a rule sets forth requirements that must be followed. If the rule is intended to apply only to that part of the manual exempt from rulemaking, that is unclear and ambiguous.

As a practical matter, the agency has been implementing and enforcing that part of the manual required to be adopted as a rule to be enforceable in violation of G.S. 150B-18. If your agency contends that the rule in question incorporates by reference the budget manual and thus is in compliance with the rulemaking provisions of the Administrative Procedure Act, that is unclear, ambiguous, and not consistent with the requirements of the Administrative Procedures Act. G.S. 150B-21.6 sets out the materials that an agency may incorporate by reference without repeating the text of the reference material. This statute does not allow an agency to adopt a rule incorporating its own unadopted material into a rule thus bypassing the rulemaking provisions. If such an adoption were otherwise allowable, then the rule would still fail because it does not state whether the incorporated material includes subsequent amendments and editions. Since the rule was last amended 25 years ago and the budget manual has undergone many changes since then, it would not be clear what version of the manual would apply to fiscal notes and 150B-19.1 certifications.

For the reasons stated above, 09 NCAC 03A .0103 BUDGET MANUAL should be designated as necessary with substantive public interest. Thank you for your consideration.

Agency Response:

Mr. Bryan raises two issues:

- (1) that the rule attempts to incorporate OSBM's unadopted materials into the administrative code by reference in violation of the Administrative Procedure Act and
- (2) that the Budget Manual addresses State agency preparation of fiscal notes and certification and these provisions are not "budgets and budget policies and procedures" exempt from rulemaking.

In response to the first point, the rule is not an attempt to incorporate the Budget Manual into the administrative code by reference.

In response to the second point, G.S. 150B-2(8a)b. states that "budgets and budget policies and procedures issued by the Director of the Budget" are not rules. G.S. 143C-1-1(d)(3) defines "budget" as "a plan to provide and spend money for specified programs, functions, activities, or objects during a fiscal year." A fiscal note is not defined in Chapter 150B, but is defined in the Budget Manual as "a realistic estimate of the impact of a proposed rule change." See 7.2, Budget Manual, p. 165. The "impact" relates to the expenditure or distribution of State funds. G.S. 150B-21.4 requires submission of a fiscal note to OSBM for permanent rules changes "that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes." As the Budget Manual states, "a rule change that causes any additional cost to the state or that moves funds requires OSBM approval." See, 7.4.1, Budget Manual, p. 172. A fiscal note "must state the amount of funds that would be expended or distributed as a result of a proposed rule change." G.S. 150B-21.4(a). The rulemaking provisions of Chapter 150B do not apply to fiscal note and certification policies and procedures because these are budget policies and procedures dealing specifically with the expenditure, distribution, or impact of "money for specified programs, functions, activities or objects during a fiscal year."

Staff Recommendation:

Staff recommends finding that the public comment has merit. The comment addresses specific substance of the Rule and three standards of RRC review: (1) ambiguity; (2) failure to follow the APA by improperly incorporating the material required by G.S. 150B-21.6; and (3) lack of statutory authority, as the agency does not cite to any current authority for the Rule or to reference material that the agency may change outside of rulemaking.

Ambiguity: Staff agrees with Mr. Bryan's statement that simply referring to the Budget Manual and not stating what is contained within it makes the Rule unclear.

Failure to comply with the APA: In its response, the agency states that it is not attempting to incorporate the manual by reference. If so, staff cannot determine the purpose of this Rule.

Lack of statutory authority I: Staff notes that the sole statute cited in the History Note, G.S. 143-2, was repealed by Session Law 2006-203, s. 1, effective July 1, 2007. Therefore, while the agency may have statutory authority to promulgate a rule for the Budget Manual, it fails to cite to one for the Rule. The agency does not address this point raised by Mr. Bryan's comment in its response.

Lack of statutory authority II: The comment states that the agency is without statutory authority to reference a manual that the agency may change outside of rulemaking. In its response, the agency states that the Director of the Budget is exempt from rulemaking for "budgets and budget policies and procedures" under G.S. 150B-2(8a)(b). Staff believes this is an overly broad interpretation of the law, which applies not only to the Director of the Budget, but to all agency heads and the State Board of Elections as it relates to budgets and budget policies and procedures.

In his comment, Mr. Bryan points out that G.S. 150B-2(8a)(b) does not create a blanket exemption for rulemaking for the Director of the Budget, and if the agency was completely exempt from rulemaking, the exemption would be listed in G.S. 150B-1(d). Staff notes that G.S. 150B-21.4, the statute that sets forth the requirements for a fiscal note, specifically speaks to the State Budget Act as G.S. 143C. Staff believes that if the agency was intended to receive a blanket exemption or a specific exemption for G.S. 143C, the legislature would have cited the statute in 150B-2(8a)(b).

In its response, the agency cites to G.S. 143C, the State Budget Act. G.S. 143C-1 states, in relevant part:

(b) The provisions of this Chapter shall apply to every State agency, unless specifically exempted herein, and to every non-State entity that receives or expends any State funds. No State agency or non-State entity shall expend any State funds except in accordance with an act of appropriation and the requirements of this Chapter. The provisions of Chapter 120 of the General Statutes shall continue to apply to the General Assembly and to control its expenditures and in the event of a conflict with this Chapter, the provisions of Chapter 120 of the General Statutes shall control. Nothing in this Chapter abrogates or diminishes the inherent power of the legislative, executive, or judicial branch.

G.S. 143C applies to the expenditure of state funds. The agency states in its response that the preparation of fiscal notes only relates to the expenditure of state funds. However, as Mr. Bryan points out in his comment, the Budget Manual, last revised January 1, 2014, also addresses assessing local funds and “substantial economic impact” through fiscal notes. Substantial economic impact includes private funds. Further, the Budget Manual in Section 7.5 tells agencies how to submit the fiscal notes, specifically stating that only electronic submissions will be considered.

Staff agrees with Mr. Bryan that even if the Budget Manual contains some policies that are in fact exempt from rulemaking because it is regarding only state budget policies, parts of the manual exceeds the scope of the exemption, including Section 7.0, which addresses OSBM requirements for the fiscal note required by G.S. 150B-21.4. (Section 7.0 of the Budget Manual is attached.)

G.S. 150B-2(8a) states a “rule” means, “[A]ny agency regulation, standards, or statement of general applicability that implements or interprets an enactment of the General Assembly... or that describes the procedure or practice requirements of an agency.” Staff believes that at least parts of the Budget Manual are rules and not budget policies exempted under G.S. 150B-21.2(8a)(b), and are therefore required to be promulgated under the APA.

N.C.G.S.A. § 150B-2

§ 150B-2. Definitions

Effective: August 23, 2013

[Currentness](#)

As used in this Chapter,

(1) “Administrative law judge” means a person appointed under [G.S. 7A-752](#), [7A-753](#), or [7A-757](#).

(1a) “Agency” means an agency or an officer in the executive branch of the government of this State and includes the Council of State, the Governor’s Office, a board, a commission, a department, a division, a council, and any other unit of government in the executive branch. A local unit of government is not an agency.

(1b) “Adopt” means to take final action to create, amend, or repeal a rule.

(1c) “Codifier of Rules” means the Chief Administrative Law Judge of the Office of Administrative Hearings or a designated representative of the Chief Administrative Law Judge.

(1d) “Commission” means the Rules Review Commission.

(2) “Contested case” means an administrative proceeding pursuant to this Chapter to resolve a dispute between an agency and another person that involves the person’s rights, duties, or privileges, including licensing or the levy of a monetary penalty. “Contested case” does not include rulemaking, declaratory rulings, or the award or denial of a scholarship, a grant, or a loan.

(2a) Repealed by [Laws 1991, c. 418, § 3](#).

(2b) “Hearing officer” means a person or group of persons designated by an agency that is subject to Article 3A of this Chapter to preside in a contested case hearing conducted under that Article.

(3) “License” means any certificate, permit or other evidence, by whatever name called, of a right or privilege to engage in any activity, except licenses issued under Chapter 20 and Subchapter I of Chapter 105 of the General Statutes and occupational licenses.

(4) “Licensing” means any administrative action issuing, failing to issue, suspending, or revoking a license or occupational license. “Licensing” does not include controversies over whether an examination was fair or whether the applicant passed the examination.

(4a) “Occupational license” means any certificate, permit, or other evidence, by whatever name called, of a right or privilege to engage in a profession, occupation, or field of endeavor that is issued by an occupational licensing agency.

(4b) “Occupational licensing agency” means any board, commission, committee or other agency of the State of North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within a particular profession, occupation or field of endeavor, and which is authorized to issue and revoke licenses. “Occupational licensing agency” does not include State agencies or departments which may as only a part of their regular function issue permits or licenses.

(5) “Party” means any person or agency named or admitted as a party or properly seeking as of right to be admitted as a party and includes the agency as appropriate.

(6) “Person aggrieved” means any person or group of persons of common interest directly or indirectly affected substantially in his or its person, property, or employment by an administrative decision.

(7) “Person” means any natural person, partnership, corporation, body politic and any unincorporated association, organization, or society which may sue or be sued under a common name.

(7a) “Policy” means any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency which is intended and used purely to assist a person to comply with the law, such as a guidance document.

(8) “Residence” means domicile or principal place of business.

(8a) “Rule” means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:

- a. Statements concerning only the internal management of an agency or group of agencies within the same

principal office or department enumerated in [G.S. 143A-11](#) or [143B-6](#), including policies and procedures manuals, if the statement does not directly or substantially affect the procedural or substantive rights or duties of a person not employed by the agency or group of agencies.

b. Budgets and budget policies and procedures issued by the Director of the Budget, by the head of a department, as defined by [G.S. 143A-2](#) or [G.S. 143B-3](#), by an occupational licensing board, as defined by [G.S. 93B-1](#), or by the State Board of Elections.

c. Nonbinding interpretative statements within the delegated authority of an agency that merely define, interpret, or explain the meaning of a statute or rule.

d. A form, the contents or substantive requirements of which are prescribed by rule or statute.

e. Statements of agency policy made in the context of another proceeding, including:

1. Declaratory rulings under [G.S. 150B-4](#).

2. Orders establishing or fixing rates or tariffs.

f. Requirements, communicated to the public by the use of signs or symbols, concerning the use of public roads, bridges, ferries, buildings, or facilities.

g. Statements that set forth criteria or guidelines to be used by the staff of an agency in performing audits, investigations, or inspections; in settling financial disputes or negotiating financial arrangements; or in the defense, prosecution, or settlement of cases.

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

i. Job classification standards, job qualifications, and salaries established for positions under the jurisdiction of the State Human Resources Commission.

j. Establishment of the interest rate that applies to tax assessments under [G.S. 105-241.21](#) and the variable component of the excise tax on motor fuel under [G.S. 105-449.80](#).

k. The State Medical Facilities Plan, if the Plan has been prepared with public notice and hearing as provided in [G.S. 131E-176\(25\)](#), reviewed by the Commission for compliance with [G.S. 131E-176\(25\)](#), and approved by the Governor.

l. Standards adopted by the Office of Information Technology Services applied to information technology as defined by [G.S. 147-33.81](#).

(8b) Repealed by [S.L. 2011-398, § 61.2, eff. July 25, 2011](#).

(8c) “Substantial evidence” means relevant evidence a reasonable mind might accept as adequate to support a conclusion.

(9) Repealed by Session [Laws 1991, c. 418, § 3](#).

Credits

Added by Laws 1973, c. 1331, § 1. Amended by Laws 1975(2nd Sess.), c. 983, §§ 61, 62; Laws 1977, c. 915, § 5; Laws 1983, c. 641, § 1; Laws 1985, c. 746, § 1; Laws 1985 (Reg. Sess., 1986), c. 1022, § 1(2) to (5); Laws 1987, c. 878, §§ 1, 2; Laws 1987, c. 878, § 21; Laws 1987 (Reg. Sess., 1988), c. 1111, § 17; [Laws 1991, c. 418, § 3](#); [Laws 1991, c. 477, §§ 3.1, 3.2](#); [Laws 1991, c. 477, § 9](#); [Laws 1995, c. 390, § 29](#); [Laws 1996 \(2nd Ex. Sess.\), c. 18, § 7.10\(g\)](#); [S.L. 2003-229, § 12, eff. July 1, 2003](#); [S.L. 2007-491, § 44, eff. Jan. 1, 2008](#); [S.L. 2011-13, § 2, eff. March 25, 2011](#); [S.L. 2013-188, § 7, eff. June 26, 2013](#); [S.L. 2013-382, § 9.1\(c\), eff. Aug. 21, 2013](#); [S.L. 2013-413, § 1, eff. Aug. 23, 2013](#).

§ 143C-1-1. Purpose and definitions

Effective: July 1, 2014

(a) Title of Chapter. -- This Chapter is the “State Budget Act” and may be cited by that name.

(b) The provisions of this Chapter shall apply to every State agency, unless specifically exempted herein, and to every non-State entity that receives or expends any State funds. No State agency or non-State entity shall expend any State funds except in accordance with an act of appropriation and the requirements of this Chapter. The provisions of Chapter 120 of the General Statutes shall continue to apply to the General Assembly and to control its expenditures and in the event of a conflict with this Chapter, the provisions of Chapter 120 of the General Statutes shall control. Nothing in this Chapter abrogates or diminishes the inherent power of the legislative, executive, or judicial branch.

(c) Purpose. -- This Chapter establishes procedures for the following:

(1) Preparing the recommended State budget.

(2) Enacting the State budget.

(3) Administering the State budget.

(d) Definitions. -- The following definitions apply in this Chapter:

(1) Appropriation. -- An enactment by the General Assembly authorizing the withdrawal of money from the State treasury. An enactment by the General Assembly that authorizes, specifies, or otherwise provides that funds may be used for a particular purpose is not an appropriation.

(1a) Authorized budget.--The certified budget with changes authorized by the Director of the Budget through authority granted in [G.S. 143C-6-4](#) or other statutes.

(1b) Availability.--The total anticipated cash available within a fund for appropriation purposes, including unreserved fund balance and all revenue and receipts anticipated in a fiscal year.

(1c) Base Budget.--That part of the recommended State budget that provides the baseline for the next biennium. The base budget for each State agency shall be the authorized budget for that agency with adjustments only for the following:

- a. Annualization of programs and positions.
- b. Reductions to adjust for items funded with nonrecurring funds during the prior fiscal biennium.
- c. Increases to adjust for nonrecurring reductions during the prior fiscal biennium.
- d. Adjustments for federal payroll tax changes.
- e. Rate increases in accordance with the terms of existing leases of real property.
- f. Adjustments to receipt projections, made in accordance with [G.S. 143C-3-5\(b\)\(2\)c](#).
- g. Reconciliation of intragovernmental and intergovernmental transfers.

(2) Biennium. -- The two fiscal years beginning on July 1 of each odd-numbered year and ending on June 30 of the next odd-numbered year.

(3) Budget. -- A plan to provide and spend money for specified programs, functions, activities, or objects during a fiscal year.

(4) Budget year. -- The fiscal year for which a budget is proposed and enacted.

(5) Capital improvement. -- A term that includes real property acquisition, new construction or rehabilitation of existing facilities, and repairs and renovations.

(6) Capital Improvements Appropriations Act. -- An act of the General Assembly containing appropriations for one or more capital improvement projects.

(7) Certified budget.--The budget as enacted by the General Assembly including adjustments made for (i) distributions to State agencies from statewide reserves appropriated by the General Assembly, (ii) distributions of reserves appropriated to a specific agency by the General Assembly, and (iii) organizational or budget changes mandated by the General Assembly.

(7a) Repealed by [S.L. 2014-100, § 6.4\(a\)](#), eff. July 1, 2014.

(8) Controller. -- The Office of the State Controller.

(9) Current Operations Appropriations Act. -- An act of the General Assembly estimating revenue availability for and appropriating money for the current operations of State government during one or more budget years.

(10) Departmental receipt. -- Fees, licenses, federal funds, grants, fines, penalties, tuition, and other similar collections or credits generated by State agencies in the course of performing their governmental functions that are applied to the cost of a program administered by the State agency or transferred to the Civil Penalty and Forfeiture Fund pursuant to [G.S. 115C-457.1](#), and that are not defined as tax proceeds or nontax revenues. Departmental receipts may include moneys transferred into a fiscal year from a prior fiscal year.

(11) Director. -- The Director of the Budget, who is the Governor.

(12) Encumbrance. -- A financial obligation created by a purchase order, contract, salary commitment, unearned or prepaid collections for services provided by the State, or other legally binding agreement.

(13) Fiscal period. -- A fiscal biennium beginning in odd-numbered years or the first or second fiscal year within a fiscal biennium.

(14) Fiscal year. -- The annual period beginning July 1 and ending on the following June 30.

(15) Fund. -- A fiscal and accounting entity with a self-balancing set of accounts recording cash and other resources, together with all related liabilities and residual equities or balances, and changes therein, for the purpose of carrying on stated programs, activities, and objectives of State government.

(16) General Fund Operating Budget. -- The sum of all appropriations from the General Fund for a fiscal year, except appropriations for (i) capital improvements, including repairs and renovations, and (ii) one-time expenditures due to natural disasters or other emergencies shall not be included.

(16a) Increase the scope.--With respect to a capital improvement project, either increasing the square footage of a capital improvement project by more than ten percent (10%) of the amount authorized or programming new functions into the project.

(17) Information technology. -- As defined in [G.S. 147-33.81\(2\)](#).

(18) Non-State entity. -- Any of the following that is not a State agency: an individual, a firm, a partnership, an association, a county, a corporation, or any other organization or group acting as a unit. The term includes a unit of local government and public authority.

(19) Nontax revenue.--Revenue that is not a tax proceed or a departmental receipt and that is required by statute to be credited to a fund.

(20) Object or line item. -- An expenditure or receipt in a recommended or enacted budget that is designated in the Budget Code Structure of the North Carolina Accounting System Uniform Chart of Accounts prescribed by the Office of the State Controller.

(21) Performance information. -- The organizational structure, agency activity statements, performance indicators, and analyses of program efficiency and effectiveness.

(22) Public authority. -- A municipal corporation that is not a unit of local government or a local governmental authority, board, commission, council, or agency that (i) is not a municipal corporation and (ii) operates on an area, regional, or multiunit basis, and the budgeting and accounting systems of which are not fully a part of the budgeting and accounting systems of a unit of local government.

(23) Purpose or program. -- A group of objects or line items for support of a specific activity outlined in a recommended or enacted budget that is designated by a nine-digit fund code in accordance with the Budget Code Structure of the North Carolina Accounting System Uniform Chart of Accounts prescribed by the Office of the State Controller.

(24) State agency. -- A unit of the executive, legislative, or judicial branch of State government, such as a department, an institution, a division, a commission, a board, a council, or The University of North Carolina. The term does not include a unit of local government or a public authority.

(25) State funds. -- Any moneys including federal funds deposited in the State treasury except moneys deposited in a trust fund or agency fund as described in [G.S. 143C-1-3](#).

(26) State resources. -- All financial and nonfinancial assets of the State.

(27) State revenue. -- An increase, other than interfund transfers and debt issue proceeds, in the financial assets of any State governmental or proprietary fund.

(28) Statutory appropriation. -- An appropriation that authorizes the withdrawal of funds from the State treasury during fiscal years extending beyond the current fiscal biennium, without further act of the General Assembly.

(29) Unit of local government. -- A municipal corporation that has the power to levy taxes, including a consolidated city-county, as defined by [G.S. 160B-2\(1\)](#), and all boards, agencies, commissions, authorities, and institutions thereof that are not municipal corporations.

(30) Unreserved fund balance.--The available cash balance effective June 30 after excluding documented encumbrances, unearned revenue, statutory requirements, and other legal obligations to a fund's cash balance as determined by the State Controller. Beginning unreserved fund balance equals ending unreserved fund balance from the prior fiscal year.

Credits

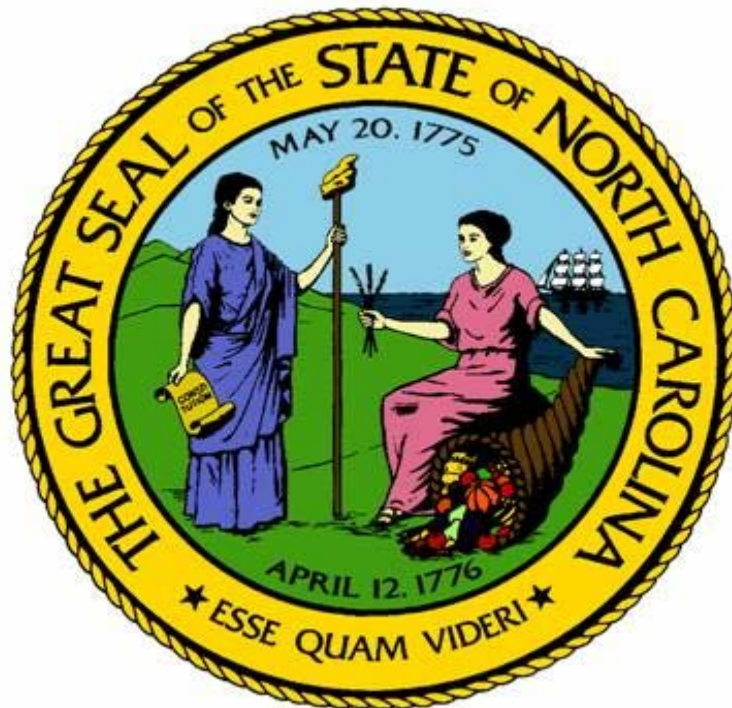
Added by [S.L. 2006-203, § 3](#), eff. July 1, 2007. Amended by [S.L. 2006-66, § 6.19\(h\)](#), eff. July 1, 2007; [S.L. 2007-393, § 2](#), eff. Oct. 1, 2007; [S.L. 2010-31, § 30.8](#), eff. July 1, 2010; [S.L. 2013-360, §§ 6.12\(a\), \(b\), \(h\), \(i\)](#), eff. July 1, 2013; [S.L. 2014-100, §§ 6.4\(a\), \(b\)](#), eff. July 1, 2014.

OFFICE OF STATE BUDGET AND MANAGEMENT

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North Carolina Budget Manual



**STATE OF NORTH CAROLINA
BUDGET MANUAL
OFFICE OF STATE BUDGET AND MANAGEMENT**

Effective Date July 1, 2013

Updated January 1, 2014

INTRODUCTION

The Office of State Budget and Management (OSBM) prepares the Budget Manual for the State of North Carolina for use by state departments, agencies and institutions in the preparation and administration of their budgets. The Manual is a guide to state departments and agencies in discharging their duties under applicable laws and regulations. It is the responsibility of department heads and their fiscal staffs to acquaint themselves with the Manual.

The Manual is divided into ten major sections:

1. State Budget Act
2. Budget Development
3. Budget Execution
4. Fiscal Policies and Regulations
5. Travel Policies and Regulations
6. Personnel
7. Rule Analysis
8. Reporting
9. Municipal Population Estimates
10. Glossary

There are several features that should facilitate referencing and navigating throughout the Manual. First, there is a table of contents at the beginning and an index at the end of each section that will assist users with quick referencing. Second, specific General Statute citations are referenced throughout the Manual and the online version includes direct links to the appropriate General Statute. A third feature, also in the online version, is the inclusion of direct links to other sites for useful information and documents.

All revisions, supplements and deletions to the Manual will be issued through the State Budget Director. Departmental officials and their staffs should maintain a current version of the Manual that will be updated online periodically by OSBM. The header at the top of each page in the Manual reflects the effective date of this version of the Manual and the date of the most recent updates to this version. The appendix at the end of the Manual lists revisions to date.

Any exceptions to the rules, regulations, or guidelines stated in the Budget Manual, except those exceptions expressly delegated, must be approved by OSBM. These policies may be superseded by OSBM directives or agency policies as long as they conform to the basic principles of the State Budget Manual.

An [OSBM staff directory](#) and a list of [Budget Memorandums](#) are available on OSBM's website.

**STATE OF NORTH CAROLINA
BUDGET MANUAL
OFFICE OF STATE BUDGET AND MANAGEMENT**

Effective Date July 1, 2013

Updated January 1, 2014

Questions, comments, or suggestions concerning the Budget Manual may be sent to Budget-Manual-OSBM@osbm.nc.gov or you can call 919-807-4700. Periodically, OSBM will revise the Budget Manual to reflect policy and procedure changes and to make the Budget Manual more user-friendly.

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7.0 RULE ANALYSIS

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7.1 Analysis of Rules

The Administrative Procedure Act, [Chapter 150B](#) of the General Statutes, and [Executive Order No. 70](#) establish procedural requirements for the adoption, amendment, and repeal of administrative rules. They include requirements for agency development of fiscal notes and rules to meet OSBM review, approval, and certification. Compliance with the following procedures will satisfy the minimum analysis required for OSBM review, approval, and certification under [Chapter 150B](#), [E.O. 70](#), and the policies of the Director of the Budget.

A fiscal note is used to anticipate and evaluate the likely consequences of rules. It provides a formal and systematic way of organizing evidence on the key effects of rules. A good analysis is designed to inform the public and other stakeholders of the effects of the proposed action. It can also demonstrate that a proposed action is reasonable and justified.

7.2 Definitions

- “Affected Parties” means those persons who bear an economic impact from the proposed rule change.
- “Agency” means any institution, board, commission, bureau, department, division, council, or officer of the State, but does not include any agency in the legislature or judicial branch of state or local government. (See [G.S. 150B-2\(1a\)](#) for further description).
- “Approval for publication” means the requirement that the agency must receive OSBM approval before it may publish a proposed rule change in the [North Carolina Register](#).
- “Baseline” means the best assessment of the way the world would look absent the proposed rule change. This assessment must account for current [N.C. General Statutes](#) and rules contained in the [N.C. Administrative Code](#). Informal agency policies not adopted as rules in compliance with [Chapter 150B](#) must be excluded from the assessment of the baseline.

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- “Certification before adoption” means the requirement that the agency must receive OSBM certification that it has complied with the principles of [G.S. 150B-19.1](#) and Section 2 of [E.O. 70](#), when applicable, before it may adopt a rule.
- “Certification of federal requirement” means (specifically, as required under [G.S. 150B-19.1. \(g\)](#)) the certification identifying:
 - The federal law that the rule is purported to implement;
 - The federal law that requires the rule or for which the rule is necessary for compliance; or
 - The federal law which places conditions on the receipt of federal funds.

If all or part of the proposed rule is not required by federal law or exceeds the requirements of federal law, then the certification shall state the reasons.

- “Fiscal note” means a realistic estimate of the impact of a proposed rule change.
- “Local funds” are receipts from nonfederal and non-state governmental units and public interest organizations including county and city funds, third party matching funds, and in-kind contributions.
- “Opportunity cost” is the value of benefits that could have been received from an alternative that is forgone as a result of the regulatory action. The use of any resource, including a person’s time, has an opportunity cost. That opportunity cost is equal to the net benefit the resource would have provided in the absence of the regulatory action. For example, if a regulatory action adds paperwork and reporting requirements, the opportunity cost is the value of the staff time now used to comply with the added requirements.
- “Person” means any natural person, partnership, corporation, body politic, unincorporated association, organization, or society that may sue or be sued under a common name.
- “Permanent rule” is a rule adopted in accordance with the requirements of [G.S. 150B-21.2](#).
- “Responsible agency fiscal officer” is the person designated by the department to certify that the agency has prepared an accurate impact analysis or fiscal note.
- “Rule” means each agency regulation, standard, or statement of general applicability that implements or interprets laws enacted by the General Assembly or Congress, or amends or repeals a prior rule. (See [G. S. 150B-2\(8a\)](#) for further clarification).
- “Rule Change” means the package of individual rules that are new or proposed for amendment that the agency is requesting to publish and adopt together. Collectively this package of rules is the new policy the agency is proposing to implement.

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- “State funds” are any moneys, including federal funds and any funds appropriated by the General Assembly, deposited in the State treasury except moneys deposited in a trust fund or agency fund as described in [G.S. 143C-1-3](#) ([G.S. 143C-1-1](#)).
- “Substantial economic impact” means an aggregate financial impact on all persons affected of at least five hundred thousand dollars (\$500,000) in a 12-month period. (See [G.S. 150B-21.4 \(b1\)](#) for further clarification). Both costs and benefits must be included when estimating this financial impact. For example, a rule change with \$300,000 of estimated benefits and \$200,000 of estimated costs would have a substantial economic impact.

7.3 Procedures for Agencies Covered by Executive Order 70

In addition to the requirements of the [Administrative Procedure Act](#), Cabinet agencies and all boards and commissions with rule-making powers located within the Cabinet agencies must also follow [Executive Order 70](#). Procedures for approval for publication and certification before adoption for these agencies are covered in this section. Procedures for agencies not covered by [E.O. 70](#) start in section 7.4.

7.3.1 OSBM Review and Approval before Publication

Before publishing permanent rule changes in the [North Carolina Register](#), an agency must obtain approval for publication from OSBM. Approval for publication includes the rule change and fiscal note as submitted to OSBM. In order to ensure adequate review time, agencies must send rule changes and fiscal notes to OSBM at least 60 days prior to the intended date of publication. To the extent a permanent rule change or fiscal note is significantly modified after approval by OSBM for publication but before publication in the [North Carolina Register](#), the rule change and fiscal note must be resubmitted for OSBM review. Significant modifications would include changing the cost or benefit estimate or adding or removing policies or procedures in the rule change.

There are three types of permanent rule changes, and each requires a different level of OSBM review. Each is briefly described below:

- a) De minimis rules – Rules with little to no impact on state funds, local funds, or private entities.
- b) Non-substantial economic impact rules – Rules that have (1) an aggregate economic impact of less than five hundred thousand dollars (\$500,000) in a 12-month period; and (2) impact State or local government funds or have a significant policy impact.
- c) Substantial economic impact rules – Rules with an aggregate economic impact on all persons affected of *at least* five hundred thousand dollars (\$500,000) in a 12-month period.

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7.3.2 Information Submitted to OSBM before Publication

A good fiscal note does not follow a strict formula or template. Different rule changes require different emphases and levels of analysis, depending on the nature and complexity of the rule change. As a result, there are three tiers of information required in a fiscal note. The first tier is required for de minimis rule changes. The second tier is required for any non-substantial economic impact rule changes, while the third tier is reserved for substantial economic impact rule changes. The general framework for the three tiers follows.

7.3.2.1 Tier I - De Minimis Rules

There are many rule changes that propose minor changes to policy or have a small economic impact. These rule changes do not require nearly the same level of analysis as a larger rule change. Examples of such rule changes include technical changes, clarifications and updates to current rule language, and rules that have no impact on state or local funds and have a de minimis impact on the private sector.

For de minimis rule changes, a brief description of the rule change must be submitted to OSBM for review and approval. The brief description must include:

- The title of the rule change and North Carolina Administrative Code citation;
- The name of the agency proposing the rule and agency contact information;
- A citation to the statute authorizing the rule change or the federal law or regulation requiring the rule;
- A brief statement identifying whether or not the rule has State, local, federal government, or substantial economic impact;
- A brief description of the rule, its purpose, likely impact of costs and benefits, and how it would benefit the public interest;
- A copy of the proposed rule text; and
- The certification of federal requirement.

7.3.2.2 Tier II - Non-Substantial Economic Impact Rules

For permanent rule changes with (1) a non-substantial economic impact and (2) an impact on State or local government funds or a significant policy impact, the fiscal note must include the following information:

a) General Information

- The title of the rule change and North Carolina Administrative Code citation;
- The name of the agency proposing the rule and agency contact information;
- A citation to the statute authorizing the rule change or the federal law or regulation requiring the rule;
- A brief statement identifying whether or not the rule has State, local, federal government, or substantial economic impact;

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- Information on the source of funds that would be used to cover new costs if the rule change requires disbursement of state funds so that OSBM can certify the existence of funds (see [G.S. 150B-21.4\(a\)](#));
 - A copy of the proposed rule; and
 - The certification of federal requirement.
- b) Summary of the Proposed Regulation
- Description of the change – Given the broad intended audience for this analysis, this discussion must be clear, concise, and avoid technical jargon.
 - Purpose of the rule change – Describe the need for the proposed action, including a clear description of the problem or issue a rule change is intended to address. Discuss any expected improvements in public health, safety, or welfare.
- c) Economic Analysis – This section is the heart of the fiscal note and must describe how the agency estimated the impact of the rule change. The depth of the fiscal note must correspond to the complexity and impact of the rule. Below are some general considerations that must be taken into account when evaluating the economic impact of the proposed rule change:
- Scope of Analysis –The appropriate time frame for analysis is dependent on the nature of a specific rule change and must cover a period long enough to encompass the important costs and benefits likely to result from the rule change. For many rule changes, a per year estimate may be sufficient. For others, such as a rule change with phased implementation over a number of years, the appropriate time frame may be much longer.
 - Baseline – The impacts identified must be measured against a baseline. This baseline must be the best assessment of the way the world would look if the rule change is not adopted. This assessment must account for effective [N.C. General Statutes](#) and rules contained in the [N.C. Administrative Code](#). Informal agency policies not adopted as rules in compliance with [G.S. 150B](#) must be excluded from the assessment of the baseline.
 - Cost Estimates – The economic impact of the rule change is the incremental difference between the baseline and the future condition expected after implementation of the regulation. Direct costs as well as opportunity costs must be included. How is the rule change expected to change the current state? What costs are associated with these changes? Agencies must include tables and schedules of the cost estimates. Cost estimates must be monetized to the greatest extent possible. Where costs are not quantified in dollars, they must be listed and described.

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- **Benefit Estimates** – Explain how the actions required by the rule change are linked to the expected benefits. Benefit estimates must be quantified in dollars to the greatest extent possible. Where benefits are not quantified, they must be listed and described.
 - **Transparency and Reproducibility** – A good fiscal note must clearly set out the basic assumptions, methods, and data used, enabling the reader to understand how conclusions were reached.
- d) **Persons Affected** – The fiscal note must identify the persons affected by the rule change within the categories listed below. Within each category, describe the number of different entities impacted by the rule change and briefly summarize how these units will be affected. In some cases, it may be useful to organize the discussion by type of entity affected, depending on the complexity of the rule change.
- State government entities,
 - Local government entities,
 - Federal government entities, and
 - Private sector entities.

7.3.2.3 Tier III - Substantial Economic Impact Rules

A rule change is considered to have a substantial economic impact if the aggregate impact on all persons affected is of at least \$500,000 in a 12-month period. For example, a rule change with \$300,000 in estimated benefits and \$200,000 in estimated costs would have a substantial economic impact.

For rule changes with substantial economic impact, the agency must send OSBM the following:

- The information required for non-substantial economic impact rules.
- **Alternatives** – Agencies must identify at least two alternatives deserving consideration, evaluate their impacts to the extent possible, and state reasons for which they were rejected. The alternatives may have been identified by the agency or by members of the public. When there is a “continuum” of alternatives to address a particular problem, an agency must examine a preferred option, a more expensive or stringent option, and a less expensive or stringent option. Agencies must also consider alternatives involving economic incentives, information disclosure requirements, performance standards, and other actions that do not require rule-making. When the status-quo is a possible alternative, it may be used as one of the two required alternatives. (See [G.S. 150B-21.4\(b2\)](#)).
- **Time Value of Money** – Benefits and costs do not always take place in the same time period. When they do not, an agency may not simply add up all of the ex-

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pected benefits or costs without accounting for when the impacts occur. Benefits or costs that occur sooner are generally more valuable. Given this preference, a discount factor of 7.0% must be used to adjust future benefits and costs when appropriate. At the discretion of OSBM, other discount rates may be used in addition to 7.0% for comparative purposes. Agencies must include a summary table of annualized costs and benefits. In constructing this summary table, it may be helpful to organize annual costs and benefits by rule provision and affected party. (See [G.S. 150B-21.4\(b1\)](#) and the [U.S. Office of Management and Budget's Circular A-4 on Regulatory Analysis](#).)

- **Risk Analysis** – A risk is a factor or possible event that may jeopardize anticipated benefits or increase the cost of a rule change. The agency must evaluate possible risks for their likelihood of occurrence and the impact of the occurrence. The impact must be described in terms of the costs and/or benefits it would affect. The risk analysis must tie into the assumptions and parameters used in the analysis of benefits and costs. Each significant risk must be listed and described. Given the uncertainty of various estimates, it may also be useful to provide a sensitivity analysis to reveal whether, and to what extent, the results of the analysis are sensitive to possible changes in key assumptions.

7.3.3 Certification before Adoption for Cabinet Agencies

[G.S. 150B-21.4](#) requires OSBM to determine and certify that an agency adhered to the principles set forth in [G.S. 150B-19.1](#) if state funds are affected. Additionally, [E.O. 70](#) requires OSBM to ensure that an agency adheres to the principles outlined in Section 2 of the order. The principles must be followed through the process of adopting the rule according to [G.S. 150B-21.2](#) and [E.O. 70](#). As a result, agencies shall not adopt a rule change until OSBM has certified compliance with the principles. OSBM will not certify an agency has complied with the principles of [G.S. 150B-19.1](#) or the [E.O. 70](#) until after publication and any public comments have been received, but prior to adoption. The procedures in 7.3.3.2 shall be followed to receive certification.

7.3.3.1 Scope of Review

OSBM certification after publication but before adoption is required to ensure that the conditions under which the rule change and fiscal note were approved for publication have not changed. For instance, if the agency receives public comments on the proposed rule change, new information is introduced that could change the assumptions made in the fiscal note and the policies that underlie the rule change. The certification review will ensure that any new information is taken into account and that the rule change and fiscal note are properly updated before adoption.

7.3.3.2 Certification Procedures

If an agency receives public comment after publication that raises significant concerns about whether the rule change complies with the principles discussed in 7.3.3. or the ba-

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sis or validity of the fiscal note, it must resubmit the rule change and any updates, the fiscal note and any updates, and any public comments received to OSBM for certification review. After the public comment period, the agency must discuss the comments with OSBM. If OSBM and the agency find that no public comments were received that meet the above criteria and no significant modifications are made to the fiscal note or the rule change that was approved for publication, then OSBM will certify the rule change and the agency may adopt the rule change.

7.4 Procedures for all other Agencies

Agencies that are not in the Cabinet or boards and commission with rule-making powers not located in Cabinet agencies are not required to follow [E.O. 70](#). However, these agencies are still subject to review, approval and, as applicable, certification by OSBM for the development of fiscal notes and rule changes as required by the [Administrative Procedure Act](#). Section 7.4 lists the requirements for these agencies.

7.4.1 Rule Changes Requiring OSBM Approval

The following are the categories of rule changes with fiscal notes that must be submitted to OSBM for approval before publication.

- State funds impact – Permanent rules that require the expenditure or distribution of state funds. “Expenditure of funds” includes new agency activities required to be implemented by state employees or other agents of the state (contractors, temporary employees, etc.) paid with state funds. These activities must be included even if other agency activities are eliminated to offset the impact of the new activities. In addition, any new agency costs must be included, even if additional receipts may offset the cost. “Distribution of state funds” includes funds paid out by the state or reallocation of funds across agencies or divisions. In short, a rule change that causes any additional costs to the state or that moves funds requires OSBM approval. See [G.S. 150B-21.4 \(a\)](#).
- Substantial economic impact – Permanent rule changes with a substantial economic impact require OSBM approval.

7.4.2 Rule Changes Requiring OSBM Review

Permanent rules with any impact on local funds require OSBM review. This impact can be either expenditures or revenue. (See [G.S. 150B-21.4 \(b\)](#) and [G.S. 150B-21.26](#)).

7.4.3 Information to Submit to OSBM for Publication Approval

If a rule change from a non-Cabinet agency requires OSBM approval or review, then before publishing permanent rule changes in the [North Carolina Register](#), an agency must obtain approval for publication from OSBM. Agencies must submit the rule changes and the fiscal note to OSBM for review and approval. The information the agency must submit to OSBM is the same information as required of Cabinet agencies and is outlined in 7.3.2 above.

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7.4.4 Certification before Adoption for non-Cabinet Agencies

[G.S. 150B-21.4](#) requires OSBM to determine and certify that the agency adhered to the principles set forth in [G.S. 150B-19.1](#) if state funds are affected. In addition, the principles must be followed through the process of adopting the rule according to [G.S. 150B-21.2](#). As a result, OSBM will not certify an agency has complied with the principles of [G.S. 150B-19.1](#) until after publication and any public comments have been received, but prior to adoption. The procedures in 7.4.4.2 shall be followed to receive certification.

7.4.4.1 Scope of Review

OSBM certification after publication but before adoption will ensure that the conditions under which the rule change and fiscal note were approved for publication have not changed. For instance, if the agency receives public comments on the proposed rule change, new information is introduced that could change the assumptions made in the fiscal note and the policies that underlie the rule change. The certification review will ensure that any new information is taken into account and that the rule change and fiscal note are properly updated before adoption.

7.4.4.2 Certification Procedures

If an agency receives public comment after publication that raises significant concerns about whether the rule change complies with the principles discussed in 7.4.4., it must re-submit the rule change and any updates, the fiscal note and any updates, and any public comments received to OSBM for certification review. After the public comment period, the agency must discuss the comments with OSBM. If OSBM and agency find that no public comments were received that meet the above criteria and no significant modifications are made to the fiscal note or the rule change that was approved for publication, then OSBM will certify the rule and the agency may adopt the rule change.

7.4.5 Other Required OSBM Approval after Rule Publication

Besides certification as discussed in 7.4.4, there are three other circumstances when an agency must get OSBM approval after it has published the text of a proposed rule change and possibly already had the rule change approved.

1. If an agency must publish the text of a proposed rule in the [North Carolina Register](#) that differs substantially from the text of a previous version of the proposed rule published in the [North Carolina Register](#), as outlined by [G.S. 150B-21.2 \(g\)](#), and if the previous version of the proposed rule change required a fiscal note, then the agency must have an amended fiscal note and rule change approved by OSBM before it publishes the text.
2. If an agency must publish the text of a proposed rule in the [North Carolina Register](#) that differs substantially from the text of a previous version of the proposed rule published in the [North Carolina Register](#), as outlined by [G.S. 150B-21.2 \(g\)](#), and if the proposed rule would cause the rule change to require a fiscal note, then the agency must have a fiscal note and rule change approved by OSBM before it publishes the text.

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3. If the Rules Review Commission objects to the proposed rule change and additional or revised data are requested and prepared for presentation that changes the fiscal note, the fiscal note must be reviewed and approved again by OSBM.

An amended fiscal note should incorporate the new circumstances created by the proposed different rule and be submitted according to the procedures outlined above. If a new fiscal note is required, it should follow the procedures outlined above.

7.5 Administrative Processes

All required submissions of rule information to OSBM must be sent electronically to osbmrule-analysis@osbm.nc.gov. Faxes and paper submittals of information will not be accepted and will not constitute the submittal of a proposed rule change and supporting fiscal note.

Once OSBM has approved the proposed rule change and fiscal note for publication (7.3.1 and 7.4.3 above), the agency will be notified and OSBM will post the fiscal note, title of rule change, and the OSBM approval date on the OSBM website. The agency is responsible for submitting the OSBM approved rule change to the Office of Administrative Hearings for publication or adoption in the [*North Carolina Register*](#).

Once OSBM has granted certification (7.3.3 and 7.4.4 above), the agency will be notified and the entry on the OSBM website will be marked as certified. If the fiscal note is modified prior to adoption, OSBM will post the final, fiscal note on the OSBM website.

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