

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 Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0106

RECOMMENDED ACTION:

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

COMMENT:

*Staff recommends objection to this Rule based upon lack of statutory authority and necessity.*

*Staff is not aware of any statutory authority within the purview of the Board that allows it to restrict the ability of its members to serve as officers, directors, district presidents, or committee chairs of private trade associations. The authority cited by the Board for this Rule is G.S. 90-142, which states:*

**§ 90-142. Rules and regulations.**

The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties and the enforcement of the provisions of this Article.

*However, the qualifications of Board members are set by statute, and the appointments are made by the Governor and General Assembly.*

**§ 90-139. Creation and membership of Board of Examiners.**

(a) The State Board of Chiropractic Examiners is created to consist of eight members appointed by the Governor and General Assembly. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of

Amanda J. Reeder  
Commission Counsel

the President Pro Tempore of the Senate and the Speaker of the House of Representatives. **No more than three members of the Board may be graduates of the same college or school of chiropractic.** The other two members shall be persons chosen by the Governor to represent the public at large. **The public members shall not be health care providers nor the spouses of health care providers.** For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

**§ 90-140. Selection of chiropractic members of Board.**

The Governor and the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board, and the General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint a chiropractic member of the Board for a term of two years from a list provided by the Board. For each vacancy, the Board must submit at least three names to the Governor, President Pro Tempore of the Senate and Speaker of the House.

The Board shall establish procedures for the nomination and election of chiropractic members. These procedures shall be adopted under Article 2A of Chapter 150B of the General Statutes, and notice of the proposed procedures shall be given to all licensed chiropractors residing in North Carolina. These procedures shall not conflict with the provisions of this section. Every chiropractor with a current North Carolina license residing in this State shall be eligible to vote in all such elections, and the list of licensed chiropractors shall constitute the registration list for elections. Any decision of the Board relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the Board has rendered the decision in controversy, and all such cases shall be heard de novo. (1917, c. 73, s. 2; C.S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s. 1; 1979, c. 108, s. 2; 1981, c. 766, s. 2; 1983, c. 717, s. 106; 1987, c. 827, s. 1; 1995, c. 490, s. 11.1; 2000-189, s. 6.)

*Staff does not believe the Board has statutory authority to create the restriction proposed by this Rule by determining that serving as an officer on those associations is a conflict of interest for serving on the Board. Further, staff notes that if the General Assembly or Governor were to appoint a member to the Board that is serving in one of the positions named in this Rule, that individual would have to resign the post or decline the appointment. Staff does not believe that the agency has the authority to effectively nullify those appointments if the individual did not wish to resign from the post.*

*Staff is aware that G.S. 90-142 allows the Board to adopt rules "for the performance of [the Board's] duties" but staff does not believe that statute is broad enough to allow the Board to adopt this Rule.*

*Staff notes that in its Submission for Permanent Rule form, the agency states that the intent of the Rule is to allow the Board to qualify for limited state antitrust immunity following the Supreme Court ruling in North Carolina State Board of Dental Examiners v. Federal Trade Commission (135 S.Ct. 1101). Staff understands the concerns of the Board, but does not believe this rationale creates the authority needed to adopt the Rule.*

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Commission Counsel

*Further, staff is unsure if this even qualifies a rule, rather than a bylaw or policy for internal management. Staff notes G.S. 150B-2(8a) states:*

(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.

*This Rule appears to state internal policy, affecting only the rights of Board members. Therefore, while staff does not believe that the agency has the authority to promulgate this Rule, staff also does not believe this would qualify as a rule, as it does not affect individuals outside of the Board.*

*Therefore, staff recommends objecting to this Rule for lack of statutory authority and necessity.*

**§ 90-139. Creation and membership of Board of Examiners.**

(a) The State Board of Chiropractic Examiners is created to consist of eight members appointed by the Governor and General Assembly. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. No more than three members of the Board may be graduates of the same college or school of chiropractic. The other two members shall be persons chosen by the Governor to represent the public at large. The public members shall not be health care providers nor the spouses of health care providers. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive terms, except that each member shall serve until his successor is chosen and qualifies. The initial appointment of the General Assembly upon the recommendation of the President of the Senate shall be for a term to expire June 30, 1986, and the initial appointment of the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for a term to expire June 30, 1985, subsequent appointments upon the recommendation of the President Pro Tempore of the Senate shall be for terms of three years, subsequent appointments upon the recommendation of the Speaker of the House of Representatives shall be for terms of two years.

(c) The Governor and General Assembly, respectively, may remove any member appointed by them for good cause shown. In addition, upon the request of the Speaker of the House of Representatives or the President Pro Tempore of the Senate concerning a person appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives or the President Pro Tempore of the Senate, respectively, the Governor may remove such appointee for good cause shown, if the request is made and removal occurs either (i) when the General Assembly has adjourned to a date certain, which date is more than 10 days after the date of adjournment, or (ii) after sine die adjournment of the regular session. The Governor may appoint persons to fill vacancies of persons appointed by him to fill unexpired terms. Vacancies in appointments made by the General Assembly shall be in accordance with G.S. 120-122. (1917, c. 73, s. 1; C.S., s. 6710; 1979, c. 108, s. 1; 1981, c. 766, s. 1; 1983, c. 717, ss. 100-104; 1995, c. 490, s. 11; 1999-405, s. 3; 1999-431, s. 3.9; 2000-181, s. 2.7(a); 2005-421, s. 2.7(b).)

**§ 90-140. Selection of chiropractic members of Board.**

The Governor and the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board, and the General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint a chiropractic member of the Board for a term of two years from a list provided by the Board. For each vacancy, the Board must submit at least three names to the Governor, President Pro Tempore of the Senate and Speaker of the House.

The Board shall establish procedures for the nomination and election of chiropractic members. These procedures shall be adopted under Article 2A of Chapter 150B of the General Statutes, and notice of the proposed procedures shall be given to all licensed chiropractors residing in North Carolina. These procedures shall not conflict with the provisions of this section. Every chiropractor with a current North Carolina license residing in this State shall be eligible to vote in all such elections, and the list of licensed chiropractors shall constitute the registration list for elections. Any decision of the Board relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the Board has rendered the decision in controversy, and all such cases shall be heard de novo. (1917, c. 73, s. 2; C.S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s. 1; 1979, c. 108, s. 2; 1981, c. 766, s. 2; 1983, c. 717, s. 106; 1987, c. 827, s. 1; 1995, c. 490, s. 11.1; 2000-189, s. 6.)

**§ 90-142. Rules and regulations.**

The State Board of Chiropractic Examiners may adopt suitable rules and regulations for the performance of their duties and the enforcement of the provisions of this Article. (1919, c. 148, s. 4; C.S., s. 6714; 1967, c. 263, s. 2.)

REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0106

**DEADLINE FOR RECEIPT: Thursday, January 14, 2016**

***NOTE WELL: This request when viewed on computer extends several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In the Introductory Statement, please note that if you make changes to the text of the Rule, it will be "with changes"*

*In Paragraph (a), please insert a comma after "president" on line 5.*

*On line 6, define "primarily"*

*Also on line 6, please insert a comma after "promote"*

*In Paragraph (b), line 9, "Rule" should be capitalized. Since it was published capitalized, you do not need to show any changes, but should simply revert to how it was published.*

*In the History Note, please include an effective date for this Rule.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: December 30, 2015

1 21 NCAC 10 .0106, published in NCR vol. 30:04 at 461, is adopted without changes to read as follows:

2  
3 **21 NCAC 10 .0106 CONFLICTS OF INTEREST**

4 (a) Private Trade Associations. During his or her term of service on the Board of Examiners, a member of  
5 the Board shall not serve as an officer, director, district president or committee chair of any private trade  
6 association that exists primarily to advance, promote and protect the commercial and political interests of  
7 the chiropractic profession in this State. Such private trade associations include the North Carolina  
8 Chiropractic Association.

9 (b) Membership Allowed. Paragraph (a) of this rule shall not prohibit a member of the Board from  
10 becoming or continuing to be an ordinary member of a private trade association and exercising the rights  
11 and privileges of membership while simultaneously serving on the Board.

12  
13 *Authority G.S. 90-142*

REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0208

**DEADLINE FOR RECEIPT: Thursday, January 14, 2016**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In the Introductory Statement, please note that if you make changes to the text of the Rule, it will be "with changes"*

*I recommend making this a two Paragraph Rule. Paragraph (a) would be lines 4 through 9. Paragraph (b) would be lines 9-14.*

*On lines 5 and 10, the use of the term "minimum" is not preferred in Rule, as the Rule sets the minimum standards. Do you feel you need to retain it here?*

*On line 6, please insert a comma after "acupuncture"*

*For the sentence beginning on line 7, are you saying that the coursework shall be offered by a college accredited pursuant to G.S. 90-143(b) as either part of the curriculum leading to the degree or the post-graduate level? If so, I think it makes the sentence clearer to put the "college accredited pursuant to G.S. 90-143(b)" at the front of the sentence.*

*If you change this to a two Paragraph Rule, please change "above-described" on line 11 to "the coursework set forth in Paragraph (a) of this Rule."*

*On line 11, I recommend ending the sentence after "coursework" (or the language suggested above.) Then state "This requirement of ..."*

*What are you saying in the last sentence? Won't a licentiate certified prior to 2019 be bound by the requirement for 200 hours of coursework as set forth in the first sentence of the Rule? Or are you trying to say that they are not required to get 300 hours? I think this can be made clearer.*

*In the History Note, please include an amended effective date for this Rule.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: December 30, 2015



1 21 NCAC 10 .0208, published in NCR vol. 30:04 at 461, is amended without changes to read as follows:

2

3 **21 NCAC 10 .0208 ACUPUNCTURE**

4 Until July 1, ~~2008~~, 2019, in order to perform acupuncture, a licentiate or applicant for licensure ~~must~~ shall  
5 first certify to the Board that he or she has completed a minimum of ~~100~~ 200 hours' coursework in  
6 acupuncture-meridian therapy, including sterile needle technique, theory of acupuncture and differential  
7 diagnosis of clinical indications. This coursework ~~must~~ shall be offered as either part of the curriculum  
8 leading to the Doctor of Chiropractic degree or at the post-graduate level, and by a college accredited  
9 pursuant to G.S. 90-143(b). Beginning July 1, ~~2008~~, 2019, in order to perform acupuncture, a licentiate or  
10 applicant for licensure ~~must~~ shall first certify to the Board that he or she has completed a minimum of ~~200~~  
11 300 hours of the above-described coursework; provided, that this requirement of ~~200~~ 300 hours'  
12 coursework shall apply only to a licentiate or applicant for licensure whose initial certification date falls on  
13 or after July 1, ~~2008~~. 2019. Any licentiate certified prior to July 1, ~~2008~~ 2019 may continue to perform  
14 acupuncture without obtaining additional education.

15

16 *History Note: Authority G.S. 90-142; 90-143; 90-151;*

17 *Eff. February 1, 2004;*

18 *Amended Eff. July 1, 2006.*

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AGENCY: Board of Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0214

RECOMMENDED ACTION:

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

COMMENT:

*Staff recommends objecting to this Rule based upon a lack of statutory authority and ambiguity.*

*In this Rule, the Board is proposing to conduct periodic inspections of chiropractic offices. Staff is not aware of any statutory authority for the Board to conduct these inspections. Staff further notes that the statutes governing the Board only give the Board authority to license individuals and not offices.*

*Further, staff believes the Rule is ambiguous as written. Subparagraph (a)(5) states that the inspection of patient records shall be restricted to evaluating them for "formatting, legibility and completeness." Staff does not know what these terms mean in this context. Further, there is nothing in the Rule that indicates what else, if anything, will be reviewed during these inspections.*

*In addition, in Paragraph (b), the Board's Secretary is given the authority to reverse a failing grade "for good cause shown" but there is no guidance of what this phrase means. In addition, the Secretary can extend the period of time to correct the problem; however, the timeframe is set in Subparagraph (a)(5) of the Rule. Therefore, the language in Paragraph (b) creates a waiver but does not include guidance on how this waiver will be granted.*

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Commission Counsel

REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Chiropractic Examiners

RULE CITATION: 21 NCAC 10 .0214

**DEADLINE FOR RECEIPT: Thursday, January 14, 2016**

The Rules Review Commission staff has completed its review of this rule prior to the Commission's next meeting. The Commission has not yet reviewed this rule and therefore there has not been a determination as to whether the rule will be approved. You may call this office to inquire concerning the staff recommendation.

In reviewing these rules, the staff determined that the following technical changes need to be made:

*In the Introductory Statement, please note that you should underline "with changes"*

*Because this is an adoption, the way to show changes made after publication is set forth in Rule 26 NCAC 02C .0405(b)(1). Here, you will remove underlining from the entire rule and only underline language added after publication. In addition, please strike the language that you are proposing to delete after publication.*

*On lines 4, 25, 30, and 32, I believe there are too many spaces between the (x) and the beginning of the sentence.*

*In (a), line 5, what is the "chiropractic practice act"? Is it G.S. 90, Article 8? Should this be capitalized?*

*On line 5, please capitalize "Rules"*

*In (a)(2), do you need to retain "at least" on line 9? I suspect you do, but wanted to check.*

*In (a)(3), so that I understand – the Board will not employ inspectors? It will use licensees? I take it the language that the individual cannot be a competitor is to satisfy 93B-8.2?*

**§ 93B-8.2. Prohibit licensees from serving as investigators.**

No occupational licensing board shall contract with or employ a person licensed by the board to serve as an investigator or inspector if the licensee is actively practicing in the profession or occupation **and is in competition with other members of the profession or occupation over which the board has jurisdiction.** Nothing in this section shall prevent a board from (i) employing licensees who are not otherwise employed in the same profession or occupation as investigators or inspectors or for other purposes or (ii) contracting with licensees of the board to serve as expert witnesses or consultants in cases where special knowledge and experience is required, provided that the board limits the duties and authority of

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Commission Counsel  
Date submitted to agency: December 30, 2015

the expert witness or consultant to serving as an information resource to the board and board personnel."

*How will it be determined who is a competitor?*

*In (a)(4), what is in this standardized checklist? Generally, the contents of any forms or checklists are required to be in Rule or law. Are the contents of the checklist in rule or law? If so, can you provide a cross-reference in the Rule? Also, how does one know whether to "pass" or "fail"? Is there training of the inspectors?*

*In (a)(5), what does "formatting, legibility and completeness" mean?*

*Also on line 17, insert a comma after "legibility"*

*On line 18, please state "his or her examination..."*

*On line 21, please replace "fifteen" with "15" (See Rule 26 NCAC 02C .0108(9)).*

*On line 23, please replace "thirty" with "30"*

*The language on lines 21-22 are entirely new. Is this optional? Or is the physician required to do this? Did the language change due to public comments? And what proof will be accepted? And the proof will not require re-inspection?*

*In (b), line 26, should "Secretary" be capitalized? The term is not consistently capitalized in the Board's other rules, so I wanted to check.*

*So that I understand (b), the Secretary has complete discretion to reverse the grade or grant additional time that waives the timeframes set forth in Subparagraph (a)(5) of the Rule? What does "for good cause" shown mean? And if the Secretary does not grant the appeal, the timeframes in (a)(5) control? What is the mechanism and timeframe for making this appeal to the Secretary?*

*On lines 28, define "negligently or willfully"*

*In (d), line 32, "Rule" should be capitalized.*

*In the History Note, please include an effective date for this Rule.*

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amanda J. Reeder  
Commission Counsel  
Date submitted to agency: December 30, 2015

1 Rule 21 NCAC 10 .0214, published in NCR vol. 30:04 at 461, is adopted with changes to read as follows:

2  
3 **21 NCAC 10 .0214           RANDOM OFFICE INSPECTIONS**

4 (a) Random Inspections Authorized. The Board shall conduct periodic inspections of chiropractic  
5 offices for the purpose of assessing compliance with the chiropractic practice act and the rules of the Board.

6 Inspections shall be conducted as follows:

7       (1) Physicians shall be selected for office inspection randomly and not based on any  
8 suspicion of wrongdoing.

9       (2) The Board shall provide at least thirty days' advance written notice to a physician whose  
10 office is to be inspected.

11       (3) The inspector shall not be a competitor of the physician whose office is to be inspected.

12       (4) The inspector shall use a published, standardized checklist provided by the Board and  
13 shall record a grade of "Pass" or "Fail" for each item on the checklist. The inspector shall  
14 leave a copy of the graded checklist with the physician and file the original with the  
15 Secretary of the Board.

16       (5) The inspector shall examine individual patient records only for the purpose of evaluating  
17 formatting, legibility and completeness. The inspector shall not draw any conclusions as  
18 to the quality of care or reasonableness of charges based on his examination of patient  
19 records.

20       (6) If the inspector issues a failing grade on any checklist item, the physician shall have ~~thirty~~  
21 days to correct the problem and request re-inspection. **fifteen days from the date of**  
22 **inspection to submit to the Board staff a plan for making corrections. Thereafter, the**  
23 **physician shall have thirty days to request re-inspection or submit proof that corrections**  
24 **have been made.**

25 (b) Appeal of Failing Grade. A physician whose office receives a failing grade on any checklist item  
26 may appeal to the Secretary of the Board. The Secretary shall have the authority to reverse the grade for  
27 good cause shown, or grant additional time within which to correct the problem. If the physician  
28 negligently or willfully fails to correct a problem after exhausting his or her appeal to the Secretary, the  
29 physician shall be subject to disciplinary action by the Board.

30 (c) Exemption. A physician whose office has been inspected pursuant to this Rule shall not be subject  
31 to further random office inspections for a period of three years following the inspection.

32 (d) Inspections For Cause. This rule shall not apply to office inspections ordered by the Secretary of  
33 the Board for cause as part of the investigation and prosecution of suspected disciplinary violations.

34  
35 *Authority G.S. 90-142*