

## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0101

RECOMMENDED ACTION:

- X 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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0101 Definitions, cites the statutory authority as G.S. 58-2-40; 58-79-45. Those statutes are set forth below:

**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

Abigail M. Hammond  
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-79-45. Fire incident reports.**

- (a) Whenever a fire department responds to a fire, the chief of that department shall complete or cause to be completed a fire incident report, which report

shall be on a form prescribed by the Department of Insurance. When such report is made without fraud, bad faith, or actual malice, the person making the report is not subject to liability for libel or slander.

- (b) The fire department shall forward a copy of the completed form to the fire marshal of the county in which the fire occurred. If there is no fire marshal in that county, the fire department shall forward a copy of the report to the county commissioners. The fire department shall retain the original of the report. The fire department and the fire marshal or county commissioners to whom reports are sent shall retain the reports for a period of five years.
- (c) At the request of any person, the county fire marshal or county commissioners shall provide such person, for a reasonable copying charge, a certified copy of the report. (1989 (Reg. Sess., 1990), c. 1054, s. 7.)

In a technical change request, an inquiry was made regarding the applicability of G.S. 58-79-45 to this Rule. The agency responded that there is no opposition to deleting the reference to G.S. 58-79-45, which leaves the remaining statute of G.S. 58-2-40. Please note that this Rule filed by the Commissioner of Insurance acting in the capacity of State Fire Marshal relies on the general rulemaking authority provided to the Commissioner of Insurance as set forth in Article 2 of Chapter 58 of the General Statutes.

#### SUMMARY:

Staff counsel is providing notice to the Rules Review Commission that this Rule, as adopted by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1, relies on the general rulemaking authority vested in the Commissioner of Insurance by G.S. 58-2-40. Staff counsel recommends approval of this Rule, contingent on review of remaining technical change requests.

## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0105

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

In addition to the general rulemaking authority vested in the Commissioner of Insurance by G.S. 58-2-40, this Rule, 11 NCAC 05A .0105 Training Operations, cites G.S. 58-78-10. Article 78 of Chapter 58 of the General Statutes is a separate agency, the State Fire and Rescue Commission. The State Fire and Rescue Commission, as a separate agency from the Commissioner of Insurance, has independent rulemaking authority:

Abigail M. Hammond  
Commission Counsel

**§ 58-78-10. State Fire and Rescue Commission - Organization; rules and regulations; meetings.**

- (a) Organization. - The Commission shall elect from its voting members a chair and vice-chair to serve as provided by the rules adopted by the Commission.
- (b) Rules and Regulations. - The Commission shall adopt such rules and regulations, not inconsistent with the laws of this State as may be required by the federal government for programs and grants-in-aid for fire protection, firefighting, and rescue purposes which may be made available to the State by the federal government. The Commission shall be the single State agency responsible for establishing policy, planning and carrying out the State's duties with respect to all programs of and grants to the State by the United States Fire Administration, Federal Emergency Management Agency. In respect to such programs and grants, the Commission shall have authority to review, approve and maintain general oversight to the State plan and its implementation, including subgrants and allocations to local units of government and local fire prevention and control and rescue agencies. All actions taken by the Commission in the performance of its duties shall be implemented and administered by the Department.
- (c) Meetings. - The Commission shall meet quarterly. Seven members shall constitute a quorum. All meetings shall be open to the public. (1977, c. 1064, s. 1; 1981, c. 791, s. 5; 1983, c. 840, s. 3; 1985, c. 757, s. 167(b), (c), (e), (f); 1989, c. 750, s. 1; 2015-39, s. 3.)

The State Fire and Rescue Commission, in compliance with the following directives of the General Assembly, has promulgated and adopted rules set forth in 11 NCAC 05B:

**§ 58-78-5. State Fire and Rescue Commission - Powers and duties.**

- (a) The Commission shall have the following powers and duties:
  - (1) To formally adopt a State Fire Education and Training Plan, a State Master Plan for Fire Prevention and Control, a Rescue Training Plan, and a State Master Plan for Rescue Services;
  - (2) To assist and participate with State and local fire prevention and control agencies in the improvement of fire prevention and control in North Carolina and to work with State and local rescue agencies to improve rescue services in the State;
  - (3) To increase the professional skills of fire protection and fire-fighting personnel and rescue personnel;
  - (4) To encourage public support for fire prevention and control and rescue services;
  - (5) To accept gifts, devises, grants, matching funds, and other considerations from private or governmental sources for use in promoting its work;
  - (6) To make grants for use in pursuing its objectives, under such conditions as are deemed to be necessary and such other powers as may be necessary to carry out the State's duties with respect to all grants to the State by the United States Fire Administration and the National Fire Academy; and all support programs brought into the State by these two entities shall be coordinated and controlled by the Commission;
  - (7) To make studies and recommendations for the improvement of fire prevention and control and rescue services in the State and to make studies and recommendations for the coordination and implementation of effective fire prevention and control and rescue services and for effective fire prevention and control and rescue services education;

- (8) To set objectives and priorities for the improvement of fire prevention and control and rescue services throughout the State;
  - (9) To advise State and local interests of opportunities for securing federal assistance for fire prevention and control and rescue services and for improving fire prevention and control and rescue services administration and planning within the State of North Carolina;
  - (10) To assist State agencies and institutions of local government and combinations thereof in the preparation and processing of applications for financial aid and to support fire prevention and control, rescue services, and planning and administration;
  - (11) To encourage and assist coordination at the federal, State and local government levels in the preparation and implementation of fire prevention and control and rescue services administrative improvements and crime reduction plans;
  - (12) To apply for, receive, disburse and audit the use of funds received from any public and private agencies and instrumentalities for fire prevention and control and rescue services, their administration and plans therefor;
  - (13) To enter into monitoring and evaluating the results of contracts and agreements necessary or incidental to the discharge of its assigned responsibilities;
  - (14) To provide technical assistance to State and local fire prevention and control and rescue agencies in developing programs for improvement;
  - (14a) To serve as a central office for the collection and dissemination of information relative to fire service and rescue service activities and programs in State government. All State government agencies conducting fire service and rescue service related programs and activities shall report the status of these programs and activities to the Commission on a quarterly basis and they shall also report to the Commission any new programs or changes to existing programs as they are implemented;
  - (14b) To establish voluntary minimum professional qualifications for all levels of fire service and rescue service personnel, and to issue, deny, suspend, revoke or take similar actions with respect to certifications issued by the Commission of minimum professional qualifications established under this subdivision.
  - (14c) To prepare an annual report to the Governor on its fire prevention and control activities and plans, rescue activities and plans, and to recommend legislation concerning fire prevention and control and rescue services;
  - (14d) To reimburse the members of the Commission's certification board, in accordance with G.S. 138-5, for travel and subsistence expenses incurred by them in their duties as certification board officers; and
  - (15) To take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities.
  - (16) To provide workers' compensation benefits under G.S. 58-87-10, to create a Volunteer Safety Workers' Compensation Board to assist it in performing this duty, and to reimburse the members of the Commission's Volunteer Safety Workers' Compensation Board in accordance with G.S. 138-5 for travel and subsistence expenses incurred by them.
- (b) Each State agency involved in fire prevention and control or rescue related activities shall furnish the executive director of the Commission such information as may be required to carry out the intent of this section. (1977,

c. 1064, s. 1; 1981, c. 791, ss. 3, 4; 1985, c. 757, s. 167(b); 1989, c. 750, s. 1; 1993, c. 321, s. 41; 1995, c. 507, s. 7.21A(c); 2011-284, s. 58; 2015-39, s. 2.)

G.S. 150B-21.9 requires the following of the Rules Review Commission:

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

This Rule was promulgated by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1. However, the content of this Rule addresses rulemaking authority that was vested by the General Assembly into a separate agency with independent rulemaking authority, the State Fire and Rescue Commission.

#### SUMMARY:

It is staff counsel's opinion that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(1), as the rulemaking authority for this Rule belongs to the State Fire and Rescue Commission and not the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

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AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0202

RECOMMENDED ACTION:

- X 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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0202 Comprehensive Emergency Management Plan, cites the statutory authority as G.S. 58-2-40; 58-80-1 thru 58-80-60. Those statutes are set forth below:

**§ 58-2-40. Powers and duties of Commissioner.**

Abigail M. Hammond  
Commission Counsel



The Commissioner shall:

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

Article 80.

State Volunteer Fire Department.

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina. (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

**§ 58-80-5. Personnel.**

The personnel of the North Carolina State Volunteer Fire Department shall consist of all active members of the organized fire departments, who are members of the North Carolina State Firemen's Association, of municipalities whereof the governing bodies shall subscribe to and endorse this Article. (1939, c. 364, s. 2.)

**§ 58-80-10. Organization.**

The North Carolina State Fire Marshal shall be chief of the State Volunteer Fire Department; regular municipal fire chiefs shall be assistant chiefs; assistant chiefs shall be deputy chiefs; battalion chiefs, captains; lieutenants and privates shall hold the same position that they occupy in their municipal companies. When engaged in rendering assistance at the scene of any emergency, the ranking officer of the first department arriving at the scene of the emergency shall have complete charge of all operations until the arrival of a superior officer. All subordinate officers and men shall act under the direction of such ranking officer. Whenever present at the scene of an emergency, the chief shall have full and complete control and authority over operations of all members of the Department. (1939, c. 364, s. 3.)

**§ 58-80-15. Acceptance by municipalities.**

Any municipality having an organized fire department and desiring to participate in the establishment of the State Volunteer Fire Department, may do so by a resolution of the governing body accepting and endorsing the provisions of this Article: Provided, that acceptance shall not be compulsory. (1939, c. 364, s. 4.)

**§ 58-80-20. Withdrawal.**

Any municipality which has accepted the provisions of this Article may withdraw its fire departments from membership in the State Volunteer Fire Department by resolution of the governing body thereof. Notice of such withdrawal shall be given to the State Fire Marshal and withdrawal shall not become effective until 60 days after his receipt thereof. (1939, c. 364, s. 5.)

**§ 58-80-25. Dispatching firemen and apparatus from municipalities.**

Municipalities endorsing this Article shall retain full and complete control and authority in sending or permitting firemen and apparatus to go beyond the limits of the municipality. The governing bodies of such municipalities shall designate and authorize a person, and at least two alternates, who shall have authority to grant or deny permission to firemen and apparatus to leave the municipality in all cases where request is made for assistance beyond its corporate limits, and the municipality shall, through the office of its municipal fire chief, furnish to the office of the State Commissioner of Insurance, and to the secretary of the North Carolina State Firemen's Association, a list of the persons so authorized by the municipality. The secretary of the State Firemen's Association shall furnish to all municipalities

and counties accepting this Article a list of all such persons so designated in all municipalities within the State. (1939, c. 364, s. 6; 1943, c. 170.)

**§ 58-80-30. No authority in State Volunteer Fire Department to render assistance to nonaccepting counties.**

The State Volunteer Fire Department shall not have authority to render assistance in any emergency occurring within a county which has not accepted the terms and conditions of this Article by resolution of the board of county commissioners: Provided, that nothing in this Article shall be construed to prevent any municipality from voluntarily permitting its fire department to render assistance in any emergency, notwithstanding that it may arise in a county which has failed to accept this Article. (1939, c. 364, s. 7.)

**§ 58-80-35. Acceptance by counties.**

Any county desiring to accept the benefits of this Article may do so by resolution of the board of county commissioners. Any such county may thereupon make agreements and enter into contracts with respect to payment for services rendered by the State Volunteer Fire Department within its boundaries in the following manner:

The county may contract with any municipality which has accepted the terms of this Article, whether within or without said county, to pay to such municipality an annual fee as a consideration for the municipality providing equipment and carrying compensation insurance which will enable it to respond to calls from within the county so contracting, and to pay an additional sum per truck for each mile traveled from the station house to the scene of the emergency, and to pay an additional sum per truck per hour or fraction thereof for the use of its water or chemical pumping equipment. Said sums shall be paid to the city within 30 days after such services have been performed: Provided, that nothing in this section shall be construed to prevent the county and municipality from adopting a different schedule of fees in cases where those provided above shall be considered excessive or inadequate: Provided, that if the emergency shall occur within the limits of another city or town, such city or town and not the county wherein it lies shall be responsible for the payments and shall assume all liabilities as provided in this section. (1939, c. 364, s. 8; 1973, c. 803, s. 5.)

**§ 58-80-40. Municipalities not to be left unprotected.**

At no time shall the entire personnel or equipment of any municipal fire department be absent from the municipality in response to a call to another municipality, or other place lying at a distance exceeding two miles from the corporate limits, but there shall remain within the municipal limits such personnel and equipment as in the judgment of the local fire chief might provide sufficient protection during the absence of the remainder. (1939, c. 364, s. 9.)

**§ 58-80-45. Rights and privileges of firemen; liability of municipality.**

When responding to a call and while working at a fire or other emergency outside the limits of the municipality by which they are regularly employed or in volunteer fire service, all members of the State Volunteer Fire Department shall have the same authority, rights, privileges and immunities which are afforded them while responding to calls within their home municipality. In permitting its fire department or equipment to attend an emergency or answer a call beyond the municipal limits, whether under the terms of this Article or otherwise, a municipality shall be deemed in exercise of a governmental function, and shall hold the privileges and immunities attendant upon the exercise of such functions within its corporate limits. (1939, c. 364, s. 10.)

**§ 58-80-50. Relief in case of injury or death.**

In case of injury or death of any member of the State Volunteer Fire Department arising out of and in the course of the performance of his duties, while such member is assisting at any emergency arising beyond the limits of the municipality with which he is connected, or while going to or returning from the scene of such emergency, such fireman shall be entitled to compensation under the terms of the North Carolina Workers' Compensation Act, and the municipality with which he is connected shall be liable for the compensation provided under that Act. (1939, c. 364, s. 11; 1991, c. 636, s. 3.)

**§ 58-80-55. Local appropriations.**

Each county and municipality is authorized to make appropriations for the purposes of this Article and to fund them by levy of property taxes pursuant to G.S. 153A-149 and 160A-209 and by the allocation of other revenues whose use is not otherwise restricted by law. Sanitary districts are authorized to make appropriations for the purposes of this Article and to fund them by annual levy of a tax on property having a situs in the district under the rules and according to the procedures prescribed in the Machinery Act (Chapter 105, Subchapter II) and by the allocation of other revenues whose use is not otherwise restricted by law. (1973, c. 803, s. 4.)

**§ 58-80-60. Sums from contingent fund of State made available for administration of Article.**

In order to assist in carrying out the purposes of the Article the Governor may, from time to time, make provisions for assistance to the North Carolina State Firemen's Association in a sum not to exceed two thousand five hundred dollars (\$2,500), in any one year, out of the contingent fund appropriated in the General Appropriation Act. One half of the amount so provided shall, in each instance, go to the State Firefighters' Relief Fund, and one half to the expenses of the said Association incurred in carrying out the provisions of this Article. (1939, c. 364, s. 12; 2007-246, s. 2.)

In a technical change request, an inquiry was made regarding the broad reference to every statute set forth in Article 80 of Chapter 58 of the General Statutes. The agency responded that there is no opposition to deleting the reference to G.S. 58-79-45, which leaves the remaining statute of G.S. 58-2-40. Please note that this Rule filed by the Commissioner of Insurance acting in the capacity of State Fire Marshal relies on the general rulemaking authority provided to the Commissioner of Insurance as set forth in Article 2 of Chapter 58 of the General Statutes.

**SUMMARY:**

Staff counsel is providing notice to the Rules Review Commission that this Rule, as adopted by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1, relies on the general rulemaking authority vested in the Commissioner of Insurance by G.S. 58-2-40. Staff counsel recommends approval of this Rule, contingent on review of remaining technical change requests.

## RRC STAFF OPINION

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AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0501

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0501 Purpose, cites the statutory authority as G.S. 58-2-40; 58-86-25. Those statutes are set forth below:

**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

Abigail M. Hammond  
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-86-25. Determination and certification of eligible firefighters.**

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually

determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

In a technical change request, an inquiry was made to the purpose of citing G.S. 58-86-25. The statute is cited as authority for the rulemaking, but the statute is an independent requirement that this Rule is merely identifying in the content of this Rule. Rule 11A NCAC 05A .0501 states the following:

**11 NCAC 05A .0501 PURPOSE**

The purpose of this Section is to set forth the ~~minimum~~ requirements that a fire department ~~must~~shall meet in order to qualify for eligibility for death benefits under Article 12A of Chapter 143 of the North Carolina General Statutes, and the North Carolina Firemen's Pension Fund under G.S. 58-86-25; for initial recognition in insurance premiums for a responding fire department; and for response rating to designate insurance premiums. (remainder of the rule not provided)

The agency responded that there is no opposition to deleting the reference to G.S. 58-86-25, which leaves the remaining statute of G.S. 58-2-40.

In further review of the content of this Rule, the language of this Rule appears to indicate that the determination of the death benefits under Article 12A of Chapter 143 of the North Carolina General Statutes is governed by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1. However, this determination and the award of such death benefits is exclusively within the jurisdiction of the North Carolina Industrial Commission, a separate agency, as set forth in G.S. 143-166.3:

**§ 143-166.3. Payments; determination.**

(a) When any law-enforcement officer, fireman, rescue squad worker or senior Civil Air Patrol member shall be killed in the line of duty, the Industrial Commission shall award a death benefit to be paid...

Article 12A of Chapter 143 further defines "line of duty" as follows:

**§ 143-166.2. Definitions.**

...

(c) The term "killed in the line of duty" shall apply to any law-enforcement officer, firefighter, rescue squad worker who is killed or dies as a result of bodily injuries sustained or of extreme exercise or extreme activity experienced in the course and scope of his official duties while in the discharge of his official duty or duties.

When applied to a senior member of the Civil Air Patrol as defined in this Article, "killed in the line of duty" shall mean any such senior member of the North Carolina Wing-Civil Air Patrol who is killed or dies as a result of bodily injuries sustained or of extreme exercise or extreme activity experienced in the course and scope of his official duties while engaged in a State requested and approved mission pursuant to Article 13 of Chapter 143B of the General Statutes. For purposes of this Article, when a law enforcement officer, firefighter, rescue squad worker, or senior Civil Air Patrol member dies as the direct and proximate result of a myocardial infarction suffered while on duty or within 24 hours after participating in a training exercise or responding to an emergency situation, the law enforcement officer, firefighter, rescue squad worker, or senior Civil Air Patrol member is presumed to have been killed in the line of duty.

(d) The term "law-enforcement officer", "officer", or "firefighter" shall mean a sheriff and all law-enforcement officers employed full-time, permanent part-time, or temporarily by a NC General Statutes - Chapter 143 Article 12A 2 sheriff, the State of North Carolina or any county or municipality thereof, whether paid or unpaid; and all full-time custodial employees and probation and parole officers of the Division of Adult Correction of the Department of Public Safety; and all full time institutional and full-time, permanent part-time, and temporary detention employees of the Division of Juvenile Justice of the Department of Public Safety and full-time, permanent part-time, and temporary detention officers employed by any sheriff, county or municipality, whether paid or unpaid. The term "firemen" shall mean both firefighter or firemen as defined in G.S. 58-84-5(3a), or "eligible firemen" as defined in Article 86 of Chapter 58 of the General Statutes, notwithstanding any age requirements set out in that Article, and all full-time, permanent part-time and temporary employees of the North Carolina Forest Service of the Department of Agriculture and Consumer Services during the time they are actively engaged in firefighting activities; or engaged in emergency response activities pursuant to G.S. 166A-19.77; and shall mean all full-time employees of the North Carolina Department of Insurance during the time they are actively engaged in firefighting activities, during the time they are training firefighters or rescue squad workers, and during the time they are engaged in activities as members of the State Emergency Response Team, when the Team has been activated; and shall mean all otherwise eligible persons who, while actively engaged as firefighters or rescue squad workers, are acting in the capacity of a fire or rescue instructor outside their own department or squad. The term "rescue squad worker" shall mean a person who is dedicated to the purpose of alleviating human suffering and assisting anyone who is in difficulty or who is injured or becomes suddenly ill by providing the proper and efficient care or emergency medical services. In addition, this person must belong to an organized rescue squad which is eligible for membership in the North Carolina Association of Rescue and Emergency Medical Services, Inc., and the person must have attended a minimum of 36 hours of training in the last calendar year. Each rescue squad belonging to the North Carolina Association of Rescue and Emergency Medical Services, Inc., must file a roster of those members meeting the above requirements with the State Treasurer on or about January 31 of each year, and this roster must be certified to by the secretary of said association. In addition, the term "rescue squad worker" shall mean a member of an ambulance service certified by the Department of Health and Human Services pursuant to Article 7 of Chapter 131E of the General Statutes. The Department of Health and Human Services shall furnish a list of ambulance service members to the State Treasurer on or about January 31 of each year. The term "Civil Air Patrol members" shall



mean those senior members of the North Carolina Wing-Civil Air Patrol 18 years of age or older and currently certified pursuant to G.S. 143B-1031. The term "firefighter" shall also mean county fire marshals when engaged in the performance of their county duties. The term "rescue squad worker" shall also mean county emergency services coordinators when engaged in the performance of their county duties.

Based upon the directives to the North Carolina Industrial Commission as set forth in Article 12A of Chapter 143 of the North Carolina General Statutes, it does not appear that the Commissioner of Insurance acting in the capacity of State Fire Marshal has the authority "to set forth the requirements that a fire department shall meet in order to qualify for eligibility for death benefits."

The language of this Rule further references insurance premiums for fire departments. Based upon the cited statutory authority, this rate discussion by the Commissioner of Insurance acting in the capacity of State Fire Marshal appears to lack statutory authority. Article 40 of Chapter 58 of the General Statutes sets forth a process for rating property insurance.

**§ 58-40-25. Rating methods.**

In determining whether rates comply with the standards under G.S. 58-40-20, the following criteria shall be applied:

...

(4) In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16; 1991, c. 644, s. 40; 2000-176, s. 2; 2004-203, s. 5(b).)

It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-40-25 is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

**SUMMARY:**

Staff counsel has concerns that this Rule is attempting to regulate a determination within the exclusive jurisdiction of the North Carolina Industrial Commission. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(1). Further, staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-40-25(4). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity in applicability of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2).

Abigail M. Hammond  
Commission Counsel



## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0503; .0504; .0505; 0506; .0507; .0508; .0510; .0511, .0512

RECOMMENDED ACTION:

- X 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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

For purposes of this Staff Opinion, below is a summary of the referenced rules, the title of the rule, and the cited statutory authority:

Rule	Title	Authority
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Abigail M. Hammond  
Commission Counsel

11 NCAC 05A .0503	Establish of Fire Department	G.S. 58-2-40; 58-86-25
11 NCAC 05A .0504	Primary Personnel	G.S. 58-2-40; 58-86-25
11 NCAC 05A .0505	Training Requirements	G.S. 58-2-40; 58-78-5; 58-86-25
11 NCAC 05A .0506	Alarm and Communications	G.S. 58-2-40; 58-86-25
11 NCAC 05A .0507	Records and Documents	G.S. 58-2-40; 58-79-45; 58-86-25
11 NCAC 05A .0508	Apparatus	G.S. 58-2-40; 58-36-10(3); 58-86-25
11 NCAC 05A .0510	Inspection	G.S. 58-2-40; 58-36-10(3); 58-86-25
11 NCAC 05A .0511	Six Mile Insurance District	G.S. 58-2-40; 58-40-25(4); 58-86-25
11 NCAC 05A .0512	Standards and Policies	G.S. 58-2-40; 58-36-10(3); 58-86-25

Below are the statutes cited in the above table:

**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided

by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.

- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-36-10. Method of rate making; factors considered.**

The following standards shall apply to the making and use of rates:

- (1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.
- (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.
- (3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply.
- (4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with

rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The Bureau shall establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or gender of the persons insured. The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence, and shall at least once every 10 years make a complete review of the territories for nonfleet private passenger motor vehicle insurance to determine whether they are proper and reasonable.

- (5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97.
- (6) To ensure that policyholders in the beach and coastal areas of the North Carolina Insurance Underwriting Association whose risks are of the same class and essentially the same hazard are charged premiums that are commensurate with the risk of loss and premiums that are actuarially correct, the North Carolina Rate Bureau shall revise, monitor, and review the existing territorial boundaries used by the Bureau when appropriate to establish geographic territories in the beach and coastal areas of the Association for rating purposes. In revising these territories, the Bureau shall use statistical data sources available to define such territories to represent relative risk factors that are actuarially sound and not unfairly discriminatory. The new territories and any subsequent amendments proposed by the North Carolina Rate Bureau or Association shall be subject to the Commissioner's approval and shall appear on the Bureau's Web site, the Association's Web site, and the Department's Web site once approved.
- (7) Property insurance rates established under this Article may include a provision to reflect the cost of reinsurance to protect against catastrophic exposure within this State. Amounts to be paid to reinsurers, ceding commissions paid or to be paid to insurers by reinsurers, expected reinsurance recoveries, North Carolina exposure to catastrophic events relative to other states' exposure, and any other relevant information may be considered when determining the provision to reflect the cost of reinsurance. (1977, c. 828, s. 6; 1979, c. 824, s. 1; 1981, c. 521, s. 5; c. 790; 1987, c. 632, s. 1; 1991, c. 644, s. 39; 1999-132, s. 3.3; 2000-176, s. 1; 2004-203, s. 5(a); 2009-472, s. 2; 2012-162, s. 3.)

#### **§ 58-40-25. Rating methods.**

In determining whether rates comply with the standards under G.S. 58-40-20, the following criteria shall be applied:

- (1) Due consideration shall be given to past and prospective loss and expense experience within this State, to catastrophe hazards, to a reasonable margin for underwriting profit and contingencies, to trends within this State, to dividends or savings to be allowed or returned by insurers to their policyholders, members, or subscribers, and to all other relevant factors, including judgment factors; however, regional or countrywide expense or loss experience and other regional or countrywide data may be considered only when credible North Carolina expense or loss experience or other data is not available.

- (2) Risks may be grouped by classifications for the establishment of rates and minimum premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans which establish standards for measuring variations in hazards or expense provisions, or both. Those standards may measure any differences among risks that have probable effect upon losses or expenses. Classifications or modifications of classifications of risks may be established based upon size, expense, management, individual experience, location or dispersion of hazard, or any other reasonable considerations. Those classifications and modifications shall apply to all risks under the same or substantially the same circumstances or conditions.
- (3) The expense provisions included in the rates to be used by an insurer may reflect the operating methods of the insurer and, as far as it is credible, its own expense experience.
- (4) In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16; 1991, c. 644, s. 40; 2000-176, s. 2; 2004-203, s. 5(b).)

**§ 58-78-5. State Fire and Rescue Commission - Powers and duties.**

- (a) The Commission shall have the following powers and duties:
  - (1) To formally adopt a State Fire Education and Training Plan, a State Master Plan for Fire Prevention and Control, a Rescue Training Plan, and a State Master Plan for Rescue Services;
  - (2) To assist and participate with State and local fire prevention and control agencies in the improvement of fire prevention and control in North Carolina and to work with State and local rescue agencies to improve rescue services in the State;
  - (3) To increase the professional skills of fire protection and fire-fighting personnel and rescue personnel;
  - (4) To encourage public support for fire prevention and control and rescue services;
  - (5) To accept gifts, devises, grants, matching funds, and other considerations from private or governmental sources for use in promoting its work;
  - (6) To make grants for use in pursuing its objectives, under such conditions as are deemed to be necessary and such other powers as may be necessary to carry out the State's duties with respect to all grants to the State by the United States Fire Administration and the National Fire Academy; and all support programs brought into

- the State by these two entities shall be coordinated and controlled by the Commission;
- (7) To make studies and recommendations for the improvement of fire prevention and control and rescue services in the State and to make studies and recommendations for the coordination and implementation of effective fire prevention and control and rescue services and for effective fire prevention and control and rescue services education;
  - (8) To set objectives and priorities for the improvement of fire prevention and control and rescue services throughout the State;
  - (9) To advise State and local interests of opportunities for securing federal assistance for fire prevention and control and rescue services and for improving fire prevention and control and rescue services administration and planning within the State of North Carolina;
  - (10) To assist State agencies and institutions of local government and combinations thereof in the preparation and processing of applications for financial aid and to support fire prevention and control, rescue services, and planning and administration;
  - (11) To encourage and assist coordination at the federal, State and local government levels in the preparation and implementation of fire prevention and control and rescue services administrative improvements and crime reduction plans;
  - (12) To apply for, receive, disburse and audit the use of funds received from any public and private agencies and instrumentalities for fire prevention and control and rescue services, their administration and plans therefor;
  - (13) To enter into monitoring and evaluating the results of contracts and agreements necessary or incidental to the discharge of its assigned responsibilities;
  - (14) To provide technical assistance to State and local fire prevention and control and rescue agencies in developing programs for improvement;
  - (14a) To serve as a central office for the collection and dissemination of information relative to fire service and rescue service activities and programs in State government. All State government agencies conducting fire service and rescue service related programs and activities shall report the status of these programs and activities to the Commission on a quarterly basis and they shall also report to the Commission any new programs or changes to existing programs as they are implemented;
  - (14b) To establish voluntary minimum professional qualifications for all levels of fire service and rescue service personnel, and to issue, deny, suspend, revoke or take similar actions with respect to certifications issued by the Commission of minimum professional qualifications established under this subdivision.
  - (14c) To prepare an annual report to the Governor on its fire prevention and control activities and plans, rescue activities and plans, and to recommend legislation concerning fire prevention and control and rescue services;
  - (14d) To reimburse the members of the Commission's certification board, in accordance with G.S. 138-5, for travel and subsistence expenses incurred by them in their duties as certification board officers; and
  - (15) To take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities.



(16) To provide workers' compensation benefits under G.S. 58-87-10, to create a Volunteer Safety Workers' Compensation Board to assist it in performing this duty, and to reimburse the members of the Commission's Volunteer Safety Workers' Compensation Board in accordance with G.S. 138-5 for travel and subsistence expenses incurred by them.

(b) Each State agency involved in fire prevention and control or rescue related activities shall furnish the executive director of the Commission such information as may be required to carry out the intent of this section. (1977, c. 1064, s. 1; 1981, c. 791, ss. 3, 4; 1985, c. 757, s. 167(b); 1989, c. 750, s. 1; 1993, c. 321, s. 41; 1995, c. 507, s. 7.21A(c); 2011-284, s. 58; 2015-39, s. 2.)

**§ 58-79-45. Fire incident reports.**

- (a) Whenever a fire department responds to a fire, the chief of that department shall complete or cause to be completed a fire incident report, which report shall be on a form prescribed by the Department of Insurance. When such report is made without fraud, bad faith, or actual malice, the person making the report is not subject to liability for libel or slander.
- (b) The fire department shall forward a copy of the completed form to the fire marshal of the county in which the fire occurred. If there is no fire marshal in that county, the fire department shall forward a copy of the report to the county commissioners. The fire department shall retain the original of the report. The fire department and the fire marshal or county commissioners to whom reports are sent shall retain the reports for a period of five years.
- (c) At the request of any person, the county fire marshal or county commissioners shall provide such person, for a reasonable copying charge, a certified copy of the report. (1989 (Reg. Sess., 1990), c. 1054, s. 7.)

**§ 58-86-25. Determination and certification of eligible firefighters.**

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

The nine rules identified by this Staff Opinion pertain to requirements placed on fire departments. A review of the cited statutes and Article 80 of Chapter 58 of the General Statutes does not provide clarification as to the Commissioner of Insurance's authority, acting as the State Fire Marshal under G.S. 58-80-1, to place these requirements on fire departments. In a

technical change request to the agency to seek clarification, the response of the agency was that there is no opposition to deleting the references to other statutes. Below is a summary of the implication of the agency's response:

Rule	Title	Authority
11 NCAC 05A .0503	Establish of Fire Department	G.S. 58-2-40
11 NCAC 05A .0504	Primary Personnel	G.S. 58-2-40
11 NCAC 05A .0505	Training Requirements	G.S. 58-2-40; 58-78-5**
11 NCAC 05A .0506	Alarm and Communications	G.S. 58-2-40
11 NCAC 05A .0507	Records and Documents	G.S. 58-2-40; 58-79-45
11 NCAC 05A .0508	Apparatus	G.S. 58-2-40; 58-36-10(3)**
11 NCAC 05A .0510	Inspection	G.S. 58-2-40
11 NCAC 05A .0511	Six Mile Insurance District	G.S. 58-2-40; 58-40-25(4)
11 NCAC 05A .0512	Standards and Policies	G.S. 58-2-40

\*\*Please note that G.S. 58-36-10 is a statute set forth in Article 36 of Chapter 58 of the General Statutes, which pertains to a separate entity, or bureau, named the North Carolina Rate Bureau.

\*\*Please note that G.S. 58-78-5 is a statute set forth in Article 78 of Chapter 58 of the General Statutes, which pertains to a separate agency named the State Fire and Rescue Commission.

Staff counsel is unclear if the purpose of these rules is to identify the process for a fire district to be "rated and certified" as set forth in G.S. 58-84-5:

**§ 58-84-5. Definitions.**

The following definitions apply in Articles 84, 85, 85A, 87, and 88 of this Chapter:

- (1) City. - A fire district.
- (2) Clerk. - The clerk of a fire district or, if there is no clerk, the person so designated by the governing body of the fire district.
- (3) Fire district. - Any political subdivision of the State or federally recognized Native American tribe within the State that meets all of the following conditions:
  - a. It has an organized fire department under the control of its governing body.
  - b. Its fire department has apparatus and equipment that is in serviceable condition for fire duty and is valued at one thousand dollars (\$1,000) or more.
  - c. It is rated and certified by the Commissioner.
  - d. Its response area has been approved by the local municipal government or, if there is no local municipal government, by the local board of county commissioners.
- (3a) Firefighter or Fireman. - Any person who meets all of the following requirements:
  - a. Is a volunteer, employee, contractor, or member of a rated and certified fire department.
  - b. Performs work or training connected with fire protection, fire prevention, fire control, fire education, fire inspection, fire investigation, rescue, Emergency Medical Services, special

- operations, or performs the statutory duties and responsibilities of the fire chief as set forth in G.S. 160A-292.
- c. Performs work or training at the direction of the fire chief.
  - d. Is included on the certified roster submitted to the North Carolina State Firemen's Association pursuant to G.S. 58-86-25.
- (4) Town. - A fire district. (1951, c. 1032, s. 1; 1995 (Reg. Sess., 1996), c. 747, s. 5; 2014-64, s. 1(a); 2015-88, s. 1.)

However, another statute requires a different body to “certify” a fire department. Further, G.S. 58-36-10(3) and 58-40-25(4) may also limit the scope of the Commissioner of Insurance review of fire districts. It is unclear from the statutory structure of referenced Articles set forth in Chapter 58 of the General Statutes if the Commission of Insurance acting as the State Fire Marshal under G.S. 58-80-1 has the authority to promulgate the nine identified rules relying on G.S. 58-2-40.

#### SUMMARY:

Staff counsel is providing notice to the Rules Review Commission that these Rules, as adopted by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1, relies on the general rulemaking authority vested in the Commissioner of Insurance by G.S. 58-2-40. Staff counsel recommends approval of the following rules, contingent on review of remaining technical change requests:

- 11 NCAC 05A .0503
- 11 NCAC 05A .0504
- 11 NCAC 05A .0506
- 11 NCAC 05A .0507
- 11 NCAC 05A .0510
- 11 NCAC 05A .0511
- 11 NCAC 05A .0512

Rules 11 NCAC 05A .0505; .0508; and .0511 have additional staff opinions recommending objection to those three rules.

## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0505

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina. (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

In addition to the general rulemaking authority vested in the Commissioner of Insurance by G.S. 58-2-40, this Rule, 11 NCAC 05A .0505 Training Requirements, cites G.S. 58-78-5 and 58-86-25. Article 78 of Chapter 58 of the General Statutes is a separate agency, the State Fire and Rescue Commission. The State Fire and Rescue Commission, as a separate agency from the Commissioner of Insurance, has independent rulemaking authority:

Abigail M. Hammond  
Commission Counsel

**§ 58-78-10. State Fire and Rescue Commission - Organization; rules and regulations; meetings.**

- (a) Organization. - The Commission shall elect from its voting members a chair and vice-chair to serve as provided by the rules adopted by the Commission.
- (b) Rules and Regulations. - The Commission shall adopt such rules and regulations, not inconsistent with the laws of this State as may be required by the federal government for programs and grants-in-aid for fire protection, firefighting, and rescue purposes which may be made available to the State by the federal government. The Commission shall be the single State agency responsible for establishing policy, planning and carrying out the State's duties with respect to all programs of and grants to the State by the United States Fire Administration, Federal Emergency Management Agency. In respect to such programs and grants, the Commission shall have authority to review, approve and maintain general oversight to the State plan and its implementation, including subgrants and allocations to local units of government and local fire prevention and control and rescue agencies. All actions taken by the Commission in the performance of its duties shall be implemented and administered by the Department.
- (c) Meetings. - The Commission shall meet quarterly. Seven members shall constitute a quorum. All meetings shall be open to the public. (1977, c. 1064, s. 1; 1981, c. 791, s. 5; 1983, c. 840, s. 3; 1985, c. 757, s. 167(b), (c), (e), (f); 1989, c. 750, s. 1; 2015-39, s. 3.)

The State Fire and Rescue Commission, in compliance with the following directives of the General Assembly, has promulgated and adopted rules set forth in 11 NCAC 05B:

**§ 58-78-5. State Fire and Rescue Commission - Powers and duties.**

- (a) The Commission shall have the following powers and duties:
  - (1) To formally adopt a State Fire Education and Training Plan, a State Master Plan for Fire Prevention and Control, a Rescue Training Plan, and a State Master Plan for Rescue Services;
  - (2) To assist and participate with State and local fire prevention and control agencies in the improvement of fire prevention and control in North Carolina and to work with State and local rescue agencies to improve rescue services in the State;
  - (3) To increase the professional skills of fire protection and fire-fighting personnel and rescue personnel;
  - (4) To encourage public support for fire prevention and control and rescue services;
  - (5) To accept gifts, devises, grants, matching funds, and other considerations from private or governmental sources for use in promoting its work;
  - (6) To make grants for use in pursuing its objectives, under such conditions as are deemed to be necessary and such other powers as may be necessary to carry out the State's duties with respect to all grants to the State by the United States Fire Administration and the National Fire Academy; and all support programs brought into the State by these two entities shall be coordinated and controlled by the Commission;
  - (7) To make studies and recommendations for the improvement of fire prevention and control and rescue services in the State and to make studies and recommendations for the coordination and implementation of effective fire prevention and control and rescue

- services and for effective fire prevention and control and rescue services education;
- (8) To set objectives and priorities for the improvement of fire prevention and control and rescue services throughout the State;
  - (9) To advise State and local interests of opportunities for securing federal assistance for fire prevention and control and rescue services and for improving fire prevention and control and rescue services administration and planning within the State of North Carolina;
  - (10) To assist State agencies and institutions of local government and combinations thereof in the preparation and processing of applications for financial aid and to support fire prevention and control, rescue services, and planning and administration;
  - (11) To encourage and assist coordination at the federal, State and local government levels in the preparation and implementation of fire prevention and control and rescue services administrative improvements and crime reduction plans;
  - (12) To apply for, receive, disburse and audit the use of funds received from any public and private agencies and instrumentalities for fire prevention and control and rescue services, their administration and plans therefor;
  - (13) To enter into monitoring and evaluating the results of contracts and agreements necessary or incidental to the discharge of its assigned responsibilities;
  - (14) To provide technical assistance to State and local fire prevention and control and rescue agencies in developing programs for improvement;
  - (14a) To serve as a central office for the collection and dissemination of information relative to fire service and rescue service activities and programs in State government. All State government agencies conducting fire service and rescue service related programs and activities shall report the status of these programs and activities to the Commission on a quarterly basis and they shall also report to the Commission any new programs or changes to existing programs as they are implemented;
  - (14b) To establish voluntary minimum professional qualifications for all levels of fire service and rescue service personnel, and to issue, deny, suspend, revoke or take similar actions with respect to certifications issued by the Commission of minimum professional qualifications established under this subdivision.
  - (14c) To prepare an annual report to the Governor on its fire prevention and control activities and plans, rescue activities and plans, and to recommend legislation concerning fire prevention and control and rescue services;
  - (14d) To reimburse the members of the Commission's certification board, in accordance with G.S. 138-5, for travel and subsistence expenses incurred by them in their duties as certification board officers; and
  - (15) To take such other actions as may be deemed necessary or appropriate to carry out its assigned duties and responsibilities.
  - (16) To provide workers' compensation benefits under G.S. 58-87-10, to create a Volunteer Safety Workers' Compensation Board to assist it in performing this duty, and to reimburse the members of the Commission's Volunteer Safety Workers' Compensation Board in accordance with G.S. 138-5 for travel and subsistence expenses incurred by them.

- (b) Each State agency involved in fire prevention and control or rescue related activities shall furnish the executive director of the Commission such information as may be required to carry out the intent of this section. (1977, c. 1064, s. 1; 1981, c. 791, ss. 3, 4; 1985, c. 757, s. 167(b); 1989, c. 750, s. 1; 1993, c. 321, s. 41; 1995, c. 507, s. 7.21A(c); 2011-284, s. 58; 2015-39, s. 2.)

In addition to the staff counsel's recommendation to object based upon the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 to adopt rules within the authority of the State Fire and Rescue Commission, lines five through seven of this Rule has added the following language:

Fire departments shall provide at least 4 hours of training per month, with each firefighter obtaining a minimum of 36 hours of training per year. A signed or verified roster of personnel containing the names and hours of training attendance shall be kept for each training session.

The proposed amended rule language does not indicate who is signing or verifying the roster, or who is responsible for keeping the documentation. G.S. 58-86-25 addresses the requirements for rosters of the training. G.S. 58-86-25 states the following:

**§ 58-86-25. Determination and certification of eligible firefighters.**

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

The proposed amended rule language does not appear to clarify G.S. 58-86-25, but appears to add unclear additional requirements. The proposed amended rule language replaces the statutory requirement of the record being a "certified roster" to being a "signed or verified roster." G.S. 58-86-25 should control the reporting requirements.

G.S. 150B-21.9 requires the following of the Rules Review Commission:

- (a) Standards. - The Commission must determine whether a rule meets all of the following criteria:
- (1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

#### SUMMARY:

It is staff counsel's opinion that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(1), as the State Fire and Rescue Commission is a separate agency and rulemaking body. The agency and rulemaking body that promulgated this Rule is the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

Further, the proposed amended rule language on lines five through seven is unclear and appears to contradict G.S. 58-86-25. It is staff' counsel's opinion that this Rule should also be objected to for failure to comply with G.S. 150B-21.9(a)(2).



## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0508

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0508 Apparatus, cites the statutory authority as G.S. 58-2-40; 58-36-10(3); 58-86-25. Those statutes are set forth below:

**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

Abigail M. Hammond  
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-36-10. Method of rate making; factors considered.**

The following standards shall apply to the making and use of rates:

- (1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.
- (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.
- (3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply.
- (4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The Bureau shall establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or gender of the persons insured. The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence, and shall at least once every 10 years make a complete review of the territories for nonfleet private passenger motor vehicle insurance to determine whether they are proper and reasonable.
- (5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97.
- (6) To ensure that policyholders in the beach and coastal areas of the North Carolina Insurance Underwriting Association whose risks are of the same

class and essentially the same hazard are charged premiums that are commensurate with the risk of loss and premiums that are actuarially correct, the North Carolina Rate Bureau shall revise, monitor, and review the existing territorial boundaries used by the Bureau when appropriate to establish geographic territories in the beach and coastal areas of the Association for rating purposes. In revising these territories, the Bureau shall use statistical data sources available to define such territories to represent relative risk factors that are actuarially sound and not unfairly discriminatory. The new territories and any subsequent amendments proposed by the North Carolina Rate Bureau or Association shall be subject to the Commissioner's approval and shall appear on the Bureau's Web site, the Association's Web site, and the Department's Web site once approved.

- (7) Property insurance rates established under this Article may include a provision to reflect the cost of reinsurance to protect against catastrophic exposure within this State. Amounts to be paid to reinsurers, ceding commissions paid or to be paid to insurers by reinsurers, expected reinsurance recoveries, North Carolina exposure to catastrophic events relative to other states' exposure, and any other relevant information may be considered when determining the provision to reflect the cost of reinsurance. (1977, c. 828, s. 6; 1979, c. 824, s. 1; 1981, c. 521, s. 5; c. 790; 1987, c. 632, s. 1; 1991, c. 644, s. 39; 1999-132, s. 3.3; 2000-176, s. 1; 2004-203, s. 5(a); 2009-472, s. 2; 2012-162, s. 3.)

**§ 58-86-25. Determination and certification of eligible firefighters.**

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

In a technical change request, an inquiry was made regarding the applicability of G.S. 58-86-25 to this Rule. The agency responded that there is no opposition to deleting the reference to G.S. 58-86-25, which leaves the remaining statutes of G.S. 58-2-40 and 58-36-10(3).

The use of G.S. 58-36-10(3) as the authority for Rule 11 NCAC 05A .0508 is questionable, as Article 36 of Chapter 58 of the General Statutes pertains to the Rate Bureau, a separate entity, and the specific cited statutes sets forth a process for rating property insurance. It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-36-10(3) is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

G.S. 150B-21.9 requires the following of the Rules Review Commission:

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

(4) It was adopted in accordance with Part 2 of this Article.

#### SUMMARY:

Staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-36-10(3). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity regarding applicability of G.S. 58-36-10(3) in implementation of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2). Alternatively, if the Commissioner of Insurance is implementing the rate review process of G.S. 58-36-10(3) as a rule of the State Fire Marshal, it is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0511

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0511 Six Mile Insurance District, cites the statutory authority as G.S. 58-2-40; 58-40-25(4); 58-86-25. Those statutes are set forth below:

**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

Abigail M. Hammond  
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-40-25. Rating methods.**

In determining whether rates comply with the standards under G.S. 58-40-20, the following criteria shall be applied:



...

(4) In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply. (1977, c. 828, s. 2; 1985 (Reg. Sess., 1986), c. 1027, s. 16; 1991, c. 644, s. 40; 2000-176, s. 2; 2004-203, s. 5(b).)

**§ 58-86-25. Determination and certification of eligible firefighters.**

For purposes of this Article, eligible firefighters must attend 36 hours of training sessions in each calendar year. Each eligible fire department shall annually determine and report a certified roster of the names of those firefighters meeting the eligibility qualifications of this Article to its respective governing body, which upon determination of the validity and accuracy of the qualification, the department shall promptly submit the list to the North Carolina State Firemen's Association. Submission of such information by a department to the North Carolina State Firemen's Association constitutes a certification of its accuracy under accounting standards set forth by the Governmental Accounting Standards Board of the Financial Accounting Foundation. The Firemen's Association shall provide a list of those persons meeting the eligibility requirements of this Article to the State Treasurer by January 31 of each year. For the purposes of the preceding sentences, the governing body of a fire department operated: by a county is the county board of commissioners; by a city is the city council; by a sanitary district is the sanitary district board; by a corporation, whether profit or nonprofit, is the corporation's board of directors; and by any other entity is that group designated by the board. An "eligible firefighter" may not also qualify as an "eligible rescue squad worker" in order to receive double benefits available under this Article. (1957, c. 1420, s. 1; 1959, c. 1212, s. 1; 1981, c. 1029, s. 1; 1983, c. 416, s. 7; 1985, c. 241; 2000-67, s. 26.22; 2001-222, s. 1; 2003-362, s. 1; 2009-66, s. 2(b); 2013-284, s. 1(a); 2015-88, s. 3.)

In a technical change request, an inquiry was made regarding the applicability of G.S. 58-86-25 to this Rule. The agency responded that there is no opposition to deleting the reference to G.S. 58-86-25, which leaves the remaining statutes of G.S. 58-2-40 and 58-40-25(4).

It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-40-25 is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

G.S. 150B-21.9 requires the following of the Rules Review Commission:

- (a) Standards. - The Commission must determine whether a rule meets all of the following criteria:



- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

SUMMARY:

Staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-40-25(4). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity regarding applicability of G.S. 58-40-25(4) in implementation of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2). Alternatively, if the Commissioner of Insurance is implementing the rate review process of G.S. 58-40-25(4) as a rule of the State Fire Marshal, it is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0603

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0603 Requirements, cites the statutory authority as G.S. 58-2-40; 58-36-10(3); 58-87-1; 143C-6-23(b). Those statutes are set forth below:

**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

Abigail M. Hammond  
Commission Counsel

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-36-10. Method of rate making; factors considered.**

The following standards shall apply to the making and use of rates:

- (1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.
- (2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.
- (3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. In the case of property insurance rates under this Article, consideration shall be given to the insurance public protection classifications of fire districts established by the Commissioner. The Commissioner shall establish and modify from time to time insurance public protection districts for all rural areas of the State and for cities with populations of 100,000 or fewer, according to the most recent annual population estimates certified by the State Budget Officer. In establishing and modifying these districts, the Commissioner shall use standards at least equivalent to those used by the Insurance Services Office, Inc., or any successor organization. The standards developed by the Commissioner are subject to Article 2A of Chapter 150B of the General Statutes. The insurance public protection classifications established by the Commissioner issued pursuant to the provisions of this Article shall be subject to appeal as provided in G.S. 58-2-75, et seq. The exceptions stated in G.S. 58-2-75(a) do not apply.
- (4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. The Bureau shall establish and implement a comprehensive classification rating plan for motor vehicle insurance under its jurisdiction. No such classification plans shall base any standard or rating plan for private passenger (nonfleet) motor vehicles, in whole or in part, directly or indirectly, upon the age or gender of the persons insured. The Bureau shall at least once every three years make a complete review of the filed classification rates to determine whether they are proper and supported by statistical evidence, and shall at least once every 10 years make a complete review of the territories for nonfleet private passenger motor vehicle insurance to determine whether they are proper and reasonable.
- (5) In the case of workers' compensation insurance and employers' liability insurance written in connection therewith, due consideration shall be given to the past and prospective effects of changes in compensation benefits and in legal and medical fees that are provided for in General Statutes Chapter 97.
- (6) To ensure that policyholders in the beach and coastal areas of the North Carolina Insurance Underwriting Association whose risks are of the same

class and essentially the same hazard are charged premiums that are commensurate with the risk of loss and premiums that are actuarially correct, the North Carolina Rate Bureau shall revise, monitor, and review the existing territorial boundaries used by the Bureau when appropriate to establish geographic territories in the beach and coastal areas of the Association for rating purposes. In revising these territories, the Bureau shall use statistical data sources available to define such territories to represent relative risk factors that are actuarially sound and not unfairly discriminatory. The new territories and any subsequent amendments proposed by the North Carolina Rate Bureau or Association shall be subject to the Commissioner's approval and shall appear on the Bureau's Web site, the Association's Web site, and the Department's Web site once approved.

- (7) Property insurance rates established under this Article may include a provision to reflect the cost of reinsurance to protect against catastrophic exposure within this State. Amounts to be paid to reinsurers, ceding commissions paid or to be paid to insurers by reinsurers, expected reinsurance recoveries, North Carolina exposure to catastrophic events relative to other states' exposure, and any other relevant information may be considered when determining the provision to reflect the cost of reinsurance. (1977, c. 828, s. 6; 1979, c. 824, s. 1; 1981, c. 521, s. 5; c. 790; 1987, c. 632, s. 1; 1991, c. 644, s. 39; 1999-132, s. 3.3; 2000-176, s. 1; 2004-203, s. 5(a); 2009-472, s. 2; 2012-162, s. 3.)

**§ 58-87-1. Volunteer Fire Department Fund.**

- (a) Fund. - The Volunteer Fire Department Fund is created as an interest-bearing, nonreverting fund in the Department to provide matching grants to volunteer fire departments to purchase equipment and make capital improvements. The Commissioner shall administer the Fund. Up to one percent (1%) of the Fund may be used for additional staff and resources to administer the Fund in each fiscal year.
- (a1) **(Applicable to the 2015 grant process)** Grant Program. - An eligible fire department may apply to the Commissioner for a grant under this section. In awarding grants under this section, the Commissioner must, to the extent possible, select applicants from all parts of the State based upon need. The Commissioner must award the grants on May 15, or on the first business day after May 15 if May 15 falls on a weekend or a holiday, of each year subject to the following limitations:
- (1) The size of a grant may not exceed thirty thousand dollars (\$30,000).
  - (2) The applicant shall match the grant on a dollar-for-dollar basis, unless the applicant receives less than fifty thousand dollars (\$50,000) per year from municipal and county funding, in which case the applicant shall match one dollar (\$1.00) for each three dollars (\$3.00) of grant funds.
  - (3) The grant may be used only for equipment purchases, payment of highway use taxes on those purchases, costs of putting property acquired from the Department of Defense through the Firefighter Property (FFP) and federal Excess Property (FEPP) programs in service, or capital expenditures necessary to provide fire protection services.
  - (4) An applicant may receive no more than one grant per fiscal year.
- (b) Eligible Fire Department. - A fire department is eligible for a grant under this section if it meets all of the conditions of this subsection. No fire department may be declared ineligible for a grant solely because it is classified as a municipal fire department.

- (1) It serves a response area of 12,000 or less in population. In making the population determination, the Department must use the most recent annual population estimates certified by the State Budget Officer.
- (2) It consists entirely of volunteer members, with the exception that the unit may have paid members to fill the equivalent of six full-time paid positions.
- (3) It has been certified by the Department of Insurance.
- (c) Report. - The Commissioner must submit a written report to the General Assembly within 60 days after the grants have been made. This report must contain the following:
  - (1) The amount of the grant and the name of the recipient.
  - (2) The Fund balance at the beginning of the grant cycle.
  - (3) Cash receipts through the grant cycle.
  - (4) Cash disbursements through the grant cycle.
  - (5) The Fund balance at the end of the grant cycle. (1987, c. 709, s. 1; 1987 (Reg. Sess., 1988), c. 1062, ss. 6-9; 1989, c. 770, s. 30; 1995, c. 507, s. 7.21A(k); 1998-212, s. 25(a); 1999-319, s. 1; 2004-203, s. 5(c); 2006-196, s. 8; 2007-250, s. 3; 2013-360, s. 20.2(b); 2014-64, ss. 4(a), (b).)

**§ 143C-6-23. State grant funds: administration; oversight and reporting requirements.**

(a) Definitions. – The following definitions apply in this section:

- (1) Grant or grant funds. – State funds disbursed as a grant by a State agency; however, the terms do not include any payment made by the Medicaid program, the State Health Plan for Teachers and State Employees, or other similar medical programs.
- (2) Grantee. – A non-State entity that receives State funds as a grant from a State agency but does not include any non-State entity subject to the audit and other reporting requirements of the Local Government Commission.
- (3) Encumbrance. – A financial obligation created by a purchase order, contract, salary commitment, unearned or prepaid collections for services provided, or other legally binding agreement. A financial obligation is not an encumbrance for purposes of this section unless it (i) is in writing and has been signed by a person or entity who has authority to legally bind the grantee or subgrantee to spend the funds or (ii) was created by the provision of goods or services to the grantee or subgrantee by a third party under circumstances that create a legally binding obligation to pay for the goods or services.
- (4) Subgrantee. – A non-State entity that receives State funds as a grant from a grantee or from another subgrantee but does not include any non-State entity subject to the audit and other reporting requirements of the Local Government Commission.

(b) Conflict of Interest Policy. – Every grantee shall file with the State agency disbursing funds to the grantee a copy of that grantee's policy addressing conflicts of interest that may arise involving the grantee's management employees and the members of its board of directors or other governing body. The policy shall address situations in which any of these individuals may directly or indirectly benefit, except as the grantee's employees or members of its board or other governing body, from the grantee's disbursing of State funds, and shall include actions to be taken by the grantee or the individual, or both, to avoid conflicts of interest and the appearance of impropriety. The policy shall be filed before the disbursing State agency may disburse the grant funds.

...

In a technical change request, an inquiry was made regarding the applicability of 58-36-10(3) to this Rule. The agency responded that there is no opposition to deleting the reference to 58-36-10(3). The use of G.S. 58-36-10(3) as the authority for Rule 11 NCAC 05A .0603 is questionable, as Article 36 of Chapter 58 of the General Statutes pertains to the Rate Bureau, a separate entity, and the specific cited statutes sets forth a process for rating property insurance. It is unclear if the authority granted to the Commissioner of Insurance to set rates in G.S. 58-36-10(3) is being implemented in this Rule by the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1.

Another technical change request inquired about the authority for the following proposed amended rule language:

(d) Any department that is on the North Carolina Department of Insurance Noncompliance list or Office of State Budget and Management Suspension of Funding List for Non State Entities at <http://www.osbm.state.nc.us/> shall be ineligible to participate in the Volunteer Fire Department Fund grant program. If a department is awarded a grant and becomes ineligible to receive funding due to being noncompliant with the requirements in this section, the grant shall be forfeited 10 business days after notification of noncompliance by OSFM. A department that provides false application information shall be ineligible for the following two grant cycles and shall forfeit any grant award already awarded during the current cycle.

The agency responded that the penalty is authorized by the general rulemaking authority of the Commissioner of Insurance set forth in G.S. 58-2-40(1). Staff counsel opines that the penalty of being ineligible for grants for two cycles, or forfeiture of awarded grants is not a penalty option offered to the State Fire Marshal under Article 87 of Chapter 58 of the General Statutes. Staff counsel's review of Chapter 143C found a specific statutory penalty for fraudulent representations that likely controls the fact pattern that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate by the proposed amended rule language:

**§ 143C-10-1. Offenses for violation of Chapter.**

- (a) Class 1 misdemeanor. - It is a Class 1 misdemeanor for a person to knowingly and willfully do any one or more of the following:
- (1) Withdraw funds from the State treasury for any purpose not authorized by an act of appropriation.
  - (2) Approve any fraudulent, erroneous, or otherwise invalid claim or bill to be paid from an appropriation.
  - (3) Make a written statement, give a certificate, issue a report, or utter a document required by this Chapter, any portion of which is false.
  - (4) Fail or refuse to perform a duty imposed by this Chapter.
- (b) Class A1 misdemeanor. - It is a Class A1 misdemeanor for a person to make a false statement in violation of G.S. 143C-6-23(c).
- (c) Forfeiture of Office or Employment. - An appointed officer or employee of the State or an officer or employee of a political subdivision of the State, whether elected or appointed, forfeits his office or employment upon conviction of an offense under this section. An elected officer of the State is subject to impeachment for committing any of the offenses specified in this section.(2006-203, s. 3.)

G.S. 150B-21.9 requires the following of the Rules Review Commission:

Abigail M. Hammond  
Commission Counsel

(a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

(1) It is within the authority delegated to the agency by the General Assembly.

(2) It is clear and unambiguous.

(3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.

(4) It was adopted in accordance with Part 2 of this Article.

#### SUMMARY:

Staff counsel is concerned that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulate premium rates in a process that is contrary to the requirements of G.S. 58-36-10(3). It is staff counsel's recommendation to the Rules Review Commission to object to this Rule for issues of clarity regarding applicability of G.S. 58-36-10(3) in implementation of this Rule. It is staff counsel's recommendation that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2). Alternatively, if the Commissioner of Insurance is implementing the rate review process of G.S. 58-36-10(3) as a rule of the State Fire Marshal, it is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).

Second, staff counsel recommends objection to this Rule, as the proposed amended rule language imposes a penalty that is not supported by the cited statutory authority. It is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).



## 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: Department of Insurance

RULE CITATION: 11 NCAC 05A .0703

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:

The rules filed by the Department of Insurance were filed on behalf of the State Fire Marshal. By statute, the State Fire Marshal is the Commissioner of Insurance, as set forth in G.S. 58-80-1:

**§ 58-80-1. Purpose of Article; meaning of "State Fire Marshal".**

The purpose of this Article shall be the creation of a State Volunteer Fire Department to provide protection for property lying outside the boundaries of municipalities, and to render assistance anywhere within the State of North Carolina, in municipalities or counties, in emergencies caused by fire, floods, tornadoes, or otherwise, in the manner and subject to the conditions provided in this Article. **As used in this Article and elsewhere in the General Statutes, "State Fire Marshal" means the Commissioner of Insurance of the State of North Carolina.** (1939, c. 364, s. 1; 1985, c. 666, s. 66.)

The statutes set forth in Chapter 58 govern "Insurance" and consists of 92 different Articles. The State Fire Marshal is set forth in Article 80 of Chapter 58 of the General Statutes.

Please note that this Rule, 11 NCAC 05A .0703 Requirements for Units Required to Match Grants, cites the statutory authority as G.S. 58-2-40; 58-87-5; 143C-6-23(b). Those statutes are set forth below:

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**§ 58-2-40. Powers and duties of Commissioner.**

The Commissioner shall:

- (1) See that all laws of this State that the Commissioner is responsible for administering and the provisions of this Chapter are faithfully executed; and to that end the Commissioner is authorized to adopt rules in accordance with Chapter 150B of the General Statutes, in order to enforce, carry out and make effective the provisions of those laws. The Commissioner is also authorized to adopt such further rules not contrary to those laws that will prevent persons subject to the Commissioner's regulatory authority from engaging in practices injurious to the public.
- (2) Have the power and authority to adopt rules pertaining to and governing the solicitation of proxies, including financial reporting in connection therewith, with respect to the capital stock or other equity securities of any domestic stock insurance company.
- (3) Prescribe to the companies, associations, orders, or bureaus required by Articles 1 through 64 of this Chapter to report to the Commissioner, the necessary forms for the statements required. The Commissioner may change those forms from time to time when necessary to secure full information as to the standing, condition, and such other information desired of companies, associations, orders, or bureaus under the jurisdiction of the Department.
- (4) Receive and thoroughly examine each financial statement required by Articles 1 through 64 of this Chapter.
- (5) Report in detail to the Attorney General any violations of the laws relative to insurance companies, associations, orders and bureaus or the business of insurance; and the Commissioner may institute civil actions or criminal prosecutions either by the Attorney General or another attorney whom the Attorney General may select, for any violation of the provisions of Articles 1 through 64 of this Chapter.
- (6) Upon a proper application by any citizen of this State, give a statement or synopsis of the provisions of any insurance contract offered or issued to the citizen.
- (7) Administer, or the Commissioner's deputy may administer, all oaths required in the discharge of the Commissioner's official duty.
- (8) Compile and make available to the public such lists of rates charged, including deviations, and such explanations of coverages that are provided by insurers for and in connection with contracts or policies of (i) insurance against loss to residential real property with not more than four housing units located in this State and any contents thereof or valuable interest therein and other insurance coverages written in connection with the sale of such property insurance and (ii) private passenger (nonfleet) motor vehicle liability, physical damage, theft, medical payments, uninsured motorists, and other insurance coverages written in connection with the sale of such insurance, as may be advisable to inform the public of insurance premium differentials and of the nature and types of coverages provided. The explanations of coverages provided for in this section must comply with the provisions of Article 38 of this Chapter.
- (9) Repealed by Session Laws 2000-19, s. 3, effective on or after April 1, 1998.
- (10) Repealed by Session Laws 2013-5, s. 1(b), effective March 6, 2013. (1899, c. 54, s. 8; 1905, c. 430, s. 3; Rev., s. 4689; C.S., s. 6269; 1945, c. 383; 1947, c. 721; 1965, c. 127, s. 1; 1971, c. 757, s. 1; 1977, c. 376, s. 1; 1979, c. 755, s. 19; c. 881, s. 1; 1981, c. 846, s. 2; 1989, c. 485, s. 29; 1991, c. 644, s. 26; 1997-392, s. 3; 2000-19, s. 3; 2010-31, s. 24.2(a); 2013-5, s. 1(b).)

**§ 58-87-5. Volunteer Rescue/EMS Fund.**

- (a) There is created in the Department of Insurance the Volunteer Rescue/EMS Fund to provide grants to volunteer rescue units, rescue/EMS units, and EMS units providing rescue or rescue and emergency medical services to purchase equipment and make capital improvements. An eligible unit may apply to the Department of Insurance for a grant under this section. The application form and criteria for grants shall be established by the Department. The North Carolina Association of Rescue and Emergency Medical Services, Inc., shall provide the Department with an advisory priority listing for rescue equipment eligible for funding, and the Department of Health and Human Services shall provide the Department with an advisory priority listing of EMS equipment eligible for funding. The State Treasurer shall invest the Fund's assets according to law, and the earnings shall remain in the Fund. On December 15, or on the first business day after December 15 if December 15 falls on a weekend or a holiday, of each year, the Department shall make grants to eligible units subject to all of the following limitations:

- (1) A grant to an applicant who is required to match the grant with non-State funds may not exceed twenty-five thousand dollars (\$25,000), and a grant to an applicant who is not required to match the grant with non-State funds may not exceed three thousand dollars (\$3,000).
- (2) An applicant whose liquid assets, when combined with the liquid assets of any corporate affiliate or subsidiary of the applicant, are more than one thousand dollars (\$1,000) shall match the grant on a dollar-for-dollar basis with non-State funds.
- (3) The grant may be used only for equipment purchases or capital expenditures.
- (4) An applicant may receive no more than one grant per fiscal year.
- (5) The grant may be used only for purposes related to services that the unit is authorized to provide.

In awarding grants under this section, the Department shall to the extent possible select applicants from all parts of the State based upon need, subject to the following priority order: (i) rescue units, (ii) rescue/EMS units, (iii) EMS units that are licensed as EMS providers under G.S. 131E-155.1, and, finally, (iv) EMS units that are volunteer fire departments that are a part of a county's EMS system plan. Up to two percent (2%) of the Fund may be used for additional staff and resources to administer the Fund in each fiscal year. In addition, notwithstanding G.S. 58-78-20, up to four percent (4%) of the Fund may be used for additional staff and resources for the North Carolina Fire and Rescue Commission.

- (b) A unit is eligible for a grant under this section if it meets all of the following conditions:

- (1) Repealed by Session Laws 1989 (Regular Session, 1990), c. 1066, s. 33(a).
- (2) It consists entirely of volunteer members, with the exception that the unit may have paid members to fill the equivalent of 10 full-time paid positions.
- (3) It has been recognized by the Department as a rescue unit, a rescue/EMS unit, or an EMS unit.
- (4) It satisfies the eligibility criteria established by the Department under subsection (a) of this section.

- (c) For the purpose of this section and Article 88 of this Chapter, "rescue" means the removal of individuals facing external, nonmedical, and nonpatient related peril to areas of relative safety. A "rescue unit" or "rescue squad" means a group of individuals who are not necessarily trained in emergency medical services, fire fighting, or law enforcement, but who

expose themselves to an external, nonmedical, and nonpatient related peril to effect the removal of individuals facing the same type of peril to areas of relative safety. The unit or squad must comply with existing State statutes and with eligibility criteria established by the North Carolina Association of Rescue and Emergency Medical Services, Inc.

- (d) For the purposes of this section, "emergency medical services" or "EMS" has the same meaning as in G.S. 131E-155(6). Unless otherwise more narrowly specified, an "EMS unit" means either (i) an EMS provider licensed under G.S. 131E-155.1 or (ii) a volunteer fire or fire/rescue department that is part of its county's EMS system plan. The unit or squad must comply with existing State statutes and with eligibility criteria established by the North Carolina Association of Rescue and Emergency Medical Services, Inc.
- (e) Report. - The Commissioner must submit a written report to the General Assembly within 60 days after the grants have been made. This report must contain the following:
  - (1) The amount of the grant and the name of the recipient.
  - (2) The Fund balance at the beginning of the grant cycle.
  - (3) Cash receipts through the grant cycle.
  - (4) Cash disbursements through the grant cycle.
  - (5) The Fund balance at the end of the grant cycle. (1987 (Reg. Sess., 1988), c. 1062, s. 2; 1989, c. 115; c. 534, s. 2; 1989 (Reg. Sess., 1990), c. 1066, s. 33(a); 1991 (Reg. Sess., 1992), c. 943, s. 2; 1995, c. 507, s. 7.21A(l); 1997-443, s. 11A.20; 1998-212, s. 25(b); 1999-319, s. 2; 2005-283, s. 1; 2014-64, s. 4(c).)

**§ 143C-6-23. State grant funds: administration; oversight and reporting requirements.**

(a) Definitions. – The following definitions apply in this section:

- (1) Grant or grant funds. – State funds disbursed as a grant by a State agency; however, the terms do not include any payment made by the Medicaid program, the State Health Plan for Teachers and State Employees, or other similar medical programs.
- (2) Grantee. – A non-State entity that receives State funds as a grant from a State agency but does not include any non-State entity subject to the audit and other reporting requirements of the Local Government Commission.
- (3) Encumbrance. – A financial obligation created by a purchase order, contract, salary commitment, unearned or prepaid collections for services provided, or other legally binding agreement. A financial obligation is not an encumbrance for purposes of this section unless it (i) is in writing and has been signed by a person or entity who has authority to legally bind the grantee or subgrantee to spend the funds or (ii) was created by the provision of goods or services to the grantee or subgrantee by a third party under circumstances that create a legally binding obligation to pay for the goods or services.
- (4) Subgrantee. – A non-State entity that receives State funds as a grant from a grantee or from another subgrantee but does not include any non-State entity subject to the audit and other reporting requirements of the Local Government Commission.

(b) Conflict of Interest Policy. – Every grantee shall file with the State agency disbursing funds to the grantee a copy of that grantee's policy addressing conflicts of interest that may arise involving the grantee's management employees and the members of its board of directors or other governing body. The policy shall address situations in which any of these individuals may directly or indirectly benefit, except as the grantee's employees or members of its board or other governing body, from the grantee's disbursing of State funds, and shall include actions to be taken by the grantee or the

individual, or both, to avoid conflicts of interest and the appearance of impropriety. The policy shall be filed before the disbursing State agency may disburse the grant funds.

...

A technical change request inquired about the authority for the following proposed amended rule language:

(d) Any department that is currently on the North Carolina Department of Insurance Noncompliance list or Office of State Budget and Management Suspension of Funding List for Non State Entities at <http://www.osbm.state.nc.us/> shall be ineligible to participate in the Volunteer Rescue/EMS fund grant program. If a department is awarded a grant and becomes ineligible to receive funding due to being noncompliant with the requirements in this section, the grant shall be forfeited after 10 business days of notification of noncompliance from OSFM. A department that provides false application information shall be ineligible for the following two grant cycles and shall forfeit any grant award already awarded during the current cycle.

The agency responded that the penalty is authorized by the general rulemaking authority of the Commissioner of Insurance set forth in G.S. 58-2-40(1). Staff counsel opines that the penalty of being ineligible for grants for two cycles, or forfeiture of awarded grants is not a penalty option offered to the State Fire Marshal under Article 87 of Chapter 58 of the General Statutes. Staff counsel's review of Chapter 143C found a specific statutory penalty for fraudulent representations that likely controls the fact pattern that the Commissioner of Insurance acting as the State Fire Marshal under G.S. 58-80-1 is attempting to regulated by the proposed amended rule language:

**§ 143C-10-1. Offenses for violation of Chapter.**

- (a) Class 1 misdemeanor. - It is a Class 1 misdemeanor for a person to knowingly and willfully do any one or more of the following:
  - (1) Withdraw funds from the State treasury for any purpose not authorized by an act of appropriation.
  - (2) Approve any fraudulent, erroneous, or otherwise invalid claim or bill to be paid from an appropriation.
  - (3) Make a written statement, give a certificate, issue a report, or utter a document required by this Chapter, any portion of which is false.
  - (4) Fail or refuse to perform a duty imposed by this Chapter.
- (b) Class A1 misdemeanor. - It is a Class A1 misdemeanor for a person to make a false statement in violation of G.S. 143C-6-23(c).
- (c) Forfeiture of Office or Employment. - An appointed officer or employee of the State or an officer or employee of a political subdivision of the State, whether elected or appointed, forfeits his office or employment upon conviction of an offense under this section. An elected officer of the State is subject to impeachment for committing any of the offenses specified in this section.(2006-203, s. 3.)

G.S. 150B-21.9 requires the following of the Rules Review Commission:

- (a) Standards. - The Commission must determine whether a rule meets all of the following criteria:

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- (1) It is within the authority delegated to the agency by the General Assembly.
- (2) It is clear and unambiguous.
- (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
- (4) It was adopted in accordance with Part 2 of this Article.

SUMMARY:

Staff counsel recommends objection to this Rule, as the proposed amended rule language imposes a penalty that is not supported by the cited statutory authority. It is staff counsel's recommendation that this Rule should be objected to for lack of statutory authority and failure to comply with G.S. 150B-21.9(a)(1).