

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 (IN ACCORD WITH RRC RULES) TO THE COMMISSION.

AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 08 .0904

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends that the Rules Review Commission object to the rule amendments filed by the Department of Insurance (DOI), because: (1) the Manufactured Housing Board (Board), and not the DOI, has the statutory authority to amend this rule; and (2) the amended rule requires a criminal record check from an applicant for a license as a manufactured home manufacturer and dealer and does not limit the requirement to initial licenses, even though the General Assembly modified this authority.

Authority to Adopt Licensure Rules Related to Manufactured Homes Licenses

The Board is the agency empowered to adopt rules related to manufactured homes licenses:

(b) In accordance with the provisions of this Part, the [Manufactured Housing] Board shall have the following powers and duties:

- (1) To **issue licenses** to manufacturers, dealers, salespersons, and set-up contractors.

* * * * *

- (4) To **adopt rules** in accordance with Chapter 150B of the General Statutes as are necessary to carry out the provisions of this Part.

Jason Thomas
Commission Counsel

G.S. 143-143.10. Under this authority and pursuant to G.S. 150B, Article 2A, the Board is required to approve and publish the notice of text and the text of the rule, to conduct a public hearing if one is held (here, a public hearing was announced in the notice of text), and to adopt the rule. G.S. 150B-21.2.

The DOI, not the Board, is listed as the “rule-making agency” on the Submission for Permanent Rule form for this amended rule. The DOI was identified as the agency intending to amend the rule in the N.C. Register notice. Moreover, it does not appear that it was the Board that approved, published, and adopted the amendment to the rule, because the Board’s quarterly meeting schedule (attached) seems inconsistent with the dates for these actions, as stated on the Submission for Permanent Rule form.

While the duty to conduct the public hearing may have been delegated to DOI personnel, research has not revealed any delegation to DOI of the authority to approve, publish, or adopt the amendment to the rule or, indeed, any explicit authority that would allow the Board to delegate these duties to DOI. Staff has contacted DOI personnel and inquired about all of these issues, but has received no response that resolves the concerns outlined in this staff opinion.

Staff recommends that the Rules Review Commission object to the amended rule because the DOI does not have the statutory authority to amend this rule and DOI has failed to comply with the APA.

Failure to comply with Session Law 2015-241, Section 14.6.(q):

The rule is being amended in response to Session Law 2015-286, Section 2.2:

SECTION 2.2. G.S. 143-143.10A reads as rewritten:

"§ 143-143.10A. Criminal history checks of applicants for licensure.

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

(1) Applicant. – A person applying for initial licensure as a manufactured home ~~manufacturer, dealer, salesperson, salesperson~~ or set-up contractor.

...

(b) All applicants for initial licensure shall consent to a criminal history record check....

The session law removes manufacturers and dealers from the definition of “applicant” for licensure by the Board, and limits the criminal history check to initial licenses only, rather than to all licenses.

Manufacturers and dealers who engage in the business of manufactured homes are required to be licensed. G.S. 143-143.11(a). Paragraph (a) of the rule requires that manufacturers and dealers consent to a criminal history check and applies this requirement to all licenses, rather than initial licenses only, contrary to the explicit provision of the Session Law 2015-286, Section 2.2.

Jason Thomas
Commission Counsel

Staff recommends that the Rules Review Commission object to the amended rule because it requires manufacturers and dealers consent to a criminal history check and applies this requirement to all licenses.

Summary:

Staff recommends objection to the amended rule, pursuant to G.S. 150B-21.9(a), because: (1) the DOI does not have the statutory authority to amend this rule and failed to comply with the APA; and (2) the amended rule requires a criminal record check from an applicant for a license as a manufactured home manufacturer and dealer and does not limit the requirement to initial licenses, without statutory authority.

§ 143-143.11. License required; application for license.

(a) It shall be unlawful for any manufactured home manufacturer, dealer, salesperson, or set-up contractor to engage in business as such in this State without first obtaining a license from the Board for each place of business operated by the licensee, as provided in this Part. The fact that a person is licensed by the Board as a set-up contractor or a dealer does not preempt any other licensing boards' applicable requirements for that person.

(b) Application for the license shall be made to the Board at such time, in such form, and contain information the Board requires, and shall be accompanied by the fee established by the Board. The fee shall not exceed three hundred fifty dollars (\$350.00) for each license issued. In addition to the license fee, the Board may also charge an applicant a fee to cover the cost of the criminal history record check required by G.S. 143-143.10A.

(c) In the application, the Board shall require information relating to the matters set forth in G.S. 143-143.13 as grounds for refusal of a license, and information relating to other pertinent matters consistent with safeguarding the public interest. All of this information shall be considered by the Board in determining the fitness of the applicant. Once the Board has determined that an applicant is fit, the Board must provide the applicant a license for each place of business operated by the applicant.

(d) All licenses shall expire, unless revoked or suspended, on June 30 of each year following the date of issue.

(e) Every licensee shall, on or before the first day of July of each year, obtain a renewal of a license for the next year by applying to the Board, completing the necessary hours of continuing education required under G.S. 143-143.11B, and paying the required renewal fee for each place of business operated by the licensee. The renewal fee shall not exceed three hundred fifty dollars (\$350.00) for each license issued. Upon failure to renew by the first day of July, a license automatically expires. The license may be renewed at any time within one year after its lapse upon payment of the renewal fee and a late filing fee. The late filing fee shall not exceed three hundred fifty dollars (\$350.00).

(f) Repealed by Session Laws 2005-297, s. 1, effective August 22, 2005.

(g) Notwithstanding the provisions of subsection (a), the Board may provide by rule that a manufactured home salesperson will be allowed to engage in business during the time period after making application for a license but before such license is granted.

(h) As a prerequisite to obtaining a license under this Part, a person may be required to pass an examination prescribed by the Board that is based on the Code, this Part, and any other subject matter considered relevant by the Board. (1981, c. 952, s. 2; 1985, c. 487, s. 1; 1987, c. 429, s. 19; 1987 (Reg. Sess., 1988), c. 1039, ss. 2, 3; 1989, c. 485, s. 44; 1991, c. 644, s. 35; 1999-393, s. 1; 2003-400, s. 10; 2005-297, s. 1.; 2005-451, s. 1; 2009-451, s. 21.4.)

MANUFACTURED HOME LICENSE/CRIMINAL HISTORY CHECK

SECTION 2.2. G.S. 143-143.10A reads as rewritten:

"§ 143-143.10A. Criminal history checks of applicants for licensure.

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

(1) Applicant. – A person applying for initial licensure as a manufactured home ~~manufacturer, dealer, salesperson, salesperson~~ or set-up contractor.

...
(b) All applicants for initial licensure shall consent to a criminal history record check. Refusal to consent to a criminal history record check may constitute grounds for the Board to deny licensure to an applicant. The Board shall ensure that the State and national criminal history of an applicant is checked. Applicants shall obtain criminal record reports from one or more reporting services designated by the Board to provide criminal record reports. Each applicant is required to pay the designated service for the cost of the criminal record report. In the alternative, the Board may provide to the North Carolina Department of Public Safety the fingerprints of the applicant to be checked, a form signed by the applicant consenting to the criminal record check and the use of fingerprints and other identifying information required by the State or National Repositories of Criminal Histories, and any additional information required by the Department of Public Safety. The Board shall keep all information obtained pursuant to this section confidential.

...."

AMEND DEFINITION OF "EMPLOYEE" UNDER THE WORKERS' COMPENSATION ACT TO EXCLUDE VOLUNTEERS AND OFFICERS OF CERTAIN NONPROFIT CORPORATIONS AND ASSOCIATIONS

SECTION 2.3. G.S. 97-2(2) reads as rewritten:

"§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires:

...
(2) Employee. – The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession, or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, including such as are elected by the people. The term "employee" shall include members of the North Carolina National Guard while on State active duty under orders of the Governor and members of the North Carolina State Defense Militia while on State active duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also the employee's legal representative, dependents, and other persons to whom compensation may be payable: Provided, further, that any employee, as herein defined, of a municipality, county, or of the State of



Manufactured Building

Wayne Goodwin, Commissioner of Insurance
Rick McIntyre, Assistant State Fire Marshal

NORTH CAROLINA MANUFACTURED HOUSING BOARD

(JANUARY 1, 2015)

SCHEDULED MEETING DATES FOR

2015

TUESDAY	FEBRUARY 10, 2015	9:00 AM
TUESDAY	MAY 12, 2015	9:00 AM
TUESDAY	AUGUST 11, 2015	9:00 AM
TUESDAY	NOVEMBER 10, 2015	9:00 AM

2016

TUESDAY	FEBRUARY 9, 2016	9:00 AM
TUESDAY	MAY 10, 2016	9:00 AM
TUESDAY	AUGUST 9, 2016	9:00 AM
TUESDAY	NOVEMBER 8, 2016	9:00 AM

ALL MEETINGS ARE CONDUCTED (UNLESS OTHERWISE NOTIFIED) AT THE OSFM OFFICES ADDRESS BELOW:

**NORTH CAROLINA DEPARTMENT OF INSURANCE
OFFICE OF THE STATE FIRE MARSHAL
322 CHAPANOKE ROAD
RALEIGH, NC**

FOR ANY QUESTIONS CONTACT KAREN HOLDEN AT 919-661-5880 EXT. 214