

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
- X Object, based on:
 - X 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.

1 11 NCAC 05A .0105 is amended as published in 31.04 NCR 282 as follows:

2 **11 NCAC 05A .0105 TRAINING OPERATIONS**

3 ~~The Field Training Staff of the Fire and Rescue Division of the Department of Insurance shall serve as staff to the~~
4 ~~State Fire Commission. OSFM Staff staff~~ duties shall include but not be limited to the following:

- 5 (1) Research and development of new techniques, tools, and procedures in order to develop specialized
6 training for firefighters as well as instructor training.
- 7 (2) Provide input to the State Fire and Rescue Commission regarding changes in standards based on
8 research.
- 9 (3) Provide technical support to the ~~State Fire~~ Commission.
- 10 (4) Evaluate and audit delivery programs ~~when~~ as authorized by the State Fire Commission ~~State Fire~~
11 ~~and Rescue Commission. requests and approves such evaluations.~~
- 12 (5) Plan, develop and deliver training programs for fire departments, rescue squads, colleges,
13 universities and other governmental agencies.

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15 *History Note: Authority G.S. 58-2-40; 58-78-10;*
16 *Eff. February 1, 1976;*
17 *Readopted Eff. May 12, 1978;*
18 *Amended Eff. December 1, 2016; September 1, 2010; October 1, 2006; July 1, 1986.*

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RRC STAFF OPINION

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AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0201

RECOMMENDED ACTION:

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

COMMENT:

The agency has adopted the following rule:

~~The Fire and Rescue Services Division~~ OSFM shall be prepared to administer the State Volunteer Fire Department in case of emergencies caused by fire, floods, ~~wars~~, tornadoes or otherwise in the manner and subject to the conditions provided in G.S. 58, Article 80. 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.

G.S. 58-80-1 states the following:

§ 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.)

A comparison of Rule 11 NCAC 05A .0201 to the applicable statute, G.S. 58-80-1, "Purpose of Article, meaning of "State Fire Marshal"," reflects that a substantial portion of the rule is duplicative of the statutory language. 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.

In light of the duplicative content of this Rule, 11 NCAC 05A .0201 does not appear necessary to implement or interpret G.S. 58-80-1. The information that is contained within this Rule and not duplicative of G.S. 58-80-1 merely identifies that the "Office of State Fire Marshal" appears to have replaced the "State Volunteer Fire Department."

SUMMARY:

Staff is concerned that the adoption of 11 NCAC 05A .0201 by the State Fire Marshal, the Commissioner of Insurance of the State of North Carolina, is an unnecessary rule. It is staff's opinion that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(3).

1 11 NCAC 05A .0201 is amended as published in 31.04 NCR 282 as follows:

2 **SECTION .0200 - STATE VOLUNTEER FIRE DEPARTMENT**

3
4 **11 NCAC 05A .0201 ADMINISTRATION OF STATE VOLUNTEER FIRE DEPARTMENT**

5 ~~The Fire and Rescue Services Division-OSFM~~ shall be prepared to administer the State Volunteer Fire Department in
6 case of emergencies caused by fire, floods, ~~war~~, tornadoes or otherwise in the manner and subject to the conditions
7 provided in G.S. 58, Article 80. As used in this Article and elsewhere in the General Statutes, "State Fire Marshal"
8 means the Commissioner of Insurance of the State of North Carolina.

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10 *History Note: Authority G.S. 58-2-40; 58-80-1 thru 58-80-60;*
11 *Eff. February 1, 1976;*
12 *Readopted Eff. May 12, 1978;*
13 *Amended Eff. December 1, 2016; April 8, 2002; July 1, 1986.*

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.)

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AGENCY: Department of Insurance

RULE CITATION: 11 NCAC 05A .0301

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 agency has adopted the following rule:

The certification provided by the North Carolina State Firemen's Association to the Department of Insurance, Office of State Fire Marshal under G.S. 58-84-40(b) shall contain the balance in each local fund, and a verification that a financial statement and status of fire department membership was ~~submitted.~~ submitted, in addition to other information required by statute or process.

G.S. 58-84-40 states the following:

§ 58-84-40. Trustees to keep account and file certified reports.

(a) Each local board of trustees shall keep a correct account of all moneys received and disbursed by them. On a form prescribed by the North Carolina State Firemen's Association, each local board shall certify by October 31 of each year the following to the Association: **the balance of the local fund, proof of sufficient bonding, a full and detailed accounting of the previous year's expenditures, and a full accounting of membership qualifications.** Such certification shall be made concurrently with the local unit's statement of Fire Readiness. The accounting of the previous year's expenditures shall include the amounts spent on each of the purposes listed

in G.S. 58-84-35(a), including the number of firefighters that received benefits for each of the purposes.

(b) In turn, the State Firemen's Association shall certify to the Department of Insurance by January 1 of each year on a form prescribed by the Department, the following:

- (1) The local units that have complied with the requirements of subsection (a) of this section.
- (2) A listing of the members of each of the local units.
- (3) The fund balances for each of the local units' relief funds.
- (4) Any departments that have exceeded the maximum balance provided under G.S. 58-84-33(a).
- (5) Details on the disbursements from local relief funds, including how much was disbursed for each allowable purpose and how many members received disbursements for those purposes, on both a unit-by-unit basis and total basis.
- (6) Information on any improper disbursements.

A comparison of Rule 11 NCAC 05A .0301 to the applicable statute, G.S. 58-84-40, "Trustees to keep account and file certified records," reflects that a substantial portion of the rule is duplicative of the statutory language. 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.

In light of the duplicative content of this Rule, 11 NCAC 05A .0301 does not appear necessary to implement or interpret G.S. 58-84-40. The information that is contained within this Rule and not duplicative of G.S. 58-84-40 merely identifies that the certification should be filed with the "Office of State Fire Marshal" of the Department of Insurance.

Rule 11 NCAC 05A .0301 has one additional clause that creates an unclear reporting requirement or ambiguity in the Rule. The last clause of this Rule states "in addition to other information required by statute or process," but does not clearly identify the additional information that the State Firemen's Association is required to certify to the Department of Insurance by January 1. Therefore, the proposed amendment is unclear of the requirements and creates an ambiguity.

SUMMARY:

Staff is concerned that the adoption of 11 NCAC 05A .0301 by the State Fire Marshal, the Commissioner of Insurance of the State of North Carolina, is an unnecessary rule. Staff is further concerned that the amended language at the end of the Rule is unclear and creates ambiguity as to what is required in the certification by the State Fireman's Association. It is

staff's opinion that this Rule should be objected to for failure to comply with G.S. 150B-21.9(a)(2), (a)(3).

1 11 NCAC 05A .0301 is amended as published in 31.04 NCR 282 as follows:

2 **SECTION .0300 - FIREFIGHTERS' RELIEF FUND**

3
4 **11 NCAC 05A .0301 ELIGIBLE MEMBERS**

5 The certification provided by the North Carolina State Firemen's Association to the Department of Insurance, Office
6 of State Fire Marshal under G.S. 58-84-40(b) shall contain the balance in each local fund, and a verification that a
7 financial statement and status of fire department membership was ~~submitted.~~ submitted, in addition to other
8 information required by statute or process.

9
10 *History Note: Authority G.S. 58-2-40(1); 58-84-40;*
11 *Eff. February 1, 1976;*
12 *Readopted Eff. May 12, 1978;*
13 *Amended Eff. December 1, 2016; September 1, 2010; October 1, 2006; February 1, 1993; July 1,*
14 *1986.*

§ 58-84-40. Trustees to keep account and file certified reports.

(a) Each local board of trustees shall keep a correct account of all moneys received and disbursed by them. On a form prescribed by the North Carolina State Firemen's Association, each local board shall certify by October 31 of each year the following to the Association: the balance of the local fund, proof of sufficient bonding, a full and detailed accounting of the previous year's expenditures, and a full accounting of membership qualifications. Such certification shall be made concurrently with the local unit's statement of Fire Readiness. The accounting of the previous year's expenditures shall include the amounts spent on each of the purposes listed in G.S. 58-84-35(a), including the number of firefighters that received benefits for each of the purposes.

(b) In turn, the State Firemen's Association shall certify to the Department of Insurance by January 1 of each year on a form prescribed by the Department, the following:

- (1) The local units that have complied with the requirements of subsection (a) of this section.
- (2) A listing of the members of each of the local units.
- (3) The fund balances for each of the local units' relief funds.
- (4) Any departments that have exceeded the maximum balance provided under G.S. 58-84-33(a).
- (5) Details on the disbursements from local relief funds, including how much was disbursed for each allowable purpose and how many members received disbursements for those purposes, on both a unit-by-unit basis and total basis.
- (6) Information on any improper disbursements.

(c) In the event that any board of trustees in any of the towns and cities benefited by this Article shall neglect or fail to perform their duties, or shall willfully misappropriate the funds entrusted in their care by obligating or disbursing such funds for any purpose other than those set forth in G.S. 58-84-35, then the Insurance Commissioner shall withhold any and all further payments to such board of trustees, or their successors, until the matter has been fully investigated by an official of the State Firemen's Association, and adjusted to the satisfaction of the Insurance Commissioner.

(d) In the event that any local relief fund provided for in this Article becomes impaired, then the Statewide Firefighters' Relief Fund may in the discretion of its board of trustees assist the local unit administering the fund in providing for relief to injured firefighters and their dependents or survivors; provided, however, that any funds so provided to such impaired units shall be repaid in full at the statutory rate of interest from future local unit receipts if the impairment resulted from violations of this Article. (1907, c. 831, s. 7; C.S., s. 6070; 1925, c. 41; 1985, c. 666, s. 63; 2007-246, s. 5; 2014-64, s. 1(a).)

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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

1 11 NCAC 05A .0501 is amended as published in 31.04 NCR 283 as follows:

2 **SECTION .0500 - INITIAL CERTIFICATION AND RESPONSE RATINGS FOR FIRE DEPARTMENTS**

3
4 **11 NCAC 05A .0501 PURPOSE**

5 The purpose of this Section is to set forth the ~~minimum~~ requirements that a fire department ~~must~~shall meet in order to
6 qualify for eligibility for death benefits under Article 12A of Chapter 143 of the North Carolina General Statutes, and
7 the North Carolina Firemen's Pension Fund under G.S. 58-86-25; for initial recognition in insurance premiums for a
8 responding fire department; and for response rating to designate insurance premiums. Upon meeting the initial
9 requirements for certification, a fire district shall be given a rating of "9S". A fire district may get a rating from "1
10 through 8" upon improving its response capabilities with "1" being the best rating. For ratings of 1 through 8, the fire
11 department shall be evaluated using the current NCFRSRS. If at any time a department is determined by OSFM to be
12 unable to meet the requirements set forth in these standards for a given period of time, they may be designated a "Class
13 10" (non-certified).

14
15 *History Note: Authority G.S. 58-2-40; 58-86-25;*

16 *Eff. September 1, 1985;*

17 *Amended Eff. December 1, 2016; October 1, 2006; July 1, 1992; July 1, 1986.*

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
- X Object, based on:
 - X Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

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).

1 11 NCAC 05A .0505 is amended as published in 31.04 NCR 283-284 as follows:

2 **11 NCAC 05A .0505 TRAINING REQUIREMENTS**

3 (a) All members of fire departments shall comply with the ~~drills and meetings training~~ requirements of G.S. 58-
4 86-25.

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

8 (b) The chief officer of each fire department shall:

9 (1) within one year of appointment, complete a class on basic management of fire department operations
10 ~~and records~~ approved by the North Carolina Fire and Rescue Commission for chief officer based
11 upon National Fire Protection Association (NFPA) standards for chief officer. NFPA Standard 1021
12 is incorporated into this Subchapter by reference, including but not limited to subsequent
13 amendments or editions. NFPA Standard 1021 is available from the National Fire Protection
14 Association at <http://www.nfpa.org/> for a fee subject to change, of ~~thirty seven dollars (\$37.00);~~
15 forty-four dollars and fifty cents (\$44.50); and

16 (2) complete the course as described in Subparagraph (1) of this Paragraph, which shall be titled "Chief
17 101" ~~a minimum of~~ every five years.

18
19 *History Note: Authority G.S. 58-2-40; 58-78-5; 58-86-25;*
20 *Eff. September 1, 1985;*
21 *Amended Eff. December 1, 2016; October 1, 2010; October 1, 2006; July 1, 1992.*
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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).

1 11 NCAC 05A .0508 is amended as published in 31.04 NCR 284-285 as follows:

2 **11 NCAC 05A .0508 APPARATUS**

3 To qualify for ~~initial inspection~~ certification and receive or maintain a minimum rating of Class "9S", the fire
4 department shall have the following apparatus, ~~and equipment: equipment, and documentation:~~

5 (1) ~~Pumper. Engine.~~

6 (a) The fire department shall have an approved ~~pumper engine~~ (automotive fire apparatus
7 equipped with a fire pump and tank). To be approved, the fire department ~~pumper engine~~
8 ~~must shall~~ be certified by Underwriters Laboratories, Inc., and constructed in accordance
9 with the National Fire Protection Association Standard 1901 - Standard for Automotive
10 Fire Apparatus. The apparatus shall not be loaded beyond limits certified by the "Gross
11 Vehicle Weight" label attached to the vehicle; nor shall the vehicle be modified in a manner
12 that would invalidate this certification. NFPA Standard 1901 is incorporated into this
13 Subchapter by reference, but not including subsequent amendments or editions. NFPA
14 Standard 1901 is available from the National Fire Protection Association at
15 <http://www.nfpa.org/> for a fee, subject to change, of fifty dollars (\$50.00). forty-four
16 dollars and fifty cents (\$44.50).

17 (b) The pump shall have a rated capacity of not less than 750 gallons per minute at 150 pounds
18 per square inch net pump pressure.

19 (c) The ~~pumper engine~~ shall be equipped with at least a ~~500~~ 300 gallon water tank.

20 (d) A service test ~~must shall~~ have been performed on the "first responding" ~~pumper engine~~
21 during the 12-month period before the inspection. If the ~~pumper engine has had~~ been
22 purchased as new within the 12-month period before the "9S" inspection, the U.L.
23 Certificate meets this requirement.

24 (e) The fire departments shall maintain documentation of all equipment and apparatus
25 including engines, tankers, service trucks and aerial apparatus through an inventory list.
26 Monthly inventory checks shall be recorded for 12 consecutive months.

27 (f) The fire departments shall maintain documentation of maintenance checklists for all
28 apparatus including engines, tankers, service trucks and aerial apparatus and records
29 verifying that all apparatus is checked monthly for 12 consecutive months.

30 (2) ~~Tanker. Tanker (or mobile water supply capacity).~~

31 (a) The fire department shall have a motorized tank truck of at least 1000 gallons water
32 capacity or enough to equal at least ~~1500~~ 1300 gallons of water total for ~~pumper engine~~
33 and ~~tanker tanker~~.

34 (b) The tanker shall be equipped with the necessary hose for filling or refilling the tank ~~with and~~
35 ~~hose hoses or equipment~~ for transferring water to the ~~pumper engine or other devices~~.

36 (c) The tanker, when fully loaded, shall not exceed the Gross Vehicle Weight limits as certified
37 on the label attached to the vehicle; nor shall the vehicle be modified in a manner that

would invalidate this certification. All tankers shall be baffled in accordance with the National Fire Protection Association Standard 1901 – Standard for Automotive Fire Apparatus which is available from the National Fire Protection Association.

(3) The following equipment shall be carried on responding fire department pumpers:

- (a) The ~~pumper engine~~ shall be equipped with 2-~~150~~ 200 foot 1-1/2 inch or 1-3/4 inch pre-connected hose lines with fog nozzles attached;
- (b) One booster reel or a third ~~three~~ 200 foot pre-connected hose ~~lines; line of 1-1/2 inch or larger with a nozzle attached;~~
- (c) Suction hose - size necessary to flow the capacity of pump on the ~~Engine engine~~ - 2 - 10 foot ~~sections; sections~~ (If the insurance district is 85% or more covered by useable hydrants the ~~Engine~~ engine may have a 15 foot section of soft suction hose size necessary to flow the capacity of the pump on the Engine engine);
- (d) Four OSHA approved self-contained breathing apparatus in proper working condition;
- (e) OSHA approved protective clothing for all firefighters including helmets, hoods, coats, pants, boots, and gloves or issued to all firefighters; and reflective clothing and helmet for traffic control personnel;
- (f) One 12 foot or 14 foot roof ladder;
- (g) One ~~24 foot~~ 24 foot, 28 foot, or 35 foot extension ladder;
- (h) One axe;
- (i) One claw tool (~~Halligan~~ (One Halligan Tool may replace claw tool and or crowbar); crowbar but not both);
- (j) One crowbar (~~Halligan~~ (One Halligan Tool may replace crowbar and or claw tool); claw tool but not both);
- (k) One pike pole, minimum 8 foot;
- (l) Two mounted rechargeable type portable hand lights suitable for hazardous conditions; ("4V" wet or "6V" dry);
- (m) 100 feet of utility rope, minimum ~~1/2 inch;~~ 1/2 inch diameter;
- ~~(n) Two shovels;~~
- ~~(o)~~ (n) Two 20 pound. Class B-C portable extinguishers;
- ~~(p)~~ (o) One First Aid kit; and
- ~~(q)~~ (p) One bolt cutter, with 14 inches or ~~longer;~~ longer handles.

*History Note: Authority G.S. 58-2-40; 58-36-10(3); 58-86-25;
Eff. September 1, 1985;
Amended Eff. December 1, 2016; October 1, 2006; August 3, 1992.*

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:

Abigail M. Hammond
Commission Counsel

- (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).

1 11 NCAC 05A .0511 is amended as published in 31.04 NCR 285-286 as follows:

2 **11 NCAC 05A .0511 SIX MILE INSURANCE DISTRICT**

3 To extend its insurance district to six miles, each fire department shall apply and meet the following criteria:

- 4 (1) The fire department shall provide ~~the~~ OSFM with a hand drawn map and written description or a
5 GIS computer generated map of its fire district.
- 6 (2) The map and written ~~description~~ description, or GIS maps shall be presented to the County
7 Commissioners for their approval, as set forth in G.S. 153A-233.
- 8 (3) The department applying to extend its insurance district to six miles shall enter into a written
9 automatic aid contract with the adjoining districts to the area being extended specifying that "an
10 apparatus capable of transporting" a minimum of 1000 gallons of water shall be dispatched
11 simultaneously with the department whose district the incident is occurring within.
- 12 (4) The County shall establish automatic aid response protocols. These protocols shall be maintained at
13 the county communication center and shall be used on all alarms involving reported structure fires.

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15 *History Note: Authority G.S. 58-2-40; 58-86-25; 58-40-25(4);*

16 *Eff. October 1, 2006;*

17 *Amended Eff. December 1, 2016.*

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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 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:

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 .0603

RECOMMENDED ACTION:

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

COMMENT:

Lines 3 and 5 reference an "application forms" or "application." The location and content of the application is not contained within this Rule or the governing statute. G.S. 150B-2 defines "rule" and "form" as follows:

- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
- ...
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - ...

Staff counsel is uncertain what application is being referenced by this Rule, but the agency has indicated the form requests approximately thirty items from the applicant. The requested items do not appear to be set forth in another rule or statute within the authority of the State Fire Marshal.

Abigail M. Hammond
Commission Counsel

Summary:

As written, this Rule is referencing an application that is outside the process of rulemaking and is not implementing a process prescribed by rule or statute. It is staff counsel's recommendation to object to this Rule for being unclear and ambiguous by referencing an application that is not identified by name and providing no information on how to obtain this form. Furthermore, it is staff counsel's recommendation to object to this Rule for failure to comply with the Administrative Procedure Act by using a form that is not prescribed by rule or statute.

1 11 NCAC 05A .0603 is amended as published in 31.04 NCR 286-287 as follows:

2 **11 NCAC 05A .0603 REQUIREMENTS**

3 (a) The Volunteer Fire Department Fund online application forms for requesting grants for equipment purchases and
4 capital expenditures, shall be made available by ~~the Division OSFM~~ to all departments registered with ~~the Division~~
5 OSFM and approved by ~~the Division OSFM~~ by the first business day of January of each year. This application will
6 be on a form as prescribed by the Commissioner and will contain information to determine grant eligibility and score.

7 (b) Online Applications applications shall be submitted to ~~the Division OSFM~~ and be ~~postmarked or~~ electronic date
8 stamped no later than March 1. Applications bearing ~~postmarks or~~ electronic date stamps later than March 1 are
9 disqualified. The names of grant recipients shall be announced on May 15. If May 15 falls on a weekend, the
10 announcement shall be made on the following Monday.

11 (c) Any application received by ~~the Division OSFM~~ that is incorrect or incomplete shall be returned to the department
12 with a request that the correct or complete information be sent to ~~the Division OSFM~~ within 10 business days after
13 receipt by the department. The failure of the department to return the requested correct or complete information shall
14 result in the forfeiture by the department of its eligibility for a grant during that grant cycle.

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

22 ~~(d)(e)~~ If the application includes a request for a motor vehicle, the vehicle specifications shall accompany the
23 application and, if used, if a used vehicle is requested, then the previous year's maintenance records shall accompany
24 the application.

25 ~~(e)(f)~~ The following documents shall accompany a grant application:

- 26 (1) A contract verification form showing an agreement between the department and a county for the
27 department to provide fire protection to a district;
- 28 (2) A current roster comprising a list of ~~eligible firemen~~ "eligible firemen" as defined in G.S. 58-86-25;
- 29 (3) A statement verifying the population that the department serves;
- 30 (4) A financial statement of the department; and
- 31 (5) A statement verifying that the department is financially able to match the grant.

32 ~~(f)(g)~~ Statements that there are no overdue taxes, conflict of interest statements as defined in G.S. 143C-6-23(b),
33 payment agreements, and equipment invoices shall be received by ~~the Division OSFM~~ no later than September 30
34 following the announcement of grant recipients. Departments submitting incorrect invoices, such as sales orders,
35 acknowledgements, and packing slips, on or before September 30 shall be contacted by ~~the Division OSFM~~ and given
36 10 business days to submit correct documents. The failure of any department to comply shall result in the department
37 forfeiting its eligibility for a grant from the Fund. Equipment or capital improvements that are ordered by a department

1 before May 15 or equipment that is back-ordered by a vendor for a department or equipment not received by a
2 department on or before September 30 shall not be funded by grants from the Fund.

3 (h) OSFM may extend the September 30 deadline for invoice submission for the following:

4 (1) new fire apparatus;

5 (2) self contained breathing apparatus;

6 (3) firefighter turnout gear;

7 (4) capital improvements; or

8 (5) specialized equipment.

9 ~~(h)(i)~~ Equipment purchased with grants is subject to inspection by ~~Division~~ OSFM personnel.

10
11 *History Note: Authority G.S. 58-2-40(1); 58-36-10(3); 58-87-1; 143C-6-23(b);*

12 *Eff. February 1, 1993;*

13 *Amended Eff. December 1, 2016.*

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:

Abigail M. Hammond
Commission Counsel

§ 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:

Abigail M. Hammond
Commission Counsel

- (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).

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
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - X Failure to comply with the APA
- Extend the period of review

COMMENT:

Lines 3 and 5 reference an “application forms” or “application.” The location and content of the application is not contained within this Rule or the governing statute. G.S. 150B-2 defines “rule” and “form” as follows:

- (8a) "Rule" means any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following:
 - ...
 - d. A form, the contents or substantive requirements of which are prescribed by rule or statute.
 - ...

Staff counsel is uncertain what application is being referenced by this Rule, but the agency has indicated the form requests approximately thirty items from the applicant. The requested items do not appear to be set forth in another rule or statute within the authority of the State Fire Marshal.

Abigail M. Hammond
Commission Counsel

Summary:

As written, this Rule is referencing an application that is outside the process of rulemaking and is not implementing a process prescribed by rule or statute. It is staff counsel's recommendation to object to this Rule for being unclear and ambiguous by referencing an application that is not identified by name and providing no information on how to obtain this form. Furthermore, it is staff counsel's recommendation to object to this Rule for failure to comply with the Administrative Procedure Act by using a form that is not prescribed by rule or statute.

1 11 NCAC 05A .0703 is amended as published in 31.04 NCR 288 as follows:

2 **11 NCAC 05A .0703 REQUIREMENTS FOR UNITS REQUIRED TO MATCH GRANTS**

3 (a) The Volunteer Rescue/EMS Fund online application forms for requesting grants for equipment purchases and
4 capital expenditures, shall be made available by ~~the Division OSFM~~ to all departments registered ~~with Division~~ and
5 approved by ~~the Division OSFM~~ by the first business day of August of each year. This application will be on a form
6 as prescribed by the Commissioner and will contain information to determine grant eligibility and score.

7 (b) ~~Online Applications applications~~ shall be submitted to ~~the Division OSFM~~ and be ~~postmarked or~~ electronic date
8 stamped no later than October 1. Applications bearing ~~postmarks or~~ electronic date stamps later than October 1 are
9 disqualified. The names of the grant recipients shall be announced on December 15. If December 15 falls on a
10 weekend, the announcement shall be made on the following Monday.

11 (c) Any application received by ~~the Division OSFM~~ that is incorrect or incomplete shall be returned to the unit with
12 a request that the correct or complete information be sent to ~~the Division OSFM~~ within 10 business days after receipt
13 by the unit. The failure by the unit to return the requested correct or complete information shall result in the forfeiture
14 by the unit of its eligibility for a grant during that grant cycle.

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

22 ~~(d)(e)~~ If the application includes a request for a motor vehicle, the vehicle specifications shall accompany the
23 application. and, if used, if a used vehicle is requested, then the previous year's maintenance records shall accompany
24 the application

25 ~~(e)(f)~~ The following documents shall accompany a grant application;

- 26 (1) A Rescue Provider Statement showing that a county recognizes the unit as providing rescue or
27 rescue/EMS services to a specified district. As used in this Subparagraph, "rescue provider
28 statement" means a statement, signed by representatives of a unit and the county in which the rescue
29 or rescue/EMS services are provided, that the unit provides rescue or rescue/EMS services within
30 the county;
- 31 (2) A current roster of unit members;
- 32 (3) A statement verifying that the unit is financially able to match the amount of the grant; and
- 33 (4) A financial statement of the unit.

34 ~~(f)(g)~~ Statements that there are no overdue taxes, conflict of interest statements as defined in G.S. 143C-6-23(b),
35 payment agreements, and equipment invoices shall be received by ~~the Division OSFM~~ no later than April 30. Units
36 submitting incorrect invoices, such as sales orders, acknowledgements, and packing slips, before April 30 shall be
37 contacted by ~~the Division OSFM~~ and given 10 business days to submit the correct documents. The failure of any unit

1 to comply shall result in the unit forfeiting its eligibility for a grant from the Fund. Equipment or capital improvements
2 that are ordered by a unit before December 15 or equipment that is back-ordered by a vendor for a unit or equipment
3 not received by a unit on or before April 30 shall not be funded by grants from the Fund.

4 (h) OSFM may extend the April 30 deadline for invoice submission for the following:

- 5 (1) new vehicles;
- 6 (2) self-contained breathing apparatus;
- 7 (3) firefighter turnout gear;
- 8 (4) capital improvements; and
- 9 (5) specialized equipment.

10 (h)(i) Equipment purchased with grants is subject to inspection by ~~Division~~ OSFM personnel

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12 *History Note: Authority G.S. 58-2-40(1); 58-87-5; 143C-6-23(b);*
13 *Eff. February 1, 1993;*
14 *Amended Eff. December 1, 2016; September 1, 2010; January 1, 2007.*
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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 .0704

RECOMMENDED ACTION:

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

COMMENT:

The Rule, as submitted by the agency on October 20, 2016, states the following:

11 NCAC 05A .0704 REQUIREMENTS FOR UNITS NOT REQUIRED TO MATCH GRANTS

Units that are not required to match funds ~~must~~shall comply with 11 NCAC 5A .0703 except for Subparagraph ~~(f)(4)~~ (f)(3) of that Rule, which requires the filing of a statement verifying that a unit is financially able to match a grant.

In a technical change request, staff counsel inquired whether this Rule was necessary, in light of a technical change request for Rule .0703 to clarify the statutory citation to G.S. 58-87-5(a)(2). The cited statute states the following:

§ 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.

Rule 11 NCAC 05A .0703, which is not the subject of this staff opinion, requires documents "verifying that the unit is financially able to match the amount of the grant" and pursuant to a technical change requests, specifies "in accordance with G.S. 58-87-5(a)(2). This Rule duplicates, by the use of a contradictory statement, one of the requirements set forth in Rule .0703. Staff counsel is concerned that the rule language in Rule 11 NCAC 05A .0704 is redundant of Rule 11 NCAC 05A .0703(f)(3), and is therefore an unnecessary rule. Alternatively, staff counsel finds the

use to a second rule to negate a requirement in the first rule to be confusing and potentially ambiguous to a grant applicant.

Summary:

As written, this Rule is duplicating a statement set forth in a prior rule and Rule 11 NCAC 05A .0704 appears to be redundant and unnecessary. It is staff counsel's recommendation to object to this Rule for being unnecessary. Further, this Rule appears to create an exception of a requirement that is not necessary after review of the governing statute. The exclusive reading of Rule 11 NCAC 05A .0704 creates a clarity issue. Therefore, it is staff's recommendation to object to this Rule as being unclear and ambiguous.

1 11 NCAC 05A .0704 is amended as published in 31.04 NCR 288 as follows:

2 **11 NCAC 05A .0704 REQUIREMENTS FOR UNITS NOT REQUIRED TO MATCH GRANTS**

3 Units that are not required to match funds ~~must~~shall comply with 11 NCAC 5A .0703 except for Subparagraph ~~(f)(3)~~
4 (f)(3) of that Rule, which requires the filing of a statement verifying that a unit is financially able to match a grant.

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6 *History Note: Authority G.S. 58-2-40(1); 58-87-5;*

7 *Eff. February 1, 1993;*

8 *Amended Eff. December 1, 2016.*

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§ 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(1); 1997-443, s. 11A.20; 1998-212, s. 25(b); 1999-319, s. 2; 2005-283, s. 1; 2014-64, s. 4(c).)