

Comments on Proposed Rules Changes

Board of Certified Public Accountant Examiners

Specific section affected in comments: 21 NCAC 08L.0101

Reason for Proposed Action stated in North Carolina Register: “To better explain the complaint process and disciplinary action by the Board.”

I have no objection to making the Rules relating to the complaint process and disciplinary action by the Board clearer and more understandable. In fact, I applaud the effort.

My objections to the proposed changes are that they leave unanswered many important questions; and that they do not go far enough.

Why is this important?

1. It is important that both the complainant and respondent have a clear understanding of what is ahead of them, what they can expect to occur, and their rights and responsibilities.
2. It is important that both complainant and respondent are afforded the rights to a fair proceeding, with clearly defined rights to have their grievances addressed.
3. It is important that the public can rely on any disclosure in the public record is a just outcome of an impartial and unbiased investigation.

The Board describes its consent process as unique. Statistics show that almost all complaints (95%) are resolved through this special process. The Website points out that the consent process allows the “Board more options in achieving a balance resolution”. In other words, the staff through negotiations can obtain solutions for the Board, which solutions would not directly be available to the Board, given the limited options afforded it by the relevant statutes. Given this expansion of available alternatives, it would seem prudent that the proposal Rule change be complete in outlining the process and limitations within the consent process.

Unanswered Questions:

1. What relationship, if any, exists between the proposed amendments to the Rules and the information presented on the Website under the heading “Filing a Complaint.”

For instance:

- a. The proposed changes require only that the respondent be notified and provided a copy of the complaint. The Website refers to the respondent’s reply and the potential of another response by the complainant. Does the Rule or the Website control? Does the respondent receive a copy of complainant’s further reply?

- b. The Website refers to potential negotiation of the terms of the Consent Order. The Rule is silent.
 - c. The Website refers to an inquiry as to whether the allegations “falls within the Board’s jurisdiction.” The Rule does not.
 - d. The Website refers to the Committee’s requesting further information from the staff. The Rule does not.
 - e. Can the Website be relied upon as authoritative? If so, should the Rules not so state? If not, should such that also be communicated?
2. What information is presented by the staff to the Committee? The entire file? A summary? Is any effort made by the staff to filter out extraneous or prejudicial information? Does the staff make recommendations to the Committee?
 3. Does the Committee’s “recommendation” concerning the Consent Order set forth any parameter for the staff as to content? Or, is the recommendation only to negotiate a Consent Order, the contents of which are left to the staff?
 4. Does the Board approve the recommendation of the Committee to the staff before the Consent Order is prepared? Or only after the Consent Order is agreed to. I submit that the proposed rule is not clear on this issue.
 5. If the Committee determines that the allegations are unsupported by the credible evidence, is it nevertheless required to cause a Notice of Hearing to be issued? A literal reading of the proposed amended Rule would suggest that the answer is “Yes.”

Going Further

It is respectfully submitted that the entire range or scope of the rights and responsibilities of the complainant and respondent and the fairness of the procedures and rules should be addressed.

First, the question of whether the Website can be relied upon as an accurate statement of rights should be addressed. If it has, I can’t find it.

Second, the respective roles of the Committee and its staff should be clarified.

Third, the desirability of imposing time limits, either specific or generic, should be considered. Certainly no one doubts the public’s interest in the prompt reporting of a CPA whose conduct is obnoxious to the Rules. By the same token, a CPA has an interest in the speedy resolution of a complaint. The CPA may be subject to being asked whether he is currently being investigated by the Board at trial or deposition. The CPA may be asked by potential clients, employees or partners.

Fourth, as the Rules now operate, the three members of the Board comprising the Committee have already been exposed to the case and have about certainly formed some opinions about the case. They may or may not have been exposed to inadmissible and prejudicial information. Consideration should be given to the fairness and legality of such state of affairs.

Fifth, given the role of the staff in the entire process, consideration should be given to the adoption of conflicts of interest rules for the staff.

The General Statutes clearly specify that any Board member (not Board staff) recuse themselves should there exist an actual or perceived conflict of interest. I appeared before the Committee in June, 2016 and made several recommendations for improving the complaint process. One recommendation made was that anyone involved in the investigative process who has a conflict of interest with a Respondent recuse himself from the investigation. The Committee initially responded that Board staff members are already covered under existing laws and rules arising out of the State Ethics Commission. I questioned whether such was the case. I have asked the Committee the following questions:

1. Are staff members subject to any conflict of interest policy, whether written or unwritten?
2. If there is a policy, what staff members pecuniary, personal bias, or other situations, preclude an individual; whether “perceived” conflicts are conflicts?
3. Who decides whether there is a conflict and what remedies are available?
4. What remedies does an accused CPA have if at any time, he believes an investigative staff member has a conflict of interest?

In summary, I respectfully submit that an extensive rewriting of the Rules is needed, with the objectives being to address both the current confusing state of the Rules as written and the fundamental issues pointed to herein.

Respectfully submitted,

s/ Robert N. Pulliam

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Ms. Molly Masich
Codifier of Rules
North Carolina Office of Administrative Hearings
Rules Division
Delivered electronically

Re: Comments Rule Adoption 21 NCAC 081.0101 Disciplinary Action – North Carolina State Board of CPA Examiners (the “Board”) – the Consent Process

Ms. Masich:

As I understand it, one of the questions that the Rules Division is to answer is this: Is the proposed rule clear and unambiguous? For the reasons cited hereafter, I urge that the portions of the proposed rules quoted below are not clear and unambiguous.

To provide context for my comments, virtually all disciplinary actions are handled through a consent process. The consent process is the essence of the Board’s investigative process. Statistics bear out this fact. The 2015-2016 Annual Occupational Licensing Board report¹ indicates the Board took disciplinary or other action against 101 licensees and non-CPAs during the year ended March 31, 2016. Board meeting minutes contain only one (1) single uncontested hearing, while the Board approved ninety-six (96) signed Consent Orders of discipline during that same period. This well-nigh universal use of the consent practice has been the norm for years.

The proposed rule states as follows:

Based on the Committee’s investigation and the recommendation of the Professional Standards Committee appointed by the Board President, and with the approval of the Board, the professional standards staff may then do any of the following:

It may close the case either with or without prejudice;

It may prepare a Consent Order;

It may apply to the courts for injunctive relief; or

It may prepare a proposed Hearing Notice.

¹ See https://nccpaboard.gov/wp-content/uploads/2016/07/2015-2016OLB_Report.pdf

One reading of the proposed rule is that the Board approves the staff's preparation of the Consent Order prior to the time the staff prepares it. In fact, any fair reading of the proposed rule engenders exactly this interpretation.

Such a reading would (1) be contrary to what I understand has been the practice that the Board approves the Consent Orders after they have been executed; (2) arguably disqualify all Board members from hearing the matter if the Consent Order is not agreed to and a full hearing is required. (See G.S. 150B-40(d)); and (3) would directly conflict with the information provided to the public and CPAs on the Board's website.

This lack of clarity and ambiguity could easily be cured by removing the reference to the Board's approval and adding a sentence stating that the Board approves (or disapproves) any executed consent order.

Likewise, the language "Prepare a Consent Order" is not clear and unambiguous.

(1) Does the Professional Standards Commission in making its recommendations dictate the essential terms of the Consent Order or leave the staff free to negotiate the Consent Order that it deems appropriate?

(2) What happens if the staff, after negotiating with the CPA accused of misconduct, decides that a modification of the "original" Consent Order would better achieve a just result?

I am limiting my comments to the amendments that the Board has already adopted. I am attaching the public comments relating to the consent process that I presented to the Board prior to such action for whatever use they may be to the Rules Division.

I will be pleased to answer any questions you may have.

Respectfully submitted,

Robert N. Pulliam CPA, ABV, CFF

Attachment