



April 12, 2018

Via Electronic Mail

North Carolina Rules Review Commission
6714 Mail Service Center
Raleigh, NC 27699-6714

Re: **Comments of the North Carolina Automobile Dealers Association Re: Rule 19A NCAC 03D .0219, as Adopted with Changes by the Department of Transportation Division of Motor Vehicles**

Dear Ladies and Gentlemen:

On behalf of the North Carolina Automobile Dealers Association ("NCADA"), the following comments are respectfully submitted regarding the proposed amendments to Rule 19A NCAC 03D .0219, as adopted with changes by the Department of Transportation Division of Motor Vehicles ("Division"). NCADA thanks the Division for its work on this rule and shares the Division's commitment to ensuring that necessary dealership records are available for inspection in the timeliest manner. Further, NCADA has supported amendments to N.C. Gen. Stat. §20-297 over the years, subject to the agreement of the Division, to address changing industry practices and technologies in this area, such as centralized storage of records as well as the retention of records in electronic format.

NCADA's purpose in submitting these comments is to object to the rule, as adopted with changes (including technical changes submitted pursuant to RRC staff review), and to recommend the following actions to improve the amendments to this important rule:

- Republication of the rule and an opportunity for further comment by affected parties to the Division due to the substantial changes made to subsection (e) of the rule, as adopted with changes, from the text of the proposed rule originally published in the *North Carolina Register* on March 1, 2017.
- Clarification of the use of the term "upon request" in multiple sections of Rule 19A NCAC 03D .0219, as adopted with changes, to ensure consistency with N.C. Gen. Stat. §20-297.
- Further amendment to subsection (e) of the rule to remove sub-subsections (e)(1)(a) and (e)(1)(b) to also ensure consistency with N.C. Gen. Stat. §20-297.

Background of G.S. §20-297 - Records to be "Made Available for Inspection by the Division Within a Reasonable Period of Time After Being Requested by the Division"

N.C. Gen. Stat. §20-297 has been amended by the General Assembly twice since 2007 to address the efficiencies and benefits to both dealers and the Division of centralized location record storage as well as the storage and retention of records in electronic format. In 2007, subsection (a) of the statute was amended by Session Law 2007-481 to address the ability to store individual dealership records at a centralized location other than the premises of the dealership. Given the inherent changes in the process of record production resulting from this statutory change, the amendment also included a specific provision that records be made available for inspection by the Division, "*within a reasonable period of time after being requested by the Division.*"

While not prohibited by existing statutes, N.C. Gen. Stat. §20-297 was further amended in 2016 to expressly permit the storage and retention of records in electronic format. Further, the 2016 amendment clarified the ability for storage of paper and electronic format records by a third-party vendor. Recognizing the storage and access capabilities and limitations of “off-site” and third-party record storage, the 2016 amendment retained the requirement that such dealership records (either in paper or electronic format) be made available for inspection by the Division, *“within a reasonable period of time after being requested by the Division.”*

Finally, the 2016 legislation directed the Division to adopt rules consistent with the provisions of the act.

Amended Rule Requires Production of Records “Upon Request”

The current Rule 19A NCAC 03D .0219(c), which was last amended prior to the 2007 amendment to N.C. Gen. Stat. §20-297, provides for the availability of covered records for inspection “upon demand.” The original version of the proposed amendments to Rule 19A NCAC 03D .0219(c) retained this “upon demand” term and included similar language in the proposed new Rule 19A NCAC 03D .0219(e). In NCADA’s comments to the Division regarding the proposed amendments to the rule, NCADA noted the N.C. Gen. Stat. §20-297 requirement that records *“be made available for inspection by the Division within a reasonable period of time after being requested by the Division.”* As the rule had last been amended in 2002, NCADA recommended to the Division that the proposed rule amendments be clarified to replace the term “upon demand” with the statutory language, “within a reasonable period of time after being requested by the Division.”

However, Rule 19A NCAC 03D .0219, as adopted with changes, does not include any reference to production of records “within a reasonable period of time” and instead replaces the term “upon demand” with the term “upon request” in both subsections (c) and (e) of the rule. While it does not appear that the Division intends for the new “upon request” term to impact the statutory requirement for production of records, NCADA would respectfully contend that not including the full language of the statute in the rule creates an ambiguity as to what is meant by “upon request” and fails to meet the criteria of N.C. Gen. Stat. §150B-21.9(a)(2). As such, NCADA respectfully renews its original recommendation that subsections (c) and (e) of Rule 19A NCAC 03D .0219, as adopted with changes, be further amended to replace the term “upon request” with the phrase, “within a reasonable period of time after being requested....” For example:

(c) All records required to be maintained in Paragraphs (a) and (b) shall be kept and maintained for every vehicle purchased or sold and shall be ~~kept so as to be readily~~ available for inspection ~~upon request from~~ within a reasonable period of time after being requested by an authorized agent of the North Carolina Division of Motor Vehicles. ~~Vehicles in order that the ownership of any vehicle purchased or sold can be traced.~~ All records that are required to be maintained by this Rule shall be either original or electronic records as defined by this Rule.

Again, the above noted change and corresponding changes to subsection (e) would remove the existing ambiguity in the rule and ensure consistency with N.C. Gen. Stat. §20-297.

Amended Rule Requires Production of Certain Electronic Records “Immediately Upon Request”

The above noted ambiguity regarding the use of only the term “upon request” and the lack of clarity as to whether “upon request” is consistent with the “within a reasonable period of time” language of N.C. Gen. Stat.

§20-297(a) is exacerbated by the new provisions included in subsection (e) of Rule 19A NCAC 03D .0219, as adopted with changes.

As discussed above, the version of Rule 19A NCAC 03D .0219(e), as published in the *North Carolina Register* on March 1, 2017, included a reference to the production of electronic records “upon demand” (changed to “upon request” in the rule as adopted with changes). However, subsection (e), as adopted with changes, also makes substantial changes to the originally published version of the rule. Specifically, the rule as adopted with changes, creates a new sub-subsection (e)(1)(a) that would now require that certain electronic format records be provided to the Division “*immediately upon request.*” Also, a new sub-subsection (e)(1)(b) would require that other electronic format records be provided “*within the same business day*” – A time requirement that, depending upon the time of the request, could clearly have the substantially similar effect of requiring “immediate” production.

- **Substantial Change in Rule - N.C. Gen. Stat. §150B-21.2(g)**

NCADA respectfully contends that Rule 19A NCAC 03D .0219(e), as adopted with changes, differs substantially from the text of the proposed rule published in the *North Carolina Register* 31:17 NCR 1754 on March 1, 2017. The addition of the new specific and restrictive time frames for the production of certain records in the rule as adopted with changes was not included in the originally published version of the rule and differs substantially from the text of the proposed rule as originally published.

In support of its contention discussed above, NCADA notes that the amendments to the originally published rule made by the rule as adopted with changes meet the elements of N.C. Gen. Stat. §150B-21.2(g)(1) as the changes affect the interests of persons who, based on the proposed text of the rule as originally published, could not reasonably have determined that the rule would be changed after publication to implement a new “immediate” production requirement or a new “within the same business day” production requirement for certain records.

Also, the changes meet the elements of N.C. Gen. Stat. §150B-21.2(g)(2) as the subject matter (i.e., new production time periods for production of certain electronic records) was not addressed in the proposed text of the rule as originally published.

Further, the changes also meet the elements of N.C. Gen. Stat §150B-21.2(g)(3) as the changes produce an effect that could not reasonably have been expected based on the proposed text of the rule. Specifically, the “upon demand” (now, “upon request”) reference in Rule 19A NCAC 03D .0219(e), which is subject to the N.C. Gen. Stat. §20-297(a) “reasonable period of time” requirement, would be changed to the new “immediately upon request” and “within the same business day” time periods for certain records noted above.

As such, NCADA respectfully suggests that, subject to the requirements of N.C. Gen. Stat. §150B-21.2(g), that Rule 19A NCAC 03D .0219, as amended with changes, be resubmitted by the Division for publication in the *North Carolina Register* along with an additional comment period for those persons impacted by the substantial changes.

- **Conflict with N.C. Gen. Stat. §20-297**

As discussed above, N.C. Gen. Stat. §20-297(a) includes a requirement that covered records be made available for inspection “within a reasonable period of time.” Again, this provision recognizes the realities and capabilities of record access and production when records, both in paper or electronic format, can be stored at a location other than the dealership in question and by a third party.

Clearly, if the legislature had intended to impose a uniform requirement for any type of record to be produced ***“immediately upon request,”*** such language would have been included in N.C. Gen. Stat. §20-297. Rather, the clear intent of the statute is to provide for a ***“reasonable period of time”*** for record production after request. It is important to note that, depending upon the facts and circumstances of a particular matter and the manner of storage and access capabilities, it could be the case in certain circumstances that “immediate production” could represent a “reasonable period of time.” However, again, this type of case-by-case and situation specific analysis is what is clearly intended and provided for by the, “within a reasonable period of time” requirement included in N.C. Gen. Stat. §20-297(a).

To the extent that electronic records requested pursuant to the new Rule 19A NCAC 03D .0219(e)(1)(a) and (b) are records covered by N.C. Gen. Stat. §20-297, NCADA respectfully contends that Rule 19A NCAC 03D .0219(e), as adopted with changes does not meet the standards of N.C. Gen. Stat. §150B-21.9(a)(1), as the rule conflicts with the statutory requirement that covered records be made available for inspection “within a reasonable period of time” and is not within the authority delegated to the agency by the General Assembly. NCADA requests that the Division further amend the rule to provide that all records subject to the rule be made available within a reasonable period of time after request by the Division consistent with the specific language of N.C. Gen. Stat. §20-297(a).

Conclusion and Recommendation

Storage and retention of dealership records at a location other than the dealership location has been expressly permitted by statute since 2007. Storage and retention of dealership records in electronic format has never been prohibited and has been expressly permitted by statute since June 2016. Dealerships as well as third-party vendors have established systems and processes throughout the years based upon the statutory requirement that any such records stored are to be made available for inspection within a reasonable period of time after being requested by the Division.

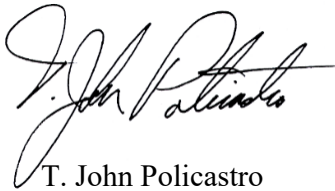
As stated above, NCADA and North Carolina’s franchised dealers support the Division and its efforts in this rulemaking process as well as ensuring the ability of the Division to inspect necessary records in the timeliest manner. Again, NCADA’s concern is simply that the rule, as adopted with changes, would require the immediate production of certain records in all situations, without the ability to take into account any facts and circumstances that may make it impossible to comply in such a time frame. While NCADA is confident that the Division would be reasonable in its enforcement of the rule, NCADA respectfully suggests that the specific language of N.C. Gen. Stat. §20-297 represents a standard for record production that provides for the swift production of record requests while also taking into account possible circumstances that would impact the ability to immediately produce records (e.g., off-site storage, late in the day requests, unavailability of access to electronic storage platform, presence of designated personnel at time of request, accessibility and proper functioning of third-party storage location, hardware and software at the time requested, etc.).

For these reasons, NCADA respectfully objects to Rule 19A NCAC 03D .0219, as adopted with changes, and makes the above noted recommendations in order to support and assist the Division in its efforts to adopt these important rule amendments pursuant to Session Law 2016-74.

Again, NCADA thanks the Division of Motor Vehicles for its efforts in the development of these rule changes and welcomes the opportunity to assist the Division in any way.

Thank you.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "T. John Policastro". The signature is fluid and cursive, with the first name "T. John" and last name "Policastro" clearly distinguishable.

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