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: NC MEDICAL BOARD

RULE CITATION: 21 NCAC 32C .0102

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:

In (1), it is not clear what ethical customs have been defined by the North Carolina Medical Board. There is no authority cited to do so outside of rulemaking.

Robert A. Bryan, Jr.

Commission Counsel

rrc staff OPINION

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AGENCY: NC MEDICAL BOARD

RULE CITATION: 21 NCAC 32C .0105

RECOMMENDED ACTION:

Approve, but note staff’s comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

There is no authority cited for the Board to adopt Items (1) through (5) and (7) of this Rule.

Items (6), (8) and (9) basically just repeat portions of G.S. 55B-6, 55B-7, 55B-8 and 55B-14 and thus are not necessary to be included in the rules.

Robert A. Bryan, Jr.

Commission Counsel

§ 55B-6. Capital stock.

(a)        Except as provided in subsections (a1) and (b) of this section, a professional corporation may issue shares of its capital stock only to a licensee as defined in G.S. 55B‑2, and a shareholder may voluntarily transfer shares of stock issued to the shareholder only to another licensee. No share or shares of any stock of a professional corporation shall be transferred upon the books of the corporation unless the corporation has received a certification of the appropriate licensing board that the transferee is a licensee. Provided, it shall be lawful in the case of professional corporations rendering services as defined in Chapters 83A, 89A, 89C, 89E, and 89F, for nonlicensed employees of the corporation to own not more than one-third of the total issued and outstanding shares of the corporation; and provided further, with respect to a professional corporation rendering services as defined in Chapters 83A, 89A, 89C, and 89E of the General Statutes, an employee retirement plan qualified under section 401 of the Internal Revenue Code of 1986, as amended (or any successor section), is deemed for purposes of this section to be a licensee if the trustee or trustees of the plan are licensees. Provided further, subject to any additional conditions that the appropriate licensing board may by rule or order impose in the public interest, it shall be lawful for individuals who are not licensees but who perform professional services on behalf of a professional corporation in another jurisdiction in which the corporation maintains an office, and who are duly licensed to perform professional services under the laws of the other jurisdiction, to be shareholders of the corporation so long as there is at least one shareholder who is a licensee as defined in G.S. 55B-2, and the corporation renders its professional services in the State only through those shareholders that are licensed in North Carolina.  Upon the transfer of any shares of such corporation to a nonlicensed employee of such corporation, the corporation shall inform the appropriate licensing board of the name and address of the transferee and the number of shares issued to the nonprofessional transferee. The issuance or transfer of any share of stock in violation of this section is void.  No shareholder of a professional corporation shall enter into a voting trust agreement or any other type of agreement vesting in another person the authority to exercise the voting power of any of the stock of a professional corporation.

(a1)      Any person may own up to forty-nine percent of the stock of a professional corporation rendering services under Chapter 93 of the General Statutes as long as:

(1)        Licensees continue to own and control voting stock that represents at least fifty-one percent (51%) of the votes entitled to be cast in the election of directors of the professional corporation; and

(2)        All licensees who perform professional services on behalf of the corporation comply with Chapter 93 of the General Statutes and the rules adopted thereunder.

(b)        A professional corporation formed pursuant to this Chapter may issue one hundred percent (100%) of its capital stock to another professional corporation in order for that corporation (the distributing corporation) to distribute in accordance with section 355 of the Internal Revenue Code of 1986, as amended (or any succeeding section), the stock of the controlled corporation to one or more shareholders of the distributing corporation authorized under this section to hold the shares. The distributing corporation shall distribute the stock of the controlled corporation within 30 days after the stock is issued to the distributing corporation. A share of stock of the controlled corporation that is not transferred in accordance with this subsection within 30 days after the share was issued to the distributing corporation is void. (1969, c. 718, s. 6; 1977, c. 855, s. 1; 1989, c. 258; 1991, c. 179, s. 1; c. 205, s. 3; 1995, c. 351, s. 16; 1999-440, s. 1; 2000-115, s. 5.)

§ 55B-7. Death or disqualification of a stockholder or employee.

(a)        If any officer, shareholder, agent or employee of a corporation organized under this Chapter who is a licensee becomes legally disqualified to render professional services within this State, he shall sever all employment with, and financial interest in, such corporation forthwith. A corporation's failure to comply with this provision shall constitute grounds for the forfeiture of its certificate of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the Secretary of State, the Secretary of State shall forthwith certify that fact to the Attorney General for appropriate action to dissolve the corporation.

(b)        A professional corporation shall report to the appropriate licensing board the death of any of its shareholders within 30 days thereafter. Within one year of the date of such death, all of the shares owned by such deceased shareholder shall be transferred to and acquired by the professional corporation or persons qualified to own such shares. In the absence of an agreement which determines the equitable value of the shares, then the price for such shares shall be the fair market value of the stock, but not less than the book value as of the end of the month immediately preceding the death or disqualification. Notwithstanding any other provisions of this Chapter, the shares of stock owned by such deceased shareholder may be owned and held by the person or persons who may be legally entitled to receive such shares for a period of one year after the death of such deceased shareholder, or in the case of the death of the owner of all the shares of such corporation, for such period of time as may be necessary to liquidate the corporation. (1969, c. 718, s. 7.)

§ 55B-8. Rendition of professional services.

A professional service corporation may render professional services only through its officers, employees and agents who are duly licensed to render such professional services; provided, however, this provision shall not be interpreted to include in the term "employee," as used herein, clerks, secretaries, bookkeepers, technicians and other assistants who are not considered by law to be rendering professional services to the public. (1969, c. 718, s. 8.)

§ 55B-14. Types of professional services.

(a)        A professional corporation shall render only one specific type professional service, and such services as may be ancillary thereto, and shall not engage in any other business or profession; provided, however, such corporation may own real and personal property necessary or appropriate for rendering the type of professional services it was organized to render and it may invest in real estate, mortgages, stocks, bonds, and any other type of investments.

(b)        Notwithstanding subsection (a) of this section, in the case of architectural, landscape architectural, engineering or land surveying, geological, and soil science services, as defined in Chapters 83A, 89A, 89C, 89E, and 89F respectively, one corporation may be authorized to provide such of these services where such corporation, and at least one corporate officer who is a stockholder thereof, is duly licensed by the licensing board of each such profession.

(c)        A professional corporation may also be formed by and between or among:

(1)        A licensed psychologist and a physician practicing psychiatry to render psychotherapeutic and related services.

(2)        Any combination of a registered nurse, nurse practitioner, certified clinical specialist in psychiatric and mental health nursing, certified nurse midwife, and certified nurse anesthetist, to render nursing and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(3)        A physician and a physician assistant who is licensed, registered, or otherwise certified under Chapter 90 of the General Statutes to render medical and related services.

(4)        A physician, a licensed psychologist, a licensed clinical social worker, or each of them and a certified clinical specialist in psychiatric and mental health nursing, a licensed marriage and family therapist, a licensed professional counselor, or each of them, to render psychotherapeutic and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(5)        A physician and any combination of a nurse practitioner, certified clinical specialist in psychiatric and mental health nursing, or certified nurse midwife, registered or otherwise certified under Chapter 90 of the General Statutes, to render medical and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(6)        A physician practicing anesthesiology and a certified nurse anesthetist to render anesthesia and related medical services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(7)        A physician and an audiologist who is licensed under Article 22 of Chapter 90 of the General Statutes to render audiological and related medical services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(8)        A physician practicing ophthalmology and an optometrist who is licensed under Article 6 of Chapter 90 of the General Statutes to render either or both of ophthalmic services and optometric and related services that the respective stockholders are licensed, certified, or otherwise approved to provide.

(9)        A physician practicing orthopedics and a podiatrist who is licensed under Article 12A of Chapter 90 of the General Statutes to render either or both of orthopedic services and podiatric and related services that the respective stockholders are licensed, certified, or otherwise approved to provide. (1969, c. 718, s. 14; 1971, c. 196, s. 2; 1973, c. 1446, s. 9; 1985, c. 251; 1991, c. 205, s. 4; 1995, c. 382, s. 1; 1997-421, s. 1; 1997-500, s. 1; 1999-136, s. 1; 2000-115, s. 6; 2001-487, s. 40(e); 2003-117, s. 4; 2006-144, s. 3.1; 2007-451, s. 2(a).)

rrc staff OPINION

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AGENCY: NC MEDICAL BOARD

RULE CITATION: 21 NCAC 32C .0106

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:

There is no authority cited for the agency to adopt this Rule.

Robert A. Bryan, Jr.

Commission Counsel

§ 55B-6. Capital stock.

(a)        Except as provided in subsections (a1) and (b) of this section, a professional corporation may issue shares of its capital stock only to a licensee as defined in G.S. 55B‑2, and a shareholder may voluntarily transfer shares of stock issued to the shareholder only to another licensee. No share or shares of any stock of a professional corporation shall be transferred upon the books of the corporation unless the corporation has received a certification of the appropriate licensing board that the transferee is a licensee. Provided, it shall be lawful in the case of professional corporations rendering services as defined in Chapters 83A, 89A, 89C, 89E, and 89F, for nonlicensed employees of the corporation to own not more than one-third of the total issued and outstanding shares of the corporation; and provided further, with respect to a professional corporation rendering services as defined in Chapters 83A, 89A, 89C, and 89E of the General Statutes, an employee retirement plan qualified under section 401 of the Internal Revenue Code of 1986, as amended (or any successor section), is deemed for purposes of this section to be a licensee if the trustee or trustees of the plan are licensees. Provided further, subject to any additional conditions that the appropriate licensing board may by rule or order impose in the public interest, it shall be lawful for individuals who are not licensees but who perform professional services on behalf of a professional corporation in another jurisdiction in which the corporation maintains an office, and who are duly licensed to perform professional services under the laws of the other jurisdiction, to be shareholders of the corporation so long as there is at least one shareholder who is a licensee as defined in G.S. 55B-2, and the corporation renders its professional services in the State only through those shareholders that are licensed in North Carolina.  Upon the transfer of any shares of such corporation to a nonlicensed employee of such corporation, the corporation shall inform the appropriate licensing board of the name and address of the transferee and the number of shares issued to the nonprofessional transferee. The issuance or transfer of any share of stock in violation of this section is void.  No shareholder of a professional corporation shall enter into a voting trust agreement or any other type of agreement vesting in another person the authority to exercise the voting power of any of the stock of a professional corporation.

(a1)      Any person may own up to forty-nine percent of the stock of a professional corporation rendering services under Chapter 93 of the General Statutes as long as:

(1)        Licensees continue to own and control voting stock that represents at least fifty-one percent (51%) of the votes entitled to be cast in the election of directors of the professional corporation; and

(2)        All licensees who perform professional services on behalf of the corporation comply with Chapter 93 of the General Statutes and the rules adopted thereunder.

(b)        A professional corporation formed pursuant to this Chapter may issue one hundred percent (100%) of its capital stock to another professional corporation in order for that corporation (the distributing corporation) to distribute in accordance with section 355 of the Internal Revenue Code of 1986, as amended (or any succeeding section), the stock of the controlled corporation to one or more shareholders of the distributing corporation authorized under this section to hold the shares. The distributing corporation shall distribute the stock of the controlled corporation within 30 days after the stock is issued to the distributing corporation. A share of stock of the controlled corporation that is not transferred in accordance with this subsection within 30 days after the share was issued to the distributing corporation is void. (1969, c. 718, s. 6; 1977, c. 855, s. 1; 1989, c. 258; 1991, c. 179, s. 1; c. 205, s. 3; 1995, c. 351, s. 16; 1999-440, s. 1; 2000-115, s. 5.)

§ 55B-12. Application of regulations of licensing boards.

A professional corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the licensing board as herein defined. Nothing in this Chapter shall impair the disciplinary powers of any licensing board applicable to a licensee as herein defined. No professional corporation may do any act which its shareholders as licensees are prohibited from doing. (1969, c. 718, s. 12.)

rrc staff OPINION

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AGENCY: NC MEDICAL BOARD

RULE CITATION: 21 NCAC 32C .0107

RECOMMENDED ACTION:

Approve, but note staff’s comment

X Object, based on:

X Lack of statutory authority

Unclear or ambiguous

X Unnecessary

Failure to comply with the APA

Extend the period of review

COMMENT:

The authority for this Rule was repealed in 1991. There is no longer a need to have a rule listing an agency's forms.

Robert A. Bryan, Jr.

Commission Counsel

rrc staff OPINION

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AGENCY: NC MEDICAL BOARD

RULE CITATION: 21 NCAC 32C .0108

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:

There is no authority cited for this Rule as written. There is no fee set in G.S. 55B-10 or 55B-11 for registration or renewal of a certificate of authority to transact business. In order to obtain a certificate of authority to transact business pursuant to G.S. 55B-16, a foreign corporation must have a certificate of registration, but there is no separate fee for the certificate of authority to transact business.

Robert A. Bryan, Jr.

Commission Counsel

§ 55B-10. Registration with licensing board.

No professional corporation shall open, operate, or maintain an establishment for any of the purposes set forth in this Chapter without first having obtained a certificate of registration from the licensing board or boards. Applications for such registration shall be made to the licensing board or boards in writing and shall contain the name and address of the corporation and such other information as may be required by the licensing board or boards. If the board finds that no disciplinary action is pending before the board against any of the licensed incorporators, officers, directors, shareholders or employees of such corporation, and if it appears that such corporation will be conducted in compliance with the law and the regulations of the board, the board shall issue, upon the payment of a registration fee, not to exceed fifty dollars ($50.00), a certificate of registration which shall remain effective until January 1 following the date of such registration or until such other expiration or renewal date as may be established by law or by the regulations of the licensing board. (1969, c. 718, s. 10.)

§ 55B-11. Renewal of certificate of registration.

Upon written application of the holder, accompanied by a fee not to exceed the sum of twenty-five dollars ($25.00), the licensing board shall renew the certificate of registration of a professional corporation as required by law or the regulations of the licensing board if the board finds that the corporation has complied with its regulations and the provisions of this section. If the corporation does not apply for renewal of its certificate of registration within 30 days after the date of the expiration of such certificate, the certificate of registration shall be automatically suspended and may be reinstated within the calendar year upon the payment of the required renewal fee plus a penalty of ten dollars ($10.00), if such corporation is then otherwise qualified and entitled to a renewal of its certificate of registration. (1969, c. 718, s. 11.)

**§ 55B-16. Foreign professional corporations.**

(a)        A foreign professional corporation may apply for a certificate of authority to transact business in this State pursuant to the provisions of this Chapter and Chapter 55 of the General Statutes provided that:

(1)        The corporation obtains a certificate of registration from the appropriate licensing board or boards in this State;

(2)        With respect to each professional service practiced through the corporation in this State, at least one director and one officer shall be a licensee of the licensing board which regulates the profession in this State;

(3)        Each officer, employee, and agent of the corporation who will provide professional services to persons in this State shall be a licensee of the appropriate licensing board in this State;

(4)        The corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the appropriate licensing board or boards in this State;

(5)        The corporation's activities in this State shall be limited as provided by G.S. 55B-14; and

(6)        The application for certificate of authority, in addition to the requirements of G.S. 55-15-03, shall set forth the personal services to be rendered by the foreign professional corporation and the individual or individuals who will satisfy the requirements of G.S. 55B-16(a)(2) and shall be accompanied by a certification by the appropriate licensing board that each individual is a "licensee" as defined in G.S. 55B-2(2) and by additional certifications as may be required to establish that the corporation is a "foreign professional corporation" as defined in G.S. 55B-16(b).

(b)        For purposes of this section, "foreign professional corporation" means a corporation for profit that:

(1)        Is incorporated under a law other than the law of this State;

(2)        Is incorporated for the purpose of rendering professional services of the type that if rendered in this State would require the obtaining of a license from a licensing board pursuant to the statutory provisions referred to in G.S. 55B-2(6); and

(3)        Has as its shareholders only individuals who:

a.         Qualify to hold shares of a corporation organized under this Chapter;

b.         Are licensed to provide professional services as defined in G.S. 55B-2(6) in a state in which the corporation is incorporated or is authorized to transact business, provided that such professional services are the same as the professional service rendered by the corporation;

c.         Are nonlicensed employees of a corporation rendering services of the type defined in Chapters 83A, 89A, 89C, and 89E of the General Statutes, provided that all such nonlicensed employees own no more than one-third of the total issued and outstanding shares of such corporation in the aggregate; or

d.         With respect to a professional corporation rendering services under Chapter 93 of the General Statutes, are persons who own not more than forty-nine percent (49%) of the stock in the professional corporation as long as:

1.         Individuals who meet the requirements of sub-subdivision a. or b. of this subdivision own and control voting stock that represents at least fifty-one percent (51%) of the votes entitled to be cast in the election of directors of the professional corporation; and

2.         All licensees who perform professional services on behalf of the corporation in this State comply with Chapter 93 of the General Statutes and the rules adopted thereunder.

(b1)      With respect to a professional corporation rendering services as defined in Chapters 83A, 89A, 89C, and 89E of the General Statutes, an employee retirement plan qualified under section 401 of the Internal Revenue Code of 1986, as amended (or any successor section), is deemed for purposes of this section to be an individual licensee if at least one trustee of the plan is a licensee and all other trustees are licensees or are individuals who are licensed under the laws of a state in which the corporation maintains an office to perform at least one of the professional services, as defined in Chapter 83A, 89A, 89C, or 89E of the General Statutes, rendered by the corporation.

(c)        A foreign professional corporation with a valid certificate of authority has the same but no greater rights and privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic professional corporation of like character, except that the provisions of G.S. 55B-6 and G.S. 55B-7 do not apply. (1995, c. 351, s. 18; 1997-485, s. 23; 1999-440, s. 2.)

rrc staff OPINION

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AGENCY: NC MEDICAL BOARD

RULE CITATION: 21 NCAC 32C .0109

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:

There is no authority cited for the agency to adopt this Rule.

Robert A. Bryan, Jr.

Commission Counsel

**§ 55B-16. Foreign professional corporations.**

(a)        A foreign professional corporation may apply for a certificate of authority to transact business in this State pursuant to the provisions of this Chapter and Chapter 55 of the General Statutes provided that:

(1)        The corporation obtains a certificate of registration from the appropriate licensing board or boards in this State;

(2)        With respect to each professional service practiced through the corporation in this State, at least one director and one officer shall be a licensee of the licensing board which regulates the profession in this State;

(3)        Each officer, employee, and agent of the corporation who will provide professional services to persons in this State shall be a licensee of the appropriate licensing board in this State;

(4)        The corporation shall be subject to the applicable rules and regulations adopted by, and all the disciplinary powers of, the appropriate licensing board or boards in this State;

(5)        The corporation's activities in this State shall be limited as provided by G.S. 55B-14; and

(6)        The application for certificate of authority, in addition to the requirements of G.S. 55-15-03, shall set forth the personal services to be rendered by the foreign professional corporation and the individual or individuals who will satisfy the requirements of G.S. 55B-16(a)(2) and shall be accompanied by a certification by the appropriate licensing board that each individual is a "licensee" as defined in G.S. 55B-2(2) and by additional certifications as may be required to establish that the corporation is a "foreign professional corporation" as defined in G.S. 55B-16(b).

(b)        For purposes of this section, "foreign professional corporation" means a corporation for profit that:

(1)        Is incorporated under a law other than the law of this State;

(2)        Is incorporated for the purpose of rendering professional services of the type that if rendered in this State would require the obtaining of a license from a licensing board pursuant to the statutory provisions referred to in G.S. 55B-2(6); and

(3)        Has as its shareholders only individuals who:

a.         Qualify to hold shares of a corporation organized under this Chapter;

b.         Are licensed to provide professional services as defined in G.S. 55B-2(6) in a state in which the corporation is incorporated or is authorized to transact business, provided that such professional services are the same as the professional service rendered by the corporation;

c.         Are nonlicensed employees of a corporation rendering services of the type defined in Chapters 83A, 89A, 89C, and 89E of the General Statutes, provided that all such nonlicensed employees own no more than one-third of the total issued and outstanding shares of such corporation in the aggregate; or

d.         With respect to a professional corporation rendering services under Chapter 93 of the General Statutes, are persons who own not more than forty-nine percent (49%) of the stock in the professional corporation as long as:

1.         Individuals who meet the requirements of sub-subdivision a. or b. of this subdivision own and control voting stock that represents at least fifty-one percent (51%) of the votes entitled to be cast in the election of directors of the professional corporation; and

2.         All licensees who perform professional services on behalf of the corporation in this State comply with Chapter 93 of the General Statutes and the rules adopted thereunder.

(b1)      With respect to a professional corporation rendering services as defined in Chapters 83A, 89A, 89C, and 89E of the General Statutes, an employee retirement plan qualified under section 401 of the Internal Revenue Code of 1986, as amended (or any successor section), is deemed for purposes of this section to be an individual licensee if at least one trustee of the plan is a licensee and all other trustees are licensees or are individuals who are licensed under the laws of a state in which the corporation maintains an office to perform at least one of the professional services, as defined in Chapter 83A, 89A, 89C, or 89E of the General Statutes, rendered by the corporation.

(c)        A foreign professional corporation with a valid certificate of authority has the same but no greater rights and privileges as, and is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic professional corporation of like character, except that the provisions of G.S. 55B-6 and G.S. 55B-7 do not apply. (1995, c. 351, s. 18; 1997-485, s. 23; 1999-440, s. 2.)