

## **Burgos, Alexander N**

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**From:** Cox, Paul  
**Sent:** Monday, March 25, 2024 1:41 PM  
**To:** Burgos, Alexander N; Rules, Oah; Peaslee, William W  
**Cc:** SBOE\_Grp - Legal  
**Subject:** Board of Elections - request to speak

Hi RRC,

I will attend Wednesday's meeting in person. I would like to speak in support of the State Board of Elections' four rules as follows:

- 08 NCAC 04 .0401 – to speak only if someone speaks in opposition or if the Commission has questions for the agency
- 08 NCAC 04 .0402 – to speak only if someone speaks in opposition or if the Commission has questions for the agency
- 08 NCAC 17 .0101 – to speak in support (if objection is removed, then will speak only if someone speaks in opposition or if the Commission has questions for the agency)
- 08 NCAC 17 .0109 – to speak only if someone speaks in opposition or if the Commission has questions for the agency

Best regards,

**Paul Cox**

General Counsel

NORTH CAROLINA STATE BOARD OF ELECTIONS

PO Box 27255

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919.814.0700 (t)

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## **Burgos, Alexander N**

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**From:** Peaslee, William W  
**Sent:** Monday, March 25, 2024 10:00 AM  
**To:** Cox, Paul  
**Cc:** Burgos, Alexander N  
**Subject:** 08 NCAC 17 .0101  
**Attachments:** 03.2024 Staff Opinion BOE 08 NCAC 17 .0101.doc

Good morning,

Attached please find the staff opinion to the above captioned rule.

If you have any questions please feel free to contact me.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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## Burgos, Alexander N

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**Subject:** FW: 08 NCAC 17 .0109  
**Attachments:** 08 NCAC 17 .0109 - Adopted by SBE 021524 - revised per RRC suggestions v3.docx

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**From:** Cox, Paul <paul.cox@ncsbe.gov>  
**Sent:** Monday, March 25, 2024 9:15 AM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>  
**Subject:** RE: 08 NCAC 17 .0109

Bill,

Please find attached a revised rule from the State Board to remedy the ambiguity objection you raise in your opinion letter, pursuant to 26 NCAC 05 .0107(b) and (c). The agency urges the Commission to consider this revision, which is not a substantial change. Otherwise, if the Commission objects and deems such a revision a substantial change (thereby depriving the agency of the ability to quickly resubmit the rule), the agency would be left with no photo ID rules for absentee voting for the May 14, 2024, second primary election which is occurring in all 100 counties.

The revision made to this version is largely adopting Commission counsel's suggestion to eliminate any ambiguity. The language at issue instructs the county boards of elections on how to provide mailed notice to a voter that their affidavit claiming an exception to the photo ID requirement will potentially be deemed false, thereby offering an opportunity for the voter to be heard on the matter. The only change is in precisely *how* that mailed notice is provided. It more prescriptively provides deadlines and a method of delivery to attempt to ensure the original intent of the rule as proposed to the public is carried out—providing “advance notice and an opportunity to address the county board” on the potential falsity of their affidavit. That last quoted language from the rule is from the originally proposed rule and is not subject to change, proving the revision is fully within the expectation of the original rule.

This is not a substantial change under G.S. 150B-21.2(g).

First, it does not “[a]ffect[] the interests of persons that, based on the proposed text of the rule published in the North Carolina Register, could not reasonably have determined that the rule would affect their interests.” G.S. 150B-21.2(g)(1). The originally proposed rule already would provide notice from the county boards to a voter in the circumstances described above.

Second, it does not “[a]ddress[] a subject matter or an issue that is not addressed in the proposed text of the rule.” G.S. 150B-21.2(g)(2). Providing mailed notice to a voter in the circumstances described above was already addressed in the originally proposed rule. The originally proposed rule would have the county board send this notice “by a means of physical delivery designed to provide the voter actual notice in advance of the opportunity to address the county board.” The change merely prescribes exactly how the board is to accomplish a task that was already required in the rule.

Third, it does not “[p]roduce[] an effect that could not reasonably have been expected based on the proposed text of the rule.” G.S. 150B-21.2(g)(3). Again, the originally proposed rule already intended for

mailed notice to be provided to a voter in the circumstances described in such a way “designed to provide the voter *actual notice in advance* of the opportunity to address the county board.” (Emphasis added.) Commission counsel’s objection is that this instruction to the county boards was too vague and would potentially lead to different methods of providing notice from county to county. But the expected effect of the original language would have been the same—that the notice be sent in enough time for it to be effective for the voter. That expected effect remains in the revised rule and has not changed. The more prescriptive deadlines and methods of delivery in the revision would only *better* ensure that the originally expected effect actually occurs.

For these reasons, the agency requests that the Commission consider this revised rule for Wednesday’s Commission meeting and conclude that the revision is not a substantial change under the APA. Otherwise, the agency will be faced with difficult choices regarding the prospect of having no photo identification rules for absentee voting in place for the statewide second primary.

With best regards,

**Paul Cox**

General Counsel

NORTH CAROLINA STATE BOARD OF ELECTIONS

RALEIGH, NC 27611

919.814.0700

[www.ncsbe.gov](http://www.ncsbe.gov)

1 08 NCAC 17 .0109 is adopted with changes as published in 38:10 NCR 614 as follows:

2  
3 **08 NCAC 17 .0109 PHOTO IDENTIFICATION FOR ABSENTEE-BY-MAIL BALLOTS**

4 (a) Identification Requirement for Absentee-by-Mail Ballots. Photo identification accompanying a voter's absentee  
5 ballot pursuant to G.S. 163-230.1(f1) is acceptable if it is a photocopy of a type of photo identification acceptable for  
6 voting purposes under 08 NCAC 17 .0101(a)(1), is readable, and the name appearing on the identification is the same  
7 as or substantially equivalent to the name contained in the voter's voter registration record in accordance with 08  
8 NCAC 17 .0101(a)(3). As used in this Rule, "readable" means that, on the photocopy of identification required by this  
9 Rule, the name on the identification can be read and the photograph depicts a person, as opposed to displaying, for  
10 example, a mere shadow or outline of a person. A photo identification shall not be rejected due to differences between  
11 the address appearing on an absentee voter's photo identification and any address contained in the voter's absentee  
12 request form, absentee ballot application, or registration record. A copy of photo identification that is acceptable under  
13 this Rule need include only the side of the identification (or, if the identification is a booklet, the page of the  
14 identification) where the person's name and photo appears.

15 (b) Initial Review by County Board Staff. County board staff shall, upon receipt of a voter's absentee ballot  
16 application, determine whether the application is accompanied by a photocopy of photo identification that is  
17 acceptable under Paragraph (a) of this Rule, or, if the application is accompanied by an affidavit claiming an exception  
18 to the identification requirement pursuant to G.S. 163-166.16(d), determine whether the affidavit includes the  
19 affirmations required by G.S. 163-166.16(d) for that exception and, if applicable, the personal identification number  
20 required to be provided by G.S. 163-230.1(g)(2). Staff shall review the registration records to determine whether the  
21 number provided matches the corresponding number in the registration records. The number required to be provided  
22 by G.S. 163-230.1(g)(2) is deficient only if it does not match the corresponding number listed in the voter's voter  
23 registration record.

24 If staff identify any deficiency, they shall mail written notice of the deficiency to the voter within one business  
25 day of identifying the deficiency, informing the voter that the voter, the voter's verifiable legal guardian or near  
26 relative, or a person of the voter's choice if the voter needs assistance due to the voter's disability, may provide a  
27 photocopy of the voter's acceptable photo identification or a completed affidavit claiming an **exceptionexception. The**  
28 **notice shall state the photocopy or affidavit must be received by te** the county board by 5 p.m. on the business day  
29 before the county canvass. The notice of the deficiency shall also be provided by telephone or email if the telephone  
30 number or email address was provided by the voter on the request form for the absentee ballot. The voter may transmit  
31 either of the above documentation curing the deficiency in person, by mail, or by email. **An electronic copy of the**  
32 **voter's photographic identification or signed affidavit claiming an exception to the identification requirement, if**  
33 **provided via email, shall be acceptable.**

34 (c) Final Review by County Board. The county board shall, at the first meeting held pursuant to G.S. 163-230.1(f)  
35 after the application and ballot is received, proceed as follows:

- 36 (1) If the voter has submitted a photocopy of their photo identification, the county board shall make its  
37 determination whether the identification is acceptable under Paragraph (a) of this Rule. A final

1 determination that the photocopy of photo identification is not acceptable under Paragraph (a) of  
2 this Rule shall require a unanimous vote by the county board. If the county board makes a final  
3 determination that a voter's photocopy of photo identification is not acceptable, staff shall notify the  
4 voter as provided in Paragraph (b) of this Rule, and the county board shall reserve its final decision  
5 on the approval of the absentee application until the next official meeting after it receives  
6 documentation curing the deficiency or the county canvass, whichever occurs first.

7 (2) If the voter has completed an affidavit claiming an exception to the identification requirement  
8 pursuant to G.S. 163-166.16(d) and is otherwise eligible to vote, the county board may reject that  
9 person's ballot only if the county board unanimously finds that the affidavit is false. The county  
10 board shall substantiate any finding of falsity with grounds recorded in a written ~~decision~~ decision,  
11 and those grounds shall be based only on facts and not speculation. Before rejecting a voter's ballot  
12 because of a finding of falsity, the county board shall provide the voter advance notice and an  
13 opportunity to address the county board prior to the completion of canvass on any grounds that the  
14 county board is considering regarding the falsity of the affidavit, ~~provided there is sufficient time~~  
15 ~~remaining before the county canvass to send a notice that will be delivered in advance of the~~  
16 ~~opportunity to address the county board~~. The notice shall identify the specific reasons the county  
17 board is considering the affidavit to be potentially false and inform the voter how the voter may  
18 address the reasons for potential falsity, which shall include the ~~option~~ options to provide a written  
19 explanation or documentation or to address the board at a meeting in person. The county board shall  
20 send the notice via U.S. Mail within one business day of a county board's preliminary finding of  
21 falsity, provided that the opportunity to be heard is at least five days from the date of mailing. The  
22 notice shall be mailed for next-day delivery if the opportunity to be heard is less than five days from  
23 the date of mailing. ~~notice shall be provided by a means of physical delivery designed to provide~~  
24 ~~the voter actual notice in advance of the opportunity to address the county board, provided there is~~  
25 ~~sufficient time remaining before the county canvass to send a notice that will be delivered in advance~~  
26 ~~of the opportunity to address the county board, and~~ Notice shall also be provided within one business  
27 day of a county board's preliminary finding of falsity by any email address or phone number that  
28 the county board possesses for the voter. The notice and opportunity to address the county board  
29 provided for in this Subparagraph shall be offered only to those voters for whom a number of county  
30 board members equal to one less than all of the members of the county board, or more, has  
31 have identified a specific reason ~~reason~~, based only on facts and not speculation, to find that the  
32 affidavit claiming an exception to the identification requirement is false.

33 (3) If a voter's photocopy of photo identification or affidavit claiming an exception to the identification  
34 requirement pursuant to G.S. 163-166.16(d) is deemed deficient upon initial review under Paragraph  
35 (b) of this Rule, the county board shall reserve its final decision on the approval of the absentee  
36 application until the next official meeting after it receives documentation curing the deficiency  
37 identified pursuant to Paragraph (b) of this Rule or the county canvass, whichever occurs first.

1 (d) Exception for Military and Overseas Voters. A ~~covered~~ voter who is casting a ballot pursuant to G.S. 163, Article  
2 21A, Part 1 is not required to submit a photocopy of acceptable photo identification under Paragraph (a) of this Rule  
3 or claim an exception under G.S. 163-166.16(d).

4 (e) Return of Original Form of Identification. If a voter sends their original form of photo identification in the  
5 container-return envelope, or if a voter or other person permitted to return the voter's absentee ballot hand-delivers an  
6 absentee ballot to the county board of elections that is not accompanied by a photocopy of the voter's photo  
7 identification and the voter or other person has the voter's photo identification that is a type acceptable for voting  
8 purposes under 08 NCAC 17 .0101(a)(1) on hand, the county board shall make a photocopy of the identification,  
9 which shall serve as an acceptable photo identification accompanying the voter's absentee ballot. When a voter sends  
10 their original form of photo identification in the container-return envelope, the county board shall notify the voter by  
11 mail and by any email address or phone number that the county board possesses for the voter that the original photo  
12 identification will be returned to the ~~voter voter. The county board and~~ shall use a method of return that documents  
13 receipt of the photo identification.

14  
15 *History Note: Authority G.S. 163-22; 163-166.7; 163-166.16; ~~163-229~~; 163-230.1;*  
16 *Temporary Adoption Eff. August 23, 2019; January 1, 2020;*  
17 *Temporary Rule Expired Eff. October 11, 2020;*  
18 *Temporary Adoption Eff. August 1, 2023;*  
19 *Eff. April 1, 2024.*  
20

## Burgos, Alexander N

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**Subject:** FW: 08 NCAC 17 .0101  
**Attachments:** 08 NCAC 17 .0101 - Adopted by SBE 021524 - revised per RRC suggestions v2.docx

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**From:** Cox, Paul <paul.cox@ncsbe.gov>  
**Sent:** Monday, March 25, 2024 12:41 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>  
**Subject:** RE: 08 NCAC 17 .0101

Bill,

Please find attached a revised rule from the State Board to remedy the ambiguity objections you raise in your opinion letter, pursuant to 26 NCAC 05 .0107(b) and (c). The first part of the objection notes a lack of statutory authority, but the explanation for the objection, read in conjunction with the remainder of the rule, shows that the objection addresses, in essence, an ambiguity, not a lack of statutory authority.

The **first revision** is to clarify what is plainly the agency's intent: that paragraph (b) of the rule applies to the person checking in the voter when they initially present to vote. The objection letter assumes that paragraph (b) could also apply to the three judges of election who are hearing a challenge to a voter's resemblance to the photo on their ID. But that interpretation does not consider the remainder of the rule.

Later in part (b) itself, the rule discusses what happens when the "election official" ultimately cannot determine that a voter resembles the picture on their ID due to a face covering. The instruction is: "the election official shall *enter a challenge* in accordance with Subparagraph (d)(3) of this Rule." (Emphasis added.) Because judges of election are the ones receiving and hearing a challenge, this provision instructing the official to "enter a challenge" plainly does not apply to them. In other words, there is no secondary challenge hearing beyond an initial challenge hearing that the judges of election can initiate by entering a challenge.

Also, in part (d)(3) of the rule, "election official" is discussed again in the context of the initial review of the ID and the entry of a challenge to the voter. Then, separately, the section refers to the "voting site's judges of election" who hear the challenge entered by the initial official. Those "judges of election" are required to conduct a challenge hearing, and the section identifies the standards that apply. The hearing must be conducted "in accordance with the applicable procedures in G.S. 163-88," which is the exact statute that the objection contends controls here, and the agency agrees. Additionally, the judges' determination of the voter's resemblance to the photo and name on the ID, the judges are required to "apply[] the same standards as the election official initially reviewing the identification under Subparagraphs (a)(2) and (a)(3)." Two things are important about this last instruction: (1) it again contrasts the initial check-in election official from the judges hearing a challenge, and (2) it incorporates by reference specific requirements for review of the ID, and those requirements do not include paragraph (b), which is the source of the ambiguity objection.

Accordingly, the agency agrees to resolve this ambiguity objection, consistent with the clear intent of the entire rule, with the attached revision.



The Commission should consider this revision, despite the reference in the objection to GS 150B-21.9(a)(1) regarding lack of statutory authority, because to conclude the agency is exceeding its authority with respect to the rules governing judges hearing voter challenges would require misreading the rule as drafted. The rule as drafted does not impose the requirements of paragraph (b) on such challenge hearings, as explained above. Properly considered as an ambiguity objection, therefore, the Commission should consider this revision from the agency to remedy that ambiguity in accordance with 26 NCAC 05 .0107(c). Once any ambiguity is removed, any purported basis for objecting due to lack of authority ceases to exist.

The **second revision** is to largely adopt Commission counsel’s suggestion to eliminate any ambiguity in part (e)(1) with respect to sending notice of potential falsity for a photo ID exception affidavit. The language at issue instructs the county boards of elections on how to provide mailed notice to a voter that their affidavit claiming an exception to the photo ID requirement will potentially be deemed false, thereby offering an opportunity for the voter to be heard on the matter. The only change is in precisely *how* that mailed notice is provided. It more prescriptively provides deadlines and a method of delivery to attempt to ensure the original intent of the rule as proposed to the public is carried out—providing “advance notice and an opportunity to address the county board” on the potential falsity of their affidavit. That last quoted language from the rule is from the originally proposed rule and is not subject to change, proving the revision is fully within the expectation of the original rule.

For these reasons, the agency requests that the Commission consider this revised rule for Wednesday’s Commission meeting.

With best regards,

**Paul Cox**

General Counsel

NORTH CAROLINA STATE BOARD OF ELECTIONS

RALEIGH, NC 27611

919.814.0700

[www.ncsbe.gov](http://www.ncsbe.gov)

1 08 NCAC 17 .0101 is amended **with changes** as published in 38:10 NCR 614 as follows:

2  
3 **08 NCAC 17 .0101**            **DETERMINATION OF REASONABLE RESEMBLANCE AT CHECK-IN**  
4                                    **VERIFICATION OF PHOTO IDENTIFICATION DURING IN-PERSON**  
5                                    **VOTING**

6 ~~(a) An election official shall check the registration status of all persons presenting to vote in person on election day~~  
7 ~~or during one stop early voting pursuant to G.S. 163-166.7, and shall require that all persons presenting to vote provide~~  
8 ~~one of the forms of photo identification listed in G.S. 163-166.13(e), subject to the exceptions outlined in Paragraph~~  
9 ~~(b) of this Rule. If a person not satisfying the exceptions described in Paragraph (b) of this Rule does not provide any~~  
10 ~~photo identification, the election official shall inform the person presenting to vote of applicable options specified in~~  
11 ~~G.S. 163-166.13(e). If the person presenting to vote wishes to choose the option of voting a provisional ballot, the~~  
12 ~~election official shall provide the person presenting to vote with information on the provisional voting process and the~~  
13 ~~address of the county board of elections office.~~

14 ~~(b) The election official shall not require photo identification of a person who has a sincerely held religious objection~~  
15 ~~to being photographed and meets the requirements of G.S. 163-166.13(a)(2), or who is the victim of a natural disaster~~  
16 ~~and meets the requirements of G.S. 163-166.13(a)(3). Persons falling within any exception listed in this Paragraph~~  
17 ~~shall be allowed to proceed pursuant to G.S. 163-166.7.~~

18 ~~(c) The election official shall inspect any photo identification provided by the person presenting to vote and shall~~  
19 ~~determine the following:~~

20            ~~(1) That the photo identification is of the type acceptable for voting purposes pursuant to G.S.~~  
21            ~~163-166.13(e). A valid United States passport book or a valid United States passport card is~~  
22            ~~acceptable pursuant to G.S. 163-166.13(e);~~

23            ~~(2) That the photo identification is unexpired or is otherwise acceptable pursuant to G.S. 163-166.13(e);~~

24            ~~(3) That the photograph appearing on the photo identification depicts the person presenting to vote. The~~  
25            ~~election official shall make this determination based on the totality of the circumstances, construing~~  
26            ~~all evidence, along with any explanation or documentation voluntarily proffered by the person~~  
27            ~~presenting to vote, in the light most favorable to that person. Perceived differences of the following~~  
28            ~~features shall not be grounds for the election official to find that the photograph appearing on the~~  
29            ~~photo identification fails to depict the person presenting to vote:~~

30            ~~(A) weight;~~

31            ~~(B) hair features and styling, including changes in length, color, hairline, or use of a wig or~~  
32            ~~other hairpiece;~~

33            ~~(C) facial hair;~~

34            ~~(D) complexion or skin tone;~~

35            ~~(E) cosmetics or tattooing;~~

36            ~~(F) apparel, including the presence or absence of eyeglasses or contact lenses;~~

37            ~~(G) characteristics arising from a perceptible medical condition, disability, or aging;~~

1                   (H) ~~photographic lighting conditions or printing quality.; and~~  
2           (4) ~~That the name appearing on the photo identification is the same or substantially equivalent to the~~  
3           ~~name contained in the registration record. The election official shall make this determination based~~  
4           ~~on the totality of the circumstances, construing all evidence, along with any explanation or~~  
5           ~~documentation voluntarily proffered by the person presenting to vote, in the light most favorable to~~  
6           ~~that person. The name appearing on the photo identification shall be considered substantially~~  
7           ~~equivalent to the name contained in the registration record if differences are attributable to a~~  
8           ~~reasonable explanation or one or more of the following reasons:~~  
9           (A) ~~Omission of one or more parts of the name (such as, for illustrative purposes only, Mary~~  
10           ~~Beth Smith versus Beth Smith, or Patrick Todd Jackson, Jr. versus Patrick Todd Jackson,~~  
11           ~~or Maria Guzman Santana versus Maria Guzman);~~  
12           (B) ~~Use of a variation or nickname rather than a formal name (such as, for illustrative purposes~~  
13           ~~only, Bill versus William, or Sue versus Susanne);~~  
14           (C) ~~Use of an initial in place of one or more parts of a given name (such as, for illustrative~~  
15           ~~purposes only, A.B. Sanchez versus Aaron B. Sanchez);~~  
16           (D) ~~Use of a former name, including maiden names (such as, for illustrative purposes only,~~  
17           ~~Emily Jones versus Emily Gibson), or a variation that includes or omits a hyphenation~~  
18           ~~(such as, for illustrative purposes only, Chantell D. Jacobson Smith versus Chantell D.~~  
19           ~~Jacobson);~~  
20           (E) ~~Ordering of names (such as, for illustrative purposes only, Maria Eva Garcia Lopez versus~~  
21           ~~Maria E. Lopez Garcia);~~  
22           (F) ~~Variation in spelling or typographical errors (such as, for illustrative purposes only,~~  
23           ~~Dennis McCarthy versus Denis McCarthy, or Aarav Robertson versus Aarav Robertsson).~~  
24           (d) ~~The election official shall not require any additional evidence outside the four corners of the photo identification.~~  
25           ~~The election official shall not require that any person remove apparel for the purposes of rendering a determination~~  
26           ~~under Paragraph (c). If the face of the person presenting to vote is covered such that the election official cannot render~~  
27           ~~a determination under Subparagraph (c)(3), then the election official shall give the person the opportunity to remove~~  
28           ~~the covering but shall not require that removal. If the person declines to remove the covering, the election official shall~~  
29           ~~inform the person presenting to vote that he or she may cast a provisional ballot, which shall be counted in accordance~~  
30           ~~with G.S. 163-182.1A, or, if applicable, may complete a written request for an absentee ballot as set out in G.S. 163-~~  
31           ~~166.13(c)(3), and shall inform the voting site's judges of election that the election official cannot affirmatively~~  
32           ~~determine that the person bears any reasonable resemblance to the photo identification. G.S. 163-166.16.~~  
33           (e) ~~Differences between the address appearing on the photo identification meeting the requirements of Subparagraph~~  
34           ~~(c)(1) and the address contained in the registration record shall not be construed as evidence that the photographic~~  
35           ~~identification does not bear any reasonable resemblance pursuant to Subparagraphs (c)(3) and (c)(4) of this Rule, nor~~  
36           ~~shall it be construed as evidence that the photographic identification does not otherwise meet the requirements of any~~  
37           ~~other provision of Paragraph (C).~~

1 ~~(f) The election official examining photo identification provided by a person presenting to vote shall construe all~~  
2 ~~evidence, along with any explanation or documentation voluntarily offered by the person presenting to vote, in the~~  
3 ~~light most favorable to that person, and shall be guided by the purpose of the photo identification requirement, which~~  
4 ~~is to confirm the person presenting to vote is the registered voter on the voter registration records. After an examination~~  
5 ~~performed in the manner set out in Paragraphs (a) through (c)(d) of this Rule, the election official shall proceed as~~  
6 ~~follows:~~

7 ~~(1) If the election official determines that the photo identification meets all the requirements of~~  
8 ~~Paragraph (c), then the person presenting to vote shall be allowed to proceed pursuant to G.S. 163-~~  
9 ~~166.7 and 163-166.13(b); or~~

10 ~~(2) If the election official determines that the photo identification does not meet all of the requirements~~  
11 ~~of Subparagraphs (c)(1) and (c)(2), the election official shall inform the person presenting to vote~~  
12 ~~of the reasons for such determination (such as, for illustrative purposes only, that the photo~~  
13 ~~identification is expired) and shall invite the person to provide any other acceptable photo~~  
14 ~~identification that he or she may have. If the person presenting to vote does not produce photo~~  
15 ~~identification that meets all the requirements of Subparagraph (c)(1) and (c)(2), then the election~~  
16 ~~official shall inform the person presenting to vote of applicable options specified in G.S. 163-~~  
17 ~~166.13(c). If the person presenting to vote wishes to choose the option of voting a provisional ballot,~~  
18 ~~the election official shall provide the person presenting to vote with information on the provisional~~  
19 ~~voting process and the address of the county board of elections office.~~

20 ~~(3) If the election official determines that the photo identification does not meet all the requirements~~  
21 ~~of Subparagraphs (c)(3) and (c)(4), the election official shall notify the voting site's judges of~~  
22 ~~election that the person presenting to vote does not bear any reasonable resemblance to the photo~~  
23 ~~identification.~~

24 (a) When a person presenting to vote checks in at a voting site, an election official shall ask the voter to show photo  
25 identification in accordance with G.S. 163-166.16 and this Rule. The election official shall examine any photo  
26 identification provided by the person presenting to vote and shall determine the following:

27 (1) The photo identification is of the type acceptable for voting purposes pursuant to G.S. 163-  
28 166.16(a). A valid United States passport book or passport card is acceptable pursuant to G.S.  
29 163-166.16(a)(1)c.

30 (2) The photograph appearing on the photo identification bears a reasonable resemblance to the  
31 person presenting to vote. A reasonable resemblance is a similarity in appearance such that an  
32 ordinary person would conclude that the photograph on the identification is more likely than not  
33 the person presenting to vote. The election official shall make this determination based on the  
34 totality of the circumstances, bearing in mind that there are many reasons that a person's  
35 appearance could change (such as, for illustrative purposes only, changes in hair, facial hair, or  
36 weight; or the effects of medical conditions, aging, or medical treatment). The election official

1 shall also be guided by the purpose of the photo identification requirement, which is to confirm the  
2 person presenting to vote is the registered voter on the voter registration records.

3 (3) The name appearing on the photo identification is the same as or substantially equivalent to the  
4 name contained in the voter's voter registration record. The election official shall make this  
5 determination based on the totality of the circumstances, construing all evidence, along with any  
6 explanation or documentation voluntarily offered by the person presenting to vote, in the light  
7 most favorable to that person. The election official shall consider the name appearing on the photo  
8 identification to be substantially equivalent to the name contained in the registration record if  
9 differences are attributable to a reasonable explanation, which shall include but is not limited to  
10 one or more of the following reasons:

11 (A) Omission or inclusion of one or more parts of the name (such as, for illustrative purposes  
12 only, Mary Beth Smith versus Beth Smith, or Patrick Todd Jackson, Jr. versus Patrick  
13 Todd Jackson, or Maria Guzman-Santana versus Maria Guzman);

14 (B) Use of a variation or nickname rather than a formal name (such as, for illustrative  
15 purposes only, Bill versus William, or Sue versus Susanne);

16 (C) Use of an initial in place of one or more parts of a given name (such as, for illustrative  
17 purposes only, A.B. Sanchez versus Aaron B. Sanchez);

18 (D) Use of a former name, including maiden names (such as, for illustrative purposes only,  
19 Emily Jones versus Emily Gibson), or a variation that includes or omits a hyphenation or  
20 hyphen (such as, for illustrative purposes only, Chantell D. Jacobson-Smith versus  
21 Chantell D. Jacobson or Chantell D. Jacobson Smith), an accent (such as, for illustrative  
22 purposes only, José Muñoz versus Jose Munoz), or an apostrophe (such as, for illustrative  
23 purposes only, Andrea D'Antonio versus Andrea Dantonio);

24 (E) Ordering of names (such as, for illustrative purposes only, Maria Eva Garcia Lopez  
25 versus Maria E. Lopez-Garcia); or

26 (F) Variation in spelling or typographical errors (such as, for illustrative purposes only,  
27 Dennis McCarthy versus Denis McCarthy, or Aarav Robertson versus Aarav  
28 Robertsson).

29 If a voter is casting a provisional ballot because the voter's record does not appear in the poll  
30 book, the election official shall instead compare the name on the photo identification with the  
31 name provided by the voter on the provisional ballot application.

32 (b) The election official checking in the person presenting to vote, when examining the photo identification  
33 provided by of that a person, presenting to vote vote, shall not require the voter to provide any additional evidence  
34 regarding the identification apart from the identification itself outside the four corners of the photo identification. If  
35 the face of the person presenting to vote is covered to such an extent that the election official cannot determine  
36 reasonable resemblance under Subparagraph (a)(2) of this Rule, then the election official shall inform the voter that  
37 the face covering is preventing the official from determining that the photo on the identification is that of the voter

1 and shall offer the voter the option to briefly remove the face covering. If the voter chooses not to remove the  
2 covering, then the election official shall enter a challenge in accordance with Subparagraph (d)(3) of this Rule.

3 (c) Differences between the address appearing on the photo identification of a person presenting to vote and the  
4 address contained in the registration record of that person shall not be considered as evidence that the photographic  
5 identification fails to meet the requirements of G.S. 163-166.16 or this Rule.

6 (d) After examining the photo identification according to Paragraphs (a) through (c) of this Rule, the election  
7 official shall proceed as follows:

8 (1) If the election official determines that the photo identification meets all the requirements of  
9 Paragraph (a) of this Rule, then the election official shall allow the person to vote pursuant to G.S.  
10 163-166.7.

11 (2) If the election official determines that the photo identification is not an acceptable type of photo  
12 identification under Subparagraph (a)(1) of this Rule, the election official shall inform the person  
13 presenting to vote of the reasons for that determination (such as, for illustrative purposes only, that  
14 the photo identification is not on the list of student identifications approved by the State Board of  
15 Elections) and shall invite the person to provide any other photo identification that is acceptable  
16 under Subparagraph (a)(1) of this Rule that the person may have. If the person presenting to vote  
17 does not produce photo identification that meets all the requirements of Subparagraph (a)(1) of  
18 this Rule, then the election official shall inform the person presenting to vote of **the both** options to  
19 vote by provisional ballot in accordance with Paragraph (e) of this Rule.

20 (3) If the election official determines that the photo or name on the photo identification do not satisfy  
21 Subparagraphs (a)(2) and (a)(3) of this Rule, the election official shall inform the person  
22 presenting to vote of the reasons for that determination and shall invite the person to provide any  
23 other photo identification that the person may have that is acceptable under Subparagraph (a)(1)  
24 and satisfies Subparagraphs (a)(2) and (a)(3) of this Rule. If the person presenting to vote does not  
25 produce photo identification that meets all the requirements of Paragraph (a) of this Rule, then the  
26 election official shall enter a challenge pursuant to G.S. 163-87 and immediately notify the voting  
27 site's judges of election of the challenge. The judges of election shall then conduct a challenge  
28 hearing, in accordance with the applicable procedures in G.S. 163-88. At the conclusion of the  
29 hearing, the judges of election shall vote on whether the photo appearing on the photo  
30 identification of the person presenting to vote bears a reasonable resemblance to that person or  
31 whether the name appearing on the photo identification is the same as or substantially equivalent  
32 to the name contained in the voter's voter registration record, applying the same standards as the  
33 election official initially reviewing the identification under Subparagraphs (a)(2) and (a)(3). Each  
34 judge shall record the judge's findings in writing. Only if the judges of election unanimously find  
35 that the photo appearing on the photo identification does not bear a reasonable resemblance to the  
36 person presenting to vote, or that the name appearing on the photo identification is not the same as  
37 or substantially equivalent to the name contained in the voter's voter registration record, the voter

1 shall be offered the both options to vote by provisional ballot in accordance with Paragraph (e) of  
2 this Rule. Absent such a unanimous finding, the person shall vote with a regular ballot pursuant to  
3 G.S. 163-166.7. When the judges of election conduct a challenge hearing under this Rule and the  
4 challenge is to a curbside voter, to ensure the voting enclosure remains properly attended, the  
5 judges may separately visit the curbside location to assess the voter's identification.

6 (e) A person presenting to vote who does not present acceptable photo identification in accordance with this Rule shall  
7 be offered both of the following options:

8 (1) To vote by provisional ballot with an affidavit claiming an exception to the identification  
9 requirement, pursuant to G.S. 163-166.16(d). If the voter has completed the affidavit as required in  
10 G.S. 163-166.16(d) and is otherwise eligible to vote, the county board shall count the provisional  
11 ballot unless the county board unanimously finds that the affidavit is false. The county board shall  
12 substantiate any finding of falsity with grounds recorded in a written decision, and those grounds  
13 shall be based only on facts and not speculation. Before disapproving a voter's provisional ballot  
14 because of a finding of falsity, the county board shall provide the voter advance notice and an  
15 opportunity to address the county board prior to completion of the canvass on any grounds that the  
16 county board is considering regarding the falsity of the affidavit. The notice shall identify the  
17 specific reasons the county board is considering the affidavit to be potentially false and inform the  
18 voter how the voter may address the reasons for potential falsity, which shall include the option  
19 options to provide a written explanation or documentation or to address the board at a meeting in  
20 person. The county board shall send the notice via U.S. Mail within one business day of a county  
21 board's preliminary finding of falsity, provided that the opportunity to be heard is at least five days  
22 from the date of mailing. The notice shall be mailed for next-day delivery if the opportunity to be  
23 heard is less than five days from the date of mailing, ~~notice shall be provided by a means of physical~~  
24 ~~delivery designed to provide the voter actual notice in advance of the opportunity to address the~~  
25 ~~county board and~~ Notice shall also be provided within one business day of a county board's  
26 preliminary finding of falsity by any email address or phone number that the county board possesses  
27 for the voter. The notice and opportunity to address the county board provided for in this  
28 Subparagraph shall be offered only to those provisional voters for whom a number of county board  
29 members equal to one less than all of the members of the county board board, or more, has have  
30 identified a specific reason, based only on facts and not speculation, to find that the affidavit  
31 claiming an exception to the identification requirement is false.

32 (2) To vote by provisional ballot and then bring to the office of the county board identification  
33 acceptable under G.S. 163-166.16 and this Rule before 5 p.m. on the business day before county  
34 canvass. If the voter brings photo identification to the office of a county board in a timely manner,  
35 a county board staff member shall examine the photo identification in accordance with Paragraphs  
36 (a), (b), and (c) of this Rule. After examining the photo identification, the staff member shall proceed  
37 as follows:

1 (A) If the photo identification meets all the requirements of Paragraph (a) of this Rule, the staff  
2 member shall recommend approval of the provisional ballot to the county board.

3 (B) If the photo identification is not an acceptable type of photo identification under  
4 Subparagraph (a)(1) of this Rule, then the staff member shall inform the voter of the reasons  
5 for that determination, while the voter is at the county board office, and invite the voter to  
6 provide an acceptable photo identification in accordance with Subparagraph (d)(2) of this  
7 Rule. If the voter does not provide acceptable identification by 5 p.m. on the business day  
8 prior to the canvass, then county board staff shall recommend disapproval of the  
9 provisional ballot to the county board.

10 (C) If the photo or name on the photo identification do not satisfy Subparagraphs (a)(2) and  
11 (a)(3) of this Rule, then the staff member shall inform the voter of the reasons for that  
12 determination and shall invite the voter to provide any other acceptable photo identification  
13 that meets the requirement of Paragraph (a) of this Rule. If the voter does not produce  
14 acceptable photo identification, identification that meets the requirement of Paragraph (a)  
15 of this Rule, then the staff member shall recommend disapproval of the provisional ballot  
16 to the county board. While the voter is at the county board office, the staff member shall  
17 inform the voter of the recommendation and provide notice to the voter of the county board  
18 meeting at which the voter's provisional ballot will be reviewed and considered by the  
19 county board. If the voter appears at that meeting and desires to address the county board  
20 on whether their photo identification meets the requirement of Paragraph (a) of this Rule,  
21 is acceptable under this Rule, the county board members are subject to the requirements of  
22 this Rule in the same manner as a staff member initially examining a voter's photo  
23 identification.

24 If the voter brings photo identification that is an acceptable type of photo identification under  
25 Subparagraph (a)(1) of this Rule to the county board office before 5 p.m. on the business day prior  
26 to the canvass, the county board shall count the provisional ballot unless the county board  
27 unanimously decides the photo identification presented does not satisfy Subparagraphs (a)(2) and  
28 (a)(3) of this Rule, in which case the county board shall record in writing the grounds for its decision.

29  
30 *History Note: Authority G.S. 163-22; 163-82.6A; 163-82.15; 163-166.7; NAACP v. McCrory, 831 F.3d 204*  
31 *(4<sup>th</sup> Cir. 2016); 163A-1145.1; S.L. 2018-144, s. 3.1(e); 163-166.11; 163-166.16;*  
32 *Eff. January 1, 2016;*  
33 *Temporary Amendment Eff. August 23, 2019;*  
34 *Temporary Amendment Expired Eff. June 12, ~~2020~~, 2020;*  
35 *Temporary Amendment Eff. August 1, ~~2023~~, 2023;*  
36 *Amended Eff. April 1, 2024.*



## Burgos, Alexander N

---

**Subject:** FW: 08 NCAC 17 .0109  
**Attachments:** 03.2024 Staff Opinion BOE 08 NCAC 17 .0109.doc

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Saturday, March 23, 2024 2:24 PM  
**To:** Cox, Paul <[paul.cox@ncsbe.gov](mailto:paul.cox@ncsbe.gov)>  
**Cc:** Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: 08 NCAC 17 .0109

Attached is a revised opinion.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

---

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**From:** Cox, Paul <[paul.cox@ncsbe.gov](mailto:paul.cox@ncsbe.gov)>  
**Sent:** Saturday, March 23, 2024 1:44 PM  
**To:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Cc:** Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** RE: 08 NCAC 17 .0109

Hi Bill,

To clarify, are you recommending objection for this rule based on the reasoning in this opinion? The checkbox notes a recommendation to approve, but the narrative text below recommends objection.

Thanks,

Paul

---

**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Saturday, March 23, 2024 12:03 PM  
**To:** Cox, Paul <[paul.cox@ncsbe.gov](mailto:paul.cox@ncsbe.gov)>  
**Cc:** Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** 08 NCAC 17 .0109

Good afternoon,

Attached please find the staff opinion on the above captioned rule.

As always if you have any questions please feel free to contact me.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

---

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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: State Board of Elections

RULE CITATION: 08 NCAC 17 .0101

RECOMMENDATION DATE: February 25, 2024

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:

I.

*Paragraph (b) of the rule prohibits "the election official" from "requiring the voter to provide any evidence regarding the identification apart from the identification itself." "Election Official" is an undefined term.<sup>1</sup>*

*However, G.S. 163-88(a) requires precinct judges in the context of a challenge hearing pursuant to G.S. 163-88 "to examine [the voter] as to his qualifications to be registered and vote." As written, the statute would require inquiry by precinct judges which the rule would prohibit. While the agency may aver that the relevant portion of Paragraph (b) is limited to the initial review of the identification contextually, that is unclear.*

*Accordingly, staff recommend objection pursuant to either G.S. 150B-21.9(a)(1) for the rule exceeding the agency's authority or (a)(2) for ambiguity.*

II.

---

<sup>1</sup> HOWEVER, "PRECINCT OFFICIAL" IS DEFINED IN G.S. 163-41(B) AS THE CHIEF JUDGES, PRECINCT JUDGES AND ASSISTANTS APPOINTED PURSUANT TO G.S. 163-42.

William W. Peaslee  
Commission Counsel

*Paragraph (e)(1) of the rule requires that the County Boards of Elections (“CBE”) to send the notice using a method of delivery “designed to provide actual notice in advance of the opportunity to address the county board...”*

*Each CBE is left to wonder what means of physical delivery provides actual notice. Is U.S. first class mail designed to deliver the “actual notice” of an opportunity to be heard three days hence? What about four days? Is returned receipt required? The county boards’ individual interpretations of the requirement could vary widely resulting in unequal treatment of voters from county to county and within a county.*

*The Subparagraph lays an unclear and ambiguous requirement upon the county boards of elections.*

*Accordingly, staff recommends objection to the rule pursuant to G.S. 150B-21.9(a)(2).*

**§ 150B-21.9. Standards and timetable for review by 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.

The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

The Commission may ask the Office of State Budget and Management to determine if a rule has a substantial economic impact and is therefore required to have a fiscal note. The Commission must ask the Office of State Budget and Management to make this determination if a fiscal note was not prepared for a rule and the Commission receives a written request for a determination of whether the rule has a substantial economic impact.

(a1) Entry of a rule in the North Carolina Administrative Code after review by the Commission creates a rebuttable presumption that the rule was adopted in accordance with Part 2 of this Article.

(b) Timetable. – The Commission must review a permanent rule submitted to it on or before the twentieth of a month by the last day of the next month. The Commission must review a rule submitted to it after the twentieth of a month by the last day of the second subsequent month. The Commission must review a temporary rule in accordance with the timetable and procedure set forth in G.S. 150B-21.1. (1991, c. 418, s. 1; 1995, c. 507, s. 27.8(f); 2000-140, s. 93.1(a); 2001-424, s. 12.2(b); 2003-229, s. 9.)

**§ 163-88. Hearing on challenge made on day of primary or election.**

(a) A challenge entered on the day of a primary or election shall be heard and decided by the chief judge and judges of election of the precinct in which the challenged registrant is registered before the polls are closed on the day the challenge is made. When the challenge is heard the precinct officials conducting the hearing shall explain to the challenged registrant the qualifications for registration and voting in this State, and shall examine him as to his qualifications to be registered and to vote. If the challenged registrant insists that he is qualified, and if, by sworn testimony, he shall prove his identity with the person in whose name he offers to vote and his continued residence in the precinct since he was registered, one of the judges of election or the chief judge shall tender to him the following oath or affirmation, omitting the portions in brackets if the challenge is heard on the day of an election other than a primary:

"You do solemnly swear (or affirm) that you are a citizen of the United States; that you are at least 18 years of age [or will become 18 by the date of the next general election]; that you have [or will have] resided in this State and in the precinct for which registered for 30 days [by the date of the next general election]; that you are not disqualified from voting by the Constitution and laws of this State; that your name is \_\_\_\_\_, and that in such name you were duly registered as a voter of this precinct; that you are the person you represent yourself to be; [that you are affiliated with the \_\_\_\_\_ party]; and that you have not voted in this [primary] election at this or any other voting place. So help you, God."

If the challenged registrant refuses to take the tendered oath, the challenge shall be sustained, and the precinct officials conducting the hearing shall mark the registration records to reflect their decision, and they shall erase the challenged registrant's name from the pollbook if it has been entered therein. If the challenged registrant takes the tendered oath, the precinct officials conducting the hearing may, nevertheless, sustain the challenge unless they are satisfied that the challenged registrant is a legal voter. If they are satisfied that he is a legal voter, they shall overrule the challenge and permit him to vote. Whenever any person's vote is received after having taken the oath prescribed in this section, the chief judge or one of the judges of election shall write on the registration record and on the pollbook opposite the registrant's name the word "sworn."

(b) Precinct election officials conducting hearings on challenges on the day of a primary or election shall have authority to administer the necessary oaths or affirmations to all witnesses brought before them to testify to the qualifications of the person challenged.

(c) A letter or postal card mailed by returnable mail and returned by the United States Postal Service purportedly because the person no longer lives at that address or because a forwarding order has expired shall not be admissible evidence in a challenge heard under this section which was made under G.S. 163-87. (1901, c. 89, s. 22; Rev., s. 4340; C.S., s. 5973; 1955, c. 871, s. 2; 1967, c. 775, s. 1; 1971, c. 1231, s. 1; 1973, c. 1223, s. 6; 1985, c. 380, ss. 1, 1.1; 1993 (Reg. Sess., 1994), c. 762, s. 27; 2017-6, s. 3; 2018-146, s. 3.1(a), (b).)

## 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: State Board of Elections

RULE CITATION: 08 NCAC 17 .0109

RECOMMENDATION DATE: March 23, 2024

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:

*This rule concerns the required photo identification for absentee-by-mail ballots.*

*As an alternative to presenting photo identification, a prospective voter can submit an affidavit pursuant to G.S. 163-166.16(d) which provides for exceptions to the photo identification otherwise required. This is part of the statutory scheme.*

*In Subparagraph (c)(2), the rule provides the process for county boards of elections (CBE) to review the photo identification or affidavits submitted. If a CBE finds that an affidavit is false, the CBE, pursuant to the rule, is required to provide "advance notice" notice to the affiant and an opportunity to be heard prior to rejecting the affiant's ballot.*

*Subparagraph (c)(2) further requires that the CBE send the notice using a method of delivery via U.S. Mail or commercial carrier that is "designed to deliver the notice to the voter in advance of the opportunity to address the county board, provided there is sufficient time remaining before the county canvass to send notice that will be delivered in advance of the opportunity to address the county board..."*

*Each CBE is left to wonder, is there "sufficient" time remaining? Is U.S. first class mail designed to deliver the notice of an opportunity to be heard three days hence? What about four days? At what temporal point is a CBE required to use FedEx or another overnight delivery service to meet the standard of "designed to deliver notice."*

William W. Peaslee  
Commission Counsel

*The county boards' individual interpretations of the requirement could vary widely resulting in unequal treatment of voters from county to county and within a county.*

*The Subparagraph lays an unclear and ambiguous requirement upon the county boards of elections.*

*Accordingly, staff recommends objection to the rule pursuant to G.S. 150B-21.9(a)(2).*

*The subparagraph can be easily remedied. For example, "The county board shall deposit the notice in the U.S. Mail, first class, postage paid within one day of a county board's finding of falsity provided that the opportunity to be heard is at least five business days from the date of deposit. The notice shall be deposited in the U.S. Mail or a commercial service, for next day delivery if the opportunity to be heard is less than five business days from the date of deposit."*

*Of course, this example would be a substantial change pursuant to G.S. 150B-21.2(g).*



## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 04 .0402  
**Attachments:** 08 NCAC 04 .0402 Procedures - Revised per RRC suggestions.docx

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Sent:** Saturday, March 23, 2024 9:20 AM  
**To:** Rules, Oah <oah.rules@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Cox, Paul <paul.cox@ncsbe.gov>  
**Subject:** FW: 08 NCAC 04 .0402

It is my intention to recommend approval of the above captioned rule as revised.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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## Burgos, Alexander N

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**From:** Cox, Paul  
**Sent:** Thursday, March 21, 2024 2:12 PM  
**To:** Peaslee, William W; Steele, Adam  
**Cc:** SBOE\_Grp - Legal; Burgos, Alexander N  
**Subject:** RE: 08 NCAC 04 .0402  
**Attachments:** 08 NCAC 04 .0402 Procedures - Revised per RRC suggestions.docx; 08 NCAC 04 .0401 Standards - Revised per RRC suggestions.docx

Bill,

Please find attached revised rules from the State Board to address the items you've raised. Please let us know if there are any other issues to consider.

Best regards,

**Paul Cox**  
General Counsel  
NORTH CAROLINA STATE BOARD OF ELECTIONS  
RALEIGH, NC 27611  
919.814.0700  
[www.ncsbe.gov](http://www.ncsbe.gov)

---

**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Sent:** Wednesday, March 20, 2024 12:24 PM  
**To:** Steele, Adam <adam.steele@ncsbe.gov>  
**Cc:** SBOE\_Grp - Legal <Legal@ncsbe.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Cox, Paul <paul.cox@ncsbe.gov>  
**Subject:** RE: 08 NCAC 04 .0402

Good afternoon.

In re Page 3, Lines 13-16:

Setting aside the question of whether the BOE can incorporate by reference the DIT standard, the language of the rule does not comply with G.S. 150B-21.6.

“In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.”

**William W. Peaslee**  
Rules Review Commission Counsel / Legislative Liaison

Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

---

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---

**From:** Steele, Adam <[adam.steele@ncsbe.gov](mailto:adam.steele@ncsbe.gov)>  
**Sent:** Tuesday, March 19, 2024 5:07 PM  
**To:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Cc:** SBOE\_Grp - Legal <[Legal@ncsbe.gov](mailto:Legal@ncsbe.gov)>  
**Subject:** FW: 08 NCAC 04 .0402

Bill,

On behalf of Paul Cox, please find attached an agency response to the request for technical changes to the .0402 rule for electronic poll books, along with a revised rule.

Regards,

**Adam Steele | Associate General Counsel**  
NORTH CAROLINA STATE BOARD OF ELECTIONS  
430 N SALISBURY STREET  
RALEIGH, NC 27611  
MAIN LINE: 919.814.0700  
DIRECT: 919.814.0654  
[www.ncsbe.gov](http://www.ncsbe.gov)

---

**From:** Cox, Paul <[paul.cox@ncsbe.gov](mailto:paul.cox@ncsbe.gov)>  
**Sent:** Monday, March 4, 2024 3:05 PM  
**To:** Steele, Adam <[adam.steele@ncsbe.gov](mailto:adam.steele@ncsbe.gov)>  
**Subject:** FW: 08 NCAC 04 .0402

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**From:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Sent:** Monday, March 4, 2024 3:01 PM  
**To:** Cox, Paul <[paul.cox@ncsbe.gov](mailto:paul.cox@ncsbe.gov)>  
**Cc:** Burgos, Alexander N <[alexander.burgos@oah.nc.gov](mailto:alexander.burgos@oah.nc.gov)>  
**Subject:** 08 NCAC 04 .0402

Good afternoon

Attached please find the request for changes in the above captioned rule.

As always if you have any questions please feel free to contact me.

**William W. Peaslee**

**Rules Review Commission Counsel / Legislative Liaison**

Office of Administrative Hearings

1711 New Hope Church Road

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Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

1 08 NCAC 04 .0401 is adopted with changes as published in 38:06 NCR 302 as follows:

2  
3 **08 NCAC 04 .0401            STANDARDS FOR CERTIFICATION OF ELECTRONIC POLL BOOKS**

4 (a) As used in this Chapter, an “electronic poll book” is a system (including hardware, software, and firmware) used  
5 to check the registration of voters who appear to vote in person, to assign voters their correct ballots, and to record the  
6 voters’ check-in and acceptance of ballots. An electronic poll book shall, to qualify for certification by the State Board  
7 for use in any election in North Carolina, fulfill the following requirements:

- 8        (1)        It shall record all information a voter is required by law to provide when presenting to vote and be  
9                    equipped so that voters and election workers can complete the steps required by law for checking a  
10                    voter’s registration and the distribution of ballots to checked-in voters in a timely fashion.
- 11        (2)        It shall be equipped for use on any day the polls are open for in-person voting and shall contain the  
12                    list of registered voters eligible to vote in the election.
- 13        (3)        It shall verify a voter’s eligibility to receive a ballot, confirm a voter has not previously voted in the  
14                    election based on available records, and record a voter’s check-in and receipt of a ballot.
- 15        (4)        It shall log all user activity and that log shall be secured from unauthorized alteration and be  
16                    available only to authorized users. It shall require the use of individual user accounts assigned to  
17                    individual authorized users and not allow shared accounts for access to the electronic poll book. As  
18                    used in this Chapter, an “authorized user” is an individual designated by the State Board or a  
19                    purchasing county board of elections to operate and maintain the electronic poll book.
- 20        (5)        It shall secure the data of the electronic poll book such that the data is stored in a manner that an  
21                    unauthorized party will not be able to access the data.
- 22        (6)        It shall secure the data contained within the electronic poll book such that the data is not transmitted  
23                    or transported for any purpose except for official use in the conduct of an election or as otherwise  
24                    authorized by law.
- 25        (7)        It shall ~~be designed to~~ ensure that the voter data contained within the electronic poll book is not  
26                    deleted without prompting by an authorized user, so that county elections personnel can comply  
27                    with all applicable laws pertaining to records retention.
- 28        (8)        It shall not allow access to confidential voter data, except for official use by authorized users, users,  
29                    including in the conduct of an election or as otherwise authorized by law.
- 30        (9)        It shall meet applicable federal standards, requirements, and guidance for electronic poll books;  
31                    including those issued by the United States Election Assistance Commission or its successor.
- 32        (10)       It shall be reviewed by an independent testing authority recognized accredited by or partnered with  
33                    a federal agency ~~the United States Election Assistance Commission~~ for compliance with applicable  
34                    state law.
- 35        (11)       It shall be designed and constructed for simple for election workers setup to set up and use, use by  
36                    election workers, and any hardware shall be designed for frequent and safe transport transportable  
37                    to voting locations, ~~and for simple setup and use by election workers.~~

1 (12) It shall be compatible with systems, equipment, and software utilized by the State Board and county  
2 boards of elections for storing and processing voter registration and voting data.

3 (13) It shall allow for a wired connection to peripherals approved by the State Board, when certifying an  
4 electronic poll book pursuant to 08 NCAC 04 .0402, during the certification process that are required  
5 for the operation of the electronic poll book and, as minimally required for functionality, allow for  
6 a ~~wired~~ secure network connection for the secure transmission of data with the state's electronic  
7 information management system, provided that the connection to the network is not automatically  
8 enabled by default upon powering on or opening the electronic poll book. All other forms of  
9 connectivity are prohibited.

10 (b) A vendor applying for certification by the State Board of Elections of an electronic poll book shall, as part  
11 of the certification application, fulfill the following requirements:

12 (1) The vendor shall ~~submit~~ submit, in a manner set forth by the State Board, the electronic poll book  
13 for examination, testing, and evaluation by the State Board. The vendor shall initiate the certification  
14 process by submitting a letter of application directed to the Executive Director of the State Board.  
15 A corporate officer or designee of the vendor shall sign the letter, and the letter shall include:

16 (A) The name and contact information of the company and the name and title of the corporate  
17 officer signing the application. and all corporate information requested by the State Board.

18 (B) The vendor's corporate information. Corporate information shall include a history and  
19 description of the business, year established, products and services offered, areas served,  
20 branch office locations, and subsidiary or parent companies; a list of owners or  
21 shareholders with a 5% or greater interest or share in each of the vendor's company,  
22 subsidiary companies, and parent company; a description of management and staff  
23 organization, number of full-time employees by category, number of part-time employees  
24 by category, and resumes of primary employees to be tasked with assisting purchasing  
25 counties; documentation demonstrating that the vendor meets the same level of security  
26 compliance required for vendors connected to the State Network, as that term is defined in  
27 G.S. § 143B-1370(a)(5)g; an audited report of the business' most current fiscal year a  
28 report showing the results of an independent audit of the business for its most current fiscal  
29 year; a comfort letter from the vendor's primary bank; and a description of the vendor's  
30 financial history including a financial statement for the past three (3) fiscal years. If the  
31 vendor is not the manufacturer of the equipment for which application is made, the vendor  
32 shall include the vendor's financial statement for the past three (3) fiscal years.

33 (C) The name and version number of the electronic poll book to be certified, and a list of all  
34 jurisdictions that have certified, have used, or are currently using the electronic poll book.

35 (D) An attestation that the corporate officer signing the application has reviewed and confirmed  
36 that the electronic poll book meets all legal requirements of electronic poll book systems  
37 under state and federal law.

- 1 (2) The vendor shall provide a listing of all software, hardware, and consumables necessary for  
2 operation of the electronic poll book, a technical data package, an accounting of any prior  
3 submission of the electronic poll book to another jurisdiction for certification, an accounting of any  
4 decertification of the vendor's electronic poll book or other voting product, and a demonstration of  
5 the system. The vendor shall provide access to the information required to be placed in escrow by a  
6 vendor pursuant to G.S. 163-165.9A.
- 7 (3) The vendor shall submit documentation of any review of the electronic poll book by an independent  
8 testing authority ~~recognized by the United States Election Assistance Commission~~ for compliance  
9 with federal or state standards, requirements, or guidance applicable to electronic poll books.
- 10 (4) The vendor shall provide a copy of its standard purchase contract and shall quote a statewide uniform  
11 price for each unit of the electronic poll book, including peripherals, consumables, and software  
12 required for operation of the electronic poll book.
- 13 (5) The vendor shall post a bond or letter of credit to cover damages resulting from defects in the  
14 electronic poll book, sufficient to cover any costs of conducting a new statewide election attributable  
15 to those defects. The State Board shall survey the county boards of elections in April of every odd-  
16 numbered year following an election held at the time prescribed in G.S. 163-1(c) to determine each  
17 county's costs for conducting its most recent general election, and the State Board shall aggregate  
18 those amounts to arrive at the cost of conducting a new statewide election. That aggregate amount  
19 shall determine the bond or letter of credit requirement, and it shall be effective June 1 of the year  
20 the survey is conducted and remain in effect until an amount is likewise calculated in a subsequent  
21 odd-numbered year following an election held at the time prescribed in G.S. 163-1(c) and is made  
22 effective.
- 23 (6) The vendor shall bear all of its costs associated with certification.

24 ~~(c)~~ ~~(7)~~ The State Board ~~may~~ shall terminate a pending certification process if:

25 ~~(1)~~ ~~(A)~~ The vendor fails to respond to a State Board request for information or other resources  
26 required to be provided under Paragraph (b) of this Rule for the certification process.

27 ~~(2)~~ ~~(B)~~ The State Board identifies ~~irreparable deficiencies with~~ the lack of a necessary quality or  
28 element in the electronic poll book system, vendor, or certification application that cannot  
29 be remedied by the vendor and is required for certification under this Rule.

30 ~~(3)~~ ~~(C)~~ The vendor withdraws from the certification process.

31 ~~(e)~~ ~~(d)~~ A vendor, to maintain certification by the State Board of Elections of the vendor's electronic poll book, shall  
32 fulfill the following requirements for the duration of the electronic poll book's certification and use in North Carolina:

- 33 (1) The vendor shall conduct a presentation to demonstrate for a county board of elections, as part of  
34 that county board's procurement and acceptance of a certified electronic poll book, the system's  
35 ability to execute its designed functionality as presented and tested during State-level certification  
36 and the vendor's ability to fulfill the duties required by G.S. 163-165.9A.

- 1 (2) The vendor shall submit to the State Board any escrow-related affidavits and other information  
2 required by G.S. 163-165.9A.
- 3 (3) The vendor's contract with each purchasing county shall include the agreement required by G.S.  
4 163-165.7(c)(4) and the following training and support:
- 5 (A) Operational training for a purchasing county's elections personnel;
  - 6 (B) Operational support prior to and during any election in which the certified electronic poll  
7 book will be in use; and,
  - 8 (C) End-of-life and end-of-service-life planning for the certified electronic poll book system,  
9 including guaranteed support until the system has reached the vendor's stated end-of-life  
10 date, optional extended support until the system has reached the end-of-service-life date,  
11 and sanitization of the electronic poll book once it has reached its end-of-service-life. End-  
12 of-life shall mean the point in time in which the vendor will no longer sell or market the  
13 electronic poll book. End-of-service-life shall mean the point in time in which the vendor  
14 will no longer provide maintenance or support for the electronic poll book.
- 15 (4) The vendor shall provide, upon request by the State Board or a purchasing county, memory devices  
16 or USB drives, sufficient in number to support the operation of the certified electronic poll book in  
17 an election setting, that meet industry standards for sanitization and security requirements for  
18 cryptographic modules, use cryptographic hashing algorithms of Secure Hash Algorithm 256-bit  
19 (SHA-256) or higher, and meet all applicable North Carolina Department of Information  
20 Technology information security standards ~~and policies~~. The standard for sanitization shall be as  
21 prescribed in National Institute of Standards and Technology (NIST) SP 800-88 Guidelines for  
22 Media ~~Sanitization~~. ~~Sanitization, including subsequent amendments and editions~~. A copy of the SP  
23 800-88 Guidelines are available for inspection in the offices of the State Board of Elections and may  
24 also be obtained at no cost by accessing the NIST website at  
25 <https://csrc.nist.gov/pubs/sp/800/88/r1/final>. The security requirements for cryptographic modules  
26 shall be as prescribed in the National Institute of Standards and Technology's Federal Information  
27 Processing Standards 140-3 ~~(FIPS 140-3)~~ ~~(FIPS 140-3), including subsequent amendments and~~  
28 ~~editions~~. A copy of the FIPS 140-3 is available for inspection in the offices of the State Board of  
29 Elections and may also be obtained at no cost by accessing the NIST website at  
30 <https://csrc.nist.gov/pubs/fips/140-3/final>.
- 31 (5) The vendor shall allow the State Board to examine the certified electronic poll book at any time to  
32 ensure compliance with state and federal election laws and certification standards. To facilitate this  
33 requirement, the vendor shall make available to the State Board, upon request and at no cost to the  
34 agency, a certified electronic poll book model. The vendor shall, upon request, assist in the State  
35 Board's examination and submit requested changes to the electronic poll book ~~to the State Board~~ to  
36 ensure continued compliance with state and federal law.



1 (6) The vendor shall submit documentation to the State Board identifying and describing a proposed  
2 change to a certified electronic poll book in use in North Carolina. The vendor shall, upon request,  
3 assist in the State Board's review of proposed changes. No vendor shall provide a county board of  
4 elections any software, firmware, hardware, or instruction that will change a certified electronic poll  
5 book unless that change has first been approved in accordance with 08 NCAC 04 .0402(b).

6 (7) The vendor shall provide electronic notice to the State Board of another United States jurisdiction's  
7 decision to decertify or halt the use of its electronic poll book or other voting product within 24  
8 hours of the jurisdiction's decision. The vendor shall provide electronic notice to the State Board of  
9 any incident, anomaly, or defect in the same system known to have occurred anywhere, and of any  
10 relevant defect known to have occurred in similar systems, within 24 hours of knowledge of the  
11 incident, anomaly, or defect.

12 (8) The vendor shall maintain the required bond or letter of credit on a continuous basis, without  
13 interruption.

14 (9) The vendor shall, on a quarterly basis, provide the State Board a quote for a statewide uniform price  
15 for each unit of the electronic poll book. The vendor shall, on a quarterly basis, furnish the State  
16 Board with an accounting of purchases of certified electronic poll books by a jurisdiction within  
17 North Carolina.

18 ~~(d)~~(e) In accordance with G.S. 163-165.7, compliance with this Rule shall not ~~apply to~~ be required of an electronic  
19 poll book which is developed or maintained by the State Board of Elections for that electronic poll book to be used in  
20 an election in North Carolina.

21  
22 *History Note: Authority G.S. 163-22; 163-165.7; 163-165.9A; 163-166.7*  
23  
24

1 08 NCAC 04 .0402 is adopted with changes as published in 38:06 NCR 302 as follows:

2  
3 **08 NCAC 04 .0402 PROCEDURES FOR CERTIFICATION OF ELECTRONIC POLL BOOKS**

4 (a) Before certifying an electronic poll book for use in North Carolina, the State Board shall do the following:

- 5 (1) Evaluate the electronic poll book for compliance with North Carolina laws and rules related to  
6 electronic poll books.
- 7 (2) Examine an electronic poll book’s system functions, operational procedures, user guides and  
8 maintenance manuals, certification reports from other states, reviews from product users, and any  
9 other documentation provided by the vendor.
- 10 (3) Test the electronic poll book for its ability to meet the requirements in 08 NCAC 04 .0401 for  
11 accuracy, reliability, security, usability, and accessibility.
- 12 ~~(4) Evaluate the suitability of the electronic poll book equipment’s design and construction for use in~~  
13 ~~an election.~~
- 14 ~~(5)~~ (4) Obtain from the proposed vendor a current financial statement and the manufacturer’s contact  
15 information.

16 (b) Changes to Certified Electronic Poll Books. A vendor shall submit in writing for the review of the Executive  
17 Director of the State Board of Elections any change to a certified electronic poll book, including changes to its  
18 software, firmware, or hardware, prior to implementation in a certified electronic poll book in use in any county’s  
19 elections. Following the review, the Executive Director shall determine whether the change is a modification or minor  
20 change of the certified electronic poll book. “Minor change” shall have the same meaning as that term is defined in  
21 Section 3.5 of Version 3.0 of the United States Election Assistance Commission’s Voting System Testing &  
22 Certification Program ~~Manual.~~ Manual, not including subsequent amendments and editions. Minor changes can  
23 include manufacturer enhancements. A copy of the Manual is available for inspection in the offices of the State Board  
24 of Elections. A copy of the Manual may be obtained at no cost by accessing the website of the Election Assistance  
25 Commission at <https://www.eac.gov/voting-equipment/manuals-and-forms>. A “modification” is a change to a  
26 certified electronic poll book that is not a minor change. Based on this determination, the Executive Director shall  
27 proceed as follows:

- 28 (1) If it is determined to be a modification, the vendor shall submit the electronic poll book as modified  
29 to the State Board of Elections for full ~~certification review.~~ review of its ability to meet the  
30 requirements in Rule .0401 of this Chapter.
- 31 (2) A vendor that proposes to implement a minor change to a certified electronic poll book shall, when  
32 submitting the proposal to the ~~State Board~~ Executive Director for review and approval, identify  
33 whether the proposed minor change has been submitted to an independent testing authority  
34 recognized accredited by or partnered with a federal agency ~~a Voting System Test Laboratory~~  
35 ~~(VSTL)~~ for review and endorsement. The If the State Board is unable to determine the nature and  
36 extent of a proposed minor change on the certified electronic poll book, the State Board may require  
37 the vendor to obtain ~~VSTL~~ review and endorsement by an independent testing authority recognized

1 accredited by or partnered with a federal agency before approving a the minor change. The  
2 Executive Director shall make a written Recommendation for Administrative Decision  
3 recommendation for administrative decision on the proposed minor change to the State Board. The  
4 State Board will then act on the Recommendation recommendation as follows:

5 (A) If, after two calendar days following the transmission of the Recommendation,  
6 recommendation, no State Board member has raised an oral or written objection to the  
7 Executive Director's Recommendation, recommendation, the Recommendation  
8 recommendation will become effective.

9 (B) If a State Board member raises an oral or written objection to the Executive Director's  
10 Recommendation recommendation within two calendar days following the transmission of  
11 the Recommendation, recommendation, the State Board may shall hear the matter or  
12 require the change to be reviewed as a modification.

13 A county board of elections using an electronic poll book certified by the State Board shall not implement a change  
14 to the electronic poll book until that change has been approved in accordance with this Paragraph.

15 (c) Decertification of Electronic Poll Book. The State Board of Elections shall hear and act on complaints, arising by  
16 petition or otherwise, that may result in the decertification of an electronic poll book in use in North Carolina. The  
17 State Board shall base its decision to decertify an electronic poll book on any of the following grounds:

18 (1) The failure or neglect of an electronic poll book or its vendor to comply with any part of the election  
19 laws of the State of North Carolina, including a failure to adhere to and fulfill the requirements of  
20 Rule .0401 of this Chapter.

21 (2) The implementation by a vendor of a change to a certified electronic poll book prior to State Board  
22 review and approval pursuant to Paragraph (b) of this Rule.

23 (3) The failure or neglect of a vendor to update and maintain the operability and security of the  
24 electronic poll book.

25 (4) The failure of the electronic poll book to satisfy all performance standards in Rule .0401 of this  
26 Chapter in examination and testing, or in an election setting.

27 (5) The failure of the vendor to comply with the requirement in 08 NCAC 04 .0401(d)(7) to provide  
28 electronic notice to the State Board of an incident or anomaly affecting the electronic poll book in  
29 any jurisdiction. The vendor shall provide the electronic notice within 24 hours of the vendor's  
30 knowledge of the incident or anomaly. As used in this Chapter, an "incident" is an event related to  
31 the security or functioning of the electronic poll book that contributed to, caused, or may have caused  
32 any of the following:

33 (A) An interruption to the voter check-in process, reporting process, or both processes.

34 (B) An unauthorized disclosure of voter information.

35 (C) An unauthorized access to the electronic poll book.

36 (D) The software or data of the electronic poll book to become unreliable or corrupt.

1 As used in this Chapter, an “anomaly” is an unexpected functioning of the electronic poll book in  
2 its operation.

3 (6) The failure of the vendor to report in writing to the State Board a change in the vendor’s corporate  
4 information provided with the certification application. The vendor shall make the report within 30  
5 calendar days of the change.

6 (7) The electronic poll book reaching its end-of-service-life date.

7 Before exercising its power to decertify an electronic poll book, the State Board shall notify the electronic poll book  
8 vendor and any affected county boards of elections, and shall give the opportunity for the vendor and county boards  
9 to be heard at a hearing to be set by the State Board. The State Board’s written decision to decertify an electronic poll  
10 book shall be considered a final decision for purposes of seeking judicial review. An electronic poll book that has  
11 been decertified by the State Board cannot be used for elections held in the State of North Carolina and cannot be  
12 purchased by a county board of elections. ~~An electronic poll book which has been decertified and is in the possession  
13 of a county board of elections shall have its memory sanitized after decertification.~~ Upon decertification of an  
14 electronic poll book, the memory of those units in the possession of a county board of elections shall be sanitized by  
15 the county board of elections in accordance with the applicable North Carolina Department of Information Technology  
16 information security standard for media sanitization, including subsequent amendments and editions, prior to  
17 disposition.

18 (d) Suspension of Electronic Poll Book. The Executive Director of the State Board ~~may,~~ shall, in the event of a threat  
19 to the integrity of an election or the privacy of voter information, issue a written order to a county board of elections  
20 to suspend the use of a certified electronic poll book system, or individual unit, for a term not to exceed one month.  
21 The Executive Director shall give written notice of the suspension to the electronic poll book vendor.

22 (e) In accordance with G.S. 163-165.7, this Rule shall not apply to an electronic poll book which is developed or  
23 maintained by the State Board of Elections.

24  
25 *History Note: Authority G.S. 163-22; 163-165.7; 163-165.9A; 163-166.7*  
26  
27

## **Burgos, Alexander N**

---

**Subject:** FW: 08 NCAC 04 .0401

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>

**Sent:** Wednesday, March 20, 2024 3:14 PM

**To:** Cox, Paul <paul.cox@ncsbe.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>

**Subject:** RE: 08 NCAC 04 .0401

Good afternoon,

I have serious concerns about Subparagraph (a)(9). Pursuant to your reply to the RFC, the BOE is attempting to require compliance with a voluntary standard established by agencies of the federal government at least one of which is not yet in existence.

It seems to me that if the BOE is going to require compliance with a standard, the standard needs to be specifically identified in the rule and incorporated by reference pursuant to GS 150B-21.6.

**William W. Peaslee**

**Rules Review Commission Counsel / Legislative Liaison**

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[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

## **Burgos, Alexander N**

---

**Subject:** FW: 08 NCAC 04 .0402

---

**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>

**Sent:** Wednesday, March 20, 2024 12:24 PM

**To:** Steele, Adam <adam.steele@ncsbe.gov>

**Cc:** SBOE\_Grp - Legal <Legal@ncsbe.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Cox, Paul <paul.cox@ncsbe.gov>

**Subject:** RE: 08 NCAC 04 .0402

Good afternoon.

In re Page 3, Lines 13-16:

Setting aside the question of whether the BOE can incorporate by reference the DIT standard, the language of the rule does not comply with G.S. 150B-21.6.

“In incorporating material by reference, the agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material. The agency can change this designation only by a subsequent rule-making proceeding. The agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.”

**William W. Peaslee**

**Rules Review Commission Counsel / Legislative Liaison**

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## Burgos, Alexander N

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**Subject:** FW: 08 NCAC 04 .0402  
**Attachments:** 03.2024 - Board of Elections Request for Technical Changes 08 NCAC 04 .0402.docx; 08 NCAC 04 .0402 Procedures - Revised per RRC suggestions.docx

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**From:** Steele, Adam <[adam.steele@ncsbe.gov](mailto:adam.steele@ncsbe.gov)>  
**Sent:** Tuesday, March 19, 2024 5:07 PM  
**To:** Peaslee, William W <[bill.peaslee@oah.nc.gov](mailto:bill.peaslee@oah.nc.gov)>  
**Cc:** SBOE\_Grp - Legal <[Legal@ncsbe.gov](mailto:Legal@ncsbe.gov)>  
**Subject:** FW: 08 NCAC 04 .0402

Bill,

On behalf of Paul Cox, please find attached an agency response to the request for technical changes to the .0402 rule for electronic poll books, along with a revised rule.

Regards,

**Adam Steele | Associate General Counsel**

NORTH CAROLINA STATE BOARD OF ELECTIONS  
430 N SALISBURY STREET  
RALEIGH, NC 27611  
MAIN LINE: 919.814.0700  
DIRECT: 919.814.0654  
[www.ncsbe.gov](http://www.ncsbe.gov)

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**From:** Cox, Paul <[paul.cox@ncsbe.gov](mailto:paul.cox@ncsbe.gov)>  
**Sent:** Monday, March 4, 2024 3:05 PM  
**To:** Steele, Adam <[adam.steele@ncsbe.gov](mailto:adam.steele@ncsbe.gov)>  
**Subject:** FW: 08 NCAC 04 .0402

RESPONSES TO REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: N.C. Board of Elections

RULE CITATION: 08 NCAC 04 .0402

**DEADLINE FOR RECEIPT: March 18, 2024**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*Page 1, Line 11: Why is anything g after “.0401” necessary? If a portion of rule .0401 does not deal with accuracy, reliability, security, etc., does the State Board not check for compliance? Is not the test whether the poll book meets the requirements of rule .0401 “.”? The agency will delete the descriptive words after .0401 in this sentence of the Rule.*

*Page 1, Lines 12-13: Using what standard(s)? Rule .0401? Or is there another standard? With the revision made in response to the above request, the agency will delete this subparagraph from this Rule, as there are certain requirements in Rule .0401 that speak to the electronic poll book’s design and construction for use in an election.*

*Page 1, Line 21: Explain how the Voting System Testing & Certification Manual can be incorporated by reference pursuant to G.S. 150B-21.6. Is the manual a guideline or law? If law, pursuant to what authority and process was it adopted? Is it in the Federal Code? The U.S. Election Assistance Commission (EAC) is charged by Congress with the responsibility for setting certain standards and requirements for voting systems. As stated in the Manual referenced here in the Rule:*

In late 2002, Congress passed the Help America Vote Act of 2002 (HAVA), which created the U.S. Election Assistance Commission (EAC) and vested it with the responsibility of setting voting system standards and for providing for the testing and certification of voting systems. This mandate represented the first time the Federal government provided for the voluntary testing, certification and decertification of voting systems nationwide. In response to this HAVA requirement, the EAC has developed the Voting System Testing and Certification Program (Program).

...

This manual provides the procedural requirements of the Program.

...

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 4, 2024



The primary purpose of this manual is to provide clear procedures to manufacturers for the testing and certification of voting systems to the Voluntary Voting System Guidelines (VVSG) consistent with the requirements of HAVA Section 321(a)(1). The Program also serves to:

- support state certification programs,
- support local election officials in the areas of acceptance testing and pre-election system verification and validation[. . .]

EAC,

[https://www.eac.gov/sites/default/files/TestingCertification/Testing%20and%20Certification%20Program%20Manual%20Version%203.0%20\(2\).pdf](https://www.eac.gov/sites/default/files/TestingCertification/Testing%20and%20Certification%20Program%20Manual%20Version%203.0%20(2).pdf) (last visited March 19, 2024).

As such, the Manual, and requirements contained therein, that are referenced here in the Rule do fit within the description of what can be incorporated by reference pursuant to G.S. § 150B-21.6(2). That provision of the APA does not require an adopted set of standards to be in the form of a “law.” Such a requirement does not appear in the plain text of the statute. If that were the case, the reference in the statute to “a generally recognized organization or association” would make no sense, as private organizations do not have lawmaking powers.

*Page 1, Line 21: Are subsequent additions and edits incorporated as well? See G.S. 150B-21.6.* This does not incorporate future additions and edits, and the agency will make the following revision: ““Minor change” shall have the same meaning as that term is defined in Section 3.5 of Version 3.0 of the United States Election Assistance Commission’s Voting System Testing & Certification Program ~~Manual.~~ **Manual, not including subsequent amendments and editions.**”

*Page 1, Line 28: What is a “full certification review?”* Full certification review is the entire process of reviewing the electronic poll book as a whole for the system’s ability to meet the requirements in Rule .0401. The agency will make the following **revision** to clarify this point: “If it is determined to be a modification, the vendor shall submit the electronic poll book as modified to the State Board of Elections for full **certification review.** ~~review of its ability to meet the requirements in Rule .0401 of this Chapter~~”

*Page 1, Line 30: Isn’t the submission to the Executive Director, not the State Board?* The agency agrees and will make the necessary **revision**. A revision for consistency with a revision made to the corresponding Rule .0401 in response to RRC counsel’s requests is also reflected in green: “A vendor that proposes to implement a minor change to a certified electronic poll book shall, when submitting the proposal to the ~~State Board~~ **Executive Director** for review and approval, identify whether the proposed minor change has been submitted to an independent testing authority recognized accredited by or partnered with a federal agency ~~a Voting System Test Laboratory (VSTL)~~ for review and endorsement.

*Page 1, Line 33: Change “may” to “shall” or state the criteria that the Board will use in exercising its discretion.* A minor change may not be one that is so complex as to require a complete review of the electronic poll book’s ability to still meet the

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 4, 2024

requirements in Rule .0401, and therefore the State Board does not seek to require that an independent review must first occur before the vendor submits a minor change for review by the State Board. However, it may be the case that during its review of that proposed minor change, the State Board determines that an independent review would assist the State Board in fully evaluating the nature and extent of the proposed minor change. That is the intent behind this being a discretionary requirement, because not every minor change will be the same or require the same level of review.

With that in mind, the agency can **revise** this subparagraph to add the criteria for when the State Board will make this decision. A revision for consistency with a revision made to the corresponding Rule .0401 in response to RRC counsel's requests is also reflected in green: "**The If the State Board is unable to determine the nature and extent of a proposed minor change on the certified electronic poll book, the State Board may require the vendor to obtain VSTL review and endorsement by an independent testing authority ~~recognized~~ accredited by or partnered with a federal agency before approving a the** minor change."

*Page 1, Line 35: "Recommendation of Administrative Decision" is capitalized. Is this term defined in the rules? If so, cite the rule. If not, why is it capitalized? The agency will make **revisions** to uncapitalize this phrase and the subsequent uses of "Recommendation."*

*Page 2, Line 6: Change "may" to "shall" or state the criteria that the Board will use in exercising its discretion. The agency will **revise** the subparagraph to replace "may" with "shall."*

*Page 2, Lines 20-21: Which "standards"? Have these been adopted? If so, where? The intent was that this refers to the performance standards in Rule .0401. The agency can clarify that with the following **revision**: "The failure of the electronic poll book to satisfy all performance standards **in Rule .0401 of this Chapter** in examination and testing, or in an election setting."*

*Page 2, Lines 23-24: Consider making this part of Rule .0401. It seems like an **afterthought**. The 24 hour notice requirement is in Rule .0401(d)(7) (as renumbered in the version provided on March 18 in response to requested changes). Because the 24 hour notice requirement in Rule .0402 is redundant to the provision in Rule .0401, the agency will make the following **revision**: "The failure of the vendor to **comply with the requirement in 08 NCAC 04 .0401(d)(7) to** provide electronic notice to the State Board of an incident or anomaly affecting the electronic poll book in any jurisdiction. ~~The vendor shall provide the electronic notice within 24 hours of the vendor's knowledge of the incident or anomaly.~~"*

*Page 3, Line 8: What does the Board mean by **sanitized**? Who is the requirement placed upon? Sanitized in this instance refers to the sanitization of the storage media, which on a more basic level can be described as the general process in which data is removed from the storage media. As explained in the NIST guidelines for media sanitization, which have been adopted by the NC Department of Information Technology, "[m]edia sanitization refers to a process that renders access to target data on the media*

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Commission Counsel

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infeasible for a given level of effort.” The intent is that the county board of elections, the entity in possession of the electronic poll book, sanitizes the memory of the electronic poll book before disposition. The agency will make the following **revision** for clarity on that point: “Upon decertification of an electronic poll book, the memory of those units in the possession of a county board of elections shall be sanitized by the county board of elections in accordance with the applicable North Carolina Department of Information Technology information security standard for media sanitization prior to disposition.”

*Page 3, Line 10: Change “may” to “shall” or state the criteria that the Executive Director will use in exercising its discretion.* The agency will **revise** the paragraph to replace “may” with “shall.”

*Page, Lines 10-13: How long is the suspension? Is the decision appealable? If so, how?* The State Board has made the decision that the suspension can be “for a term not to exceed one month.” The nature of the reason for the suspension will determine the amount of time, and this could be anywhere from a few hours for easily remedied issues to multiple weeks for issues that are more complex. Pursuant to G.S. § 163-162.7(i), a decision to “halt the use of electronic poll books in North Carolina” is appealable to the Superior Court of Wake County.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

1 08 NCAC 04 .0402 is adopted with changes as published in 38:06 NCR 302 as follows:

2  
3 **08 NCAC 04 .0402 PROCEDURES FOR CERTIFICATION OF ELECTRONIC POLL BOOKS**

4 (a) Before certifying an electronic poll book for use in North Carolina, the State Board shall do the following:

- 5 (1) Evaluate the electronic poll book for compliance with North Carolina laws and rules related to  
6 electronic poll books.
- 7 (2) Examine an electronic poll book’s system functions, operational procedures, user guides and  
8 maintenance manuals, certification reports from other states, reviews from product users, and any  
9 other documentation provided by the vendor.
- 10 (3) Test the electronic poll book for its ability to meet the requirements in 08 NCAC 04 .0401 for  
11 accuracy, reliability, security, usability, and accessibility.
- 12 ~~(4) Evaluate the suitability of the electronic poll book equipment’s design and construction for use in~~  
13 ~~an election.~~
- 14 ~~(5)~~ (4) Obtain from the proposed vendor a current financial statement and the manufacturer’s contact  
15 information.

16 (b) Changes to Certified Electronic Poll Books. A vendor shall submit in writing for the review of the Executive  
17 Director of the State Board of Elections any change to a certified electronic poll book, including changes to its  
18 software, firmware, or hardware, prior to implementation in a certified electronic poll book in use in any county’s  
19 elections. Following the review, the Executive Director shall determine whether the change is a modification or minor  
20 change of the certified electronic poll book. “Minor change” shall have the same meaning as that term is defined in  
21 Section 3.5 of Version 3.0 of the United States Election Assistance Commission’s Voting System Testing &  
22 Certification Program ~~Manual.~~ Manual, not including subsequent amendments and editions. Minor changes can  
23 include manufacturer enhancements. A copy of the Manual is available for inspection in the offices of the State Board  
24 of Elections. A copy of the Manual may be obtained at no cost by accessing the website of the Election Assistance  
25 Commission at <https://www.eac.gov/voting-equipment/manuals-and-forms>. A “modification” is a change to a  
26 certified electronic poll book that is not a minor change. Based on this determination, the Executive Director shall  
27 proceed as follows:

- 28 (1) If it is determined to be a modification, the vendor shall submit the electronic poll book as modified  
29 to the State Board of Elections for full ~~certification review.~~ review of its ability to meet the  
30 requirements in Rule .0401 of this Chapter.
- 31 (2) A vendor that proposes to implement a minor change to a certified electronic poll book shall, when  
32 submitting the proposal to the ~~State Board~~ Executive Director for review and approval, identify  
33 whether the proposed minor change has been submitted to an independent testing authority  
34 recognized accredited by or partnered with a federal agency ~~a Voting System Test Laboratory~~  
35 ~~(VSTL)~~ for review and endorsement. The If the State Board is unable to determine the nature and  
36 extent of a proposed minor change on the certified electronic poll book, the State Board may require  
37 the vendor to obtain ~~VSTL~~ review and endorsement by an independent testing authority recognized

1 ~~accredited~~ by or partnered with a federal agency before approving a ~~the~~ minor change. The  
2 Executive Director shall make a written ~~Recommendation for Administrative Decision~~  
3 ~~recommendation for administrative decision~~ on the proposed minor change to the State Board. The  
4 State Board will then act on the ~~Recommendation~~ ~~recommendation~~ as follows:

5 (A) If, after two calendar days following the transmission of the ~~Recommendation,~~  
6 ~~recommendation,~~ no State Board member has raised an oral or written objection to the  
7 Executive Director's ~~Recommendation,~~ ~~recommendation,~~ the ~~Recommendation~~  
8 ~~recommendation~~ will become effective.

9 (B) If a State Board member raises an oral or written objection to the Executive Director's  
10 ~~Recommendation~~ ~~recommendation~~ within two calendar days following the transmission of  
11 the ~~Recommendation,~~ ~~recommendation,~~ the State Board ~~may~~ ~~shall~~ hear the matter or  
12 require the change to be reviewed as a modification.

13 A county board of elections using an electronic poll book certified by the State Board shall not implement a change  
14 to the electronic poll book until that change has been approved in accordance with this Paragraph.

15 (c) Decertification of Electronic Poll Book. The State Board of Elections shall hear and act on complaints, arising by  
16 petition or otherwise, that may result in the decertification of an electronic poll book in use in North Carolina. The  
17 State Board shall base its decision to decertify an electronic poll book on any of the following grounds:

18 (1) The failure or neglect of an electronic poll book or its vendor to comply with any part of the election  
19 laws of the State of North Carolina, including a failure to adhere to and fulfill the requirements of  
20 Rule .0401 of this Chapter.

21 (2) The implementation by a vendor of a change to a certified electronic poll book prior to State Board  
22 review and approval pursuant to Paragraph (b) of this Rule.

23 (3) The failure or neglect of a vendor to update and maintain the operability and security of the  
24 electronic poll book.

25 (4) The failure of the electronic poll book to satisfy all performance standards ~~in Rule .0401 of this~~  
26 ~~Chapter~~ in examination and testing, or in an election setting.

27 (5) The failure of the vendor to ~~comply with the requirement in 08 NCAC 04 .0401(d)(7) to~~ provide  
28 electronic notice to the State Board of an incident or anomaly affecting the electronic poll book in  
29 any jurisdiction. ~~The vendor shall provide the electronic notice within 24 hours of the vendor's~~  
30 ~~knowledge of the incident or anomaly.~~ As used in this Chapter, an "incident" is an event related to  
31 the security or functioning of the electronic poll book that contributed to, caused, or may have caused  
32 any of the following:

33 (A) An interruption to the voter check-in process, reporting process, or both processes.

34 (B) An unauthorized disclosure of voter information.

35 (C) An unauthorized access to the electronic poll book.

36 (D) The software or data of the electronic poll book to become unreliable or corrupt.

1 As used in this Chapter, an “anomaly” is an unexpected functioning of the electronic poll book in  
2 its operation.

3 (6) The failure of the vendor to report in writing to the State Board a change in the vendor’s corporate  
4 information provided with the certification application. The vendor shall make the report within 30  
5 calendar days of the change.

6 (7) The electronic poll book reaching its end-of-service-life date.

7 Before exercising its power to decertify an electronic poll book, the State Board shall notify the electronic poll book  
8 vendor and any affected county boards of elections, and shall give the opportunity for the vendor and county boards  
9 to be heard at a hearing to be set by the State Board. The State Board’s written decision to decertify an electronic poll  
10 book shall be considered a final decision for purposes of seeking judicial review. An electronic poll book that has  
11 been decertified by the State Board cannot be used for elections held in the State of North Carolina and cannot be  
12 purchased by a county board of elections. ~~An electronic poll book which has been decertified and is in the possession~~  
13 ~~of a county board of elections shall have its memory sanitized after decertification.~~ Upon decertification of an  
14 electronic poll book, the memory of those units in the possession of a county board of elections shall be sanitized by  
15 the county board of elections in accordance with the applicable North Carolina Department of Information Technology  
16 information security standard for media sanitization prior to disposition.

17 (d) Suspension of Electronic Poll Book. The Executive Director of the State Board ~~may,~~ shall, in the event of a threat  
18 to the integrity of an election or the privacy of voter information, issue a written order to a county board of elections  
19 to suspend the use of a certified electronic poll book system, or individual unit, for a term not to exceed one month.  
20 The Executive Director shall give written notice of the suspension to the electronic poll book vendor.

21 (e) In accordance with G.S. 163-165.7, this Rule shall not apply to an electronic poll book which is developed or  
22 maintained by the State Board of Elections.

23  
24 *History Note: Authority G.S. 163-22; 163-165.7; 163-165.9A; 163-166.7*  
25  
26

## Burgos, Alexander N

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**Subject:** FW: 08 NCAC 17 .0109  
**Attachments:** 08 NCAC 17 .0109 - Adopted by SBE 021524 - revised per RRC suggestions v2.docx; 08 NCAC 17 .0101 - Adopted by SBE 021524 - revised per RRC suggestions.docx

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**From:** Cox, Paul <paul.cox@ncsbe.gov>  
**Sent:** Tuesday, March 19, 2024 1:11 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>  
**Subject:** FW: 08 NCAC 17 .0109

Bill – thanks for your additional feedback. Below are some additional responses from the agency and attached are the two rules, revised accordingly.

Best,

**Paul Cox**  
General Counsel  
NORTH CAROLINA STATE BOARD OF ELECTIONS  
RALEIGH, NC 27611  
919.814.0700  
[www.ncsbe.gov](http://www.ncsbe.gov)

Page 1, Lines 27-29, are you telling staff that they must include the deadline in the notice or are you establishing deadline? Who are you regulating in this sentence? *We've clarified that it is the notice from staff that must include the deadline. The deadline itself is established in GS 163-230.1(e).*

Page 1, Lines 31-33: A definition of “photocopy” would be helpful here (as the GA did not define it) and would perhaps negate the need for Lines 31-33. It appears that the BOE is making a distinction between a “photocopy” and an “electronic copy.” What is the difference? *The agency believes “photocopy” is an easily understood term that needs no definition. The “electronic copy” language is merely clarifying that a photocopy transmitted by email (i.e., electronically) is acceptable, as required by GS 163-230.1(e). But if this generates more confusion, it's not entirely necessary, since email transmission is specifically permitted already, and there's no way to transmit a document via email that is not electronic in nature. So the agency proposes to delete the last phrase in the paragraph.*

Page 2, Lines 19-21: The language is unclear. It says that the notice can be sent via U.S. mail or commercial carrier service. That part is clear. But then it become cloudy by the phrase “designed to provide the voter actual notice.” “Actual notice” is a legal concept subject to some dispute and undefined in the rule. Is simply depositing it in the US Mail first class “actual notice”? is the Board requiring returned receipt? Certified mail? Is FedEx ground acceptable? Must it be next day service? The BOE needs to be clear what it wants the County boards to do. Put another way, tell me what services are “designed to provide actual notice”? Put those in the rule. Then it's clear. *“Actual notice” is intended to mean when the person who is to be notified actually gets notified. But, of course, once a document leaves the possession of the county board, the county board cannot guarantee that it will be received by the party to be notified. So, instead, the most reasonable demand to be placed on the county board is*

for it to use a method of delivery that is designed to get the document to the person to be notified by the time required for the document to be useful. To avoid the uncertainty that “actual notice” perhaps creates, the agency proposes to more plainly state that the method of delivery should be designed so the notice is received by the voter by the requisite time.

Page 3, Line 35: That works.

Page 3, Line 9: That works.

Response:

Generally, anytime you cross reference, it removes ambiguity in the absence of a good definition rule. I've made edits to .0101 attached to incorporate some of these clarifying suggestions.



1 08 NCAC 17 .0101 is amended **with changes** as published in 38:10 NCR 614 as follows:

2  
3 **08 NCAC 17 .0101**            **DETERMINATION OF REASONABLE RESEMBLANCE AT CHECK-IN**  
4                                    **VERIFICATION OF PHOTO IDENTIFICATION DURING IN-PERSON**  
5                                    **VOTING**

6 ~~(a) An election official shall check the registration status of all persons presenting to vote in person on election day~~  
7 ~~or during one stop early voting pursuant to G.S. 163-166.7, and shall require that all persons presenting to vote provide~~  
8 ~~one of the forms of photo identification listed in G.S. 163-166.13(e), subject to the exceptions outlined in Paragraph~~  
9 ~~(b) of this Rule. If a person not satisfying the exceptions described in Paragraph (b) of this Rule does not provide any~~  
10 ~~photo identification, the election official shall inform the person presenting to vote of applicable options specified in~~  
11 ~~G.S. 163-166.13(e). If the person presenting to vote wishes to choose the option of voting a provisional ballot, the~~  
12 ~~election official shall provide the person presenting to vote with information on the provisional voting process and the~~  
13 ~~address of the county board of elections office.~~

14 ~~(b) The election official shall not require photo identification of a person who has a sincerely held religious objection~~  
15 ~~to being photographed and meets the requirements of G.S. 163-166.13(a)(2), or who is the victim of a natural disaster~~  
16 ~~and meets the requirements of G.S. 163-166.13(a)(3). Persons falling within any exception listed in this Paragraph~~  
17 ~~shall be allowed to proceed pursuant to G.S. 163-166.7.~~

18 ~~(c) The election official shall inspect any photo identification provided by the person presenting to vote and shall~~  
19 ~~determine the following:~~

20            ~~(1) That the photo identification is of the type acceptable for voting purposes pursuant to G.S.~~  
21            ~~163-166.13(e). A valid United States passport book or a valid United States passport card is~~  
22            ~~acceptable pursuant to G.S. 163-166.13(e);~~

23            ~~(2) That the photo identification is unexpired or is otherwise acceptable pursuant to G.S. 163-166.13(e);~~

24            ~~(3) That the photograph appearing on the photo identification depicts the person presenting to vote. The~~  
25            ~~election official shall make this determination based on the totality of the circumstances, construing~~  
26            ~~all evidence, along with any explanation or documentation voluntarily proffered by the person~~  
27            ~~presenting to vote, in the light most favorable to that person. Perceived differences of the following~~  
28            ~~features shall not be grounds for the election official to find that the photograph appearing on the~~  
29            ~~photo identification fails to depict the person presenting to vote:~~

30                    ~~(A) weight;~~

31                    ~~(B) hair features and styling, including changes in length, color, hairline, or use of a wig or~~  
32                    ~~other hairpiece;~~

33                    ~~(C) facial hair;~~

34                    ~~(D) complexion or skin tone;~~

35                    ~~(E) cosmetics or tattooing;~~

36                    ~~(F) apparel, including the presence or absence of eyeglasses or contact lenses;~~

37                    ~~(G) characteristics arising from a perceptible medical condition, disability, or aging;~~

1                   (H) ~~photographic lighting conditions or printing quality.; and~~  
2           (4) ~~That the name appearing on the photo identification is the same or substantially equivalent to the~~  
3           ~~name contained in the registration record. The election official shall make this determination based~~  
4           ~~on the totality of the circumstances, construing all evidence, along with any explanation or~~  
5           ~~documentation voluntarily proffered by the person presenting to vote, in the light most favorable to~~  
6           ~~that person. The name appearing on the photo identification shall be considered substantially~~  
7           ~~equivalent to the name contained in the registration record if differences are attributable to a~~  
8           ~~reasonable explanation or one or more of the following reasons:~~  
9           (A) ~~Omission of one or more parts of the name (such as, for illustrative purposes only, Mary~~  
10           ~~Beth Smith versus Beth Smith, or Patrick Todd Jackson, Jr. versus Patrick Todd Jackson,~~  
11           ~~or Maria Guzman Santana versus Maria Guzman);~~  
12           (B) ~~Use of a variation or nickname rather than a formal name (such as, for illustrative purposes~~  
13           ~~only, Bill versus William, or Sue versus Susanne);~~  
14           (C) ~~Use of an initial in place of one or more parts of a given name (such as, for illustrative~~  
15           ~~purposes only, A.B. Sanchez versus Aaron B. Sanchez);~~  
16           (D) ~~Use of a former name, including maiden names (such as, for illustrative purposes only,~~  
17           ~~Emily Jones versus Emily Gibson), or a variation that includes or omits a hyphenation~~  
18           ~~(such as, for illustrative purposes only, Chantell D. Jacobson Smith versus Chantell D.~~  
19           ~~Jacobson);~~  
20           (E) ~~Ordering of names (such as, for illustrative purposes only, Maria Eva Garcia Lopez versus~~  
21           ~~Maria E. Lopez Garcia);~~  
22           (F) ~~Variation in spelling or typographical errors (such as, for illustrative purposes only,~~  
23           ~~Dennis McCarthy versus Denis McCarthy, or Aarav Robertson versus Aarav Robertsson).~~  
24   (d) ~~The election official shall not require any additional evidence outside the four corners of the photo identification.~~  
25   ~~The election official shall not require that any person remove apparel for the purposes of rendering a determination~~  
26   ~~under Paragraph (c). If the face of the person presenting to vote is covered such that the election official cannot render~~  
27   ~~a determination under Subparagraph (c)(3), then the election official shall give the person the opportunity to remove~~  
28   ~~the covering but shall not require that removal. If the person declines to remove the covering, the election official shall~~  
29   ~~inform the person presenting to vote that he or she may cast a provisional ballot, which shall be counted in accordance~~  
30   ~~with G.S. 163-182.1A, or, if applicable, may complete a written request for an absentee ballot as set out in G.S. 163-~~  
31   ~~166.13(c)(3), and shall inform the voting site's judges of election that the election official cannot affirmatively~~  
32   ~~determine that the person bears any reasonable resemblance to the photo identification. G.S. 163-166.16.~~  
33   (e) ~~Differences between the address appearing on the photo identification meeting the requirements of Subparagraph~~  
34   ~~(c)(1) and the address contained in the registration record shall not be construed as evidence that the photographic~~  
35   ~~identification does not bear any reasonable resemblance pursuant to Subparagraphs (c)(3) and (c)(4) of this Rule, nor~~  
36   ~~shall it be construed as evidence that the photographic identification does not otherwise meet the requirements of any~~  
37   ~~other provision of Paragraph (C).~~

1 ~~(f) The election official examining photo identification provided by a person presenting to vote shall construe all~~  
2 ~~evidence, along with any explanation or documentation voluntarily offered by the person presenting to vote, in the~~  
3 ~~light most favorable to that person, and shall be guided by the purpose of the photo identification requirement, which~~  
4 ~~is to confirm the person presenting to vote is the registered voter on the voter registration records. After an examination~~  
5 ~~performed in the manner set out in Paragraphs (a) through (c)(d) of this Rule, the election official shall proceed as~~  
6 ~~follows:~~

7 ~~(1) If the election official determines that the photo identification meets all the requirements of~~  
8 ~~Paragraph (c), then the person presenting to vote shall be allowed to proceed pursuant to G.S. 163-~~  
9 ~~166.7 and 163-166.13(b); or~~

10 ~~(2) If the election official determines that the photo identification does not meet all of the requirements~~  
11 ~~of Subparagraphs (c)(1) and (c)(2), the election official shall inform the person presenting to vote~~  
12 ~~of the reasons for such determination (such as, for illustrative purposes only, that the photo~~  
13 ~~identification is expired) and shall invite the person to provide any other acceptable photo~~  
14 ~~identification that he or she may have. If the person presenting to vote does not produce photo~~  
15 ~~identification that meets all the requirements of Subparagraph (c)(1) and (c)(2), then the election~~  
16 ~~official shall inform the person presenting to vote of applicable options specified in G.S. 163-~~  
17 ~~166.13(c). If the person presenting to vote wishes to choose the option of voting a provisional ballot,~~  
18 ~~the election official shall provide the person presenting to vote with information on the provisional~~  
19 ~~voting process and the address of the county board of elections office.~~

20 ~~(3) If the election official determines that the photo identification does not meet all the requirements~~  
21 ~~of Subparagraphs (c)(3) and (c)(4), the election official shall notify the voting site's judges of~~  
22 ~~election that the person presenting to vote does not bear any reasonable resemblance to the photo~~  
23 ~~identification.~~

24 (a) When a person presenting to vote checks in at a voting site, an election official shall ask the voter to show photo  
25 identification in accordance with G.S. 163-166.16 and this Rule. The election official shall examine any photo  
26 identification provided by the person presenting to vote and shall determine the following:

27 (1) The photo identification is of the type acceptable for voting purposes pursuant to G.S. 163-  
28 166.16(a). A valid United States passport book or passport card is acceptable pursuant to G.S.  
29 163-166.16(a)(1)c.

30 (2) The photograph appearing on the photo identification bears a reasonable resemblance to the  
31 person presenting to vote. A reasonable resemblance is a similarity in appearance such that an  
32 ordinary person would conclude that the photograph on the identification is more likely than not  
33 the person presenting to vote. The election official shall make this determination based on the  
34 totality of the circumstances, bearing in mind that there are many reasons that a person's  
35 appearance could change (such as, for illustrative purposes only, changes in hair, facial hair, or  
36 weight; or the effects of medical conditions, aging, or medical treatment). The election official

1 shall also be guided by the purpose of the photo identification requirement, which is to confirm the  
2 person presenting to vote is the registered voter on the voter registration records.

3 (3) The name appearing on the photo identification is the same as or substantially equivalent to the  
4 name contained in the voter's voter registration record. The election official shall make this  
5 determination based on the totality of the circumstances, construing all evidence, along with any  
6 explanation or documentation voluntarily offered by the person presenting to vote, in the light  
7 most favorable to that person. The election official shall consider the name appearing on the photo  
8 identification to be substantially equivalent to the name contained in the registration record if  
9 differences are attributable to a reasonable explanation, which shall include but is not limited to  
10 one or more of the following reasons:

11 (A) Omission or inclusion of one or more parts of the name (such as, for illustrative purposes  
12 only, Mary Beth Smith versus Beth Smith, or Patrick Todd Jackson, Jr. versus Patrick  
13 Todd Jackson, or Maria Guzman-Santana versus Maria Guzman);

14 (B) Use of a variation or nickname rather than a formal name (such as, for illustrative  
15 purposes only, Bill versus William, or Sue versus Susanne);

16 (C) Use of an initial in place of one or more parts of a given name (such as, for illustrative  
17 purposes only, A.B. Sanchez versus Aaron B. Sanchez);

18 (D) Use of a former name, including maiden names (such as, for illustrative purposes only,  
19 Emily Jones versus Emily Gibson), or a variation that includes or omits a hyphenation or  
20 hyphen (such as, for illustrative purposes only, Chantell D. Jacobson-Smith versus  
21 Chantell D. Jacobson or Chantell D. Jacobson Smith), an accent (such as, for illustrative  
22 purposes only, José Muñoz versus Jose Munoz), or an apostrophe (such as, for illustrative  
23 purposes only, Andrea D'Antonio versus Andrea Dantonio);

24 (E) Ordering of names (such as, for illustrative purposes only, Maria Eva Garcia Lopez  
25 versus Maria E. Lopez-Garcia); or

26 (F) Variation in spelling or typographical errors (such as, for illustrative purposes only,  
27 Dennis McCarthy versus Denis McCarthy, or Aarav Robertson versus Aarav  
28 Robertsson).

29 If a voter is casting a provisional ballot because the voter's record does not appear in the poll  
30 book, the election official shall instead compare the name on the photo identification with the  
31 name provided by the voter on the provisional ballot application.

32 (b) The election official, when examining the photo identification provided by of a person presenting to vote  
33 vote, shall not require the voter to provide any additional evidence regarding the identification apart from the  
34 identification itself outside the four corners of the photo identification. If the face of the person presenting to vote  
35 is covered to such an extent that the election official cannot determine reasonable resemblance under Subparagraph  
36 (a)(2) of this Rule, then the election official shall inform the voter that the face covering is preventing the official  
37 from determining that the photo on the identification is that of the voter and shall offer the voter the option to briefly

1 remove the face covering. If the voter chooses not to remove the covering, then the election official shall enter a  
2 challenge in accordance with Subparagraph (d)(3) of this Rule.

3 (c) Differences between the address appearing on the photo identification of a person presenting to vote and the  
4 address contained in the registration record of that person shall not be considered as evidence that the photographic  
5 identification fails to meet the requirements of G.S. 163-166.16 or this Rule.

6 (d) After examining the photo identification according to Paragraphs (a) through (c) of this Rule, the election  
7 official shall proceed as follows:

8 (1) If the election official determines that the photo identification meets all the requirements of  
9 Paragraph (a) of this Rule, then the election official shall allow the person to vote pursuant to G.S.  
10 163-166.7.

11 (2) If the election official determines that the photo identification is not an acceptable type of photo  
12 identification under Subparagraph (a)(1) of this Rule, the election official shall inform the person  
13 presenting to vote of the reasons for that determination (such as, for illustrative purposes only, that  
14 the photo identification is not on the list of student identifications approved by the State Board of  
15 Elections) and shall invite the person to provide any other photo identification that is acceptable  
16 under Subparagraph (a)(1) of this Rule that the person may have. If the person presenting to vote  
17 does not produce photo identification that meets all the requirements of Subparagraph (a)(1) of  
18 this Rule, then the election official shall inform the person presenting to vote of **the both** options to  
19 vote by provisional ballot in accordance with Paragraph (e) of this Rule.

20 (3) If the election official determines that the photo or name on the photo identification do not satisfy  
21 Subparagraphs (a)(2) and (a)(3) of this Rule, the election official shall inform the person  
22 presenting to vote of the reasons for that determination and shall invite the person to provide any  
23 other photo identification that the person may have that is acceptable under Subparagraph (a)(1)  
24 and satisfies Subparagraphs (a)(2) and (a)(3) of this Rule. If the person presenting to vote does not  
25 produce photo identification that meets all the requirements of Paragraph (a) of this Rule, then the  
26 election official shall enter a challenge pursuant to G.S. 163-87 and immediately notify the voting  
27 site's judges of election of the challenge. The judges of election shall then conduct a challenge  
28 hearing, in accordance with the applicable procedures in G.S. 163-88. At the conclusion of the  
29 hearing, the judges of election shall vote on whether the photo appearing on the photo  
30 identification of the person presenting to vote bears a reasonable resemblance to that person or  
31 whether the name appearing on the photo identification is the same as or substantially equivalent  
32 to the name contained in the voter's voter registration record, applying the same standards as the  
33 election official initially reviewing the identification under Subparagraphs (a)(2) and (a)(3). Each  
34 judge shall record the judge's findings in writing. Only if the judges of election unanimously find  
35 that the photo appearing on the photo identification does not bear a reasonable resemblance to the  
36 person presenting to vote, or that the name appearing on the photo identification is not the same as  
37 or substantially equivalent to the name contained in the voter's voter registration record, the voter

1 shall be offered ~~the both~~ options to vote by provisional ballot in accordance with Paragraph (e) of  
2 this Rule. Absent such a unanimous finding, the person shall vote with a regular ballot pursuant to  
3 G.S. 163-166.7. When the judges of election conduct a challenge hearing under this Rule and the  
4 challenge is to a curbside voter, to ensure the voting enclosure remains properly attended, the  
5 judges may separately visit the curbside location to assess the voter's identification.

6 (e) A person presenting to vote who does not present acceptable photo identification in accordance with this Rule shall  
7 be offered ~~both of~~ the following options:

8 (1) To vote by provisional ballot with an affidavit claiming an exception to the identification  
9 requirement, pursuant to G.S. 163-166.16(d). If the voter has completed the affidavit as required in  
10 G.S. 163-166.16(d) and is otherwise eligible to vote, the county board shall count the provisional  
11 ballot unless the county board unanimously finds that the affidavit is false. The county board shall  
12 substantiate any finding of falsity with grounds recorded in a written decision, ~~and those grounds~~  
13 ~~shall be based only on facts and not speculation~~. Before disapproving a voter's provisional ballot  
14 because of a finding of falsity, the county board shall provide the voter advance notice and an  
15 opportunity to address the county board prior to the canvass on any grounds that the county board  
16 is considering regarding the falsity of the affidavit. The notice shall identify the specific reasons the  
17 county board is considering the affidavit to be potentially false and inform the voter how the voter  
18 may address the reasons for potential falsity, which shall include the ~~option options~~ to provide a  
19 written explanation or ~~documentation or to~~ address the board at a meeting in person. The notice  
20 shall be provided by a means of physical delivery designed to provide the voter actual notice in  
21 advance of the opportunity to address the county board and by any email address or phone number  
22 that the county board possesses for the voter. The notice and opportunity to address the county board  
23 provided for in this Subparagraph shall be offered only to those provisional voters for whom a  
24 ~~number of county board members equal to one less than all of the members of the county board~~  
25 ~~board, or more, has have~~ identified a ~~specific reason, based only on facts and not speculation~~, to find  
26 that the affidavit claiming an exception to the identification requirement is false.

27 (2) To vote by provisional ballot and then bring to the office of the county board identification  
28 acceptable under G.S. 163-166.16 and this Rule before 5 p.m. on the business day before county  
29 canvass. If the voter brings photo identification to the office of a county board in a timely manner,  
30 a county board staff member shall examine the photo identification in accordance with Paragraphs  
31 (a), (b), and (c) of this Rule. After examining the photo identification, the staff member shall proceed  
32 as follows:

33 (A) If the photo identification meets all the requirements of Paragraph (a) of this Rule, the staff  
34 member shall recommend approval of the provisional ballot to the county board.

35 (B) If the photo identification is not an acceptable type of photo identification under  
36 Subparagraph (a)(1) of this Rule, then the staff member shall inform the voter of the reasons  
37 for that determination, while the voter is at the county board office, and invite the voter to

1 provide an acceptable photo identification in accordance with Subparagraph (d)(2) of this  
2 Rule. If the voter does not provide acceptable identification by 5 p.m. on the business day  
3 prior to the canvass, then county board staff shall recommend disapproval of the  
4 provisional ballot to the county board.

5 (C) ~~If the photo or name on the photo identification do not satisfy Subparagraphs (a)(2) and~~  
6 ~~(a)(3) of this Rule, then the staff member shall inform the voter of the reasons for that~~  
7 ~~determination and shall invite the voter to provide any other acceptable photo identification~~  
8 ~~that meets the requirement of Paragraph (a) of this Rule. If the voter does not produce~~  
9 ~~acceptable photo identification, identification that meets the requirement of Paragraph (a)~~  
10 ~~of this Rule, then the staff member shall recommend disapproval of the provisional ballot~~  
11 ~~to the county board. While the voter is at the county board office, the staff member shall~~  
12 ~~inform the voter of the recommendation and provide notice to the voter of the county board~~  
13 ~~meeting at which the voter’s provisional ballot will be reviewed and considered by the~~  
14 ~~county board. If the voter appears at that meeting and desires to address the county board~~  
15 ~~on whether their photo identification meets the requirement of Paragraph (a) of this Rule,~~  
16 ~~is acceptable under this Rule, the county board members are subject to the requirements of~~  
17 ~~this Rule in the same manner as a staff member initially examining a voter’s photo~~  
18 ~~identification.~~

19 If the voter brings photo identification that is an acceptable type of photo identification under  
20 Subparagraph (a)(1) of this Rule to the county board office before 5 p.m. on the business day prior  
21 to the canvass, the county board shall count the provisional ballot unless the county board  
22 unanimously decides the photo identification presented does not satisfy Subparagraphs (a)(2) and  
23 (a)(3) of this Rule, in which case the county board shall record in writing the grounds for its decision.

24  
25 *History Note:* Authority G.S. 163-22; 163-82.6A; 163-82.15; 163-166.7; NAACP v. McCrory, 831 F.3d 204  
26 (4<sup>th</sup> Cir. 2016); 163A-1145.1; S.L. 2018-144, s. 3-1(e); 163-166.11; 163-166.16;  
27 Eff. January 1, 2016;  
28 Temporary Amendment Eff. August 23, 2019;  
29 Temporary Amendment Expired Eff. June 12, 2020-2020;  
30 Temporary Amendment Eff. August 1, 2023- 2023;  
31 Amended Eff. April 1, 2024.  
32

1 08 NCAC 17 .0109 is adopted with changes as published in 38:10 NCR 614 as follows:

2  
3 **08 NCAC 17 .0109 PHOTO IDENTIFICATION FOR ABSENTEE-BY-MAIL BALLOTS**

4 (a) Identification Requirement for Absentee-by-Mail Ballots. Photo identification accompanying a voter's absentee  
5 ballot pursuant to G.S. 163-230.1(f1) is acceptable if it is a photocopy of a type of photo identification acceptable for  
6 voting purposes under 08 NCAC 17 .0101(a)(1), is readable, and the name appearing on the identification is the same  
7 as or substantially equivalent to the name contained in the voter's voter registration record in accordance with 08  
8 NCAC 17 .0101(a)(3). As used in this Rule, "readable" means that, on the photocopy of identification required by this  
9 Rule, the name on the identification can be read and the photograph depicts a person, as opposed to displaying, for  
10 example, a mere shadow or outline of a person. A photo identification shall not be rejected due to differences between  
11 the address appearing on an absentee voter's photo identification and any address contained in the voter's absentee  
12 request form, absentee ballot application, or registration record. A copy of photo identification that is acceptable under  
13 this Rule need include only the side of the identification (or, if the identification is a booklet, the page of the  
14 identification) where the person's name and photo appears.

15 (b) Initial Review by County Board Staff. County board staff shall, upon receipt of a voter's absentee ballot  
16 application, determine whether the application is accompanied by a photocopy of photo identification that is  
17 acceptable under Paragraph (a) of this Rule, or, if the application is accompanied by an affidavit claiming an exception  
18 to the identification requirement pursuant to G.S. 163-166.16(d), determine whether the affidavit includes the  
19 affirmations required by G.S. 163-166.16(d) for that exception and, if applicable, the personal identification number  
20 required to be provided by G.S. 163-230.1(g)(2). Staff shall review the registration records to determine whether the  
21 number provided matches the corresponding number in the registration records. The number required to be provided  
22 by G.S. 163-230.1(g)(2) is deficient only if it does not match the corresponding number listed in the voter's voter  
23 registration record.

24 If staff identify any deficiency, they shall mail written notice of the deficiency to the voter within one business  
25 day of identifying the deficiency, informing the voter that the voter, the voter's verifiable legal guardian or near  
26 relative, or a person of the voter's choice if the voter needs assistance due to the voter's disability, may provide a  
27 photocopy of the voter's acceptable photo identification or a completed affidavit claiming an ~~exception~~**exception. The**  
28 **notice shall state the photocopy or affidavit must be received by** ~~to~~ the county board by 5 p.m. on the business day  
29 before the county canvass. The notice of the deficiency shall also be provided by telephone or email if the telephone  
30 number or email address was provided by the voter on the request form for the absentee ballot. The voter may transmit  
31 either of the above documentation curing the deficiency in person, by mail, or by email. **An electronic copy of the**  
32 **voter's photographic identification or signed affidavit claiming an exception to the identification requirement, if**  
33 **provided via email, shall be acceptable.**

34 (c) Final Review by County Board. The county board shall, at the first meeting held pursuant to G.S. 163-230.1(f)  
35 after the application and ballot is received, proceed as follows:

- 36 (1) If the voter has submitted a photocopy of their photo identification, the county board shall make its  
37 determination whether the identification is acceptable under Paragraph (a) of this Rule. A final



1 determination that the photocopy of photo identification is not acceptable under Paragraph (a) of  
2 this Rule shall require a unanimous vote by the county board. If the county board makes a final  
3 determination that a voter's photocopy of photo identification is not acceptable, staff shall notify the  
4 voter as provided in Paragraph (b) of this Rule, and the county board shall reserve its final decision  
5 on the approval of the absentee application until the next official meeting after it receives  
6 documentation curing the deficiency or the county canvass, whichever occurs first.

7 (2) If the voter has completed an affidavit claiming an exception to the identification requirement  
8 pursuant to G.S. 163-166.16(d) and is otherwise eligible to vote, the county board may reject that  
9 person's ballot only if the county board unanimously finds that the affidavit is false. The county  
10 board shall substantiate any finding of falsity with grounds recorded in a written ~~decision~~ decision,  
11 and those grounds shall be based only on facts and not speculation. Before rejecting a voter's ballot  
12 because of a finding of falsity, the county board shall provide the voter advance notice and an  
13 opportunity to address the county board prior to the canvass on any grounds that the county board  
14 is considering regarding the falsity of the affidavit, ~~provided there is sufficient time remaining before~~  
15 ~~the county canvass to send a notice that will be delivered in advance of the opportunity to address~~  
16 ~~the county board~~. The notice shall identify the specific reasons the county board is considering the  
17 affidavit to be potentially false and inform the voter how the voter may address the reasons for  
18 potential falsity, which shall include the ~~option~~ options to provide a written explanation or  
19 documentation or to address the board at a meeting in person. The county board shall send the notice  
20 using a method of delivery via U.S. Mail or commercial courier service that is ~~notice shall be~~  
21 ~~provided by a means of physical delivery~~ designed to deliver the notice to the voter ~~provide the~~  
22 ~~voter actual notice~~ in advance of the opportunity to address the county board, provided there is  
23 sufficient time remaining before the county canvass to send a notice that will be delivered in advance  
24 of the opportunity to address the county board, and by any email address or phone number that the  
25 county board possesses for the voter. The notice and opportunity to address the county board  
26 provided for in this Subparagraph shall be offered only to those voters for whom a number of county  
27 board members equal to one less than all of the members of the county board, or more, has  
28 have identified a specific reason ~~reason~~, based only on facts and not speculation, to find that the  
29 affidavit claiming an exception to the identification requirement is false.

30 (3) If a voter's photocopy of photo identification or affidavit claiming an exception to the identification  
31 requirement pursuant to G.S. 163-166.16(d) is deemed deficient upon initial review under Paragraph  
32 (b) of this Rule, the county board shall reserve its final decision on the approval of the absentee  
33 application until the next official meeting after it receives documentation curing the deficiency  
34 identified pursuant to Paragraph (b) of this Rule or the county canvass, whichever occurs first.

35 (d) Exception for Military and Overseas Voters. A covered voter who is casting a ballot pursuant to G.S. 163, Article  
36 21A, Part 1 is not required to submit a photocopy of acceptable photo identification under Paragraph (a) of this Rule  
37 or claim an exception under G.S. 163-166.16(d).

1 (e) Return of Original Form of Identification. If a voter sends their original form of photo identification in the  
2 container-return envelope, or if a voter or other person permitted to return the voter's absentee ballot hand-delivers an  
3 absentee ballot to the county board of elections that is not accompanied by a photocopy of the voter's photo  
4 identification and the voter or other person has the voter's photo identification that is a type acceptable for voting  
5 purposes under 08 NCAC 17 .0101(a)(1) on hand, the county board shall make a photocopy of the identification,  
6 which shall serve as an acceptable photo identification accompanying the voter's absentee ballot. When a voter sends  
7 their original form of photo identification in the container-return envelope, the county board shall notify the voter by  
8 mail and by any email address or phone number that the county board possesses for the voter that the original photo  
9 identification will be returned to the voter voter. The county board and shall use a method of return that documents  
10 receipt of the photo identification.

11  
12 *History Note: Authority G.S. 163-22; 163-166.7; 163-166.16; ~~163-229~~; 163-230.1;*  
13 *Temporary Adoption Eff. August 23, 2019; January 1, 2020;*  
14 *Temporary Rule Expired Eff. October 11, 2020;*  
15 *Temporary Adoption Eff. August 1, 2023;*  
16 *Eff. April 1, 2024.*  
17

## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 04 .0401  
**Attachments:** 03.2024 - Board of Elections Request for Technical Changes 08 NCAC 04 .0401.docx; 08 NCAC 04 .0401 Standards - Revised per RRC suggestions.docx

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**From:** Cox, Paul <paul.cox@ncsbe.gov>  
**Sent:** Monday, March 18, 2024 5:35 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>  
**Subject:** RE: 08 NCAC 04 .0401

Bill,

Please find attached an agency response to the request for technical changes to the .0401 rule for electronic pollbooks, along with a revised rule.

Best regards,

**Paul Cox**  
General Counsel  
NORTH CAROLINA STATE BOARD OF ELECTIONS  
RALEIGH, NC 27611  
919.814.0700  
[www.ncsbe.gov](http://www.ncsbe.gov)

**Request for Changes Pursuant to  
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency’s statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

Questions contained herein suggest that the rule as written is unclear or there is some ambiguity. If this document includes questions and you do not understand the question, please contact the reviewing attorney to discuss. Failure to respond may result in a staff opinion recommending objection.

Staff may suggest the agency “consider” an idea or language in this document. This is in no way a formal request that the agency adopt the idea or language but rather is offered merely for the agency’s consideration which the agency may find preferable and clarifying.

To properly submit rewritten rules, please refer to the following Rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

Note the following general instructions:

1. You must submit the revised rule via email to [oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov) and copy RRC Counsel. The electronic copy must be saved as the official rule name (XX NCAC XXXX).
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
  - Wrong: “~~a~~Association”
  - Right: “~~association~~ Association”
6. Treat punctuation as part of a word. For example:
  - Wrong: “day~~,~~ and”
  - Right: “~~day,~~ day, and”
7. Formatting instructions and examples may be found at:  
[www.ncoah.com/rules/examples.html](http://www.ncoah.com/rules/examples.html)

If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 5, 2024

RESPONSES TO REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: N.C. State Board of Elections

RULE CITATION: 08 NCAC 04 .0401

**DEADLINE FOR RECEIPT: March 19, 2024**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*Page 1, Line 5: Should “and” be “or”? “And” is correct here. The use of “and” rather than “or” is because the agency would not consider a system that performs only one of the enumerated tasks to be an electronic poll book. Instead, it would need to be capable of performing all three tasks to be considered an electronic poll book.*

*Page 1, Line 10: Define or delete “timely”. The agency will delete “in a timely fashion” for completeness in the revision.*

*Page 1, Lines 25-26: This is unclear and ambiguous. “Designed to ensure” that election personnel “can” comply. What criteria is used to make this determination? If an electronic poll book were to automatically delete the voter records contained within the system, then it would have been designed in a way that does not ensure compliance with record retention laws, which require retention of election records for many months after an election is certified. [See Item #13 on the Records Retention and Disposition Schedule for County Boards of Elections](#). The intent with this requirement is that the electronic poll book will not delete the voter records and information contained within the system unless prompted, at the appropriate time, by an authorized user to do so. The agency proposes the following revision to clarify this point: “It shall be designed to ensure that the voter data contained within the electronic poll book is not deleted without prompting by an authorized user, so that county elections personnel can comply with all applicable laws pertaining to records retention.”*

*Page 1, Line 28: “Including” implies that there is a need for access other than for elections or as otherwise authorized by law. What would those be? Rather than enumerating a list in the Rule for when an authorized user may access the data on the electronic poll book, the agency proposes making the following revision: “It shall not allow access to confidential voter data, except for official use by authorized users, including in the conduct of an election or as otherwise authorized by law.”*

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 5, 2024

*Page 1, Line 29: What are the applicable federal standards , requirements, and guidelines?* The U.S. Election Assistance Commission (EAC) is in the process of formally adopting standards for electronic poll books, known as its Voluntary Electronic Poll Book Certification Requirements (VEPBCR). The proposed requirements can be viewed here: [https://www.eac.gov/sites/default/files/2023-11/Voluntary\\_Electronic\\_Poll\\_Book\\_Requirements\\_v1.0\\_508.pdf](https://www.eac.gov/sites/default/files/2023-11/Voluntary_Electronic_Poll_Book_Requirements_v1.0_508.pdf). The public comment period for the proposed requirements closed on December 14, 2023, as noted here: <https://www.federalregister.gov/documents/2023/11/14/2023-25054/request-for-comment-voluntary-electronic-poll-book-requirements-version-10>. As noted on the Federal Register listing for the comment period:

Under the authority of the Help America Vote Act of 2002 (HAVA), the EAC developed the Election Supporting Technology Evaluation Program (ESTEP). This Program establishes a protocol for testing critical election-supporting technologies to ensure their conformance with baseline Federal standards for security and accessibility. While participation in this Program is voluntary, EAC certification benefits the public and wider election technology field by supporting State and local election officials, increasing quality control and quality assurance of election-supporting technologies, and increasing voter confidence in the use of these systems.

The VEPB[C]R v1.0 will be used primarily by electronic poll book system manufacturers and Voting System Test Laboratories (VSTLs) as a baseline set of requirements for electronic poll book system security and accessibility to which States or Territories will add their specific requirements, as necessary. Manufacturers will use these requirements when they design and build new e-poll book systems. VSTLs will refer to this document when they develop test plans for the analysis and testing of e-poll book systems to verify whether the system meets these requirements. States and Territories may utilize these requirements as a baseline and include additional requirements, as deemed necessary by their legislation or other regulations.

While these federal standards and requirements have not yet been finally adopted, once they are adopted this aspect of the Rule will make required what is otherwise only voluntary. This agency’s incorporation of those standards and requirements is precisely what the EAC envisions occurring.

*Page 1, Lines 29-30: Explain how “federal guidance,” which is not law can be incorporated by reference pursuant to G.S. 150B-21.6. Is the manual a guideline or law? If law, pursuant to what authority and process was it adopted? Is it in the Federal Code?* The EAC’s electronic poll book requirements referenced above include guidance sections and the intent was to simply use that same terminology. The agency will propose to revise this portion of the Rule to remove “guidance” as follows: “It shall meet applicable federal standards, standards and requirements, and guidance for electronic poll books . . .”

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 5, 2024

*Page 1, Line 31-32: Recognized how? By what procedure?* This reference in the Rule to a testing authority recognized by a federal agency primarily refers to the Voting System Test Laboratories (VSTL) accreditation program that is designed and operated by the EAC. As noted on the EAC’s website:

Section 231(b) of the Help America Vote Act (HAVA) of 2002 (42 U.S.C. §15371(b)) requires that the EAC provide for the accreditation and revocation of accreditation of independent, non-federal laboratories qualified to test voting systems to Federal standards. Generally, the EAC considers for accreditation those laboratories evaluated and recommend by the National Institute of Standards and Technology (NIST) pursuant to HAVA Section 231(b)(1). However, consistent with HAVA Section 231(b)(2)(B), the Commission may also vote to accredit laboratories outside of those recommended by NIST upon publication of an explanation of the reason for any such accreditation. In order to meet its statutory requirements under HAVA §15371(b), the EAC has developed the EAC’s Voting System Test Laboratory Accreditation Program.

EAC, <https://www.eac.gov/voting-equipment/voting-system-test-laboratories-vstl> (last visited March 18, 2024). The EAC’s proposed VEPBCR specifically envisions review of an electronic poll book by a VSTL, and this is in line with the agency’s desire to have a review of the electronic poll book by an independent testing authority when it is submitted for certification. Additionally, the Center for Internet Security (CIS) provides a similar service to that of a VSTL, but for a more limited review, with its Rapid Architecture-Based Election Technology Verification (RABET-V) program. The RABET-V program was launched as a partnership between CIS and the EAC, and provides testing of electronic poll books against industry standards. To be more clear on this point, the agency will make a revision to change “recognized by” to “accredited by” as follows: “It shall be reviewed by an independent testing authority **recognized accredited** by or partnered with a federal agency . . .”

*Page 1, Lines 33-34: What criteria will be used to determine whether the EPB is “designed” to the Board’s ambiguous specifications?* Election workers come from all backgrounds and ages, but retirees make up a good number of the check-in workers who will operate an electronic poll book. The setup and use of the electronic poll book must therefore be straightforward, not hyper technical, to ensure that poll workers can do their job effectively and efficiently. Specifically, as to “simple” setup and use, the agency interprets that specification as “readily understood or performed.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/simple> (last visited March 18, 2024). As such, the electronic poll book must be a system in which a user can readily understand and perform its functions of checking the registration of voters who appear to vote in person, assigning voters their correct ballots, and recording the voters’ check-in and acceptance of ballots. While the agency does not believe that “frequent and safe” are necessarily ambiguous specifications, the intent is that the electronic poll books simply be transportable from the county board of elections storage areas to the voting sites in the county. With the above in mind, the agency would be amenable to making the following revision: “It shall be designed and

constructed for simple setup and use by election workers, and any hardware shall be designed for frequent and safe transport to voting locations.”

*Page 2, Line 1: “Approved” how? By whom? Is there a rule citation which can be entered?* The State Board, when certifying an electronic poll book pursuant to its authority in 08 NCAC 04 .0402, will approve the peripherals that are used to operate the electronic poll book. This approval would occur as part of the State Board’s review and approval of the entire system submitted for certification, because electronic poll books will oftentimes rely on peripherals to function. The agency will clarify this point with the following revision: “approved by the State Board, when certifying an electronic poll book pursuant to 08 NCAC 04 .0402, during the certification process . . .”

*Page 2, Line 9: Define or delete “in a manner set forth by the State Board.”* The agency will agree to delete this language.

*Page 2, Line 21: Define or delete “primary”.* The agency will agree to delete this word.

*Page 2, Line 23: Where is “State Network” defined?* “State Network” is defined by statute as “any connectivity designed for the purpose of providing Internet Protocol transport of information for State agencies.” G.S. § 143B-1370(a)(5)g. The agency will clarify by adding the reference as follows: “. . . vendors connected to the State Network, as that term is defined in G.S. § 143B-1370(a)(5)g. . . .”

*Page 2, Line 23: “Audited” by whom? Can anyone produce the audit?* An audit report of a business is understood to mean an audit conducted by an independent auditor (i.e., a third party). To make this clarification, and address the next request for a change, the agency proposes the following revision: “. . . an audited report of the business’ most current fiscal year a report showing the results of an independent audit of the business for its most current fiscal year . . .”

*Page 2, Line 23: Is the report audited or is it an audit report of the fiscal year?* The agency will clarify that it is an audit report showing the findings of an independent audit of the business for its most recent fiscal year. See response above for the clarifying revision.

*Page 2, Line 27: Confirming that you want the “vendor’s financial statement[s]” not the manufacturers.* The agency will revise this to be the “manufacturer’s” financial statement, which was the original intent.

*Page 3, Lines 20-25: Consider making this its own paragraph. Is this a “requirement”?* The agency agrees with this suggestion and will make the necessary revision.

*Page 3, Line 20: Change “may” to “shall” or state the criteria which the Board will use in making its determination.* The agency agrees to make this revision and use “shall” instead of “may.”



*Page 3, Line 21-22: There need to be citations added here to the rules which require the information. The Board cannot request information and penalize the vendor if the vendor fails to response unless that information is required by a rule. The information and resources required to be provided are those stated in this Rule, specifically Paragraph B, when the vendor is submitting an electronic poll book for certification. The agency will make a clarifying addition to reflect that intent as follows: “The vendor fails to respond to a State Board request for information or other resources required **to be provided under Paragraph (b) of this Rule** for the certification process.”*

*Page 3, Line 23: Define “irreparable deficiencies.” By what criteria and process will be used to make this determination? By “irreparable” the agency means “not reparable.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/irreparable> (last visited March 18, 2024). By “deficiencies” the agency means “the quality or state of being defective or of lacking some necessary quality or element.” Merriam-Webster, <https://www.merriam-webster.com/dictionary/deficiencies> (last visited March 18, 2024). Accordingly, an “irreparable deficiency” occurs when an electronic poll book, the vendor, or the certification application lacks some necessary quality or element required for certification under the Rule and it cannot be remedied. To clarify that it is the vendor's responsibility to remedy that deficiency, and make clear what qualifies as a deficiency, the agency proposes making the following revision: “The State Board identifies **irreparable deficiencies with the lack of a necessary quality or element in the electronic poll book system, vendor, or certification application that cannot be remedied by the vendor and is required for certification under this Rule.**”*

*Page 4, Line 15: Strike “and policies.” See G.S. 150B-2(8a)l. The agency agrees to make this **revision**.*

*Page 4, Lines 10-23: Does this include subsequent amendments and editions? See G.S. 150B-21.6. The intent for the sanitization and cryptographic module references was for them to include subsequent amendments and editions. The agency has made **revisions** to both sentences to include this reference.*

*Page 4, Lines 15-23: Explain how federal guidelines, which are not law, can be incorporated by reference pursuant to G.S. 150B-21.6. NIST’s Guidelines for Media Sanitization are published after being developed by NIST in accordance with its statutory responsibilities under the Federal Information Security Management Act of 2002 (FISMA), 44 U.S.C. § 3541 et seq., Public Law 107-347. NIST is a federal agency responsible for developing information security standards and guidelines, including minimum requirements for federal information systems. Moreover, the standards contained within NIST’s Guidelines for Media Sanitization have been adopted by the NC Department of Information Technology for media sanitization, as part of its statewide set of standards for information technology in its Media Protection Policy. NCDIT, <https://it.nc.gov/documents/statewide-policies/scio-media-protection/download?attachment> (last visited March 18, 2024). As such, the NIST standards referenced here in the Rule do fit within the description of what can be incorporated by reference pursuant to G.S. § 150B-21.6(2). That provision of the APA does not require an adopted set of standards to be in the form of a “law.” Such a*

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 5, 2024

requirement does not appear in the plain text of the statute. If that were the case, the reference in the statute to “a generally recognized organization or association” would make no sense, as private organizations do not have lawmaking powers.

*Page 4, Line 28: To whom is the vendor submitting requested changes?* A vendor submits requested changes to the State Board. The agency has made a clarifying addition as follows: “The vendor shall, upon request, assist in the State Board’s examination and submit requested changes to the electronic poll book **to the State Board** to ensure continued compliance with state and federal law.”

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel  
Date submitted to agency: March 5, 2024

1 08 NCAC 04 .0401 is adopted with changes as published in 38:06 NCR 302 as follows:

2  
3 **08 NCAC 04 .0401            STANDARDS FOR CERTIFICATION OF ELECTRONIC POLL BOOKS**

4 (a) As used in this Chapter, an “electronic poll book” is a system (including hardware, software, and firmware) used  
5 to check the registration of voters who appear to vote in person, to assign voters their correct ballots, and to record the  
6 voters’ check-in and acceptance of ballots. An electronic poll book shall, to qualify for certification by the State Board  
7 for use in any election in North Carolina, fulfill the following requirements:

- 8        (1)        It shall record all information a voter is required by law to provide when presenting to vote and be  
9                    equipped so that voters and election workers can complete the steps required by law for checking a  
10                    voter’s registration and the distribution of ballots to checked-in voters in a timely fashion.
- 11        (2)        It shall be equipped for use on any day the polls are open for in-person voting and shall contain the  
12                    list of registered voters eligible to vote in the election.
- 13        (3)        It shall verify a voter’s eligibility to receive a ballot, confirm a voter has not previously voted in the  
14                    election based on available records, and record a voter’s check-in and receipt of a ballot.
- 15        (4)        It shall log all user activity and that log shall be secured from unauthorized alteration and be  
16                    available only to authorized users. It shall require the use of individual user accounts assigned to  
17                    individual authorized users and not allow shared accounts for access to the electronic poll book. As  
18                    used in this Chapter, an “authorized user” is an individual designated by the State Board or a  
19                    purchasing county board of elections to operate and maintain the electronic poll book.
- 20        (5)        It shall secure the data of the electronic poll book such that the data is stored in a manner that an  
21                    unauthorized party will not be able to access the data.
- 22        (6)        It shall secure the data contained within the electronic poll book such that the data is not transmitted  
23                    or transported for any purpose except for official use in the conduct of an election or as otherwise  
24                    authorized by law.
- 25        (7)        It shall ~~be designed to~~ ensure that the voter data contained within the electronic poll book is not  
26                    deleted without prompting by an authorized user, so that county elections personnel can comply  
27                    with all applicable laws pertaining to records retention.
- 28        (8)        It shall not allow access to confidential voter data, except for official use by authorized users, users,  
29                    including in the conduct of an election or as otherwise authorized by law.
- 30        (9)        It shall meet applicable federal standards, standards and requirements, and guidance for electronic  
31                    poll books, including those issued by the United States Election Assistance Commission or its  
32                    successor.
- 33        (10)        It shall be reviewed by an independent testing authority recognized accredited by or partnered with  
34                    a federal agency ~~the United States Election Assistance Commission~~ for compliance with applicable  
35                    state law.

1 (11) It shall be designed and constructed for simple setup and use by election workers, and any hardware  
2 shall be designed for frequent and safe transport to voting locations, ~~and for simple setup and use~~  
3 ~~by election workers.~~

4 (12) It shall be compatible with systems, equipment, and software utilized by the State Board and county  
5 boards of elections for storing and processing voter registration and voting data.

6 (13) It shall allow for a wired connection to peripherals approved by the State Board, when certifying an  
7 electronic poll book pursuant to 08 NCAC 04 .0402, during the certification process that are required  
8 for the operation of the electronic poll book and, as minimally required for functionality, allow for  
9 a ~~wired~~ secure network connection for the secure transmission of data with the state's electronic  
10 information management system, provided that the connection to the network is not automatically  
11 enabled by default upon powering on or opening the electronic poll book. All other forms of  
12 connectivity are prohibited.

13 (b) A vendor applying for certification by the State Board of Elections of an electronic poll book shall, as part  
14 of the certification application, fulfill the following requirements:

15 (1) The vendor shall submit ~~submit, in a manner set forth by the State Board,~~ the electronic poll book  
16 for examination, testing, and evaluation by the State Board. The vendor shall initiate the certification  
17 process by submitting a letter of application directed to the Executive Director of the State Board.  
18 A corporate officer or designee of the vendor shall sign the letter, and the letter shall include:

19 (A) The name and contact information of the company and the name and title of the corporate  
20 officer signing the application. and all corporate information requested by the State Board.

21 (B) The vendor's corporate information. Corporate information shall include a history and  
22 description of the business, year established, products and services offered, areas served,  
23 branch office locations, and subsidiary or parent companies; a list of owners or  
24 shareholders with a 5% or greater interest or share in each of the vendor's company,  
25 subsidiary companies, and parent company; a description of management and staff  
26 organization, number of full-time employees by category, number of part-time employees  
27 by category, and resumes of primary employees to be tasked with assisting purchasing  
28 counties; documentation demonstrating that the vendor meets the same level of security  
29 compliance required for vendors connected to the State Network, as that term is defined in  
30 G.S. § 143B-1370(a)(5)g.; an audited report of the business' most current fiscal year a  
31 report showing the results of an independent audit of the business for its most current fiscal  
32 year; a comfort letter from the vendor's primary bank; and a description of the vendor's  
33 financial history including a financial statement for the past three (3) fiscal years. If the  
34 vendor is not the manufacturer of the equipment for which application is made, the vendor  
35 shall include the vendor's manufacturer's financial statement for the past three (3) fiscal  
36 years.

- 1 (C) The name and version number of the electronic poll book to be certified, and a list of all  
2 jurisdictions that have certified, have used, or are currently using the electronic poll book.
- 3 (D) An attestation that the corporate officer signing the application has reviewed and confirmed  
4 that the electronic poll book meets all legal requirements of electronic poll book systems  
5 under state and federal law.
- 6 (2) The vendor shall provide a listing of all software, hardware, and consumables necessary for  
7 operation of the electronic poll book, a technical data package, an accounting of any prior  
8 submission of the electronic poll book to another jurisdiction for certification, an accounting of any  
9 decertification of the vendor's electronic poll book or other voting product, and a demonstration of  
10 the system. The vendor shall provide access to the information required to be placed in escrow by a  
11 vendor pursuant to G.S. 163-165.9A.
- 12 (3) The vendor shall submit documentation of any review of the electronic poll book by an independent  
13 testing authority ~~recognized by the United States Election Assistance Commission~~ for compliance  
14 with federal or state standards, requirements, or guidance applicable to electronic poll books.
- 15 (4) The vendor shall provide a copy of its standard purchase contract and shall quote a statewide uniform  
16 price for each unit of the electronic poll book, including peripherals, consumables, and software  
17 required for operation of the electronic poll book.
- 18 (5) The vendor shall post a bond or letter of credit to cover damages resulting from defects in the  
19 electronic poll book, sufficient to cover any costs of conducting a new statewide election attributable  
20 to those defects. The State Board shall survey the county boards of elections in April of every odd-  
21 numbered year following an election held at the time prescribed in G.S. 163-1(c) to determine each  
22 county's costs for conducting its most recent general election, and the State Board shall aggregate  
23 those amounts to arrive at the cost of conducting a new statewide election. That aggregate amount  
24 shall determine the bond or letter of credit requirement, and it shall be effective June 1 of the year  
25 the survey is conducted and remain in effect until an amount is likewise calculated in a subsequent  
26 odd-numbered year following an election held at the time prescribed in G.S. 163-1(c) and is made  
27 effective.
- 28 (6) The vendor shall bear all of its costs associated with certification.
- 29 ~~(c)~~ ~~(7)~~ The State Board ~~may~~ shall terminate a pending certification process if:
- 30 ~~(1)~~ ~~(A)~~ The vendor fails to respond to a State Board request for information or other resources  
31 required to be provided under Paragraph (b) of this Rule for the certification process.
- 32 ~~(2)~~ ~~(B)~~ The State Board identifies ~~irreparable deficiencies with the lack of a necessary quality or~~  
33 element in the electronic poll book system, vendor, or certification application that cannot  
34 be remedied by the vendor and is required for certification under this Rule.
- 35 ~~(3)~~ ~~(C)~~ The vendor withdraws from the certification process.
- 36 ~~(e)~~(d) A vendor, to maintain certification by the State Board of Elections of the vendor's electronic poll book, shall  
37 fulfill the following requirements for the duration of the electronic poll book's certification and use in North Carolina:

- 1 (1) The vendor shall conduct a presentation to demonstrate for a county board of elections, as part of  
2 that county board's procurement and acceptance of a certified electronic poll book, the system's  
3 ability to execute its designed functionality as presented and tested during State-level certification  
4 and the vendor's ability to fulfill the duties required by G.S. 163-165.9A.
- 5 (2) The vendor shall submit to the State Board any escrow-related affidavits and other information  
6 required by G.S. 163-165.9A.
- 7 (3) The vendor's contract with each purchasing county shall include the agreement required by G.S.  
8 163-165.7(c)(4) and the following training and support:
- 9 (A) Operational training for a purchasing county's elections personnel;
- 10 (B) Operational support prior to and during any election in which the certified electronic poll  
11 book will be in use; and,
- 12 (C) End-of-life and end-of-service-life planning for the certified electronic poll book system,  
13 including guaranteed support until the system has reached the vendor's stated end-of-life  
14 date, optional extended support until the system has reached the end-of-service-life date,  
15 and sanitization of the electronic poll book once it has reached its end-of-service-life. End-  
16 of-life shall mean the point in time in which the vendor will no longer sell or market the  
17 electronic poll book. End-of-service-life shall mean the point in time in which the vendor  
18 will no longer provide maintenance or support for the electronic poll book.
- 19 (4) The vendor shall provide, upon request by the State Board or a purchasing county, memory devices  
20 or USB drives, sufficient in number to support the operation of the certified electronic poll book in  
21 an election setting, that meet industry standards for sanitization and security requirements for  
22 cryptographic modules, use cryptographic hashing algorithms of Secure Hash Algorithm 256-bit  
23 (SHA-256) or higher, and meet all applicable North Carolina Department of Information  
24 Technology information security standards and policies. The standard for sanitization shall be as  
25 prescribed in National Institute of Standards and Technology (NIST) SP 800-88 Guidelines for  
26 Media Sanitization. Sanitization, including subsequent amendments and editions. A copy of the SP  
27 800-88 Guidelines are available for inspection in the offices of the State Board of Elections and may  
28 also be obtained at no cost by accessing the NIST website at  
29 <https://csrc.nist.gov/pubs/sp/800/88/r1/final>. The security requirements for cryptographic modules  
30 shall be as prescribed in the National Institute of Standards and Technology's Federal Information  
31 Processing Standards 140-3 (FIPS 140-3) (FIPS 140-3), including subsequent amendments and  
32 editions. A copy of the FIPS 140-3 is available for inspection in the offices of the State Board of  
33 Elections and may also be obtained at no cost by accessing the NIST website at  
34 <https://csrc.nist.gov/pubs/fips/140-3/final>.
- 35 (5) The vendor shall allow the State Board to examine the certified electronic poll book at any time to  
36 ensure compliance with state and federal election laws and certification standards. To facilitate this  
37 requirement, the vendor shall make available to the State Board, upon request and at no cost to the

1 agency, a certified electronic poll book model. The vendor shall, upon request, assist in the State  
2 Board's examination and submit requested changes to the electronic poll book to the State Board to  
3 ensure continued compliance with state and federal law.

4 (6) The vendor shall submit documentation to the State Board identifying and describing a proposed  
5 change to a certified electronic poll book in use in North Carolina. The vendor shall, upon request,  
6 assist in the State Board's review of proposed changes. No vendor shall provide a county board of  
7 elections any software, firmware, hardware, or instruction that will change a certified electronic poll  
8 book unless that change has first been approved in accordance with 08 NCAC 04 .0402(b).

9 (7) The vendor shall provide electronic notice to the State Board of another United States jurisdiction's  
10 decision to decertify or halt the use of its electronic poll book or other voting product within 24  
11 hours of the jurisdiction's decision. The vendor shall provide electronic notice to the State Board of  
12 any incident, anomaly, or defect in the same system known to have occurred anywhere, and of any  
13 relevant defect known to have occurred in similar systems, within 24 hours of knowledge of the  
14 incident, anomaly, or defect.

15 (8) The vendor shall maintain the required bond or letter of credit on a continuous basis, without  
16 interruption.

17 (9) The vendor shall, on a quarterly basis, provide the State Board a quote for a statewide uniform price  
18 for each unit of the electronic poll book. The vendor shall, on a quarterly basis, furnish the State  
19 Board with an accounting of purchases of certified electronic poll books by a jurisdiction within  
20 North Carolina.

21 ~~(d)~~(e) In accordance with G.S. 163-165.7, compliance with this Rule shall not apply to be required of an electronic  
22 poll book which is developed or maintained by the State Board of Elections for that electronic poll book to be used in  
23 an election in North Carolina.

24  
25 *History Note: Authority G.S. 163-22; 163-165.7; 163-165.9A; 163-166.7*  
26  
27

## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 17 .0109

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>

**Sent:** Friday, March 15, 2024 5:17 PM

**To:** Cox, Paul <paul.cox@ncsbe.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>

**Subject:** RE: 08 NCAC 17 .0109

Ok, I will only address the rules and responses highlighted.

Rule 109:

Page 1, Lines 27-29, are you telling staff that they must include the deadline in the notice or are you establishing deadline? Who are you regulating in this sentence?

Page 1, Lines 31-33: A definition of “photocopy” would be helpful here (as the GA did not define it) and would perhaps negate the need for Lines 31-33. It appears that the BOE is making a distinction between a “photocopy” and an “electronic copy.” What is the difference?

Page 2, Lines 19-21: The language is unclear. It says that the notice can be sent via U.S. mail or commercial carrier service. That part is clear. But then it become cloudy by the phrase “designed to provide the voter actual notice.” “Actual notice” is a legal concept subject to some dispute and undefined in the rule. Is simply depositing it in the US Mail first class “actual notice”? is the Board requiring returned receipt? Certified mail? Is FedEx ground acceptable? Must it be next day service? The BOE needs to be clear what it wants the County boards to do. Put another way, tell me what services are “designed to provide actual notice”? Put those in the rule. Then it’s clear.

Page 3, Line 35: That works.

Page 3, Line 9: That works.

Response:

Generally, anytime you cross reference, it removes ambiguity in the absence of a good definition rule.

Hope this helps. Have a good weekend.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

(984) 236-1939

[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)



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## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 17 .0109

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>

**Sent:** Friday, March 15, 2024 3:07 PM

**To:** Cox, Paul <paul.cox@ncsbe.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>

**Subject:** RE: 08 NCAC 17 .0109

Thank you.

Did you intend to send a revised .0101?

**William W. Peaslee**

**Rules Review Commission Counsel / Legislative Liaison**

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

(984) 236-1939

[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 17 .0109  
**Attachments:** 08 NCAC 17 .0109 - Adopted by SBE 021524 - revised per RRC suggestions.docx; NCSBE Response - Board of Elections Request for Technical Changes Rule .0109.docx; NCSBE Response - Board of Elections Request for Technical Changes Rule .0101.docx

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**From:** Cox, Paul <paul.cox@ncsbe.gov>  
**Sent:** Friday, March 15, 2024 2:55 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>  
**Subject:** RE: 08 NCAC 17 .0109

Hi Bill,

Attached are our responses to your suggestions. I've highlighted in yellow a few ideas that I did not yet put into the rules, since they were tentative responses to clarifying questions you had rather than specific suggestions you had for consideration. It would be helpful to know if you think the clarifying answers are sufficient or whether you think the changes would be advisable.

Many thanks for your work on these rules.

Best regards,

**Paul Cox**  
General Counsel  
NORTH CAROLINA STATE BOARD OF ELECTIONS  
RALEIGH, NC 27611  
919.814.0700  
[www.ncsbe.gov](http://www.ncsbe.gov)

1 08 NCAC 17 .0109 is adopted with changes as published in 38:10 NCR 614 as follows:

2  
3 **08 NCAC 17 .0109 PHOTO IDENTIFICATION FOR ABSENTEE-BY-MAIL BALLOTS**

4 (a) Identification Requirement for Absentee-by-Mail Ballots. Photo identification accompanying a voter's absentee  
5 ballot pursuant to G.S. 163-230.1(f1) is acceptable if it is a photocopy of a type of photo identification acceptable for  
6 voting purposes under 08 NCAC 17 .0101(a)(1), is readable, and the name appearing on the identification is the same  
7 as or substantially equivalent to the name contained in the voter's voter registration record in accordance with 08  
8 NCAC 17 .0101(a)(3). As used in this Rule, "readable" means that, on the photocopy of identification required by this  
9 Rule, the name on the identification can be read and the photograph depicts a person, as opposed to displaying, for  
10 example, a mere shadow or outline of a person. A photo identification shall not be rejected due to differences between  
11 the address appearing on an absentee voter's photo identification and any address contained in the voter's absentee  
12 request form, absentee ballot application, or registration record. A copy of photo identification that is acceptable under  
13 this Rule need include only the side of the identification (or, if the identification is a booklet, the page of the  
14 identification) where the person's name and photo appears.

15 (b) Initial Review by County Board Staff. County board staff shall, upon receipt of a voter's absentee ballot  
16 application, determine whether the application is accompanied by a photocopy of photo identification that is  
17 acceptable under Paragraph (a) of this Rule, or, if the application is accompanied by an affidavit claiming an exception  
18 to the identification requirement pursuant to G.S. 163-166.16(d), determine whether the affidavit includes the  
19 affirmations required by G.S. 163-166.16(d) for that exception and, if applicable, the personal identification number  
20 required to be provided by G.S. 163-230.1(g)(2). Staff shall review the registration records to determine whether the  
21 number provided matches the corresponding number in the registration records. The number required to be provided  
22 by G.S. 163-230.1(g)(2) is deficient only if it does not match the corresponding number listed in the voter's voter  
23 registration record.

24 If staff identify any deficiency, they shall mail written notice of the deficiency to the voter within one business  
25 day of identifying the deficiency, informing the voter that the voter, the voter's verifiable legal guardian or near  
26 relative, or a person of the voter's choice if the voter needs assistance due to the voter's disability, may provide a  
27 photocopy of the voter's acceptable photo identification or a completed affidavit claiming an **exception**. **The**  
28 **photocopy or affidavit must be received by** ~~to~~ the county board by 5 p.m. on the business day before the county  
29 canvass. The notice of the deficiency shall also be provided by telephone or email if the telephone number or email  
30 address was provided by the voter on the request form for the absentee ballot. The voter may transmit either of the  
31 above documentation curing the deficiency in person, by mail, or by email. **The voter may submit an** ~~An~~ electronic  
32 copy of the voter's photographic identification or signed affidavit claiming an exception to the identification  
33 **requirement**. **requirement, if provided via email, shall be acceptable.**

34 (c) Final Review by County Board. The county board shall, at the first meeting held pursuant to G.S. 163-230.1(f)  
35 after the application and ballot is received, proceed as follows:

- 36 (1) If the voter has submitted a photocopy of their photo identification, the county board shall make its  
37 determination whether the identification is acceptable under Paragraph (a) of this Rule. A final

determination that the photocopy of photo identification is not acceptable under Paragraph (a) of this Rule shall require a unanimous vote by the county board. If the county board makes a final determination that a voter's photocopy of photo identification is not acceptable, staff shall notify the voter as provided in Paragraph (b) of this Rule, and the county board shall reserve its final decision on the approval of the absentee application until the next official meeting after it receives documentation curing the deficiency or the county canvass, whichever occurs first.

(2) If the voter has completed an affidavit claiming an exception to the identification requirement pursuant to G.S. 163-166.16(d) and is otherwise eligible to vote, the county board may reject that person's ballot only if the county board unanimously finds that the affidavit is false. The county board shall substantiate any finding of falsity with grounds recorded in a written ~~decision~~ decision, and those grounds shall be based only on facts and not speculation. Before rejecting a voter's ballot because of a finding of falsity, the county board shall provide the voter advance notice and an opportunity to address the county board prior to the canvass on any grounds that the county board is considering regarding the falsity of the affidavit, ~~provided there is sufficient time remaining before the county canvass to send a notice that will be delivered in advance of the opportunity to address the county board~~. The notice shall identify the specific reasons the county board is considering the affidavit to be potentially false and inform the voter how the voter may address the reasons for potential falsity, which shall include the ~~option~~ options to provide a written explanation or documentation or to address the board at a meeting in person. The county board shall send the notice using a method of delivery via U.S. Mail or commercial courier service that is notice shall be provided by a means of physical delivery designed to provide the voter actual notice in advance of the opportunity to address the county board, provided there is sufficient time remaining before the county canvass to send a notice that will be delivered in advance of the opportunity to address the county board, and by any email address or phone number that the county board possesses for the voter. The notice and opportunity to address the county board provided for in this Subparagraph shall be offered only to those voters for whom a number of county board members equal to one less than all of the members of the county board board, or more, has have identified a specific reason reason, based only on facts and not speculation, to find that the affidavit claiming an exception to the identification requirement is false.

(3) If a voter's photocopy of photo identification or affidavit claiming an exception to the identification requirement pursuant to G.S. 163-166.16(d) is deemed deficient upon initial review under Paragraph (b) of this Rule, the county board shall reserve its final decision on the approval of the absentee application until the next official meeting after it receives documentation curing the deficiency identified pursuant to Paragraph (b) of this Rule or the county canvass, whichever occurs first.

(d) Exception for Military and Overseas Voters. A covered voter who is casting a ballot pursuant to G.S. 163, Article 21A, Part 1 is not required to submit a photocopy of acceptable photo identification under Paragraph (a) of this Rule or claim an exception under G.S. 163-166.16(d).

1 (e) Return of Original Form of Identification. If a voter sends their original form of photo identification in the  
2 container-return envelope, or if a voter or other person permitted to return the voter's absentee ballot hand-delivers an  
3 absentee ballot to the county board of elections that is not accompanied by a photocopy of the voter's photo  
4 identification and the voter or other person has the voter's photo identification that is a type acceptable for voting  
5 purposes under 08 NCAC 17 .0101(a)(1) on hand, the county board shall make a photocopy of the identification,  
6 which shall serve as an acceptable photo identification accompanying the voter's absentee ballot. When a voter sends  
7 their original form of photo identification in the container-return envelope, the county board shall notify the voter by  
8 mail and by any email address or phone number that the county board possesses for the voter that the original photo  
9 identification will be returned to the voter voter. The county board and shall use a method of return that documents  
10 receipt of the photo identification.

11  
12 *History Note: Authority G.S. 163-22; 163-166.7; 163-166.16; ~~163-229~~; 163-230.1;*  
13 *Temporary Adoption Eff. August 23, 2019; January 1, 2020;*  
14 *Temporary Rule Expired Eff. October 11, 2020;*  
15 *Temporary Adoption Eff. August 1, 2023;*  
16 *Eff. April 1, 2024.*  
17

**Agency Response to Request for Changes Pursuant to  
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency’s statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

Questions contained herein suggest that the rule as written is unclear or there is some ambiguity. If this document includes questions and you do not understand the question, please contact the reviewing attorney to discuss. Failure to respond may result in a staff opinion recommending objection.

Staff may suggest the agency “consider” an idea or language in this document. This is in no way a formal request that the agency adopt the idea or language but rather is offered merely for the agency’s consideration which the agency may find preferable and clarifying.

To properly submit rewritten rules, please refer to the following Rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

**Note the following general instructions:**

1. You must submit the revised rule via email to [oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov) and copy RRC Counsel. The electronic copy must be saved as the official rule name (XX NCAC XXXX).
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
  - Wrong: “~~a~~Association”
  - Right: “~~association~~ Association”
6. Treat punctuation as part of a word. For example:
  - Wrong: “day~~;~~ and”
  - Right: “~~day,~~ day; and”
7. Formatting instructions and examples may be found at:  
[www.ncoah.com/rules/examples.html](http://www.ncoah.com/rules/examples.html)

**If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.**

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: N.C. State Board of Elections

RULE CITATION: 08 NCAC 17 .0109

**DEADLINE FOR RECEIPT: March 15, 2024**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*Page 1, Line 9:* Consider: “and the photograph depicts discernable facial features such that the depicted person could be identified if he or she appeared in person.” The agency appreciates this suggestion, which was also considered but not adopted during the temporary rulemaking process last summer. The reason for declining this suggestion was/is: The definition of readable in the Rule sets a minimum readability standard for the photo to ensure that the photo ID does contain a photo of a person, but the photo does not need to be of the same quality as a photo ID presented by a voter voting in person for two reasons. First, the photo ID submitted with an absentee-by-mail ballot is a photocopy of the photo ID that will be made with a wide variety of at-home printers and copiers. Requiring the same or similar clarity of the photo on a copy as that on the original photo ID would be a burden on the voter. Second, no reasonable resemblance determination is made (or could be made) with an absentee-by-mail ballot. So the county board staff and members reviewing the copy of the photo ID have no need to review the voter’s facial features. Instead, a county board needs only to ensure that the photo ID is an acceptable form of photo ID that does indeed have a photo of a person and the name is the same as or substantially equivalent to the voter’s name in the pollbook. Accordingly, it is doubtful that the burden imposed by such an image resolution requirement would serve any legitimate governmental purpose.

*Page 1, Line 26-27:* Does the photocopy or affidavit need to be provided by or received by 5 P.M. on the business day before the county canvass? The agency agrees to clarify that this is a receipt deadline.

*Page 1, Line 27:* Define “acceptable.” (This is where a definitions rule would be handy.) An acceptable photo ID is defined in Paragraph (a) of the Rule. This may not be necessary, but the agency would be agreeable to rephrasing to say, “the voter's photo identification that is acceptable under Paragraph (a) of this Rule . . . .”

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024



*Page 1, Line 27: Claiming an exemption pursuant to what? G.S. 163-166.16? This is an “exception,” rather than an “exemption.” Exception is explained in the immediately preceding paragraph, so the agency did not believe reiteration here was necessary, and the rules get harder to read for nonlawyer election officials the longer the sentences are. But the agency would be agreeable to rephrasing to say, “an exception to the identification requirement pursuant to G.S. 163-166.16(d).”*

*Page 1, Lines 31-32: Does the photographic identification have to meet any standards? Paragraph (a)? Does the affidavit not need to comply with G.S. 163-166.16? I ask this because the rule states that they “shall be acceptable.” It is unclear if the Board means acceptable in the common parlance or as in defined in Paragraph (a). (This is where a definitions rule would be handy.) This part of the Rule is not intended to address the ultimate determination of acceptability, which is addressed in (c), a Paragraph which in turns points to Paragraph (a) for the acceptability requirement. This is merely instructing county boards that an electronic copy may not be rejected because it is electronic. The agency suggests rephrasing this to clarify.*

*Page 2, Line 19: “...a physical means designed to provide actual notice...” is ambiguous. Consider 26 NCAC 05 .0110(b). In the alternative, who will make the determination whether a means is “designed” to provide actual notice and what criteria will be used in making the determination? The agency proposes clarifying language. The idea is that the county boards should assess whether they need to use overnight delivery, for example, based on how close they are to the canvass. With the clarification, the context should be clear that the county board is making this assessment based on how close they are to canvass.*

*Page 2, Lines 22-27: What is the authority of the BOE to determine that a voter’s right to notice to be heard or present evidence is predicated on a finding that the affidavit is false by a super or perhaps super-super majority? If the county board has ten members, the notice of the opportunity to be heard is triggered not be the majority vote of the county board but only when there is a finding of falsity by nine members? See G.S. 163-166.16(f). A voter whose affidavit’s truthfulness is not being questioned by a sufficient number of board members to reject the affidavit will not require a hearing, because they are not faced with the prospect of their provisional ballot being rejected. See G.S. 163-166.16(f) (“the county board of elections shall find that the provisional ballot is valid unless the county board has grounds to believe the affidavit is false”); Rule section (c)(1) (requiring unanimity for this finding). Procedural due process requirements come into play where there is a cognizable liberty or property interest and there is a “deprivation of that interest by some form of state action.” *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019). If not enough board members are calling into question the affidavit to reject it, there is no prospect of deprivation. Additionally, in the State Board’s judgment, it is not good policy to provide official notification to voters that a governmental entity may be questioning the truthfulness of an affidavit they submitted to the government, if in fact, there is no or very little prospect that the governmental entity will make that judgment. Election officials must be careful not to be perceived as accusing voters of submitting false statements incautiously. As to what the required vote count may be if the legislature were to change the number of county board members to ten, an agency*

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

should not be required to anticipate potential future changes in the law when it is promulgating rules to implement the law in effect right now. If such a law change were to take place, the agency could certainly reconsider the rule, as it could with any existing rule in light of a future statutory change.

*Page 2, Lines 22-27: When and by what procedure would the county board members determine the falsity of an affidavit prior to giving notice? When would this occur?* The county board must meet weekly during the five weeks prior to election day to consider absentee ballots. G.S. 163-230.1(f). It also meets to consider such ballots on election day, at least once during the canvass period, and at the canvass itself. G.S. 163-234. The Rule in Paragraph (c) provides that the board must consider the absentee ballots at the first such meeting after the ballot/application is received (the application is on the ballot envelope). That would be the first opportunity for the board to flag an affidavit provided with an absentee ballot as potentially being false. In terms of procedure, the requisite number of board members identified in the Rule would be required to agree that there is a specific reason, based on facts and not speculation, to find that the affidavit is false.

*Page 2, Line 33: What is a “covered voter”?* That is a defined term in the statutory section identified in the sentence, Part 1 of Article 21A of Chapter 163. *See* G.S. 163-258.2. To avoid confusion, the agency agrees to remove “covered,” since the Rule already states the voter is casting their ballot pursuant to that statutory section that applies only to covered voters.

*Page 3, Line 4-8: This sentence either has too few or too many words.* The agency proposes to split the sentence into two sentences.

*Page 3, Line 10: Explain the relevance of G.S. 163-166.7 and G.S. 163-229.* G.S. 163-166.7 requires the State Board to “promulgate rules for the process of voting,” a process which takes place using multiple methods of voting, including absentee by mail. G.S. 163-229 pertains to the required content on the absentee ballot container envelope which, while relevant, is not necessary to include as an authority for the Rule. The agency proposes to delete that reference.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

**Agency Response to Request for Changes Pursuant to  
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency's statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

Questions contained herein suggest that the rule as written is unclear or there is some ambiguity. If this document includes questions and you do not understand the question, please contact the reviewing attorney to discuss. Failure to respond may result in a staff opinion recommending objection.

Staff may suggest the agency "consider" an idea or language in this document. This is in no way a formal request that the agency adopt the idea or language but rather is offered merely for the agency's consideration which the agency may find preferable and clarifying.

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**If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.**

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: N.C. Board of Elections

RULE CITATION: 08 NCAC 17 .0101

**DEADLINE FOR RECEIPT: March 15, 2024**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*Page 4, Lines 6-7: What does the Board mean by “in the light most favorable to that person”? RRC counsel is aware of the standard in a summary judgment proceeding which does not appear applicable in this non-adversarial setting. The phrase means if there are multiple reasonable inferences that could be drawn from the evidence regarding a voter’s name that is before a poll worker—those in favor of deeming the voter’s name on the ID to be substantially equivalent to the name on the registration rolls and those that don’t—the inferences should be drawn in favor of the names being deemed substantially equivalent. See, e.g., *State v. Beck*, 385 N.C. 435, 438, 894 S.E.2d 729, 732 (2023) (explaining that the phrase means that when reviewing competing evidence on a fact finding, “every reasonable inference [is] to be drawn” in favor of the relevant party). A determination of substantial equivalence requires some degree of judgment—i.e., assessing the evidence and drawing a conclusion. This would be true whether that judgment takes place in an adversarial setting or otherwise. So a poll worker judging this issue pursuant to this instruction is not altogether different from courts using this mode of analysis when reviewing evidence to derive a conclusion. For additional context, this language appears in the current temporary rule and the agency has not proposed changing that language in the permanent rule before the Commission. The Commission has approved this language three times in the recent past in various iterations of the photo ID rule.*

*Page 4, Lines 29-31: Does the procedure only apply in the event someone is voting a provisional ballot because “the voter’s record does not appear on the poll book”? Yes. That is because there is otherwise no other name to compare the ID’s name to.*

*Page 4, Lines 32-33: Evidence of what? Evidence pertaining to the examination of the photo identification provided by the person presenting to vote, which is the context of this provision: “The election official examining photo identification provided by a person presenting to vote shall not require the voter to provide any additional evidence outside the four corners of the photo identification.” Perhaps this would be clearer if the provision was restated this way: “The election official, when examining the photo identification of a person presenting to vote, shall not require that person*

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Commission Counsel

Date submitted to agency: March 1, 2024

to provide any evidence regarding the identification apart from the identification itself.” For additional context, this language appears in the current temporary rule and the agency has not proposed changing that language in the permanent rule before the Commission. The Commission has approved this language three times in the recent past in various iterations of the photo ID rule.

*Page 4, Lines 32-33: Can the election official accept additional evidence volunteered or is their analysis limited to the four corners? See G.S. 163-166.16(b).* Yes, they may consider such volunteered evidence. See (a)(2), requiring consideration of the “totality of the circumstances” for the resemblance determination, and (a)(3), requiring consideration of “the totality of the circumstances,” and “all evidence, along with any explanation or documentation voluntarily offered by the person presenting to vote” for the name equivalence determination. The reason for this is that the statute requires a voter to present photo ID only and then for the official to “verify that the photograph is that of the person seeking to vote.” G.S. 163-166.16(b). Election officials have no authority to *require* a voter to provide other evidence for that verification. On the other hand, the statutes do not prohibit an election official from considering any information volunteered by the voter to make the proper verification. And in the State Board’s judgment, election officials should do so. For example, if a voter checks in under the name “Lucille Arnaz,” which appears on the voter rolls, and presents an ID for “Lucille Ball,” the election official should be able to take into account Lucille’s explanation that she recently got married to Desi Arnaz but hasn’t changed her driver’s license yet.

*Page 4, Lines 32-33: Aren’t precinct judges “election officials”? Doesn’t this fly in the face of G.S. 163-88 which requires the judges’ “examination” of qualifications to vote? (This is where a definitions rule would be handy.)* G.S. 163-88 pertains to the quasijudicial role played by all three voting site judges when they are called upon to adjudicate a challenge to a voter’s qualifications. In contrast, this section of the Rule at issue pertains to the election official checking in a voter to confirm that the voter is eligible to receive a ballot, pursuant to G.S. 163-166.7(a), and more specifically, confirming that the photo ID presented by the voter is that person’s, pursuant to G.S. 163-166.16. A check-in official need not be a judge but may be another precinct official, such as a precinct assistant. See G.S. 163-41; G.S. 163-42. So it is helpful to use the broader term “election official,” which is the language that has been approved by the Commission in three prior versions of this rule in recent years. Please also see the response to the last query for further explanation for the legal authority and policymaking decision with regard to this provision.

*Page 6, Lines 22-26: What is the authority of the BOE to determine that a provisional voter’s right to notice to be heard or present evidence is predicated on a finding that the affidavit is false by a super or perhaps super-super majority? If the county board has ten members, the notice of the opportunity to be heard is triggered not be the majority vote of the county board but only when there is a finding of falsity by nine members? See G.S. 163-166.16(f).* A voter whose affidavit’s truthfulness is not being questioned by a sufficient number of board members to reject the affidavit will not require a hearing, because they are not faced with the prospect of their provisional ballot being rejected. See G.S. 163-166.16(f) (“the county board of elections shall find that the provisional ballot is valid unless the county board has grounds to believe the

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Commission Counsel

Date submitted to agency: March 1, 2024

affidavit is false”); Rule section (e)(1) (requiring unanimity for this finding). Procedural due process requirements come into play where there is a cognizable liberty or property interest and there is a “deprivation of that interest by some form of state action.” *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019). If not enough board members are calling into question the affidavit to reject it, there is no prospect of deprivation. Additionally, in the State Board’s judgment, it is not good policy to provide official notification to voters that a governmental entity may be questioning the truthfulness of an affidavit they submitted to the government, if in fact, there is no or very little prospect that the governmental entity will make that judgment. Election officials must be careful not to be perceived as accusing voters of submitting false statements incautiously. As to what the required vote count may be if the legislature were to change the number of county board members to ten, an agency should not be required to anticipate potential future changes in the law when it is promulgating rules to implement the law in effect right now. If such a law change were to take place, the agency could certainly reconsider the rule, as it could with any existing rule in light of a future statutory change.

*Page 6, Lines 22-26: When and by what procedure would the county board members determine the falsity of an affidavit prior to giving notice? When would this occur?* During the post-election canvass period, county boards are required to meet between election day and before canvass to consider provisional ballots. G.S. § 163-182.2(a)(4). The State Board also formally advises county boards to meet to consider photo ID provisional ballots early in the canvass period so there is sufficient time to provide notice to any voters whose affidavits are being questioned for the voter to be able to address the board at an open meeting. In terms of procedure, the requisite number of board members identified in the Rule would be required to agree that there is a specific reason, based on facts and not speculation, to find that the affidavit is false. The agency does not recommend prescribing when, or precisely how, in the canvass period this must occur because each county is going to need to schedule its five board members to conduct these tasks based on the needs and schedules of each board and its members, who are volunteer appointees and typically have day jobs. The decision whether to prescribe such procedures in a rule is a policymaking judgment reserved for the agency. *See* G.S. 150B-21.9(a); G.S. 163-22(a).

*Page 6, Lines 22-26: Explain why this change post publication is not a substantial change pursuant to G.S. 150B-21.2(g).* The changes post publication with regard to when notice is triggered are designed to avoid sending unwarranted notice to voters that election officials may be considering their photo ID affidavit to be false when, in fact, those officials are not going to ultimately determine the affidavit is false, either because not enough agree or there are no actual “grounds” for such a finding. G.S. 163-166.16(f). Accordingly, it results in voters who could potentially be subject to unwarranted questioning no longer being subject to such, and therefore does not affect any new persons’ interests, which addresses the first prong of the substantial difference analysis. *See* G.S. 150B-21.1(g). Under the second prong, the subject matter or issue of a county board providing notice to a voter of a potential finding of falsity in their photo ID affidavit was already addressed in the rule. And under the third prong, it would not be “reasonabl[e]” to expect, under the draft of the rule at publication, that county boards would unnecessarily notify voters that their affidavits are being

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

questioned as being false. *Id.* The revisions simply ensure that doesn't happen. Accordingly, the revisions align with what the reasonable expectations would be from the beginning and therefore do not produce an effect that could not have been reasonably expected.

The agency isn't certain if the question here pertains also to the change clarifying that the county board's reason for finding falsity must be "specific" and "based only on facts and not speculation." If so, the need for the board to identify a "reason" for questioning the truth of an affidavit before sending notice to a voter was already addressed in the rule. This change simply clarifies what a "reason" means, to ensure the county boards are implementing this requirement consistent with statute, which permits a board to find an affidavit is false based only upon "grounds to believe" that to be the case. G.S. 163-166.16(f). This will not impact additional persons that would not have already been subject to a finding of falsity, and it will not produce unexpected results since it simply ensures county board actions conform with statute.

*Page 7, Lines 7, 8, and 14: Define "acceptable". (This is where a definitions rule would be handy.)* The acceptability of a photo ID is defined in Paragraph (a) of the Rule. The agency would be agreeable to rephrasing to say, "any other photo identification that meets the requirements of Paragraph (a) of this Rule" in line 7, "photo identification that meets the requirements of Paragraph (a) of this Rule" in line 8, and "photo identification meets the requirements of Paragraph (a) of this Rule" in line 14.

*Page 7, Lines 12-16: County Board members cannot ask the provisional voter any questions? Are they too limited to the four corners of the identification presented? See Paragraph (b). It would appear that the precinct judges have greater latitude in their hearing than the members of the County Boards. Is that correct?* The county board members would be reviewing the photo identification the same way an election official does at check-in at the voting site—according to Paragraphs (a), (b), and (c) of the Rule. See Subparagraph (e)(2). So this is akin to the board conducting a de novo review of the initial staff member's recommendation, which makes sense because the board is ultimately responsible for deciding whether to approve any provisional ballot. See G.S. 163-182.2(a)(4). If the question is comparing this situation to how the precinct judges as a group would be considering a "challenge" to a voter's photo ID pursuant to G.S. 163-166.16(b), the agency cannot locate statutory authority that requires this provisional ballot review at the county board to be conducted using procedures mirroring a voter challenge at a precinct. Instead, the statute at issue states, "If the registered voter cannot produce the identification as required in subsection (a) of this section, the registered voter may cast a provisional ballot that is counted only if the registered voter brings an acceptable form of photograph identification listed in subsection (a) of this section to the county board of elections no later than the end of business on the business day prior to the canvass by the county board of elections as provided in G.S. 163-182.5." Perhaps that is a procedural clarification in the statute that the General Assembly could consider.

*Page 7, Lines 17-19: As determined by who? The County Board?* Yes. The county board passes on the validity of provisional ballots. See G.S. 163-182.2(a)(4); G.S. 163-182.17(c)(1). This is why in earlier sections of this subparagraph (e), the staff

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

person initially reviewing the ID is “recommend[ing]” approval or disapproval “to the county board.” And for context, regarding the lines at issue, the determination that the photo ID is “an acceptable type of photo identification under Subparagraph (a)(1) of this Rule” is a straightforward determination. It is simply determining whether the ID is on the list of the types of ID that can be used to satisfy the photo ID requirement. *See* G.S. 163-166.16(a).

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel  
Date submitted to agency: March 1, 2024



## **Burgos, Alexander N**

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**From:** Peaslee, William W  
**Sent:** Friday, March 1, 2024 11:53 AM  
**To:** Cox, Paul  
**Cc:** Burgos, Alexander N  
**Subject:** 08 NCAC 17 .0101  
**Attachments:** 03.2024 - Board of Elections Request for Technical Changes.docx

Good morning Paul,

Attached is the request for changes on the above captioned rule.

As always if you have any questions or concerns, please feel free to contact me.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 17 .0109

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>

**Sent:** Friday, March 15, 2024 5:17 PM

**To:** Cox, Paul <paul.cox@ncsbe.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>

**Subject:** RE: 08 NCAC 17 .0109

Ok, I will only address the rules and responses highlighted.

Rule 109:

Page 1, Lines 27-29, are you telling staff that they must include the deadline in the notice or are you establishing deadline? Who are you regulating in this sentence?

Page 1, Lines 31-33: A definition of “photocopy” would be helpful here (as the GA did not define it) and would perhaps negate the need for Lines 31-33. It appears that the BOE is making a distinction between a “photocopy” and an “electronic copy.” What is the difference?

Page 2, Lines 19-21: The language is unclear. It says that the notice can be sent via U.S. mail or commercial carrier service. That part is clear. But then it become cloudy by the phrase “designed to provide the voter actual notice.” “Actual notice” is a legal concept subject to some dispute and undefined in the rule. Is simply depositing it in the US Mail first class “actual notice”? is the Board requiring returned receipt? Certified mail? Is FedEx ground acceptable? Must it be next day service? The BOE needs to be clear what it wants the County boards to do. Put another way, tell me what services are “designed to provide actual notice”? Put those in the rule. Then it’s clear.

Page 3, Line 35: That works.

Page 3, Line 9: That works.

Response:

Generally, anytime you cross reference, it removes ambiguity in the absence of a good definition rule.

Hope this helps. Have a good weekend.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

(984) 236-1939

[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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Email correspondence to and from this address may be subject to the North Carolina Public Records Law and may be disclosed to third parties by an authorized state official.

## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 17 .0109

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**From:** Peaslee, William W <bill.peaslee@oah.nc.gov>

**Sent:** Friday, March 15, 2024 3:07 PM

**To:** Cox, Paul <paul.cox@ncsbe.gov>

**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>

**Subject:** RE: 08 NCAC 17 .0109

Thank you.

Did you intend to send a revised .0101?

**William W. Peaslee**

**Rules Review Commission Counsel / Legislative Liaison**

Office of Administrative Hearings

1711 New Hope Church Road

Raleigh NC, 27609

(984) 236-1939

[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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## **Burgos, Alexander N**

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**Subject:** FW: 08 NCAC 17 .0109  
**Attachments:** 08 NCAC 17 .0109 - Adopted by SBE 021524 - revised per RRC suggestions.docx; NCSBE Response - Board of Elections Request for Technical Changes Rule .0109.docx; NCSBE Response - Board of Elections Request for Technical Changes Rule .0101.docx

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**From:** Cox, Paul <paul.cox@ncsbe.gov>  
**Sent:** Friday, March 15, 2024 2:55 PM  
**To:** Peaslee, William W <bill.peaslee@oah.nc.gov>  
**Cc:** Burgos, Alexander N <alexander.burgos@oah.nc.gov>; SBOE\_Grp - Legal <Legal@ncsbe.gov>  
**Subject:** RE: 08 NCAC 17 .0109

Hi Bill,

Attached are our responses to your suggestions. I've highlighted in yellow a few ideas that I did not yet put into the rules, since they were tentative responses to clarifying questions you had rather than specific suggestions you had for consideration. It would be helpful to know if you think the clarifying answers are sufficient or whether you think the changes would be advisable.

Many thanks for your work on these rules.

Best regards,

**Paul Cox**  
General Counsel  
NORTH CAROLINA STATE BOARD OF ELECTIONS  
RALEIGH, NC 27611  
919.814.0700  
[www.ncsbe.gov](http://www.ncsbe.gov)

1 08 NCAC 17 .0109 is adopted with changes as published in 38:10 NCR 614 as follows:

2  
3 **08 NCAC 17 .0109 PHOTO IDENTIFICATION FOR ABSENTEE-BY-MAIL BALLOTS**

4 (a) Identification Requirement for Absentee-by-Mail Ballots. Photo identification accompanying a voter's absentee  
5 ballot pursuant to G.S. 163-230.1(f1) is acceptable if it is a photocopy of a type of photo identification acceptable for  
6 voting purposes under 08 NCAC 17 .0101(a)(1), is readable, and the name appearing on the identification is the same  
7 as or substantially equivalent to the name contained in the voter's voter registration record in accordance with 08  
8 NCAC 17 .0101(a)(3). As used in this Rule, "readable" means that, on the photocopy of identification required by this  
9 Rule, the name on the identification can be read and the photograph depicts a person, as opposed to displaying, for  
10 example, a mere shadow or outline of a person. A photo identification shall not be rejected due to differences between  
11 the address appearing on an absentee voter's photo identification and any address contained in the voter's absentee  
12 request form, absentee ballot application, or registration record. A copy of photo identification that is acceptable under  
13 this Rule need include only the side of the identification (or, if the identification is a booklet, the page of the  
14 identification) where the person's name and photo appears.

15 (b) Initial Review by County Board Staff. County board staff shall, upon receipt of a voter's absentee ballot  
16 application, determine whether the application is accompanied by a photocopy of photo identification that is  
17 acceptable under Paragraph (a) of this Rule, or, if the application is accompanied by an affidavit claiming an exception  
18 to the identification requirement pursuant to G.S. 163-166.16(d), determine whether the affidavit includes the  
19 affirmations required by G.S. 163-166.16(d) for that exception and, if applicable, the personal identification number  
20 required to be provided by G.S. 163-230.1(g)(2). Staff shall review the registration records to determine whether the  
21 number provided matches the corresponding number in the registration records. The number required to be provided  
22 by G.S. 163-230.1(g)(2) is deficient only if it does not match the corresponding number listed in the voter's voter  
23 registration record.

24 If staff identify any deficiency, they shall mail written notice of the deficiency to the voter within one business  
25 day of identifying the deficiency, informing the voter that the voter, the voter's verifiable legal guardian or near  
26 relative, or a person of the voter's choice if the voter needs assistance due to the voter's disability, may provide a  
27 photocopy of the voter's acceptable photo identification or a completed affidavit claiming an **exception**. **The**  
28 **photocopy or affidavit must be received by** ~~to~~ the county board by 5 p.m. on the business day before the county  
29 canvass. The notice of the deficiency shall also be provided by telephone or email if the telephone number or email  
30 address was provided by the voter on the request form for the absentee ballot. The voter may transmit either of the  
31 above documentation curing the deficiency in person, by mail, or by email. **The voter may submit an** ~~An~~ electronic  
32 copy of the voter's photographic identification or signed affidavit claiming an exception to the identification  
33 **requirement**, ~~requirement, if provided via email, shall be acceptable.~~

34 (c) Final Review by County Board. The county board shall, at the first meeting held pursuant to G.S. 163-230.1(f)  
35 after the application and ballot is received, proceed as follows:

- 36 (1) If the voter has submitted a photocopy of their photo identification, the county board shall make its  
37 determination whether the identification is acceptable under Paragraph (a) of this Rule. A final

determination that the photocopy of photo identification is not acceptable under Paragraph (a) of this Rule shall require a unanimous vote by the county board. If the county board makes a final determination that a voter's photocopy of photo identification is not acceptable, staff shall notify the voter as provided in Paragraph (b) of this Rule, and the county board shall reserve its final decision on the approval of the absentee application until the next official meeting after it receives documentation curing the deficiency or the county canvass, whichever occurs first.

(2) If the voter has completed an affidavit claiming an exception to the identification requirement pursuant to G.S. 163-166.16(d) and is otherwise eligible to vote, the county board may reject that person's ballot only if the county board unanimously finds that the affidavit is false. The county board shall substantiate any finding of falsity with grounds recorded in a written ~~decision~~ decision, and those grounds shall be based only on facts and not speculation. Before rejecting a voter's ballot because of a finding of falsity, the county board shall provide the voter advance notice and an opportunity to address the county board prior to the canvass on any grounds that the county board is considering regarding the falsity of the affidavit, ~~provided there is sufficient time remaining before the county canvass to send a notice that will be delivered in advance of the opportunity to address the county board~~. The notice shall identify the specific reasons the county board is considering the affidavit to be potentially false and inform the voter how the voter may address the reasons for potential falsity, which shall include the ~~option~~ options to provide a written explanation or documentation or to address the board at a meeting in person. The county board shall send the notice using a method of delivery via U.S. Mail or commercial courier service that is notice shall be provided by a means of physical delivery designed to provide the voter actual notice in advance of the opportunity to address the county board, provided there is sufficient time remaining before the county canvass to send a notice that will be delivered in advance of the opportunity to address the county board, and by any email address or phone number that the county board possesses for the voter. The notice and opportunity to address the county board provided for in this Subparagraph shall be offered only to those voters for whom a number of county board members equal to one less than all of the members of the county board board, or more, has have identified a specific reason reason, based only on facts and not speculation, to find that the affidavit claiming an exception to the identification requirement is false.

(3) If a voter's photocopy of photo identification or affidavit claiming an exception to the identification requirement pursuant to G.S. 163-166.16(d) is deemed deficient upon initial review under Paragraph (b) of this Rule, the county board shall reserve its final decision on the approval of the absentee application until the next official meeting after it receives documentation curing the deficiency identified pursuant to Paragraph (b) of this Rule or the county canvass, whichever occurs first.

(d) Exception for Military and Overseas Voters. A covered voter who is casting a ballot pursuant to G.S. 163, Article 21A, Part 1 is not required to submit a photocopy of acceptable photo identification under Paragraph (a) of this Rule or claim an exception under G.S. 163-166.16(d).

1 (e) Return of Original Form of Identification. If a voter sends their original form of photo identification in the  
2 container-return envelope, or if a voter or other person permitted to return the voter's absentee ballot hand-delivers an  
3 absentee ballot to the county board of elections that is not accompanied by a photocopy of the voter's photo  
4 identification and the voter or other person has the voter's photo identification that is a type acceptable for voting  
5 purposes under 08 NCAC 17 .0101(a)(1) on hand, the county board shall make a photocopy of the identification,  
6 which shall serve as an acceptable photo identification accompanying the voter's absentee ballot. When a voter sends  
7 their original form of photo identification in the container-return envelope, the county board shall notify the voter by  
8 mail and by any email address or phone number that the county board possesses for the voter that the original photo  
9 identification will be returned to the voter voter. The county board and shall use a method of return that documents  
10 receipt of the photo identification.

11  
12 *History Note: Authority G.S. 163-22; 163-166.7; 163-166.16; ~~163-229~~; 163-230.1;*  
13 *Temporary Adoption Eff. August 23, 2019; January 1, 2020;*  
14 *Temporary Rule Expired Eff. October 11, 2020;*  
15 *Temporary Adoption Eff. August 1, 2023;*  
16 *Eff. April 1, 2024.*  
17



**Agency Response to Request for Changes Pursuant to  
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency's statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

Questions contained herein suggest that the rule as written is unclear or there is some ambiguity. If this document includes questions and you do not understand the question, please contact the reviewing attorney to discuss. Failure to respond may result in a staff opinion recommending objection.

Staff may suggest the agency "consider" an idea or language in this document. This is in no way a formal request that the agency adopt the idea or language but rather is offered merely for the agency's consideration which the agency may find preferable and clarifying.

To properly submit rewritten rules, please refer to the following Rules in the NC Administrative Code:

- Rule 26 NCAC 02C .0108 – The Rule addresses general formatting.
- Rule 26 NCAC 02C .0404 – The Rule addresses changing the introductory statement.
- Rule 26 NCAC 02C .0405 – The Rule addresses properly formatting changes made after publication in the NC Register.

**Note the following general instructions:**

1. You must submit the revised rule via email to [oah.rules@oah.nc.gov](mailto:oah.rules@oah.nc.gov) and copy RRC Counsel. The electronic copy must be saved as the official rule name (XX NCAC XXXX).
2. For rules longer than one page, insert a page number.
3. Use line numbers; if the rule spans more than one page, have the line numbers reset at one for each page.
4. Do not use track changes. Make all changes using manual strikethroughs, underlines and highlighting.
5. You cannot change just one part of a word. For example:
  - Wrong: "~~a~~Association"
  - Right: "~~association~~ Association"
6. Treat punctuation as part of a word. For example:
  - Wrong: "day~~;~~ and"
  - Right: "~~day,~~ day, and"
7. Formatting instructions and examples may be found at:  
[www.ncoah.com/rules/examples.html](http://www.ncoah.com/rules/examples.html)

**If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.**

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: N.C. State Board of Elections

RULE CITATION: 08 NCAC 17 .0109

**DEADLINE FOR RECEIPT: March 15, 2024**

***PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.***

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*Page 1, Line 9:* Consider: “and the photograph depicts discernable facial features such that the depicted person could be identified if he or she appeared in person.” The agency appreciates this suggestion, which was also considered but not adopted during the temporary rulemaking process last summer. The reason for declining this suggestion was/is: The definition of readable in the Rule sets a minimum readability standard for the photo to ensure that the photo ID does contain a photo of a person, but the photo does not need to be of the same quality as a photo ID presented by a voter voting in person for two reasons. First, the photo ID submitted with an absentee-by-mail ballot is a photocopy of the photo ID that will be made with a wide variety of at-home printers and copiers. Requiring the same or similar clarity of the photo on a copy as that on the original photo ID would be a burden on the voter. Second, no reasonable resemblance determination is made (or could be made) with an absentee-by-mail ballot. So the county board staff and members reviewing the copy of the photo ID have no need to review the voter’s facial features. Instead, a county board needs only to ensure that the photo ID is an acceptable form of photo ID that does indeed have a photo of a person and the name is the same as or substantially equivalent to the voter’s name in the pollbook. Accordingly, it is doubtful that the burden imposed by such an image resolution requirement would serve any legitimate governmental purpose.

*Page 1, Line 26-27:* Does the photocopy or affidavit need to be provided by or received by 5 P.M. on the business day before the county canvass? The agency agrees to clarify that this is a receipt deadline.

*Page 1, Line 27:* Define “acceptable.” (This is where a definitions rule would be handy.) An acceptable photo ID is defined in Paragraph (a) of the Rule. This may not be necessary, but the agency would be agreeable to rephrasing to say, “the voter's photo identification that is acceptable under Paragraph (a) of this Rule . . . .”

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

*Page 1, Line 27: Claiming an exemption pursuant to what? G.S. 163-166.16? This is an “exception,” rather than an “exemption.” Exception is explained in the immediately preceding paragraph, so the agency did not believe reiteration here was necessary, and the rules get harder to read for nonlawyer election officials the longer the sentences are. But the agency would be agreeable to rephrasing to say, “an exception to the identification requirement pursuant to G.S. 163-166.16(d).”*

*Page 1, Lines 31-32: Does the photographic identification have to meet any standards? Paragraph (a)? Does the affidavit not need to comply with G.S. 163-166.16? I ask this because the rule states that they “shall be acceptable.” It is unclear if the Board means acceptable in the common parlance or as in defined in Paragraph (a). (This is where a definitions rule would be handy.) This part of the Rule is not intended to address the ultimate determination of acceptability, which is addressed in (c), a Paragraph which in turns points to Paragraph (a) for the acceptability requirement. This is merely instructing county boards that an electronic copy may not be rejected because it is electronic. The agency suggests rephrasing this to clarify.*

*Page 2, Line 19: “...a physical means designed to provide actual notice...” is ambiguous. Consider 26 NCAC 05 .0110(b). In the alternative, who will make the determination whether a means is “designed” to provide actual notice and what criteria will be used in making the determination? The agency proposes clarifying language. The idea is that the county boards should assess whether they need to use overnight delivery, for example, based on how close they are to the canvass. With the clarification, the context should be clear that the county board is making this assessment based on how close they are to canvass.*

*Page 2, Lines 22-27: What is the authority of the BOE to determine that a voter’s right to notice to be heard or present evidence is predicated on a finding that the affidavit is false by a super or perhaps super-super majority? If the county board has ten members, the notice of the opportunity to be heard is triggered not be the majority vote of the county board but only when there is a finding of falsity by nine members? See G.S. 163-166.16(f). A voter whose affidavit’s truthfulness is not being questioned by a sufficient number of board members to reject the affidavit will not require a hearing, because they are not faced with the prospect of their provisional ballot being rejected. See G.S. 163-166.16(f) (“the county board of elections shall find that the provisional ballot is valid unless the county board has grounds to believe the affidavit is false”); Rule section (c)(1) (requiring unanimity for this finding). Procedural due process requirements come into play where there is a cognizable liberty or property interest and there is a “deprivation of that interest by some form of state action.” *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019). If not enough board members are calling into question the affidavit to reject it, there is no prospect of deprivation. Additionally, in the State Board’s judgment, it is not good policy to provide official notification to voters that a governmental entity may be questioning the truthfulness of an affidavit they submitted to the government, if in fact, there is no or very little prospect that the governmental entity will make that judgment. Election officials must be careful not to be perceived as accusing voters of submitting false statements incautiously. As to what the required vote count may be if the legislature were to change the number of county board members to ten, an agency*

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

should not be required to anticipate potential future changes in the law when it is promulgating rules to implement the law in effect right now. If such a law change were to take place, the agency could certainly reconsider the rule, as it could with any existing rule in light of a future statutory change.

*Page 2, Lines 22-27: When and by what procedure would the county board members determine the falsity of an affidavit prior to giving notice? When would this occur?* The county board must meet weekly during the five weeks prior to election day to consider absentee ballots. G.S. 163-230.1(f). It also meets to consider such ballots on election day, at least once during the canvass period, and at the canvass itself. G.S. 163-234. The Rule in Paragraph (c) provides that the board must consider the absentee ballots at the first such meeting after the ballot/application is received (the application is on the ballot envelope). That would be the first opportunity for the board to flag an affidavit provided with an absentee ballot as potentially being false. In terms of procedure, the requisite number of board members identified in the Rule would be required to agree that there is a specific reason, based on facts and not speculation, to find that the affidavit is false.

*Page 2, Line 33: What is a “covered voter”?* That is a defined term in the statutory section identified in the sentence, Part 1 of Article 21A of Chapter 163. *See* G.S. 163-258.2. To avoid confusion, the agency agrees to remove “covered,” since the Rule already states the voter is casting their ballot pursuant to that statutory section that applies only to covered voters.

*Page 3, Line 4-8: This sentence either has too few or too many words.* The agency proposes to split the sentence into two sentences.

*Page 3, Line 10: Explain the relevance of G.S. 163-166.7 and G.S. 163-229.* G.S. 163-166.7 requires the State Board to “promulgate rules for the process of voting,” a process which takes place using multiple methods of voting, including absentee by mail. G.S. 163-229 pertains to the required content on the absentee ballot container envelope which, while relevant, is not necessary to include as an authority for the Rule. The agency proposes to delete that reference.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

**Agency Response to Request for Changes Pursuant to  
N.C. Gen. Stat. § 150B-21.10**

Staff reviewed these Rules to ensure that each Rule is within the agency's statutory authority, reasonably necessary, clear and unambiguous, and adopted in accordance with Part 2 of the North Carolina Administrative Procedure Act. Following review, staff has issued this document that may request changes pursuant to G.S. 150B-21.10 from your agency or ask clarifying questions.

Questions contained herein suggest that the rule as written is unclear or there is some ambiguity. If this document includes questions and you do not understand the question, please contact the reviewing attorney to discuss. Failure to respond may result in a staff opinion recommending objection.

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5. You cannot change just one part of a word. For example:
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**If you have any questions regarding proper formatting of edits after reviewing the rules and examples, please contact the reviewing attorney.**

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10

AGENCY: N.C. Board of Elections

RULE CITATION: 08 NCAC 17 .0101

**DEADLINE FOR RECEIPT: March 15, 2024**

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The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may email the reviewing attorney to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following changes be made:

*Page 4, Lines 6-7: What does the Board mean by “in the light most favorable to that person”? RRC counsel is aware of the standard in a summary judgment proceeding which does not appear applicable in this non-adversarial setting. The phrase means if there are multiple reasonable inferences that could be drawn from the evidence regarding a voter’s name that is before a poll worker—those in favor of deeming the voter’s name on the ID to be substantially equivalent to the name on the registration rolls and those that don’t—the inferences should be drawn in favor of the names being deemed substantially equivalent. See, e.g., *State v. Beck*, 385 N.C. 435, 438, 894 S.E.2d 729, 732 (2023) (explaining that the phrase means that when reviewing competing evidence on a fact finding, “every reasonable inference [is] to be drawn” in favor of the relevant party). A determination of substantial equivalence requires some degree of judgment—i.e., assessing the evidence and drawing a conclusion. This would be true whether that judgment takes place in an adversarial setting or otherwise. So a poll worker judging this issue pursuant to this instruction is not altogether different from courts using this mode of analysis when reviewing evidence to derive a conclusion. For additional context, this language appears in the current temporary rule and the agency has not proposed changing that language in the permanent rule before the Commission. The Commission has approved this language three times in the recent past in various iterations of the photo ID rule.*

*Page 4, Lines 29-31: Does the procedure only apply in the event someone is voting a provisional ballot because “the voter’s record does not appear on the poll book”? Yes. That is because there is otherwise no other name to compare the ID’s name to.*

*Page 4, Lines 32-33: Evidence of what? Evidence pertaining to the examination of the photo identification provided by the person presenting to vote, which is the context of this provision: “The election official examining photo identification provided by a person presenting to vote shall not require the voter to provide any additional evidence outside the four corners of the photo identification.” Perhaps this would be clearer if the provision was restated this way: “The election official, when examining the photo identification of a person presenting to vote, shall not require that person*

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

to provide any evidence regarding the identification apart from the identification itself.” For additional context, this language appears in the current temporary rule and the agency has not proposed changing that language in the permanent rule before the Commission. The Commission has approved this language three times in the recent past in various iterations of the photo ID rule.

*Page 4, Lines 32-33: Can the election official accept additional evidence volunteered or is their analysis limited to the four corners? See G.S. 163-166.16(b).* Yes, they may consider such volunteered evidence. See (a)(2), requiring consideration of the “totality of the circumstances” for the resemblance determination, and (a)(3), requiring consideration of “the totality of the circumstances,” and “all evidence, along with any explanation or documentation voluntarily offered by the person presenting to vote” for the name equivalence determination. The reason for this is that the statute requires a voter to present photo ID only and then for the official to “verify that the photograph is that of the person seeking to vote.” G.S. 163-166.16(b). Election officials have no authority to *require* a voter to provide other evidence for that verification. On the other hand, the statutes do not prohibit an election official from considering any information volunteered by the voter to make the proper verification. And in the State Board’s judgment, election officials should do so. For example, if a voter checks in under the name “Lucille Arnaz,” which appears on the voter rolls, and presents an ID for “Lucille Ball,” the election official should be able to take into account Lucille’s explanation that she recently got married to Desi Arnaz but hasn’t changed her driver’s license yet.

*Page 4, Lines 32-33: Aren’t precinct judges “election officials”? Doesn’t this fly in the face of G.S. 163-88 which requires the judges’ “examination” of qualifications to vote? (This is where a definitions rule would be handy.)* G.S. 163-88 pertains to the quasijudicial role played by all three voting site judges when they are called upon to adjudicate a challenge to a voter’s qualifications. In contrast, this section of the Rule at issue pertains to the election official checking in a voter to confirm that the voter is eligible to receive a ballot, pursuant to G.S. 163-166.7(a), and more specifically, confirming that the photo ID presented by the voter is that person’s, pursuant to G.S. 163-166.16. A check-in official need not be a judge but may be another precinct official, such as a precinct assistant. See G.S. 163-41; G.S. 163-42. So it is helpful to use the broader term “election official,” which is the language that has been approved by the Commission in three prior versions of this rule in recent years. Please also see the response to the last query for further explanation for the legal authority and policymaking decision with regard to this provision.

*Page 6, Lines 22-26: What is the authority of the BOE to determine that a provisional voter’s right to notice to be heard or present evidence is predicated on a finding that the affidavit is false by a super or perhaps super-super majority? If the county board has ten members, the notice of the opportunity to be heard is triggered not be the majority vote of the county board but only when there is a finding of falsity by nine members? See G.S. 163-166.16(f).* A voter whose affidavit’s truthfulness is not being questioned by a sufficient number of board members to reject the affidavit will not require a hearing, because they are not faced with the prospect of their provisional ballot being rejected. See G.S. 163-166.16(f) (“the county board of elections shall find that the provisional ballot is valid unless the county board has grounds to believe the

William W. Peaslee  
Commission Counsel

Date submitted to agency: March 1, 2024

affidavit is false”); Rule section (e)(1) (requiring unanimity for this finding). Procedural due process requirements come into play where there is a cognizable liberty or property interest and there is a “deprivation of that interest by some form of state action.” *Accident, Injury & Rehab., PC v. Azar*, 943 F.3d 195, 203 (4th Cir. 2019). If not enough board members are calling into question the affidavit to reject it, there is no prospect of deprivation. Additionally, in the State Board’s judgment, it is not good policy to provide official notification to voters that a governmental entity may be questioning the truthfulness of an affidavit they submitted to the government, if in fact, there is no or very little prospect that the governmental entity will make that judgment. Election officials must be careful not to be perceived as accusing voters of submitting false statements incautiously. As to what the required vote count may be if the legislature were to change the number of county board members to ten, an agency should not be required to anticipate potential future changes in the law when it is promulgating rules to implement the law in effect right now. If such a law change were to take place, the agency could certainly reconsider the rule, as it could with any existing rule in light of a future statutory change.

*Page 6, Lines 22-26: When and by what procedure would the county board members determine the falsity of an affidavit prior to giving notice? When would this occur?* During the post-election canvass period, county boards are required to meet between election day and before canvass to consider provisional ballots. G.S. § 163-182.2(a)(4). The State Board also formally advises county boards to meet to consider photo ID provisional ballots early in the canvass period so there is sufficient time to provide notice to any voters whose affidavits are being questioned for the voter to be able to address the board at an open meeting. In terms of procedure, the requisite number of board members identified in the Rule would be required to agree that there is a specific reason, based on facts and not speculation, to find that the affidavit is false. The agency does not recommend prescribing when, or precisely how, in the canvass period this must occur because each county is going to need to schedule its five board members to conduct these tasks based on the needs and schedules of each board and its members, who are volunteer appointees and typically have day jobs. The decision whether to prescribe such procedures in a rule is a policymaking judgment reserved for the agency. *See* G.S. 150B-21.9(a); G.S. 163-22(a).

*Page 6, Lines 22-26: Explain why this change post publication is not a substantial change pursuant to G.S. 150B-21.2(g).* The changes post publication with regard to when notice is triggered are designed to avoid sending unwarranted notice to voters that election officials may be considering their photo ID affidavit to be false when, in fact, those officials are not going to ultimately determine the affidavit is false, either because not enough agree or there are no actual “grounds” for such a finding. G.S. 163-166.16(f). Accordingly, it results in voters who could potentially be subject to unwarranted questioning no longer being subject to such, and therefore does not affect any new persons’ interests, which addresses the first prong of the substantial difference analysis. *See* G.S. 150B-21.1(g). Under the second prong, the subject matter or issue of a county board providing notice to a voter of a potential finding of falsity in their photo ID affidavit was already addressed in the rule. And under the third prong, it would not be “reasonabl[e]” to expect, under the draft of the rule at publication, that county boards would unnecessarily notify voters that their affidavits are being

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questioned as being false. *Id.* The revisions simply ensure that doesn't happen. Accordingly, the revisions align with what the reasonable expectations would be from the beginning and therefore do not produce an effect that could not have been reasonably expected.

The agency isn't certain if the question here pertains also to the change clarifying that the county board's reason for finding falsity must be "specific" and "based only on facts and not speculation." If so, the need for the board to identify a "reason" for questioning the truth of an affidavit before sending notice to a voter was already addressed in the rule. This change simply clarifies what a "reason" means, to ensure the county boards are implementing this requirement consistent with statute, which permits a board to find an affidavit is false based only upon "grounds to believe" that to be the case. G.S. 163-166.16(f). This will not impact additional persons that would not have already been subject to a finding of falsity, and it will not produce unexpected results since it simply ensures county board actions conform with statute.

*Page 7, Lines 7, 8, and 14: Define "acceptable". (This is where a definitions rule would be handy.)* The acceptability of a photo ID is defined in Paragraph (a) of the Rule. The agency would be agreeable to rephrasing to say, "any other photo identification that meets the requirements of Paragraph (a) of this Rule" in line 7, "photo identification that meets the requirements of Paragraph (a) of this Rule" in line 8, and "photo identification meets the requirements of Paragraph (a) of this Rule" in line 14.

*Page 7, Lines 12-16: County Board members cannot ask the provisional voter any questions? Are they too limited to the four corners of the identification presented? See Paragraph (b). It would appear that the precinct judges have greater latitude in their hearing than the members of the County Boards. Is that correct?* The county board members would be reviewing the photo identification the same way an election official does at check-in at the voting site—according to Paragraphs (a), (b), and (c) of the Rule. See Subparagraph (e)(2). So this is akin to the board conducting a de novo review of the initial staff member's recommendation, which makes sense because the board is ultimately responsible for deciding whether to approve any provisional ballot. See G.S. 163-182.2(a)(4). If the question is comparing this situation to how the precinct judges as a group would be considering a "challenge" to a voter's photo ID pursuant to G.S. 163-166.16(b), the agency cannot locate statutory authority that requires this provisional ballot review at the county board to be conducted using procedures mirroring a voter challenge at a precinct. Instead, the statute at issue states, "If the registered voter cannot produce the identification as required in subsection (a) of this section, the registered voter may cast a provisional ballot that is counted only if the registered voter brings an acceptable form of photograph identification listed in subsection (a) of this section to the county board of elections no later than the end of business on the business day prior to the canvass by the county board of elections as provided in G.S. 163-182.5." Perhaps that is a procedural clarification in the statute that the General Assembly could consider.

*Page 7, Lines 17-19: As determined by who? The County Board?* Yes. The county board passes on the validity of provisional ballots. See G.S. 163-182.2(a)(4); G.S. 163-182.17(c)(1). This is why in earlier sections of this subparagraph (e), the staff

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person initially reviewing the ID is “recommend[ing]” approval or disapproval “to the county board.” And for context, regarding the lines at issue, the determination that the photo ID is “an acceptable type of photo identification under Subparagraph (a)(1) of this Rule” is a straightforward determination. It is simply determining whether the ID is on the list of the types of ID that can be used to satisfy the photo ID requirement. *See* G.S. 163-166.16(a).

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

William W. Peaslee  
Commission Counsel  
Date submitted to agency: March 1, 2024

## **Burgos, Alexander N**

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**From:** Peaslee, William W  
**Sent:** Friday, March 1, 2024 11:53 AM  
**To:** Cox, Paul  
**Cc:** Burgos, Alexander N  
**Subject:** 08 NCAC 17 .0101  
**Attachments:** 03.2024 - Board of Elections Request for Technical Changes.docx

Good morning Paul,

Attached is the request for changes on the above captioned rule.

As always if you have any questions or concerns, please feel free to contact me.

**William W. Peaslee**  
**Rules Review Commission Counsel / Legislative Liaison**  
Office of Administrative Hearings  
1711 New Hope Church Road  
Raleigh NC, 27609  
(984) 236-1939  
[Bill.Peaslee@oah.nc.gov](mailto:Bill.Peaslee@oah.nc.gov)

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