



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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August 21, 2018

Katelyn Love, Rulemaking Coordinator
Board of Elections and Ethics Enforcement
Sent via email only: katelyn.love@ncsbe.gov

Re: Extension of the Period of Review for Rules 08 NCAC 01 .0106, 08 NCAC 02 .0114, 08 NCAC 05 .0111, 08 NCAC 10B .0109, 08 NCAC 16 .0101-.0104, 08 NCAC 18 .0101-.0102, and 08 NCAC 20 .0101; and Objection to Rules 08 NCAC 01 .0104, 08 NCAC 02 .0110-.0113, 08 NCAC 03 .0101-.0106, .0201-.0202, .0301-.0302, 08 NCAC 04 .0302-.0307, 08 NCAC 06B .0103-.0105, 08 NCAC 08 .0104, 08 NCAC 09 .0106-.0109, and 08 NCAC 10B .0101-.0108

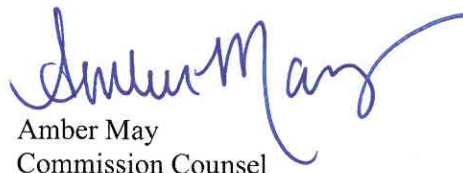
Dear Ms. Love:

At its meeting on August 16, 2018, the Rules Review Commission extended the period of review for 08 NCAC 01 .0106, 08 NCAC 02 .0114, 08 NCAC 05 .0111, 08 NCAC 10B .0109, 08 NCAC 16 .0101-.0104, 08 NCAC 18 .0101-.0102, and 08 NCAC 20 .0101 in accordance with G.S. 150B-21.10 at the request of the agency. Pursuant to 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days.

In addition, the Commission objected to 08 NCAC 01 .0104, 08 NCAC 02 .0110-.0113, 08 NCAC 03 .0101-.0106, .0201-.0202, .0301-.0302, 08 NCAC 04 .0302-.0307, 08 NCAC 06B .0103-.0105, 08 NCAC 08 .0104, 08 NCAC 09 .0106-.0109, and 08 NCAC 10B .0101-.0108 for the reasons set forth in the attached document.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please feel free to contact me.

Sincerely,



Amber May
Commission Counsel

Enclosure

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State Board of Elections and Ethics Enforcement Objections

Rule Number	Reason	Additional Information
08 NCAC 01 .0104	Unclear/Ambiguous Unnecessary	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “immediately” without providing any additional information as to the meaning of this term. In addition, Paragraph (d) provides for a “statutory penalty” without providing a specific cross-reference to say what that penalty is.</p> <p>Further, this Rule contains references to statutes that no longer exist as the statutory references have been recodified.</p> <p>The Commission also found Paragraphs (a) and (c) of this Rule unnecessary as they appear to recite G.S. 163A-1413(a) and (b)(9).</p>
08 NCAC 02 .0112	Unclear/Ambiguous	The Commission found this Rule to be unclear as written as it contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
08 NCAC 02 .0113	Unclear/Ambiguous	The Commission found this Rule to be unclear as written as it contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
08 NCAC 03 .0101	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it contains terms such as “brief”, “intelligent”, and “official” without providing any additional information.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 03 .0102	Unclear/Ambiguous	<p>The Commission found this Rule to be unclear as it includes language such as “if the charges thus filed show” and “by such other methods as the board may adopt” without providing any additional information as to how these determinations will be made. Also, this Rule contains terms such as “official” and “intentional” without providing any additional clarifying information.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 03 .0103	Unclear/Ambiguous	<p>The Commission found this Rule to be unclear as it includes language such as “unless otherwise ordered or permitted by the Board” without providing any additional information as to how this determination will be made.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 03 .0104	Unclear/Ambiguous	<p>The Commission found this Rule to be unclear as it includes language such as “unless otherwise ordered by the Board” without providing any additional information as to how this determination will be made. Also, this Rules requires that affidavits “be served” with no additional information as to how service is to be effectuated.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>

08 NCAC 03 .0105	Unclear/Ambiguous	The Commission found this Rule to be unclear as written as it contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
08 NCAC 03 .0106	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as it includes language such as “brief” without providing any additional clarifying information.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 03 .0201	Unclear/Ambiguous	The Commission found this Rule to be unclear as written as it contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
08 NCAC 03 .0202	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as it includes language such as “forthwith”, “immediately”, and “at once” without providing any additional information as to the meaning of these terms. Also, this Rule indicates that the Board “may” hear a matter “‘de novo,’ or, in the judgement of the Board may be dismissed, remanded to the county or heard on petition and affidavit...” without providing information as to how this determination will be made.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 03 .0301	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as it includes language such as “prompt”, “efficient”, and “proper” without providing any additional information as to the meaning of these terms. Also, this Rule appears to create a waiver that will enable the Board to “suspend these rules” without providing any factors that the Board will use in making that determination.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 03 .0302	Unnecessary	The Commission found that this Rule to be unnecessary as it does not provide any additional requirements or information beyond those contained in G.S. 163A-741(d).
08 NCAC 04 .0302	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it contains an approval standard for modification of voting systems, without providing any additional information as how the approval determination will be made. In addition, this Rule contains ambiguous terms such as “substantially” and “satisfactory.”</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 04 .0304	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as it includes language such as “properly” without providing any additional information as to the meaning of this term.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>

08 NCAC 04 .0305	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “proper” without providing any additional information as to the meaning of this term.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 04 .0306	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as it includes language such as “properly”, “safe”, “appropriate”, “secure”, “proper”, and “direct” without providing any additional information as to the meaning of these terms.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 04 .0307	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “properly” and “accurately” without providing any additional information as to the meaning of these terms.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 06B .0103	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “as soon as practicable” without providing any additional information as to the meaning of this term.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 06B .0104	Unclear/Ambiguous	<p>The Commission found this Rule to be unclear as written as it contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 06B .0105	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “requisite documentation”, “clearly”, and “unavoidable necessity” without providing any additional information as to the meaning of these terms.</p> <p>Further, this Rule contains references to statutes that no longer exist as the statutory references have been recodified.</p>
08 NCAC 08 .0104	Statutory Authority	<p>The Commission objected to this Rule for lack of statutory authority as the only cited authority was repealed in 1993.</p>
08 NCAC 09 .0106	Statutory Authority Unnecessary Unclear/Ambiguous	<p>The Commission objected to this Rule for lack of statutory authority as G.S. 163A-1109 prohibits the use of punch-card ballots and lever machine voting systems and this Rule appears to provide provisions regarding both punch card ballots and lever voting.</p> <p>In addition, the Commission found Paragraph (b) of this Rule to be unnecessary as it recites G.S. 163A-1176 without providing any additional information.</p> <p>The Commission found this Rule to be ambiguous as written as it includes language such as “properly” without providing any additional information as to the meaning of this term.</p>

		Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
08 NCAC 09 .0107	Statutory Authority Unclear/Ambiguous	<p>The Commission objected to this Rule for lack of statutory authority as G.S. 163A-1109 prohibits the use of punch-card ballots and lever machine voting systems and this Rule appears to provide provisions regarding both punch card ballots and lever voting.</p> <p>The Commission found this Rule is unclear or ambiguous as Subparagraph (b)(9) uses the word “should.” It is unclear whether this is intended to be a mandate or an aspiration statement that does not meet the definition of a rule. Also, the history note contains references to statutes that no longer exist as the statutory references have been recodified.</p>
08 NCAC 09 .0108	Statutory Authority Unclear/Ambiguous	<p>The Commission objected to this Rule for lack of statutory authority as G.S. 163A-1109 prohibits the use of punch-card ballots and lever machine voting systems and this Rule appears to provide provisions regarding both punch card ballots and lever voting.</p> <p>The Commission found this Rule is unclear as (d) provides for an appeals process of the recount vote without providing any further information.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 09 .0109	Statutory Authority Unclear/Ambiguous	<p>The Commission objected to this Rule for lack of statutory authority as G.S. 163A-1109 prohibits the use of punch-card ballots and lever machine voting systems and this Rule appears to provide provisions regarding both punch card ballots and lever voting.</p> <p>The Commission found this Rule to be unclear as written.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 10B .0101	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “promptly”, “good cause”, “open means”, “prompt”, “orderly”, “short notice”, “immediately”, “secure”, “properly” and “improperly”, and “clearly” without providing any additional information as to the meaning of these terms.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 10B .0102	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “other approved communications devices”, “other necessary identifiers”, “necessary mechanisms”, “correctly”, “good working order”, “continual adequate”, “proper”, and “official timepiece” without providing any additional information as to the meaning of these terms.</p> <p>In addition, (e) says that “units should be locked... and should remain that way...” It is unclear whether this is a requirement related to the units or if this is an aspirational statement that does not meet the definition of a Rule. Paragraph (i) also contains the word “should.”</p>

		Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
08 NCAC 10B .0103	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “clearly”, “fail-safe”, “adequate”, “proper”, “other approved record”, “secure”, and “properly” without providing any additional information as to the meaning of these terms.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 10B .0104	Statutory Authority Unclear/Ambiguous	<p>The Commission objected to this Rule for lack of statutory authority as G.S. 163A-1109 prohibits the use of punch-card ballots and lever machine voting systems and this Rule appears to provide provisions regarding both punch card ballots and lever voting.</p> <p>The Commission found this Rule to be ambiguous as written as it includes language such as “immediately”, “undue delay”, “proper”, and “appropriate” without providing any additional information as to the meaning of these terms.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 10B .0105	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “orderly” without providing any additional information as to the meaning of this term.</p> <p>Further it notes that “the container should be sealed...” It is unclear whether this is intended to be a requirement or an aspirational statement that does not meet the definition of a Rule.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 10B .0106	Unclear/Ambiguous	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “immediately” and “unsecured.”</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p>
08 NCAC 10B .0107	Unclear/Ambiguous Unnecessary	<p>The Commission found this Rule to be ambiguous as written as it includes language such as “near relative”, “illegally excluded”, “properly”, “good cause” and “reasonable grounds” and “unlawful assistance” without providing any additional information as to the meaning of these terms.</p> <p>Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.</p> <p>In addition, the Commission found Subparagraphs (a)(1) and (2) and Paragraphs (b) and (c) unnecessary as they essentially recite G.S. 163A-1139 without providing ny additional information.</p>
08 NCAC 10B .0108	Unclear/Ambiguous	The Commission found this Rule to be ambiguous as written as it includes language such as “sufficient” without providing any additional information as to the meaning of this term.

8/21/2018

		Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.
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August 21, 2018

Virginia Niehaus, Rulemaking Coordinator
NC Department of Health and Human Services – Division of Medical Assistance
Sent via email only: virginia.niehaus@dhhs.nc.gov

Re: Objection to Rules 10A NCAC 22F .0301 and 22J .0106

Dear Ms. Niehaus:

At its meeting on June 14, 2018, the Rules Review Commission objected to 10A NCAC 22F .0104, .0301, .0302, .0602, .0603, .0604, and 22J .0105 and .0106 in accordance with G.S. 150B-21.10. At its meeting on August 16, 2018, the Rules Review Commission reviewed rewritten rules submitted by the Division in response to the June 14, 2018 objections. At that time, the Rules Review Commission objected to 10A NCAC 22F .0301 on the basis of ambiguity and continued their objection to 10A NCAC 22J .0106, finding that the rewritten rule had not met their objection. They approved all other rules.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please feel free to contact me.

Sincerely,

Amber May
Commission Counsel

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August 16, 2018

Jennifer Everett, Rulemaking Coordinator
Department of Environmental Quality
Sent via email only: Jennifer.everett@ncdenr.gov

Re: Objection to Rules 15A NCAC 08F .0406 and 08G .0802

Dear Ms. Everett:

At its meeting today, the Rules Review Commission objected to the above-captioned rules in accordance with G.S. 150B-21.10.

The Commission objected to Rule 15A NCAC 08F .0406 based upon lack of statutory authority and necessity, as well as ambiguity.

Specifically, the Commission found that throughout the Rule, the agency appears to be delegating to the Chairman or a committee of the Commission the authority to issue summary suspension of a certification pursuant to G.S. 150B-3(c) and to revoke or suspend a certification pursuant to G.S. 150B, Article 3A. However, the APA requires a majority of the Commission members to make these decisions. The agency has not cited to any authority to abrogate the requirements of the APA and allow the Chairman to issue these decisions without approval of the Commission.

In addition, it appears from Paragraph (c) that the agency is creating a disciplinary committee composed of at least four members of the 11-member body and this committee will hold a hearing and then make a recommendation to the Chairman, who will issue a decision. G.S. 150B-40(b) requires a majority of the agency to decide contested cases; if they cannot do so, they must request an ALJ from the Office of Administrative Hearings. The agency has not cited to any authority to allow them to delegate this decision making to the Chairman, even following a consultation with a minority of the members of the Commission.

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Further, Paragraph (g) states that the decision of the Chairman becomes a final agency action unless the individual files a petition for a contested case. Therefore, the Rule is unclear as written, as it is not apparent what this Rule is doing if it is not establishing the process for filing a contested case with the agency.

The Commission also found that Subparagraphs (a)(1) through (3) merely recite G.S. 90A-47.5(a)(1) through (3) and therefore, this portion of the Rule is unnecessary.

The Commission objected to Rule 15A NCAC 08G .0802 based upon lack of statutory authority and ambiguity for the same reasons articulated in the objection to Rule 15A NCAC 08F .0406 regarding those grounds.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please let me know.

Sincerely,

A handwritten signature in blue ink, appearing to read "Amanda J. Reeder", with a stylized flourish extending from the end.

Amanda J. Reeder
Commission Counsel