

Burgos, Alexander N

Subject: FW: [External] Request for removal of chapter of rules from Existing Rules Review Schedule
Attachments: EFM request to remove 18 NCAC 07 from ERR schedule sent 6.13.23.pdf

From: Ann Wall <Awall@sosnc.gov>
Sent: Tuesday, June 13, 2023 6:38 PM
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Subject: [External] Request for removal of chapter of rules from Existing Rules Review Schedule

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Attached please find a written request from NC Secretary of State Elaine Marshall that RRC approve the removal from the 2024-2027 Existing Rules Review Schedule.

The request is made pursuant to RRC rule 26 NCAC 05 .0209.

I will be in attendance at both the June and July meetings of the Commission, should you have any questions regarding Secretary Marshall's request.

Regards,

Ann

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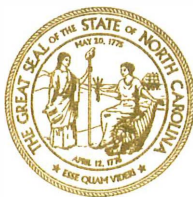
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State of North Carolina
Department of the Secretary of State

ELAINE F. MARSHALL
SECRETARY OF STATE

June 13, 2023

By E-Mail

Jeanette Doran, Chair
Andrew P. Atkins, Vice Chair
Robert A. Bryan, Second Vice Chair

North Carolina Rules Review Commission
1711 New Hope Church Road
Raleigh, North Carolina 27609

Re: Request for change to 2024-2027 Existing Rules Review Schedule

Dear Chair Doran, Vice Chairs Atkins and Bryan:

I am writing to request that, for the reasons explained below, one chapter of the Department's rules be removed from the 2024-2027 Existing Rules Review (ERR) schedule. The Department's rules in 18 NCAC 07, Notary Public Division, are presently scheduled for review by the Commission in September 2024. To summarize, as a result of a law enacted in July 2022, the Department is presently engaged in reviewing and revising all rules in 18 NCAC 07. Therefore, keeping this chapter of the Department's rules on the ERR schedule is unnecessary and will unduly burden the Commission, its staff, our own staff, and the public.

1. The new law

The Remote Electronic Notarization Act (RENA) was effective on July 8, 2022, S.L. 2022-54. RENA primarily amends Article 2 of Chapter 10B of the NC General Statutes, the Notary Public Act. Adoption of RENA was a direct outcome of the global pandemic. The pandemic increased the remote conduct of economic activity. The pandemic also established the need to conduct crucial business, legal, health-care, and other transactions safely, securely, and efficiently in the rapidly changing remote environment.

2. The law prior to RENA

The Notary Public Act sets requirements to become a traditional notary public, a constitutionally designated public official. A traditional notary public performs notarial acts during an in-person meeting with the principal. A traditional notary must identify the principal using one of three statutorily specified methods. The Act and rules govern the conduct of the notary and how to become a notary instructor.

Article 2 of the Act governs electronic notaries public (eNotary or e-Notaries). Like a traditional notary, an eNotary performs notarial acts during an in-person meeting. The eNotary uses technology to electronically notarize the principal's electronic signature. An electronic notary has to comply with most traditional notary requirements. The Act also regulates the technology used by the eNotary to perform electronic notarial acts.

3. The relationship between the pre-existing law and RENA

RENA allows an NC notary, primarily an eNotary, who is physically located in NC, to perform remote electronic notarizations for a remotely located principal. RENA calls these notaries remote electronic notaries public (RENP). A remotely located principal can physically be anywhere in the United States or its territories. In specific circumstances, the principal can be on a US military base or in a US embassy. RENA requires real-time, simultaneous communication between the RENP and the remote principal using communications technology. RENA also establishes criteria that the technology has to meet. RENA directs the Secretary of State to adopt rules on more than 20 separate topics. The rules must fulfill the purposes of the Notary Public Act, including:

- To simplify, clarify, and modernize the law governing notaries,
- To prevent fraud and forgery,
- To foster ethical conduct among notaries,
- To enhance interstate recognition of notarial acts, and
- To integrate procedures for all of the following notarial acts: Traditional paper, Electronic notarization, Remote electronic notarization.

The Department seeks to adopt rules that will promote public confidence in the reliability of signatures and the identification of remotely located principals. These rules will help to ensure that transactions are not repudiated as a result of:

1. Mental incapacity of the principal;
2. Coercion or duress; or
3. Fraud.

By enhancing reliability, the Secretary facilitates economic growth while reducing costly and avoidable litigation.

4. The Department's RENA-related rulemaking process

The Department has been steadily working on the rules since the Governor signed RENA in July 2022. Indeed, as of the writing of this letter, I can safely say that we have spent more than 2,000 hours on these rules thus far.

In order to achieve these goals, the Department promulgated two Advance Notices of Proposed Rulemaking (ANPRs). The ANPRs were published on the Department's website and emailed to stakeholders and others. The ANPRs requested comments from the public on a number of issues that are unclear in RENA. The first ANPR focused primarily on issues related to the remote electronic notary public and the remote electronic notarial act. The second ANPR focused on issues related to the technology notaries will use to perform remote electronic notarial acts.

RENA requirements for remote electronic notarial acts (RENs) are based on requirements for traditional notaries and notarial acts, as well as the requirements for eNotaries and electronic notarial acts. The RENA rules, must, therefore, harmonize the requirements for traditional notaries, electronic notaries, and remote electronic notaries to the extent feasible.

Due to the scope and scale of the requirements for this rulemaking process, the Department will propose the rules in three phases. The first set of proposed rules will deal mainly with fundamental issues related to all three methods of performing notarial acts and to establishing certain common rules, as well as some basic RENA rules. The second set of rules will primarily focus on revising existing rules. The final set of rules will be focused primarily on the technology used to perform remote electronic notarial acts and the licensure and approval of the providers of that technology.

We have already begun working with OAH staff. My staff met with attorneys assigned to RRC to discuss the process for most effectively working together on what is anticipated to be an unusually large set of rules. With the expert and gracious help of the Codifier and her staff, the Department recently completed the first formal step of the rulemaking process – transferring existing rules into the new subchapters we will be using as we draft and publish the rules. This will ease the burden on the public reviewing and commenting on the rules when published.

It is my hope that we will be publishing the first phase of the rules in one of the August 2023 NC Registers, with the next two phases being published in subsequent months. This timeline may need modification due to the fact that a bill making technical changes to the Notary Act, S 552, passed third reading in the North Carolina Senate last week. If it also passes the House, and is signed by the Governor, the technical changes in S 552 are likely to lead to at least a slight delay in our rulemaking. I anticipate that it would be no more than a month.

5. Existing Rules Review Schedule

The purposes of the ERR are two-fold: (1) ensuring that rules are reviewed and dealt with appropriately after review, and (2) ensuring that the public has the ability to periodically exercise its due process rights to notice and the opportunity to comment with regard to existing rules. Those purposes will be fulfilled by the Department in the course of the RENA-rulemaking process.

We have been reviewing all existing 18 NCAC 07 rules for almost a year, as we have worked on developing the newly required rules. We have been determining whether each of the existing rules:

- Works as written;
- Needs revision:
 - To comply with the RRC 2019 Administrative Style Guide;
 - Because of changes in other laws, in technology, etc.;
 - In order to be harmonized with RENA; or
- Needs to be repealed.

Thus, by the time we complete the current 18 NCAC 07 rulemaking, we will have re-adopted the existing rules, albeit without that official designation. The Commission and its staff, along with the public, will have had ample chance to review the rules as well.

If the RRC keeps 18 NCAC 07 on the ERR schedule, mere months after the Department has completed a thorough review of those rules, we will have to do it again at a time when there is virtually no likelihood that the results will change any rules in Chapter 07. The Department has fewer than 200 employees, and many of our duties have statutorily mandated time frames for performance of those duties. They literally cannot be pulled away from their statutorily mandated duties to work on rulemaking without causing harm to the public and businesses we serve. Once the new rules are effective, the employees of the Department will have to engage in a major effort to educate North Carolina's notaries, attorneys, and others on the requirements of the new law. Thus, a duplicative ERR requirement would be a substantial burden.

At least two of the other chapters of our rules set for ERR review by the Commission in September 2024 deal with uniform or model laws in areas of significance for commerce in North Carolina: Chapter 05, Uniform Commercial Code Division, and Chapter 06, Securities Division. It is a certainty that those readoptions will be complex and take significant departmental resources. As one example, the Securities Division rules will have to "effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this Chapter with the related federal regulation." G.S. § 78A-64.

In conclusion, I request that you remove the Department's 18 NCAC 07 rules from the 2024 – 2027 Existing Rules Review Schedule. The Department General Counsel, Ann Wall, will attend the Commission meeting on Thursday, June 15, 2023, and she will be available to answer any questions you may have in relation to this request.

Regards,



Elaine F. Marshall
NC Secretary of State

Cc: Commissioner Wayne Ronald Boyles, III
Commissioner John (Jay) Hemphill
Commissioner Barbara A. Jackson
Commissioner Jeffery T. Hyde
Commissioner Randy O. Overton
Commissioner Robert A. Rucho
Commissioner William (Paul) Powell, Jr.
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