

Burgos, Alexander N

Subject: FW: [External] Final formatted 18 NCAC 07H rules with changes agreed upon
Attachments: 18 NCAC 07H .0101.docx; 18 NCAC 07H .0103.docx; 18 NCAC 07H .0201.docx; 18 NCAC 07H .0202.docx

From: Ascher, Seth M <seth.ascher@oah.nc.gov>
Sent: Tuesday, May 13, 2025 1:36 PM
To: Wall, Ann B <awall@sosnc.gov>
Cc: Elmore, Ann M <aelmore@sosnc.gov>; Rules, Oah <oah.rules@oah.nc.gov>; Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Re: [External] Final formatted 18 NCAC 07H rules with changes agreed upon

These look good to me. I anticipate recommending approval of the final revised version of 18 NCAC 07H at this month's meeting.

Seth Ascher

Counsel to the North Carolina Rules Review Commission

Office of Administrative Hearings

(984) 236-1934

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: [External] Note re 18 NCAC 07H .0202

From: Ann Wall <awall@sosnc.gov>
Sent: Tuesday, May 6, 2025 3:01 PM
To: Ascher, Seth M <seth.ascher@oah.nc.gov>; Elmore, Ann M <aelmore@sosnc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>
Subject: Re: [External] Note re 18 NCAC 07H .0202

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Thanks. I had to do research once upon a time when we were creating a CLE on notaries. There's an old and long-outdated opinion from the turn of the 19th to 20th century saying women can't be notaries that has an excellent historical discussion of the role of notaries.

Ann B. Wall
General Counsel
Department of the Secretary of State
awall@sosnc.gov
Phone (919) 814-5310
Fax 919-814-5391

Please be aware that communications with the Secretary of State's office may be public records.

Burgos, Alexander N

Subject: FW: [External] Note re 18 NCAC 07H .0202

From: Ascher, Seth M <seth.ascher@oah.nc.gov>
Sent: Tuesday, May 6, 2025 2:50 PM
To: Elmore, Ann M <aelmore@sosnc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Wall, Ann B <awall@sosnc.gov>
Subject: Re: [External] Note re 18 NCAC 07H .0202

Ann,

I have reviewed your responses to my comments on 18 NCAC 07H (including this update) and any concerns I had have been addressed. I anticipate recommending approval of the final revised rules once you have filed the updated consistent with your responses.

I also note, I found the explanation of the nature of a notary's independent judgment as a public official very useful context.

Seth Ascher

Counsel to the North Carolina Rules Review Commission

Office of Administrative Hearings

(984) 236-1934

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.

From: Ann Elmore <aelmore@sosnc.gov>
Sent: Tuesday, May 6, 2025 9:21 AM
To: Ascher, Seth M <seth.ascher@oah.nc.gov>
Cc: Burgos, Alexander N <alexander.burgos@oah.nc.gov>; Wall, Ann B <awall@sosnc.gov>
Subject: [External] Note re 18 NCAC 07H .0202

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Good morning, Seth.

When you review our replies for the TCRs for 18 NCAC 07H, please note that our proposed fix for Item (2) in Rule .0202 is repeated (mistakenly) in the view of the rule as it was filed.

The rule text as filed is:

18 NCAC 07H .0202 MEANS OF DETERMINING PRINCIPAL LOCATION

An ~~electronic~~ A notary public shall determine the location of a principal seeking a remote electronic notarization by:

- (1) geolocation if the principal is using a GPS-enabled device; or
- (2) self-attestation if the principal is not using a GPS-enabled device.

The proposed remedy is:

18 NCAC 07H .0202 MEANS OF DETERMINING PRINCIPAL LOCATION

An ~~electronic~~ A notary public shall determine the location of a principal seeking a remote electronic notarization by:

- (1) geolocation if the principal is using a GPS-enabled device; or
- (2) self-attestation by the principal if the principal is not using a GPS-enabled device.

Thank you for your consideration.

Submitted on behalf of Ann B. Wall, General Counsel & Rulemaking Coordinator.

AnnE

Ann McNellis Elmore, Agency Legal Consultant

NC Department of the Secretary of State

PO Box 29622

Raleigh, NC 27626-0622

Telephone: [\(919\) 814-5521](tel:9198145521)

Fax: 919 814-5596

For tips on how to become a better informed investor, go to https://www.sosnc.gov/divisions/securities/for_investors.)

E-Mail to and from this Department is subject to the N.C. Public Records Law and may be disclosed to third parties.

Connect with us!

On the Web: <http://www.sosnc.gov/>

Facebook: <https://www.facebook.com/NCSecState>

Twitter: <https://twitter.com/NCSecState>

YouTube: <https://www.youtube.com/c/NCSecState>

CONFIDENTIALITY NOTICE: THIS E-MAIL MESSAGE, INCLUDING ANY ATTACHMENTS, IS FOR THE SOLE USE OF THE INTENDED RECIPIENT (S) AND MAY CONTAIN CONFIDENTIAL AND PRIVILEGED INFORMATION. ANY UNAUTHORIZED USE, DISCLOSURE, OR DISTRIBUTION IS PROHIBITED.

Burgos, Alexander N

Subject: FW: [External] Updated response re 18 NCAC 07H technical changes and questions
Attachments: 5.2.25 Response re 18 NCAC 07H technical correction requests.docx

From: Ann Wall <awall@sosnc.gov>
Sent: Friday, May 2, 2025 3:35 PM
To: Ascher, Seth M <seth.ascher@oah.nc.gov>
Cc: Elmore, Ann M <aelmore@sosnc.gov>
Subject: [External] Updated response re 18 NCAC 07H technical changes and questions

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Please let us know if you have any questions.

Regards, Ann

Ann B. Wall
General Counsel
Department of the Secretary of State
awall@sosnc.gov
Phone (919) 814-5310
Fax 919-814-5391

Please be aware that communications with the Secretary of State's office may be public records.

Connect with us!

On the Web: <http://www.sosnc.gov/>

Facebook: <https://www.facebook.com/NCSecState>

Twitter: <https://twitter.com/NCSecState>

YouTube: <https://www.youtube.com/c/NCSecState>

CONFIDENTIALITY NOTICE: THIS E-MAIL MESSAGE, INCLUDING ANY ATTACHMENTS, IS FOR THE SOLE USE OF THE INTENDED RECIPIENT (S) AND MAY CONTAIN CONFIDENTIAL AND PRIVILEGED INFORMATION. ANY UNAUTHORIZED USE, DISCLOSURE, OR DISTRIBUTION IS PROHIBITED.



*State of North Carolina
Department of the Secretary of State*

ELAINE F. MARSHALL
SECRETARY OF STATE

ANN B. WALL
General Counsel

May 2, 2025

By email

Seth Ascher
OAH counsel for RRC
seth.ascher@oah.nc.gov

Re: Request for technical changes to
18 NCAC 07H

Enclosed please find our responses to your requests for changes to 18 NCAC 07H as well as responses to your questions. For convenience, we have numbered the technical change requests. The language of the adopted rules and your technical correction requests are provided in black font, with your requests italicized. Our responses and changes made, if any, are provided in blue font.

Please feel free to call me if you have any questions.

RESPONSES TO
REQUEST FOR CHANGES PURSUANT TO G.S. 150B-21.10
FOR 18 NCAC SUBCHAPTER 07H

TCR #1

18 NCAC 07H .0103: *Correct the statutory references in item 3. Note: these were discussed in the April 15 email from Ann Elmore.*

18 NCAC 07H .0103 DEFINITIONS

For purposes of this Subchapter:

- (1) "Active duty" means that term as it is defined in 10 U.S.C. 101(d)(1).
- (2) "Armed Forces" means that term as it is defined in 18 NCAC 07K .0101(2).
- (3) "Credential" or "credentials" means a document presented as satisfactory evidence of identity pursuant to G.S. 10B-3(22)(a) and G.S. ~~10B-134.11(a)(2)(a).~~ G.S. 10B-134.11(a)(2)a..

The Department proposes the green highlighted correction:

18 NCAC 07H .0103 is adopted with changes as published in 39:13 NCR 824 as follows:

18 NCAC 07H .0103 DEFINITIONS

For purposes of this Subchapter:

- (1) "Active duty" means that term as it is defined in 10 U.S.C. 101(d)(1).
- (2) "Armed Forces" means that term as it is defined in 18 NCAC 07K .0101(2).

(3) "Credential" or "credentials" means a document presented as satisfactory evidence of identity pursuant to ~~G.S. 10B-134.11(a)(2)(a)~~ G.S. 10B-134.11(a)(2)(a) and ~~G.S. 10B-134.11(a)(2)(a)~~ G.S. 10B-134.11(a)(2)a.

TCR #2

18 NCAC 07H .0200: *You appear to have left off a section heading. Note: this was discussed in the April 15 email from Ann Elmore.*

18 NCAC 07H .0201 is adopted with changes as published in 39:13 NCR 824 as follows:

18 NCAC 07H .0201 TIMING OF VERIFICATION OF LOCATION

- (a) ~~An electronic~~ A notary public ~~shall:~~ shall
(1) ~~as a preliminary matter,~~ verify the location of a principal seeking a remote electronic notarization as required by ~~G.S. 10B-134.9(a)(6);~~ G.S. 10B-134.9(a)(6) before beginning a remote electronic notarial act . . .

The Department proposes to add the missing section number and name for 18 NCAC 07H Section .0200 ESTABLISHING LOCATION OF PRINCIPALS as highlighted in green below. The section name and number were included in 39:13 NCR 824 but were omitted from the rule file for 18 NCAC 07H .0201, which was submitted for RRC review on March 19th.

18 NCAC 07H .0201 is adopted with changes as published in 39:13 NCR 824 as follows:

SECTION .0200 ESTABLISHING LOCATION OF PRINCIPALS

18 NCAC 07H .0201 TIMING OF VERIFICATION OF LOCATION

- (a) ~~An electronic~~ A notary public ~~shall:~~ shall
(1) ~~as a preliminary matter,~~ verify the location of a principal seeking a remote . . .

TCR #3

18 NCAC 07H .0202: *The phrasing of item (2) feels awkward to me, since the subject of the sentence is the notary but self refers to the principal. Consider something like: "self-attestation by a principal who is not using a GPS-enabled device."*

18 NCAC 07H .0202 MEANS OF DETERMINING PRINCIPAL LOCATION

- ~~An electronic~~ A notary public shall determine the location of a principal seeking a remote electronic notarization by:
(1) geolocation if the principal is using a GPS-enabled device; or
(2) self-attestation by the principal if the principal is not using a GPS-enabled device.

The phrasing of Item (2) parallels that of Item (1). The parallelism was intended to highlight for the notary the different circumstances for each means of determining the principal location. We have proposed a slight modification of your proposed language as highlighted in green below.

18 NCAC 07H .0202 is adopted with changes as published in 39:13 NCR 824 as follows:

18 NCAC 07H .0202 MEANS OF DETERMINING PRINCIPAL LOCATION

- ~~An electronic~~ A notary public shall determine the location of a principal seeking a remote electronic notarization by:
(1) geolocation if the principal is using a GPS-enabled device; or
(2) self-attestation by the principal if the principal is not using a GPS-enabled device.

TCR #4

18 NCAC 07H .0207: *Am I understanding this rule correctly that the notary can rely on the principal's statement/opinion that the location cannot be divulged for reasons of national security?*

18 NCAC 07H .0207 EXCEPTION TO RULE .0206

If a principal cannot provide the information in Rule .0206 of this Section for reasons of ~~U.S.~~ United States national security, the principal may attest that:

- (1) the principal is on a U.S. military installation or vessel pursuant to military orders assigning the member to active duty for more than 120 days; and
- (2) the name and location cannot be divulged for reasons of national security.

Yes. A member of the Armed Services – a principal -- would be relied upon by the notary to make an affirmative statement that the location cannot be divulged for reasons of national security. Members of the Armed Services would be subject not only to possible civil litigation for lying in such a statement but also subject to the much more severe penalties under the Uniform Code of Justice. Further, a notary does not have the knowledge necessary to determine whether national security is being invoked properly.

TCR #5

18 NCAC 07H .0303: *As written, there are not precise standards for how a notary determines that additional information is required. Is this meant to rely on the notary's subjective discretion? Or are there standards somewhere?*

~~18 NCAC 07H .0304~~ 18 NCAC 07H .0303 NOTARY REQUEST FOR ADDITIONAL INFORMATION

If ~~an electronic~~ a notary public determines that additional ~~information~~ information, identity proofing, or identification credentials are necessary to confirm the identity of the remotely located principal, then the ~~electronic~~ notary shall:

- (1) require the principal to:
 - (a) provide additional information; or
 - (b) undergo additional identity proofing, credential ~~analysis~~ analysis, or both by the technology provider; or
- (2) cancel the remote notarial transaction if:
 - (a) the principal refuses to provide additional information or undergo additional credential analysis; or
 - (b) the notary decides the principal's identity has not been verified.

A notary public is a trusted State public official. Notaries are trained by certified instructors using Chapter 10B of the General Statutes, the rules in 18 NCAC 07, the Notary Manual written by the Department, and training materials developed by the Department. As public officials, notaries must exercise independent judgment based on their training regarding the Act and rules, their experience, and the circumstances before them. The technology provides data for the notary to use in making a determination but not certainty regarding identity. In fact, both statute and rule require the notary to make an independent determination. G.S. 10B-134.11(a)(2)(c) and 18 NCAC 07H .0301(2)(b) require that the notary—in addition to the credential analysis and identity proofing—conduct an independent comparison of the individual's credential and face. From the totality of the circumstances, the notary's knowledge of the Act and rules, the notary exercises independent judgment and determines whether the evidence of identification for the principal is satisfactory, as defined in G.S. § 10B-3.

Could a notary be disciplined for failing to request additional information if the software or in person standards at the time verify identity, even if the verification turns out to be wrong?

Please see the immediately preceding response. We cannot say definitively that a notary could never be disciplined for failing to request additional information. There could, for example, be evidence that the notary had actual or indirect knowledge of possible fraud and failed to follow up by asking for additional information. In such circumstances, failing to ask for additional information could be an element of proof of a violation of the Act and rules by the notary. On the other hand, a notary could decide based on the circumstances before her, that there is support for a decision to cancel the notarial transaction, thus needing no additional information. It would be both rare and unusual for the Department to charge a separate violation of failure to ask for additional information.

Could a notary be disciplined for requesting additional information if the software or in person standards at the time verify identity, but the notary in good faith (i.e. not based on impermissible discrimination or other violations of law) believes something is wrong?

Please see the preceding two responses to TCR #5. The Act places the decision in the hands of the notary. The technology provides guidance but not certainty. It is within the notary public's discretion to determine whether identity has been satisfactorily shown. G.S. 10B-134.11(b) provides: "Notwithstanding [credential analysis, identity proofing, and independent evaluation by the notary], an electronic notary may require the remotely located principal to provide additional information or identification credentials necessary to confirm the identity of the remotely located principal."

TCR #6

18 NCAC 07H .0400: *Several of the rules in this section forbid of notarization if something is wrong "in the judgment of the notary" (i.e. altered image). Is this meant to rely on the notary's subjective judgment? Or are there standards somewhere.*

Yes and no. Yes, the intent is to rely on the notary's judgment. As noted above, the notary public is a trusted public official, whose judgment is guided by the Act, the rules, experience, training, and the particulars of the situation. The Act provides standards to guide the notary, e.g., the definitions of "satisfactory evidence" and "personal knowledge". G.S. § 10B-3(17) and (22). A notary always has the right to refuse to perform a notarial act (except of course, if the refusal is for unlawful reasons such as discrimination based on religion).

Put another way, are these rules only violated if the notary believes there is an issue and continues anyway? I.e., a notary believes that an image is altered and still completes the notarization.

Yes. A notary is prohibited from moving forward with a notarial act under a circumstance where it is prohibited (e.g., the principal exits or the notary knows the act is false or fraudulent) or the problem is such that the notary appears to have acted in bad faith or is of such a degree as to undermine faith in the proceedings.

TCR #7

18 NCAC 07H .0507: *As written, this rule seems to require a notary to ensure something that is potentially outside of their control. What is a notary supposed to do if they discover the records are not accessible to them?*

18 NCAC 07H .0507 STORING RECORDS WITH APPROVED DEPOSITORIES AND CUSTODIANS

An electronic notary public shall ensure that the electronic notary's session records are accessible to, and readable by, the electronic notary while stored with:

- (1) an approved depository; and
- (2) an approved custodian:
 - (a) for 10 years from the date of the journal entry for a notarial act; or
 - (b) for any period of more than 10 years during which:
 - (i) there is a litigation hold or other order requiring retention for more than 10 years;
 - or
 - (ii) the electronic notary public arranges for the custodian to keep the records more than 10 years.

Notaries are well aware of, and regularly exercise, their right to use the availability of the Department's resources if they have questions. They are encouraged during training to consult the Department if a question arises. Absent special circumstances (e.g., subpoena, warrant, or court order under 18 NCAC 07J .0108), only the notary will know if the records are not (1) accessible and (2) readable. The rules are intended to ensure that the notary's records are accessible. If the records are not accessible and readable, the notary notifies the technology provider. If the technology provider does not resolve the problem, the notary notifies the Department under 18 NCAC 07D .0309.

TRC Unnumbered

Per correspondence with Staff Counsel, the Department proposes the green highlighted addition to the subchapter listing to avoid both appearing in the NCAC creating additional work for the Codifier later.

SUBCHAPTER 07H—RESERVED FOR FUTURE CODIFICATION

SUBCHAPTER 07H - REMOTE ELECTRONIC NOTARIAL ACT AND IPEN REQUIREMENTS

Regards,



Ann B. Wall
General Counsel and Rulemaking Coordinator

Burgos, Alexander N

From: Ann Wall <awall@sosnc.gov>
Sent: Tuesday, April 29, 2025 11:23 AM
To: Ascher, Seth M; Elmore, Ann M
Cc: Burgos, Alexander N
Subject: [External] Re: 18 NCAC 07H RFC

CAUTION: External email. Do not click links or open attachments unless verified. Report suspicious emails with the Report Message button located on your Outlook menu bar on the Home tab.

Thanks, Seth. We'll do our best to get them back to you as soon as we can.

Ann

Ann B. Wall
General Counsel
Department of the Secretary of State
awall@sosnc.gov
Phone (919) 814-5310
Fax 919-814-5391

Please be aware that communications with the Secretary of State's office may be public records.

Anns,

I have completed my review of 18 NCAC 07H, covered in the attached memo. I have handled this similar to how I handled the previous subchapter.

Note that per our rules you have until Tuesday, May 13, 2025 to respond. I would encourage you to respond earlier as you are able, since I think this will go more smoothly if I am able to wrap these subchapters up on a rolling basis. You are welcome to do what you did before and provide me with narrative answers and any proposed rules changes before making updates to the official filings.

Let me know if you have any questions,

Seth Ascher
Counsel to the North Carolina Rules Review Commission
Office of Administrative Hearings
(984) 236-1934

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.

Connect with us!

On the Web: <http://www.sosnc.gov/>

Facebook: <https://www.facebook.com/NCSecState>

Twitter: <https://twitter.com/NCSecState>

YouTube: <https://www.youtube.com/c/NCSecState>

CONFIDENTIALITY NOTICE: THIS E-MAIL MESSAGE, INCLUDING ANY ATTACHMENTS, IS FOR THE SOLE USE OF THE INTENDED RECIPIENT (S) AND MAY CONTAIN CONFIDENTIAL AND PRIVILEGED INFORMATION. ANY UNAUTHORIZED USE, DISCLOSURE, OR DISTRIBUTION IS PROHIBITED.