

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: North Carolina Department of the Secretary of State

RULE CITATION: 18 NCAC 07E .0602, .0801, .0802, .0803, .0804

RECOMMENDATION DATE: February 26, 2024

RECOMMENDED ACTION:

- X 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 am recommending approval of these rules but note that the rules and the seemingly unique statutory authority supporting them operate in a manner that is not commonly approved by the RRC.

Rule .0602 provides that:

A certified notary instructor shall follow the Department curriculum for notary courses unless the Department grants a written variance to the instructor pursuant to the Rules in Section .0800 of this Subchapter.

The rules in Section .0800 describe the process for requesting a variance. Rule .0804 provides the following criteria for approving a variance:

- (1) *conformity with Chapter 10B of the General Statutes and the rules in this Chapter;*
- (2) *the value added to the curriculum;*
- (3) *the impact of the change on the length of the course; and*
- (4) *the quality of visual or audio elements; and elements.*

Note that the "Department curriculum" referenced in .0602 is not contained in a rule, which raised a red flag initially. However, it is my opinion that a seemingly unique aspect of the Secretary's authority in G.S. 10B-8 justifies the approach taken by these rules.

Seth Ascher
Commission Counsel

In relevant part G.S. 10B-8 provides that:

Every applicant for an initial notary commission shall, within the three months preceding application, take a course of classroom instruction of not less than six hours approved by the Secretary and take a written examination approved by the Secretary.

The highlighted section indicates that the Secretary approves the “course of classroom instruction” itself, rather than setting general educational standards or requirements. I would not expect that those approvals be done by rule, as they are more akin to a discretionary action by the Secretary. Rather, the standards for the Secretary’s decision making would be contained in a rule.

Here, what the Secretary is doing is effectively acknowledging a pre-approved “course of classroom instruction” in the form of a Department curriculum, and setting the standards by which alternative “courses of classroom instruction” will be considered for approval. This appears to effectuate the requirements of the statute, while potentially reducing the administrative burden of separately approving each “course of classroom instruction.”

I do note that both this statute and rule are different from the structure of rules that the Commission normally sees in a licensing context. Licensing statutes usually talk about setting training requirements or educational minimums, rather than giving direct authority to approve a “course of classroom instruction.” This distinction makes sense in the overall context of notary regulations, as notaries are created by the State, as opposed to most licensed professions which exist independent of State action.

Therefore, I am recommending approval of these rules.