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: Secretary of State

RULE CITATION: 18 NCAC 07J .0111

                      18 NCAC 07J .0624, .1501, .1701, .1901, .2101

RECOMMENDATION DATE: April 17, 2025

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: The rules about the technical requirements for providers of remote notary software raise an issue related to the exceptions to the definition of rules which rarely come up. Based on the underlying statutes and the agency's response to my questions, I am recommending approval.

I. Background

The issue is apparent in this definition and rule:

18 NCAC 07J .0101   DEFINITIONS

> (12)   "Protocols" or "Department's Scientific, Architectural, and Engineering Protocols for Technology Providers" means a document prepared by the Department and made available to the public that contains scientific, architectural, and engineering standards, forms, or procedures related to information technology for technology providers.

18 NCAC 07J .0111   COMPLIANCE WITH TECHNOLOGY PROVIDER PROTOCOLS REQUIRED

Technology providers shall comply with applicable provisions of the Department's Scientific, Architectural, and Engineering Protocols for Technology Providers. The protocols may be accessed on the Department's website at no cost.

Seth Ascher
Commission Counsel

The most relevant sections of the APA are:

§ 150B-18. Scope and effect.

This Article applies to an agency's exercise of its authority to adopt a rule. A rule is not valid unless it is adopted in substantial compliance with this Article. An agency shall not seek to implement or enforce against any person a policy, guideline, or other interpretive statement that meets the definition of a rule contained in G.S. 150B-2(8a) if the policy, guideline, or other interpretive statement has not been adopted as a rule in accordance with this Article.

§ 150B-2. Definitions

(8a) Rule. - Any agency regulation, standard, or statement of general applicability that implements or interprets an enactment of the General Assembly or Congress or a regulation adopted by a federal agency or that describes the procedure or practice requirements of an agency. The term includes the establishment of a fee and the amendment or repeal of a prior rule. The term does not include the following: . . .

h. Scientific, architectural, or engineering standards, forms, or procedures, including design criteria and construction standards used to construct or maintain highways, bridges, or ferries.

The most relevant sections of the underlying Secretary of State statutes are:

§ 10B-134.21. Rules.

(a) The Secretary shall adopt rules necessary to establish standards, procedures, practices, forms, and records relating to remote electronic notarial acts to implement this Part, including at least all of the following:
(1) Any additional educational requirements for electronic notaries regarding remote electronic notarizations.
(2) The contents and security of the electronic journal.
(3) The security standards, features, qualifications, measures, storage, and any other matter related to communication technology, credential analysis, identity proofing, and depository and custodial services.
(4) The requirements of secure storage of all communication technology recordings, the electronic journal, and any other documentation under the control of the electronic notary regarding the electronic notarial act.
(5) Any necessary actions upon notification of permanent loss of data, unauthorized use, loss of use, or compromise of security of the electronic journal or the communication technology recordings of remote electronic notarial acts.

§ 10B-134.23. Standards for services provided to electronic notaries; enforcement.

(A) All licensees and third-party vendors shall meet all standards established by the Secretary under this Part for the provision of services to electronic notaries in this State for remote electronic notarization services. If the Secretary has not adopted rules establishing standards for a service, a licensee or third-party vendor may not furnish that service to an electronic notary public until the Secretary has determined that the provided service meets security standards generally accepted within the industry for that service.

II. Analysis

As a preliminary matter, this Commission is usually skeptical of rules that purport to enforce documents that are outside of statute or rule. Fundamentally, this would sidestep the protections and processes created by the APA and thus exceed the authority of an agency to make rules pursuant to the APA. Note that incorporation under G.S. 150B-21.6 is an exception to this principle but it is not available here because the protocols are being written by the agency which adopted the rules.

Here, the Secretary of State's plans to draft protocols "that address subjects such as application programming interfaces between the Department notary database and platforms; cyber- and software security measures to be adopted and implemented by technology providers that are generally accepted industry practice; accommodations for users with vision, hearing or speech impairment; and assuring data integrity at rest and after transfer." There is little to no case law on exactly what "scientific, architectural, or engineering standards" are, though it seems reasonable to assert that these kinds of technical details are such standards.

By rule, the Secretary proposes to definitionally limit what can go into the protocols, require software providers to follow those protocols, and reference those protocols in the application and licensure process for software.

Two additional circumstances support the assertion that this is a proper approach. First, pursuant to G.S. 10B-134.23, if the agency did not adopt rules referencing some of these standards, the Secretary would still be able to enforce industry standard practices on applicants. Thus, by committing in rule to put the protocols in writing, the Secretary is making it easier for the regulated public to meet the requirements.

Second, given the complexity and quasi-public nature of the remote notary service, it makes sense to read these potentially ambiguous statutory provisions to allow the Secretary to have a more flexible approach to technical standards. These regulations cover software services that must be able to interface with each other and potentially systems under the Secretary's control. Therefore, even without written rules or protocols, the Secretary would likely be able to establish standards simply through the operation of computer software.

Seth Ascher
Commission Counsel

III. Recommendation

Taking into account the plain language of the APA, the language regarding the Secretary's authority over remote notarization, and the overall rulemaking scheme created by the General Assembly, it is my opinion that the Secretary has the authority to enforce the technical engineering standards related to remote notarization as described in the memo they provided. The question of how they refer to such standards in the rules is somewhat novel.

On balance, I believe that by defining the term protocols in line with the statute, the Secretary's proposed rule .0111 could be approved by this Commission.

Alternatively, if the Commission believes the reference in .0111 to protocols could be reasonably interpreted to allow the Secretary to exceed their authority to enforce technical engineering standards, the Commission could object for lack of clarity and authority. If the Commission objects, it is my opinion that the other rules identified in this memo are interconnected with .0111 and would need to be held under the same objection.

Seth Ascher
Commission Counsel