

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: DHHS-DIVISION OF HEALTH SERVICE REGULATION

RULE CITATION: 10A NCAC 14A .0103

RECOMMENDED ACTION:

- ☐ 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:

In (d), it is not clear what relevance Subparagraphs (1) and (2) have to a determination of whether a rule is valid or as to the applicability to a given state of facts of a statute, rule or order. If the factors are not relevant there is no authority cited to base a decision on them.

§ 150B-4. Declaratory rulings.

(a) On request of a person aggrieved, an agency shall issue a declaratory ruling as to the validity of a rule or as to the applicability to a given state of facts of a statute administered by the agency or of a rule or order of the agency, except when the agency for good cause finds issuance of a ruling undesirable. The agency shall prescribe in its rules the circumstances in which rulings shall or shall not be issued. A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by the court. An agency may not retroactively change a declaratory ruling, but nothing in this section prevents an agency from prospectively changing a declaratory ruling. A declaratory ruling is subject to judicial review in the same manner as an order in a contested case. Failure of the agency to issue a declaratory ruling on the merits within 60 days of the request for such ruling shall constitute a denial of the request as well as a denial of the merits of the request and shall be subject to judicial review.

(b) Repealed by Session Laws 1997-34, s. 1. (1973, c. 1331, s. 1; 1985, c. 746, s. 1; 1991, c. 418, s. 4; c. 477, s. 2.1; 1997-34, s. 1.)

ROBERT A. BRYAN, JR.
COMMISSION COUNSEL

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AGENCY: COMMISSION FOR PUBLIC HEALTH

RULE CITATION: 10A NCAC 41C .0904

RECOMMENDED ACTION:

- ☐ 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:

In (e)(4), it is not clear what is required to be submitted. There is nothing in Paragraph (f) about qualifications of instructors.

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AGENCY: DEPARTMENT OF INSURANCE

RULE CITATION: 11 NCAC 04 .0423

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - Lack of statutory authority
 - X Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT:

In (a), it is not clear what is meant by “when in contact with the public.” Specifically, it is not clear what circumstances require an agent, etc., to identify himself as required in (1) or conduct himself in a particular manner as required in (3).

In (a)(3), it is not clear what is meant by “honorable dealings.”

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AGENCY: DEPARTMENT OF INSURANCE

RULE CITATION: 11 NCAC 06A .0812

RECOMMENDED ACTION:

- ☐ 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:

In (b)(1), it is not clear what is meant by “pattern of irregularities.”

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AGENCY: Office of Administrative Hearings

RULE CITATION: 26 NCAC 03 .0103

RECOMMENDED ACTION:

- Approve, but note staff's comment
- X Object, based on:
 - X Lack of statutory authority
 - Unclear or ambiguous
 - Unnecessary
 - Failure to comply with the APA
- Extend the period of review

COMMENT: The section of the Budget Act cited as authority, SB202; S.L. 2009-451, Sec.s 21A. 2(a), (b) and (c), amended Article 3 of Chapter 150B of the North Carolina General Statutes. It did not amend Article 3A.

Homoly v. Board of Dental Examiners, 121 N.C.App. 695, 468 S.E.2d 481(1996), held that Article 3 and Article 3A of Chapter 150B must be read separately; the provisions of one cannot be applied to the other. Any portion of the proposed amendment to 26 NCAC 03.0103 that would require a fee be paid in any Article 3A hearing lacks statutory authority.

Jeffrey P. Gray
Acting Commission Counsel