

G.S. 150B-21.3A Report for 09 NCAC Chapter 03, OFFICE OF THE GOVERNOR

Agency - Office of State Budget and Management

Comment Period - November 7, 2014 - January 6, 2015.

Date Submitted to APO - February 23, 2015

Subchapter or Blank	Rule Section	Rule Citation	Rule Name	Date and Last Agency Action on the Rule	Agency Determination [150B-21.3A(c)(1)a]	Implements or Conforms to Federal Regulation [150B-21.3A(d1)]	Federal Regulation Citation	Public Comment Received [150B-21.3A(c)(1)]	Agency Determination Following Public Comment [150B-21.3A(c)(1)]	RRC Determination of Public Comments [150B-21.3A(c)(2)]	RRC Final Determination of Status of Rule for Report to APO [150B-21.3A(c)(2)]	OAH Next Steps
SUBCHAPTER 3A - OFFICE OF STATE BUDGET AND MANAGEMENT	SECTION .0100 - ORGANIZATION AND FUNCTION	09 NCAC 03A .0101	ORGANIZATION	Amended Eff. April 1, 1989	Necessary without substantive public interest	No		No	Necessary without substantive public interest	No comments with merit	Necessary without substantive public interest and should remain in effect without further action	Keep in Code - Update History Note
		09 NCAC 03A .0103	BUDGET MANUAL	Amended Eff. April 1, 1989	Necessary without substantive public interest	No		Yes	Necessary without substantive public interest	One or more comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
SUBCHAPTER 03M - UNIFORM ADMINISTRATION OF STATE GRANTS	SECTION .0100 - ORGANIZATION AND FUNCTION	09 NCAC 03M .0101	PURPOSE	Amended Eff. October 1, 2007	Necessary without substantive public interest	No		No	Necessary without substantive public interest	No comments with merit	Necessary without substantive public interest and should remain in effect without further action	Keep in Code - Update History Note
		09 NCAC 03M .0102	DEFINITIONS	Amended Eff. October 1, 2007	Necessary without substantive public interest	No		No	Necessary without substantive public interest	No comments with merit	Necessary without substantive public interest and should remain in effect without further action	Keep in Code - Update History Note
	SECTION .0200 - RESPONSIBILITIES OF GRANTEEES AND SUBGRANTEEES	09 NCAC 03M .0201	ALLOWABLE USES OF STATE FUNDS	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0202	GRANTEE RESPONSIBILITIES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0203	SUBGRANTEE RESPONSIBILITIES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0205	REPORTING THRESHOLDS AND FORMATS FOR GRANTEEES AND SUBGRANTEEES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0300 - RESPONSIBILITIES OF THE OFFICE OF THE STATE CONTROLLER	09 NCAC 03M .0301	OFFICE OF THE STATE CONTROLLER RESPONSIBILITIES	Amended Eff. October 1, 2007	Unnecessary	No		No	Unnecessary	No comments with merit	Unnecessary and should expire on the first day of the month following the consultation	Rule expired - remove from Code
	SECTION .0400 - RESPONSIBILITIES OF AGENCIES	09 NCAC 03M .0401	AGENCY RESPONSIBILITIES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0500 - RESPONSIBILITIES OF THE OFFICE OF THE STATE AUDITOR	09 NCAC 03M .0501	OFFICE OF THE STATE AUDITOR RESPONSIBILITIES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0600 - RESPONSIBILITIES OF THE OFFICE OF STATE BUDGET AND MANAGEMENT	09 NCAC 03M .0601	OFFICE OF STATE BUDGET AND MANAGEMENT RESPONSIBILITIES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0700 - CONTRACTING, MONITORING, AND OVERSIGHT	09 NCAC 03M .0701	GRANT DOCUMENTATION	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0702	SUBORDINATION OF OTHER CONTRACTS AGREEMENTS	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0703	REQUIRED CONTRACT PROVISIONS	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0704	GRANT MONITORING AND EVALUATION	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
	SECTION .0800 - SANCTIONS	09 NCAC 03M .0801	NONCOMPLIANCE WITH RULES	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt
		09 NCAC 03M .0802	RECOVERY OF STATE FUNDS	Eff. July 1, 2005	Necessary with substantive public interest	No		No	Necessary with substantive public interest	No comments with merit	Necessary with substantive public interest and must be readopted	Agency must readopt

Agency	Rule	Name	Type of Comment	Comment
Office of State Budget and Management	09 NCAC 03A .0103	Budget Manual	Select One Public Coment as defined in G.S. 150B-21.3A(a)(5)	<p>From: Robert A, (Bobby) Bryan, Jr. Sent: Saturday, November 8, 2014 4:45 pm To: Brandon James, OSBM Subject: comments on 09 NCAC 03 .0103 BUDGET MANUAL</p> <p>Please accept these comments on the rule, 09 NCAC 03A .0103 BUDGET MANUAL, which is now open for public comment pursuant to G.S. 150B-21.3A, Periodic Review and Expiration of Existing Rules. It is my understanding that your agency has determined that this rule is "necessary without substantive public interest." I would contend that the rule should be designated as "necessary with substantive public interest. By way of introduction, I am a retired State employee. For over 20 years, I was employed as Commission Counsel for the Rules Review Commission. I am intimately familiar with the Administrative Procedure Act and its requirements for what should be adopted as a rule and the standards that a rule must meet. The rule in question does not meet the standards necessary for Rules Review Commission approval set forth in G.S. 150B-21.9(a). The rule in question purports to tell what is in the budget manual and provides for its availability. Even though at least part of the budget manual meets the definition of "rule" in G.S. 150B-2(8a), it does not appear that the actual contents of the manual appear anywhere in the North Carolina Administrative Code. The budget manual contains procedures State agencies must use in preparing fiscal notes on rules even though this rule does not address that issue. This violates at least two of the standards set forth in G.S. 150B-21.9(a). It appears that this rule is attempting to incorporate the agency's unadopted and therefore non-binding material into the Administrative Code by reference. This is not allowed by the Administrative Procedure Act. There is no authority granted to the agency by the General Assembly for it to incorporate its own unadopted materials without adopting them pursuant to the procedures set out in the Administrative Procedure Act, and, since the provisions are not in the Administrative Code, it is not clear what the requirements are. While the authority cited in the history note for this rule, G.S. 143-2, has been repealed, it may well be that there exists statutory authority for the Office of State Budget and Management to adopt the information in the budget manual as a rule. The problem is that the information has not been so adopted. G.S. 150B-2(8a) defines "rule" as "any agency regulation, standards, or statement of general applicability that implements or interprets an enactment of the General Assembly . . ." G.S. 150B-2(8a)b. exempts "[b]udgets and budget policy and procedures issued by the Director of the Budget . . ." from the definition of "rule." This exemption exempts much of what is in the manual from the definition of "rule" and thus the need to be adopted pursuant to the provisions of the Administrative Procedure Act. However, that exemption does not apply to requirements set by the agency in implementing its authority under G.S. 150B-21.4(b1) regarding State agencies preparing fiscal notes on rules with substantial economic impacts and certifying that those rules adhere to the regulatory principles in G.S. 150B-19.1(a)(2), (5) and (6). "Substantial economic impact" is defined as "an aggregate financial impact on all persons affected of at least one million dollars (\$1,000,000) in a 12-month period." These</p>

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Copy all columns in this row to the right of this yellow cell and paste			Select One	<p>requirements are not "[b]udgets or budget policies and procedures." The exemption in G.S. 150B-2(8a)b. relates to certain powers of the Director of the Budget and not to everything the Office of State Budget and Management may do. There is no total exemption for the agency such as could have been given in G.S. 150B-1(d). When the agency creates requirements other than budgets and budget policy and procedures, it is subject to the rulemaking requirements of G.S. 150B. G.S. 150B-18 clearly states that "[a] rule is not valid unless it is adopted in substantial compliance with [Article 2A of the Administrative Procedure Act]. An agency shall not seek to implement or enforce against any person a policy, guideline, or any 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 pursuant to [Article 2A of the Administrative Procedure Act]." Because at least part of what is in the budget manual meets the definition of "rule," that part is not valid or enforceable since it has not been properly adopted. There is no authority given to an agency to adopt a rule implying that a manual not adopted as a rule sets forth requirements that must be followed. If the rule is intended to apply only to that part of the manual exempt from rulemaking, that is unclear and ambiguous. As a practical matter, the agency has been implementing and enforcing that part of the manual required to be adopted as a rule to be enforceable in violation of G.S. 150B-18. If your agency contends that the rule in question incorporates by reference the budget manual and thus is in compliance with the rulemaking provisions of the Administrative Procedure Act, that is unclear, ambiguous, and not consistent with the requirements of the Administrative Procedures Act. G.S. 150B-21.6 sets out the materials that an agency may incorporate by reference without repeating the text of the reference material. This statute does not allow an agency to adopt a rule incorporating its own unadopted material into a rule thus bypassing the rulemaking provisions. If such an adoption were otherwise allowable, then the rule would still fail because it does not state whether the incorporated material includes subsequent amendments and editions. Since the rule was last amended 25 years ago and the budget manual has undergone many changes since then, it would not be clear what version of the manual would apply to fiscal notes and 150B-19.1 certifications. For the reasons stated above, 09 NCAC 03A .0103 BUDGET MANUAL should be designated as necessary with substantive public interest. Thank you for your consideration.</p>

Agency	Rule	Name	Type of Comment	Agency Response	RRC Staff Recommendation	RRC Determination [150B-21.3A(c)(2)]
Copy all columns in this row to the right of this yellow cell and paste			Select One	Public Comment as defined in G.S. 150B-21.3A(a)(5) Mr. Bryan raises two issues: (1) that the rule attempts to incorporate OSBM's unadopted materials into the administrative code by reference in violation of the Administrative Procedure Act and (2) that the Budget Manual addresses State agency preparation of fiscal notes and certification and these provisions are not "budgets and budget policies and procedures" exempt from rulemaking. In response to the first point, the rule is not an attempt to incorporate the Budget Manual into the administrative code by reference. In response to the second point, G.S. 150B-2(8a)b. states that "budgets and budget policies and procedures issued by the Director of the Budget" are not rules. G.S. 143C-1-1(d)(3) defines "budget" as "a plan to provide and spend money for specified programs, functions, activities, or objects during a fiscal year." A fiscal note is not defined in Chapter 150B, but is defined in the Budget Manual as "a realistic estimate of the impact of a proposed rule change." See 7.2, Budget Manual, p. 165. The "impact" relates to the expenditure or distribution of State funds. G.S. 150B-21.4 requires submission of a fiscal note to OSBM for permanent rules changes "that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes." As the Budget Manual states, "a rule change that causes any additional cost to the state or that moves funds requires OSBM approval." See, 7.4.1, Budget Manual, p. 173. A fiscal note is not a rule change.	Select One	Select One
Office of State Budget and Management	09 NCAC 03A .0103	Budget Manual	Public Comment as defined in G.S. 150B-21.3A(a)(5)	Mr. Bryan raises two issues: (1) that the rule attempts to incorporate OSBM's unadopted materials into the administrative code by reference in violation of the Administrative Procedure Act and (2) that the Budget Manual addresses State agency preparation of fiscal notes and certification and these provisions are not "budgets and budget policies and procedures" exempt from rulemaking. In response to the first point, the rule is not an attempt to incorporate the Budget Manual into the administrative code by reference. In response to the second point, G.S. 150B-2(8a)b. states that "budgets and budget policies and procedures issued by the Director of the Budget" are not rules. G.S. 143C-1-1(d)(3) defines "budget" as "a plan to provide and spend money for specified programs, functions, activities, or objects during a fiscal year." A fiscal note is not defined in Chapter 150B, but is defined in the Budget Manual as "a realistic estimate of the impact of a proposed rule change." See 7.2, Budget Manual, p. 165. The "impact" relates to the expenditure or distribution of State funds. G.S. 150B-21.4 requires submission of a fiscal note to OSBM for permanent rules changes "that would require the expenditure or distribution of funds subject to the State Budget Act, Chapter 143C of the General Statutes." As the Budget Manual states, "a rule change that causes any additional cost to the state or that moves funds requires OSBM approval." See, 7.4.1, Budget Manual, p. 173. A fiscal note is not a rule change.	Select One	Select One

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Copy all columns in this row to the right of this yellow cell and paste			Select One	<p>Manual, p. 172. A fiscal note "must state the amount of funds that would be expended or distributed as a result of a proposed rule change." G.S. 150B-21.4(a). The rulemaking provisions of Chapter 150B do not apply to fiscal note and certification policies and procedures because these are budget policies and procedures dealing specifically with the expenditure, distribution, or impact of "money for specified programs, functions, activities or objects during a fiscal year."</p>	Select One	Select One