



STATE OF NORTH CAROLINA
OFFICE OF ADMINISTRATIVE HEARINGS

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August 21, 2018

Katelyn Love, Rulemaking Coordinator
Board of Elections and Ethics Enforcement
Sent via email only: katelyn.love@ncsbe.gov

Re: Extension of the Period of Review for Rules 08 NCAC 01 .0106, 08 NCAC 02 .0114, 08 NCAC 05 .0111, 08 NCAC 10B .0109, 08 NCAC 16 .0101-.0104, 08 NCAC 18 .0101-.0102, and 08 NCAC 20 .0101; and Objection to Rules 08 NCAC 01 .0104, 08 NCAC 02 .0110-.0113, 08 NCAC 03 .0101-.0106, .0201-.0202, .0301-.0302, 08 NCAC 04 .0302-.0307, 08 NCAC 06B .0103-.0105, 08 NCAC 08 .0104, 08 NCAC 09 .0106-.0109, and 08 NCAC 10B .0101-.0108

Dear Ms. Love:

At its meeting on August 16, 2018, the Rules Review Commission extended the period of review for 08 NCAC 01 .0106, 08 NCAC 02 .0114, 08 NCAC 05 .0111, 08 NCAC 10B .0109, 08 NCAC 16 .0101-.0104, 08 NCAC 18 .0101-.0102, and 08 NCAC 20 .0101 in accordance with G.S. 150B-21.10 at the request of the agency. Pursuant to 150B-21.13, when the Commission extends the period of review, it is required to approve or object to rules or call a public hearing on the same within 70 days.

In addition, the Commission objected to 08 NCAC 01 .0104, 08 NCAC 02 .0110-.0113, 08 NCAC 03 .0101-.0106, .0201-.0202, .0301-.0302, 08 NCAC 04 .0302-.0307, 08 NCAC 06B .0103-.0105, 08 NCAC 08 .0104, 08 NCAC 09 .0106-.0109, and 08 NCAC 10B .0101-.0108 for the reasons set forth in the attached document.

Please respond to this letter in accordance with the provisions of G.S. 150B-21.12. If you have any questions regarding the Commission's actions, please feel free to contact me.

Sincerely,

Amber May
Commission Counsel

Enclosure

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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: State Board of Elections and Ethics Enforcement

RULE CITATION: 08 NCAC 10B .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:

Staff believes this Rule is ambiguous as written as it includes language such as “clearly”, “fail-safe”, “adequate”, “proper”, “other approved record”, “secure”, and “properly” without providing any additional information as to the meaning of these terms.

Further, the history note contains references to statutes that no longer exist as the statutory references contained in this Rule have been recodified.

Staff notes that additional information relating to the clarity of this Rule is noted in this Rule's corresponding technical change requests.

REQUEST FOR TECHNICAL CHANGE

AGENCY: Board of Elections and Ethics Enforcement

RULE CITATION: 08 NCAC 10B .0103

DEADLINE FOR RECEIPT: Friday, August 10, 2018

PLEASE NOTE: This request may extend to several pages. Please be sure you have reached the end of the document.

The Rules Review Commission staff has completed its review of this Rule prior to the Commission's next meeting. The Commission has not yet reviewed this Rule and therefore there has not been a determination as to whether the Rule will be approved. You may call our office to inquire concerning the staff recommendation.

In reviewing this Rule, the staff recommends the following technical changes be made:

Throughout this Rule, please change "ballot(s)" to ballot or ballots, whatever is accurate.

In (a), line 7, please change "slip(s)" to slip or slips, whatever is meant. Please do the same for record(s). Also, is this provisions still accurate?

On line 7, please provide the specific law for curbside voting.

Line 8, please delete or define "secure" in "secure removal"

Line 9, please change "would be permissible" to "shall be permissible"

Please rewrite lines 8-10 (Provisions... emergencies) to be more clear. What is the emergency management plan? I assume that this is required elsewhere in rule or statute?

How does the emergency management plan of a county board go with the Executive Director's emergency powers set forth in 01 .0106? Do they go together?

In (b), please delete or define "clearly" in "clearly communicate"

On line 12, what is meant by "in some cases, the precinct judge may prompt the voter..." When will this occur? Is this language necessary?

Is the process set forth in lines 16-20 an accurate depiction of the current process?

On line 21, please change "identity/name" to "name", or whatever is intended.

In (c), when and by whom would a voter be challenged? When would the challenge be overruled? Is there a cross-reference available?

Line 24, what is meant by "each official ballot the voter is entitled to vote"? Is this based on jurisdiction of the voter?

Amber May
Commission Counsel
Date submitted to agency: August 2, 2018

Line 29-30, what is meant by “Note that unaffiliated voter.. committees”? Is there a cross-reference available for this? Is this in accordance with 163A-989? IF so, why not say something like subject to the 163A-989, unaffiliated voters may...”

In (d), what is the “fail-safe” voting process?

Delete the “or” at the end of (d)(1) and (d)(2).

In (d)(3), what is meant and how is it determined whether someone “maintains continuous eligibility”?

In (e), please delete or define “adequate”

In (e), please delete or define “proper.” I assume that you mean the voting place in his or her precinct?

In (f) and (g), please change “it is the duty of the chief judge and judges” to a directive. A suggestion would be “the chief judge and judges shall...”

In (f), line 10, what is meant by “pursuant to law”? What law?

In (f), must the judge do this before giving the voter his or her ballot?

In (g), what is considered to be “technical information”? Are there examples?

Does (h) reflect the current process?

Line 18, what is meant by “other approved record”? Approved by whom?

In (i), please define “secure”

Line 23, please delete or define “properly”

Line 23, please change “are entitled” to “shall be entitled”

What is the intent of lines 23-24? May the observer request this information more often or may the precinct voluntarily provide this information? Please review and clarify.

Line 25, what are “authorization to vote” documents versus “traditional pollbooks”?

Please update the History Note to reflect the current law and add any additional pertinent statutory authority.

Please retype the rule accordingly and resubmit it to our office at 1711 New Hope Church Road, Raleigh, North Carolina 27609.

Amber May
Commission Counsel
Date submitted to agency: August 2, 2018

1 08 NCAC 10B .0103 is readopted as published in 31:23 NCR 2311 as follows:

2
3 **08 NCAC 10B .0103 VOTING PROCEDURES**

4 (a) From the time the polls are opened until the precinct count has been completed, the returns signed, and the results
5 declared, no person shall take or remove from the voting enclosure election supplies and materials, including official
6 ballots, containers of official ballots, provisional official ballots, spoiled ballots, the pollbook or voter authorization
7 slip(s), the registration record(s) or any voting units or devices that are part of the voting system, except as authorized
8 by law to accommodate curbside voters. Provisions for secure removal of election supplies and materials at any time
9 would be permissible under the emergency management plan of a county board of elections in the cases of natural or
10 man-made emergencies.

11 (b) A person seeking to vote shall enter the voting enclosure at the voting place through the designated entrance and
12 shall clearly communicate the person's name and place of residence to one of the judges of election. In some cases,
13 the precinct judge may prompt the voter to provide this information. In a primary election, the voter shall also state
14 the political party with which the voter affiliates and in whose primary the voter desires to vote, or if the voter is an
15 unaffiliated voter permitted to vote in the primary of a particular party, the voter shall state the name of the authorizing
16 political party in whose primary the voter wishes to vote. This information, including the political party's primary in
17 which the voter elected to participate, provided by the voter shall be recorded in the precinct pollbook or on the voter
18 authorization slip. The judge or assistant to whom the voter gives this information shall announce the name and
19 residence of the voter so that the information may be heard by the necessary officials and observers. After examining
20 the precinct registration records, the judge or assistant shall state whether the person seeking to vote is registered. The
21 precinct judge or assistant shall not presume the identity/name, address, or party affiliation of any person seeking to
22 vote.

23 (c) If the person is found to be registered and is not challenged, or if the challenge is overruled, the responsible judge
24 of election shall provide the voter with each official ballot the voter is entitled to vote. In a primary election the voter
25 shall be allowed to vote the political party ballot(s) the voter is entitled to vote and no others, except non-partisan
26 ballots. Unaffiliated voters may choose to participate in only one party's primary and no others on the same day. In
27 the case of a second primary, unaffiliated voters who participated in a party's primary in the first primary may only
28 vote that party's ballot in the second primary. However, if an unaffiliated voter did not participate in the first primary,
29 the voter may choose which party's primary to participate in during the second primary. Note that unaffiliated voter
30 participation in party primaries is subject to authorization by the respective state party executive committees.
31 Unaffiliated voters who are otherwise qualified may always participate in non-partisan primaries.

32 (d) If the person is found to not be registered to vote in the precinct, the responsible judge of election shall inform the
33 person of the fail-safe voting process. First, based on information provided by the person the responsible judge shall
34 determine whether or not the person may be eligible to vote an official provisional ballot. The person is eligible to
35 vote an official provisional ballot if the person resides in the precinct and either:

- 36 (1) is a registered voter in the county and has moved into the precinct 30 days or more prior to the
37 election and has not reported the change to the board of elections; or

1 (2) claims to have applied for voter registration in the county but there is no record of the person's name
2 on the registration records; or

3 (3) was removed from the list, but the person maintains continuous eligibility within the county; or

4 (4) disputes the voting districts (and ballots) to which the person has been assigned.

5 (e) If the person is found to not be registered to vote in the precinct and the responsible judge of election learns from
6 the person that the person resides in a different precinct, the responsible judge shall provide the person with adequate
7 information in order to direct the person to the proper voting place.

8 (f) It is the duty of the chief judge and judges to gather any voter information regarding changes of name and address
9 in order to assist the county board of elections in updating voter records. If the county board of elections has identified
10 a voter's record pursuant to law to gather additional information, the responsible judge shall require the voter to update
11 the information.

12 (g) It is the duty of the chief judge and judges to give any voter any technical information the voter desires in regard
13 to ballot items. In response to questions asked by the voter, the chief judge and judges shall communicate to the voter
14 only technical information necessary to enable the voter to vote the ballot.

15 (h) The Chief Judge shall assign two precinct officials, one from each political party if possible, to keep the pollbook
16 or other voting record and to keep the registration list. The names of all persons voting shall be checked on the
17 registration record and entered on the pollbook or other voting record. In an election where observers may be
18 appointed each voter's party affiliation shall be entered in the proper column of the pollbook or other approved record
19 opposite the voter's name. The designated official shall make each entry at the time the ballots are handed to the voter.
20 The information about the voter's political party registration shall be obtained from the registration record and not
21 from the voter.

22 (i) The chief judge, judges, and assistants must ensure that registration records are kept secure and do not leave the
23 voting enclosure for any purpose. Properly designated observers are entitled to obtain a list of the persons who have
24 voted in the precinct so far in that election day at least at the following times: 10 a.m., 2 p.m. and 4 p.m. Counties
25 using authorization to vote documents as opposed to traditional pollbooks may comply with the requirement by
26 permitting each observer to inspect election records so that the observer may create a list of persons who have voted
27 in the precinct. A party may designate more than two observers for each precinct, but only two may serve in the voting
28 place at the same time. Observers may serve in shifts, as long as the shifts are at least four hours long and the persons
29 serving in the shifts have been properly appointed as observers.

30
31 *History Note: Authority G.S. 163-22; 163-166.7; 163-119;*

32 *Temporary Adoption Eff. April 15, 2002;*

33 *Eff. August 1, 2004.*

34 *Readopted Eff. September 1, 2018.*