

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 Education

RULE CITATION: 16 NCAC 06D .0211

RECOMMENDED ACTION:

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

COMMENT:

Staff recommends objection for failure to comply with the APA, ambiguity, and lack of necessity. The Rule refers to an "Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina." In Item (1), the Rule states the Invitation provides "the required procedures for submission, evaluation, and adoption of textbooks and a schedule for the process." The Invitation also includes the "criteria used to evaluate textbooks presented for adoption for their conformity to the North Carolina Standard Course of Study." These contents meet the definition of a "rule" in G.S. 150B-2(8a). Referring to the Invitation rather than stating its contents in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Invitation outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these procedural requirements in Rule also makes the process for submitting and evaluating textbooks unclear. Therefore, staff recommends objection for failure to comply with the APA and ambiguity.

Staff also recommends objection to Item (2) for lack of necessity. Item (2) directs the General Counsel of the State Board to "review and approve" the Invitation. This statement concerns only the internal management of the agency and is therefore unnecessary. G.S. 150B-2(8a)(a).

Ashley Snyder
Commission Counsel

1 16 NCAC 06D .0211 is proposed for adoption as follows:

2 **16 NCAC 06D .0211 TEXTBOOK EVALUATION CRITERIA AND INVITATION TO SUBMIT**

3 The North Carolina Department of Public Instruction shall develop the criteria used to evaluate textbooks presented
4 for adoption for their conformity to the North Carolina Standard Course of Study.

5 (1) The criteria shall be included in the Invitation to Submit Textbooks for Evaluation and Adoption in
6 North Carolina. The Invitation, also developed by the Department, shall provide the required
7 procedures for submission, evaluation, and adoption of textbooks and a schedule for the process.

8 (2) General Counsel to the State Board of Education shall review and approve the Invitation prior to its
9 being submitted to the State Board of Education for review and adoption.

10 (3) The State Board-approved and adopted Invitation to Submit Textbooks for Evaluation and Adoption
11 in North Carolina that includes the criteria shall be sent to the publishers on the NC Publishers
12 Registry requesting the submission of textbooks for evaluation and adoption. Only publishers on the
13 NC Publishers Registry will be sent the invitation and can submit textbooks for evaluation and
14 adoption.

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16 History Note: Authority G.S. 115C-12; 115C-89;

17 Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);

18 Emergency Rule Eff. August 20, 2019.

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AGENCY: State Board of Education

RULE CITATION: 16 NCAC 06D .0212

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 recommends objection for failure to comply with the APA, ambiguity, and lack of necessity. The Rule refers to an "Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina." In Paragraph (b) the Rule states "Publishers are required to follow the procedures set forth in the invitation. Failure to comply with all procedure, including stated deadlines, may result in disqualification." Subparagraph (d)(3) states the Invitation includes the "procedure for reconsideration." These procedures meet the definition of a "rule" in G.S. 150B-2(8a). Referring to the Invitation rather than stating its contents in rule circumvents the permanent rulemaking process set forth in G.S. 150B-21.2. As written, this allows the agency to amend the Invitation outside the rulemaking process, changing the substance of this Rule without public notice, comment, or RRC review. Failure to provide these procedural requirements in Rule also makes the process for submitting and evaluating textbooks unclear. Therefore, staff recommends objection for failure to comply with the APA and ambiguity.

Staff also recommends objection to Paragraph (a) for lack of necessity because it repeats the requirements of G.S. 115C-94.

§ 115C-94. Publishers to register.

Any publisher who submits books for adoption shall register in the office of the Superintendent of Public Instruction the names of all agents or other employees authorized to represent that company in the State, and this registration list shall be open to the public for inspection.

Ashley Snyder
Commission Counsel

1 16 NCAC 06D .0212 is proposed for adoption as follows:

2 **16 NCAC 06D .0212 TEXTBOOK PUBLISHERS REGISTRY**

3 (a) In accordance with G.S. 115C-94, the State Superintendent of Public Instruction or designee shall maintain a
4 register of all publishers who submit textbooks for adoption by the State Board of Education. The State Superintendent
5 shall prescribe the information required for registration.

6 (b) Publishers shall be registered on the NC Publishers Registry in order to receive the State Board of Education-
7 approved Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina, which shall provide the
8 required procedures for submission, evaluation, and adoption of textbooks. Publishers are required to follow the
9 procedures set forth in the invitation. Failure to comply with all procedures, including stated deadlines, may result in
10 disqualification. Only publishers on the NC Publishers Registry will be sent the invitation and can submit textbooks
11 for evaluation and adoption.

12 (c) Each publishing company piloting textbook materials being submitted for consideration in the current adoption
13 year shall notify the Textbook Commission, in writing, which materials are being piloted and in which local education
14 agencies materials are being piloted. The Textbook Commission shall notify all local superintendents involved in
15 piloting textbook materials prior to the end of the textbook selection process that the materials they are piloting may
16 or may not be accepted by the Commission.

17 (d) Contact with the State Board of Education, the Textbook Commission, advisors, and the Department must be
18 limited.

19 (1) The Commission may meet publicly with representatives of publishers to discuss the Commission's
20 plans and procedures for adoption of textbooks.

21 (2) At no time during the adoption process (from the time the State Board approves the invitation until
22 the State Board adopts the list of textbooks) may the publishers or any of their representatives meet
23 privately with members of the Textbook Commission, the State Board of Education, evaluation
24 advisors, or the Department staff involved in submission, evaluation, or adoption process.

25 (3) A period of time shall be set aside for the Textbook Commission to meet and deliberate before a list
26 of textbook recommendations is taken to the State Board of Education for adoption. Publishers will
27 have time to present additional information to the Commission if their title(s) have been excluded
28 from the list of recommendations. The procedure for reconsideration shall be described in the
29 Invitation to Submit Textbooks for Evaluation and Adoption in North Carolina.

30 (e) Publishers may not exercise undue pressure.

31 (1) For purposes of restrictions, "undue pressure" means personal contact, whether in person, by
32 telephone, or in written form, that attempts to advocate for the selection of a particular book or series
33 of books. "Undue pressure" does not include social contact or presentations to the Textbook
34 Commission as a whole, and does not include written communication with Textbook Commission
35 members or agency officials following acceptance or rejection of a submission in an effort to seek
36 clarification or reconsideration.

1 (2) The State Superintendent shall remove from the NC Publishers Registry any publisher whose
2 representatives attempt to exercise undue pressure of any kind to adopt its books upon a member of
3 the Textbook Commission, the advisors, or the Department.

4 (3) The State Board of Education shall direct the State Superintendent of Public Instruction to remove
5 from the NC Publishers Registry any publisher whose representatives attempt to exercise undue
6 pressure of any form upon a member of the State Board of Education to adopt its books.

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8 *History Note: Authority G.S. 115C-12; 115C-89;*

9 *Interim Rule status conferred Eff. June 27, 2018, pursuant to S.L. 2018-114, sec. 27.(b);*

10 *Emergency Rule Eff. August 20, 2019.*

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