

The Art of Writing Good Rules

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Let's first look at G.S. 150B, what does it contain?

- ▶ Does everyone do rulemaking?
 - ▶ Agencies are subject to rulemaking.
 - ▶ "Agency" defined as an agency or an officer in the executive branch of the government of this State, and includes:
 - ▶ the Council of State,
 - ▶ the Governor's Office,
 - ▶ a board, a commission,
 - ▶ a department,
 - ▶ a division,
 - ▶ a council, and
 - ▶ any other unit of government in the executive branch.

See G.S. 150B-2(1a)

Let's first look at G.S. 150B, what does it contain?

- ▶ Does everyone do rulemaking?
 - ▶ No.
 - ▶ Certain agencies are provided exemptions in G.S. 150B-1.
- ▶ Are those the ONLY exemptions? No.
 - ▶ Department of Revenue - § 105-262.1. Rules to exercise authority under G.S. 105-130.5A.
 - ▶ Roanoke Island Commission - § 143B-131.2. Roanoke Island Commission – Purpose, powers, and duties.
 - ▶ These are examples. Other exemptions exist in various agency specific statutes.

What is next in G.S. 150B?

- ▶ Defined terms:
 - ▶ “Rule” means 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.
 - ▶ “Policy” means any nonbinding interpretive statement within the delegated authority of an agency that merely defines, interprets, or explains the meaning of a statute or rule. The term includes any document issued by an agency which is intended and used purely to assist a person to comply with the law, such as a guidance document.

See G.S. 150B-2(7a), (8a)

What should NOT be a rule?

► An agency may not adopt a rule that does one or more of the following:

- (1) Implements or interprets a law unless that law or another law specifically authorizes the agency to do so.
- (2) Enlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required.
- (3) Imposes criminal liability or a civil penalty for an act or omission, including the violation of a rule, unless a law specifically authorizes the agency to do so or a law declares that violation of the rule is a criminal offense or is grounds for a civil penalty.
- (4) Repeats the content of a law, a rule, or a federal regulation. A brief statement that informs the public of a requirement imposed by law does not violate this subdivision and satisfies the "reasonably necessary" standard of review set in G.S. 150B-21.9(a)(3).
- (5) Establishes a fee or other charge for providing a service in fulfillment of a duty unless a law specifically authorizes the agency to do so or the fee or other charge is for one of the following:
 - a. A service to a State, federal, or local governmental unit.
 - b. A copy of part or all of a State publication or other document, the cost of mailing a document, or both.
 - c. A transcript of a public hearing.
 - d. A conference, workshop, or course.
 - e. Data processing services.
- (6) Allows the agency to waive or modify a requirement set in a rule unless a rule establishes specific guidelines the agency must follow in determining whether to waive or modify the requirement.

See G.S. 150B-19

Agency is thinking about adopting a rule. Anything to consider?

- (1) An agency may adopt only rules that are expressly authorized by federal or State law and that are necessary to serve the public interest.
- (2) An agency shall seek to reduce the burden upon those persons or entities who must comply with the rule.
- (3) Rules shall be written in a clear and unambiguous manner and must be reasonably necessary to implement or interpret federal or State law.
- (4) An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant.
- (5) When appropriate, rules shall be based on sound, reasonably available scientific, technical, economic, and other relevant information. Agencies shall include a reference to this information in the notice of text required by G.S. 150B-21.2(c).
- (6) Rules shall be designed to achieve the regulatory objective in a cost-effective and timely manner.

See G.S. 150B-19.1

Rulemaking coordinator – every agency has one, right?

- ▶ (a) Each agency must designate one or more rule-making coordinators to oversee the agency's rule-making functions. The coordinator shall serve as the liaison between the agency, other agencies, units of local government, and the public in the rule-making process. The coordinator shall report directly to the agency head.
- ▶ (b) The rule-making coordinator shall be responsible for the following:
 - ▶ (1) Preparing notices of public hearings.
 - ▶ (2) Coordinating access to the agency's rules.
 - ▶ (3) Screening all proposed rule actions prior to publication in the North Carolina Register to assure that an accurate fiscal note has been completed as required by G.S. 150B-21.4(b).
 - ▶ (4) Consulting with the North Carolina Association of County Commissioners and the North Carolina League of Municipalities to determine which local governments would be affected by any proposed rule action.
 - ▶ (5) Providing the North Carolina Association of County Commissioners and the North Carolina League of Municipalities with copies of all fiscal notes required by G.S. 150B-21.4(b), prior to publication in the North Carolina Register of the proposed text of a permanent rule change.
 - ▶ (6) Coordinating the submission of proposed rules to the Governor as provided by G.S. 150B-21.26.

See G.S. 150B-21

Mailing list exists, right?

- ▶ An agency must maintain a mailing list of persons who have requested notice of rule making.
- ▶ When is an agency required to provide notice through the mailing list?
 - ▶ When an agency publishes in the North Carolina Register a notice of text of a proposed permanent rule;
 - ▶ 30 business days prior to adopting a temporary rule; or
 - ▶ Department of Agriculture must annually provide admission fees for the State Fair; and operating hours, admission fees, or related activity fees at State forests.
- ▶ An agency may charge an annual fee to each person on the agency's mailing list to cover copying and mailing costs.
 - ▶ Consider cost effective options, such as a listserv.

See G.S. 150B-21.2(d).

The rulemaking coordinator received something odd in the mail. What is it?

► Petition for rulemaking

- What is the petition?
 - Written rule-making request to the agency requesting an agency to create or amend a rule.
 - The requestor must submit the proposed text of the requested rule change and a statement of the effect of the requested rule change.
- An agency must respond and grant or deny the rulemaking petition.
 - An agency must respond within 30 days after submission.
 - A board or commission must respond within 120 days after submission.
- If petition for rulemaking is granted, then agency must inform the requestor and initiate rulemaking
- If petition for rulemaking is denied, then agency must provide written notice to requestor
 - Denial is a final agency decision subject to judicial review. Failure to act within set time frames is a denial.
- Each agency must establish by rule the procedure for submitting a rule-making petition to it and the procedure the agency follows in considering a rule-making petition.

See G.S. 150B-20

Types of Rules

► “Only” three types:

- Emergency
- Temporary
- Permanent

Emergency what...rules?

- ▶ What is required?
 - ▶ “the immediate adoption of the rule is required by a serious and unforeseen threat to the public health or safety”
- ▶ Notice or hearing?
 - ▶ No notice or hearing.
- ▶ Who reviews an emergency rule?
 - ▶ Codifier of Rules
- ▶ Does it expire?
 - ▶ Sixty days from the date the emergency rule was published in the North Carolina Register
 - ▶ Time is expanded if a temporary rule is filed for review by the Rules Review Commission.
 - ▶ Time shorter than sixty days may be specified in the rule.

See G.S. 150B-21.1A

Temporary rules

- ▶ What is required?
 - ▶ Agency finds that adherence to the notice and hearing requirements of G.S. 150B-21.2 would be contrary to the public interest and that the immediate adoption of the rule is required as set forth in G.S. 150B-21.1(a).
- ▶ Notice or hearing?
 - ▶ Yes. Comments must be accepted for 30 business days and one public hearing must be held.
- ▶ Who reviews a temporary rule?
 - ▶ The Rules Review Commission ensures compliance with G.S. 150B-21.1(a) and G.S. 150B-21.9(a).
- ▶ Does it expire?
 - ▶ 270 days from the date the temporary rule was published in the North Carolina Register
 - ▶ Time is expanded if a permanent rule is filed for review by the Rules Review Commission.
 - ▶ Time shorter than 270 days may be specified in the rule.

See G.S. 150B-21.1

Permanent rules

- ▶ What is required?
 - ▶ Agency determines they need a rule is necessary to serve the public interest
- ▶ Notice or hearing?
 - ▶ Yes. Comments must be accepted for 60 days and one public hearing may be held.
- ▶ Who reviews a permanent rule?
 - ▶ The Rules Review Commission ensures compliance with G.S. 150B-21.9(a).
- ▶ Does it expire?
 - ▶ Prior to 2013, no.
 - ▶ S.L. 2013-413 created the Periodic Review and Expiration of Existing Rules.

See G.S. 150B-21.2.

Rules noticed, now what?

- ▶ Who is this “Rules Review Commission” you speak of?
 - ▶ 10 appointees - 5 Senate and 5 House.
 - ▶ 2 year term
 - ▶ Current Senate appointees:
 - ▶ Jeffery Hyde (1st Vice Chair), Robert Bryan, Jr., Margaret Currin, John “Jay” Hemphill, and Jeffery Poley
 - ▶ Current House appointees:
 - ▶ Garth Dunklin (Chair), Stephanie Simpson (2nd Vice Chair), Danny Earl Britt, Jr., Jeanette Doran, and Wm. Paul Powell, Jr.

See G.S. 143B-30.1

Rules Review Commission reviews rules?

- ▶ The Commission must determine whether a rule meets all of the following criteria:
 - ▶ (1) It is within the authority delegated to the agency by the General Assembly.
 - ▶ (2) It is clear and unambiguous.
 - ▶ (3) It is reasonably necessary to implement or interpret an enactment of the General Assembly, or of Congress, or a regulation of a federal agency. The Commission shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed.
 - ▶ (4) It was adopted in accordance with Part 2 of this Article.
- ▶ The Commission shall not consider questions relating to the quality or efficacy of the rule but shall restrict its review to determination of the standards set forth in this subsection.

See G.S. 150B-21.9(a)

What else does the Rules Review Commission review?

- ▶ Periodic Review of Rules See G.S. 150B-21.3A.
 - ▶ S.L. 2013-413, with the stated goal of “eliminate[ing] unnecessary regulation,” created the “Periodic review and expiration of existing rules”
 - ▶ Prior to 2013, a permanent rule in the North Carolina Administrative Code (NCAC) stayed in the NCAC until an agency decided to take action on the rule
 - ▶ Periodic review and expiration of existing rules requires an agency to review rules, to classify the necessity of the rule, and to review that classification after public comment. Classifications are then reviewed by the Rules Review Commission.
 - ▶ The “review” of existing rules will occur for an agency every 10 years
- ▶ Rules Review Commission has adopted 11 rules for this process.

Overview done. Now what?

► Legislative drafting suggestions

- Is there specific rulemaking? Does the member want discretion left with the agency to alternate between rules or policies?
 - Legislative directives vary:
 - Agency "may promulgate rules, regulations, or guidelines "
 - "Secretary or the Secretary's designee shall be vested with authority to promulgate rules and regulations"
 - Agency "is authorized and empowered to adopt such rules and regulations, not inconsistent with the laws of this State, in accordance" with program
 - "Adopt rules for the administration of the Department and implementing this Article, pursuant to the Administrative Procedure Act, Chapter 150B of the General Statutes."
 - "...adopt rules in accordance with Chapter 150B of the General Statutes as are necessary to carry out the provisions of this Part."

Overview done. Now what?

► Legislative drafting suggestions

- Does the member have a preferred deadline?
 - "...shall adopt rules to implement this section no later than December 1, 2015."
 - "...authority to adopt rules without complying with the requirements of Article 2A of Chapter 150B of the General Statutes shall expire on July 1, 2016, and the Department shall adopt permanent rules to implement subsection (b) of this section by that date."
 - "...shall adopt rules implementing this act. The [agency] shall issue temporary rules, in addition to its permanent rule-making authority, to enforce this act. Rules for the implementation of Section 4 of this act shall be adopted no later than October 31, 2014."
 - "The Commission, after hearing, shall adopt rules to implement this section as soon as practicable."
 - "...shall adopt permanent rules in accordance with the provisions of this act using the procedure and time lines for temporary rules set forth in G.S. 150B-21.1(a3)."

Overview done. Now what?

- ▶ Legislative drafting suggestions
 - ▶ Does the member want a certain type of rule?
 - ▶ Temporary rule
 - ▶ Shorter timeline for comment
 - ▶ Will expire if agency does not take permanent rulemaking action
 - ▶ Permanent rule
 - ▶ Is there a fiscal analysis required for the rule by the agency?
 - ▶ If the rule “type” is temporary, then can the deadline be accommodated?
 - ▶ Is the statutory directive setting a specified deadline instead of allowing G.S. 150B-21.1(a2) to control?
 - ▶ Bill sits in a committee for a while, review the deadline.
 - ▶ Can the agency still meet the prescribed statutory deadline?

Overview done. Now what?

- ▶ Legislative drafting suggestions
 - ▶ Statutory specified outside authorities
 - ▶ “as approved by the Commission for Accreditation of Allied Health Educational Programs, or the Canadian Council on Accreditation for Respiratory Therapy Education”
 - ▶ Those standards are gone and now it is Commission on Accreditation for Respiratory Care
 - ▶ Rules Review Commission lacks the authority to allow an agency by rule to change the applicable standards set by statute
 - ▶ Consider adding “or an equivalent nationally recognized standard”
 - ▶ Consider impact of fees and the G.S. 12-3.1 consultation with timing
 - ▶ All fee increases require a consultation with the Joint Legislative Commission on Governmental Operations, see G.S. 150B-19(5)
 - ▶ Emergency rules, see G.S. 150B-21.1A(b)
 - ▶ Temporary rules, see G.S. 150B-21.1(a4),(b3)
 - ▶ Permanent rules, see G.S. 150B-21.3(c1)

Time to draft. Where to start?

- ▶ Take a step back and think about the process involved with the rules being drafted
 - ▶ Remember that as a rule-drafter, one understands their own intent
 - ▶ Write a rule for someone who does not understand the process
 - ▶ Involve the employees who will be responsible for implementation of the rules
 - ▶ Ask questions of what happens first, and then next, and after that...
 - ▶ Think about the work flow and try to organize the rules to follow the work flow
 - ▶ Consider involving the regulated public to receive feedback on the front end of the process
 - ▶ This will help to facilitate the process. While ultimately, the agency has the discretion to promulgate rules within the agency's authority, getting feedback will help to write better rules.

Time to draft. What should be in the rule?

- ▶ Rules should be clear statements
 - ▶ Remove excess language
 - ▶ Here is what the rule said:
 - ▶ "After an application for a permit, a modification, or a transfer ..."
 - ▶ Here was the technical change suggestion:
 - ▶ "I think the "a" before "modification" and "transfer" are unnecessary"
 - ▶ Other similar technical change requests:
 - ▶ "Do (d) and (e) mean the same thing? Are both necessary?"
 - ▶ "I think you should strike "has and" and just state, "only if it maintains an inventory..."
 - ▶ "each and every one" is duplicative. Why not delete it altogether and state "confirming that the conditions set forth..."

Time to draft. What should be in the rule?

- ▶ Rules should be clear statements
 - ▶ Short declarative sentences
 - ▶ Here is what the rule said:
 - ▶ Each applicant must submit evidence of having reached the recommended levels of acceptable performance on the National Board examinations given by the [redacted national testing agency] on or after the April, 1978 administration in one of the following formats and under the following conditions prior to Board approval of his application to take the clinical practicum examination administered by the Board, and shall authorize the release of his official score report by the [redacted national testing agency] prior to the approval by the Board of his application to take the clinical practicum examination.
 - ▶ Here was the technical change suggestion:
 - ▶ The first sentence in Paragraph (a) is too long and reads confusingly. Why not end the sentence after "Board" on line 7 and begin the next sentence, "The applicant shall authorize..."

Time to draft. What should be in the rule?

- ▶ Rules should be clear statements
 - ▶ Avoid "-ly" words
 - ▶ Typical technical change requests:
 - ▶ "what is "adequately sized"? Define or delete the term."
 - ▶ define or delete "specifically"
 - ▶ "is "a commercially reasonable period" defined in another rule or by statute? Please include a cross-reference. Otherwise, define or delete."
 - ▶ Rules Review Commission has a rule specifically to address this issue:
 - ▶ See 26 NCAC 05 .0101(5)(b)(4) - clarifying or deleting commonly used adjectives or adverbs such as "thoroughly," "clearly," "adequately," "appropriate," and "substantial;"

Time to draft. Is there a limit to the number of rules?

- ▶ Shorter rules are preferred
 - ▶ When a rule is amended, the entire rule is before the Rules Review Commission for their review
 - ▶ Consider breaking processes into separate rules
 - ▶ Example: an adjudication process
 - ▶ Rule regarding appeal time line
 - ▶ Rule regarding who to send notice of the appeal
 - ▶ Rule regarding filing deadlines prior to review of appeal
 - ▶ Rule regarding any hearing regarding an appeal
 - ▶ Think about breaking a rule into the different parts based on who the actor is in the rule.

See G.S. 150B-21.8.

Time to draft. What is the rule requiring?

- ▶ Provide clear directives to the regulated public
 - ▶ Is it permissive?
 - ▶ Then "may"
 - ▶ Is it mandatory?
 - ▶ Then the preference is for "shall"

Time to draft. What if there is an “outside” source?

- ▶ Reference an outside standard
 - ▶ Has it been incorporated in accordance with G.S. 150B-21.6?
 - ▶ Allows an agency to reference a rule adopted by another agency; or a standard or regulation of another agency, the federal government, or a generally recognized organization or association.
 - ▶ Agency must designate in the rule whether or not the incorporation includes subsequent amendments and editions of the referenced material.
 - ▶ Agency must have copies of the incorporated material available for inspection and must specify in the rule both where copies of the material can be obtained and the cost on the date the rule is adopted of a copy of the material.
 - ▶ Free websites are acceptable and encouraged

Time to draft. Should this information be in the rule or just on the form?

- ▶ Reference a form?
 - ▶ Is the content or substantive requirements prescribed by rule or statute?
 - ▶ If yes, then the form is good
 - ▶ If no, then the content or substantive requirements of the form should be set forth in the rule
 - ▶ Typical technical change request:
 - ▶ “Page 2, line 7 references a “Financial Responsibility Ownership Form.” G.S. 150B-2(8a)d does not require a form to be a rule if “the contents or substantive requirements of which are prescribed by rule or statute.” Is there a rule or statute that provides the information required in the application? Could it be cross-referenced? Please clarify.”

Time to draft. Can the agency draft this rule?

- ▶ Is the rule within the statutory authority?
 - ▶ Make certain the history note is as complete as possible.
 - ▶ Why is review of the authority in the history note so important?
 - ▶ This is what the staff counsel is reviewing.
 - ▶ If authority for the rule is not contained in the history note, then a staff opinion is likely.
 - ▶ Review cited authority and supplement as necessary prior to publication of the rule in the Register.

Time to draft. Is the rule just the statute, in some minor variation?

- ▶ Is the rule within the statutory authority?
 - ▶ Yes.
 - ▶ But wait, the rule is not a verbatim restatement of the statute, right?
 - ▶ Look at G.S. 150B-19(4)
 - ▶ A rule should not " repeats the content of a law, a rule, or a federal regulation. "
 - ▶ Also, look at G.S. 150B-19.1(a)(4)
 - ▶ "An agency shall consider the cumulative effect of all rules adopted by the agency related to the specific purpose for which the rule is proposed. The agency shall not adopt a rule that is unnecessary or redundant."
 - ▶ Typical technical change requests:
 - ▶ "this is duplicative of the statute, and these definitions are meant to supplement this statute. Is this definition necessary? If necessary, delete the clause 'means an inspection'."

Done drafting. Now what?

- ▶ Pre-reviews
 - ▶ Not part of the official rulemaking process.
 - ▶ Is done in tandem with staff counsel's work for the RRC, so beware of timing concerns.
 - ▶ How to ask?
 - ▶ Email with rule attached.
 - ▶ Provide a preferred responsive deadline.
 - ▶ Email who?
 - ▶ Any of the four attorneys and we internally distribute based upon current workload.

Fiscal notes

- ▶ Be aware of those requirements, but they are not reviewed by staff counsel.
- ▶ Each agency shall quantify the costs and benefits to all parties of a proposed rule to the greatest extent possible. Prior to submission of a proposed rule for publication in accordance with G.S. 150B-21.2, the agency shall review the details of any fiscal note prepared in connection with the proposed rule and approve the fiscal note before submission.
- ▶ (f) If the agency determines that a proposed rule will have a substantial economic impact as defined in G.S. 150B-21.4(b1), the agency shall consider at least two alternatives to the proposed rule.

See G.S. 150B-19.1.

Ready to publish

- ▶ Each agency subject to this Article shall post on its Web site, no later than the publication date of the notice of text in the North Carolina Register, all of the following:
 - ▶ (1) The text of a proposed rule.
 - ▶ (2) An explanation of the proposed rule and the reason for the proposed rule.
 - ▶ (3) The federal certification required by subsection (g) of this section.
 - ▶ (4) Instructions on how and where to submit oral or written comments on the proposed rule, including a description of the procedure by which a person can object to a proposed rule and subject the proposed rule to legislative review.
 - ▶ (5) Any fiscal note that has been prepared for the proposed rule.
- ▶ If an agency proposes any change to a rule or fiscal note prior to the date it proposes to adopt a rule, the agency shall publish the proposed change on its Web site as soon as practicable after the change is drafted. If an agency's staff proposes any such change to be presented to the rule-making agency, the staff shall publish the proposed change on the agency's Web site as soon as practicable after the change is drafted.

See G.S. 150B-19.1.

Is there more to the rulemaking process?

- ▶ Yes!
 - ▶ OAH rules division website has an abundance of information:
 - ▶ <http://www.ncoah.com/rules/>
 - ▶ OAH offers training
 - ▶ Topics covered are the following:
 - ▶ Distinctions in policy and rules
 - ▶ Rulemaking processes for emergency, temporary, and permanent rules
 - ▶ Periodic review
 - ▶ Fiscal notes process is reviewed by OSBM

Questions?

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