

Fiscal Impact Analysis
Permanent Rule Readoption without Substantial Economic Impact
10A NCAC 14A, Section .0100 - Rulemaking

Rulemaking Authority Proposing Rule Change:

North Carolina Department of Health and Human Services (Secretary)

Agency Contact Persons

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Impact Summary

Federal Government: No
State Government: Yes
Local Government: No
Private Entities: No
Substantial Impact: No

N.C. Administrative Code Citations and Titles of Rule Changes

**See proposed text of these rules in the Appendix*

10A NCAC 14A .0101 Petitions (Readoption with Substantive Changes)

10A NCAC 14A .0103 Declaratory Rulings (Readoption with Substantive Changes)

Authorizing Statutes

N.C. G.S. 143B-10

N.C. G.S. 150B-4

N.C. G.S. 150B-20

Background and Rationale for Rule Readoptions

Under authority of N.C.G.S. 150B-21-3A, Periodic Review and Expiration of Existing Rules, the Department of Health and Human Services/Secretary (DHHS), Rules Review Commission and the Joint Legislative Administrative Procedure Oversight Committee approved the final Subchapter report with classifications for the rules located at 10A NCAC 14A – Rulemaking, Section .0100 – on May 23, 2017, November 16, 2017, and January 9, 2018, respectively. The following rules were classified as “Necessary with Substantive Public Interest” in this report: 10A NCAC 14A .0101, .0102, and .0103. Therefore, in accordance with G.S. 150B-21.3A(c)(2)(g), these rules, must be readopted as though the rules were new rules.

Of these three rules, the agency is presenting 10A NCAC 14A .0101 and .0103 for readoption with substantive changes in this fiscal impact analysis. Rule 10A NCAC 14A .0102 will be readopted as a repeal; therefore, in accordance with G.S. 150B-21.3A(d)(2), no fiscal note is required for this rule and it will not be included in this report.

The rulemaking procedures in Subchapter 10A NCAC 14A under the rulemaking authority of the DHHS apply to the actions of the Director of the Division of Health Service Regulation (Director, DHSR). G.S. 150B-20 requires rules in the N.C. Administrative Code for the procedure for submitting a rule petition to an Agency and the procedure an Agency follows in considering a rulemaking petition. There are 1792 rules

the Division of Health Service Regulation (DHSR) has jurisdiction over in the N.C. Administrative Code. Of that number, DHHS has rulemaking authority for 171 rules, and the Director, DHSR has rulemaking authority for 152 rules through Directive II-24 from the DHHS. The remaining 1469 rules are under the rulemaking authority of one of four Commissions that include the N.C. Medical Care Commission, N.C. Radiation Protection Commission, N.C. Social Services Commission and the N.C. Mental Health Commission.

In accordance with G.S. 150B-4, DHSR issues declaratory rulings upon requests to interpret statutes or rules as applied to a specified set of facts. Following the submission of a petition, the Director, DHSR issues the declaratory ruling within the timeframe established in statute. From January 1, 2013 through October 10, 2018, the Director, DHSR has issued 76 declaratory rulings all related to Certificate of Need applications.

Substantive changes have been made to the rules proposed for readoption discussed in this fiscal impact analysis to provide clarity in the rule, remove ambiguity and language restating statute, update outdated information, and implement technical changes. In addition, information on the petitioner's opinion of the potential impact has been added to the criteria for declaratory ruling submission requests.

Rules Summary and Anticipated Fiscal Impact

Rule .0101 – Petitions

The Agency is proposing to readopt this rule with substantive changes to include a revision to the written petition procedure to clarify the requirements for rule petition submission and for rule petition approval by the Agency. The rule has been reorganized to identify items the petitioner may include in the petition but are not required to submit. The requirement for the rendering of a final decision by the Director within 30 days of a petition submission was removed because it restates the statute in G.S. 150B-20(b). By clarifying the requirements for rule petition submission and rule petition approval in the proposed rule readoption, it removes the ambiguity in the rule for the submission of rule petitions to the Director, DHSR for rulemaking.

Fiscal Impact

In the last five years (1/1/13 -11/1/18), there has been one rule petition submitted to DHSR with the rulemaking authority of the Director, DHSR. In clarifying the requirements for petition submission in the proposed rule readoption, no additional requirements were added for the petitioner to address. Of the optional items listed in the rule, it is up to the discretion of the petitioner to include any or all of these items listed the submitted petition for Agency consideration. Clarifying the determination factors for granting the petition enables a fair and equitable process for the Director to grant petitions submitted. Director, DHSR rulemaking petitions are not granted for rules that are cost prohibitive, unnecessary, and for rules that do not promote the best interest of the public for health and safety. By identifying the criteria in the rule for petition denial, there will be a fiscal impact benefit to state government that results from the lack of the rule process going forward in terms of the cost of time and resources needed for rule promulgation. The proposed rule is clarifying the process, as these factors have been used by the Agency in consideration of the rule petition approval and are not new in the determination used to grant a rule petition. There will be no increase in time for a petition determination by the Director.

There is no federal or local fiscal impact associated with the readoption of this rule; however, the changes to the rule will result in a positive state fiscal impact.

Rule .0103 – Declaratory Rulings

The Agency is proposing to readopt this rule with substantive changes to include technical changes, clarify good cause for denial, clarify the criteria for declaratory ruling submission requests, and update the agency’s address. Statutory criteria has been used by the Director, DHSR for determining the good cause for a declaratory ruling determination. This criteria has been used by the Director, DHSR in making decisions for granting and disapproving declaratory rulings; however, the good cause criteria was not articulated in the rule. The petitioner may have specialized knowledge or have information on how the declaratory ruling may affect others. Therefore, added in the proposed rule for the petitioner to address is what they think the potential impact of the declaratory ruling on the public will be. This information will strengthen the rationale for the request by assessing the effect the declaratory ruling would have on the citizens of North Carolina if granted by the Director/DHSR. The requirement for issuing a ruling by the Director within 60 days of receipt of the petition for a declaratory ruling was removed because it restates the statute in G.S. 150B-4(a1).

Fiscal Impact

The Director, DHSR has issued 76 declaratory rulings from January 1, 2013 through October 10, 2018. As demonstrated in Table 1, the number of declaratory rulings issued per year declined between the years 2013-2017, but increased slightly in year 2018. Because there is one more month remaining in calendar year 2018, it not unreasonable to predict a slight increase in the number of declaratory rulings issued in 2018.

Table 1 - Declaratory Rulings Issued per Year by the Director, DHSR

| Year | Declaratory Rulings Issued |
|-------------|-----------------------------------|
| 2018 | 7 |
| 2017 | 6 |
| 2016 | 9 |
| 2015 | 12 |
| 2014 | 19 |
| 2013 | 23 |

Source: DHSR website: <https://www2.ncdhhs.gov/dhsr/declrule/index.html>

Of these 76 declaratory rulings, all were approved with the exception of one denial being issued in 2013. The clarified criteria for good cause denial of the declaratory ruling added to the proposed rule has been used by the Director, DHSR in making decisions for granting and disapproving declaratory rulings; however this criteria had not been articulated in the rule. As this criteria had been used by the Director, DHSR in making declaratory ruling approval determinations, the addition of the criteria to the rule allows the declaratory ruling decisions to become enforceable and transparent. In addition, should a denial decision result in litigation between the Director, DHSR and the petitioner, defense of the decision would be aided by a rule with specific denial criteria than a rule that is broadly written. Adding this criteria will clarify the Director, DHSR’s review of the request for the declaratory ruling determination and not add fiscal impact to the rule.

The addition of the petitioner’s opinion of the potential impact of the declaratory ruling on the public in the readoption rule will require the petitioner to include an extra written paragraph or two in their request for the declaratory ruling and will cause no additional time in the Director, DHSR’s review of the request for the declaratory ruling determination. No data to support the petitioner’s position will be required to be submitted by the petitioner. A written statement of their opinion on the impact is what will be required.

There is no federal, local fiscal impact associated with the readoption of this rule; however, the changes to the rule will result in a positive state fiscal impact.

Appendix: Proposed Rule Text

10A NCAC 14A .0101 is proposed for readoption with substantive changes as follows:

SECTION .0100 - RULEMAKING

10A NCAC 14A .0101 PETITIONS

(a) Any person wishing to submit a written petition requesting the adoption, ~~amendment~~ amendment, or repeal of a rule by the Director of the Division of Health Service Regulation shall ~~address the petition~~ submit the petition addressed to the Director, Division of Health Service Regulation, 809 Ruggles Drive, 2701 Mail Service Center, Raleigh, North Carolina, 27699-2701.

(b) The petition shall contain the following information:

- (1) ~~either a draft of the proposed rule or a summary of its contents~~ the text of the proposed rule(s) for adoption or amendment and the statutory authority for the agency to promulgate the ~~rule;~~ rule(s);
- (2) a statement of the ~~reason~~ reasons for ~~proposal;~~ adoption of the proposed rule(s), amendment or the repeal of an existing rule(s);
- (3) a statement of the effect on existing rules or orders;
- (4) ~~any data supporting the proposal;~~ a statement of the effect of the proposed rule(s) on existing practices in the area involved, if known;
- (5) ~~effect of the proposed rule on existing practices in the area involved, including cost factors, if known; a statement explaining the costs and computation of the cost factors, if known; and~~
- (6) names of those most likely to be affected by the proposed rule, with addresses, if known;
- (7) ~~(6)~~ the name(s) and address(es) of the petitioner(s).

(c) The petitioner may include the following information within the request:

- (1) documents and any data supporting the petition;
- (2) a description, including the names and addresses, if known, of those most likely to be affected by the proposed rule(s).

(d) ~~(e)~~ The Director, based on a study review of the facts stated in the petition, ~~will determine whether the public interest will be served by granting the petition. He will~~ shall consider ~~all the contents of the submitted petition, plus any additional information he deems relevant.~~ the following in his or her determination to grant the petition:

- (1) whether he or she has authority to adopt the rule(s);
- (2) the effect of the proposed rule(s) on existing rules, programs and practices;
- (3) probable costs and cost factors of the proposed rule(s);
- (4) the impact of the rule on the public and the regulated entities; and
- (5) whether the public interest will be served by granting the petition.

(e) ~~(e)~~ Within 30 days of submission of the petition, the Director will render a final decision. If the decision is to deny the petition, the Director will notify the petitioner in writing, stating the reasons for the denial. If the decision is to approve the petition, the Director will initiate a rulemaking proceeding by issuing a rulemaking notice, as provided in these rules. Petitions

that do not contain the information required by Paragraph (b) of this Rule shall be returned to the petitioner by the Director of Division of Health Service Regulation.

*History Note: Authority G.S. 143B-10; 150B-20;
Eff. June 10, 1977;
Readopted Eff. December 1, 1977;
Amended Eff. November 1, ~~1989~~ 1989;
Readopted Eff. July, 1, 2019.*

10A NCAC 14A .0103 is proposed for readoption with substantive changes as follows:

10A NCAC 14A .0103 DECLARATORY RULINGS

(a) The Director of the Division of Health Service Regulation may ~~make~~ issue declaratory rulings. All requests for declaratory rulings shall be written and submitted to: the Director, Division of Health Service Regulation, 809 Ruggles Drive, 2701 Mail Service Center, Raleigh, North Carolina, 27699-2701.

(b) All requests for a declaratory ruling ~~must~~ shall include the following information:

- (1) the name and address of the petitioner;
- (2) a statement of all relevant facts if the person aggrieved requests a declaratory ruling as to the applicability to a statute, rule, or order of the Division;
- ~~(2)~~ (3) the statute or rule to which the petition relates;
- (4) a statement regarding the petitioner's opinion as to any conflict or inconsistencies, if any, within the Division regarding an interpretation of the law or a rule adopted by the Division to which the petition relates;
- ~~(3)~~ (5) a concise statement of the manner in which the petitioner is aggrieved by the rule or ~~statute~~ statute, or its potential application to ~~him; him or her; and~~
- ~~(4)~~ (6) the consequences of a failure to issue a declaratory ~~ruling~~ ruling; and
- (7) the petitioner's opinion as to the potential impact of the declaratory ruling on the public.

(c) Whenever the Director ~~believes~~ finds for good cause that the issuance of a declaratory ruling will not serve the public interest, he ~~or she~~ may ~~refuse~~ deny the request to issue ~~one~~ a declaratory ruling. ~~When good cause is deemed to exist, In such a case, the Director shall notify the petitioner in writing of his the decision in writing stating reasons to deny the request for declaratory ruling and shall state the reason for the denial of a declaratory ruling: denial.~~

(d) ~~The Director may refuse to consider the validity of a rule and therefore refuse to issue a declaratory ruling: Good cause for the denial of a declaratory ruling request includes, but is not limited to:~~

- (1) the person submitting the request is not a person aggrieved; or
- (2) there is no conflict or inconsistency within the Division regarding an interpretation of the law or a rule adopted by the Division; or
- ~~(2)~~ (3) if a situation where there has been similar controlling factual determination in a contested ~~case~~, case; or
- (4) if the request for declaratory ruling involves a factual context ~~being raised for a declaratory ruling was that was~~ specifically considered upon adoption of the rule being questioned as ~~evidence~~ evidenced by the rulemaking record; or

~~(5) the factual representations are not specific to the statute or rule being questioned; or~~

~~(6) issuing the declaratory ruling will not serve the public interest; or~~

~~(2) (7) if circumstances stated in the request or otherwise known to the agency show that a contested case hearing would presently be appropriate.~~

~~(e) Where a declaratory ruling is deemed to be in the public interest, the Director shall issue the ruling within 60 days of receipt of the petition.~~

~~(f) (e) A declaratory ruling procedure may consist of written submissions, oral hearings, or such other procedure as may be appropriate the Director may determine in a particular case.~~

~~(g) (f) The Director may issue notice to persons who might be affected by the ruling that written comments may be submitted or oral presentations received at a scheduled hearing.~~

~~(h) A record of all declaratory ruling procedures shall be maintained for as long as the ruling has validity. This record will contain:~~

~~(1) the original request,~~

~~(2) reasons for refusing to issue a ruling,~~

~~(3) all written memoranda and information submitted,~~

~~(4) any written minutes or audio tape or other record of the oral hearing, and~~

~~(5) a statement of the ruling.~~

~~This record will be maintained in a file at the Division Office, Division of Health Service Regulation, 2701 Mail Service Center, Raleigh, North Carolina, 27699-2701 and will be available for public inspection during regular office hours.~~

History Note: Authority G.S. 143B-10; 150B-4;

Eff. November 1, 1989;

Amended Eff. November 1, 2010; 2010;

Readopted Eff. July 1, 2019.