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Sequence Number: 9-52-15
Rule ID(s): 6052
File Date: 9-28-15
Effective Date: 12-27-15

Rulemaking Hearing Rule(s) Filing Form

Rulemaking Hearing Rules are rules filed after and as a result of a rulemaking hearing (Tenn. Code Ann. § 4-5-205).

Pursuant to Tenn. Code Ann. § 4-5-229, any new fee or fee increase promulgated by state agency rule shall take effect on July 1, following the expiration of the ninety (90) day period as provided in § 4-5-207. This section shall not apply to rules that implement new fees or fee increases that are promulgated as emergency rules pursuant to § 4-5-208(a) and to subsequent rules that make permanent such emergency rules, as amended during the rulemaking process. In addition, this section shall not apply to state agencies that did not, during the preceding two (2) fiscal years, collect fees in an amount sufficient to pay the cost of operating the board, commission or entity in accordance with § 4-29-121(b).

Agency/Board/Commission:	Environment and Conservation
Division:	Office of General Counsel
Contact Person:	Wayne Gregory
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Revision Type (check all that apply):

- Amendment
 New
 Repeal

Rule(s) Revised (ALL chapters and rules contained in filing must be listed here. If needed, copy and paste additional tables to accommodate multiple chapters. Please enter only ONE Rule Number/Rule Title per row)

Chapter Number	Chapter Title
0400-01-40	Electronic Reporting
Rule Number	Rule Title
0400-01-40-.01	Applicability
0400-01-40-.02	Definitions
0400-01-40-.03	Enforcement and Compliance
0400-01-40-.04	Electronic Reporting
0400-01-40-.05	Electronic Reporting System

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to <http://state.tn.us/sos/rules/1360/1360.htm>)

New Rule

0400-01-40 Electronic Reporting

Table of Contents

- 0400-01-40-.01 Applicability
- 0400-01-40-.02 Definitions
- 0400-01-40-.03 Enforcement and Compliance
- 0400-01-40-.04 Electronic Reporting
- 0400-01-40-.05 Electronic Reporting System

0400-01-40-.01 Applicability

- (1) Except as paragraph (2) of this rule provides otherwise, this chapter applies to persons who submit reports or other documents to the Department electronically to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69.
- (2) This chapter does not apply to:
 - (a) Documents submitted to the Department by facsimile or e-mail;
 - (b) Electronic documents submitted to the Department by magnetic or optical media such as diskette, compact disk, digital video disk, or tape;
 - (c) Documents and information submitted to the Department under grants issued by the Department, unless the conditions of the grant provide otherwise;
 - (d) Documents and information submitted to the Department under cooperative agreements entered into with the Department, unless the conditions of the agreement provides otherwise; or
 - (e) Data transfers between EPA and the Department.
- (3) This chapter provides the framework for guiding the Department to implement electronic reporting and for guiding any person who submits reports or other documents to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68, and 69. It is intended that divisions of the Department that implement electronic reporting in their programs will develop such provisions through their own programs. The Department will receive, in electronic form, reports and other documents after each program prepares and becomes ready for electronic reporting.

0400-01-40-.02 Definitions

The definitions set forth in this rule apply when used in this chapter.

- (1) "Acknowledgment" means a confirmation of electronic document receipt.
- (2) "Commissioner" means the Commissioner of the Department of Environment and Conservation.
- (3) "Copy of Record" means a true and correct copy of an electronic document received by an electronic document receiving system, which copy can be viewed in a human-readable format that clearly and accurately associates all the information provided in the electric document with descriptions or labeling of the information. A "copy of record" includes:
 - (a) All electronic signatures contained in or logically associated with that document;

- (b) The date and time of receipt; and
 - (c) Any other information used to record the meaning of the document or the circumstances of its receipt.
- (4) "Department" means the Tennessee Department of Environment and Conservation.
- (5) "Disinterested individual" means an individual who is not connected with the person in whose name the electronic signature device is issued. A "disinterested individual" is not any of the following:
- (a) The person's employer or employer's corporate parent, subsidiary, or affiliate;
 - (b) The person's contracting agent;
 - (c) Member of the person's household; or
 - (d) Relative with whom the person has a personal relationship.
- (6) "Electronic document" means any information in digital form that is conveyed to an agency or third-party, where "information" may include data, text, sounds, codes, computer programs, software, or databases. "Data" in this context, refers to a delimited set of data elements, each of which consists of a context or value together with an understanding of what the content or value means; where the electronic document includes data, this understanding of what the data element content or value means must be explicitly included in the electronic document itself or else be readily available to the electronic document recipient.
- (7) "Electronic document receiving system" means any set of apparatus, procedures, software, records, or documentation used to receive electronic documents.
- (8) "Electronic signature" means any information in digital form that is included in or logically associated with an electronic document for the purpose of expressing the same meaning and intention as would a handwritten signature if affixed to an equivalent paper document with the same reference to the same content. The electronic document bears or has on it an electronic signature where it includes or has logically associated with it such information.
- (9) "Electronic signature agreement" means an agreement signed by an individual with respect to an electronic signature device that the individual will use to create his or her electronic signatures requiring such individual to protect the electronic signature device from compromise; to promptly report to the agency or agencies relying on the electronic signatures created any evidence discovered that the device has been compromised; and to be held as legally bound, obligated, or responsible by the electronic signatures created as by a handwritten signature.
- (10) "Electronic signature device" means a code or other mechanism that is used to create electronic signatures. Where the "device" is used to create an individual's electronic signature, then the code or mechanism must be unique to that individual at the time the signature is created and he or she must be uniquely entitled to use it. The "device" is compromised if the code or mechanism is available for use by any other person.
- (11) "EPA" means the United States Environmental Protection Agency.
- (12) "Handwritten signature" mean the scripted name or legal mark of an individual, handwritten by that individual with a marking or writing instrument such as a pen or stylus and executed or adopted with the present intention to authenticate a writing in a permanent form, where "a writing" means any intentional recording of words in a visual form, whether in the form of handwriting, printing, typewriting, or any other tangible form. The physical instance of the scripted name or mark so created constitutes the handwritten signature. The scripted name or legal mark, while conventionally applied to paper, may also be applied to other media.
- (13) "Person" means any individual, partnership, corporation, association, governmental subdivision, or public or private organization of any character, including another agency.

- (14) "Subscriber agreement" means an electronic signature agreement signed by an individual with a handwritten signature. This agreement must be stored until five (5) years after the associated electronic signature device has been deactivated.
- (15) "Transmit" means to successfully and accurately convey an electronic document so that it is received by the intended recipient in a format that can be processed by the electronic document receiving system.
- (16) "Valid electronic signature" means an electronic signature on an electronic document that has been created with an electronic device that the identified signatory is uniquely entitled to use for signing that document, where this device has not been compromised, and where the signatory is an individual who is authorized to sign the document by virtue of his or her legal status or his or her relationship to the entity on whose behalf the signature is executed.

0400-01-40-.03 Enforcement and Compliance

- (1) A person is subject to any applicable state civil, criminal, or other penalties and remedies for failure to submit reports or other documents or otherwise comply with a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68, and 69 if the person fails to comply with the applicable provisions for electronic reporting.
- (2) When an electronic document is submitted to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69, the electronic signature legally binds, obligates, and makes the signatory responsible, to the same extent as the signatory's handwritten signature would on a paper document submitted to satisfy the same reporting requirement.
- (3) Proof that a particular signature device was used to create an electronic signature will suffice to establish that the individual uniquely entitled to use the device did so with the intent to sign the electronic document and give it effect.
- (4) Nothing in this chapter limits the use of electronic documents or information derived from electronic documents as evidence in enforcement or other proceedings.

0400-01-40-.04 Electronic Reporting

- (1) When allowed by the Department, a person may submit reports or other documents to the Department electronically to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69, provided that person complies with the requirements of paragraph (3) of this rule.
- (2) When required by the Department, a person must submit reports or other documents to the Department electronically to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69 in compliance with the requirements of paragraph (3) of this rule.
- (3)
 - (a) The person that transmits the electronic document to the Department's applicable electronic document receiving system must comply with the system's requirements for submission; and
 - (b) The electronic document must bear all valid electronic signatures that are required by paragraph (4) of this rule.
- (4) An electronic document must bear the valid electronic signature of a signatory if that signatory would be required to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69 to sign the paper document for which the electronic document substitutes, unless the Department includes specific provisions to accept a handwritten signature on a separate paper submission and the signatory provides that handwritten signature. The paper submission must contain references to the electronic document sufficient for legal certainty that the signature was executed with the intention to certify to, attest to, or

agree to the content of that electronic document.

0400-01-40-.05 Electronic Reporting System

The Department's electronic document receiving system that receives electronic documents submitted in lieu of paper documents to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69 must be able to generate data with respect to any such electronic document, as needed and in a timely manner, including a copy of record for the electronic document, sufficient to prove, in private litigation, civil enforcement proceedings, and criminal proceedings, that:

- (1) The electronic document was not altered without detection during transmission or at any time after receipt;
- (2) Any alterations to the electronic document during transmission or after receipt are fully documented;
- (3) The electronic document was submitted knowingly and not by accident;
- (4) Any individual identified in the electronic document submission as a submitter or signatory had the opportunity to review the copy of record in a human-readable format that clearly and accurately associates all the information provided in the electronic document with descriptions or labeling of the information and had the opportunity to repudiate the electronic document based on this review; and
- (5) In the case of an electronic document that must bear electronic signatures of individuals as provided by paragraph (4) of Rule 0400-01-40-.04, that:
 - (a) Each electronic signature was a valid electronic signature at the time of signing;
 - (b) The electronic document cannot be altered without detection at any time after being signed;
 - (c) Each signatory had the opportunity to review in a human-readable format the content of the electronic document that he or she was certifying to, attesting to or agreeing to by signing;
 - (d) Each signatory had the opportunity, at the time of signing, to review the content or meaning of the required certification statement, including any applicable provisions that false certification carries criminal penalties;
 - (e) Each signatory had signed either an electronic signature agreement or a subscriber agreement with respect to the electronic signature device used to create his or her electronic signature on the electronic document;
 - (f) The electronic document receiving system had automatically responded to the receipt of the electronic document with an acknowledgement that identifies the electronic document received, including the signatory and the date and time of receipt, and was sent to at least one address that does not share the same access controls as the account used to make the electronic submission; and
 - (g) For each electronic signature device used to create an electronic signature on the document, the identity of the individual uniquely entitled to use the device and his or her relation to any entity for which he or she will sign electronic documents had been determined with legal certainty by the Department. In the case of electronic documents submitted in lieu of paper documents to satisfy a statutory obligation or a regulatory requirement administered by the Department under the applicable portions of Tennessee Code Annotated, Titles 11, 59, 60, 68 and 69, this determination had been made before the electronic document was received, by means of:
 1. Identifiers or attributes that are verified (and that may be re-verified at any time) by attestation of disinterested individuals to be uniquely true of (or attributable to) the individual in whose name the application is submitted, based on information or objects of independent origin, at least one item of which is not subject to change with governmental action or authorization;

2. A method of determining identity no less stringent than would be permitted by part 1 of this subparagraph; or
3. Collection of either a subscriber agreement or a certification from the Department that such an agreement has been received and securely stored.

Authority: T.C.A. §§ 11-1-101, 47-10-101 et seq., and 4-5-201 et seq.

I certify that this is an accurate and complete copy of rulemaking hearing rules, lawfully promulgated and adopted by the Commissioner on 9-4-15, and is in compliance with the provisions of T.C.A. § 4-5-222.

I further certify the following:

Notice of Rulemaking Hearing filed with the Department of State on: 11/12/14

Rulemaking Hearing(s) Conducted on: (add more dates). 01/06/15



Date: 9/4/15

Signature: [Handwritten Signature]

Name of Officer: Robert J. Martineau, Jr.

Title of Officer: Commissioner

Subscribed and sworn to before me on: 9-4-15

Notary Public Signature: [Handwritten Signature]

My commission expires on: 11-5-18

All rulemaking hearing rules provided for herein have been examined by the Attorney General and Reporter of the State of Tennessee and are approved as to legality pursuant to the provisions of the Administrative Procedures Act, Tennessee Code Annotated, Title 4, Chapter 5.

[Handwritten Signature]
Herbert H. Slattery III
Attorney General and Reporter
9/24/2015 Date

Department of State Use Only

Filed with the Department of State on: 9-28-15

Effective on: 12-27-15
[Handwritten Signature]

Tre Hargett
Secretary of State

RECEIVED
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SECRETARY OF STATE
PUBLICATIONS

Public Hearing Comments

One copy of a document containing responses to comments made at the public hearing must accompany the filing pursuant to T.C.A. § 4-5-222. Agencies shall include only their responses to public hearing comments, which can be summarized. No letters of inquiry from parties questioning the rule will be accepted. When no comments are received at the public hearing, the agency need only draft a memorandum stating such and include it with the Rulemaking Hearing Rule filing. Minutes of the meeting will not be accepted. Transcripts are not acceptable.

Comment: A commenter was concerned about the definition of electronic document including electronic documents that are conveyed to third-parties and the difficulty of third parties going through the Freedom of Information Act to obtain those documents.

Response: The term "electronic document" means any information in digital form that is conveyed to an agency or third-party and is identical to the federal definition found in 40 CFR 3.3. The Department believes it would be inappropriate to change the definition as suggested. The procedure a third party must use to obtain data is beyond the scope of this rulemaking.

Comment: A commenter requested that paragraph (1) of Rule 0400-01-40-.03 be clarified to make it clear that a person is not subject to penalties when the electronic document submission is in full compliance with the reporting requirements.

Response: The Department does not agree that the proposed language would assess a penalty when the electronic document submission is in full compliance with the reporting requirements. The intent of the regulation is to establish that the enforceability of documents submitted electronically is the same as the enforceability of written documents. However, paragraph (1) of Rule 0400-01-40-.03 has been changed to more adequately reflect this intent.

Comment: A commenter was concerned about electronically signed documents being as legally binding as handwritten signature when electronic signature can be hacked and suggested the that a provision be established in the regulations where the e-signatory is not responsible for information which has been submitted by hackers or other unauthorized persons.

Response; The language of Rule 0400-01-40-.03(2) is consistent with 40 CFR 3.4(c) and the modifications requested would not support our efforts to obtain program authorization for the individual regulatory programs. The person authorized to electronically sign electronic documents has an obligation to protect the electronic signature device and to promptly report any evidence that the device has been compromised. In an enforcement case the department will consider all the facts, including hacking.

Comment: A commenter was confused by paragraphs (1) and (2) of Rule 0400-10-40-.04 stating "when allowed by the Department" and "when required by the Department" because Chapter 0400-10-40 does not delimitate when electronic reporting is "allowed" or "required".

Response: This set of rules is foundational and does not on its own require or allow specific reports. These rules are intended to support the requirements of the individual programs. We anticipate that all of our major programs will be undergoing major revisions in the near future to require or allow specific electronic reporting. This Chapter of rule will be referenced by the other chapters to ensure consistency in how electronic data is captured and the exchange of data between programs and with the EPA.

Comment: A commenter read Rule 0400-01-40-.05 to require an electronic document to be able to generate data and requested a clarification.

Response: Rule 0400-01-04-.05 does not require the electronic document to be able to generate data but for the electronic document receiving system to be able to generate data. Rule 0400-01-40-.05 governs the system TDEC is to provide. This was necessary to support program authorization for the individual programs since EPA is requiring the system states develop to meet these requirements as a minimum.

Comment: A commenter recognized that Chapter 0400-01-40 does not mention password restricted access for the electronic submission server and stated that EPA's proposed NPDES Electronic Reporting Rule may require it and requested provisions be established to provide security to the electronic submission in addition to the signatory authority.

Response: This issued raised by the commenter is outside the scope of this rulemaking but is an example of the type of detail that will be included when the individual programs amend their rules to address specific submission requirements as appropriate for the type of document being submitted such as those that will be required by EPA when the NPDES electronic rule becomes final.

Regulatory Flexibility Addendum

Pursuant to T.C.A. §§ 4-5-401 through 4-5-404, prior to initiating the rule making process as described in T.C.A. § 4-5-202(a)(3) and T.C.A. § 4-5-202(a), all agencies shall conduct a review of whether a proposed rule or rule affects small businesses.

This proposed rulemaking creates Chapter 0400-01-40 Electronic Reporting and it will apply to persons who submit reports or documents to the Department of Environment and Conservation electronically to satisfy a statutory obligation or a regulatory requirement administered by the Department. It also establishes the minimum requirements for the electronic document receiving system provided by the Department. These standards are designed to apply Department wide and to support the Department's initiative to allow electronic submissions of information that is currently being received in written formats.

- (1) The type or types of small business and an identification and estimate of the number of small businesses subject to the proposed rule that would bear the cost of, or directly benefit from the proposed rule.

Any business, including a small business, which is required to submit documents to the Department will benefit from these new rules. These new rules provide the foundation for allowing businesses to comply with many regulatory requirements electronically.

- (2) The projected reporting, recordkeeping, and other administrative costs required for compliance with the proposed rule, including the type of professional skills necessary for preparation of the report or record.

These rules provide the foundation for electronic submission of required documents but these rules do not directly require or allow electronic submissions. Requiring or allowing electronic submissions will result when the individual regulatory programs amend their current rules. There is a demand for the Department to support electronic submissions of documents because it is believed it will result in a reduction of the cost of doing business.

- (3) A statement of the probable effect on impacted small businesses and consumers.

Small businesses will be required to comply with these rules when individual regulatory programs in the Department amend their rules to require or allow electronic submissions. It is believed that electronic submission of documents will result in a reduction of the cost of compliance.

- (4) A description of any less burdensome, less intrusive or less costly alternative methods of achieving the purpose and objectives of the proposed rule that may exist, and to what extent the alternative means might be less burdensome to small business.

We are not aware of any alternative methods to achieve the purpose and objectives of these new rules.

- (5) A comparison of the proposed rule with any federal or state counterparts.

The EPA is preparing regulations to make electronic submission of documents mandatory and the Department must be prepared. These new rules are a necessary step toward that preparation. Surrounding states are also making progress in allowing electronic submission of documents. Tennessee must continue to develop this capability to remain competitive because it is believed that electronic submission of documents is a less costly and more efficient means of complying with regulatory requirements.

- (6) Analysis of the effect of the possible exemption of small businesses from all or any part of the requirements contained in the proposed rule.

Exempting small businesses from the requirements of these new rules would serve to deny them of its cost saving benefits.

Impact on Local Governments

Pursuant to T.C.A. §§ 4-5-220 and 4-5-228 “any rule proposed to be promulgated shall state in a simple declarative sentence, without additional comments on the merits of the policy of the rules or regulation, whether the rule or regulation may have a projected impact on local governments.” (See Public Chapter Number 1070 (<http://state.tn.us/sos/acts/106/pub/pc1070.pdf>) of the 2010 Session of the General Assembly)

The Department anticipates that these new rules will not have a financial impact on local governments.

Additional Information Required by Joint Government Operations Committee

All agencies, upon filing a rule, must also submit the following pursuant to T.C.A. § 4-5-226(i)(1).

- (A) A brief summary of the rule and a description of all relevant changes in previous regulations effectuated by such rule;

This proposed rulemaking creates Chapter 0400-01-40 Electronic Reporting and it will apply to persons who submit reports or documents to the Department of Environment and Conservation electronically to satisfy a statutory obligation or a regulatory requirement administered by the Department. It also establishes the minimum requirements for the electronic document receiving system provided by the Department. These standards are designed to apply Department wide and to support the Department's initiative to allow electronic submissions of information that is currently being received in written formats.

- (B) A citation to and brief description of any federal law or regulation or any state law or regulation mandating promulgation of such rule or establishing guidelines relevant thereto;

These new rules are patterned after the EPA's 40 CFR Part 3 (Cross Media Electronic Reporting Rule) and is being adopted under the authority of T.C.A. §§ 11-1-101 and 47-10-101 et seq.

- (C) Identification of persons, organizations, corporations or governmental entities most directly affected by this rule, and whether those persons, organizations, corporations or governmental entities urge adoption or rejection of this rule;

All persons, organizations, corporations or government entities that desire or are required to submit a document electronically will be directly affected by this new rule and there were no comments received during the comment period.

- (D) Identification of any opinions of the attorney general and reporter or any judicial ruling that directly relates to the rule;

The Department is not aware of any.

- (E) An estimate of the probable increase or decrease in state and local government revenues and expenditures, if any, resulting from the promulgation of this rule, and assumptions and reasoning upon which the estimate is based. An agency shall not state that the fiscal impact is minimal if the fiscal impact is more than two percent (2%) of the agency's annual budget or five hundred thousand dollars (\$500,000), whichever is less;

This rulemaking will not impact state or local government revenues or expenditures.

- (F) Identification of the appropriate agency representative or representatives, possessing substantial knowledge and understanding of the rule;

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- (G) Identification of the appropriate agency representative or representatives who will explain the rule at a scheduled meeting of the committees;

Emily Urban
Assistant General Counsel
Office of General Counsel

- (H) Office address, telephone number, and email address of the agency representative or representatives who will explain the rule at a scheduled meeting of the committees; and

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(I) Any additional information relevant to the rule proposed for continuation that the committee requests.

The Department anticipates that these amended rules will not have a financial impact on local governments.

Katelyn Smith

From: Wayne Gregory
Sent: Monday, December 21, 2015 8:43 AM
To: Katelyn Smith
Subject: RE: Rulemaking Hearing Rule 0400-01-40

Katelyn,

The two typos you identified in your email should be changed as you pointed out. All of the rules in Chapter 0400-01-40 should indicate the same T.C.A. Authority after each rule. Thank you for finding the typos and making this rulemaking better.

Please let me know if you find anything else.

Thank you,



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From: Katelyn Smith
Sent: Friday, December 18, 2015 4:30 PM
To: Wayne Gregory
Subject: Rulemaking Hearing Rule 0400-01-40

Hi Wayne,

I have been reviewing the next set of rules to be posted and I found a couple of typographical errors. The first one is on the second page of the Rulemaking Hearing Rule filing form that was filed with our office on September 28, 2015 (sequence number 9-52-15; Rule ID 6052). It is a new rule filing for Chapter 0400-01-40. The typographical error I found is under 0400-01-40-.02 Definitions and in paragraph (3). The first sentence reads, "“Copy of Record” means a true and correct copy of an electronic document received by an electronic document receiving system, which copy can be viewed in a human-readable format that clearly and

accurately associates all the information provided in the electric document with descriptions or labeling of the information.” Should this be changed to electronic document so that it reads: ““Copy of Record” means a true and correct copy of an electronic document received by an electronic document receiving system, which copy can be viewed in a human-readable format that clearly and accurately associates all the information provided in the **electronic** document with descriptions or labeling of the information”?

The second typographical error is on page three of the filing under paragraph (12). It reads, ““Handwritten signature” mean the scripted name or legal mark of an individual, handwritten by that individual with a marking or writing instrument such as a pen or stylus and executed or adopted with the present intention to authenticate a writing in a permanent form, where “a writing” means any intentional recording of words in a visual form, whether in the form of handwriting, printing, typewriting, or any other tangible form.” Should this be changed to means so that the document reads: ““Handwritten signature” **means** the scripted name or legal mark of an individual, handwritten by that individual with a marking or writing instrument such as a pen or stylus and executed or adopted with the present intention to authenticate a writing in a permanent form, where “a writing” means any intentional recording of words in a visual form, whether in the form of handwriting, printing, typewriting, or any other tangible form.”

The third issue with the Rulemaking Hearing Rule is that the only rule that has a T.C.A. reference listed is the last rule of 0400-01-40-.05. Does the whole chapter refer to the same T.C.A. Authority?

Please let me know how we should proceed.

Thank you for your time,

Katelyn Smith
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