OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

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AGENDA

Committee on Legal Services

November 14, 2012

10:00 a.m.

House Committee Room 0112

1. Review of New Rules (rules adopted or amended on or after November 1, 2011, and before November 1, 2012, and scheduled to expire May 15, 2013):

   a. Rules of the Executive Director, Department of Natural Resources, concerning weather modification, 2 CCR 401-1 (LLS Docket No. 120318; SOS Tracking No. 2012-00297).
   Staff: Chuck Brackney and Kate Meyer
   (Uncontested)

   b. Rules of the State Board of Human Services, Department of Human Services, concerning the food assistance program, 10 CCR 2506-1 (LLS Docket No. 120006; SOS Tracking No. 2011-00675).
   Staff: Chuck Brackney
   (Status Unknown)

   c. Rules of the Chief of the Colorado State Patrol, Department of Public Safety, concerning minimum standards for the operation of commercial vehicles, 8 CCR 1507-1 (LLS Docket No. 120217; SOS Tracking No. 2012-00035).
   Staff: Chuck Brackney and Jery Payne
   (Uncontested)

   d. Rules of the Colorado Medical Board, Division of Professions and Occupations, Department of Regulatory Agencies, concerning the licensure and supervision of distinguished foreign teaching physicians, 3 CCR 713-33

(LLS Docket No. 120446; SOS Tracking No. 2012-00516).
Staff: Thomas Morris
(Status Unknown)

2. Consideration of a Committee Bill regarding Defining the Use of the Word "must" in the Colorado Revised Statutes.
Staff: Thomas Morris

3. Consideration of a Committee Bill regarding an exemption from archival fees for the legislative branch.
Staff: Ed DeCecco

4. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Chuck Brackney and Kate Meyer, Office of Legislative Legal Services

DATE: November 2, 2012

RE: Rules of the Executive Director, Department of Natural Resources, concerning weather modification, 2 CCR 401-1 (LLS Docket No. 120318; SOS Tracking No. 2012-00297).[1]

Summary of Problems Identified and Recommendations

Sections 36-20-115 and 24-33.5-714, C.R.S., establish the procedures through which the Executive Director of the Department of Natural Resources may modify or suspend weather modification operations. But Rule 18 allows entities not authorized by statute to require suspension of weather modification operations. **We therefore recommend that Rule 18 of the rules of the Department of Natural Resources concerning weather modification not be extended.**

Former section 36-20-106, C.R.S., established an advisory committee to advise the Executive Director of the Department of Natural Resources regarding weather modification issues. That statute was repealed in 1992. But the Department's Rule 20 allows the Executive Director to create a weather modification advisory committee without following the sunset process for

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

advisory committees pursuant to section 2-3-1203, C.R.S. **We therefore recommend that Rule 20 of the rules of the Department of Natural Resources concerning weather modification not be extended.**

Section 36-20-112, C.R.S., establishes the requirements for obtaining a weather modification permit. But Rule 21 creates an emergency permit that impermissibly allows the Executive Director the authority to waive regulatory and other requirements for permit applicants. **We therefore recommend that Rule 21 of the Department of Natural Resources concerning weather modification not be extended.**

Analysis

I. Rule 18 erroneously allows unauthorized persons to suspend weather modification operations.

Section 36-20-105, C.R.S., vests the Executive Director ("Director") of the Department of Natural Resources ("Department") with the authority to administer the "Weather Modification Act of 1972". It states:

> **36-20-105. Administration.** (1) **The executive director of the department of natural resources is hereby charged with the administration of this article.**
>
> (2) **The director shall issue all permits provided for in this article.** The director is hereby empowered to issue rules and regulations the director finds necessary to facilitate the implementation of this article, and the director is authorized to execute and administer all other provisions of this article pursuant to the powers and limitations contained in this article. **(emphasis added).**

Once a permit has been granted, the Director may not revise[2], suspend[3],

---

[2] *See* section 36-20-115 (1), C.R.S., which provides:

> **36-20-115. Modification of permit**. (1) The director may revise the terms and conditions of a permit if:
>
> (a) The operator is first given notice and a reasonable opportunity for a hearing on the need for a revision; and
>
> (b) It appears to the director that a revision is necessary to protect the health or property of any person or to protect the environment.

[3] *See* section 36-20-121 (1), C.R.S., which states:

> **36-20-121. Hearing required**. (1) Except as provided in section 36-20-115, the director may not suspend or revoke a permit without first giving the operator notice and a reasonable opportunity to be heard with respect to the grounds for the director's proposed action.

or revoke[4] it unless the Director provides the operator with prior notice and an opportunity for a hearing, except as provided in section 36-20-115 (2), C.R.S., which provides:

> **36-20-115. Modification of permit. (2) If it appears to the director that an emergency situation exists or is impending which could endanger life, property, or the environment, the director may, without prior notice or a hearing, immediately modify the conditions of a permit or order temporary suspension of the permit on the director's own order.** The issuance of such order shall include notice of a hearing to be held within ten days thereafter on the question of permanently modifying the conditions or continuing the suspension of the permit. Failure to comply with an order temporarily suspending an operation or modifying the conditions of a permit shall be grounds for immediate revocation of the permit. **(emphasis added).**

In accordance with its duties to prepare for and address disaster emergencies in Colorado, the Office of Emergency Management in the Division of Homeland Security and Emergency Management under the Department of Public Safety is charged with keeping apprised of weather conditions in the state. When the Office of Emergency Management determines that precipitation resulting from weather modification operations would cause or exacerbate a disaster, it must communicate with the Director to avert or remediate the situation. Specifically, the statute provides:

> **24-33.5-714. Weather modification.** The office of emergency management shall keep continuously apprised of weather conditions that present danger of precipitation or other climatic activity severe enough to constitute a disaster. If the office of emergency management determines that precipitation that may result from weather modification operations, either by itself or in conjunction with other precipitation or climatic conditions or activity, would create or contribute to the severity of a disaster, **it shall recommend to the executive director of the department of natural resources, empowered to issue permits for weather modification operations under article 20 of title 36, C.R.S., to warn those organizations or agencies engaged in weather modification to suspend their operations until the danger has passed or recommend that said executive director modify the terms of any permit as may be necessary. (emphasis added)**

The Director's Rule 18 concerns the suspension of weather modification operations. It states, in its entirety:

> **Rule 18. <u>Suspension of Weather Modification Operations by</u>**

[4] *See id.*

> **Emergency Managers:** Emergency managers may require the immediate temporary suspension of weather modification operations for any reason.

Rule 18 deviates from the statutory procedures in several crucial respects. First, although both section 36-20-115, C.R.S., and section 24-33.5-714, C.R.S., recognize the Director as the authority empowered to mandate suspension of weather modification operations, Rule 18 allows "emergency managers" to require suspension. The term "emergency managers" is not defined in the "Weather Modification Act of 1972" or in rule. The rule also ignores the procedural safeguards found in section 36-20-115 (2), C.R.S., including hearing that must be held within ten days. Further, while the statute concerns emergencies, the rule expands the power to suspend to encompass "any reason". Finally, the rule disregards the interdepartmental procedure for suspension of operations in response to a request from the Office of Emergency Management.

Because Rule 18 grants "emergency managers" the authority to require the immediate suspension of weather modification operations when section 36-20-115, C.R.S., grants this authority to the Director, and because it disregards the statutorily enacted procedural safeguards, it conflicts with that statute and should not be extended.

II. The Director may not create an advisory committee outside the sunset review process.

The Director's Rule 20 allows him or her to create an advisory committee as follows:

> **Rule 20. Weather Modification Advisory Committee.**
>
> A. Formation of Weather Modification Advisory Committee: **Pursuant to section 36-20-108, C.R.S. (2011) the Director may create a weather modification advisory committee**. Members of this committee shall be appointed by the Director, and serve for a period of time as determined by the Director.
>
> B. Duties of the Weather Modification Advisory Committee:
>
> (1) Advise the Director on applications for weather modification permits; and
>
> (2) Advise and make recommendations concerning legislation, policies, administration, research, and other matters related to cloud seeding and weather modification activities to the Director; and
>
> (3) Other duties as determined by the Director. **(emphasis added).**

Formerly, the "Weather Modification Act of 1972" included an advisory

committee created under section 36-20-106, C.R.S. The General Assembly allowed that statutory section to repeal in 1992[5]. Section 36-20-108, C.R.S. does *not* mention an advisory committee.

The General Assembly considers the creation of advisory committees to be a prerogative of the General Assembly and a matter requiring legislative oversight. Section 2-3-1203 (1), C.R.S., states:

> **2-3-1203. Sunset review of advisory committees.** (1) (a) The general assembly hereby finds and declares that advisory committees are beneficial to government since they help involve private citizens in the daily operations of government and provide the government with a system for utilizing the expertise of its citizens. However, there has been no **legislative supervision** which would allow for the **systematic review of such committees** to ascertain which committees may have outlived their usefulness yet remain on the statutes through oversight or neglect and which committees may have failed to perform the functions for which they were created. To assure that previously created advisory committees received this supervision, the review and hearing provisions set forth in subsection (2) of this section and the schedule set forth in subsection (3) of this section were created in 1986, and repeal provisions were added to the existing statutory authorizations for such committees. To assure that newly created advisory committees are supervised and subjected to such a review, any advisory committee created on or after July 1, 1990, shall have a life not to exceed six years, and the statutory authorization for the committee shall contain a corresponding repeal provision. An advisory committee created on or after July 1, 1994, shall have a life not to exceed ten years, and the statutory authorization for the committee shall contain a corresponding repeal provision. The general assembly, acting by bill, may reschedule the review date for an advisory committee to a later date if such rescheduled date does not violate the ten-year maximum life provision. **Newly created advisory committees shall be subject to the review provisions of this section.**
>
> (b) As used in this section, "advisory committee" means any advisory body, including but not limited to any commission, council, or board. **(emphases added)**

The rule not only frustrates the General Assembly's intent to subject advisory committees to periodic review to determine which committees may have outlived their usefulness, but also administratively revives an entity that had been allowed to expire twenty years ago pursuant to legislative prerogative and in accordance with statutory procedure.

Because Rule 20 allows the creation of an advisory committee absent

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[5] *See* House Bill 92-1018.

statutory authority, the advisory committee exists outside the statutorily mandated sunset review process and, therefore, Rule 20 should not be extended.

III. The Department has no power to grant weather modification permits in a manner that circumvents statutorily prescribed procedures.

The "Weather Modification Act of 1972" requires anyone who wishes to engage in weather modification activities to first obtain a permit issued by the Director. To procure such a permit, an applicant must perform a number of tasks. Section 36-20-112, C.R.S., states:

> **36-20-112. Permit required - when issued.** (1) The director, in accordance with regulations, shall issue a weather modification permit to each applicant who:
>
> (a) (Deleted by amendment, L. 96, p. 969, § 8, effective July 1, 1996.)
>
> (b) **Pays the permit fee**, if applicable;
>
> (c) **Furnishes proof of financial responsibility** adequate to meet obligations reasonably likely to be attached to or result from the proposed weather modification operation. Such proof of financial responsibility may, but at the discretion of the director shall not be required to, be shown by presentation of proof of a prepaid insurance policy with an insurance company licensed to do business in Colorado, which insurance policy shall insure liabilities in an amount set by the director and provide a cancellation clause with a thirty-day notice to the director, or by filing with the director an individual, schedule, blanket, or other corporate surety bond in an amount approved by the director. The director shall not require proof of financial responsibility in excess of the limitations imposed by section 24-10-114, C.R.S., from any political subdivision of the state authorized to conduct ground-based winter cloud seeding weather modification activities pursuant to this article.
>
> (d) **Submits a complete operational plan** for each proposed project prepared by the operator in control which includes a specific statement of objectives, a map of the proposed operating area which specifies the primary target area and shows the area reasonably expected to be affected, the name and address of the operator, the nature and object of the intended operation, the person or organization on whose behalf it is to be conducted, and a statement showing any expected effect upon the environment and methods of determining and evaluating the same. This operational plan shall be placed on file with the director and with any other agent as the director may require.
>
> (e) **Publishes a notice of intent to modify weather** in the counties to be affected by the weather modification program before the operator secures a permit and before beginning operations. The published notice shall designate the primary target area and indicate the general area which might be affected. It shall also indicate the expected duration and

intended effect and state that complete details are available on request from the operator or the director or from the other agent specified by the director. The publication shall also specify a time and place, not more than one week following the completion of publication, for a hearing on the proposed project. Proof of publication shall be furnished to the director by the operator.

(f) **Receives approval** under the criteria set forth in subsection (3) of this section;

(g) **Provides the information** that is requested by the director regarding the qualifications, education, and experience of the operator. **(emphasis added).**

Applicants for a permit must pay a fee, prove financial responsibility, submit an operational plan, and publish a notice of intent to modify weather as conditions for receiving a permit to conduct weather modification operations.

The General Assembly has enacted two narrow exceptions to the above requirements. The first is found in section 36-20-109 (2), C.R.S. That section reads as follows:

36-20-109. Permit required - exemptions. (2) The director, to the extent he considers exemptions practical, may provide by regulation for **exempting the following activities from the fee requirements** of this article:

(a) Research, development, and experiments conducted by state and federal agencies, state institutions of higher education, and bona fide nonprofit research organizations;

(b) Laboratory research and experiments; and

(c) Activities of an emergency nature for protection against fire, frost, hail, sleet, smog, fog, or drought. **(emphasis added).**

This section allows the Director to exempt certain activities from the fee requirements only.

Section 36-20-114 (3), C.R.S., contains the only other specific exemption to the permit requirements. It reads as follows:

36-20-114. Limits of permit. (3) A project permit may be granted by the director **without prior publication of notice by the operator** in cases of fire, frost, hail, sleet, smog, fog, drought, or other emergency. In such cases, publication of notice shall be performed as soon as possible and shall not be subject to the time limits specified in this article or in article 4 of title 24, C.R.S. **(emphasis added).**

This section allows the Director to bypass the usual prior publication requirements in cases of weather emergency.

These two isolated provisions are the only statutorily sanctioned deviations from the permitting procedure.

The Director's Rule 21 creates an "emergency permit" that the Director may grant without regard to *any* permit-related rules. The rule provides as follows:

> **Rule 21. Procedure for granting emergency permits.** Notwithstanding the foregoing, **the Director may exempt weather modification operations from these requirements, and others**, as provided by section 36-20-109, C.R.S. (2011), including for activities of an emergency nature for protection against fire, frost, hail, sleet, smog, fog, or drought. The procedure for issuing an emergency permit is as follows.
>
> A. **A permit may be granted on an emergency basis through the waiving of one or more of these rules** when evidence is presented that clearly defines the situation as an emergency.
>
> B. Upon presentation of evidence satisfactory to the Director that an emergency condition exists or may reasonably be expected to exist in the very near future that may be alleviated or overcome by weather modification activities, the Director shall issue a permit for those activities.
>
> C. Within 10 days after the granting of an emergency permit, and if the permittee desires to continue the permitted weather modification activities, the permittee shall publish a legal notice of intent to modify weather as provided by Rule 7 herein. In addition to the requirements of Rule 7, the permittee shall describe the objectives of the emergency action, the success to date, and the future plans under the permit. The Director will evaluate whether to revoke the emergency permit, modify it, or permit its continued operations as soon as is practical after the public hearing on the weather modification activities. **(emphasis added)**

According to Rule 21, this type of permit may be issued without following any of the permit requirements of section 36-20-112, C.R.S., such as the submission of an operational plan and proof of financial responsibility. But the General Assembly has authorized only two narrow conditions under which permit obligations may be waived. There are no other statutory exceptions to the permitting requirements. The Director has no unilateral discretion to exempt certain permit applicants from the permitting requirements.

Because Rule 21 allows for the bypass of the permit requirements of section 36-20-112, C.R.S., it conflicts with that statute and should not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Chuck Brackney, Office of Legislative Legal Services

DATE: November 2, 2012

RE: Rules of the State Board of Human Services, Department of Human Services, concerning the food assistance program, 10 CCR 2506-1 (LLS Docket No. 120006; SOS Tracking No. 2011-00675).[1]

Summary of Problem Identified and Recommendation

The statutes governing the food assistance program in title 26, C.R.S., direct the Board of Human Services to adopt rules concerning eligibility for this program. State agencies must comply with the Administrative Procedure Act (APA) when conducting rulemaking. Section 24-4-102 (15), C.R.S., defines a "rule" to include any agency statement setting forth agency policy. But the State Board's rule B-4224 C. attempts to bypass the requirements of the APA by adopting resource dollar limits for the food assistance program using an agency letter rather than adopting a rule. **We therefore recommend that Rule B-4224 C. of the rules of the State Board of Human Services concerning the food assistance program not be extended.**

Analysis

I. Rulemaking under the food assistance program

[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

The food assistance program, formerly known as the food stamp program and sometimes referred to as the supplemental nutrition program (SNAP), is a federal program of public assistance. Pursuant to section 26-2-301, C.R.S., the State Department of Human Services (State Department) supervises the administration of the food assistance program and the program is implemented by and administered by the county departments. The relevant subsections of section 26-2-301, C.R.S., provide:

> **26-2-301. Food stamps - administration.** (1) The state department is hereby designated as the single state agency to administer or supervise the administration of the food stamp program in this state in cooperation with the federal government pursuant to the federal "Food Stamp Act", as amended, and this part 3.
>
> (2) The state department, with the approval of the state board, may enter into an agreement with the secretary of the United States department of agriculture to accept federal food assistance benefits for disbursement to qualified households in accordance with federal law. Under state department supervision, the responsibility for disbursement may be delegated, under agreement, to county departments, United States postal service facilities, or other commercial facilities such as but not limited to banks.
>
> (3) The food stamp program shall be implemented and administered in every county in the state by the respective county departments or by the state department pursuant to an agreement with one or more counties. If a county can demonstrate to the satisfaction of the state department that it is impossible or impractical for the county department to administer the program, the state department shall ensure that the program is implemented and administered within such county, and the county shall continue to meet the requirements of section 26-1-122.
>
> (5) The provisions of article 1 of this title and, where not inconsistent with this part 3, the provisions of part 1 of this article shall apply to federal food assistance benefits under this part 3.

Part 3 of article 2 of title 26, C.R.S., does not include a specific grant of rulemaking authority regarding the food assistance program. However, the State Board of Human Services ("Board") has authority under section 26-1-107 (5) (a) and (b), C.R.S., to adopt "board rules" regarding program scope and content and the requirements, obligations, and rights of recipients with respect to programs administered and services provided by the State Department:

> **26-1-107. State board of human services - rules.** (5) (a) "Board rules" are rules promulgated by the state board governing:
>
> (I) **Program scope and content**;
>
> (II) **Requirements, obligations, and rights of** clients and **recipients**;
>
> (III) Non-executive director rules concerning vendors, providers,

and other persons affected by acts of the state department.

(b) **The state board shall have authority to adopt "board rules" for programs administered and services provided by the state department as set forth in this title** and in title 27, C.R.S. **(emphasis added)**

The food assistance program is one of the programs of "public assistance" that is governed by part 2 of article 26, C.R.S. Section 26-2-103 (7), C.R.S., defines "public assistance" as follows:

26-2-103. Definitions. As used in this article and article 1 of this title, unless the context otherwise requires:

(7) "Public assistance" means assistance payments, **food stamps,** and social services provided to or on behalf of eligible recipients through programs administered or supervised by the state department, either in cooperation with the federal government or independently without federal aid, pursuant to the provisions of this article. Public assistance includes programs for old age pensions except for the old age pension health and medical care program, and also includes the Colorado works program, aid to the needy disabled, aid to the blind, child welfare services, food stamps supplementation to households not receiving public assistance found eligible for food stamps under rules adopted by the state board, expenses of treatment to prevent blindness or restore eyesight as defined in section 26-2-121, and funeral and burial expenses as defined in section 26-2-129. **(emphasis added)**

There are several statutes in part 2 of article 2 of title 26, C.R.S., that require the county departments to verify the eligibility of applicants for assistance payments or for public assistance pursuant to rules of the State Department. Section 26-2-108 (1), C.R.S., states in part:

26-2-108. Granting of assistance payments and social services. (1) (a) **Upon completion of the verification** and record of each application for assistance payments, **the county department, pursuant to the rules of the state department, shall determine whether the applicant is eligible for assistance payments,** the amount of such assistance payments to be granted, and the date upon which such assistance payments shall begin.

(b) **In determining the amount of assistance payments to be granted, due account shall be taken of any income or property available to the applicant** and any support, either in cash or in kind, that the applicant may receive from other sources, **pursuant to rules of the state department**. Effective July 1, 2000, a county may pay families that are eligible for temporary assistance for needy families (TANF), as defined in section 26-2-703 (19), an amount that is equal to the state and county share of child support collections as described in section 26-13-108 (1). Such payments shall not be considered income for the purpose of grant calculation. However, such income shall be considered income for purposes

of determining eligibility. If a county chooses to pay child support collections directly to a family that is eligible for temporary assistance for needy families (TANF), as defined in section 26-2-703 (19), the county shall report such payments to the state department for the month in which they occur and indicate the choice of this option in its performance contract for Colorado works. For the purposes of determining eligibility for public assistance or the amount of assistance payments, compensation received by the applicant pursuant to the "Colorado Crime Victim Compensation Act", part 1 of article 4.1 of title 24, C.R.S., shall not be considered as income, property, or support available to such applicant.

(c) **When the eligibility, amount, and date for beginning assistance payments have been established, the county department shall make an award to or on behalf of the applicant in accordance with rules of the state department,** which award shall be binding upon the county and shall be complied with by the county until it is modified or vacated.

(d) (I) Except as provided in subparagraph (II) of this paragraph (d) and part 7 of this article, assistance payments under public assistance programs shall be paid at least monthly to or on behalf of the applicant upon order of the county department from funds appropriated to the county department for this purpose and **pursuant to the rules of the state department**.

(II) Assistance in the form of aid to the needy disabled for persons who are disabled as a result of a primary diagnosis of alcoholism or a controlled substance addiction shall be paid on the person's behalf to the treatment program in which the person is participating as required pursuant to section 26-2-111 (4) (e) (I) or to the person directly upon the person providing the documentation required pursuant to section 26-2-111 (4) (e) (II).

(e) The county department shall at once notify the applicant and the state department, in writing, of its decisions on assistance payments and the reasons therefor. **(emphasis added)**

Another section that provides that eligibility must be determined pursuant to rules is section 26-2-111 (1) (b), C.R.S., which provides:

26-2-111. Eligibility for public assistance. (1) **No person shall be granted public assistance in the form of assistance payments** under this article **unless** such person meets all of the following requirements:

(b) **The person has insufficient income, property, or other resources to meet his or her needs as determined pursuant to rules and regulations of the state department;** except that resource eligibility for the program of aid to the needy disabled shall be as specified in paragraph (d) of subsection (4) of this section, resource eligibility for the program of aid to the blind shall be as specified in subparagraph (III) of paragraph (a) of subsection (5) of this section, and resource eligibility requirements for the old age pension program shall be as specified in paragraph (a) of subsection (2) of this section; **(emphasis added)**

Both sections 26-2-108 (1) and 26-2-111 (1), C.R.S., require the Board to adopt rules regarding eligibility amounts for public assistance.

II. The Board's Rule B-4224 C. does not comply with the rulemaking requirements of the State Administrative Procedure Act

The State Administrative Procedure Act (APA) governs rulemaking by executive branch agencies. Section 24-4-103 (1), C.R.S., states:

> **24-4-103. Rule-making - procedure - definitions - repeal.** (**1) When any agency is required or permitted by law to make rules**, in order to establish procedures and to accord interested persons an opportunity to participate therein, **the provisions of this section shall be applicable.** Except when notice or hearing is otherwise required by law, this section does not apply to interpretative rules or general statements of policy, which are not meant to be binding as rules, or rules of agency organization. **(emphasis added).**

When adopting rules, a state agency must follow the APA. This includes complying with the definition of "rule", found at section 24-4-102 (15), C.R.S.:

> **24-4-102. Definitions.** As used in this article, unless the context otherwise requires:
>
> (15) "Rule" means the whole or any part of **every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency.** "Rule" includes "regulation". **(emphasis added).**

The definition of "rule" in the APA is very broad and includes "every" statement from an agency implementing or interpreting law or policy and establishing the practices of the agency.

The Board's rule B-4224 C. states:

> B-4224 RESOURCE ELIGIBILITY STANDARDS
>
> C. As a result of the Food, Conservation and Energy Act of 2008, effective October 1, 2011, adjustments to the food assistance resource limit will be subject to change annually according to the consumer price index. **Information regarding the resource limits for all household classifications shall be sent to all county departments of social/human services every October in an agency letter.** There are currently two resource limits:

> One established for households that do contain a member who is elderly and/or is a person with a disability, and another established for households that do not contain a member who is elderly and/or is a person with a disability. **(emphasis added).**

The rule says that resource limits for food assistance program eligibility will be set through an annual agency letter sent to county departments.

But the setting of these resource limits constitutes a statement by the Board implementing its policy. Such a statement comes within the statutory definition of "rule" in section 24-4-102 (15), C.R.S., for purposes of the APA. This means that the resource limits must be set by rulemaking pursuant to the APA, not merely included in an annual letter sent to the local departments. The Board must follow the safeguards found in the APA, such as providing for notice to and comments from affected persons and review by the Office of Legislative Legal Services.

Section 24-4-102 (15) also says that a "rule" for purposes of the APA includes an agency statement of "general applicability and future effect." The resource limits of Rule 4224 C. are applicable to each applicant to the food assistance program, which means this is exactly the type of information that should be subject to the APA's rulemaking requirements.

The previous version established the specific dollar amount of the resource limits in rule. By including the dollar amount in the rule, the Board previously followed the requirements of the APA. See **Addendum A.** But in the current version of the rule, the Board bypasses the APA requirements by establishing the dollar amounts in an agency letter and not through open rulemaking.

In addition, the Board is not complying with the statutes that direct that the eligibility for the food assistance program be established in the Board's rules.

Because Rule B-4224 C. establishes the resource limits for the food assistance program eligibility by agency letter, it fails to meet the rulemaking process required by the APA and in the statutes governing the food assistance program in title 26, C.R.S., and should not be extended.

Addendum A

B-4224 RESOURCE ELIGIBILITY STANDARDS

Rev. eff. 2/1/11

A. The food assistance office shall consider households eligible under either expanded or basic categorical eligibility to have satisfied the resource eligibility criteria of this section. For households eligible under basic categorical eligibility, the case shall be documented to show that all household members have been approved for and/or are receiving benefits from the program that confers basic categorical eligibility.

B. Households not categorically eligible shall have their nonexempt resources, as anticipated to be available in the issuance month, used to determine household eligibility. The resources of non-household members shall not be counted as available to the household. However, the resources of a person who is excluded from household composition because of intentional program violation/fraud determination, failure to provide or acquire a Social Security Number or who is an ineligible non-citizen shall be counted, in their entirety, as household resources. The resources of a sponsor and spouse considered toward a non-citizen household shall be the sponsor's total resources less two thousand dollars ($2,000). (See the section entitled "Consideration of Sponsor's Income and Resources Toward the Sponsored Alien".)

C. The maximum allowable value of resources shall apply to all households not categorically eligible ~~and shall not exceed~~.

AS A RESULT OF THE FOOD, CONSERVATION AND ENERGY ACT OF 2008, EFFECTIVE OCTOBER 1, 2011, ADJUSTMENTS TO THE FOOD ASSISTANCE RESOURCE LIMIT WILL BE SUBJECT TO CHANGE ANNUALLY ACCORDING TO THE CONSUMER PRICE INDEX. INFORMATION REGARDING THE RESOURCE LIMITS FOR ALL HOUSEHOLD CLASSIFICATIONS SHALL BE SENT TO ALL COUNTY DEPARTMENTS OF SOCIAL/HUMAN SERVICES EVERY OCTOBER IN AN AGENCY LETTER. THERE ARE CURRENTLY TWO RESOURCE LIMITS: ONE ESTABLISHED FOR HOUSEHOLDS THAT DO CONTAIN A MEMBER WHO IS ELDERLY AND/OR IS A PERSON WITH A DISABILITY, AND ANOTHER ESTABLISHED FOR HOUSEHOLDS THAT DO NOT CONTAIN A MEMBER WHO IS ELDERLY AND/OR IS A PERSON WITH A DISABILITY.

~~1. Two thousand dollars ($2,000) for households that do not include a person who is elderly or is a person with a disability.~~

~~2. Effective October 1, 2002, three thousand dollars ($3,000) for households with at least one member who is elderly or a person with a disability.~~

An elderly member is a member who is sixty (60) years of age or older. A disabled member is defined in Section B-4214.1, C.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Chuck Brackney and Jery Payne, Office of Legislative Legal Services

DATE: November 2, 2012

RE: Rules of the Chief of the Colorado State Patrol, Department of Public Safety, concerning minimum standards for the operation of commercial vehicles, 8 CCR 1507-1 (LLS Docket No. 120217; SOS Tracking No. 2012-00035).[1]

Summary of Problem Identified and Recommendation

Section 42-4-235 (4) (a), C.R.S., states that commercial vehicles regulated by the public utilities commission are exempt from financial-responsibility and insurance regulation by the state patrol. But the Chief of the Colorado State Patrol's Rule IV. A. incorrectly states that these financial-responsibility regulations apply to all commercial vehicles. **We therefore recommend that Rule IV. A. of the rules of the Chief of the State Patrol concerning minimum standards for the operation of commercial vehicles not be extended.**

Analysis

Section 42-4-235 (4) (a), C.R.S., requires the adoption of commercial vehicle rules based upon the corresponding federal regulations promulgated

[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

by the U.S. Department of Transportation. But the statute specifically exempts vehicles regulated by the public utilities commission from some of the regulations. It reads as follows:

> **42-4-235. Minimum standards for commercial vehicles - rules.** (4) (a) The chief of the Colorado state patrol shall adopt rules for the operation of all commercial vehicles. In adopting the rules, the chief shall use as general guidelines the standards contained in the current rules and regulations of the United States department of transportation relating to safety regulations, qualifications of drivers, driving of motor vehicles, parts and accessories, notification and reporting of accidents, hours of service of drivers, inspection, repair and maintenance of motor vehicles, financial responsibility, insurance, and employee safety and health standards; **except that rules regarding financial responsibility and insurance do not apply to a commercial vehicle as defined in subsection (1) of this section that is also subject to regulation by the public utilities commission under article 10.1 of title 40, C.R.S.** On and after September 1, 2003, all commercial vehicle safety inspections conducted to determine compliance with rules promulgated by the chief pursuant to this paragraph (a) shall be performed by an enforcement official, as defined in section 42-20-103 (2), who has been certified by the commercial vehicle safety alliance, or any successor organization thereto, to perform level I inspections. **(emphasis added).**

The statute requires the regulation of commercial vehicles, but specifically exempts commercial vehicles regulated by the public utilities commission under article 10.1 of title 40 from the rules concerning financial responsibility and insurance. This means that vehicles such as taxis, limousines, and chartered buses are exempt from these regulations. Authority for insurance and financial responsibility requirements for these motor carriers is given by law to the public utilities commission, which in turn sets the financial responsibility and insurance requirements in its rules.

The Chief of the State Patrol has adopted rules to meet the requirements of section 42-4-235 (4) (a), C.R.S. Among these is Rule IV. A., which covers rules governing several topics, including hours of operation, equipment standards, and the inspection, repair, and maintenance of vehicles. The introductory portion of Rule IV. A. reads as follows:

> IV. REGULATIONS
>
> A. **All commercial vehicles and motor carriers** as defined in section 42-4-235 (1) (a), C.R.S., and all drivers as defined in 49 CFR 390.5, **shall operate in conformity with the safety regulations contained in:**
>
> 49 CFR 40 Procedures for Transportation Drug and

	Alcohol Testing Programs
49 CFR 368	Application for a Certificate of Registration to Operate in Municipalities in the United States on the United States-Mexico International Border or Within the Commercial Zones of Such Municipalities
49 CFR 380	Special Training Requirements
49 CFR 382	Controlled Substances and Alcohol Use Testing
49 CFR 395 Subpart D	New Entrant Safety Assurance Program
49 CFR 387	**Minimum Levels of Financial Responsibility for Motor Carriers**
49 CFR 390	General
49 CFR 391	Qualifications of Drivers and Longer Combination Vehicle (LCV) Driver Instructors
49 CFR 392	Driving of Commercial Motor Vehicles
49 CFR 393	Parts & Accessories Necessary for Safe Operation
49 CFR 395	Hours of Service of Drivers
49 CFR 396	Inspection, Repair, and Maintenance
49 CFR 399	Employee Safety and Health Standards
49 CFR Appendix G	Minimum Periodic Inspection Standards

(emphasis added).

Rule IV. A. in its entirety is shown in **Addendum A**.

Rule IV. A. says that "all commercial vehicles and motor carriers" must comply with certain federal regulations. It goes on to list these regulations, including 49 CFR 387 Minimum Levels of Financial Responsibility for Motor Carriers. But section 42-4-235 (4) (a), C.R.S., specifically exempts rules relating to financial responsibility and insurance for commercial vehicles subject to regulation by the public utilities commission. The use of the words "all commercial vehicles and motor carriers" in Rule IV. A includes these exempt commercial vehicles, making the current language of the rule impermissibly overinclusive.

Because Rule IV. A includes all commercial vehicles and motor carriers when section 42-4-235 (4) (a), C.R.S., excludes vehicles regulated by the public utilities commission from financial responsibility and insurance regulation by the state patrol, the rule conflicts with that statute and should not be extended.

Addendum A

IV. REGULATIONS

A. All commercial vehicles and motor carriers as defined in §42-4-235(1)(a), C.R.S., and all drivers as defined in 49 CFR 390.5, shall operate in conformity with the safety regulations contained in:

49 CFR 40	Procedures for Transportation Workplace Drug and Alcohol Testing Programs
49 CFR 368	Application for a Certificate of Registration to Operate in Municipalities in the United States on the United States-Mexico International Border or Within the Commercial Zones of Such Municipalities
49 CFR 380	Special Training Requirements
49 CFR 382	Controlled Substances and Alcohol Use and Testing
49 CFR 385 Subpart D	New Entrant Safety Assurance Program
49 CFR 387	Minimum Levels of Financial Responsibility for Motor Carriers
49 CFR 390	General
49 CFR 391	Qualifications of Drivers and Longer Combination Vehicle (LCV) Driver Instructors
49 CFR 392	Driving of Commercial Motor Vehicles
49 CFR 393	Parts & Accessories Necessary for Safe Operation
49 CFR 395	Hours of Service of Drivers
49 CFR 396	Inspection, Repair, and Maintenance
49 CFR 399	Employee Safety and Health Standards
49 CFR Appendix G:	Minimum Periodic Inspection Standards

of the United States Department of Transportation's Motor Carrier Safety Regulations as the same were in effect on October 1, 2011 and published in Title 49 of the Code of Federal Regulations, subtitle B chapter III, Parts 200 through 399, with references therein, with the following modifications:

1. All references only to interstate commerce shall also include intrastate commerce.

2. 49 CFR 368.3 through 368.6 and 368.8 shall not apply.

3. 49 CFR 380.509(a) shall be amended to read: "Each employer must ensure each entry level driver, who first began operating a commercial motor vehicle requiring a commercial driver's license under §42-2-404, C.R.S., in intrastate commerce after July 1, 2004 receives the training required by 49 CFR 380.503."

4. 49 CFR 385.301 through 385.308 and 385.319(b) through 385.337 shall not apply. 49 CFR 385.309 through 385.319 (a), hereafter referred to as the Intrastate New Entrant Safety Assurance Program, shall apply to intrastate motor carriers who are beginning in intrastate operations after July 1, 2004, and are required to obtain a Colorado assigned DOT identification number. A prior interstate safety audit or compliance review shall meet the requirement for an intrastate safety audit.
   a. All intrastate motor carriers beginning in operations after July 1, 2004 must submit

to a Safety Audit as defined in 49 CFR 385.3.

b. Safety Audits will be conducted by the Colorado State Patrol Motor Carrier Safety Section.

5. 49 CFR 387.1 through 387.17, 387.303, 387.305 and 387.309 shall apply with the following exceptions:
   a. 49 CFR 387.7(e) and (g) shall not apply.
   b. 49 CFR 387.9 (4) applies only to interstate and foreign commerce.
   c. Transportation carriers may obtain a certificate of self insurance issued pursuant to § 42-7-501, C.R.S., or part 387 of 49 CFR.
   d. Motor carriers subject to these rules shall carry a minimum level of cargo liability coverage of $10,000 for loss or damage to property carried on any one motor vehicle or an amount adequate to cover the value of the property being transported, whichever is less, unless the shipper and the property carrier otherwise agree by written contract to a lesser amount.

6. 49 CFR 390.3(f), (1-2) and (6) shall not apply.

7. 49 CFR 390.5 Definitions:
   a. The definition of "Commercial Motor Vehicle" and "Motor Carrier" shall not apply.
   b. The definition of an "Emergency" is amended by adding the following: "A governmental agency has determined that a local emergency requires relief from the maximum driving time in 49 CFR 395.3 or 395.5."

8. 49 CFR 390.19(a) is amended to read: "Each motor carrier that conducts operations in intrastate commerce must apply for and receive a Colorado assigned USDOT identification number prior to beginning operations within the state. The motor carrier is also required to update the information contained in the application every 24 months."
   a. Identification numbers for intrastate motor carriers are issued through the Colorado State Patrol, Motor Carrier Safety Section.
   b. Only the legal name or single trade name may be used on the application for the Colorado assigned USDOT identification number.

9. 49 CFR 390.21(b) is amended by adding the following: "Intrastate carriers must mark their vehicles with the Colorado assigned USDOT identification number, preceded by the letters "USDOT" and followed by the suffix "CO" (e.g.: USDOT 1234567 CO).
   (A) Motor carriers operating in intrastate commerce, not transporting 16 or more passengers (including the driver) or transporting placarded hazardous materials and having a GVWR or GCWR equal to or in excess of 10,001 lbs., but not in excess of 26,000 lbs, may meet the marking requirements of 49 CFR 390.21 by marking the trailer or secondary unit, if the GVWR of the self-propelled unit is 10,000 lbs. or less.

10. 49 CFR 391.11(b)(1) shall be amended to read: "Is at least 21 years old if engaged in interstate commerce or transporting hazardous materials of a type or quantity that would require the vehicle to be marked or placarded under 49 CFR 177.823. All other drivers must be at least 18 years of age."

11. 49 CFR 393.48 and 393.49 shall not apply to trailers equipped with hydraulic surge brakes provided that the GCWR does not exceed 26,000 pounds and they comply with

the rules adopted pursuant to §42-4-223(2.5), C.R.S. (8CCR 1507-18), concerning the use of surge brakes in Colorado.

12. Public transit agency carriers and their drivers operating in intrastate commerce may meet the requirement in 49 CFR 395.1(e)(1)(ii) by either meeting the existing regulation or by replacing 49 CFR 395.1(e)(1)(ii) with "the driver is released from work within 12 consecutive hours."

13. 49 CFR 395.3 or 395.5 shall not apply to governmental drivers working an emergency, as defined in 49 CFR 390. The motor carrier must document this local emergency.

14. 49 CFR 395.3 shall not apply to tow drivers who are working an emergency, as defined in 49 CFR 390.5, or are towing a vehicle from public roadway at the request of a police officer or other law enforcement purpose.
    a. The tow carrier/driver must document the emergency or law enforcement call and time associated.

15. Drivers transporting livestock, poultry, slaughtered animals or the grain, corn, feed, hay etc. used to feed animals are eligible to use the agricultural operations exception in 49 CFR 395.1(k).

16. 49 CFR 395.1(k)(2) is amended to read: "Is conducted during the planting and harvesting seasons within Colorado as determined by the Department of Agriculture to be from January 1 to December 31."

17. 49 CFR 396.9 any reference to an out-of-service sticker shall mean any out-of-service declaration.

18. 49 CFR 396.11 and 396.13(b) and (c) shall not apply to an intrastate farmer (as defined in 49 CFR 390.5 operating commercial motor vehicles as defined in §42-4-235(1)(a), C.R.S. during planting and harvest seasons, as defined by the Colorado Department of Agriculture.

19. All references to federal agencies and authorized personnel shall be construed to mean the Colorado State Patrol, Public Utilities Commission, and law enforcement agencies with a signed memorandum of understanding with the Colorado State Patrol and their authorized personnel.

20. All reporting requirements referred to in 49 CFR 40, 368, 380, 382, 385, 387, 390, 391, 392, 393, 395, 396 and 399, shall be filed with the Colorado State Patrol, Motor Carrier Safety Section, 15075 South Golden Road, Golden, Colorado 80401.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: October 31, 2012

RE: Rules of the Colorado Medical Board, Division of Professions and Occupations, Department of Regulatory Agencies, concerning the licensure and supervision of distinguished foreign teaching physicians, 3 CCR 713-33 (LLS Docket No. 120446; SOS Tracking No. 2012-00516).[1]

Summary of Problem Identified and Recommendation

Section 12-36-107.2 (2), C.R.S., authorizes the Colorado Medical Board to issue a distinguished foreign teaching physician license to an applicant who is an assistant professor, but for only one year and the license cannot be renewed unless the applicant becomes at least an associate professor. But Colorado Medical Board Rule 140 II. C. 2. b. conflicts with this statute by allowing the renewal of assistant professor licenses. **We therefore recommend that Rule 140 II. C. 2. b. of the rules of the Colorado Medical Board concerning the supervision of distinguished foreign teaching physicians not be extended.**

Analysis

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2013, unless the General Assembly acts by bill to postpone such expiration.

I. Background

Medical schools occasionally invite foreign physicians to teach at the school for a limited time. The appointment can be as an assistant professor or as an associate professor or higher ("associate professor"). Assistant professors are ranked below associate professors.

Section 12-36-107.2, C.R.S. (attached as **Addendum A**), authorizes the Colorado Medical Board ("Board") to issue a medical license to a distinguished foreign teaching physician who meets several conditions. The applicant must typically be appointed as an associate professor at a state medical school. The license expires after one year and may be renewed annually, but only after the board has specifically determined that the qualification conditions, including the requirement of being at least an associate professor, will "continue" during the next licensing period. If an applicant is only an assistant professor, the board can issue a "temporary license, for one year only" under section 12-36-107.2 (2), C.R.S., if the applicant will practice under the direct supervision of an associate professor.

Section 12-36-107.2 (5), C.R.S., directs the Board to promulgate rules specifying standards related to the "qualification and supervision" of distinguished foreign teaching physicians:

> **12-36-107.2. Distinguished foreign teaching physician license - qualifications.** (5) The board shall promulgate rules specifying standards related to the qualification and supervision of distinguished foreign teaching physicians.

The Board promulgated Rule 140 (section II of which is attached as **Addendum B**) to implement this program. Rule 140 II. C. 2. b. allows an assistant professor to renew a license by providing detailed plans for acquiring licensure by other means.

II. Rule 140 II. C. 2. b. conflicts with the statute by allowing renewal of an assistant professor's license.

There are two classes of applicants for a distinguished foreign teaching physician license: associate professors and assistant professors. Associate professor licenses are granted pursuant to section 12-36-107.2 (1), C.R.S., which states:

> **12-36-107.2. Distinguished foreign teaching physician license**

- qualifications. (1) Notwithstanding any other provision of this article, **an applicant** of noteworthy and recognized professional attainment who is a graduate of a foreign medical school and who is licensed in a foreign jurisdiction, if that jurisdiction has a licensing procedure, **may be granted a distinguished foreign teaching physician license** to practice medicine in this state, upon application to the board in the manner determined by the board, **if the following conditions are met**:

(a) The applicant has been invited by a medical school in this state to serve as a full-time member of its academic faculty for the period of his or her appointment, at a rank equal to **an associate professor or higher**;

(b) The applicant's medical practice is limited to that required by his or her academic position, the limitation is so designated on the license in accordance with board procedure, and the medical practice is also limited to the core teaching hospitals affiliated with the medical school, as identified by the board, on which the applicant is serving as a faculty member. (**emphasis added**)

Subsection (1) establishes the general conditions that an applicant must meet to be issued a license, including being at least an associate professor. But a person who is only an assistant professor can apply for a license pursuant to section 12-36-107.2 (2), C.R.S.:

12-36-107.2. Distinguished foreign teaching physician license - qualifications. (2) **An applicant who** meets the qualifications and conditions set forth in subsection (1) of this section but **is not offered the rank of associate professor or higher may be granted a temporary license, for one year only**, to practice medicine in this state, as a member of the academic faculty, at the discretion of the board and in the manner determined by the board. If the applicant is granted a temporary license, he or she shall practice only under the **direct supervision** of a person who has the rank of associate professor or higher. (**emphasis added**)

This statute specifies that assistant professor licenses are "temporary" and last "for one year only".

License renewal is governed by section 12-36-107.2 (3), C.R.S., which states:

12-36-107.2. Distinguished foreign teaching physician license - qualifications. (3) A distinguished foreign teaching physician license is effective and in force only while the holder is serving on the academic staff of a medical school. **The license** expires one year after the date of issuance and **may be renewed annually only after the board has specifically determined that the conditions specified in subsection (1) of this section will continue during the ensuing period of licensure**. The board may require an applicant for licensure under this section to present himself or herself to the board for an interview. The board may withdraw licensure granted under this section prior to the expiration of the license for

unprofessional conduct as defined in section 12-36-117. (**emphasis added**)

An explicit requirement for renewal is that the Board specifically determine that the conditions specified in subsection (1)–including that the applicant is at least an associate professor–"will continue" during the ensuing period of licensure. "Continue" means that the applicant **already** meets the conditions when the application for renewal is filed, and that the applicant will also meet those conditions during the renewal period. Therefore, under this statute, the Board cannot renew an assistant professor license because it cannot determine that an assistant professor will "continue" to be an associate professor.

Therefore, section 12-36-107.2, C.R.S., treats the two classes of applicants differently regarding whether a license can be renewed:

- Licenses for assistant professors are governed by subsection (2), which limits them to "one year only";
- Renewal is governed by subsection (3), which requires that an applicant "continue" to be an associate professor; and
- Nothing in section 12-36-107.2, C.R.S., authorizes the renewal of a license for an assistant professor.

But Rule 140 II. C. 2. b. allows assistant professors to renew their licenses:

> II. APPLICATION REQUIREMENTS: **An applicant** for licensure as a distinguished foreign teaching physician **shall**:
>
> C. Submit a letter from the Dean's Office of the medical school on whose academic faculty the applicant will serve identifying:
>
> 2. Whether the applicant will serve in the role of professor, associate professor, or assistant professor;
>
> b. **For renewal applicants not designated as associate professor or higher, provide detailed** information for the applicant's **plans to obtain Colorado medical licensure** pursuant to sections 12-36-107 or 12-36-107.6, C.R.S.; (**emphasis added**)

Under the rule, assistant professors can renew a license simply by providing detailed information about their "plans" to become licensed under one of two other sections of law.[2] This conflicts with section 12-36-107.2 (3), C.R.S., which requires that a renewal applicant "continue" to be an associate professor. The Board's rule-making authority, which is limited to specifying standards

[2] Section 12-36-107, C.R.S., contains the general licensure requirements. Section 12-36-107.6, C.R.S., allows the full licensure of foreign medical school graduates if the Board makes a case-by-case determination that the applicant is qualified.

related to the "qualification and supervision" of distinguished foreign teaching physicians, does not include a rule that allows the renewal of an assistant professor license by an applicant who is not already an associate professor.

We therefore recommend that Rule 140 II. C. 2. b. of the rules of the Board concerning the supervision of distinguished foreign teaching physicians not be extended.

Addendum A

12-36-107.2. Distinguished foreign teaching physician license - qualifications. (1) Notwithstanding any other provision of this article, an applicant of noteworthy and recognized professional attainment who is a graduate of a foreign medical school and who is licensed in a foreign jurisdiction, if that jurisdiction has a licensing procedure, may be granted a distinguished foreign teaching physician license to practice medicine in this state, upon application to the board in the manner determined by the board, if the following conditions are met:

(a) The applicant has been invited by a medical school in this state to serve as a full-time member of its academic faculty for the period of his or her appointment, at a rank equal to an associate professor or higher;

(b) The applicant's medical practice is limited to that required by his or her academic position, the limitation is so designated on the license in accordance with board procedure, and the medical practice is also limited to the core teaching hospitals affiliated with the medical school, as identified by the board, on which the applicant is serving as a faculty member.

(2) An applicant who meets the qualifications and conditions set forth in subsection (1) of this section but is not offered the rank of associate professor or higher may be granted a temporary license, for one year only, to practice medicine in this state, as a member of the academic faculty, at the discretion of the board and in the manner determined by the board. If the applicant is granted a temporary license, he or she shall practice only under the direct supervision of a person who has the rank of associate professor or higher.

(3) A distinguished foreign teaching physician license is effective and in force only while the holder is serving on the academic staff of a medical school. The license expires one year after the date of issuance and may be renewed annually only after the board has specifically determined that the conditions specified in subsection (1) of this section will continue during the ensuing period of licensure. The board may require an applicant for licensure under this section to present himself or herself to the board for an interview. The board may withdraw licensure granted under this section prior to the expiration of the license for unprofessional conduct as defined in section 12-36-117.

(4) The board may establish and charge a fee for a distinguished foreign teaching physician license pursuant to section 24-34-105, C.R.S., not to exceed the amount of the fee for renewal of a physician's license.

(5) The board shall promulgate rules specifying standards related to the qualification and supervision of distinguished foreign teaching physicians.

Addendum B

RULE 140 - LICENSURE AND SUPERVISION OF DISTINGUISHED FOREIGN TEACHING PHYSICIANS

II. APPLICATION REQUIREMENTS: An applicant for licensure as a distinguished foreign teaching physician shall:

A. Fully and accurately complete the Board's distinguished foreign teaching physician application, initial or renewal, as applicable;

B. Pay the Board a licensing fee to be determined and collected pursuant to Section 24-34-105, C.R.S.;

C. Submit a letter from the Dean's Office of the medical school on whose academic faculty the applicant will serve identifying:

1. The applicant's proposed faculty position, title, and term of appointment;

2. Whether the applicant will serve in the role of professor, associate professor, or assistant professor;

a. If assistant professor, provide the following information:

i. An explanation as to why the applicant does not qualify or satisfy the University guidelines for the rank of associate professor or higher; and

ii. Identification of a supervising physician who shall have a rank of associate professor or above and have a current Colorado medical license in good standing, which is not a distinguished foreign teaching license nor reentry license; and

b. For renewal applicants not designated as associate professor or higher, provide detailed information for the applicant's plans to obtain Colorado medical licensure pursuant to sections 12-36-107 or 12-36-107.6, C.R.S.;

3. The reasons international recruitment for this academic faculty position was or continues to be necessary, to include if salary was a motivating factor;

4. How the applicant will uniquely enhance or has uniquely enhanced clinical medicine and medical education in this state;

5. How the applicant meets or continues to meet the Qualification Standards defined in this Rule to be eligible for this license type;

6. Additional information which would assist the Board in understanding the reason for this appointment; and

7. For a renewal applicant continued satisfaction of the Qualification Standards defined in this Rule shall be demonstrated by:

a. an updated curriculum vita;

b. an updated list of publications and teaching experience;

c. continued post-graduate education; and

d. copies of the applicant's teaching evaluations since the last renewal application.

CONCERNING THE USE OF AUTHORITY VERBS IN THE COLORADO REVISED STATUTES

Define "Must" "Shall" In Colorado Revised Statutes

The bill defines the word "must", as it is used generally in the Colorado Revised Statutes, to mean that a person or thing is required to meet a condition for a consequence to apply. "Shall" means that a person has a duty.

SECTION 1. Legislative declaration. (1) The general assembly hereby:

(a) Finds that:

(I) Courts presume that, in the absence of any manifest indication to the contrary, the meaning attributed to the words used in one part of the statutes should be ascribed to the same words found elsewhere in the statutes; and

(II) Many statutes have been written in the passive voice and future tense, including the use of the word "shall" as a future tense verb;

(b) Determines that:

(I) Drafting statutes, when possible, in the active voice and present tense will clarify the general assembly's intent; and

(II) In order to clarify the general assembly's use of authority verbs such as "must" and "shall", it is useful to use different words to distinguish between:

(A) The imposition of a duty on a person; and

(B) The creation of a condition to which a person or thing is subject but as to which there is no duty to act; and

(c) Declares that:

(I) Passage of this act is not intended to alter the interpretation of a statute enacted before the effective date of this act; and

(II) While this act creates standard definitions of the words "must" and "shall", the determination of the proper meanings to be attributed to the words "must" and "shall" should consider the context in which those words were enacted and are used.

SECTION 2. In Colorado Revised Statutes, 2-4-401, **add** (6.5) and (13.7) as follows:

2-4-401. Definitions. The following definitions apply to every statute, unless the context otherwise requires:

(6.5) (a) "MUST" MEANS THAT A PERSON OR THING IS REQUIRED TO MEET A CONDITION FOR A CONSEQUENCE TO APPLY. "MUST" DOES NOT MEAN THAT A PERSON HAS A DUTY.

(b) THIS SUBSECTION (6.5):

(II) IS NOT INTENDED TO ALTER THE INTERPRETATION OF A STATUTE ENACTED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (6.5); AND

(II) APPLIES TO STATUTES ENACTED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (6.5) BUT ONLY WITH REGARD TO LANGUAGE THAT APPEARS IN SMALL CAPITAL FONT IN THE SESSION LAWS PUBLISHED PURSUANT TO SECTION 24-70-233, C.R.S.

(13.7) (a) "SHALL" MEANS THAT A PERSON HAS A DUTY.

(b) THIS SUBSECTION (13.7):

(I) IS NOT INTENDED TO ALTER THE INTERPRETATION OF A STATUTE ENACTED BEFORE THE EFFECTIVE DATE OF THIS SUBSECTION (13.7); AND

(II) APPLIES TO STATUTES ENACTED ON OR AFTER THE EFFECTIVE DATE OF THIS SUBSECTION (13.7) BUT ONLY WITH REGARD TO LANGUAGE THAT APPEARS IN SMALL CAPITAL FONT IN THE SESSION LAWS PUBLISHED PURSUANT TO SECTION 24-70-233, C.R.S.

SECTION 3. Act subject to petition - effective date. This act takes effect at 12:01 a.m. on the day following the expiration of the ninety-day period after final adjournment of the general assembly (August 7, 2013, if adjournment sine die is on May 8, 2013); except that, if a referendum petition is filed pursuant to section 1 (3) of article V of the state constitution against this act or an item, section, or part of this act within such period, then the act, item, section, or part will not take effect unless approved by the people at the general election to be held in November 2014 and, in such case, will take effect on the date of the official declaration of the vote thereon by the governor.

GUIDELINES FOR WHEN TO UPDATE STATUTES REGARDING THE PRESENT TENSE, ACTIVE VOICE, AND AUTHORITY VERBS

1. The determination of whether to update[1] existing statutory language is primarily one for the attorney drafting the bill to make. If updating seems advisable under section 4 but the drafter has not updated a statute, a revisor should raise the issue with the drafter and should consider whether to include the updates in the current version of the bill or the next draft of the bill.
   a. LAs do not need to suggest updates to bills.
   b. LAs should raise a concern if they notice conflicting updates between bills or within a bill.

2. The attorney should comply with the drafting manual[2] concerning the use of the present tense, active voice, and authority verbs (unless doing so is likely to create ambiguity) when a bill adds:
   a. An entirely new subdivision of law; or
   b. An entirely new sentence within an existing subdivision of law. In doing so, the attorney should consider whether the rest of the subdivision should be updated - *see* section 4.

3. Do not update a subdivision of law that is not already in a bill for other, substantive reasons. This does not prevent:
   a. Updating an introductory portion of law that is not otherwise being amended and therefore wouldn't otherwise be in the amending clause.
   b. Updating an entire section or other multi-part subdivision of law if doing so is helpful for other reasons, for example, most of the subdivisions of the section or subdivision are already being amended or it's important to show the context of the section or subdivision.

4. In determining whether to update existing statutory language, an attorney should consider:
   a. Whether updating the language is likely to create ambiguity or have any substantive effect.
   b. Whether the existing language has been construed by case law. If so, the attorney should not update the language unless doing so would clearly not affect the reasoning or result of the case.
   c. Whether the existing language relates to a particularly sensitive issue. If so, the language should probably be left alone.
   d. Whether the sponsor of the bill or the committee where it will probably be heard are likely to be concerned with each and every statutory change.
   e. The resulting work load on the publication and bill production processes, including on LAs, revisors, and the pub team. Updating in a 5- or 10-page bill has a very different impact than doing so in a 50-page bill. Updating sections of law that are in the bill only as conforming amendments may be unduly burdensome if there are many conforming amendments.

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[1]For purposes of these guidelines, "update" means to amend an existing statute to make it comply with the drafting manual concerning the use of the present tense, active voice, and authority verbs (that is, "shall", "may", "must", and "need").

[2]Refer to the drafting manual, pages 5-15 through 5-19.