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AGENDA

Committee on Legal Services

November 25, 2013

10:00 a.m.

Senate Committee Room 354

1. Discussion of Chair vacancy.

2 Review of New Rules (rules adopted or amended on or after November 1, 2012, and before November 1, 2013, and scheduled to expire May 15, 2014):

   a. Rules of the State Board of Education, Department of Education, concerning Administration of the Accreditation of School Districts (Assessment Administration Security Policies and Procedures), 1 CCR 301-1 (LLS Docket No. 130206; SOS Tracking No. 2013-00067).
   Staff: Julie Pelegrin
   (Contested)

   b. Rules of the State Board of Education, Department of Education, concerning Administration of the Accreditation of School Districts (District Accreditation Contracts), 1 CCR 301-1 (LLS Docket No. 130101; SOS Tracking No. 2012-01001).
   Staff: Julie Pelegrin
   (Uncontested)

   c. Rules of the State Board of Education, Department of Education, concerning Administration of the Exceptional Children's Educational Act, 1 CCR 301-8 (LLS Docket No. 130102; SOS Tracking No. 2012-00942).

Staff: Julie Pelegrin
(Uncontested)

d. Rules of the Secretary of State, Department of State, concerning administration of the "Colorado Charitable Solicitations Act", 9 CCR 1505-9 (LLS Docket No., 130001; SOS Tracking No. 2012-00821).
Staff: Thomas Morris
(Uncontested)

e. Rules of the Colorado State Patrol, Department of Public Safety, concerning Part III, hazardous materials route designation, 8 CCR 1507-25 (LLS Docket No. 1301093; SOS Tracking No. 2013-00058).
Staff: Jery Payne
(Uncontested)

f. Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning building, fire, and life safety code enforcement of inspectors for health facilities licensed by the state of Colorado, article 10, building code and fire inspector qualification, 8 CCR 1507-31 (LLS Docket No. 130425; SOS Tracking No. 2013-00749).
Staff: Chuck Brackney and Kate Meyer
(Uncontested)

g. Rules of the State Housing Board, Division of Housing, Department of Local Affairs, concerning manufactured housing installations, 9 CCR 1302-7 (LLS Docket No. 130381; SOS Tracking No. 2013-00483).
Staff: Chuck Brackney and Nate Carr
(Uncontested)

3. Report from the Legislative Digital Policy Advisory Committee.
Staff: Dan Cartin

4. Scheduled Meetings During the Session - Organizational Meeting in January and Scheduled Meetings on the First Friday of the Month:
February 7, March 7, April 4, May 2 - Noon to 2:00 p.m.

5. Recognition of Chuck Brackney's service with the Office of Legislative Legal Services and the Committee on Legal Services.

6. Other.

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STAFF ATTORNEY
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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: November 14, 2013

SUBJECT: Rules of the State Board of Education, Department of Education, concerning Administration of the Accreditation of School Districts (Assessment Administration Security Policies and Procedures), 1 CCR 301-1 (LLS Docket No. 130206; SOS Tracking No. 2013-00067).[1]

Summary of Problem Identified and Recommendation

Section 24-4-102 (15), C.R.S., defines a rule, thereby identifying the types of statements that an agency must promulgate as a rule and may not adopt as a guideline or policy. State Board of Education Rules 5.03 and 10.01 (B) require school districts and public schools to comply with the Department of Education's statewide assessment administration and security policies and procedures, which appear to be agency statements that fit the definition of a rule and must be promulgated in accordance with the "State Administrative Procedure Act." **We therefore recommend that Rules 5.03 and 10.01 (B) of the rules of the State Board of Education concerning administration of statewide accountability measures for the Colorado public school system, charter school institute, public school districts and public schools not be extended.**

[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, 2014, unless the General Assembly acts by bill to postpone such expiration.

Analysis

I. The State Board of Education must adopt the policies and procedures for statewide assessment administration and security as rules promulgated under the Act.

A. The "State Administrative Procedure Act" defines the types of agency statements that constitute a rule and must be promulgated using the procedures in the Act. The statutes require the State Board of Education to adopt rules to implement the "Education Accountability Act of 2009."

If an executive branch agency, such as the State Board of Education (State Board) is authorized or required to promulgate rules to implement a statute, the agency must comply with the requirements of the "State Administrative Procedure Act", article 4 of title 24, C.R.S. (APA). An agency may, however, think that a statement by the agency is merely a guideline, a policy, or a procedure and therefore not subject to the APA.

Section 24-4-102 (15), C.R.S., of the APA defines a "rule" as follows:

> **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".

Section 24-4-103 (1), C.R.S., applies this definition as follows:

> **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.

Thus, if an agency is authorized or required to adopt rules, it must follow the provisions of the APA. The only situation in which the agency is not required to follow the APA is if the statements the agency is adopting

do not fit within the definition of a rule. Based on the language in section 24-4-103 (1), C.R.S., if the statements of an agency are not simply interpretative or general statements of policy or if they are meant to be binding as rules, then the agency must promulgate the statements as rules in compliance with the APA procedures.

The General Assembly enacted the "Education Accountability Act of 2009", article 11 of title 22, C.R.S., (Accreditation Act) to set the parameters and general process for accrediting the state charter school institute and school districts and assigning performance plans to public schools. The Accreditation Act requires the Department of Education (Department) annually to review the performance of the state charter school institute, each school district, and each public school to determine the accreditation level for the institute or district and the appropriate performance plan level for each public school. The Department must also enter into an accreditation contract with the institute and each school district.

Section 22-11-104, C.R.S., specifically directs the State Board to promulgate rules pursuant to the APA to implement the Accreditation Act. In addition, section 22-11-207 (2), C.R.S., specifically directs the State Board to promulgate rules establishing criteria to determine the accreditation category of the institute and each school district:

> **22-11-207. Accreditation categories - criteria - rules.** (2) The state board shall promulgate rules establishing objective, measurable criteria that the department shall apply in determining the appropriate accreditation category for each school district and the institute, placing the greatest emphasis on attainment of the performance indicators. At a minimum, the rules shall take into consideration:…**(Criteria omitted.)**

Thus, the State Board must promulgate rules that establish the criteria for assigning accreditation categories to the institute and school districts. Section 22-11-210 (1) (a), C.R.S., uses comparable language to require the State board to adopt rules to set the criteria for determining the performance plan that a public school must adopt.

B. Rules 5.03 and 10.01 (B) attempt to enforce policies and procedures of the Department that fall within the definition of a rule and must, therefore, be promulgated by the State Board pursuant to the APA.

In adopting rules to implement section 22-11-207, C.R.S., the State Board adopted two rules that affect the accreditation rating of the institute

and each school district and the performance plan for each public school. Rule 5.03 applies to accreditation ratings:

> **5.00 DISTRICT ACCREDITATION CATEGORIES AND ACCREDITATION REVIEWS**
>
> **5.03** A District's or the Institute's failure to comply with **the Department's Statewide Assessment administration and security policies and procedures shall be considered by the Department in assigning the District or Institute to an Accreditation category, and may result in the District or Institute being assigned to an Accreditation category at least one level lower than what otherwise would have been assigned.** If the District or Institute otherwise would have been assigned to Accredited with Distinction, Accredited with Performance Plan, or Accredited with an Improvement Plan, it instead may be assigned to Accredited with Priority Improvement Plan. If the District or Institute otherwise would have been assigned to Accredited with Priority Improvement Plan, it instead may be assigned to Accredited with Turnaround Plan. The Commissioner shall determine whether a District or Institute has breached the Department's Statewide Assessment administration and security policies and procedures and shall determine whether the breach was pervasive and egregious enough to warrant a change in the District's or Institute's accreditation rating. **(Emphasis added.)**

Rule 10.01(B) uses similar language for determining a public school's performance plan:

> **10.00 SCHOOL PLANS AND SCHOOL RESTRUCTURING**
>
> **10.01(B) A Public School's failure to comply with the Department's Statewide Assessment administration and security policies and procedures shall be considered by the Department in identifying which type of plan the Public School must implement, and may result in a plan type at least one level lower than what otherwise would have been required.** If the Public School otherwise would have been required to implement a Performance Plan or Improvement Plan, it instead may be required to implement a Priority Improvement Plan. If the Public School otherwise would have been required to implement a Priority Improvement Plan, it instead may be required to implement a Turnaround Plan. The Commissioner shall determine whether a Public School has breached the Department's Statewide Assessment administration and security policies and procedures and shall determine whether the breach was pervasive and egregious enough to warrant a change in the Public School's plan type assignment. **(Emphasis added.)**

The Department's statewide assessment administration and security policies and procedures are not established by rule, and the rules do not incorporate these policies and procedures by reference. There is no other

reference to these policies and procedures in the State Board's rules other than in these two rules.

Based on information from the Department, the policies and procedures are generally dictated by the assessment publisher. It appears, however, that the Department's statewide assessment administration and security policies and procedures fall within the definition of a "rule" in section 24-4-102 (15), C.R.S. These policies and procedures are statements of general applicability to the state charter school institute, school districts, and public schools. If not followed, these policies and procedures have the potential future effect of lowering the institute's or a school district's accreditation rating or lowering a public school's performance plan level.

Rules 5.03 and 10.01(B) clearly fall within the authority of the State Board, but they refer to agency statements that must also be promulgated by the State Board as rules in accordance with the APA. The State Board and the Department cannot impose these policies and procedures on the state charter school institute, school districts, and public schools without following the notice requirements and procedures established by the APA.

We therefore recommend that Rules 5.03 and 10.01(B) of the rules of the State Board of Education concerning administration of statewide accountability measures for the Colorado public school system, charter school institute, public school districts and public schools not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: November 14, 2013

SUBJECT: Rules of the State Board of Education, Department of Education, concerning Administration of the Accreditation of School Districts (District Accreditation Contracts), 1 CCR 301-1 (LLS Docket No. 130101; SOS Tracking No. 2012-01001).[1]

Summary of Problem Identified and Recommendation

Section 22-11-206 (2), C.R.S., requires the State Board of Education to enter into an accreditation contract with the State Charter School Institute and each school district and to automatically renew the Institute's or a school district's contract so long as the Institute or the school district is accredited or accredited with distinction. But the State Board of Education Rule 3.02 states that the State Board of Education will automatically renew the Institute's or a school district's accreditation contract so long as the Institute or the school district is accredited with improvement plan or higher. **We therefore recommend that Rule 3.02 of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.**

[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, 2014, unless the General Assembly acts by bill to postpone such expiration.

Analysis

I. Rule 3.02 conflicts with the statute by allowing automatic renewal of an accreditation contract for the State Charter School Institute or a school district that is not performing as well as the statute requires for automatic renewal of an accreditation contract.

The "Education Accountability Act of 2009", article 11 of title 22, C.R.S., requires the State Board of Education (State Board) and the Department of Education (Department) to annually review the performance of the State Charter School Institute (Institute) and of each school district and to place the Institute and each school district at one of five accreditation levels: accredited with distinction, the highest level of accreditation; accredited; accredited with improvement plan; accredited with priority improvement plan; or accredited with turnaround plan, the lowest level of accreditation.

Section 22-11-206 (2), C.R.S., requires the State Board annually to enter into an accreditation contract with the Institute and each school district and provides for automatic renewal of certain contracts, as follows:

> **22-11-206. Accreditation of school districts and institute – contracts – rules.** (2) The state board shall enter into an accreditation contract with each local school board and with the institute. **Each accreditation contract shall have a term of one year and shall be automatically renewed each year so long as the school district or the institute remains in the accreditation category of accredited or higher.** The parties to each accreditation contract may renegotiate the contract at any time during the term of the contract, based on appropriate and reasonable changes in the circumstances upon which the original contract terms were based. The state board shall promulgate rules specifying the contents and terms of the accreditation contract in accordance with the provisions of this article. **(emphasis added)**

Thus, the State Board must automatically renew the accreditation contract of the Institute or of a school district only if the Institute or the school district is accredited at one of the two highest levels – accredited or accredited with distinction.

To implement the "Education Accountability Act of 2009", the State Board enacted Rule 3.02, which reads:

3.00 DISTRICT ACCREDITATION CONTRACTS

> **3.02** Each Contract shall have a term of one year and shall be automatically renewed each year so long as the District or the Institute remains in the Accreditation category of Accredited with Distinction, Accredited **or Accredited with Improvement Plan**. **(emphasis added)**

Under Rule 3.02, the State Board grants automatic renewal to the Institute or a school district even though the Institute or the school district is performing at a lower level – accredited with improvement plan – than that required for automatic renewal in section 22-11-206 (2), C.R.S.

We therefore recommend that Rule 3.02 of the rules of the State Board of Education concerning administration of the accreditation of school districts not be extended.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: November 14, 2013

SUBJECT: Rules of the State Board of Education, Department of Education, concerning Administration of the Exceptional Children's Educational Act, 1 CCR 301-8 (LLS Docket No. 130102; SOS Tracking No. 2012-00942).[1]

Summary of Problem Identified and Recommendation

Section 22-60.5-111 (5) (d), C.R.S., states that a temporary educator eligibility authorization is valid for one year and may be renewed twice. But State Board of Education Rule 3.04(2) states that the authorization is valid for three years and cannot be renewed. **We therefore recommend that Rule 3.04(2) of the rules of the State Board of Education concerning administration of the exceptional children's educational act not be extended.**

Analysis

I. The statutes require annual review of a temporary educator eligibility authorization; the rules allow a person to hold a temporary educator eligibility authorization for three years without review.

[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, 2014, unless the General Assembly acts by bill to postpone such expiration.

The statutes create several educator authorizations to allow persons who do not qualify for an educator license to work as a teacher, a special services provider, or a principal. One of these is the temporary educator eligibility authorization, which applies to a person who is enrolled in an approved preparation program for a special education educator or who is working to attain a special services provider initial license, but who has not yet met the requirements for the applicable initial educator license. See section 22-60.5-111 (5), C.R.S. (attached as **Addendum A**) After listing the criteria for obtaining the authorization, the statute specifies that the authorization "is valid for one year and may be renewed twice." Section 22-60.5-111 (5) (d), C.R.S.

The State Board of Education adopted rules to implement the temporary educator eligibility authorization. Rule 3.04 (2) states:

> **3.04(2) Temporary Teacher Eligibility (TTE).**
> If an administrative unit or approved facility school is unable to employ an individual who is appropriately certificated/licensed and endorsed, the director of special education may apply to the Department of Education for temporary teacher eligibility. **Approval** shall be effective for five school years for TTEs issued through the 1998-99 school year, and **beginning with 1999-2000, shall be effective for three school years. Temporary Teacher Eligibility is nonrenewable** and subject to the following conditions:…**(entire rule not shown) (emphasis added)**

Although both the statute and the rule result in a total of three years of eligibility for a person holding a temporary educator eligibility authorization, the statute and the rule actually conflict in substance as well as in form. Under the statute, the department must review the person's status and qualifications annually. Under the rule, a person may hold the authorization without review for three years.

We therefore recommend that the introductory portion to Rule 3.04(2) of the rules of the State Board of Education concerning administration of the exceptional children's educational act not be extended.

ADDENDUM A

22-60.5-111. Authorization - types - applicants' qualifications - rules. (5) **Temporary educator eligibility authorization.** (a) The department of education may issue a temporary educator eligibility authorization to a person who is enrolled in an approved program of preparation for a special education educator or who is working to attain a special services provider initial license but who has not yet met the requirements for the applicable initial educator license. The department may issue the authorization under the following circumstances:

(I) A school district requests the temporary educator eligibility authorization to employ as a special education teacher or director or as a special services provider an applicant who does not yet meet the requirements to obtain the applicable initial educator license but who meets the eligibility criteria specified in paragraph (b) of this subsection (5);

(II) The requesting school district provides documented evidence of a demonstrated need for specific and essential educational services that the applicant would provide but that would otherwise be unavailable to students due to a shortage of licensed educators with the appropriate endorsement.

(b) An applicant for a temporary educator eligibility authorization shall:

(I) Be continuously enrolled in an approved or alternative program of preparation leading to a bachelor's degree or higher degree from an accepted institution of higher education; or

(II) Be enrolled in an approved or alternative special education or special education director preparation program offered by an accepted institution of higher education; or

(III) Be approved for a temporary educator eligibility authorization based on evidence that documents compliance with requirements specified by rule of the state board of education.

(c) In addition to the circumstances and criteria specified in paragraphs (a) and (b) of this subsection (5), the department of education may issue a temporary educator eligibility authorization to a special services provider who has met the minimum degree requirements necessary to practice in his or her area of specialization, but who has not completed the necessary national content examination or school practicum in the area of specialization. A school district may employ a person who holds a temporary educator eligibility authorization issued pursuant to this paragraph (c) only if the person is under the supervision of a professionally licensed person in the same area of specialization.

(d) A temporary educator eligibility authorization is valid for one year and may be renewed twice.

(e) (I) A school district that employs a person who holds a temporary educator eligibility authorization may provide an induction program for the person, as described in section 22-60.5-204, 22-60.5-213, or 22-60.5-309, whichever is applicable. If the person successfully completes the induction program while employed under the temporary educator eligibility authorization, the person may apply completion of the induction program toward meeting the requirements for a professional educator license.

(II) If a person who is employed under a temporary educator eligibility authorization successfully completes an induction program and completes the requirements prescribed in section 22-60.5-201 (1) (b) (I), 22-60.5-210 (1) (a) (I), or 22-60.5-306 (1) (a) (I), whichever is applicable, for an initial educator license while employed under the temporary educator eligibility authorization, the department of education may issue a professional educator license to the person upon application. **(emphasis added)**

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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: November 13, 2013

SUBJECT: Rules of the Secretary of State, Department of State, concerning administration of the "Colorado Charitable Solicitations Act", 8 CCR1505-9 (LLS Docket No. 130001; SOS Tracking No. 2012-00821).[1]

Summary of Problems Identified and Recommendations

Section 6-16-103 (7) (a), C.R.S., exempts from the definition of a "paid solicitor" a person whose sole responsibility is to mail fundraising literature. But Rule 1.17 of the Secretary of State (Secretary) conflicts with the statute by defining "sole responsibility" to exempt only employees of professional printing and copying businesses from that definition. **We therefore recommend that Rule 1.17 of the rules of the Secretary concerning administration of the "Colorado Charitable Solicitations Act" not be extended.**

The statute that creates the requirement that entities maintain a registered agent to accept service of process, section 7-90-701, C.R.S., imposes this requirement only on certain domestic and foreign entities, and no statute authorizes the Secretary to promulgate rules regarding who must maintain a registered agent. Further, the "Colorado Charitable Solicitations

[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, 2014, unless the General Assembly acts by bill to postpone such expiration.

Act", in section 6-16-112, C.R.S., specifies that a foreign entity that violates section 7-90-701, C.R.S., by failing to maintain a registered agent is subject to service of process on the entity itself. But the Secretary's Rule 1.15 requires all persons who must register under the "Colorado Charitable Solicitations Act", including individuals, to designate a registered agent. In doing so, the rule both lacks statutory authority and conflicts with the statute. **We therefore recommend that Rule 1.15 of the Secretary concerning administration of the "Colorado Charitable Solicitations Act" not be extended.**

Analysis

I. Some people engaged in charitable solicitations must register with the Secretary.

The General Assembly enacted the "Colorado Charitable Solicitations Act", article 16 of title 6, C.R.S. (the "Act"), to "protect the public's interest in making informed choices as to which charitable causes should be supported." Section 6-16-102, C.R.S. The main methods of protecting those interests are to require certain persons engaged in charitable solicitations to register with the Secretary and to require these registrants to make particular disclosures. The registration requirement is imposed on charitable organizations, paid solicitors, and professional fundraising consultants. See sections 6-16-104, 6-16-104.3, and 6-16-104.6, C.R.S.

This memorandum will repeatedly use three terms to refer to registrants, defined as follows: "Individual" means a human being; "entity" means a legal entity other than an individual; and "person" is defined in the Act as "an individual, a corporation, an association, a partnership, a trust, a foundation, or any other entity however organized or any group of individuals associated in fact but not a legal entity." Section 6-16-103 (8), C.R.S. While a "charitable organization" might sound like it must be an entity, in fact all three types of registrants are defined in the Act as a "person" that meets certain qualifications, and thus all three types of registrants could be either an individual or an entity.

II. Rule 1.17 conflicts with the statute by failing to exclude from the definition of "paid solicitor" a person whose sole responsibility is to mail fund-raising literature.

The Act contains some exclusions from the statutory definitions of the three types of persons who must register. As relevant here, a person

whose "sole responsibility is to print or mail fund-raising literature" is not a paid solicitor:

> **6-16-103. Definitions.** As used in this article, unless the context otherwise requires:
>
> (7) "Paid solicitor" means a person who, for monetary compensation, performs any service in which contributions will be solicited in this state by such compensated person or by any compensated person he or she employs, procures, or engages, directly or indirectly, to solicit for contributions. The following persons are not "paid solicitors":
>
> (a) A person whose sole responsibility is to **print or mail** fund-raising literature; (**emphasis added**)

Section 6-16-103 (7) (a), C.R.S. The Secretary promulgated Rule 1.17, which further defines what "sole responsibility" means for purposes of the Act:

> 1.17 "Sole Responsibility", with respect to section 6-16-103(7)(a), C.R.S., a person whose "sole responsibility is to print or mail fundraising literature"–is intended to exempt only employees of professional **printing and copying** businesses from the definition of paid solicitor. (**emphasis added**)

Rule 1.17 exempts only employees of "printing and copying" businesses from the definition of paid solicitor; it does not exempt employees of mailing businesses from that definition. By failing to exclude employees whose sole responsibility is to mail fundraising literature, Rule 1.17 conflicts with section 6-16-103 (7), C.R.S. We therefore recommend that Rule 1.17 of the rules of the Secretary concerning administration of the Act not be extended.

III. Rule 1.15 conflicts with the statute and lacks statutory authority by requiring all registrants, including individuals, to maintain a registered agent.

A. Under applicable statutes, only certain entities must have registered agents; no individuals must have registered agents.

Registered agents exist so that persons who wish to sue or otherwise notify certain types of entities have a convenient way of doing so. *See* section 7-90-704 (1), C.R.S.:

> **7-90-704. Service on entities.** (1) The registered agent of an entity is an agent of the entity authorized to receive service of any

> process, notice, or demand required or permitted by law to be served on the entity. . . .

"Service of process" means delivery of formal legal papers to a person according to strict due process rules governed by Rule 4 of the Colorado Rules of Civil Procedure, after which the appropriate court acquires jurisdiction over the person. Service of process on individuals is, in general, governed by C.R.C.P. Rule 4 (e) (1), (e) (2), and (e) (3), pursuant to which (among other ways) service is accomplished simply by delivering the process to the individual. Service of process upon an entity is governed, in general, by C.R.C.P. Rule 4 (e) (4), which specifies that service of process is accomplished (among other ways) by delivering a copy of the process on the entity's registered agent.

Part 7 of article 90 of title 7, C.R.S., comprehensively governs the law concerning registered agents. In particular, only one statute imposes upon a person a requirement[2] that the person appoint and maintain a registered agent—section 7-90-701 (1), C.R.S., which states:

> **7-90-701. Registered agent.** (1) Every domestic entity for which a constituent filed document is on file in the records of the secretary of state and every foreign entity authorized to transact business or conduct activities in this state shall continuously maintain in this state a registered agent . . . . (**emphasis added**)

Under this statute, the only persons that must have a registered agent are certain entities, not individuals. In particular, only those domestic entities that have filed a "constituent document"[3] with the Secretary and those foreign entities that are authorized to do business in Colorado are required to have a registered agent. There is no requirement anywhere in Colorado's statutes that an individual or a different type of entity (including "any group of individuals associated in fact but not a legal entity") must maintain a registered agent.

B. Rule 1.15 improperly requires all registrants, including individuals and all types of entities, to maintain a registered agent.

[2] A person, including an individual, who registers a trademark can elect either to appoint a registered agent pursuant to part 7 of article 90 of title 7, C.R.S., or simply have the trademark registration include the person's address to which service of process may be mailed. Section 7-70-102 (1) (e), C.R.S.

[3] Roughly, a "constituent document" means the articles of incorporation, articles of organization, partnership agreement, or similar document that creates and organizes an entity.

The Secretary's rule-making authority under the Act is narrow. **Addendum A** contains all of that authority, which can be summarized as follows:

1. Section 6-16-104 (3), C.R.S., allows the Secretary to adopt rules concerning the acceptance of a uniform multistate registration statement;
2. Section 6-16-110.5 (3), C.R.S., allows the Secretary to adopt rules to effectively implement section 6-16-110.5, C.R.S., which relates to the dissemination of information about charitable solicitations, including by publicizing the requirements of the Act, annually publishing the information provided by registrants, participating in a national online charity information system, and exchanging information with appropriate authorities of other jurisdictions. Specific rule-making authority exists regarding the extension of filing deadlines, online availability of forms, electronic filing of required forms, and setting fines for noncompliance; and
3. Section 6-16-111 (6) (b), C.R.S., requires the Secretary to adopt rules for expedited deadlines governing hearings regarding the denial, suspension, or revocation of a registration.

Clearly, there is no explicit grant of rule-making authority to the Secretary in the Act to impose a requirement that an individual or any other type of entity maintain a registered agent, nor is there any grant of rule-making authority about how to notify registrants. Neither is there any such grant of rule-making authority in the registered agent statute, part 7 of article 90 of title 7, C.R.S.[4]

However, the Secretary promulgated just such a rule:

> 1.15 "Registered Agent" has the same meaning as in section 7-90-701, C.R.S., **except that, if a person must register** under the Charitable Solicitations Act, **the person must appoint and continuously maintain a registered agent, even if the person is not required to do so under section 7-90-701, C.R.S.** A registration document filed in accordance with Article 16 of Title 6, C.R.S., that requests the name and address of the organization's registered agent must also include a statement by the filer that the registered agent consents to the appointment. (**emphasis added**)

[4] In fact, the only rule-making authority of any type in article 90 of title 7, C.R.S. (section 7-90-303 (2) (b), C.R.S.), simply allows the Secretary to increase fees after they've been reduced to comply with section 24-75-402 (3), C.R.S.

Under Rule 1.15, a registrant that is an individual or an entity that is neither a domestic entity nor a foreign entity (and thus is not required by statute to maintain a registered agent) must nevertheless maintain a registered agent. The Secretary has exceeded his rule-making authority by adopting a rule that requires individuals and all entities to maintain a registered agent.

Further, both the registered agent statute and the Act contain provisions that govern what happens when an entity fails to maintain a registered agent:

> **7-90-704. Service on entities.** (2) If an entity that is required to maintain a registered agent pursuant to this part 7 has no registered agent, or if the registered agent is not located under its registered agent name at its registered agent address, or if the registered agent cannot with reasonable diligence be served, **the entity may be served by registered mail or by certified mail**, return receipt requested, addressed to the entity at its principal address. . . .
>
> **6-16-112. Service of process.** Any foreign corporation performing any of the acts prohibited under this article through any salesman or agent is **subject to service of process** either upon the registered agent specified by said corporation or **upon the corporation itself if no agent is maintained pursuant to part 7 of article 90 of title 7**, C.R.S. . . . (**emphases added**)

Existing law already provides a perfectly adequate means of notifying not only entities that should but don't have a registered agent but also registrants that don't need to have a registered agent. We therefore recommend that Rule 1.15 of the rules of the Secretary concerning administration of the Act not be extended.

ADDENDUM A

6-16-104. Charitable organizations - initial registration - annual filing - fees. (3) The secretary of state may promulgate **rules** concerning the acceptance of a uniform multistate registration statement, such as a unified registration statement, in lieu of the registration statement described in subsection (2) of this section. As soon as practicable, the secretary of state shall take steps to cooperate in a joint state and federal electronic filing project involving state charity offices and the internal revenue service to enable and promote electronic filing of uniform multistate registration statements and federal annual information returns. (**emphasis added**)

6-16-110.5. Secretary of state - dissemination of information - cooperation with other agencies - rules. (1) The secretary of state shall take steps to:

(a) Publicize the requirements of this article. . . ;

(b) Compile and publish, on an annual basis, the information provided by charitable organizations, professional fundraising consultants, and paid solicitors under this article . . . ;

(c) Participate in a national online charity information system . . . .

(2) The secretary of state may exchange with appropriate authorities of this state, any other state, and the United States information with respect to charitable organizations, professional fundraising consultants, commercial coventurers, and paid solicitors.

(3) The secretary of state shall have the authority to promulgate **rules** as needed for the effective implementation of this section, including but not limited to:

(a) Providing for the extension of filing deadlines;

(b) Providing for the online availability of forms required to be filed pursuant to sections 6-16-104 to 6-16-104.6;

(c) Providing for the electronic filing of required forms, including the acceptance of electronic signatures;

(d) Mandating electronic filing and providing, in the secretary of state's discretion, for exceptions to mandatory electronic filing; and

(e) Setting fines for noncompliance with this article or **rules** promulgated pursuant to this article. The fine for soliciting while unregistered shall not exceed three hundred dollars per year for charities or one thousand dollars per year for paid solicitors. (**emphasis added**)

6-16-111. Violations. (6) (b) Upon notice from the secretary of state that a registration has been denied or is subject to suspension or revocation, the aggrieved party may request a hearing. The request for hearing must be made within five calendar days after receipt of notice. Proceedings for any such denial, suspension, or revocation hearing shall be governed by the "State Administrative Procedure Act", article 4 of title 24, C.R.S.; except that the secretary of state shall promulgate **rules** to provide for expedited deadlines to govern such proceedings and shall bear the burden of proof. The status quo concerning the ability of the aggrieved party to solicit funds shall be maintained during the pendency of the proceedings. Judicial review shall be available pursuant to section 24-4-106, C.R.S. (**emphasis added**)

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jery Payne, Office of Legislative Legal Services

DATE: November 14, 2014

SUBJECT: Rules of the Colorado State Patrol, Department of Public Safety, Part III, concerning hazardous materials route designation, 8 CCR 1507-25 (LLS Docket No. 130193; SOS Tracking No. 2013-00058).[1]

Summary of Problem Identified and Recommendation

Section 42-20-301, C.R.S., authorizes the state patrol to set routes for transporting hazardous materials. It also exempts certain fuel products unless the local government has requested otherwise. But the State Patrol's Rule HMR 8 C. states that transporters of these products generally have to follow designated routes. This misstatement changes an exemption into a rule. **We therefore recommend that Rule HMR 8 C. of the rules of the state patrol concerning hazardous materials route designation not be extended.**

[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, 2014, unless the General Assembly acts by bill to postpone such expiration

Analysis

I. The statement in Rule HMR 8 C. misstates the standard in section 42-20-301, C.R.S.

A. Section 42-20-301, C.R.S., exempts certain fuel carriers from routing requirements.

Section 42-20-301 (1) (a), C.R.S., authorizes the state patrol to designate which roads must be used by motor vehicles carrying hazardous materials:

> The patrol, after consultation with local governmental authorities, has the sole authority to designate which public roads are to be used and which are not to be used by motor vehicles transporting hazardous materials.

This paragraph, however, exempts certain fuel carriers:

> **Gasoline, diesel fuel, and liquefied petroleum gas are exempt from route designation** unless the petitioning authority specified in section 42-20-302 requests their inclusion. **(Emphasis added)**

So unless an authority requests inclusion, these fuel carriers are exempt from routing requirements.

A petitioning authority can be a city, county, or the Colorado department of transportation. According to the Colorado State Patrol, many local governments have not requested that fuel vehicles be included in route regulation. Therefore, the roads of many jurisdictions have no routing requirements for gasoline, diesel fuel, and liquefied petroleum gas.

B. Rule HMR 8 C. misstates that these carriers are generally required to use designated routes

Rule HMR 8 C. asserts that these carriers are generally required to use designated routes:

> HMR 8 C. **While generally required to employ designated state, federal and interstate roadways**, transporters of Gasoline, Diesel Fuel and Liquefied Petroleum Gas may routinely travel on the following state and federal highways:

1. US 160 from I-25 to the Kansas border.
2. US 350 from US 160 to US 50
3. US 385 from US 50 to US 40
4. SH 96 from SH 71 to the Kansas Border, and
5. SH 109 from US 160 to East 3RD Street in La Junta. **(emphasis added)**

The introductory clause asserts that these carriers are required to use designated routes. This implies that these vehicles must obey the routing requirements unless an exception applies.

But section 42-20-301, C.R.S. says that these fuel carriers are an exception to the requirement. The Colorado State Patrol has it backwards; they flipped the requirement with the exception.

Because the rule incorrectly states the statutory requirement, we recommend that Rule HMR 8 C. of the rules of the Colorado State Patrol concerning hazardous materials route designation not be extended.

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MEMORANDUM

TO: Committee on Legal Services

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

DATE: November 13, 2013

SUBJECT: Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning building, fire, and life safety code enforcement and certification of inspectors for health facilities licensed by the state of Colorado, Article 10 (Building Code and Fire Code Inspector Qualification), 8 CCR 1507-31 (LLS Docket No. 130425; SOS Tracking No. 2013-00749).[1]

Summary of Problem Identified and Recommendation

Section 24-33.5-1212.5 (3) (b) (II), C.R.S., requires third-party inspectors to retain records for two years after issuance of a certificate of occupancy ("COO"). But the Division's Rule #10.1.3 (f) directs such inspectors to retain these records for three years from the date that a COO is issued. **We therefore recommend that Rule 10.1.3 F) of the rules of the Director of the Division of Fire Prevention and Control (Director)**

[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, 2014, unless the General Assembly acts by bill to postpone such expiration.

concerning building code and fire code inspector qualifications not be extended.

Analysis

I. Rule 10.1.3 F) conflicts with the statutorily fixed period of time that records must be retained by third-party inspectors.

When a health facility is constructed or substantially remodeled, it must undergo plan reviews and inspections to ensure that the facility's structures conform to the building and fire codes adopted by the director.[2] Section 24-33.5-1212.5 (3), C.R.S., authorizes third-party inspectors to perform those plan reviews and inspections. Subparagraph (b) (II) of subsection (3) states:

> **24-33.5-1212.5. Health facility fire and building codes - third-party inspections authorized - temporary certificate of occupancy - fees - rules - board of appeals.** (3) **Third-party inspectors.** (b) (II) If a third-party inspector is used, the division shall require a sufficient number of third-party inspection reports to be submitted by the inspector to the division based upon the scope of the project to ensure quality inspections are performed. Except as specified in subsection (4) of this section, the third-party inspector shall attest that inspections are complete and all violations are corrected before the health facility is issued a certificate of occupancy. **Inspection records shall be retained by the third-party inspector for two years after the certificate of occupancy is issued.** If the division finds that inspections are not completed satisfactorily, as determined by rule of the division, or that all violations are not corrected, the division shall take enforcement action against the appropriate health facility pursuant to section 24-33.5-1213. (**emphasis added**)

The prevailing statute, then, unambiguously imposes a *two-year* period during which third-party inspectors must keep records. Subpart F) of the Director's Rule 10.1.3, however, imposes a *three-year* record retention period on such inspectors:

> **10.1.3 Duties of Third-Party Inspectors**
> **F)** Third-Party Inspectors contracted by the Business Entity must attest that inspections are complete and all violations are corrected before the Division issues the Business Entity a Certificate of Occupancy. **The qualified Third-party Inspectors shall retain inspection records for three years after the Certificate of Occupancy is issued.** (**emphasis added**)

---

[2] *See* sections 24-33.5-1203 and 24-33.5-1212.5, C.R.S.

Rule 10.1.3 F) extends by one year the amount of time that a third-party inspector is required to retain certain records and thus conflicts with section 24-33.5-1212.5, C.R.S. We therefore recommend that Rule 10.1.3 F) of the rules of the Director of the Division of Fire Prevention and Control concerning building code and fire code inspector qualifications not be extended.

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Colorado General Assembly

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MEMORANDUM

TO: Committee on Legal Services

FROM: Chuck Brackney and Nate Carr, Office of Legislative Legal Services

DATE: November 12, 2013

RE: Rules of the State Housing Board, Division of Housing, Department of Local Affairs, concerning Resolution No. 38, manufactured housing installations, 8 CCR 1302-7 (LLS Docket No. 130381; SOS Tracking No. 2013-00483).[1]

Summary of Problem Identified and Recommendation

Section 24-32-3317, C.R.S., requires that a certification of installation for a manufactured home include certain information, including the address of the installer who performed the installation. But Section 12 of Resolution 38 of the State Housing Board does not require the inclusion of the address of the installer in the certification insignia. **We therefore recommend that Section 12 of Resolution 38 of the State Housing Board concerning manufactured housing installations not be extended.**

Analysis

[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, 2014, unless the General Assembly acts by bill to postpone such expiration.

Colorado law requires the owner or registered installer of a manufactured home to obtain an installer's certificate that certifies that the home was installed in compliance with the provisions of state law. Section 24-32-3317, C.R.S., requires that the State Housing Division ("Division") adopt rules specifying the standard form to be used as a certificate of installation. It reads as follows:

> **24-32-3317. Installation of manufactured homes - certificates - inspections - inspector qualification and education requirements - rules.** (5) (a) The division shall adopt rules that specify a standard form to be used statewide by the division or an independent contractor as a certificate of installation certifying that a manufactured home was installed in compliance with the provisions of this part 33. However, the certificate of installation applies only to installation of a manufactured home built in a factory and components shipped with the manufactured home as reflected in the approved plans for the manufactured home. The certificate of installation shall include but not be limited to the following:
>
> (I) The name, address, and telephone number of the division;
>
> (II) The date the installation was completed; and
>
> (III) **The name, address, telephone number, and registration number of the registered installer who performed the installation. (emphasis added)**

Section 24-32-3317 (5) (a), C.R.S., lists a number of items that must be included in the certificate of installation. Among these is the address of the registered installer who performed the installation.

The State Housing Board's ("Board") Resolution 38 constitutes the Division's rule-making concerning manufactured housing installations. Both the Division and the Board have rule-making authority. The Board's authority regarding rules for the installation of manufactured homes is found in section 24-32-3304 (1) (d), C.R.S., which reads as follows:

> **24-32-3304. State housing board - powers and duties.** (1) The board shall have the following powers and duties pursuant to this part 33:
>
> (d) To promulgate rules establishing standards for the installation and setup of manufactured housing units; and

Section 24-32-3304 (1) (d), C.R.S. provides the Board with the necessary authority to adopt rules concerning the installation of manufactured homes found in Resolution No. 38. See **Addendum A**.

Section 12 of Resolution 38 deals with certificates of installation,

which are referred to in the rule "insignia", and reads as follows:

> **SECTION 12: CERTIFICATE OF INSTALLATION INSIGNIA**
>
> The Division shall adopt a standard Insignia to be used statewide as a certificate of installation certifying that the manufactured home was installed in compliance with the provisions of this regulation.
>
> The Insignia shall include, but not be limited to, the name, address, and telephone number of the Division, date the installation was completed, and **name, telephone number, and registration number of the installer who performed the installation.**
>
> Insignias shall remain the property of the State of Colorado and are not subject to refunds.
>
> The insignia shall be permanently attached to the exterior, within 30 inches of the electrical service entrance of the manufactured home that they certify and the insignia is not transferable. When there is no exterior electrical service equipment on the home, the insignia shall be affixed to the exterior of the home near the HUD label or other readily visible location.
>
> The possession of unattached insignias is limited to the Division, participating jurisdictions, certified inspectors and certified installers. Participating jurisdictions, certified inspectors, and certified installers may purchase installation insignias from the Division. Insignias must be kept secure. **(emphasis added)**

Section 12 of Resolution 38 specifies that division may adopt an insignia as the certificate of installation for manufactured housing. The current and previous versions of the insignia can be seen in **Addendum B**. The rule also lists a number of items that must be included on the insignia. But the rule does not include the address of the installer who performed the installation. Because the rule does not require this information on the insignia, it fails to meet the requirements of section 24-32-3317 (5) (a), C.R.S.

We therefore recommend that Section 12 of Resolution 38 of the rules of the State Housing Board concerning manufactured housing not be extended.

Addendum A

RESOLUTION #38

MANUFACTURED HOUSING INSTALLATIONS

BE IT RESOLVED BY THE STATE HOUSING BOARD OF THE STATE OF COLORADO;

THAT PURSUANT TO §24-32-3301 et seq C.R.S. as amended, the State Housing Board of the State of Colorado (the "Housing Board") repeals and readopts Resolution #38, Manufactured Housing Installations; and

THAT PURSUANT TO §24-32-3301 et seq C.R.S. as amended, the State Housing Board adopts the nationally recognized codes as cited in SCHEDULE "B" as the "Colorado Manufactured Housing Installation Code" that are the Division of Housing responsibility; and

THAT PURSUANT TO §24-32-3301 et seq C.R.S. as amended the State Housing Board states the basis and purpose of these rule changes is to update the current minimum construction and safety code for "Manufactured Housing Installations"; and

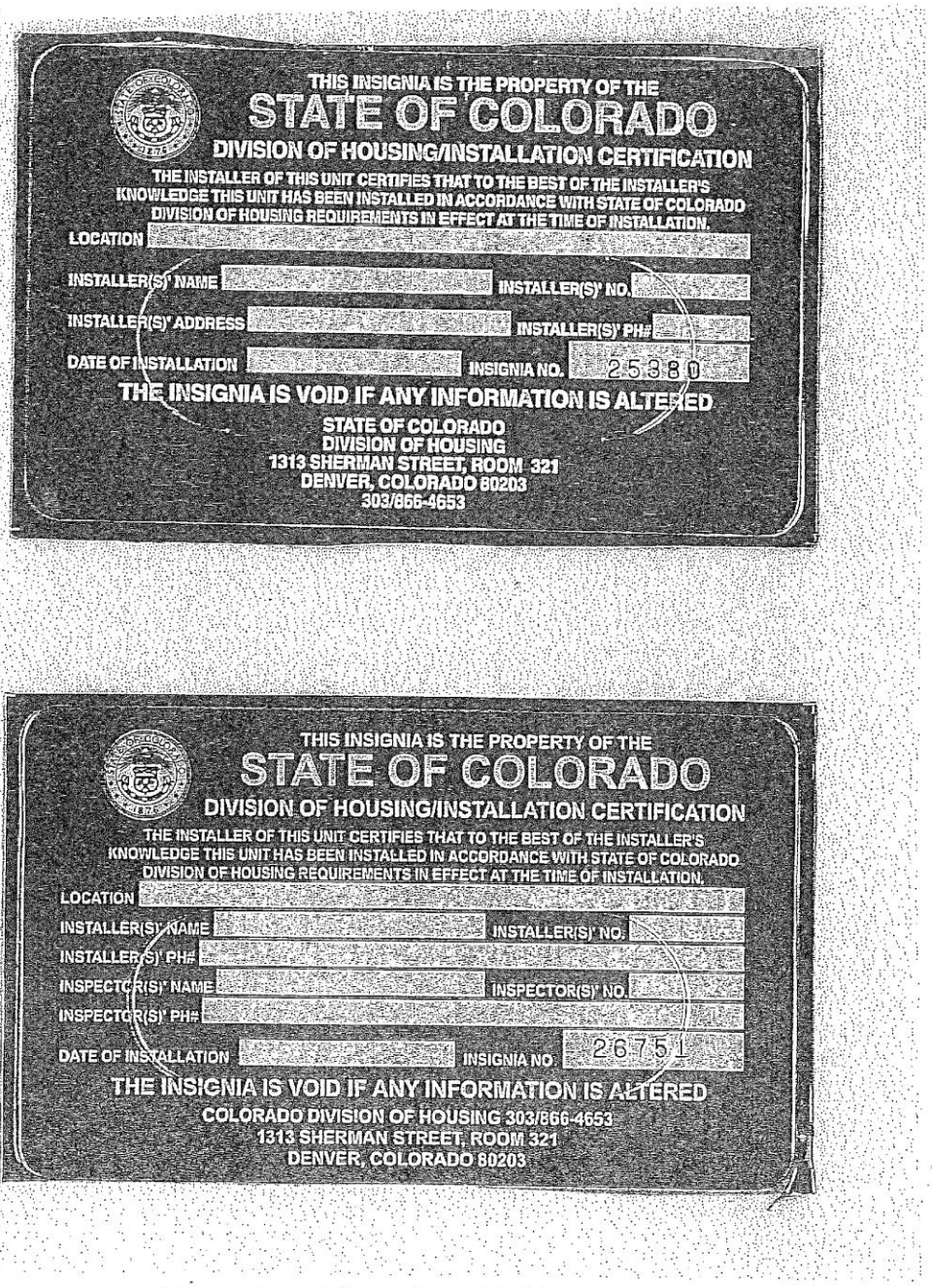
THAT PURSUANT TO '24-32-3301 et seq C.R.S. as amended, the State Housing Board establishes standards, to the extent allowed by the state constitution, Article 50 of the "State Personnel System Act", and the rules promulgated by the Personnel Board, for private inspection and certification entities to perform the Colorado Division of Housing' certification and inspection of Manufactured Housing Installations; and

THAT PURSUANT TO §24-32-3301 et seq C.R.S. as amended, the State Housing Board states that "Manufactured Housing Installation" installers shall have the option to contract with the Colorado Division of Housing or an authorized inspection agency to perform inspection and certification functions where a local jurisdiction does not have exclusive inspection agency rights; and

THAT PURSUANT TO §24-32-3301 et seq C.R.S. as amended, the State Housing Board establishes minimum training standards for installers and inspectors; and

The Colorado Housing Board repeals and readopts these rules and regulations to be administered and enforced by the Colorado Division of Housing (Division).

Addendum B



THIS INSIGNIA IS THE PROPERTY OF THE
STATE OF COLORADO
DIVISION OF HOUSING/INSTALLATION CERTIFICATION
THE INSTALLER OF THIS UNIT CERTIFIES THAT TO THE BEST OF THE INSTALLER'S KNOWLEDGE THIS UNIT HAS BEEN INSTALLED IN ACCORDANCE WITH STATE OF COLORADO DIVISION OF HOUSING REQUIREMENTS IN EFFECT AT THE TIME OF INSTALLATION.
LOCATION
INSTALLER(S)' NAME
INSTALLER(S)' NO.
INSTALLER(S)' ADDRESS
INSTALLER(S)' PH#
DATE OF INSTALLATION
INSIGNIA NO. 25380
THE INSIGNIA IS VOID IF ANY INFORMATION IS ALTERED
STATE OF COLORADO
DIVISION OF HOUSING
1313 SHERMAN STREET, ROOM 321
DENVER, COLORADO 80203
303/866-4653

THIS INSIGNIA IS THE PROPERTY OF THE
STATE OF COLORADO
DIVISION OF HOUSING/INSTALLATION CERTIFICATION
THE INSTALLER OF THIS UNIT CERTIFIES THAT TO THE BEST OF THE INSTALLER'S KNOWLEDGE THIS UNIT HAS BEEN INSTALLED IN ACCORDANCE WITH STATE OF COLORADO DIVISION OF HOUSING REQUIREMENTS IN EFFECT AT THE TIME OF INSTALLATION.
LOCATION
INSTALLER(S)' NAME
INSTALLER(S)' NO.
INSTALLER(S)' PH#
INSPECTOR(S)' NAME
INSPECTOR(S)' NO.
INSPECTOR(S)' PH#
DATE OF INSTALLATION
INSIGNIA NO. 26751
THE INSIGNIA IS VOID IF ANY INFORMATION IS ALTERED
COLORADO DIVISION OF HOUSING 303/866-4653
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DENVER, COLORADO 80203

COLORADO SUPREME COURT LIBRARY
2 East 14th Avenue
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720-625-5105

November 1, 2013

Sent via e-mail to Mr. Dan Cartin

Representative Jeanne Labuda
Colorado State Capitol
200 East Colfax
Denver, CO 80203

Dear Representative Labuda:

The Legislative Digital Policy Advisory Committee respectfully submits the attached report, as required pursuant to House Bill 13-1182.

All members of the committee, or their designees, have reviewed and approved the final version of the report, and have authorized me to share it with your committee in the attached PDF format.

We thank you for the opportunity to participate in this process, and will make ourselves available to answer any questions you might have related to the report at your upcoming hearing.

Very truly yours,

Dan Cordova

Dan Cordova
Colorado Supreme Court Librarian
Chair, Legislative Digital Policy Advisory Committee

Legislative Digital Policy Advisory Committee (LDPAC)

Report to the

Joint Budget Committee
and
Committee on Legal Services

Members of the LDPAC

Dan Cordova, Chair	Colorado Supreme Court Librarian
Gene Hainer, Vice-Chair	Colorado State Librarian
Dan Cartin	Director, Office of Legislative Legal Services
Korwynn Kolar	Designee, Chief Clerk of the House of Representatives
Susan Liddle	Designee, Legislative Council Staff
Max Majors	Designee, Secretary of the Senate
George Orlowski	State Archivist

November 1, 2013

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EXECUTIVE SUMMARY

Digitization of Legislative Audio Recordings

CHARGE	LDPAC RESPONSE
Define the optimal digital audio format.	The optimum digital audio format is .wav for archival purposes and mp3 format for public access.
Digitize taped archived recordings to the optimal digital file format.	Analog-to-digital conversion will be a dual extraction process where digital files are created in both the optimal digital format (.wav) and the consumer digital access format (mp3) (see Appendix B). Metadata, using best practices, will be created with the migration of the digital files and will be imbedded with those same digital files.
Migrate digital recordings to the optimum format.	Digitization and migration of the 1973-74 analog tapes first, followed by the remaining analog tapes from 1975 through 1997. Investigate the transfer of digital files on the Freedom system to a non-proprietary format. Address the digital data tapes from 1998 through 2001 last.
Provide the information technology system for ongoing archival storage and access.	Original tapes will be relabeled, cataloged and stored in environmentally controlled location. Digital files will be housed in remotely operated digital ("Cloud") storage with mirrored storage in local servers or other digital storage devices.
Identify and prioritize at least two funding options for the plan.	A benchmarked, 5-year appropriation to State Archives above current levels from the General Fund. Collaboration and savings through an economy of scale with similar agencies. Additional spending authority of any cash fund surplus from fees.
Recommend a policy for limited storage for archived recordings, perpetual archival storage, and public access to digital legislative recordings.	Follow the Library of Congress National Recording Preservation Plan. Limited storage will consist of the preservation of both machinery and the tapes within environmentally controlled storage areas. Perpetual storage will include both the original audio and the digital files. Customer access will be through the General Assembly webpage with a link to the servers administered by the various departments.

EXECUTIVE SUMMARY

Implementing Uniform Electronic Legal Materials Act
(UELMA)

CHARGE	LDPAC RESPONSE
Recommend a policy for limited-term legislative storage, perpetual archival storage, and public access to electronic legislative records.	The General Assembly, or vendors by agreement with the General Assembly, should maintain not only a secure digital depository for public access, but also a separate system for reliable, perpetual archival storage of electronic legislative records, utilizing cloud storage, secure off-site servers, eBooks, paper books, or similar electronic means that ensure secure, perpetual preservation of the records.
Identify potential authentication systems for an electronic records authentication system, including the vendors and the costs to the state.	Some form of mark-up language combined with a digital signature secured by a hash key is likely the best of the known systems for authenticating future legislative digital records. The Secretary of State's experience moving forward will help verify the accuracy of that premise.
Recommend the best electronic records authentication system for the state and funding options.	All of the information necessary for determining the best and most cost effective electronic records authentication system for the legislature (or the entire state) is not yet available. In addition to the actions listed above, the LDPAC would like to completely survey all U.S. states that have passed UELMA legislation regarding actions they have taken to comply, concerns they have, and/or barriers they face. We would also like to more fully survey Colorado government and its partners regarding current digitization projects already undertaken, specifically their selected processes and procedures.
Any other information that the LDPAC determines to be relevant.	Colorado is at the forefront of UELMA implementation. The LDPAC should continue with additional members added.

INTRODUCTION

Background. A budget request submitted in November 2012 by the Colorado State Archives highlighted the need to preserve Colorado's permanent legal and historical records, both print and legislative audio. These records provide critical historical context to complex legislative and legal issues throughout the state and are at risk of being permanently lost if immediate and ongoing steps are not taken to preserve them.

Currently, legislative recordings from 1973 through 1981 are very difficult to access because of machine and tape degradation due to age. Legislative recordings between 1982 and 1998 could become inaccessible due to the unavailability of historical machines used to play the specialized, multi-track recordings. Additionally, the legislative tapes from 1998 through 2001 are becoming difficult to access due to the degradation of the tapes and the unstable nature of the historical proprietary software. Recordings on the Freedom System (2002-2011) are in a proprietary format. Each era of audio recording utilizes a different historical machine, which are unique proprietary multi-track tape reproducers manufactured in those specific eras, or are recordings in proprietary digital formats.

While these recordings are currently still accessible to professionals trained in the treatment and preservation of historical recordings, the fragility of the machines and the recordings themselves make it impossible to make the legislative recordings available directly to customers. As a result, each of these recordings must be individually accessed by a trained archivist and a digital recording must be made on an ad hoc basis for the customer. This ad hoc approach is not efficient and does not address the increasing inaccessibility of large volumes of historical recordings.

House Bill 13-1182, which created the Legislative Digital Policy Advisory Committee, was introduced in response to the concerns identified in the State Archives' budget request. The LDPAC is required to develop plans for converting existing archived recordings of legislative proceedings into a digital format and implementing the Uniform Electronic Legal Material Act.

COMMITTEE CHARGE

The Legislative Digital Policy Advisory Committee consists of the following individuals, or their designees:

- State Archivist;
- Supreme Court Librarian;
- State Librarian;
- Director of Research of the Legislative Council;
- Director of the Office of Legislative Legal Services;

- Chief Clerk of the House of Representatives; and
- Secretary of the Senate.

Pursuant to House Bill 13-1182, the Legislative Digital Policy Advisory Committee was charged to develop a plan to digitize the archived recordings that:

- Defines the optimal digital audio file format;
- Identifies potential vendors and the cost to the state to:
  - digitize taped archived recordings to the optimal digital audio file format;
  - migrate digital archived recordings to the optimal digital audio file format; and
  - provide the information technology system for the ongoing archival storage and access;
- Identifies and prioritizes at least two funding options for the plan, including any grant opportunities or licensing contracts;
- Recommends a policy for limited-term storage of archived recordings, perpetual archival storage, and public access to all digital legislative audio recordings; and
- includes any other information that the LDPAC determines to be relevant.

The LDPAC was also to develop a plan for implementation of the "Uniform Electronic Legal Material Act" (hereinafter UELMA) for legislative electronic records that:

- Recommends a policy for limited-term legislative storage, perpetual archival storage, and public access to electronic legislative records;
- Identifies potential authentication systems for an electronic records authentication system, including the vendors and the costs to the state;
- Recommends the best electronic records authentication system for the state;
- Identifies funding options for the authentication system; and
- Includes any other information that the LDPAC determines to be relevant.

The committee must report its finding to the Committee on Legal Services and the Joint Budget Committee by November 1, 2013. The LDPAC repeals January 1, 2014.

COMMITTEE ACTIVITIES

The LDPAC met 12 times from June through October 2013 and discussed issues related to digitizing the analog recordings from 1973-2001 as well as potential authentication systems for electronic records to use to comply with UELMA.

Topics discussed during LDPAC meetings and recommendations made by the LDPAC are discussed below.

LDPAC RECOMMENDATIONS

Digitization of Legislative Audio Recordings

Audio recordings of all legislative hearings are stored at the Colorado State Archives, and date back to 1973. These recordings comprise several thousand audio tapes in five different formats. For purposes of the LDPAC, analog audio files from 1973 to 2001 were examined. In this time period, three distinct recording systems were used, including two different reel-to-reel systems and a digital data tape system. All of the tapes during this time period can only be played on their proprietary system. The ability to access these tapes is impacted by age, wear and tear over the years, as well as the deteriorating condition of the playback machines. A detailed overview of the status of the legislative recordings at the Colorado State Archives is included as Appendix A.

The LDPAC recommends the following plan to digitize the archived recordings:

1. **Define the optimal digital audio format.** The optimal format for audio preservation is PCM wav (.wav) format, as this is a universal audio format used in compact disks, professional audio and most audio applications. It is a lossless format from which all other formats (including mp3) can be down-sampled and compressed. The LDPAC recommends that the .wav format be used for archival storage and the mp3 format be used for public access. Archival standards suggest either high-definition audio or standard CD audio as the best formats from which to derive all other access formats, and to insure readability in the future.

2. **Identify potential vendors to digitize in the optimum format, migrate digital recordings to the optimum format, and provide the information technology system for the ongoing archival storage and access.**

Short term strategies: In the short term, State Archives should work towards stabilizing its existing analog machines and tapes, and look for ways to enhance these machines to make digitization easier. State Archives is currently working with Jonathan Broyles of Image and Sound Forensics (Parker, CO) to re-build and maintain existing audio tape machines. State Archives has also estimated the amount of storage space necessary to archive the audio content in its digital form. In addition, State Archives is investigating long-term preservation of the actual audio tapes. The LDPAC recommends that State Archives continue these short term endeavors while it works towards long term digital solutions and estimates a 9-12 month timeline for the short term strategies.

Long term strategies: Long term digitization will be a difficult process for State Archives. State Archives worked with Image and Sound Forensics to establish a cost baseline for long term digitization. Current cost estimates from potential vendors are $2,478,100; however, the LDPAC knows that much of the expertise in the digitization of analog to digital exists in the music industry. For instance, it was shared in the committee that the Grateful Dead producers were on the cutting edge of salvaging analog tapes and digitizing them. The LDPAC recommends an additional 12 months to research similar solutions in other industries (i.e., music industry and Department of Defense). Along with results of the short-term baseline, the LDPAC will be able to recommend a more definite figure. The LDPAC believes that long term solutions can occur within a five year period.

The LDPAC recommends that State Archives should do one or more of the following:

- Verify the established baseline through an advertised RFI/RFQ
- Document the knowledge, skills and abilities required to continue audio tape conversion
- Hire additional staff needed to complete conversion of audio tapes in-house
- Advertise for vendor completion of audio tape conversion through the RFP process

A. Digitize taped archived recordings to the optimal digital file format. Transfer and digitization of the analog tape-based legislative recordings will be accomplished by modifying existing Dictaphone and Magnasync playback devices to allow for multi-track fast speed extraction. Utilizing Library of Congress best practices, the analog-to-digital conversion will be a dual extraction process where digital files are created in both the optimal digital format (.wav) and the consumer digital access format (MP3) (see Appendix B). Metadata, using best practices, will be created with the migration of the digital files and will be imbedded with those same digital files. Steps will be in place to handle issues with tape degradation as needed (see Appendix C).

B. Migrate digital recordings to the optimum format. The LDPAC

recommends the digitization of the 1973-74 analog tapes first. These are the oldest tapes and should be able to be completed in accordance with the with Library of Congress best practices.

The LDPAC then recommends digitizing the remaining analog tapes from 1975 through 1997. The prioritization of these tapes may be determined by significant legislative issues, and not necessarily sequentially. The LDPAC also recommends the transfer of the Freedom system to a non-proprietary format. This will allow some of the most recent legislative audio to be available to the public in an accessible digital format.

Finally, the LDPAC recommends that the digital data tapes from 1998 through 2001 be migrated last. While these tapes and the platform may be the most fragile, the LDPAC recognized that at this time, these recordings are also the most difficult to transfer. In addition, the LDPAC and State Archives have been unable to find a vendor who will work with these tapes. The LDPAC believes that this prioritization will provide the greatest success to the whole digitization project.

The LDPAC recommends the following timeline for converting and migrating audio tapes:

- Short-term: 9-12 months
- Long-term: Currently unknown; preferably five years or less.

C. Provide the information technology system for ongoing archival storage and access. Original antiquated tapes will be relabeled, cataloged and stored in environmentally controlled environment both prior to and after digitization. Digital files will be housed in remotely operated digital ("Cloud") storage with mirrored storage in local servers or other digital storage devices to possibly include traditional disc or solid-state digital storage or long-term refreshable digital tape storage facilities.

Based upon a limited sample of interviews by LDPAC members and presentations to the group at large, the LDPAC believes that storage and access requirements can be grouped together or contracted separately. The LDPAC has already begun the investigation phase concerning possible partners in this endeavor.

The LDPAC recommends compiling a more complete list of proprietary or open source software vendors already contracting with the State of Colorado for inclusion in any future bid process.

The LDPAC recognizes that a total cost is not yet estimable; any attempt to prematurely calculate the number will result in over-paying. The space and related cost for storing digitized audio tape content are only a portion of the amount needed; the space/cost for storing prospective electronic data related to UELMA compliance should be calculated and added to this figure. Taken together, economies of scale are available.

For example, an unlimited cloud storage contract can accompany an enterprise contract, sometimes with generous discounts associated with group licenses for simultaneous access.

3. Identify and prioritize at least two funding options for the plan. There are several viable funding options for the digitization of legislative audio: general funding appropriation, grant money and appropriated transfer of cash from the State Archives cash fund balance. The LDPAC would recommend that the prioritization of these options begin with a benchmarked, 5-year appropriation to State Archives above current levels from the General Fund for audio tape conversion and a content management system capable of searching, accessing, and manipulating the data formatted according to the UELMA recommendations. Cooperation between the various programs subject to UELMA will streamline expenditure by assisting the establishment of the UELMA format, recommend hardware and software standards for creating and editing primary law statewide, recognize State Archives as the official depository of retrospective print materials over 20 years old, and maximize State money already expended under the DPA umbrella.

In addition to the economies of scale associated with storing and accessing the audio tape content and the prospective digital content created pursuant to UELMA, the LDPAC recognizes the potential for significant savings to all state agencies who print through DPA/IDS if that unit is selected as the printer of choice for retrospective textual materials corresponding to the audio tape content. Such savings appear to be at least an off-set (more likely a net savings) to the General Fund over the number of years that Archives requests dollars for audio conversion. This approach has the attendant benefit of making all primary law from Statehood through the present available online, in the same format, and similarly searchable.

In exchange for the State Archives providing free access to retrospective primary law materials after audio conversion, the governmental bodies contemplating participation in UELMA could agree to match grant funded monies annually required, up to, but not exceeding, the five-year period during which State Archives would provide the assistance described above. This is a real choice based upon the highly collaborative conversation that the LDPAC has created, and universal agreement that free access to primary law is our common goal; still, it is a distant second choice if for no other reason than it shifts the burden of funding State Archives to other branches of government who already deposit legal content there.

An archival contract for the above-described services in association with one or more similarly-situated state archives in the Rocky Mountain region or beyond might also offer a bargaining position strong enough to discount the retail price of conversion and content management such that it might be affordable using grant funded monies only. This is the least preferred option, since it potentially subordinates the preferred timeline for converting the Colorado audio content to the vagaries of vendor negotiation in a

multi-jurisdiction scenario.

The LDPAC has several reasons for the above listed priorities. First, the current state of the legislative audio tapes and equipment is such that immediate funds need to be earmarked to address the situation. Grant money, while attractive, is not guaranteed and this would lead only to additional delays. Moreover, the LDPAC found that many of the available grants are not available to the State of Colorado because grants require that the information being digitized be free to the public. This is not the case right now with the State Archives as it must charge fees to insure adequate funding. The LDPAC believes that with an initial general fund appropriation and the appropriated spending of the State Archives cash fund balance over the next 5 years, the groundwork will be laid so that general fund money can be phased out. The cash fund balance, matching grant monies from state agencies, and external grants could then potentially fund the digitization after the initial 5 year period.

4. Recommend a policy for limited storage for archived recordings, perpetual archival storage, and public access to all digital legislative recordings. All standards for best practices concerning storage of both short-term and perpetual recordings will be according to guidelines and practices from the Library of Congress National Recording Preservation Plan as well as other standard best practice publications. Limited storage will consist of the preservation of both rare and antiquated machinery and the tapes within environmentally sound storage areas. Ongoing maintenance will insure the operation of these machines to provide public access during the legislative transfer process.

Perpetual storage will include both the original audio artifacts and the newly created digital files, with best archival practices as a guide to the preservation of both. Analog files will be put in environmentally controlled spaces that insure that they can be accessed indefinitely for file restoration or other needs. Digital files will be stored in their higher-resolution format (archival) and in their customer access (compressed) format in at least three locations, to include a remote server, a mirrored site, and one locally under the control of the State Archives, either as an in-house server or long-term digital storage format (such as tape).

Customer access will be through the General Assembly webpage, so as to create the least confusion in the public as to the origination of the recordings, and then linked to the servers administered by the various departments that will include both the audio files and related printed file materials.

The LDPAC recommends the following funding approaches and requirements for defining short-term legislative storage, perpetual archival storage, and ongoing public access to digital legislative audio records.

- Discontinue access fees for other governmental units in Colorado

- If access fees cannot be discontinued, establish one-time subscription fee schedule to be paid to State Archives as early in the fiscal year as possible (to facilitate fiscal planning), and set a date beyond which access fees will not be paid.
- If access fees must be paid for longer than one fiscal year, add one FTE to State Archives sufficiently skilled, and cross-trained, to fulfill legislative history requests more rapidly.
- Enterprise funding from non-governmental marketplace
- Shared allocation with IDS (General Fund)

5. Other relevant information to be considered. The LDPAC strongly recommends that the committee continue after January 1, 2014. Even if the LDPAC is not statutorily mandated, the members of the committee unanimously agreed that the collaboration between the three branches of government was invaluable and useful service for the citizens of Colorado. The LDPAC had extensive discussions concerning a federated search system in which each governmental entity provides data to a central hub so that Coloradoans need to go only to one location to gain historical legal information. The LDPAC would like to continue to discuss this option for future implementation.

In addition, the LDPAC discussed several options to provide raw data free to citizens, including enhanced data, such as an e-book subscription, to users for a subscription fee. Such a system would allow State Archives to apply for more grants, as it would be providing information to citizens free of charge. It would also allow State Archives to continue charging fees to users for enhanced services.

Implementation of the Uniform Electronic Legal Material Act (UELMA)

The Uniform Electronic Legal Material Act ("UELMA") was enacted in Colorado in 2012. (H.B. 12-1209 codified at C.R.S. 24-71.5-101, et seq.). It is the legislative response to the increasing demand for electronic distribution of legal information by state governments, and the security concerns related to potential alteration of that information, whether accidentally or maliciously, before it reaches an individual user.

UELMA requires an official publisher of legal material that is published only in an electronic record to designate the electronic record as official and to: (1) authenticate the origin and document integrity of the record; (2) provide for the preservation and security of the electronic record in electronic or non-electronic form; and (3) ensure the legal material is available for permanent public use. An official publisher that publishes legal material in a record other than an electronic format may designate an electronic record as official if UELMA's requirements for authentication, preservation, and permanent availability are met.

UELMA's scope in Colorado is limited: The legal materials it applies to are the Colorado Constitution, Session Laws, and Colorado Revised Statutes, for which the General Assembly is the official publisher, and state agency rules, for which the Secretary of State is the official publisher. (24-71.5-102 (2), (3), C.R.S.).

UELMA does not require any particular technology for authenticating and preserving electronic legal materials. The General Assembly and Secretary of State can choose the same or different technology for authentication and preservation of these legal materials.

Because the Secretary of State currently publishes the official version of Colorado's administrative rules and regulations in electronic format, they must comply with UELMA requirements by March 31, 2014.

The Secretary of State's schedule for complying with UELMA required the dedication of appropriated resources and ultimately a commitment to comply before the LDPAC was able to meaningfully assist in that agency's decision-making process. The SOS has selected one of the authentication methods identified as potentially viable in the LOC/DIIPP white paper. (Appendix D). It remains to be seen if the relatively small volume of records that the SOS publishes each year can be scaled to work in the much larger volume legislative environment.

The printed version of the Colorado Constitution, Session Laws, and Colorado Revised Statutes published by the General Assembly currently is the official record of these legal materials. The General Assembly is not required to comply with UELMA until it designates an electronic format as its official record. For the Colorado Revised Statutes, that designation will require legislation.

UELMA-related information and LDPAC recommendations. Section 24-80-114 (4), C.R.S., directs the LDPAC to develop a plan for implementing UELMA for legislative records, and to report on specific aspects of that plan. The following work resulted in the LDPAC's recommendations and, is required by law to be included in this report.

Eight states, including Colorado, have adopted some form of UELMA; six others introduced it but did not adopt it last session. There is no fully-functioning model from another state that Colorado can use as a template, so we are leading the way nationally on implementation.

For purposes of an implementation plan, the committee considered digital records relating to the specified legal materials enumerated in UELMA, i.e., the Colorado Constitution, the Session Laws of Colorado, the Colorado Revised Statutes, state agency rules, and any other items that could be legal materials under the UELMA, including legislative audio recordings. Other legal materials that might also be included in UELMA are published appellate court opinions, court rules, legislative journals and calendars,

versions of bills, executive orders, and attorney general formal opinions.

During its meetings, the LDPAC members reported on research into known digitization initiatives in various stages of implementation at the federal level and in other states, identified similar information regarding on-going scanning programs in Colorado, met with information technology experts (i.e., government IT professionals, consultants, vendors), and studied the UELMA plan being implemented by the Secretary of State's Office, which participated in several of the LDPAC meetings.

1. **Recommendation for a policy for limited-term legislative storage, perpetual archival storage, and public access to electronic legislative records.**

In lieu of recommending a preferred digital authentication system for legislative records, the LDPAC offers the following consensus statements in support of its conclusion that further research is necessary.

Electronic legislative records should be easily accessible and widely available to the public at no cost.

A 1-2-3 approach to preservation is advised. That is, one original copy should be maintained in two independent locations and made available on three different platforms if not formats. The General Assembly, or vendors by agreement with the General Assembly, should maintain not only a secure digital depository for public access, but also a separate system for reliable, perpetual archival storage of electronic legislative records, utilizing cloud storage; secure off-site servers, eBooks, paper books, or similar electronic means that ensure secure, perpetual preservation of the records.

This process should begin with the end-users' experience clearly defined.

A centralized administration for statewide UELMA compliance (hub and spokes content management structure) would maximize efficiency and reduce unnecessary time and expense. Such a structure would also provide the general public a better customer service experience when inevitable questions arise about how to navigate the system. Other advantages are the ability to identify, negotiate and provide common equipment, software and training for the creation of and conversion to common formats, statewide.

A common language is necessary to forecast and manage emerging technology. Should the General Assembly decide to include retrospective (historical) primary law into the UELMA digital records depository, a shared vocabulary will assist in the conversion of those documents to digital form. The same is true of preserving historical administrative rules and regulations. It is the committee's opinion that end users would be better served and the Secretary of State's workflow assisted if the Code of Colorado Regulations were numbered in a uniform manner. We acknowledge that this would

require legislative action, and that the transition process would have to be phased. Such a change is not absolutely necessary, however, should it be desired, this would be an expedient moment to begin the dialogue, as correlation tables could be created and linked to prospective digital files under UELMA.

2. Identification of potential authentication systems for an electronic records authentication system, including vendors and the costs to the state.

The plan being implemented by the Secretary of State will produce an HTML format created using JAVA-code, which is then converted to an archival PDF that is authenticated using a proprietary Adobe certificate. The Secretary of State's Office has elected to manage its authentication system in-house.

The LDPAC currently believes that some form of mark-up language combined with a digital signature secured by a hash key is likely the best of the known systems for authenticating future legislative digital records. The Secretary of State's experience moving forward will help verify the accuracy of that premise.

The Office of Legislative Legal Services currently contracts with a vendor to print its official primary law. A conversation with that vendor would be a next step toward UELMA compliance. The state should also consider advertising to other vendors via an RFI/RFQ to further explore available options and to quantify associated costs.

3. Recommendation for the best electronic records authentication system for the state and funding options for the authentication system.

All of the information necessary for determining the best and most cost effective electronic records authentication system for the legislature (or the entire state) is not yet available. In addition to the actions listed above, the Committee would like to completely survey all U.S. states that have passed UELMA legislation regarding actions they have taken to comply, concerns they have, and/or barriers they face. We would also like to more fully survey Colorado government and its partners regarding current digitization projects already undertaken, specifically their selected processes and procedures.

4. Other relevant information to be considered.

As discussed previously, the LDPAC should continue to meet for the purpose of evaluating information that best implements UELMA and facilitates access to electronic legal materials by Colorado's citizens at no charge. Ongoing communication between the legislative, judicial, and executive branches of Colorado state government may, in addition to ensuring efficiencies in implementing UELMA, result in the recommendation of

future legislative changes necessary to that implementation. It may also result in helpful recommendations relating to the ongoing conversion of legislative audio tapes.

As the legislature faces no deadline to comply with UELMA, the LDPAC respectfully requests a one-year extension to more completely research the information and technical requirements necessary to optimally implement the UELMA portion of its charge. Alternatively, the LDPAC could meet as an informal inter-branch group on a regular basis to evaluate information that will further the implementation of UELMA.

The members of the LDPAC unanimously agree that the collegiality and cooperation among the group contributed to a highly informative and productive process. If allowed to continue, the group recommends adding the Director of the Business and Licensing Division of the Secretary of State's Office, the Legislative Council Librarian, the Revisor of Statutes, the Senior IT Manager of the Legislative Counsel, and the Director of Statewide Programs in the Department of Personnel and Administration to the next iteration of the LDPAC.

In addition, the LDPAC would like to thank the following non-members who provided generously of their time, energy and expertise:

- State Archive staff, including Lance Christensen and Tracie Seurer
- The Director of Statewide Programs & Chief Administrative Law Judge, Matthew Azer
- Secretary of State staff members, including D.J. Davis, Deanna Maiolo, Phil Gehlich, Setareh Saadat, Carla Hoke, Joe Ingle and Ben Rector
- State Library staff member Deborah MacLeod
- Legislative Council Librarian Molly Otto
- Legislative Council IT staff Manish Jani and Zack Wimberly
- Legislative Legal Services staff Ed DeCecco
- Jonathan Broyles of Image & Sound Forensics

APPENDIX A

The Status of the Legislative Tapes at the Colorado State Archives

Issue: The Legislative Tapes at the Colorado State Archives are in danger of becoming unusable due to the age of the recordings and the rarity of the antiquated orphan machines designed to play them.

Part 1 - The Tapes: The Legislative Tapes at the Colorado State Archives comprise several thousand audiotapes utilizing five different formats. Of these, a partial group of tapes ¼ inch tapes (containing recordings of the House and Senate Chambers from 1973) were transferred to a digital format in 2006 and a further group of cassettes (containing committee hearings from early 1973) were transferred to a digital format in 2012. There are three distinct formats and types:

1973 – 1981: Half-inch 10 track tape held on NAB 10 ½" reels, playable on Dictaphone Corporation 4000/5000 logging machines only. One track holds SMPTE-style code in H/M/S format.[1] All tapes in this collection suffer from varying degrees of hydrolysis, sticky-tape syndrome and other defects that are the result of age and decay, the emulsions in the tapes and poor storage conditions. Many tapes have suffered breakage, have poor splices and suffer from loss of data.

1982 – 1998: 1-inch 20 track logging tape on NAB 10 ½" reels, playable only on Magnasync/Moviola Company logging machines and fitted with custom-built SMPTE-style readers, or machines modified to emulate these proprietary devices. One track holds time code in D/H/M/S format.[2] While the tapes are in good condition, they too are exhibiting early signs of wear and oxide loss due to age and storage issues. Many tapes have suffered breakage and have poor splices and loss of data.

1997 – 2004: 4mm 4 GB DDC data tapes, playable only on the software platform designed by Lanier and abandoned in 2001. The tapes are proprietary data burst format, loaded onto a Windows 3.1-based system utilizing software that is incompatible with modern operating systems. The data on the tapes is fragile and while there are backups of many of the tapes, many of the originals are no longer recognized by the system and are unplayable. While some years of these tapes are repeated in other formats, there is no replacement for the years 1999 – 2001. Neither the tapes nor the software designed for them were intended for extended life or use.

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[1] Hour/Minute/Second. Hours are on a 24-hour clock. SMPTE refers to the Society of Motion Picture and Television Engineers and is one format of time code in use in film, television and in any situation where specific time and synchronization is required.

[2] Day/Hour/Minute/Second. 365-day calendar with 24-hour clock format.

In the case of all systems, the tapes hold several days of hearings with all rooms in use recorded at the same time. All of the tapes can only be played on their proprietary systems. Wear and non-archival storage facilities have adversely impacted all of the tapes, which are also affected by the deteriorating condition of the playback machines.

The total numbers for each format of tape are:

1. 1973 – 1982: 1,144 Half-inch Tapes
2. 1982 – 1998: 881 1 inch Tapes
3. 1998 – 2004: 167 DDC Tapes (1999 – 2001: 100 DDC Tapes)

(Note: if only tapes not covered by overlapping formats are considered, the DDC tapes for which there is no other format is 100 total).

Part 2 - The Machines: As stated earlier, there are three types of machines that play these recordings. All are either proprietary and unique, or use software that is proprietary, unsupported and on an antiquated platform. These machines should only be operated by individuals with specific training and expertise in analog tape systems, transfer formats and digital audio workstations, with an emphasis on industry experience and audio archival methodology. The three systems and their condition follows:

1973 – 1981: Dictaphone 4000/5000
These machines are open-reel players, manufactured by Dictaphone. They have push-button mechanisms and a separate SMPTE-style module located above the reels. Both Dictaphone machines were repaired by Jonathan Broyles of Image And Sound Forensics(R) in 2012, a process which replaced rubber parts, many electronic components and returned both machines to functional operation at a total cost of $5000 each. At the present time, these machines should have many years of functionality, assuming operation by trained personnel and periodic maintenance, calibration and repair.

1982 – 1998: Magnasync/Moviola
These machines are open-reel players with custom-built time-code readers installed. Unlike the Dictaphone machines, these machines maintain constant contact with the tape even during fast-winding.

With the loss of functionality of these machines, Dictaphone 5000 machines were utilized and modified to handle these tapes and to read the time code on them. Two machines are being fitted in this manner, at a cost of $5000 each, and are scheduled to be in service in November 2013.

1999-2001: DDC Computers (Window 3.1 OS, Lanier software with 4mm Data Drives). There are two of these machines, both of which are functional. One machine has had its data drive rebuilt. While the machines are fairly stable, they are 1st generation Pentium machines with unsupported operating systems that may become more fragile with age. Additionally, the tapes were of a format never intended for daily use, and are becoming unstable with age.

APPENDIX B

Digital formats: the initial transfer storage format from tape should be the highest quality that will capture with "no loss" from tape to digital format. Since the bandwidth of the recorders is specified at 300 to 3000Hz (-3dB), and since these analog recorders have a typical useful frequency response to 6000Hz, the minimum digital format should be 12KHz sample rate and 16bit amplitude resolution to ensure that all of the usable bandwidth of the audio format is captured.

The ideal file format will be one that reaches beyond simply preservation and exceeds the minimum standards. Many universities and the Library of Congress recommend a high definition standard of 92KHz/24 bit resolution, also known as 'high definition audio.' For the purposes of these recordings, this would result in a very large file size. For the purposes of easier access and standardization, the recommended format is the CD standard of 44.1KHz/16 bit. This is both for best audio preservation as well as for ease of access in the future. This is also an optimum format for down-sampling to access formats.

Storage requirements. This would be for the preservation format as well as the compressed format for public access. code audio should also be recorded from one of the channels on the tape. Information such as time and origination should be preserved at the point of transfer as part of the metadata stream.

The formula for stating the size of audio files in a lossless wav format is:
MB/Hour = x bits/sample * x samples/second * bytes/8 bits * KB/1024 bytes * MB/1024KB * 60 seconds/minute * 60 minutes/hour * number of channels. For 44.1/16 audio, this would result in 605mb per hour or .591gb per hour of data. Assuming the current estimate of 500,000 hours of audio, this would indicate 295 terabytes of data storage necessary for the archival format storage needs.

Calculating the public access MP3 format audio, results in MP3 at a 128 bit rate would result in 56.3 MB/hour or approximately 28 terabytes of data.

Total storage needs would result in a requirement of at least 323 terabytes of storage. However, the true amount of storage necessary would be contingent on the actual amount of hours per year, which cannot be determined until a full year of audio is transferred.

APPENDIX C

Examination and Research of Potential Tape Problems [1]

After examination and testing of the ½" and 1" tapes from the Colorado Archives I have been able to determine that the Dictaphone (½") recorded tapes' back coating is deteriorating due to absorption of moisture or hydrolysis of the tape's back coating[1]. Further, an examination of the material that deposits on the tape heads contains mostly back coating and very little iron oxide and is the same as the material found on the tape lifters which contact the back side of the tape. The deteriorating back coating is transferring to the front/recording surface through contact when the tape is wound on a reel [1]. The longer this goes unchecked, the more the deteriorating back coating will break down and transfer to the front surface of the tape which could eventually "glue" the layers of the tape together making it unplayable. The contamination of the recording surface with the deteriorating back coating will interfere with the playback quality by putting a space between the recording surface and the playback head. This type of signal loss is very difficult or impossible to be fully compensated for by downstream digital processing [3].

Dictaphone tapes exhibiting this deterioration require head and tape guide cleaning after approximately 15 minutes of playback [2].

Further examination shows that the Magnasync tapes (1") do not have a back coating and also do not exhibit any symptoms of hydrolysis deterioration. The oxide build up that appears on the playback heads after 8 hours of use appears to be more or less consistent with normal tape wear [1][2].

Possible Solutions Include:

1. Chemical Removal of Back Coating

2. Environmental Controls

3. Vacuum Dehydrator

References

1. Jonathan Broyles, Senior Forensic Examiner, Image And Sound Forensics®, Parker, Colorado.
2. Lance Christensen, Digital and Audio Archivist, Colorado State Archives.
3. Bertram, H.N. and E.F. Cuddihy, "Kinetics of the Humid Aging of Magnetic Recording Tape, IEEE Trans. Magn., MAG-18, No. 5, pp993-999, Sep. 1982.

APPENDIX D

The LDPAC reviewed the following 32 page White Paper concerning Minnesota's UELMA strategies. For brevity of this report, a hyperlink has been provided.

Minnesota Historical Society – "Preserving State Government Digital Information:

http://www.mnhs.org/preserve/records/legislativerecords/carol/docs_pdfs/MHS-NDIIPP_FinalReport02_29_2012.pdf