Office of Legislative Legal Services
Colorado General Assembly

Director
Dan L. Cartin

Deputy Director
Sharon L. Eubanks

Revisor of Statutes
Jennifer G. Gilroy

Assistant Directors
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

Publications Coordinator
Kathy Zambrano

State Capitol Building, Room 091
200 East Colfax Avenue
Denver, Colorado 80203-1782
Telephone: 303-866-2045 Facsimile: 303-866-4157
E-mail: olls.ga@state.co.us

Senior Attorneys
Jeremiah B. Barry, Duane H. Gall, Christine B. Chase, Jason Gelender, Edward A. DeCecco, Robert S. Lackner, Michael J. Dohr, Thomas Morris, Kristen J. Forrestal, Nicole H. Myers, Gregg W. Fraser

Senior Staff Attorneys
Brita Darling, Jane M. Ritter, Kate Meyer, Richard Sweetman, Jery Payne, Esther van Mourik

Senior Attorney for Annotations
Michele D. Brown

Staff Attorney
Jennifer A. Berman

AGENDA

Committee on Legal Services

Friday, December 19, 2014

10:00 a.m.

House Committee Room 0112

(Lunch will be provided for the Committee members)

1. Review of New Rules (rules adopted or amended on or after November 1, 2013, and before November 1, 2014, and scheduled to expire May 15, 2015):

   a. Rules of the State Board of Human Services, Department of Human Services, concerning restricted use of electronic benefits transfer cards for the Temporary Assistance for Needy Families / Colorado Works program and financial cash benefits, 9 CCR 2503-5 and 9 CCR 2503-6 (LLS Docket No. 140496; SOS Tracking No. 2014-00601).
   Staff: Brita Darling
   (Status: Uncontested)

   b. Rules of the State Board of Human Services, Department of Human Services, concerning the Low-Income Energy Assistance Program ("LEAP") Update, 9 CCR 2503-7 (LLS Docket No. 140564; SOS Tracking No. 2014-00899).

Staff: Brita Darling
(Status: Uncontested)

c. Rules of the Colorado Oil and Gas Conservation Commission, Department of Natural Resources, concerning practice and procedure, 2 CCR 404-1 (LLS Docket No. 140483; SOS Tracking No. 2014-00587).
Staff: Thomas Morris
(Status: Contested)

d. Rules of the Parks and Wildlife Commission, Department of Natural Resources, concerning river outfitters, 2 CCR 405-3 (LLS Docket No. 140533; SOS Tracking No. 2014-00757).
Staff: Jennifer Berman
(Status: Contested)

e. Rules of the Division of Motor Vehicles, Department of Revenue, Rule 8 – Driver testing and education program rules and regulations, 1 CCR 204–30 (LLS Docket No. 140296; SOS Tracking No. 2013-01120).
Staff: Jery Payne
(Status: Contested)

f. Rules of the State Board of Health, Department of Public Health and Environment, concerning the medical marijuana research grant program, 5 CCR 1006-2 (LLS Docket No. 14-0552; SOS Tracking No. 2014-00743).
Staff: Michael Dohr
(Status: Contested)

g. Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 140595; SOS Tracking No. 2014-00684).
Staff: Jason Gelender and Kate Meyer
(Status: Uncontested)

2. Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill.
Staff: Debbie Haskins

3. Discussion of Opt-out Bill Draft.
Staff: Debbie Haskins

4. Sponsorship of Other Committee on Legal Services Bills:

Bill to Enact the C.R.S.
Revisor's Bill
Staff: Jennifer Gilroy, Revisor of Statutes

5. Litigation Update.
Staff: Bob Lackner

6. Scheduled Meetings During the Session:
- January 9, 8:30 a.m. - Organizational Meeting to Elect a Chair and Vice-Chair
- First Fridays of the Month from Noon to 2:00 p.m.: February 6, March 6, April 3, and May 1

7. Other.

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E-mail: olls.ga@state.co.us

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Senior Attorney for Annotations
Michele D. Brown

Staff Attorney
Jennifer A. Berman, Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Brita Darling, Office of Legislative Legal Services

DATE: December 12, 2014

SUBJECT: Rules of the State Board of Human Services, Department of Human Services, concerning restricted use of electronic benefits transfer cards for the Temporary Assistance for Needy Families / Colorado Works program and financial cash benefits, 9 CCR 2503-5 and 9 CCR 2503-6 (LLS Docket No. 140496; SOS Tracking No. 2014-00601).[1]

Summary of Problems Identified and Recommendations

Section 26-2-104, C.R.S., contains the locations where electronic benefits transfer ("EBT") card cash withdrawals from automated teller machines ("ATMs") are prohibited by persons receiving Colorado Works benefits. But, there are two distinct problems with Rules 3.520.4 D. 6. and 3.602.1 E. 2. k.:

1) The State Board of Human Services ("State Board") has exceeded its statutory authority by including an additional prohibited location in the rules that is not included in the list of prohibited locations contained in the statute; and

---

[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, 2015, unless the General Assembly acts by bill to postpone such expiration.

2) The rules are confusing and potentially misleading to county administrators and Colorado Works clients because they do not include prohibited locations under Colorado law, and the rule language creates uncertainty as to whether there are additional locations where EBT card use is prohibited.

We therefore recommend that Rules 3.520.4 D. 6. and 3.602.1 E. 2. k. of the rules of the State Board of Human Services concerning restricted use of electronic benefits transfer cards for the Temporary Assistance for Needy Families/Colorado Works program and financial cash benefits not be extended.

Analysis

I. The State Board exceeded its rule-making authority by including marijuana shops in its rules as an additional location where EBT card cash withdrawals are prohibited.

The State Board's Rules 3.520.4 D. 6. and 3.602.1 E. 2. k. ("EBT rules") relate to the application process for the Colorado Works program that provides cash assistance pursuant to the federal Temporary Assistance for Needy Families ("TANF") program. As part of the application process, clients are given information concerning establishments where the use of the EBT card for cash withdrawals from ATMs is prohibited.

The General Assembly has enacted law specifically related to the locations where EBT use is prohibited by persons receiving benefits under the Colorado Works program. Section 26-2-104 (2) (a), C.R.S., reads, in relevant part:

> **26-2-104. Public assistance programs - electronic benefits transfer service - rules.** (2) (a) Clients shall not be allowed to access cash benefits through the electronic benefits transfer service from automated teller machines in this state located in **licensed gaming establishments** as defined in section 12-47.1-103 (15), C.R.S., **in-state simulcast facilities** as defined in section 12-60-102 (14), C.R.S., **tracks for racing** as defined in section 12-60-102 (26), C.R.S., **commercial bingo facilities** as defined in section 12-9-102 (2.3), C.R.S., **stores or establishments in which the principal business is the sale of firearms,** or **retail establishments licensed to sell malt, vinous, or spirituous liquors** pursuant to part 3 of article 47 of title 12, C.R.S. (**emphasis added**)

However, the State Board's EBT rules require the county to provide an explanation on the use of EBT cards to Colorado Works clients, which explanation "shall include prohibited establishments, including, but not limited to, liquor stores, gambling establishments, **adult oriented**

establishments, and marijuana shops . . ." (**emphasis added**) (See Rule 3.520.4 D. 6. and Rule 3.602.1 E. 2. k. in **Addendum A**). The EBT rules contain locations **not** found in the statute, including **adult oriented establishments** and **marijuana shops**.

Pursuant to section 24-4-103 (8), C.R.S., an agency shall not adopt any rule that exceeds the power delegated to the agency by the General Assembly and as authorized by law. While the State Board has rule-making authority related to administering the Colorado Works program and, specifically related to EBT card administration pursuant to section 26-2-104 (2) (b), C.R.S., **in enacting section 26-2-104 (2) (a), C.R.S., the General Assembly exercised its legislative power to determine Colorado's policy concerning prohibited locations for EBT card use by persons participating in the Colorado Works program.** The addition of adult oriented establishments falls within the State Board's authority to comply with federal requirements for TANF funding pursuant to section 26-2-105, C.R.S. However, restricting EBT card use at **marijuana shops** is neither required nor authorized pursuant to federal law. By adding marijuana shops despite the General Assembly's clear indication of its intent to regulate in this area, the State Board has infringed upon the General Assembly's power to continue making public policy in this area.

The State Board's adoption of rules in an area where the General Assembly has clearly expressed its intent to make public policy exceeds the State Board's rule-making authority and, therefore, Rule 3.520.4 D. 6. and Rule 3.602.1 E. 2. k. should not be extended.

II. The EBT rules are confusing and potentially misleading to county administrators and Colorado Works clients because they do not include prohibited locations under Colorado law and create uncertainty as to whether there are additional locations where EBT card use is prohibited.

Pursuant to section 24-4-103 (4) (b), C.R.S., any exercise of rule-making authority by an agency must comply with statute. However, the list of prohibited locations contained in the EBT rules does not match Colorado law. Missing from the EBT rules' lists are **in-state simulcast facilities**, **tracks for racing**, **commercial bingo facilities**, and **stores or establishments in which the principal business is the sale of firearms**. When an agency rule relates to a specific area that is regulated in statute, in this case locations where EBT card use is prohibited, the rule must accurately repeat the statute.

Further, pursuant to section 24-4-103 (4) (b), C.R.S., an agency rule must be "clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation". The EBT rules contain the phrase "including but not limited to" prior to the list of prohibited locations. This language implies that there are other locations where EBT use is prohibited, but neither rule describes the additional locations nor directs the reader to a different rule or statute. In fact, there are additional prohibited locations set forth in statute that have been omitted from the rules. Further, the State Board cannot add prohibited locations to the rules at its discretion because it is limited to the locations listed in state or federal law. It is not reasonable to assume that county administrators explaining the EBT restrictions to individuals issued EBT cards will know from the rules' language whether there are additional prohibited locations or where to find a description of those locations. It is even more unlikely that a Colorado Works client will be fairly put on notice through the rules that, pursuant to Colorado law, EBT card cash withdrawals are also prohibited at **in-state simulcast facilities**, **tracks for racing**, **commercial bingo facilities**, and **stores or establishments in which the principal business is the sale of firearms**, and that the client's EBT card will be suspended for misuse of the benefits.

Because the EBT rules do not accurately repeat the statutory prohibitions on EBT card use contained in state statute, and the "including but not limited to" language in the rules is confusing and potentially misleading to persons required to comply with the rules, Rule 3.520.4 D. 6. and Rule 3.602.1 E. 2. k. should not be extended.

Conclusion

We therefore recommend that Rules 3.520.4 D. 6. and 3.602.1 E. 2. k. of the rules of the State Board of Human Services concerning restricted use of electronic benefits transfer cards for the Temporary Assistance for Needy Families/Colorado Works program and financial cash benefits not be extended.

Addendum A

(9 CCR 2503-5)

3.520.4 APPLICATION PROCESSING [Rev. eff. 8/1/14]

D. The interview shall include:

6. An explanation provided regarding the process of utilizing the Electronic Benefit Transfer (EBT) card. This explanation shall include prohibited establishments including, but not limited to, liquor stores, gambling establishments, adult oriented establishments, and marijuana shops; and, an explanation that the cash portion issued on the EBT card may be suspended with identified misuse.

(9 CCR 2503-6)

3.602.1 Applications [Rev. eff. 8/1/14]

E. Receiving Applications for Colorado Works Benefits

2. The application process shall consist of all activity from the date the application is received from the applicant until a determination concerning eligibility is made. Language translate via an interpreter shall be provided by the county department of residence as needed. The major steps in the application process shall include:

k. An explanation provided regarding the process of utilizing the Electronic Benefit Transfer (EBT) card. This explanation shall include prohibited establishments including, but not limited to, liquor stores, gambling establishments, adult oriented establishments, and marijuana shops; and, an explanation that the cash portion issued on the EBT card may be suspended with identified misuse.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Brita Darling, Office of Legislative Legal Services

DATE: December 12, 2014

SUBJECT: Rules of the State Board of Human Services, Department of Human Services, concerning the Low-Income Energy Assistance Program ("LEAP") Update, 9 CCR 2503-7 (LLS Docket No. 140564; SOS Tracking No. 2014-00899).[1]

Summary of Problems Identified and Recommendations

Section 26-2-104, C.R.S., contains the locations where electronic benefits transfer ("EBT") card cash withdrawals from automated teller machines ("ATMs") are prohibited by persons receiving LEAP benefits. But, there are two distinct problems with Rule 3.751.44 ("EBT rule"):

1) The State Board of Human Services ("State Board") has exceeded its statutory authority by including additional prohibited locations in the rule that are not included in the list of prohibited locations contained in the statute; and

2) The rule is confusing and potentially misleading to county administrators and LEAP clients because it does not include prohibited locations under Colorado law, and the rule language

[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, 2015, unless the General Assembly acts by bill to postpone such expiration.

creates uncertainty as to whether there are additional locations where EBT card use is prohibited.

We therefore recommend that Rule 3.751.44 of the rules of the State Board of Human Services concerning notice of appropriate use of electronic benefits transfer (EBT) cards for the LEAP program not be extended.

Analysis

I. The State Board exceeded its rule-making authority by including adult oriented establishments and marijuana shops in its rule as additional locations where EBT card cash withdrawals are prohibited.

The State Board's EBT rule requires a county to provide an explanation to a LEAP client concerning establishments where the use of an EBT card for cash withdrawals from ATMs is prohibited.

The General Assembly has enacted law specifically related to the locations where EBT use is prohibited by persons receiving cash assistance pursuant to a public assistance program, including the LEAP program. Section 26-2-104 (2) (a), C.R.S., reads, in relevant part:

> **26-2-104. Public assistance programs - electronic benefits transfer service - rules.** (2) (a) Clients shall not be allowed to access cash benefits through the electronic benefits transfer service from automated teller machines in this state located in **licensed gaming establishments** as defined in section 12-47.1-103 (15), C.R.S., **in-state simulcast facilities** as defined in section 12-60-102 (14), C.R.S., **tracks for racing** as defined in section 12-60-102 (26), C.R.S., **commercial bingo facilities** as defined in section 12-9-102 (2.3), C.R.S., **stores or establishments in which the principal business is the sale of firearms,** or **retail establishments licensed to sell malt, vinous, or spirituous liquors** pursuant to part 3 of article 47 of title 12, C.R.S. (**emphasis added**)

However, the State Board's EBT rule requires the county to provide an explanation on the use of EBT cards to LEAP clients, which explanation "shall include prohibited establishments, including, but not limited to, liquor stores, gambling establishments, **adult oriented establishments, and marijuana shops** . . . " (**emphasis added**) (See Rule 3.520.4 D. 6. and Rule 3.602.1 E. 2. k. in **Addendum A**). The EBT rule contains locations **not** found in the statute, including **adult oriented establishments** and **marijuana shops**.

Pursuant to section 24-4-103 (8), C.R.S., an agency shall not adopt any rule that exceeds the power delegated to the agency by the General Assembly and as authorized by law. While the State Board has rule-making authority related to administering the LEAP program and, specifically related to EBT card administration pursuant to section 26-2-104 (2) (b), C.R.S., **in enacting section 26-2-104 (2) (a), C.R.S., the General Assembly exercised its legislative power to determine Colorado's policy concerning prohibited locations for EBT card use by persons participating in the LEAP program.** However, restricting EBT card use at **adult oriented establishments** and **marijuana shops** is not authorized pursuant to state or federal law. By adding adult oriented establishments and marijuana shops to the list of prohibited locations, despite the General Assembly's clear indication of its intent to regulate in this area, the State Board has infringed upon the General Assembly's power to continue making public policy in this area.

The State Board's adoption of a rule in an area where the General Assembly has clearly expressed its intent to make public policy exceeds the State Board's rule-making authority and, therefore, Rule 3.751.44 should not be extended.

II. The EBT rule is confusing and potentially misleading to county administrators and LEAP clients because it does not include prohibited locations under Colorado law and creates uncertainty as to whether there are additional locations where EBT card use is prohibited.

Pursuant to section 24-4-103 (4) (b), C.R.S., any exercise of rule-making authority by an agency must comply with statute. However, the list of prohibited locations contained in the EBT rule does not match Colorado law. Missing from the EBT rule's list are **in-state simulcast facilities**, **tracks for racing**, **commercial bingo facilities**, and **stores or establishments in which the principal business is the sale of firearms**. When an agency rule relates to a specific area that is regulated in statute, in this case locations where EBT card use is prohibited, the rule must accurately repeat the statute.

Further, pursuant to section 24-4-103 (4) (b), C.R.S., an agency rule must be "clearly and simply stated so that its meaning will be understood by any party required to comply with the regulation". The EBT rule contains the phrase "including but not limited to" prior to the list of prohibited locations. This language implies that there are other locations where EBT use is prohibited, but the rule neither describes the additional locations nor directs the reader to a different rule or statute. In fact, there

are additional prohibited locations set forth in statute that have been omitted from the rules. Further, the State Board cannot add prohibited locations to the rules at its discretion because it is limited to the locations listed in state or federal law. It is not reasonable to assume that county administrators explaining the EBT restrictions to individuals issued EBT cards will know from the rule's language whether there are additional prohibited locations or where to find a description of those locations. It is even more unlikely that a LEAP client will be fairly put on notice through the rule that, pursuant to Colorado law, EBT card cash withdrawals are also prohibited at **in-state simulcast facilities**, **tracks for racing**, **commercial bingo facilities**, and **stores or establishments in which the principal business is the sale of firearms**, and that the client's EBT card will be suspended for misuse of the benefits.

Because the EBT rule does not accurately repeat the statutory prohibitions on EBT card use contained in state statute, and the "including but not limited to" language in the rule is confusing and potentially misleading to persons required to comply with the rule, Rule 3.751.44 should not be extended.

Conclusion

We therefore recommend that Rule 3.751.44 of the rules of the State Board of Human Services concerning notice of appropriate use of electronic benefits transfer (EBT) cards for the LEAP program not be extended.

Addendum A

(9 CCR 2503-7)

3.750 LOW-INCOME ENERGY ASSISTANCE PROGRAMS

3.751.44 Notice of Appropriate Use of Electronic Benefit Transfer (EBT) Card [Eff. 12/1/14]

An explanation shall be provided regarding the process of utilizing the Electronic Benefit Transfer (EBT) card. This explanation shall include prohibited establishments including, but not limited to, liquor stores, gambling establishments, adult oriented establishments and marijuana shops; and an explanation that the LEAP cash portion issued on the EBT card may be suspended with identified misuse.

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

DIRECTOR
Dan L. Cartin

DEPUTY DIRECTOR
Sharon L. Eubanks

REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTORS
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

PUBLICATIONS COORDINATOR
Kathy Zambrano

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045 FACSIMILE: 303-866-4157
E-MAIL: OLLS.GA@STATE.CO.US

MANAGING SENIOR ATTORNEYS
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SENIOR ATTORNEYS
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SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEY
Jennifer A. Berman, Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris, Office of Legislative Legal Services

DATE: December 5, 2014

SUBJECT: Rules of the Colorado Oil and Gas Conservation Commission, Department of Natural Resources, concerning practice and procedure, 2 CCR 404-1 (LLS Docket No. 140483; SOS Tracking No. 2014-00587).[1]

Summary of Problems Identified and Recommendations

H.B. 14-1356 made several changes to section 34-60-121, C.R.S., the statute that governs oil and gas penalties. But the Colorado oil and gas conservation commission (Commission) did not update Rules 523. a. (1), 523. a. (3), 523. c., and 525. b. to reflect these changes when it repromulgated 2 CCR 404-1.

H.B. 14-1077, which amended section 34-60-122 (1) (b), C.R.S., increased the two-year average of the unobligated portion of the oil and gas conservation and environmental response fund from $4 million to $6 million. But Rule 710. still includes the $4 million cap.

Section 24-4-103 (12.5), C.R.S., establishes requirements for the incorporation by reference of material into a rule, including a requirement that the rule must state where copies of the incorporated material are

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2015, unless the General Assembly acts by bill to postpone such expiration.

available from the organization that originally issued the incorporated material. But Rules 604. c. (2) G., 605. a. (1), and 605. a. (4) do not make this statement, and Rules 604. c. (2) G. and 605. a. (4) also do not comply with other incorporation by reference requirements.

We therefore recommend that Rules 523. a. (1), 523. a. (3), 523. c, 525. b., 604. c. (2) G., 605. a. (1), 605. a. (4), and 710. of the rules of the Commission concerning practice and procedure not be extended.

Analysis

Recently, the General Assembly enacted three laws that affect the Commission's rules and rule-making authority:

- H.B. 14-1356 changed several aspects of the Commission's authority to impose penalties. In particular, it increased the per-day penalty cap from $1,000 per day to $15,000 per day, repealed a $10,000 cumulative penalty cap, and changed the circumstances in which the Commission may restrict oil and gas operators' authority to operate. The Commission has specific rule-making authority with regard to penalties, as described below.
- H.B. 14-1077 raised the two-year average of the unobligated portion of the oil and gas conservation and environmental response fund from $4 million to $6 million. The Commission has no specific rule-making authority with regard to the unobligated portion of the oil and gas conservation and environmental response fund.
- H.B. 10-1235 amended several aspects of the "incorporation by reference" requirements of the Administrative Procedures Act. The Commission has no specific rule-making authority with regard to incorporation by reference.

The Commission has broad, general rule-making authority:

> **34-60-105. Powers of commission.** (1) The commission has jurisdiction over all persons and property, public and private, necessary to enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article. . . .

In July, 2014, the Commission repromulgated its rules on practice and procedure; these rules did not address these recent statutory changes. Instead, to address the concerns raised by the Office of Legislative Legal Services, the Commission has issued a notice of rule-making hearing that indicates that the Commission will adopt necessary changes at a hearing to be held on December 15, 2014.

I. The Commission did not update its penalty rules to reflect H.B. 14-1356 when it repromulgated its rules.

H.B. 14-1356 (attached as **Addendum A)**, made several changes to the statute that governs oil and gas penalties. In particular, the maximum daily penalty was increased from $1,000 to $15,000 (§34-60-121 (1) (a), C.R.S.); the maximum $10,000 aggregate penalty cap was repealed (§34-60-121 (1) (b), C.R.S.); the rules had to be updated to establish the basis for determining the duration of violations and to include certain presumptions (§34-60-121 (1) (c), C.R.S.); and the circumstances pursuant to which the commission can prohibit the issuance of any new permits to an operator or suspend an operator's certificate of clearance were changed (§34-60-121 (7), C.R.S.).

Rule 523. of the Commission's rules (**Addendum B**) relates to penalties. As indicated by this red-line version, the Commission did not change Rule 523. in any way (other than a change in Rule 523 (f) that is not relevant to this discussion). Several portions of Rule 523. conflict with H.B. 14-1356:

- Rule 523. a. (1) still contains the $1,000 per day maximum fine;
- Rule 523. a. (3) still contains the maximum $10,000 aggregate penalty cap; and
- Rule 523. c, which establishes the base fine schedule, still reflects the $1,000 per day maximum fine.

Additionally, Rule 525. b specifies when the Commission can prohibit the issuance of permits to an operator:

> **525. PERMIT-RELATED PENALTIES**
>
> b. Whenever the Commission or the Director has evidence that an operator is responsible for a **pattern of violation** of any provision of the Act, or of any rule, permit or order of the Commission, the Commission or the Director shall issue a notice to such operator to appear for a hearing before the Commission. If the Commission finds, after such hearing, that a knowing and willful pattern of violation exists, it may issue an order which shall **prohibit the issuance of any new permits** to such operator. When such operator demonstrates to the satisfaction of the Commission that it has brought each of the violations into compliance and that any fine not subject to judicial review or appeal has been paid, such order denying new permits shall be vacated. **(emphasis added)**

Rule 525. b does not list the suspension of an operator's certificate of clearance as a potential penalty and does not include the additional ground

for the imposition of penalties of gross negligence that results in an egregious violation, and therefore conflicts with section 34-60-121 (7).

Rules 523. a. (1), 523. a. (3), 523. c, and 525. b. conflict with the statutes and should not be extended.

II. The Commission did not update its rule on the oil and gas conservation and environmental response fund to reflect H.B. 14-1077 when it repromulgated its rules.

The general assembly recently enacted H.B. 14-1077, which amended section 34-60-122 (1) (b), C.R.S., to increase the two-year average of the unobligated portion of the oil and gas conservation and environmental response fund from $4 million to $6 million:

> **34-60-122. Expenses - fund created.** (1) (b) On and after July 1, 2014, the commission shall ensure that the two-year average of the unobligated portion of the fund does not exceed **six million dollars** and that there is an adequate balance in the environmental response account created pursuant to subsection (5) of this section to address environmental response needs. **(emphasis added)**

But Rule 710. still includes the $4 million cap:

> **710. Oil and Gas Conservation and Environmental Response Fund.**
>
> The Commission shall ensure that the two-year average of the unobligated portion of the Oil and Gas Conservation and Environmental Response Fund is maintained at a level of approximately, but not to exceed, **four million dollars** ($4,000,000), and that there is an adequate balance in the fund to address environmental response needs, which may be used in accordance with the Act and Rule 701. **(emphasis added)**

Rule 710. therefore conflicts with the statute and should not be extended.

III. The Commission did not update its incorporation by reference rules to reflect H.B. 10-1235 when it repromulgated its rules.

Section 24-4-103 (12.5) (a), C.R.S., as updated by H.B. 10-1235, establishes requirements for the incorporation by reference of material into a rule, including a requirement that the rule must state where copies of the incorporated material are available from the organization that originally issued the incorporated material:

> **24-4-103. Rule-making - procedure - definitions - repeal.** (12.5) (a) A rule may incorporate by reference all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or

another state, or adopted or published by a nationally recognized organization or association, if:

(I) Repeating verbatim the text of the code, standard, guideline, or rule in the rule would be unduly cumbersome, expensive, or otherwise inexpedient;

(II) The reference fully identifies the incorporated code, standard, guideline, or rule by citation and date, identifies the address of the agency where the code, standard, guideline, or rule is available for public inspection, and states that the rule does not include any later amendments or editions of the code, standard, guideline, or rule;

(III) The code, standard, guideline, or rule is readily available to the public in written or electronic form;

(IV) **The rule states** where copies of the code, standard, guideline, or rule are available for a reasonable charge from the agency adopting the rule and **where copies are available from** the agency of the United States, this state, another state, or **the organization or association originally issuing the code**, standard, guideline, or rule; and

(V) The agency maintains a copy of the code, standard, guideline, or rule readily available for public inspection at the agency office during regular business hours. (**emphasis added**)

But Rules 604. c. (2) G., 605. a. (1), and 605. a. (4) (attached as **Addendum C**) do not make this statement, and Rules 604. c. (2) G. and 605. a. (4) do not comply with other incorporation by reference requirements.

Rules 604. c. (2) G., 605. a. (1), 605. a. (4) therefore conflict with section 24-4-103 (12.5), C.R.S., and should not be extended.

Conclusion

We therefore recommend that Rules 523. a. (1), 523. a. (3), 523. c, 525. b., 604. c. (2) G., 605. a. (1), 605. a. (4), and 710. of the rules of the Commission concerning practice and procedure not be extended.

NOTE: The governor signed this measure on 6/6/2014.

Addendum A

HOUSE BILL 14-1356

BY REPRESENTATIVE(S) Foote, Becker, Buckner, Court, Exum, Fields, Ginal, Hamner, Hullinghorst, Kagan, Kraft-Tharp, Labuda, Lebsock, Lee, May, McCann, McLachlan, Melton, Mitsch Bush, Moreno, Pabon, Pettersen, Primavera, Rosenthal, Ryden, Salazar, Schafer, Singer, Tyler, Wright, Ferrandino;
also SENATOR(S) Jones, Aguilar, Guzman, Heath, Kefalas, Nicholson, Schwartz, Carroll.

CONCERNING AN INCREASE IN THE COLORADO OIL AND GAS COMMISSION'S PENALTY AUTHORITY, AND, IN CONNECTION THEREWITH, MAKING AN APPROPRIATION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 34-60-121, **amend** (1) and (7) as follows:

34-60-121. Violations - penalties - rules - legislative declaration. (1) (a) Any operator that violates ~~any provision of~~ this article, any rule or order of the commission, or any permit ~~shall be~~ IS subject to a penalty of not more than ~~one~~ FIFTEEN thousand dollars for each act of violation per day that such violation continues; ~~Any such~~

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

(b) THE COMMISSION MAY IMPOSE A penalty ~~shall be imposed~~ by order ~~of the commission,~~ ONLY after a hearing in accordance with section 34-60-108 or by an administrative order by consent entered into by the commission and ~~an~~ THE operator. ~~For a violation that does not result in significant waste of oil and gas resources or damage to correlative rights or does not result in a significant adverse impact on public health, safety, or welfare, the maximum penalty shall not exceed ten thousand dollars.~~

(c) The commission shall:

(I) Promulgate rules that establish a penalty schedule appropriate to the nature of the violation and ~~that~~ provide for the consideration of any aggravating or mitigating circumstances. THE RULES MUST ESTABLISH THE BASIS FOR DETERMINING THE DURATION OF A VIOLATION FOR PURPOSES OF IMPOSING THE APPLICABLE PENALTY AND INCLUDE PRESUMPTIONS THAT:

(A) A REPORTING OR OTHER MINOR OPERATIONAL VIOLATION: BEGINS ON THE DAY THAT THE REPORT SHOULD HAVE BEEN MADE OR OTHER CORRECTIVE ACTION SHOULD HAVE BEEN TAKEN; AND ENDS WHEN THE REQUIRED REPORT IS SUBMITTED OR OTHER CORRECTIVE ACTION IS COMMENCED;

(B) ANY OTHER VIOLATION: BEGINS ON THE DATE THE VIOLATION WAS DISCOVERED OR SHOULD HAVE BEEN DISCOVERED THROUGH THE EXERCISE OF REASONABLE CARE; AND ENDS WHEN CORRECTIVE ACTION IS COMMENCED;

(C) THE FAILURE TO DILIGENTLY IMPLEMENT CORRECTIVE ACTION PURSUANT TO A SCHEDULE EMBODIED IN AN ADMINISTRATIVE ORDER ON CONSENT, ORDER FINDING VIOLATION, OR OTHER ORDER OF THE COMMISSION CONSTITUTES AN INDEPENDENT VIOLATION FOR WHICH THE OPERATOR MAY BE SUBJECT TO ADDITIONAL PENALTIES OR CORRECTIVE ACTION ORDERS IMPOSED BY THE COMMISSION; AND

(D) THE NUMBER OF DAYS OF VIOLATION DOES NOT INCLUDE ANY PERIOD NECESSARY TO ALLOW THE OPERATOR TO ENGAGE IN GOOD FAITH NEGOTIATION WITH THE COMMISSION REGARDING AN ALLEGED VIOLATION IF THE OPERATOR DEMONSTRATES A PROMPT, EFFECTIVE, AND PRUDENT RESPONSE TO THE VIOLATION.

(II) PUBLISH A QUARTERLY REPORT ON ITS WEB SITE THAT SPECIFIES, FOR EACH PENALTY ASSESSED IN THE PREVIOUS QUARTER:

(A) THE ACTUAL PENALTY ASSESSED, INCLUDING THE NUMBER OF DAYS FOR WHICH THE PENALTY WAS ASSESSED AND THE AMOUNT OF THE PENALTY PER DAY OF VIOLATION;

(B) THE AGGRAVATING OR MITIGATING CIRCUMSTANCES FROM THE PENALTY SCHEDULE THAT APPLIED;

(C) WHETHER THE VIOLATION WAS PART OF A PATTERN OF VIOLATIONS;

(D) WHETHER AN EGREGIOUS VIOLATION RESULTED FROM GROSS NEGLIGENCE OR KNOWING AND WILLFUL MISCONDUCT;

(E) WHETHER THE PENALTY WAS ASSESSED AFTER A HEARING OR BY AN ADMINISTRATIVE ORDER BY CONSENT; AND

(F) ANY OTHER RATIONALE USED IN DETERMINING THE AMOUNT OF THE PER-DAY PENALTY, DURATION OF THE VIOLATION, OR AMOUNT OF THE PENALTY ACTUALLY ASSESSED; AND

(III) ENSURE THAT THE REPORTS PREPARED PURSUANT TO SUBPARAGRAPH (II) OF THIS PARAGRAPH (c) ARE DISCUSSED AT THE ANNUAL DEPARTMENTAL PRESENTATIONS MADE PURSUANT TO SECTION 2-7-203, C.R.S.

(d) An operator subject to a penalty order shall pay the amount due within thirty days after its imposition unless ~~such~~ THE operator files a judicial appeal. The COMMISSION MAY RECOVER penalties owed under this section ~~may be recovered~~ in a civil action brought by the attorney general at the request of the commission in the second judicial district. Moneys collected through the imposition of penalties shall be credited first to any legal costs and attorney fees incurred by the attorney general in ~~such a~~ THE recovery action and then to the environmental response account in the oil and gas conservation and environmental response fund created in section 34-60-122.

(e) THE GENERAL ASSEMBLY HEREBY DECLARES THAT THE PURPOSES

OF THIS SUBSECTION (1) ARE TO DETER NONCOMPLIANCE AND TO ENCOURAGE ANY OUT-OF-COMPLIANCE OPERATORS TO COME INTO COMPLIANCE AS SOON AS POSSIBLE AND TO THOSE ENDS INTENDS THAT, IN DETERMINING THE AMOUNT OF A PENALTY, THE COMMISSION SHOULD NOT REDUCE THE NUMBER OF DAYS OF VIOLATION FOR WHICH A PENALTY IS ASSESSED BELOW THAT NUMBER WHICH THE EVIDENCE SUPPORTS.

(7) (a) THE COMMISSION OR THE DIRECTOR SHALL ISSUE AN ORDER TO AN OPERATOR TO APPEAR FOR A HEARING BEFORE THE COMMISSION IN ACCORDANCE WITH SECTION 34-60-108 whenever the commission or the director has evidence that an operator is responsible for:

(I) GROSS NEGLIGENCE OR KNOWING AND WILLFUL MISCONDUCT THAT RESULTS IN AN EGREGIOUS VIOLATION; OR

(II) A pattern of violation ~~of any provision~~ of this article, ~~or of~~ any rule ~~regulation,~~ or order of the commission, or ~~of~~ any permit. ~~the commission or the director shall issue an order to such operator to appear for a hearing before the commission in accordance with section 34-60-108.~~

(b) If the commission finds, after such hearing, that ~~a knowing and willful pattern of violation exists~~ THE OPERATOR IS RESPONSIBLE UNDER THE LEGAL STANDARDS SPECIFIED IN PARAGRAPH (a) OF THIS SUBSECTION (7), it may issue an order ~~which shall prohibit~~ THAT PROHIBITS the issuance of any new permits to ~~such~~ THE operator, suspends any or all of the operator's certificates of clearance, OR BOTH. When ~~such~~ THE operator demonstrates to the satisfaction of the commission that it has brought each of the violations into compliance and that any penalty not subject to judicial review or appeal has been paid, ~~such~~ THE COMMISSION MAY VACATE THE order. ~~denying new permits shall be vacated.~~

SECTION 2. Appropriation. In addition to any other appropriation, there is hereby appropriated, out of any moneys in the oil and gas conservation and environmental response fund created in section 34-60-122 (5), Colorado Revised Statutes, not otherwise appropriated, to the department of natural resources, for the fiscal year beginning July 1, 2014, the sum of $80,425 and 0.9 FTE, or so much thereof as may be necessary, for allocation to the oil and gas conservation commission for the implementation of this act.

SECTION 3. Applicability. This act applies to conduct occurring on or after the effective date of this act.

SECTION 4. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Mark Ferrandino SPEAKER OF THE HOUSE OF REPRESENTATIVES	Morgan Carroll PRESIDENT OF THE SENATE
Marilyn Eddins CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES	Cindi L. Markwell SECRETARY OF THE SENATE

APPROVED_____

John W. Hickenlooper
GOVERNOR OF THE STATE OF COLORADO

Addendum B

(4) In the event an operator fails to comply with a cease and desist order, the Commission may request the attorney general to bring suit pursuant to §34-60-109, C.R.S.

523. PROCEDURE FOR ASSESSING FINES

a. **Fines.** An operator who violates any provision of the Act or any rule, permit, or order issued by the Commission shall be subject to a fine which shall be imposed only by order of the Commission, after hearing, or by an AOC approved by the Commission. All fines shall be calculated using the base fine amount for the particular violation as set forth in the fine schedule in subparagraph c. of this Rule 523. subject to the following:

(1) The Commission may in its discretion find that each day a violation exists constitutes a separate violation; however, no fine for any single violation shall exceed one thousand dollars ($1,000) per day.

(2) All fines shall be subject to adjustment based upon the factors listed in subparagraph d. of this Rule 523.

(3) For a violation which does not result in significant waste of oil and gas resources, damage to correlative rights, or a significant adverse impact on public health, safety or welfare, including the environment or wildlife resources, the maximum penalty for any single violation shall not exceed ten thousand dollars ($10,000) regardless of the number of days of such violation.

(4) Fines for violations for which no base fine is listed shall be determined by the Commission at its discretion subject to subparagraphs (1), (2), and (3) of this Rule 523.a.

b. **Voluntary disclosure.** Any operator who conducts a voluntary self-evaluation as defined in the 100 Series of the rules and makes a voluntary disclosure to the Director of a significant adverse impact on the environment or of a failure to obtain or comply with any necessary permits, shall enjoy a rebuttable presumption against the imposition of a fine for any violation relating to such impact or failure, under the following conditions:

(1) The disclosure is made promptly after the operator learns of the violation as a result of the voluntary self-evaluation;

(2) The operator making the disclosure cooperates with the Director regarding investigation of the issue identified in the disclosure; and

(3) The operator making the disclosure has achieved or commits to achieve compliance within a reasonable time and pursues compliance with due diligence.

The Commission shall deny the presumption against the imposition of fines only if, after hearing, it finds that any of the preceding conditions have not been met, or that the use of this process was engaged in for fraudulent purposes.

c. **Base fine schedule.** The following table sets forth the base fine for violation of the rules listed

RULE NUMBER	BASE FINE
205	$1000
205A	$1000
206	$1000
207	$1000
208	$1000
209	$1000

210	$500

RULE NUMBER	BASE FINE
301	$1000
302	$1000
303	$1000
305	$1000
306	$1000
307	$500
308	$1000
309	$1000
310	$1000
311	$500
312	$500
313	$500
313A	$1000
314A	$500
315	$500
316A	$1000
316B	$1000
317	$1000
317A	$1000
317B	$1000
318	$1000
319	$1000
320	$1000
321	$1000
322	$1000
323	$1000
324	$1000
325	$1000
326	$1000
327	$1000
328	$1000
329	$1000
330	$1000
331	$1000
332	$1000
333	$1000
341	$1000

RULE NUMBER	BASE FINE
401	$1000
403	$1000
404	$1000
405	$500

RULE NUMBER	BASE FINE
602	$1000
603	$1000
604	$1000

606A	$1000
606B	$1000
607	$1000
608	$1000

RULE NUMBER	BASE FINE
703	$1000
704	$1000
705	$1000
706	$1000
707	$1000
708	$1000
709	$1000
711	$1000
712	$1000

RULE NUMBER	BASE FINE
802	$1000
803	$500
804	$500
805	$1000

RULE NUMBER	BASE FINE
901	$1000
902	$1000
903	$1000
904	$1000
905	$1000
906	$1000
907	$1000
908	$1000
909	$1000
910	$1000
911	$1000
912	$1000

RULE NUMBER	BASE FINE
1002	$1000
1003	$1000
1004	$1000

RULE NUMBER	BASE FINE
1101	$1000
1102	$1000
1103	$1000

RULE NUMBER	BASE FINE
1201	$1000
1203	$1000
1204	$1000

1205	$1000

d. **Adjustment.** The fine may be increased (if base fine is less than $1000) or decreased by application of the aggravating and mitigating factors set forth below.

Aggravating factors.

(1) The violation was intentional or reckless.

(2) The violation had a significant negative impact, or threat of significant negative impact, on the environment or on public health, safety, or welfare.

(3) The violation resulted in significant waste of oil and gas resources.

(4) The violation had a significant negative impact on correlative rights of other parties.

(5) The violation resulted in or threatened to result in significant loss or damage to public or private property.

(6) The violation involved recalcitrance or recidivism upon the part of the violator.

(7) The violation involved intentional false reporting or recordkeeping.

(8) The violation resulted in economic benefit to the violator, including the economic benefit associated with noncompliance with the applicable rule, in which case the amount of such benefit may be taken into consideration.

(9) The violation results in significant, avoidable loss of wildlife or wildlife resources, including the ability of the land to produce vegetation supportive of wildlife.

Mitigating factors.

(1) The violator self-reported the violation.

(2) The violator demonstrated prompt, effective and prudent response to the violation, including assistance to any impacted parties.

(3) The violator cooperated with the Commission, or other agencies with respect to the violation.

(4) The cause(s) of the violation was (were) outside of the violator's reasonable control and responsibility, or is (are) customarily considered to be force majeure.

(5) The violator made a good faith effort to comply with applicable requirements prior to the Commission learning of the violation.

(6) The cost of correcting the violation reduced or eliminated any economic benefit to the violator.

(7) The violator has demonstrated a history of compliance with Commission rules, regulations and orders.

e. **Public projects.** In lieu of or in reduction of fine amounts, an AOC may provide for the initiation of or participation in operator projects which are beneficial to public health, safety and welfare,

including the environment and wildlife resources, and the Commission encourages AOCs which so provide.

f. **Payment of fines.** An operator against whom the Commission enters an order to pay a fine must pay the amount due within ~~thirty (30)~~35 days of the effective date of the order, unless the Commission grants a longer period or unless the operator files for judicial appeal, in which event payment of the penalty shall be stayed pending resolution of such appeal. An operator's obligations to comply with the provisions of a Commission order requiring compliance with the Act, a permit condition, or these rules and regulations shall not be stayed pending resolution of an appeal unless the stay is ordered by the court.

524. DETERMINATION OF RESPONSIBLE PARTY

In all cases initiated by the Commission or at the request of the Director, it shall be the burden of the Director to present sufficient evidence to the Commission to determine responsible party status. In all other cases, the applicant shall have the burden to present sufficient evidence to the Commission to determine responsible party status.

a. A hearing may be initiated on the Commission's own motion, upon application, or at the request of the Director to decide responsible party status upon at least ~~twenty (20)~~21 days' notice to the potentially responsible parties.

b. Potentially responsible parties shall be those persons that have or should have submitted Registration for Oil and Gas Operation, Form 1, or that have or should have submitted financial assurance for oil and gas operations pursuant to requirements of the 700-Series Rules.

c. Potentially responsible parties shall provide to the Commission or Director such information as the Commission or Director may reasonably require in making such determination.

d. The Commission shall make the determination under this section without regard to any contractual assignments of liability or other legal defenses between parties.

e. An operator shall enjoy a rebuttable presumption against mitigation liability under §34-60-124(7) C.R.S., for ongoing significant adverse environmental impacts where the violation which led to such impacts was committed by a predecessor operator and where the operator has conducted an environmental investigation, with reasonable due diligence, of the environmental condition of the particular asset or activity and such investigation did not reveal such significant adverse environmental impacts. The failure to report any condition which is causing such impacts, upon subsequent knowledge by the operator, shall negate the rebuttable presumption against mitigation liability.

f. Where multiple persons are determined to be responsible parties, they shall share in the mitigation liability in proportion to their respective shares of production, respective periods of ownership or respective contributions to the problem, or any other factors as may serve the interests of fairness.

g. The determination of responsible party status and mitigation liability shall require a showing that the responsible party conducted operations that have resulted in or have threatened to cause a significant adverse environmental impact to any air, water, soil or biological resource based on the conduct of oil or gas operations in contravention of any then applicable historic provisions of the Act or rules, whether or not the Commission has entered an order finding violation.

525. PERMIT-RELATED PENALTIES

Addendum C

604. SETBACK AND MITIGATION MEASURES FOR OIL AND GAS FACILITIES, DRILLING, AND WELL SERVICING OPERATIONS

604.c. **Mitigation Measures.** The following requirements apply to an Oil and Gas Location within a Designated Setback Location and such requirements shall be incorporated into the Form 2A or associated Form 2 as Conditions of Approval.

(2) **Location Specific Requirements – Designated Setback Locations.** Subject to Rule 502.b., the following mitigation measures shall apply to any Well or Production Facility proposed to be located within a Designated Setback Location for which a Form 2, Application for Permit—to-Drill or Form 2A, Oil and Gas Location Assessment, is submitted on or after August 1, 2013:

G. **Berm construction.** Berms or other secondary containment devices in Designated Setback Locations shall be constructed around crude oil, condensate, and produced water storage tanks and shall enclose an area sufficient to contain and provide secondary containment for one-hundred fifty percent (150%) of the largest single tank. Berms or other secondary containment devices shall be sufficiently impervious to contain any spilled or released material. All berms and containment devices shall be inspected at regular intervals and maintained in good condition. No potential ignition sources shall be installed inside the secondary containment area unless the containment area encloses a fired vessel. Refer to API Bulletin D16: Suggested Procedure for Development of a Spill Prevention Control and Countermeasure Plan

605. OIL AND GAS FACILITIES.

a. **Crude Oil and Condensate Tanks.**

(1) Atmospheric tanks used for crude oil storage shall be built in accordance with the following standards as applicable. Only those editions of standards cited within this rule shall apply to this rule; later amendments do not apply. The material cited in this rule is available for public inspection during normal business hours from the Public Room Administrator at the office of the Commission, 1120 Lincoln Street, Suite 801, Denver, Colorado 80203. In addition, these materials may be examined at any state publication depository library.

A. Underwriters Laboratories, Inc., No. UL-142, "Standard for Steel above ground Tanks for Flammable and Combustible Liquids," 9th Edition (December 28, 2006);

B. API Standard No. 650, "Welded Steel Tanks for Oil Storage," 12th Edition (March 2013);

C. API Standard No. 12B, "Bolted Tanks for Storage of Production Liquids," 15th Edition (October 2008);

D. API Standard No. 12D, "Field Welded Tanks for Storage of Production Liquids," 11th Edition (October 2008); or

E. API No. 12F, "Shop Welded Tanks for Storage of Production Liquids," 12th Edition (October 2008).

(4) Berms or other secondary containment devices shall be constructed around crude oil, condensate, and produced water tanks to provide secondary containment for the largest single tank and sufficient freeboard to contain precipitation. A synthetic or engineered liner shall be placed directly beneath each above-ground tank. Berms and secondary containment devices and all containment areas shall be sufficiently impervious to contain any spilled or released material. Berms and secondary containment devices shall be inspected at regular intervals and maintained in good condition. No potential ignition sources shall be installed inside the secondary containment area unless the containment area encloses a fired vessel. Any electrical equipment installations inside the bermed area shall comply with API RP 500: Recommended Practice for Classification of Locations for Electrical Installations at Petroleum Facilities classified as Class I, Division I and Division 2, 3rd Edition (December 2012) and the current national electrical code as adopted by the State of Colorado.

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY

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Dan L. Cartin

DEPUTY DIRECTOR
Sharon L. Eubanks

REVISOR OF STATUTES
Jennifer G. Gilroy

ASSISTANT DIRECTORS
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

PUBLICATIONS COORDINATOR
Kathy Zambrano

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045 FACSIMILE: 303-866-4157
E-MAIL: OLLS.GA@STATE.CO.US

MANAGING SENIOR ATTORNEYS
Jeremiah B. Barry
Christine B. Chase
Michael J. Dohr
Gregg W. Fraser
Duane H. Gall
Jason Gelender
Robert S. Lackner
Thomas Morris

SENIOR ATTORNEYS
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Esther van Mourik

SENIOR ATTORNEY FOR ANNOTATIONS
Michele D. Brown

STAFF ATTORNEY
Jennifer A. Berman
Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Jennifer Berman, Office of Legislative Legal Services

DATE: December 10, 2014

SUBJECT: Rules of the Parks and Wildlife Commission, Department of Natural Resources, concerning river outfitters, 2 CCR 405-3 (LLS Docket No. 140533; SOS Tracking No. 2014-00757).[1]

Summary of Problem Identified and Recommendation

Section 42-4-235 (4) (a), C.R.S., requires the Chief of the Colorado State Patrol (Chief) to adopt rules for the operation of all commercial vehicles, including rules governing financial responsibility and insurance. But Rule # 300 5. b. (attached as **Addendum A**) adopted by the Parks and Wildlife Commission (Commission) imposes reduced insurance requirements for commercial vehicles operated by river outfitters. While the Chief, through Rule V. A., 8 CCR 1507-1, (attached as **Addendum B**), requires commercial vehicle operators to obtain $1.5 million in motor vehicle liability coverage for commercial vehicles with a seating capacity of 15 passengers or fewer and $5 million for commercial vehicles with a seating capacity of 16 passengers or more, the Commission, through Rule # 300 5. b., requires river outfitter commercial vehicle operators to obtain only $1 million in motor vehicle liability coverage for commercial vehicles

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2015, unless the General Assembly acts by bill to postpone such expiration.

with a seating capacity of 15 passengers or fewer and only $1.5 million for commercial vehicles with a seating capacity of 16 passengers or more.

Because the General Assembly vested the authority to adopt rules concerning commercial vehicle insurance requirements with the Chief, the Commission lacks statutory authority to promulgate rules concerning commercial vehicle insurance requirements. **We therefore recommend that Rule # 300 5. b. of the rules of the Commission concerning commercial vehicle insurance requirements for river outfitters not be extended.**

Analysis

I. The Chief has the authority to adopt rules concerning insurance requirements for commercial vehicles operated by river outfitters.

Section 42-4-235, C.R.S., concerns minimum standards for commercial vehicles. A "commercial vehicle" is defined in statute in pertinent part as:

> **42-4-235. Minimum standards for commercial vehicles – motor carrier safety fund – created - definition – rules.** (1) (a) (I) Any self-propelled or towed vehicle bearing an apportioned plate or having a manufacturer's gross vehicle weight rating or gross combination rating of ten thousand one pounds or more, which vehicle is used in commerce on the public highways of this state or is designed to transport sixteen or more passengers, including the driver ....

Section 42-4-235 (4) (a), C.R.S., provides that the "chief of the Colorado state patrol **shall** adopt rules for the operation of **all** commercial vehicles." **(emphasis added)** Paragraph (a) further provides that, in adopting the rules, the Chief "shall use as general guidelines the standards contained in the current rules and regulations of the United States department of transportation relating to ... insurance...." Therefore, the General Assembly explicitly granted the Chief the authority to adopt rules concerning insurance requirements for the operation of commercial vehicles.

In Rule V. A., the Chief set the minimum levels of insurance required for the operation of commercial vehicles at $1.5 million for vehicles with a seating capacity of 15 passengers or fewer and $5 million for vehicles with a seating capacity of 16 passengers or more. These amounts are in accordance with the minimum levels of insurance required by the federal Motor Carrier Safety Administration of the Department of Transportation in 49 CFR 387.33. (attached as **Addendum C**)

The rules promulgated by the Chief are generally applicable to all operators of commercial vehicles; however, there are two statutory exemptions set forth in section 42-4-235, C.R.S., neither of which applies to river outfitters operating commercial vehicles. The first statutory exemption is for commercial vehicles operated for certain agricultural purposes under section 42-4-235 (2) (b) (IV) (A), C.R.S. The second statutory exemption provides that the Chief's "rules regarding financial responsibility and insurance do not apply to a commercial vehicle ... that is also subject to regulation by the public utilities commission under article 10.1 of title 40, C.R.S." *See* section 42-4-235 (4) (a), C.R.S. Commercial vehicles operated by river outfitters for the purpose of transporting passengers and equipment for river-running activities do not fit under either exemption set forth in section 42-4-235, C.R.S. Had the General Assembly intended a similar exemption for river outfitters, it could have so provided in section 42-4-235, C.R.S. *See Specialty Rests. Corp. v. Nelson*, 231 P.2d 393, 397 (Colo. 2010) ("[T]he General Assembly's failure to include particular language [in a statute] is a statement of legislative intent.").

II. The Commission lacks any authority to adopt rules concerning insurance requirements for commercial vehicles operated by river outfitters.

The Commission has general authority to promulgate rules "to govern the licensing of river outfitters, to regulate river outfitters, guides, trip leaders, and guide instructors, to ensure the safety of associated river-running activities, and to establish guidelines" concerning determinations about hazardous river conditions. *See* section 33-32-103, C.R.S. The Commission does not, however, have statutory authority to adopt commercial vehicle insurance requirements for river outfitters because the General Assembly vested that authority solely with the Chief.

Article 32 of title 33, C.R.S., which concerns the Commission's authority over river outfitters, makes no mention of the Commission having specific rule-making authority concerning insurance requirements for the operation of a commercial vehicle. The only mention of rule-making authority concerning insurance requirements in article 32 of title 33 is in section 33-32-105 (1) (b), C.R.S., which requires a river outfitter to "submit to the commission evidence of liability insurance in the minimum amount of three hundred thousand dollars combined single limit for property damage and bodily injury." The Commission's own rules make clear that this language does not apply to motor vehicle insurance, but rather to

commercial exposure resulting from a river outfitter's use or operation of a vessel.[2]

To the extent that the Commission would argue that its authority prevails over the Chief's authority because the Chief's authority is more general in nature in that it applies to all commercial vehicle operators and that the Commission's authority more narrowly applies to river outfitters, the Commission's argument fails on two grounds. First, a specific provision in statute only "prevails" over a general provision if there is an irreconcilable conflict between the two statutes. Section 2-4-205, C.R.S., provides that: "If a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both." Here, there is no conflict between the statute granting the Commission rule-making authority over river outfitters and the statute granting the Chief rule-making authority over the operation of commercial vehicles.[3]

Second, even assuming that the statutes irreconcilably conflict, section 42-4-235, C.R.S., would still prevail. Under section 2-4-205, C.R.S.: "If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, **unless the general provision is the later adoption and the manifest intent is that the general provision prevail." (emphasis added)**

Here, the most recent substantive amendments to article 32 of title 33, C.R.S., were enacted in 2010 as part of the sunset review of river outfitters. *See* H.B. 10-1221, enacted in 2010. The most recent substantive amendments to section 42-4-235 (4), C.R.S., were enacted in 2011 and concerned the exemption pertaining to commercial vehicles subject to regulation by the public utilities commission. *See* H.B. 11-1198, enacted in 2011. Therefore, section 42-4-235, C.R.S., as amended, is the later adoption. And it is clear from the language of section 42-4-235, C.R.S., as amended, that the manifest intent is that the provision should prevail with respect to any other statutes concerning commercial vehicles. Had there not been a manifest intent to have section 42-4-235, C.R.S., prevail, then there would have been no need to carve out statutory exemptions to the Chief's rule-making authority concerning commercial vehicles.

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[2] "Vessel" is defined in section 33-32-102 (8), C.R.S., as "every description of a watercraft used or capable of being used as a means of transportation of persons and property on the water, other than single-chambered, air-inflated devices or seaplanes."

[3] The fact that the Commission has promulgated a rule that conflicts with the Chief's rule V. A. does not change this analysis; it is whether there is a conflict between the statutes authorizing their rule-making authority that is the relevant inquiry.

Finally, to the extent that the Commission would argue that it has concurrent jurisdiction with the Chief to adopt rules concerning insurance requirements for commercial vehicles operated by river outfitters, that argument is flawed. Concurrent jurisdiction should not be presumed if it is not expressly provided for in statute because such presumption would lead to agency rules that irreconcilably conflict with each other as does the Commission's Rule # 300 5. b. and the Chief's Rule V. A.

The General Assembly has expressly provided for concurrent jurisdiction between two or more agencies in other statutes. For example, section 13-65-102 (5) (b), C.R.S., "[t]he attorney general and the district attorney of the judicial district in which the case originated shall each have a separate and concurrent authority to intervene as parties to a petition." Finally, section 35-50-122, C.R.S. provides that "[n]othing in this article diminishes or supersedes the concurrent jurisdiction or the authorities of the parks and wildlife commission or the agriculture commission to regulate captive wildlife and alternative livestock." Had the General Assembly intended concurrent jurisdiction between the Commission and the Chief, it could have so provided in statute. *See Specialty Rests. Corp.*, 231 P.2d at 397 ("[T]he General Assembly's failure to include particular language [in a statute] is a statement of legislative intent.").

Conclusion

The Chief has the authority to adopt rules concerning insurance requirements for all commercial vehicles. While narrow exceptions to the Chief's authority have been expressly carved out in section 42-4-235, C.R.S., the Commission's Rule # 300 5. b. concerning insurance requirements for commercial vehicles operated by river outfitters does not meet either of those narrow exceptions. Consequently, the Commission lacked the statutory authority to adopt Rule # 300 5. b.

We therefore recommend that Rule # 300 5. b. of the rules of the Commission concerning insurance requirements for commercial vehicles operated by river outfitters not be extended.

Addendum A

DEPARTMENT OF NATURAL RESOURCES

Colorado Parks and Wildlife

CHAPTER P-3 - RIVER OUTFITTERS

2 CCR 405-3

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

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300 - LICENSE APPLICATION AND ISSUANCE

1. An individual, sole proprietorship, partnership, corporation, nonprofit corporation or organization as defined in section 13-21-115.5 (3), C.R.S., limited liability company, firm, association, or other legal entity either located within or outside of this state may apply for a river outfitter license. The application shall bear notice to the effect that any false statements made therein are punishable by law. All application signatures shall be made under oath that all information furnished is true and correct. The position held by the individual who signs the application shall be stated on the application. All applications submitted shall bear an original signature.

    a. If the applicant is a partnership, any general partner may sign the application.

    b. Any unincorporated legal entity, other than a partnership, consisting of more than one individual shall designate one of its members to sign and submit an application.

    c. If the applicant is a corporation, the president or other authorized executive officer of the corporation shall sign the application and the secretary of the corporation shall attest the signature.

2. A corporation shall be incorporated pursuant to the laws of this state or shall be duly qualified to do business in this state. To be duly qualified to do business in this state, an out-of-state corporation that transacts business in the State of Colorado must show evidence that it has procured a current and valid certificate of authority from the Colorado Department of State. A copy of a current and valid certificate of authority shall be submitted with the license application.

3. No person shall outfit under a business name until the licensee has notified the division of the business name. Such notice must be submitted in writing at least ten business days prior to soliciting for or providing river outfitting services under the business name.

4. Any licensee using a d/b/a (doing business as) must list any and all d/b/a's. Should new d/b/a's be formed, the licensee must notify the division, in writing, within ten days of the action.

5.

a. A copy of a current and valid certificate of liability insurance shall be submitted with the license application. A certificate of insurance shall be accepted by the division as evidence that the applicant has qualifying liability insurance if the certificate states:

(1) That the type of insurance is "CGL", meaning either "comprehensive general liability" or "commercial general liability" business insurance; or that the type of insurance is "watercraft liability". As used herein, "watercraft liability" policy means liability insurance covering commercial exposure for property damage and personal injury which may result from a river outfitter's use or operation of vessels, including shore-side activities such as passenger loading and unloading. Such liability insurance shall provide coverage for all vessels used by the insured for commercial purpose, to include newly acquired vessels and vessels borrowed from other persons for the insured's use.

(2) A minimum amount of coverage of three hundred thousand dollars combined single limit per occurrence for any combination of property damage, death, and bodily injury;

(3) That the insured's name and address stated on the certificate of insurance is the same as the primary business name used by the applicant on the license application;

(4) The name, address, and phone number of the issuing insurance agent;

(5) A policy number;

(6) The beginning and ending dates of coverage and is currently in effect;

(7) That the division is a certificate holder;

(8) That the division will be given at least forty-five days written notice by certified mail prior to any modification, termination, or cancellation of the policy;

(9) That every insurance company affording coverage is listed with an indication as to which company or companies is/are providing which insurance; and

(10) That every insurance company affording coverage is licensed in the State of Colorado, or is currently listed on the approved surplus lines listing for Colorado and is offering coverage in compliance with the requirements of the Colorado Surplus Lines Insurance Act, Article 5 for Title 10, C.R.S., or is a risk retention group qualified under the Federal" Liability Risk Retention Act of 1986", 15 U.S.C., Sections 3901 Et Seq., as amended in 1986. If coverage is provided by a purchasing group qualified under the Federal "Liability Risk Retention Act of 1986", then the name and address of the group must be identified on the certificate.

b. A copy of a current and valid certificate of motor-vehicle liability insurance shall be submitted, prior to undertaking any licensed activity for a season, covering all "Commercial Vehicles" used in connection with the licensed activity. A certificate demonstrating motor vehicle liability insurance covering vehicles used in the licensed river outfitting activities shall be accepted by the division as evidence that the applicant has qualifying insurance if the certificate states:

(1) That the type of insurance is commercial motor vehicle liability insurance. Motor vehicle liability means liability for bodily injury and property damage.

(2) A minimum amount of coverage of one million five hundred thousand dollars combined single limit liability coverage for commercial vehicles with a seating capacity of 16 or more including the driver. A minimum amount of coverage of one million dollars combined single limit liability coverage for commercial vehicles with a seating capacity of 15 or less.

(3) That the insured's name and address stated on the certificate of insurance is the same as the primary business name used by the applicant on the license application;

(4) The name, address, and phone number of the issuing insurance agent;

(5) A policy number;

(6) The beginning and ending dates of coverage and is currently in effect;

(7) That the division is a certificate holder;

(8) That the division will be given at least thirty-five days written notice by certified mail prior to any modification, termination, or cancellation of the policy;

(9) That every insurance company affording coverage is listed with an indication as to which company or companies is/are providing which insurance; and

(10) That every insurance company affording coverage is licensed in the State of Colorado, or is currently listed on the approved surplus lines listing for Colorado and is offering coverage in compliance with the requirements of the Colorado Surplus Lines Insurance Act, Article 5 for Title 10, C.R.S.

c. The liability insurance policies shall insure the river outfitter against all claims occasioned by acts or omissions of the outfitter in carrying out the activities and operations authorized by the license.

d. The qualifying liability insurance policies shall be maintained so as to continue in full force and effect for the duration of time that the river outfitter is licensed. If any claims reduce the remaining annual aggregate amount below the required minimums, which must be written on an occurrence basis, then the licensee must purchase additional insurance such that a minimum amount of coverage is continued in full force and effect for the duration of time that the river outfitter is licensed. Any expiration, termination, or cancellation of the required policy or, if an annual aggregate amount is a condition of the coverage, any claims that reduce the amount of coverage below the required minimums shall cause the license to become invalid. The licensee shall ensure that current and valid certificates of insurance are on file with the division at all times.

Addendum B

DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE PATROL

RULES AND REGULATIONS
CONCERNING
MINIMUM STANDARDS FOR THE OPERATION
OF COMMERCIAL VEHICLES

AUTHORITY TO ADOPT STANDARDS AND SPECIFICATIONS

The Chief of the Colorado State Patrol (CSP) is authorized by the provisions of §42-4-235(4)(a), C.R.S., to adopt rules and regulations for safety standards and specifications for the operation of all commercial vehicles in Colorado, both in interstate and intrastate transportation.

I. APPLICABILITY

A. These rules and regulations shall apply to individuals, corporations, Colorado government or governmental subdivisions or agencies, or other legal entities who operate commercial vehicles as defined in §42-4-235(1)(a), C.R.S.

1. In addition to this rule, anyone who transports hazardous materials as defined in 49 CFR 171.8 §42-20-103(3), C.R.S. and/or nuclear materials as defined in §42-20-402(3)(a)(b)(c), C.R.S., shall comply with the CSP Rules and Regulations Concerning the Permitting, Routing, and Safe Transportation of Hazardous and Nuclear Materials and the Intrastate Transportation of Agricultural Products in the State of Colorado found in 8 CCR 1507-25.

2. The CSP Motor Carrier Safety Section (MCSS) may consider and grant requests for temporary variance from the rules in 8 CCR 1507-1 for intrastate commercial motor carriers only, provided the variance is not in violation of §42-4-235, C.R.S.

3. The CSP MCSS may grant variances/waivers to drivers unable to satisfy the requirements of 49 CFR 391, Subpart E. Individual applications requesting a variance/waiver of specific requirements may be approved when the approval of the variance/waiver is based upon sound medical judgment combined with appropriate performance standards ensuring no adverse affect on safety.

II. GENERAL DEFINITIONS

A. Definitions relevant to these rules are found in Title 49 of the Code of Federal Regulations (CFR). These definitions are amended, where necessary, to conform to

the Colorado Revised Statutes (CRS). Those definitions controlled by the CRS that are applicable to these rules are referenced below:

1. Commercial Vehicle: The definition of commercial vehicle will be as it is set forth in §42-4-235 (1)(A), CRS.

2. Enforcement Official: The definition of enforcement official will be as it is set forth in §§ 16-2.5-101, 16-2.5-114, 16-2.5-115, and 16-2.5-143 and also as set forth in 42-20-103(2), CRS.

3. Motor Carrier: The definition of motor carrier will be as it is set forth in §42-4-235 (C), CRS.

III. AUTHORITY TO INSPECT VEHICLES, DRIVERS, CARGO, BOOKS AND RECORDS

A. Enforcement officials, who are authorized to perform motor vehicle safety inspections on commercial motor vehicles and drivers, shall be required to meet the inspector qualifications set forth in §42-4-235(4), C.R.S., while performing a Level I North American Standard Safety Inspection. All enforcement officials performing Level I-VI North American Standard Safety Inspections must maintain certification requirements prescribed in the Commercial Vehicle Safety Alliance (CVSA) Operations Manual.

B. Authorized enforcement officials shall at all times have the authority to inspect commercial vehicles, commercial vehicle drivers, cargo, and any required documents, set forth in 49 CFR, Subchapter B, Parts, 387, 390, 391, 392, 393, 395, 396 and 399 CFR, as revised October 1, 2013.

C. CSP Enforcement officials who are certified by the Federal Motor Carrier Safety Administration (FMCSA) (49 CFR 385, Subpart C) to perform compliance reviews and safety audits shall have the authority to enter the facilities of and inspect any motor carrier, as defined in §42-4-235, C.R.S., and any required records and supporting documents, set forth in 49 CFR, Subchapter B, Parts 40, 380, 382, 385, 387, 390, 391, 392, 393, 395, 396 and 399, and Appendix G, CFR, as revised October 1, 2013.

IV. INSPECTIONS STANDARDS AND REPORTS

A. Through a Memorandum of Understanding with the CVSA, the CSP adopts the standards and procedures established for the inspection of commercial vehicles, collectively known as the North American Uniform Driver/Vehicle Inspection.

Addendum B

B. Authorized enforcement officials performing safety inspections on commercial vehicles, drivers, and cargo shall use as general guidelines the levels, methods of inspections and Out-of-Service criteria, found in the CVSA bylaws, as revised April 1, 2014

C. Authorized enforcement officials shall, on completion of each inspection, prepare a report which at minimum fully identifies the inspector, the inspector's agency, the carrier's name and address, the date and time of the inspection, the location of the inspection, the vehicle, the driver, the defects found, if any, and the disposition of the vehicle. A copy of the inspection report shall be given to the driver or motor carrier.

V. REGULATIONS

A. All intrastate and interstate motor carriers, commercial vehicles and drivers thereof operating within the state of Colorado shall operate in compliance with the safety regulations contained in:

49 CFR 40	Procedures for Transportation Workplace Drug and Alcohol Testing Programs
49 CFR 380	Special Training Requirements
49 CFR 382	Controlled Substances and Alcohol Use and Testing
49 CFR 385 Subparts C & D	Safety Fitness Procedures
49 CFR 387	**Minimum Levels of Financial Responsibility for Motor Carriers (emphasis added)**
49 CFR 390	General
49 CFR 391	Qualifications of Drivers and Longer Combination Vehicle (LCV) Driver Instructors
49 CFR 392	Driving of Commercial Motor Vehicles
49 CFR 393	Parts & Accessories Necessary for Safe Operation
49 CFR 395	Hours of Service of Drivers
49 CFR 396	Inspection, Repair, and Maintenance
49 CFR 399	Employee Safety and Health Standards
49 CFR Appendix G:	Minimum Periodic Inspection Standards

of the United States Department of Transportation's Motor Carrier Safety Regulations as the same were in effect on October 1, 2013 and published in Title 49 of the Code of Federal Regulations, subtitle B chapter III, Parts 200 through 399, with references therein, with the following modifications:

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

2. 49 CFR 380.509(a) shall be amended to read: "Each employer must ensure each entry level driver, who first begins operating a commercial motor vehicle

Addendum C

ELECTRONIC CODE OF FEDERAL REGULATIONS

e-CFR Data is current as of December 9, 2014

Title 49 → Subtitle B → Chapter III → Subchapter B → Part 387 → Subpart B → §387.33

Title 49: Transportation
PART 387—MINIMUM LEVELS OF FINANCIAL RESPONSIBILITY FOR MOTOR CARRIERS
Subpart B—Motor Carriers of Passengers

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§387.33 Financial responsibility, minimum levels.

Link to an amendment published at 78 FR 52651, Aug. 23, 2013.

The minimum levels of financial responsibility referred to in §387.31 of this subpart are hereby prescribed as follows:

SCHEDULE OF LIMITS

Public Liability

For-hire motor carriers of passengers operating in interstate or foreign commerce.

Vehicle seating capacity	Effective dates	
	Nov. 19, 1983	Nov. 19, 1985
(1) Any vehicle with a seating capacity of 16 passengers or more	$2,500,000	$5,000,000
(2) Any vehicle with a seating capacity of 15 passengers or less[1]	750,000	1,500,000

[1]Except as provided in §387.27(b).

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ASSISTANT DIRECTORS
Deborah F. Haskins
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PUBLICATIONS COORDINATOR
Kathy Zambrano

STATE CAPITOL BUILDING, ROOM 091
200 EAST COLFAX AVENUE
DENVER, COLORADO 80203-1782

TELEPHONE: 303-866-2045 FACSIMILE: 303-866-4157
E-MAIL: OLLS.GA@STATE.CO.US

MANAGING SENIOR ATTORNEYS
Jeremiah B. Barry
Christine B. Chase
Michael J. Dohr
Gregg W. Fraser
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STAFF ATTORNEY
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Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Jery Payne, Office of Legislative Legal Services

DATE: December 12, 2014

SUBJECT: Rules of the Division of Motor Vehicles, Department of Revenue, Rule 8 – Driver testing and education program rules and regulations, 1 CCR 204–30 (LLS Docket No. 140296; SOS Tracking No. 2013-01120).[1]

Summary of Problems Identified and Recommendations

The General Assembly repealed the statutes that authorize the Division of Motor Vehicles (Division) to promulgate rules licensing commercial driving schools or commercial driving instructors. But the following rules continue to regulate commercial driving schools as if these schools were licensed under the repealed statutes:

- Rule 8 (200) g), requiring general liability insurance;
- Rule 8 (200) h), requiring a surety bond of $10,000;
- Rule 8 (200) j), forbidding substantially similar names;

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[1] Under section 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under section 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2015, unless the General Assembly acts by bill to postpone such expiration.

- Rule 8 (300) d), requiring instructors to be physically able to operate a motor vehicle and train others;
- Rule 8 (300) e), requiring school employees to have a background check;
- Rule 8 (300) f), authorizing the department to deny certification if an employee had been convicted of a felony;
- Rule 8 (300) h), prohibiting driving instructors from having eight or more points assessed against their driver's license in the last three years;
- Rule 8 (300) l), requiring the school to notify the department when an employee changes driving status or departs;
- Rule 8 (400), establishing a code of conduct; and
- Rule 8 (900) e), allowing the department to revoke certification for fraudulent or criminal activity by a school employee.

We therefore recommend that Rule 8 (200) g), (200) h), (200) j), (300) d), (300) e), (300) f), (300) h), (300) l), (400) a), and (900) e) of the Division of Motor Vehicles concerning the driver's testing and education program not be extended.

Analysis

I. The legislature repealed the statutes requiring commercial driving schools to be regulated.

During the 1991 session, the General Assembly passed H.B. 91-1078. The bill amended section 12-15-121, C.R.S., to read:

> **12-15-121. Repeal – review of functions.** Sections 12-15-102 to 12-15-113, 12-15-115, and 12-15-117 to 12-15-119 are repealed, effective July 1, 1994. Prior to such repeal, the licensing functions of the department shall be reviewed as provided for in section 24-34-104, C.R.S.

This repeal ended the Division's authority to license driving schools and instructors, including these specific powers:

- Section 12-15-102, C.R.S.—the power to require licenses;
- Section 12-15-103, C.R.S., and 12-15-119, C.R.S.—the power to enforce a requirement that a school have general liability insurance;
- Section 12-15-104, C.R.S.—the power to set qualifications for a driving school;

- Section 12-15-105, C.R.S.—the power to license driving schools;
- Section 12-15-107, C.R.S.—the power to license instructors;
- Section 12-15-108, C.R.S.—the power to set qualifications for driving instructors;
- Section 12-15-110, C.R.S.—the power to examine driving instructors, including the ability to drive a motor vehicle safely and to train drivers; and
- Section 12-15-117, C.R.S.—the power to discipline driving schools and instructors for fraudulent, unethical, or illegal acts.[2]

(The current statutes are shown in **Addendum A** and indicate the repealed statutes.)

The repeal did not take effect immediately. Instead, H.B. 91-1078 required the Department of Regulatory Agencies to do a sunset review two years after the bill became effective. Typically sunset reviews are scheduled for much longer—often ten years or more. The General Assembly intended that these licensure statutes be reexamined soon with an eye towards repeal.

In accordance with section 12-15-121, C.R.S., the Department of Regulatory Agencies issued a sunset report, which is titled, "Regulation of Commercial Driving Schools and Instructors." (See **Addendum B**) The report recommended that the licensing of driving schools be allowed to terminate. It explained that licensing is not needed because "There have been no disciplinary actions against licensees, insignificant failure rates on examinations, and no complaints from consumers against either commercial diving schools or their instructors."[3] The report also says "The marketplace and consumer of the 1990's are adequate watchdogs of this industry,"[4] and "If a school operates unsafe vehicles, the company exposes itself to enormous risk, and financial and criminal liability."[5] The report's authors concluded that general-purpose state laws and market forces adequately regulate the industry. In accordance with the sunset report, the General Assembly did not extend the program; it was allowed to repeal.

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[2] Article 15 of title 12, C.R.S., as it existed in 1991 before the repeal.

[3] See page 7 of **Addendum B**.

[4] See page 11 of **Addendum B**.

[5] See page 7 of **Addendum B**.

The Division of Motor vehicles, therefore, no longer has the authority to impose the requirements like the ones repealed by H.B. 91-1078.

II. The department's authority to regulate driving schools covers only curriculum, equipment, records, and contracts.

Section 12-15-116, C.R.S., gives the Division its remaining statutory rule-making authority to regulate driving schools:

> **12-15-116. Rules and regulations.** (1) The department[6] is authorized to promulgate such rules and regulations necessary to carry out the provisions of this article.
>
> (2) **Specifically**, the department shall have power to adopt rules and regulations upon the following matters:
>
> (a) Prescribe the content of courses of instruction;
>
> (b) Prescribe the type of equipment to be used in said courses of instruction;
>
> (c) Prescribe records to be kept by a commercial driving school;
>
> (d) Prescribe the form of contracts and agreements used by commercial driving schools.
>
> (3) **In adopting such rules and regulations** the department shall use the guidelines concerning commercial driving schools promulgated by the United States department of transportation. **(emphasis added)**

It might be argued that section 12-15-116 (3), C.R.S., (the guidelines provision) gives the Division authority to regulate driving schools beyond those powers listed in subsection (2) (the specific-powers provision) of this section. But a careful reading of the language of the guidelines provision refutes this notion. The language specifically begins with "In adopting such rules…." This phrase ties the guideline requirement to the specific powers. It acts as a limitation on the specific powers granted in subsection (2).

Not only does the statute's language make the specific-powers provision a limitation, but the sunset report shows that the repeal was intended to end direct oversight by the agency. In H.B. 91-1078, the General Assembly made a decision that these rules flout.

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[6] This section addresses the Department of Revenue. The department oversees driving schools through the Division of Motor Vehicles.

III. The rules lump different classes of schools together.

There are two classes of driving schools: Some driving schools merely teach driving, and some driving schools also administer driving tests. If a school merely teaches driving skills, it falls under the authority granted by article 15 of title 12, C.R.S. But if a school desires to conduct driver's license tests, the school also falls under the authority granted in section 42-2-111 (1) (b), C.R.S:

> **42-2-111. Examination of applicants and drivers - when required.** (1) (b) **The department**, in issuing the drivers' licenses for certain types or general classes of vehicles, ... **may certify** certain employers, governmental agencies, or other **appropriate organizations to train and examine all applicants for** such certain types or general classes of **licenses**, if such training and examination is equal to the training and examination of the department. **(emphasis added)**

Many of these rules do not exceed the Division's authority to regulate the entities that administer the written and driving tests necessary to get a driving permit or license. Unfortunately, these rules lump all driving schools together with those that administer the tests. For example, the old rule required bonding only if the school did testing: "The Approved Commercial Driving School/Course Provider offering the BOST test will maintain a Performance Bond for $2,500 with the Department."[7] In this old rule, "BOST" stands for "Basic Operators Skills Test. The old rule was careful to require only testing schools to post a bond. But the recodified version of this rule applies the bond to *all* commercial schools. Many of these rules may be promulgated if they apply only to testing schools.

Unfortunately, the rules fail to make this distinction, so the Division is imposing these rules on all driving schools even if a school does not choose to offer testing. The department needs to be clear about which requirements apply only to testing schools.

IV. The Division regulates all driving schools as if the repeal never occurred.

Despite the deregulation of driving schools, the Division continues to maintain and impose rules that reflect repealed statutes. It appears that

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[7] See 1 CCR 204-3 D. 8.) as it existed in 2013 before the new rule was promulgated.

the Division never fully complied with the change in statutes. On April 29, 2014, the Division repromulgated these rules as Rule 8 and relocated these rules from 1 CCR 204-3 to 1 CCR 204-30. This is why the rules are before us over twenty years after the statutes were repealed.

Many of these rules actually contain the same basic duties from the repealed statutes. For example, the General Assembly repealed the statutes, sections 12-15-103 and 12-15-119, C.R.S., requiring general liability insurance. But the rules require all driving schools to have general liability insurance. It's as if the repeal never happened. The rules continue to impose these types of requirements even though they are similar to the statutes repealed by the General Assembly.

A. Rule 8 (200) g) requires general liability insurance.

Before they were repealed, sections 12-15-103 and 12-15-119, C.R.S., required a driving school to have general liability insurance. The General Assembly intended that driving schools would no longer need to have this type of insurance.[8] So after the General Assembly repealed these statutes, the rules should not include that basic requirement. But Rule 8 (200) g) requires driving schools to have general liability insurance:

> g) **Insurance:** All CDS[9] must have: proof of current and valid vehicle insurance, vehicle registration, general liability insurance, surety bond, and worker's compensation insurance on file with the Department at all times.
>
> 1. The Department must be listed on the general liability and vehicle insurance policies as a secondary insured.
> 2. It is the CDS owner's responsibility to ensure that the insurance company sends the required information to the Department.
> 3. Failure to provide updated insurance and registration information to the Department within 30 days of expiration is grounds for

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[8] This does not affect a driving school's obligation, under section 42-4-1409, C.R.S., to have its vehicles insured in the same manner as any other driver.

[9] A "CDS" is defined by rule 8 100 (h) as "Any business or any person who, for compensation, provides or offers to provide instruction in the operation of a motor vehicle, and is certified by the Driver Testing Education Section of the Motor Vehicle Division. The aforementioned does not include secondary schools and institutions of higher education offering programs approved by the Department of Education and/or private occupational schools offering programs approved by the private occupational school division." See 1 CCR 204–30.

suspension, and such suspension may be in effect until current insurance and/or registration is received.

4. A CDS is required to provide an inventory of all vehicles used for testing/training, and proof of second brake installation to the Department. Changes to vehicle inventory shall be reported, in writing, to the Department within 30 days of the change.

The Division lacks the statutory authority to impose these requirements because the General Assembly repealed sections 12-15-103 and 12-15-119, C.R.S. And insurance is not one of the four subjects—curriculum, equipment, records, and contracts—that the Division still has authority to regulate.

B. Rule 8 (200) h) requires a surety bond of $10,000.

As mentioned, the insurance requirements for these schools were repealed. Another way to guarantee payment of debts is through a surety bond. Frequently, surety bonds are issued as a type of insurance policy payable to the creditors; they frequently are insurance. Bonds serve much the same purpose as insurance.

Rule 8 (200) h) requires all driving schools to have surety bonds:

h) **Bond:** All CDS's shall maintain a surety bond, executed by a surety company authorized to do business in Colorado, in the amount of $10,000 with the Department.

1. The bond shall be for the use and benefit of the Department in the event of a monetary loss within the limitations of the bond attributable to the willful, intentional, or negligent conduct of the CDS, or its agents or employees.
2. The bond may be used to indemnify against loss or damage arising out of the CDS's breach of contract between the CDS and the student.
3. If the amount of the bond is decreased or terminated, or if there is a final judgment outstanding on the bond, the CDS's certification shall be suspended. The suspension shall continue until satisfactory steps are taken to restore the original amount of the bond.
4. The Department shall be named as the beneficiary on the bond.

The Division lacks the statutory authority to impose these requirements because the General Assembly repealed sections 12-15-103 and 12-15-119. And a surety bond is not included in one of the four subjects the Division may regulate.

C. Rule 8 (200) j) forbids schools from having substantially similar names.

Nothing in the article gives the Division the authority to regulate a driving school's name. But Rule 8 (200) j) forbids a driving school from having a similar name to another school:

> j) A new CDS may not have a name that is substantially similar to a previously certified CDS. The Department reserves the right to determine if a name is substantially similar.

The Division lacks the statutory authority to regulate driving school names. And this topic is not included in one of the four subjects the Division may regulate.

D. Rule 8 (300) d) requires instructors to be physically and safely able to operate a motor vehicle and train others.

Before it was repealed, section 12-15-110, C.R.S., required an applicant to pass an examination of an instructor's "vision," "ability to operate a motor vehicle safely," "ability to give driver training to others," and "such matters as the department may prescribe by rule."[10] So when the General Assembly repealed this statue, driving instructors no longer needed to demonstrate to the agency that they could meet these qualifications.

But the Division includes these types of qualifications with Rule 8 (300) d):

> d) All instructors shall be physically and mentally able to safely operate a motor vehicle and to train others in the operation of a motor vehicle.

The Division lacks the statutory authority to impose these requirements because the General Assembly repealed section 12-15-110, C.R.S. And this topic is not included in one of the four subjects the Division may regulate.

E. Rule 8 (300) e) requires school employees to have a background check.

Rule 8 (300) e) requires a background check:

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[10] Section 12-15-110, C.R.S., as it existed in 1991 before the repeal.

e) All employees of a CDS must:
   1. have a CBI background check and an original signature on a Department approved form on file with the Department;
   2. submit a new background check and an original signature, on a Department approved form, with each renewal packet;
   3. submit paperwork for any new hire within 10 days of employment;
   4. have a valid Colorado driver's license that has not been suspended, revoked, forfeited, or denied within the last three years; and
   5. must ensure that testing/training forms are fully and accurately completed.

A background check is used to verify that the applicant has no criminal record. This is a qualification for licensure but licensure has been repealed. The Division lacks the statutory authority to require background checks for applicants.

F. Rule 8 (300) f) authorizes the department to deny certification if an employee has been convicted of a felony.

Rule 8 (300) f) states that the Division may deny a person the opportunity to work in a driving school if the person has committed a felony:

f) If the Department has reason to believe or receives information that an employee has been convicted of or pled guilty or nolo contendere to a felony or received a deferred sentence to a felony charge, the Department may deny certification or suspend or revoke testing certification.
A CDS must:
   1. have a valid tester number on file with the Department; and
   2. account for all forms in his/her possession.

Rule 8 (300) f) is similar to repealed section 12-15-117, C.R.S., which specifically gave the department authority to deny a license or suspend or revoke a license if the school or instructor had committed certain crimes. Repealing this statute removes this authority.

The Division lacks the statutory authority to suspend or revoke a person's permission to join the occupation because the General Assembly repealed section 12-15-117, C.R.S. And this topic is not one of the four subjects the Division may regulate.

G. Rule 8 (300) h) prohibits driving instructors from having eight or more points assessed against their driver's license in the last three years.

Rule 8 (300) h) sets a qualification for driving with students:

> h) If an employee drives with students, the employee may not have a personal driving record showing the accumulation of 8 or more points in the past three-year period. The Department will randomly audit motor vehicle records (MVR) of all CDS employees. If upon random audit, it is determined that an employee has accumulated more than 8 points within a 3-year period his/her license has been suspended, revoked, forfeited, or denied, the employee's certification will be suspended or revoked. If a CDS fails to report a change of status with the driving license of one of its employees, the CDS's certification may be suspended or revoked.

In addition to setting qualifications, Rule 8 (300) h) also authorizes the department to suspend or revoke a person's or business's permission to engage in the occupation.

The Division lacks the statutory authority to impose these types of requirements because the General Assembly repealed licensure. And this topic is not included in one of the four subjects the Division may regulate.

H. Rule 8 (300) l) requires the school to notify the department when an employee changes driving status or leaves employment.

Rule 8 (300) l) requires businesses to notify the Division when an employee changes driving status or leaves employment:

> l) A CDS shall notify the Department in writing within 3 business days of an employee's change of driving status or departure from the CDS.

This requirement does not fall within one of the four subjects the Division may regulate: curriculum, equipment, records, and contracts.

I. Rule 8 (400) establishes a code of conduct.

Section 12-15-117, C.R.S., before it was repealed, gave the Division the authority to "refuse to issue or renew" or "suspend or revoke" the

license of a school or instructor for various unethical behavior, including fraud and other crimes.

Rule 8 (400) establishes a code of conduct:

a) Every CDS and its BOST testers, employees, and agents recognize that they have a position of high public trust and agree to adhere to the following code of conduct:
   1. Impartially administer all official duties without regard to race, gender, creed, national origin, position or influence.
   2. Conduct all examinations in a manner reflecting their importance to public safety.
   3. serve the public with all possible promptness and courtesy and not bully, threaten, degrade, put down, or disgrace any student or any other CDS.
   4. Refuse any additional payment, bribe or favor.
   5. Convey only accurate information to the public with regard to licensing requirements and BOST examinations.
   6. Work only by official BOST testing standards – never substituting personal ideas for prescribed methods.
   7. Maintain a professional appearance and demeanor.
   8. Uphold the honor and dignity of the profession by reporting any fraudulent or illegal activities related to a CDS employee, BOST tester or agent of a CDS.
   9. Carry out all duties not specifically covered by this code with the safety and welfare of the public as the controlling motive.

   Failure to adhere to the aforementioned standards will result in an investigation and may lead to disciplinary action up to and including curriculum withdrawal, employee or CDS suspension, or revocation.

The conduct this code imposes may be desirable, but that is not the issue. The question is whether the Division has the statutory authority to deny a person the right to work in an occupation for failure to meet a standard.

If the repeal of licensure and section 12-15-117, C.R.S., is to have the intended effect, the Division may not stop a person from entering an occupation based on a code of conduct. The Division no longer has the statutory authority to promulgate rules imposing a code of conduct. And this topic is not included in one of the four subjects the Division may regulate.

J. Rule 8 (900) e) allows the department to revoke certification for fraudulent or criminal activity by a school employee.

Rule 8 (900) e) is similar to Rules 8 (300) e) and f) and Rule 8 (400); it still states that the Division has the authority to deny a person permission to work in the occupation for fraud or crime:

> e) Fraudulent or criminal activity involving any CDS or CDS employee will be grounds for revocation.

For the mentioned reasons, the Division lacks the statutory authority to impose these requirements because the General Assembly repealed section 12-15-117, C.R.S. And this topic is not included in one of the four subjects the Division may regulate.

Conclusion

The Division no longer has the authority to issue the rules identified in this memo. We, therefore, recommend that Rule 8 (200) g), (200) h), (200) j), (300) d), (300) e), (300) f), (300) h), (300) l), (400) a), and (900) e) of the Division of Motor Vehicles concerning the driver's testing and education program not be extended.

Addendum A

Source: L. 2007: Entire part added, p. 1963, § 1, effective January 1, 2008.

12-14.5-239. Relation to federal "Electronic Signatures in Global and National Commerce Act". This part 2 modifies, limits, and supersedes the federal "Electronic Signatures in Global and National Commerce Act", 15 U.S.C. sec. 7001 et seq., but does not modify, limit, or supersede section 101 (c) of that act, 15 U.S.C. sec. 7001 (c), or authorize electronic delivery of any of the notices described in section 103 (b) of that act, 15 U.S.C. sec. 7003 (b).

Source: L. 2007: Entire part added, p. 1963, § 1, effective January 1, 2008.

12-14.5-240. Transitional provisions - application to existing transactions. Transactions entered into before January 1, 2008, and the rights, duties, and interests resulting from them may be completed, terminated, or enforced as required or permitted by a law amended, repealed, or modified by this part 2 as though the amendment, repeal, or modification had not occurred.

Source: L. 2007: Entire part added, p. 1963, § 1, effective January 1, 2008.

12-14.5-241. Severability. If any provision of this part 2 or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this part 2 that can be given effect without the invalid provision or application, and to this end the provisions of this part 2 are severable.

Source: L. 2007: Entire part added, p. 1963, § 1, effective January 1, 2008.

12-14.5-242. Repeal of part. This part 2 is repealed, effective July 1, 2015. Prior to such repeal, the functions of the administrator pursuant to this part 2 and the registration of providers shall be reviewed as provided for in section 24-34-104, C.R.S.

Source: L. 2007: Entire part added, p. 1963, § 1, effective January 1, 2008.

ARTICLE 15

Commercial Driving Schools

Editor's note: Section 12-15-121 provided for the repeal of §§ 12-15-102 to 12-15-113, 12-15-115, and 12-15-117 to 12-15-119, effective July 1, 1994. (See L. 91, p. 680.)

12-15-101.	Definitions.	12-15-110.	Examinations required. (Repealed)
12-15-102.	License required. (Repealed)	12-15-111.	License issues. (Repealed)
12-15-103.	Application - fee. (Repealed)	12-15-112.	Possession and display requirements. (Repealed)
12-15-104.	Qualifications for commercial driving schools. (Repealed)	12-15-113.	Expiration of license - renewal - fee. (Repealed)
12-15-105.	Issuance of license. (Repealed)	12-15-114.	Equipment of vehicles.
12-15-106.	Expiration of license - renewal - fee. (Repealed)	12-15-115.	Registration and inspection. (Repealed)
12-15-107.	Commercial driving instructor license required. (Repealed)	12-15-115.1.	Registration and inspection. (Repealed)
12-15-108.	Qualifications of commercial driving instructors. (Repealed)	12-15-116.	Rules and regulations.
12-15-109.	Application for license - fee. (Repealed)	12-15-117.	Refusal to issue or renew or suspension or revocation of licenses - grounds. (Repealed)

12-15-118. Procedure - judicial review. (Repealed)
12-15-119. Department to be informed of cancellation of insurance. (Repealed)
12-15-120. Violations - penalty.
12-15-121. Repeal - review of functions. (Repealed)

12-15-101. Definitions. As used in this article, unless the context otherwise requires:

(1) "Clock hour" means a full hour consisting of sixty minutes.

(2) "Commercial driving instructor" means an individual who has been employed by a commercial driving school.

(3) "Commercial driving school" means any business or any person who, for compensation, provides or offers to provide instruction in the operation of a motor vehicle, with the exceptions of secondary schools and institutions of higher education offering programs approved by the department of education and private occupational schools offering programs approved by the private occupational school division. Such term shall not include any motorcycle operator safety training program established pursuant to section 43-5-502, C.R.S.

(4) "Department" means the department of revenue.

(5) "Laboratory instruction" means an extension of classroom instruction which provides students with opportunities for traffic experiences under real and simulated conditions.

(6) Repealed.

Source: L. 69: p. 163, § 1. **C.R.S. 1963:** § 13-24-1. **L. 83:** (3) amended, p. 523, § 1, effective May 4. **L. 90:** (3) amended, p. 1161, § 8, effective July 1; (3) amended, p. 1817, § 3, effective July 1. **L. 94:** (3) amended, p. 2547, § 24, effective January 1, 1995. **L. 2003:** (6) repealed, p. 862, § 1, effective August 6.

Editor's note: Amendments to subsection (3) by House Bill 90-1155 and House Bill 90-1058 were harmonized.

12-15-102. License required. (Repealed)

Source: L. 69: p. 163, § 2. **C.R.S. 1963:** § 13-24-2. **L. 92:** Entire section amended, p. 2006, § 1, effective July 1.

12-15-103. Application - fee. (Repealed)

Source: L. 69: p. 163, § 3. **C.R.S. 1963:** § 13-24-3. **L. 92:** (3) added, p. 2006, § 2, effective July 1.

12-15-104. Qualifications for commercial driving schools. (Repealed)

Source: L. 69: p. 164, § 4. **C.R.S. 1963:** § 13-24-4.

12-15-105. Issuance of license. (Repealed)

Source: L. 69: p. 164, § 5. **C.R.S. 1963:** § 13-24-5.

12-15-106. Expiration of license - renewal - fee. (Repealed)

Source: L. 69: p. 164, § 6. **C.R.S. 1963:** § 13-24-6.

12-15-107. Commercial driving instructor license required. (Repealed)

Source: L. 69: p. 164, § 7. **C.R.S. 1963:** § 13-24-7.

12-15-108. Qualifications of commercial driving instructors. (Repealed)

Source: L. 69: p. 165, § 8. **C.R.S. 1963:** § 13-24-8. **L. 73:** p. 516, § 14. **L. 75:** (1)(c) amended and (2) repealed, p. 208, §§ 13, 14, effective July 16.

12-15-109. Application for license - fee. (Repealed)

Source: L. 69: p. 165, § 9. **C.R.S. 1963:** § 13-24-9.

12-15-110. Examinations required. (Repealed)

Source: L. 69: p. 165, § 10. **C.R.S. 1963:** § 13-24-10.

12-15-111. License issues. (Repealed)

Source: L. 69: p. 165, § 11. **C.R.S. 1963:** § 13-24-11.

12-15-112. Possession and display requirements. (Repealed)

Source: L. 69: p. 165, § 12. **C.R.S. 1963:** § 13-24-12.

12-15-113. Expiration of license - renewal - fee. (Repealed)

Source: L. 69: p. 166, § 13. **C.R.S. 1963:** § 13-24-13.

12-15-114. Equipment of vehicles. (1) Every motor vehicle used by a commercial driving school in the conduct of its course of driver training shall be equipped as follows:

(a) The vehicle shall be equipped as provided in article 4 of title 42, C.R.S.

(b) The vehicle shall be equipped with dual controls on the foot brake that will enable the commercial driving instructor to bring the car under control in case of emergency.

(c) The vehicle shall have an outside rear vision mirror on the commercial driving instructor's side of the vehicle.

(d) The vehicle shall be equipped with four-way emergency flashers.

(e) (Deleted by amendment, L. 2003, p. 862, § 2, effective August 6, 2003.)

(f) The vehicle shall be equipped with seat belts for the operator of the vehicle and for the commercial driving instructor.

Source: L. 69: p. 166, § 14. **C.R.S. 1963:** § 13-24-14. **L. 2003:** (1)(b) and (1)(e) amended, p. 862, § 2, effective August 6.

12-15-115. Registration and inspection. (Repealed)

Source: L. 69: p. 166, § 15. **C.R.S. 1963:** § 13-24-15. **L. 81:** Entire section amended, p. 1943, § 3, effective July 1; (2) added by revision, p. 1964, §§ 34, 35. **L. 84:** (2) repealed, p. 1080, § 1, effective July 1.

12-15-115.1. Registration and inspection. (Repealed)

Source: L. 81: Entire section added, p. 1950, § 17, effective July 1, 1984; (2) added by revision, p. 1964, § 35. **L. 84:** Entire section repealed, p. 1080, § 1, effective July 1.

12-15-116. Rules and regulations. (1) The department is authorized to promulgate such rules and regulations necessary to carry out the provisions of this article.

(2) Specifically, the department shall have power to adopt rules and regulations upon the following matters:

(a) Prescribe the content of courses of instruction;

(b) Prescribe the type of equipment to be used in said courses of instruction;

(c) Prescribe records to be kept by a commercial driving school;

(d) Prescribe the form of contracts and agreements used by commercial driving schools.

(3) In adopting such rules and regulations the department shall use the guidelines concerning commercial driving schools promulgated by the United States department of transportation.

(4) Rules and regulations adopted pursuant to this section shall be adopted in accordance with section 24-4-103, C.R.S.

Source: L. 69: p. 166, § 16. **C.R.S. 1963:** § 13-24-16.

12-15-117. Refusal to issue or renew or suspension or revocation of licenses - grounds. (Repealed)

Source: L. 69: p. 167, § 17. **C.R.S. 1963:** § 13-24-17. **L. 73:** p. 516, § 15. **L. 74:** (2)(a) amended, p. 406, § 17, effective April 11.

12-15-118. Procedure - judicial review. (Repealed)

Source: L. 69: p. 167, § 18. **C.R.S. 1963:** § 13-24-18.

12-15-119. Department to be informed of cancellation of insurance. (Repealed)

Source: L. 69: p. 167, § 19. **C.R.S. 1963:** § 13-24-19.

12-15-120. Violations - penalty. Any person who violates any of the provisions of this article is guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than five hundred dollars, or by imprisonment in the county jail for not more than thirty days, or by both such fine and imprisonment.

Source: L. 69: p. 168, § 20. **C.R.S. 1963:** § 13-24-20.

12-15-121. Repeal - review of functions. (Repealed)

Source: L. 88: Entire section added, p. 929, § 7, effective April 28. **L. 91:** Entire section amended, p. 680, § 14, effective April 20. **L. 97:** Entire section repealed, p. 1007, § 6, effective August 6.

ARTICLE 16

Farm Products and Farm Commodity Warehouses

Editor's note: This article was numbered as article 4 of chapter 7, C.R.S. 1963. The provisions of this article were repealed and reenacted in 1985, resulting in the addition, relocation, and elimination of sections as well as subject matter. For amendments to this article prior to 1985, consult the Colorado statutory research explanatory note and the table itemizing the replacement volumes and supplements to the original volume of C.R.S. 1973 beginning on page vii in the front of this volume. Former C.R.S. section numbers are shown in editor's notes following those sections that were relocated.

Cross references: For warehouse receipts, bills of lading, and other documents as contained in the "Uniform Commercial Code - Documents of Title", see article 7 of title 4.

Addendum B

REGULATION OF COMMERCIAL DRIVING SCHOOLS AND INSTRUCTORS

Submitted by the
Colorado Department of Regulatory Agencies
June 10, 1993

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EXECUTIVE SUMMARY

This sunset report recommends allowing the provisions of article 15, title 12 to terminate. Adoption of this recommendation will leave in statute self-enforcing regulation of commercial driving schools. The statutory provisions not scheduled to repeal are:

1. **Subsection 101 - Definitions.** Defines terms including commercial driving instructor and commercial driving school;

2. **Subsection 114 - Equipment of vehicles.** Requires that all vehicles used for driver training meet certain requirements such as dual controls for brake and clutch;

3. **Subsection 116 - Rules and Regulations.** Authorizes the Department of Revenue to promulgate rules and regulations to carry out the provisions of the article. Specific authority is granted to prescribe the content of instruction, the form of contracts used by schools and records that must be maintained by schools; and,

4. **Subsection 120 - Violations - penalty.** Provides that violation of the article is a misdemeanor punishable by a fine of not more than $500 or by imprisonment in county jail for not more than 30 days or both.

The Department of Regulatory Agencies (DORA) found insufficient public harm or potential for harm to justify the existing levels of regulation. There have been no disciplinary actions against licensees, insignificant failure rates on examinations, and no complaints from consumers against either commercial driving schools or their instructors.

The present level of regulation is extensive. It includes regulation of schools and their curricula, examination of school facilities and equipment, and licensing of instructors, including examinations.

In addition, the Department recommends that the Division repeal its rules and regulations promulgated pursuant to article 15 of title 12. The changes wrought by the sunset of most of the statute will render many of the rules obsolete, such as the requirements for an instructor's license and rules pertaining to inspection of commercial driving school facilities. In addition, some existing rules may be burdensome to businesses and should not be repromulgated in the new rules. Rule review by the Office of Regulatory Reform in the Department of Regulatory Agencies will aide in bringing these rules up to date and determining that Department of Revenue regulations are not burdensome to commercial driving schools. The Department of Revenue should promulgate new rules in light of its reduced mission.

I. THE SUNSET PROCESS

The regulation of Commercial Driving Schools will terminate on July 1, 1994 unless continued by the General Assembly pursuant to the Sunset Act, C.R.S. 24-34-104 (22). The purpose of this sunset report is to evaluate the performance of the Department of Revenue based on statutory evaluation criteria which are attached as an Appendix of this report. The central question this report seeks to answer is whether the continuation of this regulatory program is necessary and beneficial to the public health, safety and welfare of the people of Colorado, and whether, if the program is continued, significant changes are necessary to improve agency operations and thereby enhance the public interest.

This sunset review is unusual because the statutory repealer, section 12-15-121, C.R.S., specifically exempts from repeal four subsections of the statute. Subsections 101, 114, 116 and 120 are not subject to repeal, and, therefore, not subject to sunset review. The impact of the remaining regulatory language will, however, be evaluated as part of this review. (Please see the discussion on page 10 of this report).

The Department of Regulatory Agencies, in conducting this review, contacted the Department of Revenue (DOR), the Department of Education (DOE), owners of commercial driving schools in Colorado, federal officials and officials in other states.

II. THE COMMERCIAL DRIVING SCHOOL INDUSTRY

What are commercial driving schools?

A commercial driving school is defined by Colorado statute to be any business or person who provides instruction in motor vehicle operation for compensation. In general terms, an individual will contract with a commercial driving school to provide, for a fee, a combination of classroom instruction and behind the wheel instruction.

There are 16 commercial driving schools in Colorado at this time with an additional seven branch offices. The 16 schools employ about 85 instructors total. Staffing levels may fluctuate at any given time. The largest commercial driving school in Colorado currently is the American Automobile Association driving school. That association has four offices and employs about 40 instructors.

Commercial driving schools have been regulated for 22 years. Colorado began regulation of this industry in 1970 and it has been regulated continuously since that time. It is difficult to pinpoint precisely why regulation was initiated. Some sources interviewed for this report believe that there was a general, nationwide effort to improve the quality of instruction and the credentials of persons providing that instruction.

Related to that nationwide effort, driver education was included in the 1966 Federal Highway Safety Act, Public Law 89-564. The Act gives the Secretary of Transportation authority to improve highway safety based on the assumption, stated in the introduction of the standards, "that public and private driver education courses need to be more widely available." The federal standards speak to a variety of other driver safety issues including motorcycle safety, alcohol use, and motor vehicle inspection.

Regulation of driving schools is the responsibility of the Department of Revenue. Commercial driving schools and instructors in Colorado are regulated by the Motor Vehicle Division of the Department of Revenue. The Motor Vehicle Division's Driver License Administration Section is charged with enforcement of the regulatory program.

The Division also administers the Commercial Driver's License Program. Commercial driver's licenses are issued in accordance with the federal "Commercial Motor Vehicle Safety Act of 1986." Essentially, such a license is needed in order to operate a commercial motor vehicle designed to transport passengers or property.

The Division does not regulate schools that train drivers of these commercial trucks or other vehicles (a commercial driver's license is required to transport sixteen or more passengers). It is helpful to keep in mind that the regulatory program under review only regulates schools and instructors who teach operation of standard automobiles.

III. THE REGULATORY SCHEME

Commercial Driving Schools. In order to operate a commercial driving school in Colorado, one must provide certain proof and meet certain requirements. Among those requirements are: pay an appropriate fee; provide evidence of liability insurance on driver's education vehicles; pass an inspection of the classroom facilities and of the automobile(s) used in driver's education; and, applicants for a commercial driving school license must maintain a place of business in the state, and must be at least twenty-one years of age. Applicants must pay a $100.00 fee.

At least one employee of the school must be a licensed commercial driving instructor. The school must have at least one vehicle registered to the school and insured for driver training purposes.

Insurance Requirements. Every commercial driving school must have insurance on all motor vehicles used in driving instruction. Insurance must cover the school, instructors, students, and any passengers.

Rules and regulations require that schools maintain coverage of not less than $100,000 because of bodily injury or death of one person in any one accident and not less than $300,000 because of bodily injury or death of two or more persons in any one accident.

If a policy of insurance is canceled, both the insurance company and the licensee are required to notify the Department of Revenue. The commercial driving school is required to cease using any vehicle used for driver training if the insurance for the vehicle is not in force.

Driver Training Vehicle Requirements. In addition to meeting all requirements of Article 4 of Title 42 (Regulation of Vehicles and Traffic), driver training vehicles must meet other, special requirements. Foremost among these special requirements is dual controls on the foot brake and the clutch, if the vehicle is equipped with a manual transmission. Other requirements include a "kill-switch" on the instructor's side of the vehicle which enables the instructor to shut the engine off and a requirement that the vehicle be equipped with an outside rear-view mirror on both sides.

Commercial Driving Instructors. In order to receive a license to teach driver's education, one must meet certain standards and minimum qualifications.

1. Be at least twenty-one years of age, of good moral character and hold a valid Colorado license.

2. An applicant must have completed certain educational requirements in driver's education:

    a. At least eighty clock hours of formal classroom and laboratory preparation in order to teach both laboratory and classroom components of driver's education.

    b. At least forty clock hours of formal classroom and laboratory preparation to teach the laboratory phase only.

3. Pass an examination administered by the Department of Revenue.

Statute requires that a commercial driving instructor license is valid only when the instructor is employed by a licensed commercial driving school. Division regulations require that an instructor who ceases to be employed by a licensed school must surrender his current license to the Department of Revenue. Regulations further require that no new license shall be issued unless an instructor has surrendered all current outstanding licenses issued in his name.

Regulation of School Facilities. The Division has promulgated rules and regulations that impose certain requirements on the facilities of commercial driving schools. A school must cover an area of 300 square feet. Other requirements include seating facilities for at least 12 students, adequate chalkboards that are visible from all seats, sound projector, screen, films, and a magnetic traffic board.

The Division inspects all schools and branch offices upon opening for business. If the school passes the inspection, the Division issues a license which the school or branch must display.

Regulation of Courses of Instruction. The Division has promulgated rules requiring minimum standards of instruction. There are three standards:

1. Thirty hours classroom instruction and six hours behind the wheel if a student does not hold a valid driver's license and is between the age of fifteen years and nine months and eighteen years of age.
2. Fifteen hours classroom and six hours behind the wheel instruction if the student does not have a valid driver's license and is over the age of eighteen but has not reached age twenty-one.

3. Ten hours classroom and six hours behind the wheel instruction if the student does not have a valid driver's license and is over the age of twenty-one.

Commercial driving schools may also offer review or retraining instruction to anyone who holds a valid driver's license. There are no minimum requirements for such courses.

The Division has promulgated specific course requirements for each of the above three curricula (thirty, fifteen, and ten hours). There are twenty-nine requirements for the longest of the courses; fewer requirements for each of the other two. Some examples of course requirements shared by all three programs include basic driving skills, Colorado traffic accident problems, the value of proper seeing habits, and alcohol, drugs and driving.

Other Regulated Aspects of the Driver Training Industry. The Division regulates two other areas regarding commercial driving schools: student records and commercial driving school contracts. Regulations require that certain information be maintained for a period of three years including the type and date of instruction given and whether classroom or behind the wheel instruction was given.

Division regulations also require that all contracts between commercial driving schools and students contain basic information such as contract price per hour, disclosure of additional fees for the use of the school's vehicle during state examination for a driver's license, and a statement whether or not behind the wheel instruction will be private or conducted in groups.

IV. THE FUNCTION OF THE REGULATORY PROGRAM

Regulation of the commercial driving schools and instructors is a function of the Driver's License Section of the Division of Motor Vehicles. Administration of the program is conducted by the Commercial Driver's License Coordinator.

Examinations. The Division examines applicants for an instructor license by use of a multiple - choice written test. One must score 85% on the test in order to pass, although this passing score has never been validated. According to regulation, an applicant may take the examination three times in one calendar year.

Research conducted for this review reveals that no one appears to fail the examination or be denied a license for any other reason. DORA requested information for the past ten years but the Division of Motor Vehicles was unable to provide such records. However, the Division did report that, based on four years' data, 100% of all applicants to become licensed driving instructors have been approved. The Division reported:

1. Approximately 15 tests per year are administered;

2. Approximately three out of the 15 applicants will fail the test the first time; and,

3. Applicants who initially fail the examination will re-test and pass thus leading to a 100% pass rate.

Complaints. Complaint data for the past ten years was requested for this sunset review. The Division reported only that it receives very few complaints. It appears that most complaints have come from driving schools, not from consumers. An example of one complaint received from a driving school is that a competitor used a student's car for training rather than a marked, approved, driver training vehicle.

Disciplinary Actions Against Schools and Instructors. Again, disciplinary data and records for the past ten years were requested for this sunset review. The Division reported that in one instance involving a complaint against the Colorado Department of Education for an advertisement, the Division resolved the problem through negotiating with both parties.

V. IS REGULATION OF COMMERCIAL DRIVING SCHOOLS AND DRIVING INSTRUCTORS NEEDED?

The most significant question asked by a Sunset Review is whether or not regulation should be continued. One approach to determining whether state regulation is needed is to ask if a consumer can distinguish between a qualified and unqualified practitioner.

Commercial driving schools. State licensing of these schools is, for the most part, simply a matter of meeting certain insurance requirements, passing an inspection of the classroom facilities and a safety check of the automobiles.

The inspection of classroom facilities is burdensome and provides little that a consumer cannot determine alone. Requirements that an office or school be inspected for telephones, blackboards, charts and restrooms may not be a good use of state resources. Some requirements may be outdated, such as a requirement that a school have sound projectors and film. What if the school uses video presentations? Finally, one element of state inspection is appearance of facilities, a completely subjective standard.

Inspection of Vehicles. State regulation also provides a safety inspection of vehicles used in driver training. This is a basic inspection of a vehicle such as some states require of all vehicles, with the exception of dual controls. The Department of Revenue's inspection checklist covers 21 safety items. Among them: brakes, rear view windows, dual controls, brakes/clutch, bumpers, tires, and seat belts.

Although this type of inspection makes more sense than the school inspection, this review concludes that consumers can make an effective decision regarding the school and its vehicles. While it may be unreasonable to expect a consumer to physically inspect the vehicles, there are other alternatives.

A consumer might inquire of the school's safety record, for instance. Also, recommendations from friends and acquaintances undoubtedly play a large role in selection of a driving school. Most students are teenagers learning to drive or wishing to take driver's education for the insurance discount. It is reasonable to assume that students and parents will share experiences with schools just as they do with insurance companies.

Perhaps the most compelling reason to rely on self-regulation is that commercial driving schools are businesses. If a school operates unsafe vehicles, the company exposes itself to enormous risk, and financial and criminal liability. Regulation and annual inspection only provide a sense of security for a point in time. Once an inspection has been completed, nothing prevents a school from using any car it chooses except the financial and legal risk that accompanies such a choice.

Enforcement Activities Do Not Justify Regulation.

Another approach to justifying regulation is to argue that the regulation keeps out incompetent practitioners (primarily instructors in the instant case) and provides relief to consumers who have been harmed. There is no foundation in either case for continuing the present level of regulation of the commercial driving school industry.

Licensing of Driving Instructors. Under the present regulatory scheme, the only oversight mechanism for driving instructors is the test administered by the Department of Revenue. Driving schools themselves prepare instructors to take the examination.

The Division reports that owners of the commercial driving schools check the driving history and police records before the individual completes training and before examination. It appears, then, that most of the oversight is performed by the schools in order to be sure that they get high quality instructors. Since the success of the school depends so strongly on the quality of its people, this works as a much stronger force than state oversight.

Complaint Data and Disciplinary Actions. Complaint data provided by DOR is very sketchy. However, the information that is available indicates that very few complaints are made against schools or instructors in this industry.

Some believe that lack of complaints proves that the regulatory inspection programs are doing their jobs. Without the regulatory program, it is argued, consumer harm would occur frequently.

This sunset review suggests that lack of any significant complaints shows that consumers are sophisticated enough to understand the services that are provided. Although it is reasonable to argue that driving instructors provide a service to some consumers, there is no evidence, in general terms, that any special knowledge or skills are required to teach others to drive a car. In fact, many parents teach their children to drive using the standard "family car." This report does not attempt to argue that driving instructors ought to be unqualified. It only argues that the service being provided is common and that persons of standard intelligence can understand the level and quality of service they are receiving.

If there were significant numbers of license revocations and probations or other actions, consideration would have to be given to the possibility of public harm in a deregulated market. However, there is no data to suggest that any problems have occurred.

Have Conditions That Brought About the Original Regulation Changed?

Several members of the driver training industry who were interviewed as part of the research for this report stated that the initial regulation of the industry resulted from federal legislation passed in 1966. From this legislation, the U.S. Department of Transportation (USDOT) promulgated the Highway Safety Program Standards in 1967.

Contact with regional USDOT officials revealed that driver education is no longer a priority program listing as it appears to have been in the latter 1960's. At first glance, this means that the US Department of Transportation views other elements of highway safety, such as abuse of alcohol, as more deserving of scarce resources.

Some industry members stated that failure to regulate driver education schools would result in federal sanctions or penalties imposed on transportation funds, but this is a mistaken belief. Contact with USDOT regional officials revealed that there would be no sanctions or penalties. Therefore, any argument that state regulation is needed to comply with federal mandates is not valid.

No Relationship Between Fees and Costs.

Most occupational licensing programs assess fees based on the direct costs of the function. In this way, a regulatory program pays for itself. However, there appears to be no relationship between fees and costs in the regulation of commercial driving schools and instructors.

One factor that contributes to this is that fees are set in statute. Therefore, it takes an act of the General Assembly to change the fees. The present fee structure has apparently been in effect since 1969.

In a 1990 audit, the State Auditor estimated that the Division could collect additional revenue of about $22,000 per year if appropriate fees, determined by consideration of direct and indirect services, were charged. Of course, the Division provides other services, but licensing of commercial driving schools and instructors is part of the Division's duties and fees ought to reflect costs. Otherwise, the licensing of commercial driving schools may be subsidized by fees collected from some other source. The fact that fees are set in statute and that there is no clear relationship between fees and costs indicates that this is a low priority program.

VI. POLICY RECOMMENDATIONS

Sunset Would Leave in Statute Self-Enforcing Regulation.

Section 12-15-121, C.R.S., sunsets most of the statute creating the regulatory oversight of commercial driving schools. Four subsections of the article are not covered by the sunset repealer.

The four subsections and highlights of their contents are:

1. **Subsection 101 - Definitions.** Defines terms including commercial driving instructor and commercial driving school;

2. **Subsection 114 - Equipment of vehicles.** Requires that all vehicles used for driver training meet certain requirements such as dual controls for brake and clutch;

3. **Subsection 116 - Rules and Regulations.** Authorizes the Department of Revenue to promulgate rules and regulations to carry out the provisions of the article. Specific authority is granted to prescribe the content of instruction, the form of contracts used by schools and records that must be maintained by schools; and,

4. **Subsection 120 - Violations - penalty.** Provides that violation of the article is a misdemeanor punishable by a fine of not more than $500 or by imprisonment in county jail for not more than 30 days or both.

The repeal of all of the statute with the exception of these subsections would create a self-enforcing regulatory statute. Substantial requirements of the article would remain in law without requiring the examining, licensing, and inspecting that is presently built into the regulatory program.

Enforcement would remain to protect consumers because all penalties for violation of the article would continue in the law. In many regulatory programs, administrative sanctions are important tools in enforcement. However, review of this program shows that administrative sanctions are not applied to licensees (nor, for that matter, are criminal sanctions applied).

If there is concern that reduced regulation would result in harm to consumers, then it is recommended that the four subsections under discussion be left in statute. This provides a more appropriate level of protection to consumers, at the least cost and with the least amount of intrusion by the government in the market, than the current program.

Conclusion

The state of Colorado has the benefit of over twenty years experience in regulating commercial driving schools and driving instructors. The record of action by the state in protecting consumers has been that there is no record. This is not because the state has been deficient in carrying out regulatory oversight. Rather, it is because there has been no harm to consumers and, therefore, nothing to oversee, save purely administrative licensing and inspection functions.

As part of this sunset review, most commercial driving schools in Colorado were contacted and interviewed regarding the need for regulation. Everyone contacted by this Department stated that regulation should continue. While there may have been a time when a program such as this was needed (although the record does not support even this charitable assumption), such time has clearly passed. The marketplace and consumers of the 1990's are adequate watchdogs of this industry. A representative of the Division that regulates the industry stated that these schools are professional organizations in a competitive business; they must endeavor to create satisfied customers if they are to succeed. All that must be added to that analysis is that these factors are more powerful motivators than state inspections, examinations, and licenses.

Recommendation 1: **The General Assembly should allow the regulation of commercial driving schools and instructors to sunset on July 1, 1994.**

RULES SHOULD BE REPEALED AND REPROMULGATED

The Division has promulgated numerous rules and regulations to augment the statutory provisions. Many of these regulations will be made obsolete if the recommendations of this report are adopted. In particular, rules pertaining to licensing instructors and inspection of facilities will no longer be needed.

In addition, some other rules may be burdensome to business and not needed to protect the public health, safety and welfare. For instance, rules that require chalkboards and seats for twelve students may be determined as unnecessary without jeopardizing the public safety.

Recommendation 2: **Repeal all rules and regulations promulgated pursuant to article 15 of title 12.**

APPENDIX

SUNSET STATUTORY EVALUATION CRITERIA

(I) Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;

(II) If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;

(III) Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices of the Department of Regulatory Agencies and any other circumstances, including budgetary, resource and personnel matters;

(IV) Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;

(V) Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;

(VI) The economic impact of regulation and, if national economic information is available, whether the agency stimulates or restricts competition;

(VII) Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;

(VIII) Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;

(IX) Whether administrative and statutory changes are necessary to improve agency operations to enhance public interest.

Office of Legislative Legal Services
Colorado General Assembly

Director
Dan L. Cartin

Deputy Director
Sharon L. Eubanks

Revisor of Statutes
Jennifer G. Gilroy

Assistant Directors
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

Publications Coordinator
Kathy Zambrano

State Capitol Building, Room 091
200 East Colfax Avenue
Denver, Colorado 80203-1782

Telephone: 303-866-2045 Facsimile: 303-866-4157
E-mail: olls.ga@state.co.us

Managing Senior Attorneys
Jeremiah B. Barry, Duane H. Gall, Christine B. Chase, Jason Gelender, Michael J. Dohr, Robert S. Lackner, Gregg W. Fraser, Thomas Morris

Senior Attorneys
Brita Darling, Jery Payne, Edward A. DeCecco, Jane M. Ritter, Kristen J. Forrestal, Richard Sweetman, Kate Meyer, Esther van Mourik, Nicole H. Myers

Senior Attorney for Annotations
Michele D. Brown

Staff Attorney
Jennifer A. Berman, Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Michael Dohr, Office of Legislative Legal Services

DATE: December 12, 2014

SUBJECT: Rules of the State Board of Health, Department of Public Health and Environment, concerning the medical marijuana health research grant program, 5 CCR 1006-2 (LLS Docket No. 140552; SOS Tracking No. 2014-00743).[1]

Summary of Problems Identified and Recommendations

Section 25-1.5-106.5 (3) (a) (I), C.R.S., only permits the medical marijuana scientific advisory council ("council") to provide a peer review process for medical marijuana research grants and to make recommendations for grant proposals. But, Regulation 6. D. 3. also requires the council to review petitions to add additional debilitating medical conditions to the list of conditions eligible for medical marijuana use and make recommendations corresponding recommendations. **We therefore recommend that Regulation 6. D. 3. of the rules of the State Board of Health concerning the medical marijuana health research grant program not be extended.**

Section 25-1.5-106.5 (2), C.R.S., requires the State Board of Health ("the Board") to promulgate rules regarding the timelines for the grant proposal application process. But, Regulation 14. A. 2. states that grant

---

[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, 2015, unless the General Assembly acts by bill to postpone such expiration.

proposals may be solicited on dates determined by the Department of Public Health and Environment ("the Department"). **We therefore recommend that Regulation 14. A. 2. of the rules of the State Board of Health concerning the medical marijuana health research grant program not be extended.**

Analysis

I. The Board has no statutory authority to give the council additional duties.

Coloradoans who suffer from a constitutionally specified debilitating medical condition have the authority to use medical marijuana to treat that condition without criminal sanction if the person receives a medical marijuana recommendation from a physician. The Department has the authority to add to the list of qualifying debilitating medical conditions. The Department has not used that authority, frequently citing the lack of verifiable scientific research related to the medical efficacy of marijuana on particular medical conditions. In 2014, the General Assembly created a grant program for research related to the medical efficacy of marijuana on particular medical conditions. The grant program is designed to give the Department more information to use in evaluating whether to add particular medical conditions to the list of debilitating medical conditions.

As a part of that grant program, the council was created. The council is statutorily authorized to engage in a peer review of the application proposals to ensure that the proposed research is not biased towards a particular outcome. "The grant program shall establish a scientific advisory council . . . to provide a peer review process that guards against funding research that is biased in favor of or against particular outcomes." Section 25-1.5-106.5 (3) (a) (I), C.R.S. The council also submits recommendations for grant proposals to the state board of health. Section 25-1.5-106.5 (3) (b) (I), C.R.S. The council has no additional statutory authority.

Regulation 6. D. 3. tasks the council with reviewing petitions to add debilitating medical conditions and make recommendations to the Department[2]. The Department has rule-making authority regarding "the manner in which . . . it may consider adding debilitating medical conditions

[2] The council membership that performs peer reviews of grant proposals and the council membership that reviews petitions for debilitating medical conditions are the same, except there is one member who is part of the peer review process that who is not part of the debilitating medical condition process.

to the list of debilitating medical conditions contained in section 14 of article XVIII of the state constitution". Section 25-1.5-106 (3) (a) (VII), C.R.S.

Although the Department has the rule-making authority to create a group of experts that review petitions to add a debilitating condition to the list in the constitution, it cannot use the council for that purpose. The statute that created the council authorized the council to serve as a peer reviewer for the grant proposals to root out any biased proposals and make recommendations; it did not authorize the council to perform any other functions or duties. Therefore, the council lacks statutory authority to also review debilitating medical condition petitions.

II. The Board failed to promulgate rules for the timelines for grant applications.

Section 25-1.5-106.5 (2) (b) (I), C.R.S., directs the Board to promulgate rules regarding the timelines for the grant proposal application process.

> **25-1.5-106.5. Medical marijuana health research grant program.** (2) **Medical marijuana research grant program - rules.** (b) The state board of health shall promulgate rules for the administration of the grant program, including:
>
> (I) The procedures and **timelines by which an entity may apply for program grants**; (**emphasis added**)

The Board promulgated a rule entitled "Timelines for grant application", but the rule does not include timelines.

> **Regulation 14: Colorado medical research grant program**
>
> A. Procedures for grant application to the grant program
>
> 2. Timelines for grant application.
>
> Grant applications may be solicited on dates determined by the department.

Instead, the rule improperly delegates the authority to determine the timelines to the Department. The statute requires the timelines to be included in Board's rules, so the Board has no authority to delegate the authority to determine the timelines to the Department. Requiring the timelines to be promulgated by rule ensures that everyone has the same public notice regarding the application timelines. The rule cannot delegate the responsibility to the Department to determine the timelines.

Conclusion

Therefore, Regulation 6. D. 3. and Regulation 14. A. 2. of the rules of the State Board of Health concerning the medical marijuana health research grant program should not be extended.

Office of Legislative Legal Services
Colorado General Assembly

Director
Dan L. Cartin

Deputy Director
Sharon L. Eubanks

Revisor of Statutes
Jennifer G. Gilroy

Assistant Directors
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

Publications Coordinator
Kathy Zambrano

State Capitol Building, Room 091
200 East Colfax Avenue
Denver, Colorado 80203-1782

Telephone: 303-866-2045 Facsimile: 303-866-4157
E-mail: olls.ga@state.co.us

Managing Senior Attorneys
Jeremiah B. Barry, Duane H. Gall, Christine B. Chase, Jason Gelender, Michael J. Dohr, Robert S. Lackner, Gregg W. Fraser, Thomas Morris

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Senior Attorney for Annotations
Michele D. Brown

Staff Attorney
Jennifer A. Berman, Yelana Love

MEMORANDUM

TO: Committee on Legal Services

FROM: Jason Gelender and Kate Meyer, Office of Legislative Legal Services

DATE: December 12, 2014

SUBJECT: Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 140595; SOS Tracking No. 2014-00684).[1]

Summary of Problems Identified and Recommendations

Section 24-72-305.6 (2), C.R.S., authorizes county clerks and recorders to request the criminal history records for election judges serving in the county. But the first paragraph of the Secretary of State's (Secretary) Rule 6.5 requires county clerks and recorders to arrange for criminal background checks for all supervisor election judges. **We therefore recommend that the first paragraph of Rule 6.5 of the rules of the Secretary concerning elections not be extended.** The Secretary's Rule 6.4.1 cross-references the mandatory supervisor election judge background checks. **We therefore recommend that Rule 6.4.1 of the rules of the Secretary concerning elections also not be extended.**

Section 24-72-305.6, C.R.S., permits either county clerks and recorders or county sheriffs to obtain the criminal history records of certain county election personnel from the public website maintained by the

---

[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 memorandum will expire on May 15, 2015, unless the General Assembly acts by bill to postpone such expiration.

Colorado Bureau of Investigation (CBI). However, the Secretary's Rule 6.5 (a) allows criminal background checks to be conducted "by or through" those persons "*or similar state or federal agency* (emphasis added)". Because the rule sanctions the usage of additional entities or resources not contemplated by the statute, **we recommend that Rule 6.5 (a) of the rules of the Secretary concerning elections not be extended.**

Rulemaking Authority

The Secretary promulgated the Rules 6.5, 6.4.1, and 6.5 (a) pursuant to section 1-1-107 (2) (a), C.R.S., which states:

> **1-1-107. Powers and duties of secretary of state - penalty.** (2) In addition to any other powers prescribed by law, the secretary of state shall have the following powers:
>
> (a) To promulgate, publish, and distribute, either in conjunction with copies of the election laws pursuant to section 1-1-108 or separately, such rules as the secretary of state finds necessary for the proper administration and enforcement of the election laws, including but not limited to rules establishing the amount of fees as provided in this code;

Analysis

I. The rules of the Secretary of State requiring criminal history record checks for election judges require what statute merely permits.

Section 24-72-305.6, C.R.S., sets forth the circumstances under which county clerks and recorders (clerks) are required or authorized to obtain criminal history records for certain elections personnel:

> **24-72-305.6. County clerk and recorder access to criminal history records of election judges and employees.** (1) A county clerk and recorder **shall request** the criminal history records from the public web site maintained by the Colorado bureau of investigation **for all full-time, part-time, permanent, and contract employees of the county who staff a counting center and who have any access to electromechanical voting systems or electronic vote tabulating equipment**. The county clerk and recorder shall request the records not less than once each calendar year prior to the first election of the year.
>
> (2) A county clerk and recorder **may request, in his or her discretion**, the criminal history records from the public web site

maintained by the Colorado bureau of investigation **for an election judge** serving in the county. **(emphases added)**

For some elections personnel, subsection (1) requires clerks to request such records. But subsection (2) does not require the acquisition of such records for election judges, but instead explicitly authorizes clerks to acquire such records at their discretion.

A. The first paragraph of Rule 6.5 requires clerks to perform criminal history inquiries that statute merely authorizes.

Although subsection (2) of section 24-72-305.6, C.R.S., *supra*, allows clerks to request criminal history records of election judges, the first paragraph of Rule 6.5 of the Secretary's rules requires clerks to examine the criminal histories[2] of supervisor judges, a type of election judge:[3]

> 6.5 **The county clerk must arrange for a criminal background check on a supervisor judge** and each staff member conducting voter registration activities. **(emphasis added)**

Rule 6.5, therefore, divests clerks of their statutory discretion to decide whether to perform criminal background checks on election judges (including supervisor judges). Because the General Assembly deliberately elected to give clerks decision-making capacity with respect to election judges, the first paragraph of Rule 6.5 irreconcilably conflicts with the statute.

B. Rule 6.4.1 reiterates the regulatory requirement for criminal history checks on all supervisor judges.

Rule 6.4 of the Secretary's rules concerning election judges sets forth prerequisites for persons seeking to act as supervisor judges:

> 6.4 A supervisor judge in a voter service and polling center must:
>
> 6.4.1 **Successfully pass the criminal background check described in Rule 6.5.** Any person who has been convicted of an

---

[2] Section 24-72-305.6, C.R.S., authorizes a clerk to request "criminal history records", while Rules 6.4 and 6.5 reference "criminal background checks". In the context of this rule review, the meanings of the quoted phrases are identical.

[3] The term "election judge" is not defined for the purposes of article 72 of title 24, C.R.S. But, the "Uniform Election Code of 1992" (Code) is instructive. The Code defines "election judge" as "a registered elector appointed by the county clerk and recorder or designated elected official to perform the election duties assigned by the county clerk and recorder or designated election official". *See* §1-6-101 (1), C.R.S. The Code further defines "supervisor judge" as "the election judge appointed by the designated election official to be in charge of the election process at a polling location." *See* §1-1-104 (47), C.R.S.

election offense or an offense with an element of fraud is prohibited from handling voter registration applications or conducting voter registration and list maintenance activities. **(emphasis added)**

6.4.2 Complete a training course provided by the Secretary of State.

Because Rule 6.4.1 cross-references the invalid requirement that clerks arrange for mandatory background checks on supervisor judges, it also conflicts with the statute.

II. Rule 6.5 (a) of the Secretary's rules concerning election judges sanctions the acquisition of criminal history records through parties or processes not allowed by statute.

Subsections (1) and (2) of section 24-72-305.6, C.R.S., impose the duty and grant permission, respectively, to obtain criminal history records for certain types of elections personnel. In either case, the statute requires the records to be accessed directly through the public web site maintained by the CBI. Subsection (3) of the statute repeats and expands upon this provision:

24-72-305.6. County clerk and recorder access to criminal history records of election judges and employees. (3) A county clerk and recorder authorized to access criminal history records pursuant to this section may access records that are maintained by or within this state directly through the public web site maintained by the Colorado bureau of investigation. A county clerk and recorder that does not have access or authorization to use a credit card for conducting business on behalf of the county in which the clerk and recorder serves may request that the county sheriff for the county access the criminal records from the public web site maintained by the Colorado bureau of investigation. Criminal records shall not be accessed pursuant to this section directly from the Colorado criminal justice computer system or the national criminal justice computer system.

The law, then, recognizes only two persons who may acquire the records: clerks or county sheriffs. In either case, the records must be obtained directly from the CBI's public web site.

Rule 6.5 (a) of the Secretary's rules concerning election judges allows the use of additional parties for background checks:

6.5 The county clerk must arrange for a criminal background check on a supervisor judge and each staff member conducting voter registration activities.

> (a) **The criminal background check must be conducted by or through** the Colorado Bureau of Investigation, the county sheriff's department in accordance with section 24-72-305.6 (3), C.R.S., **or similar state or federal agency. (emphasis added)**

The General Assembly has specifically identified the persons and systems involved in performing background checks on elections personnel and has not provided the Secretary of State with any specific authority to add additional entities or resources to conduct these checks. Because the Secretary's Rule 6.5 (a) allows criminal background checks to be conducted "by or through" the CBI, the county sheriff, "or similar state or federal agency", the rule sanctions the usage of additional entities or resources not contemplated by, and conflicts with, the statute.

Conclusion

We therefore recommend that the first paragraph of Rule 6.5, Rule 6.4.1, and Rule 6.5 (a) of the rules of the Secretary of State concerning elections not be extended.

First Regular Session
Seventieth General Assembly
STATE OF COLORADO

DRAFT
11.12.14

DRAFT

LLS NO. 15-0209.01 Debbie Haskins x 2045 **COMMITTEE BILL**

Committee on Legal Services

BILL TOPIC: "Leg Cosponsors Opt-out Of Rules Notices "

A BILL FOR AN ACT

CONCERNING NOTIFICATION TO COSPONSORS OF THE ADOPTION OF EXECUTIVE BRANCH AGENCY RULES THAT IMPLEMENT NEWLY ENACTED LEGISLATION.

Bill Summary

(Note: This summary applies to this bill as introduced and does not reflect any amendments that may be subsequently adopted. If this bill passes third reading in the house of introduction, a bill summary that applies to the reengrossed version of this bill will be available at http://www.leg.state.co.us/billsummaries.)

Committee on Legal Services. Under the direction of the committee on legal services, the staff of the committee on legal services (the office of legislative legal services) may implement a voluntary system that allows legislators to opt-out of receiving notices sent to cosponsors of legislation about the adoption of rules implementing newly

Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

enacted legislation.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. In Colorado Revised Statutes, 24-4-103, **amend** (8) (e) as follows:

24-4-103. Rule-making - procedure - definitions - repeal. (8) (e) For rules adopted on or after November 1, 2013, the staff of the committee on legal services shall identify the rules that were adopted during each applicable one-year period as a result of legislation enacted during any legislative session, regular or special, commencing on or after January 1, 2013. After such rules have been identified, the staff of the committee on legal services shall notify in writing any prime sponsors and cosponsors of the enacted legislation who are still serving in the general assembly, and the current members of the applicable committees of reference in the senate and house of representatives for that enacted legislation that a rule has been adopted as a result of the legislation. UNDER THE DIRECTION OF THE COMMITTEE ON LEGAL SERVICES, THE STAFF OF THE COMMITTEE ON LEGAL SERVICES MAY IMPLEMENT A VOLUNTARY SYSTEM THAT ALLOWS LEGISLATORS TO OPT-OUT OF RECEIVING NOTICES SENT TO COSPONSORS OF LEGISLATION ABOUT THE ADOPTION OF RULES IMPLEMENTING NEWLY ENACTED LEGISLATION.

SECTION 2. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety. <{***does the committee want a safety clause on the bill?***}>