Office of Legislative Legal Services

Colorado General Assembly

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AGENDA

Committee on Legal Services

Tuesday, December 15, 2015

9:00 a.m.

HCR 0112

(Lunch will be provided for the Committee members)

1. Review of New Rules (rules adopted or amended on or after November 1, 2014, and before November 1, 2015, and scheduled to expire May 15, 2016):

   a. Rules of the Marijuana Enforcement Division, Department of Revenue, concerning medical marijuana business and licensees and retail marijuana establishments and licensees, 1 CCR 212-1 and 1 CCR 212-2 (LLS Docket No. 150459 and 150460; SOS Tracking No. 2015-0499 and 2015-00500).
   Staff: Michael Dohr
   (Status: Contested)

   b. Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 150399; SOS Tracking No. 2015-00313).
   Staff: Kate Meyer
   (Status: Uncontested and Contested)

c. Rules of the Parks and Wildlife Division, Department of Natural Resources, concerning the big horn sheep access program and the ranching for wildlife program, 2 CCR 406-2 (LLS Docket No. 150431; SOS Tracking No. 2015-00485).
Staff: Tom Morris and Rebecca Hausmann
(Status: Contested)

d. Rules of the Medical Services Board, Department of Health Care Policy and Financing, concerning the Colorado Dental Health Care Program for Low-Income Seniors, 10 CCR 2505-10 (LLS Docket No. 150120; SOS Tracking No. 2015-0031).
Staff: Jeremiah Barry
(Status: Uncontested)

e. Rules of the Charter School Institute, Department of Education, concerning administration of the state charter school institute, 1 CCR 302-1 (LLS Docket No. 150456; SOS Tracking No. 2015-00545).
Staff: Julie Pelegrin
(Status: Uncontested)

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

3. Sponsorship of Other Committee on Legal Services Bills:
Bill to Enact the C.R.S.
Revisor's Bill
Additional Revisor's Bill
Staff: Jennifer Gilroy, Revisor of Statutes

4. Approval and Sponsorship of Other Committee on Legal Services Bills:
Draft Bill - LLS 16-0400 - OLLS Director Authority to Sign Vouchers
Draft Bill - LLS 16-0526 - Administrative Responsibility of OLLS for Maintaining and Storing Legislative Bill Files
Staff: Dan Cartin

5. Presentation of Year Two Report from the Legislative Digital Policy Advisory Committee.
Staff: Jennifer Gilroy, Revisor of Statutes
Dan Cordova, Colorado Supreme Court Librarian and Chair of LDPAC

6. Scheduled Meetings During the Session:
   - January 15, 8:00 a.m. - Organizational Meeting to Elect a Chair and Vice-chair
   - First Friday of the Month during Session from Noon to 2:00 p.m.: February 5, March 4, April 1, and May 6

7. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Michael Dohr, Office of Legislative Legal Services

DATE: December 8, 2015

SUBJECT: Rules of the Marijuana Enforcement Division, Department of Revenue, concerning medical marijuana businesses and licenses and retail marijuana establishments and licenses, 1 CCR 212-1 and 1 CCR 212-2 (LLS Docket No. 150459 and 150460; SOS Tracking No. 2015-0499 and 2015-0500).[1]

Summary of Problems Identified and Recommendations

Sections 12-43.3-202 (2) (a) (XVIII.5) and 12-43.4-202 (3) (a) (XIV.5), C.R.S., require an applicant for a permitted economic interest license to submit to and pass a background check. But Rules M 231.5 B.1. and R 231.5 B.1. state that any individual applying for a permitted economic interest license shall be fingerprinted for a fingerprint-based criminal history record check at the division's discretion. **Because Rules M 231.5 B.1. and R 231.5 B.1. conflict with the statute, we recommend that Rule M 231.5 B.1. and R 231.5 B.1. of the Marijuana Enforcement Division (Division) not be extended.**

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[1] Under § 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 § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

The Division's rulemaking authority does not give it the power to promulgate rules that criminalize disclosure of confidential records. But Rule R 1308 makes disclosure of confidential records in violation of the retail marijuana code a class 1 misdemeanor. **Because the Division lacks rule-making authority to promulgate Rule R 1308 A., we recommend that Rule 1308 A.1-3 of the Division not be extended.**

Rule-making Authority

Sections 12-43.3-202 (2) (a) (XVIII.5) and 12-43.4-202 (3) (a) (XIV.5), C.R.S., require the Division to adopt rules on permitted economic interests. The sections state:

> **12-43.3-202. Powers and duties of state licensing authority - rules.** (2) (a) Rules promulgated pursuant to paragraph (b) of subsection (1) of this section may include, but need not be limited to, the following subjects:
>
> (XVIII.5) Rules effective on or before January 1, 2016, relating to permitted economic interests including a process for a criminal history record check; a requirement that a permitted economic interest applicant submit to and pass a criminal history record check; a divestiture; and other agreements that would qualify as permitted economic interests;

> **12-43.4-202. Powers and duties of state licensing authority - rules.** (3) (a) Rules promulgated pursuant to paragraph (b) of subsection (2) of this section must include, but need not be limited to, the following subjects:
>
> (XIV.5) Rules effective on or before January 1, 2016, relating to permitted economic interests including a process for a criminal history record check; a requirement that a permitted economic interest applicant submit to and pass a criminal history record check; a divestiture; and other agreements that would qualify as permitted economic interests;

The rules adopted regarding permitted economic interest conflict with the rule-making authority since the rules make a background check discretionary.

Section 12-43.4-202 (2) (b), C.R.S., gives the Division the authority to promulgate rules regarding retail marijuana. Section 12-43.4-202 (2) (b), C.R.S., states:

> **12-43.4-202. Powers and duties of state licensing authority - rules.** (2) The state licensing authority has the authority to:
>
> (b) Promulgate, on or before July 1, 2013, rules for the proper regulation and control of the cultivation, manufacture, distribution, sale, and testing of retail marijuana and retail marijuana products and for the enforcement of this article and promulgate amended rules and such special rulings and findings as necessary;

Despite the broad rule-making authority, the Division does not have the authority to create a crime through rule.

Analysis

1. The statute requires a criminal history record check, but the rules conflict with statute by making a fingerprint-based criminal history record check discretionary.

During the 2015 legislative session, the General Assembly created a new license type for both medical and retail marijuana – a permitted economic interest. A permitted economic interest will allow greater investment in marijuana businesses than was permitted prior to the 2015 session. Permitted economic interests were to be developed almost completely as a creature of rule. The bill consisted only of a definition of a permitted economic interest and granted rule-making authority related to permitted economic interests. The only statutory requirement for the rules is that the rules must require a permitted economic interest applicant to submit to and pass a criminal history record check.

> **12-43.3-202. Powers and duties of state licensing authority - rules.** (2) (a) Rules promulgated pursuant to paragraph (b) of subsection (1) of this section may include, but need not be limited to, the following subjects:
>
> (XVIII.5) Rules effective on or before January 1, 2016, relating to permitted economic interests including a process for a criminal history record check; **a requirement that a permitted economic interest applicant submit to and pass a criminal history record check;** a divestiture; and other agreements that would qualify as permitted economic interests; (**emphasis added**)

> **12-43.4-202. Powers and duties of state licensing authority - rules.** (3) (a) Rules promulgated pursuant to paragraph (b) of subsection (2) of this section must include, but need not be limited to, the following subjects:
>
> (XIV.5) Rules effective on or before January 1, 2016, relating to permitted economic interests including a process for a criminal history record check; **a requirement that a permitted economic interest applicant submit to and pass a criminal history record check**; a divestiture; and other agreements that would qualify as permitted economic interests; (**emphases added**)

However, the rules promulgated by the Division give the Division discretion whether to require a fingerprint-based criminal history record check.

> **M 231.5 – Qualifications for Permitted Economic Interests: Individual.**
>
> B. Other Requirements

1. Fingerprints Required. Any individual applying for a Permitted Economic Interest shall be fingerprinted for a fingerprint-based criminal history record check **at the Division's discretion**. (**emphases added**)

R 231.5 – Qualifications for Permitted Economic Interests: Individuals

B. Other Requirements

1. Fingerprints Required. Any individual applying for a Permitted Economic Interest shall be fingerprinted for a fingerprint-based criminal history record check **at the Division's discretion**. (**emphasis added**)

The statute requires a criminal history record check while the rules give the Division the discretion whether to require a fingerprint-based criminal history record check. Therefore, the rules conflicts with the statutes.

2. The Division does not have the authority to create a crime through rule.

The Division promulgated a rule that makes disclosure of material that is confidential, as identified by the retail marijuana code, a class 1 misdemeanor.

R 1308 – Confidential Information and Former State Licensing Authority Employees

A. Misdemeanor if Disclosed. Disclosure of confidential records or information in violation of the Retail Code constitutes a class 1 misdemeanor pursuant to subsection 12-43.3-201(5), C.R.S.

1. Licensees, and employees or agents Licensees, shall not obtain or utilize confidential information the Licensee, employee or agent is not lawfully entitled to possess and acquire through use or misuse of Division processes or Division-approved systems. For confidentiality requirements of State Licensing Authority and Division employees, see rule R 1201 – Duties of Employees of the State Licensing Authority.
2. Any Licensee, and any employee or agent of a Licensee, who is authorized to access the Division's Inventory Tracking System and/or have access to confidential information derived from Division sources, shall utilize the confidential information only for a purpose authorized by the Division or these Rules.
3. All Licensees, and all employees and agents of Licensees, shall not use the Inventory Tracking System for any purpose other than tracking the Licensee's Retail Marijuana and Retail Marijuana Product.

In the medical marijuana code, § 12-43.3-201 (5), C.R.S., makes it a class 1 misdemeanor to disclose confidential records or information in violation of the

medical marijuana code[2]. There is no corresponding statutory criminal penalty in the retail marijuana code.

Section 12-43.3-201 (5), C.R.S., states:

> **12-43.3-201. State licensing authority - creation.** (5) Any person who discloses confidential records or information **in violation of the provisions of this article** commits a class 1 misdemeanor and shall be punished as provided in section 18-1.3-501, C.R.S. Any criminal prosecution pursuant to the provisions of this section must be brought within five years from the date the violation occurred. (**emphasis added**)

The terms of § 12-43.3-201, C.R.S., limit the section to violations of the medical marijuana code since the section refers to "violations of the provisions of this article", with "this article" referring to article 43.3, the medical marijuana code. The Division may not use the criminal sanction in the medical marijuana code as authority to create the same crime in the retail marijuana code.

Since the Division cannot rely on a statutory provision to authorize the crime, the Division must rely on its rule-making authority, but it too is lacking. Although the division has broad rule-making authority, this rule-making authority does not extend to creating a criminal sanction. The Colorado Supreme Court has ruled that the General Assembly may not delegate to an administrative agency the power to define criminal conduct. *People v. Lowrie,* 761 P.2d 778, 781 (Colo. 1988). Therefore, the broad rule-making authority conferred to the Division by the General Assembly does not extend to creating a new crime in the retail code related to disclosing confidential materials.

Conclusion

We recommend that Rules M 231.5 B.1.and R 231.5 B.1. of the rules of the Division not be extended because they conflict with §§ 12-43.3-202 (2) (a) (XVIII.5) and 12-

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[2] The medical marijuana rules have a corresponding rule, M 1308 A., that reiterates the criminal penalty:

> **M 1308 –Confidential Information and Former State Licensing Authority Employees**
>
> A. Misdemeanor if Disclosed. Disclosure of confidential records or information in violation of the Medical Code constitutes a class 1 misdemeanor pursuant to subsection 12-43.3-201(5), C.R.S.

43.4-202 (3) (a) (XIV.5), C.R.S., and we recommend that Rule R 1308 A.1-3 not be extended because the Division lacks the rule-making authority to promulgate the rule.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Kate Meyer, Office of Legislative Legal Services

DATE: December 8, 2015

SUBJECT: Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 150399; SOS Tracking No. 2015-00313).[1]

Summary of Problems Identified and Recommendations

Section 1-1-104 (2.8), C.R.S., defines correspondence sent pursuant to, *inter alia*, § 1-2-509, C.R.S., as correspondence sent via forwardable mail. Section 1-2-509 (3), C.R.S., however, directs clerks to send new voter notifications via nonforwardable mail. Rule 2.10.2 of the Secretary of State (Secretary) contemplates the United States Postal Service providing a county clerk and recorder with a postcard notice that such new voter notifications have been forwarded. The rule therefore complies with § 1-1-104 (2.8), C.R.S., but not with § 1-2-509 (3), C.R.S. **Because Rule 2.10.2 conflicts with § 1-2-509 (3), C.R.S., we recommend that Rule 2.10.2 of the rules of the Secretary concerning elections not be extended.**

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[1] Under § 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 § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

Section 1-6-101 (5), C.R.S., requires county clerks or designated election officials to hold instruction classes for supervisor judges. However, Rule 6.4 requires voter service and polling center supervisor judges to complete a training course that may be provided by the Secretary. **Because Rule 6.4 conflicts with the statute, we recommend that Rule 6.4 of the rules of the Secretary concerning elections not be extended.**

The General Assembly, via the 2015 "Rule Review Bill"[2], allowed a rule of the Secretary concerning third-party delivery of mail ballots to expire. Rule 7.2.6 revives a substantial portion of the expired rule. However, § 24-4-103 (8) (d), C.R.S., prohibits repromulgation of an expired rule. **Because Rule 7.2.6 constitutes a repromulgation of an expired rule in derogation of the "State Administrative Procedures Act"[3] (APA), the rule is void, and we therefore recommend that the rule not be extended.**

Rule-making Authority

Section 1-1-107, C.R.S., generally authorizes the Secretary to adopt rules to administer and enforce election laws:

> **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;

Notwithstanding this broad grant of rulemaking authority, Rules 2.10.2 and 6.4 conflict with portions of the "Uniform Election Code of 1992"[4], as discussed in the Analysis portion of this memorandum.

Additionally, the Secretary has specific authority under §1-7.5-106, C.R.S., to adopt rules regarding mail ballot elections:

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[2] S.B. 15-100, 2015 Colo. Sess. Laws, ch. 182.

[3] Article 4 of title 24, C.R.S.

[4] The "Uniform Election Code of 1992" comprises articles 1 to 13 of title 1, C.R.S.

1-7.5-106. Secretary of state - duties and powers. (1) In addition to any other duties prescribed by law, the secretary of state, with advice from election officials of the several political subdivisions, shall:

(a) Prescribe the form of materials to be used in the conduct of mail ballot ballot elections; except that all mail ballot packets shall include a ballot, instructions for completing the ballot, a secrecy envelope, and a return envelope;

(b) Establish procedures for conducting mail ballot elections; except that the procedures shall be consistent with section 1-7.5-107;

(c) Supervise the conduct of mail ballot elections by the election officials as provided in section 1-7.5-105 (3).

(2) In addition to other powers prescribed by law, the secretary of state may adopt rules governing procedures and forms necessary to implement this article and may appoint any county clerk and recorder as an agent of the secretary to carry out the duties prescribed in this article.

As discussed in the Analysis portion of the memorandum, this grant of rule-making authority does not extend to adopting rules that conflict with the APA.

Analysis

1. A statutory conflict exists regarding whether certain voter notifications must be sent via forwardable or nonforwardable mail.

In accordance with the "Uniform Election Code of 1992", persons engaging in certain elections-related transactions (i.e., changing an address, applying to register to vote, or cancelling an existing voter registration) receive various mailed correspondence from their county clerks and recorders. Section 1-1-104, C.R.S., identifies this correspondence as a "confirmation card" and defines the term as follows:

1-1-104. Definitions. As used in this code, unless the context otherwise requires:

(2.8) "Confirmation card" **means a communication mailed from a county clerk and recorder to an elector pursuant to section 1-2-302.5, 1-2-509, or 1-2-605, which card must:**

(a) Be mailed to the elector's address of record, unless the elector has requested that such communication be sent to his or her deliverable mailing address pursuant to section 1-2-204 (2) (k);

(b) **Be sent by forwardable mail;**

(c) Comply with all relevant requirements of the federal "National Voter Registration Act of 1993", 42 U.S.C. sec. 1973gg, as amended; and

(d) Include a postage-prepaid, preaddressed form by which the elector may verify or correct his or her address information. **(emphases added)**

This provision, then, contemplates that such correspondence is sent only via *forwardable* mail. Section 1-2-509 (3), C.R.S., however, requires new voter notifications to be sent to applicants for voter registration via *nonforwardable* mail:

1-2-509. Reviewing voter registration applications - notification. (3) Within ten business days after receipt of the application, **the county clerk and recorder shall notify each applicant of the disposition of the application by nonforwardable mail.** If within twenty business days after receipt of the application the notification is returned to the county clerk and recorder as undeliverable, the applicant shall not be registered. If the notification is not returned within twenty business days as undeliverable, then the applicant shall be deemed registered as of the date of the application; except that, if the applicant was notified that the application was not complete, then the applicant shall be deemed registered as of the date of the application if the additional information is provided at any time prior to the actual voting. If such applicant does not provide the additional information necessary to make his or her application complete and accurate within twenty-four months after notification is sent pursuant to subsection (2) of this section, the applicant will be required to reapply in order to be registered. **(emphasis added)**

Rule 2.10.2 of the rules of the Secretary concerning elections comports with the § 1-1-104 (2.8), C.R.S., definition of "confirmation card" by providing that a county clerk and recorder may be apprised that new voter notification has been forwarded:

2.10.2 If after the 20-day period outlined in section 1-2-509(3), C.R.S, the United States Postal Service returns a new voter notification to the county clerk as undeliverable, **or provides the clerk with a postcard notice of mail forwarding,** the county clerk must mark the voter's record "Inactive" and mail a confirmation card. **(emphasis added)**

Because § 1-2-509 (3) requires that the notifications be sent via nonforwardable mail, a county clerk and recorder will not receive notice from the United States Postal Service that such correspondence has been forwarded. Rule 2.10.2 therefore conflicts with § 1-2-509 (3), C.R.S.

2. The statutory duty to train election judges, including supervisor judges, is vested solely in county clerks and recorders and other designated election officials.

Election judges are registered electors appointed to perform various election duties assigned to them by county clerk and recorders or other designated election officials[5]. (In the "Uniform Election Code of 1992", "designated election official" is a defined term that does not include the Secretary.[6]) Supervisor judges are a subset of election judges who have been selected to be in charge of the election process at polling locations by a designated election official.[7]

All election judges must undergo training prior to each election.[8] This training is provided by designated election officials:

> **1-6-101. Qualifications for election judges - student election judges - definition - legislative declaration.** (5) **The county clerk and recorder or the designated election official shall hold** a class of instruction concerning the tasks of an election judge and **a special school of instruction concerning the task of a supervisor judge** not more than forty-five days prior to each election. **(emphases added)**

Rule 6.4 of the rules of the Secretary concerning elections sets forth the Secretary's role in training supervisory judges for voter service and polling centers as follows:

> 6.4 A supervisor judge in a voter service and polling center must complete a training course **provided by** or approved by **the Secretary of State**. **(emphases added)**

The statutory power to provide this training does not, however, extend to the Secretary. Because Rule 6.4 permits the Secretary to provide training that, consistent with statute, may only be given by designated election officials, the rule conflicts with § 1-6-101 (5), C.R.S.

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[5] See § 1-6-101 (1), C.R.S.

[6] For purposes of the "Uniform Election Code of 1992", "designated election official" is defined as "the member of a governing board, secretary of the board, county clerk and recorder, or other person designated by the governing body as the person who is responsible for the running of an election." § 1-1-104 (8), C.R.S.

[7] Section 1-1-104 (47), C.R.S.

[8] "Each person appointed as an election judge shall be required to attend one class of instruction prior to the first election in an election cycle in which the person will serve as an election judge. The county clerk and recorder or other designated election official may require a person appointed as an election judge to attend more than one class of instruction in an election cycle." § 1-6-101 (6), C.R.S.

3. Rule 7.2.6 impermissibly repromulgates a predecessor rule[9] that was allowed to expire pursuant to the annual "Rule Review Bill".

In 2014, the Secretary promulgated elections rules, including a rule requiring mail ballot return envelopes to contain an affirmation for those electors availing themselves of third-party mail ballot delivery. To wit, the rule stated:

> 7.2.6 Effective January 1, 2015, each mail ballot return envelope must include the following affirmation: "For third party delivery: I am voluntarily giving my ballot to (name and address) for delivery. I have marked and sealed my ballot in private and have not allowed any person to observe the marking of the ballot, except for those authorized to assist voters under state or federal law."

The 2014 rule, then, consisted of two discrete prongs: a deliverer identification prong and a privacy prong.

At its December 19, 2014, hearing, the Committee on Legal Services (Committee), in response to a motion made by Representative Kagan, voted[10] not to extend Rule 7.2.6 of the rules of the Secretary of State concerning elections. Crucially, debate among the Committee members was not confined to either prong exclusively, but included the entirety of Rule 7.2.6.[11] That rule ultimately expired on May 15, 2015, by operation of its inclusion in the annual "Rule Review Bill".

The elections rules adopted by the Secretary on August 6, 2015, contain a new version of Rule 7.2.6. While the privacy prong has been completely omitted from the 2015 version of Rule 7.2.6, the deliverer identification prong is substantially similar to that contained in the 2014 iteration of that rule. The 2015 version states:

> 7.2.6 Effective January 1, 2016, each mail ballot return envelope must include the following: "I am voluntarily giving my ballot to (name and address) for delivery on my behalf."

The APA prohibits repromulgation of a rule that has expired pursuant to the rule review process, and declares void any rules so repromulgated. Section 24-4-103 (8) (d), C.R.S., states, in pertinent part:

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[9] A side-by-side comparison of the 2014 and 2015 versions of Rule 7.2.6 is attached as **Addendum A**.

[10] The vote on the motion to extend was 0-6.

[11] An excerpt of the minutes of the December 19, 2014, Committee meeting relating to the discussion of Rule 7.2.6 is attached as **Addendum B**.

> **24-4-103. Rule-making - procedure - definitions - repeal.** (8) (d) … Only that portion of any rule specifically disapproved by bill shall no longer be effective, and that portion of the rule which remains after deletion of a portion thereof shall retain its character as an administrative rule. Each agency shall revise its rules to conform with the action taken by the general assembly. **A rule which has been allowed to expire by action of the general assembly** pursuant to the provisions of paragraph (c) of this subsection (8) because such rule, in the opinion of the general assembly, is not authorized by the state constitution or statute **shall not be repromulgated** by an agency unless the authority to promulgate such rule has been granted to such agency by a statutory amendment or by the state constitution or by a judicial determination that statutory or constitutional authority exists. **Any rule so repromulgated shall be void.** …[12] **(emphases added)**

The General Assembly explicitly disapproved Rule 7.2.6 by allowing it to expire via the "Rule Review Bill". In this case, the above-cited APA provision requires the Secretary "to revise [his] rules to conform with" that action. Instead, by essentially restoring one of the two prongs of the expired rule, the Secretary has not acted consonant with the APA but has repromulgated, in substantial part, a previously disapproved rule.

Because the 2015 rule revives a significant portion of its expired predecessor rule (absent authority to do so being granted to the Secretary by statutory amendment, by the state constitution, or by a judicial determination that statutory or constitutional authority exists), Rule 7.2.6 of the 2015 elections rules of the Secretary is void.

Conclusion

We recommend that Rules 2.10.2 and 6.4 of the rules of the Secretary of State concerning elections not be extended because they conflict with §§ 1-2-509 (3) and 1-6-101 (5), C.R.S., respectively.

We further recommend that Rule 7.2.6 of the rules of the Secretary of State concerning elections not be extended because it repromulgates a rule in contravention of the state APA and is therefore void.

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[12] The entirety of § 24-4-103 (8), C.R.S., is attached as **Addendum C.**

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ADDENDUM A

Side-by-Side Comparison Table of Rule 7.2.6[13]

2014 version of Rule 7.2.6	2015 version of Rule 7.2.6
7.2.6 Effective January 1, 2015, in addition to the affirmation required by section 1-7.5-107(3), C.R.S., **each mail ballot return envelope must include the following** affirmation: "For third party delivery: **I am voluntarily giving my ballot to** (Blank) **for delivery**. I have marked and sealed my ballot in private and have not allowed any person to observe the marking of the ballot, except for those authorized to assist voters under state or federal law."	**7.2.6 Effective January 1**, 2016, **each mail ballot return envelope must include the following**: "**I am voluntarily giving my ballot to** (name and address) **for delivery** on my behalf."

[13] Emphases added to indicate identical language.

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ADDENDUM B

SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

December 19, 2014

The Committee on Legal Services met on Friday, December 19, 2014, at 10:02 a.m. in HCR 0112. The following members were present:

Senator Steadman, Vice-chair
Senator Brophy
Senator Guzman
Senator Johnston (present at 12:10 p.m.)
Senator Roberts
Representative Foote
Representative Gardner
Representative Kagan (present at 10:06 a.m.)
Representative McCann

[EXCERPT OF DISCUSSION OF RULE 7.2.6]

12:44 p.m.

Representative Kagan moved to extend Rule 7.2.6 of the rules of the Secretary of State and asked for a no vote. He said this does not appear on the agenda but I do make that motion and request that we discuss the matter.

Senator Steadman said let me put this in context for the Committee. We are now moving to agenda item 1g., which are rules of the secretary of state. This rule that Representative Kagan has called out is subsumed within the larger packet of rules. Staff had not brought this before the Committee for a recommendation. Staff did not see a problem with it. Representative Kagan, however, has made a motion to not extend this particular rule. It might be helpful if we take this rule in isolation since we have a motion on the table and we'll get to the rest of the rule subsequent to dealing with Representative Kagan's motion.

12:46 p.m. – Jason Gelender, Managing Senior Attorney, Office of Legislative Legal Services, addressed the Committee. He said I'll explain why the Office does not think that Rule 7.2.6 creates an issue. This issue concerns a statutory limitation on delivery of ballots by a third party and then a secretary of state rule related to that. The specific statute is section 1-7.5-107 (4) (b) (I) (B), C.R.S., which imposes a 10-ballot limit on third-party delivery of mail ballots in an election. There are no additional statutory provisions that specify how the limit is to be enforced and there is no specific rule-

making authority tied directly to this statute for the secretary of state to enforce the provision. Having said that, the rule-making authority of the secretary of state over elections is broad. There are two sources for that authority. The first and most general is section 1-1-107 (2) (a), C.R.S., which gives the secretary of state authority to promulgate rules necessary for the proper administration and enforcement of the election laws. More specific to this issue and the main basis for our belief that there's not an issue with the rule is section 1-7.5-106 (1) (a), C.R.S., which gives the secretary of state specific rule-making authority to prescribe the form of materials to be used in the conduct of mail ballot elections and specifically requires that all mail ballot packets include a ballot, instructions for completing the ballot, a secrecy envelope, and a return envelope. There's also additional specific authority there to establish procedures for conducting mail ballot elections. What the secretary of state has done in Rule 7.2.6 is require the mail ballot return envelope to include an affirmation of the voter saying that for third-party delivery, I'm voluntarily giving my ballot to a specific person, require the name and address of that person, and then it goes on to say how they've marked and sealed the ballot in private and not allowed it to be observed, etc. We believe that, under the secretary of state's authority to prescribe the form of mail ballot election materials, this rule falls under that authority. I don't know if there are folks here from the secretary of state's office or not to further explain the rule.

Senator Steadman said on this part about marking and sealing the ballot in private and not allowing any person to observe the marking of the ballot, is there any requirement in statute that voters are prohibited from having someone observe them marking their ballot? Mr. Gelender said that answer I actually do not know for certain. I do know that when you go to the voting booths you are put in privacy and that there is a general expectation that that's how it will be done.

Senator Steadman said but in the privacy of one's home where we're marking mail ballots, can every eligible voter in the household sit together at the kitchen table and mark their ballots in sight of each other and perhaps even discuss with each other how they're marking the ballots? There's nothing prohibiting that in statute is there? Mr. Gelender said no, I don't believe there is.

Senator Steadman said yet the rule appears to create that prohibition because the voter is required to affirm that they've done this in private when there's no statutory obligation on them to do so. Mr. Gelender said yes.

Representative Kagan asked do you think that the authority to prescribe the form of the materials encompasses the authority to prescribe the content of the materials? Mr. Gelender said that's a very interesting question. I think that in this case when you're looking at what the materials are, the form, to at least some degree, is the content. I suppose there would be some limits in contradiction of other statutes if they, for example, required who you are voting for to be on the outside of the envelope or something like that. This particular language to me falls within the realm of form.

Representative Kagan asked do you think that relevant to this discussion is the requirement that the procedures that the secretary of state is authorized to establish must be consistent with section 1-7.5-107, C.R.S.? That section is very proscriptive. In parts it says the wording that should be on these forms and it specifies that the ballot may be delivered to any person of the elector's own choice for delivery directly or delivery in the mail. Do you think it's consistent with section 1-7.5-107, C.R.S., to make requirements that you must tell us who the person is who you gave your ballot to – and this only applies to persons who have their ballot delivered – and you have to mark your ballot in private? Do you think that's consistent with the structure in section 1-7.5-107, C.R.S.? Mr. Gelender said with regard to your first question, I do believe that the language about identifying the third-party delivery is supported by rules. The reason why is the secretary of state has broad authority to enforce election laws. We do have a law that a person may deliver no more than 10 mail ballots on behalf of another. There's nothing that specifies how the secretary of state is to attempt to track or enforce that and under a rational basis test I think that it's not irrational for them to say if we make them list these people on the ballots we can see if the same name and address shows up more than 10 times. That part of it is very clearly in by rule. The bit about marking and sealing in private, I'm not aware of anything that specifically conflicts with requiring that oath. Nothing requires it to be there but I don't know of anything that conflicts with it.

Senator Steadman said as a voter I have the right to mark my ballot with you watching, do I not? Mr. Gelender said as far as I know, yes.

Senator Steadman said as a voter I have a right to give my ballot to a third party to deliver to the clerk's office on my behalf, don't I? Mr. Gelender said yes.

Senator Steadman said given that I have a right to do both of those things, doesn't this rule conflict with my rights as a voter? Mr. Gelender said the first part of it I think clearly does not for the reasons I've specified. In no way does indicating who you're giving it to impinge on your ability to give it to somebody.

Representative Gardner said I think it interesting this question about can you show everyone as a matter of law your ballot as you're marking it because in election standards the notion is that a voter is supposed to vote in secrecy. Setting that aside, this issue is new on the agenda and I'm a little disturbed. I respect my colleague Representative Kagan for wanting to bring an issue forward. Bringing issues forward that staff has not is something this Committee can do. I guess in my own experience the way that has been done is to ask staff to look at the issue and write a memo. It seems to me like we have an issue before us that needs some work as well as the ability of the department to come forward. I would point out that while I will not be here for this, the rule review bill will come back to this Committee on two occasions in each house. I would ask and request of Representative Kagan that perhaps we lay this over and ask staff to do a memo and ask the secretary of state to state their position. I think the issues you raise are extremely legitimate, but it does seem that it ought to be done

in a more informed way and with the assistance of staff as well as the department. I'll point out also that we will have a new secretary of state who may have a different view of the regulation. I would ask the Chair to lay this over.

Senator Steadman said I should advise you all that I was made aware yesterday that this would be an issue. I discussed the matter with staff. I asked the staff to advise the department of state and they were advised and had an opportunity to be here. This rule is part of the larger group of rules that are before us on the agenda that were uncontested until this new wrinkle. It's been on the agenda and the department of state was notified, albeit about 24 hours ago. Representative Kagan has a motion on the floor and I consider it in order. I understand the suggestion that we spend more time on this, but that will be for the Committee to decide. I'm not going to take it off the table.

Senator Johnston said to the last conversation about whether this is a close call about regulatory authority under the statutes or not, this doesn't actually look like a close call at all. If you look at section 1-7.5-107 (4) (b) (I) (B), C.R.S., it says deliver the ballot to any person of the elector's own choice or to any duly authorized agent of the county clerk and recorder or designated election official for mailing or personal delivery, except that no person other than a duly authorized agent of the county clerk and recorder or designated election official may receive more than 10 mail ballots in any election for mailing or delivery. There is nothing in that statute that authorizes any additional rule-making or burden beyond what that statute prescribes. The statute intentionally carved out the less than 10 exception as the section of statute that is exempt from other rule-making. The more than 10 exceptions are the ones under subsection (4)(b)(I)(A), which refers to the county clerk and recorder, designated election official, voter service, polling center, or drop-off location. The statute very intentionally regulated and specified 10 and over and very intentionally did not for 10 and under. For me this is not at all a close call that there's rule-making power here. I would say if someone wants to change this they should run a bill, but I don't see anything that grants power to a rule-making agency to change that. I would support Representative Kagan's motion.

Representative Gardner said to clarify, is the motion to extend?

Representative Kagan said the motion is to extend the rule and I'm urging a no vote.

Representative Gardner said I'm going to be a yes vote. I think there is a legitimate question raised here. Let me express my concern that we have a very specific rule item and I regret that the secretary of state's office has not seen fit to come and defend its rule or to say that it's uncontested. I do feel an obligation to the process to vote yes to extend and then were I to be successful I don't think that should preclude further consideration on this on the two more occasions this will come before the Committee.

Senator Roberts said I'll echo Representative Gardner not just because I'd like us to be on the same page on one of his last acts, but I'm troubled by the process. I understand that maybe there was 24 hour notice but this is certainly new to me. We get this information and the paperwork at least a week in advance and it gives us time to consider it and put it in context and with the expectation that the agency would have enough time. Who knows why 24 hours wasn't notice sufficient for them to send someone over. For the same idea that perhaps it's a conversation worthy to have, it feels a little procedurally insufficient including to the agency involved. For that reason I'll be an aye vote.

Senator Brophy said for all of those reasons, I would respectfully ask that the motion be withdrawn. I don't think it's appropriate to vote on it without giving more of an opportunity for the secretary of state's office to come over and respond. Notice was less than 24 hours ago. I realize that it's now 24 hours ago that notice was given, but there was no guarantee when this meeting started that the issue would be taken up in excess of 24 hours. As Representative Gardner pointed out, the Committee will meet two more times with the ability to vote on whether to extend this rule or not. At that point give the secretary of state the appropriate amount of time to either prepare a defense of their rule or say we agree and we're seeking a legislative remedy.

Representative Kagan said thanks for the suggestion. I'm going to decline to withdraw the motion. One of my concerns is that this rule, in my opinion, is putting requirements on voters and a subclass of voters – those voters who choose lawfully and as authorized by statute to give their ballot to somebody else for delivery. Statute says that should be a person of their own choosing. This rule seeks to put an additional requirement on those voters. To me, that's a very serious matter. It directly impacts the ballot and it is not explicitly or even implicitly authorized, I believe, by statute. I think it would be a mistake to allow a rule that without statutory authorization puts a burden and a restriction on a subclass of voters – those who are not able for whatever reason or who do not choose for whatever reason to go to the ballot box themselves or to put a stamp on the ballot themselves. This is a very serious matter and I consider it a matter of urgency. I am declining to withdraw the motion.

Senator Roberts said I have to say that I think what Representative Kagan has just done is given a policy-based rationale for this and yet what we've heard is more of a process. This Committee has kind of prided itself on focusing on process. It doesn't bode well going into this next year where we have some changes coming up in the chambers. I'll just say my opinion is it feels much more partisan than policy. I hope that's not the case because we have some changes coming around the corner and this Committee has oftentimes steered away from the more partisan positions. I need to leave to catch a plane but I think it's somewhat disrespectful to the agencies impacted.

Representative Gardner said ironically I may agree with you on the policy aspect of this. As Senator Roberts notes, the process seems to me to be wholly inadequate and it's very disturbing to me. For that reason, I'll be an aye vote.

The motion failed on a vote of 0-6, with Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting no.

ADDENDUM C

24-4-103. Rule-making - procedure - definitions - repeal. (8) (a) No rule shall be issued except within the power delegated to the agency and as authorized by law. A rule shall not be deemed to be within the statutory authority and jurisdiction of any agency merely because such rule is not contrary to the specific provisions of a statute. Any rule or amendment to an existing rule issued by any agency, including state institutions of higher education administered pursuant to title 23, C.R.S., which conflicts with a statute shall be void.

(b) On and after July 1, 1967, no rule shall be issued nor existing rule amended by any agency unless it is first submitted by the issuing agency to the attorney general for his opinion as to its constitutionality and legality. Any rule or amendment to an existing rule issued by any agency without being so submitted to the attorney general shall be void.

(c) (I) Notwithstanding any other provision of law to the contrary and the provisions of section 24-4-107, all rules adopted or amended on or after January 1, 1993, and before November 1, 1993, shall expire at 11:59 p.m. on May 15 of the year following their adoption unless the general assembly by bill acts to postpone the expiration of a specific rule, and commencing with rules adopted or amended on or after November 1, 1993, all rules adopted or amended during any one-year period that begins each November 1 and continues through the following October 31 shall expire at 11:59 p.m. on the May 15 that follows such one-year period unless the general assembly by bill acts to postpone the expiration of a specific rule; except that a rule adopted pursuant to section 25.5-4-402.3 (5) (b) (III), C.R.S., shall expire at 11:59 p.m. on the May 15 following the adoption of the rule unless the general assembly acts by bill to postpone the expiration of a specific rule. The general assembly, in its discretion, may postpone such expiration, in which case, the provisions of section 24-4-108 or 24-34-104 shall apply, and the rules shall expire or be subject to review as provided in said sections. The postponement of the expiration of a rule shall not constitute legislative approval of the rule nor be admissible in any court as evidence of legislative intent. The postponement of the expiration date of a specific rule shall not prohibit any action by the general assembly pursuant to the provisions of paragraph (d) of this subsection (8) with respect to such rule.

(II) It is the intent of the general assembly that, in the event of a conflict between this paragraph (c) and any other provision of law relating to suspension or extension of rules by joint resolution (whether said provision was adopted prior to or subsequent to this paragraph (c)), this paragraph (c) shall control, notwithstanding the rule of law that a specific provision of law controls over a general provision of law.

(d) All rules adopted or amended on or after July 1, 1976, including temporary or emergency rules, shall be submitted by the adopting agency to the office of legislative legal services in the form and manner prescribed by the committee on legal services. Said rules and amendments to existing rules shall be filed by and in such office and shall be first reviewed by the staff of said committee to determine whether said rules and amendments are within the agency's rule-making authority and for later review by the committee on legal services for its opinion as to whether the rules conform with paragraph (a) of this subsection (8). The committee on legal services shall direct the staff of the committee to review the rules submitted by adopting agencies using graduated levels of review based on criteria established by the committee. The criteria developed by the committee shall provide that every rule shall be reviewed as to form and compliance with filing procedures and that, upon request of any member of the committee or any other member of the general assembly, the staff shall provide full legal review of any rule during the time period that such rule is subject to review by the committee. The official certificate of the director of the office of legislative legal services as to the fact of submission or the date of submission of a rule as shown by the records of his office, as well as to the fact of nonsubmission as shown by the nonexistence of such records, shall be received and held in all civil cases as competent evidence of the facts contained therein. Records regarding the review of rules pursuant to this section shall be retained by the office of legislative legal services in accordance with policies established pursuant to section 2-3-303 (2), C.R.S. Any such rule or amendment to an existing rule issued by any agency without being so submitted within twenty days after the date of the attorney general's opinion rendered thereon to the office of legislative legal services for review by the committee on legal services shall be void. The staff's findings shall be presented to said committee at a public meeting held after timely notice to the public and affected agencies. The committee on legal services shall, on affirmative vote, submit such rules, comments, and proposed legislation at the next regular session of the general assembly. The committee on legal services shall be the committee of reference for any bill introduced pursuant to this paragraph (d). Any member of the general assembly may introduce a bill which rescinds or deletes portions of the rule. Rejection of such a bill does not constitute legislative approval of the rule. Only that portion of any rule specifically disapproved by bill shall no longer be effective, and that portion of the rule which remains after deletion of a portion thereof shall retain its character as an administrative rule. **Each agency shall revise its rules to conform with the action taken by the general assembly. A rule which has been allowed to expire by action of the general assembly pursuant to the provisions of paragraph (c) of this subsection (8) because such rule, in the opinion of the general assembly, is not authorized by the state constitution or statute shall not be repromulgated by an agency unless the authority to promulgate such rule has been**

granted to such agency by a statutory amendment or by the state constitution or by a judicial determination that statutory or constitutional authority exists. Any rule so repromulgated shall be void. Such revision shall be transmitted to the secretary of state for publication pursuant to subsection (11) of this section. Passage of a bill repealing a rule does not result in revival of a predecessor rule. This paragraph (d) and subsection (4.5) of this section do not apply to rules of agency organization or general statements of policy which are not meant to be binding as rules. For the purpose of performing the functions assigned it by this paragraph (d), the committee on legal services, with the approval of the speaker of the house of representatives and the president of the senate, may appoint subcommittees from the membership of the general assembly.

(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. **(emphasis added)**

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REVISED MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris and Rebecca Hausmann, Office of Legislative Legal Services

DATE: December 9, 2015

SUBJECT: Rules of the Parks and Wildlife Commission, Department of Natural Resources, concerning the bighorn sheep access program and the ranching for wildlife program, 2 CCR 406-2 (LLS Docket No. 150431; SOS Tracking No. 2015-00485).[1]

Summary of Problem Identified and Recommendation

Section 33-4-103 (3) (a), C.R.S., specifies that the landowner preference program does not apply to moose or Rocky Mountain big horn sheep, and § 33-3-103.5 (2) (a) (III), C.R.S., specifies that the division of wildlife shall not deny a claim for damages to a landowner on the ground that the landowner is enrolled in the landowner preference program. Rules #210 and #211 create the ranching for wildlife and bighorn sheep access programs, respectively, which are a type of landowner preference program. But many portions of Rule #210 extend the program to moose and Rocky Mountain big horn sheep; all of Rule #211 extends the program to Rocky Mountain big horn sheep; and parts of Rule #206 refer to these prohibited rules. And Rules #210 B. 8. and #211 B. 8. specify that landowners enrolled in the ranching for wildlife and bighorn sheep

[1] Under § 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 § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memorandum will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

access programs are not eligible for game damage payments. **Because these rules conflict with the statute, we recommend that Rules #206 B. 1. f., #206 B. 5. e. 1., #210 B. 8., #210 B. 9., #210 D. 1. a., #210 D. 2. b., #210 D. 3. d., #210 D. 3. e., #210 D. 3. f. 1., #210 D. 5. a. 2., #210 E. 1., #210 E. 6., and #211 of the rules of the Parks and Wildlife Commission concerning the bighorn sheep access program and the ranching for wildlife program not be extended.**

Rule-making Authority

The statutes give the Parks and Wildlife Commission (Commission) general rule-making authority:

> **33-1-104. General duties of commission.** (1) The commission is responsible for all wildlife management, for licensing requirements, and for the promulgation of rules, regulations, and orders concerning wildlife programs.

> **33-9-102. Powers and duties of commission - rules.** (2) In addition to any other specific grant of rule-making authority, the commission may adopt or revise any rules, in accordance with article 4 of title 24, C.R.S., that the commission deems necessary or convenient to effect the purposes of, and fulfill its duties under, this title.

The Commission's rule-making authority regarding the landowner preference program is specified in § 33-4-103 (5), C.R.S.:

> **33-4-103. Landowner preference for hunting license - legislative declaration - rules.** (5) The commission shall adopt rules to implement this section prior to July 1, 2014.

The Commission has no explicit rule-making authority regarding cooperative agreements.

The wildlife damages statutes contain five references to rules promulgated by the Commission:

> **33-3-104. State shall be liable - when.** (3) The burden of proof shall be with the claimant for all claims for damages enumerated in paragraph (d) of subsection (1) of this section, pursuant to rules established by the commission pertaining to wildlife damage.
>
> (4) If the commission has not promulgated rules relating to damage by wildlife, pursuant to sections 33-1-104 and 33-1-108, the division shall not refuse to pay a claim for wildlife damage.

(5) If for any reason a pertinent rule of the commission relating to wildlife damage is declared void or suspended, the provisions of subsection (4) of this section shall not be applicable.

(6) For the year 1979, any damage claims received by the division after June 21, 1979, shall not be denied until and unless considered under the rules promulgated by the commission relating to damage by wildlife. If such rules are not promulgated by January 1, 1980, the provisions of subsection (4) of this section shall apply.

(8) All rules concerning damages by wildlife adopted or amended by the commission on or after July 1, 1979, shall be subject to sections 24-4-103 (8) (c) and (8) (d) and 24-4-108, C.R.S.

None of these grants of or references to rule-making authority authorize rules that would include moose or bighorn sheep in the landowner preference program or eliminate the state's liability for big game damages with respect to landowners who enroll in the program, as discussed in the Analysis portion of this memorandum.

Analysis

1. To manage wildlife on private property, the General Assembly has enacted a landowner hunting license preference, which excludes moose and bighorn sheep and includes eligibility for big game damages.

As specified above in § 33-1-104 (1), C.R.S., the commission is responsible for all wildlife management, for issuing hunting licenses, and promulgating rules. These three elements are closely related: indeed, the control of hunting–whether and how many licenses are available, for which species, for which sex, during which part of the year, in which parts of the state, using which means of take–is the primary means by which the Commission manages wildlife. And the Commission controls hunting by periodically amending its rules.

But in numerous areas of the state, substantial big game populations are found on private property, and absent landowner consent, the Commission cannot authorize hunting on private land. To address this issue, the General Assembly has enacted two related statutes: a highly detailed one for the landowner preference program, and a general one regarding cooperative agreements with landowners (discussed in section 2 below).

1.1. Only the General Assembly can adopt a license preference program.

Section 33-4-103, C.R.S. (attached as **Addendum A**), creates the landowner preference program, which is "designed to encourage hunter access to private land by enabling

landowners to apply for licenses using applications based upon land ownership and wildlife benefit."[2] A landowner of at least 160 acres that contain good habitat for an eligible big game species who agrees to make the land available for hunting of the species (along with some other conditions) is entitled to one or more vouchers that can be submitted for hunting licenses for that particular big game species.

This is called a "preference" program because, generally[3], hunting licenses are distributed pursuant to a drawing in which applicants bid all of their "points" to hunt a particular species in a particular game unit. Applicants acquire points either by applying for a point (rather than for a license) or by applying for a license and not getting a license under the draw. Essentially, licenses are issued to the applicants who bid the most points.

In contrast, a landowner enrolled in the preference program receives one or more vouchers that can either be submitted for a license or transferred to someone else, who can also submit the voucher for a license. This is a preference because all the vouchers are drawn for licenses before the public drawing, so the landowners have a much better chance at receiving a license.

There are only a few other statutes that authorize a license preference:

- § 33-4-102 (1.9) (b) , C.R.S. (for wounded warriors);
- § 33-4-104 (4) , C.R.S. (for certain members or veterans of armed forces);
- § 33-4-117, C.R.S. (for youth hunters and adult mentors); and
- § 33-4-119, C.R.S. (for mobility-impaired hunters).[4]

Because hunting license preferences discriminate among categories of applicants, all hunting license preferences are created by statute; the Commission does not have rule-making authority to adopt a hunting license preference program that has not been established by statute.

1.2. The landowner preference statute excludes moose and bighorn sheep.

The landowner preference statute limits the landowner preference program to only certain types of game, as specified in § 33-4-103 (3) (a), C.R.S.:

> **33-4-103. Landowner preference for hunting license - legislative declaration - rules.** (3) **Applications - availability.** (a) After determining a land-

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[2] Section 33-4-103 (1) (a), C.R.S.

[3] Some licenses are available over the counter in areas where the supply exceeds demand.

[4] These statutes are attached as **Addendum B**.

owner is eligible and in compliance with this section, **the division shall issue the landowner applications for licenses permitting the hunting of** deer, elk, pronghorn, and such other **species, except for moose, rocky mountain big horn sheep**, desert big horn sheep, and rocky mountain goat, **that meet the commission's animal management objectives** for the game management unit where the property lies, in an amount determined by this subsection (3). (**emphases added**)

The statute specifically prevents a landowner who has enrolled in the landowner preference program from getting a hunting license for moose or Rocky Mountain bighorn sheep due to such enrollment. Further, the statute specifies that the only types of wildlife habitat that qualify a landowner for enrollment in the program are those for which a license may be issued:

> **33-4-103. Landowner preference for hunting license - legislative declaration - rules.** (2) **Eligibility.** (a) A landowner who is an owner, as shown by a recorded deed, of a parcel of agricultural land of one hundred sixty acres or more and whose land meets the following requirements is eligible for the landowner preference program, also referred to in this section as the "program". **The land must**:
>
> (I) **Be inhabited by the species being applied for** in significant numbers throughout the year or in substantial numbers for shorter times; (**emphasis added**)

So a landowner whose habitat is valuable only for moose or bighorn sheep is ineligible for enrollment in the program, and a landowner who is otherwise eligible to be enrolled cannot be issued a hunting license for moose or bighorn sheep. The General Assembly has clearly determined that the landowner preference program must exclude moose and bighorn sheep.

1.3. The landowner preference statute includes big game damages.

Article 3 of title 33, C.R.S., creates a program whereby the state is liable, within listed parameters, for landowners' damages caused by big game. Section 33-3-103, C.R.S., specifies when the state is not liable for big game damages; § 33-3-103.5, C.R.S. (attached as **Addendum C**), directs the division of wildlife to determine whether to provide game damage prevention materials to a landowner; and § 33-3-104, C.R.S., specifies when the state is liable for big game damages.

Significantly, the General Assembly has specified that enrollment in the landowner preference program created by § 33-4-103, C.R.S., does not disqualify a landowner from being eligible to receive payments for big game damages:

> **33-3-103.5. Game damage prevention materials - definitions.** (2) (a) (III) The division shall not deny a landowner game damage claims or game damage prevention materials on the grounds that the landowner received a voucher pursuant to the wildlife conservation landowner hunting preference program for wildlife habitat improvement under section 33-4-103.

2. To manage wildlife on private property, the General Assembly has also authorized the Commission to enter into cooperative agreements with landowners, which authority does not include a hunting license preference and does not exclude eligibility for big game damages.

The Commission also has statutory authority to enter into cooperative agreements:

> **33-1-105. Powers of commission.** (1) The commission has power to:
>
> (e) Enter into cooperative agreements with state and other agencies, educational institutions, municipalities, political subdivisions, corporations, clubs, landowners, associations, and individuals for the development and promotion of wildlife programs;
>
> (g) **Enter into agreements with landowners** for public hunting and fishing areas. Such agreements shall be negotiated by the commission or its authorized agent and shall provide that, **if the landowner opens the land under his control to public hunting and fishing, the commission shall compensate him** in an **amount** to be determined by the parties to the agreement. Under the agreement, the commission shall control public access to the land to prevent undue damage and to properly manage attendant wildlife populations. In no event shall the commission be liable for damages caused by the public other than those specified in the agreement. (**emphases added**)

This statute is very general, particularly when compared with the very detailed § 33-4-103, C.R.S. As noted above, the Commission has specific authority to promulgate rules governing the landowner preference statute[5], but it has no explicit rule-making authority relating to cooperative agreements.

Significantly, the statute does not specify that the landowner receives a hunting license or voucher for a hunting license or a preference for a hunting license; instead, the Commission shall "compensate" the landowner in an "amount" to be determined by the agreement. The most natural interpretation of this language is the payment of money.

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[5] Section 33-4-103 (5), C.R.S.

Also note that this statute, while it does specify that the Commission is not liable for damages "caused by the public" (other than those specified in the agreement), does not mention any exemption from liability for big game damages.

3. The Commission's ranching for wildlife and bighorn sheep access programs are landowner preference programs, and so must exclude moose and bighorn sheep and include big game damages.

The Commission has created by rule, on the basis of its authority to enter into cooperative agreements, two regulatory programs that share two essential elements with the landowner preference program: the ranching for wildlife program (Rule #210) and the bighorn sheep access program (Rule #211). Like the statutory landowner preference program, the goal of these rule-based programs is to manage wildlife populations on private property, and the landowner is compensated not by money but through a hunting license preference. These similarities indicate that the landowner preference and cooperative agreement statutes must be read in conjunction rather than isolation.[6]

3.1. The ranching for wildlife and bighorn sheep access programs create a landowner preference, but include moose and bighorn sheep.

When a private landowner enrolls in either the ranching for wildlife and bighorn sheep access programs, the landowner receives one or more hunting licenses that are not subject to the public draw. Specifically, the Commission determines how many licenses can be allocated to the private property based on its habitat characteristics, and then distributes that total between a "private" share (*i.e.*, for the landowner) and a "public" share (*i.e.*, for the public that are available only pursuant to a draw):

> **#210 - RANCHING FOR WILDLIFE – DEER, ELK, PRONGHORN, BLACK BEAR, MOOSE, AND BIGHORN SHEEP**
>
> E. License Allocation
>
> 1. A maximum of 1,000 licenses of each species and sex for deer, elk, and pronghorn, a maximum of 30 black bear licenses, a maximum of 20 licenses of each sex for bighorn sheep, and a maximum of 50 licenses of each sex for moose may be allocated to each ranch annually, and subsequently distributed to the public and private share according to the distribution table established in this regulation.
>
> **#211- BIGHORN SHEEP ACCESS PROGRAM**

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[6] **Addendum D** contains a table that compares the statutory landowner preference program with the Commission's two rule-based programs.

E. License Allocation

3. The public share of the licenses in the following distribution table represents the minimum number of licenses provided to the public. Fractions of licenses shall be rounded up for public distribution licenses.

	ROCKY MOUNTAIN BIGHORN SHEEP			
	Private Share of Licenses		Public Share of Licenses	
	% of total allocation to each enrolled property		% of total allocation to each enrolled property	
Option	Ram	Ewe	Ram	Ewe
A	67	0	33	100
B	75	0	25	100

The private share licenses are not subject to the public draw. By specifying in the rules that the "compensation" that the Commission must give to the landowner pursuant to § 33-1-105 (1) (g), C.R.S., for enrolling in the programs is one or more hunting licenses that are not subject to the public draw, these two programs essentially create a landowner preference and are therefore subject to § 33-4-103, C.R.S.

These two strands of statutory authority–a highly specific one that includes explicit rule-making authority (§ 33-4-103, C.R.S.), and very general one that lacks explicit rule-making authority (§ 33-1-105 (1) (g), C.R.S.)–must be construed together to avoid vitiating the General Assembly's policy choices regarding the parameters pursuant to which the Commission may manage wildlife located on private property through the issuance of hunting licenses that create a preference.

Rule #210 (excerpts attached as **Addendum E**) creates the ranching for wildlife program which, as contemplated by the landowner preference statute, enables the division of wildlife to manage big game populations by encouraging hunter access to private land and by enabling landowners to apply for licenses using applications based upon land ownership while avoiding the public draw. It is therefore a type of landowner preference program that is governed by § 33-3-104, C.R.S. But many portions of Rule #210 (Rules #210 D. 1. a., #210 D. 2. b., #210 D. 3. d., #210 D. 3. e., #210 D. 3. f. 1., #210 D. 5. a. 2., #210 E. 1., and #210 E. 6.) improperly include moose and bighorn sheep in the ranching for wildlife program.

Similarly, Rule #211 (also included in **Addendum E**) creates, and applies only to, the bighorn sheep access program. This program, like the ranching for wildlife program, enables the division of wildlife to manage big horn sheep populations by encouraging hunter access to private land and by enabling landowners to apply for licenses using applications based upon land ownership while avoiding the public draw. It is therefore also a type of landowner preference program that is governed by § 33-3-104, C.R.S.

Finally, certain portions of Rule #206 and of Rule #210 (also included in **Addendum E**) refer to these prohibited rules: Rules #206 B. 1. f., #206 B. 5. e. 1., #210 B. 9.

Because these rules conflict with the statute, we recommend that they not be extended.

3.2. The ranching for wildlife and bighorn sheep access programs exclude landowners from qualifying for big game damages.

Section 33-3-103.5 (2) (a) (III), C.R.S. (quoted above on page 6), specifies that landowners who are enrolled in the landowner preference program cannot be excluded from being eligible for big game damages.

But Rules #210 B. 8. and #211 B. 8. (reproduced on pages 20 and 23, respectively, of **Addendum E**) prohibit landowners who are enrolled in the ranching for wildlife or bighorn sheep access programs from receiving payments for big game damages:

> **#210 - RANCHING FOR WILDLIFE - DEER, ELK, PRONGHORN, BLACK BEAR, MOOSE, AND BIGHORN SHEEP**
>
> B. Ranch Entry and Maintenance
>
> 8. Enrolled ranches shall not be eligible for game damage payments or materials for those species hunted in the program when damage occurs within the boundaries of the enrolled portions of the ranch.
>
> **#211 - BIGHORN SHEEP ACCESS PROGRAM**
>
> B. Property Enrollment Constraints
>
> 8. Enrolled properties shall not be eligible for game damage payments or materials for damage caused by Rocky Mountain bighorn sheep.

Because Rules #210 B. 8. and #211 B. 8. conflict with the statute, we recommend that they should not be extended.

Conclusion

The landowner preference statute is highly detailed and contains explicit rule-making authority. The statute specifies that hunting licenses for moose and Rocky Mountain bighorn sheep cannot be issued to private landowners in exchange for the landowner

agreeing to allow hunting on their land. And landowners who participate in the program are eligible for big game damages.

Similar to the statutory landowner preference program, the goal of the Commission's two regulatory programs is to manage wildlife populations on private property, and the landowner is given an incentive to participate through the issuance of hunting licenses for wildlife on the private property.

But the Commission has no explicit rule-making authority to implement its cooperative agreement authority, and chose to adopt regulatory programs that share an essential element with the statutory landowner preference program. Most importantly, the Commission elected to implement its statutory duty to "compensate" the landowner by providing hunting licenses that are exempt from the public draw. This creates a landowner preference, which means that the ranching for wildlife and bighorn sheep access programs must comply with the landowner preference statute, §33-4-103, C.R.S.

But the Commission's rules allow the issuance of hunting licenses for moose and Rocky Mountain bighorn sheep and exclude participating landowners from eligibility for big game damages.

Because these rules conflict with the statute, we recommend that Rules #206 B. 1. f., #206 B. 5. e. 1., #210 B. 8., #210 B. 9., #210 D. 1. a., #210 D. 2. b., #210 D. 3. d., #210 D. 3. e., #210 D. 3. f. 1., #210 D. 5. a. 2., #210 E. 1., #210 E. 6., and #211 of the rules of the Parks and Wildlife Commission concerning the bighorn sheep access program and the ranching for wildlife program not be extended.

ADDENDUM A

33-4-103. Landowner preference for hunting license - legislative declaration - rules. (1) **Legislative declaration.** (a) The general assembly hereby finds, determines, and declares that the wildlife resources of the state are in danger of decline from increasing population pressures and the loss of wildlife habitat. In order to encourage private landowners to provide habitat that increases wildlife populations for the benefit of all hunters, discourage the harboring of game animals on private lands during public hunting seasons, and relieve hunting pressure on public lands by increasing game hunting on private lands, **the general assembly finds that it is necessary to provide an incentive-based system to landowners to provide habitat for wildlife through a hunting license allocation program that allows hunters access to the state's wildlife under the cooperative control of the private landowner.**

(b) **The landowner preference program is designed to encourage hunter access to private land by enabling landowners to apply for licenses using applications based upon land ownership and wildlife benefit.**

(2) **Eligibility.** (a) A landowner who is an owner, as shown by a recorded deed, of a parcel of agricultural land of one hundred sixty acres or more and whose land meets the following requirements is eligible for the landowner preference program, also referred to in this section as the "program". **The land must:**

(I) **Be inhabited by the species being applied for** in significant numbers throughout the year or in substantial numbers for shorter times;

(II) Provide for the species being applied for wintering habitat, transitional habitat, calving areas, solitude areas, migration corridors, or an important food source; and

(III) Have a history of game damage or a huntable population of the species being applied for.

(b) For owners of one hundred sixty to six hundred thirty-nine acres, the division shall verify the size of the property and that the property meets the eligibility requirements of this subsection (2) before issuing the applications under subsection (3) of this section.

(c) Owners of properties registered under the "wildlife conservation application program" that existed prior to July 1, 2013, remain eligible to participate in the program until the earlier of:

(I) July 1, 2016;

(II) The date when the ownership of the property is transferred to a person who is not within the immediate family of the owner; or

(III) The date when the owner of land no longer is in compliance with this section or any rule promulgated under this section.

(3) **Applications - availability.** (a) After determining a landowner is eligible and in compliance with this section, the division shall issue the landowner applications for

licenses permitting the hunting of **deer, elk, pronghorn, and such other species, except for moose, rocky mountain big horn sheep**, desert big horn sheep, and rocky mountain goat, that meet the commission's animal management objectives for the game management unit where the property lies, in an amount determined by this subsection (3).

(b) (I) In game management units west of interstate highway 25:

(A) Ten percent of the number of licenses established for each management area where firearm hunting licenses are totally limited are available for eligible landowners; and

(B) An additional ten percent of the number of licenses established for each management area where firearm hunting licenses are totally limited are available for eligible landowners if these licenses are restricted to use on private land in the designated management area.

(II) In game management units east of interstate highway 25:

(A) Fifteen percent of the number of licenses established for each management area where firearm hunting licenses are totally limited are available for eligible landowners; and

(B) An additional ten percent of the number of licenses established for each management area where firearm hunting licenses are totally limited are made available for eligible landowners if these licenses are restricted to use on private land by the applicant's immediate family members or youth under eighteen years of age.

(III) The division shall make licenses not used by eligible landowners available to the general public.

(c) (I) The applications available under this subsection (3) are allocated to a participant based upon the following schedule:

(A) For owners of one hundred sixty to one thousand two hundred thirty-nine acres, one application;

(B) For owners of six hundred forty to one thousand two hundred thirty-nine acres, an additional application for a license restricted to private land if the division has verified that the land meets the conditions required for eligibility under paragraph (a) of subsection (2) of this section; and

(C) For owners of one thousand two hundred forty or more acres, one additional application for each additional six hundred acres more than one thousand two hundred forty acres, not to exceed nineteen applications or the limit imposed by subparagraph (II) of this paragraph (c).

(II) Landowners may obtain more than eight applications only if the division has verified that the land is the size reported by the landowner and meets the conditions required for eligibility under paragraph (a) of subsection (2) of this section.

(4) **Requirements - vouchers.** In addition to the limitation on the number of applications available under the program, the program has the following additional requirements and authorizations:

(a) Successful applicants receive a voucher that may be transferred to any person who is eligible for a big game license for that species, to be used for the purchase of a license to be used only within the applicant's game management unit for that species and in accordance with any restrictions imposed by this section.

(b) The transfer of a license voucher by a landowner must include permission to access and hunt the lands yielding the license under the program during the entire season that the license is issued. The permission must not discriminate among hunters entering the property or contain restrictions other than manner of access, including foot, horseback, or vehicular restrictions reasonably necessary to prevent damage to property.

(c) Except as authorized by paragraph (a) of this subsection (4), a voucher that has been transferred by any person who is not the landowner or land manager is void. A voucher that is brokered for another person is void. A hunting license obtained for use with a void voucher is also void.

(d) If a landowner submits one or more applications that fail to yield a license, the division shall give a preference in succeeding years to one application of that landowner for each application of the same landowner that failed to yield a license.

(e) (I) **In game management units where hunting is totally limited for a species, and where eligible landowners do not use the number of landowner preference licenses established for a species for that management area, the division shall make the unused licenses available to private landowners in that particular game management unit** or data analysis unit as a first priority **before making them available to the general public hunter**.

(II) A landowner may receive no more than three times the number of leftover applications than the number of initial applications authorized under paragraph (c) of subsection (3) of this section.

(f) If a landowner or hunter fails to comply with this section or any rule promulgated under this section, the division may disqualify the person from participation in the program for up to five years.

(5) The commission shall adopt rules to implement this section prior to July 1, 2014. (**emphases added**)

ADDENDUM B

33-4-102. Types of licenses and fees - rules - repeal. (1.9) (a) (I) The general assembly hereby finds, determines, and declares that:

(A) Service members returning from post-September 11, 2001, overseas contingency operations who have been injured during combat face a challenging period of rehabilitation upon their return to the United States;

(B) Many of these service members are so severely injured that they require medical assistance for many years, or even the rest of their lives, as they reenter mainstream life;

(C) Although the scope of care provided by the United States armed services wounded warrior programs varies with each service member, based on the needs of the individual, these service members may be assigned, upon return to Colorado, to a medical treatment facility such as Evans army hospital at Fort Carson, Colorado;

(D) Wounded warrior programs are direct efforts by the United States armed services to care for service members during their long transition from combat-related injury to civilian life and to provide assistance to those service members in recovery, rehabilitation, and reintegration that is worthy of their service and sacrifice; and

(E) For those wounded warriors who suffer injuries so severe that they will require intense, ongoing care or assistance for many years or the rest of their lives, a significant part of the healing process is enabling and encouraging these service members to experience some of the recreational activities they enjoyed prior to their service-related injuries.

(II) The general assembly therefore recognizes the need to provide opportunities for Colorado's severely injured "wounded warriors" to enjoy the natural resources of the state as part of their rehabilitative care. Furthermore, offering reduced-cost or free big game hunting licenses to such recovering service members is a small, but recognizable, acknowledgment of their selfless service and sacrifice.

(b) The commission may promulgate rules to reduce or eliminate big game license fees and establish a big game hunting license **preference** for members of the United States armed services wounded warrior programs who are residents of, or stationed in, Colorado and who have been so severely injured that they will require years of intense, ongoing care or assistance.

(c) As used in this subsection (1.9), "United States armed services wounded warrior programs" means:

(I) The Army wounded warrior (AW2) program;

(II) The Air Force wounded warrior (AFW2) program;

(III) The Navy safe harbor program;

(IV) The Coast Guard wounded warrior regiment; and

(V) Any successor program administered by a branch of the United States armed services to provide individualized support for service members who have been severely injured in overseas contingency operations undertaken since September 11, 2001.

(d) The commission may adopt rules to implement this subsection (1.9), including rules defining "severely injured" and establishing residency requirements for service members eligible under this subsection (1.9). (**emphasis added**)

33-4-104. Free licenses issued - members or veterans of armed forces - when - rules. (4) The commission may adopt appropriate rules to establish a **preference** for active duty members of the United States armed forces who are stationed at any military facility located in Colorado or are Colorado residents upon their return from service outside of the United States for licenses left over after completion of the division's annual limited license draw. The **preference** may allow for such a member of the United States armed forces to apply for **preference** points for any limited license draw that occurred during the member's absence. (**emphases added**)

33-4-117. Youth licenses - terminally ill hunters - special restrictions and privileges. (1) A person under the age of eighteen years may obtain a youth small game hunting license, issued pursuant to section 33-4-102 (1.4) (x), for a fee of one dollar upon showing a hunter education certificate as required by section 33-6-107 (8). The one-dollar fee includes the search and rescue fund surcharge imposed under section 33-1-112.5 (2) (a).

(2) Every person under sixteen years of age hunting with a youth small game hunting license shall at all times be accompanied by a person eighteen years of age or older as required by section 33-6-107 (3.5); except that a person of any age who purchases a small game hunting license issued pursuant to section 33-4-102 (1.4) (f) is exempt from this restriction.

(3) (Deleted by amendment, L. 2003, p. 1031, § 7, effective July 1, 2003.)

(4) Youth big game licenses, entitling the holder to hunt deer, elk, or pronghorn, may be purchased by persons who are at least twelve years of age but under eighteen years of age for the fees specified in section 33-4-102 (1.4) (w). Said fees include the search and rescue fund surcharge imposed under section 33-1-112.5 (2) (a). Persons under sixteen years of age hunting deer, elk, or pronghorn must be accompanied by a person eighteen years of age or older as required by section 33-6-107 (4).

(4.5) The commission is authorized to establish a special licensing program for hunters eligible for a youth license under the provisions of this section, and to adopt rules that establish a hunting license **preference** for youth hunters. In connection with such a program the commission is also authorized, within its discretion, to establish a special licensing program for adult mentors of youth hunters and to adopt rules that establish a hunting license **preference** for such adult mentors.

(5) (Deleted by amendment, L. 2004, p. 83, § 1, effective August 4, 2004.)

(6) The commission is authorized to establish a special licensing program for hunters twenty-one years of age or younger who suffer from a terminal illness or a life-threatening disease or injury and to adopt rules that establish a hunting license **preference** for such hunters. (**emphases added**)

33-4-119. Mobility-impaired hunters. (1) The commission is authorized to establish a special licensing program for mobility-impaired hunters.

(2) The commission is authorized to adopt appropriate rules that define "mobility-impaired" and establish a hunting license **preference** for the mobility-impaired. (**emphasis added**)

ADDENDUM C

33-3-103.5. Game damage prevention materials - definitions. (1) This section shall be applicable in determining the liability of the state under paragraph (e) of subsection (3) of this section and section 33-3-103 (1) (d) and (1) (e).

(2) (a) (I) Every landowner shall be eligible to receive sufficient and appropriate temporary game damage prevention materials pursuant to this section.

(II) Permanent game damage prevention materials shall be available only to a landowner who does not unreasonably restrict hunting of species likely to cause damage on land under the landowner's control or restrict the hunting of species likely to cause damage on any other lands by restricting access across lands under the landowner's control, and:

(A) Who charges not more than five hundred dollars per person, per season, for big game hunting access on or across the landowner's property; or

(B) Who charges a fee in excess of five hundred dollars per person, per season, for big game hunting access on or across the landowner's property, if the landowner has requested and been denied game damage prevention materials from the habitat partnership program created in section 33-1-110 (8) and the division determines that excessive game damage is occurring, and may continue to occur in the future.

(III) **The division shall not deny a landowner game damage claims or game damage prevention materials on the grounds that the landowner received a voucher pursuant to the wildlife conservation landowner hunting preference program for wildlife habitat improvement under section 33-4-103.**

(IV) As used in this section:

(A) "Temporary game damage prevention materials" means materials of an adequate substance that are utilized to protect private property for a period of time agreed upon by the landowner and the division. Such materials may include, but are not limited to, transferable panels or pyrotechnics.

(B) "Permanent game damage prevention materials" means materials of an adequate substance that are erected in such a way to protect private property for the expected normal life of the materials. The normal life of the materials shall be as specified in a written agreement between the landowner and the division.

(b) The division has the responsibility to supply useable, sufficient, and appropriate game damage prevention materials to a requesting landowner, and the landowner shall keep such materials in good repair throughout their normal life, if such materials have not been destroyed or damaged by wildlife.

(3) (a) The division shall respond to a landowner making an inquiry related to game damage within two business days after receiving the inquiry.

(b) (I) Within five business days after receiving a request for game damage prevention materials, the division shall consult with the landowner to discuss the sufficient and appropriate materials to prevent or mitigate the game damage. Temporary game damage prevention materials shall be delivered to the landowner within fifteen business days after the consultation, unless otherwise agreed to by the division and the landowner.

(II) For a landowner eligible to receive permanent game damage prevention materials pursuant to subparagraph (II) of paragraph (a) of subsection (2) of this section, such materials shall be provided within forty-five days after the date that the landowner makes the initial request for the materials.

(c) The division shall deliver game damage prevention materials to the specific site as directed by the landowner, if such delivery may be made by truck.

(d) When agreed upon by the landowner, the division may construct permanent stackyards or orchard fencing in those areas of high wildlife damage potential within the limitations of appropriation by the general assembly for that purpose.

(e) (I) If the division does not provide game damage prevention materials within the amount of time established by paragraph (b) of this subsection (3), the division shall have the sole responsibility to supply and erect the damage prevention materials, and the state shall be liable for game damages incurred on and after the date by which the division should have provided the game damage prevention materials.

(II) When erecting game damage prevention materials pursuant to subparagraph (I) of this paragraph (e), the division may use division employees, individuals under contract to the division, or voluntary workers. If the division uses voluntary workers to assist in erecting game damage prevention materials, the division shall keep in force workers' compensation insurance as necessary to protect the landowner from liability resulting from injuries or death of said voluntary workers while engaged in the erection of such game damage prevention materials. If the division uses contract workers to assist in erecting game damage prevention materials as provided in this section, the division shall require the contractor to provide evidence of workers' compensation insurance as necessary to protect the landowner from liability resulting from injuries or death of said contract workers while engaged in the erection of such game damage prevention materials.

(4) If the game damage prevention materials that the division provides to a landowner fail to prevent game damage due to insufficiency or inappropriateness of such materials, or if the division's insufficient or inappropriate erection of such materials fail to prevent game damage, the state shall be liable for damages caused by such materials or erection. (**emphasis added**)

ADDENDUM D

	Landowner Preference	Ranching for Wildlife	Bighorn Sheep Access Program
Asserted statutory authority	33-4-103	Cooperative agreements, 33-1-105 (1) (e) and (1) (g)	Cooperative agreements, 33-1-105 (1) (e) and (1) (g)
Applicable rule	Rule 206 - B.4. a., b., and c.	Rule 210	Rule 211
Purpose of program	Manage wildlife by encouraging hunting on private land	Manage wildlife by encouraging hunting on private land	Manage wildlife by encouraging hunting on private land
What incentive is given to the landowner for participation in the program?	Statute & rule: One or more hunting licenses for the landowner	Statute: "compensate" landowner Rule: one or more hunting licenses for the landowner	Statute: "compensate" landowner Rule: one or more hunting licenses for the landowner
Minimum acreage to be eligible	Statute & rule: At least 160	Rule: At least 10,000	Rule: At least 5,000
Are moose & bighorn sheep included?	Statute: No	Rule: Yes	Rule: Sheep only
Is the landowner eligible for big game damages?	Statute: Yes	Rule: No	Rule: No

REVISED ADDENDUM E

#206 - APPLICATIONS AND DRAWINGS FOR LIMITED LICENSES

B. Application and Drawing Provisions and Restrictions:

1. General Provisions and Restrictions

f. **Bighorn Sheep** Access Program: Non-residents are not eligible to apply for public Bighorn Sheep Access Program licenses.

5. Drawing Processes

e. Nonresident hunter drawing limitations (first choice applications only)

1. Nonresidents hunters shall receive no more than 10% of available **moose, bighorn sheep** and mountain goat licenses for all hunt codes. In the event there are an insufficient number of nonresident applications for the allocated number of moose, bighorn sheep or mountain goat licenses in any hunt code, the excess nonresident licenses will be issued to residents through the regular drawing process. These drawing limitations do not apply to the issuance of **Bighorn Shee**p Access Program (BSAP) licenses.

(**emphases added**)

#210 - RANCHING FOR WILDLIFE – DEER, ELK, PRONGHORN, BLACK BEAR, MOOSE, AND BIGHORN SHEEP

B. Ranch Entry and Maintenance

8. Enrolled ranches shall not be eligible for **game damage payments** or materials for those species hunted in the program when damage occurs within the boundaries of the enrolled portions of the ranch.

9. The Division may, at its sole discretion, require ranches with public **bighorn sheep** hunting seasons to provide scouting access to those hunters and their companions prior to such seasons. Provisions for this scouting access shall be contained in the Management Plan.

D. Season Structures, Manner of Take, License Restrictions

1. Public and private seasons opening and closing date parameters

a. Deer, elk, pronghorn, **moose, and bighorn sheep** seasons may not begin before the first day of the statewide archery season for that species, nor extend beyond January 31.

2. Private season length

b. **Moose or bighorn sheep** private seasons are restricted to a maximum of 30 days.

3. Public season length

d. **Moose** public season length

1. Antlered or antlerless public hunting seasons shall be a minimum of ten (10) days in length. Antlered seasons shall include a minimum of five (5) consecutive days without overlapping any antlerless moose hunting season on the ranch.

e. **Bighorn sheep** public season length

1. Public hunting seasons for rams shall be a minimum of thirty (30) days in length and shall include a minimum of fifteen (15) consecutive days of hunting without overlapping any ewe hunting season on the ranch.

2. Public hunting seasons for ewes shall be a minimum of fifteen (15) days in length.

f. Additional primitive weapon seasons may be established provided that the season is structured so there is a minimum of 5 days of opportunity in which the method of take is restricted to archery or muzzleloading rifles.

1. These seasons shall be in addition to the previously mentioned minimum season lengths. Hunters drawing licenses for these seasons shall be allowed to hunt in the season with the restricted method of take and also in at least 10 additional days of opportunity with rifle method of take for **moose**, or antlered or either sex deer, elk, or black bear licenses; at least 5 additional days of opportunity with rifle method of take for pronghorn, or antlerless deer or elk licenses; at least 30 additional days of opportunity with rifle method of take for ram **bighorn sheep** licenses; and at least 15 additional days of opportunity with rifle method of take for ewe bighorn sheep. Additional primitive weapon seasons will include one full weekend.

5. License Restrictions

a. Ranching for Wildlife licenses are the only licenses valid for hunting of species under contract on the ranch, except that auction and raffle licenses may be used when there is not a public season for the same species in progress on the ranch and antlerless deer or elk licenses may be used on a ranch when authorized in writing by the Division, subject to the following provisions:

2. Such licenses shall not be used concurrently with any Ranching For Wildlife season, or at any other time when the Division determines that it would result in elk, deer, pronghorn, **bighorn sheep, moose**, or black bear not being available to Ranching For Wildlife public hunters.

E. License Allocation

1. A maximum of 1,000 licenses of each species and sex for deer, elk, and pronghorn, a maximum of 30 black bear licenses, a maximum of 20 licenses of each sex for **bighorn sheep**, and a maximum of 50 licenses of each sex for **moose** may be

allocated to each ranch annually, and subsequently distributed to the public and private share according to the distribution table established in this regulation.

6. The public share of the licenses in the following distribution tables represents the minimum for each species. Fractions of licenses shall be rounded up for public distribution licenses.

	DEER, ELK, AND PRONGHORN			
	Private Share of Licenses		Public Share of Licenses	
	% of total allocation to each ranch		% of total allocation to each ranch	
Tier	Buck, Antlered, or Either Sex	Doe or Antlerless	Buck, Antlered, or Either Sex	Doe or Antlerless
A	90	0	10	100
B	85	0	15	100
C	80	0	20	100

BLACK BEAR			
Private Share of Licenses		Public Share of Licenses	
% of total allocation to each ranch		% of total allocation to each ranch	
Either Sex		Either Sex	
60		40	
BIGHORN SHEEP			
Private Share of Licenses		Public Share of Licenses	
% of total allocation to each ranch		% of total allocation to each ranch	
Ram	Ewe	Ram	Ewe
50	0	50	100

MOOSE			
Private Share of Licenses		Public Share of Licenses	
% of total allocation to each ranch		% of total allocation to each ranch	
Antlered, or Either Sex	Antlerless	Antlered, or Either Sex	Antlerless

50	0	50	100

(**emphases added**)

#211- BIGHORN SHEEP ACCESS PROGRAM

A. Implementation Authority

1. The Director is authorized to implement the Bighorn Sheep Access Program (BSAP), including the authority to determine private land enrollment status, enter into cooperative agreements with legal landowners, establish and modify public and private season dates on each property, and establish and modify license allocations to each property including the subsequent distribution of licenses to the public and private share, and may establish additional BSAP operating guidelines subject to the following provisions. All new or renewed contracts must be signed by the Director by October 15 in order to participate in the program the following year.

B. Property Enrollment Constraints

1. Properties must have a minimum of 5,000 acres of privately owned land.

2. There must be a sustainable population of Rocky Mountain bighorn sheep that are predictably present on the private lands and at times for which public hunting seasons may be set. All sheep on the property must be a part of a single bighorn sheep herd (DAU). Land under contract may not cross sheep herd boundaries. At least 60% of the sheep herd within the bighorn sheep game management unit to be hunted must be located on private land or State Trust Land.

3. Properties may not charge public hunters an access fee for hunting.

4. Except as agreed to in writing by the Division, enrolled properties must provide for equality of access in terms of geographical area and mode of transportation for both public and private hunters. No closure or restriction of land or roads shall apply to public hunters that do not also apply to private hunters.

5. Public hunts must be established at a time when sheep are present and available for harvest. No public seasons shall be established during times when normal winter conditions would prevent access to most of the property, nor when normal migration patterns would result in sheep having migrated off the property.

6. Ranches that establish coinciding or overlapping public and private hunts may not exclude public hunters from any portion of the property due to the presence of private hunters.

7. The private landowner(s) will provide to each public hunter a property information packet which includes, but is not limited to, property maps showing access routes and camping areas, and landowner contact information,

8. **Enrolled properties shall not be eligible for game damage payments or materials for damage caused by Rocky Mountain bighorn sheep.**

C. Cooperative Agreements, Enrollment, Termination of Enrollment

1. The Division is authorized to enter into cooperative agreements with private property owners. Multiple private property owners may participate in the program under a single contract as long as all legal owners agree to the same terms and requirements.

2. The Division shall establish minimum performance standards or requirements for properties enrolled in the program. Such performance standards shall be incorporated into the cooperative agreement with each property owner(s). Each cooperative agreement will include an option to renew at the end of the contract period if agreed to by both the Division and private landowner.

3. Each cooperative agreement will also contain a termination clause. Potential termination will be based on public hunter satisfaction that is within the control of the property owner or manager. No future private ram licenses will be allocated to a property after their contract is terminated.

D. Season Structures, Manner of Take, License Restrictions

1. Public and private seasons opening and closing date parameters

a. Ram seasons may not begin before August 1 and may not extend beyond December 31.

b. Ewe seasons may not begin before September 1 and may not extend beyond January 15.

c. Public ram seasons shall always precede private ram seasons. When necessary for private and public seasons to be conducted in the same year, public ram seasons will occur prior to private seasons.

2. Private season length

a. Private ram seasons shall not be less than 20 days nor greater than 60 days.

3. Public season length

a. Public ram seasons shall be equal or greater in length to the private ram seasons, but not less than 30 days nor greater than 60 days. If multiple ram seasons are necessary to spread out hunting pressure, then season length may be shortened to not less than 20 days per season.

b. Ewe seasons shall be not less than 10 days in length with no more than a 5 day overlap with public ram seasons.

4. Method of take for ram hunting will be hunter's choice in accordance with regulation #203 of this chapter. Method of take for ewe hunting will be determined by contract negotiation.

5. License Restrictions

a. BSAP licenses are the only licenses valid for hunting sheep on the property, except that auction and raffle licenses may be used when there is not a public season in progress on the property.

E. License Allocation

1. Division staff recommendations regarding license allocations for each property shall be approved by the Director.

2. All ewe licenses allocated are public licenses. The Division shall determine if ewe hunting is needed or desired for sheep management on the property.

3. The public share of the licenses in the following distribution table represents the minimum number of licenses provided to the public. Fractions of licenses shall be rounded up for public distribution licenses.

	ROCKY MOUNTAIN BIGHORN SHEEP			
	Private Share of Licenses		Public Share of Licenses	
	% of total allocation to each enrolled property		% of total allocation to each enrolled property	
Option	Ram	Ewe	Ram	Ewe
A	67	0	33	100
B	75	0	25	100

4. Enrolled properties will have the choice between two license distribution options. In order to receive the license allocation percentages listed in option B, a competent, skilled guide will be provided for free to the public ram hunter. The guide must be competent and knowledgeable of the property and of bighorn sheep behavior and use patterns on the property. The guide provided to the public ram hunter must be the same guide provided to the private ram hunter, unless otherwise agreed to in writing by the Division. In order to receive the license allocation percentages listed in option A, each public sheep hunter will receive free access to the property and a free area for camping if the property is located 40 minutes or more from public accommodations. No free guiding services are provided under option A.

5. Public ram hunters will be allowed to bring a maximum of two additional non-hunting persons with them onto the property during their hunt. Ewe hunters will be allowed to bring a maximum of one additional non-hunting person with them onto the property during their hunt.

6. Landowners are not required to provide pre-draw or pre-season scouting access in either license allocation option.

G. License Distribution

1. Applications

a. Applications for private ram licenses stamped with the ranch name and season dates shall be available to the landowner for distribution.

b. Public hunter licenses shall be available through application and selection from the Division during the annual limited license drawing process.

(emphasis added)

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jeremiah B. Barry, Office of Legislative Legal Services

DATE: December 8, 2015

SUBJECT: Rules of the Medical Services Board, Department of Health Care Policy Financing, concerning the Colorado Dental Health Care Program for Low-income Seniors, 10 CCR 2505-10 (LLS Docket No. 150120; SOS Tracking No. 2015-00031).[1]

Summary of Problem Identified and Recommendation

Section 25.5-3-404 (4), C.R.S., requires the Medical Services Board (Board) to promulgate rules regarding a description of dental services that may be provided to eligible seniors and determining whether to require eligible seniors to make a co-payment and the amount of the co-payment. But, the rules do not include a description of the allowable services nor do they specify whether copayments are required or co-payment amounts. **Because the Board failed to promulgate rules addressing these items, we recommend that Rule 8.960 of the rules of the Medical Services Board concerning the Colorado Dental Health Care For Low-income Seniors Program not be extended.**

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[1] Under § 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 § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

Rule-making Authority

Section 25.5-3-404 (4), C.R.S., requires the Medical Services Board to adopt rules governing the Colorado Dental Health Care for Low-income Seniors Program (Program). Section 25.5-3-404 (4), C.R.S., states:

> **25.5-3-404. Colorado dental health care program for low-income seniors - rules.** (4) Following recommendations of the state department and the advisory committee, the medical services board shall adopt rules pursuant to section 24-4-103, C.R.S., governing the program, including but not limited to:
>
> (a) A definition of "economically disadvantaged" for purposes of eligibility;
>
> (b) A description of dental services that may be provided to eligible under the program; except that such services must include but not be oral examination, diagnosis, treatment planning, emergency treatment, prophylaxis, X rays, partial and full dentures, replacement or repair of permanent teeth, removal of permanent teeth, fillings, periodontal treatment, and soft tissue treatment;
>
> (c) Whether to require eligible seniors to make a co-payment and, if so, the circumstances and amount of the co-payment;
>
> (d) A distribution formula for the availability of moneys to each area of the state; and
>
> (e) Procedures, criteria, and standards for awarding dental health care services grants.

Analysis

1. Rule 8.960 fails to contain a description of the dental services that may be provided under the Program.

Section 25.5-3-404 (4) (b), C.R.S., requires the rules to contain a description of the dental services that may be provided:

> **25.5-3-404. Colorado dental health care program for low-income seniors - rules.** (4) Following recommendations of the state department and the advisory committee, the medical services board shall adopt rules pursuant to section 24-4-103, C.R.S., governing the program, including but not limited to:
>
> (b) A description of dental services that may be provided to eligible seniors under the program; except that such services must include but not be limited to oral examination, diagnosis, treatment planning, emergency treatment, prophylaxis, X rays, partial and full dentures, replacement or re-

> pair of permanent teeth, removal of permanent teeth, fillings, periodontal treatment, and soft tissue treatment

Rule 8.960, attached as **Addendum A**, fails to include a description of the dental services that may be provided under the Program. Although it contains a definition of "Covered Dental Care Services", the definition does not include a description of dental services:

> Covered Dental Care Services means the Current Dental Terminology (CDT) procedure codes and descriptions for the Colorado Dental Health Care Program for Low-Income Seniors as published on the Department's website at https:www.colorado.gov/hcpf/research-data-and grants.

Addendum B is the material published on the Department's web site. The listing of dental services appears on the Department of Health Care Policy and Financing's website, not in the rule. The statute requires the description of covered services to be in the rule. Since the listing of services is not in the rule, either the Board or the Department could change the covered services at any time without going through the procedures and safeguards in the "Administrative Procedure Act" for amending a rule.

The Rule fails to contain a description of the dental services under the Program as required by § 25.5-3-404, C.R.S., and should therefore not be extended.

2. Rule 8.960 fails to specify the circumstances when an eligible senior may be required to make a co-payment or the amount of the co-payment.

Section 25.5-3-404 (4) (c), C.R.S., requires the rules to include provisions concerning co-payments that may be paid by eligible seniors:

> **25.5-3-404. Colorado dental health care program for low-income seniors - rules.** (4) Following recommendations of the state department and the advisory committee, the medical services board shall adopt rules pursuant to section 24-4-103, C.R.S., governing the program, including but not limited to:
>
> (c) Whether to require eligible seniors to make a co-payment and, if so, the circumstances and amount of the co-payment;

However, Rule 8.960.3.E 3. provides:

> 3. It is up to the discretion of Qualified Providers whether to charge a co-payment. Under no circumstances shall Eligible Seniors be charged more than the Max Patient Co-Pay per procedure rendered.

Thus, the Board failed to adopt a rule governing the circumstances for when or if a co-payment is required and has improperly delegated to the Qualified Providers the

discretion to determine the circumstances under which an eligible senior may be required to make a co-payment.[2]

Conclusion

We therefore recommend that Rule 8.960 of the rules of the Medical Services Board concerning the Colorado Dental Health Care Program for Low-Income Seniors not be extended because it fails to comply with § 25.5-3-404, C.R.S.

[2] For each covered service, **Addendum B** includes a Maximum Allowable Fee, Program Payment, and Max Patient Co-Pay.

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Addendum A

8.960 COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

8.960.1 Definitions

Arrange For or Arranging For means demonstrating established relations with Qualified Providers for any of the Covered Dental Care Services not directly provided by the applicant.

Covered Dental Care Services mean the Current Dental Terminology (CDT) procedure codes and descriptions for the Colorado Dental Health Care Program for Low-Income Seniors as published on the Department's website at https://www.colorado.gov/hcpf/research-data-and-grants.

C.R.S. means the Colorado Revised Statutes.

Dental Health Professional Shortage Area or Dental HPSA means a geographic area, population group, or facility so designated by the Health Resources and Services Administration of the U.S.
Department of Health and Human Services.

Department means the Colorado Department of Health Care Policy and Financing established pursuant to title 25.5, C.R.S. (2014).

Economically Disadvantaged means a person whose Income is at or below 250% of the most recently published federal poverty level for a household of that size.

Eligible Senior means an adult who is 60 years of age or older, who is Economically Disadvantaged, who is able to demonstrate lawful presence in the state in accordance with 1 CCR 201-17, who is not eligible for dental services under Medicaid or the Old Age Pension Health and Medical Care Program, and who does not have private dental insurance.

Federally Qualified Health Center means a federally funded nonprofit health center or clinic that serves medically underserved areas and populations as defined in 42 U.S.C. section 1395x (aa)(4).

Income means any cash, payments, wages, in-kind receipt, inheritance, gift, prize, rents, dividends, or interest that are received by an individual or family. Income may be self-declared. Resources are not included in Income.

Max Allowable Fee means the total reimbursement listed by procedure for Covered Dental Care Services under the Colorado Dental Health Care Program for Low-Income Seniors. The Max Allowable Fee is the sum of the Program Payment and the Max Patient Co-Pay.

Max Patient Co-Pay means the maximum amount that a Qualified Provider may collect from an Eligible Senior listed by procedure for Covered Dental Services under the Colorado Dental Health Care Program for Low-Income Seniors.

Medicaid means the Colorado medical assistance program as defined in article 4 of title 25.5, C.R.S. (2014).

Old Age Pension Health and Medical Care Program means the program described at 10 CCR 2505-10, section 8.940 et. seq. and as defined in sections 25.5-2-101 and 26-2-111(2), C.R.S. (2014) Program Payment means the maximum amount by procedure listed for Covered Dental Care Services for which a Qualified Grantee may invoice the Department under the Colorado Dental Health Care Program for Low-Income Seniors.

Qualified Grantee means an entity that can demonstrate that it can provide or Arrange For the provision of Covered Dental Care Services and may include but is not limited to:

1. An Area Agency on Aging, as defined in section 26-11-201, C.R.S. (2014);

2. A community-based organization or foundation;

3. A Federally Qualified Health Center, safety-net clinic, or health district;

4. A local public health agency; or

5. A private dental practice.

Qualified Provider means a licensed dentist or dental hygienist in good standing in Colorado or a person who employs a licensed dentist or dental hygienist in good standing in Colorado and who is willing to accept reimbursement for Covered Dental Services. A Qualified Provider may also be a Qualified Grantee if the person meets the qualifications of a Qualified Grantee.

Senior Dental Advisory Committee means the advisory committee established pursuant to section 25.5-3-406, C.R.S. (2014).

8.960.2 Legal Basis

The Colorado Dental Health Care Program for Low-Income Seniors is authorized by state law at part 4 of article 3 of title 25.5, C.R.S. (2014).

8.960.3 Request of Grant Proposals and Grant Award Procedures

8.960.3.A Request for Grant Proposals

Grant awards shall be made through an application process. The request for grant proposals form shall be issued by the Department and posted for public access on the Department's website at https://www.colorado.gov/hcpf/research-data-and-grants at least 30 days prior to the due date.

8.960.3.B Evaluation of Grant Proposals

Proposals submitted for the Colorado Dental Health Care Program for Low-Income Seniors will be evaluated by a review panel in accordance with the following criteria developed under the advice of the Senior Dental Advisory Committee.

1. The review panel will be comprised of individuals who are deemed qualified by reason of training and/or experience and who have no personal or financial interest in the selection of any particular applicant.

2. The sole objective of the review panel is to recommend to the Department's executive director those proposals which most accurately and effectively meet the goals of the program within the available funding.

3. Preference will be given to grant proposals that clearly demonstrate the applicant's ability to:

   a. Outreach to and identify Eligible Seniors;

   b. Collaborate with community-based organizations; and

   c. Serve a greater number of Eligible Seniors or serve Eligible Seniors who reside in a geographic area designated as a Dental HPSA.

4. The review panel shall consider the distribution of funds across the state in recommending grant proposals for awards. The distribution of funds should be based on the estimated percentage of Eligible Seniors in the state by Area Agency on Aging region as provided by the Department.

8.960.3.C Grant Awards

The Department's executive director, or his or her designee, shall make the final grant awards to selected Qualified Grantees for the Colorado Dental Health Care Program for Low-Income Seniors.

8.960.3.D Qualified Grantee Responsibilities

A Qualified Grantee that is awarded a grant under the Colorado Dental Health Care Program for Low-Income Seniors is required to:

1. Identify and outreach to Eligible Seniors and Qualified Providers;

2. Demonstrate collaboration with community-based organizations;

3. Ensure that Eligible Seniors receive Covered Dental Care Services efficiently without duplication of services;

4. Maintain records of Eligible Seniors serviced, Covered Dental Care Services provided, and moneys spent for a minimum of six (6) years;

5. Distribute grant funds to Qualified Providers in its service area or directly provide Covered Dental Care Services to Eligible Seniors;

6. Expend no more than seven (7) percent of the amount of its grant award for administrative purposes; and

7. Submit an annual report as specified under 8.960.3.F.

8.960.3.E Invoicing

A Qualified Grantee that is awarded a grant under the Colorado Dental Health Care Program for Low-Income Seniors shall submit invoices on a form and schedule specified by the Department. Covered Dental Care Services shall be provided before a Qualified Grantee may submit an invoice to the Department.

1. Invoices shall include the number of Eligible Seniors served, the types of Covered Dental Care Services provided, and any other information required by the Department.

2. The Department will pay no more than the established Program Payment per procedure rendered.

8.960.3.F Annual Report

On or before September 1, 2016, and each September 1 thereafter, each Qualified Grantee receiving funds from the Colorado Dental Health Care Program for Low-Income Seniors shall submit a report to the Department following the state fiscal year contract period.

The annual report shall be completed in a format specified by the Department and shall include:

1. The number of Eligible Seniors served;

2. The types of Covered Dental Care Services provided;

3. An itemization of administrative expenditures; and

4. Any other information deemed relevant by the Department.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
This is not intended to replace appropriate clinical judgments and recommended treatment but is intended as a guide for reimbursement under the Colorado Dental Health Care Program for Low-Income Seniors. Seniors served under this program should receive ethical treatment that aligns with standards of care in dentistry and takes into consideration the individual's ability to withstand limited treatment time and number of procedures per appointment					
DIAGNOSTIC					
Periodic oral evaluation - established patient	D0120	$46.00	$46.00	$0.00	Eval on patient of record to determine changes in medical or dental status since last evaluation. Includes oral cancer evaluation, periodontal evaluation, diagnosis, treatment planning. Frequency: One 1 time per 6 month period per patient; 2 week window accepted.
Limited Oral Evaluation - problem Focused	D0140	$62.00	$52.00	$10.00	Eval limited to a specific oral health problem or complaint. This code must be used in association w/a specific oral health problem or complaint and is not to be used to address situations that arise during multi-visit treatments covered by a single fee, such as, endodontic or post operative visits related to treatments including prosthesis. Specific problems may include dental emergencies, trauma, acute infections, etc. Should not be used for adjustments made to prosthesis provided w/in previous 12 months. Should not be used as an encounter fee.
Comprehensive Oral Evaluation - new or established patient	D0150	$81.00	$81.00	$0.00	Eval used by general dentist or specialist. Applicable to new patients or established patients w/significant health changes, or absence from active treatment for more than 5 years. This includes a thorough eval and recording of the extraoral and intraoral hard and soft tissues, and an eval and recording of the patient's dental and medical history and general health assessment. A periodontal eval, oral cancer eval, diagnosis and treatment planning should be included. Frequency: 1 per 5 years per patient. Should not be charged on the same date as D0180.
Comprehensive Periodontal Evaluation - new or established patient	D0180	$88.00	$88.00	$0.00	Eval for patients presenting signs & symptoms of periodontal disease & patients w/risk factors such as smoking or diabetes. This eval encompasses a comprehensive oral exam, and full, complete & detailed periodontal charting. Frequency: 1 per 3 yrs per patient. Should not be charged on the same date as D0150.
Intraoral - complete series of radiographic images	D0210	$125.00	$125.00	$0.00	Radiographic survey of whole mouth, 6-22 periapical & posterior bitewing images displaying the crowns & roots of all teeth, periapical areas of alveolar bone. Panoramic radiographic image & bitewing radiographic images taken on the same date of service shall not be billed as a D0210. Payment for add'l periapical radiographs w/in 60 days of a full month series or a panoramic film is not covered unless there is evidence of trauma. Frequency: 1 per 5 yrs per patient. Any combination of x-rays taken on the same date of service that equals or exceeds the max allowable fee for D0210 should be billed and reimbursed as D0210. Should not be charged in addition to panoramic film D0330. Either D0330 or D0210 per 5 year period.
Intraoral - periapical first radiographic image	D0220	$25.00	$25.00	$0.00	D0220 one (1) per day per patient. Report add'l radiographs as D0230. Any combination of D0220, D0230, D0270, D0272, D0273, or D0274 taken on the same date of service that exceeds the max allowed fee for D0210 is reimbursed at the same fee as D0210. D0210 will only be reimbursed every 5 years.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Intraoral - periapical each additional radiographic image	D0230	$23.00	$23.00	$0.00	D0230 should be utilized for add'l films taken beyond D0220. Any combination of D0220, D0230, D0270, D0272, D0273, or D0274 taken on the same date of service that exceeds the max allowed fee for D0210 is reimbursed at the same fee as D0210.
Bitewing - single radiographic image	D0270	$26.00	$26.00	$0.00	Frequency: 1 in a 12 month period. Report more than 1 radiographic image as: D0272 two (2); D0273 three (3); D0274 four (4). Any combination of D0220, D0230, D0270, D0272, D0273, or D0274 taken on the same date of service that exceeds the max allowed fee for D0210 is reimbursed at the same fee as D0210.
Bitewings - two radiographic images	D0272	$42.00	$42.00	$0.00	Frequency: 1 time in a 12 month period. Any combination of D0220, D0230, D0270, D0272, D0273, or D0274 taken on the same date of service that exceeds the max allowed fee for D0210 is reimbursed at the same fee as D0210.
Bitewings - three radiographic images	D0273	$52.00	$52.00	$0.00	Frequency: 1 time in a 12 month period. Any combination of D0220, D0230, D0270, D0272, D0273, or D0274 taken on the same date of service that exceeds the max allowed fee for D0210 is reimbursed at the same fee as D0210.
Bitewings - four radiographic images	D0274	$60.00	$60.00	$0.00	Frequency: 1 time in a 12 month period. Any combination of D0220, D0230, D0270, D0272, D0273, or D0274 taken on the same date of service that exceeds the max allowed fee for D0210 is reimbursed at the same fee as D0210.
Panoramic radiographic image	D0330	$63.00	$63.00	$0.00	Frequency: 1 per 5 yrs per patient. Should not be charged in addition to full mouth series D0210. Either D0330 or D0210 per 5 yrs.
PREVENTATIVE					
Prophylaxis - Adult	D1110	$88.00	$88.00	$0.00	Removal of plaque, calculus and stains from the tooth structures w/intent to control local irritational factors. Prophylaxis is not a benefit when billed on the same date of service as any periodontal procedure code. Frequency: 1 time per 6 calendar months; 2 week window accepted. May be billed for routine prophylaxis for areas of mouth not periodontally involved. Should not be billed in addition to code D4910 for periodontal maintenance. D1110 may be billed w/ D4341 and D4342 one time during initial periodontal therapy for prophylaxis of areas of the mouth not receiving nonsurgical periodontal therapy. When this option is used, individual should still be placed on D4910 for maintenance of periodontal disease. D1110 should only be charged once, not per quadrant, and represents areas of the mouth not included in the D4341 or D4342 being reimbursed. Should not be alternated w/D4910 for maintenance of periodontally-involved individuals. Should not be used as 1 month re-evaluation following nonsurgical periodontal therapy.
Topical application of fluoride varnish	D1206	$52.00	$52.00	$0.00	Topical fluoride application is to be used in conjunction w/prophylaxis or preventive appointment. Should be applied to whole mouth. Frequency: up to four (4) times per 12 calendar months. Should not be used w/D1208.
Topical application of fluoride - excluding varnish	D1208	$52.00	$52.00	$0.00	Any fluoride application, including swishing, trays or paint on variety, to be used in conjunction w/prophylaxis or preventive appointment. Frequency: one (1) time per 12 calendar months. Should not be used wD1206. D1206 varnish should be utilized in lieu of D1208 whenever possible.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
RESTORATIVE					
Amalgam - one surface, primary or permanent	D2140	$107.00	$97.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included.
Amalgam - two surfaces, primary or permanent	D2150	$138.00	$128.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Amalgam - three surfaces, primary or permanent	D2160	$167.00	$157.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Amalgam - four or more surfaces, primary or permanent	D2161	$203.00	$193.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Resin-based composite - one surface, anterior	D2330	$115.00	$105.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included.
Resin-based composite - two surfaces, anterior	D2331	$146.00	$136.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Resin-based composite - three surfaces, anterior	D2332	$179.00	$169.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Resin-based composite - four or more surfaces or involving incisal angle (anterior)	D2335	$212.00	$202.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Resin-based composite - one surface, posterior	D2391	$134.00	$124.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Resin-based composite -two surfaces, posterior	D2392	$176.00	$166.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Resin-based composite - three surfaces, posterior	D2393	$218.00	$208.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Resin-based composite - four or more surfaces, posterior	D2394	$268.00	$258.00	$10.00	Includes tooth preparation, all adhesives, liners, etching, polishing, and bases. Adjustments are included. Frequency: 36 months for the same restoration.
Crown - porcelain/ceramic substrate	D2740	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - porcelain fused to high noble metal	D2750	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - porcelain fused to predominantly base metal	D2751	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - porcelain fused to noble metal	D2752	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - 3/4 cast predominantly base metal	D2781	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - 3/4 cast noble metal	D2782	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - 3/4 porcelain/ceramic	D2783	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - full cast high noble metal	D2790	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - full cast predominantly base metal	D2791	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Crown - full cast noble metal	D2792	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Crown - titanium	D2794	$780.00	$730.00	$50.00	One of (D2710, D2712, D2721, D2722, D2740, D2750, D2751, D2752, D2781, D2782, D2783, D2790, D2791, D2792, D2794) per 84 month(s) per patient per tooth. Second molars are only covered if it meets criteria and is necessary to support a partial denture or to maintain eight posterior teeth in occlusion.
Re-cement or re-bond inlay, onlay, veneer or partial coverage restoration	D2910	$87.00	$77.00	$10.00	Not allowed within 6 months of placement.
Re-cement or re-bond crown	D2920	$89.00	$79.00	$10.00	
Core buildup, including any pins when required	D2950	$225.00	$200.00	$25.00	One of (D2950, D2952, D2954) per 84 month(s) per patient per tooth. Refers to building up of anatomical crown when restorative crown will be placed. Not payable on the same tooth and same day as D2951.
Pin Retention per tooth	D2951	$50.00	$40.00	$10.00	Pins placed to aid in retention of restoration. Should only be used in combination with a multi-surface amalgam.
Cast post and core in addition to crown	D2952	$332.00	$307.00	$25.00	One of (D2950, D2952, D2954) per 84 month(s) per patient per tooth. Refers to building up of anatomical crown when restorative crown will be placed. Not payable on the same tooth and same day as D2951.
Prefabricated post and core in addition to crown	D2954	$269.00	$244.00	$25.00	One of (D2950, D2952, D2954) per 84 month(s) per patient per tooth. Refers to building up of anatomical crown when restorative crown will be placed. Not payable on the same tooth and same day as D2951.
ENDODONTICS					
Endodontic therapy, anterior tooth (excluding final restoration)	D3310	$566.40	$516.40	$50.00	Teeth covered - 6-11, 22-27.
Endodontic therapy, bicuspid tooth (excluding final restoration)	D3320	$661.65	$611.65	$50.00	Teeth covered - 4,5,12,13,20,21,28, and 29.
Endodontic therapy, molar (excluding final restoration)	D3330	$786.31	$736.31	$50.00	Teeth covered - 2,3,14,15,18,19,30, and 31.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
PERIODONTICS					
Periodontal scaling & root planing - four or more teeth per quadrant	D4341	$177.00	$167.00	$10.00	Involves instrumentation of the crown and root surfaces of the teeth to remove plaque and calculus from these surfaces. For patients w/periodontal disease and is therapeutic, not prophylactic. D4341 and D1110 can be reported on same service date when D1110 is utilized for areas of the mouth that are not affected by periodontal disease. D1110 may only be charged once, not per quadrant. A diagnosis of periodontitis w/clinical attachment loss (CAL) included. Diagnosis and classification of the periodontology case type must be in accordance w/documentation as currently established by the American Academy of Periodontology. Current periodontal charting must be present in patient chart documenting active periodontal disease. Frequency: 1 time per quadrant per 36 month interval. When 4 quadrants are completed in a single visit, consideration should be taken for individual's ability to withstand extended treatment time. Documentation of other treatment provided at same time will be requested. Should include any follow-up and re-evaluation.
Periodontal scaling & root planing - one to three teeth per quadrant	D4342	$128.00	$128.00	$0.00	Involves instrumentation of the crown and root surfaces of the teeth to remove plaque and calculus from these surfaces. For patients w/periodontal disease and is therapeutic, not prophylactic. D4341 and D1110 can be reported on same service date when date when D1110 is utilized for areas of the mouth that are not affected by periodontal disease. D1110 may only be charged once, not per quadrant. A diagnosis of periodontitis w/clinical attachment loss (CAL) included. Current periodontal charting must be present in patient chart documenting active periodontal disease. Frequency: 1 time per quadrant per 36 month interval. When 4 quadrants are completed in a single visit, consideration should be taken for individual's avility to withstand extended treatment time. Documentation of other treatment provided at same time will be requested. Should include any follow-up and re-evaluation
Periodontal maintenance procedures	D4910	$136.00	$136.00	$0.00	Procedure following periodontal therapy (D4341,D4342). This procedure includes removal of the bacterial plaque and calculus from supragingival and subgingival regions, site specific scaling and root planning where indicated and polishing the teeth. If D1110 is once again reported then scaling and root planing will be required to use D4910. Frequency: up to four (4) times per fiscal year per patient. Should not be charged alternating with D1110. Cannot be charged w/in the first three months following active periodontal treatment.
PROSTHODONTICS, REMOVABLE					
Complete denture - maxillary	D5110	$793.00	$713.00	$80.00	Reimbursement made upon DELIVERY (completed) maxillary denture. D5110 or D5120 should not be used to report an immediate denture. Immediate denture (D5130, D5140) OR interim complete denture (D5810, D5811) is inserted immediately after extraction of teeth and is not currently covered on the OAP Dental Program Provider Reimbursement Schedule. Routine follow-up adjustments/relines w/in 12 months should be anticipated and are included in the initial reimbursement. A complete denture is made after teeth have been removed and the gum and bone tissues have healed - or to replace an existing denture. Complete dentures are provided once adequate healing has taken place following extractions. This can vary greatly depending upon patient, oral health, overall health, and other confounding factors. Frequency: There should be an expected life span of 5-10 years before replacement dentures should be considered - documentation that existing prosthesis cannot be made serviceable should be maintained

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Complete denture - mandibular	D5120	$793.00	$713.00	$80.00	Reimbursement made upon DELIVERY (completed) mandibular denture. D5110 or D5120 should not be used to report an immediate denture. Immediate denture (D5130, D5140) OR interim complete denture (D5810, D5811) is inserted immediately after extraction of teeth and is not currently covered on the OAP Dental Program Provider Reimbursement Schedule. Routine follow-up adjustments/relines w/in 12 months should be anticipated and are included in the initial reimbursement. A complete denture is made after teeth have been removed and the gum and bone tissues have healed - or to replace an existing denture. Complete dentures are provided once adequate healing has taken place following extractions. This can vary greatly depending upon patient, oral health, overall health, and other confounding factors. Frequency: There should be an expected life span of 5-10 years before replacement dentures should be considered - documentation that existing prosthesis cannot be made serviceable should be maintained.
Maxillary partial denture - resin base (including any conventional clasps, rests and teeth)	D5211	$700.00	$640.00	$60.00	Reimbursement made upon DELIVERY (completion) of partial maxillary denture. D5211 or D5212 should not be used to report an interim partial denture (D5820, D5821). D5211 and D5212 should be considered definitive treatment. Routine follow-up adjustments or relines within 12 months should be anticipated and are included in the initial reimbursement. A partial resin base denture can be made right after having teeth extracted (healing from only a few teeth is as extensive as healing from multiple). A partial resin base denture can be made before having teeth extracted if the teeth being removed are in the front or necessary healing will be minimal. Several impressions and "try-in" appts may be necessary and are included in the cost. Frequency: There should be an expected life span of 5 - 10 years before replacement dentures should be considered - documentation that existing prosthesis cannot be made serviceable should be maintained.
Mandibular partial denture - resin base (including any conventional clasps, rests and teeth)	D5212	$778.00	$718.00	$60.00	Reimbursement made upon DELIVERY (completion) of partial mandibular denture. D5211 or D5212 should not be used to report an interim partial denture (D5820, D5821). D5211 and D5212 should be considered definitive treatment. Routine follow-up adjustments/relines within 12 months should be anticipated and are included in the initial reimbursement. A partial resin base denture can be made right after having teeth extracted (healing from only a few teeth is not as extensive as healing from multiple). A partial resin base denture can be made before having teeth extracted if the teeth being removed are in the front or necessary healing will be minimal. Several impressions and "try-in" appts may be necessary and are included in the cost. Frequency: There should be an expected life span of 5 - 10 years before replacement dentures should be considered - documentation that existing prosthesis cannot be made serviceable should be maintained.
Repair *Broken complete denture base	D5510	$87.00	$77.00	$20.00	Repair *Broken complete denture base.
Replace missing or *Broken teeth - complete denture (each tooth)	D5520	$73.00	$63.00	$10.00	Replacement/repair of missing or *Broken teeth.
Repair resin denture base	D5610	$95.00	$85.00	$10.00	Repair of upper/lower partial denture base.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Repair or replace *Broken clasp	D5630	$123.00	$113.00	$10.00	Repair of *Broken clasp on partial denture base.
Replace *Broken teeth-per tooth	D5640	$80.00	$70.00	$10.00	Repair/replacement of missing tooth.
Add tooth to existing partial denture	D5650	$109.00	$99.00	$10.00	Adding tooth to partial denture base. Documentation may be requested when charged on partial delivered in last 12 months.
Add clasp to existing partial denture	D5660	$131.00	$121.00	$10.00	Adding clasp to partial denture base. Documentation may be requested when charged on aprtial delivered in last 12 months.
Rebase complete maxillary denture	D5710	$322.00	$297.00	$25.00	Rebasing the denture base material due to alveolar ridge resorption. Frequency: one (1) time per 12 months. Completed at laboratory. May not be charged on denture provided in the last 12 months. May not be charged in addition to a reline in a 12 month period.
Rebase complete mandibular denture	D5711	$308.00	$283.00	$25.00	Rebasing the denture base material due to alveolar ridge resorption. Frequency: one (1) time per 12 months. Completed at laboratory. May not be charged on denture provided in the last 12 months. May not be charged in addition to a reline in a 12 month period.
Rebase maxillary partial denture	D5720	$304.00	$279.00	$25.00	Rebasing the partial denture base material due to alveolar ridge resorption. Frequency: one (1) time per 12 months. Completed at laboratory. May not be charged on denture provided in the last 12 months. May not be charged in addition to a reline in a 12 month period.
Rebase mandibular partial denture	D5721	$304.00	$279.00	$25.00	Rebasing the partial denture base material due to alveolar ridge resorption. Frequency: one (1) time per 12 months. Completed at laboratory. May not be charged on denture provided in the last 12 months. May not be charged in addition to a reline in a 12 month period.
Reline complete maxillary denture (chairside)	D5730	$182.00	$172.00	$10.00	Chair side reline that resurfaces w/out processing denture base. Frequency: One (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
Reline complete mandibular denture (chairside)	D5731	$182.00	$172.00	$10.00	Chair side reline that resurfaces w/out processing denture base. Frequency: One (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
Reline maxillary partial denture (chairside)	D5740	$167.00	$157.00	$10.00	Chair side reline that resurfaces w/out processing partial denture base. Frequency: one (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
Reline mandibular partial denture (chairside)	D5741	$167.00	$157.00	$10.00	Chair side reline that resurfaces w/out processing partial denture base. Frequency: one (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
Reline complete maxillary denture (laboratory)	D5750	$243.00	$218.00	$25.00	Laboratory reline that resurfaces w/processing denture base. Frequency: one (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Reline complete mandibular denture (laboratory)	D5751	$243.00	$218.00	$25.00	Laboratory reline that resurfaces w/processing denture base. Frequency: one (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
Reline maxillary partial denture (laboratory)	D5760	$239.00	$214.00	$25.00	Laboratory reline that resurfaces w/processing partial denture base. Frequency: one (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
Reline mandibular partial denture (laboratory)	D5761	$239.00	$214.00	$25.00	Laboratory reline that resurfaces w/processing partial denture base. Frequency: one (1) time per 12 months. May not be charged on denture provided in the last 12 months. May not be charged in addition to a rebase in a 12 month period.
ORAL AND MAXILLOFACIAL SURGERY					
Extraction, erupted tooth or exposed root (elevation and/or forceps removal)	D7140	$82.00	$72.00	$10.00	Routine removal of tooth structure, including minor smoothing of socket bone, and closure as necessary. Treatment notes must include documentation that a surgical extraction was done per tooth.
Surgical removal of erupted tooth requiring removal of bone and/or sectioning of tooth, and including elevation of mucoperiosteal flap if indicated	D7210	$135.00	$125.00	$10.00	Includes removal of bone, and/or sectioning of erupted tooth, smoothing of socket bone and closure as necessary. Treatment notes must include documentation that a surgical extraction was done per tooth.
Surgical removal of residual tooth roots (cutting procedure)	D7250	$143.00	$133.00	$10.00	Includes removal of bone, and/or sectioning of residual tooth roots, smoothing of socket bone and closure as necessary. Treatment notes must include documentation that a surgical extraction was done per tooth. May only be charged once per tooth. May not be charged for removal of broken off roots for recently extracted tooth.
Incisional biopsy of oral tissue-soft	D7286	$381.00	$381.00	$0.00	Removing tissue for histologic evaluation. Treatment notes must include documentation and proof that biopsy was sent for evaluation.
Alveoloplasty in conjunction with extractions - four or more teeth or tooth spaces, per quadrant	D7310	$150.00	$140.00	$10.00	Substantially reshaping the bone after an extraction procedure, much more than minor smoothing of the bone. Reported per quadrant.

COVERED DENTAL CARE SERVICES FOR THE COLORADO DENTAL HEALTH CARE PROGRAM FOR LOW-INCOME SENIORS

CDT Procedure Description	CDT Code	Max Allowable Fee	Program Payment	Max Patient Co-Pay	DENTAL PROCEDURE GUIDELINES
Alveoloplasty in conjunction with extractions - one to three teeth or tooth spaces, per quadrant	D7311	$138.00	$128.00	$10.00	Substantially reshaping the bone after an extraction procedure, much more than minor smoothing of the bone. Reported per quadrant.
Alveoloplasty not in conjunction with extractions - four or more teeth or tooth spaces, per quadrant	D7320	$150.00	$140.00	$10.00	Substantially reshaping the bone after an extraction procedure, correcting anatomical irregularities. Reported per quadrant.
Alveoloplasty not in conjunction with extractions - one to three teeth or tooth spaces, per quadrant	D7321	$138.00	$128.00	$10.00	Substantially reshaping the bone after an extraction procedure, correcting anatomical irregularities. Reported per quadrant.
Incision & drainage of abscess - intraoral soft tissue	D7510	$193.00	$183.00	$10.00	Incision through mucosa, including periodontal origins.
ADJUNCTIVE GENERAL SERVICES					
Palliative (emergency) treatment of dental pain - minor procedure	D9110	$61.00	$36.00	$25.00	Emergency treatment to alleviate pain/discomfort. This code should not be used for file claims for writing or calling in a prescription to the pharmacy or to address situations that arise during multi-visit treatments covered by a single fee such as surgical or endodontic treatment. Report per visit, no procedure. Frequency: Limit 1 time per fiscal yr. May not be charged as an encounter fee. maintain documentation that specifies problem and treatment.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Julie Pelegrin, Office of Legislative Legal Services

DATE: December 4, 2015

SUBJECT: Rules of the State Charter School Institute Board, Department of Education, concerning administration of the state charter school institute, 1 CCR 302-1 (LLS Docket No. 150456; SOS Tracking No. 2015-00545).[1]

Summary of Problems Identified and Recommendations

Section 22-30.5-509, C.R.S., specifies the information that must be included in an institute charter school application. But the State Charter School Institute Board (Board) Rule 4.00 2) allows an applicant that is an existing district charter school seeking to convert to an institute charter school to submit an application that provides a subset of the required information.

Section 22-7-1013 (5), C.R.S., requires each school district and charter school to review its content standards on July 1, 2017, and every six years thereafter, and revise and readopt the rules if necessary to ensure that they meet or exceed the state content

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[1] Under § 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 § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

standards. Board Rule 9.00 6) states that each institute charter school must review and revise its content standards as necessary to promote student achievement.

Because Rules 4.00 2) and 9.00 6) conflict with the statute, we recommend that Rules 4.00 2) and 9.00 6) of the rules of the State Charter School Institute Board concerning administration of the state charter school institute not be extended.

Rule-making Authority

Section 22-30.5-505 (4) (k), C.R.S., authorizes the Board to adopt rules to administer part 5 of article 30.5 of title 22, C.R.S., the statutes that create the state charter school institute (institute) and authorize the institute to authorize and oversee institute charter schools. Section 22-30.5-505 (4) (k), C.R.S., states:

> **22-30.5-505. State charter school institute - institute board - appointment - powers and duties - rules.** (4) In addition to any other powers granted by law to the institute board, the institute board shall have the following powers:
>
> (k) To promulgate rules in accordance with article 4 of title 24, C.R.S., for the administration of this part 5; and

Notwithstanding this broad grant of rule-making authority, Rules 4.00 2) and 9.00 6) conflict with §§ 22-30.5-509 and 22-7-1013 (5), C.R.S., respectively, as discussed in the Analysis portion of this memorandum.

Analysis

1. **Because Rule 4.00 2) allows an application to convert an existing district charter school to an institute charter to include a subset of the information required for an application to create a new institute charter school, the rule conflicts with §22-30.5-509, C.R.S., which specifies the minimum information that every application for an institute charter school must include.**

Section 22-30.5-504, C.R.S., grants the institute the authority to approve or deny applications for institute charter schools. An application may be submitted by an entity or a group of persons who are seeking to create a new institute charter school or, under § 22-30.5-510 (1), C.R.S., by an existing charter school that is authorized by a school district and is seeking to convert to an institute charter school.

Section 22-30.5-509 (1), C.R.S., specifies, the minimum information that each institute charter school application must contain:

> **22-30.5-509. Institute charter school application - contents**. (1) The institute charter school application is a proposed agreement upon which the institute charter applicant and the institute negotiate a charter contract. **At a minimum, each institute charter school application includes:**
>
> (a) … [required application items continue through paragraph (s)] (**emphasis added**)

The statute does not distinguish between an application for a new institute charter school and an application for a district charter school that seeks to convert to an institute charter school. Nor does the statute set forth any other circumstances under which an application for an institute charter school would not include all of the information listed. Further, § 22-30.5-510 (1), C.R.S., which describes the application process, states in pertinent part:

> **22-30.5-510. Institute charter school application - process - rule-making.** (1) (a) … Within fifteen days after receiving an institute charter school application, the institute shall determine whether the application contains **the minimum components specified in section 22-30.5-509 (1) and is therefore complete. If the application is not complete, the institute shall notify the applicant** within the fifteen-day period and provide a list of the information required to complete the institute charter application. The applicant has fifteen days after the date it receives the notice to provide the required information to the institute for review…. **(emphasis added)**

This section requires the institute to ensure that each application contains all of the minimally required information and to notify the applicant if it does not.

The Board adopted Rule 4.00, which describes the information that an institute charter school application must include. Subsection (1) of the rule sets out a list of required information that mirrors the requirements specified in § 22-30.5-509, C.R.S. Subsection 2) of Rule 4.00 sets out additional information that an application to convert an existing district charter school to an institute charter school must contain. Although this subsection of the rule sets out additional information, the introductory portion of this subsection states:

> **Rule 4.00 Institute Charter School application contents.**
>
> 2) If the applicant is an existing school, the application shall contain **a modified subset of the information described under Section 1 above, appropriate to a conversion school situation as determined by the Institute,** in addition to the following information: **(emphasis added)**

Thus, under the rule, the institute may determine that an application to convert an existing district charter school into an institute charter school does not have to include

all of the information required for an application to create a new institute charter school.

Because the statute establishes the minimum required information for each institute charter school application, and Rule 4.00 2) allows the institute to decide that an application to convert an existing district charter school to an institute charter school need not contain all of the statutorily required information, the rule conflicts with the statute.

2. By requiring each institute charter school to review and revise its standards as the institute charter school deems necessary, Rule 9.00 6) conflicts with § 22-7-1013 (5), C.R.S., which requires each institute charter school to review its standards on a regular basis and revise them as necessary to meet or exceed the state standards.

The "Preschool to Postsecondary Education Alignment Act", part 10 of article 7 of title 22, C.R.S., requires the State Board of Education to adopt state academic standards in several subjects and to review and revise the state academic standards in accordance with a specific schedule. Section 22-7-1013, C.R.S., of the Act also requires each local education provider, which is defined to include an institute charter school, to adopt its own academic standards in the same subjects. A local education provider's standards must meet or exceed the state academic standards.

Each local education provider must also review and revise its academic standards in accordance with a specific schedule. Section 22-7-1013 (5), C.R.S., states:

> **22-7-1013. Local education provider - preschool through elementary and secondary education standards - adoption - academic acceleration.** (5) **On or before July 1, 2017, and on or before July 1 every six years thereafter, each local education provider shall review its preschool through elementary and secondary education standards and,** taking into account any revisions to the state preschool through elementary and secondary education standards, **shall revise and readopt its standards if necessary to ensure that they continue to meet or exceed the state preschool through elementary and secondary education standards.** The local education provider shall revise its curricula accordingly to ensure that the curricula continue to align with the local education provider's preschool through elementary and secondary education standards. **(emphases added)**

The Board adopted Rule 9.00 which requires each institute charter school to adopt academic standards. Subsection 6) of this rule states:

Rule 9.00 Institute Charter School Content Standards.

6) Following adoption of content standards pursuant to this Section, **each Institute Charter School shall review and revise such content standards as necessary to promote the highest student achievement.** In revising such content standards, each Institute Charter School shall seek recommendations from and shall work in cooperation with educators, parents, students, business persons, and members of the general community who are representative of the cultural diversity of the Institute Charter School. **(emphasis added)**

Thus, under Rule 9.00 6), an institute charter school may decide whether a review or revision of its academic standards is necessary based on the institute charter school's determination that the standards do or do not promote the highest student achievement. Section 22-7-1013 (5), C.R.S., however, requires each institute charter school to review its academic standards by July 1, 2017, and every six years thereafter to ensure that the academic standards continue to meet or exceed the state academic standards. Since the rule establishes a different timeline and standard of review than that required by the statute, Rule 9.00 6) conflicts with § 22-7-1013 (5), C.R.S.

Conclusion

We recommend that Rules 4.00 2) and 9.00 6) of the rules of the state charter school institute board concerning administration of the state charter school institute not be extended because they conflict with §§ 22-30.5-509 and 22-7-1013 (5), C.R.S., respectively.

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Second Regular Session
Seventieth General Assembly
STATE OF COLORADO

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11.17.15

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LLS NO. 16-0400.01 Debbie Haskins x2045 **COMMITTEE BILL**

Committee on Legal Services

BILL TOPIC: "Authority Of OLLS Director To Sign Vouchers"

A BILL FOR AN ACT

CONCERNING AUTHORITY OF THE DIRECTOR OF THE OFFICE OF LEGISLATIVE LEGAL SERVICES TO SIGN VOUCHERS FOR EXPENDITURES OF THE OFFICE.

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 current law, any payroll voucher or other vouchers for expenditures of the Office of Legislative Legal Services must be signed by the chair of the Committee on Legal Services, or in the chair's absence, by the vice-chair. This bill authorizes the staff director of the Office of Legislative Legal Services or his or her

authorized designee to sign any payroll voucher or any other voucher that does not exceed $5000.

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

SECTION 1. In Colorado Revised Statutes, 2-3-507, **amend** (2) as follows:

2-3-507. Office space in capitol - office hours - appropriations.

(2) Adequate appropriations shall be made to carry out the purposes of this part 5, to be included in the appropriation to the legislative department. The controller is authorized and directed to draw warrants monthly in payment of the salaries of personnel, and in payment of expenditures of the office, on vouchers signed by the chair of the committee or, in the absence of the chair, by the vice-chair; EXCEPT THAT ANY PAYROLL VOUCHER OR ANY OTHER VOUCHER THAT DOES NOT EXCEED FIVE THOUSAND DOLLARS MAY BE SIGNED BY THE STAFF DIRECTOR OR, IF AUTHORIZED BY THE STAFF DIRECTOR, BY EITHER THE DEPUTY DIRECTOR OR THE OFFICE MANAGER.

<{ alternate approach:

EXCEPT THAT ANY PAYROLL VOUCHER OR ANY OTHER VOUCHER THAT DOES NOT EXCEED FIVE THOUSAND DOLLARS MAY BE SIGNED BY THE STAFF DIRECTOR OR, WITH PRIOR WRITTEN APPROVAL OF THE CHAIR OF THE COMMITTEE, BY THE STAFF DIRECTOR'S AUTHORIZED DESIGNEE. *}>*

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 to have a safety clause on the bill?***}>

Second Regular Session
Seventieth General Assembly
STATE OF COLORADO

DRAFT
11.17.15

DRAFT

LLS NO. 16-0526.01 Debbie Haskins x2045 **COMMITTEE BILL**

Committee on Legal Services

BILL TOPIC: "Maintenance Bill Request Files By Leg Legal Serv"

A BILL FOR AN ACT

CONCERNING THE ADMINISTRATIVE DUTY OF THE OFFICE OF LEGISLATIVE LEGAL SERVICES TO MAINTAIN FILES RELATING TO BILL DRAFTS AS THE OFFICIAL CUSTODIAN OF THOSE FILES, AND, IN CONNECTION THEREWITH, PERMITTING THE TRANSFER OF THOSE FILES FOR PURPOSES OF STORAGE.

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 current law, the Office of Legislative Legal Services (OLLS) has a statutory duty to keep, maintain,

and protect the confidentiality of files on bills prepared for members of the general assembly, which are considered work product, as defined in the "Colorado Open Records Act". The bill permits the OLLS to transfer legislator bill files to state archives or to another entity in the department of personnel or to a private entity for purposes of storing the files. This aligns the statute with the current practice of the OLLS. The bill clarifies that when any legislator bill files are so transferred, the OLLS is the official custodian of those files. The bill further states that the OLLS has the right of reasonable access to any legislator bill files that are transferred to the state archives in the department of personnel and, as the official custodian of the files, controls the access to those files by the public.

The bill also deletes outdated language relating to the governor requesting bill drafting services of the OLLS and relating to the storage and maintenance of bill files prepared for the governor.

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

SECTION 1. In Colorado Revised Statutes, 2-3-504, **amend** (1) (a) and (1) (e) as follows:

2-3-504. Duties of office. (1) The office shall:

(a) Upon the request of any member of the general assembly, ~~or the governor,~~ draft or aid in drafting legislative bills, resolutions, memorials, amendments thereto, conference reports, and such other legislative documents and papers as may be required in the legislative process;

(e) Keep on file records concerning legislative bills and the proceedings of the general assembly with respect to such bills; subject indexes of bills introduced at each session of the general assembly; files on each bill prepared for members of the general assembly; ~~and the governor;~~ and such documents, pamphlets, or other literature relating to proposed or pending legislation, without undue duplication of material contained in the office of the legislative council or in the supreme court library. All such records and documents shall be made available in the

office at reasonable times to the public for reference purposes, unless said records are classed as confidential under this part 5. IN CARRYING OUT THE DUTY TO KEEP, MAINTAIN, AND PROTECT THE CONFIDENTIALITY OF FILES ON BILLS PREPARED FOR MEMBERS OF THE GENERAL ASSEMBLY, WHICH ARE CONSIDERED WORK PRODUCT, AS DEFINED IN SECTION 24-72-202 (6.5), C.R.S., THE OFFICE MAY TRANSFER SUCH FILES TO STATE ARCHIVES OR TO ANOTHER ENTITY IN THE DEPARTMENT OF PERSONNEL OR TO A PRIVATE ENTITY FOR PURPOSES OF STORING THE FILES. THE OFFICE, HOWEVER, IS THE OFFICIAL CUSTODIAN OF THOSE FILES.

SECTION 2. In Colorado Revised Statutes, 24-80-102, **amend** (10) (b) as follows:

24-80-102. State archives and public records - personnel - duties - cash fund - rules - definition. (10) (b) (I) The department of personnel shall not charge any fees for responding to a request for information or research from a member of the general assembly or his or her agent or anyone from a legislative service agency if the request:

(A) Relates to an audio recording of a legislative proceeding or any document provided to the department of personnel by the legislative branch of the state; and

(B) Is made in the performance of the requester's official duties.

(II) As used in this paragraph (b), "legislative service agency" means the office of legislative legal services, legislative council staff, office of the state auditor, or staff of the joint budget committee.

(III) THE OFFICE OF LEGISLATIVE LEGAL SERVICES HAS THE RIGHT OF REASONABLE ACCESS TO ALL FILES ON BILLS PREPARED FOR LEGISLATIVE MEMBERS THAT ARE WORK PRODUCT, AS DEFINED IN SECTION 24-72-202 (6.5), AND THAT HAVE BEEN TRANSFERRED TO THE PHYSICAL

CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF PERSONNEL FOR STORAGE PURPOSES IN ACCORDANCE WITH SECTION 2-3-504 (1) (e), C.R.S. IN ALL INSTANCES, THE OFFICE OF LEGISLATIVE LEGAL SERVICES IS THE OFFICIAL CUSTODIAN OF THOSE FILES.

SECTION 3. 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?***}>