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Rules and Regulations: A primer on formal rulemaking processes and procedures in Colorado

October 2012

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Rulemaking—the formal process of passing, or promulgating regulations—is one of the most important and least understood functions of government. Lawmaking begins with the legislature passing broad policies in the form of statutes. The rulemaking process then allows executive agencies to clarify, refine and operationalize statutes passed by the legislature in greater detail.

Every year, state executive agencies promulgate hundreds of regulations that govern everything from the delivery of health care benefits to consumer protections and public health and safety requirements. Colorado’s rulemaking processes and procedures, which provide significant opportunities for public participation, are critical for ensuring rules are developed and adopted in a fair manner that achieves the best outcomes for Coloradans. It is critical that advocates and concerned citizens clearly understand the rulemaking process so they may effectively engage with the development and adoption of rules.

This issue brief serves as a guide to Colorado’s rulemaking process, with a particular focus on the procedures of state agencies responsible for health care and human services. What follows is a step-by-step overview of the process, from an agency’s initial determination that rulemaking is necessary to the rule’s final, permanent adoption. The particular focus throughout is on opportunities for the public to participate in and influence the rulemaking process.

Rulemaking Process in Colorado

The Colorado Administrative Procedure Act¹ (APA) governs the legal and procedural requirements that the state must follow when promulgating rules and regulations. The APA applies to all state departments, agencies, and boards required or permitted by law to make rules.

Step 1: The agency determines a rule is needed

Generally, agencies must promulgate rules whenever adopting a “policy of general applicability” that implements or interprets an enactment of the Colorado General Assembly, Congress or a regulation adopted by a federal agency.² State executive agencies must also adhere to the APA when implementing “procedures or practice requirements” of the agency.³ A simple way of thinking about whether rulemaking is required is to determine if the subject matter of the proposed policy is meant to be binding on an individual or group of individuals, thereby affecting their rights. If so, rulemaking is usually appropriate. This determination is critical since rules affecting individual rights trigger a host of due process rights, which include the right to appeal the harmful application of a rule.

Agencies are not required, however, to promulgate rules when adopting “interpretive rules or general statements of policy.”⁴ In contrast to a rule, “a general statement of policy is not meant to establish a binding norm,” nor is it meant to serve as the final determinant of an individual’s rights.⁵ A straightforward example is that rulemaking is required to adopt eligibility criteria for a public benefits program (because the criteria are binding and affect individual rights) but

¹ See generally, Colo. Rev. Stat. §§ 24-4-101 through 24-4-108.

² Colo. Rev. Stat. § 24-4-102(15)

³ *Id.*

⁴ Colo. Rev. Stat. § 24-4-103(1)

⁵ *Meyer v. State Dept. of Soc. Servs.*, 758 P.2d 192, 195 (Colo. App. 1988).

rulemaking may not be required to establish standards governing how certain benefits are administered.⁶

Step 2: File Notice of Rulemaking Hearing

When an agency determines rulemaking is needed to implement a policy, the agency must submit a notice of rulemaking to the office of the Colorado Secretary of State for publication in the Colorado Register.⁷ The Colorado Register is the sole official publication for notices of rulemaking, proposed rules, Attorney General's opinions relating to such rules, and adopted rules.⁸ Notices of rulemaking must include the following information:

- The time, place and nature of the public rulemaking hearing, which must be held no fewer than 20 days after publication of the notice;
- The authority under which the rule is proposed;
- The text of the proposed rule or a description of the subjects and issues involved in the rule.⁹

The Colorado Register is published on the 10th and 25th of each month. Notices of rulemaking filed with the Secretary of State's office between the 1st through the 15th of each month will be published on the 25th of that month and notices filed from the 16th through the end of the month will be published on the 10th of the following month.

In addition to publication in the Colorado Register, each agency with rulemaking authority must maintain a list of individuals that request notifications of rulemaking.¹⁰ Individuals may subscribe to agency-specific electronic notifications of proposed rulemaking on the Department of Regulatory Agencies website.¹¹

At the time an agency files a notice of proposed rulemaking with the Secretary of State for publication, it must also submit the proposed rule to the Office of Policy, Research, and Regulatory Reform (OPRRR)¹² for review of potential "negative impact on economic competitiveness or small business in Colorado."¹³ If the OPRRR determines that a proposed rule may have such negative impact, the agency proposing the rule must complete a cost-benefit analysis of the rule at least five days before the hearing on the rule.¹⁴

⁶ *Id.* The Court in *Meyer* determined that a point system to determine the appropriate level of nursing home care for Medicaid recipients was merely guidance and therefore not required to undergo formal rulemaking. The Court explained that the point system did not finally determine an individual's continued need for nursing home care, but merely assisted the Department in determining an appropriate level of care.

⁷ Colo. Rev. Stat. § 24-4-103(3)(a).

⁸ Colo. Rev. Stat. § 24-4-103(11)(a).

⁹ Colo. Rev. Stat. § 24-4-103(3)(a).

¹⁰ Colo. Rev. Stat. § 24-4-103(3)(b).

¹¹ Individuals may subscribe to email notification of proposed rulemaking at the following web address:
http://www.dora.state.co.us/pls/real/sb121_web.signup_form

¹² The OPRRR is an office under the Colorado Department of Regulatory Agencies (DORA). More information is available on the OPRRR website, *available at*

<http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DORA->

[OPRRR%2FDORALayout&cid=1251614750683&pagename=CBONWrapper](http://www.colorado.gov/cs/Satellite?c=Page&childpagename=DORA-OPRRR%2FDORALayout&cid=1251614750683&pagename=CBONWrapper) (accessed October 16, 2012).

¹³ Colo. Rev. Stat. § 24-4-103(2.5)(a).

¹⁴ *Id.* The cost-benefit analysis must include the following information:

- i. The reason for the rule or amendment;

Step 3: Agency makes proposed rules available

At least five days before the public rulemaking hearing, the agency must make available to the public the proposed rule (including all revisions to the rule), a proposed statement of basis, specific statutory authority, purpose, and a regulatory analysis.¹⁵ The statement of basis and purpose provides a written, concise notice of what the agency is considering with the proposed rule and also serves to provide a reference point against which the validity of the rule can be measured.¹⁶ The statement of basis and purpose typically includes a concise, plain language bullet-point list of what the proposed rule will accomplish, including background information of why the proposed rule is necessary (for example, to comply with a new law).

In addition to the statement of basis and purpose, agencies must prepare and issue a regulatory analysis of a proposed rule upon the request of any individual, so long as the request is made at least 15 days before the rulemaking hearing.¹⁷ A number of state agencies, including the Department of Health Care Policy and Financing (HCPF) and the Department of Human Services (CDHS), include a regulatory analysis with all proposed rules, whether or not there is a request for the analysis. The regulatory analysis must identify the groups of people affected by the proposed rule and assess the probable impact (economic and other) of the proposed rule on those groups.¹⁸ Furthermore, the regulatory analysis must evaluate the likely costs and benefits of the proposed rule, whether there are any less costly methods of achieving the purpose the rule, and a description of why any less costly alternatives were rejected in favor of the proposed rule.¹⁹

Step 4: Hold rulemaking hearing

Agency rulemaking hearings provide an excellent opportunity for interested individuals and advocates to give a firsthand account of the potential impact of proposed rules. Agencies have a significant amount of discretion to establish procedures and administer rulemaking hearings in a manner they see fit. However, the APA sets forth a number of core requirements. The agency must hold a public hearing for all proposed rules that must take place at least 20 days after publication of the hearing notice and at least five days after release of the proposed rule language, statement of basis and purpose, and regulatory analysis.²⁰ The agency must allow individuals an opportunity to submit written and oral testimony at the public hearing.²¹ All

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- ii. The anticipated economic benefits of the rule or amendment, which shall include economic growth, the creation of new jobs, and increased economic competitiveness;
 - iii. The anticipated costs of the rule or amendment, which shall include the direct costs to the government to administer the rule or amendment and the direct and indirect costs to business and other entities required to comply with the rule or amendment;
 - iv. Any adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness; and
 - v. At least two alternatives to the proposed rule or amendment that can be identified by the submitting agency or a member of the public, including the costs and benefits of pursuing each of the alternatives identified.

¹⁵ Colo. Rev. Stat. § 24-4-103(4)(a).

¹⁶ *Citizens for Free Enter. v. Dept. of Rev.*, 649 P.2d 1054 (Colo. 1982).

¹⁷ Colo. Rev. Stat. § 24-4-103(4.5)(a)

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Colo. Rev. Stat. § 24-4-103(4)(a).

²¹ The agency may decline to accept oral testimony at the public hearing if “the agency deems it unnecessary.” *Id.*

documents associated with a proposed rule, including all supporting documents prepared by the agency, written testimony from the public, or any other evidence, must be made part of the official record.²² Finally, the agency must adopt the proposed rule within 180 days of the last public hearing on the rule or terminate the rulemaking proceeding by publication of a notice in the Colorado Register.²³

HCPF: Medical Services Board

Each state agency with rulemaking authority has its own rules and procedures for holding public rulemaking hearings. The Colorado General Assembly created the Medical Services Board, within HCPF, to hold rulemaking hearings and adopt rules that govern Colorado's medical assistance programs, including Medicaid and the Child Health Plan Plus program.²⁴ The Medical Services Board, which meets on the second Friday of each month, holds two separate hearings on each proposed rule to provide adequate opportunity for public participation.

In addition to monthly Medical Services Board meetings, HCPF holds Public Rule Review meetings to discuss proposed rules before a rule goes to a hearing.²⁵ This meeting allows stakeholders and interested persons an opportunity to interact with and offer input to department staff. Public feedback made during these meetings is then made available to Medical Services Board members for consideration.

CDHS: State Board of Human Services

As with the Medical Services Board, the Colorado General Assembly established the State Board of Human Services, within the Department of Human Services, to hold rulemaking hearings and adopt rules that govern Colorado's human services programs, such as Temporary Assistance to Needy Families (TANF), the Old Age Pension program, child welfare programs, state nursing homes, and mental health and developmental disability services.²⁶ The board, which typically meets on the first Friday of each month, holds two hearings for each proposed rule. The first hearing, or "initial approval," is informal and does not require a quorum of the board for approval. The initial approval phase is intended to allow interested individuals and board members an opportunity to provide department staff with feedback on the proposed rule. The proposed rule must come back in front of the board at a future meeting for a formal hearing, including a comment period and vote.²⁷

²² Colo. Rev. Stat. § 24-4-103(4)(a).

²³ Colo. Rev. Stat. § 24-4-103(4)(d).

²⁴ See, Department of Health Care Policy and Financing, *About the Board*, <http://www.colorado.gov/cs/Satellite/HCPF/HCPF/1214386698725> (accessed September 24, 2012).

²⁵ Public Rule Review meetings are announced on the Department of Health Care Policy and Financing website, but are not noticed in the same manner as proposed rules. For more information about HCPF Public Rule Review meetings, see, <http://www.colorado.gov/cs/Satellite/HCPF/HCPF/1214427706440> (accessed September 24, 2012).

²⁶ Department of Human Services, *State Board of Human Services By-Laws*, <http://www.colorado.gov/cs/Satellite/CDHS-ExecDir/CBON/1251610443109> (accessed September 25, 2012).

²⁷ State Board of Human Services Administrator, *Standards and procedures manual for rulemaking*, § 6.1 (2008) (available at http://www.colorado.gov/cs/Satellite?c=Document_C&childpagename=CDHS-Emp%2FDocument_C%2FCBONAddLinkView&cid=1251590951273&pagenam=C BONWrapper).

Step 5: Review by Attorney General

Upon adoption of a rule, a number of procedures are set into motion that must occur within a quick time frame. First, the state agency must submit the rule to the Attorney General's office for an examination as to the rule's legality.²⁸ If a rule is not submitted to the Attorney General's office, it shall be void.²⁹ Once the Attorney General's office issues its opinion about the legality of the adopted rule, the agency has a maximum of 20 days from the date of the rule's adoption to then file the rule with the Office of Legislative Legal Services (OLLS) and the Secretary of State for publication.³⁰

Step 6: Submit for review by the Office of Legislative Legal Services

State agencies must submit all adopted rules to the OLLS for review. The OLLS must review all adopted rules to determine if the rule is within the power of the state agency and consistent with law.³¹ If the OLLS determines that a legal problem exists with an administrative rule, the rule is then reviewed by the Committee on Legal Services at a public hearing.³² The Committee on Legal Services is a standing committee of the General Assembly, consisting of 10 legislators.³³ At the public hearings, interested individuals have the opportunity to provide testimony. The OLLS then has the power to submit all legally problematic rules to the legislature so those rules may be forced to expire.³⁴

Step 7: File rule with Secretary of State for publication & Effective Date

Within 20 days of the rules adoption, the issuing agency must electronically submit the rule to the Secretary of State's office for publication in the Colorado Register.³⁵ Again, the Colorado Register is published on the 10th and 25th of each month. The rule shall become effective 20 days after publication of the rule as finally adopted, or later if specifically prescribed in the rule

²⁸ Colo. Rev. Stat. § 24-4-103(8)(a)

²⁹ *Id.*

³⁰ Colo. Rev. Stat. § 24-4-103(11)(d)(II).

³¹ Colo. Rev. Stat. § 24-4-103(8)(d).

³² *Id.* The Committee on Legal Services is a

³³ Members of the Committee on Legal Services include the following members of the Colorado General Assembly:

- The respective chairs of the House and Senate committees on Judiciary or their designees;
- Four members from the House of Representatives, two from each major political party (one member from each party is to be an attorney-at-law if an attorney is available); and
- Four members from the Senate, two from each major political party (one member from each party is to be an attorney-at-law if an attorney is available). Colo. Rev. Stat. § 2-3-502(3).

³⁴ The Colorado Office of Legislative Legal Services website states: "By statute, all rules adopted or amended during any one-year period that begins November 1 and ends the following October 31 expire on the May 15th that follows such one-year period unless the General Assembly adopts a bill that postpones their expiration. Each session, members of the Committee on Legal Services sponsor a bill to postpone the expiration of the rules scheduled to expire May 15 of that year; except that those rules that the legislature finds to exceed the rule-making authority of the agency or to be inconsistent with law are designated to expire as scheduled on May 15. After each session of the General Assembly, the Office of Legislative Legal Services reviews existing rules to determine if they are in conflict with laws enacted during that session." *Available at*,

http://www.state.co.us/gov_dir/leg_dir/olls/duties_and_responsibilities.htm (accessed September 24, 2012).

³⁵ Colo. Rev. Stat. § 24-4-103(11)(d)(II).

itself.³⁶ Individuals may challenge the validity of an adopted rule in court before its effective date.³⁷

Miscellaneous rulemaking requirements

Emergency Rulemaking

Under the APA, an agency may propose a temporary or emergency rule, so long as the agency finds that “immediate adoption of the rule is imperatively necessary to comply with state or federal law or federal regulations or for the preservation of public health, safety, or welfare” and that complying fully with the APA would be contrary to the public interest.³⁸ However, the agency must submit such findings and a statement of the reasons for the emergency or temporary rule along with the rule language itself.³⁹ Under such circumstances, the agency does not have to comply with the APA’s notice and hearing procedure requirements. The temporary or emergency rule becomes effective upon adoption by the agency or at such later time indicated in the rule.

It is important to note that emergency rulemaking does not allow agencies to completely avoid the requirements under the APA. When the agency proposes an emergency rule, it may not be effective for more than 120 days, unless the agency fully complies with the APA by providing adequate notice and a public hearing.⁴⁰ If the agency fails to subject the emergency rule to notice and hearing within 120 days, the rule terminates. Individuals adversely affected by an emergency rule should monitor compliance with the emergency rulemaking process to ensure that temporary rules are not permanently enforced.

Public Petition for Rulemaking

Anyone has the right to petition an executive agency to issue, amend or repeal a rule.⁴¹ This can provide people who are adversely affected by a rule the opportunity to challenge the rule directly with the state agency. Moreover, anyone can request the issuance of new rules or amendments to existing rules to encourage the executive agency to identify and improve its functions in new and innovative ways. Executive agencies have a great deal of discretion to act on public petitions for rulemaking in a manner they see fit. However, when an executive agency undertakes rulemaking, it must consider and act upon all related public petitions simultaneous to the proposed rule.⁴² Consequently, public petitions for rulemaking may be most effective if made in conjunction with formal rulemaking on the same subject matter.

³⁶ Colo. Rev. Stat. § 24-4-103(5).

³⁷ See, *CF&I Steel v. Colo. Air Pol. Control Com'n*, 610 P.2d 85 (1980). (“Even where a regulation is of general applicability, and even where enforcement measures concerning compliance with the regulation have not yet been taken specifically against an individual, whether it be a permit denial, a cease or desist order, or the like, we can see nothing in the APA that denies standing to that individual to initiate a pre-enforcement challenge to the validity of the regulation, if he is subject to its demands.” *Id.* at 91.

³⁸ Colo. Rev. Stat. § 24-4-103(6)(a).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Colo. Rev. Stat. § 24-4-103(7).

⁴² *Id.*

Incorporation by Reference

In 2010, the Colorado General Assembly passed House Bill 10-1235, which expanded the ability of state agencies to incorporate materials into rule by reference.⁴³ This means that a state agency may now propose a rule that incorporates by reference “all or any part of a code, standard, guideline, or rule that has been adopted by an agency of the United States, this state, or another state, or adopted or published by a nationally recognized organization or association.”⁴⁴

However, a state agency may only incorporate material by reference if the following criteria are met:

- The agency must establish that repeating verbatim the text of the incorporated material would be unduly cumbersome, expensive, or otherwise inexpedient.
- The reference fully identifies the incorporated materials by citation and date, identifies the address of the agency where incorporated materials is available for public inspection, and states that the rule does not include any later amendments or editions of the incorporated material.
- The incorporated material must be readily available to the public in written or electronic form and the rule must state where copies of the incorporated material are available. Furthermore, the agency must maintain a copy of the incorporated material for public inspection at the agency office during regular business hours.⁴⁵

The expanded ability of state agencies to incorporate material by reference into rule may have the effect of blurring the rulemaking authority of state agencies. Before passage of HB 10-1235, state agencies could only incorporate by reference federal rules, codes, or standards promulgated in either the Federal Register or Code of Federal Regulations or published in nationally recognized scientific journals. Now, state agencies can propose a rule that incorporates by reference any state law, rule or guidance from this or any other state. These incorporated materials may include criteria or definitions that in effect establish binding norms. It is unclear whether materials incorporated by reference must be subject to all APA requirements or not, including review by the Attorney General, review by the OLLS and judicial review. It is also unclear procedurally how or whether binding norms embedded within incorporated materials must be subject to APA requirements separately from incorporated materials that do not establish binding norms.

Materials incorporated into rule by reference should have the full force and effect of the rule itself. Adoption of a rule that includes materials incorporated by reference should serve as adoption of the incorporated materials as well. Not requiring material incorporated by reference to fully comply with the APA would create administrative inefficiencies, confusion, and potential legal issues concerning the finality of rulemaking.

Mandatory Stakeholder Involvement

In 2012, the Colorado General Assembly passed House Bill 12-1008, which requires state agencies, when contemplating rulemaking, to establish a “representative group of participants,” or stakeholders, that are likely to be affected by the proposed rule to give feedback to the

⁴³ H.B. 10-1235, 67th Gen. Assem., 2d Reg. Sess. (Colo. 2010).

⁴⁴ Colo. Rev. Stat. § 24-4-103(12.5)(a).

⁴⁵ *Id.*

agency.⁴⁶ The agency must “make diligent attempts to solicit input” from all stakeholder interests that “may be affected positively or negatively by the proposed rules.”⁴⁷ These stakeholder groups may be formed either before or after the formal notice of rulemaking hearing is published.⁴⁸ However, the agency must convene these groups before the rule is finally adopted.

The new requirements under HB 12-1008 are similar to the rule review process that currently exists in HCPF. However, to comply with the additional requirements in HB 12-1008, HCPF must integrate a number of new processes. Namely, HCPF (and all rulemaking entities) must now *actively* reach out to individuals or groups of individuals that may benefit from or be harmed by the proposed rule. This new requirement will help to ensure that agencies are better informed of any potential impact that a proposed rule may have.

Conclusion

Rulemaking procedures, which provide important opportunities for public participation, are critical to a healthy and functioning government. These procedures ensure there is adequate justification for rulemaking, that rulemaking is open and transparent and that rulemaking is expedient and timely. Moreover, rulemaking procedures legitimize outcomes by providing multiple opportunities for public engagement. To function properly, however, it is critical that concerned individuals participate in the process. This means that individuals should not only provide testimony at public hearings, but also monitor an agency’s compliance with all APA requirements, including notice requirements, regulatory analysis requirements and emergency rulemaking requirements. The APA, while elaborate, is a crucial component that holds the state government accountable to those who are ultimately affected by rulemaking.

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⁴⁶ See, H.B. 12-1008, 68th Gen. Assem., 2d Reg. Sess. (Colo. 2012). Codified in Colo. Rev. Stat. § 24-4-103(2).

⁴⁷ Colo. Rev. Stat. § 24-4-103(2).

⁴⁸ *Id.*