

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY



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MEMORANDUM

TO: Committee on Legal Services

FROM: Thomas Morris

DATE: March 29, 2018

SUBJECT: Proposed pilot project for a consolidated motion on uncontested incorporation by reference rule issues

Summary of Proposal

The Office of Legislative Legal Services (OLLS) asks the Committee on Legal Services (COLS) to approve a pilot project, to be implemented during the 2018-19 rule review cycle, during which the COLS would decide multiple uncontested rule submissions¹ that relate exclusively to incorporation-by-reference issues by using a single, consolidated motion that relates to the multiple rule submissions.

- 1. Uncontested incorporation by reference rule issues are a small but steady portion of the COLS's rule review workload, and the COLS virtually always agrees with the OLLS's recommendation to not extend these rules.**

In an average annual rule review cycle², over 500 total rule submissions are filed with and reviewed by the OLLS staff, totalling an average of more than 15,000 pages. Of

¹ For the purposes of this memorandum, "rule submission" refers to all the rules that an agency submits to the OLLS to which the OLLS assigns a single docket number; "rule" refers to individual rules within a rule submission. The memorandum that the OLLS submits to the COLS for a rule submission that contains one or more rules that the OLLS believes should not be extended refers to this docket number.

² The data reported here is from the annual rule review cycles from November 2005 to November 2017.

those 500-plus rule submissions, the OLLS staff identifies an average of about 30 rule submissions that have one or more rule issues. Of those rule submissions, agencies typically are able to fix the majority in time so that the OLLS staff does not need to bring the rule submissions to the COLS, but the OLLS staff brings an average of about 12 rule submissions to the COLS each year.

Of these rule submissions, an average of about one rule submission per year has issues that relate exclusively to incorporation by reference; the actual number varied from zero to five per annual rule review cycle with a 13-cycle total of 18 rule submissions. These rule submissions are generally uncontested; only two were contested during the 13-cycle period. The COLS voted to not extend all of these 18 rule submissions that related exclusively to incorporation by reference, including the two contested rule submissions.

2. The pilot project would allow the COLS to skip the OLLS's oral presentation and to make a consolidated motion on all uncontested incorporation by reference rule submissions that are on the agenda at a particular COLS hearing.

Current practice requires the OLLS staff to submit to the COLS a separate memorandum for each rule submission that contains one or more rules that the OLLS argues should not be extended. At the COLS hearing, the OLLS staff presents to the COLS its oral argument as to why the individual rules within a particular rule submission should not be extended. The motion that the COLS uses specifically lists every individual rule that the OLLS proposes not be extended. That list of rules is often quite long, particularly when incorporation by reference rules are involved. The following is an example of a standard motion:

I move to extend Rules 17.03., 17.04.(a)(1), 17.04.(b)(1), and 17.04.(d) of the rules of the Commissioner of Agriculture, and ask for a "no" vote.

The OLLS staff and the COLS repeat this process for each rule submission that is on the agenda at a particular COLS hearing.

Under the proposed pilot project, the OLLS staff would continue to prepare a separate memorandum on each rule submission that contains one or more rules that the OLLS argues should not be extended. But a different hearing procedure would apply to a memorandum that relates to a rule submission that is uncontested and includes only incorporation by reference issues. The OLLS staff would not make an oral presentation for such a memorandum unless a member of the COLS requests it. At the COLS's option, this ability to request an oral presentation could be extended to the affected agency. The affected agency and the public would always have an opportunity to be heard at the hearing.

Further, a single consolidated motion would cover all rule submissions that relate only to uncontested incorporation by reference issues on the agenda at a particular COLS hearing for which the OLLS did not make an oral presentation, and instead of a motion specifically listing every individual rule within a rule submission that is proposed to not be extended, the motion would refer to the OLLS docket numbers, and the dates of the associated OLLS memoranda, for the affected rule submissions. Following is an example of a consolidated motion:

I move to extend the rules listed in the memoranda dated November 15, 2018, concerning LLS Docket Nos. 180253 and 180357, and ask for a "no" vote.

Request for Approval of Pilot Project

The OLLS requests that the COLS approve a pilot project for implementation during the 2018-19 rule review cycle during which the COLS would decide uncontested rule submissions that relate exclusively to incorporation by reference issues by:

- Foregoing the oral presentation by the OLLS staff on all rule submissions on a particular hearing agenda that relate exclusively to uncontested incorporation by reference issues, but giving the members of the COLS (and potentially agencies) the option to request the OLLS staff to give an oral presentation on one or more individual rule submissions; and
- Using a single, consolidated motion for all rule submissions on a particular hearing agenda that relate exclusively to uncontested incorporation by reference issues and for which the OLLS did not make an oral presentation.