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## MEMORANDUM

**TO:** Interested Persons  
**FROM:** Office of Legislative Legal Services  
**DATE:** March 29, 2019  
**SUBJECT:** Explanation of S.B. 19-168, the Rule Review Bill

### Explanation of the Rule Review Process

Since 1976, executive agencies have been required by section 24-4-103 (8)(d), C.R.S., of the State Administrative Procedure Act (APA) to submit their rules to the General Assembly for review.

Under section 24-4-103 (8)(c)(I), C.R.S., all rules adopted or amended during any one-year period that begins each November 1 and continues through the following October 31 expire on the May 15 that follows the one-year period, unless the General Assembly by bill acts to postpone the expiration.

Every newly adopted or amended rule is submitted by the adopting agency to the Office of Legislative Legal Services, where the rule is reviewed to determine if the rule is within the agency's rule-making authority and consistent with law. If an attorney finds a possible problem with a rule, and if the attorney is unable to resolve the problem with the agency, the Office prepares a memorandum on the issue and presents the issue to the Committee on Legal Services after notice to the affected agency. At the Committee hearing, an attorney with the Office explains why the rule lacks statutory authority or conflicts with the law and argues that the rule should not be extended beyond the May 15 expiration date. The Committee gives the affected agency an opportunity to respond and gives members of the public or other interested parties an opportunity to speak on the issue. After hearing all the testimony and asking questions, the Committee then takes a vote to determine whether the rule should not be extended beyond the May 15 expiration date.

Each year the Committee sponsors a bill (the annual rule review bill) that extends the rules adopted or amended during the previous year (i.e., those rules scheduled to expire on May 15); except that the bill specifically allows the expiration of those rules that the Committee determined not to extend beyond the May 15 expiration date. S.B. 19-168 is the Committee's annual rule review bill for 2019.

## **Explanation of S.B. 19-168**

- 1. Rules of the Colorado State Board of Education, Department of Education, concerning the administration of the waiver of statute and rule, 1 CCR 301-35 (LLS Docket No. 180441; SOS Tracking No. 2018-00413). S.B. 19-168: Subsection (1)(c).**

*Staff: Brita Darling*

### Explanation:

Section 22-2-117 (1)(b)(VII), C.R.S., prohibits the State Board of Education from waiving any requirements specified in section 22-1-130, C.R.S., relating to notification to parents of alleged criminal conduct by *school district employees*. The State Board's Rule 2.6 (o) implementing section 22-2-117 (1)(b)(VII), C.R.S., conflicts with statute because it prohibits the State Board from waiving parental notification requirements relating to alleged criminal conduct by *charter school employees*, not school district employees.

Agency position: The agency did not contest the staff recommendation not to extend the rule.

- 2. Rules of the State Board of Human Services, Department of Human Services, concerning Adult Protective Services, 12 CCR 2518-1 (LLS Docket No. 180108 and No. 180218; SOS Tracking No. 2017-00532 and No. 2017-00647). S.B. 19-168: Subsection (1)(f).**

*Staff: Brita Darling*

Explanation: Section 26-3.1-101 (10), C.R.S., defines "self-neglect" and excludes from the definition of "self-neglect" the actions of a "duly authorized surrogate medical decision maker". The definition of "self-neglect" in the State Board's Rule 30.100 omits this exclusion.

Agency position: The agency did not contest the staff recommendation not to extend the rule.

**3. Rules of the Colorado Uninsured Employers Board, Department of Labor and Employment, concerning the Colorado Uninsured Employers Fund, 7 CCR 1106-1 (LLS Docket No. 180386; SOS Tracking No. 2018-00244). S.B. 19-168: Subsection (1)(g)(I).**

*Staff: Jacob Baus*

Explanation: No statute authorizes the Colorado Uninsured Employers Board to void an order issued by the Office of Administrative Courts or the Director of the Division of Workers' Compensation for improper notice. Rule 2-1 (B), however, authorizes the Board to void such an order for improper notice. The Board lacks statutory authority for Rule 2-1 (B).

No statute authorizes the Board to require all Workers' Compensation Act (WCA) claimants to file a notice of entitlement with the Board. Rule 2-3 (D), however, requires all WCA claimants to file a notice of entitlement with the board. The Board lacks statutory authority for Rule 2-3 (D).

Section 8-68-107 (1)(b), C.R.S., requires the Board to prioritize and pay benefits among seven benefit types at reduced rates if the Colorado Uninsured Employers Fund is insufficiently funded to pay out all claims. The Board's Rule 3-2 (B)(I) conflicts with the statute because the rule authorizes the Board to pay only one of the 7 benefit types if the fund is insufficiently funded.

Agency position: The agency did not contest the staff recommendation not to extend the rules.

**4. Rules of the Director of the Division of Oil and Public Safety, Department of Labor and Employment, concerning explosives regulation, 7 CCR 1101-9 (LLS Docket No. 180442; SOS Tracking No. 2018-00443). S.B. 19-168: Subsection (1)(g)(II).**

*Staff: Thomas Morris*

Explanation: Section 24-4-103 (12.5)(a)(IV), C.R.S., allows a rule to incorporate a code by reference if the rule states where copies of the code are available from the organization that originally issued the code. The Director's Rule 1-5 conflicts with the incorporation by reference statute because the rule purports to incorporate a code by reference but does not include a statement where the copies of the code are available from the organization that originally issued the code.

Section 24-4-103 (12.5)(a)(II), C.R.S., does not allow a rule to incorporate a local rule by reference and only allows the incorporation of federal rules in compliance with the incorporation by reference statute. The Director's Rule 6-1 (G) conflicts with the statute because the rule attempts to incorporate a local rule and does not comply with any of the incorporation by reference requirements for incorporating federal rules.

Section 24-4-104 (4) and (6), C.R.S., does not allow a summary revocation of a permit and requires a hearing to be held for all revocations and suspensions. Director's Rule 3-4 (A), 3-4 (B), and 3-4 (D) conflict with the statute because they allow summary revocation of a permit and only requires a hearing for either a suspension or a revocation if the permittee first requests the hearing.

Agency position: The agency did not contest the staff recommendation not to extend the rules.

**5. Rules of the Parks and Wildlife Commission, Department of Natural Resources, concerning general provisions, 2 CCR 406-0 (LLS Docket No. 180140; SOS Tracking No. 2018-00036). S.B. 19-168: Subsection (1)(k).**

*Staff: Jennifer Berman*

Explanation: Section 33-10.5-105 (1)(a), C.R.S., prohibits a person from possessing, importing, exporting, shipping, or transferring an aquatic nuisance species. The Commission's Rule #012 F. conflicts with the statute because the rule allows the Division of Parks and Wildlife or a permit issued by the Department of Agriculture to authorize the import, transport, possession, or release of an aquatic nuisance species.

Agency position: The agency did not contest the staff recommendation not to extend the rule.

Subsequent Developments: H.B. 19-1026, sponsored by Representatives Catlin and McCluskie and Senators Coram and Donovan, would authorize the Commission to adopt rules authorizing the import, export, shipment, or transport of aquatic nuisance species. H.B. 19-1026 has passed out of the House Rural Affairs and Agriculture Committee and is scheduled in the House Appropriations Committee.

**6. Rules of the Executive Director of the Department of Public Safety, Division of Fire Prevention and Control, concerning persons dealing with fireworks, 8 CCR 1507-12 (LLS Docket No. 180231; SOS Tracking No. 2018-00097). S.B. 19-168: Subsection (1)(n)(I).**

*Staff: Megan Waples*

Explanation: Section 24-4-104 (6), C.R.S., requires a hearing before an agency may suspend or revoke a license. The Executive Director's Rule 4.9 conflicts with the statute because the rule only requires a hearing on a suspension or revocation if the licensee first requests a hearing.

Agency position: The agency did not contest the staff recommendation not to extend the rule.

**7. Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning the Colorado fire suppression program, 8 CCR 1507-11 (LLS Docket No. 180083; SOS Tracking No. 2017-00619). S.B. 19-168: Subsection (1)(n)(II).**

*Staff: Megan Waples*

Explanation: Section 24-4-104 (6), C.R.S., requires a hearing before an agency may suspend or revoke a license. Section 24-4-102 (7) defines "license" to include "any agency permit, certificate, [or] registration". The Director's Rules 10.5.1 and 10.5.4 conflict with the statute because the rules do not require the Division to hold a hearing before issuing a notice of suspension.

Section 24-5-101, C.R.S, provides that a conviction for a felony or other offense involving moral turpitude shall not, by itself, prevent a person from obtaining a license or registration required by law to follow a business, occupation, or profession. But the Director's Rule 5.5.1. 4 conflicts with the statute because the rule allows the Division to deny an application for registration when the applicant has been convicted of any "crime which reflects upon the integrity of the applicant."

Agency position: The agency did not contest the staff recommendation not to extend the rules.

**8. Rules of the Director of the Division of Fire Prevention and Control, Department of Public Safety, concerning building, fire, and life safety code enforcement and certification of inspectors for health facilities licensed by the state of Colorado, 8 CCR 1507-31 (LLS Docket No. 180085; SOS Tracking No. 2017-00621). S.B. 19-168: Subsection (1)(n)(III).**

*Staff: Megan Waples*

Explanation: Section 24-4-103 (12.5)(a)(IV), C.R.S., allows a rule to incorporate a code by reference if the rule states where copies of the code are available from the organization that originally issued the code. The Director's Rule 3 incorporates various

codes and standards by reference, but does not provide information about where a person can get copies from the agencies or organizations originally issuing those codes and standards. The following other rules rely on the improperly incorporated codes and standards and also do not include the information required by statute: 3.1, 3.2, 3.3, 3.4, 3.7, 3.8, 3.9, 4.2, 5.3, 5.4, 6.2.1, 6.2.3, 6.5.1, 6.5.2, 6.5.3 (C), 7.2.1, 8.4, 9.1.1, 9.2.1, 9.2.2, 10.1.3 (A), 10.1.3 (B), 10.2.1, 10.2.3 (B), and 12.1.3. The rules conflict with the incorporation by reference statute.

Section 24-33.5-1202 (2.5), C.R.S., defines the term "certified fire inspector" as a person who is certified to conduct fire safety plan reviews and inspections. The Director's Rule 10.2.1, however, requires that fire inspectors performing plan reviews "must be 'Qualified Fire Inspectors' as defined in section 24-33.5-1202 (2.5), C.R.S.". The defined term in Rule 10.2.1 is inconsistent with the defined term in statute.

Agency position: The agency did not contest the staff recommendation not to extend the rules.

**9. Rules of the Division of Motor Vehicles, Department of Revenue, concerning obtaining records for abandoned motor vehicles, 1 CCR 204-10 (LLS Docket No. 180371; SOS Tracking No. 2018-00220). S.B. 19-168: Subsection (1)(p).**

*Staff: Richard Sweetman*

Explanation: Registered tow operators and law enforcement agencies may access information about abandoned vehicles on a website operated by the Division. Sections 42-4-1806 (2)(b) and 42-4-2105 (2)(b), C.R.S., allow the Executive Director of the Department of Revenue to cancel the registration of any operator for a violation of part 18 or part 21 of article 4 of title 42, C.R.S. The Division's Rule 12.2.6 conflicts with the statute because it authorizes the Executive Director to cancel or suspend the registration of an operator *or a law enforcement agency* for such violation.

Agency position: The agency did not contest the staff recommendation not to extend the rule.