Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2012 Sunset Review: Requirements and Procedures Regarding the Preparation of a Cost-Benefit Analysis of Proposed Rules

October 15, 2012

Consumer Protection

Department of Regulatory Agencies

Executive Director's Office
Barbara J. Kelley
Executive Director

John W. Hickenlooper
Governor

October 15, 2012

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of Colorado's requirements and procedures regarding the preparation of a cost-benefit analysis of proposed rules. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2013 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

> The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...
>
> The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination….

The report discusses the question of whether there is a need for the process provided under section 24-4-103(2.5), C.R.S. The report also discusses the effectiveness of the process and staff of DORA in carrying out the intent of the statutes and makes recommendations for statutory changes in the event this process is continued by the General Assembly.

Sincerely,

Barbara J. Kelley
Executive Director

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2012 Sunset Review:
Requirements and Procedures Regarding the Preparation of a Cost-Benefit Analysis of Proposed Rules

Summary

What Is the Process?
To protect small business from unnecessary costs by requiring state agencies to consider the economic impact their rules will have on small business in Colorado, section 24-4-103(2.5), Colorado Revised Statutes (C.R.S.), requires all state agencies to file a copy of proposed rules or amendments to rules with the Executive Director of the Colorado Department of Regulatory Agencies (DORA). DORA reviews the proposed rules to determine if they could potentially have a negative impact on economic competitiveness or on small business in Colorado.

If DORA determines that a proposed rule or amendment could potentially have a negative impact on small business, it may direct the submitting agency to perform a cost-benefit analysis (CBA) of the rule or amendment. The CBA must, among other things, identify the reason for the rule or amendment; its anticipated economic benefits or costs; any adverse effects the rule may cause on the economy, consumers, private markets, small business, job creation, and economic competitiveness; and at least two alternatives to the proposed rule including the costs and benefits of pursuing each of the alternatives identified. Upon receiving the CBA, DORA notifies the public that it is available for review.

What Does It Cost?
The cost of the process was absorbed into DORA's existing budget.

Continue the CBA provisions of the State Administrative Procedure Act (APA) with modifications and repeal the requirement that the process be reviewed pursuant to section 24-34-104, C.R.S.

The rule review function conducted by DORA was created to protect Colorado citizens and small business from unnecessary costs by requiring all state agencies to consider the economic impact their rules will have on small business in Colorado. It is important that Colorado agencies remain focused on the impact of their regulations, and consider viable alternatives to regulation, for Colorado to remain a business-friendly state. Therefore, the General Assembly should continue the CBA provisions and make improvements in the process. Because the sunset criteria were originally designed for the review of professional and occupational regulatory programs and boards, the review of section 24-4-103(2.5), C.R.S., should be removed from the sunset schedule.

Require that agencies submit draft rules and a CBA of rules that have a "significant" impact on small business, job creation, or economic competitiveness to the Secretary of State, and define "significant."

Rather than a DORA employee reviewing every rule to make a threshold determination whether a CBA should be performed in connection with a proposed rule, a more reasonable approach is to require the promulgating agency to make that determination earlier in the rulemaking process. If the agency determines, during the initial stages of developing rules with its stakeholder groups, that there is a significant negative impact, the most efficient and effective way to proceed would be to perform a CBA at that time. However, agencies should not be expected to perform a CBA in connection with every rule they consider. To encourage agencies to undertake CBAs in a more thorough and meaningful fashion, the statute should be revised to require a CBA only for rules with "significant impact," as defined by the General Assembly.

Allow state agencies, with input from their respective stakeholder groups, to determine the proper methodologies needed for the CBA.

Good quality CBAs can be costly. There are indications that an increase in resources committed to the CBA leads to an increase in the quality of the analysis. However, agencies frequently do not have available to them the resources which should be committed to the analysis. Agencies, together with input from their representative stakeholder groups, should be permitted to use their reasonable discretion in determining the methodology needed to assess costs and benefits in the context of any particular proposed rule. The representative groups and other stakeholders should be able to assist in providing agencies with the necessary information required to complete an analysis that includes direct and downstream impacts of regulatory alternatives.

Major Contacts Made During This Review

Colorado Secretary of State's Office
Various Rulemaking Agencies

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

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Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria[1] and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

- Whether regulation by the agency is necessary to protect the public health, safety and welfare; whether the conditions which led to the initial regulation have changed; and whether other conditions have arisen which would warrant more, less or the same degree of regulation;
- If regulation is necessary, whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, considering other available regulatory mechanisms and whether agency rules enhance the public interest and are within the scope of legislative intent;
- Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes, rules, procedures and practices and any other circumstances, including budgetary, resource and personnel matters;
- Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively;
- Whether the composition of the agency's board or commission adequately represents the public interest and whether the agency encourages public participation in its decisions rather than participation only by the people it regulates;
- The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;
- Whether complaint, investigation and disciplinary procedures adequately protect the public and whether final dispositions of complaints are in the public interest or self-serving to the profession;
- Whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

[1] Criteria may be found at § 24-34-104, C.R.S.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.askdora.colorado.gov.

The requirement that state agencies prepare a cost-benefit analysis (CBA) of rules, in accordance with section 24-4-103(2.5), Colorado Revised Statutes (C.R.S.), is repealed effective July 1, 2013, unless continued by the General Assembly. During the year prior to this date, it is the duty of the Department of Regulatory Agencies (DORA) to conduct an analysis and evaluation of this function pursuant to section 24-34-104, C.R.S. Since this particular function is not a traditional regulatory function, all of the sunset criteria are not relevant to this process. Of the nine sunset criteria, six have been identified as relevant to this review. These six criteria are highlighted in Appendix A on page 26.

The purpose of this sunset review is to determine whether the authority to request CBAs of rules that may impact small business and economic competitiveness should be continued and to evaluate the effectiveness of this review function and the staff that administers this function. During the sunset review, a demonstrated need for the review of rules must be identified as well as the determination of the least restrictive regulation consistent with the public interest.

Methodology

As part of this sunset review, DORA staff:

- Reviewed the State Administrative Procedure Act;
- Interviewed agency staff, examined agency records, and reviewed past CBA requests by DORA;
- Surveyed state agency personnel required to submit rules to DORA and perform the CBA if requested;
- Surveyed interested parties, who receive notification of proposed rules and CBAs from DORA, referred to as stakeholders;
- Canvassed the laws of other states;
- Reviewed federal laws governing rule promulgation relating to small business; and
- Reviewed documents concerning rule review published by state and federal government agencies.

Profile of Small Business in Colorado

The U.S. Small Business Administration's Office of Advocacy researches and maintains information on the individual states' status with regards to small business. According to the Federal Regulatory Flexibility Act and Colorado's regulatory flexibility provisions, a small business is defined as one with fewer than 500 employees. The following excerpt was obtained from the Office of Advocacy's most recent Small Business Profile for Colorado:[2]

> Small business totaled 530,913 in Colorado in 2009. They represent 97.6 percent of all businesses and employ 49.3 percent of the private-sector workforce. Being such a large part of the state's economy, these businesses are central to Colorado's health and well-being.
>
> - Colorado's economy struggled in 2010, with real gross state product decreasing 0.9 percent and private-sector employment decreasing 1.5 percent (Bureau of Economic Analysis, Bureau of Labor Statistics).
>
> - Most of Colorado's small businesses are very small as 76.3 percent of all businesses did not have employees and most employers have fewer than 20 employees.
>
> - Small businesses employed 988,785 workers in 2009 with most of the employment coming from firms with 20-499 employees.
>
> - While the employment situation in 2008 to 2009 was weak, small businesses in Colorado represented 60.8 percent of the net new private-sector jobs from 2005 to 2008.
>
> - Self-employment in Colorado surged over the last decade. Minority self-employment fared the best compared with other demographic groups during the decade.
>
> - Throughout 2010, the number of opening establishments was lower than closing establishments and the net employment change from this turnover was positive.

[2] U.S. Small Business Administration, Office of Advocacy. *Small Business Profile, January 2012.* Retrieved March 8, 2012, from http://www.sba.gov/sites/default/files/co11.pdf

The following table reflects the most recent data regarding the number of small and large business employers in Colorado.[3]

Table 1
Number of Businesses in Colorado

	2000	2008	2009
Small employers (<500 employees)	113,327	127,264	123,774
Large employers (500+ employees)	2,896	3,033	2,997
Non-Employers	333,364	414,663	407,139

Source: U.S. Dept. of Commerce, Census Bureau, Bureau of Economic Analysis; U.S. Dept. of Labor, Bureau of Labor Statistics; Admin. Office of the U.S. Courts; Federal Deposit Insurance Corporation; and U.S. Small Business Administration, Office of Advocacy.

The rule review function conducted by DORA, as reflected in section 24-4-103(2.5), Colorado Revised Statutes, concerning cost-benefit analyses, was created to protect small business in particular, from unnecessary costs by requiring state agencies to consider the economic impact their rules will have on small business in Colorado.

[3] U.S. Small Business Administration, Office of Advocacy. *Small Business Profile, January 2012.* Retrieved March 8, 2012, from http://www.sba.gov/sites/default/files/co11.pdf

Legal Framework

Regulatory History

The State Administrative Procedure Act (APA), Title 24, Article 4, of the Colorado Revised Statutes (C.R.S.), governs the procedures that state agencies must follow when promulgating rules. Senate Bill 03-121 amended section 24-4-103, C.R.S., of the APA to require state agencies to file a copy of a proposed rule or proposed amendments to an existing rule with the Office of the Executive Director in the Department of Regulatory Agencies (DORA). This addition to the APA is Colorado's version of the federal Regulatory Flexibility Act. The rule review function conducted by DORA was created to protect Colorado citizens and small business from unnecessary costs by requiring state agencies to consider the economic impact their rules will have on small business in Colorado.

The requirements and procedures regarding the preparation of a cost-benefit analysis (CBA) of proposed rules underwent a sunset review in 2005. House Bill 06-1041 amended section 24-4-103(2.5)(a), C.R.S., to require that state agencies submitting proposed rules or amendments include a plain language statement concerning the subject matter and purpose of the proposed changes.

Federal Regulatory Flexibility Legislation

The Regulatory Flexibility Act (RFA), enacted by Congress in 1980, mandated that federal agencies consider the impact of their regulatory proposals on small entities, analyze equally effective alternatives and make the analyses available for public comment. According to the U.S. Small Business Administration, Office of Advocacy (Office of Advocacy), the RFA was not intended to create special treatment for small business. Rather, Congress intended that agencies consider impacts on small business to ensure that, in their efforts to fulfill their public responsibilities, the agencies' regulatory proposals did not have unintended anti-competitive impacts and that agencies explored less burdensome alternatives that were equally, or more, effective in meeting agency objectives.

After much pressure from the small business community and years of uneven compliance with the RFA, amendments to the RFA were enacted in 1996. The Small Business Regulatory Enforcement Fairness Act authorized the judicial branch to review agency compliance with the RFA as well as reinforced the RFA requirement that agencies reach out and consider the input of small business in the development of regulatory proposals.

Over the past several years, the Office of Advocacy has advocated for states to enact legislation similar to the federal RFA. The Office of Advocacy states that over 93 percent of businesses in every state are small businesses. Therefore, small business should be protected from state regulations that require them to bear disproportionate costs and burdens.

Colorado Law

DORA reviews proposed rules to determine if they could potentially have a negative impact on economic competitiveness or on small business in Colorado. The specific provisions of the APA requiring submission of proposed rules to DORA and the preparation of a CBA are discussed below.

- Section 24-4-102(5.5), C.R.S., defines "economic competitiveness" as the ability of the state of Colorado to attract new business and the ability of the businesses currently operating in Colorado to create new jobs and raise productivity.

- Section 24-4-102(18), C.R.S., defines "small business" as a business with fewer than 500 employees.

- Section 24-4-103(2.5)(a), C.R.S., requires an agency promulgating a new rule or amendment to an existing rule to file a copy of the rule with the Executive Director of DORA. DORA then has the option to evaluate the rule to determine if the proposed rule or amendment appears to negatively impact economic competitiveness or small business in Colorado. Exemptions to this requirement include orders, licenses, permits, adjudication, or rules affecting the direct reimbursement of vendors or providers with state funds.

If DORA determines that a proposed rule or amendment potentially has a negative impact on small business, DORA may direct the submitting agency to perform a CBA of the rule or amendment. DORA's request must be made at least 20 days prior to the first rulemaking hearing. The agency receiving a request for a CBA must submit the analysis to DORA at least five days before the rulemaking hearing and make the analysis available to the public at the hearing. Failure to complete a requested CBA precludes the adoption of the rule or amendment.

The CBA must include the following:

- The reason for the rule;

- The anticipated economic benefits of the rule, including economic growth, the creation of new jobs, and increased economic competitiveness;

- The anticipated costs of the rule or amendment, including the direct costs to the government to administer the rule and the direct and indirect costs to business and other entities required to comply with the rule;

- Any adverse effects the rule may cause on the economy, consumers, private markets, small business, job creation, and economic competitiveness; and

- At least two alternatives to the proposed rule identified by the submitting agency or a member of the public, including the costs and benefits of pursuing each of the alternatives identified.

Upon receiving the CBA, DORA notifies the public that it is available for review. Section 24-4-103(2.5)(d), C.R.S., states that the rule will not be considered invalid on the grounds that the contents of the CBA are insufficient or inaccurate if the submitting agency made a good faith effort to complete the CBA.

Any proprietary information provided to the Department of Revenue by a business or trade association for the purpose of preparing a CBA is confidential. Finally, the agency rulemaking record must include a copy of the CBA and any formal statement made to the agency by DORA regarding the CBA.

2012 Legislation Made Major Modifications to Rulemaking Process

During the 2012 session, the General Assembly considered a number of bills concerning state regulations. House Bill 12-1008 (HB 1008), in particular, made numerous changes to the APA that improve citizens' access to the rulemaking process. First, the legislation requires state agencies to establish a representative group of participants with an interest in the subject of the rulemaking. The intent of that provision is that these representative groups are able to submit input or otherwise participate informally in the promulgation of new or amended rules prior to the formal rulemaking proceedings. Of course, these groups or individuals that make up these groups may also participate in the public rulemaking hearings as well.

Second, House Bill 1008 goes on to require that each member of the General Assembly be notified of any proposed rule that increases fees or fines.

A third important component of House Bill 1008 is that each state department file a regulatory agenda with staff of the Legislative Council on November 1 of each year and publish the regulatory agenda on the department's website. Also, the regulatory agenda must be filed with the Secretary of State, who publishes the agenda in the Colorado Register. Each department's regulatory agenda must include:

- A list of new rules and revisions to existing rules that the department expects to propose in the next calendar year;
- The statutory basis for the adoption of the proposed rules;
- The purpose of the proposed rules;
- The contemplated schedule for adoption of the rules; and
- An identification and listing of persons or parties that may be affected positively or negatively by the rules.

Finally, House Bill 1008 requires that, beginning on November 1, 2013, agencies list and provide a brief summary of all permanent and temporary rules actually adopted since the previous departmental regulatory agenda was filed.[4]

The General Assembly also passed Senate Bill 12-026 (Senate Bill 026). This legislation amended the APA by requiring any state agency that promulgates a rule creating a state mandate on a local government to provide to the Director of the Office of State Planning and Budgeting the following: [5]

- The proposed rule;
- The nature and extent of any consultations that the agency had with elected officials or other representatives of the local governments that would be affected by the proposed state mandate;
- The nature of any concerns of the elected officials or other representatives of the local governments;
- Any written communications or comments submitted to the agency by elected officials or other representatives of local governments; and
- The agency's reasoning supporting that need to promulgate the rule containing the state mandate.

The legislation also requires the Director of the Office of State Planning and Budgeting (Director) to determine if the agency information complies with the requirements set forth in Senate Bill 026. If the Director determines that the agency is not in compliance with the statutory provisions, the agency is prohibited from conducting a public rulemaking proceeding. Senate Bill 026 goes on to require each agency to develop a process to actively solicit input of elected officials and other representatives of local governments to the development of proposed rules that contain state mandates that affect local governments.

Other States

The Office of Advocacy collects data on the number of states with legislation addressing the issue of small business and state regulation. The Office of Advocacy reports that 18 states and 1 territory have active regulatory flexibility provisions, while 26 states have partial or partially used regulatory flexibility provisions, some of which are by executive order (EO). Six states, two territories, and the District of Columbia have no regulatory flexibility statutes.

[4] § 2-7-202(2.3), C.R.S.
[5] § 24-4-103(2.7)(c)(I)(6), C.R.S.

Table 2 provides an overview of U.S. jurisdictions that, as of 2012, have enacted the model regulatory flexibility legislation advocated by the Office of Advocacy, states that have some type of legislation or EO that addresses small business and state regulations, and states that have no type of legislation addressing this issue.

Table 2[6]
States and Territories with Regulatory Flexibility Provisions

Eighteen states and one territory have active regulatory flexibility statutes:

Arizona	North Dakota
Colorado	Oklahoma
Connecticut	Oregon
Florida	Puerto Rico
Hawaii	Rhode Island
Indiana	South Carolina
Maine	Tennessee
Missouri	Virginia
Nevada	Wisconsin
New York	

Twenty-six states have a partial or partially used regulatory flexibility statute or EO:

Alaska	Minnesota
Arkansas	Mississippi
California	New Hampshire
Delaware	New Jersey
Georgia (EO)	New Mexico
Illinois	Ohio
Iowa	Pennsylvania
Kansas	South Dakota
Kentucky	Texas
Louisiana	Utah
Maryland	Vermont
Massachusetts (EO)	Washington
Michigan	West Virginia (EO)

Six states, two territories and the District of Columbia have no regulatory flexibility statutes:

Alabama	Nebraska
District of Columbia	North Carolina
Guam	Virgin Islands
Idaho	Wyoming
Montana	

Note: This information may not reflect updates from the past two legislative sessions.

[6] U.S. Small Business Administration. *State Regulatory Flexibility Model Legislative Initiative.* Retrieved August 31, 2012, from http://www.sba.gov/advocacy/819/12303?page=0%2C1

Process Description and Administration

In accordance with section 24-4-103(2.5), Colorado Revised Statutes (C.R.S.), state agencies are required to file a copy of proposed rules or amendments to rules with the Executive Director of the Colorado Department of Regulatory Agencies (DORA) at the time they file the Notice of Proposed Rulemaking with the Secretary of State. The Office of Policy, Research and Regulatory Reform (OPRRR) is designated as the office to oversee the submittal of these proposed rules. OPRRR utilizes 30 percent of one General Professional IV full-time-equivalent employee. The cost of the process has been absorbed into DORA's existing budget.

Once a proposed rule is submitted to DORA, staff determines whether the rule falls under the exemptions provided for in the State Administrative Procedure Act (APA). The APA exemptions are those that relate to:

- Orders (the whole or any part of the final disposition [whether affirmative, negative, injunctive, or declaratory in form] by any agency in any matter other than rulemaking);

- Licenses and permits (the whole or any part of any agency permit, certificate, registration, charter, membership, or statutory exemption);

- Adjudication (the procedure used by an agency for the formulation, amendment, or repeal of an order and includes licensing); or

- The direct reimbursement of vendors or providers with state funds (i.e., Medicaid and Medicare).

If a rule does not meet the exemption criteria, DORA staff proceeds to evaluate the rule through standard criteria:

- Does the rule impact small business?

- Is the rule a result of recent legislation? If so, does it mirror the legislation or is the rule more restrictive than the legislation intended?

- Does the rule seem to have a negative impact on small business and/or economic competitiveness? Factors considered include whether the rule imposes additional recordkeeping or reporting requirements, requires additional capital costs, or creates potential barriers to entry into the profession.

- Is there a clear benefit?

- Does the rule appear to overstep the bounds of where state government should be involved?

If necessary, the submitting agency is contacted for discussion and clarification of the rule. As part of this process, DORA may also contact business owners, business groups, and stakeholders directly to solicit specific input.

If DORA staff determines that a rule or rules may have a negative impact, staff requests that the submitting agency complete a cost-benefit analysis (CBA). In order to complete the CBA, the agency must consider alternatives to the proposed rule. If the agency does not complete the CBA, the proposed rule becomes void.

Rules Reviewed

During fiscal years 06-07 through 10-11, 2,303 rule submissions were reviewed and OPRRR made 35 requests for CBAs. The following table details the number of rule submissions received by DORA during the time period under review and the number of CBAs requested.

Table 3
Rule Submissions Reviewed and Cost-Benefit Analyses Requested
Fiscal Year 06-07 through Fiscal Year 10-11

Fiscal Year	Rules Submissions Reviewed	Cost-Benefit Analyses Requested
06-07	452	8
07-08	394	5
08-09	514	7
09-10	457	7
10-11	486	8
Total	**2,303**	**35**

At 15 percent, the percentage of CBA requests is low compared to the number of rule submissions reviewed. There are a number of reasons for the disproportionate number of requests for CBAs. Many rules fell within the statutory exemptions, such as changes to Medicaid reimbursement rules and license or permit fee changes.

Although not maintained on a regular basis, the following table provides a snapshot of rules submitted between November 20, 2009 and June 1, 2011 and whether they were exempt, not small business related, less burdensome, or if the rules fell within other categories. Some rules fell within multiple categories. According to staff, these rules and statistics are typical of the types of rules submitted during the five fiscal year period under review.

Table 4
Snapshot of Rules Submitted between November 20, 2009 and June 1, 2011

Rule Submission Statistics										
Exempt	Per State or Federal Law or Court Ruling	Less Burdensome	Regulatory Analysis Submitted With Proposed Rules	Not Small Business Related	Small Business Impact		Emergency Rules	Secretary of State Formatting Changes	Clarification-Removing Obsolete Provisions	Rule Not Heard/Withdrawn
					Yes	No				
85	292	99	46	193	54	157	12	19	122	2
11.53%	39.62%	13.43%	6.24%	26.19%	7.33%	21.30%	1.63%	2.58%	63.21%	0.27%

During the November 20, 2009 through June 1, 2011 time period, 12 CBAs were requested. It is important to note that Table 4 does not include rules submitted since the issuance of Executive Order D 2012-002. Executive Order D 2012-002 was issued on January 19, 2012 and requires that all state agencies conduct periodic reviews of their existing rules to determine if they continue to be necessary, cost-effective, and easy to understand and whether they can be amended to be less burdensome while still maintaining the benefits.

The following agencies completed CBAs during the five fiscal year period under review:

- **Agriculture**
  - Animal Industry: Pet Animal Care and Facilities Act (two CBAs completed)
  - Plant Industry: Pesticide Applicators' Act

- **Human Services**
  - State Board of Human Services:
    - Changes to the Group Leader Qualifications for Child Care Centers and Training Requirements for Family Child Care Homes and School-Age Child Care Centers
    - Changes to the Rules Regulating Child Care Centers for the Positions of Director, Group Leader and Infant Nursery Supervisor
    - Family Child Care Homes

- **Labor and Employment**
  - Oil and Public Safety: Design, Construction, Operation, Inspection, Testing, Maintenance, Alteration, and Repair of Conveyances, such as Elevators, Platform Lifts, Personnel Hoists, Stairway Chair Lifts, Dumbwaiters, Escalators, Moving Walks, and Automated People Movers

- **Law**
  - Uniform Consumer Credit Code: Deferred Deposit Loan Payment Plans

- **Natural Resources**
  - Water Resources: Determination of the Nontributary Nature of Ground Water Produced Through Wells in Conjunction with the Mining of Minerals

- **Public Health and Environment**
  - Air Quality Control Commission: Implementation of the Vehicle Emissions Inspection Program in Larimer and Weld Counties
  - Hazardous Waste Commission: Requirement for Submittal of Self-Certification Information
  - Solid and Hazardous Waste Commission: Solid Waste Sites and Facilities
  - State Board of Health:
    - Concerning Facilities for Persons with Developmental Disabilities
    - Licensing of Radioactive Material
    - Medical Use of Marijuana (two CBAs completed)
    - Regarding the Limiting of Antifreeze Use in the Sprinkler Systems of Licensed Health Care Entities
    - Requirements Specific to Uranium and Thorium Processing Facilities that were Incorporated into The Colorado Radiation Control Act in 2002, 2003, and 2010
    - Standards for Hospitals and Health Facilities, Home Care Agencies
    - Standards for Hospitals and Health Facilities
    - Use of Radionuclides in the Healing Arts

- Water Quality Control Commission:
  - Financial Assurance Criteria Regulations for Colorado Housed Commercial Swine Feeding Operations
  - Animal Feeding Operations

- **Regulatory Agencies**
  - Division of Civil Rights: Sexual Orientation Rules
  - Division of Insurance:
    - Concerning Small Employer Health Plans
    - Title Insurer Assessment
  - Division of Professions and Occupations
    - Accountancy: Requirements to become Active when in Inactive, Expired or Retired Status
    - Chiropractic:
      - Mandatory Tests and New Paperwork Requirements
      - Pre-Payment Billing Practices and Required Trust Accounts
  - Public Utilities Commission:
    - Low-Income Rate Assistance Rules for Electric
    - Low-Income Rate Assistance Rules for Gas
  - Division of Real Estate
    - Real Estate Appraisers: Conservation Easement Appraiser Update Course

- **Revenue**
  - Division of Motor Vehicles: Commercial Driver's License Program
  - Gaming: Gaming Devices and Equipment
  - Taxpayer Services: Private Letter Rulings and Informational Letters

Although not reflected in the above statistics, in 2008, DORA staff also met with staff of the Department of Natural Resources (DNR) to discuss the proposed rules that should be included in DNR's voluntary CBA of the revised oil and gas rules.

All of these rules were evaluated according to the criteria delineated on page 10. Recall that in part, DORA considers factors such as the imposition of additional recordkeeping or reporting requirements, requirements for additional capital costs, and the proposed benefits of the rules in determining whether to request a CBA.

In all cases, CBAs were completed and submitted. Therefore, no rules were voided because of noncompliance with the request for a CBA.

The resulting CBAs differed in both analytical methods and the depth of the analysis. Additionally, in general, the findings of the CBAs supported the rules as proposed.

Analysis and Recommendations

Recommendation 1 – Continue the cost-benefit analysis provisions of the State Administrative Procedure Act, with modifications and repeal the requirement that this process be reviewed pursuant to section 24-34-104, Colorado Revised Statutes.

The sunset criteria were originally designed for the review of professional and occupational regulatory programs and boards. They were not designed to review state statutes such as the Administrative Procedure Act (APA). Therefore, the review of section 24-4-103(2.5), Colorado Revised Statutes (C.R.S.), should be removed from the sunset schedule.

The rule review function conducted by the Department of Regulatory Agencies (DORA) was created to protect Colorado citizens and small business from unnecessary costs by requiring all state agencies to consider the economic impact their rules will have on small business in Colorado.

While it is possible that, prior to the implementation of this process, agencies may have considered the economic impacts of their proposed rules, it is reasonable to conclude that the presence of this review function has increased this awareness in Colorado government. Agencies may be asked to perform a cost-benefit analysis (CBA) which is then distributed among hundreds of stakeholders. In fact, anecdotal evidence supports the contention that a number of agencies approach rulemaking with full consideration of the possibility of producing a CBA of proposed rules.

Colorado currently ranks in the top 10 business-friendly states according to the Small Business and Entrepreneurship Council's *Small Business Survival Index 2011: Ranking the Policy Environment for Entrepreneurship across the Nation*, which includes in its factors, whether a state has regulatory flexibility legislation (See Appendix B on page 27). It is important that Colorado agencies remain focused on the impact of their regulations, and that they consider viable alternatives, for Colorado to remain a business-friendly state.

General Consensus to Continue CBA Process

The third sunset criterion directs the sunset review to consider whether an agency's operations are impeded or enhanced by existing statutes, rules, procedures, and practices and any other circumstances, including budgetary, resource and personnel matters.

During this sunset review, DORA surveyed all 4,451 stakeholders who receive e-mail notification of rules proposed by state agencies from DORA. Also surveyed were state agencies that are required to submit rules to DORA for analysis.

Three hundred and forty-one business stakeholders responded to the survey. Two-hundred thirteen (64.5 percent) responded that the cost-benefit process should be continued by the General Assembly. Eighteen (5.5 percent) responded that the process should not be continued and 99 survey respondents (30 percent) responded that they do not know if the process should or should not be continued.

Of the 59 responses submitted by state rulemaking agencies, 23 (39.7 percent) responded that the process should not be continued by the General Assembly. Fifteen respondents (25.9 percent) believe that the CBA process should continue, and 20 (34.5 percent) do not know if the process should or should not be continued.

While the number of survey respondents is too small to offer statistically reliable findings, the results may nonetheless provide useful information for legislative decision makers.

National Study Ranks Colorado's Regulatory Review Process in the Top 10 Nationally

The Institute for Policy Integrity, New York University School of Law recently published a study analyzing the form, quality, and effectiveness of the states' regulatory review functions.[7] The report entitled, "52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings", graded states based on the following guiding principles:

1. Reasonable Requirements Given Resources
2. Structure Calibrates Rules, Does Not Just Check Them
3. Protection against Delaying or Deterring Rules
4. Review is Exercised Consistently, Not Ad Hoc
5. Review Is Guided by Substantive Standards
6. Review Promotes Inter-Agency Coordination
7. Review Combats Agency Inaction
8. Review Promotes Transparency and Participation
9. Periodic Review is Guided by Substantive Standards
10. Periodic Review is Balanced and Consistent
11. Analysis Treats Costs and Benefits Equally
12. Analysis Is Integrated into Decision Making
13. Analysis Focuses on Maximizing Net Benefits
14. Analysis Considers a Range of Alternatives
15. Analysis Includes a Balanced Distributional Assessment

It is important to note that this study included an analysis of the rule review functions of the Office of Legislative Legal Services as well as the rule review function in DORA.

[7] *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings*, Institute for Policy Integrity, New York University School of Law (November 2010), p. 80.

Seven states scored in the "B"-range: Iowa (B+); Vermont and Washington (B); and Michigan, New Hampshire, Pennsylvania, and Virginia (B-). The average grade was about a "D+", and the most frequently awarded grade was a "D". (See Appendix C on page 28 for a summary of the states' results.)

Colorado scored a "C+", with only the above seven states achieving a higher grade. Colorado was found to have balanced analytical requirements, but the study also found that the scope and timing of the reviews should be rethought.

Specific findings applicable to DORA's process include:[8]

- Colorado's process is not well matched to its resources. Colorado agencies have the analytical capacity to be doing more analysis, more consistently.

- By relying on a petition mechanism, Colorado's analytical requirements are at best inconsistently applied, and at worst may be simultaneously too broad and too narrow, imposing analytical burdens on some minor rules while not covering all major rules.

- Cost-benefit and regulatory analyses are made available to the public and the public can participate in the review process—there is room for improvement, but Colorado is off to a good start on transparency and participation.

- The analysis may be triggered too late and too sporadically to be meaningfully integrated into the decision-making process.

Cutting Red Tape in Colorado State Government Omnibus Report

"Cutting Red Tape in Colorado State Government: Making Government More Efficient, Effective and Elegant," DORA's Omnibus Report to the Governor on the "Pits and Peeves" Roundtables Initiative, was published December 2011.

[8] *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings*, Institute for Policy Integrity, New York University School of Law (November 2010), p.180.

The report made specific observations and recommendations directed towards regulation and rulemaking:

1. Greater attention to economic and unintended adverse impacts of proposed regulations, requirements and procedures is needed;
2. The CBA of the impact of major new regulations is either missing or poorly presented;
3. Revise and implement a more robust CBA process, as well as a regulatory and fiscal assessment to help identify social, financial and economic impacts of proposed regulations;
4. Create more interactive websites as a communication tool for notices and information on new or revised rules;
5. Agencies appear to ignore the full scope of economic impacts to the private sector by failing to perform an appropriate, broad-based CBA of proposed regulations; and
6. The current system offers too little analysis, too late in the process. What value does the process serve?

It seems clear from the above reports' findings that the Colorado provisions regarding the preparation of a CBA of proposed rules have a number of shortcomings.

A number of complaints have been directed at the quality of the CBAs provided by state agencies. One reason for this may be the current 15 calendar day timeframe in which an agency has to complete a CBA if one is requested.

In fact, the statute requires only that an agency make a good faith effort if DORA requests a CBA. Some argue an agency is motivated to provide a CBA that validates the proposed rules. This sunset review reveals that such efforts did not go unnoticed by stakeholders. This contention is also highlighted by the fact that the majority of the agencies that responded to DORA's survey stated that rarely, if ever, is a rule changed as a result of the information contained in the CBA.

Further, some complain about the small number of CBAs requested by DORA. Additional complaints have been directed at the significance of the rules chosen for a CBA by DORA.

In addition, stakeholders report that the current five-day period is not sufficient time to evaluate the information contained in the CBA and provide meaningful input into the rulemaking process.

The General Assembly should continue the CBA provisions, together with the adoption of the following recommendations in this review, which would make improvements in the process, benefiting Colorado small business, state agencies and other stakeholders.

Recommendation 2 – Require that agencies submit draft rules and a CBA of rules that have a "significant" impact on small business, job creation or economic competitiveness to the Secretary of State at the time the Notice of Proposed Rulemaking is filed with the Secretary of State, and define "significant" in statute.

Under House Bill 12-1001, rulemaking agencies convene stakeholder groups early in the rule development process. Once an agency decides to actually promulgate a rule, it files a Notice of Proposed Rulemaking with the Secretary of State, but not necessarily the draft rule. At the same time, the draft rule is submitted to DORA for the determination of whether a CBA is necessary.

This process is problematic for several reasons. First, the determination of whether a CBA is necessary is made relatively late in the process. Second, the party with the least amount of expertise in the subject matter is making the determination of whether a CBA is necessary. Lastly, there are no clearly defined triggers for making this determination.

Under the current provisions, DORA makes a determination of whether a CBA is necessary no later than 20 days prior to the rulemaking hearing. If a CBA is requested, the agency must complete the analysis and submit it to DORA no later than five days prior to the hearing. This can give the agency only 15 calendar days to prepare the analysis and the stakeholders only five days to review it, thereby severely limiting stakeholder input. However, an earlier opportunity exists.

Rather than a DORA employee reviewing every rule to make a threshold determination that a CBA should be performed in connection with a proposed rule or amendment, a more reasonable approach is to require the promulgating agency to make that determination earlier in the rulemaking.

It is reasonable to conclude that the promulgating agency is in the best position to determine the level of impact of the proposed rules. If the agency determines, during the initial stages of developing rules with its stakeholder groups, that there is a significant negative impact, the most efficient and effective way to proceed would be to perform a CBA at that time. This would provide the agency and its stakeholders sufficient opportunity to analyze the conceptual rules and the issues identified in the CBA, as well as consider alternatives prior to formulation of the proposed rules. The agency should then submit the CBA and the draft proposed rules at the same time that the agency files the Notice of Proposed Rulemaking with the Secretary of State, thereby providing stakeholders with the CBA at the same time they receive the proposed rules.

However, agencies should not be expected to perform a CBA in connection with every rule they consider. It would be reasonable to establish a benchmark to help agencies determine when a CBA is appropriate. At the federal level, a CBA is required only for a "significant regulatory action," which meets certain defined monetary and non-monetary benchmarks. This practice recognizes that not every rule with potential adverse impacts warrant the expenditure of resources required for a quality CBA.

To encourage agencies to undertake CBAs in a more thorough and meaningful fashion, the statute should be revised to require a CBA only for rules with "significant impact," as defined by the General Assembly.

This begs the question: What is a significant negative impact on small business, job creation, or economic competitiveness? There are many confounding factors that make answering this question difficult. As an example, a significant impact for a very small neighborhood 10-person dry cleaner would be a lesser threshold than a significant impact on a 400-employee energy company or a hospital.

Other indicators of a significant impact could include rules that:

- Adversely affect any of the following: the economy, a sector of the economy, productivity, competition, jobs, the environment, public health, public safety, State, local, or tribal governments or communities;
- Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof;
- Raise novel legal or policy issues arising out of legal mandates; or
- Impact a high percentage of regulated persons or entities.

The General Assembly should direct through statutory amendments, the indicators of "significant" impact that should be used to determine when a CBA must be completed.

Recommendation 3 – Allow state agencies, with input from their representative stakeholder groups, to determine the proper methodologies needed for the CBA.

Good quality CBAs can be costly. In many instances, the analysis requires the professional judgment of an economist and scientific data to support the metrics and assumptions used by the agency. There are indications that an increase in resources committed to the CBA leads to an increase in the quality of the analysis. However, agencies frequently do not have available to them the resources which should be committed to the analysis.

With respect to the performance of CBAs under various federal mandates including Executive Order 12866 as well as the Regulatory Flexibility Act, the Office of Management and Budget (OMB) has developed guidelines and best practices to assist federal agencies to produce viable and useful analyses. In 1996, OMB released its "Economic Analysis of Federal Regulations under Executive Order 12866," (Guide), which describes "best practices" for preparing economic analysis of a significant regulatory action as directed under the executive order.

The Guide indicates that if a screening analysis indicates that a regulation will have a significant impact on a substantial number of small entities, the practices described should be used in preparing the economic analysis under the Regulatory Flexibility Act. Further, it also notes that an economic analysis or CBA should also include analysis of unfunded mandates on local government.

The Guide acknowledges that a good CBA should contain three elements:

1. A statement of the need for the proposed action;
2. An examination of alternative approaches; and
3. An analysis of the benefits and costs, including the costs of alternatives.

The need for the proposed action should include consideration of market failure, which includes: externality, natural monopoly, market power, and inadequate or asymmetric information. Alternative approaches which should be explored include: more performance-oriented standards for health, safety and environmental regulations; different requirements for different segments of the regulated population; alternative levels of stringency; alternative dates of compliance; alternative methods of ensuring compliance; informational measures; and more market-oriented approaches.

According to the Guide, the analysis of benefits and costs must be measured against a baseline, i.e., an assessment of the way the world would look absent the proposed regulation. The CBA must also include:

- Discounting to the extent benefits and costs occur in different time periods;
- Comparisons of benefits and costs across generations, which will raise special questions regarding equity and efficiencies;
- Considerations of the treatment of risk and uncertainty;
- Determination of risk assessment;
- Valuing risk levels and changes;
- Where used, explicit statements of major or key assumptions used in the estimate of costs or benefits;
- International trade effects;

- Non-monetized benefits and costs;
- Distributional effects and equity, where those who bear the costs of a regulation and those who enjoy the benefits are not the same group;
- Benefit estimates;
- Considerations of “opportunity costs” and the principle of “willingness to pay”;
- Valuing benefits and goods directly and indirectly traded in markets; and
- Methods for valuing health and safety benefits, including fatal and nonfatal injuries and illness.

More specific to the analysis of the costs component, the Guide states the CBA should also:

- Include opportunity costs of the resources used or benefit forgone as a result of the regulatory action, calculated on an incremental basis;
- Distinguish between real costs and transfer payments, scarcity rents and monopoly profits, and insurance payments; and
- Include the treatment of indirect taxes, subsidies and distribution expenses.

In March, 2000, OMB issued a memorandum, which sets forth Guidelines to Standardize Measures of Costs and Benefits and the Format of Accounting Statements (2000 Guidelines). The 2000 Guidelines note that they are drawn from the Best Practices Guide, summarized above, which the agencies are advised can be used as supplementary material. The 2000 Guidelines reference many of the same protocols and principles as in the Guide with respect to preparation of a good CBA. It also includes more recent examples of the effective application of those principles in federal agencies.

As is evident from just the outline of the suggested process, principles and protocols involved in the conduct of a valid and meaningful CBA, such a process is intricate, complex and complicated. As stated in the 2000 Guidelines,

> . . . you cannot write a good regulatory [cost-benefit] analysis according to a formula. The preparation of high-quality analysis requires competent professional judgment. Different regulations may call for different emphases in the analyses, depending on the importance and complexity of the regulatory issues and the sensitivity of the benefit and cost estimates to key assumptions.

No more specific guidelines for the conduct of a CBA have been developed for Colorado. However, given the similarity of the basic requirements, state agencies could reasonably look to the federal guidance for any necessary direction. Colorado-specific provisions currently require that the CBA include the following:

- The reason for the rule;
- The anticipated economic benefits of the rule, including economic growth, the creation of new jobs, and increased economic competitiveness;
- The anticipated costs of the rule or amendment, including the direct costs to the government to administer the rule and the direct and indirect costs to business and other entities required to comply with the rule;
- Any adverse effects the rule may cause on the economy, consumers, private markets, small business, job creation, and economic competitiveness; and
- At least two alternatives to the proposed rule identified by the submitting agency or a member of the public, including the costs and benefits of pursuing each of the alternatives identified.

In summary, agencies, together with input from their representative stakeholder groups, should be permitted to use their reasonable discretion in determining the methodology needed to assess costs and benefits in the context of any particular proposed rule. The representative groups and other stakeholders, through notification of regulatory agendas, should be able to assist in providing agencies with the necessary information required to complete an analysis that includes direct and downstream impacts of regulatory alternatives.

The APA states that if the agency has made a good faith effort to comply with the requirements of the CBA, the rule or amendment cannot be invalidated on the ground that the contents of the CBA are insufficient or inaccurate. This statutory provision recognizes the challenges and difficulty of producing a complete and competent CBA and should be maintained in the revised statute.

Recommendation 4 – Exempt from the CBA provisions rules that mirror state or federal legislation or federal rules.

DORA staff reviewed 2,303 rule submissions between fiscal years 06-07 and 10-11. However, many rules simply implement specific requirements of legislation passed by the General Assembly or imposed under federal laws and regulations. In those instances, the preparation of a CBA serves no useful purpose because a promulgating agency is not free to deviate from the mandates of the statute. Presently, the CBA provisions do not apply to orders, licenses, permits, adjudication, or rules affecting vendor or provider state reimbursements.

In order to improve efficiency, the CBA process should be streamlined by expanding the statutory exemptions to include rules that mirror state or federal legislation or federal rules.

Recommendation 5 – Amend section 24-4-103(4.5)(a), C.R.S., to require agencies to complete a regulatory analysis for rules that are within the discretion of the agency but that do not rise to the level of a "significant impact." The regulatory analysis should be submitted with the draft rules to the Secretary of State at the time the Notice of Proposed Rulemaking is filed. Exemptions to this requirement should be the same as the exemptions to the CBA provisions.

As recommended in this sunset review, preparation of a CBA will be reserved for only those rules that have a "significant impact". However, there are other rules that may financially and operationally impact small business. An analysis of the anticipated compliance costs or other regulatory impact to meet the requirements of these rules would be useful for both agencies and business to consider early in the rulemaking process.

Under a separate section of the APA, Colorado provides the opportunity for any person, at least 15 days prior to the hearing, to request directly from the agency, a regulatory analysis of a proposed rule, which must be made available to the public at least five days prior to the rulemaking hearing. A regulatory analysis per the provisions of section 24-4-103(4.5)(a), C.R.S., is not as intensive a process as a CBA, but it contains information that is useful to the agency and to the stakeholders,

As examples, the APA requires that a regulatory analysis include:

- A comparison of the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;

- A description of the probable quantitative and qualitative impact of the proposed rule, economic or otherwise, upon affected classes of persons; and

- A determination of whether there are less costly or less intrusive methods for achieving the purpose of the proposed rule.

Proposed rules that do not rise to the level of "significant" impact, but that are within the discretion of the rulemaking agency, i.e., non-exempt, should also undergo an initial analysis of the need for the proposed regulatory action.

Preparation of a regulatory analysis after publication of the Notice of Rulemaking also affects the quality and limits the usefulness of the analysis for both the agency and the stakeholders. To facilitate a more comprehensive analysis and better results, agencies should complete this process prior to noticing the proposed rules with the Secretary of State. This will also allow stakeholders sufficient time to review and comment on agency proposals.

As with a CBA, if the agency has made a good faith effort to comply with the requirements of completing the regulatory analysis, the rule should not be invalidated on the grounds that the contents of the regulatory analysis are insufficient or inaccurate. This statutory provision should be maintained in the revised statute.

Appendix A – Sunset Statutory Evaluation Criteria

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

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

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

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

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

(VI) ***The economic impact of regulation and, if national economic information is not available, whether the agency stimulates or restricts competition;***

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

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

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

Appendix B – Small Business Survival Index State Rankings 2011[9]

Following are the state rankings (from friendliest to least friendly) for the Small Business Survival Index 2011: State Rankings*

Rank	State	SBSI	Rank	State	SBSI
1	South Dakota	32.292	26	Louisiana	60.120
2	Nevada	38.531	27	Idaho	60.452
3	Texas	39.076	28	New Mexico	60.576
4	Wyoming	46.049	29	Michigan	61.480
5	South Carolina	47.047	30	Montana	62.193
6	Alabama	48.765	31	Delaware	62.785
7	Ohio	49.538	32	West Virginia	63.486
8	Florida	50.081	33	New Hampshire	63.568
9	Colorado	51.317	34	Oregon	65.181
10	Virginia	51.697	35	Pennsylvania	65.350
11	Washington	52.312	36	Nebraska	66.420
12	Mississippi	52.319	37	North Carolina	66.858
13	North Dakota	53.296	38	Maryland	67.103
14	Utah	53.374	39	Hawaii	70.889
15	Arizona	54.388	40	Illinois	72.078
16	Georgia	54.639	41	Iowa	72.525
17	Missouri	55.382	42	Massachusetts	73.976
18	Arkansas	56.162	43	Minnesota	75.308
19	Oklahoma	57.080	44	Connecticut	75.587
20	Indiana	57.747	45	Maine	75.876
21	Alaska	58.802	46	California	76.357
22	Kentucky	58.934	47	Rhode Island	77.250
23	Kansas	58.977	48	Vermont	78.291
24	Wisconsin	59.282	49	New Jersey	82.625
25	Tennessee	59.976	50	New York	82.787
			51	Dist. of Columbia	84.354

* (Please note that the District of Columbia was not included in the studies on the states' liability systems, eminent domain legislation and highway cost efficiency, so D.C.'s last place score actually should be even worse.)

[9] *Small Business Survival Index 2011: Ranking the Policy Environment for Entrepreneurship across the Nation,* Small Business and Entrepreneurship Council (November 2011), p. 2.

Appendix C - Guiding Principles - Comparison of State Regulatory Review Functions[10]

Chart 1: Guiding Principles and Grades	OVERALL REVIEW STRUCTURE			EXECUTIVE/LEGISLATIVE/INDEPENDENT REVIEW					PERIODIC REVIEW		ANALYTICAL REQUIREMENTS					GUIDING PRINCIPLES GRADE 12-15 = A (Solid Structure) 8-11 = B (Room for Improvement) 4-7 = C (Some Promise, but Problem Areas) 0-3 = D (Rethink and Rebuild Structure)
	Reasonable Requirements Given Resources	Calibrates Rules, Does Not Just Check Them	Protects Against Delaying or Deterring Rules	Exercised Consistently, Not Ad Hoc	Guided by Substantive Standards	Promotes Inter-Agency Coordination	Combats Agency Inaction	Promotes Transparency and Participation	Guided by Substantive Standards	Balanced, Consistent, and Meaningful	Balanced Treatment of Costs & Benefits	Integrated into Decisionmaking Process	Focused on Maximizing Net Benefits	Consideration of Range of Alternatives	Balanced Distributional Analysis	
Alabama	X	✓	✓	X	X	X	X	X	X	X	✓	X	✓	✓	✓	C (but unclear whether analytical requirements are consistently achieved in practice)
Alaska	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (review tools are powerful but not ideally designed)
Arizona	✓	X	✓	✓	✓	X	X	✓	X	X	X	X	X	✓	X	C (as epitomized by current moratorium, Arizona tends to view rules as burdens)
Arkansas	✓	X	X	X	X	X	✓	✓	X	X	X	X	X	✓	X	C- (should systematize legislative review, periodic review, and analysis)
California	X	X	X	✓	✓	X	X	X	X	X	X	X	X	X	X	D (agencies should be given the guidance and resources to conduct better analysis)
Colorado	X	X	X	✓	✓	X	X	✓	X	X	✓	X	X	✓	✓	C+ (balanced analytical requirements, but scope and timing of review should be rethought)
Connecticut	X	X	✓	✓	X	X	✓	X	X	X	X	X	X	X	X	D+ (review tools are powerful but not ideally designed)
Delaware	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (essentially no review structure exists)
District of Columbia	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (besides attorney general review for legality, no consistent review mechanism exists)
Florida	X	X	✓	✓	X	X	X	✓	✓	X	X	✓	X	✓	X	C (entire process should focus on maximizing net benefits, not just reducing regulatory costs)
Georgia	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (legislative review exists as a sledgehammer that is rarely picked up; no real analysis)
Hawaii	X	X	✓	✓	X	X	X	✓	✓	X	X	✓	X	X	X	C (resources could be spent on deeper, more balanced analysis, rather than multiple, duplicative reviews)
Idaho	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (executive branch review should be on the books, transparent, and focused on maximizing benefits)
Illinois	X	X	✓	✓	✓	X	X	✓	✓	X	X	X	X	X	X	C (review committee and analysis both consciously focused on reducing burdens, not maximizing benefits)
Indiana	✓	X	✓	✓	X	X	✓	X	✓	X	X	✓	X	✓	X	C+ (analysis needs to consider benefits, and legislative review needs more resources to be meaningful)
Iowa	X	X	X	✓	X	✓	X	✓	✓	✓	✓	✓	✓	✓	✓	B+ (analytical consistency needs improvement, and multiple reviews may focus too much on checking)
Kansas	✓	X	X	✓	X	X	X	✓	X	X	X	X	X	X	X	D+ (review is advisory only, but still could focus more on maximizing net benefits)
Kentucky	X	X	X	X	X	X	✓	X	X	X	X	X	X	X	X	D (still plenty of review power, but should be exercised transparently and with emphasis on net benefits)
Louisiana	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (legislative review exists as a sledgehammer that is rarely picked up; no meaningful analysis of benefits)
Maine	X	X	✓	✓	✓	X	✓	✓	✓	X	X	✓	X	X	X	C+ (analysis needs to consider benefits, and legislative review needs more resources to allow calibration)
Maryland	X	X	✓	✓	X	✓	X	✓	✓	✓	X	X	X	X	X	C (solid periodic review, but weak legislative review and analytical requirements)
Massachusetts	X	X	✓	✓	X	✓	X	X	X	X	X	✓	X	X	X	C- (limited analysis and limited transparency)
Michigan	X	✓	X	X	X	X	✓	X	✓	X	✓	✓	✓	✓	✓	B- (strong analytical requirements; executive review needs standards and transparency)
Minnesota	X	✓	X	✓	X	X	X	X	✓	X	X	✓	X	X	✓	C (governor's review lacks transparent standards; "net benefits" language from Exec. Order should be revived)
Mississippi	X	X	X	X	X	X	X	X	X	X	✓	✓	X	✓	X	D (analytical requirements show promise, but overall regulatory review is non-existent)
Missouri	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	X	D (analysis and review not well-designed to calibrate rules and maximize net benefits)

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[10] *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings,* Institute for Policy Integrity, New York University School of Law (November 2010), pp. 82-85.

Chart 1: Guiding Principles and Grades	OVERALL REVIEW STRUCTURE			EXECUTIVE/LEGISLATIVE/INDEPENDENT REVIEW					PERIODIC REVIEW		ANALYTICAL REQUIREMENTS					GUIDING PRINCIPLES GRADE 12-15 = A (Solid Structure) 8-11 = B (Room for Improvement) 4-7 = C (Some Promise, but Problem Areas) 0-3 = D (Rethink and Rebuild Structure)
	Reasonable Requirements Given Resources	Calibrates Rules, Does Not Just Check Them	Protects Against Delaying or Deterring Rules	Exercised Consistently, Not Ad Hoc	Guided by Substantive Standards	Promotes Inter-Agency Coordination	Combats Agency Inaction	Promotes Transparency and Participation	Guided by Substantive Standards	Balanced, Consistent, and Meaningful	Balanced Treatment of Costs & Benefits	Integrated into Decisionmaking Process	Focused on Maximizing Net Benefits	Consideration of Range of Alternatives	Balanced Distributional Analysis	
Montana	X	X	✓	X	X	X	✓	✓	X	X	✓	X	✓	✓	✓	C+ (scope of analyses should be broader; legislative review needs consistency and standards)
Nebraska	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (executive review should be more transparent and based on standards that promote maximizing benefits)
Nevada	X	X	X	✓	✓	X	X	✓	X	X	X	X	X	X	X	D+ (has been reforming its process in recent years, but still needs improvement)
New Hampshire	✓	✓	✓	✓	✓	X	✓	✓	X	X	✓	X	X	X	X	B- (periodic review and analytical requirements need to be better designed)
New Jersey	X	X	X	X	✓	X	✓	X	X	X	X	X	X	X	X	D (process on paper does not translate to effective practice)
New Mexico	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (no review structure exists)
New York	X	X	X	✓	✓	X	✓	X	X	X	X	X	X	X	X	D+ (plenty of review power, but must be exercised more transparently and with emphasis on net benefits)
North Carolina	✓	✓	X	✓	X	X	X	X	X	X	✓	✓	✓	✓	X	C+ (strong analysis with appropriate threshold; but review needs to work on transparency and delay)
North Dakota	✓	X	X	X	X	X	✓	X	X	X	X	X	X	X	X	D (analysis and review not well-designed to calibrate rules and maximize net benefits)
Ohio	X	X	✓	X	✓	X	X	X	✓	X	X	X	X	X	X	D+ (review is advisory only, but still could focus more on maximizing net benefits)
Oklahoma	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	X	D (plenty of review power, but must be exercised more transparently and with emphasis on net benefits)
Oregon	X	X	✓	✓	✓	X	X	X	✓	X	X	✓	X	X	X	C (entire process should focus on maximizing net benefits, not just reducing regulatory costs)
Pennsylvania	X	✓	X	✓	✓	X	X	✓	✓	X	X	✓	X	✓	✓	B- (review could be streamlined; analytical consistency and balance need improvement)
Puerto Rico	✓	X	✓	✓	✓	X	X	✓	✓	✓	X	X	X	X	X	C+ (needs to expand beyond just small business analysis and review)
Rhode Island	X	X	✓	X	X	X	X	X	✓	X	X	X	X	X	X	D (needs to expand beyond just small business analysis and review)
South Carolina	X	X	X	X	X	X	X	X	✓	X	✓	X	X	X	X	D (legislative review is inconsistent, and analytical requirements are not rigorously enforced)
South Dakota	X	✓	X	✓	X	X	X	✓	X	X	X	X	X	X	X	D (plenty of review power, but not exercised consistently or with emphasis on net benefits)
Tennessee	X	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	D (though future practice could improve, currently analysis is weak and review is inconsistent)
Texas	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	D- (essentially no review structure exists, and analytical requirements are not ideally designed)
Utah	X	✓	X	✓	✓	X	✓	✓	X	X	X	X	X	X	X	C (sunset likely wastes resources; should reinvigorate what were balanced analytical requirements)
Vermont	✓	✓	✓	✓	✓	✓	X	✓	X	X	✓	X	X	✓	X	B (compliance with analytical requirements needs to be more consistent)
Virginia	✓	✓	X	✓	✓	X	X	✓	✓	X	X	✓	✓	X	X	B- (with more resources, analysis could be fuller and more balanced)
Washington	X	X	X	X	X	✓	✓	✓	✓	✓	✓	✓	✓	✓	X	B (strong analytical practices, but review process needs to improve consistency)
West Virginia	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (analysis and review not well-designed to calibrate rules and maximize net benefits)
Wisconsin	✓	✓	X	✓	✓	X	X	X	✓	X	X	X	X	X	X	C (current analytical requirements have little practical effect on rulemaking process)
Wyoming	X	X	X	✓	X	X	X	X	X	X	X	X	X	X	X	D (no analytical requirements, and too much review happens behind the scenes)