



**COLORADO**

**Department of  
Regulatory Agencies**

Colorado Office of Policy, Research &  
Regulatory Reform

**2017 Sunset Review:  
Requirements and Procedures Regarding the  
Preparation of a Cost-Benefit Analysis of  
Proposed Rules**

*October 13, 2017*



**COLORADO**

**Department of  
Regulatory Agencies**

Executive Director's Office

October 13, 2017

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 Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and
- 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 Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the cost-benefit analysis of rules process. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2018 legislative committee of reference.

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

Sincerely,

Marguerite Salazar  
Executive Director





# COLORADO

## Department of Regulatory Agencies

Colorado Office of Policy, Research &  
Regulatory Reform

### 2017 Sunset Review Requirements and Procedures Regarding the Preparation of a Cost-Benefit Analysis of Proposed Rules

#### SUMMARY

##### ***What is the process?***

The process is created within the Colorado State Administrative Procedure Act (APA), which establishes the standard rulemaking procedures for state agencies. Under the APA, when a state agency is proposing creating a new rule or revising an existing rule, anyone may request that the agency conduct a cost-benefit analysis of such rule. A person must make the request no later than five days after the Notice of Proposed Rulemaking is published in the *Colorado Register*.

##### ***Who administers the process?***

The APA vests the Executive Director of the Colorado Department of Regulatory Agencies (Executive Director and DORA, respectively) with the authority to administer the cost-benefit analysis of rules process. The Executive Director has delegated this responsibility to the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within DORA.

##### ***How does a person request a cost-benefit analysis?***

People may request a cost-benefit analysis via mail, email, or a simple online form. COPRRR staff consults with the appropriate state agency and determines whether the cost-benefit analysis must be completed. If COPRRR and the agency determine that a cost-benefit analysis is needed, the state agency must complete it no later than 10 days before the rulemaking hearing.

##### ***What does a cost-benefit analysis contain?***

The cost-benefit analysis must include the reason for the new or amended rule and identify the anticipated economic costs and benefits of the rule; any adverse effects on consumers, small businesses, or the economy; and two alternatives to the proposed new or amended rule.

##### ***How many cost-benefit analyses are requested, and how many are completed?***

In fiscal year 15-16, COPRRR received six cost-benefit analysis requests and required that four be completed.

##### ***What does it cost?***

The process is absorbed into DORA's existing budget.

## KEY RECOMMENDATIONS

***Continue the requirements and procedures regarding the preparation of a cost-benefit analysis of proposed rules process indefinitely.***

Many of the requests for cost-benefit analyses pertain to proposed rules that would potentially increase the regulatory burden for businesses or licensed professionals. The imposition of new regulatory requirements can increase costs for small businesses, affecting their profitability and potentially their payroll. In a survey of state rulemaking agencies conducted as part of this sunset review, 29 percent of respondents stated that their agency has revised its rules based on a completed cost-benefit analysis. This demonstrates the value of the process to the public and warrants its continuation. The merit of continuing to subject the process to sunset review is, however, unclear. It is one of many processes in the APA intended to increase stakeholder involvement and compel state agencies to consider the impact of the rules they impose. Yet only the provision relating to the cost-benefit analysis process has a sunset clause. Because the process is a straightforward administrative function grounded in good-government principles, and because most of the sunset criteria do not apply to the process, the General Assembly should continue it indefinitely.

***Require all state agencies to include information about the cost-benefit analysis process on all applicable websites that post rulemaking information.***

Requests for cost-benefit analyses remain fairly low: this could be at least partially due to lack of publicity. More advocacy for the process by state agencies might increase public awareness of and participation in the process. Therefore, the General Assembly should require state rulemaking agencies to include information about the cost-benefit analysis process and a link to COPRRR's regulatory notice enrollment form on all applicable websites containing rulemaking information.

## METHODOLOGY

As part of this review, COPRRR sunset staff interviewed staff responsible for administering the cost-benefit analysis process; interviewed officials with state and national associations representing business interests and other stakeholders; and reviewed federal laws, Colorado laws and rules, and the laws of other states. COPRRR also conducted a survey of all state agencies that had submitted a proposed rule via DORA's online system.

## MAJOR CONTACTS MADE DURING THIS REVIEW

Colorado Business Roundtable  
Colorado Chamber of Commerce & Industry  
Colorado Concern  
Colorado Office of Policy, Research, and Regulatory Reform  
Colorado Secretary of State's Office  
Independence Institute  
Mercatus Center at George Mason University  
National Federation of Independent Business

### What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether 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.

Sunset Reviews are prepared by:  
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# Table of Contents

Background .....	1
Introduction .....	1
Types of Regulation .....	2
Licensure .....	2
Certification .....	3
Registration .....	3
Title Protection .....	3
Regulation of Businesses .....	4
Sunset Process .....	4
Methodology .....	4
Colorado’s Rulemaking Process .....	5
Legal Framework .....	8
History of Regulation .....	8
Legal Summary .....	9
Program Description and Administration .....	11
Collateral Consequences - Criminal Convictions .....	14
Analysis and Recommendations .....	15
Recommendation 1 - Continue the requirements and procedures regarding the preparation of a cost-benefit analysis of proposed rules process indefinitely. ....	15
Recommendation 2 - Require all state agencies to include information about the cost-benefit analysis process on all applicable websites that post rulemaking information. ....	17
Appendix A - Survey of State Rulemaking Agencies .....	18

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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 Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria<sup>1</sup> 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;

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<sup>1</sup> Criteria may be found at § 24-34-104, C.R.S.

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- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
  - Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

## Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

### Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection - only those individuals who are properly licensed may use a particular title(s) - and practice exclusivity - only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

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## Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

## Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements - typically non-practice related items, such as insurance or the use of a disclosure form - and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

## Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency - depending upon the prescribed preconditions for use of the protected title(s) - and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.



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## Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

## **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 on COPRRR's website at: [www.dora.colorado.gov/opr](http://www.dora.colorado.gov/opr).

The functions of the Executive Director of the Department of Regulatory Agencies (Executive Director and DORA, respectively) as enumerated in Section 103(2.5)(a) of Article 4 of Title 24, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2018, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the cost-benefit analysis process pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed process to request and conduct cost-benefit analyses of proposed rules should be continued and to evaluate the performance of the Executive Director. During this review, the Executive Director must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

## **Methodology**

As part of this review, COPRRR sunset staff interviewed staff responsible for administering the cost-benefit analysis process; interviewed officials with state and national associations representing business interests and other stakeholders; and reviewed federal laws, Colorado laws and rules, and the laws of other states.

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In July 2017, COPRRR conducted a survey of all state agencies that had submitted a proposed rule via DORA's online system. COPRRR sent the survey link to 134 state employees via email addresses collected by the online system. Of these, 86 surveys were successfully delivered<sup>2</sup> and 35 recipients responded. This represents a response rate of 40 percent. Survey questions and responses may be found in Appendix A.

## Colorado's Rulemaking Process

The cost-benefit analysis of rules process is created within the State Administrative Procedure Act (APA), located at Article 4 of Title 24, Colorado Revised Statutes (C.R.S.), which governs the state rulemaking process. The following paragraphs give a general overview of the steps in the rulemaking process.

- **Drafting the new or revised rule.** The rulemaking process begins when an agency wants to create a new rule or revise an existing rule. Changes in federal or state law, changes in a regulated industry, increased public protection concerns, and other factors may drive rule changes. State agencies, boards and commissions work on drafting the proposed rules, in cooperation with boards, commissions, representatives of the regulated industry, and other stakeholders likely to be affected by a rule change.
- **Public notice.** Once a proposed rule has been drafted, the state agency schedules a public hearing where the rule will be considered and files a Notice of Proposed Rulemaking with the Secretary of State, which then publishes the notice in the *Colorado Register*. The agency must also submit the proposed rule to DORA via an online system.
- **Public comment period.** Following the publication of the Notice of Proposed Rulemaking in the *Colorado Register*, the public may offer comments on the proposed rule. State agencies must consider comments from the public before they change any rule unless the rule is explicitly exempted from the APA.
- **Cost-benefit analysis: the portion of the rulemaking process that is the subject of this sunset review.** No later than five days after the publication of the Notice of Proposed Rulemaking, anyone may submit a request to COPRRR that the rulemaking agency conduct a cost-benefit analysis of the proposed rule. COPRRR consults with the agency to determine whether the analysis would be justified. If COPRRR and the agency determine that a cost-benefit analysis is needed, the state agency must complete it no later than 10 days before the rulemaking hearing.

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<sup>2</sup> Successful delivery is deemed to have occurred when the email sending the survey was not returned or did not fail.

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- **Regulatory analysis.** Anyone can request that the rulemaking agency conduct a regulatory analysis up until 15 days before the rulemaking hearing. A regulatory analysis must address alternatives to, and probable impacts of, the proposed rule, among other factors. Regulatory analyses must be completed no later than five days before the rulemaking hearing.
  - **Rulemaking hearing.** At the hearing, state agencies take written or oral testimony in support of or in opposition to the proposed rule. At the conclusion of the hearing, the public comment period is closed (unless the agency proposes extensive changes that necessitate starting the process again).
  - **Review by Attorney General.** The rulemaking agency must submit every proposed rule to the Office of the Attorney General to assure that the rule is constitutional and within the agency's legal authority.
  - **Adoption of the rule.** Following the rulemaking hearing on the proposed rule, the state agency has 180 days to file adopted rules with the Secretary of State for publication in the *Colorado Register*. Adopted rules go into effect 20 days after publication or on a later date as specified in the rule.

The rulemaking process is intended to ensure that affected stakeholders have multiple opportunities to weigh in on proposed policy changes. To gain insight into how state agencies seek stakeholder input throughout the rulemaking process, the extent to which stakeholders actually participate in the process, and the extent to which stakeholder input shapes proposed rules, COPRRR surveyed state employees who have submitted rules to DORA's online system.<sup>3</sup> The survey revealed the following:

#### **At what point in the rulemaking process do state agencies involve stakeholders?**

- 86 percent of survey respondents said their agency involves stakeholders in the process before the rules are drafted.
- 91 percent said their agency involves stakeholders while the rules are being drafted.
- 86 percent said their agency involves stakeholders at the rulemaking hearing.

#### **How do state agencies gather input from stakeholders?**

- 37 percent of survey respondents said their agency has a standing stakeholder committee to develop/review proposed rules.
- 80 percent said their agency convenes stakeholder committees to develop/review proposed rules on an as-needed basis.
- 88 percent said their agency solicits written feedback from stakeholders.
- 91 percent said their agency solicits stakeholder participation in rulemaking hearings.

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<sup>3</sup> COPRRR sent the survey via email to 134 state employees. Of these, 48 bounced back. Of the remaining 86, COPRRR received 35 responses, constituting a 40 percent response rate.

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**How often do stakeholders participate in the rulemaking process?**

- 63 percent of survey respondents said stakeholders frequently participate in their agency's rulemaking process.
- 27 percent said stakeholders occasionally participate.
- 9 percent said stakeholders rarely participate.

**Do state agencies consider potential impact on small business when contemplating a rule change?**

- 86 percent of survey respondents said their agency typically considers the potential costs to small business associated with a rule change.

**Do state agencies revise proposed rules based on a completed regulatory analysis?**

- 45 percent of survey respondents stated that their agency has revised its rules based on a completed regulatory analysis.

**Do state agencies revise proposed rules based on a completed cost-benefit analysis?**

- 29 percent of survey respondents stated that their agency has revised its rules based on a completed cost-benefit analysis.

While the survey is not comprehensive, it provides a snapshot of how state agencies seek to comply with the APA's rulemaking guidance.

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# Legal Framework

## History of Regulation

The General Assembly added the cost-benefit analysis of rules process to the State Administrative Procedure Act (APA) in 2003, when it passed Senate Bill 121 (SB 121).

Finding that state rules can negatively affect small businesses in Colorado, the General Assembly established a process requiring state agencies seeking to promulgate a new rule or amend an existing rule to send a draft of the proposed rule to the Executive Director of the Department of Regulatory Agencies (Executive Director and DORA, respectively). The bill vested DORA's Executive Director, or his or her designee, with the authority to review the submitted rule and to direct the submitting agency to conduct a cost-benefit analysis of the rule.

The cost-benefit analysis had to include the reason for the new or amended rule and identify the anticipated economic costs and benefits of the rule; any adverse effects on consumers, small businesses, or the economy; and two alternatives to the proposed new or amended rule. Upon reviewing the cost-benefit analysis, the Executive Director could urge the submitting agency to amend the rule to lessen its potentially negative effect.

In 2006, the General Assembly amended the law to require rulemaking agencies to include, with each proposed rule, a plain-language statement concerning the subject matter and purpose of the proposed rule.

In 2013, the General Assembly passed two bills affecting the cost-benefit analysis of rules process.

- Senate Bill 13-030 directed the rule-submitting agency and the Executive Director to post cost-benefit analyses on their respective official websites.
- Senate Bill 13-158 made a critical change: while the Executive Director or his or her designee retained the ultimate authority to direct a rulemaking agency to conduct a cost-benefit analysis, the bill allowed anyone to request a cost-benefit analysis within five days of a proposed rule's publication in the *Colorado Register*.

The cost-benefit analysis of rules process is just one of a number of changes the General Assembly made to the APA to compel state agencies to consider the potential economic impacts of proposed rules and increase stakeholder involvement in the rulemaking process. Those changes are described below.

Since 1988, the law has permitted anyone to request a state agency to perform a regulatory analysis of a proposed rule. The regulatory analysis must:<sup>4</sup>

- Describe who will be affected by a proposed rule, including who will bear the costs of the proposed rule and who will benefit from it;
- Compare the probable costs and benefits of the proposed rule to the probable costs and benefits of inaction;

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<sup>4</sup> § 24-4-103(4.5), C.R.S.

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- Determine whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule; and
  - Describe alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.

In 2012, the General Assembly revised the APA to require state agencies to convene representative groups during the rulemaking process. Members of the representative groups must have diverse viewpoints and may include businesses, trade associations, advocacy groups, and anyone who would be affected by the proposed rule, whether positively or negatively.<sup>5</sup>

In 2014, the General Assembly amended the APA to require DORA to establish a schedule for the review of each principal department's rules. Each review must assess the continuing need for and the cost-effectiveness of each rule and evaluate whether the rule could be amended to give more flexibility, reduce regulatory burdens, or reduce unnecessary paperwork.<sup>6</sup>

Collectively, these statutory revisions reveal an ongoing concern about the effect state rules have on Coloradans, including small business owners.

## Legal Summary

Section 24-4-103(2.5)(a), Colorado Revised Statutes (C.R.S.), establishes the requirements and procedures for the cost-benefit analysis of proposed rules.

Any state agency seeking to promulgate a new rule or amend an existing rule must file a Notice of Proposed Rulemaking with the Secretary of State's Office. At the same time, the agency must also submit to the Executive Director, or his or her designee, a draft of the proposed new rule or the proposed amendment to an existing rule, and a statement, in plain language, describing the subject matter or purpose of the proposed rule or amendment.

Within five days of the publication of the Notice of Proposed Rulemaking in the *Colorado Register*, anyone may ask DORA to require the rulemaking agency to prepare a cost-benefit analysis. The Executive Director reviews the request and determines, after consulting with the agency, whether the agency must prepare the cost-benefit analysis.

If the Executive Director determines a cost-benefit analysis is required, the agency must complete it at least 10 days before the scheduled rulemaking hearing; the Executive Director posts the completed analysis on DORA's website. If the agency needs more time to complete the analysis, it may postpone the scheduled hearing. If an agency fails to complete a requested cost-benefit analysis, the rule cannot be adopted.

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<sup>5</sup> § 24-4-102(14.5), C.R.S.

<sup>6</sup> § 24-4-103.3(1), C.R.S.

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Each cost-benefit analysis must include:

- The reason for the rule;
- The anticipated economic benefits of the rule, including economic growth, job creation, and increased competition;
- The anticipated costs of the rule, including the direct costs to the government to administer it and the direct and indirect costs to business and other entities required to comply with it;
- Any adverse effects on the economy, consumers, private markets, small businesses, job creation, and economic competitiveness; and
- At least two alternatives to the proposed rule, including the costs and benefits of pursuing each identified alternative.

The Executive Director must study the cost-benefit analysis and may urge the agency to revise the rule to eliminate or reduce any negative economic impact. The Executive Director may inform the public about any negative economic impact.

Any proprietary information provided to the Department of Revenue by a business or trade association for the purpose of preparing a cost-benefit analysis is considered confidential.

If the agency has made a good faith effort to comply with the cost-benefit analysis requirement, the rule cannot be invalidated on the grounds that the contents of the cost-benefit analysis are insufficient or inaccurate.

The process does not apply to orders, licenses, permits, adjudication, or rules affecting the direct reimbursement of vendors or providers with state funds.

Section 24-4-103(2.5), C.R.S., also creates DORA's regulatory notice system, which allows interested stakeholders wishing to keep informed about upcoming rule changes to sign up to receive email alerts.

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## Program Description and Administration

The provisions creating the cost-benefit analysis process are contained within Colorado's State Administrative Procedure Act (APA), located at Article 4 of Title 24, Colorado Revised Statutes (C.R.S.). The Executive Director of the Department of Regulatory Agencies (Executive Director and DORA, respectively) is responsible for administering this process and has delegated this authority to the Colorado Office of Policy, Research and Regulatory Reform (COPRRR).

The law requires COPRRR to perform three distinct administrative functions: to accept proposed rule submissions from state agencies; to allow the public to sign up to receive regulatory alerts when an agency has submitted a proposed rule; and to permit people to request that a cost-benefit analysis be performed on a proposed rule. All of these functions are performed electronically via COPRRR's website.

The cost of these processes is absorbed into DORA's existing budget.

In August 2017, there were a total of 1,757 stakeholders registered to receive regulatory notice emails. When enrolling in the system, stakeholders may choose one or more subject areas that interest them –such as elementary education, probate and trust, or libraries and cultural resources—or choose to receive notices from a certain state department or division. Stakeholders receive regulatory alerts for an average of 4.8 subject areas, with the most popular areas being insurance, health, and professions and occupations. Each regulatory notice email contains a link to the text of the proposed rule and a description of its subject matter and purpose, as well as a link to the website where a cost-benefit analysis may be requested.

COPRRR is engaged in an ongoing outreach effort to increase the number of registered stakeholders.

People wishing to request a cost-benefit analysis can do so via mail, email, or a simple online form. COPRRR staff consults with the appropriate state agency and determines whether the cost-benefit analysis must be completed.



Table 1 shows, for the five fiscal years indicated, the number of rules submissions COPRRR received; the number of cost-benefit analyses requested; the number of distinct rules that were the subject of the requests; the number of analyses required; and the number completed.

**Table 1**  
**Rules Submissions Received and Cost-Benefit Analyses Requested**  
**Fiscal Year 11-12 through 15-16**

Fiscal Year	Rules Submissions Reviewed	Cost-Benefit Analyses Requested	Distinct Rules with Public Requests	Cost-Benefit Analyses Required	Cost-Benefit Analyses Submitted
11-12	464	0	0	11	11
12-13	425	0	0	0	0
13-14	559	19	12	4	4
14-15	414	10	8	2	2
15-16	410	6	4	4	4
<b>TOTAL</b>	<b>2,272</b>	<b>35</b>	<b>24</b>	<b>21</b>	<b>21</b>

Prior to fiscal year 13-14, COPRRR staff was responsible for reviewing rules submissions and directing submitting agencies to conduct cost-benefit analyses as needed. Following the passage of Senate Bill 13-158, the process changed so that anyone could request that a cost-benefit analysis be conducted. The data above demonstrate that certain rules often precipitate multiple requests. The table below gives an overview of the content of completed cost-benefit analyses.

Table 2 shows the rule submission date, the rulemaking authority proposing the rule, and a brief description of the proposed rule, for the 21 cost-benefit analyses completed from fiscal years 11-12 to 15-16.

**Table 2**  
**Cost Benefit Analyses Completed from July 1, 2011 to June 30, 2016**

Date Rule Submitted	Agency/Division/Board	Description of Rule
2/12/2016	Board of Examiners of Water Well Construction and Pump Installation Contractors	Relates to water well construction, pump installation, cistern installation, and monitoring and observation of hole/well construction
10/30/2015	Peace Officer Standards and Training	Establishes minimum recommended hiring standards for peace officers
10/07/2015	Oil and Gas Conservation Commission	Facilitates coordination between oil and gas operators and local governments
9/28/2015	State Board of Human Services	Brings the Food Assistance Program in compliance with federal requirements

Date Rule Submitted	Agency/Division/Board	Description of Rule
6/30/2015	Insurance	Requires electronic filings of title insurance and imposing a seven-day period to record documents
5/13/2015	Public Utilities Commission	Makes changes to basic emergency telephone service
4/15/2014	Animal Industry	Relates to the regulation of facilities under the Pet Animal Care and Facilities Act
11/25/2013	Air Quality Control Commission	Expands air emission control requirements for oil and gas facilities
11/25/2013	Air Quality Control Commission	Changes air quality reporting and permitting requirements
7/19/2013	State Board of Human Services	Establishes nighttime resident to staff ratios for certain agencies licensed by the Office of Behavioral Health
1/31/2012	Office of Private Investigator Voluntary Licensure	Creates requirements for the new private investigator voluntary license program
1/13/2012	Solid and Hazardous Waste Commission	Relates to recyclable materials and operations
1/13/2012	Solid and Hazardous Waste Commission	Relates to waste impoundments
1/10/2012	State Board of Health	Requires licensed acute care or long-term nursing care facilities to ensure their healthcare personnel are vaccinated annually against influenza or wear a mask during flu season
11/21/2011	Water Quality Control Commission	Relates to basic standards and methodologies for surface water
11/21/2011	Water Quality Control Commission	Relates to nutrients management control regulation
10/03/2011	Workers Compensation	Establishes medical treatment guidelines
9/30/2011	Public Utilities Commission	Sets an age limit for motor vehicles operated by regulated intrastate carriers
8/23/2011	Motor Carrier Services Division	Increases fees for the administration of the Commercial Driver License Examination
8/15/2011	Board of Architects, Professional Engineers, and Professional Land Surveyors	Increases continuing education requirements for architects
7/28/2011	State Board of Health	Imposes signage, reporting, and other administrative requirements on community clinics

The substance of the rules undergoing review varies widely. To complete a cost-benefit analysis requires, especially in the case of rules relating to health or the environment, considerable subject matter expertise. In most cases, the completed cost-benefit analysis provides insight into the level of stakeholder outreach the rulemaking agency conducted prior to submitting the rule to COPRRR and the Secretary of State.

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Since the General Assembly changed the process to a stakeholder-initiated process, COPRRR has received 35 cost-benefit analysis requests for 24 distinct rules. In 10 cases, COPRRR directed the rulemaking agency to complete the cost-benefit analysis as requested. In the remaining 14 cases, COPRRR—in consultation with the rulemaking agency—determined that no cost-benefit analysis was required. The most common reason for requests to be declined was that recent legislative changes mandated the proposed rule.

### **Collateral Consequences – Criminal Convictions**

Section 24-34-104(6)(b)(IX), C.R.S., requires COPRRR to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or registrants based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

No licenses or certificates are issued under the cost-benefit analysis process statute.

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## Analysis and Recommendations

### **Recommendation 1 – Continue the requirements and procedures regarding the preparation of a cost-benefit analysis of proposed rules process indefinitely.**

The State Administrative Procedure Act (APA), located at Article 4 of Title 24, Colorado Revised Statutes (C.R.S.), establishes the rulemaking process for state agencies. Section 24-4-103(2.5), C.R.S., creates a process allowing anyone to request that a state agency conduct a cost-benefit analysis of a proposed rule and charges the Executive Director of the Department of Regulatory Agencies (Executive Director and DORA, respectively) or his or her designee with administering the process. The Executive Director has delegated this responsibility to the Colorado Office of Policy, Research and Regulatory Reform (COPRRR).

The central question of this sunset review is whether the cost-benefit analysis process is necessary to protect the public health, safety and welfare.

Many of the requests for cost-benefit analyses pertain to a proposed rule that would potentially increase the regulatory burden for businesses or licensed professionals. It is in the interest of the public to assure that rules do not place too onerous a burden on small businesses in particular, because so many Coloradans work for them. According to the U.S. Small Business Administration Office of Advocacy, in 2014 there were 596,210 small businesses in Colorado, constituting 99.5 percent of all businesses in the state; over 1.1 million Coloradans—48.6 percent of all private sector employees—worked for a small business.<sup>7</sup>

Clearly, small businesses constitute a considerable part of Colorado's economy. The imposition of new regulatory requirements can increase costs for small businesses, affecting their profitability and potentially their payroll. In a survey of state rulemaking agencies conducted as part of this sunset review, 29 percent of respondents stated that their agency has revised its rules based on a completed cost-benefit analysis. This demonstrates the value of the process to the public and warrants its continuation.

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<sup>7</sup> *Small Business Profile: Colorado*, U.S. Small Business Administration Office of Advocacy (2017), p. 1.

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The merit of continuing to subject the process to sunset review is, however, unclear. It is one of many processes in the APA intended to increase stakeholder involvement and compel state agencies to consider the impact of the rules they impose. The APA requires rulemaking agencies to solicit stakeholder participation in the rulemaking process<sup>8</sup> and to hold public hearings;<sup>9</sup> it allows citizens to request that state agencies perform a regulatory analysis of a proposed rule<sup>10</sup> and to petition for the amendment or repeal of any rule.<sup>11</sup> The APA also compels all principal departments in the state to conduct regular reviews of their rules to assure they are necessary and cost-effective.<sup>12</sup> Yet only the provision relating to the cost-benefit analysis process has a sunset clause.

Also, the sunset review criteria COPRRR uses apply primarily to regulatory programs. Most of the criteria simply are not applicable to good-government initiatives such as the cost-benefit analysis process.

There are legitimate concerns with the cost-benefit analysis process as it stands now: the cost-benefit analysis may come too late in the process to inform decision-making, and the same personnel who drafted the proposed rule, rather than a disinterested third party, conduct the cost-benefit analysis. But meaningful solutions might require a comprehensive overhaul of the APA.

Executive Order 12866 (E.O. 12866), signed by President Bill Clinton, establishes guiding principles for federal agencies to follow when contemplating a new rule. The first three principles E.O. 12866 describes are:<sup>13</sup>

- Identifying the problem the new rule is intended to fix;
- Assessing whether current laws have contributed to the problem, and if so, determining what changes to existing laws might address the problem better than a new regulation; and
- Thoroughly evaluating diverse regulatory alternatives prior to selecting a regulatory strategy.

All three of these foundational principles describe steps that must occur early in the process, before a rulemaking agency chooses a policy approach. Colorado's cost-benefit analysis process serves a purpose; however, it is no substitute for a thorough, methodical decision-making process. The vast majority of stipulations regarding the rulemaking process lie outside of the provision subject to sunset review.

The number of cost-benefit analysis requests is low considering the number of rules that state agencies submit, but additional outreach could increase stakeholder participation in the cost-benefit analysis process (please see Recommendation 2, below). Also, arguably, the better state agencies become at involving stakeholders early in the rulemaking process, the fewer requests for cost-benefit analyses there are likely to be.

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<sup>8</sup> § 24-4-103(2), C.R.S.

<sup>9</sup> § 24-4-103(4), C.R.S.

<sup>10</sup> § 24-4-103(4.5), C.R.S.

<sup>11</sup> § 24-4-103(7), C.R.S.

<sup>12</sup> §24-4-103.3, C.R.S.

<sup>13</sup> Executive Order 12866, Section 1 (b), Federal Register Vol. 58, No, 190, October 4, 1993.

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In the meantime, the cost-benefit analysis of rules process fulfills its purpose: therefore, the General Assembly should continue it.

Because the process is a straightforward administrative function grounded in good-government principles, and because most of the sunset criteria do not apply to the process, the General Assembly should continue it indefinitely.

**Recommendation 2 – Require all state agencies to include information about the cost-benefit analysis process on all applicable websites that post rulemaking information.**

Requests for cost-benefit analyses remain fairly low: COPRRR has received only 35 such requests since the transition to a stakeholder-initiated process in fiscal year 13-14.

While the dearth of requests could be due to state agencies having a robust rulemaking process that considers costs and benefits and involves stakeholders early in the process, it also could be due to lack of publicity. Though COPRRR conducts outreach regarding the cost-benefit analysis process, more advocacy for the process by state agencies might increase public awareness of and participation in the process.

Therefore, the General Assembly should require state rulemaking agencies to include information about the cost-benefit analysis process and a link to COPRRR's regulatory notice enrollment form on all applicable websites containing rulemaking information.

## Appendix A - Survey of State Rulemaking Agencies

In July 2017, COPRRR conducted a survey of all state agencies that had submitted a proposed rule via DORA's online system. COPRRR sent the survey link to 134 state employees via email addresses collected by the online system. Of these, 86 surveys were successfully delivered<sup>14</sup> and 35 recipients responded. This represents a response rate of 40 percent.

**1. Approximately how long does it take to submit rules to DORA via its online system?**

Less than 15 minutes	23	65.7%
15-30 minutes	5	14.3%
30-45 minutes	3	8.6%
45-60 minutes	1	2.9%
Not sure	3	8.6%

**2. When considering a rule change, does your agency typically consider the potential costs to small business associated with the rule change?**

Yes	30	85.7%
No	5	14.3%

**3. Does knowing that a cost-benefit analysis could be requested affect the rules your agency proposes?**

Yes	7	20%
No	28	80%

**4. Approximately how long does it take your agency to prepare a cost-benefit analysis? If more than one staff member works on the analysis, please take into account the total number of staff hours.**

Less than 5 hours	2	5.7%
5-10 hours	3	8.6%
10-15 hours	1	2.9%
15-20 hours	2	5.7%
More than 20 hours	4	11.4%
Not sure	23	65.7%

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<sup>14</sup> Successful delivery is deemed to have occurred when the email sending the survey was not returned or did not fail.

**5. To what extent does your agency typically revise a proposed rule based on a completed cost benefit analysis?**

Significantly	1	2.9%
Somewhat	10	28.6%
Not at all	24	63.6%

**6. How many regulatory analyses does your agency conduct per year?**

None	12	34.3%
1 every 2 to 3 years	7	20.0%
1-5 per year	8	22.9%
8-15 per year	2	5.7%
Not sure	6	17.1%

**7. To what extent does your agency typically revise a proposed rule based on a completed regulatory analysis?**

Significantly	1	2.9%
Somewhat	15	42.9%
Not at all	19	54.3%

**8. How does your agency involve stakeholders in the rulemaking process? Please check all that apply.**

Have a standing stakeholder committee develop/review proposed rules	13	37.1%
Convene stakeholder committees to develop/review proposed rules on an as-needed basis	28	80.0%
Solicit written feedback	31	88.6%
Solicit participation in rulemaking hearings	32	91.4%
The stakeholder committees are based on each individual rule, not necessarily "as needed".	1	2.9%
Stakeholder meeting(s) prior to the rulemaking hearing	1	2.9%
The Colorado Secretary of State may appoint advisory commissions or work groups that may also help develop/review proposed rules as necessary. In accordance with section 24-21-630, C.R.S., the Colorado bingo-raffle advisory board helps develop/review proposed bingo and raffle games rules.	1	2.9%



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9. At what point in the process do stakeholders provide input on proposed rules? Please check all that apply.

Before the rules are drafted	30	85.7%
While the rules are being drafted	32	91.4%
At the rulemaking hearing	30	85.7%

10. Does your agency have a rule or written procedure in place governing stakeholder involvement in the rulemaking process?

Yes, we have a rule in place.	7	20%
Yes, we have a written procedure in place.	14	40%
No, we do not have a written rule or procedure.	14	40%

11. How often do stakeholders participate in the rulemaking process?

Frequently	22	62.9%
Occasionally	10	28.6%
Rarely	3	8.6%