



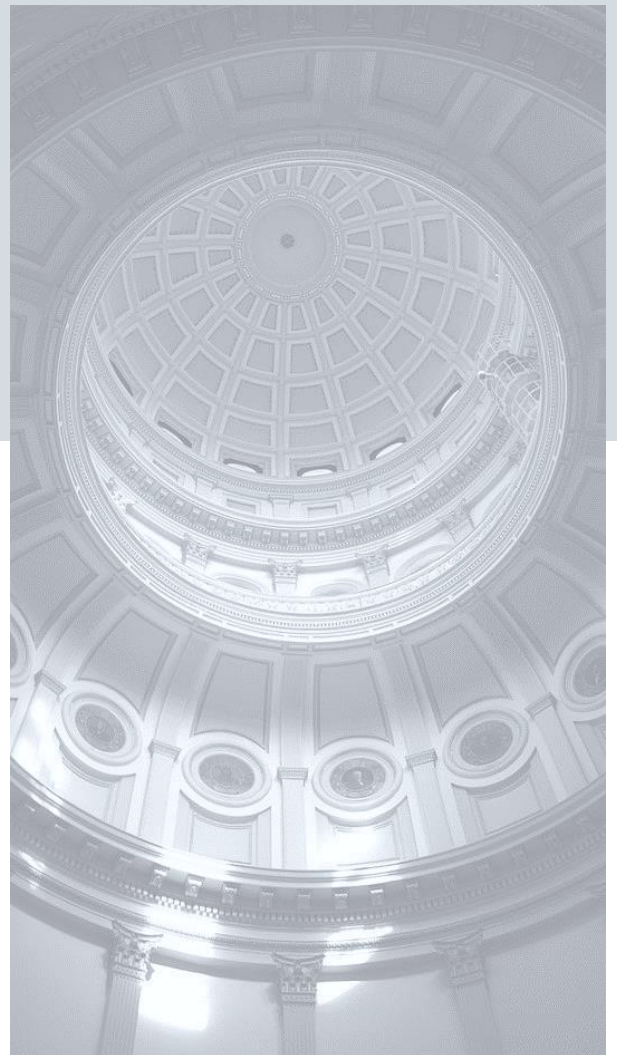
COLORADO

**Department of
Regulatory Agencies**

Colorado Office of Policy, Research &
Regulatory Reform

2019 Sunset Review

Licensing of Audiologists



October 15, 2019



COLORADO

**Department of
Regulatory Agencies**

Executive Director's Office

October 15, 2019

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 licensing of audiologists. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2020 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 29.9 of Title 12, C.R.S. The report also discusses the effectiveness of the Director of the Division of Professions and Occupations 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,

Patty Salazar
Executive Director





COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research &
Regulatory Reform

2019 Sunset Review Licensing of Audiologists

SUMMARY

What is regulated?

Audiologists are health-care providers who specialize in hearing loss and balance disorders. When working with individuals with hearing loss, audiologists assess the degree and type of hearing loss and may offer treatment options, such as hearing aids, cochlear implants and assistive listening devices. Audiologists may also counsel individuals with hearing loss on different methods of listening and communicating, and educate clients or patients on how to prevent hearing loss. Additionally, audiologists work with individuals to assess the cause of balance disorders. When medical treatment is ruled out, audiologists may provide clients or patients with exercises to reduce dizziness and increase balance and activity levels.

Why is it regulated?

Audiologists may physically damage an ear when making an ear mold. An individual may suffer permanent hearing loss if an audiologist does not refer for a medically treatable condition, such as sudden hearing loss in one ear, and an audiologist may exacerbate hearing loss if a hearing aid is over amplified. Children who are fit with hearing aids that are under amplified may suffer delays in language acquisition, learning and development. Furthermore, consumers may be financially harmed when purchasing hearing aids.

Who is regulated?

In fiscal year 17-18, the Director of the Division of Professions and Occupations (Director and Division, respectively) licensed 549 audiologists.

How is it regulated?

Only those licensed under Article 29.9 of Title 12, Colorado Revised Statutes (C.R.S.), (Act) may practice audiology or represent themselves as audiologists. In order to qualify for a license, an applicant must obtain either a doctorate in audiology from a program accredited by an agency recognized by the U.S. Department of Education or another program approved by the Director, or a master's degree with a concentration in audiology conferred prior to July 1, 2007 and a certificate of competency in audiology from a nationally recognized agency.

What does it cost?

In fiscal year 17-18, the total expenditures to oversee the program were \$43,935, and there were 0.35 full-time equivalent employees dedicated to the program.

What disciplinary activity is there?

In fiscal year 17-18, no audiologists were disciplined by the Director.

KEY RECOMMENDATIONS

Continue the regulation of audiologists for 11 years, until 2031.

Audiologists may physically damage an ear when making an ear mold. An individual may suffer permanent hearing loss if an audiologist does not refer for a medically treatable condition, such as sudden hearing loss in one ear, and an audiologist may exacerbate hearing loss if a hearing aid is over amplified. Children who are fit with hearing aids that are under amplified may suffer delays in language acquisition, learning and development. For these reasons, it is important to ensure that audiologists are qualified in order to protect the public health, safety and welfare. Audiologists also sell hearing aids, and consumers may be financially harmed when purchasing hearing aids.

Combine the audiology licensing act with the hearing aid provider licensing act.

In order to create efficiencies in the regulation of audiologists and hearing aid providers, the General Assembly should combine the audiology licensing act with the hearing aid provider licensing act.

Restore the deceptive trade practices provisions related to hearing aid sales in section 6-1-701, C.R.S., to the Act.

Section 6-1-701, C.R.S., of the Consumer Protection Act, defines deceptive trade practices related to hearing aid sales. It also contains specific language to be utilized in the hearing aid sales contract, and specifies the conditions for sales cancellation and refunds. The Colorado Attorney General (AG) and the state's district attorneys (DAs) are statutorily mandated with the enforcement of this section. However, it is more likely that consumers will file complaints with the licensing program, and the Director is better situated to take action related to violations of section 6-1-701, C.R.S. than the AG or the various DAs. For these reasons, the General Assembly should restore section 6-1-701, C.R.S., to the Act.

METHODOLOGY

As part of this review, Colorado Office of Policy, Research and Regulatory Reform staff interviewed stakeholders, Division staff and officials with state and national professional associations; reviewed records, Colorado statutes and rules, and the laws of other states.

MAJOR CONTACTS MADE DURING THIS REVIEW

American Academy of Otolaryngology-Head and Neck Surgery
Colorado Academy of Audiology
Colorado Commission for the Deaf, Hard of Hearing and Deaf-Blind
Colorado Division of Professions and Occupations
Colorado Ear, Nose and Throat Society
Colorado Families for Hands and Voices
Colorado Hearing Society
Colorado Office of the Attorney General
Colorado Speech-Language Hearing Association
International Hearing Society

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:
Colorado Department of Regulatory Agencies
Colorado Office of Policy, Research and Regulatory Reform
1560 Broadway, Suite 1550, Denver, CO 80202
www.dora.colorado.gov/opr



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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 criteria¹ 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:

- 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;

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

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- IX. Whether the agency through its licensing or certification process imposes any sanctions or disqualifications on applicants based on past criminal history and, if so, whether the sanctions or disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subsection (5)(a) of this section must include data on the number of licenses or certifications that the agency denied based on the applicant's criminal history, the number of conditional licenses or certifications issued based upon the applicant's criminal history, and the number of licenses or certifications revoked or suspended based on an individual's criminal conduct. For each set of data, the analysis must include the criminal offenses that led to the sanction or disqualification; and
- X. Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Sunset reports are organized so that a reader may consider these criteria while reading. While not all criteria are applicable to all sunset reviews, the various sections of a sunset report generally call attention to the relevant criteria. For example,

- In order to address the first criterion and determine whether a particular regulatory program is necessary to protect the public, it is necessary to understand the details of the profession or industry at issue. The Profile section of a sunset report typically describes the profession or industry at issue and addresses the current environment, which may include economic data, to aid in this analysis.
- To ascertain a second aspect of the first sunset criterion - whether conditions that led to initial regulation have changed - the History of Regulation section of a sunset report explores any relevant changes that have occurred over time in the regulatory environment. The remainder of the Legal Framework section addresses the third sunset criterion by summarizing the organic statute and rules of the program, as well as relevant federal, state and local laws to aid in the exploration of whether the program's operations are impeded or enhanced by existing statutes or rules.
- The Program Description section of a sunset report addresses several of the sunset criteria, including those inquiring whether the agency operates in the public interest and whether its operations are impeded or enhanced by existing statutes, rules, procedures and practices; whether the agency performs efficiently and effectively and whether the board, if applicable, represents the public interest.
- The Analysis and Recommendations section of a sunset report, while generally applying multiple criteria, is specifically designed in response to the tenth criterion, which asks whether administrative or statutory changes are necessary to improve agency operations to enhance the public interest.

These are but a few examples of how the various sections of a sunset report provide the information and, where appropriate, analysis required by the sunset criteria. Just as not all criteria are applicable to every sunset review, not all criteria are specifically highlighted as they are applied throughout a sunset review.

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.

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.

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.

The functions of the Director of the Division of Professions and Occupations (Director and Division, respectively) as enumerated in Article 29.9 of Title 12, Colorado Revised Statutes (C.R.S.),² shall terminate on September 1, 2020, 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 program pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed regulation should be continued and to evaluate the performance of the program and the Division. During this review, the 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 staff interviewed stakeholders, officials with state and national professional associations, and Division staff; and reviewed records, Colorado statutes and rules, and the laws of other states.

² House Bill 19-1172 recodified this article and placed it in Article 210. In order to avoid confusion and erroneous citations and references, this sunset report consistently refers to the statutory provisions as they existed during the sunset review. A table showing the citations as they have been recodified is located in Appendix B.

Profile of the Profession

In a sunset review, COPRRR is guided by the sunset criteria located in section 24-34-104(6)(b), C.R.S. The first criterion asks 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.

In order to understand the need for regulation, it is first necessary to understand what the profession does, where they work, who they serve and any necessary qualifications.

Audiologists are health-care providers who specialize in hearing loss and balance disorders.³

When working with individuals with hearing loss, audiologists assess the degree and type of hearing loss and may offer treatment options,⁴ such as hearing aids, cochlear implants and assistive listening devices. Audiologists may also counsel individuals with hearing loss on different methods of listening and communicating and educate clients or patients on how to prevent hearing loss.⁵

Audiologists also work with individuals to assess the cause of balance disorders. When medical treatment is ruled out, audiologists may provide clients or patients with exercises to reduce dizziness and increase balance and activity levels.⁶

Audiologists may work in physician offices, in offices with other health-care providers and in hospitals, or they may be self-employed. Audiologists also work in public and private schools.⁷

The sixth sunset criterion requires COPRRR to evaluate the economic impact of regulation. One way this may be accomplished is to review the expected salary of the profession and the projected growth in the profession.

The aging population is expected to increase the demand for audiologists, leading to a projected growth in employment of 21 percent between 2016 and 2026. In 2017, the median annual pay for audiologists was about \$76,000.⁸

³ Colorado Academy of Audiology. *What Is an Audiologist*. Retrieved October 29, 2018, from <https://www.coaudiology.org/consumers/what-is-an-audiologist/>

⁴ American Academy of Audiology. *Type of Hearing Loss (January 2008)*. Retrieved October 29, 2018, from <https://www.audiology.org/publications-resources/consumer-information/fact-sheets>

⁵ U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

⁶ *Audiology Information Series: Balance Rehabilitation*, American Speech-Language-Hearing Association (2005).

⁷ U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

⁸ U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

Typically, audiologists are required to complete a doctorate in audiology (Au.D.), which covers coursework in:⁹

- Anatomy,
- Physiology,
- Genetics,
- Abnormal and normal communication development,
- Diagnosis and treatment,
- Pharmacology, and
- Ethics.

Doctoral students in audiology programs must also complete supervised clinical practice in order to graduate.¹⁰

An audiologist may also obtain professional certification from one of two private organizations, the American Speech-Language-Hearing Association or the American Board of Audiology. In order to be certified, an audiologist must obtain a doctorate degree and pass an examination. Some states require certification as a condition of licensure.¹¹ Colorado does not.

In evaluating the need for regulation, COPRRR also takes into consideration regulation in other states. All states require audiologists to be licensed in order to practice, but requirements for a license vary by state.¹²

⁹ U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

¹⁰ U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

¹¹ U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

¹² U.S. Bureau of Labor Statistics. *Audiologists*. Retrieved October 29, 2018, from <https://www.bls.gov/ooh/healthcare/print/audiologists.htm>

Legal Framework

History of Regulation

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by the sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The first sunset criteria questions 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.

One way that COPRRR addresses this is by examining why the program was established and how it has evolved over time.

The Board of Hearing Aid Dealers (Board) was created in 1975 in what is now the Division of Professions and Occupations (Division) in the Department of Regulatory Agencies. A license was required for anyone who fit, dispensed or sold hearing aids. At the time, audiologists were only required to obtain a license to practice audiology if they fit, sold or dispensed hearing aids. In 1985, the General Assembly sunset the Board after a sunset review found that it was ineffective in protecting consumers and, as an alternative to regulation, the legislature strengthened the Consumer Protection Act (CPA), Article 1 of Title 6, C.R.S., by adding deceptive trade practices specific to the sale of a hearing aid.

In 1994, a sunrise review revealed that, despite the provisions in the CPA, consumers were being harmed by hearing aid providers. The most common consumer complaints were related to:

- Refusal to provide a refund as required by law,
- Problems with fittings and repairs, and
- Contract compliance and fraud issues.

In response, the General Assembly created a registration program for audiologists and hearing aid providers.

Later, the laws regulating audiologists and hearing aid providers were strengthened. In 2000, the General Assembly expanded the authority of the Director of the Division (Director) to issue cease and desist orders, and in 2006, it authorized confidential letters of concern. In 2007, the General Assembly changed the registration program to a licensure program and increased the minimum educational requirement for audiologists from a master's degree to a doctorate.

In 2013, the legislature separated the regulation of audiologists from the regulation of hearing aid providers by creating two distinct licensing acts, one dedicated to audiology and the other to hearing aid providers.

The legislature also adopted several recommendations from a sunset review conducted in 2011, the most important of which:

- Created a process for a license to be issued by endorsement,
- Required anyone with a revoked or surrendered license to wait two years before applying for another license,
- Added aiding and abetting a violation to the grounds for discipline, and
- Added failure to respond to a complaint letter to the grounds for discipline.

Legal Summary

The second and third sunset criteria question

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; and

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.

A summary of the current statutes and rules is necessary to understand whether regulation is set at the appropriate level and whether the current laws are impeding or enhancing the agency's ability to operate in the public interest.

The laws governing the practice of audiology are located in Article 29.9 of Title 12, C.R.S. (Act).

During the 2019 legislative session, and as part of a larger effort to recodify portions of Title 12, C.R.S., the General Assembly passed, and the Governor signed, House Bill 1172. Effective October 1, 2019, this bill recodified the Act (section 12-29.9-101, *et seq.*, C.R.S.) and moved it to Article 210. Notwithstanding this recodification, and to avoid confusion and erroneous citations and references, this sunset report consistently refers and cites to the Act as it existed during the sunset review. A table showing the citations as they have been recodified may be found in Appendix B.

The Director is vested with the authority to enforce the Act, which includes:

- Promulgating rules,¹³
- Investigating potential violations of the Act,¹⁴ and
- Issuing subpoenas.¹⁵

The Director requires audiologists to maintain professional liability insurance of at least \$1 million per claim and \$3 million annual aggregate.¹⁶

The Director has adopted rules, as required by the Act, requiring licensees to maintain, for at least seven years, client or patient records, which must include:¹⁷

- The name of the client or patient,
- The goods and services provided, except for batteries and minor accessories, and
- The date and price of each transaction.

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

When considering this requirement, it is first necessary to examine the current scope of practice as it is defined in the Act.

The practice of audiology is defined as:¹⁸

The application of principles, methods and procedures related to the development, disorders and conditions of the human auditory-vestibular system, whether those disorders or conditions are of organic or functional origin, including disorders of hearing, balance, tinnitus, auditory processing and other neural functions, as those principles, methods and procedures are taught in accredited programs in audiology.

The principles, methods or procedures include diagnosis, assessment, measurement, testing, appraisal, evaluation, rehabilitation, treatment, prevention, conservation, identification, consultation, counseling, intervention, management, interpretation, instruction and research related to hearing, vestibular function, balance and fall prevention, and associated neural systems, and any abnormal condition related to tinnitus, auditory sensitivity, acuity, function or processing, speech,

¹³ § 12-29.9-109(5), C.R.S.

¹⁴ § 12-29.9-109(1), C.R.S.

¹⁵ § 12-29.9-109(3)(a), C.R.S.

¹⁶ 3 CCR § 711-2(5)(B), Office of Audiology Licensure Program Rules.

¹⁷ 3 CCR § 711-2(4)(B), Office of Audiology Licensure Program Rules.

¹⁸ § 12-29.9-101(7), C.R.S.

language or other aberrant behavior resulting from hearing loss, for the purpose of diagnosing, designing and implementing audiological management and treatment or other programs for the amelioration of human auditory-vestibular system disorders and conditions.

Prescribing, selecting, specifying, evaluating, assisting in the adjustment to and dispensing of prosthetic devices for hearing loss, including hearing aids and hearing assistive devices by means of specialized audiometric equipment or by any other means accepted by the Director;

Determining work-related hearing loss or impairment, as defined by federal regulations;

Prevention of hearing loss; and

Consulting with, and making referrals to, a physician when appropriate.

It is unlawful to practice audiology in Colorado without a license,¹⁹ and only those licensed under the Act may use the title, “Audiologist,” or any other title or abbreviation that implies he or she is an audiologist. A licensee with a doctorate may use the title, “Doctor” or its abbreviation, “Dr.,” when joined with the terms, “Audiologist” or “Audiology” or an appropriate degree designation and may use the term, “Doctor of Audiology.”²⁰

In order to qualify for a license, an applicant must obtain either a:²¹

- Doctorate in audiology from a program accredited by an agency recognized by the U.S. Department of Education or another program approved by the Director; or
- Master’s degree with a concentration in audiology conferred prior to July 1, 2007 and a certificate of competency in audiology from a nationally recognized agency.

A license by endorsement must be issued to an audiologist who presents proof of holding a license in another state that has substantially equivalent requirements.²²

Licensees must use a unique license number assigned by the Director on all contracts and receipts.²³

¹⁹ § 12-29.9-104(1)(a), C.R.S.

²⁰ §§ 12-29.9-103(1) and (2), C.R.S.

²¹ § 12-29.9-104(2), C.R.S.

²² §§ 12-29.9-106(1) and (2), C.R.S.

²³ § 12-29.9-104(1)(b), C.R.S.

The following are exempt from the Act:²⁴

- Anyone licensed by the Colorado State Board of Education as a special services provider to work in the public schools;
- Anyone working as an audiologist in the U.S. armed forces, public health service, Coast Guard or veterans administration;
- Anyone studying audiology or hearing or speech sciences, who is supervised by a licensed audiologist; or
- Anyone who is otherwise licensed as a health-care provider in Colorado.

The grounds for discipline include:²⁵

- Violating the Act or a Director rule;
- Aiding or abetting a violation, or conspiring to violate the Act or a Director rule;
- Failing to maintain professional liability insurance;
- Using false or misleading advertising;
- Violating the CPA;
- Causing physical harm to a client or patient;
- Failing to practice in accordance with professional standards;
- Practicing beyond the scope of a licensee's education, skills, experience or competence;
- Failing to adequately supervise a trainee;
- Employing anyone who violates the Act or the Director's rules;
- Failing to comply with an order of the Director;
- Having an alcohol or substance use disorder, or excessively or habitually using or abusing drugs or alcohol;
- Failing to notify the Director of a physical illness; a physical condition; or a behavioral, mental health or substance use disorder that impacts the licensee's ability to perform audiology with reasonable skill and safety to clients or patients;
- Failing to act within the limitations created by a physical illness, a physical condition or a behavioral, mental health or substance use disorder that renders the licensee unable to perform audiology with reasonable skill and safety to the client or patient;
- Failing to comply with the limitations agreed to under a confidential agreement, in which the audiologist has agreed to limit his or her practice based on limitations related to a physical illness or condition or a mental or behavioral health condition in order to practice safely;
- Refusing to submit to a physical or mental examination when ordered by the Director;

²⁴ § 12-29.9-102(1), C.R.S.

²⁵ § 12-29.9-108(2), C.R.S.

-
- Failing to respond in an honest, materially responsive and timely manner to a complaint lodged against the licensee; and
 - Being convicted of, pleading guilty or *nolo contendere* to, or receiving a deferred sentence for a felony or a crime involving fraud, deception, false pretense, theft, misrepresentation, false advertising or dishonest dealing.

The Director may order a licensee to undergo a mental or physical examination. If the Director determines that the licensee is unable to practice with reasonable skill and safety,²⁶ the Director has the authority to enter into a confidential agreement, which is not considered a disciplinary action, with an audiologist who agrees to limit his or her practice based on limitations related to a physical illness or condition, or a mental or behavioral health condition in order to practice safely.²⁷

The Director has the authority to take the following actions against anyone who has violated the Act:²⁸

- Deny, revoke, refuse to renew or suspend a license;
- Place a licensee on probation; or
- Issue a letter of admonition.

When the Director finds conduct that may not warrant formal action but if not corrected could lead to serious consequences, the Director may dismiss the complaint with a confidential letter of concern.²⁹

The Act also authorizes the Director to impose a fine of up to \$2,500 for each offense.³⁰ All fines must be credited to the General Fund.³¹

Finally, the Director may issue an order to cease and desist if he or she finds someone is practicing audiology without a license or engaging in unlawful activity.³² The Director may also seek an injunction through a court of competent jurisdiction against anyone violating the Act.³³

The Director may appoint an administrative law judge to take evidence and report any findings to the Director.³⁴

²⁶ § 12-29.9-114(1), C.R.S.

²⁷ § 12-29.9-113(2), C.R.S.

²⁸ § 12-29.9-108(1), C.R.S.

²⁹ § 12-29.9-108(3), C.R.S.

³⁰ § 12-29.9-108(1)(a), C.R.S.

³¹ § 12-29.9-108(8), C.R.S.

³² § 12-29.9-110(1), C.R.S.

³³ § 12-29.9-109(2), C.R.S.

³⁴ § 12-29.9-109(3)(a), C.R.S.

Program Description and Administration

In a sunset review, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) is guided by sunset criteria located in section 24-34-104(6)(b), Colorado Revised Statutes (C.R.S.). The third, fourth and fifth sunset criteria question:

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; and

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.

In part, COPRRR utilizes this section of the report to evaluate the agency according to these criteria.

The Director (Director) of the Division of Professions and Occupations (Division) within the Colorado Department of Regulatory Agencies is vested with the authority to regulate audiologists.

Table 1 illustrates, for the five fiscal years indicated, the expenditures and full-time equivalent (FTE) employees associated with the regulation of audiologists.

Table 1
Program Fiscal Information

Fiscal Year	Total Program Expenditures	FTE
13-14	\$62,248	0.40
14-15	\$41,841	0.40
15-16	\$59,753	0.40
16-17	\$48,693	0.40
17-18	\$43,935	0.35

The fluctuations in expenditures are primarily due to legal fees. In fiscal years 13-14 and 15-16, the Director pursued more disciplinary actions than in other years, resulting in higher legal fees. Also, in fiscal year 13-14, the Audiology and Hearing Aid Provider Program was split into two separate programs. As a result, both programs

underwent comprehensive rulemaking, which substantially increased legal services related to rulemaking.

In fiscal year 17-18, the FTE was reduced slightly following an assessment of the program director’s workload and the Division’s organizational goals.

The FTE numbers in Table 1 do not include employees in the centralized offices of the Division, which provide licensing, administrative, technical and investigative support to the program. However, the cost of those employees is reflected in the total program expenditures.

In fiscal year 18-19, there were 0.35 FTE allocated to the program:

- A Program Manager II (0.10 FTE), who is responsible for overall program management, complaint resolution, stakeholder engagement and program personnel;
- An Administrator III (0.05 FTE), who is responsible for practice monitoring and compliance;
- A Technician IV (0.10 FTE), who is responsible for case management, correspondence, research, statute and rules review, and case summary preparation;
- A Technician III (0.05 FTE), who is responsible for case management and correspondence including research, statutes and rules review, and case summary preparation; and
- An Administrative Assistant III (0.05 FTE), who is responsible for complaint intake and correspondence.

Table 2 shows the fees associated with regulation of audiologists over the five-year period under review.

**Table 2
Licensing Fees**

Fiscal Year	Original	Endorsement	Renewal	Reinstatement
13-14	\$145	\$145	\$310	\$325
14-15	\$145	\$145	n/a*	\$325
15-16	\$145	\$145	\$210	\$225
16-17	\$145	\$145	n/a*	\$225
17-18	\$125	\$125	\$110	\$125

*Not applicable

In fiscal year 17-18, the program’s fund balance reached a level that required a correction, so the license fees were reduced.

After initial licensure, licenses must be renewed every two years. If a license is not renewed, an audiologist must reinstate his or her license in order to practice.

Licensing

The eighth sunset criterion questions whether the scope of practice of the regulated occupation contributes to the optimum utilization of personnel and whether entry requirements encourage affirmative action.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

An individual must be licensed as an audiologist in order to practice audiology or to represent himself or herself as an audiologist.

In order to obtain a license, an applicant must complete and submit an application and supporting documentation to the Division. A licensing specialist reviews the application and notifies the applicant of any deficiencies. Once the application is complete, a licensing specialist evaluates the application to ensure the applicant is qualified. If all the requirements are met, the license is issued. If not, the licensing specialist notifies the applicant in writing, and the application is kept on file for one year.

In order to qualify for a license, an applicant must obtain either a:³⁵

- Doctorate in audiology from a program accredited by an agency recognized by the U.S. Department of Education or another program approved by the Director; or
- Master's degree with a concentration in audiology conferred prior to July 1, 2007 and a certificate of competency in audiology from a nationally recognized agency.

In Colorado, an audiologist who has obtained a doctorate degree is not required to pass an examination in order to be licensed.

An audiologist may qualify for a license by endorsement if the individual is licensed in another state with substantially equivalent licensure requirements.

Table 3 shows the number of licenses issued to audiologists over a five-year period.

³⁵ § 12-29.9-104(2), C.R.S.

Table 3
Audiology Licenses

Fiscal Year	Original	Endorsement	Renewal	Reinstatement	Active
13-14	30	1	424	0	426
14-15	32	20	0	4	483
15-16	22	24	466	9	484
16-17	29	18	0	6	538
17-18	44	20	528	7	549

The number of actively licensed audiologists increased by about 29 percent over the five-year period. On average, 31 audiologists received original licenses each year. Excluding fiscal year 13-14, in which only one audiologist was licensed by endorsement, on average, about 21 audiologists were licensed by endorsement each year.

In fiscal year 13-14, the Director issued only one license by endorsement because, until 2013, the Director did not have this authority.

Audiology licenses expire on March 31 of even-numbered years.

Complaint and Disciplinary Activity

The seventh sunset criterion requires COPRRR to examine 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.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

Anyone, including consumers, relatives of consumers, health-care providers and the Director, may file a complaint against a licensed audiologist or anyone who may have violated Article 29.9 of Title 12, C.R.S. (Act).

Operating under the authority delegated by the Director, staff reviews incoming complaints to determine any possible violations of the Act. If possible violations are identified, staff notifies the licensee of the complaint and allows him or her 30 days to respond to the allegations.

When a response to a complaint is received, staff forwards the complaint and the response, as well as a preliminary recommendation for how the case should be handled, to the Director. Staff may recommend dismissing the case or forwarding the

complaint to the Division’s Office of Investigations. The Director makes final decisions regarding all actions taken concerning complaints.

Table 4 illustrates the number and types of complaints against audiologists over a five-year period.

**Table 4
Complaints**

Type	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18
Unlicensed Practice	0	0	2	1	0
Standard of Practice	0	4	1	0	0
Scope of Practice	0	0	0	0	0
Sexual Misconduct	0	0	0	0	0
Substance Abuse	0	0	0	0	0
Felony Conviction	0	0	0	0	0
Total	0	4	3	1	0

Over a five-year period, few complaints were lodged against audiologists. The leading cause for a complaint involved a violation of the standards of practice, followed closely by unlicensed practice.

The Director has the authority to deny, revoke, refuse to renew or suspend a license; place a licensee on probation; or issue a letter of admonition. The Director may also issue an order to cease and desist against anyone who is practicing audiology without a license.

When the Director determines that disciplinary action is appropriate, the Director may utilize the Expedited Settlement Process (ESP) within the Division to settle a disciplinary matter. The ESP process was established to resolve disciplinary issues without a formal hearing. When a case is referred to the ESP office, ESP staff obtains the parameters concerning the level of discipline that the Director determines is warranted and attempts to settle the case.

Over the five-year period under review, the ESP office resolved two cases related to audiologists.

If the respondent does not agree to the terms offered through the ESP process, the Director may refer the case to the Attorney General’s Office for formal proceedings against an audiologist’s license.

Table 5 illustrates the number and types of final actions taken by the Director against audiologists during the five fiscal years indicated.

**Table 5
Final Agency Actions**

Type	FY 13-14	FY 14-15	FY 15-16	FY 16-17	FY 17-18
Denials	0	0	0	0	0
Revocations	0	0	0	0	0
Suspensions	0	0	0	0	0
Stipulations	0	0	1	2	0
Letters of Admonition	0	0	1	2	0
Total Disciplinary Actions	0	0	2	4	0
Dismissals	0	2	0	1	1
Letters of Concern	0	1	1	0	0
Total Dismissals	0	3	1	1	1

Because a complaint may be received in one fiscal year and resolved the next or following years, the total number of disciplinary actions and dismissals for a given year may not match the total number of complaints for that year. The increase in final agency actions against audiologists in fiscal year 16-17 may be attributed to complaints from previous years.

Over a five-year period, the Director took six disciplinary actions against audiologists, including three stipulated agreements and three letters of admonition.

Fines

The Act also authorizes the Director to impose a fine of up to \$2,500 for each offense.³⁶

From fiscal year 13-14 to fiscal year 17-18, the Director issued one fine, in the amount of \$2,500, for practicing without a license for several years.

Collateral Consequences - Criminal Convictions

The ninth sunset criterion requires COPRRR to examine whether the agency under review, through its licensing processes, imposes any sanctions or disqualifications based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

³⁶ § 12-29.9-108(1)(a), C.R.S.

In part, COPRRR utilizes this section of the report to evaluate the program according to this criterion.

The Director may deny, suspend or revoke the license of an audiologist who has been convicted of, plead guilty or *nolo contendere* to, or received a deferred sentence for a felony or a crime involving fraud, deception, false pretense, theft, misrepresentation, false advertising or dishonest dealing.

The Director did not disqualify or sanction any audiology licenses based on criminal history.

Analysis and Recommendations

The final sunset criterion questions whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest. The recommendations that follow are offered in consideration of this criterion, in general, and any criteria specifically referenced in those recommendations.

Recommendation 1 - Continue the regulation of audiologists for 11 years, until 2031.

The laws that govern audiologists are located in Article 29.9 of Title 12, Colorado Revised Statutes (C.R.S.) (Act), and the Director (Director) of the Division of Professions and Occupations (Division) in the Department of Regulatory Agencies (DORA) is vested with the authority to enforce the Act.

Sunset reviews are guided by statutory criteria found in section 24-34-104, C.R.S., and the first criterion asks whether regulation is necessary to protect the health, safety and welfare of the public.

The Act protects the public by ensuring that audiologists are qualified. In order to qualify for a license, an applicant must obtain either a:³⁷

- Doctorate in audiology from a program accredited by an agency recognized by the U.S. Department of Education or another program approved by the Director; or
- Master's degree with a concentration in audiology conferred prior to July 1, 2007 and a certificate of competency in audiology from a nationally recognized agency.

Audiologists do more than just test hearing and fit and dispense hearing aids. They may counsel individuals with hearing loss on different methods of listening and communicating and educate clients or patients on how to prevent hearing loss. They may also program cochlear implants and work with individuals with balance disorders.

Audiologists may physically damage an ear when making an ear mold. An individual may suffer permanent hearing loss if an audiologist does not refer for a medically treatable condition, such as sudden hearing loss in one ear, and an audiologist may exacerbate hearing loss if a hearing aid is over amplified. Children who are fit with hearing aids that are under amplified may suffer delays in language acquisition, learning and development.

For these reasons, it is important to ensure that audiologists are qualified in order to protect the public health, safety and welfare.

³⁷ § 12-29.9-104(2), C.R.S.

The Act also protects the public by vesting the Director with the authority to discipline audiologists.

Over a five-year period, the Director took six disciplinary actions against audiologists, including three stipulated agreements and three letters of admonition. Violations related to standards of practice were the primary cause for complaints against audiologists. For example, a diagnosis of hearing loss was missed on an infant when an audiologist failed to properly supervise a doctoral student.

While there were few complaints and disciplinary actions against audiologists, substandard practice related to audiology can have serious consequences for the individuals who are served by them. For example, audiologists conduct hearing tests on infants. If an audiologist misses hearing loss in an infant, the child's speech, language and cognitive development may be compromised during an important window of time for the child's development. Further, pediatric audiologists conduct hearing tests on children and fit them with hearing aids and assistive listening devices, and substandard practice related to children can affect the child's progress in school, their social and emotional development and their ability to succeed in life.

While audiology is, for the most part, fairly safe as evidenced in the complaint and disciplinary data, the Director should have the ability to take action when an audiologist is not practicing according to commonly accepted standards of practice or is no longer safe to practice.

Prior to introducing a bill requiring mandatory continuing education (MCE), section 24-34-901, C.R.S., requires information concerning the need for the requirement to be submitted to the Executive Director of DORA (Executive Director).

Upon receiving an MCE application, the Executive Director must:

- Conduct an analysis and evaluation of any proposal to impose mandatory continuing education on a given profession or occupation, and
- Present a written report to the General Assembly that addresses whether the proposed continuing education requirement would likely protect the public.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within the Office of the Executive Director of DORA, is responsible for fulfilling this statutory mandate. During the sunset review, COPRRR received an application related to MCE for audiologists, as required. COPRRR conducted an evaluation of the proposal to impose continuing education requirements on audiologists.

After evaluating the proposal, COPRRR determined that information in the MCE application did not demonstrate sufficient evidence that mandatory continuing education was necessary to protect the public health, safety and welfare.

As authorized in section 24-34-104, C.R.S., the General Assembly may continue this program for any period between 1 and 15 years. As few substantive issues were raised during the review, it would be reasonable to continue the Act for 11 years.

Therefore, the General Assembly should continue the regulation of audiologists for 11 years, until 2031.

Recommendation 2 - Combine the Act with the hearing aid provider licensing act.

In 2013, the General Assembly separated the regulation of audiologists from the regulation of hearing aid providers by creating two distinct licensing acts, one dedicated to licensing audiologists and another dedicated to licensing hearing aid providers.

It may be helpful to understand the reason for this separation. Following the last sunset review, the sunset bill to continue the regulation of audiologists and hearing aid providers did not pass due to an inability for stakeholders to come to an agreement. The program subsequently went into wind up, and during the next legislative session, the stakeholders went their separate ways and two bills were passed, one regulating audiologists and another regulating hearing aid providers. This decision was not based on public policy or administrative reasons.

The third and fourth sunset criteria ask:

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes; and

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively.

While the legislature may determine that the two licensing acts should remain separate, the regulation of audiologists would be more efficient if they were combined. This would benefit licensees in the long term by reducing the cost to administer the program, which could result in lower license fees for both audiologists and hearing aid providers.

While audiologists and hearing aid providers have different scopes of practice and different qualifications, they both fit and dispense hearing aids. Audiologists and hearing aid providers have been regulated under one program in the past without any problems, and at least 13 other states regulate these license types under one program.

The two licensing programs currently share the same program director and the same legal counsel. However, combining the two licensing acts would allow the programs to

be more fully integrated. The two license types could then share an operating budget and legal fees.

Also, the Division would only need to manage one licensing act. The parts in the separate licensing acts that are substantially similar could be combined, and the parts that are different could be maintained in separate parts of the new act. This would create a more efficient rulemaking process for the two license types. When the rules are changed that relate to both license types, it would only require one stakeholder process and one rulemaking hearing. Rulemaking can consume a significant amount of administrative and legal resources, so combining the two acts would help to streamline the regulation of audiologists and hearing aid providers.

In order to create efficiencies in the regulation of audiologists and hearing aid providers, the General Assembly should combine the Act with the hearing aid provider licensing act.

Recommendation 3 - Restore the deceptive trade practices provisions related to the sale of hearing aids in section 6-1-701, C.R.S., to the Act.

Section 6-1-701, C.R.S., of the Consumer Protection Act (CPA), is entitled, “Dispensing hearing aids - deceptive trade practices.” This section defines deceptive trade practices related to hearing aid sales. It also contains specific language to be utilized in the hearing aid sales contract, and specifies the conditions for sales cancellation and refunds (see Appendix A). The Colorado Attorney General (AG) and the state’s district attorneys (DAs) are statutorily mandated with the enforcement of this section.

In 2006, a sunset report found that AG and DA enforcement of this section of the CPA was minimal to nonexistent and recommended moving section 6-1-701, C.R.S., to the audiology and hearing aid provider licensing act in order to ensure that all complaints concerning hearing aid sales were filed with the Director.

However, in 2013, when the General Assembly divided the regulation of audiologists and hearing aid providers into two distinct licensing acts, it also removed this section of law from both acts. Consequently, the Director no longer has authority to take action related to this section of the CPA unless a court has already ruled that an individual has violated it.

The third sunset criterion asks whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes.

In 1994, 2006 and 2011, COPRRR found that enforcement of the CPA by the AG and the DAs was minimal to nonexistent and that this section of the CPA, in and of itself, was insufficient to protect hearing aid buyers, which is why the regulatory program was continued during each sunset review. Consumers are unlikely to understand that

they have recourse under the CPA, so they are unlikely to make use of it. Without a consumer complaint, this section is effectively useless.

It is more likely that consumers will file complaints with the licensing program, and the Director is better situated to take action related to violations of section 6-1-701, C.R.S.

For a time, Colorado sunset the regulation of audiologists and hearing aid providers, and this section of the CPA was created in its place. In 1995, a sunrise review revealed that consumers were being harmed in hearing aid sales, and this section of the CPA alone was insufficient to protect them. The most common consumer complaints were related to:

- Refusal to provide a refund as required by the CPA,
- Problems with fittings and repairs, and
- Contract compliance and fraud issues.

The first sunset criterion asks whether regulation is necessary to protect the health, safety and welfare of the public.

Previous sunset reviews found that consumers may be harmed by unscrupulous sales practices or by the improper fitting of hearing aids. For example, an individual may collect money for hearing aids and not provide the promised goods or services. An individual may sell hearing aids that do not work properly and refuse to provide a refund or string the buyer along until the trial period expires. An individual may tell a consumer that he or she will extend the trial period but not do so, leaving the consumer with hearing aids that he or she does not want or that may not work properly. An individual may also harm a consumer by selling a hearing aid to anyone who walks in the door whether or not the hearing aid is necessary or will benefit the consumer.

Older people are especially vulnerable to unscrupulous sales practices, and hearing loss is one of the most common, chronic health conditions that affect older people. The National Institutes of Health estimates that as much as one-quarter of people aged 65 to 74 and half of those over 75 suffer from disabling hearing loss.³⁸

During the last sunset review, eight complaints related to deceptive trade practices were filed against audiologists. Since this section was removed from the licensing acts, the disciplinary activity in the audiology licensing program is almost nonexistent, leading some stakeholders to question why Colorado regulates audiologists at all. This is a reasonable question.

³⁸ National Institutes of Health. *Quick Statistics About Hearing*. Retrieved July 18, 2019, from <https://www.nidcd.nih.gov/health/statistics/quick-statistics-hearing>

Rather than repeating history and deregulating audiologists, it would be better to create an effective regulatory program that provides the Director with the framework necessary to protect consumers.

The fourth sunset criterion questions whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively.

Restoring these provisions to the Act will ensure that complaints related to hearing aid sales will be filed with the Director and will provide the Director with the authority to enforce this section of the law and help to create an effective regulatory structure.

This recommendation does not seek to remove these provisions from the CPA. If only a few consumers are harmed, the AG and the DAs will likely not take action based on these provisions, and the Director is better positioned to act. However, if one hearing aid provider or business harms numerous people, the CPA will afford better protection than the Act since the AG or a DA could assess triple damages and the Director does not have this authority.

Therefore, the General Assembly should restore section 6-1-701, C.R.S., to the Act.

Recommendation 4 - Amend the language in the grounds for discipline referring to an alcohol or substance use disorder.

Under section 12-29.9-108(2)(q), C.R.S., an audiologist may be disciplined upon the finding that he or she has:

An alcohol use disorder, as defined in section 27-81-102, or a substance use disorder, as defined in section 27-82-102, or excessively or habitually using or abusing alcohol or habit-forming drugs or habitually using a controlled substance, as defined in section 18-18-102, or other drugs or substances having similar effects....

This provision should be amended to instead prohibit the habitual or excessive use or abuse of alcohol or controlled substances, and references to “alcohol use disorder” and “substance use disorder” should be repealed.

In *Robinson v. California*, 370 U.S. 660 (1962), the U.S. Supreme Court held that narcotic addiction is an illness and that any state law that seeks to punish a person because of an illness violates the Fourteenth Amendment. Although this case involved a criminal prohibition, it may be considered persuasive in the administrative context.

Furthermore, in *Colorado State Board of Nursing v. Crickenberger*, 757 P.2d 1167 (Colo. App. 1988), the Colorado Court of Appeals addressed a provision in the Nurse Practice Act substantially similar to the one at issue here. In vacating the Board’s

disciplinary action, the court held that the plain language of the statute requires addiction at the time of hearing.

These two cases, taken together, suggest that disciplinary action based on addiction is not the best way to discipline practitioners who abuse alcohol or controlled substances.

In *Colorado State Board of Medical Examiners v. Davis*, 893 P.2d 1365 (Colo. App. 1995), the Colorado Court of Appeals held that disciplinary action based on excessive use of alcohol or a controlled substance does not require current addiction or use of alcohol or controlled substances at the time of the disciplinary hearing.

The second and third sunset criteria ask:

Whether the existing statutes and regulations establish the least restrictive form of regulation consistent with the public interest, and

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes.

Since it may be unconstitutional to discipline a practitioner based on addiction to controlled substances or alcohol and since “excessive use” does not require current addiction or use at the time of the disciplinary hearing, the existing language should be amended.

Several other practice acts have similar language in the grounds for discipline.³⁹

For these reasons, the General Assembly should align the grounds for discipline with other practice acts by prohibiting, “habitual or excessive use or abuse” and repealing, “An alcohol use disorder, as defined in section 27-81-102, C.R.S., or a substance use disorder, as defined in section 27-82-102, C.R.S.”

Recommendation 5 - Require licensees and insurance carriers to report any malpractice settlements or judgments to the Director within 30 days.

Audiologists are currently required to maintain professional liability insurance of \$1 million per claim and \$3 million for all claims in a year. The potential for harm by an audiologist includes puncturing an ear drum, damaging the ear from taking an impression of the ear canal, misdiagnosing hearing loss and vestibular disorders, under-amplifying or over-amplifying hearing aids and cochlear implants, and failing to refer for medical conditions.

³⁹ §§ 12-36-117(1)(i), 12-32-107(3)(f), 12-37.3-112(1)(d), 12-40-118(1)(e), 12-37-107(3)(f), and 12-41-115(1)(l), C.R.S.

Currently, licensees are not required to report to the Director any malpractice settlements that are entered into on their behalf, or malpractice judgments that have been entered against them.

The third sunset criterion asks whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes.

Malpractice cases often provide important information about whether a practitioner is competent to practice. If the underlying facts of a case demonstrate that harm was caused by substandard practice, the Director should be able to determine whether any steps are necessary to protect the public. Under the current requirements, unless a consumer files a complaint, the Director will not have any knowledge of these cases, and, therefore, cannot take any action to protect the public.

The statutes regulating other health-care professions, such as acupuncturists, dentists, physicians and podiatrists,⁴⁰ have provisions that require licensees to report malpractice settlements and judgments to the respective regulatory authority. As health-care providers, audiologists should have the same requirement.

Unfortunately, self-reported information is not always reliable, so it would be reasonable to also require the insurance companies who write professional liability insurance for audiologists to also report settlements and judgments. Several other practice acts are structured this way.

It is important for the regulatory authority to have knowledge of malpractice settlements and judgments because the information provided by an insurance company could help protect the public in case an audiologist is unsafe to practice.

Therefore, the General Assembly should require audiologists and insurance companies who underwrite professional liability insurance for audiologists to report any malpractice settlements or judgments to the Director within 30 days.

Recommendation 6 - Require final agency actions to be appealed directly to the Court of Appeals.

Currently, the Act is silent on where final agency actions may be appealed. In these circumstances, a case may be appealed to the District Court and once an appeal has been decided by the District Court, it may then be further appealed to the Court of Appeals.

The third and fourth sunset criteria ask:

⁴⁰ §§ 10-1-120, 10-1-124, 12-29.5-104(5), and 12-35-129(1)(q) and (r), C.R.S.

Whether the agency operates in the public interest and whether its operation is impeded or enhanced by existing statutes; and

Whether an analysis of agency operations indicates that the agency performs its statutory duties efficiently and effectively.

It would be more efficient and consistent with other practice acts for appeals of the Director's decisions to be made directly to the Court of Appeals. This saves time by putting the appeal in the court that is most familiar with administrative law, and it allows the District Court to devote more of its time to its over-burdened docket.

For these reasons, the General Assembly should require disciplinary actions to be appealed directly to the Court of Appeals.

Appendix A - Section 6-1-701, C.R.S.

Recommendation 3 of this report proposes restoring the deceptive trade practices provisions related to the sale of hearing aids in section 6-1-701, Colorado Revised Statutes (C.R.S.) to Article 29.9 of Title 12, C.R.S. The language of this section is provided here.

Section 6-1-701. Dispensing Hearing Aids - Deceptive Trade Practices - Definitions

(1) As used in this section, unless the context otherwise requires:

(a) "Dispense", with regard to a hearing aid, means to sell or transfer title, possession, or the right to use by lease, bailment, or any other method. The term does not apply to wholesale transactions with distributors or dealers.

(b) "Dispenser" means a person who dispenses hearing aids.

(c) (I) "Hearing aid" means any wearable instrument or device designed or offered to aid or compensate for impaired human hearing and includes:

- (A) Any parts, attachments, or accessories to the instrument or device, as defined in rules adopted by the director of the division of professions and occupations in the department of regulatory agencies; and
- (B) Ear molds, excluding batteries and cords.

(II) "Hearing aid" does not include a surgically implanted hearing device.

(d) "Practice of dispensing, fitting, or dealing in hearing aids" includes:

- (I) Selecting and adapting hearing aids for sale;
- (II) Testing human hearing for purposes of selecting and adapting hearing aids for sale; and
- (III) Making impressions for ear molds and counseling and instructing prospective users for purposes of selecting, fitting, adapting, or selling hearing aids.

(e) "Surgically implanted hearing device" means a device that is designed to produce useful hearing sensations to a person with a hearing impairment and that has, as one or more components, a unit that is surgically implanted into the ear, skull, or other interior part of the body. The term includes any associated unit that may be worn on the body.

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- (2) In addition to any other deceptive trade practices under section 6-1-105, a dispenser engages in a deceptive trade practice when the dispenser:
- (a) Fails to deliver to each person to whom the dispenser dispenses a hearing aid a receipt that:
 - (I) Bears the business address of the dispenser together with specifications as to the make and serial number of the hearing aid furnished and the full terms of the sale clearly stated. If the dispenser dispenses a hearing aid that is not new, the dispenser shall clearly mark on the hearing aid container and the receipt the term "used" or "reconditioned", whichever is applicable, within the terms of the guarantee, if any.
 - (II) Bears, in no smaller type than the largest used in the body of the receipt, in substance, a provision that the buyer has been advised at the outset of the buyer's relationship with the dispenser that any examination or representation made by a dispenser in connection with the practice of dispensing, fitting, or dealing in hearing aids is not an examination, diagnosis, or prescription by a person licensed to practice medicine in this state and, therefore, must not be regarded as medical opinion or advice;
 - (III) Bears, in no smaller type than the largest used in the body of the receipt, a provision indicating that dispensers who are licensed, certified, or registered by the department of regulatory agencies are regulated by the division of professions and occupations in the department of regulatory agencies;
 - (IV) Bears a provision labeled "warranty" in which the exact warranty terms and periods available from the manufacturer are documented, or includes an original or photocopy of the original manufacturer's warranty with the receipt;
 - (b) Dispenses a hearing aid to a child under eighteen years of age without receiving documentation that the child has been examined by a licensed physician and an audiologist within six months prior to the fitting;
 - (c)
 - (I) Fails to receive from a licensed physician, before dispensing, fitting, or selling a hearing aid to any person, a written prescription or recommendation, issued within the previous six months, that specifies that the person is a candidate for a hearing aid; except that any person eighteen years of age or older who objects to medical evaluation on the

basis of religious or personal beliefs may waive the requirement by delivering to the dispenser a written waiver;

(II) Dispenses, adjusts, provides training or teaching in regard to, or otherwise services surgically implanted hearing devices unless the dispenser is an audiologist or physician;

(d) Fails to recommend in writing, prior to fitting or dispensing a hearing aid, that the best interests of the prospective user would be served by consulting a licensed physician specializing in diseases of the ear, or any licensed physician, if any of the following conditions exist:

(I) Visible congenital or traumatic deformity of the ear;

(II) Active drainage of the ear, or a history of drainage of the ear within the previous ninety days;

(III) History of sudden or rapidly progressive hearing loss;

(IV) Acute or chronic dizziness;

(V) Unilateral hearing loss of sudden onset within the previous ninety days;

(VI) Audiometric air-bone gap equal to or greater than fifteen decibels at 500 hertz (Hz), 1,000 Hz, and 2,000 Hz;

(VII) Visible evidence of significant cerumen accumulation on, or a foreign body in, the ear canal;

(VIII) Pain or discomfort in the ear;

(e) Fails to provide a minimum thirty-day rescission period with the following terms:

(I) The buyer has the right to cancel the purchase for any reason before the expiration of the rescission period by giving or mailing written notice of cancellation to the dispenser and presenting the hearing aid to the dispenser, unless the hearing aid has been lost or significantly damaged beyond repair while in the buyer's possession and control. The rescission period is tolled for any period during which a dispenser takes possession or control of a hearing aid after its original delivery.

(II) The buyer, upon cancellation, is entitled to receive a full refund of any payment made for the hearing aid within thirty days after

returning the hearing aid to the dispenser, unless the hearing aid was significantly damaged beyond repair while the hearing aid was in the buyer's possession and control;

(III)

(A) The dispenser shall provide a written receipt or contract to the buyer that includes, in immediate proximity to the space reserved for the signature of the buyer, the following specific statement in all capital letters of no less than ten-point, bold-faced type:

THE BUYER HAS THE RIGHT TO CANCEL THIS PURCHASE FOR ANY REASON AT ANY TIME PRIOR TO 12 MIDNIGHT ON THE [insert applicable rescission period, which must be no shorter than thirty days after receipt of the hearing aid] CALENDAR DAY AFTER RECEIPT OF THE HEARING AID BY GIVING OR MAILING THE DISPENSER WRITTEN NOTICE OF CANCELLATION AND BY RETURNING THE HEARING AID, UNLESS THE HEARING AID HAS BEEN SIGNIFICANTLY DAMAGED BEYOND REPAIR WHILE THE HEARING AID WAS IN THE BUYER'S CONTROL.

(B) The written contract or receipt provided to the buyer must also contain a statement, in print size no smaller than ten-point type, that the sale is void and unenforceable if the hearing aid being purchased is not delivered to the consumer within thirty days after the date the written contract is signed or the receipt is issued, whichever occurs later. The written contract or receipt must also include the dispenser's license, certification, or registration number, if the dispenser is required to be licensed, certified or registered by the state, and a statement that the dispenser will promptly refund all moneys paid for the purchase of a hearing aid if it is not delivered to the consumer within the thirty-day period. The buyer cannot waive this requirement, and any attempt to waive it is void.

(IV) A refund request form must be attached to each receipt and must contain the information in subparagraph (I) of paragraph (a) of this subsection (2) and the statement, in all capital letters of no less than ten-point, bold-faced type: "Refund request - this form must be postmarked by ----- (Date to be filled in). No refund will be given until the hearing aid or hearing aids are returned to the dispenser." A space for the buyer's address, telephone number, and signature must be provided. The buyer is required only to sign, list the buyer's current address and telephone number, and mail the refund request

form to the dispenser. If the hearing aid is sold in the buyer's home, the buyer may require the dispenser to arrange the return of the hearing aid.

- (f) Represents that the service or advice of a person licensed to practice medicine will be used or made available in the selection, fitting, adjustment, maintenance, or repair of hearing aids when that is not true or using the terms "doctor", "clinic", "state-licensed clinic", "state-registered", "state-certified", or "state-approved" or any other term, abbreviation, or symbol when it would:
 - (I) Falsely give the impression that service is being provided by persons trained in medicine or that the dispenser's service has been recommended by the state when that is not the case; or
 - (II) Be false or misleading;
- (g) Directly or indirectly:
 - (I) Gives or offers to give, or permits or causes to be given, money or anything of value to any person who advises another in a professional capacity as an inducement to influence the person or have the person influence others to purchase or contract to purchase products sold or offered for sale by the dispenser; except that a dispenser does not violate this subparagraph (I) if the dispenser pays an independent advertising or marketing agent compensation for advertising or marketing services the agent rendered on the dispenser's behalf, including compensation that is paid for the results or performance of the services on a per-patient basis; or
 - (II) Influences or attempts to influence any person to refrain from dealing in the products of competitors;
- (h) Dispenses a hearing aid to a person who has not been given tests utilizing appropriate established procedures and instrumentation in the fitting of hearing aids, except when selling a replacement hearing aid within one year after the date of the original purchase;
- (i) Makes a false or misleading statement of fact concerning goods or services or the buyer's right to cancel with the intention or effect of deterring or preventing the buyer from exercising the buyer's right to cancel, or refuses to honor a buyer's request to cancel a contract for the purchase of a hearing aid, if the request was made during the rescission period set forth in paragraph (e) of this subsection (2);

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- (j) Employs a device, a scheme, or artifice with the intent to defraud a buyer of a hearing aid;
 - (k) Intentionally disposes of, conceals, diverts, converts, or otherwise fails to account for any funds or assets of a buyer of a hearing aid that is under the dispenser's control; or
 - (l) Charges, collects, or recovers any cost or fee for any good or service that has been represented by the dispenser as free.
- (3) (a) This section applies to a dispenser who dispenses hearing aids in this state.
- (b) This section does not apply to the dispensing of hearing aids outside of this state so long as the transaction either conforms to this section or to the applicable laws and rules of the jurisdiction in which the transaction takes place.

Appendix B - Title 12 Recodification Table

This table shows the provisions of Article 29.9 of Title 12 of the Colorado Revised Statutes that were relocated as a result of the passage of House Bill 19-1172, concerning an organizational recodification of Title 12.

Prior to October 1, 2019	October 1, 2019 and Thereafter	Prior to October 1, 2019	October 1, 2019 and Thereafter
12-29.9-101 IP	12-210-102 IP	12-29.9-108(2)(a)	12-210-108(2)(a)
12-29.9-101(1)	Repealed	12-29.9-108(2)(b)	12-210-108(2)(b)
12-29.9-101(2)	12-210-102(1)	12-29.9-108(2)(c)	12-210-108(2)(c)
12-29.9-101(3), (4)	Repealed	12-29.9-108(2)(d)	12-210-108(2)(d)
12-29.9-101(5)(a)	12-210-102(2)(a)	12-29.9-108(2)(e)	12-210-108(2)(e)
12-29.9-101(5)(b)	12-210-102(2)(b)	12-29.9-108(2)(f)	12-210-108(2)(f)
12-29.9-101(6)	Repealed	12-29.9-108(2)(g)	12-210-108(2)(g)
12-29.9-101 IP(7)	12-210-102 IP(3)	12-29.9-108(2)(h)	12-210-108(2)(h)
12-29.9-101(7)(a)(I)	12-210-102(3)(a)(I)	12-29.9-108(2)(i)	12-210-108(2)(i)
12-29.9-101(7)(a)(II)	12-210-102(3)(a)(II)	12-29.9-108(2)(j)	12-210-108(2)(j)
12-29.9-101(7)(b)	12-210-102(3)(b)	12-29.9-108(2)(k)	12-210-108(2)(k)
12-29.9-101(7)(c)	12-210-102(3)(c)	12-29.9-108(2)(l)	12-210-108(2)(l)
12-29.9-101(7)(d)	12-210-102(3)(d)	12-29.9-108(2)(m)	12-210-108(2)(m)
12-29.9-101(7)(e)	12-210-102(3)(e)	12-29.9-108(2)(n)	12-210-108(2)(n)
12-29.9-101(8)	12-210-102(4)	12-29.9-108(2)(o)	12-210-108(2)(o)
12-29.9-102	12-210-103	12-29.9-108(2)(p)	12-210-108(2)(p)
12-29.9-102 IP(1)	12-210-103 IP(1)	12-29.9-108(2)(q)	12-210-108(2)(q)
12-29.9-102(1)(a)	12-210-103(1)(a)	12-29.9-108(2)(r)(I)	12-210-108(2)(r)(I)
12-29.9-102(1)(b)	12-210-103(1)(b)	12-29.9-108(2)(r)(II)	12-210-108(2)(r)(II)
12-29.9-102(1)(c)	12-210-103(1)(c)	12-29.9-108(2)(r)(III)	12-210-108(2)(r)(III)
12-29.9-102(1)(d)	12-210-103(1)(d)	12-29.9-108(2)(s)	12-210-108(2)(s)
12-29.9-102(2)	12-210-103(2)	12-29.9-108(2)(t)	12-210-108(2)(t)
12-29.9-103	12-210-104	12-29.9-108(2)(u)	12-210-108(2)(u)
12-29.9-103(1)	12-210-104(1)	12-29.9-108(3)	12-210-108(3)
12-29.9-103(2)	12-210-104(2)	12-29.9-108(4), (5)	Repealed
12-29.9-104	12-210-105	12-29.9-108(6)	12-210-108(4)
12-29.9-104(1)(a)	12-210-105(1)(a)	12-29.9-108(7), (8)	Repealed
12-29.9-104(1)(b)	12-210-105(1)(b)	12-29.9-109	12-210-109
12-29.9-104 IP(2)	12-210-105 IP(2)	12-29.9-109(1)	12-210-109(1)
12-29.9-104(2)(a)	12-210-105(2)(a)	12-29.9-109(2)	12-210-109(2)
12-29.9-104(2)(b)(I)	12-210-105(2)(b)(I)	12-29.9-109(3)	Repealed
12-29.9-104(2)(b)(II)	12-210-105(2)(b)(II)	12-29.9-109(4)	12-210-109(3)
12-29.9-104(3)	12-210-105(3)	12-29.9-109(5)	12-210-109(4)
12-29.9-104 IP(4)	12-210-105 IP(4)	12-29.9-110	12-210-110
12-29.9-104(4)(a)	12-210-105(4)(a)	12-29.9-110(1) to (5)	12-210-110(1)
12-29.9-104(4)(b)	12-210-105(4)(b)	12-29.9-110(6)	12-210-110(2)
12-29.9-104 IP(4)(c)	12-210-105 IP(4)(c)	12-29.9-111	Repealed

Prior to October 1, 2019	October 1, 2019 and Thereafter	Prior to October 1, 2019	October 1, 2019 and Thereafter
12-29.9-104(4)(c)(I)	12-210-105(4)(c)(I)	12-29.9-112	12-210-111
12-29.9-104(4)(c)(II)	12-210-105(4)(c)(II)	12-29.9-112(1)(a)	12-210-111(1)(a)
12-29.9-104(4)(c)(III)	12-210-105(4)(c)(III)	12-29.9-112(1)(b)	12-210-111(1)(b)
12-29.9-104(4)(c)(IV)	12-210-105(4)(c)(IV)	12-29.9-112(2)	12-210-111(2)
12-29.9-104(4)(d)	12-210-105(4)(d)	12-29.9-113	12-210-112
12-29.9-104(4)(e)	12-210-105(4)(e)	12-29.9-113(1), (2)	12-210-112(1)
12-29.9-104(5)	12-210-105(5)	12-29.9-113(3)	12-210-112(2)
12-29.9-105	12-210-106	12-29.9-114	12-210-113
12-29.9-105(1)	12-210-106(1)	12-29.9-114(1)	12-210-113(1)
12-29.9-105(2)	12-210-106(2)	12-29.9-114(2)	12-210-113(2)
12-29.9-106	12-210-107	12-29.9-114(3)	12-210-113(3)
12-29.9-106 IP(1)	12-210-107 IP(1)	12-29.9-114(4)	12-210-113(4)
12-29.9-106(1)(a)	12-210-107(1)(a)	12-29.9-115	12-210-114
12-29.9-106(1)(b)	12-210-107(1)(b)	12-29.9-115 IP(1)	12-210-114 IP(1)
12-29.9-106(2)	12-210-107(2)	12-29.9-115(1)(a)	12-210-114(1)(a)
12-29.9-107	Repealed	12-29.9-115(1)(b)	12-210-114(1)(b)
12-29.9-108	12-210-108	12-29.9-115(1)(c)	12-210-114(1)(c)
12-29.9-108 IP(1)	12-210-108 IP(1)	12-29.9-115(2)	12-210-114(2)
12-29.9-108(1)(a)	12-210-108(1)(a)	12-29.9-115(3)	12-210-114(3)
12-29.9-108(1)(b)	12-210-108(1)(b)	12-29.9-115(4)	12-210-114(4)
12-29.9-108(1)(c)	12-210-108(1)(c)	12-29.9-115(5)	12-210-114(5)
12-29.9-108(1)(d)	12-210-108(1)(d)	12-29.9-116	12-210-115
12-29.9-108 IP(2)	12-210-108 IP(2)		