

STATE OF COLORADO

DEPARTMENT OF REGULATORY AGENCIES

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Bill Owens
Governor

October 14, 2005

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 Department of Regulatory Agencies (DORA) has completed its evaluation of the provisions governing the preparation of a cost-benefit analysis by state agencies under the State Administrative Procedure Act. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2006 legislative committee of reference. The report is submitted pursuant to section 24-34-104, of the Colorado Revised Statutes (C.R.S.), which states in part:

The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...

The department of regulatory agencies shall submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination....

The report discusses the question of whether there is a need to continue the review of proposed rules and amendments to rules by DORA as provided under 24-4-103(2.5), C.R.S. The report also discusses the effectiveness of the rule review and notification program in DORA as well as the staffs' ability to carry out the intent of the statutes. The report makes recommendations for statutory and administrative changes in the event the General Assembly continues this program.

Sincerely,

Tambor Williams
Executive Director

2005 Sunset Review

Provisions Governing the Preparation of a Cost-Benefit Analysis by State Agencies under the State Administrative Procedure Act

Department of Regulatory
Agencies

Bill Owens
Governor

Tambor Williams
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Executive Summary

Quick Facts

What is the Department of Regulatory Agencies' (DORA's) role in administrative rule review?

Under the State Administrative Procedure Act, all state agencies are required to file drafts of proposed rules or amendments to existing rules with DORA for review. DORA reviews the proposed changes to determine whether they may negatively impact small business or economic competitiveness in Colorado. The agency may then be asked to prepare a cost-benefit analysis on the rule.

What Does it Cost?

The rule review process is conducted by 30 percent of one General Professional III FTE employee.

Program Highlights.

The Office of Policy, Research and Regulatory Reform:

- Requested 14 cost-benefit analyses over the past two fiscal years.
- Created a web-based system for filing draft rules and notifying stakeholders.
- Maintains a mailing list of over 1,900 stakeholders.

Where Do I Get the Full Report? The full sunset review can be found on the internet at:

<http://www.dora.state.co.us/opr/oprpublications.htm>.

Key Recommendations

The General Assembly should continue the provisions of the State Administrative Procedure Act governing the preparation of a cost-benefit analysis by state agencies.

The provisions governing the preparation of a cost-benefit analysis by state agencies meet the standard of continuation required by the sunset criteria. This rule review conducted by the DORA protects Colorado citizens and small businesses from unnecessary costs associated with running a small business by requiring all state agencies to consider the economic impact their rules will have on small businesses in Colorado. Small businesses are vital to the success and growth of Colorado's economy. In Colorado, nearly 98 percent of all businesses are considered small and over 52 percent of all private sector workers are employed by small businesses.

DORA has requested 14 cost-benefit analyses, and informally negotiates with state agencies regarding proposed rules to reduce costs to small businesses. Four rules were eventually withdrawn prior to the hearing because of their potential to create a negative economic impact. In addition, DORA has successfully developed a website that effectively and efficiently provides rulemaking hearing and cost-benefit analysis information to Colorado's small business community.

The General Assembly should amend Section 24-4-103(2.5)(a), C.R.S., to require that state agencies submitting a proposed rule include a plain language statement concerning the subject matter or purpose of the proposed rule or amendment.

**Major Contacts Made in Researching the 2005 Sunset Review of the Provisions
Governing the Preparation of a Cost-Benefit Analysis by the State Agencies under the
State Administrative Procedure Act**

U.S. Small Business Administration, Office of Advocacy
State Agency Personnel Required to Submit Rules to DORA
Office of Policy, Research, and Regulatory Reform
Office of the Secretary of State
Office of Economic Development & International Trade
Interested Parties on the OPRRR E-mail List for Rule Notification

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 the public interest. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the rights of businesses to exist and thrive in a highly competitive market, free from unfair, costly or unnecessary regulation.

Sunset Reviews are Prepared By:
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Background

The Sunset Process

The requirement that state agencies prepare of a cost-benefit analysis (CBA) of rules, in accordance with section 24-4-103(2.5), Colorado Revised Statutes (C.R.S.), is repealed effective July 1, 2006, unless continued by the General Assembly. During the year prior to this date, it is the duty of the Department of Regulatory Agencies (DORA) to conduct an analysis and evaluation of this function pursuant to section 24-34-104, C.R.S. Since this particular function is not a traditional regulatory function, all of the sunset criteria are not relevant to this program. Of the nine sunset criteria, six have been identified as relevant to this review. These six criteria are highlighted in Appendix A on page 17.

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

DORA's findings and recommendations are submitted via this report to the legislative committee of reference of the Colorado General Assembly.

Methodology

As part of this sunset review, DORA staff:

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

Small Business in Colorado

In Colorado, nearly 98 percent of all businesses are considered small. These small businesses employ over 52 percent of all private sector workers in Colorado.¹ For purposes of this report, “small business” is defined as a business with fewer than five hundred employees.

The United States Department of Labor estimated that the total number of small businesses in Colorado in 2003 was 481,800. Of the 143,821 employer firms in 2003, 97.6 percent, or an estimated 140,400, were small firms. The most recent data available show that non-employer businesses numbered 341,380 in 2001. Self-employment increased by 17.7 percent, from 170,923 in 2002 to 201,176 in 2003.² Colorado’s economy depends greatly on the success of small businesses in the state.

According to the Small Business and Entrepreneurship Council’s *Small Business Survival Index 2004: Ranking the Policy Environment for Entrepreneurship across the Nation*, Colorado ranks ninth among the states as being small business friendly³, up from 12th place in the 2003 index⁴. Colorado’s ranking under this index indicates that Colorado attracts and retains small businesses due to a positive regulatory climate in the state.

The Small Business Survival Index examines how state and local governments affect entrepreneurial decision-making. Specifically, the index assesses the cost of doing business in a state by evaluating indicators, such as:

- the state’s personal income tax, capital gains tax and corporate income tax rates;
- the state’s health care cost index;
- the state’s electricity cost index;
- the state’s crime rate;
- the state’s right-to-work status; and
- the state’s regulatory flexibility legislation status.⁵

See Appendix B on page 18 for a complete list of factors used to calculate the index.

¹ Colorado Office of Economic Development & International Trade.

² U.S. Department of Labor, Employment and Training Administration; U.S. Department of Commerce, Bureau of the Census; U.S. Department of Labor, Bureau of Labor Statistics.

³ Raymond Keating, *Small Business Survival Index, 2004: Ranking the Policy Environment for Entrepreneurship Across the Nation*, Small Business and Entrepreneurship Council, Oct. 2004, p. 2.

⁴ Raymond Keating, *Small Business Survival Index, 2003: Ranking the Policy Environment for Entrepreneurship Across the Nation*, Small Business and Entrepreneurship Council, Sept. 2003, p. 2.

⁵ Keating (2004) at 5.

Legal Framework

Federal Regulatory Flexibility Legislation

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

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

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

Other States

The Office of Advocacy collects data on the number of states with legislation addressing the issue of small business and state regulation. The Office of Advocacy reports that in 2005, five states enacted regulatory flexibility legislation or an executive order, and 18 states introduced regulatory flexibility legislation. Ten states and one territory have active regulatory flexibility statutes, while 30 states have partial or partially used regulatory flexibility statutes. Eight states, two territories, and the District of Columbia have no regulatory flexibility statutes.

Table 1 provides an overview of U.S. jurisdictions that, as of 2005, have enacted the model regulatory flexibility legislation advocated by the Office of Advocacy, states that have some type of legislation or executive order that addresses small businesses and state regulations, and states that have no type of legislation addressing this issue.

Table 1

State Regulatory Flexibility Model Legislative Initiative

12 States and 1 Territory have active regulatory flexibility statutes

- Arizona
- Connecticut*
- Hawaii
- Indiana
- Michigan
- Nevada
- New York
- North Dakota ‡
- Oklahoma
- Puerto Rico
- South Carolina*
- Virginia
- Wisconsin *

30 States have partial or partially used regulatory flexibility statutes

- Arkansas
- California
- Colorado ‡ #
- Delaware
- Florida
- Georgia
- Illinois
- Iowa
- Kentucky*
- Louisiana
- Maine
- Maryland
- Massachusetts ‡
- Minnesota
- Mississippi
- Missouri*
- New Hampshire
- New Jersey
- New Mexico
- North Carolina
- Ohio
- Oregon
- Pennsylvania
- Rhode Island*
- South Dakota*
- Texas
- Utah
- Vermont
- Washington
- West Virginia ‡

8 States, 2 Territories, and the District of Columbia have no regulatory flexibility statutes

- Alabama
- Alaska
- Washington, DC
- Guam
- Idaho
- Kansas
- Montana
- Nebraska
- Tennessee
- Virgin Islands
- Wyoming

* In 2004, the state enacted legislation or an Executive Order that offered regulatory relief for state small businesses.

‡ In 2003, the state enacted legislation or an Executive Order that offered regulatory relief for state small businesses.

Colorado is listed in the partial category as a periodic review of all rules is not required. Additionally, the judicial review process in the APA is not small business specific.

Compiled from information obtained from the Office of Advocacy, U.S. Small Business Administration.

Of the six states that border Colorado, two, Utah and Arizona, have laws requiring the review of rules in relation to small business. Rhode Island is similar to Colorado in that the Rhode Island Secretary of State's Office utilizes a web-based notification system known as Rule Tracker. The Office of Advocacy identified Colorado and Rhode Island as two states that lead the nation in public access to rule promulgation. Summaries of the Rhode Island, Arizona and Utah programs follow.

Rhode Island

Rhode Island has instituted an Internet regulatory alert system known as Rule Tracker. This program began when the state required state agencies to file their regulations electronically. The alert system allows users to access adopted rules on-line. The program allows interested parties to receive daily, weekly or monthly updates on agency-specific rules by submitting the agency, sub-agency, or keywords of interest.

Rhode Island state agencies notify the public of rule-making hearings through notices published in local newspapers. Once a rule is adopted, the agency files the rule with the Secretary of State. Therefore, the Rule Tracker system provides detailed information concerning rules that have been adopted but not an exhaustive list of new rules being promulgated. According to the Rhode Island Secretary of State's office, a handful of agencies do notify the Secretary of State's Office of rule-making hearings. These notifications are available on Rule Tracker.

In 2004, Rhode Island enacted legislation requiring state agencies to notify the Governor's Office and the Economic Development Corporation of the agencies' intent to adopt proposed rules. If either entity identifies that the rule may have adverse economic impacts on small business, the proposing agency must prepare a regulatory flexibility analysis. The agency must consider regulatory methods that will accomplish the objective of the rule while minimizing the adverse impact on small business. In addition, the Economic Development Corporation acts as an advocate for small business.

Arizona

Arizona's Governor's Regulatory Review Council (Council) is charged with reviewing and approving rules promulgated by Arizona's state agencies. The Council reviews the rule, and associated documentation including economic, small business, and consumer impact statements prepared by the state agency for all rules.

For most agencies, the Council is the final step in the rule-making process. The Council reviews most rules to ensure that they are necessary and to avoid duplication and adverse impact on the public. The Council assesses whether a rule is clear, concise, understandable, legal, consistent with legislative intent and within the agency's statutory authority, and whether the benefits of a rule outweigh the cost. If a rule does not meet these criteria, the Council returns it to the agency for further consideration. Arizona's program does not include a centralized notification system. Each individual agency is responsible for notifying the public of rule changes.

Utah

The Utah Administrative Rule-Making Act (Act) mandates public notice for all proposed rules, requires a public hearing only when the public requests one, and permits petitions to change rules. The Act allows public recourse to the courts when administrative remedies do not satisfy public concerns. Agencies are required to assess the impact of their rules by preparing a financial impact statement for all proposed rules. The Act requires every rule to be reviewed within five years of its promulgation, and the agency must justify the rule's continuation or repeal it.

The Division of Administrative Rules (Division) is charged with publishing the Utah State Bulletin and the Utah Administrative Code (UAC). By law, the Division publishes "all proposed rules, rule analyses, notices of effective dates, and continuation notices" in the Utah State Bulletin (Bulletin), which is issued semi-monthly. This publication provides the reader with the text of recent proposed rule changes.

Monthly, the Division updates the UAC database and posts effective rules to its web site. While interested parties can access the information included in the Bulletin and UAC, there is no centralized rule-making notification system offered to interested parties.

Colorado Law

The State Administrative Procedure Act (APA), Title 24, Article 4, of the Colorado Revised Statutes (C.R.S.), governs the procedures that state agencies must follow when promulgating agency rules and regulations. Senate Bill 03-121 (SB 121), amended section 24-4-103, C.R.S., of the APA. The provisions of SB 121 require state agencies to file a copy of a proposed rule or proposed amendments to an existing rule with the Office of the Executive Director in the Department of Regulatory Agencies (DORA).

The Office of Policy, Research and Regulatory Reform (OPRRR) in DORA reviews the proposed rule to determine if the rule potentially has a negative impact on economic competitiveness or on small business in Colorado. The specific provisions of the law requiring submission of proposed rules to DORA and the preparation of a CBA are discussed below.

Section 24-4-102(5.5), C.R.S., defines "economic competitiveness" as the ability of the state of Colorado to attract new business and the ability of the businesses currently operating in Colorado to create new jobs and raise productivity. Section 24-4-102(18), C.R.S., defines "small business" as a business with fewer than five hundred employees.

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

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

The CBA must include the following:

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

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

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

Program Description and Administration

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

As required by 24-4-103(2.5), C.R.S., the staff of OPRRR accepts drafts of proposed rules from all state agencies. Once a proposed rule is submitted to OPRRR, staff determines whether the rule falls under the exemptions provided for in the Administrative Procedure Act (APA). The APA exempts orders, licenses, permits, adjudication, or rules affecting the direct reimbursement of vendors or providers with state funds from the cost-benefit analysis (CBA) requirements. If a rule does not meet the exemption criteria, OPRRR staff proceeds by evaluating the rule through a standard checklist.

The checklist developed by OPRRR staff consists of 14 questions aimed at determining if a proposed rule may impact economic competitiveness or small business (see Appendix C on page 19). If necessary, the agency is contacted for discussion and clarification of the rule. As part of this process, OPRRR may also contact business owners, business groups, and stakeholders directly to solicit specific input.

The checklist includes the following questions:

- Does the rule impact small business?
- Is the rule a result of recent legislation? If so, is the rule more restrictive than the legislation intended?
- Does the rule seem to have a negative impact on small business and/or economic competitiveness? Factors considered include whether the rule imposes additional recordkeeping or reporting requirements, requires additional capital costs, or creates potential barriers to entry into the profession.
- Is there a clear benefit?
- Does the rule appear to overstep the bounds of where state government should be involved?

If OPRRR staff determines that a rule or rules may have a negative impact, staff requests that the submitting agency complete a CBA. In order to complete the CBA, the agency must consider alternatives to the proposed rule that would not create a negative impact. If the agency does not complete the CBA, the proposed rule becomes void.

During fiscal years 03-04 and 04-05, 353 rule-making hearings were held, and OPRRR made 14 requests for CBAs. Of the 14 CBAs completed, two resulted in changes to the rule as drafted. It should be noted that during a rule-making hearing, the rule-making body might be considering one rule or several rules. According to the Office of Legislative Legal Services, over 10,000 pages of rules are reviewed by that office each year. Therefore, the exact number of individual rules being promulgated in one year does not correspond to the number of rule-making hearings. Additionally, many rule-making hearings were conducted for rules that fell within the statutory exemptions, such as changes to Medicaid reimbursement rules and license or permit fee changes. Also noteworthy when reviewing the number of CBA requests, is the fact that a couple of agencies regularly include a regulatory analysis with their submissions.

Compliance by State Agencies

OPRRR staff has manually checked for compliance with the rule review process by cross checking the Secretary of State's handwritten ledger of notices of proposed rule-making against the list of rules submitted through OPRRR's electronic system. During the first year of the program, 15 letters were sent to agencies that had not submitted their rules to DORA at the time of filing with the Secretary of State. Fortunately, all of these rules were discovered in a timely manner, and the rule-making agencies submitted their proposed rules without having to reschedule corresponding rule-making hearings. Non-compliance problems are most likely attributed to agencies not being accustomed to the new rule-making requirements. Non-compliance appears to no longer be a problem.

Impacts of the Rule Review Process

The following examples illustrate the impact of the rule review process:

- **Excessive Regulation on Restaurants Could Have Thwarted Intent of Legislature**

The Division of Liquor/Tobacco Enforcement proposed rules to implement new legislation that allows patrons to remove unfinished wine from restaurants. The proposed rules increased requirements on restaurants beyond those in the legislation. Thus, the rules potentially increased costs to businesses. The Division changed the language in question to a recommendation instead of a rule.

- **Regulations Created Barriers to Getting License**

The Plumbing Board was contacted regarding the requirement that out-of-state applicants who have satisfied education requirements that are substantially equivalent to Colorado's must have held their out-of-state license for a minimum of six months before qualifying for licensure by endorsement. The need for holding the license for six months was questioned. This provision was deleted, making licensure by endorsement easier for individuals who meet Colorado requirements.

- Regulation Increased Education Requirements for Licensees

Section 12-4-107(2)(a)(I)(A), C.R.S. requires that an applicant for licensure as an architect have a degree from an accredited program. However, the State Board of Examiners of Architects' current and proposed rule gave the Board the authority to impose additional requirements on graduates from accredited schools whose schools subsequently lost their accreditation. Both the current and proposed rules would increase educational and/or experience requirements for applicants for licensure and restrict entry into the profession. After discussion between OPRRR staff and the promulgating agency, the rule was repealed in its entirety.

- Anti-Competitive Regulations Defeated

The Division of Racing Events proposed a change that would have created a new fee to appeal a steward's decision. In addition, a proposed rule would potentially limit vendor competition in restricted areas to a single vendor.

The Racing Commission retained the Division's proposed fee with respect to horse owners, but reduced the fee for greyhound owners because of the much lower purses that greyhounds can win compared to horses. Secondly, the potentially anti-competitive regulation regarding vendors was abandoned.

- Unnecessary Regulation

A rule was proposed by the Office of Barber and Cosmetology Licensure which would have prevented animals, other than aquariums or trained animals accompanying disabled persons, from being present in barber and beauty establishments during the day. Since the Colorado Department of Public Health and Environment has no such requirements for establishments that do not serve food, OPRRR questioned the necessity of such a regulation. The proposed rule was removed at the rule-making hearing.

Rule-Making Hearing Notification

Although the APA does not explicitly require DORA to notify the public of pending rule-making hearings, DORA developed an on-line notification system for stakeholders. This on-line system provides stakeholders with information concerning rule-making hearings, the draft language of proposed rules and any associated CBAs.

It should be noted that stakeholders include many trade organizations, industry groups and lobbyists, who in turn provide this information to other interested parties. Additionally, many state agencies are signed up to receive notices from other state agencies that are proposing rules in their areas of interest and involvement. Finally, many stakeholders receive notifications for multiple subject areas. Table 2 details by subject area, the number of stakeholders receiving regulatory notices.

Table 2**Stakeholders Registered by Subject Area as of September 27, 2005**

Subject Area	Number of Stakeholders
Administrative Rule Review	598
Agriculture	238
Alcoholic Beverages	240
Appropriations	288
Children and Domestic Matters	382
Consumer and Commercial Transactions	382
Corporations	523
Corrections	222
Courts	366
Criminal Law and Procedure	317
Economic Development	433
Education - Higher Ed	305
Education – K-12	371
Elections	346
Environment	512
Financial Institutions	337
Gaming	171
General Assembly	414
Government	584
Health	740
Health Care Policy and Financing	751
Housing	390
Human Services - Social Services	476
Insurance	793
Labor and Industry	519
Libraries and Cultural Resources	176
Military and Veterans	219
Motor Vehicles & Traffic Regulation	523
Natural Resources	398
Probate, Trusts, and Fiduciaries	241
Professions and Occupations	671
Property	477
Public Safety	431
Public Utilities	395
Racing	111
Securities	215
Statutes	555
Taxation	577
Transportation	426
Water and Irrigation	472
Total Number of Registered Stakeholders	1,963
Average Number of Subject Areas Per Stakeholder:	8.4

System Improvements

In fall 2004, OPRRR staff conducted an internal performance audit of the rule review program. The audit identified several areas of the program that could be improved to create a more user-friendly and accessible program for stakeholders and increased efficiency for government agencies. Consequently, the electronic system that was first implemented in August 2003 has undergone a number of changes to simplify the process for government users, to assist stakeholders and to clarify and resolve issues. Recent changes include:

- The standard CBA worksheet was updated twice in an effort to simplify the process for government users, while still enabling OPRRR to obtain the statutorily required information. The questions on the CBA worksheet were reduced from 27 to 14 questions (see Appendix D on page 20).
- Functionality was added to enable agency users to modify a submission up until the time that it is published by OPRRR and the regulatory notices are sent. Previously, if errors were found, staff of OPRRR deleted an agency's submission and the agency user had to re-enter all of the information.
- Although agencies are not statutorily required to do so, OPRRR requests that agency users submit the Statement of Basis and Purpose as part of their rule submission. Many agencies now supply this information, which assists both the staff of OPRRR and stakeholders in better understanding the purpose and impetus for the proposed rules.
- To better assist recipients of regulatory notices, the system was improved to assist recipients in locating the agency's complete current rules to determine the impact of the proposed changes.
- The e-mail notifications to stakeholders were modified allowing stakeholders to more easily determine if the proposed rule will potentially affect them or be of interest to them.
- E-mails are now sent to interested stakeholders alerting them that a CBA has been provided by the rule-making agency, approved by OPRRR staff, and is available for review.
- The Calendar of Hearings page was changed so that a listing of all proposed changes can now be viewed on each agency's rule-making page.
- An Alerts page was added which includes a summary of state rule-making hearings by topic. Language encouraging stakeholders to participate in the rule-making process by either contacting OPRRR or the rule-making agency was added.

Outreach Efforts

OPRRR has undertaken outreach efforts and will continue to promote the program. Two examples of outreach reported by staff include contacting both the Governor's Office of Economic Development & International Trade and the Regional Transportation District to promote the program and encourage those agencies to advertise the on-line notification system to their many affiliated small business owners. Secondly, OPRRR contacted all Colorado small businesses listed on the Regional Transportation District's Small Business Database in May 2005. During that month, 89 additional stakeholders registered with OPRRR requesting rule-making notification. This is roughly three times the normal amount of stakeholders registering in a given month.

Further outreach efforts planned by OPRRR include contacting and/or meeting with the chambers of commerce throughout the state to promote the notification system as well as continuing efforts to publicize this service as opportunities arise. An additional resource available to publicize this service to small businesses could include the cooperation of other state agencies. Other state agencies could provide a web link to the OPRRR notification system via their web pages. Agencies that may consider such a link include the Office of the Secretary of State, the Office of Economic Development & International Trade, and the Department of Labor and Employment.

Analysis and Recommendations

Recommendation 1 – Continue the provisions of the State Administrative Procedure Act governing the preparation of a cost-benefit analysis (CBA) by state agencies.

The provisions governing the preparation of a CBA by state agencies meet the standard of continuation required by the sunset criteria. The rule review function conducted by the Department of Regulatory Agencies' Office of Policy, Research and Regulatory Reform (OPRRR) helps to protect Colorado citizens and small businesses from unnecessary costs associated with running a small business by requiring all state agencies to consider the economic impact their rules will have on small businesses in Colorado. Small businesses are vital to the success and growth of Colorado's economy. In Colorado, nearly 98 percent of all businesses are considered small and over 52 percent of all private sector workers are employed by small businesses.

While it is possible that, prior to the implementation of this program, some agencies may have considered the economic impacts of their proposed rules, it is reasonable to conclude that the presence of this review function has increased this awareness in Colorado government. Agencies may be asked to perform a CBA which is then distributed among hundreds of stakeholders.

Colorado currently ranks in the top 10 business friendly states according to the Small Business and Entrepreneurship Council's *Small Business Survival Index 2004: Ranking the Policy Environment for Entrepreneurship across the Nation*, which includes in its factors, whether a state has regulatory flexibility legislation. While it is important that Colorado agencies remain focused on the impact of their regulations and that they consider viable alternatives, it is equally important that Colorado remain a business-friendly state in order to attract new businesses to Colorado.

Under the State Administrative Procedure Act (APA), the Department of Regulatory Agencies (DORA) is permitted, not required, to review all proposed rules for negative impacts to economic competitiveness and small business. In addition to reviewing proposed rules for economic impact, DORA has created a rule notification system for public use that provides public access to state government. While this was not a requirement of the statute, it appears to fall under the legislative intent of the APA in that it provides increased public access to government proceedings and gives the citizens of Colorado the means and opportunity to participate more fully in the rule-making process.

As of September 27, 2005, there were 1,963 stakeholders receiving electronic notices of upcoming rule-making hearing. The OPRRR website has received 125,612 hits to view detailed rule information over the past two fiscal years and 4,919 hits to view the calendar of rule-making hearings. Stakeholders have conducted searches on the website 4,970 times in the past two fiscal years, and OPRRR has sent 501,900 regulatory notices. This notification function appears to be one of the most successful aspects of the program. Stakeholders report that the most valuable function of this system is the ability to have access to all rule-making hearings and draft language to proposed rules in one easy to access location.

OPRRR has been receptive to the needs of the population it serves as evidenced by the improvements made to the electronic notification system. The Office of Advocacy in the U.S. Small Business Administration reported in June 2005 that Colorado has been breaking new ground by providing e-mail notices about proposed changes to the state's regulation to anyone who requests them and that OPRRR has made the process even more small business friendly.⁶ It appears that no other state currently has a program comparable to Colorado's.

A number of system users report that the on-line submittal process is clear and easy to use, and staff of OPRRR has observed that most agencies are able complete their DORA rule submissions in minutes.

This program is aimed at providing information and government access to the public, protecting citizens from burdensome regulation without their input, and further enhancing the APA. DORA provides the budgetary resources and personnel from its existing budget.

The information provided to stakeholders, who consist of multiple trade associations, industry groups, and other state agencies, has enhanced the ability of these stakeholders to either participate in the rule-making process, and at the very least, has increased their awareness of proposed rules that may affect them when they become final.

In most cases, stakeholders are made aware of proposed rule changes in advance of when agencies are required to notify interested persons per the APA. The APA requires that agencies make copies of proposed rules available to the public five days before the hearing. (§ 24-4-103(4)(a), Colorado Revised Statutes (C.R.S.)) The requirement that proposed rules be submitted to DORA at the same time that they are submitted to the Office of the Secretary of State, and the automatic e-mail notifications increase the amount of time that stakeholders have to review and comment on proposed changes that affect them.

DORA's electronic notification system enables subscribers to review and comment upon proposed regulations well in advance of the final adoption of the rules. This provides a distinct advantage to small business owners who bear the brunt of new regulatory costs. Further, business owners are often more aware of the alternatives to the proposed regulations, and this system provides sufficient time for that information to be communicated, considered and perhaps adopted by the promulgating agency.

Additionally, many government agencies are signed up for electronic notices in their respective areas of interest. This may ultimately impact the amount of unnecessary and/or duplicative rule-making proposals.

OPRRR has requested 14 CBAs, questioned four proposed rules that eventually were withdrawn prior to the hearing because of the negative impact the rules would have created, and successfully developed a website that provides the public with efficient access to rule-making hearings, and draft rules.

⁶ *The Small Business Advocate*, U.S. Small Business Administration, Office of Advocacy, June 2005.

The CBA provisions of the APA created a new level of oversight against burdensome and costly government regulation. The goal of the provisions is not to eliminate needed regulation, but to add value to the process by helping ensure that government regulation is as efficient as it can be.

Although there is no data to determine the cost of regulation to small business from state regulations, the process of thoroughly reviewing regulations to minimize negative impacts on small business promotes economic strength for this major component of Colorado's economy. Further, promoting equitable competition ensures fairness for small business owners and may promote their growth.

Recommendation 2 - Amend section 24-4-103(2.5)(a), C.R.S., to require that state agencies submitting proposed rules or amendments include a plain language statement concerning the subject matter and purpose of the proposed changes.

Although agencies are not statutorily required to do so, OPRRR requests that agency users submit a "Statement of Basis and Purpose" as part of their rule submissions. Further, stakeholders indicate that the notification system could be more user-friendly if it clearly identified the subject matter of the proposed changes. This information would assist both the staff of OPRRR and the stakeholders in better understanding the nature of the proposed rules.

Agency rules are often quite lengthy and may be very dense with technical changes. While this format is a requirement of the rule-making process, it remains, nonetheless, a morass of bureaucratic legalese to ordinary citizens. It is relatively simply for the government regulators to explain clearly and simply what the rules are intended to do and what problem the agency is addressing by creating the rules.

To effectuate the intent of this recommendation, the APA should be amended as follows:

24-4-103. Rule-making - procedure - repeal.

(2.5)(a) At the time of filing a notice of proposed rule-making with the secretary of state as the secretary may require, an agency shall submit a draft of the proposed rule or the proposed amendment to an existing rule to the office of the executive director in the department of regulatory agencies. EACH SUBMISSION TO THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REGULATORY AGENCIES SHALL INCLUDE, IN PLAIN LANGUAGE, A STATEMENT CONCERNING THE SUBJECT MATTER OR PURPOSE OF SUCH PROPOSED CHANGES. The executive director, or his or her designee, may determine if the proposed rule or amendment may have a negative impact on economic competitiveness or on small business in Colorado...

Appendix A – Sunset Statutory Evaluation Criteria

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

Appendix B – Small Business Index Criteria

The Small Business Survival Index ties together 23 major government-imposed or government-related costs impacting small businesses and entrepreneurs⁷:

- state's top personal income tax rate
- state's top capital gains tax rate on individuals
- state's top corporate income tax rate
- additional income tax imposed on S-Corporations beyond the top personal income tax rate
- state individual alternative minimum tax
- state corporate alternative minimum tax
- state indexing of personal income tax rates
- state and local property taxes (property taxes as a share of personal income)
- state and local sales, gross receipts and excise taxes
- state death taxes
- unemployment tax
- state's health care cost index
- state's electricity cost index
- index of state average workers' compensation premiums
- state's crime rate per 100 residents
- right-to-work status
- state and local government bureaucrats
- tax limitation status
- Internet access tax
- state gas tax
- state minimum wage minus the federal minimum wage
- state liability score (mean grades based on survey of corporations to assess the fairness and reasonableness of state liability systems in eight key areas)
- regulatory flexibility legislation status

⁷ Keating (2004) at 5.

Appendix C – Analysis Checklist

Agency:	Hearing Date:	Date Reviewed:	CBA Requested:	
			Yes	No
Does the rule deal with orders, licenses, permits, adjudication, or the direct reimbursement of vendors or providers with state funds?			Yes	No
Does the rule impact small business? ("Small business" means a business with fewer than five hundred employees.)			Yes	No
Is the rule a result of recent legislation?			Yes	No
Does the rule seem to have a negative impact on small business and/or economic competitiveness?			Yes	No
Is there a clear benefit?			Yes	No
Does the rule appear to overstep the bounds of where state government should be involved?			Yes	No
How does the rule create a potential barrier to entry or increase the cost of doing business?				
Increased education requirements?				
Reduction in number of licenses given?				
Increased paperwork requirements?				
Increased direct costs?				
Increased indirect costs (e.g. tools, fleet, or complements)?				
Does the rule increase Colorado's regulatory burden relative to our neighbors and economic competitors?				
Does the rule simply seem unnecessary and/or overly burdensome?				
Other:				

Actions Taken:

Appendix D - Cost-Benefit Analysis Request

In performing a cost-benefit analysis, each rule-making entity must provide the information requested for the cost-benefit analysis to be considered a good faith effort. The cost-benefit analysis must be submitted to the Office of Policy, Research and Regulatory Reform at least five (5) days before the administrative hearing on the proposed rule. For all questions, please attach all underlying data that supports the statements or figures stated in this cost-benefit analysis.

DEPARTMENT: _____ AGENCY: _____

CCR: _____ DATE: _____

RULE TITLE OR SUBJECT:

Benefits of the Proposed Rule(s)/Amendment(s)

1. Please provide detailed statements indicating the need for the proposed changes. *(This statement should include specific issues such as specific changes in statutes or the subject matter area, market failure, a compelling public need, risks to the health, safety or welfare of Coloradans, lack of efficient and effective performance of an important government function, or other specific problem(s) that are being addressed by the proposed rule(s).)* Please include the number of complaints you received (if any) that spurred you to take regulatory action.
2. Please list the top three benefits of the proposed regulation; explain how the proposed regulation results in the expected benefits; and if the proposed regulation reduces or eliminates the problem(s) listed above.
3. What, in your estimation, would be the consequence of taking no action, thereby maintaining the status quo?
4. Please describe market-based alternatives or voluntary standards that you considered in place of the proposed regulation and state the reason(s) for not selecting those alternatives. How many small businesses did you talk to about the proposed regulation?

Impact of Proposed Rule(s)/Amendment(s)

5. Please describe the government costs to be incurred because of the proposed regulation *(Examples include collection; paperwork; filing; recordkeeping; audit, inspection and training costs, etc.)*, and state your estimates (in dollars) of the costs that will be incurred.
6. Please provide the number and types of entities or small businesses that will be required to comply with the proposed rule(s). Please provide the source of data used *(i.e., program data, NAICS code statistics, etc.)*.

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7. Does the proposed regulation create barriers to entry (*i.e., licensing, permit or educational requirements*)? If so, please describe those barriers and why those barriers are necessary.
 8. Explain the additional requirements with which small business owners will have to comply (*i.e., will they need to purchase new equipment or software to meet the requirement(s); are there training costs; are there new disclosure/filing requirements they will have to provide to the state; are there transactional costs, paperwork costs, recordkeeping, etc.*). Please state your estimates (in dollars) of the compliance costs by types listed.
 9. Please state whether the proposed regulation contains different requirements for different sized entities or different geographic regions, and explain why this is, or is not, necessary. (*For example, an audit fee (as a percentage of assets) for a bank examination is lower based upon a higher level of assets due to marginal cost savings and water usage is more restricted in geographic regions with less water storage or supplies because demand far outpaces supply.*)
 10. Please describe your understanding of the ability of small business owners to implement changes required by the proposed regulation, and state the average estimated cost of implementation. (*For example, if a proposed rule required all business in a particular sector to utilize a specific software application, a small business owner may have a difficult time implementing the software if the software is expensive to purchase or if their existing computers are not able to run the software.*)
 11. Please state if the proposed regulation will force the cessation of business by any existing businesses, and the impact the cessation will have on the economy including but not limited to the number of employees losing their jobs, the economic losses by the businesses and the estimated economic ripple the cessation will have on suppliers, consumers or buyers.
 12. Does the proposed regulation restrict consumer choice (*i.e., availability of goods or services; price increases; etc.*)? If so, please describe those restrictions.
 13. Please state the estimated impact (in dollars) the proposed regulation will have on sales, employment or tax revenue.
 14. Please identify all other small business sector(s) that the proposed regulation(s) may impact, and state the estimated financial impact the proposed regulation will have on each small business sector.

Thank you for your time and effort.