Colorado Register

42 CR 6

Volume 42 , No. 6

March 25, 2019

Introduction

The *Colorado Register* is published pursuant to C.R.S. 24-4-103(11) and is the sole official publication for state agency notices of rule-making, proposed rules, attorney general's opinions relating to such rules, and adopted rules. The register may also include other public notices including annual departmental regulatory agendas submitted by principal departments to the secretary of state.

"Rule" means the whole or any part of every agency statement of general applicability and future effect implementing, interpreting, or declaring law or policy or setting forth the procedure or practice requirements of any agency. "Rule" includes "regulation". C.R.S. 24-4-102(15). Adopted rules are effective twenty days after the publication date of this issue unless otherwise specified.

The *Colorado Register* is published by the office of the Colorado Secretary of State twice monthly on the tenth and the twenty-fifth. Notices of rule-making and adopted rules that are filed from the first through the fifteenth are published on the twenty-fifth of the same month, and those that are filed from the sixteenth through the last day of the month are published on the tenth of the following month. All filings are submitted through the secretary of state's electronic filing system.

For questions regarding the content and application of a particular rule, please contact the state agency responsible for promulgating the rule. For questions about this publication, please contact the Administrative Rules Program at rules@sos.state.co.us.

Notice of Proposed Rulemaking

Tracking number

2019-00115

Department

200 - Department of Revenue

Agency

207 - Division of Gaming - Rules promulgated by Gaming Commission

CCR number

1 CCR 207-1

Rule title

GAMING REGULATIONS

Rulemaking Hearing

Date

04/18/2019

Time

09:15 AM

Location

17301 W. Colfax Ave., Suite 135, Golden, CO 80401

Subjects and issues involved

Proposed Amendment to Gaming regulation 30-305 Investigation Fees, to increase the background investigation rate from $73.00 per hour to $77.00 per hour. The Colorado Limited Gaming Commission will determine if the increase is warranted after hearing testimony.

Statutory authority

Sections 44-30-102, C.R.S., 44-30-103, C.R.S., 44-30-201, C.R.S., 44-30-203, C.R.S., 44-30-302, C.R.S., and part 5 of article 30 of title 44, C.R.S.

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BASIS AND PURPOSE FOR RULE 3

The purpose of Rule 3 is to establish and provide the specific information required on license applications; to establish yearly license fees for each type of license; to establish nonrefundable application fees; to establish investigation fees for certain applicants and deposit procedures for investigation fees; to establish procedures for conducting background checks on applicants and other interested persons and assessing the costs of such background checks; to require certain information regarding the premises the applicant wishes to be licensed, and to provide a procedure for approval of modifications of such premises; and to provide for the issuance of conditional, temporary, and duplicate licenses. The statutory basis for Rule 3 is found in sections 44-30-102, C.R.S., 44-30-103, C.R.S., 44-30-201, C.R.S., 44-30-203, C.R.S., 44-30-302, C.R.S., and part 5 of article 30 of title 44, C.R.S. *Amended 1/14/15*

RULE 3 APPLICATIONS, INVESTIGATIONS AND LICENSURE

30-305 Investigation fees.

(1) All applicants for licenses and persons seeking approval of variation games of blackjack, poker, craps, roulette, blackjack-poker combination games and table games with electronic betting terminals, except support licenses, shall pay the costs of investigations into their backgrounds, suitability, and qualifications for licensure. *Eff 04/01/2007 Amended 11/30/2012*

(a) The cost of such investigations shall be at the rate of $737.00 per hour for each hour spent by investigators of the Division, the Colorado Bureau of Investigation, or the Department of Revenue investigating the applicants until the conclusion of the investigation. *Eff 7/1/2011, (30-305 (1)(a) amended temp. 7/1/16, amended perm. 7/16/16), (30-305 (1)(a) amended temp. 7/1/17, amended perm. 7/30/17), (Amended 7/1/19)*

Notice of Proposed Rulemaking

Tracking number

2019-00114

Department

200 - Department of Revenue

Agency

207 - Division of Gaming - Rules promulgated by Gaming Commission

CCR number

1 CCR 207-1

Rule title

GAMING REGULATIONS

Rulemaking Hearing

Date

04/18/2019

Time

09:15 AM

Location

17301 W Colfax Ave, Suite 135, Golden, CO 80401

Subjects and issues involved

No changes are being proposed to current Gaming Tax rates. The Commission will consider changes after two months of testimony.

Statutory authority

Sections 44-30-201, C.R.S., 44-30-203, C.R.S., 44-30-302, C.R.S., 44-30-602, C.R.S., and 44-30-604, C.R.S., (1991).

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BASIS AND PURPOSE FOR RULE 14

The purpose of Rule 14 is to establish the rate of the gaming tax on adjusted gross proceeds of gaming in compliance with section 44-30-601, C.R.S., to provide for security for the payment of gaming taxes to the Department, and to provide for the payment of gaming taxes by electronic fund transfer and to change the method of filing monthly gaming tax returns to electronically transmitted. The statutory basis for purpose for Rule 14 is found in sections 44-30-201, C.R.S., 44-30-203, C.R.S., 44-30-302, C.R.S., 44-30-602, C.R.S., and 44-30-604, C.R.S., (1991).

RULE 14 GAMING TAX

30-1401 Gaming and device taxes.

Annually the Commission shall conduct rule making hearings concerning the gaming tax rate and device fee rate for the subsequent gaming year. Testimony regarding the consideration of the gaming tax shall include the following topics to be heard during the following time periods. Additional appropriate topics relating to these issues may also be considered as deemed necessary by the Commission. Furthermore, in addition to the topics outlined below, the Commission may receive testimony from any member of the public during any of the following time periods on the other topics relevant to the consideration of the gaming tax and device fee rates. The following general schedule is established to provide structure to the annual consideration by the Commission, however rigid compliance is not mandatory and this regulation shall in no way be construed to limit the time periods or subject matters which the Commission may consider in determining the various tax rates. During the month of April, the Commission shall receive testimony regarding the methodology to be utilized in the consideration of the gaming tax for the subsequent gaming year. In May, the Commission shall receive testimony regarding the following topics: the expenditure impacts and revenue benefits from limited gaming in the cities of Black Hawk, Central City, and Cripple Creek, and the counties of Gilpin and Teller; the expenditure impacts and revenue benefits from limited gaming for statutorily defined entities eligible for the Local Government Limited Gaming Impact Fund; and the expenditure impacts from limited gaming on agencies of the State of Colorado. During the month of June the Commission shall receive testimony regarding the financial conditions of licensees pertinent to the consideration of the gaming tax pursuant to the criteria expressed in part 6 of the limited gaming act of 1991. (30-1401(1) temp. 5/12/93. perm. 6/30/93)(30-1401 1/30/98 amended perm 07/30/00) *Eff 07/30/2008*

(1) Each retail licensee conducting or offering limited gaming to the public shall be liable for, and shall pay to the Department of Revenue, a limited gaming tax upon the adjusted gross proceeds from limited gaming. The tax imposed by Section 44-30-601, C.R.S.(1991), shall be determined in accordance with the following schedule: *Eff 07/30/2008*

If the Annual Adjusted Gross Proceeds are:	The Tax is:
Up to $2,000,000 (Including $2,000,000)	0.25%
Over $2,000,000 to $5,000,000	2%
Over $5,000,000 to $8,000,000	9%
Over $8,000,000 to $10,000,000	11%
Over $10,000,000 to $13,000,000	16%
Over $13,000,000	20%

(30-1401(1) temp. 9/29/94. perm. 11/30/94)(30-1401(1) temp. 10/01/96, perm. 10/30/96)(30-1401(1) temp 07/01/99. perm. 07/30/99) *Eff 07/01/2013*

Notice of Proposed Rulemaking

Tracking number

2019-00111

Department

700 - Department of Regulatory Agencies

Agency

731 - Division of Professions and Occupations - Office of Barber and Cosmetology Licensure

CCR number

4 CCR 731-1

Rule title

BARBER AND COSMETOLOGY LICENSURE

Rulemaking Hearing

Date

04/15/2019

Time

10:00 AM

Location

1560 Broadway, 19th Floor - Conference Room 1250 A

Subjects and issues involved

The purpose of this rulemaking is to amend and adopt language from an emergency rule related to Chapter 4, Licensure by Endorsement, section 4.2 in order to further define the term substantially equivalent as set forth in section 12-8-118(1)(a), C.R.S.

Statutory authority

12-8-108 (1)(a), C.R.S. and 24-4-103, C.R.S.

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CHAPTER 4 LICENSURE BY ENDORSEMENT

This chapter clarifies the qualifications and procedures for applicants seeking licensure by endorsement pursuant to section 12-8-118, C.R.S.

…

4.2 REQUIREMENTS FOR LICENSURE BY ENDORSEMENT

A. To be considered for licensure by endorsement under section 12-8-118, C.R.S., an applicant must submit a completed application form, all requested documentation, and the appropriate fee.

B. An applicant must submit verification of at least one active/ valid license, in good standing at the time of the application, from another state, territory, or foreign country. An applicant must also identify all licenses held in any other state, territory, or foreign country.

C. To be eligible for licensure by endorsement, the applicant must attest to the following qualifications:

1. Graduation from a school approved by the appropriate governmental agency responsible for approving such schools in that state, territory, or foreign country;

2. Successful completion of training hours that are substantially equivalent to the ~~equal to or greater than~~ the training hours specified in Chapter 2 for the license sought in this state as determined by the Director. The Director deems "substantially equivalent" to include:
    a. The successfully completed training hours are equal to or greater than the training hours specified in Chapter 2 for the license sought in this state; OR
    b. The successful completion of a minimum of 65% of the training hours specified in Chapter 2 for the license sought in this state at an approved training program AND five (5) hours of documented work experience performed as a licensee in good standing in another state, territory or foreign country for every one (1) hour of Colorado required training that has not been met.
        i. For example, if an applicant completes 1000 hours of the required 1500 hours of training, the applicant must

demonstrate 2500 hours of work experience to account for the 500 hour difference in training hours: OR

c. Any other combination of successfully completed training hours at an approved training program and documented work experience performed as a licensee in good standing in another state, territory or foreign country as determined by the Director on a case by case basis.

~~;~~

3. Passage of a written examination administered or accepted by the appropriate licensing agency for that state, territory, or foreign country; and,

4. Passage of a practical examination administered by or accepted by the appropriate licensing agency for that state, territory, or foreign country **OR** at least 1,000 hours of work experience for the type of license being sought, within the 2 years immediately preceding the application receipt.

~~C. An applicant must submit verification of at least one active/ valid license, in good standing at the time of the application, from another state, territory, or foreign country. An applicant must also identify all licenses held in any other state, territory, or foreign country.~~

D. The applicant must report any disciplinary actions taken against them in any other jurisdiction.

E. An applicant holding a current license from another jurisdiction that does not meet the qualification requirements for licensure by endorsement in Colorado may apply to take the examination(s) (practical or written, or both) not taken or passed in another jurisdiction. The Director will determine the examination(s) required on a case-by-case basis.

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Notice of Proposed Rulemaking

Tracking number

2019-00116

Department

700 - Department of Regulatory Agencies

Agency

752 - Division of Conservation

CCR number

4 CCR 752-1

Rule title

CONSERVATION EASEMENTS

Rulemaking Hearing

Date

04/18/2019

Time

09:00 AM

Location

1560 Broadway - Conf Room 110-D Denver

Subjects and issues involved

Proposed permanent rules for the Division of Conservation. Emergency Rules (chapters 2, 3 & 4) were adopted 12/21/2018. These proposed permanent rules include the three emergency rules plus one new rule consisting only of definitions (chapter 1). Changes to the emergency rules are minor, affecting only chapter 2. They have been red-lined.

Statutory authority

part 11, article 61 of title 12 implementing HB 18-1291 signed into law May 29, 2018.

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DEPARTMENT OF REGULATORY AGENCIES
Division of Conservation
4 CCR 752-1
Conservation Easements

PROPOSED PERMANENT RULE

Chapter 1: Definitions

The following definitions are in addition to those set forth at section 12-61-1106(1), C.R.S.

1.1. Conservation Easement: for the purpose of implementing part 11, article 61 title 12, C.R.S., an interest in real property as defined in section 38-30.5, C.R.S.,

A. for which an income tax credit has been claimed, or

B. for which an income tax credit application has been filed, or

C. for which an income tax credit application may be filed pursuant to section 39-22-522.

1.2. Days: calendar days for the purposes of implementing part 11, article 61, title 12, C.R.S.

1.3. Phased Conservation Easement: a conservation easement that is or is intended to be part of a series conveyed by the same landowner encumbering different areas of the same property.

1.4. Contiguous: for purposes of section 12-61-1106, C.R.S., this is defined as physically touching, sharing any boundary or corner; lands transected by a strip or parcel owned in fee simple by others are not contiguous.

DEPARTMENT OF REGULATORY AGENCIES
Division of Conservation
4 CCR 752-1
Conservation Easements

PROPOSED PERMANENT RULE

CHAPTER 2: CERTIFICATION OF QUALIFIED ORGANIZATIONS THAT HOLD CONSERVATION EASEMENTS

Statement of Basis and Purpose

Pursuant to section 12-61-1104, C.R.S., the Division of Conservation, in consultation with the Conservation Easement Oversight Commission, establishes minimum qualifications for organizations that hold conservation easements as described and defined at rule 1.1 to encourage professionalism and stability.

2.1. Qualifications for certification of qualified organizations that intend to accept and hold new conservation easements ~~as described and defined at rule 1.1,for which a new tax credit may be claimed.~~

The Division may deny, refuse to renew, suspend or revoke the certification of a conservation easement holder who fails to meet any of the following minimum qualifications:

A. Organization

The conservation easement holder:

1. pursuant to sections 12-61-1104(5) and (7)(a), C.R.S., is accredited by a national land conservation organization broadly accepted by the conservation industry; or
2. meets the requirements of a qualified organization under section 12-61-1104, C.R.S. and the qualifications in section 38-30.5-104(2), C.R.S., to hold a conservation easement ~~for which a state tax credit may be claimed~~; and
3. has the capacity to accomplish the work of the holder including, but not limited to
    a. a board of sufficient size, skills, backgrounds and experience,
    b. a sufficient number of staff and/or volunteers; and
4. if a non-governmental entity, the holder must be in good standing with the Colorado Secretary of State.

B. Conservation Easement Selection, Review and Approval

1. The conservation easement holder has and follows reasonable written policies and procedures for selecting conservation easements. These must include, but are not limited to
    a. establishing and following selection criteria to identify conservation easements with at least one conservation purpose as defined in section 12-61-1106(1)(b), C.R.S.;
    b. documenting the conservation purpose(s);

c. working with the conservation easement grantor on an individual basis to identify and design the permitted uses, reserved rights, and prohibited uses intended to be memorialized in the conservation easement;

d. establishing and following a written policy for accepting phased conservation easements as defined at rule 1.3 such that each proposed conservation easement of a phased project has at least one conservation purpose;

e. advising potential conservation easement grantors in writing that

i. they should seek their own legal, financial and tax advice;

ii. the holder does not provide legal, financial or tax advice;

iii. there may be adverse legal and other consequences if grantor terminates a conservation easement ~~that was created or conveyed in expectation of receiving a tax credit~~; and

iv. the holder neither promises nor guarantees that the proposed conservation easement qualifies for state income tax credit purposes.

2. The conservation easement holder has and follows reasonable written policies and procedures for reviewing proposed conservation easements. These must include, but are not limited to:

a. Declining projects that

i. do not have at least one conservation purpose, or

ii. do not appear to have the necessary donative intent, or

iii. are potentially fraudulent or abusive.

b. Having a title company or competent attorney investigate and report on the title, water and mineral rights comprising the property prior to accepting the donation;

c. Evaluating title exceptions and, prior to accepting the donation, documenting how grantee addressed severed minerals or other exceptions to title so that they will not result in extinguishment or undermining of the expressed conservation purpose(s);

d. Ensuring that, prior to accepting the donation, any liens or encumbrances are released, subordinated or addressed so that the conservation purpose(s) of the easement is protected in perpetuity;

e. Providing sufficient information to the board of the holder, a qualified committee or other designee for review before a conservation easement is approved.

f. Receiving, reviewing and acknowledging, prior to accepting the donation, a baseline documentation report for the conservation easement prepared pursuant to section 12-61-1106(5)(c), C.R.S. The review shall assess, at a minimum, that:

i. The report documents describe the physical condition of the property at the time of the gift;

ii. The report documents accurately the conservation purposes of the easement; and

iii. The report is signed and dated by its author(s), the easement grantor and the easement grantee.

g. If a prior baseline documentation report is updated for use in connection with the second or subsequent phase of a conservation project, the update shall be a separate document preserved in the conservation easement holder's records, along with the original report.

h. Receiving and reviewing, before the donor submits a tax credit application pursuant to sections 12-61-1105 and 12-61-1106, C.R.S., a true copy of the signed "qualified appraisal" prepared by one or more "qualified appraisers" for all conservation easements ~~for which a tax credit may be claimed pursuant to section 39-22-522, C.R.S~~. The holder's review shall assess, at a minimum, that:

i. The physical aspects and legal description of the property that was appraised are the same as those described in the conservation easement;

ii. The conservation easement that was appraised is identical to the conservation easement that was recorded;

iii. The ownership of the property that was appraised is identical to the grantor of the easement; and

iv. The appraisal appears to be a qualified appraisal prepared by a qualified appraiser in compliance with section 12-61-1106(3)(b)(I)-(IV), C.R.S.

3. Having the board of the holder approve all conservation easement donations, or establishing policies delegating the authority to approve transactions to a qualified committee or other designee;

i. Such review and approval must be documented; and

ii. If an entity other than the holder performs the due diligence and analysis described in parts 2., b., c, and d. of this section B., the holder must review the transaction and document that the project is consistent with its policies and procedures.

C. Stewardship and Enforcement: Practices and Capacity

1. The conservation easement holder has the following written practices, policies and procedures to ensure the fulfillment of the perpetual stewardship responsibilities of each of its conservation easements including, but not limited to:

a. Monitoring all conservation easements no less than annually, using at least one of the following methods:

i. On-the-ground physical inspection of the property; or

ii. aerial inspection of the property using manned or unmanned aircraft, or other methods in general use by other holders that monitor easements encumbering similar properties; and

iii. If aerial or other methods are used, conducting on-the-ground monitoring at least every five years.

b. Monitoring is documented in writing, and the documentation is reviewed by either the board of the holder, a qualified committee, or other designee;

c. Enforcing every conservation easement deed;

d. Reviewing proposed amendments to conservation easement deeds to confirm they

i. do not result in a net loss of conservation value, and

ii. do not create any non-incidental benefits serving the interests of grantor (impermissible private benefit).

e. Preserving important records, such as but not limited to, deeds, baseline documentation reports, monitoring reports and appraisals, in a safe and secure manner.

2. The conservation easement holder has the capacity to maintain, monitor and defend the purposes of its easements. If a non-governmental entity, these written policies must include, but not be limited to:

a. The holder maintains dedicated funds for the stewardship and legal defense of every conservation easement held. The funds must be managed in conformance with a financial plan, which may consider the value of insurance policies. The plan shall:

i. Ensure the longevity of the dedicated stewardship and enforcement funds;

ii. Determine the amount of stewardship and legal defense funds that will be needed. Minimum requirements are:

A. For stewardship, maintain a minimum fund balance of $3,500 per conservation easement, and

B. For legal defense, maintain a minimum fund balance of $100,000, or

C. For holders lacking sufficient money, provide a detailed plan with specific funding targets and timelines to achieve the minimum requirements in no more than two years.

b. Ensure that the dedicated funds for stewardship- and enforcement-related purposes are used only for these purposes or, as established through written policies, other allowable uses.

c. If a government entity, sufficient funds must be allocated in the budget to steward and enforce conservation easements. Funds are not required to be held in a dedicated stewardship fund.

D. Finance

The conservation easement holder has and follows reasonable written fiscal policies and procedures to ensure the transparent and responsible management of its assets. These must include, but are not limited to:

1. Having the board of the holder review and/or regularly assess the holder's financial status, including the annual budget and any financial changes that have occurred; and
2. Having a financial evaluation conducted on an annual basis by an independent qualified accountant who has no financial or other interest in the holder. The level of evaluation is determined by the holder's total annual operating revenue, not including the cost or value of conservation easements or fee-owned properties:
   a. Less than $100,000 requires an annual compilation;
   b. $100,000-$500,000 requires an annual financial review; and
   c. More than $500,000 requires an annual financial audit.

E. Governance

The conservation easement holder has and follows reasonable written policies and procedures to ensure responsible management. These must include, but are not limited to:

1. The holder has board meetings;
2. The holder has a written conflict of interest policy; and
3. Conservation easements and financial transactions with insiders must be documented and must demonstrate that there is no private inurement.

2.2. Qualifications for certification of qualified holders that do not intend to accept and hold new conservation easements ~~for which a new tax credit may be claimed~~

Pursuant to 12-61-1104(7)(b), the Division shall offer a streamlined and lower-cost process for conservation easement holders that do not intend to accept new donations of conservation easements for which tax credits would be claimed.

The Division may deny, refuse to renew, suspend or revoke the certification of a conservation easement holder who fails to meet any of the following minimum qualifications:

A. Organization

The conservation easement holder:

1. pursuant to sections 12-61-1104(5) and (7)(a), C.R.S., is accredited by a national land conservation organization broadly accepted by the conservation industry; or

2. meets the requirements of a qualified organization under section 12-61-1104, C.R.S. and the qualifications in section 38-30.5-104(2), C.R.S., to hold a conservation easement ~~for which a state tax credit may be claimed~~; and

3. has the capacity to accomplish the work of the holder including, but not limited to

   a. a board of sufficient size, skills, backgrounds and experience,

   b. a sufficient number of staff and/or volunteers; and

4. if a non-governmental entity, the holder must be in good standing with the Colorado Secretary of State.

B. Stewardship and Enforcement: Practices and Capacity

1. The conservation easement holder has the following written practices, policies and procedures to ensure the fulfillment of the perpetual stewardship responsibilities of each of its conservation easements including, but not limited to:

   a. Monitoring all conservation easements no less than annually, using at least one of the following methods:

      i. On-the-ground physical inspection of the property; or

      ii. aerial inspection of the property using manned or unmanned aircraft, or other methods in general use by other holders that monitor easements encumbering similar properties; and

      iii. if aerial or other methods are used, conducting on-the-ground monitoring at least every five years.

   b. Monitoring is documented in writing, and the documentation is reviewed by either the board of the holder, a qualified committee, or other designee;

   c. Enforcing every conservation easement deed, including violations;

   d. Reviewing proposed amendments to conservation easement deeds to confirm they

      i. do not result in a net loss of conservation value, and

      ii. do not create any non-incidental benefits serving the interests of grantor (impermissible private benefit).

   e. Preserving original and duplicate copies of necessary and important records, such as deeds, baseline documentation reports, monitoring reports and appraisals, in a safe and secure manner.

2. The conservation easement holder has the capacity to maintain, monitor and defend the purposes of its easements. If a non-governmental entity, these written policies must include, but not be limited to:

   a. The holder maintains dedicated funds for the stewardship and legal defense of every conservation easement held. The funds must be

managed in conformance with a financial plan, which may consider the value of insurance policies. The plan shall:

a. Ensure the longevity of the dedicated stewardship and enforcement funds;

b. Determine the amount of stewardship and legal defense funds that will be needed. Minimum requirements are:

i. For stewardship, maintain a minimum fund balance of $3,500 per conservation easement, and

ii. For legal defense, maintain a minimum fund balance of $100,000, or

iii. For holders lacking sufficient money, provide a detailed plan with specific funding targets and timelines to achieve the minimum requirements in no more than two years.

b. Ensure that the dedicated funds for stewardship- and enforcement-related purposes are used only for these purposes or, as established through written policies, other allowable uses.

c. If a government entity, sufficient funds must be allocated in the budget to steward and enforce conservation easements. Funds are not required to be held in a dedicated stewardship fund.

C. Finance

The conservation easement holder has and follows reasonable written fiscal policies and procedures to ensure the transparent and responsible management of its assets. These must include, but are not limited to:

1. Having the board review and/or regularly assess the holder's financial status, including the annual budget and any financial changes that have occurred; and

2. Having a financial evaluation conducted on an annual basis by an independent qualified accountant who has no financial or other interest in the holder. The level of evaluation is determined by the holder's total annual operating revenue, not including the cost or value of conservation easements or fee-owned properties:

a. Less than $100,000 requires an annual compilation;

b. $100,000-$500,000 requires an annual financial review; and

c. More than $500,000 requires an annual financial audit.

D. Governance

The conservation easement holder has and follows reasonable written policies and procedures to ensure responsible management. These must include, but are not limited to:

1. The holder has board meetings;

2. The holder has a written conflict of interest policy; and
3. Conservation easements and financial transactions with insiders must be documented to show that there is no private inurement.

2.3. Expiration Date for Certification

Certification for a conservation easement holder expires on December 31 following the date of issuance, or on the date set forth on the next year's renewal application provided by the Division, whichever is later.

2.4. Eligibility for Conservation Easement Holders After Revocation

A conservation easement holder whose certification to hold a conservation easement has been revoked is not eligible to re-apply for certification until more than two years have elapsed from the date of certification revocation. Any re-application after such two-year period is required to be submitted on a new application.

2.5. Certification Renewal

Renewal of a conservation easement holder certification shall be executed only with the renewal application provided by the Division, submitted and accompanied by the prescribed non-refundable fee prior to the expiration date of certification.

2.6. Reinstatement of Certification After Expiration

An expired certification may be reinstated within one year after the date of expiration if the holder meets all the requirements in section 12-61-1104, C.R.S. and rules 2.1 or 2.2. A complete renewal application and the prescribed non-refundable renewal fee must be submitted to the Division for reinstatement. Certification is effective on the date reinstatement is issued and shall not be effective retroactively. Any certification that has been expired for more than one year shall not be reinstated.

2.7. Disciplinary Action

The Director may impose an administrative fine not to exceed two thousand five hundred dollars ($2,500) for each separate offense, as defined in subparagraphs A-E, below; and may revoke, suspend, or refuse to renew the certification of any conservation easement holder if, after an investigation and notice, and subject to the right to a hearing pursuant to the provisions of sections 24-4-104 and 24-4-105, C.R.S., the Director determines that the conservation easement holder:

A. Has made false or misleading statements or material omission in their application for certification;

B. Has misrepresented or concealed any material fact from a conservation easement grantor;

C. Has employed any device, scheme, or artifice with intent to defraud a conservation easement grantor or any government agency;

D. Has failed to comply with any stipulation or agreement made with the Director; or

E. Has failed to comply with any of the certification requirements, or any lawful rule or regulation promulgated by the Director.

2.8. Information Request

A conservation easement holder must furnish to the Director such information or documentation as the Director in her/his sole discretion deems reasonably necessary for the enforcement of 12-61-1104, C.R.S. or any rules enacted by the Division. If information or documentation is required, the Director must give written notice, in detail, of the information so required and must allow the holder an additional twenty-one (21) days from delivery to present such material, which period may be extended only upon showing of good cause. Written notice may be hand-delivered or mailed by regular first-class mail, postage pre-paid, to the party entitled thereto. If hand-delivered, said notice is deemed delivered upon hand delivery. If mailed, said notice is deemed delivered as of the date of mailing.

2.9. Cease and Desist

If the Division has reasonable cause to believe any public or private holder is not in compliance with section 38-30.5-104 (2), C.R.S. and section 12-61-1104, C.R.S., the Director may issue an order requiring such organization to cease and desist from holding a conservation easement ~~for which a state tax credit may be claimed~~.

2.10. Transferring Conservation Easements to Non-Certified Entities

A. A conservation easement holder must not assign or otherwise transfer any interest in a conservation easement ~~for which a state tax credit has been or may be claimed~~ to a non-certified holder.

B. A non-certified entity must not accept an assigned or otherwise transferred interest in a conservation easement ~~for which a state tax credit has been or may be claimed~~.

C. Governmental entities transferring a partial interest in a conservation easement to another governmental entity in accordance with an established written agreement are exempt from this prohibition on transferring a partial interest in a conservation easement.

D. All certified holders retaining any interest in a conservation easement must remain responsible for stewardship and defense of the conservation easement.

2.11. Courtesy Filing

A certified conservation easement holder must notify the Division within 30 days of a substantive change in:

A. Physical or mailing address of the holder,

B. Authorized contact person,

C. Holder name,

D. Holder mission, or

E. Holder structure.

DEPARTMENT OF REGULATORY AGENCIES
Division of Conservation
4 CCR 752-1
Conservation Easements

PROPOSED PERMANENT RULE

CHAPTER 3: CONSERVATION EASEMENT DONATIONS MADE ON OR AFTER MAY 29, 2018

Statement of Basis and Purpose

Pursuant to section 12-61-1104(7), the Division shall promulgate rules to effectuate the duties of the commission pursuant to article 4 of title 24. Such rules shall specifically address the following:

(d) The adoption of best practices, processes, and procedures used by other entities that regularly review conservation easement transactions, including a practice, process, or procedure deeming qualified conservation easement appraisals approved by these entities based on their independent reviews as credible for purposes of the conservation easement tax credit.

3.1 Tax credit application containing an appraisal that was prepared pursuant to section 12-61-1106(3)(b)(I)-(IV).

If another entity that regularly reviews conservation easement transactions has approved a qualified appraisal with a report date on or after May 29, 2018 for use by the other entity, the Director shall deem the appraisal as credible for purposes of the conservation easement tax credit if all of the following conditions are satisfied:

A. The qualified appraisal has been independently reviewed by a real estate appraiser licensed in Colorado as a certified general appraiser who, as of the effective date of the review:

1. is competent to appraise a conservation easement for the income tax purposes of its donor; and

2. is competent to appraise the type of property appraised in the appraisal under review; and

3. is in good standing with the Colorado Board of Real Estate Appraisers.

B. The appraisal review was prepared in compliance with the uniform standards of professional appraisal.

C. The other entity certifies in writing to the Division that:

1. it approved the appraisal for its own use; and

2. the reviewed appraisal was a qualified appraisal made for the income tax purposes of the donor of the easement; and

3. the independent review obtained by the entity for its use was prepared by a real estate appraiser licensed in Colorado as a certified general appraiser who, as of the date of the review:

a. was competent to appraise a conservation easement for the income tax purposes of its donor; and

b. was competent to appraise the type of property appraised in the appraisal under review; and

c. was in good standing with the Colorado Board of Real Estate Appraisers.

D. The other entity provides the Division with a true copy of the independent appraisal review it relied on as the basis for its approval of the qualified appraisal that was reviewed.

DEPARTMENT OF REGULATORY AGENCIES
Division of Conservation
4 CCR 752-1
Conservation Easements

PROPOSED PERMANENT RULE

CHAPTER 4: APPLICATION FEES FOR CALENDAR YEAR 2019

Statement of Basis and Purpose

Pursuant to section 12-61-1104(7), the Division shall promulgate rules to effectuate the duties of the commission pursuant to article 4 of title 24. Such rules shall specifically address the following:

(a) Allowing for the expedited or automatic certification of an entity that is currently accredited by national land conservation organizations that are broadly accepted by the conservation industry;

(b) A streamlined and lower-cost process for conservation easement holders that do not intend to accept new donations of conservation easements for which tax credits would be claimed that focuses on the holder's stewardship capabilities;

(c) The fees charged pursuant to subsection (3) of this section or section 12-61-1106(6), specifically ensuring that the fees are adequate to pay for administrative costs but not so high as to act as a disincentive to the creation of conservation easements in the state

4.1	Certification fees for entities currently accredited by a national land conservation organization		
	A.	Initial Certification Application Fee - Stewardship-only	$500
	B.	Initial Certification Application Fee - Full certification	$1,000
	C.	Conservation Easement Holder Renewal Fee - Stewardship-only	$250
	D.	Conservation Easement Holder Renewal Fee - Full certification	$500
4.2	Certification fees for entities not currently accredited by a national land conservation organization		
	A.	Initial Certification Application Fee - Stewardship-only	1,000
	B.	Initial Certification Application Fee - Full certification	$2,000
	C.	Conservation Easement Holder Renewal Fee - Stewardship-only	$500
	D.	Conservation Easement Holder Renewal Fee - Full certification	$1,000
4.3	Optional preliminary advisory opinions		
	A.	For an appraisal of a proposed transaction	$10,000
	B.	For a proposed deed of conservation easement, conservation purpose, or other relevant aspect of a proposed transaction	$2,000
4.4	Tax credit certificate applications		
	A.	For Donations made in 2011-2013	$305
	B.	For Donations made on or after January 1, 2014 or later	$8,000

Explanation of the March 15, 2019 filing

On March 1, 2019, the Division of Conservation filed a rulemaking notice containing proposed permanent rules identical to those found in this March 15, 2019 filing.

The March 1, 2019 filing contained the incorrect hearing date. This error was not discovered until after the March 1 notice was published in the Colorado Register, Vol. 42, No. 5, March 10, 2019.

This March 15, 2019 filing corrects the hearing date from April 1 to April 18, consistent with the original COPRRR filing, and consistent with notification to stakeholders of the correct April 18 hearing date and also of an in-person stakeholder meeting on March 21, 2019.

Notice of Proposed Rulemaking

Tracking number

2019-00117

Department

1100 - Department of Labor and Employment

Agency

1101 - Division of Oil and Public Safety

CCR number

7 CCR 1101-18

Rule title

UNDERGROUND DAMAGE PREVENTION SAFETY COMMISSION REGULATIONS

Rulemaking Hearing

Date

04/16/2019

Time

09:00 AM

Location

633 17th St., Suite 500, Denver, CO 80222

Subjects and issues involved

Senate Bill 18-167 provides rule making authority to the Underground Damage Prevention Safety Commission. This is the first filing for permanent rules.

Statutory authority

Excavation Requirements Act §§ 9-1.5-101, et. seq., C.R.S. These regulations have been created pursuant to Section 104.2 (2)(d) and 104.2(6)(a) of the Act.

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COLORADO DEPARTMENT OF

LABOR AND EMPLOYMENT

DIVISION OF OIL AND PUBLIC SAFETY

UNDERGROUND DAMAGE PREVENTION

SAFETY COMMISSION REGULATIONS

7 C.C.R. 1101-18

Effective: June 14, 2019

UNDERGROUND DAMAGE PREVENTION SAFETY COMMISSION REGULATIONS

COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF OIL AND PUBLIC SAFETY

TABLE OF CONTENTS

ARTICLE 1 GENERAL PROVISIONS

Section 1-1 Statement of Basis and Purpose

These regulations are promulgated to establish rules for the Underground Damage Prevention Safety Commission (Safety Commission) responsibilities within the Excavation Requirements Act §§ 9-1.5-101, et. seq., C.R.S. (the Act). The purpose of the Safety Commission is to prevent injury to persons and damage to property.

Section 1-2 Statutory Authority

These regulations have been created pursuant to Section 104.2 (2)(d) and 104.2(6)(a) of the Act.

Section 1-3 Effective Date

These regulations shall be effective on June 14, 2019. The previous version of these regulations were filed as an emergency rule that was effective February 14, 2019.

Section 1-4 Definitions

Terms in these regulations shall have the same definitions as those found in the Act or as defined below.

DAMAGE. Includes the penetration or destruction of any protective coating, housing, or other protective device of an underground facility, the denting or partial or complete severance of an underground facility, or the rendering of any underground facility inaccessible.

EMERGENCY SITUATIONS. Includes ruptures and leakage of pipelines, explosions, fires, and similar instances where immediate action is necessary to prevent loss of life or significant damage to property, including, without limitation, underground facilities, and advance notice of proposed excavation is impracticable under the circumstances.

EXCAVATION. Any operation in which earth is moved or removed by means of any tools, equipment, or explosives and includes augering, backfilling, boring, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching, hydro excavating, postholing, and tunneling. "Excavation" does not include:

(1) Routine maintenance on existing planted landscapes; or

(2) An excavation by a rancher or a Farmer, as defined in Section 42-20-108.5, C.R.S., occurring on a ranch or farm when the excavation involves:

(a) Any form of existing agricultural activity that is routine for that ranch or farm;

(b) Land clearing if the activity does not involve deep ripping or deep root removal of trees or shrubs; or

(c) Routine maintenance of:

(i) An existing irrigation facility if the facility has been subjected to maintenance in the previous 24 months; or

(ii) Existing fence lines.

FARMER. A person or such person's agent or contractor engaged in the production or raising of crops, poultry, or livestock.

FRIVOLOUS COMPLAINT. A complaint filed with the Safety Commission that is entirely without merit and is made with the intention of causing inconvenience, harassment or expense.

GRAVITY-FED SYSTEM. Any underground facility that is not pressurized and that utilizes gravity as the only means to transport its contents. These systems include sanitary sewer lines, storm sewer lines, and open-air irrigation ditches.

LICENSED PROFESSIONAL ENGINEER. A professional engineer as defined in Section 12-25-102, C.R.S.

NOTIFICATION ASSOCIATION. The statewide notification association of owners and operators of underground facilities created in Section 9-1.5-105, C.R.S., also known as Colorado 811 and the Utility Notification Center of Colorado.

OPERATOR or OWNER. Any person, including public utilities, municipal corporations, political subdivisions, or other persons having the right to bury underground facilities in or near a public road, street, alley, right-of-way, or utility easement. Operator or owner in these regulations does not include any railroad.

PERSON. Any individual acting on his or her own behalf, sole proprietor, partnership, association, corporation, or joint venture; the state, any political subdivision of the state, or any instrumentality or agency of either; or the legal representative of any of them.

ROUTINE MAINTENANCE. A regular activity that happens at least once per year on an existing planted landscape if earth is not disturbed at a depth of more than twelve inches by nonmechanical means or four inches by mechanical means and if the activities are not intended to permanently lessen the ground cover or lower the existing ground contours. Mechanical equipment used for routine maintenance tasks includes aerators, hand-held rototillers, soil injection needles, lawn edgers, overseeders, and hand tools.

SAFETY COMMISSION. Also known as the “Underground Damage Prevention Safety Commission.” The enforcement authority as established by statute.

SUBSURFACE UTILITY ENGINEERING NOTIFICATION. A notice to the notification association that a project is being designed by a licensed professional engineer and that the project will include the investigation and depiction of existing underground facilities that meet or exceed the ASCE 38 standard.

SUBSURFACE UTILITY ENGINEERING-REQUIRED PROJECT. A project that meets all of the following conditions:

(1) The project involves a construction contract with a public entity, as that term is defined in Section 24-91-102, C.R.S.;

(2) The project involves primarily horizontal construction and does not involve primarily the construction of buildings;

(3) The project:

(a) Has an anticipated excavation footprint that exceeds two feet in depth, not including rotomilling, and is a contiguous one thousand square feet, not including fencing and signing projects; or

(b) Involves utility boring.

(4) The project requires the design services of a licensed professional engineer.

UNDERGROUND FACILITY. Any item of personal property which is buried or placed below ground for use in connection with the storage or conveyance of water or sewage, electronic, telephonic, or telegraphic communications or cable television, electric energy, or oil, gas, or other substances. An item of personal property, as used in this definition, includes, but is not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments thereto.

VIOLATION. A determination by the Safety Commission that a violation of the Act has occurred.

VIOLATION, MAJOR. A major violation includes, but is not limited to, a violation that the Review Committee finds to be in blatant disregard of the best practices and the potential for injury to the public or property is highly probable.

VIOLATION, MINOR. A minor violation includes, but is not limited to, a frivolous complaint or a violation that the Review Committee finds to be valid and the potential for injury to the public or property is not a factor.

VIOLATION, MODERATE. A moderate violation includes, but is not limited to, a violation that the Review Committee finds to be not within best practices and the potential for injury to the public or property is foreseeable.

Section 1-5 Scope

These regulations apply to requirements defined in Sections 104.2, 104.4, 104.7 and 104.8 of the Act, although they may refer to other Sections of the Act.

Section 1-6 Codes and Standards

The following codes, documents or standards are incorporated by reference and may be purchased from the mailing addresses or websites listed with the title of each Institute or Association:

(1) **American Society of Civil Engineers (ASCE)**, 1801 Alexander Bell Drive, Reston, VA 20191; https://ascelibrary.org/

(a) Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data (ASCE 38-02)

Interested parties may inspect the referenced incorporated materials by contacting the Division of Oil and Public Safety at 633 17th Street, Suite 500, Denver, Colorado, 80202.

This rule does not include later amendments to or editions of the incorporated material.

Section 1-7 Safety Commission

The Safety Commission will conduct itself according to its adopted Bylaws and Code of Conduct, and these regulations.

ARTICLE 2 ENFORCEMENT OF VIOLATIONS

Section 2-1 Enforcement Process

The Safety Commission provides these regulations to denote its process for reviewing complaints and conducting hearings. When a person is found to be in violation of the Act and/or these regulations, the Safety Commission will pursue penalties or remedial actions against the person.

Section 2-2 Complaints

(1) The Safety Commission may review complaints from any person of alleged violations of the Act.

(a) A person who brings a frivolous complaint, as determined by the Safety Commission, commits a minor violation and is subject to a fine.

(b) The person filing the complaint may voluntarily withdraw the complaint prior to a hearing.

(2) The review of a complaint shall be completed by a review committee (Review Committee). The Review Committee shall:

(a) Be comprised of three to five members of the Safety Commission.

(b) Have an equal number of members representing excavators and owners/operators.

(c) Include at least one member who does not represent either excavators or owners/operators.

(3) The complaint process shall include:

(a) A complaint form, and if applicable a damage form, being completed and submitted to the Safety Commission.

(b) Within 90 days of the complaint form being received a hearing will be scheduled.

(i) Both the person filing the complaint and the alleged violator will be sent hearing notification letters to advise them of the logistics for the hearing.

(ii) Both parties shall receive a copy of the complaint form, and, if applicable, a damage form.

(iii) The scheduled hearing date may be modified by mutual agreement of all parties and rescheduled when the Review Committee is available.

(c) If applicable, the Safety Commission will file a Data Request Form with Colorado 811 to gain ticket information.

Section 2-3 Hearing

(1) Hearings shall be conducted in the following manner, unless otherwise directed by the Review Committee:

(a) Presentation of positions - every party to the proceeding shall have the right to present its case by oral and documentary evidence and shall provide eight copies of supporting documentation at the time of the hearing.

(b) The Review Committee shall utilize the complaint and damage forms (as applicable), presentations, the response to the Colorado 811 Data Request Form, and committee members' experience in the field in its discussion and finding of facts.

(c) Any member of the Review Committee may ask questions of any person involved in the hearing.

(2) Hearings shall be conducted in the following order, unless otherwise directed by the Review Committee:

(a) Complaint Report number is called.

(i) Introduction of Review Committee members and explanation of the proceedings.

(ii) Determination of whether any Review Committee members have a conflict of interest; this can be determined prior to the formation of a Review Committee, and will be reviewed at the start of the hearing.

(b) Presentation of position and submittal of documentation or other materials by the person filing the complaint.

(c) Presentation of position and submittal of documentation or other material by the person alleged to be in violation, in the complaint.

(d) Rebuttal by the person filing the complaint.

(e) Questions from the Review Committee to both parties.

(f) Discussion by the Review Committee on the findings of fact and recommendations for remedial action (if applicable).

(3) Maximum time allowed for hearings shall be the following, unless otherwise directed by the Review Committee:

(a) Each party shall have 20 minutes to present its case.

(i) The Review Committee may allow additional time for presentations.

(ii) If the Review Committee grants additional time to one person, the same amount of additional time will be offered to the other person.

(b) The person filing the complaint shall have five minutes for rebuttal.

(c) The Review Committee shall take as much time as is necessary to ask questions and discuss the complaint.

(4) Burden of Proof

(a) The person filing the complaint has the burden to prove by a preponderance of the evidence that the alleged violator committed a violation.

(5) Application of Technical Knowledge

(a) The Review Committee may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.

(b) The Review Committee may take notice of general, technical, or scientific facts within its knowledge, but only if the facts so noticed are specified in the record or are brought to the attention of the persons involved in the complaint before the final decision and both the person filing the complaint and the person alleged to be in violation are afforded an opportunity to controvert the facts so noticed.

(6) Representation by Counsel

(a) Any person permitted or compelled to testify or to submit data or evidence shall be entitled to the benefit of legal counsel of his or her own choosing and at his or her own expense, but a person may appear for his or her self.

(b) An attorney who is a witness may not act as counsel for the person involved in the hearing.

Section 2-4 Final Decision

(1) Review Committee's Finding of Facts:

(a) After due consideration of written and oral statements, and accompanying documentation, the Review Committee shall determine whether a violation of the law has occurred and, if appropriate, recommend remedial action, or make such determination of the matter as it shall deem appropriate consistent with the Act.

(b) Within seven business days after the completion of the hearing, the Review Committee shall provide to the Safety Commission a report of its findings and recommendations.

(2) Safety Commission's Final Determination:

(a) The Safety Commission shall review the Review Committee's findings and recommendations at its next scheduled meeting.

(i) The Safety Commission is bound by the Review Committee's findings of fact and decision.

(ii) The Safety Commission may adjust the Review Committee's recommendation of remedial action or penalty if an adjustment is supported by at least 12 members of the Safety Commission.

(b) Within 10 business days after the Safety Commission's meeting to review the Review Committee's findings and recommendations, the Safety Commission shall provide both parties involved in the complaint a summary of the Review Committee's findings and the Safety Commission's final determination with respect to any required remedial action or penalty.

(c) The decision of the Safety Commission is a final agency action subject to review by the District Court pursuant to Section 24-4-106, C.R.S.

Section 2-5 Remedial Actions

(1) A recommendation of remedial action that includes a fine requires a unanimous vote of the Review Committee.

(2) The Review Committee shall not recommend remedial action or a fine against a homeowner, rancher or Farmer (as defined), unless the Review Committee finds by clear and convincing evidence that a violation of the law has occurred.

(3) The Safety Commission may consider training, support services or other remediation measures that will improve the behavior of the person found in violation.

(4) Guidance for the recommendation of remedial action shall be consistent with the following principles:

(a) Whether the alleged violation is classified as a Minor, Moderate or Major violation (as defined).

(b) For a person who has not had a violation in the previous 12 months, the Safety Commission may consider alternatives to fines.

(c) The number of violations, relative to the number of notifications received, are a part of the consideration.

(d) The maximum fines are set forth in Table 2-5.

Table 2-5: Potential Enforcement Penalties				
Type of Violation	**Number of Violations within the previous 12 months**			
	1	**2**	**3**	**4**
Minor	$250	$500	$1,000	$5,000
Moderate	$1,000	$2,500	$5,000	$25,000
Major	$5,000	$25,000	$50,000	$75,000

Section 2-6 Home Rule Entity

(1) This enforcement process shall not apply to a home rule county, city and county, municipality, or power authority established pursuant to Section 29-1-204 (1), C.R.S.; except that if the Safety Commission identifies an alleged violation by the home rule entity, the Safety Commission shall:

(a) Inform the home rule entity of the alleged violation.

(b) If requested by the home rule entity, suggest corrective action.

(2) Every home rule entity described in subsection (1) shall:

(a) Adopt by resolution, ordinance, or other official action either:

(i) Its own damage prevention safety program similar to that established pursuant to the Act; or

(ii) A waiver that delegates its damage prevention safety program to the Safety Commission.

(b) Notify the Safety Commission of the decision in subsection (a).

ARTICLE 3 BEST PRACTICES

(1) The Safety Commission shall advise the Notification Association and other state agencies, the general assembly, and the local government on:

(a) Best practices and training to prevent damage to underground utilities.

(b) Policies to enhance public safety, including the establishment and periodic updating of industry best standards, including marking and documentation best practices and technology advancements.

(c) Policies and best practices to improve efficiency and cost savings to the Colorado 811 program, including the review, establishment, and periodic updating of industry standards, to ensure the highest level of productivity and service for the benefit of both excavators and owners and operators.

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

Regulation 39-22-109. Colorado-Source Income.

(1) **General Rule.** A Nonresident who derives income from sources in Colorado and who has Nexus must file a Colorado income tax return and pay Colorado income tax on Colorado net taxable income. Deferred recognition of any income from sources in Colorado remains Colorado-source income when such income is finally recognized. A Nonresident's Colorado income tax liability is calculated by first calculating the Nonresident's Colorado income tax as if the Nonresident was a full year Colorado resident and multiplying such tentative tax by the ratio of the Nonresident's Colorado modified federal adjusted gross income to the Nonresident's total modified federal adjusted gross income. See Department Regulation 39-22-110 for rules governing modifications to income.

(2) **Definitions.** The following terms have the meanings set forth below unless the context of the regulation indicates otherwise:

(a) 'Nonresident' means an individual who is neither a domiciliary of Colorado nor a statutory resident of Colorado as set forth in § 39-22-103(8), C.R.S., and Department Regulation 39-22-103(8)(a).

(b) 'Business' means a business, trade, profession or occupation, including the activities of a nonprofit Pass-through entity that has unrelated business taxable income for federal income tax purposes. Business does not include activities of a Nonresident whose only activity in Colorado is buying and selling intangible property on his or her own account (See § 39-22-109(2)(a)(V), C.R.S.).

(c) 'Entertainer' means an individual who receives compensation to act, entertain, or inform (e.g., speaker or lecturer) at one or more discrete events in Colorado. This includes, but is not limited to, actors, bands, singers, orchestras, dancers, comedians, speakers, lecturers and similar performers.

(d) 'Member' means a partner, member, or shareholder of a Pass-through entity as defined in subparagraph (2)(e), below.

(e) 'Pass-through entity' means a partnership, limited partnership, limited liability partnership, a limited liability company that is treated as a partnership for Colorado tax purposes or a trust that is not taxed at the entity level (e.g., a grantor-type trust).

(f) 'Nexus' means the Nonresident's presence in Colorado, whether by being personally present in Colorado or being present in Colorado through agents or representatives, including through membership in a Pass-through entity or in a series of Pass-through entities described in paragraph (3)(c), below, for the purpose of direct or indirect financial

profit, gain, benefit or advantage. Once nexus has been established, that nexus will continue for as long as the person continues to receive income from sources in Colorado that are related to such presence.

(3) **Common Types of Income Derived from Sources Within Colorado.** A Nonresident's income derived from a source within Colorado is subject to Colorado income tax. The source of income refers to the location where income is earned and not to the location of the payor or to the residency of the taxpayer. § 39-22-109, C.R.S., lists several types of income that are conclusively presumed to be Colorado-source income, but it is not an exclusive list of Colorado-source income. Colorado-source income includes any income derived from sources within Colorado including, but not limited to:

(a) *Ownership of Real or Tangible Personal Property.* Income derived from any ownership interest in real or tangible personal property located in Colorado (e.g., leases and licenses) is Colorado-source income, regardless of whether the Nonresident carries on a Business within Colorado and regardless of the place where the sale of such property is consummated. The following are examples of Colorado-source income.

(i) Rent and royalty income earned from real or tangible personal property located in Colorado is Colorado-source income.

(ii) Any gain or loss realized from the sale of real property located in Colorado is Colorado-source income. Deferred recognition of a gain (or loss) from the sale or exchange of real property located in Colorado remains Colorado-source income when such gain (or loss) is finally recognized. These types of transactions include installment sales, exchanges or transfers.

(A) Example: A Nonresident owns real property in Colorado and makes an I.R.C. § 1031 exchange of the Colorado property for real property located in Texas. At the time of the exchange, the property had appreciated in value. In the following year, the Nonresident sells the Texas property. That portion of the gain attributable to the appreciation in value of the Colorado property is Colorado-source income even though the income was not recognized until the Texas property was sold. The Nonresident continues to have Colorado Nexus as long as the gain is deferred.

(iii) With respect to tangible personal property that appreciates in value while located in Colorado but is removed from Colorado for purposes of selling such property, the gain from the sale of such property is Colorado-source income.

(A) Example: A Nonresident owns a valuable painting that is displayed in her vacation home in Colorado. The painting significantly appreciates in value while located in Colorado. The Nonresident moves the painting to Nevada and immediately sells the painting for significant gain. The gain is Colorado-source income.

(iv) Interest income paid on a tax lien certificate for property located in Colorado is Colorado-source income. Any other interest income derived from the ownership of real or tangible personal property located in Colorado is also Colorado-source income. However, interest income from a loan secured by real or tangible property located in Colorado is not Colorado-source income.

(v) Interest income from an installment sale of real or tangible personal property located in Colorado is Colorado-source income.

(b) *Business Income.* Income earned by, credited to, derived from, accumulated for, or otherwise effectively attributable to (referred to herein as "derived from") a Business carried on in Colorado is Colorado-source income. A Nonresident carries on a Business in Colorado if the Nonresident (a) is present in Colorado for Business or (b) directly or indirectly (e.g., through employees, representatives, or as a member of a pass-through entity) maintains, operates or shares in the maintaining or operating of any place in Colorado where Business affairs are conducted. When a Business is carried on within and outside Colorado, only such income that is fairly and equitably attributable to the Business carried on in Colorado is Colorado-source income. The following is a non-exhaustive list of common types of Business income and rules for sourcing such income.

(i) *Wage Income*. Income earned as an employee for work performed in Colorado is Colorado-source income, unless a more specific rule below applies. "Performed in Colorado" means the employee is physically in Colorado when the employee performs the work.

(A) *Telecommuting*. A Nonresident employee who telecommutes from a location outside of Colorado is not working in Colorado and the employee's income from such work is not Colorado-source income.

(B) *Work Days*. An employee's income is apportioned to Colorado based on the number of days the employee works ("Work Day") in Colorado. A Work Day in Colorado means a day in which the majority of the employee's work time for that day is performed in Colorado. Travel time to Colorado is included in calculating the Colorado Work Day hours, but travel time departing from Colorado is not included calculating the Colorado Work Day hours. The denominator of this ratio is the total number of Work Days the employee works in the year. A day is not a Work Day if the work done on such day is *de minimis.* See example (II) below.

(I) Example. Nonresident flies from California to Colorado on Tuesday but does not perform any other Business-related work in either California or Colorado on Tuesday. Nonresident attends a 2 hour Business meeting on Wednesday, returns to California Wednesday afternoon, and works 1 hour in the California office. Travel time to Colorado on Tuesday is considered a Work Day in Colorado because no other work was performed on Tuesday. Wednesday is not a Colorado Work Day because the majority of the work hours are allocated to California (flight to California and office work in California).

(II) *Example.* Nonresident prolongs his work trip to Colorado through the weekend. While in Colorado on the weekend vacation, the Nonresident checks his or her email and responds to a few non-substantive emails. Such a day is neither a Colorado Work Day nor a Work Day anywhere.

(ii) *Independent Contractor.* Business income of an independent contractor is sourced depending on whether the income is from a purely personal service or is from other than purely personal service. Purely personal services consist of services performed by an individual independent contractor with only incidental contributions from either other individuals or property. Such services include, but are not limited to, legal, accounting, architecture, or other professional services.

(A) *Purely personal service income.* If an independent contractor's Business income is earned by performing purely personal services and the purely personal services are performed both within and outside Colorado, the Nonresident shall apportion such income in the ratio of the number of hours the individual performed such services in Colorado to the total number of hours the individual performed such services in the year. But see paragraph (4)(b)(iii) and (iv) if the Nonresident is paid on commission or contingency for purely personal services. Each discrete Business activity shall be separately apportioned. See paragraph (4)(b)(ii)(3) for a discussion of discrete Business activities.

(I) Hours worked includes non-billable hours.

(II) Nonresidents independent contractors who work on a single job for entire days may utilize the Work Day rule described in paragraph (3)(b)(i)(B) of this regulation.

(III) Example. An expert witness testifies in trials conducted in Colorado during the year. The total hours the expert witness spent working in Colorado was 26. Therefore, the expert witness must apportion his or her income in the ratio of 26 hours in Colorado over the total number of work hours performed in that year.

(B) *Other than purely personal services income*. If an independent contractor's Business income is earned from activities other than the performance of purely personal services, then the Business income is apportioned under the apportionment rules for corporations set forth in § 39-22-303.6, C.R.S., and the regulations thereunder.

(I) Example. A Nonresident independent contractor provides oil and gas consulting services and travels to Colorado to provide consultation services to an oil and gas exploration company. Consultant hires Company B to perform laboratory analysis, the results of which are used by consultant to provide consulting services to the exploration company. Consultant is not performing purely personal services because the personal services of Company B are not incidental in value to consultant's services. Consultant uses the apportionment rules set forth in § 39-22-303.6(6), C.R.S., and the regulations thereunder.

(II) Example. Nonresident independent contractor provides interior design consulting services to homeowners. Designer also sells a substantial amount of tangible personal property to Colorado homeowners. Designer is not performing purely personal services in Colorado because he or she makes sales of tangible personal property that are not incidental in value. The designer will apportion Business income using § 39-22-303.6(5), C.R.S., and the regulations thereunder.

(C) *Discrete Business Activities*. If the Nonresident independent contractor carries on two or more discrete Business activities in Colorado during the year, then the Nonresident independent contractor shall separately apportion the income derived from each activity, unless the income from each cannot be separately determined. The apportionment for each discrete Business activity, if both are purely personal services, is

calculated based on the ratio of the number hours the individual performed such services in Colorado to the total number of hours the individual performed such purely personal services everywhere in the tax year. If the Nonresident independent contractor carries on more than one discrete Business activity, and at least one is a purely personal service while at least another is not a purely personal service, the Nonresident independent contractor may choose to either apportion his or her income under 1) § 39-22-303.6, C.R.S., and the regulations thereunder or 2) may separately calculate and apportion his or her income on the basis of work hours.

(I) Example. An independent contractor provides purely personal services in the form of consulting services for two separate companies in the same year. Contractor is paid on an hourly basis and performs these services in and outside Colorado for the first company and performs all consulting services outside Colorado for the second company. Each consulting job is a discrete income producing activity and, in the absence of records demonstrating a more accurate apportionment methodology, the Department will presume that the income for work performed for the first company should be apportioned based on the ratio of the number of work hours the consultant worked in Colorado to the total number of work hours in the tax year for the first company. Income from the second company is a discrete Business activity, the income from such work is entirely allocated to a source outside Colorado, and neither the income nor the work hours for such work is included in the apportionment for the first company.

(iii) *Commissions*. The amount of Colorado-source income of a Nonresident employee or independent contractor whose compensation is based on commissions is determined by multiplying the gross income earned from all commissions by a fraction, the numerator of which is the amount of sales made within Colorado and the denominator of which is the amount of sales made everywhere. The determination of whether sales are made within Colorado or elsewhere is based upon where the salesperson performs the activities in obtaining the order, not the location of the formal acceptance of the contract. If the Nonresident also earns income other than as commissions (e.g., wages as base pay), then the Nonresident must apportion such non-commission income based on the applicable rule (e.g., wage income apportioned as set forth in paragraph (4)(b)(i), above).

(iv) *Contingency Fees.* Each contingency fee arrangements is usually viewed as discrete Business activity and the fee is apportioned based on the ratio of the number of hours the Nonresident worked in Colorado on the discrete Business activity to the total number of hours worked everywhere on the discrete Business activity in the year.

(v) *Board of Directors.* Compensation paid by a corporation for services performed in Colorado by a Nonresident member of the board of directors for director services, including attendance at a board of directors' meeting, is Colorado-source income. If all services are performed in Colorado, the total income for such services is Colorado-source income. If the director’s services are performed both within and outside Colorado, then the total income paid for performing such service is multiplied by a fraction, the numerator of which is the number of hours the director is in Colorado performing director services and the denominator of which

is the total hours the director provides services in the year. If the Nonresident is a paid member of more than one board of directors in the year, then the ratio is determined separately for each board.

(vi) *Construction Contractors*. Income of a construction contractor or subcontractor for construction services is sourced to the state where construction service is performed.

(vii) *Professional Athletes Employed by a Professional Team*. Income earned in Colorado by a Nonresident professional athlete employed by a professional team is Colorado-source income. The compensation received for services rendered as a member of a professional athletic team reported for federal income tax purposes shall be apportioned in the ratio of the number of duty days of professional services performed in Colorado over the total number of duty days during the tax year for which the athlete is required to make his or her services available to the franchise under the terms of his or her contract. The formula applies to active team members, team members on the disabled list, and other persons required to travel with the team and to perform services on behalf of the team, including coaches, managers and trainers. Teams include, but are not limited to, any professional baseball, basketball, football, hockey, soccer, and lacrosse teams.

(A) Duty days include all days of game, practice or travel that occur on or after the beginning of the team's official pre-season training through the last game in which the team competes. Duty days also include days the Nonresident is required by contract to perform services, but which fall outside this period, such as instructional leagues, “Pro Bowl”, or promotional events. In addition, duty days include days during the off-season when a team member undertakes training activities as part of a team-imposed program, but only if performed at the team facilities. Duty days for any member joining a team during the season shall begin on the day such person becomes a member, and for any member leaving a team during the season shall end on the day such person ceases to be a member. When a person switches teams during a taxable year, a separate duty day calculation shall be made for the period such person was with each team. Duty days do not include any try-out or pre-season cut days for which the Nonresident is not under contract with a team or any days for which a member is not compensated and is not rendering services for the team in any manner because such person has been suspended without pay and prohibited from performing any services for the team.

(B) Each duty day is assigned to the state in which the service is performed. Duty days during which a team member is on the disabled list performing no substantial services for the team will not be apportioned to any particular state but will be included in the total number of duty days for apportionment purposes.

(C) Travel days are considered duty days and are apportioned as follows: Travel days which include a game, required practice, meeting, or other service are duty days apportioned to the state in which the game, practice, or service is conducted. Travel days not involving a game, practice, or required service will not be apportioned to any particular state, but will be included in the total number of duty days.

(D) "Compensation received for services rendered as a member of a professional athletic team" means the total compensation received for the official pre-season training period through the last game in which the team competes or is scheduled to compete during the taxable year, plus any additional compensation received for rendering services for the team on a date that is not during the season (e.g., compensation for representing a team at an all-star game) during the taxable year. "Compensation received for services rendered as a member of a professional athletic team" includes, but is not limited to, salaries; wages; guaranteed payments; bonuses except as otherwise provided herein. Bonuses are includable in "compensation received for services rendered as a member of a professional athletic team" if they are earned as a result of play during the season or for playing in championship, playoff or "all-star" games. Bonuses are also includable if paid for signing a contract, unless all of the following conditions are met:

(I) The bonus is not conditional upon the athlete playing any games, or performing any subsequent services, for the team, or even making the team,

(II) The bonus is separate from the payment of salary or any other compensation, and

(III) The bonus is nonrefundable.

(E) Income not subject to apportionment would include strike benefits contract buy-out payments, severance pay, termination pay, relocation payments, and other payments not related to the performance of service.

(F) *Examples.*

(I) Player A, a Nonresident individual, is a member of a professional athletic team. His accounting period for federal income tax purposes (and, hence, for Colorado income tax purposes) is the calendar year. Player A's contract with the team requires Player A to report to his team's training camp and to participate in all exhibition, regular season and playoff games. This two-season contract covers an athletic season that begins during calendar year 2013 and ends during calendar year 2014 (for which Player A shall be paid $400,000) and an athletic season that begins during calendar year 2014 and ends during calendar year 2015 (for which Player A shall be paid $600,000). Assuming that Player A is paid $500,000 during 2014 (50% of his salary for the 2013-2014 season and 50% of his salary for the 2014-2015 season), the proportion of such compensation received by Player A for calendar year 2014 that is derived from Colorado sources is that proportion of the $500,000 Player A had duty days in Colorado during calendar year 2014 to the total duty days for Player A during calendar year 2014.

(II) Player C, a Nonresident individual, is a member of a professional athletic team. During the season, Player C travels to Colorado to participate in the annual all-star game as a representative of his team. The days that Player C spends in Colorado for travel, practice and the game are considered to be duty days spent in

Colorado during the taxable year and are included in duty days for Player C during the taxable year.

(III) Assume that the facts are the same as in Example (c), except that Player C is not participating in the all-star game and is not rendering services for his team in any manner. Player C is travelling to and attending the game solely as a spectator. If Player C is not required to render services for the team during the all-star game, then the days that Player C spends in Colorado to attend the all-star game are not considered to be duty days spent in Colorado during the taxable year and are not included in duty days for Player C during the taxable year.

(viii) *Entertainers and Professional Athletes Not Employed by a Professional Team.* Income earned by a Nonresident professional athlete that is not a member of a professional team (e.g., golfers, boxers, wrestlers, racers, etc.) or a Nonresident Entertainer for performances, competitions, or events held within Colorado is Colorado-source income. If the Entertainer or professional athlete is paid an identifiable amount for each event performed in Colorado, that amount is the amount of Colorado-source income. If the Nonresident is not paid a specific amount for the performance or competition in Colorado, then the Department will presume that a fair apportionment of the Nonresident's income for such activity is the Nonresident's gross income derived from the performance(s) or competition(s) multiplied by the ratio of the number of performances or competitions performed in Colorado divided by the total number of performances and competitions performed anywhere in the year.

(ix) *Stock Options*. Income from the exercise of employee stock options is Colorado-source income if such income is treated as compensation for federal tax purposes and to the extent the employee worked in Colorado during the period the employee was required to work for the employer prior to the exercise of the option.

(x) *Severance, Paid-out Sick and Vacation Leave, Disability Pay and Unemployment Insurance.* Severance pay, paid-out sick and vacation leave pay, disability pay and unemployment insurance is Colorado-source income to the extent that the income is attributable to employment in Colorado regardless of whether the person is a resident when the benefit is paid.

(xi) *Deferred Compensation*. Deferred compensation is Colorado-source income to the extent it is income derived from a Business, including employment, carried on in Colorado. Deferred compensation includes all compensation paid or made available to the Nonresident in a tax year following the year in which the compensation was earned. Deferred compensation paid to a Nonresident is not subject to Colorado income tax if 4 U.S.C. § 114 applies to such income (including retirement plans under sections I.R.C. § 401(a), 403(a) and (b), 408(k), 7701(a)(38), 457, railroad retirement benefits (45 U.S.C. § 231(m)), Social Security benefits, or other income that federal law precludes Colorado from subjecting to Colorado income tax, even if the retirement benefits were earned in tax years when the taxpayer was a resident or was a Nonresident earning income from Colorado sources). Deferred compensation is often treated as wage income and therefore paragraph 4(b)(i) above applies in determining whether or not the deferred compensation derived from a Business carried on in Colorado in the year it was earned is Colorado-source income. Similarly, to the extent that deferred income reflects other types of income (e.g., royalties from patents employed in Colorado), then the relevant subparagraph of this regulation applies.

(xii) *Guaranteed Payments.* Guaranteed payments typically are in lieu of wage income and the source of such income is determined in accordance with the rules for sourcing wage income (see paragraph (4)(b)(i), above). If the guaranteed payment is not in lieu of wage income, then the guaranteed payment is allocated or apportioned based on the income-generating activity (e.g., a guaranteed payment based on partnership income from the sale of real property located in Colorado is allocated pro rata to the Nonresident partner).

(xiii) *State Income Tax Refunds.* A state income tax refund is apportioned to Colorado to the extent the underlying or related income is derived from any Business, including employment, carried on by the Nonresident in Colorado.

(xiv) *Military Personnel and Their Spouses*. Compensation paid by the United States for service in the armed forces of the United States performed by a Nonresident in Colorado is not Colorado-source income. See §§ 39-22-109(2)(b) and 103(8)(b), C.R.S., and Department Regulation 39-22-103(8) governing income of military personnel and their spouses.

(xv) *Payments from a Covenant Not to Compete*. Income derived from a covenant not to compete is Colorado-source income to the extent that it is derived from any Business, including employment, carried on by the Nonresident in Colorado.

(xvi) *Disaster Relief Workers.* For tax years beginning on or after January 1, 2015, the income earned by a Nonresident disaster relief worker performing work in Colorado during a disaster period is exempt from Colorado income tax. See § 39-22-104(4)(t), C.R.S.

(c) *Distributive Share of a Member of a Pass-through Entity.* Income received as part of the Nonresident individual's distributive share of a Pass-through entity income, gain, loss, or deduction is Colorado-source income to the extent that the Pass-through entity determines that income is Colorado-source income pursuant to § 39-22-203(1)(a), C.R.S., and the regulations promulgated thereunder. These rules apply to all Members of a Pass-through entity regardless of the type of the entity (e.g., limited liability company, limited liability partnership, limited liability limited partnership) or the status of the Member (e.g., limited or general).

(i) A Nonresident has Nexus with Colorado if the Nonresident is a Member of a Pass-through entity doing business in Colorado.

(ii) *Character of income*. The activities of a Pass-through entity are attributable to its Members. Therefore, a Member is engaged in a Business in Colorado to the extent the Pass-through entity is engaged in Business in Colorado. The character of the item of income, loss, deduction or credit included in the Member's distributive share is determined as if the item was realized or incurred directly by the Member from the source from which the item was realized by the Pass-through entity or incurred in the same manner as the Pass-through entity. The principles of this paragraph apply in the case of an ownership chain that runs through multiple Pass-through entities.

(iii) A Nonresident Member of a Pass-through entity deriving income from within Colorado and elsewhere has Colorado-source income as determined by § 39-22-109, C.R.S., and this regulation, or as determined by § 39-22-303.6, C.R.S., and the regulations thereunder if the Pass-through entity elects under § 39-22-203(1)(a), C.R.S., to apportion its income pursuant to § 39-22-303.6, C.R.S.

(iv) A Nonresident Member's share of Colorado-source Business income of a Pass-through entity that elects to apportion its income pursuant to § 39-22-303.6, C.R.S. (including the special apportionment regulations adopted thereunder), shall be based on the Member's pro rata share of such Pass-through entity's income multiplied by the Pass-through entity's apportionment percentage.

(v) In the case of a Nonresident who is a Member of a partnership ("first partnership"), which partnership is a partner in another partnership ("second partnership"), the following rules apply:

(A) *Unitary Partnerships.* In the case of unitary partnerships, the election made by the second partnership is irrelevant to the treatment of income of the first partnership.

(I) If the first partnership makes the election to apportion its income pursuant to § 39-22-303.6, C.R.S. (including the special apportionment regulations adopted thereunder), and is unitary with the second partnership as determined by general unitary theory, then the Nonresident member of the first partnership's share of Colorado source income is the Member's pro rata share of the partnership's Colorado-source income as determined by § 39-22-303.6, C.R.S. The first and second partnerships are treated as a single entity for purposes of calculating apportionment under § 39-22-303.6, C.R.S.

(II) If the first partnership makes the election not to apportion its income pursuant to § 39-22-303.6, C.R.S., and is unitary with the second partnership, then the partnerships are treated as one partnership and the income is sourced in accordance with this regulation.

(B) *Non-unitary Partnerships.* In the case of non-unitary partnerships, the election made by the first partnership is irrelevant to the treatment of income of the second partnership.

(I) If the two partnerships are non-unitary, then regardless of the election made by the first partnership, the first partnership's pro-rata share of the second partnership's Colorado-source income is directly allocated by the first partnership to Colorado and is not apportioned. The pro-rata share of such income passes through to the Nonresident Member as Colorado-source income.

(vi) A Nonresident individual may include as a credit for taxes paid on their Nonresident individual income tax return any payment made on their behalf by a partnership or Subchapter S corporation on a composite return. See §§ 39-22-601(2.5) and (5), C.R.S.

(vii) *Investment Partnerships*. A partnership whose sole activity is to buy and sell securities for its own account is not carrying on a Business in Colorado. Therefore, a Nonresident individual partner of such a partnership is not subject to Colorado income tax on their distributive share of such partnership income. § 39-22-109(2)(a)(V), C.R.S. A partnership that engages in other activities in Colorado that are neither the described activities here nor entirely ancillary to such activities is carrying on Business in Colorado.

(viii) *Foreign Source Income of an Export Partnership*. See, § 39-22-206, C.R.S., for the exclusion of foreign source income of an export partnership from Colorado taxable income.

(d) *Estates and Trusts.* The Colorado-source income of a Nonresident's distributive share of estate or trust income shall be determined as follows:

(i) A Nonresident individual's share of estate or trust income, gain, loss or deduction is Colorado-source income to the extent the estate or trust derives income from sources described in section (3), above. Estates or trusts that derive income from a Business carried on partly within and without Colorado allocate and apportion their income in accordance with the provisions of this regulation.

(ii) Income received by a Nonresident fiduciary of a resident trust is sourced to Colorado.

(iii) The character of the item of income, loss, deduction or credit included in the Nonresident beneficiary's distributive share is determined as if the item was realized or incurred directly by the beneficiary from the source from which the item was realized by the estate or trust, or incurred in the same manner as the estate or trust.

(e) *Intangible Personal Property.* Income, including gain, loss, interest, annuity benefits, and dividends earned by a Nonresident is Colorado-source income when the intangible property earning income is employed in a Business in Colorado. The following is a non-exhaustive list of examples of intangible property employed in a Business activity.

(i) Patent and copyright (including trademark and other similar intangible interests) royalties constitute Colorado-source income if, in the case of a patent, the patent is employed in production, fabrication, manufacturing, processing or other commercial activity in Colorado and, in the case of copyright, if the printing or publication of the copyrighted material occurs in Colorado.

(ii) *Sale of Interest in Pass-through Entity*. Gain or loss from the sale of a Member's active interest in a Pass-through entity is Colorado-source income in the same proportion as the entity's average apportionment factor for the immediately prior three tax years. Gain or loss from the sale of a Member's passive interest in a Pass-through entity is not Colorado-source income. A Member's interest is passive if, in the tax year the interest is sold, the Member did not materially participate in the Business of the Pass-through entity as defined in I.R.C. § 469(h).

(iii) Income from the sale of goodwill in a Business is allocated or apportioned in the same percentage as the sale of the Business's other assets.

(f) *Subchapter S Corporations.*

(i) A Subchapter S corporation's distribution of Colorado-source income to a Nonresident is subject to Colorado income tax. Subchapter S corporation distribution of income attributable to Colorado sources is allocated and apportioned pursuant to § 39-22-303.6, C.R.S., and the regulations thereunder.

(ii) The character of income of a shareholder of a Subchapter S corporation is not determined as if the item of income or expense is incurred by the shareholder

but, rather, is determined as if the income is incurred directly by the Subchapter S corporation. See § 39-22-323(3), C.R.S

(iii) See § 39-22-326, C.R.S., for calculation for an individual who is a part-year Nonresident. A subchapter S corporation must file a tax return that applies apportionment as described in § 39-22-303.6, C.R.S. See § 39-22-601(2.5), C.R.S.

(g) Gambling and Games of Chance. Income from gambling and games of chance conducted in Colorado, including limited stakes gambling, bingo, raffle, Colorado Lottery, sweepstakes, door prizes and other games of chance, is Colorado-source income regardless of whether the Nonresident was present in Colorado when the gambling or game was conducted or the winnings or prize was awarded or paid.

(4) **Net Operating Loss Carryforwards.** A net operating loss carryforward is treated as Colorado or non-Colorado sourced based on the source in the year the loss was generated.

(a) *Example*: Taxpayer is a resident of California in tax year 1 and generates a federal net operating loss of $80,000 that is carried forward on the federal return. In tax year 2, taxpayer has $50,000 of California-source income and $60,000 in Colorado-source income. Pursuant to § 39-22-110, C.R.S., taxpayer calculates the tentative Colorado income tax based on the net income of $30,000. The numerator of the apportioning ratio that is applied to the tentative Colorado income tax does not include the net operating loss generated in California but the denominator includes the net operating loss. Assuming taxpayer has no “above-the-line” adjustments or adjustments described in §§ 39-22-104(3) and (4), C.R.S., the ratio is 50/(50+60-80)=5/3. In this case, the taxpayer multiplies Colorado tentative tax by a ratio greater than one. See Department Regulation 39-22-110 for a discussion of the tentative tax and adjustments to income of part-year residents and full-year nonresidents.

Cross References

1. See 1 CCR 201-2, Regulation 39-22-110 for guidance on how a part-year resident or nonresident reports Colorado-source income, and for the treatment of modifications to federal income on the Colorado return.

Regulation 39-22-303.7–1. Definitions for Sourcing Sales of Mutual Fund Service Corporations.

In addition to the definitions provided in §39-22-303.7, C.R.S., and for the purpose of implementing §§ 39-22-303.5, 39-22-303.6, 39-22-304, and 39-22-303.7, C.R.S., and related regulations, the following terms are defined or further defined as follows:

(1) "Affiliate of" or "affiliated with" another person means any person directly or indirectly controlling, controlled by, or under common control with such other person.

(2) "Affiliated regulated investment company" or "affiliated RIC" means a regulated investment company that (1) is a shareholder in another regulated investment company and (2), in common with such other regulated investment company, obtains management or distribution services, as described in (4)(a) and (4)(b), from the same provider of such services or a related provider.

(3) "Direct" and "indirect" services:

(a) *Direct services*. Amounts are derived directly from the performance of management, distribution, or administration services when they are received as compensation for providing such services to a RIC or to a RIC's officers, directors or trustees acting on behalf of the RIC. For example, the fee received by a person hired by a RIC's trustees to manage the RIC's assets is derived directly from the performance of management services.

(b) *Indirect services*. Amounts are derived indirectly from the performance of management, distribution, or administration services when they are received as compensation for providing such services to a person who is directly responsible for providing management, distribution or administration services to a RIC pursuant to a contract between such person and the RIC or the RIC's officers, directors, or trustees acting on behalf of the RIC. For example, the fee received by a brokerage firm hired by a person that is under contract to provide management services to a RIC is derived indirectly from the performance of management services.

(4) "Mutual Fund Sales" means gross receipts derived, directly or indirectly, from the performance of the following services:

(a) "Management services." The term management services includes, but is not limited to, the rendering of investment advice or investment research to or on behalf of a RIC, making determinations as to when sales and purchases of securities are to be made on behalf of the RIC, or the selling or purchasing of securities constituting assets of a RIC. Such activities must be performed:

(i) pursuant to a contract with the RIC entered into pursuant to 15 U.S.C. section 80a-15(a);

(ii) for a person that has entered into a contract referred to in subsection i) with the RIC; or

(iii) for a person that is affiliated with a person that has entered into a contract referred to in i) with the RIC.

(b) "Distribution services." The term distribution services includes, but is not limited to, advertising, servicing, marketing or selling shares of a RIC, including the receipt of contingent deferred sales charges and fees received pursuant to 17 CFR § 270.12b-1 (Sept. 9, 2004), which is incorporated herein by reference, but such incorporation by reference does not include later amendments or editions of this referenced material.

Certified copies of this material are available for review in the executive director's office of the Department of Revenue at 1375 Sherman Street, Denver, Colorado 80261. Additionally, a copy of this material may be examined at any state publications depository library.

(i) In the case of an open end company, advertising, servicing or marketing shares must be performed by a person who is either engaged in or affiliated with a person that is engaged in the services of selling shares of a RIC. The service of selling shares of a RIC must be performed pursuant to a contract entered into pursuant to 15 U.S.C. section 80a-15(b).

(ii) In the case of a closed end company, advertising, servicing or marketing shares must be performed by a person who was either engaged in or affiliated with a person that was engaged in the services of selling shares of a RIC.

(c) "Administration services." The term administration services includes, but is not limited to, clerical, fund or shareholder accounting, participant record keeping, transfer agency, bookkeeping, data processing, custodial, internal auditing, legal and tax services performed for a RIC. The provider of administration services must also provide or be affiliated with a person that provides management or distribution services to any RIC.

(5) "Average Number of Shares" means the average of the number of shares owned by a class of shareholders at the beginning of each year and by the same class of shareholders at the end of the year, where "the year" refers to the RIC's taxable year that ends with or within the mutual fund service corporation's taxable year.

(6) "RIC" or "regulated investment company" or "fund" means a regulated investment company as defined in section 851 of the federal internal revenue code of 1986, as amended. For purposes of the apportionment of income pursuant to § 39-22-303.7or § 39-22-303.6(9), C.R.S., and these regulations, if the mutual fund service corporation principally provides management, distribution, or administration services to regulated investment companies as defined in section 851 of the federal internal revenue code, such terms also include pension and employee retirement plans and foreign entities similar to regulated investment companies as defined in section 851 of the federal internal revenue code.

(7) "Shareholder factor" or "Colorado shareholder factor" means the Average Number of Shares owned by the RIC's shareholders domiciled in Colorado divided by the Average Number of Shares owned by the RIC's shareholders everywhere.

Regulation 39-22-303.7–2. Application.

(1) The Colorado net income of mutual fund service corporations shall be calculated pursuant to §§ 39-22-303.6, and 39-22-304, C.R.S., with the modification to apportionment set out in § 39-22-303.7, C.R.S., and related regulations.

(2) **Colorado Receipts from Mutual Fund Sales.** To determine Colorado receipts from mutual fund sales, a mutual fund service corporation must calculate mutual fund sales by fund and apply the Colorado shareholder factor for each fund to such mutual fund sales by fund.

(a) Colorado receipts by fund are calculated by multiplying mutual fund sales by fund by each fund's shareholder factor.

(b) The total Colorado receipts from mutual fund sales are then calculated by adding together the Colorado receipts for each separate fund.

(3) If the domicile of a shareholder is unknown to the mutual fund service corporation because the shareholder of record is a person that holds the shares of a regulated investment company as a depositor for the benefit of others, §39-22-303.7(2)(b) provides that the mutual fund service corporation may use any reasonable basis, such as ZIP codes of underlying shareholders or US census bureau data, in order to determine the proper location for the assignment of the shares. If no other basis appears reasonable, and if the number of such shares is not a majority of the total shares of the fund, then it shall be reasonable to exclude such shares from both the numerator and the denominator of the shareholder factor calculation.

Regulation 39-22-303(10). Foreign Source Income.

"Foreign source income" is taxable income from sources outside the United States as defined in section 862 of the internal revenue code. "Foreign source income" includes, but is not limited to, interest, dividends (including Sec. 78 "gross-up,") compensation for personal services, rents and royalties, and net income from the sale of property. "Foreign source income" is gross income, less expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any other expenses, losses, or deductions that cannot be allocated to some item or class of gross income.

IRC Sec. 78 dividend shall be subtracted from federal taxable income in accordance with 39-22-304(3)(j), C.R.S.

(1) If a taxpayer elects to claim foreign income taxes as a deduction for federal income tax purposes, such deductions shall also be allowed for Colorado income tax purposes.

Colorado modifications to federal taxable income shall include any foreign source income and related foreign income taxes included in a combined report but not included in the federal return.

(2)

(a) If a federal election is made to claim foreign taxes as a credit, a percentage of foreign source income shall be excluded from Colorado income subject to apportionment and from the numerator and denominator of the receipts factor.

For purposes of this regulation, foreign tax includes tax paid or accrued, deemed paid, or carried over or carried back to the tax year, per the federal income tax return. Not included are taxes carried over from, or carried back to, a tax year beginning before Jan. 1, 1986.

The foreign source income exclusion shall be the lesser of:

(i) Foreign source income (Excluding Sec. 78 Dividend), or

(ii) The product of Foreign Taxes Paid ("FT") and the Foreign Source Income (Excluding Sec. 78 Dividend) ("FSI net §78") divided by the product of the effective federal corporation tax rate ("Fed Rate") and the Foreign Source Income (Including Sec.78 Dividend) ("FSI"). This is expressed as the following formula:

(FT X "FSI net §78") / (Fed Rate X FSI)

The effective federal corporation tax rate means the combined taxpayer's federal corporate income tax (calculated in accordance with section 11(a) and (b) of the internal revenue code for such tax year) divided by the combined taxpayer's federal taxable income. As a formula:

Effective federal corporate tax rate = federal corporate income tax / federal corporate taxable income

Modifications computed per this regulation shall be claimed as "other" additions or subtractions in the modification section of the Colorado corporate income tax return.

(b) For tax years commencing prior to January 1, 2000, the denominator of the formula in subsection (a)(ii) will use 46% in place of the effective federal corporation tax rate.

(3) When determining foreign source income for a foreign corporation, such income shall not include any income of the foreign corporation that is derived from the conduct of a trade or business within the United States.

(4) The excess, if any, of a taxpayer's foreign source income over the foreign source income exclusion shall not be included in the numerator of the Colorado receipts factor (see §39-22-303.6(4)(b), C.R.S.).

Regulation 39-22-303(11)(c). Apportionment of Income on a Combined Report or Consolidated Return.

Basis and Purpose. The basis for this regulation are §§ 39-21-112(1), 39-22-301, 39-22-303, 39-22-303.6, 39-22-303.7, 39-22-303.9, and 39-22-305, C.R.S. The purpose of this regulation is to clarify how an affiliated group of C corporations apportion their income when included in a combined report or consolidated return.

(1) When filing a combined report, the affiliated group of C corporations shall file one return, apportioning income under the provisions of §§ 39-22-303.6, 39-22-303.7, or 39-22-303.9, C.R.S., and summing the numerators of each affiliated C corporation doing business in Colorado to derive a single apportionment factor for the combined group.

(a) In making any calculation pursuant to this regulation, including calculations of income, gross receipts, apportionment, or minimal commercial activity determinations, all intercompany transactions shall be eliminated before making any such calculation.

(b) Example: Corporations A, B, and C are an affiliated group of C corporations meeting three of the six tests in § 39-22-303(11), C.R.S. Corporations A and B are doing business in Colorado under 1 CCR 201-2, Department 39-22-301.1 and C is not. The Colorado receipts factors of the three corporations are as follows:

	Colorado Receipts	Total Receipts
Corporation A	$5,160,118	$7,652,492
Corporation B	$1,642,720	$80,009,652
Corporation C	$183,290	$814,005

The combined receipts factor would be as follows:

Colorado receipts (A+B) = $6,802,838

Total receipts (A+B+C) = $88,476,149 (Assumes no intercompany transactions.)

Combined receipts factor (Colorado receipts divided by total receipts) = 7.6889%

The 7.6889% receipts factor is applied to the combined modified federal taxable income (after elimination of intercompany transactions) of the affiliated group to determine the Colorado taxable income to be reported on the combined report.

Cross References

1. For additional information on doing business in Colorado, see 1 CCR 201-2, Regulation 39-22-301.1.

2. For information on which members of an affiliated group must be included in a combined report see 1 CCR 201-2, Regulation 39-22-303(11)(a).

3. For additional information for taxpayers subject to multiple apportionment methods, see 1 CCR 201-2, Regulation 39-22-303.6–3.

Regulation 39-22-305. Consolidated Returns.

Basis and Purpose. The bases for this regulation are §§ 39-21-112(1) and 39-22-305, C.R.S. The purpose of this regulation is to clarify how to make an election to file a consolidated return and how to withdraw such election.

(1) **Election to File a Consolidated Return.**

(a) The election to file a consolidated C corporation return pursuant to § 39-22-305, C.R.S., must be made on or before the due date of the filing of the return, including any extensions of time for filing the return. Such election must be made by indication on the return in the designated manner. If an election is made, such election may not be withdrawn after the due date, including any extension of time, for filing the return. A taxpayer who has not made a timely election may request permission from the Executive Director or his or her designee to make a consolidated return election consistent with the requirements set forth in Treas. Reg. (26 C.F.R.) § 301.9100-3.

(b) The election to file a consolidated return is binding for the election year and the next three tax years, unless permission is granted in writing by the Executive Director or the Executive Director's designee for an earlier change.

(c) From the fifth year forward, a taxpayer may revoke the election prior to the due date for filing a consolidated return, including any extensions of time for filing the return. If revoked, the revocation may not be withdrawn after such due date or any extension of time for filing the return. If the taxpayer revokes the election, it may subsequently elect to file on a consolidated basis pursuant to (1)(a) of this regulation. The filing by multiple taxpayers of non-consolidated returns shall be considered the revocation of the election. However, the inadvertent exclusion of a corporation from a consolidated return shall not be considered a revocation of the election.

(i) Example. A taxpayer will not revoked its consolidated election if the taxpayer acquires a new C corporation doing business in Colorado and inadvertently fails to include such corporation in the consolidated return for the year of acquisition.

(d) For any year a consolidated return is filed, the taxpayer shall file an affiliation schedule with the return.

(2) **Members of the Consolidated Return.** The Colorado income tax liability for an affiliated group of corporations filing a consolidated return is based only on the net income of those members of the affiliated group that have substantial nexus in Colorado, exceed the minimum standards of Public Law 86-272 (15 U.S.C. § 381) in Colorado, and for which a tax is imposed under § 39-22-301, C.R.S., during that tax year. The consolidated net income of such corporations is allocated and apportioned in accordance with § 39-22-303.6, § 39-22-303.7, or § 39-22-303.9, C.R.S. The apportionment factors of such consolidated group are based solely on the consolidated sales of the consolidated group.

(3) **Consolidated Return that Includes a Combined Report.**

(a) An election to file a consolidated return can be made even if the consolidated return will include members of an affiliated group of corporations that are required to file a combined report. When filing a consolidated return that includes any member of an affiliated group that is required to be included in a combined report, such consolidated return must include the income as computed in the combined report even if that income calculation is based on business activities of one or more affiliated corporations not doing business in Colorado.

(b) The affiliated group electing to file a consolidated return shall be treated as one taxpayer for purposes of filing the combined report.

Cross References

1. See 1 CCR 201-2, Regulation 39-22-301.1 for additional information on substantial nexus.

2. See 1 CCR 201-2, Regulation 39-22-303(11)(a) for additional information on filing a combined report.

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Tracking number: 2018-00706

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/25/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:48:13

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-303.5–1. Business and Nonbusiness Income.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) Section 39-22-303.5(1)(a), C.R.S., defines “business income” as income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. All income that arises from the conduct of trade or business operations of a taxpayer is business income. The income of the taxpayer is business income unless clearly classifiable as nonbusiness income under the standards set forth in this regulation, under constitutional law or otherwise as explicitly provided by law.

(2) The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, non-operating income, etc., is of no aid in determining whether income is business or nonbusiness income. Income of any type or class and from any source is business income if it arises from transactions and activity occurring in the regular course of a trade or business. Accordingly, the critical element in determining whether income is “business income” or “nonbusiness income” is the identification of the transactions and activities that are the elements of a particular trade or business. In general all transactions and activities of the taxpayer that are dependent upon or contribute to the operation of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, and will constitute integral parts of, a trade or business. (See 1 CCR 201-2, paragraph (4) of Regulation 39-22-303.6–3 concerning the calculation of income when a taxpayer engages in more than one commercial activity.)

(3) **Business and Nonbusiness Income: Application of Definitions.** The following are rules for determining whether particular income is business or nonbusiness income:

(a) *Rents from real and tangible personal property.* Rental income from real and tangible property is business income if the property with respect to which the rental income was received is used in the taxpayer's trade or business or is incidental thereto.

(b) *Gains or losses from sales of assets.*

(i) Gain or loss from the sale, exchange or other disposition of real or tangible or intangible personal property constitutes business income if the property while owned by the taxpayer was used in the taxpayer's trade or business. However, if such property was utilized exclusively for the production of nonbusiness income the gain or loss will constitute nonbusiness income. If the property was used both for the production of business income and nonbusiness income then the gain from the sale is business income. If the property was held for sale after having

been used for the production of business income, the gain or loss shall be business income.

(ii) Gain or loss from the sale, exchange or other disposition of property shall be included in business income if such property is actually used or is available for or capable of being used during the tax period in the regular course of the trade or business of the taxpayer. Gain or loss from the disposition of property held as reserves or standby facilities or property held as a reserve source of materials shall be included in business income. Gain or loss from the disposition of property or equipment under construction during the tax period shall be included in business income if such property was intended to be used in the regular course of the trade or business of the taxpayer.

(c) *Interest.* Interest income is business income where the intangible with respect to which the interest was received arises out of, is used, or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the intangible is related to or incidental to such trade or business operations.

(d) *Dividends.* Dividends are business income where the stock with respect to which the dividends are received arises out of or was acquired in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the stock is related to or incidental to such trade or business operations.

(e) *Patent and copyright royalties.* Patent and copyright royalties are business income where the patent or copyright with respect to which the royalties were received arises out of or was created in the regular course of the taxpayer's trade or business operations or where the purpose for acquiring and holding the patent or copyright is related to or incidental to such trade or business operations.

(4) **Proration of Deductions.**

(a) In most cases an allowable deduction of a taxpayer will be applicable only to the business income arising from a particular trade or business or to a particular item of nonbusiness income. In some cases an allowable deduction may be applicable to the business incomes of more than one trade or business and/or to several items of nonbusiness income. In such cases the deduction shall be prorated among such trades or businesses and such items of nonbusiness income in a manner that fairly distributes the deduction among the classes of income to which it is applicable.

(b) *Consistency and uniformity in reporting.*

(i) *Year-to-Year consistency.* In filing returns with this state, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modifications.

(ii) *State-to-State uniformity.* If the returns or reports filed by a taxpayer with all states to which the taxpayer reports under this section, Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the application or proration of any deduction then the taxpayer shall disclose in its return to this state the nature and extent of the variance or variances, except where such non-uniformity in reporting is a direct and necessary consequence of differences between the law of this state and the law of another state.

Regulation 39-22-303.5–2. Other Definitions.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

In addition to the definitions provided in § 39-22-303.5, C.R.S., the following terms are defined or further defined as follows:

(1) "Apportionment" refers to the division of business income among states by use of a formula containing apportionment factors.

(2) "Allocation" refers to the assignment of nonbusiness income to one or more particular states.

(3) "Business activity" refers to the transactions and activity occurring in the regular course of a particular trade or business of a taxpayer.

(4) "Sales" – See 1 CCR 201-2, Regulation 39-22-303.5–4.

Regulation 39-22-303.5–3. Apportionment and Allocation.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) **Apportionment.** If the business activity in respect to any trade or business of a taxpayer occurs both within and without this state, and if by reason of such business activity the taxpayer is taxable in another state, the portion of the net income (or net loss) arising from such trade or business that is derived from sources within this state shall be determined by apportionment in accordance with § 39-22-303.5(4), C.R.S.

(2) **Allocation.** Unless electing to treat all income as business income (see regulation 39-22-303.5–8), any taxpayer subject to the taxing jurisdiction of this state shall allocate all of its nonbusiness income or loss within or without this state in accordance with § 39-22-303.5(5), C.R.S.

(3) **Combined Report.** If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in these regulations shall preclude the use of a "combined report" whereby the entire business income of such trade or business is apportioned in accordance with § 39-22-303, § 39-22-303.5, or § 39-22-303.7, C.R.S. However, the income in the combined report may be required to be calculated pursuant to 1 CCR 201-2, Regulation 39-22-303.6–3 paragraph (4) of and pursuant to any applicable special regulations for allocation and apportionment of corporate income.

(4) **Consistency and Uniformity in Reporting.** In filing returns with this state, if the taxpayer departs from or modifies the manner in which income has been classified as business income or nonbusiness income, except for nonbusiness income with respect to which an election has been made pursuant to § 39-22-303.5(6), C.R.S., in the returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(5) **Taxable in Another State.**

(a) *In general.* Under § 39-22-303.5(3)(b), C.R.S., the taxpayer is subject to the allocation and apportionment provisions of this section if it has income from business activity that is taxable both within and without this state. A taxpayer's income from business activity is taxable without this state if such taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of § 39-22-303.5(3)(c), C.R.S.

(b) *Applicable tests.* A taxpayer is taxable within another state if it meets either one of two tests: (1) If by reason of business activity in another state the taxpayer is subject to one of the types of taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., namely: a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, a corporate stock tax, or other similar tax; or (2) If by reason of such business activity another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(c) *Producing nonbusiness income.* A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in such other state pertaining to the production of nonbusiness income or business activities relating to a separate trade or business.

(d) A taxpayer is "subject to" one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., if it carries on business activities in such state and such state imposes such a tax thereon. Any taxpayer that asserts that it is subject to one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., in another state shall furnish to the executive director upon his or her request evidence to support such assertion. The executive director may request that such evidence include proof that the taxpayer has filed the requisite tax return in such other state and has paid any taxes imposed under the law of such other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., in such other state.

(e) *Voluntary tax payment.* If the taxpayer voluntarily files and pays one or more of such taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but

(i) does not actually engage in business activity in that state, or

(ii) does actually engage in some business activity, not sufficient for nexus, and the minimum tax bears no relation to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified within the meaning of § 39-22-303.5(3)(c)(I), C.R.S.

(f) *Taxability.* The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states that do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in § 39-22-303.5(3)(c)(I), C.R.S., that may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in § 39-22-303.5(3)(c)(I), C.R.S., in another state. By way of illustration and not of limitation, regulatory measures could include fees charged out-of-state cigarette and tobacco vendors for access to the state's market or out-of-state alcoholic beverage vendors to ensure compliance with local liquor laws.

(g) The second test, that of § 39-22-303.5(3)(c)(II), C.R.S., applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C.A., paragraphs 381-385. In the case of any "state" as defined in § 39-22-303.5(1)(e), C.R.S., other than a state of the United States or political subdivision of such state, the determination of whether such "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applies in that "state". If jurisdiction is otherwise present, such "state" is not considered as without

jurisdiction by reason of the provisions of a treaty between that state and the United States.

Regulation 39-22-303.5–4. Calculation of Sales Factor.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) **In General.** Section 39-22-303.5(1)(d), C.R.S., generally defines the term "sales" to mean all gross receipts of the taxpayer not allocated under subsection (5) of section 303.5, C.R.S. Thus, except as otherwise specifically provided, for the purposes of the sales factor of the apportionment formula for each trade or business of the taxpayer, the term "sales" means all gross receipts derived by the taxpayer from transactions and activity in the regular course of such trade or business. The following are rules for determining "sales" in various situations:

(a) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products (or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales. Federal and state excise taxes (including sales taxes) shall be included as part of such receipts if such taxes are passed on to the buyer or included as part of the selling price of the product.

(b) In the case of cost-plus-fixed fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost, plus the fee.

(c) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency, the performance of equipment service contracts, or research and development contracts, "sales" includes the gross receipts from the performance of such services including fees, commissions, and similar items.

(d) In the case of a taxpayer engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.

(e) In the case of a taxpayer engaged in the assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

(f) In the case of a taxpayer engaged in the sale of intangible personal property, including patents and copyrights, "sales" means the gain therefrom.

(g) If a taxpayer derives receipts from the sale of equipment used in its business, such receipts constitute "sales".

(h) "Safe Harbor" lease income. All income and deductions created by "safe harbor" lease transactions shall be included in the numerator of the Colorado sales factor only if the lessor's commercial domicile is located in Colorado. All income and deductions created by "safe harbor" lease transactions shall not be included in the numerator of the Colorado sales factor if the lessor's commercial domicile is not in Colorado.

(2) **Exceptions.** In some cases certain gross receipts should be disregarded in determining the sales factor in order that the apportionment formula will operate fairly to apportion to this state the income of the taxpayer's trade or business.

(3) Colorado destination sales of a corporation not having nexus in Colorado when such corporation is an includable member of an affiliated group of corporations. In the case of a corporation that does not have nexus (is not doing business) in Colorado even though it is an "includable corporation" in an affiliated group of unitary corporations filing a combined Colorado return, the sales of such corporation of property delivered to purchasers in Colorado shall not constitute Colorado sales for purposes of determining the sales factor.

(4) **Denominator.** The denominator of the sales factor shall include the total sales derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under § 39-22-303.5(7)(b), C.R.S.

(5) **Numerator.** The numerator of the sales factor shall include sales attributable to this state and derived by the taxpayer from transactions and activity in the regular course of its trade or business. All interest income, service charges, carrying charges, or time-price differential charges incidental to such gross receipts shall be included regardless of (1) the place where the accounting records are maintained or (2) the location of the contract or other evidence of indebtedness.

(6) **Consistency and Uniformity in Reporting.**

(a) *Numerator/denominator consistency.* In filing returns with this state, the taxpayer must use the same methodology in calculating both the numerator and the denominator of the sales factor.

(b) *Year-to-Year consistency.* In filing returns with this state, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(c) *State-to-State uniformity.* If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under this section, Article IV of the Multistate Tax Compact or the Uniform Division of Income for Tax Purposes Act are not uniform in the inclusion or exclusion of gross receipts, then the taxpayer shall disclose in its return to this state the nature and extent of the variance or variances, except where such non-uniformity in reporting is a direct and necessary consequence of differences between the law of this state and the law of another state.

Regulation 39-22-303.5–5. Sales of Tangible Personal Property in this State.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) Gross receipts from sales of tangible personal property are in this state:

(a) if the property is delivered or shipped to a purchaser within this state regardless of the f.o.b. point or other condition of sale; or

(b) if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the taxpayer is not taxable in the state to which the property is shipped.

(2) Property shall be deemed to be delivered or shipped to a purchaser within this state if the recipient is located in this state, even though the property is ordered from outside this state.

(3) Property is delivered or shipped to a purchaser within this state if the shipment terminates in this state, even though the property is subsequently transferred by the purchaser to another state.

(4) The term "purchaser within this state" shall include the ultimate recipient of the property if the taxpayer in this state, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within this state.

(5) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.

(6) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to this state if the property is shipped from an office, store, warehouse, factory, or other place of storage in this state.

(7) If a taxpayer whose salesperson operates from an office located in this state makes a sale to a purchaser in another state in which the taxpayer is not taxable and the property is shipped directly by a third party to the purchaser, the following rules apply:

(a) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in this state only if the third party ships the property from this state.

(b) If the taxpayer is not taxable in the state from which the property is shipped, then the sale is in this state.

Regulation 39-22-303.5–6. Sales Other Than Sales of Tangible Personal Property in This State.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) Gross receipts from services rendered are included in the Colorado sales factor numerator if the service that gave rise to the gross receipt is performed wholly within Colorado. If the service is performed within and without Colorado, and except as otherwise provided by § 39-22-303.7, C.R.S., or applicable special regulations for allocation and apportionment of corporate income or other regulation, the portion of the gross receipt included in the Colorado numerator is found by multiplying the gross receipt by a fraction, the numerator of which is the direct costs incurred in the performance of that service in Colorado and the denominator of which is the direct costs incurred in the performance of that service everywhere.

(a) Direct costs include:

(i) wages of employees engaged in the performance of the service;

(ii) taxpayer's payments to an agent or independent contractor for the performance of personal services on behalf of the taxpayer which give rise to the particular item of gross receipts;

(iii) a reasonable measure of the real and tangible-personal property used in the performance of the service. Such reasonable measure could be a market lease rate, depreciation, or other reasonable method. However, the same method must be used consistently from year to year and from state to state.

(iv) Services on Behalf of the Taxpayer. An activity giving rise to gross receipts performed on behalf of a taxpayer by an agent or independent contractor is attributed to this state if such activity giving rise to gross receipts is in this state. In order to be included as a sale of the taxpayer in either the numerator or

denominator of the sales factor, the activities described in this subparagraph iv must themselves directly give rise to gross receipts of the taxpayer. By way of illustration and not of limitation, such costs could include, for an accounting firm, amounts paid to an independent contractor accountant whose time or activities directly relate to the accounting of the firm's client and which time or activities directly give rise to a billing item presented to the firm's client. Such costs would not include, for the same firm, amounts paid to an independent contractor accountant whose services consist of accounting services related to the firm's accounting, because these activities do not give rise to gross receipts of the taxpayer.

(1) Such activity giving rise to gross receipts is in this state:

(A) when the taxpayer can reasonably determine at the time of filing that the activity is actually performed in this state by the agent or independent contractor, but if the activity occurs in more than one state, the location where the activity is actually performed shall be deemed to be not reasonably determinable at the time of filing under this subparagraph (1)(a)(iv)(1)(A);

(B) if the taxpayer cannot reasonably determine at the time of filing where the activity is actually performed, when the contract between the taxpayer and the agent or independent contractor indicates it is to be performed in this state and the portion of the taxpayer's payment to the agent or contractor associated with such performance is determinable under the contract;

(C) if it cannot be determined where the activity is actually performed and the agent or independent contractor's contract with the taxpayer does not indicate where it is to be performed, when the contract between the taxpayer and the taxpayer's customer indicates it is to be performed in this state and the portion of the taxpayer's payment to the agent or contractor associated with such performance is determinable under the contract; or

(D) if it cannot be determined where the activity is actually performed and neither contract indicates where it is to be performed or the portion of the payment associated with such performance, when the domicile of the taxpayer's customer is in this state. If the taxpayer's customer is not an individual, "domicile" means commercial domicile.

(2) If the location of the activity giving rise to gross receipts by an agent or independent contractor, or the portion of the payment associated with such performance, cannot be determined under subparagraphs (1)(a)(iv)(1)(A) through (1)(a)(iv)(1)(C), or the taxpayer's customer's domicile cannot be determined under subparagraph (1)(a)(iv)(1)(D), or, although determinable, such activity is in a state in which the taxpayer is not taxable, such income producing activity shall be disregarded.

(b) Direct costs do not include:

(i) Overhead costs,

(ii) Management costs, unless such management was directly involved in the performance of the service, and

(iii) The costs of property not directly used in the performance of the service.

(2) Rents and royalties from real property located in Colorado are included in the Colorado sales factor numerator.

(3) Gross proceeds from the sale of real property located in Colorado are included in the Colorado sales factor numerator.

(4) Interest and dividend income is included in the Colorado sales factor numerator if the taxpayer's commercial domicile for that trade or business is located in Colorado.

(5) Gain from the sale of intangible property is included in the Colorado sales factor numerator if the taxpayer's commercial domicile for that trade or business is located in Colorado.

(6) Patent and copyright royalties are included in the Colorado sales factor numerator if:

(a) The patent or copyright is utilized by the payer in Colorado, or

(b) The patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile for that trade or business is located in Colorado.

(7) Revenue from the performance of purely personal services is included in the Colorado sales factor numerator if the income producing activity is performed in Colorado.

(a) Purely personal services consist of services that are performed by individuals with only incidental contributions either from individuals not directly engaged in the performance of the service or from property.

(b) Such services include, but are not limited to:

(i) legal, accounting, or other professional services,

(ii) entertainment and sporting services.

(c) In general, the performance of each individual is a separate income producing activity. Where sales are generated by the performance of services of a number of individuals, such sales must be divided among the several individuals performing the services. Such division must be reasonably related to the generation of the revenue. The contributions of individuals whose services are not the direct object of the contract (such as para-professionals and support and administrative staff) are not considered income producing activities. Their contributions are not considered in performing the calculation described in subparagraph (d) of this paragraph (7). If the contributions of such personnel are more than incidental, then the activity is not a purely personal service and would be apportioned pursuant to § 39-22-303.5(4)(c)(I), C.R.S.

(d) Each income producing activity is performed in Colorado to the extent that the individual is in Colorado when performing the service. Thus, an income producing activity for the performance of purely personal services is in Colorado in the ratio of the time spent in Colorado in performing the service to the total time spent in performing the service. Time spent in performing the service includes the amount of time expended in the performance of a contract or other obligation that gives rise to the revenue. Personal service not

directly connected with the performance of the contract or other obligation, as for example time expended in negotiating the contract, is excluded from the computation.

Regulation 39-22-303.5–7. Nonbusiness Income.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

Tangible personal property has a situs in Colorado at the time of the sale if it is physically located in Colorado immediately prior to the sale of the property. The movement of property in anticipation of sale or as part of the sale transaction is not considered in determining its situs immediately prior to the time of sale.

Regulation 39-22-303.5–8. Election to Treat Nonbusiness Income as Business Income.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) Every year, taxpayers have an election to treat all nonbusiness income as business income.

(a) The election must be made with the original return on the appropriate departmental form filed prior to the extended due date of the return (the fifteenth day of the tenth month following the close of the tax year). If no departmental form is available, the taxpayer may make the election on its own form in a clear and unequivocal manner filed together with the original return. The taxpayer's form must be clearly marked "Election to treat nonbusiness income as business income for the tax year ending MM, YYYY" (enter the appropriate month and year in which the tax year for which the election is being made ends).

(b) Once the election has been filed for the year, it may not be changed, even if the extended due date for the year has not passed.

(c) The filing of a return without the election constitutes the non-exercise of the election for that tax year, even if the return is calculated with all income as business income.

(d) The failure to file a return prior to the extended due date of the return constitutes the non-exercise of the election for that tax year.

(2) If the election described in this regulation is made for the income tax year, all sales of the taxpayer are included in the denominator and, if appropriate, the numerator of the taxpayer's sales factor.

Regulation 39-22-303.5–9. Alternative Apportionment.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

(1) Section 39-22-303.5(7)(b), C.R.S., permits a departure from the allocation and apportionment provisions of § 39-22-303.5, C.R.S., (hereinafter "303.5") only in limited and specific cases. Paragraph (7)(b) of 303.5 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in section 303.5.

(2) In the case of certain industries, the general regulations under section 303.5 in respect to the apportionment formula do not set forth appropriate procedures for determining the apportionment

factors. Nothing in § 39-22-303.5(7)(b), C.R.S., or in this Regulation 39-22-303.5–9 shall preclude the executive director from establishing appropriate procedures under 303.5 and paragraph (7)(a) of 303.5 for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

(3) In the case of certain taxpayers, the general regulations under §§ 39-22-303 and 303.5, C.R.S. do not set forth appropriate procedures for determining income or the apportionment factors. Nothing in § 39-22-303.5(7)(b), C.R.S., or in this Regulation 39-22-303.5–9 shall preclude the executive director from distributing or allocating income and deductions under § 39-22-303(6), C.R.S.

(4) **Special rules.**

(a) Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor.

(b) Insubstantial amounts of gross receipts arising from incidental or occasional transactions or activities may be excluded from the sales factor unless such exclusion would materially affect the amount of income apportioned to this state.

(c) Where business income from intangible property cannot readily be attributed to any particular income-producing activity of the taxpayer, and such income cannot be assigned to the numerator of the sales factor for any state, such income shall be excluded from the denominator of the sales factor.

(d) Where the income-producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income-producing activity occurs in this state, in the numerator of the sales factor as well.

Regulation 39-22-303.5–10. Income from Foreclosures.

The provisions of this regulation apply to income tax years commencing on or after January 1, 2009, but prior to January 1, 2019.

A taxpayer who qualifies under the provisions of § 39-22-303.5(8), C.R.S., must file using the rules of that provision (direct allocation). A taxpayer may not make an election pursuant to § 39-22-303.5(6), C.R.S., to treat such income as business income.

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Tracking number: 2018-00707

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:48:28

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-2102. Colorado Affordable Housing Tax Credit.

Basis and Purpose. The bases for this regulation are § 39-21-112(1) and § 39-22-2102, C.R.S. The purpose of this regulation is to provide clarification for pass-through entities making an allocation of the Colorado affordable housing credit, as well as to establish when the carryforward period begins for the credit.

(1) **Allocating the Credit for Pass-Through Entities.**

(a) The owner of a qualified development project receiving an allocation of a Colorado affordable housing credit may allocate the credit among its partners, shareholders, members, or other qualified taxpayers in any manner agreed to by such persons. The owner must submit with the Colorado Partnership or S Corporation Return their Colorado State Affordable Housing Tax Credit Allocation Certificate ("Allocation Certificate") along with a schedule detailing how the credit is allocated ("Allocation Schedule"). In addition, the owner shall send to the Department of Revenue the following information:

(i) The name(s) and federal taxpayer identification number(s) of the owner,

(ii) The address of the property for which the credit is received,

(iii) The name and federal taxpayer identification number of the qualified taxpayers who receive an allocation of the credit,

(iv) The total amount of credit allocated to all qualified taxpayers,

(v) The amount of credit each qualified taxpayer received,

(vi) The tax year in which the credit was allocated to each qualified taxpayer and the amount allocated to such qualified taxpayer for each such year, and

(vii) The amount of credit claimable in each year.

(b) Each partner, shareholder, member or other qualified taxpayer must attach a copy of the Allocation Certificate and the Allocation Schedule to their Colorado income tax return. Once the partners, shareholders, members or other qualified taxpayers claim the credits on their respective income tax returns, the allocation cannot be amended for that tax year.

(c) If the qualified taxpayer is a pass-through entity, then, to the extent that the owner's records reflect such information, the owner shall identify by name and federal taxpayer number the qualified taxpayer(s) of such pass-through entity and their taxpayer identification number and beginning credit allowances.

(2) **Carryforwards.** Any amount of credit not applied to a qualified taxpayer's tax liability may be carried forward up to eleven years from the tax year in which the allocation was made. An allocation is made when the Authority issues the Allocation Certificate to the owner of a qualified development after a qualified development is placed in service. The credit must be applied first to the earliest years possible. Any amount of credit not used during this carryforward period shall not be refunded to the taxpayer.

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Tracking number: 2018-00717

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:51:55

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-303.6–1. Apportionment and Allocation Definitions.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide definitions for the terms used throughout Regulations 39-22-303.6–1 through –17. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **Definitions.** In addition to the definitions provided in § 39-22-303.6, C.R.S., and unless the context otherwise requires, the following terms, as used throughout Regulations 39-22-303.6–1 through –17, are defined or further defined as follows:

(a) "Allocation" refers to the assignment of nonapportionable income to a particular state.

(b) "Apportionment" refers to the division of apportionable income among states by use of a formula containing apportionment factors.

(c) "Billing address" means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer's account as of the time of the transaction and kept in good faith in the normal course of business and not for tax avoidance purposes.

(d) "Business activity" refers to the transactions and activities occurring in the regular course of a particular trade or business of a taxpayer and includes the acquisition, employment, development, management, or disposition of property that is or was related to the operation of the taxpayer's trade or business.

(e) "Business customer" means a customer that is a business operating in any form, including a sole proprietorship. Sales to a nonprofit organization, to a trust, to the U.S. Government, to a foreign, state, or local government, or to an agency or instrumentality of that government are treated as sales to a business customer and must be assigned consistent with the rules for those sales.

(f) "Code" means the Internal Revenue Code as currently written and subsequently amended.

(g) "Gross receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction that produces apportionable income for which the income or loss is recognized under the Internal Revenue Code, and, where the income of foreign entities is included in apportionable income, amounts that would have been recognized under the Internal Revenue Code if the relevant transactions or entities were in the United States. Amounts realized on the

sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.

(h) "Individual customer" means a customer that is not a business customer.

(i) "Intangible property" generally means property that is not physical or whose representation by physical means is merely incidental and includes, without limitation, copyrights; patents; trademarks; trade names; brand names; franchises; licenses; trade secrets; trade dress; information; know-how; methods; programs; procedures; systems; formulae; processes; technical data; designs; literary, musical, or artistic compositions; ideas; contract rights including broadcast rights; agreements not to compete; goodwill and going concern value; securities; and, except as otherwise provided in this regulation, computer software. Receipts from the sale of intangible property may be excluded from the numerator and denominator of the taxpayer's receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S., and paragraph (1)(d) of Regulation 39-22-303.6–12.

(j) "Place of order" means the physical location from which a customer places an order for a sale, other than a sale of tangible personal property from a taxpayer, resulting in a contract with the taxpayer.

(k) "Population" means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.

(l) "Receipts" means all gross receipts of the taxpayer that are not allocated under § 39-22-303.6, C.R.S., and that are received from transactions and activity in the regular course of the taxpayer's trade or business. The following are additional rules for determining "receipts" in various situations:

(i) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "receipts" includes all gross receipts from the sale of such goods or products (or other property of a kind that would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances.

(ii) In the case of cost-plus-fixed-fee contracts, such as the operation of a government-owned plant for a fee, "receipts" includes the entire reimbursed cost plus the fee.

(iii) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "receipts" includes the gross receipts from the performance of such services including fees, commissions, and similar items.

(iv) In the case of a taxpayer engaged in the sale of equipment used in the taxpayer's trade or business, where the taxpayer disposes of the equipment under a regular replacement program, "receipts" includes the gross receipts from the sale of this equipment. For example, a truck express company that owns a fleet of trucks, and sells its trucks under a regular replacement program, the gross receipts from the sale of the trucks would be included in "receipts."

(v) In the case of a taxpayer with insubstantial amounts of gross receipts arising from sales in the ordinary course of business, the insubstantial amounts may be

excluded from the receipts factor unless their exclusion would materially affect the amount of income apportioned to Colorado.

(vi) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan, or other disposition of cash or securities, shall be excluded. Receipts arising from a business activity are receipts from hedging if the primary purpose of engaging in the business activity is to reduce the exposure to risk caused by other business activities. Whether events or transactions not involving cash or securities are hedging transactions shall be determined based on the primary purpose of the taxpayer engaging in the activity giving rise to the receipts, including the acquisition or holding of the underlying asset. Receipts from the holding of cash or securities, or maturity, redemption, sale, exchange, loan, or other disposition of cash or securities are excluded from the definition of receipts whether or not those events or transactions are engaged in for the purpose of hedging. The taxpayer's treatment of the receipts as hedging receipts for accounting or federal tax purposes may serve as indicia of the taxpayer's primary purpose, but shall not be determinative.

(vii) Receipts, even if apportionable income, are presumed not to include such items as, for example:

(A) damages and other amounts received as the result of litigation;

(B) property acquired by an agent on behalf of another;

(C) tax refunds and other tax benefit recoveries;

(D) contributions to capital;

(E) income from forgiveness of indebtedness;

(F) amounts realized from exchanges of inventory that are not recognized by the Code; or

(G) amounts realized as a result of factoring accounts receivable recorded on an accrual basis.

(viii) Notwithstanding any other provision of law, foreign source income that is included in taxable income is not included as receipts of the taxpayer in Colorado for purposes of apportioning apportionable income under § 39-22-303.6, C.R.S., but may be included in the denominator as otherwise required by § 39-22-303.6, C.R.S., and its accompanying regulations.

(ix) Exclusion of an item from the definition of "receipts" is not determinative of its character as apportionable or nonapportionable income. Certain gross receipts that are "receipts" under the definition are excluded from the "receipts factor" under § 39-22-303.6(6), C.R.S. Nothing in this definition shall be construed to modify, impair, or supersede any provision of § 39-22-303.6(9), C.R.S.

(m) "Related party" means:

(i) a stockholder who is an individual, or a member of the stockholder's family as set forth in section 318 of the Code, if the stockholder and the members of the

stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock;

(ii) a stockholder, or a stockholder's partnership, limited liability company, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, limited liability companies, estates, trusts, and corporations own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of the taxpayer's outstanding stock; or

(iii) a corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under the attribution rules of the Code, if the taxpayer owns, directly, indirectly, beneficially, or constructively, at least 50 percent of the value of the corporation's outstanding stock. The attribution rules of the Code shall apply for purposes of determining whether the ownership requirements of this definition have been met.

(n) "Security" means any interest or instrument commonly treated as a security as well as other instruments that are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.

(o) “State where a contract of sale is principally managed by the customer” means the primary location at which an employee or other representative of a customer serves as the primary contact person for the taxpayer with respect to the day-to-day execution and performance of a contract entered into by the taxpayer with the customer.

(p) “Trade or business,” as used in the definition of apportionable income and in the application of that definition means the unitary business of the taxpayer, part of which is conducted within Colorado.

Regulation 39-22-303.6–2. Apportionable and Nonapportionable Income.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining what is apportionable and nonapportionable income. Consistent with the General Assembly’s adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state’s income tax laws to the Multistate Tax Commission’s model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** Section 39-22-303.6(1)(a) and (c), C.R.S., requires every item of income be classified either as apportionable income or nonapportionable income. Income for purposes of classification as apportionable or nonapportionable includes gains and losses. Apportionable income is apportioned among jurisdictions by use of a formula. Nonapportionable income is specifically assigned or allocated to one or more specific jurisdictions pursuant to express rules. An item of income is classified as apportionable income if it falls within the definition of apportionable income. An item of income is nonapportionable income only if it does not meet the definitional requirements for being classified as apportionable income.

(2) **Apportionable Income.**

(a) Apportionable income means:

(i) any income that would be allocable to Colorado under the United States Constitution, but that is apportioned rather than allocated pursuant to the laws of this state.

(ii) all income that is apportionable under the United States Constitution and is not allocated under the laws of this state, including:

(A) income arising from transactions and activity in the regular course of the taxpayer's trade or business; and

(B) income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business.

(b) The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, income derived from accounts receivable, operating income, non-operating income, etc., is of no aid in determining whether income is apportionable or nonapportionable income.

(3) **Principal Tests of Apportionable Income.**

(a) *Transactional Test.* Apportionable income includes income arising from transactions and activity in the regular course of the taxpayer's trade or business.

(i) If the transaction or activity is in the regular course of the taxpayer's trade or business, part of which trade or business is conducted within Colorado, the resulting income of the transaction or activity is apportionable income for Colorado. Income may be apportionable income even though the actual transaction or activity that gives rise to the income does not occur in Colorado.

(ii) For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business and will, therefore, satisfy the transactional test. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. However, even if a taxpayer frequently or customarily engages in investment activities, if those activities are for the taxpayer's mere financial betterment rather than for the operations of the trade or business, such activities do not satisfy the transactional test.

(iii) The transactional test includes, but is not limited to, income from sales of:

(A) inventory;

(B) property held for sale to customers;

(C) services which are commonly sold by the trade or business; and

(D) property used in the production of apportionable income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

(b) *Functional Test.* Apportionable income also includes income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business.

(i) "Property" includes any direct or indirect interest in, control over, or use of real property, tangible personal property, and intangible property by the taxpayer.

(ii) Property that is "related to the operation of the trade or business" refers to property that is or was used to contribute to the production of apportionable income directly or indirectly, without regard to the materiality of the contribution. Property that is held merely for investment purposes is not related to the operation of the trade or business.

(iii) "Acquisition, management, employment, development or disposition" refers to a taxpayer's activities in acquiring property, exercising control and dominion over property, and disposing of property, including dispositions by sale, lease, or license. Income arising from the disposition or other utilization of property that was acquired or developed in the course of the taxpayer's trade or business constitutes apportionable income, even if the property was not directly employed in the operation of the taxpayer's trade or business.

(iv) *Application of Functional Test.*

(A) Income from the disposition or other utilization of property is apportionable if the property is or was related to the operation of the taxpayer's trade or business. This is true even though the transaction or activity from which the income is derived did not occur in the regular course of the taxpayer's trade or business.

(B) Income that is derived from isolated sales, leases, assignments, licenses, and other infrequently occurring dispositions, transfers, or transactions involving property, including transactions made in the full or partial liquidation or the winding-up of any portion of the trade or business, is apportionable income if the property is or was related to the taxpayer's trade or business. Income from the licensing of an intangible asset, such as a patent, copyright, trademark, service mark, know-how, trade secrets, or the like that was developed or acquired for use by the taxpayer in its trade or business constitutes apportionable income whether or not the licensing itself constituted the operation of a trade or business, and whether or not the taxpayer remains in the same trade or business from or for which the intangible asset was developed or acquired.

(C) Income from intangible property is apportionable income when the intangible property serves an operational function as opposed to solely an investment function.

(D) If the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business, then income from that property is apportionable income

even if the actual transaction or activity involving the property that gives rise to the income does not occur in Colorado.

(E) Income from the disposition or other utilization of property that has been withdrawn from use in the taxpayer's trade or business and is instead held solely for unrelated investment purposes is not apportionable. Property that was related to the operation of the taxpayer's trade or business is not considered converted to investment purposes merely because it is placed for sale, but any property which has been withdrawn from use in the taxpayer's trade or business for five years or more is presumed to be held for investment purposes.

(F) If, with respect to an item of property, a taxpayer takes a deduction from income that is apportioned to Colorado, it is presumed that the item of property is or was related to the operation of the taxpayer's trade or business. No presumption arises from the absence of any of these actions.

(G) Application of the functional test is generally unaffected by the form of the property (e.g., tangible, intangible, real, or personal property). Income arising from an intangible interest, as, for example, corporate stock or other intangible interest in an entity or a group of assets, is apportionable income when the intangible itself, or the property underlying or associated with the intangible, is or was related to the operation of the taxpayer's trade or business. Thus, while apportionment of income derived from transactions involving intangible property may be supported by a finding that the issuer of the intangible property and the taxpayer are engaged in the same trade or business, i.e., the same unitary business, establishment of such a relationship is not the exclusive basis for concluding that the income is subject to apportionment. It is sufficient to support the finding of apportionable income if the holding of the intangible interest served an operational rather than an investment function.

(v) *Examples.*

(A) *Example (i):* Taxpayer purchases a chain of 100 retail stores for the purpose of merging those store operations with its existing business. Five of the retail stores are redundant under the taxpayer's business plan and are sold six months after acquisition. Even though the five stores were never integrated into the taxpayer's trade or business, the income is apportionable because the property's acquisition was related to the taxpayer's trade or business.

(B) *Example (ii):* Taxpayer is in the business of developing adhesives for industrial and construction uses. In the course of its business, it accidentally creates a weak but non-toxic adhesive and patents the formula, awaiting future applications. Another manufacturer uses the formula to create temporary body tattoos. Taxpayer wins a patent infringement suit against the other manufacturer. The entire damages award, including interest and punitive damages, constitutes apportionable income.

(C) *Example (iii):* Taxpayer is engaged in the oil refining business and maintains a cash reserve for buying and selling oil on the spot market as conditions warrant. The reserve is held in overnight "repurchase

agreement" accounts of U.S. treasuries with a local bank. The interest on those amounts is apportionable income because the reserves are necessary for the taxpayer's business operations. Over time, the cash in the reserve account grows to the point that it exceeds any reasonably expected requirement for acquisition of oil or other short-term capital needs and is held pending subsequent business investment opportunities. The interest received on the excess amount is nonapportionable income.

(D) *Example (iv):* A manufacturer decides to sell one of its redundant factories to a real estate developer and transfers the ownership of the factory to a special purpose subsidiary, SaleCo, immediately prior to its sale to the real estate developer. The parties elect to treat the sale as a disposition of assets under section 338(h)(10) of the Code, resulting in SaleCo recognizing a capital gain on the sale. The capital gain is apportionable income. Note: although the gain is apportionable, application of the standard apportionment formula in § 39-22-303.6(6), C.R.S., may not fairly reflect the taxpayer's business presence in any state, necessitating resort to equitable apportionment pursuant to § 39-22-303.6(9), C.R.S.

(E) *Example (v)*: A manufacturer purchases raw materials to be incorporated into the product it offers for sale. The nature of the raw materials is such that the purchase price is subject to extreme price volatility. In order to protect itself from extreme price increases (or decreases), the manufacturer enters into futures contracts pursuant to which the manufacturer can either purchase a set amount of the raw materials for a fixed price, within a specified time period, or resell the futures contract. Any gain on the sale of the futures contract would be considered apportionable income, regardless of whether the contracts were made or resold in Colorado.

(F) *Example (vi):* A national retailer produces substantial revenue related to the operation of its trade or business. It invests a large portion of the revenue in fixed income securities that are divided into three categories: (a) short-term securities held pending use of the funds in the taxpayer's trade or business; (b) short-term securities held pending acquisition of other companies or favorable developments in the long-term money market; and (c) long-term securities held as an investment. Interest income on the short-term securities held pending use of the funds in the taxpayer's trade or business (a) is apportionable income because the funds represent working capital necessary to the operations of the taxpayer's trade or business. Interest income derived from the other investment securities ((b) and (c)) is not apportionable income as those securities were not held in furtherance of the taxpayer's trade or business.

(4) **Nonapportionable Income.** Nonapportionable income means all income other than apportionable income.

(5) **General Rules for Certain Classes of Income.** The following applies the foregoing principles for purposes of determining whether particular income is apportionable or nonapportionable income. The examples used throughout these regulations are illustrative only and are limited to the facts they contain.

(a) *Rents from Real and Tangible Personal Property.* Rental income from real and tangible property is apportionable income if the property with respect to which the rental income was received is or was used in the taxpayer's trade or business.

(i) *Example (i):* The taxpayer operates a multistate car rental business. The income from car rentals is apportionable income.

(ii) *Example (ii):* The taxpayer is engaged in the heavy construction business in which it uses equipment such as cranes, tractors, and earth-moving vehicles. The taxpayer makes short-term leases of the equipment when particular pieces of equipment are not needed on any particular project. The rental income is apportionable income.

(iii) *Example (iii):* The taxpayer operates a multistate chain of men's clothing stores. The taxpayer purchases a five-story office building for use in connection with its trade or business. It uses the street floor as one of its retail stores and the second and third floors for its general corporate headquarters. The remaining two floors are held for future use in the trade or business and are leased to tenants on a short-term basis in the meantime. The rental income is apportionable income.

(iv) *Example (iv)*: The taxpayer operates a multistate chain of grocery stores. It purchases as an investment an office building in another state with surplus funds and leases the entire building to others. The net rental income is not apportionable income of the grocery store trade or business. Therefore, the net rental income is nonapportionable income.

(v) *Example (v):* The taxpayer operates a multistate chain of men's clothing stores. The taxpayer invests in a 20-story office building and uses the street floor as one of its retail stores and the second floor for its general corporate headquarters. The remaining 18 floors are leased to others. The rental of the 18 floors is not done in furtherance of but rather is separate from the operation of the taxpayer's trade or business. The net rental income is not apportionable income of the clothing store trade or business. Therefore, the net rental income is nonapportionable income.

(vi) *Example (vi):* The taxpayer constructed a plant for use in its multistate manufacturing business, and 20 years later the plant was closed and put up for sale. The plant was rented for a temporary period from the time it was closed by the taxpayer until it was sold 18 months later. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(b) *Gains or Losses from Sales of Assets.* Gain or loss from the sale, exchange, or other disposition of real property or of tangible or intangible personal property constitutes apportionable income if the property, while owned by the taxpayer, was related to the operation of the taxpayer’s trade or business.

(i) *Example (i):* In conducting its multistate manufacturing business, the taxpayer systematically replaces automobiles, machines, and other equipment used in the trade or business. The gains or losses resulting from those sales constitute apportionable income.

(ii) *Example (ii):* The taxpayer constructed a plant for use in its multistate manufacturing business and 20 years later sold the property at a gain while it was in operation by the taxpayer. The gain is apportionable income.

(iii) *Example (iii):* Same as (ii) except that the plant was closed and put up for sale but was not in fact sold until a buyer was found 18 months later. The gain is apportionable income.

(iv) *Example (iv):* Same as (ii) except that the plant was rented while being held for sale. The rental income is apportionable income and the gain on the sale of the plant is apportionable income.

(c) *Interest.* Interest income is apportionable income when the intangible with respect to which the interest was received arose out of, or was created in, the regular course of the taxpayer's trade or business, or the purpose of acquiring and holding the intangible is or was related to the operation of the taxpayer's trade or business.

(i) *Example (i):* The taxpayer operates a multistate chain of department stores, selling for cash and on credit. Service charges, interest, or time-price differentials and the like are received with respect to installment sales and revolving charge accounts. These amounts are apportionable income.

(ii) *Example (ii):* The taxpayer conducts a multistate manufacturing business. During the year, the taxpayer receives a federal income tax refund pertaining to the taxpayer's trade or business and collects a judgment against a debtor of the business. Both the tax refund and the judgment bear interest. The interest income is apportionable income.

(iii) *Example (iii):* The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, rain and storm damage, machinery replacement, etc. The funds in those accounts earn interest. Similarly, the taxpayer temporarily invests funds intended for payment of federal, state, and local tax obligations pertaining to the taxpayer's trade or business. The interest income is apportionable income.

(iv) *Example (iv):* The taxpayer is engaged in a multistate money order and traveler's check business. In addition to the fees received in connection with the sale of the money orders and traveler's checks, the taxpayer earns interest income by the investment of the funds pending their redemption. The interest income is apportionable income.

(v) *Example (v):* The taxpayer is engaged in a multistate manufacturing and selling business. The taxpayer usually has working capital and extra cash totaling $200,000 that it regularly invests in short-term interest bearing securities. The interest income is apportionable income.

(vi) *Example (vi):* In January, the taxpayer sold all of the stock of a subsidiary for $20,000,000. The funds are placed in an interest-bearing account pending a decision by management as to how the funds are to be utilized. The funds are not pledged for use in the business. The interest income for the entire period between the receipt of the funds and their subsequent utilization or distribution to shareholders is nonapportionable income.

(d) *Dividends.* Dividends are apportionable income when the stock with respect to which the dividends were received arose out of or was acquired in the regular course of the taxpayer's trade or business, or when the purpose for acquiring and holding the stock is or was related to the operation of the taxpayer's trade or business, or contributes to the production of apportionable income of the trade or business.

(i) *Example (i):* The taxpayer operates a multistate chain of stock brokerage houses. During the year, the taxpayer receives dividends on stock that it owns. The dividends are apportionable income.

(ii) *Example (ii):* The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business, the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are apportionable income.

(iii) *Example (iii):* The taxpayer and several unrelated corporations own all of the stock of a corporation whose business consists solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing trade or business. The dividends are apportionable income.

(iv) *Example (iv):* The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity, the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are apportionable income.

(v) *Example (v):* The taxpayer receives dividends from the stock of its subsidiary or affiliate that acts as the marketing agency for products manufactured by the taxpayer. The dividends are apportionable income.

(vi) *Example (vi):* The taxpayer is engaged in a multistate glass manufacturing business. It also holds a portfolio of stock and interest-bearing securities, the acquisition and holding of which are unrelated to the manufacturing business. The dividends and interest income received are nonapportionable income.

(e) *Patent and Copyright Royalties*. Patent and copyright royalties are apportionable income when the patent or copyright with respect to which the royalties were received arose out of or was created in the regular course of the taxpayer's trade or business, or when the acquiring and holding the patent or copyright is or was related to the operation of the taxpayer’s trade or business, or contributes to the production of apportionable income of the trade or business.

(i) *Example (i):* The taxpayer is engaged in the multistate business of manufacturing and selling industrial chemicals. In connection with that business, the taxpayer obtained patents on certain of its products. The taxpayer licensed the production of the chemicals in foreign countries, in return for which the taxpayer receives royalties. The royalties received by the taxpayer are apportionable income.

(ii) *Example (ii):* The taxpayer is engaged in the music publishing trade or business and holds copyrights on numerous songs. The taxpayer acquires the assets of a smaller publishing company, including music copyrights. These acquired copyrights are thereafter used by the taxpayer in its trade or business. Any royalties received on these copyrights are apportionable income.

(6) **Proration of Deductions.** In most cases, an allowable deduction of a taxpayer will be applicable to only the apportionable income arising from a particular trade or business or to a particular item of nonapportionable income. In some cases, an allowable deduction may be applicable to the apportionable incomes of more than one trade or business and to items of nonapportionable income. In such cases, the deduction shall be prorated among those trades or businesses and those items of nonapportionable income in a manner that fairly distributes the deduction among the classes of income to which it is applicable.

(a) *Consistency in Reporting.*

(i) *Year-to-Year Consistency.* In filing returns with Colorado, if the taxpayer departs from or modifies the manner of prorating any such deduction used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modifications.

(ii) *State-to-State Consistency*. If the returns or reports filed by a taxpayer with all states to which the taxpayer reports under § 39-22-303.6, C.R.S., Article IV of the Multistate Tax Compact, or the Uniform Division of Income for Tax Purposes Act are not uniform in the application or proration of any deduction, the taxpayer shall disclose in its Colorado return the nature and extent of the variance.

(7) **Consistency and Uniformity in Reporting.**

(a) *Year-to-Year Consistency.* In filing returns with Colorado, if the taxpayer departs from or modifies the manner in which income has been classified as apportionable income or nonapportionable income in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(b) *State-to-State Consistency.* If the returns or reports filed by a taxpayer for all states to which the taxpayer reports under § 39-22-303.6, C.R.S., Article IV of the Multistate Tax Compact, or the Uniform Division of Income for Tax Purposes Act are not uniform in the classification of income as apportionable or nonapportionable income, the taxpayer shall disclose in its Colorado return the nature and extent of the variance.

Regulation 39-22-303.6–3. Apportionment and Allocation of Income.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining whether income must be allocated or apportioned. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **Apportionment.** If the business activity with respect to any trade or business of a taxpayer occurs both within and without Colorado, and if by reason of such business activity, the taxpayer is taxable in another state, the portion of the net income (or net loss) arising from such trade or business that is derived from sources within Colorado shall be determined by apportionment in accordance with § 39-22-303.6(4), (5), and (6), C.R.S.

(2) **Allocation.** Unless electing to treat all income as apportionable income, any taxpayer subject to the taxing jurisdiction of Colorado shall allocate all of its nonapportionable income or loss within or without Colorado in accordance with § 39-22-303.6(7), C.R.S., and the corresponding regulation.

(3) **Combined Report.** If a particular trade or business is carried on by a taxpayer and one or more affiliated corporations, nothing in § 39-22-303.6, C.R.S., or in these regulations, shall preclude the use of a "combined report" whereby the entire apportionable income of such trade or business is apportioned in accordance with §§ 39-22-303, 39-22-303.6, 39-22-303.7, or 39-22-303.9, C.R.S.

(4) **Taxpayers Subject to Multiple Apportionment Methodologies.** A taxpayer may be engaged in two or more distinctly different commercial activities. Each activity may require the use of different apportionment methodologies described in Regulations 39-22-303.6–1 through –17 (regular apportionment of apportionable income) and Special Regulations for Allocation and Apportionment 1A through 8A.

(a) *Minimal Commercial Activities.*

(i) When the sum of the gross receipts of one commercial activity that requires the use of a different apportionment methodology amounts to less than one percent of the taxpayer's total gross receipts, such commercial activity is conclusively minimal and the taxpayer shall apportion the income from the minimal activity in the same ratio that it apportions its gross receipts pursuant to the receipts factor for the remainder of the commercial activity.

(ii) When the sum of the gross receipts of one commercial activity that requires the use of a different apportionment methodology amounts to less than five percent of the taxpayer's total gross receipts, such commercial activity may be minimal depending on the facts. If such commercial activity is considered minimal, the taxpayer shall apportion the income from the minimal activity in the same ratio that it apportions its gross receipts pursuant to the receipts factor for the remainder of the commercial activity.

(b) *Commercial Activities that are Not Minimal.* If multiple activities give rise to gross receipts that are not minimal, the taxpayer shall use the apportionment methodology most applicable to each commercial activity to separately allocate and apportion Colorado income for such commercial activities. The Colorado taxable income for each commercial activity shall be computed on a separate apportionment schedule. Such Colorado taxable incomes shall then be combined and any net operating loss carryforward applied. Any tax and credits shall then be computed on the total Colorado taxable income.

(c) *Examples.*

(i) *Example (i).* Corporation A and Corporation B are an affiliated group of C corporations that are required to file a combined report. Corporation A engages in trucking and Corporation B engages in retail sales of tangible personal property. Corporation A derives all of its income from sales of transportation services to Corporation B. Corporation A and Corporation B have distinctly different commercial activities; however, Corporation A does not derive income from sources outside its affiliate, Corporation B. Corporation A and Corporation B apportion their taxable income pursuant to § 39-22-303.6 C.R.S., and the regulations thereunder because of Corporation B's retail sales. Special Regulation 6A, regarding the apportionment of trucking income, is not used to apportion Corporation A's income because all of Corporation A's receipts are excluded from the apportionment calculation as intercompany transactions.

(ii) *Example (ii).* Same facts as Example (i), except Corporation A derives $2 million from sales of transportation services to third-parties who are not part of the affiliated group. Corporation B makes $20 million in sales of its goods to consumers. Total sales of the affiliated group are $22 million. Corporation A must use Special Regulation 6A, prescribing apportionment of income for trucking

companies, and Corporation B must apportion its income pursuant to § 39-22-303.6, C.R.S., and the regulations thereunder. Corporation A and Corporation B must separately calculate their receipts factors using the appropriate methodologies. Each corporation must also calculate separate taxable income for each commercial activity and use the appropriate receipts factor to calculate Colorado taxable income. The combined group then calculates tax and applies any credits generated.

Regulation 39-22-303.6–4. Taxable in Another State.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining whether a taxpayer is taxable in another state. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** A taxpayer is subject to the allocation and apportionment provisions of § 39-22-303.6, C.R.S., if it has income from business activity that is taxable both within and without Colorado. A taxpayer's income from business activity is taxable without Colorado if the taxpayer, by reason of such business activity (i.e., the transactions and activity occurring in the regular course of a particular trade or business), is taxable in another state within the meaning of § 39-22-303.6(3)(c), C.R.S.

(2) **Applicable Tests.** A taxpayer's income is taxable in another state if it meets either one of two tests:

(a) by reason of business activity in another state, the taxpayer is subject to one of the types of taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., or

(b) by reason of such business activity, another state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state imposes such a tax on the taxpayer.

(3) **Producing Nonapportionable Income.** A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in that other state pertaining to the production of nonapportionable income or business activities relating to a separate trade or business.

(4) **Subject to Tax in Another State.** A taxpayer is "subject to" one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., if it carries on business activities in a state and the state imposes such a tax thereon. Any taxpayer that asserts that it is subject to one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., in another state shall furnish to the Department upon its request evidence to support such assertion. The Department may request that such evidence include proof that the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state; the taxpayer's failure to produce such proof may be taken into account in determining whether the taxpayer in fact is subject to one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., in the other state.

(a) *Voluntary Tax Payment.* If the taxpayer voluntarily files and pays one or more of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., when not required to do so by the laws of that state, or pays a minimal fee for the qualification, organization, or privilege of doing business in that state, but:

(i) does not actually engage in business activity in that state, or

(ii) engages in some business activity not sufficient for nexus, and

the minimum tax bears no relationship to the taxpayer's business activity within such state, the taxpayer is not "subject to" one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S.

(A) *Example*: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the $50 minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.

(b) The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income tax even though every state does not do so. In states that do not, other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes enumerated in § 39-22-303.6(3)(c)(I), C.R.S., that may be considered as basically revenue raising rather than regulatory measures shall be considered in determining whether the taxpayer is "subject to" one of the taxes specified in § 39-22-303.6(3)(c)(I), C.R.S., in another state.

(i) *Example (i):* State A requires all nonresident corporations which qualify or register in State A to pay to the Secretary of State an annual license fee or tax for the privilege of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of $50 and a maximum fee of $500. Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not "taxable" in State A.

(ii) *Example (ii):* Same facts as Example (i) except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is "subject to" the net income tax of State A and is "taxable" in State A.

(iii) *Example (iii):* State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of (1) outstanding capital stock, and (2) surplus and undivided profits. The fee or tax base attributable to State B is determined by a three factor apportionment formula. Nonresident Corporation X, which operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is "taxable" in State B.

(iv) *Example (iv):* State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.

(5) **Another State has Jurisdiction to Subject Taxpayer to a Net Income Tax.** The second test, that of § 39-22-303.6(3)(c), C.R.S., applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such business activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present when the state is prohibited from imposing the tax by reason of the provision of Public Law 86-272, 15 U.S.C., §§

381–385. In the case of any "state," as defined in § 39-22-303.6(1)(e) C.R.S., other than a state of the United States or political subdivision thereof, the determination of whether the "state" has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that "state." If jurisdiction is otherwise present, that "state" is not considered as without jurisdiction by reason of the provisions of a treaty between that state and the United States.

(a) *Example:* Corporation X is actively engaged in manufacturing farm equipment in State A and in Foreign Country B. Both State A and Foreign Country B impose a net income tax but Foreign Country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and Foreign Country B.

Regulation 39-22-303.6–5. Calculating the Receipts Factor.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** All apportionable income of each trade or business of the taxpayer shall be apportioned to this state by use of the apportionment formula set forth in § 39-22-303.6(4), C.R.S.

(a) *Denominator.* The denominator of the receipts factor shall include the gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under § 39-22-303.6, C.R.S., and these regulations.

(b) *Numerator.* The numerator of the receipts factor shall include the gross receipts attributable to Colorado and derived by the taxpayer from transactions and activity in the regular course of its trade or business, except gross receipts excluded under § 39-22-303.6, C.R.S., and these regulations.

(c) *Exceptions.* In some cases, certain gross receipts should be disregarded in determining the receipts factor in order that the apportionment formula will operate fairly to apportion to Colorado the income of the taxpayer's trade or business.

(d) The receipts factor for an affiliated group of C corporations filing a combined return shall not include receipts from property delivered in Colorado by an includable C corporation that is not doing business in Colorado.

(e) *Consistency in Reporting.*

(i) *Numerator and Denominator Consistency*. In filing returns with Colorado, the taxpayer must use the same methodology in calculating both the numerator and the denominator of the receipts factor.

(ii) *Year-to-Year Consistency*. In filing returns with Colorado, if the taxpayer departs from or modifies the basis for excluding or including gross receipts in the receipts factor used in returns for prior years, the taxpayer shall disclose in the return for the current year the nature and extent of the modification.

(iii) *State-to-State Consistency*. If the returns or reports filed by the taxpayer with all states to which the taxpayer reports under § 39-22-303.6, C.R.S., Article IV of the

Multistate Tax Compact, or the Uniform Division of Income for Tax Purposes Act are not uniform in the inclusion or exclusion of gross receipts, the taxpayer shall disclose in its return to Colorado the nature and extent of the variance.

(2) **Mediation**. Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services by the Department and one or more other state taxing authorities, the taxpayer may petition for, and the Department may participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution regulations promulgated by the Multistate Tax Commission from time to time, regardless of whether all the state taxing authorities are members of the Multistate Tax Compact.

Regulation 39-22-303.6–6. Sales of Tangible Personal Property in Colorado.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from sales of tangible personal property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** Gross receipts from sales of tangible personal property are in Colorado:

(a) if the property is delivered or shipped to a purchaser within Colorado regardless of the f.o.b. point or other condition of sale; or

(b) if the property is shipped from an office, store, warehouse, factory, or other place of storage in Colorado and the taxpayer is not taxable in the state to which the property is shipped.

(2) Property is delivered or shipped to a purchaser within Colorado if the recipient is located in Colorado, even though the property is ordered from outside Colorado.

(a) *Example:* The taxpayer, with inventory in State A, sold $100,000 of its products to a purchaser having branch stores in several states, including Colorado. The order for the purchase was placed by the purchaser's central purchasing department located in State B. $25,000 of the purchase order was shipped directly to purchaser's branch store in Colorado. The branch store in Colorado is the purchaser within Colorado with respect to $25,000 of the taxpayer's sales.

(3) Property is delivered or shipped to a purchaser within Colorado if the shipment terminates in Colorado, even though the property is subsequently transferred by the purchaser to another state.

(a) *Example*: The taxpayer makes a sale to a purchaser who maintains a central warehouse in Colorado at which all merchandise purchases are received. The purchaser reships the goods to its branch stores in other states for sale. All of the taxpayer's products shipped to the purchaser's warehouse in Colorado constitute property delivered or shipped to a purchaser within Colorado.

(4) The term "purchaser within Colorado" shall include the ultimate recipient of the property if the taxpayer, at the designation of the purchaser, delivers to or has the property shipped to the ultimate recipient within Colorado.

(a) *Example*: A taxpayer sold merchandise to a purchaser in State A. Taxpayer directed the manufacturer or supplier of the merchandise in State B to ship the merchandise to the purchaser's customer in Colorado pursuant to purchaser's instructions. The sale by the taxpayer is in Colorado.

(5) When property being shipped by the taxpayer from the state of origin to a consignee in another state is diverted while en route to a purchaser in Colorado, the sales are in Colorado.

(a) *Example*: The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route, the produce is diverted to the purchaser's place of business in Colorado in which state the taxpayer is subject to tax. The sale by the taxpayer is attributed to Colorado.

(6) If the taxpayer is not taxable in the state of the purchaser, the sale is attributed to Colorado if the property is shipped from an office, store, warehouse, factory, or other place of storage in Colorado.

(a) *Example*: The taxpayer has its head office and factory in State A. It maintains a branch office and inventory in Colorado. Taxpayer's only activity in State B is the solicitation of orders by a resident salesperson. All orders by the State B salesperson are sent to the branch office in Colorado for approval and are filled by shipment from the inventory in Colorado. Since the taxpayer is immune under Public Law 86-272 from tax in State B, all sales of merchandise to purchasers in State B are attributed to Colorado, the state from which the merchandise was shipped.

(7) If a taxpayer whose salesperson operates from an office located in Colorado makes a sale to a purchaser in another state in which the taxpayer is not taxable, and the property is shipped directly by a third party to the purchaser, the following rules apply:

(a) If the taxpayer is taxable in the state from which the third party ships the property, then the sale is in that state.

(b) If the taxpayer is not taxable in the state from which the third party ships the property, then the sale is in Colorado.

(c) *Example:* The taxpayer in Colorado sold merchandise to a purchaser in State A. Taxpayer is not taxable in State A. Upon direction of the taxpayer, the merchandise was shipped directly to the purchaser by the manufacturer in State B. If the taxpayer is taxable in State B, the sale is in State B. If the taxpayer is not taxable in State B, the sale is in Colorado.

Regulation 39-22-303.6–7. Sales Other Than Sales of Tangible Personal Property in Colorado.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from sales other than sales of tangible personal property are included in a taxpayer’s receipts factor. Consistent with the General Assembly’s adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state’s income tax laws to the Multistate Tax Commission’s model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.**

(a) In general, § 39-22-303.6(6), C.R.S., provides for the inclusion in the numerator of the receipts factor of gross receipts arising from transactions other than sales of tangible personal property

(b) Receipts, other than receipts described in § 39-22-303.6(5), C.R.S., (from sales of tangible personal property) are in Colorado within the meaning of § 39-22-303.6(6), C.R.S., and Regulations 39-22-303.6–7 through –13 if and to the extent that the taxpayer's market for the sales is in Colorado. In general, the provisions in this section establish uniform rules for (1) determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Colorado, (2) reasonably approximating the state or states of assignment when the state or states cannot be determined, (3) excluding receipts from the sale of intangible property from the numerator and denominator of the receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S., and (4) excluding receipts from the denominator of the receipts factor, pursuant to § 39-22-303.6(6)(f), C.R.S., where the state or states of assignment cannot be determined or reasonably approximated.

(2) **General Principles of Application.** In order to satisfy the requirements of Regulations 39-22-303.6–7 through –13, a taxpayer's assignment of receipts from sales of other than tangible personal property must be consistent with the following principles:

(a) A taxpayer shall apply the rules set forth in Regulations 39-22-303.6–7 through –13 based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing including, without limitation, the taxpayer's books and records kept in the normal course of business. A taxpayer shall determine its method of assigning receipts in good faith, and apply it such method consistently with respect to similar transactions year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, and shall provide those records to the Department upon request.

(b) Regulations 39-22-303.6–7 through –13 provide various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy, and must continue to do so with each succeeding rule in the hierarchy, where applicable. For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.

(c) A taxpayer's method of assigning its receipts, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of receipts consistent with the standards set forth in Regulations 39-22-303.6–7 through –13, rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

(3) **Rules of Reasonable Approximation.**

(a) In general, Regulations 39-22-303.6–7 through –13 establish uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Colorado. Each regulation also sets forth rules of

reasonable approximation, which apply if the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation prescribed in Regulations 39-22-303.6–7 through –13. In other cases, the applicable rule in Regulations 39-22-303.6–7 through –13 permits a taxpayer to reasonably approximate the state or states of assignment using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in Regulations 39-22-303.6–7 through –13.

(b) *Approximation Based Upon Known Sales.* In an instance where, applying the applicable rules set forth in Regulation 39-22-303.6–10 (Sale of a Service), a taxpayer can ascertain the state or states of assignment for a substantial portion of its receipts from sales of substantially similar services ("assigned receipts"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned receipts, it shall include receipts from those sales that it believes tracks the geographic distribution of the assigned receipts in its receipts factor in the same proportion as its assigned receipts. This rule also applies in the context of licenses and sales of intangible property where the substance of the transaction resembles a sale of goods or services. *See paragraph (5) of Regulation 39-22-303.6–11 and paragraph (1)(c) of Regulation 39-22-303.6–12.*

(c) *Related-Party Transactions.* Where a taxpayer has receipts subject to these Regulations 39-22-303.6–7 through –13 from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

(4) **Rules with Respect to Exclusion of Receipts from the Receipts Factor.**

(a) The receipts factor only includes those amounts defined as receipts under § 39-22-303.6(1)(d), C.R.S., and applicable regulations.

(b) Certain receipts arising from the sale of intangibles are excluded from the numerator and denominator of the receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S. *See paragraph (1)(d) of Regulation 39-22-303.6–12.*

(c) In a case in which a taxpayer cannot ascertain the state or states to which receipts of a sale are to be assigned pursuant to the applicable rules set forth in Regulations 39-22-303.6–7 through –13 (including through the use of a method of reasonable approximation, when relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the denominator of the taxpayer's receipts factor pursuant to § 39-22-303.6(6)(f), C.R.S., and these regulations.

(d) Receipts of a taxpayer from hedging transactions, or from holding cash or securities, or from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities, shall be excluded pursuant to §§ 39-22-303.6(1)(d) and (6), C.R.S.

(5) **Changes in Methodology; Department Review.**

(a) *No Limitation on § 39-22-303.6(9), C.R.S., or Regulations 39-22-303.6–16 and –17.* Nothing in the regulations adopted here pursuant to § 39-22-303.6(6), C.R.S., is intended to limit the application of § 39-22-303.6(9), C.R.S., or the authority granted to the Department under § 39-22-303.6(9), C.R.S. To the extent that regulations adopted pursuant to § 39-22-303.6(9), C.R.S., conflict with provisions of these regulations adopted pursuant to § 39-22-303.6(6), C.R.S., the regulations adopted pursuant to § 39-

22-303.6(9), C.R.S., control. If the application of § 39-22-303.6(6), C.R.S., or the regulations adopted pursuant thereto result in the attribution of receipts to the taxpayer's receipts factor that do not fairly represent the extent of the taxpayer's business activity in Colorado, the taxpayer may petition for, or Department may require, the use of a different method for attributing those receipts.

(b) *General Rules Applicable to Original Returns.* In any case in which a taxpayer files an original return for a taxable year in which it properly assigns its receipts using a method of assignment, including a method of reasonable approximation, in accordance with the rules stated in Regulations 39-22-303.6–7 through –13, the application of such method of assignment shall be deemed to be a correct determination by the taxpayer of the state or states of assignment to which the method is properly applied. In those cases, neither the Department nor the taxpayer (through the form of an audit adjustment, amended return, abatement application or otherwise) may modify the taxpayer's methodology as applied for assigning those receipts for the taxable year. However, the Department and the taxpayer may each subsequently, through the applicable administrative process, correct factual errors or calculation errors with respect to the taxpayer's application of its filing methodology.

(c) *Department's Authority to Adjust a Taxpayer's Return*. The provisions contained in this paragraph (5)(c) are subject to paragraph (5)(b). The Department's authority to review and adjust a taxpayer's assignment of receipts on a return to more accurately assign receipts consistently with the rules or standards of Regulations 39-22-303.6–7 through –13 includes, but is not limited to, each of the following potential actions.

(i) In a case in which a taxpayer fails to properly assign receipts from a sale in accordance with the rules set forth in Regulations 39-22-303.6–7 through –13, including the failure to properly apply a hierarchy of rules consistent with the principles of paragraph (2)(b), the Department may adjust the assignment of the receipts in accordance with the applicable rules in Regulations 39-22-303.6–7 through –13.

(ii) In a case in which a taxpayer uses a method of approximation to assign its receipts and the Department determines that the method of approximation employed by the taxpayer is not reasonable, the Department may substitute a method of approximation that the Department determines is appropriate or may exclude the receipts from the taxpayer's numerator and denominator, as appropriate.

(iii) In a case in which the Department determines that a taxpayer's method of approximation is reasonable, but has not been applied in a consistent manner with respect to similar transactions or year to year, the Department may require that the taxpayer apply its method of approximation in a consistent manner.

(iv) In a case in which a taxpayer excludes receipts from the denominator of its receipts factor on the theory that the assignment of the receipts cannot be reasonably approximated, the Department may determine that the exclusion of those receipts is not appropriate, and may instead substitute a method of approximation that the Department determines is appropriate.

(v) In a case in which a taxpayer fails to retain contemporaneous records that explain the determination and application of its method of assigning its receipts, including its underlying assumptions, or fails to provide those records to Department upon request, the Department may treat the taxpayer's assignment of receipts as unsubstantiated, and may adjust the assignment of the receipts in

a manner consistent with the applicable rules in Regulations 39-22-303.6–7 through –13.

(vi) In a case in which the Department concludes that a customer's billing address was selected by the taxpayer for tax avoidance purposes, the Department may adjust the assignment of receipts from sales to that customer in a manner consistent with the applicable rules in Regulations 39-22-303.6–7 through –13.

(d) *Taxpayer Authority to Change a Method of Assignment on a Prospective Basis*. A taxpayer that seeks to change its method of assigning its receipts under Regulations 39-22-303.6–7 through –13 must disclose, in the original return filed for the year of the change, the fact that it has made the change. If a taxpayer fails to adequately disclose the change, the Department may disregard the taxpayer's change and substitute an assignment method that the Department determines is appropriate.

(e) *Department Authority to Change a Method of Assignment on a Prospective Basis*. The Department may direct a taxpayer to change its method of assigning its receipts in tax returns that have not yet been filed, including changing the taxpayer's method of approximation, if upon reviewing the taxpayer's filing methodology applied for a prior tax year, the Department determines that the change is appropriate to reflect a more accurate assignment of the taxpayer's receipts within the meaning of Regulations 39-22-303.6–7 through –13, and determines that the change can be reasonably adopted by the taxpayer. The Department will provide the taxpayer with a written explanation as to the reason for making the change. In a case in which a taxpayer fails to comply with the Department's direction on subsequently filed returns, the Department may deem the taxpayer's method of assigning its receipts on those returns to be unreasonable, and may substitute an assignment method that the Department determines is appropriate.

(f) *Further Guidance.* The Department may issue further public written statements with respect to the rules set forth in this regulation. These statements may, among other things, include guidance with respect to: (1) what constitutes a reasonable method of approximation within the meaning of the regulations, and (2) the circumstances in which a filing change with respect to a taxpayer's method of reasonable approximation will be deemed appropriate.

Regulation 39-22-303.6–8. Sale, Rental, Lease, or License of Real Property.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from the sale, rental, lease, or license of real property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

In the case of a sale, rental, lease, or license of real property, the receipts from the sale are in Colorado if and to the extent that the property is in Colorado.

Regulation 39-22-303.6–9. Rental, Lease, or License of Tangible Personal Property.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from the rental, lease, or license of tangible personal property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and

regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

In the case of a rental, lease, or license of tangible personal property, the receipts from the sale are in Colorado if and to the extent that the property is in Colorado. If property is mobile property that is located both within and without Colorado during the period of the lease or other contract, the receipts assigned to Colorado are the receipts from the contract period multiplied by a fraction, the numerator of which is the total time within Colorado during the tax period and the denominator of which is the total time during the tax period (as adjusted when necessary to reflect differences between usage during the contract period and usage during the taxable year).

Regulation 39-22-303.6–10. Sale of a Service.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from sales of services are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** The receipts from a sale of a service are in Colorado if and to the extent that the service is delivered to a location in Colorado. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth in paragraphs (2)–(4).

(2) **In-Person Services.**

(a) *In General.* Except as otherwise provided in this paragraph (2), in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer's real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry; construction contractor services; pest control; landscape services; medical and dental services, including medical testing, x-rays, and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer's real or tangible personal property. Although various professional services, including legal, accounting, financial, and consulting services, and other similar services as described in paragraph (4), may involve some amount of in-person contact, they are not treated as in-person services within the meaning of this paragraph (2).

(b) *Assignment of Receipts.*

(i) *Rule of Determination.* Except as otherwise provided in this paragraph (2)(b), if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Colorado if and to the extent the customer receives the in-person service in Colorado. In assigning receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received, as follows:

(A) If the service is performed with respect to the body of an individual customer in Colorado (e.g., hair cutting or x-ray services) or in the physical presence of the customer in Colorado (e.g., live entertainment or athletic performances), the service is received in Colorado.

(B) If the service is performed with respect to the customer's real estate in Colorado, or if the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in Colorado, the service is received in Colorado.

(C) If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed within or outside Colorado, the service is received in Colorado if the property is shipped or delivered to the customer in Colorado.

(c) *Rule of Reasonable Approximation*. In an instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states.

(d) *Examples*. For purposes of the examples, it is irrelevant whether the services are performed by an employee of the taxpayer or by an independent contractor acting on the taxpayer's behalf.

(i) *Example (i).* Salon Corp has retail locations in Colorado and in other states where it provides hair cutting services to individual and business customers, the latter of whom are paid for through the means of a company account. The receipts from sales of services provided at Salon Corp's Colorado locations are in Colorado. The receipts from sales of services provided at Salon Corp's locations outside Colorado, even when provided to residents of Colorado, are not receipts from Colorado sales.

(ii) *Example (ii)*. Landscape Corp provides landscaping and gardening services in Colorado and in neighboring states. Landscape Corp provides landscaping services at the in-state vacation home of an individual who is a resident of another state and who is located outside Colorado at the time the services are performed. The receipts from sale of services provided at the Colorado location are in Colorado.

(iii) *Example (iii)*. Same facts as Example (ii), except that Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to those locations of Retail Corp that are in Colorado and the other states. The receipts from the sale of services provided to Retail Corp are in Colorado to the extent the services are provided in Colorado.

(iv) *Example (iv).* Camera Corp provides camera repair services at a Colorado retail location to walk-in individual and business customers. In some cases, Camera Corp actually repairs a camera that is brought to its Colorado location at a facility that is in another state. In these cases, the repaired camera is then returned to the customer at Camera Corp's Colorado location. The receipts from the sale of these services are in Colorado.

(v) *Example (v).* Same facts as Example (iv), except that a customer located in Colorado mails the camera directly to the out-of-state facility owned by Camera Corp to be fixed, and receives the repaired camera back in Colorado by mail. The receipts from the sale of the service are in Colorado.

(vi) *Example (vi).* Teaching Corp provides seminars in Colorado to individual and business customers. The seminars and the materials used in connection with the seminars are prepared outside Colorado, the teachers who teach the seminars include teachers that are resident outside Colorado, and the students who attend the seminars include students that are resident outside Colorado. Because the seminars are taught in Colorado, the receipts from sales of the services are in Colorado.

(3) **Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.**

(a) *In General.* If the service provided by the taxpayer is not an in-person service within the meaning of paragraph (2), or a professional service within the meaning of paragraph (4), and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in Colorado if and to the extent that the service is delivered in Colorado.

(i) For purposes of this paragraph (3):

(A) A service that is delivered "to" a customer is a service in which the customer and not a third party is the recipient of the service.

(B) A service that is delivered "on behalf of" a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services or the direct or indirect delivery of advertising to the customer's intended audience. *(See paragraph (3)(b)(i) and Example (iv) under paragraph (3)(b)(i)(C))*

(C) A service can be delivered to or on behalf of a customer by physical means or through electronic transmission.

(D) A service that is delivered electronically "through" a customer is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient.

(b) *Assignment of Receipts*. The assignment of receipts to a state or states in the instance of a sale of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this paragraph (3), a service delivered by an electronic transmission is not a delivery by a physical means). If a rule of assignment set forth in this paragraph (3) depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer.

(i) *Delivery to or on Behalf of a Customer by Physical Means Whether to an Individual or Business Customer.* Services delivered to a customer or on behalf of a customer through physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers, or other direct mail services; the delivery of advertising or advertising-related services to the customer's intended audience in the form of a physical medium; and the sale of custom software (e.g., when software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of corporate income taxation) when the taxpayer installs the custom software at the customer's site. The rules in this paragraph (3)(b)(i) apply whether the taxpayer's customer is an individual customer or a business customer.

(A) *Rule of Determination*. In assigning the receipts from a sale of a service delivered to a customer or on behalf of a customer through physical means, a taxpayer must first attempt to determine the state or states where the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.

(B) *Rule of Reasonable Approximation*. If the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate the state or states.

(C) *Examples*.

(I) *Example (i).* Direct Mail Corp, a corporation based outside Colorado, provides direct mail services to its customer, Business Corp. Business Corp contracts with Direct Mail Corp to deliver printed fliers to a list of customers that is provided to it by Business Corp. Some of Business Corp's customers are in Colorado and some of those customers are in other states. Direct Mail Corp will use the postal service to deliver the printed fliers to Business Corp's customers. The receipts from the sale of Direct Mail Corp's services to Business Corp are assigned to Colorado to the extent that the services are delivered on behalf of Business Corp to Colorado customers (i.e., to the extent that the fliers are delivered on behalf of Business Corp to Business Corp's intended audience in Colorado).

(II) *Example (ii).* Ad Corp is a corporation based outside Colorado that provides advertising and advertising-related services in Colorado and in neighboring states. Ad Corp enters into a contract at a location outside Colorado with an individual customer, who is not a Colorado resident, to design advertisements for billboards to be displayed in Colorado, and to design fliers to be mailed to Colorado residents. All of the design work is performed outside Colorado. The receipts from the sale of the design services are in Colorado because the service is physically delivered on behalf of the customer to the customer's intended audience in Colorado.

(III) *Example (iii)*. Same facts as Example (ii), except that the contract is with a business customer that is based outside

Colorado. The receipts from the sale of the design services are in Colorado because the services are physically delivered on behalf of the customer to the customer's intended audience in Colorado.

(IV) *Example (iv).* Fulfillment Corp, a corporation based outside Colorado, provides product delivery fulfillment services in Colorado and in neighboring states to Sales Corp, a corporation located outside Colorado that sells tangible personal property through a mail order catalog and over the Internet to customers. In some cases when a customer purchases tangible personal property from Sales Corp to be delivered in Colorado, Fulfillment Corp will, pursuant to its contract with Sales Corp, deliver that property from its fulfillment warehouse located outside Colorado. The receipts from the sale of the fulfillment services of Fulfillment Corp to Sales Corp are assigned to Colorado to the extent that Fulfillment Corp's deliveries on behalf of Sales Corp are to recipients in Colorado.

(V) *Example (v).* Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in Colorado, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside Colorado, and then physically installs the software on Buyer Corp's computer hardware located in Colorado. The development and sale of the custom software is properly characterized as a service transaction, and the receipts from the sale are assigned to Colorado because the software is physically delivered to the customer in Colorado.

(ii) *Delivery to a Customer by Electronic Transmission*. Services delivered by electronic transmission include, without limitation, services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases, or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following rules apply.

(A) *Services Delivered By Electronic Transmission to an Individual Customer.*

(I) *Rule of Determination*. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Colorado if and to the extent that the taxpayer's customer receives the service in Colorado. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.

(II) *Rules of Reasonable Approximation*. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states. If a taxpayer does not have sufficient information from which it can determine or reasonably

approximate the state or states in which the service is received, it shall reasonably approximate the state or states using the customer's billing address.

(B) *Services Delivered By Electronic Transmission to a Business Customer.*

(I) *Rule of Determination*. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in Colorado if and to the extent that the taxpayer's customer receives the service in Colorado. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this paragraph (3)(b)(ii)(B), it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.

(II) *Rule of Reasonable Approximation*. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states.

(III) *Secondary Rule of Reasonable Approximation.* In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, the taxpayer shall reasonably approximate the state or states as set forth in this paragraph (3)(b)(ii)(B)(III). In these cases, unless the taxpayer can apply the safe harbor set forth in paragraph (3)(b)(ii)(B)(IV), the taxpayer shall reasonably approximate the state or states in which the service is received as follows:

(1) first, by assigning the receipts from the sale to the state where the contract of sale is principally managed by the customer;

(2) second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the receipts from the sale to the customer's place of order; and

(3) third, if the customer's place of order is not reasonably determinable, by assigning the receipts from the sale using the customer's billing address;

provided, however, if the taxpayer derives more than 5% of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.

(IV) *Safe Harbor*. In the case of the delivery of a service to a business customer by electronic transmission, a taxpayer may

not be able to determine or reasonably approximate under paragraph (3)(b)(ii)(B)(II) the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated in paragraph (3)(b)(ii)(B)(III), apply the safe harbor stated in this paragraph. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxable year in which the taxpayer:

(1) engages in substantially similar service transactions with more than 250 customers, whether business or individual, and

(2) does not derive more than 5% of its receipts from sales of all services from that customer.

This safe harbor applies only for purposes of services delivered by electronic transmission to a business customer, and not otherwise.

(V) *Related Party Transactions*. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary rule of reasonable approximation in (3)(b)(ii)(B)(III) but may use the rule of reasonable approximation in paragraph (3)(b)(ii)(B)(II) and the safe harbor in paragraph (3)(b)(ii)(B)(IV), provided that the Department may aggregate sales to related parties in determining whether the sales exceed 5% of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

(C) *Examples*. In these examples, unless otherwise stated, assume that the taxpayer is not related to the customer to which the service is delivered. Further, assume if relevant, unless otherwise stated, that the safe harbor set forth in paragraph (3)(b)(ii)(B)(IV) does not apply.

(I) *Example (i)*. Support Corp, a corporation based outside Colorado, provides software support and diagnostic services to individual and business customers that have previously purchased certain software from third-party vendors. These individual and business customers are located in Colorado and other states. Support Corp supplies its services on a case by case basis when directly contacted by its customer. Support Corp generally provides these services through the Internet but sometimes provides these services by phone. In all cases, Support Corp verifies the customer's account information before providing any service. Using the information that Support Corp verifies before performing a service, Support Corp can determine where its services are received, and therefore must assign its receipts to these locations. The receipts from sales made to Support Corp's individual and business customers are in Colorado to the extent that Support Corp's services are received in Colorado. *See paragraph (3)(b)(ii)(A) and (B).*

(II) *Example (ii)*. Online Corp, a corporation based outside Colorado, provides web-based services through the Internet to

individual customers who are resident in Colorado and in other states. These customers access Online Corp's web services primarily in their states of residence, and sometimes, while traveling, in other states. For a substantial portion of its receipts from the sale of services, Online Corp can either determine the state or states where the services are received, or, where it cannot determine the state or states, it has sufficient information regarding the place of receipt to reasonably approximate the state or states. However, Online Corp cannot determine or reasonably approximate the state or states of receipt for all of the sales of its services. Assuming that Online Corp reasonably believes, based on all available information, that the geographic distribution of the receipts from sales for which it cannot determine or reasonably approximate the location of the receipt of its services generally tracks those for which it does have this information, Online Corp must assign to Colorado the receipts from sales for which it does not know the customers' location in the same proportion as those receipts for which it has this information. *See paragraph (3)(b) of Regulation 39-22-303.6–7*.

(III) *Example (iii).* Same facts as Example (ii), except that Online Corp reasonably believes that the geographic distribution of the receipts from sales for which it cannot determine or reasonably approximate the location of the receipt of its web-based services do not generally track the sales for which it does have this information. Online Corp must assign the receipts from sales of its services for which it lacks information as provided to its individual customers using the customers' billing addresses. *See paragraph (3)(b)(ii)(A).*

(IV) *Example (iv).* Net Corp, a corporation based outside Colorado, provides web-based services to a business customer, Business Corp, a company with offices in Colorado and two neighboring states. Particular employees of Business Corp access the services from computers in each Business Corp office. Assume that Net Corp determines that Business Corp employees in Colorado were responsible for 75% of Business Corp's use of Net Corp's services, and Business Corp employees in other states were responsible for 25% of Business Corp's use of Net Corp's services. In this case, 75% of the receipts from the sale are received in Colorado. *See paragraph (3)(b)(ii)(B)(I).*

(V) *Example (v).* Same facts as Example (iv), except assume alternatively that Net Corp lacks sufficient information regarding the location or locations where Business Corp's employees used the services to determine or reasonably approximate the location or locations. Under these circumstances, if Net Corp derives 5% or less of its receipts from sales to Business Corp, Net Corp must assign the receipts under paragraph (3)(b)(ii)(B)(III) to the state where Business Corp principally managed the contract, or if that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from sales of services to Business Corp, Net Corp is required to identify the state in which its contract of sale is principally

managed by Business Corp and must assign the receipts to that state.

(VI) *Example (vi).* Net Corp, a corporation based outside Colorado, provides web-based services through the Internet to more than 250 individual and business customers in Colorado and in other states. Assume that for each customer Net Corp cannot determine the state or states where its web services are actually received, and lacks sufficient information regarding the place of receipt to reasonably approximate the state or states. Also assume that Net Corp does not derive more than 5% of its receipts from sales of services to a single customer. Net Corp may apply the safe harbor stated in paragraph (3)(b)(ii)(B)(IV), and may assign its receipts using each customer's billing address.

(iii) *Services Delivered Electronically Through or on Behalf of an Individual or Business Customer*. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.

(A) *Rule of Determination*. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in Colorado if and to the extent that the end users or other third-party recipients are in Colorado. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in Colorado to the extent that the audience for the advertising is in Colorado. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in Colorado to the extent that the end users or other third-party recipients receive the services in Colorado. The rules in this paragraph (3)(b)(iii) apply whether the taxpayer's customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.

(B) *Rule of Reasonable Approximation*. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, the taxpayer shall reasonably approximate the state or states.

(C) *Select Secondary Rules of Reasonable Approximation.*

(I) If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if the taxpayer lacks sufficient

information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary rules of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in that area. For a taxpayer with less information about its audience, the taxpayer shall reasonably approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in that area.

(II) If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that service to end users or other third party recipients, and if the taxpayer lacks sufficient information regarding the location of the end users or other third party recipients from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells the services, relative to the total population in that area.

(III) When using the secondary reasonable approximation methods provided above, the relevant specific geographic area of delivery includes only the areas where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

(D) *Examples*.

(I) *Example (i)*. Cable TV Corp, a corporation based outside of Colorado, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the business customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in Colorado. Second, Cable TV Corp sells monthly subscriptions to individual customers in Colorado and in other states. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to Colorado to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in Colorado. *See* paragraph (3)(b)(iii)(A). If Cable TV Corp is unable to determine the actual location of its audience for the programming, and lacks sufficient information regarding audience location to reasonably approximate the location, Cable TV Corp must approximate its Colorado audience using the

percentage that reflects the ratio of its Colorado subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. *See paragraph (3)(b)(iii)(C)(I)*. To the extent that Cable TV Corp's sales of monthly subscriptions represent the sale of a service, the receipts from these sales are properly assigned to Colorado in any case in which the programming is received by a customer in Colorado. *See paragraph (3)(b)(ii)(A)*. In any case in which Cable TV Corp cannot determine the actual location where the programming is received, and lacks sufficient information regarding the location of receipt to reasonably approximate the location, the receipts from these sales of Cable TV Corp's monthly subscriptions are assigned to Colorado where its customer's billing address is in Colorado. *See paragraph (3)(b)(ii)(A)(II).* Note that whether and to the extent that the monthly subscription fee represents a fee for a service or for a license of intangible property does not affect the analysis or result as to the state or states to which the receipts are properly assigned. *See paragraph 5 of Regulation 39-22-303.6–11.*

(II) *Example (ii)*. Network Corp, a corporation based outside of Colorado, sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming as distributed by unrelated cable television and satellite television transmission companies. The receipts from Network Corp's sale of advertising time to its business customers are assigned to Colorado to the extent that the audience for Network Corp's televised programming during which the advertisements will run is in Colorado. *See paragraph (3)(b)(iii)(A).* If Network Corp cannot determine the actual location of the audience for its programming during which the advertisements will run, and lacks sufficient information regarding audience location to reasonably approximate the location, Network Corp must approximate the receipts from sales of advertising that constitute Colorado sales by multiplying the amount of advertising receipts by a percentage that reflects the ratio of the Colorado population in the specific geographic area in which the televised programming containing the advertising is run relative to the total population in that area. *See paragraphs (3)(b)(iii)(C)(II) and (III).*

(III) *Example (iii)*. Web Corp, a corporation based outside of Colorado, provides Internet content to viewers in Colorado and other states. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. The receipts from Web Corp's sale of advertising space to its business customers are assigned to Colorado to the extent that the viewers of the Internet content are in Colorado, as measured by viewings or clicks. *See paragraph (3)(b)(iii)(A).* If Web Corp is unable to determine the actual location of its viewers, and lacks sufficient information regarding the location of

its viewers to reasonably approximate the location, Web Corp must approximate the amount of its Colorado receipts by multiplying the amount of receipts from sales of advertising by a percentage that reflects the Colorado population in the specific geographic area in which the content containing the advertising is delivered relative to the total population in that area. *See paragraph (3)(b)(iii)(C).*

(IV) *Example (iv)*. Retail Corp, a corporation based outside of Colorado, sells tangible property through its retail stores located in Colorado and other states, and through a mail order catalog. Answer Co, a corporation that operates call centers in multiple states, contracts with Retail Corp to answer telephone calls from individuals placing orders for products found in Retail Corp's catalogs. In this case, the phone answering services of Answer Co are being delivered to Retail Corp's customers and prospective customers. Therefore, Answer Co is delivering a service electronically to Retail Corp's customers or prospective customers on behalf of Retail Corp and must assign the proceeds from this service to the state or states from which the phone calls are placed by the customers or prospective customers. If Answer Co cannot determine the actual locations from which phone calls are placed, and lacks sufficient information regarding the locations to reasonably approximate the locations, Answer Co must approximate the amount of its Colorado receipts by multiplying the amount of its fee from Retail Corp by a percentage that reflects the Colorado population in the specific geographic area from which the calls are placed relative to the total population in that area. *See paragraph (3)(b)(iii)(C)(I).*

(V) *Example (v)*. Web Corp, a corporation based outside of Colorado, sells tangible property to customers via its Internet website. Design Co. designed and maintains Web Corp's website, including making changes to the site based on customer feedback received through the site. Design Co.'s services are delivered to Web Corp, the proceeds from which are assigned pursuant to paragraph (3)(b)(ii). The fact that Web Corp's customers and prospective customers incidentally benefit from Design Co.'s services, and may even interact with Design Co in the course of providing feedback, does not transform the service into one delivered "on behalf of" Web Corp to Web Corp's customers and prospective customers.

(VI) *Example (vi)*. Wholesale Corp, a corporation based outside of Colorado, develops an Internet-based information database outside Colorado and enters into a contract with Retail Corp whereby Retail Corp will market and sell access to this database to end users. Depending on the facts, the provision of database access may be either the sale of a service or the license of intangible property or may have elements of both, but for purposes of analysis it does not matter. *See paragraph (5) of Regulation 39-22-303.6–11.* Assume that on the particular facts applicable in this example, Wholesale Corp is selling database access in transactions properly characterized as involving the performance of a service. When an end user purchases access to Wholesale Corp's database from Retail Corp, Retail Corp in

turn compensates Wholesale Corp in connection with that transaction. In this case, Wholesale Corp's services are being delivered through Retail Corp to the end user. Wholesale Corp must assign its receipts from sales to Retail Corp to the state or states in which the end users receive access to Wholesale Corp's database. If Wholesale Corp cannot determine the state or states where the end users actually receive access to Wholesale Corp's database, and lacks sufficient information regarding the location from which the end users access the database to reasonably approximate the location, Wholesale Corp must approximate the extent to which its services are received by end users in Colorado by using a percentage that reflects the ratio of the Colorado population in the specific geographic area in which Retail Corp regularly markets and sells Wholesale Corp's database relative to the total population in that area. *See paragraph (3)(b)(iii)(C)(II).* Note that it does not matter for purposes of the analysis whether Wholesale Corp's sale of database access constitutes a service or a license of intangible property, or some combination of both. *See paragraph (5) of Regulation 39-22-303.6–11.*

(4) **Professional Services.**

(a) *In General.* Except as otherwise provided in this paragraph (4), professional services are services that require specialized knowledge and in some cases require a professional certification, license, or degree. These services include the performance of technical services that require the application of specialized knowledge. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.

(b) *Overlap with Other Service Categories.*

(i) Certain services that fall within the definition of "professional services" set forth in this paragraph (4) are nevertheless treated as "in-person services" within the meaning of paragraph (2), and are assigned under the rules of paragraph (2). Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services, or child care services, where the customer or the customer's real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are "in-person services" and are assigned as such, notwithstanding that they may also be considered to be "professional services." However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial, and consulting services, are assigned as professional services under the rules of this paragraph (4), notwithstanding the fact that these services may involve some amount of in-person contact.

(ii) Professional services may, in some cases, include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment rules that apply are those set

forth in this paragraph (4), and not those set forth in paragraph (3), pertaining to services delivered to a customer or through or on behalf of a customer.

(c) *Assignment of Receipts.* In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be reasonably approximated. The assignment of receipts from a sale of a professional service depends, in many cases, upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the receipts from a sale of a professional service, a taxpayer's customer is the person who contracts for the service, irrespective of whether another person pays for or also benefits from the taxpayer's services.

(i) *General Rule*. Receipts from sales of professional services other than those services described in paragraph (4)(c)(ii) (architectural and engineering services), paragraph (4)(c)(iii) (services provided by a financial institution) and paragraph (4)(h)(iv) (transactions with related parties) are assigned in accordance with this paragraph (4)(c)(i).

(A) *Professional Services Delivered to Individual Customers*. Except as otherwise provided in this paragraph (4) (see, in particular, paragraph (4)(c)(v)), in any instance in which the service provided is a professional service, and the taxpayer's customer is an individual customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this paragraph (4)(c)(i)(A). In particular, the taxpayer shall assign the receipts from a sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.

(B) *Professional Services Delivered to Business Customers*. Except as otherwise provided in paragraph (4), in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this paragraph (4)(c)(i)(B). In particular, unless the taxpayer may use the safe harbor set forth in paragraph (4)(c)(i)(C), the taxpayer shall assign the receipts from the sale as follows:

(I) first, by assigning the receipts to the state where the contract of sale is principally managed by the customer;

(II) second, if the place of customer management is not reasonably determinable, to the customer's place of order; and

(III) third, if the customer's place of order is not reasonably determinable, to the customer's billing address;

provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

(C) *Safe Harbor. Large Volume Transactions.* Notwithstanding the rules set forth in paragraph (4)(c)(i)(A) and (B), a taxpayer may assign its receipts from sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of paragraph (4)(c)(i) and not otherwise.

(ii) *Architectural and Engineering Services with Respect to Real or Tangible Personal Property*. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this paragraph (4). However, unlike in the case of the general rule that applies to professional services, (a) the receipts from a sale of an architectural service are assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in the state or states; and (b) the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in this paragraph (4)(c)(ii), the receipts from a sale of these services must be assigned under the general rule for professional services. *See paragraph (4)(c)(i)*.

(iii) *Services Provided by a Financial Institution*. The apportionment rules that apply to financial institutions are set forth in 1 CCR 201-2, Special Regulation 7A, which includes specific rules for determining a financial institution's receipts factor. However, 1 CCR 201-2, Special Regulation 7A also provides that receipts from sales, other than sales of tangible personal property, including service transactions that are not otherwise apportioned under 1 CCR 201-2, Special Regulation 7A, are to be assigned pursuant to § 39-22-303.6, C.R.S., and these regulations. In any instance in which a financial institution performs services that are to be assigned pursuant to § 39-22-303.6, C.R.S., and these regulations, including, for example, financial custodial services, those services are considered professional services within the meaning of this paragraph (4) and are assigned according to the general rule for professional service transactions as set forth paragraph (4)(c)(i).

(iv) *Services Provided by a Mutual Fund Service Corporation.* To the extent the services that give rise to "mutual fund sales" as defined in § 39-22-303.7(1)(e), C.R.S., would be considered professional services, the apportionment rules that apply to "mutual fund sales" by a "mutual fund service corporation," as that term is defined in § 39-22-303.7(1)(f), C.R.S., are set forth in § 39-22-303.7, C.R.S., and the regulations thereunder.

(v) *Related Party Transactions*. In any instance in which the professional service is sold to a related party, rather than applying the rule for professional services delivered to business customers in paragraph (4)(c)(i)(B), the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy:

(A) if the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or

(B) if the service does not relate primarily to operations or activities of a related party conducted in particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states.

The taxpayer may use the safe harbor provided in paragraph (4)(c)(i)(C) provided that the Department may aggregate the receipts from sales to related parties in applying the 5% rule if necessary or appropriate to avoid distortion.

(vi) *Examples*. Unless otherwise stated, assume in each of these examples that the customer is not a related party and that the safe harbor set forth in paragraph (4)(c)(i)(C) does not apply.

(A) *Example (i)*. Broker Corp provides securities brokerage services to individual customers who are residents in Colorado and in other states. Assume that Broker Corp knows the state of primary residence for many of its customers, and where it does not know the state of primary residence, it knows the customer's billing address. Also assume that Broker Corp does not derive more than 5% of its receipts from sales of all services from any one individual customer. If Broker Corp knows its customer's state of primary residence, it shall assign the receipts to that state. If Broker Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it shall assign the receipts to that state. *See paragraph (4)(c)(i)(A).*

(B) *Example (ii)*. Same facts as Example (i), except that Broker Corp has several individual customers from whom it derives, in each instance, more than 5% of its receipts from sales of all services. Receipts from sales to customers from whom Broker Corp derives 5% or less of its receipts from sales of all services must be assigned as described in Example (i). For each customer from whom it derives more than 5% of its receipts from sales of all services, Broker Corp is required to determine the customer's state of primary residence and must assign the receipts from the services provided to that customer to that state. In any case in which a 5% customer's state of primary residence is Colorado, receipts from a sale made to that customer must be assigned to Colorado; in any case in which a 5% customer's state of primary residence is not Colorado receipts from a sale made to that customer are not assigned to Colorado.

(C) *Example (iii)*. Architecture Corp provides building design services for buildings located, or expected to be located, in Colorado to individual customers who are resident in Colorado and other states, and to business customers that are based in Colorado and other states. The receipts from Architecture Corp's sales are assigned to Colorado because the locations of the buildings to which its design services relate are in Colorado, or are expected to be in Colorado. For purposes of assigning these receipts, it is not relevant where, in the case of an individual customer, the customer primarily resides or is billed for the

services, and it is not relevant where, in the case of a business customer, the customer principally manages the contract, placed the order for the services, or is billed for the services. Further, these receipts are assigned to Colorado even if Architecture Corp's designs are either physically delivered to its customer in paper form in a state other than Colorado or are electronically delivered to its customer in a state other than Colorado. *See paragraphs (4)(b)(ii) and (c)(ii).*

(D) *Example (iv)*. Law Corp provides legal services to individual clients who are resident in Colorado and in other states. In some cases, Law Corp may prepare one or more legal documents for its client as a result of these services and/or the legal work may be related to litigation or a legal matter that is ongoing in a state other than where the client is a resident. Assume that Law Corp knows the state of primary residence for many of its clients, and where it does not know the state of primary residence, it knows the client's billing address. Also assume that Law Corp does not derive more than 5% of its receipts from sales of all services from any one individual client. If Law Corp knows its client's state of primary residence, it shall assign the receipts to that state. If Law Corp does not know its client's state of primary residence, but rather knows the client's billing address, it shall assign the receipts to that state. For purposes of the analysis, it is irrelevant whether the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or the litigation or other legal matter that is the underlying predicate for the services is in another state. *See paragraphs (4)(b)(ii) and (c)(i).*

(E) *Example (v).* Law Corp provides legal services to several multistate business clients. In each case, Law Corp knows the state in which the agreement for legal services that governs the client relationship is principally managed by the client. In one case, the agreement is principally managed in Colorado; in the other cases, the agreements are principally managed in states other than Colorado. If the agreement for legal services is principally managed by the client in Colorado, the receipts from sale of the services are assigned to Colorado; in the other cases, the receipts are not assigned to Colorado. In the case of receipts that are assigned to Colorado, the receipts are so assigned even if (1) the legal documents relating to the service are mailed or otherwise delivered to a location in another state, or (2) the litigation or other legal matter that is the underlying predicate for the services is in another state. *See paragraphs (4)(b)(ii) and (c)(i).*

(F) *Example (vi)*. Consulting Corp, a company that provides consulting services to law firms and other customers, is hired by Law Corp in connection with legal representation that Law Corp provides to Client Co. Specifically, Consulting Corp is hired to provide expert testimony at a trial being conducted by Law Corp on behalf of Client Co. Client Co pays for Consulting Corp's services directly. Assuming that Consulting Corp knows that its agreement with Law Corp is principally managed by Law Corp in Colorado, the receipts from the sale of Consulting Corp's services are assigned to Colorado. It is not relevant for purposes of the analysis that Client Co is the ultimate beneficiary of Consulting Corp's services, or that Client Co pays for Consulting Corp's services directly. *See paragraph (4)(c)(i)(B).*

(G) *Example (vii)*. Bank Corp provides financial custodial services, including the safekeeping of some of its customers' financial assets, to 100

individual customers who are resident in Colorado and in other states. Assume for purposes of this example that Bank Corp knows the state of primary residence for many of its customers, and where it does not know the state of primary residence, it knows the customer's billing address. Also assume that Bank Corp does not derive more than 5% of its receipts from sales of all of its services from any single customer. Note that because Bank Corp does not have more than 250 customers, it may not apply the safe harbor for professional services stated in paragraph (4)(c)(i)(C). If Bank Corp knows its customer's state of primary residence, it must assign the receipts to that state. If Bank Corp does not know its customer's state of primary residence, but rather knows the customer's billing address, it must assign the receipts to that state. Bank Corp's receipts are assigned to Colorado if the customer's state of primary residence (or billing address, in cases where it does not know the customer's state of primary residence) is in Colorado, even if Bank Corp's financial custodial work, including the safekeeping of the customer's financial assets, takes place in a state other than Colorado. *See paragraph (4)(c)(i)(A).*

(H) *Example (viii)*. Same facts as Example (vii), except that Bank Corp has more than 250 customers, individual or business. Bank Corp may apply the safe harbor for professional services stated in paragraph (4)(c)(i)(C), and may assign its receipts from sales to a state or states using each customer's billing address.

(I) *Example (ix)*. Same facts as Example (viii), except that Bank Corp derives more than 5% of its receipts from sales from a single individual customer. As to the sales made to this customer, Bank Corp is required to determine the individual customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state. *See paragraphs (4)(c)(i)(A) and (c)(iii)*. Receipts from sales to all other customers are assigned as described in Example (viii).

(J) *Example (x).* Advisor Corp, a corporation that provides investment advisory services, provides these advisory services to Investment Co. Investment Co is a multistate business client of Advisor Corp that uses Advisor Corp's services in connection with investment accounts that it manages for individual clients, who are the ultimate beneficiaries of Advisor Corp's services. Assume that Investment Co's individual clients are persons that are resident in numerous states, which may or may not include Colorado. Assuming that Advisor Corp knows that its agreement with Investment Co is principally managed by Investment Co in Colorado, receipts from the sale of Advisor Corp's services are assigned to Colorado. It is not relevant for purposes of the analysis that the ultimate beneficiaries of Advisor Corp's services may be Investment Co's clients, who are residents of numerous states. *See paragraph (4)(c)(i)(B).*

(K) *Example (xi)*. Advisor Corp provides investment advisory services to Investment Fund LP, a partnership that invests in securities and other assets. Assuming that Advisor Corp knows that its agreement with Investment Fund LP is principally managed by Investment Fund LP in Colorado, receipts from the sale of Advisor Corp's services are assigned to Colorado. *See paragraph (4)(c)(i)(B).* Note that it is not relevant for purposes of the analysis that the partners in Investment Fund LP are residents of other states.

(L) *Example (xii)*. Design Corp is a corporation based outside Colorado that provides graphic design and similar services in Colorado and in neighboring states. Design Corp enters into a contract at a location outside Colorado with an individual customer to design fliers for the customer. Assume that Design Corp does not know the individual customer's state of primary residence and does not derive more than 5% of its receipts from sales of services from the individual customer. All of the design work is performed outside Colorado. Receipts from the sale are in Colorado if the customer's billing address is in Colorado. *See paragraph (4)(c)(i)(A).*

Regulation 39-22-303.6–11. License or Lease of Intangible Property.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from the license or lease of intangible property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rules.**

(a) The receipts from the license of intangible property are in Colorado if and to the extent the intangible is used in Colorado. In general, the term "use" is construed to refer to the location of the taxpayer's market for the use of the intangible property that is being licensed and is not to be construed to refer to the location of the property or payroll of the taxpayer. The rules that apply in determining the location of the use of intangible property in the context of several specific types of licensing transactions are set forth in paragraphs (2) through (5) of this regulation. For purposes of the rules set forth in this Regulation 39-22-303.6–11, a lease of intangible property is to be treated the same as a license of intangible property.

(b) In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of Regulations 39-22-303.6–7 through –13. *See Regulation 39-22-303.6–12.* Note, however, that for purposes of Regulations 39-22-303.6–11 and –12, a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use, or disposition of the property.

(c) Intangible property licensed as part of the sale or lease of tangible property is treated under Regulations 39-22-303.6–7 through –13 as the sale or lease of tangible property.

(d) Nothing in this Regulation 39-22-303.6–11 shall be construed to allow or require the inclusion of receipts in the receipts factor that are not included in the definition of "receipts" pursuant to § 39-22-303.6(1)(d), C.R.S., or related regulations, or that are excluded from the numerator and the denominator of the receipts factor pursuant to § 39-22-303.6(6)(d)(III), C.R.S. For examples of the types of intangibles that are excluded pursuant to § 39-22-303.6(1)(d), C.R.S., see paragraphs (1)(i), (1)(l)(vi), and (1)(l)(vii) of Regulation 39-22-303.6–1. For examples of the types of intangibles that are excluded pursuant to § 39-22-303.6(6)(d)(III), C.R.S., see paragraph (1)(d) of Regulation 39-22-303.6–12. To the extent that the transfer of either a security, as defined in paragraph (1)(n) of Regulation 39-22-303.6–1, or business "goodwill" or similar intangible value, including, without limitation, "going concern value" or "workforce in place," may be characterized as a license or lease of intangible property, receipts from such transaction

shall be excluded from the numerator and the denominator of the taxpayer's receipts factor.

(2) **License of a Marketing Intangible.** Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items (a "marketing intangible") to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Colorado to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Colorado.

(a) Examples of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or trade name; certain copyrights; the license of a film, television, or multimedia production, or event for commercial distribution; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales.

(b) In the case of the license of a marketing intangible, where a taxpayer has actual evidence of the amount or proportion of its receipts that is attributable to Colorado, it shall assign that amount or proportion to Colorado. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Colorado consumers, the portion of the licensing fee to be assigned to Colorado must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Colorado population in the specific geographic area in which the licensee makes material use of the intangible property to regularly market its goods, services, or other items relative to the total population in that area. If the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the portion of the licensing fee to be assigned to Colorado must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Colorado population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

(3) **License of a Production Intangible.** If a license is granted for the right to use intangible property other than in connection with the sale, lease, license, or other marketing of goods, services, or other items, and the license is to be used in a production capacity (a "production intangible"), the licensing fees paid by the licensee for that right are assigned to Colorado to the extent that the use for which the fees are paid takes place in Colorado.

(a) Examples of a license of a production intangible include, without limitation, the license of a patent, a copyright, or trade secrets to be used in a manufacturing process, where the value of the intangible lies predominately in its use in that process.

(b) In the case of a license of a production intangible to a party, other than a related party where the location of actual use is unknown, it is presumed that the use of the intangible property takes place in the state of the licensee's commercial domicile (where the licensee is a business) or the licensee's state of primary residence (where the licensee is an individual). If the Department can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in Colorado, it is presumed that the entire use is in Colorado except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Colorado. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.

(4) **License of a Mixed Intangible.** If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible (a "mixed intangible") and the fees to be paid in each instance are separately and reasonably stated in the licensing contract, the Department will accept that separate statement for purposes of Regulations 39-22-303.6–7 through –13. If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible and the fees to be paid in each instance are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the Department can reasonably establish otherwise.

(5) **License of Intangible Property where the Substance of the Transaction Resembles a Sale of Goods or Services.**

(a) *In General.* In some cases, the license of intangible property will resemble the sale of an electronically delivered good or service rather than the license of a marketing intangible or a production intangible. In these cases, the receipts from the licensing transaction are assigned by applying the rules set forth in paragraphs (3)(b)(ii) and (iii) of Regulation 39-22-303.6–10, as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this paragraph (5) include, without limitation, the license of database access, the license of access to information, the license of digital goods (see paragraph (2) of Regulation 39-22-303.6–13), and the license of certain software (e.g., where the transaction is not the license of pre-written software that is treated as the sale of tangible personal property see paragraph (1) of Regulation 39-22-303.6–13).

(b) *Sublicenses*. Pursuant to paragraph (5)(a), the rules of paragraph (3)(b)(iii) of Regulation 39-22-303.6–10 may apply where a taxpayer licenses intangible property to a customer that, in turn, sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the rules set forth at paragraph (3)(b)(iii) of Regulation 39-22-303.6–10 that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users. For this purpose, the intangible property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to that property (e.g., because the sublicensee's rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because that property is bundled with additional services or items of property.

(6) **Examples.** In these examples, unless otherwise stated, assume that the customer is not a related party.

(a) *Example (i)*. Crayon Corp and Dealer Co enter into a license contract under which Dealer Co, as licensee, is permitted to use trademarks that are owned by Crayon Corp in connection with Dealer Co's sale of certain products to retail customers. Under the contract, Dealer Co is required to pay Crayon Corp a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co of products using the Crayon Corp trademarks. Under the contract, Dealer Co is permitted to sell the products at multiple store locations, including store locations that are both within and without Colorado. Further, the licensing fees that are paid by Dealer Co are broken out on a per-store basis. The licensing fees paid to Crayon Corp by Dealer Co represent fees from the license of a marketing intangible. The portion of the fees to be assigned to Colorado are determined by multiplying the fees by a percentage that reflects the ratio of Dealer Co's

receipts that are derived from its Colorado stores relative to Dealer Co's total receipts. *See paragraph (2).*

(b) *Example (ii)*. Program Corp, a corporation based outside Colorado, licenses programming that it owns to licensees, such as cable networks, that, in turn, will offer the programming to their customers on television or other media outlets in Colorado and in all other U.S. states. Each of these licensing contracts constitutes the license of a marketing intangible. For each licensee, assuming that Program Corp lacks evidence of the actual number of viewers of the programming in Colorado, the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's Colorado receipts is determined by multiplying the amount of the licensing fee by a percentage that reflects the ratio of the Colorado audience of the licensee for the programming relative to the licensee's total U.S. audience for the programming. *See paragraph (5).* Note that the analysis and result as to the state or states to which receipts are properly assigned would be the same to the extent that the substance of Program Corp's licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. *See paragraph (5).*

(c) *Example (iii)*. Moniker Corp enters into a license contract with Wholesale Co. Pursuant to the contract, Wholesale Co is granted the right to use trademarks owned by Moniker Corp to brand sports equipment that is to be manufactured by Wholesale Co or an unrelated entity and to sell the manufactured equipment to unrelated companies that will ultimately market the equipment to consumers in a specific geographic region, including a foreign country. The license agreement confers a license of a marketing intangible, even though the trademarks in question will be affixed to property to be manufactured. In addition, the license of the marketing intangible is for the right to use the intangible property in connection with sales to be made at wholesale rather than directly to retail customers. The component of the licensing fee that constitutes the Colorado receipts of Moniker Corp is determined by multiplying the amount of the fee by a percentage that reflects the ratio of the Colorado population in the specific geographic region relative to the total population in that region. *See paragraph (2).* If Moniker Corp is able to reasonably establish that the marketing intangible was materially used throughout a foreign country, then the population of that country will be included in the population ratio calculation. However, if Moniker Corp is unable to reasonably establish that the marketing intangible was materially used in the foreign country in areas outside a particular major city; then none of the foreign country's population beyond the population of the major city is included in the population ratio calculation.

(d) *Example (iv)*. Formula, Inc and Appliance Co enter into a license contract under which Appliance Co is permitted to use a patent owned by Formula, Inc to manufacture appliances. The license contract specifies that Appliance Co is to pay Formula, Inc a royalty that is a fixed percentage of the gross receipts from the products that are later sold. The contract does not specify any other fees. The appliances are both manufactured and sold in Colorado and several other states. Assume the licensing fees are paid for the license of a production intangible, even though the royalty is to be paid based upon the sales of a manufactured product (i.e., the license is not one that includes a marketing intangible). Because the Department can reasonably establish that the actual use of the intangible property takes place, in part, in Colorado, the royalty is assigned based to the location of that use rather than to the location of the licensee's commercial domicile in accordance with paragraph (1). It is presumed that the entire use is in Colorado except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Colorado. Assuming that Formula, Inc can demonstrate the percentage of manufacturing that takes place in Colorado using the patent relative to the manufacturing in other states, that percentage of the total licensing fee paid to Formula, Inc under the contract will constitute Formula, Inc's Colorado receipts. *See paragraph (5).*

(e) *Example (v)*. Axle Corp enters into a license agreement with Biker Co in which Biker Co is granted the right to produce motor scooters using patented technology owned by Axle Corp and also to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The contract is a license of both a marketing and production intangible, i.e., a mixed intangible. The scooters are manufactured outside Colorado. Assume that Axle Corp lacks actual information regarding the proportion of Biker Co's receipts that are derived from Colorado customers. Also assume that Biker Co is granted the right to sell the scooters in a U.S. geographic region in which the Colorado population constitutes 25% of the total population during the period in question. The licensing contract requires an upfront licensing fee to be paid by Biker Co to Axle Corp and does not specify what percentage of the fee derives from Biker Co's right to use Axle Corp's patented technology. Because the fees for the license of the marketing and production intangible are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible, unless either the taxpayer or the Department reasonably establish otherwise. Assuming that neither party establishes otherwise, 25% of the licensing fee constitutes Colorado receipts. *See paragraphs (2) and (4).*

(f) *Example (vi)*. Same facts as Example (v), except that the license contract specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing contract constitutes both the license of a marketing intangible and the license of a production intangible. Assuming that the separately stated fees are reasonable, the Department will: (1) assign no part of the licensing fee paid for the production intangible to Colorado, and (2) assign 25% of the licensing fee paid for the marketing intangible to Colorado. *See paragraph (4).*

(g) *Example (vii)*. Better Burger Corp, which is based outside Colorado, enters into franchise contracts with franchisees that agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger Corp franchises are in Colorado. In each case, the franchise contract between the individual and Better Burger provides that the franchisee is to pay Better Burger Corp an upfront fee for the receipt of the franchise and monthly franchise fees, which cover, among other things, the right to use the Better Burger name and service marks, food processes and cooking know-how, as well as fees for management services. The upfront fees for the receipt of the Colorado franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Colorado receipts because the franchises are for the right to make Colorado sales. The monthly franchise fees paid by Colorado franchisees constitute fees paid for (1) the license of marketing intangibles (the Better Burger name and service marks), (2) the license of production intangibles (food processes and know-how) and (3) personal services (management fees). The fees paid for the license of the marketing intangibles and the production intangibles constitute Colorado receipts because in each case the use of the intangibles is to take place in Colorado. *See paragraphs (2) and (3).* The fees paid for the personal services are to be assigned pursuant to Regulation 39-22-303.6–10.

(h) *Example (viii)*. Online Corp, a corporation based outside Colorado, licenses an information database through the Internet to individual customers who are resident in Colorado and in other states. These customers access Online Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with paragraph (5). If Online Corp can determine or reasonably approximate the state or states from which its database is accessed, it must do so. Assuming that Online Corp cannot determine or reasonably approximate the location from which its database is accessed, Online Corp must assign the receipts made to the individual customers using the customers' billing addresses to the extent known. Assume for purposes of this example that Online Corp knows the

billing address for each of its customers. In this case, Online Corp's receipts from sales made to its individual customers are in Colorado in any case in which the customer's billing address is in Colorado. *See paragraph (3)(b)(ii)(A) of Regulation 39-22-303.6–10.*

(i) *Example (ix)*. Net Corp, a corporation based outside Colorado, licenses an information database through the Internet to a business customer, Business Corp, a company with offices in Colorado and two neighboring states. The license is a license of intangible property that resembles a sale of goods or services and are assigned in accordance with paragraph (5). Assume that Net Corp cannot determine the location from which its database is accessed but reasonably approximates that 75% of Business Corp's database access took place in Colorado, and 25% of Business Corp's database access took place in other states. In that case, 75% of the receipts from database access is in Colorado. Assume alternatively that Net Corp lacks sufficient information regarding the location from which its database is accessed to reasonably approximate the location. Under these circumstances, if Net Corp derives 5% or less of its receipts from database access from Business Corp, Net Corp must assign the receipts under paragraph (3)(b)(ii)(B) of Regulation 39-22-303.6–10 to the state from which Business Corp principally managed the contract, or if that state is not reasonably determinable, to the state where Business Corp placed the order for the services, or if that state is not reasonably determinable, to the state of Business Corp's billing address. If Net Corp derives more than 5% of its receipts from database access from Business Corp, Net Corp is required to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state. See paragraph (3)(b)(ii)(B) of Regulation 39-22-303.6–10

(j) *Example (x)*. Net Corp, a corporation based outside Colorado, licenses an information database through the Internet to more than 250 individual and business customers in Colorado and in other states. The license is a license of intangible property that resembles a sale of goods or services and receipts from that license are assigned in accordance with paragraph (5). Assume that Net Corp cannot determine or reasonably approximate the location where its information database is accessed. Also assume that Net Corp does not derive more than 5% of its receipts from sales of database access from any single customer. Net Corp may apply the safe harbor stated in paragraph (3)(b)(ii)(B)(IV) of Regulation 39-22-303.6–10 and may assign its receipts to a state or states using each customer's billing address.

(k) *Example (xi)*. Web Corp, a corporation based outside of Colorado, licenses an Internet-based information database to business customers that then sublicense the database to individual end users that are resident in Colorado and in other states. These end users access Web Corp's information database primarily in their states of residence, and sometimes, while traveling, in other states. Web Corp's license of the database to its customers includes the right to sublicense the database to end users, but the sublicenses provide that the rights to access and use the database are limited to the end users' own use and prohibit the individual end users from further sublicensing the database. Web Corp receives a fee from each customer based upon the number of sublicenses issued to end users. The license is a license of intangible property that resembles a sale of goods or services and are assigned by applying the rules set forth in paragraph (3)(b)(iii) of Regulation 39-22-303.6–10. *See paragraph (5).* If Web Corp can determine or reasonably approximate the state or states from which its database is accessed by end users, it must do so. Assuming that Web Corp lacks sufficient information from which it can determine or reasonably approximate the location from which its database is accessed by end users, Web Corp must approximate the extent to which its database is accessed from Colorado using a percentage that represents the ratio of the Colorado population in the specific geographic area in which Web Corp's customer sublicenses the database access relative to the total population in that area. *See paragraph (3)(b)(iii)(C) of Regulation 39-22-303.6–10.*

Regulation 39-22-303.6–12. Sale of Intangible Property.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from the sale of intangible property are included in a taxpayer's receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **Assignment of Receipts.** The assignment of receipts to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold. For purposes of this Regulation 39-22-303.6–12, a sale or exchange of intangible property includes a license of that property where the transaction is treated for tax purposes as a sale of all substantial rights in the property and the receipts from the transaction are not contingent on the productivity, use, or disposition of the property. For the rules that apply where the consideration for the transfer of rights is contingent on the productivity, use, or disposition of the property, see paragraph (1) of Regulation 39-22-303.6–11.

(a) *Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area*. In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the receipts from the sale are assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in Colorado, the taxpayer shall assign the receipts from the sale to Colorado. If the intangible property is used or is authorized to be used in Colorado and one or more other states, the taxpayer shall assign the receipts from the sale to Colorado to the extent that the intangible property is used in or authorized for use in Colorado through reasonable approximation.

(b) *Sale that Resembles a License (Receipts are Contingent on Productivity, Use, or Disposition of the Intangible Property).* In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use, or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in Regulation 39-22-303.6–11 (pertaining to the license or lease of intangible property).

(c) *Sale that Resembles a Sale of Goods and Services*. In the case of a sale or exchange of intangible property where the substance of the transaction resembles a sale of goods or services, and where the receipts from the sale or exchange do not derive from payments contingent on the productivity, use, or disposition of the property, the receipts from the sale are assigned by applying the rules set forth in paragraph (5) of Regulation 39-22-303.6–11 (relating to licenses of intangible property that resemble sales of goods and services). Examples of these transactions include those that are analogous to the license transactions cited as examples in paragraph (5) of Regulation 39-22-303.6–11.

(d) *Excluded Receipts*. Receipts from the sale of intangible property are not included in the receipts factor in any case in which the sale does not give rise to receipts within the meaning of § 39-22-303.6(1)(d), C.R.S. In addition, in any case in which the sale of intangible property does result in receipts within the meaning of § 39-22-303.6(1)(d), C.R.S., those receipts are excluded from the numerator and the denominator of the taxpayer's receipts factor if the receipts are not referenced in §§ 39-22-303.6(6)(d)(I), 39-22-303.6(6)(d)(II)(A), or 39-22-303.6(6)(d)(II)(B), C.R.S. See §§ 39-22-303.6(6)(d)(III), C.R.S. The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's receipts factor under this provision includes, without

limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value.

(2) **Examples.**

(a) *Example (i)*. Airline Corp, a corporation based outside Colorado, sells its rights to use several gates at an airport located in Colorado to Buyer Corp, a corporation based outside Colorado. The contract of sale is negotiated and signed outside of Colorado. The receipts from the sale are in Colorado because the intangible property sold is a contract right that authorizes the holder to conduct a business activity solely in Colorado. *See paragraph (1).*

(b) *Example (ii)*. Wireless Corp, a corporation based outside Colorado, sells a license issued by the Federal Communications Commission (FCC) to operate wireless telecommunications services in a designated area in Colorado to Buyer Corp, a corporation based outside Colorado. The contract of sale is negotiated and signed outside of Colorado. The receipts from the sale are in Colorado because the intangible property sold is a government license that authorizes the holder to conduct business activity solely in Colorado. *See paragraph (1)(a).*

(c) *Example (iii)*. Same facts as Example (ii) except that Wireless Corp sells to Buyer Corp an FCC license to operate wireless telecommunications services in a designated area in Colorado and an adjacent state. Wireless Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Colorado. For purposes of making this reasonable approximation, Wireless Corp may rely upon credible data that identifies the percentage of persons that use wireless telecommunications in the two states covered by the license. *See paragraph (1)(a).*

(d) *Example (iv)*. Sports League Corp, a corporation based outside Colorado, sells the rights to broadcast the sporting events played by the teams in its league in all 50 U.S. states to Network Corp. Although the games played by Sports League Corp will be broadcast in all 50 states, the games are of greater interest in the western region of the country, including Colorado. Because the intangible property sold is a contract right that authorizes the holder to conduct a business activity in a specified geographic area, Sports League Corp must attempt to reasonably approximate the extent to which the intangible property is used in or may be used in Colorado. For purposes of making this reasonable approximation, Sports League Corp may rely upon audience measurement information that identifies the percentage of the audience for its sporting events in Colorado and the other states. *See paragraph (1)(a).*

(e) *Example (v)*. Inventor Corp, a corporation based outside Colorado, sells patented technology that it has developed to Buyer Corp, a business customer that is based in Colorado. Assume that the sale is not one in which the receipts derive from payments that are contingent on the productivity, use, or disposition of the property. *See paragraph (1)(a).* Inventor Corp understands that Buyer Corp is likely to use the patented technology in Colorado, but the patented technology can be used anywhere (i.e., the rights sold are not rights that authorize the holder to conduct a business activity in a specific geographic area). The receipts from the sale of the patented technology are excluded from the numerator and denominator of Inventor Corp's receipts factor. *See § 39-22-303.6(6)(III), C.R.S., and paragraph (1)(d).*

Regulation 39-22-303.6–13. Special Rules.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance for determining which gross receipts from sales of certain property are included in a taxpayer's receipts factor. Consistent with the General

Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **Software Transactions.** A license or sale of pre-written software for purposes other than commercial reproduction (or other exploitation of the intellectual property rights) transferred on a tangible medium is treated as the sale of tangible personal property, rather than as either the license or sale of intangible property or the performance of a service. In these cases, the receipts are in Colorado as determined under the rules for the sale of tangible personal property set forth under § 39-22-303.6(5), C.R.S., and Regulation 39-22-303.6–6. In all other cases, the receipts from a license or sale of software are to be assigned to Colorado as determined otherwise under Regulations 39-22-303.6–7 through –13 (e.g., depending on the facts, as the development and sale of custom software, see paragraph (3) of Regulation 39-22-303.6–10; as a license of a marketing intangible, see paragraph (2) of Regulation 39-22-303.6–11; as a license of a production intangible, see paragraph (3) of Regulation 39-22-303.6–11; as a license of intangible property where the substance of the transaction resembles a sale of goods or services, see paragraph (5) of Regulation 39-22-303.6–11; or as a sale of intangible property, see Regulation 39-22-303.6–12).

(2) **Sales or Licenses of Digital Goods or Services.**

(a) *In General.* In the case of a sale or license of digital goods or services, including, among other things, the sale of various video, audio and software products or similar transactions, the receipts from the sale or license are assigned by applying the same rules as set forth in paragraph (3)(b)(ii) or (iii) of Regulation 39-22-303.6–10 as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. For purposes of the analysis, it is not relevant what the terms of the contractual relationship are or whether the sale or license might be characterized, depending upon the particular facts, as, for example, the sale or license of intangible property or the performance of a service. *See paragraph (5) of Regulation 39-22-303.6–11 or paragraph (1)(c) of Regulation 39-22-303.6–12.*

(b) *Telecommunications Companies*. In the case of a taxpayer that provides telecommunications or ancillary services, and that is thereby subject to 1 CCR 201-2, Special Regulation 8A, receipts from the sale or license of digital goods or services not otherwise assigned for apportionment purposes pursuant to that regulation are assigned pursuant to this paragraph (2)(b) by applying the rules set forth in paragraphs (3)(b)(ii) or (iii) of Regulation 39-22-303.6–10 as if the transaction were a service delivered to an individual or business customer or delivered through or on behalf of an individual or business customer. However, in applying these rules, if the taxpayer cannot determine the state or states where a customer receives the purchased product, it may reasonably approximate this location using the customer's "place of primary use" of the purchased product, applying the definition of "place of primary use" set forth in 1 CCR 201-2, Special Regulation 8A.

Regulation 39-22-303.6–14. Nonapportionable Income.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance in the allocation of nonapportionable income.

In the allocation of nonapportionable income, tangible personal property has a situs in Colorado at the time of the sale if it is physically located in Colorado immediately prior to the sale of the property. The movement of property in anticipation of sale or as part of the sale transaction is not considered in determining its situs immediately prior to the time of sale.

Regulation 39-22-303.6–15. Election to Treat All Income as Apportionable Income.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, 39-22-303.6, C.R.S. The purpose of this regulation is to clarify how a taxpayer makes an election to treat all income as apportionable income.

(1) Every year, taxpayers may elect to treat all income as apportionable income.

(a) The election to treat all income as apportionable income must be made on or before the extended due date of the return (the fifteenth day of the tenth month following the close of the tax year) by marking the appropriate box on the original return.

(b) Once the original return has been filed for the year, the election may not be changed even if the extended due date for the year has not passed.

(c) Filing a return without making the election as provided in paragraph (1)(a) constitutes the non-exercise of the election for that tax year, even if the return is calculated with all income as apportionable income.

(d) The failure to file a return prior to the extended due date of the return constitutes the non-exercise of the election for that tax year.

(2) If the election described in this regulation is made for the income tax year, all income of the taxpayer is apportionable income and is included in the denominator and, if appropriate, the numerator of the taxpayer's receipts factor if not excluded pursuant to §§ 39-22-303.6(6)(d)(III) or (6)(f), C.R.S.

Regulation 39-22-303.6–16. Alternative Apportionment.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to provide guidance regarding the use of alternative apportionment methods. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** Section 39-22-303.6(9), C.R.S., provides that if the allocation and apportionment provisions of § 39-22-303.6, C.R.S., do not fairly represent the extent of the taxpayer's business activity in Colorado, the taxpayer may petition for, or the Department may require, with respect to all or any part of the taxpayer's business activities, if reasonable:

(a) separate accounting;

(b) the inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in Colorado;

(c) the inclusion of any receipts of a taxpayer otherwise excluded under § 39-22-303.6(1)(d), C.R.S., including those from hedging transactions or from the maturity, redemption, sale, exchange, loan, or other disposition of cash or securities; or

(d) the employment of any other method, notwithstanding any other provision of § 39-22-303.6(9), C.R.S., to effectuate an equitable apportionment or allocation of the taxpayer's income, fairly calculated to determine the net income derived from or attributable to sources in Colorado.

(2) Section 39-22-303.6(9)(b), C.R.S., permits a departure from the allocation and apportionment provisions of § 39-22-303.6, C.R.S., only in limited and specific cases where the apportionment and allocation provisions contained in § 39-22-303.6, C.R.S., produce incongruous results.

(3) In the case of certain industries, transactions, or activities, Regulations 39-22-303.6–1 through –13, with respect to the apportionment formula, may not set forth appropriate procedures for determining the apportionment factor. Nothing in § 39-22-303.6(9)(b), C.R.S., or in this Regulation 39-22-303.6–16 shall preclude the Department from establishing appropriate procedures under §§ 39-22-303.6(4) through (6), C.R.S., for determining the apportionment factor for each such industry, but such procedures shall be applied uniformly.

(4) In the case of certain taxpayers, the general rules under §§ 39-22-303 and 39-22-303.6, C.R.S., and the regulations thereunder may not set forth appropriate procedures for determining gross income or the apportionment factor. Nothing in § 39-22-303.6(9)(b), C.R.S., or in this regulation, shall preclude the Department from distributing or allocating gross income and deductions under § 39-22-303(6), C.R.S.

Regulation 39-22-303.6–17. Apportioning Gross Receipts of Taxpayers with De Minimis or No Receipts.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, and 39-22-303.6, C.R.S. The purpose of this regulation is to clarify how taxpayers with *de minimis* or no receipts shall determine their receipts factor. Consistent with the General Assembly's adoption of § 39-22-303.6, C.R.S., these regulations are intended to conform the state's income tax laws to the Multistate Tax Commission's model statute and regulation except when those model provisions are inconsistent with Colorado statute. See 2018 Colo. Sess. Laws, ch. 369, § 1(2).

(1) **General Rule.** This Regulation 39-22-303.6–17 applies to the determination of the receipts factor if the taxpayer's receipts are less than 3.33 percent of the taxpayer's gross receipts. A taxpayer's receipts subject to assignment under § 39-22-303.6 paragraph (5) and (6), C.R.S., are assigned under those sections and are not assigned by this Regulation 39-22-303.6–17.

(2) **Definitions.**

(a) "Gross receipts from lending activities" means interest income and other gross receipts arising from the activities described in paragraphs (1)(c)(iv) through (1)(c)(x) of 1 CCR 201-2, Special Regulation 7A, Financial Institutions.

(b) An entity's apportionment factor is "*de minimis*" if the denominator is less than 3.33 percent of the entity's apportionable gross receipts or if the factor is insignificant in producing income.

(3) The following gross receipts are included in the receipts factor denominator and are assigned to the receipts factor numerator in Colorado as follows:

(a) Dividends paid by a related party are assigned to the receipts factor numerator in Colorado as follows:

(i) If paid from earnings that can be reasonably attributed to a particular year, the dividends are assigned to the receipts factor numerator in Colorado in a proportion equal to the dividend payor's apportionment factor in Colorado for that year as determined pursuant to § 39-22-303.6, C.R.S.

(ii) If the dividends were paid from earnings that cannot reasonably be attributed to a particular year, the dividends are assigned to the receipts factor numerator in

Colorado in a proportion equal to the dividend payor's average apportionment factor in Colorado for the current and preceding year as determined pursuant to § 39-22-303.6, C.R.S.

(iii) *Example*. Taxpayer Bigbox Holding, Inc. (Holding) is a domestic corporation, domiciled in Delaware, with numerous foreign and domestic subsidiaries. Holding has no "receipts." Holding is the corporate parent of Bigbox Retailing, Inc. (Retailing), a domestic corporation with its commercial domicile in State X. During the tax year, Holding receives $100 million in dividends from Retailing. In both the current tax year and the prior tax year, Retailing conducted operations in ten states, including Colorado. Retailing's apportionment factor in Colorado in the current year is 20%, and the factor was 18% in the prior year. The dividends received from Retailing cannot be reasonably attributed to that entity's earnings in any specific year. Therefore, pursuant to paragraph (3)(a)(ii), Holding's receipts factor in Colorado is calculated by including the $100 million of apportionable dividends received from Retailing in the denominator, and $19 million in the receipts factor numerator in Colorado, based on the average of Retailing's apportionment factors in Colorado in the current year (20%) and prior year (18%).

(b) Gains are assigned to the receipts factor numerator in Colorado as follows:

(i) Gains (net of related losses, but not less than zero) from the disposition of stock (or other intangible property rights) representing at least a 20% ownership interest in an entity are assigned to the receipts factor numerator in Colorado in a proportion equal to what the entity's separate apportionment factor was in Colorado for the tax year preceding the disposition as determined pursuant to § 39-22-303.6, C.R.S.

(ii) Gains (net of related losses, but not less than zero) from the disposition of assets of an entity or segment of a business are assigned to the receipts factor numerator in Colorado in a proportion equal to what the entity's separate apportionment factor was in Colorado in the tax year preceding the disposition as determined pursuant to § 39-22-303.6, C.R.S.

(iii) In applying paragraphs (3)(b)(i) or (ii), in any case in which the entity did not exist in the prior year, or had an apportionment factor of zero, or had only a *de minimis* apportionment factor, the gross receipts from the gain are attributed to the receipts factor numerator of Colorado under paragraphs (4) or (5) of this Regulation 39-22-303.6–17, as appropriate.

(iv) In applying this paragraph (b), in the case of an entity that was not subject to entity-level taxation, the apportionment percentage shall be computed as if the entity were a C corporation.

(v) *Examples*.

(A) *Example (i).* Taxpayer, Nuclear Corp. (Nuclear) is a holding company with no "receipts" from transactions and activities in the ordinary course of business. In the prior tax year, Nuclear formed Target Corp. (Target) and transferred its stock ownership interest in three power plants, located in three states, one of which is in Colorado, to Target in exchange for the stock of Target. In the current tax year, Nuclear sells the stock of Target to Risky Investments for $500 million in cash, recognizing a gain of $100 million. In the tax year preceding the sale, Target's apportionment factor in Colorado was 30%. Based on Target's prior year apportionment factor,

Nuclear would include $100 million in the denominator of its receipts factor and would assign $30 million to the receipts factor numerator in Colorado.

(B) *Example (ii).* Same facts as example (i) except during the current tax year Nuclear formed Target and then sold the Target stock on the same day. Because Target did not exist in the year preceding the disposition, Nuclear would have to use paragraph (4) or (5), as appropriate, to assign a portion of the $100 million gain to its receipts factor numerator in Colorado.

(c) Gross receipts from lending activities are included in the receipts factor denominator and assigned to the receipts factor numerator in Colorado to the extent those gross receipts would have been assigned to Colorado under 1 CCR 201-2, Special Regulation 7A, Financial Institutions (including the rule of assignment to commercial domicile under (1)(c)(xv) of that regulation) as if the taxpayer were a financial institution subject to Special Regulation 7A, except that:

(i) in the case of gross receipts derived from loans to a related party, which are not secured by real property, including interest, fees, and penalties, the gross receipts are included in Colorado's numerator in a proportion equal to the related party's apportionment factor in Colorado as determined by § 39-22-303.6, C.R.S., in the year the gross receipts were included in apportionable income; and

(ii) gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer are assigned under paragraph (3)(d).

(iii) *Examples*.

(A) *Example (i).* Taxpayer Bigbox Holding, Inc. (Holding) is a domestic corporation domiciled in Delaware, with numerous foreign and domestic subsidiaries. Holding has no "receipts." Holding is the corporate parent of Bigbox Retailing, Inc. (Retailing), a domestic corporation with its commercial domicile in state X. During the current tax year, Holding receives $100 million in dividends from Retailing. In both the current tax year and the prior tax year, Retailing conducted operations in ten states, including Colorado. Retailing's apportionment factor in Colorado in the current year is 20%, and its factor was 18% in the prior year. In a prior year, Holding lent its excess capital to Retailing as an unsecured loan. In repayment of that loan, Holding received $40 million of interest income from Retailing in the current tax year, in addition to the $100 million of dividend income that Holding received from Retailing. Pursuant to paragraph (3)(c) of this Regulation 39-22-303.6–17, Holding's interest income would be included in its receipts factor denominator, and 20% of Holding's interest income ($8 million) would be included in its receipts factor numerator in Colorado because 20% of Retailing's apportionment factors were in Colorado in the year the interest income was included in taxable income. Assuming Holding had no other gross receipts, Holding's receipt factor numerator in Colorado is 19.28% ($27 million / $140 million).

(B) *Example (ii).* Taxpayer Loan Participation Inc. (LPI) was formed to acquire and hold a participation in loans secured by real property originated by an unrelated financial institution. LPI has no employees or property and no other gross receipts except for payments of interest on the participation loan held. Even though LPI would not be considered a

financial institution under 1 CCR 201-2, Special Regulation 7A, LPI's gross receipts are included in the denominator and assigned to the receipts factor numerator in Colorado under paragraph (1)(c)(iv) of 1 CCR 201-2, Special Regulation 7A in proportion to the value of loans secured by real property in Colorado compared to the value of loans secured by real property everywhere.

(d) Gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer are included in the denominator and assigned to the receipts factor numerator in Colorado to the extent those accounts receivable are attributed to borrowers located in Colorado.

(i) *Examples*.

(A) *Example (i).* Taxpayer IH Factoring, Inc. (Factoring) is a Delaware corporation that has twenty employees, all of whom are located in Delaware. Factoring purchases installment agreements (accounts receivable) from its parent corporation, Iron Horse Motorcycles, Inc. (Iron Horse). Factoring has access to information showing the addresses of the installment agreement customers. Factoring purchases installment agreements originating from Iron Horse's borrowers in States A and Colorado. Factoring is taxable in State A and Colorado. Factoring re-sells the agreements as securitized instruments to institutional investors. Factoring's gross receipts from selling the securitized instruments originating from Iron Horse's borrowers in State A and Colorado would be included in the receipts factor denominator, and Factoring's gross receipts from selling securitized instruments originating from Iron Horse's borrowers in Colorado would be assigned to the receipts factor numerator in Colorado.

(B) *Example (ii).* Same facts as example (i), but IH Factoring retains its ownership in the installment agreements and receives principal, interest, and related fees from Iron Horse's customers (borrowers). The principal, interest, and related fees received by Factoring from borrowers in State A and Colorado would be included in Factoring's receipts factor denominator, and Factoring's receipts received from Iron Horse's customers (borrowers) in Colorado would be assigned to the receipts factor numerator in Colorado.

(e) The net amount (but not less than zero) of gross receipts not otherwise assigned under this paragraph (3) arising from investment activities, including the holding, maturity, redemption, sale, exchange, or other disposition of marketable securities or cash, are assigned to the receipts factor numerator in Colorado if the gross receipts would be assigned to Colorado under paragraphs (1)(c)(xiii) or (1)(c)(xv) of 1 CCR 201-2, Special Regulation 7A; all other gross receipts from investment activities not otherwise assigned under this paragraph (3) are assigned to the receipts factor numerator in Colorado if the investments are managed in Colorado.

(4) Except for gross receipts included and assigned under paragraph (3), gross receipts of a taxpayer whose income and receipts factor are included in a combined report in Colorado are included in the receipts factor denominator and are assigned to the receipts factor numerator in Colorado in the same proportion as the ratio of: (A) the total of the receipts factor numerators of all members of the combined group in Colorado, whether taxable or nontaxable, as determined pursuant to § 39-22-303(11), C.R.S., to (B) the denominator of the combined group.

(a) *Example*. Taxpayer Windfall, Inc. (Windfall) is a wholly owned subsidiary of ABC Manufacturing Company (ABC). Windfall's only gross receipt during the year is $1 billion received in settlement of ABC's patent infringement suit against a business competitor that has been ongoing for several years. Windfall is included on a combined report filed by ABC on behalf of ABC, Windfall, and other direct and indirect controlled subsidiaries of ABC (collectively, the Combined Subsidiaries). The ratio of the total numerators of ABC and Combined Subsidiaries in Colorado, as reported on the combined report, to the denominator of the combined group is 25 percent. Windfall would include $1 billion in its receipts factor denominator and would include $250 million in the receipts factor numerator in Colorado.

(5) Except for those gross receipts included and assigned under paragraphs (3) or (4), gross receipts of a taxpayer that files as part of a federal consolidated return are included in the receipts factor denominator and are assigned to the receipts factor numerator in Colorado in a proportion equal to a percentage (but not greater than 100%), the numerator of which is the total of the consolidated group members' income allocated or apportioned to Colorado pursuant to § 39-22-303.6, C.R.S., and the denominator of which is the total federal consolidated taxable income.

(a) *Example*. Taxpayer Windfall, Inc. (Windfall) is a wholly owned subsidiary of ABC Manufacturing Corp. (ABC). Windfall's only gross receipt is $1 billion received in settlement of ABC's patent infringement suit against a business competitor that has been ongoing for several years. Windfall is not included on a combined report filed in Colorado, but is included on a consolidated federal return filed by ABC on behalf of Windfall and other affiliated corporations that are included in such consolidated return. The total federal taxable income of that consolidated group is $5 billion, and the total amount of that income that is apportioned to Colorado by members of the consolidated group other than Windfall is $500 million. Because the percentage of the consolidated group's income that would be apportioned to Colorado is 10%, Windfall would include $1 billion in its receipts factor denominator and would assign 10% of that amount ($100 million) to the receipts factor numerator in Colorado.

(6) Nothing in this Regulation 39-22-303.6–17 shall prohibit a taxpayer from petitioning for, or the Department from applying, an alternative method to calculate the taxpayer's receipts factor in order to fairly represent the extent of the taxpayer's business activity in Colorado as provided for in § 39-22-303.6(9)(b), C.R.S., including the application of this rule in situations that do not meet the threshold of paragraph (1) of this Regulation 39-22-303.6–17. Such alternative method may be appropriate, for example, in situations otherwise addressed under paragraph (3)(a) where dividends were paid from earnings that were generated by the activities of a related party of the dividend payor, in which case the dividends may be more appropriately assigned to the receipts factor numerator in Colorado using the related party's average apportionment factors in Colorado.

Regulation 39-22-303.6–18. Income from Foreclosures.

Basis and Purpose. The bases of this regulation are §§ 39-21-112, 39-22-301, 39-22-303, 39-22-303.6, C.R.S. The purpose of this regulation is to clarify that a taxpayer who qualifies under § 39-22-303.6(10), C.R.S., may not make an election pursuant to § 39-22-303.6(8), C.R.S.

A taxpayer who qualifies under the provisions of § 39-22-303.6(10), C.R.S., must file using the rules of that provision (direct allocation). A taxpayer may not make an election pursuant to § 39-22-303.6(8), C.R.S., to treat such income as apportionable income.

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Tracking number: 2018-00705

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:47:52

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-522. Conservation Easement Credit.

Basis and Purpose. The bases for this regulation are §§ 39-21-112(1), 39-21-113, 39-22-522, and 39-22-522.5, C.R.S. The purpose of this regulation is to clarify the requirements and procedures to claim the conservation easement credit.

(1) **Qualified Taxpayers.**

(a) Taxpayers qualified to claim the gross conservation easement credit (including transferees of these credits) are:

(i) Colorado residents,

(ii) C corporations,

(iii) Trusts,

(iv) Estates,

(v) Partners, shareholders or members of a pass-through entity donor who receive the credit from such entity, regardless of whether such individuals are Colorado residents.

(b) Joint tenancies, tenancies in common, pass-through entities such as partnerships or S corporations, or other similar entities or groups that donate a conservation easement must allocate the credit to such entities' owners, partners, shareholders or members in proportion to their distributive shares of income or ownership percentage.

(c) A limited liability company with only one member will generally be disregarded for federal tax purposes (26 C.F.R. § 301.7701-3) as well as state income tax purposes. Therefore, the sole member does not qualify as a "member of a pass-through entity" and does not qualify for the credit unless the member is a Colorado resident.

(d) Individuals who are not residents of Colorado cannot claim the credit for a donation they make, or receive a credit transfer. Part-year residents may claim the credit, but only if they make the donation while they are a Colorado resident. Only a credit allocated to nonresident partners, shareholders or members of a pass-through entity may be claimed by nonresidents. Nonresident owners included in a joint tenancy, tenancy in common, and similar ownership arrangements cannot claim the credit.

(e) A nonprofit corporation, regardless of whether it has unrelated business taxable income, may claim a gross conservation easement credit for a conservation easement donation it makes to a qualified organization; except that a nonprofit corporation that has a state governmental entity as a shareholder cannot claim such a credit.

(2) **Donor Limitations.**

(a) A taxpayer may claim only one credit per tax year as a donor, including as a partner, shareholder, or member of a pass-through entity donor. A taxpayer cannot claim multiple credits in one year from multiple donations even if the donations are made by different pass-through entities. [See § 39-22-522(6), C.R.S.]

(b) For donations made prior to January 1, 2014, a taxpayer cannot claim a credit from a new donation if:

(i) In the year of the donation, the taxpayer has a carryforward credit from a prior tax year, or

(ii) In the year of the donation, another taxpayer has a carryforward credit from the taxpayer's prior donation.

(c) *Amount per Donation.*

(i) For donations made on or after January 1, 2000 but prior to January 1, 2003, the credit cannot exceed $100,000 (100% of the first $100,000).

(ii) For donations made on or after January 1, 2003 but prior to January 1, 2007, the credit cannot exceed $260,000 (100% of the first $100,000 plus 40% of the next $400,000).

(iii) For donations made on or after January 1, 2007 but prior to January 1, 2015, the credit cannot exceed $375,000 (50% of the first $750,000).

(iv) For donations made on or after January 1, 2015, including donations made by pass-through entities, the credit cannot exceed $1,500,000 (75% of the first $100,000 plus 50% of the next $2,850,000).

(v) The limits in this paragraph (c) apply in aggregate to a married couple, regardless of whether they file jointly or separately, all partners, shareholders or members of a pass-through entity, and all tenants in common, joint tenants, and similar ownership arrangements that make a donation.

(d) *Tax Credit Certificate.* Donors of conservation easements made on or after January 1, 2011 must obtain a Tax Credit Certificate from the Department of Regulatory Agencies. The credit may not be claimed or used on a Colorado income tax return for a tax year commencing prior to the year designated in the certificate. The credit may be waitlisted to a later tax year if the cap for the donation year has been exceeded.

(i) For donations made prior to January 1, 2014, the taxpayer must establish with the Department of Revenue that their credit claim complies with all requirements of § 39-22-522, C.R.S., including the federal statutory and regulatory requirements incorporated therein, and with this regulation. The determination of whether a claimed conservation easement tax credit complies with the statutory and regulatory requirements rests with the Department of Revenue and not with the Department of Regulatory Agencies.

(ii) Any limitation to the number of credits that may be claimed by the taxpayer in the designated year will include a waitlisted credit. If the taxpayer makes another easement donation in the designated year, a credit will not be allowed for that

donation even if the Department of Regulatory Agencies would have waitlisted the second credit to a later year.

(iii) The charitable deduction addback for any waitlisted credit must still be reported beginning in the year of the donation.

(iv) The twenty year carryforward period will be based on the year of the certificate, not the year of the donation.

(v) Fiscal year filers cannot claim a credit for a donation that occurs in 2011 prior to the end of their fiscal year that begins in 2010 because the Department of Regulatory Agencies must certify all credits generated by donations made on or after January 1, 2011.

(vi) The amount of the credit allowed on the Tax Credit Certificate may be further reduced if other limitations apply including, but not limited to, a reduction in the appraised or donated value of the easement made prior to January 1, 2014, a reduction to the taxpayer's basis in the conservation easement, or a determination that a prior year credit is not fully utilized by the taxpayer.

(vii) Due to the annual cap, a single credit generated by one easement donation may be split between two tax years with a Tax Credit Certificate being issued for each year. In this situation, the taxpayer may claim the second part of the credit in the second designated tax year in addition to using any unused carryforward from the first part of the credit. Despite the limitation on when parts of the credit may be claimed and utilized, only one credit is generated by the donation. The twenty year carryforward period for each part of the credit will be based on the designated tax year for that part of the credit. The limitation referenced in paragraph (2)(d)(ii) of this regulation still prohibits the taxpayer from claiming another credit from a separate donation.

(e) If the donated property is held by the taxpayer making the donation for less than one year prior to the date of donation, the value of the conservation easement will be reduced by the gain the taxpayer would have realized had the easement been sold on the date of donation for the fair market value of the easement as established in the qualified appraisal.

(3) **Transfer of Credit.**

(a) A taxpayer may transfer all or part of a credit to a transferee who is a qualified taxpayer as described in paragraph (1) of this regulation. The portion of the credit being transferred must not be utilized by the transferor to offset tax or to claim a refund on any income tax return.

(i) A pass-through entity may not be the transferee of a credit. The partners, shareholders, or members must independently qualify as transferees.

(ii) A pass-through entity may directly transfer a credit if:

(A) Each partner, shareholder or member consents to the transfer, and

(B) Each partner, shareholder or member could, under the restrictions of the law and this regulation, have claimed and transferred their pro rata share of the credit directly.

(iii) Upon the death of a taxpayer, a gross conservation easement credit passes to the decedent's estate. If the decedent is the donor of the easement, the estate may use the credit to offset income tax owed by the estate or may transfer some or all of the credit according to the transfer rules. If the decedent is a transferee of the credit, the estate may use the credit to offset income tax owed by the estate but cannot transfer the credit.

(b) A credit may be transferred only once. A transferee cannot thereafter transfer the credit to another taxpayer. Thus, a transferee cannot transfer the credit back to the donor of the easement for the donor to utilize or transfer again to another taxpayer.

(c) If a taxpayer transfers a credit to one or more taxpayers, and any part of that credit is later disallowed by the Department of Revenue, the transferee will be held liable for the disallowed credits to the extent utilized plus any applicable penalty and interest.

(d) *Number of Credits.*

(i) During tax years beginning on or after January 1, 2000, but prior to January 1, 2003, a transferee may receive and use one credit each tax year.

(ii) During tax years beginning on or after January 1, 2003, a transferee may receive an unlimited number of credits.

(e) *Transfer Amount.*

(i) For donations made during tax years beginning prior to January 1, 2003, a minimum of $20,000 in credit may be transferred to any one taxpayer. Credits transferred after January 1, 2003 that arise from donations made prior to that date are subject to the $20,000 limit.

(ii) For donations made during tax years beginning on or after January 1, 2003, the donor may transfer any portion of the credit.

(f) *Transfer Date.*

(i) From June 7, 2005 through May 28, 2018, a transfer must be completed by the due date, not including any extensions, of the transferee's income tax return on which they use the credit.

(ii) Beginning on or after May 29, 2018, a transfer must be completed by the extension date of the transferee's income tax return on which they use the credit.

(g) *Limit Due to Prior Donations.*

(i) A taxpayer cannot receive a credit transfer during a tax year beginning on or after January 1, 2000, but prior to January 1, 2014, if, in the same year:

(A) The taxpayer claimed a new or carryforward credit as a donor of a conservation easement for the tax year, including as a member of a pass-through entity, regardless of whether the credit is utilized on that taxpayer's return or transferred to another taxpayer, or

(B) Another taxpayer has a carryforward credit from a prior donation the taxpayer made.

(ii) A taxpayer cannot receive a credit transfer during a tax year beginning on or after January 1, 2014 if the taxpayer claimed a new credit as a donor of conservation easement for the tax year, including as a member of a pass-through entity, regardless of whether the credit is utilized on that taxpayer's return or transferred to another taxpayer.

(h) *Tax Matters Representative.* The tax matters representative (TMR) is the person who donates the conservation easement and/or transfers the credit. A pass-through entity that donates the easement and passes the credit to, or sells the credit on behalf of, its partners, shareholders or members, is the TMR, unless the entity's status as the TMR is otherwise revoked or changed in accordance with paragraphs (3)(h)(iv), (v), and (vi).

(i) *Representation.* The value and validity of a gross conservation easement credit held by a transferee is derived from, and dependent on, the credit generated and/or transferred by the TMR. Therefore, an adjustment of a credit, to the extent such adjustment is based on the transfer of a gross conservation easement credit ("Transfer Item Adjustment"), made by the Department of Revenue against the TMR shall also be binding on the credit held by a transferee. Final resolution of disputes between the Department of Revenue and the TMR determines the Transfer Item Adjustments and such resolution is binding on transferees of the credit.

(ii) The TMR represents a transferee for Transfer Item Adjustments in matters including, but are not limited to:

(A) A donor's failure to file all required documents;

(B) A donor's improper claim of more than one credit per tax year;

(C) A donor's improper transfer of credit above the allowable or available amounts; and

(D) Any other such matters regarding the donation or credit that affect the value or validity of the credit, except those requirements for which the authority is granted to the Department of Regulatory Agencies or the Conservation Easement Oversight Commission for donations made on or after January 1, 2014 pursuant to § 12-61-727, C.R.S.

(iii) The TMR does not represent a transferee in matters that are an inappropriate use of the credit by a donor or transferee, including, but not limited to:

(A) An out-of-state resident attempting to use a credit in violation of § 39-22-522(1), C.R.S.;

(B) A transferee using a transferred credit and generating his or her own credit as a donor in the same year in violation of § 39-22-522(6), C.R.S.; or,

(C) A transferee claiming a refund of a credit in violation of §§ 39-22-522(5) & (7)(c), C.R.S.

(iv) *Effective Date.* The rights and responsibilities of the TMR and transferee, including the right to a hearing, appeal, notification, and limitations of action set forth in §§ 39-22-522(7)(i) and (j), C.R.S., apply to Transfer Item Adjustments initiated by the Department of Revenue on or after June 7, 2005.

(v) *Changing the TMR Designation.* Any person who has claimed a credit or who may be eligible to claim a credit in relation to a TMR's conservation easement donation may petition the Department of Revenue to change the TMR's designation if the TMR:

(A) Is incarcerated;

(B) Is residing outside the United States, its possessions, or territories;

(C) Is deceased or, if the representative is an entity, is liquidated or dissolved;

(D) Is under eighteen years of age at the time the Transfer Item Adjustment is initiated by the Department of Revenue, or a court determines the person to be legally incompetent;

(E) Does not request a hearing for the Transfer Item Adjustment pursuant to §§ 39-21-103 or 104, C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for requesting a hearing;

(F) Does not appear at hearing or fails to adequately participate in such hearing, including by failing to file a required pleading or to appear at a scheduled conference; or

(G) Does not file an appeal of a final determination pursuant to §§ 39-21-105 and 39-22-522.5(6), C.R.S., provided that the petition to change the TMR's designation is filed within 10 business days after the final date for filing an appeal.

(vi) *Petition to Change TMR's Designation*.

(A) The petition to change the TMR's designation must be in writing and filed with the Department of Revenue.

(B) The petition must contain at least the following information:

(I) The petitioner's name, address, and tax account number;

(II) A statement that the petitioner is a person who has claimed a credit or who may be eligible to claim a credit in relation to the TMR's conservation easement donation, including the taxable period(s) and amount of tax in dispute;

(III) A summary statement of the grounds upon which the petitioner relies for changing the TMR's designation; and

(IV) A proposed replacement TMR, including the replacement TMR's qualifications to serve as TMR in accordance with the criteria for representation listed in paragraph (3)(h)(vii) .

(C) The Department of Revenue may provide the TMR and transferees with notice of the petition and an opportunity to respond.

(D) The Executive Director of the Department of Revenue will issue an order regarding the petition as soon as practicably possible.

(vii) *Criteria for Representation*. The Department of Revenue will determine whether a TMR is unavailable or unwilling to act as a TMR and whether a petition to change the TMR's designation should be granted. The Department of Revenue will then determine the appropriate person to serve as the TMR. Criteria to be considered when determining who will serve as the TMR includes:

(A) The general knowledge of the donor or transferor and any proposed replacement TMR regarding the gross conservation easement credit transfer items at issue.

(B) The donor's or transferor's and any proposed replacement TMR's access to the records of the conservation easement.

(C) The views of the transferees involved in the transaction.

(viii) *Statute of Limitations*. The statute of limitations of the transferor and any extension to the statute of limitations agreed to by the TMR will also apply to the transferees of the credit, but only to the extent that it applies to Transfer Item Adjustments.

(4) **Refundable Credit.**

(a) Taxpayers, but not transferees of such credits, may claim a refund of the conservation easement credit if state revenues are in excess of the limitation on state fiscal year spending imposed by Section 20(7)(a) of Article X of the Colorado Constitution.

(b) For each donation made during tax years beginning on or after January 1, 2000, but before January 1, 2003, a maximum of $20,000 of the credit may be utilized by all taxpayers, including transferees, if any portion is to be refunded to a donor. This limit increases to $50,000 for credits arising from donations made in tax years beginning on or after January 1, 2003.

(c) The limits in subparagraph (b) of this paragraph (4) apply in aggregate to a married couple, regardless of whether they file jointly or separately, and all partners, shareholders or members of a pass-through entity, tenants in common, joint tenants, or similar ownership arrangements that make a donation, if one or more such partners, shareholders, members or owners request a refund of the credit.

(5) **Qualifying Donation.** For donations made prior to January 1, 2014, the Department of Revenue has the authority to review whether a donation qualifies for the credit as:

(a) A perpetual conservation easement in gross on real property located in Colorado,

(b) A donation to a governmental entity or a charitable organization that is exempt under section 501(c)(3) of the Internal Revenue Code of 1954, as amended, and

(c) A charitable contribution for federal income tax purposes under the Internal Revenue Code.

(6) **Credit Carryforward.**

(a) Any excess credit not utilized or transferred may be carried forward by the taxpayer for up to twenty years from the tax year of the return on which the credit is first claimed. A credit must be utilized in the earliest tax year possible.

(b) A taxpayer who moves to another state after receiving a credit remains eligible to carryforward the credit.

(c) A taxpayer may elect to abandon and not carryforward a credit by stating the abandonment on their return, thereby avoiding the prohibition against claiming a new credit set forth in paragraph (2) of this regulation.

(7) **Documentation.**

(a) Every taxpayer who claims, transfers, passes through, carries forward, or utilizes a credit must file a return with all appropriate Colorado Gross Conservation Easement Credit Schedules for each tax year with such activity. This includes claiming a credit that has been transferred to another taxpayer, reporting that a credit will be carried forward to the following year, and reporting that a carryforward credit has been transferred for that year.

(b) Every donor who claims a credit must attach the documents listed in this paragraph (7)(b) to their return, or submit them to the Department of Revenue at the same time the return is filed. The requirements of this paragraph (7)(b) apply without regard to whether the credit has been transferred to another taxpayer. The requirements of this paragraph (7)(b) also apply to returns filed by pass-through entities that donate a conservation easement, and the partners, shareholders or members of such entities. The Department of Revenue may waive the requirements of this paragraph (7)(b) for any taxpayer(s) in writing. The documents required are:

(i) All Colorado Conservation Easement Schedules required for the relevant year, including all required attachments;

(ii) A federal form 8283 with a summary of the qualified appraisal that meets the requirements set forth in § 39-22-522(3.3), C.R.S.;

(iii) For donations made on or after January 1, 2011, a copy of the Tax Credit Certificate obtained from the Department of Regulatory Agencies.

(8) **Appraisals.** Appraisals for donations made prior to January 1, 2014 are subject to review by the Department of Revenue.

(a) The appraiser must hold a valid license as a certified general appraiser in accordance with the provisions of part 7 of article 61 of title 12, C.R.S.

(b) The appraiser must meet all applicable education and experience requirements established by the Board of Real Estate Appraisers in accordance with § 12-61-704(k), C.R.S.

(c) A qualified appraisal for computing the gross conservation easement credit must meet requirements for claiming a federal charitable deduction for the donation of the easement.

(d) The Department of Revenue may require a taxpayer to submit a copy of the complete appraisal upon request.

(e) The Department of Revenue may require the taxpayer to provide a second appraisal at the taxpayer's expense if the Executive Director:

(i) Reasonably believes that the appraisal represents a gross valuation misstatement,

(ii) Receives notice of such a valuation misstatement from the Division of Real Estate, or

(iii) Receives notice from the Division of Real Estate that an enforcement action has been taken by the Board of Real Estate Appraisers against the appraiser.

(f) Any second appraisal required pursuant to this paragraph (8) and § 39-22-522(3.5), C.R.S. must be prepared by a certified general appraiser who is not affiliated with the appraiser who prepared the first appraisal, is in good standing and has met qualifications established by the Division of Real Estate.

(g) If, upon final determination, it is determined that an appraisal submitted in connection with a gross conservation easement credit claim is a substantial or gross valuation misstatement, the Department of Revenue must submit a complaint to the Board of Real Estate Appraisers and may pursue any other penalties or remedies authorized by law.

(9) **Requests for Documents.**

(a) If a taxpayer has not provided a document related to the gross conservation easement credit that was required to be provided as part of the taxpayer's return, including the return itself—or, if requested by the Department of Revenue for conservation easements donated prior to January 1, 2014, a copy of the complete appraisal obtained at the time of donation—the Department may send a written request to the taxpayer or TMR for such document. Such request may be sent by certified mail. Failure to provide the requested document to the Department of Revenue within 60 days of the mailing of the Department's request shall constitute grounds for the Executive Director of the Department of Revenue to issue a notice denying the credit.

(b) Documents that may be requested by the Department of Revenue include, but are not limited to, all or any part of the taxpayer's return, the Tax Credit Certificate from the Department of Regulatory Agencies, the Colorado Gross Conservation Easement Credit Schedule, the Colorado Conservation Easement Donor Schedule, the federal Form 8283, a summary of the appraisal, a copy of the complete appraisal, a copy of the appraiser's affidavit submitted to the Department of Regulatory Agencies, and the recorded deed of conservation easement.

(10) **Disallowance of Conservation Easement Tax Credits.**

(a) *Notice to TMR and Transferee.* The Department of Revenue shall initiate a Transfer Item Adjustment to a credit by issuing to the TMR a notice setting forth the proposed adjustment, regardless of whether the state tax liability of the TMR is affected by the proposed adjustment. The Department of Revenue shall also send to each transferee a notice of the Department's proposed Transfer Item Adjustment for such transferee's credit.

(b) *Multiple Transferees.* If there is more than one transferee of a credit, the Department of Revenue will generally allocate proportionally the Transfer Item Adjustment based on the percentage of the overall credit originally transferred to the transferees. However, the

Department of Revenue may allocate the adjustment among and between the transferees in any manner appropriate to the circumstances.

(c) *Request for Hearing.* A request pursuant to §§ 39-21-103 or 104, C.R.S. for hearing on a Transfer Item Adjustment, including a Transfer Item Adjustment that results in the denial or modification of the transferee's credit, may be made only by the TMR. A transferee does not have a right to protest the Notice of Deficiency or refund change issued to the transferee (including the allocation of the adjustment between or among transferees) to the extent the adjustment is based on a Transfer Item Adjustment. If the TMR does not timely request a hearing pursuant to §§ 39-21-103 or 104, C.R.S., a transferee may petition the Department of Revenue to change the TMR's designation within 10 business days after the final date for requesting a hearing in accordance with paragraphs (3)(h)(v), (3)(h)(vi), and (3)(h)(vii) of this regulation. If the Department of Revenue grants the petition, the new TMR may request a hearing pursuant to §§ 39-21-103 or 104, C.R.S., within 30 days of the Department's order regarding the petition.

(d) *Notification and Request to be Admitted as Party.* The Department of Revenue will issue a notice of the hearing to the TMR and each transferee of the credit. Such notice shall advise the transferee of the right to be admitted as a party to the hearing upon the filing of a written request setting forth a brief and plain statement of the facts that entitle the transferee to be admitted and the matters to be decided. The Executive Director of the Department of Revenue may admit parties for limited purposes.

(e) *Transfer of Jurisdiction.* If the Executive Director of the Department of Revenue issues a final order pursuant to § 39-22-522.5(5)(b), C.R.S., finding that a case cannot reasonably be resolved through the administrative process and transferring jurisdiction of the case to the district court, the Department will not oppose waiver of surety bond or other deposit in connection with the case.

(11) **Hearing Process.** To expedite the equitable resolution of requests for administrative hearings regarding conservation easement tax credits, avoid inconsistent determinations, and allow the Executive Director of the Department of Revenue to consider the full scope of applicable issues of law and fact, such hearings will be conducted in accordance with the following provisions:

(a) The Executive Director of the Department of Revenue may invite the participation in the hearing of any person who has claimed a credit or who may be eligible to claim a credit in relation to the TMR's conservation easement donation. Such participation shall include the right to be admitted as a party to the hearing upon the filing of a written request in accordance with paragraph (10)(d) of this regulation.

(b) The Executive Director of the Department of Revenue may resolve the issues raised by the parties in phases:

(i) The first phase will address issues regarding the validity of the credit and any other claims or defenses touching the regularity of the proceedings;

(ii) The second phase will address the value of the easement; and

(iii) The third phase will address determinations of the tax, interest, and penalties due and apportionment of such tax liability among persons who claimed a tax credit in relation to the TMR's conservation easement donation.

(c) Any request by a taxpayer to continue, stay, or otherwise postpone the hearing, including, but not limited to, a request for continuance to pursue mediation, shall be deemed consent by the taxpayer to enter into a written agreement with the Executive

Director of the Department of Revenue to extend the time for the Executive Director to issue a final determination by a period of days equal to the requested period of postponement.

(d) Nothing in this section shall be construed to abrogate or diminish the ability of the taxpayer to assert any facts, make any arguments, and file any briefs and affidavits the taxpayer believes pertinent to the case.

(12) **Final Determination and Appeal.** The Department of Revenue will issue, pursuant to § 39-21-103, C.R.S., a notice of final determination regarding the Transfer Item Adjustment(s) to the TMR and transferee of the credit. The TMR, not the transferee, may appeal the determination in accordance with §§ 39-21-105 and 39-22-522.5(6), C.R.S. If the TMR does not file an appeal pursuant to §§ 39-21-105 and 39-22-522.5(6), C.R.S., a transferee may petition the Department of Revenue to change the TMR's designation within 10 business days after the final date for filing an appeal, in accordance with § 39-22-522(6), C.R.S., and paragraphs (3)(h)(v), (3)(h)(vi), and (3)(h)(vii) of this regulation.

(13) **Confidentiality.** Except as otherwise provided in § 39-21-113, C.R.S. and regulation thereunder, every tax return and all information contained therein is confidential. Section 39-21-113(17.5), C.R.S., provides an exception to the Department of Revenue's confidentiality rule for tax information relating to conservation easement tax credits. For the purposes of this exception, "cases", as used in statute, is not limited to cases in administrative hearing, in district court, or in further appellate courts, but also includes information pertinent to any disallowed conservation easement tax credit.

Cross References

1. See Department Regulation 39-21-113 for additional information about the confidentiality of tax returns and all information therein.

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Office of the Attorney General

Tracking number: 2018-00716

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:44:08

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

~~**REGULATION 39-22-303.1. APPORTIONMENT FOR TAX YEARS BEGINNING PRIOR TO JANUARY 1, 2009.**~~

~~For income tax years beginning prior to January 1, 2009, every corporation doing business in Colorado and one or more other states has an annual election to apportion income under the provisions of section 39-22-303, C.R.S. (the Colorado Income Tax Act) or under the provisions of section 24-60-1301, C.R.S. (the Multistate Tax Compact). The election must be made with the filing of the Colorado income tax return and cannot be changed after the due date of the return. Statutory references in this regulation refer to those sections as they existed prior to January 1, 2009.~~

~~**REGULATION 39-22-303.3. Inclusion of Tangible Drilling Costs in the Property Factor.**~~

~~(1) The provisions of this regulation apply for income tax years beginning prior to January 1, 2009. Statutory sections referenced in the regulation refer to those sections as they existed prior to January 1, 2009.~~

~~(2) **Inclusion of intangible drilling costs in the property factor.** Intangible drilling costs should be included in both the numerator and the denominator of the property factor as computed under section 39-22-303(3), C.R.S. Since intangible drilling costs represent long range investments in the hope of producing oil or gas income, they are properly includable in the computation of the property factor.~~

~~(3) **"Safe Harbor" lease property.** "Safe Harbor" lease property shall be included in the property factor of the lessee/user and shall be excluded from the property factor of the lessor/owner.~~

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Tracking number: 2018-00708

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:48:44

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-121. Child Care Contribution Credit.

Basis and Purpose. The bases for this regulation are § 39-21-112(1) and § 39-22-121, C.R.S. The purpose of this regulation is to provide clarification regarding the child care contribution credit and the conditions necessary to qualify for the credit.

(1) **Computation of the Credit.**

(a) Any taxpayer that makes a qualifying monetary contribution to promote child care in Colorado may claim an income tax credit of fifty percent of the total value of the qualifying contribution.

(b) No credit may be claimed for in-kind contributions made in tax years commencing on or after January 1, 2000.

(2) **Limitation on Amount of Credit that May be Generated.**

(a) The amount of credit generated for contributions made during any one tax year may not exceed $100,000 per taxpayer and is further subject to the limitations in this paragraph (2), and in paragraphs (3), and (8). For purposes of this regulation, two taxpayers filing a joint return are considered one taxpayer.

(b) Credits for contributions made to facilities listed in paragraph 5(a)(viii) in tax years beginning on or after January 1, 2013 but before January 1, 2014 shall not be claimed until a tax year commencing on or after January 1, 2014.

(c) Qualifying contributions made in tax years 2011 and 2012 may only be used beginning in tax year 2013 and after. See paragraph (8) of this regulation for information on the calculation of such credit. See § 39-22-121(6.7)(a), C.R.S.

(3) **Carryforwards.** If the amount of credit generated in one tax year exceeds the amount of tax due, the excess may be carried forward for up to five tax years. A credit carryforward does not restrict additional credits from being generated in future years. Notwithstanding the suspension of the credit in tax years 2011 and 2012, no extension of the five-year carryforward is allowed by the statute.

(4) **Qualifying Contributions.** In order for a contribution to be a qualifying contribution, it must be one of the following:

(a) Monetary contributions made to a qualifying child care facility, as defined in paragraph (5)(a) below, to the extent that the facility utilizes the contribution for child care provided to children who are twelve years of age or younger.

(b) Monetary contributions made to a qualifying grandfathered facility or program, as defined in paragraph (7) below, and utilizes the contribution for child care provided to children eighteen years of age or under.

(5) **Qualifying Child Care Facilities or Programs.**

(a) Qualifying contributions to the following child care facilities or programs are eligible for the child care contribution credit. Programs and facilities specified in paragraphs (i) through (viii) qualify only if the programs or facilities are licensed by the Department of Human Services. Programs and facilities specified in paragraphs (ix) through (xiii) qualify only if the facility or program is registered with the Department of Revenue.

(i) A child care center as defined in § 26-6-102(5), C.R.S.,

(ii) A child placement agency as defined in § 26-6-102(7), C.R.S.,

(iii) A family child care home as defined in § 26-6-102(13), C.R.S.,

(iv) A foster care home as defined in § 26-6-102(14), C.R.S.,

(v) A homeless youth shelter as defined in § 26-6-102(17), C.R.S.,

(vi) A residential child care facility as defined in § 26-6-102(33), C.R.S.,

(vii) A secure residential treatment center as defined in § 26-6-102(35), C.R.S.,

(viii) Any approved facility school as such term is defined in section § 22-2-402(1), C.R.S., that is also affiliated with a licensed or certified hospital in the state and is also a nonprofit organization (see the restriction on a credit for contributions made to such facilities in paragraph 2(b) of this regulation),

(ix) An unlicensed child care facility that provides child care services similar to those provided by a licensed child care center as defined in § 26-6-102(5), C.R.S. This includes child care provided for the whole or part of a day. The program must provide for the care of five or more children who are not related to the owner, operator, or manager. This does not include;

(A) facilities or programs that provide services identical or similar to day treatment centers, guest child care facilities, family child care homes, foster care homes, homeless youth shelters, medical foster care, residential care facilities, secure residential treatment centers, specialized group facilities, or therapeutic foster care,

(B) facilities or programs that qualify for the enterprise zone administrator credit, or

(C) school programs maintained during regular school hours including kindergartens;

(I) maintained in connection with a public, private, or parochial elementary school system of at least six grades, or

(II) operated as a component of a school district's preschool program operated pursuant to article 28 of title 22, C.R.S.,

(x) A grant or loan program for a parent or parents in Colorado requiring financial assistance for child care,

(xi) A training program for child care providers in Colorado,

(xii) An information dissemination program in Colorado to provide information and referral services to assist a parent or parents in obtaining child care,

(xiii) A grandfathered child care facility or program as defined in paragraph (7) below.

(6) **Registration of Unlicensed Facilities or Programs.**

(a) Facilities or programs that are licensed by the Department of Human Services as a child care facility or program do not need to separately register with the Department of Revenue. However, unlicensed facilities or programs must register with the Department of Revenue to be a qualified facility or program for the purposes of this credit. The application for registration must include:

(i) An explanation why they are a qualified facility or program,

(ii) An explanation why licensing with the Department of Human Services is not required,

(iii) Brochures, newspaper articles, community publications and other documentation describing the facility or program.

(b) Applicants for registration, either pursuant to this paragraph (6) or (7) below, whose application has been denied in whole or in part, may appeal the denial by filing a request for hearing before the Executive Director pursuant to the Colorado Administrative Procedures Act (§ 24-4-104, C.R.S.) and not pursuant to § 39-21-103, C.R.S.

(7) **Grandfathered Facilities or Programs.**

(a) A grandfathered child care program is considered a qualifying facility or program on or after March 9, 2004 if the facility or program:

(i) Received contributions prior to January 1, 2004 for which a child care contribution credit was properly allowed and claimed,

(ii) No longer qualifies for the credit under the new rules because the program no longer meets the qualifications of the law and/or some or all children cared for in the program are age thirteen through eighteen,

(iii) Has applied for eligibility with the Department of Revenue and been approved to continue to accept contributions that qualify for the credit.

(b) The grandfather application must include:

(i) Documentation proving the program qualified for the credit under the law as it existed prior to March 9, 2004,

(ii) Documentation regarding the children age thirteen through eighteen that were assisted by contributions received in 2003 or prior, and

(iii) A list of taxpayers who claimed the credit in tax year 2003 or prior.

(8) **Limitation to the Credit for Tax Years 2013 and 2014.**

(a) For tax years beginning on or after January 1, 2013 but prior to January 1, 2014 (tax year 2013), the maximum credit that can be used to offset tax is limited to 50% of the total of the carryforward credits from 2012 and any credit generated by contributions made during 2013. Any unused credits must be carried forward to tax year 2014.

(b) For tax years beginning on or after January 1, 2014 but prior to January 1, 2015 (tax year 2014), the maximum credit that can be used to offset tax is limited to 75% of the total of the carryforward credits from 2013 and any credit generated by contributions made during 2014. Any unused credits must be carried forward to tax year 2015.

(c) There is no similar limitation to the percentage of the credit that can be used in tax year 2015 or later.

(9) **Exceptions.** Contributions will not qualify for this credit if any of the following apply:

(a) The contribution is made to a child care facility or program in which the taxpayer or a person related to the taxpayer has a financial interest.

(i) A "person related to the taxpayer" means a person connected with another person by blood or marriage. The term also includes:

(A) a corporation, partnership, limited liability company, trust or association controlled by the taxpayer;

(B) an individual, corporation, limited liability company, partnership, trust or association under the control of the taxpayer; or

(C) a corporation, limited liability company, partnership, trust, or association controlled by an individual, corporation, limited liability company, partnership, trust, or association under the control of the taxpayer.

(b) The contribution is made to a for-profit business, unless the contribution is directly used for the acquisition or improvement of facilities, equipment, or services, including the improvement of staff salaries, staff training, or the quality of child care.

(c) The contribution is not directly related to promoting child care in Colorado as defined in this rule.

(d) The contribution is made in a tax year commencing after December 31, 2024.

(e) The donor receives consideration from the donee facility or program facility or program in exchange for the contribution. If this is the case, a sale occurs rather than a contribution. However, this will not restrict a company from contributing to a child care facility and claiming a credit based on that contribution if the employees of the company receive a benefit in the form of discounted child care, assuming that the employer has no financial interest in the child care facility.

(10) **Contributions Split Between Qualified and Nonqualified Purposes.**

(a) Donee facilities or programs may accept contributions that are used in part for qualified child care purposes but are also used, in part, for nonqualified purposes. Examples include:

(i) A child care facility that cares for children both 12 and under and 13 and over,

(ii) A church that uses part of the contribution to fund its child care facility and part to fund other charitable functions,

(iii) Contributions to a community center construction project where a child care facility is only part of the overall project.

(b) The donee facility or program must allocate the portion of a contribution that qualifies for the child care contribution credit for the donor. This allocation must be done in a reasonable manner based on the facts of the situation. Examples of methods that can be used to allocate the contribution include:

(i) A child care facility that cares for children of various ages, some of which are 13 or older who do not qualify for the credit.

(A) The child care facility can compute the percentage of children in its care that qualify for the credit. This percentage can be used to allocate contributions that are made to the facility.

(B) The child care facility can document the expenses incurred in caring for children who are 12 and younger versus children who are 13 and older. The contribution would be allocated using this percentage. This method requires extensive supporting documentation.

(ii) A facility or program that operates several different programs, not all of which qualify for the credit.

(A) The expenses of the various programs must be accounted for and contributions can be directly allocated to the qualified programs.

(B) The contribution can be allocated on a percentage basis utilizing total expense figures for the entire facility.

(iii) The construction of a community center, which includes a child care facility.

(A) A percentage of area method can be utilized if this provides an equitable calculation of the credit (i.e. 30% of the floor space is for the child care facility so 30% of the costs are allocated to the child care facility).

(B) If construction costs vary greatly between the child care area of the building and other areas, a more equitable allocation of the contribution would be achieved by determining the difference between the cost of the facility with and without the child care facility. That difference can be used to determine the percentage of costs to allocate to the child care facility.

(C) If construction costs are reasonably allocated using the method in paragraph (1), above, but the costs of equipping the child care facility varies significantly from other areas of the building, a hybrid method of allocating contributions can be used. Construction costs can be allocated using a percentage of area method with equipment costs directly allocated. These factors could then be combined into one overall percentage to be used in allocating the contributions.

(iv) If the methods above do not equitably allocate the contribution to the child care facility or program, a written request to the Department of Revenue may be made to obtain permission to use an alternate method of allocation.

(c) If contributions are accepted as earmarked for only the child care facility despite the existence of nonqualified programs, the full contribution will qualify for the 50% credit. The facility must have accounting procedures in place to verify that those contributions are indeed utilized 100% for the child care function and no funds are utilized for nonqualified purposes. Any excess funds left over at the end of the year must be carried forward for eligible expenses in the next year. Accounting procedures must be in place to track and document this allocation process. A separate fund cannot be arbitrarily set up to accept contributions for the child care facility while funds from other sources (such as federal or state funds, charitable organizations, nonresident donors) are used to pay other expenses that would not qualify for the credit.

(11) **Documentation.** Any contribution must be supported by a signed statement from the donee child care facility or program and furnished to the donor.

(a) The statement must state the amount of the monetary contribution.

(b) The statement must list the name and Department of Human Service's license number, if applicable, of the eligible facility or program, or the name and Department of Revenue registration number of a pre-registered facility or program that qualifies for the credit.

(c) The statement must include a detailed description of the eligible purpose(s) for which the contribution will be used and that the contribution will be utilized one-hundred percent for purposes directly related to promoting child care.

(d) If the contribution is not being utilized one-hundred percent for purposes directly related to promoting child care, the statement must clearly state the portion of the contribution that qualifies for the credit computation. It will be the responsibility of the donee facility or program to prove that the percentage of the contribution reported as utilized for purposes directly related to promoting child care is accurate and no portion has been expended on any other expense or purpose. Example: A contribution of $1,000 is made to a qualifying child care facility. Seventy percent of the contribution is expended on qualifying purposes and the other thirty percent is expended on unrelated overhead expenses of the organization. The statement must clearly state that only $700 of the contribution is eligible for calculating the fifty percent credit.

(e) The donor must provide the statement to the Department of Revenue with an income tax return filed on a paper form. In the case of an income tax return filed electronically, the certification must be provided to the Department of Revenue upon request with all information specified by the Department provided.

(12) **Investment Funds.** Money donated to a qualified facility or program may be invested by that facility or program in an account that provides future payments to the facility or program. The interest and the principal, when removed from the account in any future year, must be utilized 100% for qualifying child care purposes in order for the original contribution to qualify for the credit.

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Tracking number: 2018-00715

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:51:11

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

Regulation 39-22-119. Child Care Expenses Tax Credit.

Basis and Purpose. The bases for this regulation are § 39-21-112(1) and § 39-22-119, C.R.S. The purpose of this regulation is to provide clarification regarding the child care expenses tax credit.

(1) **Child Care Expenses Tax Credit.** Resident individuals who claim the federal tax credit for child care expenses on their federal income tax return shall be allowed a credit against their Colorado income tax liability as follows:

(a) For income tax years beginning before January 1, 2019:

(i) A credit equal to 50% of the federal tax credit for taxpayers whose federal adjusted gross income is $25,000 or less.

(ii) A credit equal to 30% of the federal tax credit for taxpayers whose federal adjusted gross income is between $25,001 and $35,000.

(iii) A credit equal to 10% of the federal credit for taxpayers whose federal adjusted gross income is between $35,001 and $60,000.

(b) For income tax years beginning on and after January 1, 2019, a credit equal to 50% of the federal tax credit for taxpayers whose federal adjusted gross income is less than or equal to $60,000.

(c) This credit cannot be claimed by taxpayers whose federal adjusted gross income exceeds $60,000 in a given tax year.

(2) **Part-year Residents.** A part-year Colorado resident is allowed only that portion of the Colorado child care expenses tax credit that is equal to the credit multiplied by the ratio (not to exceed 100%) of the taxpayer's Colorado modified adjusted income over the taxpayer's entire federal modified taxable income.

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Tracking number: 2018-00714

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:50:21

Philip J. Weiser
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by Eric R. Olson
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-2

Rule title

1 CCR 201-2 INCOME TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

INCOME TAX

1 CCR 201-2

~~**REGULATION 39-22-303.5.7(A)**~~

~~For special regulations for allocation and apportionment of corporate income of certain industries for tax years beginning before January 1, 2009, see special regulations issued pursuant to the Multistate Tax Compact, title 24, article 60, part 13. The following special regulations implement the single sales factor apportionment methodology set forth in §39-22-303.5, C.R.S. as modified pursuant to §39-22-303.5(7)(a), C.R.S., and apply to tax years beginning on or after January 1, 2009.~~

~~Special Regulation 1A – Airlines~~

~~Special Regulation 2A – Contractors~~

~~Special Regulation 3A – Publishing~~

~~Special Regulation 4A – Railroads~~

~~Special Regulation 5A – Television and Radio Broadcasting~~

~~Special Regulation 6A – Trucking~~

~~Special Regulation 7A – Financial institutions~~

~~Special Regulation 8A – Telecommunications~~

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Tracking number: 2018-00709

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-2

INCOME TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:48:58

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-718. Charitable and Other Exempt Organizations.

Basis and Purpose. The bases for this regulation are § 39-21-112(1), § 39-26-102(2.5), § 39-26-718, and § 39-26-725, C.R.S. The purpose of this regulation is to provide clarification regarding what organizations, activities, and purchases qualify for the charitable and other exempt organizations exemption.

(1) **General Rule.**

(a) Purchases by charitable organizations are exempt from state sales and use taxes and state-administered local sales and use taxes if the purchases are part of the charitable organization's regular charitable functions and activities.

(b) Sales by charitable organizations generally are not exempt from sales tax, except for occasional sales, sales where a portion of the purchase price is a donation, and sales by certain school-related entities.

(c) The following are common situations where the acquisition of property by a charitable organization is not subject to sales tax.

(i) The charitable organization does not pay the donor for the donation (sales tax does not apply to transactions when consideration is not paid), or

(ii) The purchase was part of its regular charitable function and activity, or

(iii) The purchase was made with the intention of reselling the item at a fundraising event, in which case the charitable organization's purchase is exempt as a wholesale purchase for resale.

(2) **Types of Charitable Organizations.**

(a) Charitable organizations must serve a public rather than a private interest and be organized and operated exclusively for one or more of the following purposes or functions:

(i) Religious; to the extent consistent with Catholic Health Initiatives Colo. v. City of Pueblo, 207 P.3d 812, (Colo. 2009).

(ii) Charitable;

(iii) Scientific;

(iv) Literary;

(v) Educational;

(vi) Testing for public safety;

(vii) Fostering national or international amateur sports competition, as long as no part of its activities involves providing athletic facilities or equipment;

(viii) Preventing cruelty to children or animals;

(b) *Veterans' Organizations.* A veterans' organization registered under section 501(c)(19) of the Internal Revenue Code is a charitable organization for purposes of the Colorado charitable organizations exemption.

(c) Charitable, as used in paragraph (2)(a)(ii) of this regulation, is used in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration of other tax-exempt purposes which may fall within the broad outlines of *charity* as developed by judicial decisions. Charitable includes:

(i) Relief of the poor and distressed or of the underprivileged;

(ii) Advancement of education or science;

(iii) Erection or maintenance of public buildings, monuments, or works;

(iv) Lessening of the burdens of government;

(v) Care of the sick, infirm, or aged;

(vi) Lessen neighborhood tensions;

(vii) Eliminate prejudice and discrimination;

(viii) Defend human and civil rights secured by law; or

(ix) Combat community deterioration and juvenile delinquency.

(d) Educational, as used in (2)(a)(v) of this regulation, relates to:

(i) The instruction or training of the individual for the purpose of improving or developing his capabilities; or

(ii) The instruction of the public on subjects useful to the individual and beneficial to the community.

(e) Testing for public safety, as used in paragraph (2)(a)(vi) of this regulation, includes the testing of consumer products to determine whether they are safe for use by the general public.

(f) Scientific, as used in paragraph (2)(a)(iii) of this regulation, includes carrying on of scientific research in the public interest. For research to be scientific, it must be carried on in furtherance of the scientific purpose.

(g) *IRS 501(c)(3) Certificates.* A charitable organization that holds a 501(c)(3) determination letter from the Internal Revenue Service is provisionally presumed to qualify as a charitable organization that is exempt from Colorado sales and use tax. However, the

Department is not bound by an IRS determination of an organization's charitable status, and the Department may independently evaluate whether the entity qualifies as a charitable entity.

(h) *Religious Organization.* The IRS does not require religious organizations to apply for a 501(c)(3) certificate in order to qualify as a tax-exempt charitable organization. In such cases, the Department will issue a sales tax exemption certificate to a religious charitable entity, even in the absence of an 501(c)(3) certificate, if the organization has a charitable purpose and meets the conditions set forth below. In lieu of the 501(c)(3) certificate, a religious organization shall provide to the Department a copy of its IRS No Record of Exempt Organization letter and Department Form DR 0716, "Statement of Nonprofit Church, Synagogue, or Organization".

(i) If the applicant is a religious organization that is an affiliate of a national organization that holds a Colorado exemption certificate, applicant may submit, in lieu of such a determination letter, documentation from the national organization demonstrating that applicant is an affiliate of such organization.

(i) *Nonprofit Organizations.* An organization that is a nonprofit or an organization that performs some charitable services or provides funding to a qualified charitable organization does not automatically qualify as a charitable organization for sales and use tax purposes. In order to qualify, the organization must be established and operated exclusively for one or more of the charitable purposes listed above. Examples of organizations that do not typically qualify as a charitable organization for purposes of this exemption are nonprofit country clubs, private clubs, employees or social clubs or organizations, nonprofit recreational organizations, lodges, patriotic organizations, fraternities, sororities, professional and trade associations, civic organizations, labor unions, political organizations, and other nonprofit entities.

(3) **Application for Exemption Certificates.**

(a) Applicants must submit a completed application for a sales tax exemption certificate and include a copy of the organization's federal exemption determination letter.

(b) Notwithstanding a determination by the IRS of an applicant's exempt status, the Department may conduct, either before or after the issuance of an exemption certificate, an independent review of whether the organization qualifies for the exemption authorized by § 39-26-718, C.R.S.

(4) **Restrictions on Charitable Organization Activities.** The restrictions in this paragraph (4) are applicable only to charitable organizations described in paragraph (2)(a) of this regulation.

(a) *Exclusively.* A charitable organization described in paragraph (2)(a) of this regulation will be regarded as operating exclusively for one or more exempt purpose only if the organization exclusively engages in activities in furtherance of its exempt purpose. A charitable organization described in paragraph (2)(a) of this regulation will not lose its exempt charitable status if its non-charitable activities are insubstantial.

(i) *Examples.*

(A) If the religious organization operates a restaurant or coffee shop for the public unrelated to its charitable purpose, then the organization does not qualify for the exemption because this activity is not considered part of the organization's charitable function. Note that sales by a charitable organization are not generally exempt from sales tax. For example, sales

by a church in a coffee shop operated on church property are subject to sales tax even if the revenues from such sales are insubstantial, unless the sales qualify under the occasional sale exemption or the donation exemption, discussed below.

(B) Providing meals to the poor or homeless for free or below cost is generally considered a charitable activity.

(b) *Other Restrictions.* A charitable organization described in paragraph (2)(a) of this regulation is subject to the following limitations in order to qualify for the sales and use tax exemption certificate:

(i) No part of an organization's net earnings can benefit any private shareholder or individual. Compensation paid by the organization for services rendered, including services performed by employees or officers of the charitable organization, must be reasonable.

(A) The fact that an organization charges a fee for its goods or services is not fatal to a claim that it is a charitable organization. However any profit that a charitable organization generates must be used for charitable purposes. Factors that the Department will consider with respect to whether an organization that charges fees is a charitable organization include: (i) whether such fees vary depending on the need of the recipient of the goods or services; and (ii) the extent to which such fees show material reciprocity or *quid pro quo* transactions between the organization and those it serves.

(B) Example: A mutual benefit society is an organization whose benefits are available only to its members and/or their beneficiaries and requires payment by its members as a condition to receiving such benefits. A mutual benefit society is not organized for a charitable purpose, and is not a charitable organization exempt from sales and use taxes under this exemption.

(ii) No substantial part of an organization's activities can be carrying-on propaganda or otherwise attempting to influence legislation. For example, an organization whose main activity is scientific is not a charitable organization for sales and use tax purposes if a substantial portion of the organization's activities involves dissemination of propaganda that is favorable to its political objectives or consists of lobbying for legislation that supports the organization's activities and mission.

(iii) An organization may not participate in, or intervene in, a political campaign on behalf of any candidate for public office (including the publishing or distributing of statements).

(5) **Purchases by Charitable Organizations.**

(a) Purchases by charitable organizations are exempt from sales and use taxes if the goods or services are used exclusively in the conduct of the charitable organization's regular charitable functions and activities. Purchases must be made directly from the organization's funds and, for purchases over two-hundred fifty dollars, must be made with a check or credit card issued in the organization's name. Purchases made with funds other than the organization's own funds or purchases made with a charitable organization's funds but reimbursed by someone who is not a qualified charitable organization are not exempt from sales or use tax. Whenever a charitable organization

purchases tangible personal property (such as cards, food, cars, etc.) that is to be transferred to anyone else for personal use and all or part of the price of the goods is recouped from the user through direct payment, donation or games of chance (but not including a sale), the organization's exempt status does not apply and sales tax must be paid to the vendor by the exempt organization. If such purchases are made outside Colorado or in Colorado without payment of Colorado sales tax, the tax must be paid directly to the Department by the organization.

(i) *Examples.*

(A) A purchase made on behalf of a charitable organization with a credit card issued in the name of an individual is not exempt.

(B) An educational charitable organization's purchase of computers is not exempt if the computers are given to members of the organization who use the computers for their own personal use or who reimburse the organization.

(C) An educational institution's purchase of athletic equipment or uniforms is not exempt from sales and use tax if the educational institution is reimbursed for the equipment or uniforms from students or their families.

(6) **Donor's Obligation for Sales and Use Tax.**

(a) A donor who purchases tangible personal property for the purpose of donating it to a charity must pay sales or use tax on the purchase and cannot claim the charitable organization's exemption. The donor cannot claim a sale for resale exemption because the property is donated, not resold, to the charitable organization.

(b) A retailer who initially makes a wholesale (exempt) purchase of an item for resale (e.g., retailer buys an item for its inventory it plans to resale) and later withdraws that item from inventory and donates it to a charitable organization incurs use tax on the withdrawal from inventory. However, see cross reference (3) for information on the exemption for donations of manufactured goods by manufacturers.

(7) **Sales by Charitable Organizations.**

(a) *General Rule.* Sales made by charitable organizations are generally not exempt from sales tax, unless the sale qualifies for the occasional sale exemption, as a donation, or for any other exemption that may apply (see paragraphs (8) and (9) of this regulation). For that reason, a charitable organization that makes repeated sales of tangible personal property to the public and otherwise meets the definition of a retailer must have a sales tax license and collect and remit tax in the same manner as any other retailer. For example, a charitable organization that operates a gift or book shop, rummage store, or coffee shop must collect sales tax on sales. The fact that the merchandise sold may have been acquired by gift or donation, or that the proceeds are to be used for charitable purposes, does not make the sales exempt from tax.

(b) *Occasional Sale Exemption.* Occasional sales of taxable tangible personal property by a charitable organization that holds a Colorado exemption certificate are exempt from sales and use taxes. See paragraph (10), below, for information of local taxes. An occasional sale must meet the following criteria:

(i) The charitable organization conducts sales for a total of twelve days or less during a calendar year, and

(A) Each day a sale occurs is counted as an entire day, even if the sale occurs for less than a full day or the organization characterizes a multi-day sale as one event.

(ii) The "net proceeds" from all these events do not exceed twenty-five thousand dollars in that calendar year. "Net proceeds" means the total gross receipt(s) minus expenses directly attributable to the event(s).

(A) "Directly attributable" generally means those expenses that would not have arisen but for the occurrence of the event and do not include indirect and overhead costs, such as administrative staff wages, insurance unless purchased for the specific event, rent otherwise due even if no event was held, property taxes, and other expenses that would be incurred even in the absence of the event.

(B) Payment by the charitable organization to acquire any goods that are later sold at a fundraising event is an expense that is deducted from the gross proceeds to determine net proceeds.

(C) When a charitable organization exceeds either threshold described in paragraph (7)(b)(i) or (ii) of this regulation, then all sales that occur in that calendar year are subject to tax, including sales in that calendar year that were previously exempt prior to the date when the threshold was exceeded. Sales tax applies to the gross proceeds, not the net proceeds. The charitable organization must have a sales tax license if and when either of these limits is exceeded.

(I) *Example 1.* Charitable organization conducts one auction sale which generates $30,000 in gross proceeds and $20,000 in net proceeds. Because neither threshold was exceeded, the charitable organization does not collect, report, or remit sales tax.

(II) *Example 2.* Same facts as Example No. 1, but net proceeds are $26,000. Charitable organization has exceeded the $25,000 threshold, and, therefore, must collect, report, and remit sales tax on the gross proceeds of $30,000.

(iii) The funds retained by the charitable organization are used in the course of the organization's charitable service.

(iv) *Living accommodations and other taxable services.* The exemption for occasional sales applies only to the sale of tangible personal property. Therefore, sales of taxable services by a charitable organization are subject to tax. For example, a charitable organization conducts a silent auction at which it auctions a weekend rental of a timeshare or hotel room. The sale of living accommodations is a sale of a service. The sale is subject to state and local sales taxes applicable to where the accommodation is located even if the charitable organization has not exceeded the twelve day or twenty-five thousand dollar thresholds. The sale of the living accommodation is not included in the calculation of the twenty-five thousand dollar threshold.

(A) If the auction is not conducted in the same state-administered local jurisdiction in which the living accommodation is located, then the charitable organization must register with the Department for the local

jurisdiction where the accommodation is located and collect the local sales taxes, including any lodging or local marketing district taxes, applicable to the rental of living accommodations.

(v) *Goods sold on consignment.* Goods given by a retailer to a charitable organization for sale at a fundraising event with the understanding that the goods will be offered for sale at a minimum price and the minimum price is paid to the retailer, and with the further understanding that the goods would be returned to the retailer if not sold at the event are subject to sales tax on the minimum price even if the twenty-five thousand dollar threshold is not met. For example, a bike shop offers a bike to a charitable organization to be sold at a fundraising auction, but the bike shop requires the charitable organization to pay the bike shop a portion of the purchase price in the event the bike is sold. The charitable organization must collect sales tax from the successful bidder for the payment made to the bike shop, even if the net proceeds from the event do not exceed the twenty-five thousand dollar threshold.

(c) *Donations.* A portion of the purchase price for a sale made by a charitable organization may be a donation if the amount paid exceeds the fair market value of the good purchased.

(i) The exclusion of donations from the tax base applies even if the charitable organization exceeds the twelve day / twenty-five thousand dollar threshold of the occasional sale exemption. This rule also applies to state-administered local sales taxes even if the local tax jurisdiction elected to tax occasional sales of charitable organizations.

(ii) The donation amount is not included in the calculation of the twenty-five thousand dollar net proceeds threshold for the occasional sale exemption.

(iii) *Examples.*

(A) An electronic retailer donates a laptop computer that it sells for $700 at retail. The charitable organization offers the laptop computer at a silent auction and discloses that the fair market value of the laptop computer is $700. The winning bid is $1,000. $300 is a donation not subject to tax.

(B) Charitable organization sells 300 tickets for $100 for a dinner and silent auction event. This is the charitable organization's only event that calendar year. Organization discloses to ticket purchasers that $75 of the $100 ticket price is a donation. Each dinner costs the charitable organization $10. Charitable organization generates $33,000 in silent auction gross sale proceeds ($30,000 derived from the auction of taxable tangible personal property, $1,000 from the auction of non-taxable services and gift certificates, and $2,000 from the auction of taxable vacation rentals), $20,000 in net proceeds from the silent auction, and $4,500 from the sale of dinner (($25-$10) X 300), for a total in net proceeds of $24,500. Because the $75 is a donation and not proceeds from a sale of what would otherwise be taxable goods, the $22,500 ($75 X 300) in donations from ticket sales is not added to the $24,500 in net proceeds to determine whether the $25,000 in net proceeds threshold is exceeded. Sales tax is not due on the net proceeds because the charity has not exceeded the $25,000 threshold. The $1,000 in non-taxable services and gift certificates and the $2,000 in taxable living accommodations are excluded from the net proceeds calculations because the services and gift certificates are not taxable and the living

accommodations do not qualify under the occasional sales exemption, which applies only to taxable tangible personal property and not taxable services. (Tax must be collected on the living accommodations.)

(I) *Local Sales Taxes.* If the state-administered local tax jurisdiction in which the sale occurred elected not to exempt occasional sales by charitable organizations, then the local tax applies to the gross proceeds from the sale of dinner and auction items, even if the organization did not exceed the $25,000 net proceeds threshold, but local tax does not apply to the $75 per ticket because a donation is not subject to state or local sales taxes.

(C) Same facts as Example No. 2, except the net proceeds from the auction sale are $23,000. Because the net proceeds threshold is exceeded ($23,000 + $4,500), sale tax applies to the gross price, not just the net proceeds, for all dinners ($25 X 300) and to the gross price all of the sales at auction ($30,000 + $2,000). Sales tax is not collected on the $1,000 in the sales of non-taxable services and gift cards and not on the $22,500 in donations.

(iv) In order to claim a sales tax exemption for a donation included in the buyer's purchase price, the buyer and charitable organization must establish the following:

(A) the fair market value of the taxable item or service, and

(B) that the buyer knowingly paid in excess of the fair market value with the intent to donate that excess portion of the price to the charitable organization.

(v) The Department will presume that the price paid for an item sold at auction is the item's fair market value and that the buyer did not knowingly pay in excess of the fair market value. These presumptions can be rebutted by reasonable evidence, such as the price for comparable goods sold by a retailer in its regular course of business and that buyer knew the fair market value of the goods at the time of the purchase. For example, the fair market value of a signed professional sports jersey sold at auction will be presumed to be the price paid by the successful bidder, but the presumption can be rebutted by documentation of the sales price of a comparable signed jersey sold to the public at the professional team's or other retail store.

(A) *Examples.*

(I) A charitable organization holds a fundraising dinner for which patrons purchase a ticket for $100 per person. The organization compiles information that establishes that the fair market value of the dinner is $25 and the cost per meal is $10. The organization establishes that purchasers knowingly paid in excess of the fair market value of the item by disclosing to patrons, at the time tickets are sold, that the fair market value of the dinner is $25 (or that $75 of the $100 purchase price is a donation). State sales tax is due on the $25 if the organization exceeded the $25,000 net proceeds threshold.

(II) The fair market value of an item sold at auction is not based on the cost to the organization to acquire the item. For example, a donor may donate a set of golf clubs or a night stay at a condominium to the organization to be auctioned at a fundraising event. The fair market value of the golf clubs or room is not zero even though the organization acquired the golf clubs or room for free. The fair market value is the price at which the item would sell on the open market.

(III) A charitable organization holds a fundraising auction. The organization previously conducted concession sales and other fundraising sales for twelve days in the same year. The organization compiles information of the fair market value of each of the items sold at auction. The organization establishes that the purchaser knowingly paid in excess of the fair market value of the item by disclosing the fair market value of the auctioned items to potential bidders prior to bidding. The organization does not collect sales tax on that portion of the purchase price that exceeds the fair market value.

(vi) The Department will presume that any donation that qualifies as a donation for federal income tax purposes also qualifies as a donation for sales tax purposes.

(8) **Parent-Teacher Associations.** Sales by associations or organizations of parents and teachers of public school students are exempt from sales tax if:

(a) The association or organization is a charitable organization, and;

(b) The sale proceeds are used for the benefit of a public school, an organized public school activity, or to pay reasonable expenses of the association or organization.

(c) The exemption does not apply to sales by private schools. However, sales by private schools that qualify as charitable organizations are exempt as occasional sales or are not taxable to the extent the purchase price is a donation, or are exempt pursuant to paragraph 9, below. §39-26-718(1)(c), C.R.S. See paragraph (10), below, for information on local taxes.

(d) *Occasional Sales Restrictions Do Not Apply.* This exemption applies even if the sale has exceeded the occasional sale exemption threshold (twelve days / twenty-five thousand dollar as discussed in (7)(b) “Occasional Sale Exemption”).

(i) *Example.* A public school parent-teacher association can raise funds by selling candy exempt from sales tax in order to purchase school sports uniforms. However, if the parent-teacher association is supporting a private school, its sales are taxable, unless the association is a charitable organization for educational purposes. In addition, if students reimburse the school for the uniforms, then tax must be collected on the amount paid by students.

(9) **Sales by Public, Private Schools and Supporting Organizations.** Sales by public and private schools and supporting organizations are exempt from sales tax if the conditions described in paragraphs (a) to (d) are met. See paragraph (10), below, for information on local taxes.

(a) The school is for students in kindergarten through twelfth grade.

(b) Preschools, trade schools and post-secondary schools do not qualify.

(c) The sale is made by any of the following:

(i) the school;

(ii) an association or organization of parents and school teachers;

(iii) booster club or other club, group or organization whose primary purpose is to support a school activity; or

(iv) a school class, student club, group or organization.

These organizations qualify for this exemption even if they are not charitable organizations. Examples include: concession sales by booster club or a silent auction sales conducted by a parent-teacher association or school are exempt if all the proceeds are donated to the school or school-approved student organization

(d) All the proceeds from the sale, except the actual cost incurred by a person or entity to acquire the good or service sold, must be donated to the school or school-approved student organization. Actual costs incurred to acquire the goods or services include, payment facility charges (rent for space, furniture or equipment), labor (wages for security, independent contractors, employees), transportation, meals, insurance, and other costs.

(e) Sales by a parent-teacher association that are not exempt under this paragraph (9) may, nevertheless, be as exempt if the sale meets the requirements for an exempt sale as a charitable organization or as a public school parent-teacher association or organization.

(f) *Occasional Sales Restrictions do not apply.* This exemption applies even if the sale has exceeded the thresholds for the occasional sale exemption (twelve days / twenty-five thousand dollar as discussed in (7)(b) “Occasional Sale Exemption”).

(g) Purchases by public schools are exempt from sales tax. § 39-26-704(4), C.R.S. Purchases by private schools are not exempt unless the private school is a charitable organization.

(10) **State-Administered Local Tax Jurisdictions.** State-administered cities and counties have the option to adopt the following exemptions from sales tax (1) occasional sales by charitable organizations, (2) sales that benefit a Colorado school, and (3) sales by an association or organization of parents and teachers of public school students that is a charitable organization. See, § 29-2-105(1)(d)(I)(E), (K), and (L), C.R.S., respectively. However, state-administered special districts, such as the Regional Transportation District, must always exempt such sales from sales tax in conformity with state sales tax exemptions. Unless exempt, charitable organizations are responsible for collecting state-administered city and county sales taxes for the local jurisdiction in which the sale occurs. If the state-administered city or county taxes occasional sales, then the charitable organization must obtain a Colorado sales tax license prior to such sales so that the organization can report and remit the local sales tax to the Department, even though these sales are exempt from Colorado state sales tax. Home rule cities are not governed by these rules and procedures and should be contacted directly for more information on their procedures

(11) **Other Tax Exempt Organizations**. Other tax-exempt organizations (including governmental entities) that sell tangible personal property (for example, through a secondhand goods retail store, a fundraiser sales event or routine sales of organization-related items) must obtain a sales tax license and collect all applicable state and local sales taxes.

Cross References

1. For a list of state-administered local tax jurisdictions that levy sales tax on occasional sales, see Department publication “Colorado Sales/Use Tax Rates” (DR 1002), available at www.colorado.gov/pacific/tax > Instructions and Forms > Sales Tax > DR 1002.

2. For a list of home rule cities, see also Department publication “Colorado Sales/Use Tax Rates” (DR 1002).

3. For information on the exemption for donations of manufactured goods by manufacturers, see § 39-26-705(2), C.R.S.

4. For additional information on sales related to schools, see § 39-26-725, C.R.S.

5. Catholic Health Initiatives Colo. v. City of Pueblo, 207 P.3d 812, (Colo. 2009).

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Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:52:43

Philip J. Weiser
Attorney General
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-204(2). Retailer's Use Tax.

(1) Every retailer that has substantial nexus with Colorado and is doing business in this state, as defined in § 39-26-102(3), C.R.S., shall collect retailer's use tax, pursuant to § 39-26-204(2), C.R.S., with respect to any sale of tangible personal property for storage, use, or consumption in Colorado for which the retailer was not, under state and federal law, required to collect sales tax. Retailers are considered to have a substantial nexus with Colorado for use tax purposes if they meet any of the following criteria:

(a) the retailer maintains a physical presence in Colorado pursuant to §§ 39-26-102(3)(a), (d), and (e), C.R.S.; or

(b) in the previous calendar year or the current calendar year, the retailer's retail sales of tangible personal property or services delivered into Colorado exceeds one hundred thousand dollars.

(2) Paragraph (1)(b) of this regulation shall not apply in determining a retailer's obligation to collect tax under § 39-26-204(2), C.R.S. and this regulation for any sale made prior to December 1, 2018.

(3) A retailer that has substantial nexus with Colorado as defined in paragraph (1) of this regulation is not a "remote seller" as defined in § 39-26-102(7.7), C.R.S. and sales made by any such retailers are not "remote sales" as defined in § 39-26-102(7.6), C.R.S.

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Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:48:03

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-102(1.3). Auctioneers.

(1) **Auctioneer's Duty to Collect Tax**

(a) Definitions

(i) *Auction sale*. An auction sale is a sale conducted by an auctioneer who solicits offers to purchase tangible personal property or services until the highest offer is made.

(ii) *Auctioneer*. An auctioneer is a person who sells an interest in tangible personal property or taxable services owned by the auctioneer or another person at an auction sale. An auctioneer has the legal authority to accept on behalf of the seller an offer to buy. An interest in property or services includes a lease and license. A person selling goods on consignment for another is an auctioneer if the sale is made at an auction sale. An auctioneer includes a person who is a lienholder, such as storageman, pawnbroker, motor vehicle mechanic, or artisan, and is selling the property at an auction sale to foreclose such lien.

(b) *General Rule*. An auctioneer is a retailer and, therefore, must collect, report, and remit Colorado sales tax and state-administered local sales taxes to the Department, even if the auctioneer is a disclosed agent of the owner.

(c) *Calculation of Tax*. Sales tax is calculated on the gross price paid by the buyer for the purchase of taxable tangible personal property or a taxable service, including any non-optional fee that only successful bidders must pay in order to purchase taxable goods or services, even if the non-optional fee is separately stated from the bid price paid for the auctioned item.

(i) *Examples.*

(A) Auctioneer sells restaurant equipment at auction for $10,000 and charges a fee of ten percent of the selling price, which is deducted from the total sale proceeds paid by the purchaser(s). Sales tax is calculated on the selling price paid by a successful bidder ($10,000), which includes the ten percent auctioneer's fee. Similarly, the fee is included in the sales tax calculation if the purchaser is required to pay the fee in addition to the successful bid price (i.e., tax calculated on $11,000) because the fee is included in the overall purchase price of the item.

(B) Auctioneer charges owners or bidders a flat “entrance” fee which compensates auctioneer for its cost to rent the auction facilities,

advertising, insurance, and/or auctioneer's administrative overhead. The fee is collected from sellers and bidders regardless of whether the owner's good(s) sells or the bidder purchases auctioned property or a service. The fee is not included in the calculation of sales tax because the fee is charged regardless of whether there is a taxable sale of goods or services. However, the fee is included in the calculation of sales tax if the fee (whether a flat or percentage fee) is due and payable only when goods or services are sold.

(C) Auctioneer charges buyer a fee for additional services that buyer has the option, but is not required, to purchase as part of buyer's purchase of auctioned property or services, such as an optional fee for auctioneer's or seller's service of delivering the auctioned goods to buyer. The optional fee paid by buyer is not included in the sales tax calculation if, and only if, the fee is separately stated on the buyer's invoice.

(d) *Local Sales Taxes*. Auctioneers must collect any applicable state-administered local sales taxes. For motor vehicles sold at auction, an auctioneer, who is required to collect sales tax (see paragraph (2)(b), below), must collect any applicable state-administered local sales taxes, unless the motor vehicle is exempted from such local sales tax by § 29-2-105(1)(e), C.R.S.

(2) **Exceptions to Auctioneer's Duty to Collect.**

(a) *Licensed Owners.* An auctioneer is not required to collect sales tax if the auctioneer sells taxable tangible personal property or services on behalf of a seller who, at the time of the sale, holds a current Colorado sales tax license issued by the Department. The licensed owner is responsible for collecting, remitting, and filing a sales tax return, even if the auctioneer was contractually obligated to the owner to collect the sales tax from the purchaser(s) and report and remit the tax to the Department, or if the auctioneer was contractually required to remit such collected tax to the licensed owner. An auctioneer, who is not legally required to collect tax because the owner is a licensed retailer but is collecting such tax on behalf of the owner, must disclose to the successful bidder the owner's name and owner's retail license number. An auctioneer who is not legally responsible to collect sales tax because the owner is a licensed retailer, but who nevertheless collects sales tax from a purchaser must hold the same in trust on behalf of the State of Colorado, and is liable for such tax if the tax is not remitted to the licensed seller or the Department.

(b) *Sales of motor vehicles.* An auctioneer is not required to collect sales taxes due on the sale of a motor vehicle, unless the auctioneer is licensed by Colorado as an automotive dealer pursuant to §12-6-101, et seq., C.R.S and the sale or use of the vehicle is subject to tax. § §39-26-113(7)(a) and (b), C.R.S.

(c) *Property Exempt from Sales Tax*. An auctioneer does not collect sales tax if the property is exempt from sales tax, such as an exempt farm close-out sale.

(d) *Burden of Proof*. An auctioneer has the burden of establishing with objective, verifiable documentation an exception or exemption from collecting, reporting, and remitting sales tax. An auctioneer selling on behalf of a licensed seller or to a purchaser with a sales tax exemption certificate must obtain a copy of the owner's sales tax license or, in the case of an exempt sale, the sales tax license number or the purchaser's sales tax exemption certificate, and verify that such license or certificate is valid at the time of the sale.

Cross References

1. Please visit the Department's website (www.colorado.gov/tax) for online services available for verifying tax licenses and exemption certificates.

2. See 1 CCR 201-4, Rule 39-26-716.4(a) regarding an auctioneer's duties for an exempt farm close-out sale.

3. See 1 CCR 201-4, Regulation 39-26-718 for information on charitable entities conducting fundraising by auction sales.

4. See 1 CCR 201-4, Regulation 39-26-102(9) for the sourcing of sales for state and local sales tax purposes.

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Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:46:12

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

~~Regulation 39-26-105(1)(A) TAX RATE~~

~~(1) **General Rule.** A retailer shall collect the state sales tax and any applicable state-administered local sales taxes in effect at the time of the sale. If the retailer's filing period does not end on the day preceding the effective date of a new tax rate, the retailer must compute the amount of sales tax on its sales tax return using both tax rates.~~

~~(a) **Leases and Credit Sales.** Retailers who enter into leases or credit sales subject to Colorado sales or use taxes must collect for each such payment the tax at the rate in effect when the credit sale or lease was first made.~~

~~(i) Retailers who receive payments for a lease or credit sale after the effective date of a change in the tax rate must continue to collect the tax at the original rate. If the tax rate decreases and the retailer collects tax at the old rate on payments made after the effective date of the new tax rate, the retailer must report on their sales tax return the difference between the old tax rate and the new tax rate on the "Excess tax collected" line that is applicable to the tax jurisdiction whose tax rate has changed. Retailers cannot distribute the excess tax to the reporting columns of tax jurisdictions whose rate has not changed. If the tax rate increases and the retailer collects tax at the old rate on payments made after the effective date of the new tax rate, the retailer should contact the Department for instructions on filing the return.~~

~~(A) Retailers who renew or extend a lease must collect on each subsequent payment the tax rate in effect on the effective date of such renewal or extension.~~

~~(b) **Deferred Transactions.** Retailers who have conditional sales contracts or who remit tax on a cash basis for sales that occurred before a change in the tax rate must continue to collect the tax related to all payments made after the effective date of the new tax rate at the rate in effect at the time the contract or sale was originally made.~~

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Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:47:44

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

~~**REGULATION 39- 26-102.3**~~

~~1) "Doing business in this state" under C.R.S. 39-26-102(3)(a) requires that the person both (1) sell, lease, or deliver tangible personal property in this state, and (2) maintain, directly or indirectly, an office, salesroom, warehouse, or similar place of business within the state. A person meeting these requirements must obtain a Colorado Sales Tax License. "Doing business in this state" under C.R.S. 39-26-102(3)(b) requires that the person both (1) sell, lease, or deliver tangible personal property in this state, and (2) regularly or systematically make solicitations in this state. A person meeting these requirements should obtain a Colorado Retailer's Use Tax License or a Colorado Sales Tax License.~~

~~2) The solicitation required by (3)(b)(I) of section 39-26-102 C.R.S. may be by any means whatsoever, including advertising by catalogues, newspapers, radio, television, e-mail, or Internet. The solicitation need not originate in this state. It is sufficient that the vendor purposefully direct the advertising into the state, which includes national or international advertising that includes Colorado.~~

~~3)~~

~~a) Any retailer that does not collect Colorado tax (the "remote retailer") and is a component member of a controlled group of corporations, which controlled group also contains a retailer with a physical presence in this state (the "in-state retailer"), is presumed to be doing business in the state at a level sufficient to require the collection of Colorado sales tax. The remote retailer is required to register with the department and is required to collect Colorado sales tax.~~

~~b) The presumption articulated in a) may be rebutted by the remote retailer by a showing that the in-state retailer did not engage in any constitutionally sufficient solicitation on behalf of the remote retailer.~~

~~c) A retailer that does not collect Colorado tax is a retailer that sells taxable property or services to customers who are not exempt from sales tax, but does not collect sales or use tax.~~

~~d) In-state retailer includes any member of the controlled group of corporations that has a controlling interest in any in-state retailer regardless of the form of doing business of the in-state retailer.~~

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Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:46:31

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-102(9). Retail Sales.

Basis and Purpose. The bases for this regulation are §§ 29-2-105(1)(b), 39-21-112(1), 39-26-102(9), 39-26-102(10), 39-26-104, 39-26-107, 39-26-204(2), and 39-26-713, C.R.S. The purpose of this regulation is to establish the location to which a retail sale is sourced within Colorado.

(1) "Retail sale" includes all sales on which sales tax is imposed under § 39-26-104, C.R.S.

(2) A retail sale is a sale to the user or consumer of tangible personal property or service whether the sale is made by a licensed vendor or is between private parties.

(3) "Retail sale" includes only those sales made within Colorado. For purposes of determining whether a sale of tangible personal property or services, other than leases or rentals controlled by paragraphs (4), (5), or (6) below, and sales of mobile telecommunications services under §39-26-104(1)(c), C.R.S., is made within Colorado, the following rules apply:

(a) When tangible personal property or services are received by the purchaser at a business location of the seller, the sale is sourced to that business location.

(b) When tangible personal property or services are not received by the purchaser at a business location of the seller, the sale is sourced to the location where receipt by the purchaser (or the purchaser's donee, designated as such by the purchaser) occurs, including the location indicated by instructions for delivery to the purchaser (or donee), if that location is known to the seller.

(c) When subparagraphs (3)(a) and (3)(b) do not apply, the sale is sourced to the location indicated by an address for the purchaser that is available from the business records of the seller that are maintained in the ordinary course of the seller's business when use of this address does not constitute bad faith.

(d) When subparagraphs (3)(a) through (3)(c) do not apply, the sale is sourced to the location indicated by an address for the purchaser obtained during the consummation of the sale, including the address of a purchaser's payment instrument, if no other address is available, when use of this address does not constitute bad faith.

(e) When subparagraphs (3)(a) through (3)(d) do not apply, including the circumstance in which the seller is without sufficient information to apply the previous rules, then the location will be determined by the address from which tangible personal property was shipped.

(f) For the purpose of applying subparagraphs (3)(a) through (3)(e), the terms "receive" and "receipt" mean:

(i) Taking possession of tangible personal property; or

(ii) Making first use of services; but not

(iii) Possession by a shipping company on behalf of the purchaser.

(4) Except as provided in paragraph (7) of this regulation, the lease or rental of tangible personal property, other than property identified in paragraphs (5) or (6) shall be sourced as follows:

(a) For a lease or rental that requires recurring periodic payments, the first periodic payment is sourced the same as a retail sale in accordance with paragraph (3) of this regulation. Periodic payments made subsequent to the first payment are sourced to the primary property location for each period covered by the payment. The primary property location shall be as indicated by an address for the property provided by the lessee that is available to the lessor from its records maintained in the ordinary course of business, when use of this address does not constitute bad faith. The property location shall not be altered by intermittent use at different locations, such as use of business property that accompanies employees on business trips and service calls.

(b) For a lease or rental that does not require periodic payments, the payment is sourced the same as a retail sale in accordance with the provisions of paragraph (3) of this regulation.

(c) This subparagraph does not affect the imposition or computation of sales or use tax on leases or rentals based on a lump sum or accelerated basis, or on the acquisition of property for lease.

(5) Except as provided in paragraph (7) of this regulation, the lease or rental of motor vehicles, trailers, semi-trailers, or aircraft that do not qualify as transportation equipment, as defined in paragraph (6), shall be sourced as follows:

(a) For a lease or rental that requires recurring periodic payments, each periodic payment is sourced to the primary property location. The primary property location shall be as indicated by an address for the property provided by the lessee that is available to the lessor from its records maintained in the ordinary course of business, when use of this address does not constitute bad faith. The location shall not be altered by intermittent use at different locations.

(b) For a lease or rental that does not require recurring periodic payments, the payment is sourced the same as a retail sale in accordance with the provisions of paragraph (3).

(c) This subparagraph does not affect the imposition or computation of sales or use tax on leases or rentals based on a lump sum or accelerated bases, or on the acquisition of property for lease.

(6) The retail sale, including the lease or rental, of transportation equipment shall be sourced the same as a retail sale in accordance with the provisions of paragraph (3), notwithstanding the exclusion of lease or rental in paragraph (3). “Transportation equipment” means any of the following:

(a) Locomotives and railcars that are utilized for the carriage of persons or property in interstate commerce.

(b) Trucks and truck-tractors with a Gross Vehicle Weight Rating (GVWR) of 10,001 pounds or greater, trailers, semi-trailers, or passenger buses that are:

(i) Registered through the International Registration Plan; and

(ii) Operated under authority of a carrier authorized and certificated by the U.S. Department of Transportation or another federal or a foreign authority to engage in the carriage of persons or property in interstate or foreign commerce.

(c) Aircraft that are operated by air carriers authorized and certificated by the U.S. Department of Transportation or another federal or foreign authority to engage in the carriage of persons or property in interstate or foreign commerce.

(d) Containers designed for use on and component parts attached or secured on the items set forth in subparagraphs (6)(a) through (6)(c).

(7) Paragraphs (4) and (5) of this regulation do not apply to any payment made pursuant to a lease or rental agreement executed prior to December 1, 2018. Lease or rental payments described in this paragraph (7) are subject to any state and state-administered local sales taxes applicable to the lease or rental agreement at the time of execution. Any state and state-administered local sales taxes that did not apply to the lease or rental agreement at the time of execution will not apply to any lease payments made pursuant thereto and described in this paragraph (7).

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Tracking number: 2018-00583

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:46:45

Philip J. Weiser
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by Eric R. Olson
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-103.5. Direct Payment Permit.

(1) **General Rule.** A purchaser who holds a direct payment permit ("Qualified Purchaser") shall remit sales and use taxes directly to the Colorado Department of Revenue ("Department") and not to the retailer. Retailers who sell taxable goods or services to a Qualified Purchaser shall not collect sales tax from such purchasers.

(2) **Qualified Purchaser Qualifications.** An applicant, which can be an entity or individual, for a direct payment permit must meet the following conditions.

(a) *Dollar Threshold*. An applicant must have had a minimum of $7,000,000 in purchases on which Colorado state sales or use tax was owed during the twelve months preceding the application. The dollar threshold excludes purchases that are exempt from Colorado state sales and use tax, even if such purchases are subject to state-administered local sales or use taxes. See, § 29-2-105, C.R.S. for a description of the local tax base. For example, the dollar threshold excludes exempt wholesale purchases of inventory. Additionally, commodities or tangible personal property that are to be erected upon or affixed to real property, such as building and construction materials and fixtures, are not included in the dollar threshold. See, § 39-26-103.5(1)(a), C.R.S.

(b) *Good Standing.* If an applicant has been subject to any tax administered by the Department for at least three years prior to the date of the application, an applicant cannot have been delinquent in collecting, remitting, or reporting any sales, use, income, or other tax administered by the Department for the immediate three years prior to the date applicant submits its application. If an applicant has not been subject to any tax administered by the Department for at least three years, the applicant cannot have been delinquent in collecting, remitting, or reporting taxes for any period after the date the applicant was first obligated to collect, remit, and report such taxes. The Department can waive this requirement if an applicant demonstrates to the satisfaction of the director or their designee that the failure to comply with the collecting, remitting, and reporting requirements was due to reasonable cause. In determining whether reasonable cause exists, the Department will consider, among other relevant aggravating and mitigating factors, whether:

(i) the failure was due to willful or reckless disregard of applicant's tax obligations;

(ii) the applicant failed to comply on more than one occasion;

(iii) the magnitude of the failure was significant in terms of dollars or time; and

(iv) the applicant made subsequent efforts to avoid future failures.

(c) *Accounting Systems and Practices*. An applicant must have in place an accounting system and set of practices that are acceptable to the Department. The accounting

system and practices must fully and accurately report the amount of sales or use tax to be reported on the appropriate sales or use tax return(s), including state-administered local tax jurisdictions. The Department may revoke a direct payment permit and may make assessments of tax, penalties, or interest if such system or practices are not adequate to enable the Department to fully and accurately collect and allocate to cities, counties, and other local taxing entities all the sales and use taxes that the Department collects on behalf of such entities.

(d) A Qualified Purchaser is not required to be subject to the collection, remittance, and reporting requirements for sales taxes in order to obtain such a permit. Rather, a Qualified Purchaser can be subject to the collection, remittance, and reporting requirements for any tax administered by the Department.

(3) **Effective Date.** A direct payment permit is effective from the date of issuance until December 31 of the third year following the year in which it is issued unless sooner revoked.

(4) **Purchaser's Funds.** When a Qualified Purchaser uses a direct payment permit, the Qualified Purchaser must use its own funds when paying a retailer for a transaction to which the direct payment permit applies. Retailers cannot accept payment from persons other than the Qualified Purchaser, including payment from the personal funds of an individual if the permit is held in the name of an entity. Retailers must collect tax if a Qualified Purchaser is making a purchase with funds other than the Qualified Purchaser's funds and will be liable for unpaid taxes for transactions paid in contravention of this subsection (4).

(5) **Revocation of Permits.**

(a) The Department may revoke a direct payment permit if the Qualified Purchaser violates any statute or regulation governing the administration of sales and use taxes, or if in the opinion of the Department the Qualified Purchaser becomes otherwise unable to meet any of the conditions for holding a direct payment permit. The Department shall provide written notice of the revocation by first-class mail to the last known address of the Qualified Purchaser thirty days prior to the effective date of such revocation. The notice of revocation shall set forth:

(i) the factual and legal basis for revocation,

(ii) advise the Qualified Purchaser of its right to appeal, and

(iii) the date the Department issued the notice.

The Department will issue a denial of a direct payment permit application in the same manner.

(b) An applicant who is denied a permit or a Qualified Purchaser whose permit was revoked, may appeal the decision by submitting to the Department's executive director a written request for hearing. The notice of appeal must be received by the Department within thirty days of the date of issuance of the notice of revocation or denial and contain the permit holder's name, address, permit account number (for revocations), and the legal and factual basis explaining why the permit should not be revoked or denied. Qualified Purchaser's notice of appeal shall suspend the effective date of the revocation until a final order resolving the appeal is issued by the executive director or the director's designee. The executive director or director's designee shall conduct a hearing and issue a final ruling on such appeal within a reasonable time.

(6) **Reporting Requirements.**

(a) A Qualified Purchaser holding a direct payment permit must directly remit to the Department all state and state-administered city, county and special district sales taxes that would have been collected by the retailer had the Qualified Purchaser purchased such goods or services without a direct payment permit.

(i) *Exceptions.* A Qualified Purchaser holding a direct payment permit cannot pay county lodging taxes, county short-term rental taxes, and local marketing district taxes directly to the Department because such taxes are not sales taxes. Retailer must collect such taxes from the Qualified Purchaser and remit them to the Department. See, § 30-11-107.5 and § 30-11-107.7, C.R.S.

(b) A Qualified Purchaser must report and remit state and state-administered local taxes on or before the 20th day of each month following the month the Qualified Purchaser purchases taxable goods or services with a direct payment permit.

(c) The vendor must retain a copy of Qualified Purchaser's direct pay permit.

Cross References

1. See Regulation 1 CCR 201-4, 39-26-102(9) for the sourcing of sales for state and local sales tax purposes.

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Tracking number: 2018-00584

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:47:00

Philip J. Weiser
Attorney General
by Eric R. Olson
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-104(1)(b)(I). Exchanged Tangible Personal Property.

(1) **General Rule.** When tangible personal property is received by a retailer as part or full payment for the sale of tangible personal property, sales tax shall be calculated upon the purchase price of the tangible personal property sold, minus the fair market value of the tangible personal property exchanged by the purchaser, provided the property taken by the retailer in the exchange is to be resold in the usual course of the retailer's trade or business.

(2) **Exceptions**. The general rule does not apply if:

(a) The property transferred from purchaser, or by a third party on behalf of the purchaser, to seller is not tangible personal property.

(i) *Examples.*

(A) Intangible property, such as stock certificates, and real property are not subject to sales or use tax.

(B) Services (because they are not property).

(b) Retailer does not resell, in the usual course of its business, the property transferred from purchaser.

(i) *Examples.*

(A) Retailer does not resell the property in a commercially reasonable period.

(B) Retailer takes a used computer from buyer in exchange for the sale of a new computer to buyer. Retailer then donates the used computer to a school. A donation does not constitute a sale and, therefore, the initial exchange does not qualify under the general rule.

(C) Retailer is in the business of selling only construction equipment. Buyer exchanges a boat as partial payment of its purchase of a large compressor. Retailer cannot reduce the price on which sales tax is calculated for the compressor by the fair market value of the boat even if the seller resells the boat. The resale of boats is not part of the retailer’s usual course of business. Retailer and buyer also do not qualify for the vehicle exchange, even though the boat qualifies as a vehicle, because both the buyer and retailer must exchange vehicles. Therefore, both the retailer, as a licensed vendor, and buyer are liable for the sales tax on the purchase of the equipment and the retailer, as a buyer, is liable for sales tax on the fair market value of the boat (buyer would also be liable for the sales tax on the boat if buyer is a licensed retailer).

(ii) *Exception to the Resale Requirement - Vehicles.* The resale requirement does not apply if the property transferred (exchanged) by the seller to buyer is a vehicle and the property transferred (exchanged) by the buyer to the seller is a vehicle. Both vehicles must be subject to licensing, registration, or certification by the laws of Colorado. "Vehicles" include:

(A) Trailers, semi-trailers, trailer coach,

(B) Special mobile machinery (except such machinery used solely on property of the owner),

(C) Vehicles designed primarily to be operated or drawn on public highways, (§§ 42-3-103(1) and 104, C.R.S.),

(D) Watercraft (§ 33-13-103, C.R.S.),

(E) Aircraft (Colorado does not license aircraft but Colorado law requires aircraft possessed in this state be licensed by FAA) (§ 43-10-114(1), C.R.S.).

Purchaser, on whom the obligation to pay sales tax is levied, is the person who pays money or other consideration in addition to the exchanged vehicle. If the seller is a licensed retailer, then the retailer must collect sales tax from the purchaser. Persons who engage in three or more such exchanges may be required to obtain a motor vehicle dealer's license

(c) Exchanges that do not occur at the same time and place. See, § 39-26-104(1)(b).

(i) *Examples.*

(A) Motor vehicle dealer sells a motor vehicle to buyer, who pays cash. Two weeks later, buyer decides to sell another vehicle he owns to the dealer. Buyer cannot claim a refund for taxes paid for the first purchase because the second vehicle was not exchanged as part of the first sale.

(B) Retailer is in the business of leasing equipment. Customer rents a forklift for 30 days and retailer and customer agree at the time the lease is signed that customer will give retailer, as part of the payment, a used compressor that retailer intends to lease to third parties. The exchange does not qualify because the use of the forklift occurs over thirty days and does not occur at the same time and place as the exchange of the compressor. In contrast, a finance lease is treated as a credit sale and not as a true lease. An exchange involving a finance lease is treated as occurring at the same time and place as the other party's exchange of property.

Cross References

1. For additional requirements regarding the collection of tax for motor vehicles, see § 39-26-113, C.R.S.

2. See, § 39-26-104(1)(b)(I)(B), C.R.S. and § 12-6-101, et seq., C.R.S. for laws governing motor vehicle dealer licensing.

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Tracking number: 2018-00585

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:47:13

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-105. Remittance of Sales Tax.

Basis and Purpose. The statutory bases for this regulation are §§ 39-21-112(1) and 39-21-119, 39-26-105, 39-26-107, 39-26-109, 39-26-112, 39-26-118, and 39-26-704(2), C.R.S. The purpose of this regulation is to clarify sales tax remittance requirements and conditions under which a retailer is eligible to deduct a retailer's service fee from the sales tax they remit.

(1) **Retailer Requirements.**

(a) A retailer is liable and responsible for tax on the retailer's taxable sales made during the tax period prescribed for the retailer pursuant to 1 CCR 201-4, Regulation 39-26-109, calculated using the tax rate in effect at the time of the sale and applied to all taxable sales, including all taxable sales made for less than the minimum amount subject to tax pursuant to § 39-26-106, C.R.S. A retailer is also liable and responsible, pursuant to § 39-26-112, C.R.S., for the payment of any tax collected in excess of the tax rate in effect at the time of the sale and must remit such excess amount to the Department.

(b) A retailer shall file with the Department a return reporting its sales, including any sales exempt from taxation under article 26 of title 39, C.R.S., made during the preceding tax period. If a retailer makes no retail sales during its preceding tax period, the retailer must file a return reporting zero sales. Returns and any required supplemental forms must be completed in full.

(c) A retailer must file returns and remit any tax due to the Department in accordance with the filing schedules prescribed by 1 CCR 201-4, Regulation 39-26-109.

(2) **Due Date of Returns.** Sales tax returns and payments of tax reported thereon are due the twentieth day of the month following the close of the tax period. If the twentieth day of the month following the close of the tax period is a Saturday, Sunday, or legal holiday, the due date shall be the next business day.

(3) **Retailer's Service Fee.** Except as provided in this paragraph (3), a retailer may, in the remittance of collected sales tax, deduct and retain a retailer's service fee in the amount prescribed by § 39-26-105(1)(c), C.R.S.

(a) If the retailer is delinquent in remitting any portion of the tax due, other than in unusual circumstances shown to the satisfaction of the executive director, the retailer shall not retain a retailer's service fee for any portion of the tax for which the retailer is delinquent.

(b) If a retailer has retained a retailer's service fee pursuant to paragraph (3) of this regulation and, subsequent to the applicable due date, owes additional tax for the filing period as the result of an amended return or an adjustment made by the Department, the retailer shall not be permitted to retain a retailer's service fee with respect to the

additional tax, but the retailer may retain the retailer's service fee associated with the original return, so long as the retailer filed the original return in good faith.

(4) **Application.**

(a) The liability and responsibility imposed by § 39-26-105, C.R.S. and this regulation apply to any retailer that has substantial nexus with Colorado and is doing business in this state, as defined in § 39-26-102(3), C.R.S. Retailers are considered to have a substantial nexus with Colorado for sales tax purposes if they meet any of the following criteria:

(i) the retailer maintains a physical presence in Colorado pursuant to §§ 39-26-102(3)(a), (d), or (e), C.R.S.; or

(ii) in the previous calendar year or the current calendar year, the retailer's retail sales of tangible personal property and services delivered into Colorado exceeds one hundred thousand dollars.

(b) Paragraph (4)(a)(ii) of this regulation shall not apply in determining a retailer's liability and responsibility for tax pursuant to § 39-26-105, C.R.S. and this regulation for any sale made prior to December 1, 2018.

(c) A retailer that has substantial nexus with Colorado as defined in paragraph (4)(a) of this regulation is not a "remote seller" as defined in § 39-26-102(7.7), C.R.S. and sales made by any such retailers are not "remote sales" as defined in § 39-26-102(7.6), C.R.S.

Cross References

1. Forms, returns, and instructions can be found online at www.colorado.gov/tax.

2. For additional information about excess tax collected by a retailer, see § 39-26-112, C.R.S. and 1 CCR 201-4, Regulation 39-26-106.

3. For information about electronic funds transfer (EFT) requirements and the timeliness of payments made via EFT, see 1 CCR 201-1, Special Regulation 1 Electronic Funds Transfer.

4. For information about dates payments or returns are deemed to have been made, see § 39-21-119, C.R.S. and 1 CCR 201-1, Regulation 39-21-119.

5. For information about electronic filing, see § 39-21-120, C.R.S. and 1 CCR 201-1, Regulation 39-21-120.

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Tracking number: 2018-00586

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:47:29

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-4

Rule title

1 CCR 201-4 SALES AND USE TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division – Tax Group

SALES AND USE TAX

1 CCR 201-4

Regulation 39-26-704(2).

(1) All sales which the state of Colorado is prohibited from taxing under the constitution or laws of the United States or the state of Colorado are exempt, including sales to ambassadors, consuls, and their employees who are citizens of the nation they are representing.

(2) Sales involving interstate commerce are exempt only in cases where the tax would be unconstitutional.

(3) All sales to railroads, except as provided in C.R.S. 1973, 39-26-710(1)(a) and to other common carriers doing an interstate business, to telephone and telegraph companies, and to all other agencies engaged in interstate commerce are taxable in the same manner as are sales to other persons.

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Tracking number: 2018-00589

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/14/2019

1 CCR 201-4

SALES AND USE TAX

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:48:18

Philip J. Weiser
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Permanent Rules Adopted

Department

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Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-18

Rule title

1 CCR 201-18 RETAIL MARIJUANA TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

RETAIL MARIJUANA TAX

1 CCR 201-18

Regulation 39-28.8-101. Retail Marijuana Definitions.

Basis and Purpose. The basis for this regulation is §§ 39-21-112(1), 39-28.8-101, 39-28.8-205, and 39-28.8-308, C.R.S. The purpose of this regulation is to establish definitions for terms used in 1 CCR 201-18 regarding retail marijuana sales tax and retail marijuana excise tax.

With respect to regulations promulgated under Article 28.8 of Title 39, the following terms have the following meanings:

(1) Unless the context clearly requires otherwise, terms defined by section 39-28.8-101, C.R.S., section 44-12-103, C.R.S., or in Rule R 103 of 1 CCR 212-2 of the Marijuana Enforcement Division's rules related to the Colorado Retail Marijuana Code, shall have the same meanings in these regulations as therein defined.

(2) "Affiliated" means being owned or controlled by the same or related interests, where "related interests" includes individuals who are related by blood or marriage or entities that are directly or indirectly controlled by an entity or individual or related individuals.

(3) "Average Market Rate" shall have the same meaning as defined in subsection 39-28.8-101(1.5), C.R.S., and shall be calculated pursuant to Department Regulation 39-28.8-302(5) in the following categories:

(a) Bud

(b) Trim

(c) Bud Allocated for Extraction

(d) Trim Allocated for Extraction

(e) Immature Plant

(f) Wet Whole Plant

(g) Seed

(4) "Bud" shall have the same meaning as the product of the "Flowering" stage as set forth by Rule R 103 of 1 CCR 212-2 including the actual flower.

(5) "Bud Allocated for Extraction" means Bud that is designated for the extraction of Retail Marijuana Concentrate and not for direct sale to consumers.

(6) "Immature Plant" shall have the same meaning as set forth by Rule R 103 of 1 CCR 212-2.

(7) "Inventory Tracking System" shall have the same meaning as set forth by Rule R 103 of 1 CCR 212-2.

(8) "Marijuana" means Medical Marijuana or Retail Marijuana.

(9) "Retail Marijuana" shall have the same meaning as defined in subsection 39-28.8-101(7), C.R.S.

(10) "Retail Marijuana Concentrate" shall have the same meaning as "Retail Marijuana Concentrate" as set forth by Rule R 103 of 1 CCR 212-2.

(11) "Retail Marijuana Cultivation Facility" shall have the same meaning as defined in subsection 39-28.8-101(8), C.R.S.

(12) "Retail Marijuana Excise Tax" or "Excise Tax" means excise tax imposed by Part 3 of Article 28.8 of Title 39, C.R.S.

(13) "Retail Marijuana Excise Tax Return" means the excise tax return upon which all sales or Transfers of Retail Marijuana subject to Retail Marijuana Excise Tax and the amount of Retail Marijuana Excise Tax are reported.

(14) "Retail Marijuana Plant" means a plant of the genus cannabis, other than an Immature Plant, whether growing or harvested, that is cultivated by a licensed Retail Marijuana Cultivation Facility.

(15) "Retail Marijuana Product Manufacturing Facility" shall have the same meaning as defined in subsection 39-28.8-101(10), C.R.S.

(16) "Retail Marijuana Sales Tax" means sales tax imposed by Part 2 of Article 28.8 of Title 39, C.R.S.

(17) "Retail Marijuana Sales Tax Return" means the sales tax return upon which all sales of Retail Marijuana and Retail Marijuana Products and the amount of state and local Retail Marijuana Sales Tax are reported.

(18) "Retail Sales Tax" means the sales tax imposed by Part 1 of Article 26 of Title 39, C.R.S.

(19) "Test Period" means the period of time used to calculate the Average Market Rate. The Test Period shall be each November 1st to the subsequent January 31st, each February 1st to the subsequent April 30th, each May 1st to the subsequent July 31st, and each August 1st to the subsequent October 31st.

(20) "Transfer(s)(ed)(ing)" means to grant, convey, hand over, assign, sell, exchange, or barter, in any manner or by any means, with or without consideration, any Retail Marijuana or Retail Marijuana Product from one licensee to another licensee or to a consumer. A Transfer includes the movement of Retail Marijuana or Retail Marijuana Product from one licensed premises to another, even if both premises are contiguous, and even if both premises are owned by a single entity or individual or group of individuals.

(21) "Trim" means any part of a Retail Marijuana Plant other than Bud or Wet Whole Plant. Trim includes "sweet leaf" or "sugar leaf".

(22) "Trim Allocated for Extraction" means Trim that is designated for the extraction of Retail Marijuana Concentrate and not for direct sale to consumers.

(23) "Unaffiliated" means not being owned or controlled by the same or related interests, where "related interests" includes individuals who are related by blood or marriage or entities that are directly or indirectly controlled by an entity or individual or related individuals.

(24) "Unprocessed Retail Marijuana" means all Retail Marijuana that is first Transferred by a Retail Marijuana Cultivation Facility to a Retail Marijuana Store or a Retail Marijuana Products Manufacturing Facility, even though it may have gone through some processing, and even though it may be subject to further processing by another licensee.

(25) "Wet Whole Plant" means a Retail Marijuana Plant that is cut off just above the roots and is not trimmed, dried, or cured. The weight of the Wet Whole Plant includes all bud, leaves, stems, and stalk. The Wet Whole Plant must be weighed within 2 hours of the plant being harvested. The plant must not undergo any further processing prior to being weighed, and tax must be paid on the weight of the entire unprocessed plant.

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Tracking number: 2018-00719

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-18

RETAIL MARIJUANA TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:45:15

Philip J. Weiser
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Permanent Rules Adopted

Department

Department of Revenue

Agency

Taxpayer Service Division - Tax Group

CCR number

1 CCR 201-18

Rule title

1 CCR 201-18 RETAIL MARIJUANA TAX 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Taxpayer Service Division - Tax Group

RETAIL MARIJUANA TAX

1 CCR 201-18

Regulation 39-28.8-302. Retail Marijuana Excise Tax.

Basis and Purpose. The basis for this regulation is §§ 39-21-112(1), 39-28.8-101, 39-28.8-301, 39-28.8-302, and 39-28.8-308, C.R.S. The purpose of this regulation is to provide guidance regarding the imposition and calculation of retail marijuana excise tax and the record keeping requirements therefor.

(1) **Incidence of Tax.** The Excise Tax is imposed upon the Retail Marijuana Cultivation Facility, which shall pay the Excise Tax to the Department on the first Transfer of Retail Marijuana to a Retail Marijuana Store or a Retail Marijuana Product Manufacturing Facility. No Excise Tax is imposed on the Transfer of Retail Marijuana from one Retail Marijuana Cultivation Facility to another Retail Marijuana Cultivation Facility. In the case of such Transfer, the Excise Tax is imposed on the subsequent Transfer of the Retail Marijuana to a Retail Marijuana Store or a Retail Marijuana Product Manufacturing Facility.

(2) **Exempt Transfers.** The Transfer of Retail Marijuana to a Retail Marijuana Testing Facility for testing purposes is exempt from Retail Marijuana Excise Tax so long as the marijuana is destroyed by the Retail Marijuana Testing Facility during or following the testing.

(3) **Inventory Tracking System.** When a Transfer is entered into the Inventory Tracking System, all Transfers between Unaffiliated Retail Marijuana business licensees must be entered in a manner that allows the contract price to be recorded in such Inventory Tracking System. The contract price recorded in the Inventory Tracking System must be the actual contract price as described in paragraph 4(b) of this regulation.

(4) **Calculation and Payment of Tax.**

(a) The method for calculating Retail Marijuana Excise Tax depends on the relationship between Retail Marijuana business licensees.

(i) Transfers from Retail Marijuana Cultivation Facilities to Unaffiliated Retail Marijuana Stores or Unaffiliated Retail Marijuana Product Manufacturing Facilities.

(A) If the first Transfer from a Retail Marijuana Cultivation Facility is to an Unaffiliated Retail Marijuana Store or Unaffiliated Retail Marijuana Product Manufacturing Facility, the Excise Tax is calculated based on the actual contract price, as defined in paragraph (4)(b) of this regulation, of the Retail Marijuana Transferred.

(B) If no contract price is established at the time of the first Transfer referenced in paragraph (4)(a)(i)(A), the Excise Tax is calculated based on the Average Market Rate of the Retail Marijuana Transferred. Examples of such Transfers include:

(I) a temporary Transfer, which does not constitute a sale, of Retail Marijuana from a Retail Marijuana Cultivation Facility to an Unaffiliated Retail Marijuana Product Manufacturing Facility that will process or manufacture the Retail Marijuana before returning it to the Retail Marijuana Cultivation Facility or to a Retail Marijuana Store Affiliated with the Retail Marijuana Cultivation Facility; or

(II) a Transfer of Retail Marijuana from a Retail Marijuana Cultivation Facility to an Unaffiliated Retail Marijuana Store for which a price is not established at the time of Transfer, but instead depends upon the revenue generated from the subsequent sale of the Retail Marijuana to the end consumer.

(ii) Transfers between Unaffiliated Retail Marijuana Cultivation Facilities of Retail Marijuana Harvested for Sale or for Extraction.

(A) If the first Transfer of Retail Marijuana is between Unaffiliated Retail Marijuana Cultivation Facilities, the Excise Tax is calculated based on the contract price, as defined in paragraph (4)(b) of this regulation, provided the Retail Marijuana had, at the time of Transfer between Unaffiliated Retail Marijuana Cultivation Facilities, been harvested for sale at a Retail Marijuana Store or for extraction by a Retail Marijuana Product Manufacturing Facility, and underwent no further cultivation following the Transfer between Unaffiliated Retail Marijuana Cultivation Facilities.

(B) The Excise Tax calculated pursuant to paragraph (4)(a)(ii)(A) of this regulation shall be imposed on the first Transfer of the Retail Marijuana from the Retail Marijuana Cultivation Facility to a Retail Marijuana Store or Retail Marijuana Product Manufacturing Facility.

(C) If no contract price is established prior to the first Transfer between Unaffiliated Retail Marijuana Cultivation Facilities, the Excise Tax is calculated on the Average Market Rate at the time of the Transfer. An example of such a transfer includes, but is not limited to:

(I) a transfer of Retail Marijuana between Unaffiliated Retail Marijuana Cultivation Facilities for which a price is not established at the time of Transfer, but instead depends on the revenue generated from the subsequent Transfer to a Retail Marijuana Store or Retail Marijuana Product Manufacturing Facility.

(iii) Affiliated Retail Marijuana business licensees.

(A) Except as provided in paragraph (4)(a)(ii) of this regulation, if the first Transfer from a Retail Marijuana Cultivation Facility is to an Affiliated Retail Marijuana Store or an Affiliated Retail Marijuana Product Manufacturing Facility, the Excise Tax is calculated based on the Average Market Rate of the Retail Marijuana Transferred.

(b) *Contract Price.* The contract price is the invoice price charged by a Retail Marijuana Cultivation Facility to each licensed purchaser for each Transfer of Unprocessed Retail Marijuana, exclusive of any tax that is included in the written invoice price, and exclusive

of any discount or other reduction. In the case of multiple invoices reflecting multiple prices for the same transaction, the contract price used to calculate the tax is the highest such price. For the purpose of this paragraph (4)(b), the invoice price charged includes all consideration the seller receives from the buyer in whatever form and regardless of the time of receipt.

(c) *Calculation of Average Market Rate.* The Department will calculate the Average Market Rate using reported sales of each category during the Test Period. The Department will determine the best methodology to arrive at the Average Market Rate. The Department may, from time to time, change its method of calculating the Average Market Rate if, in the judgment of the Department, such change is necessary to arrive at the most accurate Average Market Rate given the market conditions.

(d) In the case of Retail Marijuana Excise Tax calculated using Average Market Rate, the Excise Tax shall be calculated based on the category of Retail Marijuana (i.e., Bud, Trim, Immature Plant, Wet Whole Plant, Seed, Bud Allocated for Extraction, or Trim Allocated for Extraction) being Transferred. The provisions of this paragraph (4)(d) apply only to Excise Tax calculated using Average Market Rate.

(i) For the categories of Bud, Trim, Bud Allocated for Extraction, and Trim Allocated for Extraction, the Excise Tax is computed on the total weight of the Retail Marijuana Transferred. If multiple categories of Retail Marijuana are included in the Transfer, the Excise Tax shall be calculated separately for each category of Retail Marijuana included in the Transfer by separately calculating the total weight of the Retail Marijuana included in each category and multiplying the weight by the Average Market Rate of each category and the applicable Excise Tax rate. Notwithstanding this rule, inconsequential amounts of Bud inadvertently included in a Transfer that is otherwise Trim shall be treated as Trim and not as Bud.

(A) Retail Marijuana categorized for the purpose of Excise Tax calculation as Bud Allocated for Extraction or Trim Allocated for Extraction may not be subsequently Transferred for direct sale to consumers unless it has first been subject to extraction as allocated.

(B) If Bud Allocated for Extraction or Trim Allocated for Extraction is subsequently Transferred for direct sale to consumers and has not been subjected to extraction, the Retail Marijuana Cultivation Facility shall amend the Retail Marijuana Excise Tax Return upon which the Excise Tax was initially paid in order to recalculate the Excise Tax, and any applicable penalty and interest, using the Average Market Rates for the category of Bud or Trim, respectively.

(C) The Retail Marijuana Product Manufacturing Facility shall notify, in writing, the Retail Marijuana Cultivation Facility of any subsequent Transfer of Bud Allocated for Extraction or Trim Allocated for Extraction that has not first been subjected to extraction within seven (7) days of the Transfer by the Retail Marijuana Product Manufacturing Facility. Any failure by a Retail Marijuana Production Manufacturing Facility to notify a Retail Marijuana Cultivation Facility in accordance with this paragraph (4)(d)(i)(C) shall not relieve the Retail Marijuana Cultivation Facility of liability for any additional tax, penalty, and interest due pursuant to paragraph (4)(d)(i)(B) of this regulation.

(ii) The Retail Marijuana Excise Tax for Immature Plants is calculated on the total number of Immature Plants being sold or Transferred.

(iii) The Retail Marijuana Excise Tax for Wet Whole Plants is calculated on the total weight of the entire Retail Marijuana Wet Whole Plant. The weight of the entire Retail Marijuana Wet Whole Plant is subject to the Excise Tax because the Average Market Rate for Wet Whole Plant already reflects an allowance for water weight and waste. The Wet Whole Plant may not undergo any further processing (i.e., drying the plant and subsequently selling separately the Bud and Trim) prior to being weighed when using the Wet Whole Plant basis. The Wet Whole Plant must be harvested and packaged in the same day.

(A) The Retail Marijuana Wet Whole Plant must be weighed within 2 hours of the plant being harvested and without any further processing, including any artificial drying such as increasing the ambient temperature of the room or any other form of drying, curing, or trimming. The Retail Marijuana Excise Tax must be calculated and paid on the total Wet Whole Plant weight. If the Wet Whole Plant is not weighed within 2 hours of being harvested or is subjected to further processing before being weighed, the Excise Tax on such plant cannot be calculated and paid on the Wet Whole Plant basis and must instead be calculated and paid at the Bud and Trim rates.

(B) A Retail Marijuana Cultivation Facility that calculates and pays the Excise Tax using the Wet Whole Plant rate must maintain records of the time each Wet Whole Plant (identified by its RFID tag) was harvested and weighed and the weight of each Wet Whole Plant. The records must be in writing and created contemporaneously with the harvesting and weighing.

(iv) The Retail Marijuana Excise Tax for seeds is calculated on the total number of seeds being Transferred.

(v) The Retail Marijuana Excise Tax for Retail Marijuana Concentrate produced by a Retail Marijuana Cultivation Facility shall be calculated either pursuant to paragraph (4)(d)(i) of this regulation based on the weight of Bud Allocated for Extraction and/or Trim Allocated for Extraction used in the extraction or pursuant to paragraph (4)(d)(iii) of this regulation based on the weight of Wet Whole Plant(s) used in the extraction.

(5) **Evidence of Payment of Tax.**

(a) Both the Retail Marijuana Cultivation Facility and the first purchaser or transferee shall maintain documentation sufficient to determine the Excise Tax due for the Transfer. Such documentation must include:

(i) the name and license number of the Retail Marijuana Cultivation Facility,

(ii) the name and license number of first purchaser or transferee,

(iii) the category of Retail Marijuana Transferred,

(iv) the date of Transfer,

(v) the weight or quantity, as applicable, of the Retail Marijuana Transferred, and

(vi) the contract price for the Transfer, if applicable.

Cross References

1. See §§ 29-2-114 and 32-1-1004, C.R.S. and the applicable local ordinance or resolution for information about the application of any local excise taxes to Retail Marijuana Transfers.

PHILIP J. WEISER
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Office of the Attorney General

Tracking number: 2018-00720

Opinion of the Attorney General rendered in connection with the rules adopted by the

Taxpayer Service Division - Tax Group

on 02/22/2019

1 CCR 201-18

RETAIL MARIJUANA TAX

The above-referenced rules were submitted to this office on 02/22/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:46:41

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Division of Motor Vehicles

CCR number

1 CCR 204-30

Rule title

1 CCR 204-30 DRIVER'S LICENSE-DRIVER CONTROL 1 - eff 04/14/2019

Effective date

04/14/2019

RULE 6 RULES FOR THE APPLICATION FOR A DRIVER'S LICENSE OR IDENTIFICATION CARD FOR U.S. CITIZENS AND INDIVIDUALS WHO CAN DEMONSTRATE PERMANENT LAWFUL PRESENCE AND COLORADO RESIDENCY

Purpose

The purpose of this rule is to set forth regulations for the types of documents the Department will accept as proof of the applicant's identity, date of birth, social security number, residency, and U.S. citizenship or permanent lawful presence when applying for a driver's license or identification card. Additionally, this rule describes the process the applicant will be required to follow for completing the application and what will occur if an application is incomplete or denied, including the process the applicant may use to request a hearing if their application is denied.

Statutory Authority

The statutory bases for this regulation are sections 24-4-103, 24-72.1-102(5), 24-72.1-103, 42-1-204, 42-2-107, 42-2-108, and 42-2-302, C.R.S.

Incorporation By Reference Of Federal Law

The Department adopts, as part of Rule 6 of the Department of Revenue Regulations, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, section 384, 110 Stat. 3009 (Sept. 30, 1996), referred to in this Rule 6. Such Act is published by the Department of Homeland Security in full in the United States Statutes at Large, Volume 110, page 3009. Rule 6 does not include any later amendments or editions of such Act.

A copy of such Act is available for a reasonable charge from the Colorado Department of Revenue, 1881 Pierce Street, Suite 136, Lakewood, Colorado 80214. A copy of such Act is maintained by the Colorado Department of Revenue and may be inspected by contacting the Records Custodian at the Colorado Department of Revenue, 1881 Pierce Street, Suite 136, Lakewood, Colorado 80214 during normal business hours. The incorporated material may also be examined at any state publications depository library. A copy, including a certified copy, of such Act is also available from the United States Citizenship and Immigration Services ("USCIS") Historical Reference Library at 111 Massachusetts Avenue NW, First Floor (MS2180), Washington, DC 20529-2180.

1.0 Definitions

1.1 Applicant–Any natural person applying to the Department for a Colorado driver's license or identification card who is a U.S. citizen or who can demonstrate permanent lawful presence in the U.S. and residency in Colorado.

1.2 Department–The Colorado Department of Revenue.

1.3 Document–An original document certified by the issuing agency, an amended original document certified by the issuing agency, or a true copy certified by the issuing agency, excluding miniature, wallet sized, or photocopies of documents.

1.4 Driver's License–A driver's license, minor driver's license, or instruction permit.

1.5 Exceptions Processing–The procedure the Department has established for persons who are unable, for reasons beyond their control, to present all necessary documents and must rely on alternative documents to establish identity, date of birth, SSN, or U.S. citizenship.

1.6 Full Legal Name –The applicant's first name, middle name(s), and last name or surname, without use of initials or nicknames.

1.7 Hearing–Hearing before a Department Administrative Hearing Officer.

1.8 Identification Card– A document issued by A Department of Motor Vehicles or its equivalent that contains the applicant's full legal name, full facial digital photograph, date of birth, and sex, but does not confer upon the bearer the right to operate a motor vehicle.

1.9 Identity–The verifiable characteristics that when taken together make a person unique and identifiable. Evidence of identity includes proof of name, date of birth, and physical characteristics and must include a verifiable photograph unless approved through Exceptions Processing.

1.10 Incomplete Application–An application for a Colorado driver's license or identification card that does not satisfy federal and state requirements for the issuance of a Colorado driver's license or identification card.

1.11 Lawful Presence– The status of a person who demonstrates U.S. citizenship or permanent lawful presence.

1.12 SAVE– The Department of Homeland Security Systematic Alien Verification for Entitlements system, managed by the U.S. Citizenship and Immigration Services of the Department of Homeland Security.

1.13 SSA – The U.S. Social Security Administration.

1.14 SSN – The Social Security Number issued by SSA.

1.15 SSOLV–The Social Security Online Verification system managed by SSA.

1.16 USCIS – United States Citizenship and Immigration Services

2.0 Proof of Identity, Date of Birth, and Lawful Presence

2.1 Every application for a Colorado driver's license or identification card shall include the applicant's full legal name, date of birth, sex, SSN, and address of principal residence.

2.2 An applicant must provide source documents that are secure and verifiable as defined in section 24-72.1-102(5), C.R.S.

2.3 The following documents or combination of documents are acceptable to establish identity, date of birth, and lawful presence:

2.3.1 A valid, unexpired Colorado driver's license or identification card except that a Colorado driver's license or identification card issued under the Colorado Road and Community Safety Act, section 42-2-501 et seq., C.R.S. is not acceptable.

2.3.2 A valid, unexpired U.S. passport verified using U.S. Passport Verification Services.

2.3.3 A certified copy of a birth certificate filed with a State Office of Vital Statistics or equivalent agency in the applicant's state of birth.

2.3.4 A Consular Report of Birth Abroad (CRBA) issued by the U.S. Department of State (Form FS-240, DS-1350, or FS-545).

2.3.5 A valid, unexpired Permanent Resident Card (Form I-551) issued by the Department of Homeland Security (DHS) or USCIS.

2.3.6 A Certificate of Naturalization issued by DHS or USCIS (Form N-550 or N-570).

2.3.7 A Certificate of Citizenship issued by DHS or USCIS (Form N-560 or N-561).

2.3.8 A valid unexpired driver's license or identification card verified with the state of issuance.

2.3.9 Such other documents as determined by the Department consistent with the REAL ID Act.

2.4 To establish a name other than the name that appears on a source document (for example through marriage, adoption, court order or other mechanism permitted by state law or regulation), the Department shall require evidence of the name change through the presentation of documents issued by a court, governmental body, or other entity as determined by the Department.

3.0 Social Security Requirements

3.1 An applicant must provide evidence of his or her SSN by presenting one of the following documents bearing the applicant's full SSN:

3.1.1 An SSA account number card,

3.1.2 A W–2 form,

3.1.3 An SSA–1099 form,

3.1.4 A non-SSA–1099 form, or

3.1.5 A pay stub with the applicant's name and SSN on it.

3.2 An applicant's SSN shall be verified using SSOLV.

4.0 Address of Principal Residence in Colorado

4.1 To document the address of principal residence in Colorado, an applicant must present at least two documents that include the applicant's name and address of principal residence. Examples include, but are not limited to: utility bill, credit card statements, pay stub or earnings statement, rent receipt, telephone bill, or bank statement.

4.2 A Colorado street address must be displayed except as provided below:

4.2.1 An alternative address may be displayed for individuals for whom a State law, regulation, or the procedures of the Department permit display of an alternative address.

4.2.2 An alternative address may be displayed for individuals who satisfy any of the following:

4.2.2.1 If the individual is enrolled in a State address confidentiality program, which allows victims of domestic violence, dating violence, sexual assault, stalking, or a severe form of trafficking, to keep, obtain and use alternative addresses; and provides that the address of such person must be kept confidential, or other similar program; or

4.2.2.2 If the individual is entitled to have their address suppressed under state or federal law or suppressed by a court order including an administrative order issued by a State or Federal court; or

4.2.2.3 If the individual is protected from disclosure of information pursuant to section 384 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

4.2.3 In areas where a number and street name has not been assigned for U.S. mail delivery, an address convention used by the U.S. Postal Service is acceptable.

5.0 Qualifications for Issuance of a Duplicate Driver's License

5.1 Applicants may apply for a duplicate of an existing driver's license as provided below:

5.1.1 Applicants for a duplicate credential who are within Colorado must appear in person and certify, under penalty of perjury, that the previous credential was lost, stolen, or destroyed by completing the “Request for Duplicate Instruction Permit/Driver’s License” (DR2989) form provided by the Department.

5.1.2 Applicants for a duplicate credential who are out of state must submit, by mail, the “Request for Duplicate Instruction Permit/Driver’s License” (DR2989) form provided by the Department on which the applicant must certify, under penalty of perjury, that the previous credential was lost, stolen, or destroyed.

5.1.2.1 Duplicates by mail will be processed only for applicants who are out of state and provide an out of state mailing address.

5.1.3 Only two duplicate credentials may be issued per renewal period unless additional duplicates are approved by the Department.

6.0 Process for Complete Application

6.1 When an applicant has completed the required application and met the standards established in this rule, the applicant will be required to review and verify the information on the application by signing a “signature capture device”; a fingerprint will be captured; and a photograph of the applicant will be taken. A temporary Colorado driver’s license or identification card will be issued. The permanent Colorado driver’s license or identification card will be mailed to the applicant at the address provided on the applicant’s application.

7.0 Process for Incomplete Application

7.1 If an application is incomplete or the applicant has failed to provide documents verifiable by the Department for identity, date of birth, lawful presence, SSN, or residency in Colorado the Department shall provide a Notice of Incomplete Application unless the Department provides a Notice of Denial per Section 8.0 below.

7.2 The Notice of Incomplete Application shall include a notation of the information that is incomplete or of the documentation that is unverifiable. If the authenticity of a document cannot be verified, then an application may be considered incomplete and additional documentation may be required, or the applicant may be referred to Exceptions Processing. An applicant may return to the Department with additional documentation prior to being denied a Colorado driver’s license or identification card.

7.3 Any applicant who has received a Notice of Incomplete Application and believes he or she has provided sufficient documentation to establish identity, date of birth, lawful presence, or SSN may proceed with Exceptions Processing.

7.4 Any applicant who has received a Notice of Incomplete Application and believes he or she has provided sufficient documentation to establish identity, date of birth, lawful presence, SSN, or residency may request a Notice of Denial and contest the decision through the process described in section 9.0 below.

8.0 Denial of Applications

8.1 If an application is incomplete or the applicant has failed to provide documents verifiable by the Department for identity, date of birth, lawful presence, SSN, or residency, the Department may provide a Notice of Denial.

8.2 Nothing in this regulation shall be construed to prevent the Department from denying an application on the basis that an applicant has presented documents that are fraudulent or that are not secure and verifiable pursuant to section 24-72.1-102(5), C.R.S.

8.3 Nothing in this regulation restricts or prohibits the Department from verifying any document

presented by an applicant.

8.4 An application shall be denied if the applicant presents fraudulent or altered documents or commits any other fraud in the application process.

9.0 Hearing and Final Agency Action

9.1 An Applicant who has received a Notice of Denial may, within 60 days of the date of the Notice of Denial, request a hearing on the denial by filing a written request for hearing with the Hearings Section of the Department at the address specified on the Notice of Denial..

9.2 Hearings shall be held in accordance with the provisions of the State Administrative Procedure Act and the provisions of Title 42 of the Colorado Revised Statutes.

9.3 The only issue at the hearing shall be whether the applicant has satisfied federal and state requirements for the issuance of a Colorado driver's license or identification card.

9.4 The hearing officer shall issue a written decision. If the hearing officer finds that the applicant has not satisfied federal and state requirements for the issuance of a Colorado driver's license or identification card, then the denial shall be sustained. If the hearing officer finds that the applicant has satisfied federal and state requirements for the issuance of a Colorado driver's license or identification card, then the denial shall be rescinded and the Department shall issue the Colorado driver's license or identification card.

9.5 The decision by the hearing officer shall constitute final agency action, and is subject to judicial review as provided by section 24-4-106, C.R.S.

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Office of the Attorney General

Tracking number: 2018-00695

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Motor Vehicles

on 03/07/2019

1 CCR 204-30

DRIVER'S LICENSE-DRIVER CONTROL

The above-referenced rules were submitted to this office on 03/11/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:53:59

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Division of Motor Vehicles

CCR number

1 CCR 204-32

Rule title

1 CCR 204-32 SEX DESIGNATION 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF REVENUE

Division of Motor Vehicles

DRIVER'S LICENSE – DRIVER CONTROL

1 CCR 204-32

RULE 1 SEX DESIGNATION FOR DRIVER LICENSES, IDENTIFICATION CARDS, AND IDENTIFICATION DOCUMENTS

BASIS, PURPOSE, and STATUTORY AUTHORITY

The purpose of the rule is to ensure the accuracy of the sex designation on driver licenses, identification cards, and identification documents issued by the Division of Motor Vehicles. The rule authorizes individuals to obtain a correct sex designation on their license, identification card, or identification document. The rule also ensures that the Division of Motor Vehicles collects and maintains accurate sex designation data.

Pursuant to the rule, an applicant may choose from one of three sex designations, including female, male, and intersex. Under the rule, the holder of an existing license, identification card, or identification document may amend their sex designation using a form created by the Department, which form requires confirmation from a licensed treating medical or behavioral healthcare provider that the individual has received appropriate clinical treatment for their correct sex. The rule does not require that an individual undergo any specific surgery, treatment, clinical care, or behavioral healthcare. The rule also does not require that the treating medical or behavioral healthcare provider be licensed by the State of Colorado, and may instead be licensed in another jurisdiction.

The rule is consistent with a recent Colorado federal district court decision ordering the U.S. Department of State to issue a passport with an intersex sex designation to a Colorado citizen. *See Zzyym v. Pompeo*, Case No. 15-CV-2362-RBJ, 2018 WL 4491434 (D. Colo. Sept. 19, 2018). Adopting the rule allowing the designation will also make the Division of Motor Vehicle's practices consistent with American Association of Motor Vehicle Administrators (AAMVA) Card Design Standards as well as the practices of four other states and the District of Columbia.

The statutory authorities for the rule are sections 24-4-103, 24-4-104, 42-1-201, 42-1-204, 42-2-107, 42-2-108, 42-2-302, 42-2-303, 42-2-403, 42-2-505, C.R.S.

1.0 **Definitions**

1.1 Department – The Colorado Department of Revenue

1.2 Sex or Gender – For purposes of Article 2 of Title 42, and all rules, regulations, and forms related to Article 2 of Title 42, "sex" or "gender" means female, male, or intersex.

2.0 Changing a Sex Designation

2.1 Before changing the sex designation on a driver's license, identification card, or identification document issued by the Division of Motor Vehicles, the Department must:

2.1.1 Confirm that the name on the driver's license, identification card, or identification document and the name of the individual for whom the change is requested, match or can be linked through submitted documentation.

2.1.2 Receive a “Change of Sex Designation” (DR2083) form completed by a licensed treating medical or behavioral healthcare provider confirming the individual has received appropriate clinical treatment for their correct sex. The form must be signed and include the provider's license or certificate number and the issuing U.S. State/Foreign Country.

3.0 Sex Designation Changes Must Be Processed in Person

3.1 Requests for a change of sex designation must be processed in person, at a Driver’s License Office. Online renewal and renewal by mail cannot be used to change the sex designation on a Colorado driver license, identification card, or identification document.

4.0 No Surgery, Treatment, Clinical Care, or Behavioral Healthcare Requirements

4.1 Nothing in this rule should be read to require an individual to undergo any specific surgery, treatment, clinical care, or behavioral healthcare to change the sex designation on a Colorado driver license, identification card, or identification document.

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NATALIE HANLON LEH
Chief Deputy Attorney General

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Office of the Attorney General

Tracking number: 2018-00664

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Motor Vehicles

on 02/27/2019

1 CCR 204-32

SEX DESIGNATION

The above-referenced rules were submitted to this office on 02/28/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 12, 2019 16:55:26

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Revenue

Agency

Colorado Racing Commission

CCR number

1 CCR 208-1

Rule title

1 CCR 208-1 RACING 1 - eff 05/15/2019

Effective date

05/15/2019

3.601 – All jockeys who intend to ride at a recognized race meet shall be required to show written documentation of a complete physical examination by a licensed physician affirming fitness to participate as a jockey and must include a baseline concussion test. This examination must have taken place within a thirty (30) day period prior to the start of the meet at which the rider intends to participate. The board may waive the thirty (30) day requirement for riders that can provide written proof of a physical and baseline concussion test within one year that meets the requirements of this rule.

4.713 – Effective January 1, 2020, the Racing Secretary shall ensure that the foal certificates for all Thoroughbred horses entered to race that were foaled in 2018, or thereafter, have a "Digital Tattoo." This Digital Tattoo shall indicate that the Thoroughbred Racing Protective Bureau has confirmed the identity of the horse and uploaded updated digital photographs to the breed registry database.

5.314 – Medication Stacking and Combined Use

(a) The concurrent use, or stacking, of medications or unauthorized substances bearing similar pharmacological properties and/or effects shall not be permitted. No blood or urine sample shall have two or more substances bearing similar pharmacological properties and/or effects present at any time, without regard to whether any detected substances are found by the primary testing laboratory at or below any established regulatory threshold. Medications and unauthorized substances shall be deemed to have similar properties or effects if they would be classified under the same subsection of Rule 5.300.

(b) The combined use of medications or unauthorized substances shall not be permitted. No blood or urine sample shall have any combination of substances known to have any adverse or performance enhancing effect at any time, regardless of whether any detected substances are found by the primary testing laboratory at or below any established regulatory threshold.

(c) This Rule 5.314 shall not apply when:

    a. The substances detected are NSAIDS and would be addressed by NSAID stacking as detailed by Rule 5.312;

    b. Any concurrent use of medications bearing similar pharmacological properties and/or effects or combined used of medication known to have any adverse or performance enhancing effect has been approved in advance by the Division veterinarian.

(d) Violations of this Rule 5.314 shall be penalized as a Class A medication violation as prescribed by Rule 5.441.

6.114 – The Director may, upon written request from a racing association, order the release of funds credited to the horse purse trust account from the source market fee to the requesting association for the limited purposes of ensuring the continuity of racing operations or Capital Improvements to the licensed racing facility. All requests shall contain a statement that the horsemen's association has been consulted and has approved the release of funds to the racing association, a brief statement of the issue for which the funds are requested and shall be accompanied by documentation evidencing the cost incurred for resolving the issue or proposed cost of the improvement. The Director may approve, in any fraction or in full, or deny the request and may include any oversight provisions or conditions the Director sees fit to include in granting the request. Any order approving the release of funds must be accepted by the requesting association prior to the funds being released.

11.110 – An association shall adopt, have posted, and implement a protocol for education, evaluation, diagnosis, and management of concussion of all participants exposed to potential or actual head trauma which shall be approved by the Commission. At a minimum, the protocol shall include:

(a) Each jockey shall acknowledge in writing that they have been made aware of the concussion protocols in place for the facility at which they are riding;
(b) A minimum assessment shall include the most current Sport Concussion Assessment Tool examination, when necessary, and be performed by a medical professional authorized in that jurisdiction to perform such evaluation;
(c) Each jockey shall obtain a baseline concussion test to be submitted with the physical fitness forms.
(d) A *return-to-ride* and *return-to-work* guideline shall be established in order to clear a participant who has been concussed, or is believed to have been concussed, once the participant is declared fit-to-ride or fit-to-work by a medical professional authorized to do so; and,
(e) The Stewards shall be notified when a jockey is not permitted to ride and when the jockey has been authorized to return to riding.

11.404 – Transmitting any race information through the use of a telephone or other device at the racetrack or simulcast facility is prohibited, unless express authorization is granted by the Commission or Director.

11.465 – The association shall develop a hazardous weather and lightning protocol to be approved by the Commission which shall include the use of an early warning detection system. The association shall designate a person responsible for monitoring the system who shall notify the Stewards if conditions exist that warrant delay and/or cancellation of a performance and/or the notification to the public of such threatening weather conditions. The Stewards shall commence a race delay and/or cancellation when lightning is detected within an 8 mile radius of the racetrack which shall remain in effect until a minimum of 30 minutes has passed since the last strike is observed within an 8 mile radius.

12.127 – At the start of the business day, an additional simulcast facility shall have adequate resources on premises to cash winning pari-mutuel tickets or vouchers issued by the facility. Upon tender of a winning pari-mutuel ticket or voucher issued by the facility for payment, an additional simulcast facility is required to pay out, in cash, the winning pari-mutuel ticket or voucher issued by the facility up to $5,000, unless the facility has depleted its adequate resources. Any remaining amount or ticket or voucher over $5,000 may be paid by check within seven days of tender for payment. “Adequate resources” are defined as: 50% of daily average wagering handle or $5,000, whichever is greater.

12.178 – Vouchers not cashed by the end of the race meet shall be valid for a minimum of one year from the date issued. At that time, the value of any uncashed vouchers shall revert to the association that issued them. The expiration policy for all vouchers shall be published daily in the racing program and posted at the racing facility.

12.400 – All contracts governing participation in interstate common pools, along with the host state’s commission approval, shall be approved by the Commission. Request shall be submitted to the Division at least two business days prior to the effective date of such contract and/or agreement. The request shall include the following minimum information: name of the host track, date contract was executed, type of contract, start date, end date, days taken, signal fees, takeout, tote company, and date submitted. At any time, the Commission or the Division may request additional information or that any or all agreements or contracts be provided. These contracts shall include but are not limited to horsemen’s agreements and simulcast contracts.

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Tracking number: 2018-00703

Opinion of the Attorney General rendered in connection with the rules adopted by the

Colorado Racing Commission

on 02/12/2019

1 CCR 208-1

RACING

The above-referenced rules were submitted to this office on 02/19/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 01, 2019 11:17:01

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Natural Resources

Agency

Ground Water Commission

CCR number

2 CCR 410-1

Rule title

2 CCR 410-1 RULES AND REGULATIONS FOR THE MANAGEMENT AND CONTROL OF DESIGNATED GROUND WATER 1 - eff 04/14/2019

Effective date

04/14/2019

5.6 Replacement Plans – New appropriations of designated ground water from aquifers which are otherwise overappropriated or where such appropriations may result in an unreasonable impairment to existing water rights may be allowed pursuant to a detailed Replacement Plan. The source of water proposed to be delivered as replacement supply is referred to in this Rule as Replacement Source Water.

5.6.1 Requirements for approval of all Replacement Plans. The Applicant shall have the burden of proving the adequacy of the plan in all respects. If the Applicant meets its burden of proof, the Commission shall grant approval of a Replacement Plan to the Applicant which shall include any terms and conditions established by the Commission.

A. The plan must not cause any material injury to water rights of other appropriators.

B. The plan must not cause unreasonable impairment of water quality.

1. In making this determination, there shall be a rebuttable presumption of no unreasonable impairment of water quality if the Replacement Source Water complies with one of the criteria listed below.

   a. If the Replacement Source Water is subject to a Colorado Department of Public Health, Water Quality Control Division permit authorizing discharges into the aquifer that is not subject to a compliance order or enforcement actions, and the Applicant demonstrates compliance with the Water Quality Control Division groundwater discharge permit, using the relevant points of compliance established in the permit; or

   b. If the Replacement Source Water is from an onsite wastewater treatment system permitted by a local health agency, and the applicant demonstrates the source is in compliance with that permit; or

   c. If the Replacement Source Water meets site specific standards contained in the Department of Public Health and Environment, Water Quality Control Commission's Regulation No. 42 (5 CCR 1002-42, effective June 30, 2018), or if there are not site specific standards, meets standards set forth in the Department of Public Health and Environment, Water Quality Control Commission's Regulation No. 41 (5 CCR 1002-41, effective December 30, 2018), including all of the standards in Tables 1-4, and, in both instances, the point of compliance is the point at which the water is recharged into the aquifer. The Commission may consult with the Department of Public Health and Environment Water Quality Control Division in determining whether the source meets the standards of the relevant regulation.

2. Other methods of proving Replacement Source Water will not cause unreasonable impairment of water quality may be proposed. The Commission may consult with the Department of Public Health and Environment Water Quality Control Division in determining whether the source will or will not

cause unreasonable impairment of water quality.

3. During any hearing, once the Applicant presents evidence sufficient to make a *prima facie* showing of no unreasonable impairment of water quality, any party opposing the Replacement Plan bears the burden of providing evidence of unreasonable impairment to water quality. If Commission Staff or a party opposing the replacement plan provides contrary evidence of impairment, the burden shifts back to the Applicant to rebut that evidence and show an absence of unreasonable impairment of water quality by a preponderance of the evidence.

C. The proposed Replacement Plan, including the uses of the new withdrawals of designated ground water, must not be speculative under Colorado law. The Applicant must demonstrate the plan's technical and financial feasibility and the Applicant's ability to complete the project.

D. The Replacement Plan must be able to be operated and administered on an ongoing and reliable basis.

1. Replacement Source Water consisting of designated ground water must be diverted from its source and delivered into the aquifer for which the replacement water must be provided using a structure or method acceptable to the Commission. Delivery of the Replacement Source Water to an aquifer by way of claiming credit for not diverting a proposed source of water out of an aquifer is not allowed.

2. Pursuant to C.R.S. 37-90-107.5, a Replacement Plan shall not be used as a vehicle for avoiding limitations on existing wells, including but not limited to restrictions on change of well locations. Therefore, before approving any Replacement Plan that includes existing wells, the Commission shall require independent compliance with all rules governing those existing wells in addition to compliance with any guidelines or rules governing replacement plans.

3. Flow or other measurement devices must be installed, operated, and maintained on all wells, replacement water delivery structures, and any other structure involved in the plan unless the Commission finds that such devices would be unnecessary or impractical.

4. Water quality sampling and monitoring shall be done of the Replacement Source Water at the point the Replacement Source Water is introduced into the aquifer, at any other point of compliance and at monitoring well(s) in the aquifer, as required by the Replacement Plan. The Commission may require a different location and frequency of water quality monitoring if the evidence indicates that a different location or frequency is more appropriate or feasible for the aquifer.

5. The Applicant must record, maintain and submit records of Replacement Plan operations on forms acceptable to the Commission on a schedule determined by

the Commission but no less than on an annual basis, which shall also be made available to the ground water management district and parties to the original Replacement Plan proceedings on request without charge.

6. Replacement Plan approvals shall include appropriate terms and conditions for updating and/or recalibration of groundwater model(s) and a schedule for specified adjustments to the plan in accordance with the potential results of any such updated/recalibrated modeling. Plan approvals shall also include appropriate terms and conditions for ongoing water quality sampling and monitoring and monitoring of groundwater levels and a schedule for specified adjustments to the plan in accordance with the potential results of any ongoing sampling and monitoring.

E. A copy of the approved Replacement Plan must be recorded by the Applicant in the clerk and recorder's records of the county in which structures that recharge and withdraw water involved in the plan are located so that a title examination of the land on which such structures are located reveals the existence of the plan.

F. Diversions must be limited to the extent necessary to ensure that the potential for material injury caused by the diversions will be prevented by Replacement Source Water physically and legally available for delivery to the aquifer in time, place and amount sufficient to prevent material injury to potentially affected water rights holders. Plan approvals may include terms and conditions to account for recharged water that is lost to vegetative consumption or evaporation.

G. Applicant must demonstrate that any Replacement Source Water identified for use in the Replacement Plan is legally available for use pursuant to the plan prior to actually being used as Replacement Source Water pursuant to the Replacement Plan.

1. For any Replacement Source Water decreed by a water court in a tributary system, the legality of the use of the water shall be determined by consideration of the water court decree consistent with the provisions of the Water Rights Determination and Administration Act of 1969 ("1969 Act") and Colorado case law regarding decree interpretation.

2. Any determination concerning a 1969 Act source of water shall pertain only to the use of such right in the Replacement Plan.

3. The Commission may approve a Replacement Plan including proposed Replacement Source Water that is not legally available for use pursuant to the plan at the time the Replacement Plan is approved, if the Applicant: (1) has demonstrated it has a legal right to use the Replacement Source Water, as demonstrated by ownership or contract and that the replacement water will not be used by any other person; and (2) has demonstrated a reasonable probability of obtaining such approvals as are necessary to make the Replacement Source Water legally available for use in the Replacement Plan. An Applicant seeking approval

of proposed Replacement Source Water shall have the burden of proving the time, place, amount and quality of the supplies anticipated in a manner sufficiently detailed to permit the Commission, the ground water management district, and other parties the ability to assess the actual use of the Replacement Source Water in the plan.

4. A Replacement Plan approving the future use of proposed Replacement Source Water not legally available at the time of the application shall include the following procedures requiring the Applicant to provide written notice to the Commission, the ground water management district, and all parties in the Replacement Plan proceedings when that Replacement Source Water has become legally available:

    a. Applicant shall give at least sixty-three (63) days advance written Notice of Legal Availability of Replacement Source ("Notice") to the Commission, the ground water management district, and the parties in the original Replacement Plan proceedings, prior to using such Replacement Source Water in the Replacement Plan, which shall identify: (1) the amount available for use pursuant to the Replacement Plan; (2) documentation as to how the Replacement Source Water became legally available, including copies of all decrees, permits, findings and orders and determinations issued by the Commission and Courts.

    b. Any person may provide written comments on the Notice, which shall be submitted to the Commission and provided to the ground water management district and all parties to the original Replacement Plan proceedings within sixty-three (63) days after the date the Notice was submitted. Commission Staff shall consider any comments in determining: (1) whether the requirements of 5.6.1.G.4.a are met; and (2) any plan adjustments under the terms and conditions of 5.6.1.D.6 that are to be implemented for use of the Replacement Source Water in the Replacement Plan. Applicant may not use the Replacement Source Water until Commission Staff provides written confirmation the requirements of 5.6.1.G.4.a are met and setting forth any plan adjustments under 5.6.1.D.6 that are necessary for use of the Replacement Source Water in the Replacement Plan.

    c. The Replacement Plan shall state that any Notice must be served no later than six (6) years after the date of approval of the Replacement Plan by the Commission or the Applicant's right to use the source water shall expire. After the expiration, Applicant may only add the Replacement Source Water to the Replacement Plan by a new application to the Commission.

H. Once a Replacement Plan has been approved, any proposed Replacement Source Water not included in the Replacement Plan approval shall only be added to the Replacement Plan by a new application to the Commission. The Commission shall determine the terms and conditions under which the proposed Replacement Source Water shall be added to the Replacement Plan.

I. Replacement Source Water introduced into a designated aquifer is designated groundwater available to other appropriators in the basin.

J. Ground water management districts may have additional rules governing the operation of Commission approved Replacement Plans and may require compliance with such rules.

5.6.2 Applications for Replacement Plans must contain the following.

A. Name, mailing address, email address and telephone number of Applicant(s).

B. Name of designated basin in which plan will be located, and management district, if any, and aquifer in which the plan will operate.

C. Information regarding other water rights diverted from the structures involved in the plan.

D. Maps (either USGS topographic base map or other base map as appropriate) showing the locations of all structures involved in the Replacement Plan, including all recharge wells, recharge ponds, and other structures involved in recharging Replacement Source Water, all structures involved in delivering the Replacement Source Water to the project location, and all structures involved in delivering the new diversions to the end use.

E. A detailed description of the plan and its operation, including the following.

1. A general description of the Replacement Plan project location.

2. The purpose of the Replacement Plan.

3. The detailed description of the physical and legal sources of all proposed Replacement Source Water. Identify the amount of water available for replacement use from each source and provide copies of all decrees, permits, findings and orders and determinations issued by the Ground Water Commission and Courts.

4. The description of how the Replacement Source Water is delivered to the Replacement Plan project for recharge.

5. The method, location, timing, and amount of Replacement Source Water being recharged into the aquifer including without limitation identification of the structures that will recharge the Replacement Source Water, such as by recharge through a well or through a pond.

6. Based on Applicant's proposed Replacement Plan operations, the maximum volume of water proposed to be introduced into the aquifer in any day, month and year, as applicable.

7. The detailed description of the method, location, timing and amount of proposed new diversions and depletions caused by the new appropriations of designated basin water, including without limitation identification of the structures that will divert, legal descriptions of their locations, and identification and copies of all decrees, permits, findings and orders and determinations issued by the Commission and Courts involving the structures.

8. The proposed use of the new diversions.

9. The proposed quantity and quality monitoring plan.

10. The approximate cost of the Replacement Plan project and the approximate date construction will begin and end.

F. Evidence that the plan will not injure other water rights.

G. Evidence that the plan does not cause unreasonable impairment of water quality. Such evidence shall include water quality for the Replacement Source Water and the water quality of the receiving aquifer unless 5.6.1.B.1.a applies.

H. Proposed terms and conditions required to prevent injury to other water rights, and prevent unreasonable impairment of water quality.

I. If required by Commission Staff, the Applicant shall submit a ground water model evidencing no material injury to vested rights or unreasonable impairment of water quality will result from operation of the plan.

J. A detailed description of the proposed use of the new appropriation of designated ground water which would result under the plan, including where the use will occur.

K. Name(s) and address(es) of owner(s) or reputed owner(s) of the land upon which structures that withdraw water and recharge replacement water involved in the plan are located. The Applicant must notify these owners that the Applicant is applying for this Replacement Plan, and provide proof to the Commission that the Applicant has done so, no later than 14 days after filing the application. Applicant may rely on the records maintained by the applicable County, including records available online, to determine the owner(s) or reputed owner(s), unless Applicant has actual knowledge or information of others not identified in said records.

L. If proposed Replacement Source Water is not legally available for use in the Replacement Plan at the time the application is submitted, the Applicant must identify any applications it has or is submitting or actions it has or is taking to make the

source legally available.

M. Applicant must provide information demonstrating the Applicant's right to use all proposed Replacement Source Water and that the Replacement Source Water will not be used by any other person.

N. A summary of the application for publication. If required by the Commission, the summary must be submitted in an electronic form that can be provided to the newspaper in which publication occurs.

5.6.3 Other than approval of a Replacement Plan the Commission does not permit or license the physical act of Artificial Recharge, and the Applicant is responsible for obtaining any and all necessary approvals for Artificial Recharge as may be required by federal, state, and local agencies. A well permit from the State Engineer is required for the construction of a well to be used solely for the purpose of Artificial Recharge.

5.6.4 Upon receipt of an application for a replacement plan, the staff shall review it to determine whether the application is complete under these rules, in order for the application to be published. If the plan is located within a ground water management district, a copy of the application shall be sent by the staff to the management district and the staff shall consider any comments or recommendations from the management district. If requested by the Applicant or any other party after publication of the application, Commission staff shall host a meeting including all interested parties to discuss the nature and scope of submitted and/or required modeling and to provide the Applicant feedback on its proposed modeling approach. If agreed to by all parties in the meeting, in order to encourage open discussion, communications in and related to the meeting shall be considered conduct or statements made in compromise negotiations within the ambit of C.R.E. 408, not discoverable, and not to be offered as evidence by any party in the course of the litigation. Staff may propose any additional terms and conditions or limitations which are necessary to prevent material injury and meet the requirements of these rules.

5.6.5 All rules and regulations referenced in this Rule 5.6 are available from the office of the Division of Water Resources, 1313 Sherman St., Room 821, Denver, CO 80203 and are available for public inspection during regular business hours. Certified copies of these materials shall be provided at cost upon request. This Rule does not contain any later amendments or editions of the materials.

5.8 Aquifer storage and recovery plans (ASR Plan). An ASR Plan is a plan to artificially recharge water into, store water in, and recover water from a designated aquifer. The source of water that is so recharged, stored, and recovered is referred to in this Rule as ASR Source Water.

5.8.1 Requirements for Approval. The Applicant has the burden of proving the adequacy of the plan in all respects. If the Applicant meets its burden of proof, the Commission shall grant approval of an ASR Plan to the Applicant which shall include any terms and conditions established by the Commission.

A. The ASR Plan must not cause any material injury to water rights.

B. The ASR Plan must not cause unreasonable impairment of groundwater quality

1. In making this determination, there shall be a rebuttable presumption of no unreasonable impairment of water quality if the ASR Source Water is from a source described in 5.8.1.B.1.a and b below.

   a. If the ASR Source Water is subject to a Colorado Department of Public Health, Water Quality Control Division permit authorizing discharges into the aquifer that is not subject to a compliance order or enforcement actions, and the Applicant demonstrates compliance with the Water Quality Control Division groundwater discharge permit, using the relevant points of compliance established in the permit; or

   b. If the ASR Source Water meets site specific standards contained in the Department of Public Health and Environment, Water Quality Control Commission's Regulation No. 42 (5 CCR 1002-42, effective June 30, 2018), or if there are not site specific standards, meets the standards set forth in the Department of Public Health and Environment, Water Quality Control Commission's Regulation No. 41 (5 CCR 1002-41, effective December 30, 2018), including all of the standards in Tables 1-4, and, in both instances, the point of compliance is the point at which the water is recharged into the aquifer. The Commission may consult with the Department of Public Health and Environment Water Quality Control Division in determining whether the source meets the standards of the relevant regulation.

2. Other methods of proving ASR Source Water will not cause unreasonable impairment of water quality may be proposed. The Commission may consult with the Department of Public Health and Environment Water Quality Control Division in determining whether the source will or will not cause unreasonable impairment of water quality

3. During any hearing, once the Applicant present evidence sufficient to make a *prima facie* showing of no unreasonable impairment of water quality, any party opposing the ASR Plan bears the burden of providing evidence of unreasonable impairment to water quality. If Commission Staff or a party opposing the ASR

Plan provides contrary evidence of impairment, the Applicant has the ultimate burden of showing an absence of unreasonable impairment of water quality by a preponderance of the evidence.

C. The proposed ASR Plan, including uses of the recovered ASR Source Water, must not be speculative under Colorado law. The Applicant must demonstrate the plan's technical and financial feasibility and the Applicant's ability to complete the project.

D. The ASR Plan must be able to be operated and administered on an ongoing and reliable basis.

1. The ASR Source Water must be diverted from its source and delivered into the aquifer using a structure or method acceptable to the Commission. Delivery of the ASR Source Water to an aquifer by way of claiming credit for not diverting a proposed source of water out of an aquifer is not allowed.

2. Flow or other measurement devices must be installed, operated, and maintained on all wells or other structures artificially recharging water into and recovering water from the aquifer, and any other structure involved in the plan, unless the Commission finds that such devices would be unnecessary or impractical.

3. Water quality sampling and monitoring shall be done of the ASR Source Water at the point the ASR Source Water is introduced into the aquifer, at any other point of compliance, and at monitoring well(s), as required by the ASR Plan. The Commission may require a different location and frequency of water quality monitoring if the evidence indicates that a different location or frequency is more appropriate or feasible for the aquifer.

4. The Applicant must record, maintain and submit records of ASR Plan operations on forms acceptable to the Commission on a schedule determined by the Commission but no less than on an annual basis, which shall also be made available to the ground water management district and parties to the original ASR Plan proceedings on request without charge.

5. If a ground water model is submitted or required, then plan approvals shall include appropriate terms and conditions for updating and/or recalibration of any groundwater model(s) and a schedule for specified adjustments to the plan in accordance with the potential results of any such updated/recalibrated modeling. Plan approvals shall also include appropriate terms and conditions for ongoing water quality sampling and monitoring and monitoring of groundwater levels and a schedule for specified adjustments to the plan in accordance with the potential results of any ongoing sampling and monitoring.

E. A copy of the approved ASR Plan must be recorded by the Applicant in the clerk and recorder's records of the county in which any structure involved in the ASR Plan is

located so that a title examination of the land on which such structure is located reveals the existence of the plan.

F. All ASR Source Water must be artificially recharged and stored in an aquifer. The aquifer must be capable of accommodating the water being recharged and stored without the water appearing within any surface or subsurface structure other than a well, and without contributing to evaporation or consumption by plants. Storage may be limited in order to maintain a minimum depth below the ground surface to avoid losses of stored water due to vegetative consumption, evaporation, or otherwise. Plan approvals may include terms and conditions for specified adjustments to the amounts of water that may be stored and limits on a minimum depth below the ground surface.

G. Except for plans proposed pursuant to Rule 5.8.2, the Applicant must demonstrate dominion and control over the ASR Source Water by showing the change in the water table and an ability to recover stored water within the ASR Boundary as described below. An Applicant is not required to own or have a legal right to use all of the land overlying the portions of the aquifer in which water will be stored. Water over which dominion and control is not maintained becomes designated ground water available to other appropriators within the basin. The following applies when determining whether or not dominion and control has been maintained.

1. The plan may contain methods or man-made structures to confine or restrict the water artificially recharged and stored in the aquifer from moving within the aquifer and/or mingling with the water previously existing in the aquifer.

2. Applicant has lost dominion and control over recharged and stored water that is pumped by wells other than the recovery wells identified in the plan.

3. An ASR Boundary concept that defines the area where water is recharged into, stored in and recovered from the aquifer.

    a. The ASR Boundary shall be based upon the expected lateral extent of mounding resulting from proposed quantities and locations of recharge before any recovery of water.

    b. Dominion and control has been lost on any water that flows across the ASR Boundary or is otherwise not available to the recovery wells. All recovery wells must be located within the ASR Boundary.

4. Consideration must be given to aquifer characteristics that result in the inability to recover amounts of water artificially recharged and stored in the aquifer.

H. Applicant must demonstrate that any ASR Source Water identified for use in the ASR Plan is legally available for recharge, storage, recovery and use pursuant to the plan prior to actually being recharged and stored in the aquifer under the ASR Plan.

1. For any ASR Source Water decreed by a water court in a tributary system, the legality of the use of the water shall be determined by consideration of the water court decree consistent with the provisions of the Water Rights Determination and Administration Act of 1969 ("1969 Act") and Colorado case law regarding decree interpretation.

2. Any determination concerning a 1969 Act source of water shall pertain only to the use of such right in the ASR Plan.

3. The Commission may approve an ASR Plan including a potential source of ASR Source Water that is not legally available for recharge, storage, recovery and use pursuant to the plan if, at the time the ASR Plan is approved, the Applicant: (1) has demonstrated it has a legal right to use the ASR Source Water, as demonstrated by ownership or contract and that the ASR Source Water will not be used by any other person; (2) has demonstrated a reasonable probability of obtaining such approvals as are necessary to make the ASR Source Water legally available for use in the ASR Plan. An Applicant seeking approval of such a potential source of ASR Source Water shall have the burden of proving the time, place, amount and quality of the supplies anticipated in a manner sufficiently detailed to permit the Commission, the ground water management district, and other parties the ability to assess the actual use of the ASR Source Water in the plan.

4. An ASR Plan approving the future use of a potential source of ASR Source Water not legally available at the time of the application shall include the following procedures requiring the Applicant to provide written notice to the Commission, the ground water management district, and all parties in the ASR Plan proceedings when that ASR Source Water has become legally available:

    a. Applicant shall give at least sixty-three (63) days advance written Notice of Legal Availability of ASR Source Water ("Notice") to the Commission, the ground water management district, and the parties in the original ASR Plan proceedings, prior to recharging and storing such source in the aquifer, which shall identify: (1) the amount available for recharge, storage, recovery and use pursuant to the ASR plan; and (2) documentation as to how the ASR Source Water became legally available, including copies of all decrees, permits, findings and orders and determinations issued by the Commission and Courts.

    b. Any person may provide written comments on the Notice, which shall be submitted to the Commission and provided to the ground water management district and all parties to the original ASR Plan proceedings within sixty-three (63) days after the date the Notice was submitted. Commission Staff shall consider any comments in determining: (1) whether the requirements of 5.8.1.H.4.a are met; and (2) any plan adjustments under the terms and conditions of 5.8.1.D.5 that are to be implemented for use of the ASR Source Water in the ASR plan. Applicant may not use the ASR Source Water until

Commission Staff provides a written determination confirming the requirements of 5.8.1.H.4.a are met and setting forth any plan adjustments under 5.8.1.D.5 that are necessary for use of the ASR Source Water in the ASR Plan.

c. The ASR Plan shall state that any Notice must be served no later than six (6) years after the date of approval of the ASR Plan by the Commission or the Applicant's right to use the ASR Source Water shall expire. After the expiration, Applicant may only add the ASR Source Water to the ASR Plan by a new application to the Commission.

I. Once an ASR Plan has been approved, any proposed ASR Source Water not included in the ASR Plan approval shall only be added to the ASR Plan by a new application to the Commission. The Commission shall determine the terms and conditions under which the proposed ASR Source Water shall be added to the ASR Plan.

J. While the ASR Plan may contain methods or man-made structures to confine or restrict the ASR Source Water within in the aquifer and/or prevent mingling with the water previously existing in the aquifer or other aquifers in the Designated Basin, such methods or structures are not required.

K. ASR Source Water that is recovered under the plan does not have to consist of the same molecules as the ASR Source Water that was initially recharged and stored.

L. ASR Source Water that is recharged, stored and recovered retains the same classification (e.g. designated ground water, waters of the state, nontributary groundwater, not-nontributary ground water) as the ASR Source Water had prior to being recharged and stored.

M. ASR Source Water that is recharged, stored and recovered remains subject to applicable provisions of the decrees and/or permits regarding types, manner and place of use under which it was originally diverted, the terms and conditions of the ASR Plan, and applicable Commission rules. Subsequent withdrawal of such water by Applicant's recovery wells under an ASR Plan is not subject to the flow rate, volumetric limits and three-year modified banking provision of Rule 7.11 contained in the original well permit or decree.

N. Recharge or recovery wells used in an ASR Plan must have their producing zone completed in the single aquifer in which the water is intended to be stored. An ASR Plan must operate in only one aquifer.

O. ASR Plans shall include terms and conditions to prevent material injury to water rights or to prevent unreasonable impairment of the water quality.

P. Ground water management districts may have additional rules governing the operation of Commission approved ASR Plans and may require compliance with the District rules.

5.8.2 ASR Plans in aquifers for which appropriations are determined pursuant to Rule 5.3 or 5.4 have the following requirements for approval, in addition to those contained in 5.8.1.

A. Definitions

1. "Contiguous Extraction Area" means an area within an aquifer for which allocations are determined pursuant to Rule 5.3 or 5.4 from which the Applicant has the right to withdraw the naturally occurring water and from which the Applicant is proposing to recover ASR Source Water. The Applicant's right to withdraw the naturally occurring water through overlying land ownership, consent of the landowner as described in Rules 5.3 or 5.4, or other means, must be continuous throughout the contiguous extraction area. The land area overlying the contiguous extraction area need not be a single legal tract of land.

2. "Remote Recovery Well" means the recovery of ASR Source Water from a well other than a well through which the volume of water to be recovered was injected or recharged.

B. No recovery well shall be located closer than one (1) mile to any point of contact between any natural stream including its alluvium and the outcrop/subcrop of the aquifer from which the ASR Source Water would be recovered.

C. Recovery from a Confined Aquifer.

1. Recovery of ASR Source Water from a confined aquifer within a designated basin shall be through the same well through which the water was recharged or shall be through a Remote Recovery Well located within the same Contiguous Extraction Area, but in no case shall the Remote Recovery Well be located more than five (5) miles from the farthest artificial recharge well within the same Contiguous Extraction Area. If, prior to or during recovery, the confined aquifer becomes an unconfined aquifer between any recharge well and the Remote Recovery Well, as determined by the Commission, recovery of the ASR Source Water by the Remote Recovery Well shall be subject to the provisions of Rule 5.8.2.D unless an exception is requested and granted by the Commission. The exception request shall include an analysis of continued operation of the Remote Recovery Well upon the change from a confined aquifer to an unconfined aquifer and the potential for material injury to all rights of record in the State Engineer's office allowing the withdrawal of water from the same aquifer owned by other parties, which are located within one (1) mile of the Remote Recovery Well, or over a larger distance if requested by the Commission. The analysis shall consider the hydraulic gradient between the recharge wells and the Remote Recovery Well in the

unconfined aquifer state. Requirements for submittal, publication and hearings of exception requests shall be the same as for variance requests as described in Rules 11.2.2 through 11.2.5. The Commission may also require the Applicant to provide specific notice of the exception request to the owners of those water rights identified in the above referenced analysis. If the exception request is granted, the Commission may require the exception request be repeated at a future specified date based on potential changes to unconfined aquifer conditions.

2. No Remote Recovery Well withdrawing ASR Source Water from a confined aquifer shall be located within the cylinder of appropriation, as calculated pursuant to Rule 4.2.15, for any existing or permitted well subject to Rule 5.3.3, owned by other than the Applicant, and authorized to withdraw water from the same aquifer, without the written permission of the owner of the well.

D. Recovery of ASR Source Water from an unconfined aquifer shall be through the same well through which the water was recharged, or shall be through a Remote Recovery Well located down hydraulic gradient from the recharge well and within the same Contiguous Recovery Parcel, but in no case shall the Remote Recovery Well be located more than one thousand (1,000) feet from the farthest recharge well.

E. The maximum amount of ASR Source Water that may be recovered from an aquifer through any one recovery well in any one calendar year shall not exceed five (5) times the maximum amount of water recharged into that aquifer in any one calendar year, and in no case shall the amount of water recovered exceed the total amount of water recharged into that aquifer less any amounts previously recovered.

F. ASR Source Water may be retained in the aquifer indefinitely by the person who has artificially recharged the water. Nothing in these rules shall limit the right of any person to withdraw naturally occurring ground water which has been “banked” pursuant to Rule 5.3.2.5.

5.8.3 Form of ASR Applications.

A. All applications for ASR Plans must contain the following:

1. Name, mailing address, email address and telephone number of Applicant(s).

2. Name of designated basin, ground water management district (if any), and aquifer in which the plan will operate.

3. Evidence that the plan will not injure other water rights.

4. A detailed description of the plan and its operation, including the following.

a. A general description of the ASR project location and ASR Boundary.

b. The purpose of the ASR Plan.

c. The description of the ASR Source Water (see Rule 5.8.3.A.8).

d. The description of how the ASR Source Water is delivered to the ASR project for recharge.

e. The method, location, timing, and amount of ASR Source Water being recharged into the aquifer including without limitation identification of the structures that will recharge the ASR Source Water, such as by recharge through a well or through a pond.

f. The maximum volume of water that would be stored in the aquifer at any one time.

g. Whether the Applicant proposes to use structures or methods to restrict or direct the underground flow of the water.

h. The method, location, timing, and amount of recovery of the ASR Source Water, including without limitation identification of the structures that will recover the stored water, legal descriptions of their locations, and identification and copies of all decrees, permits, findings and orders and determinations issued by the Commission and Courts involving the structures.

i. The proposed use of the ASR Source Water after it is recovered and where the use will occur if the use is not on the site of the ASR project.

j. The proposed plan to monitor both water quantity and water quality.

k. The approximate cost of the ASR project and the approximate date construction will begin and end.

l. An estimate of the amount of ASR Source Water that will be pumped by wells other than the recovery wells identified in the plan, and an explanation of how that estimate was made.

m. An estimate of the amount of ASR Source Water over which the Applicant will lose dominion and control, and an explanation of how that estimate was made.

n. Proposed terms and conditions required to prevent injury to other water rights.

5. If required by Commission Staff, the Applicant shall submit a ground water model evidencing: (a) that no material injury to vested rights or unreasonable impairment of water quality will result from operation of the plan, (b) maintenance of dominion and

control over the water, (c) the timing and amount of recharged and stored water available to permitted wells other than the recovery wells identified in the plan.

6. Maps (either USGS topographic base map or other base map as appropriate) showing the following information:

a. A depiction of the project location and ASR Boundary, including a depiction of land owned by the Applicant within the boundaries.

b. The locations of all structures involved in the ASR Plan, including all recharge and recovery wells, recharge ponds and other structures involved in recharging and recovering the ASR Source Water, all structures involved in delivering the ASR Source Water to the project location, and all structures involved in delivering the recovered ASR Source Water to its end use.

7. The amount of storage space available in the aquifer within the ASR Boundary, how that amount was calculated, the amount of that available storage space the ASR Plan will utilize, the depth to water within the ASR Boundary prior to operation of the ASR Plan and the projected minimum depth to water during operation of the plan.

8. A detailed description of the physical and legal source of all proposed ASR Source Water, including without limitation identifying the amount of water available from each source, and providing copies of all decrees, permits, findings and orders and determinations issued by the Commission and Courts. If a proposed source of ASR Source Water is not legally available for storage, recovery, and subsequent use in the plan at the time the application is submitted, the Applicant must identify any applications it has or is submitting, or actions it has or is taking, to make the water legally available. Applicant must also provide information demonstrating the Applicant's right to use all proposed ASR Source Water and that the ASR Source Water will not be used by any other person.

9. Evidence that the plan does not cause unreasonable impairment of ground water quality. Such evidence shall include water quality for the source water and the water quality of the receiving aquifer unless 5.8.1.B.1.a applies.

10. Name(s) and address(es) of owner(s) or reputed owner(s) of the land upon which structures that recharge and withdraw water involved in the plan are located. The Applicant must notify these owners that the Applicant is applying for the ASR Plan, and provide proof to the Commission that the Applicant has done so, no later than 14 days after filing the application. Applicant may rely on the records maintained by the applicable County, including records available online, to determine the owner(s) or reputed owner(s), unless Applicant has actual knowledge or information of others not identified in said records.

11 Information regarding other water rights diverted from the structures involved in the plan.

12. A summary of the application for publication. If required by the Commission, the summary must be submitted in an electronic form that can be provided to the newspaper in which publication occurs.

B. All ASR applications pursuant to Rule 5.8.2 must contain the following:

1. The items required by Rule 5.8.3.A.

2. A report summarizing the hydrological conditions in the aquifer, including, but not limited to, evidence as to whether the aquifer is confined or unconfined at the artificial recharge well(s) and any Remote Recovery Well(s) and any location between those wells, static water levels, and aquifer hydraulic gradient. The report must identify all large capacity wells of record in the State Engineer's office allowing the withdrawal of ground water from the aquifer within one (1) mile of the proposed recovery site(s) that are subject to Rule 5.3.3, and identify the cylinder of appropriation of those wells as calculated pursuant to Rule 4.2.15.

5.8.4 A well used for recovery of ASR Source Water pursuant to an ASR Plan must be permitted for such use by the Commission. The Commission may permit wells for recovery that are not otherwise permitted for withdrawal of designated groundwater.

5.8.5 A well permit from the State Engineer is required for the construction of a well to be used solely for the purpose of Artificial Recharge or injection. Other than approval of an ASR Plan, the Commission does not permit or license the physical act of Artificial Recharge or storage. The Applicant is responsible for obtaining any and all necessary approvals to allow the physical act of Artificial Recharge or storage as may be required by federal, state, and local agencies.

5.8.6 Upon receipt of an application for an ASR Plan, the staff shall review it to determine whether the application is complete under these rules in order for the application to be published. If the plan is located within a ground water management district, a copy of the application shall be sent by the staff to the management district and the staff shall consider any comments or recommendations from the management district. If requested by the Applicant or any other party after publication of the ASR application, Commission staff shall host a meeting including all interested parties to discuss the nature and scope of submitted and/or required modeling and to provide the Applicant feedback on its proposed modeling approach. If agreed to by all parties in the meeting, in order to encourage open discussion, communications in and related to the meeting shall be considered conduct or statements made in compromise negotiations within the ambit of C.R.E. 408, not discoverable, and not to be offered as evidence by any party in the course of the litigation. Staff may propose any additional terms and conditions or limitations which are necessary to prevent material injury to water rights and meet the requirements of these rules.

5.8.7. All rules and regulations referenced in this Rule 5.8 are available from the office of the Division of Water Resources, 1313 Sherman St., Room 821, Denver, CO 80203 and are

available for public inspection during regular business hours. Certified copies of these materials shall be provided at cost upon request. This Rule does not contain any later amendments or editions of the materials.

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Office of the Attorney General

Tracking number: 2018-00412

Opinion of the Attorney General rendered in connection with the rules adopted by the

Ground Water Commission

on 02/15/2019

2 CCR 410-1

RULES AND REGULATIONS FOR THE MANAGEMENT AND CONTROL OF DESIGNATED GROUND WATER

The above-referenced rules were submitted to this office on 02/19/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:51:40

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Regulatory Agencies

Agency

Division of Insurance

CCR number

3 CCR 702-4 Series 4-2

Rule title

3 CCR 702-4 Series 4-2 LIFE, ACCIDENT AND HEALTH, Series 4-2 Accident and Health (General) 1 - eff 06/01/2019

Effective date

06/01/2019

DEPARTMENT OF REGULATORY AGENCIES

Division of Insurance

3 CCR 702-4

LIFE, ACCIDENT AND HEALTH

Amended Regulation 4-2-17

PROMPT INVESTIGATION OF HEALTH CLAIMS INVOLVING UTILIZATION REVIEW AND DENIAL OF BENEFITS AND RULES RELATED TO INTERNAL CLAIMS AND APPEALS PROCESSES

Section 1 Authority

This regulation is promulgated and adopted by the Commissioner of Insurance under the authority of §§ 10-1-109, 10-3-1110, 10-16-109, and 10-16-113(2) and (10), C.R.S.

Section 2 Scope and Purpose

The purpose of this regulation is to set forth guidelines for carrier compliance with the provisions of §§ 10-3-1104(1)(h), 10-16-409(1)(a), and 10-16-113, C.R.S., in situations involving utilization review and certain denials of benefits for treatment, as well as rescission, cancellation, or denial of coverage based on an eligibility determination, as described herein. Among other things, § 10-3-1104(1)(h), C.R.S., requires carriers to adopt and implement reasonable standards for the prompt investigation of claims arising from health coverage plans; promptly provide a reasonable explanation of the basis in the health coverage plan in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; and refrain from denying a claim without conducting a reasonable investigation based upon all available information.

This regulation is designed to provide minimum standards for handling appeals and grievances involving utilization review determinations, certain denials of benefits for treatments excluded by health coverage plans, and as otherwise required by § 10-16-113, C.R.S.

Section 3 Applicability

The provisions of this regulation shall apply to all health coverage plans, including, but not limited to, dental insurance policies. It does not apply to long-term care insurance policies as the requirements for the appeals process for that type of health coverage plan is covered under a separate regulation. This regulation shall not apply to automobile medical payment policies, worker's compensation policies, or property and casualty insurance. Where a decision concerning a claim is not based on utilization review, a carrier is not required to use the specific procedures outlined in this regulation. However, this regulation shall apply to a carrier's denial of a benefit because the treatment is excluded by the health coverage plan if the covered person presents evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply. Nothing in this regulation shall be construed to supplant any appeal or due process rights that a person may have under federal or state law.

Section 4 Definitions

A. "Adverse determination" means, for the purposes of this regulation:

1. A determination by a carrier or its designee that a request for a pre-service or post-service benefit has been reviewed and, based upon the information provided, does not meet the carrier's requirement for medical necessity, or that the benefit is not appropriate, effective, efficient, is not provided in or at the appropriate health care setting or level of care, or is determined to be experimental or investigational, and is therefore denied, reduced, or terminated;

2. A denial for a benefit excluded by a health coverage plan for which the covered person is able to present evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply to the denied benefit;

3. A rescission or cancellation of coverage applied retroactively that is not attributed to a failure to pay premiums. However, a physician is not required to evaluate an appeal of this type of adverse determination; and

4. A denial of coverage to an individual based on an initial eligibility determination for all:

a. Individual sickness and accident insurance policies issued by a carrier subject to Part 2 of Article 16 of Title 10; and

b. Individual health care or indemnity contracts issued by a carrier subject to Parts 3 or 4 of Article 16 of Title 10.

Section 4.A.4. does not apply to supplemental policies covering a specified disease or other limited benefit. A physician is not required to evaluate an appeal of this type of adverse determination.

B. "Ambulatory review" means, for the purposes of this regulation, a utilization review of health care services performed or provided in an outpatient setting.

C. "Applicable non-English language" means, for the purposes of this regulation, with respect to an address in any Colorado county to which a notice is sent, a non-English language that ten percent (10%) or more of the population residing in the county is only literate in as determined by the Secretary of the United States Department of Health and Human Services.

D. "Carrier" shall have the same meaning as found at § 10-16-102(8), C.R.S.

E. "Carrier's receipt" means, for the purposes of this regulation, the receipt date as date-stamped by the carrier in a legible manner; an electronically-formatted receipt date; a facsimile transmission

date; or a receipt date imprinted on the document in some type of permanent manner. The earliest receipt date on the document will be considered the carrier's receipt date.

F. "Case management" means, for the purposes of this regulation, a coordinated set of activities conducted for individual patient management of serious, complicated, protracted, or other health conditions.

G. "Clinical peer" means, for the purposes of this regulation, a physician or other health care professional who holds a non-restricted license in a state of the United States and in the same or similar specialty as typically manages the medical condition, procedure or treatment under review.

H. "Complaint" means, for the purposes of this regulation, a written communication primarily expressing a grievance.

I. "Covered person" shall have the same meaning as found at § 10-16-102(15), C.R.S.

J. "Date of receipt of a notice" means, for the purposes of this regulation, the date that shall be calculated to be no less than three (3) calendar days after the date the notice is postmarked by the carrier.

K. "Designated representative" means, for the purposes of this regulation:

1. A person, including the treating health care professional or a person authorized by subsection 4.K.2., to whom a covered person has given express written consent to represent the covered person;

2. A person authorized by law to provide substituted consent for a covered person, including but not limited to a guardian, agent under a power of attorney, a proxy, or a designee of the Colorado Department of Health Care Policy and Financing; and/or

3. In the case of an urgent care request, a health care professional with knowledge of the covered person's medical condition.

L. "Discharge planning" means, for the purposes of this regulation, the formal process for determining, prior to discharge from a medical facility or service, the coordination and management of the care that a covered person receives following discharge from a medical facility or service.

M. "Emergency medical condition" means, for the purposes of this regulation, the sudden, and at the time, unexpected onset of a health condition that requires immediate medical attention, where failure to provide medical attention would result in serious impairment to bodily functions or serious dysfunction of a bodily organ or part, or would place the covered person's health in serious jeopardy.

N. "Grievance" means, for the purposes of this regulation, a circumstance regarded as a cause for protest, including the protest of an adverse determination.

O. "Health care professional" means, for the purposes of this regulation, a physician or other health care practitioner licensed, accredited, or certified to perform specified health care services consistent with state law.

P. "Health care services" shall have the same meaning as found at § 10-16-102(33), C.R.S.

Q. "Health coverage plan" shall have the same meaning as found at § 10-16-102(34), C.R.S.

R. “Life or limb threatening emergency” means, for the purposes of this regulation, any event that a prudent layperson would believe threatens his or her life or limb in such a manner that a need for immediate medical care is created to prevent death or serious impairment of health.

S. “Managed care plan” shall have the same meaning as found at § 10-16-102(43), C.R.S.

T. “Medical facility” means, for the purposes of this regulation, a facility licensed or otherwise authorized to furnish health care services, including, but not limited to, residential treatment facilities.

U. “Medical professional” means, for the purposes of this regulation, an individual licensed pursuant to the “Colorado Medical Practice Act”, article 36 of title 12, C.R.S., or, for dental plans only, a dentist licensed pursuant to the “Dental Practice Law of Colorado”, article 35 of title 12, C.R.S., acting within his or her scope of practice.

V. “Prospective review” means, for the purposes of this regulation, a utilization review conducted prior to an admission or course of treatment. Also known as a “pre-service review”.

W. “Rescission” means, for the purposes of this regulation, the cancellation or discontinuance of coverage that has a retroactive effect. This includes a cancellation that treats a policy as void from the time of enrollment and a cancellation that voids benefits paid up to a year before the cancellation takes place. A rescission of coverage shall be treated as an adverse determination. A cancellation or discontinuance of coverage is not a rescission if the cancellation or discontinuance is exclusively prospective, or the cancellation or discontinuance is retroactive only to the extent attributable to a failure to pay premiums or contributions toward the cost of coverage in a timely manner.

X. “Retrospective review” means, for the purposes of this regulation, utilization review conducted after services have been provided to a covered person, but does not include the review of a claim that is limited to an evaluation of reimbursement levels, veracity of documentation, accuracy of coding, or adjudication for payment. Also known as a “post-service review”.

Y. “Second opinion” means, for the purposes of this regulation, an opportunity or requirement to obtain a clinical evaluation by a health care professional other than the one originally making a recommendation for a proposed health care service to assess the medical necessity and appropriateness of the initial proposed health care service.

Z. “Voluntary second level review” means, for the purposes of this regulation, a request for a review of an adverse determination from a first-level appeal which is only available to persons covered under a group health coverage plan.

AA. “Stabilized” means, for the purposes of this regulation, with respect to an emergency medical condition or a life or limb threatening emergency, that no material deterioration of the condition is likely, within reasonable medical probability, to result or occur before an individual can be transferred.

AB. “Urgent care request” means, for the purposes of this regulation:

1. A request for a health care service or course of treatment with respect to which the time periods for making a non-urgent care request determination that:

a. Could seriously jeopardize the life or health of the covered person or the ability of the covered person to regain maximum function; or for a covered person with a physical or mental disability, creates an imminent and substantial limitation on his or her existing ability to live independently; or

b. In the opinion of a physician with knowledge of the covered person's medical condition, would subject the covered person to severe pain that cannot be adequately managed without the health care service or treatment that is the subject of the request.

2. Except as provided in section 4.AB.3., in determining whether a request is to be treated as an urgent care request, a person acting on behalf of the carrier shall apply the judgment of a prudent layperson who possesses an average knowledge of health and medicine.

3. Any request that a physician with knowledge of the covered person's medical condition determines and states is an urgent care request within the meaning of section 4.AB.1. shall be treated as an urgent care request.

AC. "Utilization review" means, for the purposes of this regulation, a set of formal techniques designed to monitor the use of, or evaluate the medical necessity, appropriateness, efficacy, or efficiency of, health care services, procedures, or settings. Techniques include ambulatory review, prospective review, second opinion, authorization, concurrent review, case management, discharge planning, and retrospective review. It also includes reviews for the purpose of determining coverage based on whether or not a procedure or treatment is considered experimental or investigational in a given circumstance, and reviews of a covered person's medical circumstances when necessary to determine if an exclusion applies in a given situation.

Section 5 Compliance Requirements

A. Pursuant to § 10-3-1104(1)(h)(IV), C.R.S., a carrier that does not use a procedure for investigating claims involving utilization review consistent with this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that a carrier refrain from denying a claim without conducting a reasonable investigation based upon all available information.

B. Pursuant to § 10-3-1104(1)(h)(III), C.R.S., a carrier using standards in the review of claims involving utilization review that are not in compliance with the rules contained in this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that a carrier use reasonable standards for the prompt investigation of claims.

C. Pursuant to § 10-3-1104(1)(h)(II), C.R.S., a carrier that does not investigate claims involving utilization review within the time frames set out in this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that a carrier promptly investigate claims.

D. Pursuant to § 10-3-1104(1)(h)(XIV), C.R.S., a carrier that does not follow the procedures for explaining the basis of a utilization review decision set forth in this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that a carrier promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.

E. Pursuant to § 10-3-1104(1)(h)(IV), C.R.S., a carrier that does not allow an appeal, consistent with the procedures set forth in this regulation, of a benefit denial for a treatment excluded by the health coverage plan when the covered person presents evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that a carrier refrain from denying a claim without conducting a reasonable investigation based upon all available information.

F. Carriers shall avoid conflicts of interest to ensure all benefit reviews and appeals are adjudicated in a manner designed to guarantee the independence and impartiality of the persons involved in making the decision. With respect to any person involved in the review of benefit requests and/or the review of appeals, decisions regarding hiring, compensation, termination, or promotion shall not be made based upon the likelihood that the person will support the denial of benefits.

Section 6 Form and Manner of Notices

A. Carriers shall provide all relevant notices in a culturally and linguistically appropriate manner as follows:

1. In the English versions of all notices, a statement prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the carrier; and

2. Shall provide, upon request, a notice in any applicable non-English language and shall allow the covered person the option of electing to receive all subsequent notices in the requested applicable non-English language.

B. Carriers shall provide oral language services in any applicable non-English language, providing assistance with answering questions about the filing of benefit requests and appeals.

Section 7 Standard Utilization Review

A. A carrier shall maintain written procedures pursuant to this section for making utilization review decisions and for notifying covered persons of its decisions. For purposes of this section, "covered person" includes the designated representative of a covered person.

B. Prospective review determinations.

1. Time period for determination and notification.

a. Subject to section 7.B.1.b., a carrier shall make the determination and notify the covered person and the covered person’s medical facility and/or health care professional of the determination, whether the carrier certifies the provision of the benefit or not, within a reasonable period of time appropriate to the covered person’s medical condition, but in no event later than fifteen (15) calendar days after the carrier’s receipt of the request. Whenever the determination is an adverse determination, the carrier shall make the notification of the adverse determination in accordance with section 7.E.

b. The time period for making a determination and notifying the covered person of the determination pursuant to section 7.B.1.a. may be extended one (1) time by the carrier for up to fifteen (15) calendar days, provided the carrier:

(1) Determines that an extension is necessary due to matters beyond the carrier’s control; and

(2) Notifies the covered person, prior to the expiration of the initial fifteen (15) calendar day time period, of the circumstances requiring the extension of time and the date by which the carrier expects to make a determination.

c. If the extension under section 7.B.1.b. is necessary due to the failure of the covered person to submit information necessary to reach a determination on the request, the notice of extension shall:

(1) Specifically describe the required information necessary to complete the request; and

(2) Give the covered person at least forty-five (45) calendar days from the date of receipt of a notice to provide the specified information. If the deadline for submitting the specified information ends on a weekend or holiday, the deadline be extended to the next business day.

2. Failure to meet the carrier's filing procedures.

a. Whenever the carrier receives a prospective review request from a covered person that fails to meet the carrier's filing procedures, the carrier shall notify the covered person of this failure and provide in the notice information on the proper procedures to be followed for filing a request.

b. Required notice.

(1) The notice required under section 7.B.2.a. shall be provided as soon as possible, but in no event later than five (5) calendar days following the date of the failure.

(2) The carrier shall provide the notice in writing.

c. The provisions of section 7.B.2. shall apply only in the case of a failure that:

(1) Is a communication by a covered person that is received by a person or organizational unit of the carrier responsible for handling benefit matters; and

(2) Is a communication that refers to a specific covered person, a specific medical condition or symptom, and a specific health care service, treatment or medical facility and/or health care professional for which authorization is being requested.

3. For an adverse determination regarding a prospective review decision that occurs during a covered person's hospital stay or course of treatment, also known as concurrent review, the health care service or treatment that is the subject of an adverse determination shall continue to be covered according to the provisions of the health coverage plan until the covered person has been notified of the determination by the carrier.

4. The requirements of section 7.B. apply to all written requests involving utilization review received by the carrier which are submitted by a covered person or a medical facility and/or health care professional requesting a determination of coverage for a specific health care service or treatment for the covered person.

C. Retrospective review determinations.

1. For retrospective review determinations, a carrier shall make the determination and notify the covered person and the covered person's medical facility and/or health care professional of the determination within a reasonable period of time, but in no event later

than thirty (30) calendar days after the carrier's receipt of the benefit request. Whenever the determination is an adverse determination, the carrier shall provide notice of the adverse determination to the covered person in accordance with section 7.E.

2. Time period for determination and notification.

a. The time period for making a determination and notifying the covered person of the determination pursuant to section 7.C.1. may be extended one (1) time by the carrier for up to fifteen (15) calendar days, provided the carrier:

(1) Determines that an extension is necessary due to matters beyond the carrier's control; and

(2) Notifies the covered person, prior to the expiration of the initial thirty (30) calendar day time period, of the circumstances requiring the extension of time and the date by which the carrier expects to make a determination.

b. If the extension under section 7.C.2.a. is necessary due to the failure of the covered person to submit information necessary to reach a determination on the request, the notice of extension shall:

(1) Specifically describe the required information necessary to complete the request; and

(2) Give the covered person at least forty-five (45) calendar days from the date of receipt of a notice to provide the specified information. If the deadline for submitting the specified information ends on a weekend or holiday, the deadline shall be extended to the next business day.

D. Calculation of time periods.

1. For purposes of calculating the time periods within which a determination is required to be made under sections 7.B. and 7.C., the time period shall begin on the date of the carrier's receipt of the request in accordance with the carrier's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

2. Extensions.

a. If the time period for making the determination under sections 7.B. or 7.C. is extended due to the covered person's failure to submit the information necessary to make the determination, the time period for making the determination shall be tolled from the date on which the carrier sends the notification of the extension to the covered person until the earlier of:

(1) The date on which the covered person responds to the request for additional information; or

(2) The date on which the specified information was to have been submitted.

b. If the covered person fails to submit the information before the end of the period of the extension, as specified in sections 7.B. or 7.C., the carrier may deny the authorization of the requested benefit.

E. Requirements for adverse determination notifications.

1. Except for the adverse determinations described section 7.E.2., a notification of an adverse determination under this section shall, in a manner calculated to be understood by the covered person, set forth:

   a. An explanation of the specific medical basis for the adverse determination;

   b. The specific reason or reasons for the adverse determination;

   c. Reference to the specific plan provisions on which the determination is based;

   d. A description of any additional material or information necessary for the covered person to perfect the benefit request, including an explanation of why the material or information is necessary to perfect the request;

   e. If the carrier relied upon an internal rule, guideline, protocol, or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

   f. If the adverse determination is based on a medical necessity, experimental or investigational treatment, or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the health coverage plan to the covered person's medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

   g. Information sufficient for the covered person to be able to identify the claim involved and a statement describing the availability, upon request, of the diagnosis code and its corresponding meaning, and the treatment code and its corresponding meaning;

   h. If applicable, instructions for requesting:

      (1) A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 7.E.1.e.;

      (2) The written statement of the scientific or clinical rationale for the adverse determination, as provided in section 7.E.1.f.; and/or

      (3) The information necessary to identify the claim, as provided in section 7.E.1.g.;

   i. A description of the carrier's review procedures and the time limits applicable to such procedures; and

   j. An explanation of the right of the covered person to appeal an initial adverse determination with a description of the procedures for requesting an appeal.

      (1) For individual health coverage plans, the notice shall include:

         (a) An explanation of the right to a single level of internal appeal through a written appeal review or, unless it is an expedited

appeal, the ability to appear in person or by telephone conference at a review meeting; and

(b) A description of the process to schedule a review meeting including the covered person's rights pursuant to section 12.

(2) For group health coverage plans, the notice shall advise that the covered person does not have the right to be present during the first level review.

2. For denials based on a contractual exclusion, the adverse determination notice shall include the health coverage plan's specific exclusion language and shall advise the covered person of the right to appeal the applicability of the exclusion by providing evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply.

3. A carrier shall provide the notice required under this section in writing, either on paper or electronically.

4. All written adverse determinations, except an adverse determination described in § 10-16-113(1)(b)(I)(C) and (E), C.R.S., shall be reviewed and signed by a licensed physician familiar with standards of care in Colorado. In the case of written denials of requests for covered benefits for dental care, a licensed dentist familiar with standards of care in Colorado may review and sign the written denial.

5. The notice of the initial adverse determination shall include information concerning the covered person's ability to request an internal and external expedited review on a concurrent basis. This information may be included in the letter or other notice advising the covered person of the finding of an adverse determination, or it may be included as a separate document within the same mailing.

F. The requirements of section 7 apply to all written requests involving standard utilization review received by the carrier which are submitted by a covered person or a medical facility and/or health care professional requesting a determination of coverage for a specific health care service or treatment for the covered person.

Section 8 Expedited Utilization Review

A. Procedures.

1. A carrier shall establish written procedures in accordance with this section for receiving benefit requests from covered persons and for making and notifying covered persons of expedited utilization review with respect to urgent care requests. For purposes of this section, "covered person" includes the designated representative of a covered person.

2. Notification requirements.

a. As part of the procedures required under section 8.A.1., a carrier shall provide that, in the case of a failure by a covered person to follow the carrier's procedures for filing an urgent care request, the covered person shall be notified of the failure and the proper procedures to be followed for filing the request.

b. The notice required under section 8.A.2.a.:

(1) Shall be provided to the covered person as soon as possible but not later than twenty-four (24) hours after the carrier's receipt of the request; and

(2) Shall be in writing.

c. The provisions of section 8.A.2. apply only in the case of a failure that:

(1) Is a communication by a covered person that is received by a person or organizational unit of the carrier responsible for handling benefit matters; and

(2) Is a communication that refers to a specific covered person, a specific medical condition or symptom, and a specific health care service, treatment or medical facility and/or health care professional for which approval is being requested.

B. Urgent care requests.

1. Notification requirements for carrier determinations.

a. For an urgent care request, unless the covered person has failed to provide sufficient information for the carrier to determine whether, or to what extent, the benefits requested are covered benefits or payable under the covered person's health coverage plan, the carrier shall notify the covered person and the covered person's medical facility and/or health care professional of the carrier's determination with respect to the request, whether or not the determination is an adverse determination, as soon as possible, taking into account the medical condition of the covered person, but in no event later than seventy-two (72) hours after the carrier's receipt of the request.

b. If the carrier's determination is an adverse determination, the carrier shall provide notice of the adverse determination in accordance with section 8.E.

2. Notification requirements for insufficient information.

a. If the covered person fails to provide sufficient information for the carrier to make a determination, the carrier shall notify the covered person either orally or, if requested by the covered person, in writing of this failure and state what specific information is needed as soon as possible, but in no event later than twenty-four (24) hours after the carrier's receipt of the request.

b. The carrier shall provide the covered person a reasonable period of time to submit the necessary information, taking into account the circumstances, but in no event less than forty-eight (48) hours after notifying the covered person of the failure to submit sufficient information, as provided in section 8.B.2.a.

c. The carrier shall notify the covered person and the covered person's medical facility and/or health care professional of its determination with respect to the urgent care request as soon as possible, but in no event more than forty-eight (48) hours after the earlier of:

(1) The carrier's receipt of the requested specified information; or

(2) The end of the period provided for the covered person to submit the requested specified information.

d. If the covered person fails to submit the information before the end of the period of the extension, as specified in section 8.B.2.b., the carrier may deny the authorization of the requested benefit.

e. If the carrier's determination is an adverse determination, the carrier shall provide notice of the adverse determination in accordance with section 8.E.

C. Concurrent urgent care review requests.

1. For concurrent urgent care review requests involving a request by the covered person to extend the course of treatment beyond the initial period of time or the number of treatments authorized, if the request is made at least twenty-four (24) hours prior to the expiration of the authorized period of time or authorized number of treatments, the carrier shall make a determination with respect to the request and notify the covered person and the covered person's medical facility and/or health care professional of the determination, whether it is an adverse determination or not, as soon as possible, taking into account the covered person's medical condition, but in no event more than twenty-four (24) hours after the carrier's receipt of the request.

2. If the carrier's determination is an adverse determination, the carrier shall provide notice of the adverse determination in accordance with section 8.E. The health care service or treatment that is the subject of an adverse determination shall continue to be covered according to the provisions of the health coverage plan until the covered person has been notified of the determination by the carrier.

D. For purposes of calculating the time periods within which a determination is required to be made under sections 8.B. or 8.C., the time period shall begin on the date of the carrier's receipt of the request in accordance with the carrier's procedures established for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

E. Adverse determination notification requirements.

1. A notification of an adverse determination under this section shall, in a manner calculated to be understood by the covered person, set forth:

a. An explanation of the specific medical basis for the adverse determination;

b. The specific reasons or reasons for the adverse determination;

c. Reference to the specific plan provisions on which the determination is based;

d. A description of any additional material or information necessary for the covered person to perfect the benefit request, including an explanation of why the material or information is necessary;

e. If the carrier relied upon an internal rule, guideline, protocol, or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

f. If the adverse determination is based on a medical necessity, experimental or investigational treatment or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the

terms of the health coverage plan to the covered person's medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

g. Information sufficient for the covered person to be able to identify the claim involved and a statement describing the availability, upon request, of the diagnosis code and its corresponding meaning, and the treatment code and its corresponding meaning;

h. If applicable, instructions for requesting:

(1) A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 8.E.1.e.;

(2) The written statement of the scientific or clinical rationale for the adverse determination, as provided in section 8.E.1.f.; and/or

(3) The information necessary to identify the claim, as provided in section 8.E.1.g.;

i. A description of the carrier's expedited review procedures and the time limits applicable to such procedures; and

j. An explanation of the right of the covered person to appeal an initial adverse determination with a description of the procedures for requesting an appeal.

(1) For individual health coverage plans, the notice shall include an explanation of the right to a single level of internal appeal through a written appeal review and, because it is an expedited appeal, the inability to appear in person or by telephone conference at a review meeting.

(2) For group health coverage plans, the notice shall advise that the covered person does not have the right to be present during the first level review.

2. Additional notification requirements.

a. A carrier may provide the notice required under this section orally, in writing, or electronically.

b. If notice of the adverse determination is provided orally, the carrier shall provide a written or electronic notice of the adverse determination within three (3) calendar days following the oral notification.

3. All written adverse determinations shall be reviewed and signed by a licensed physician familiar with standards of care in Colorado. In the case of written denials of requests for covered benefits for dental care, a licensed dentist familiar with standards of care in Colorado may review and sign the written denial.

4. The notice of the initial adverse determination shall include information concerning the covered person's ability to request an internal and external expedited review on a concurrent basis. This information may be included in the letter or other notice advising the covered person of the finding of an adverse determination, or it may be included as a separate document within the same mailing.

F. The requirements of section 8 apply to all written requests involving expedited utilization review received by the carrier which are submitted by a covered person or a medical facility and/or health care professional requesting a determination of coverage for a specific health care service or treatment for the covered person.

Section 9 Emergency Services

A. A carrier shall not deny a claim for emergency services necessary to screen and stabilize a covered person on the grounds that an emergency medical condition did not actually exist if a prudent layperson having average knowledge of health care services and medicine and acting reasonably would have believed that an emergency medical condition or life or limb threatening emergency existed. Under these same circumstances, a claim for emergency services necessary to screen and stabilize a covered person shall not be denied for failure by the covered person or the emergency service medical facility or health care professional to secure prior authorization. With respect to care obtained from a non-contracted medical facility and/or health care professional within the service area of a managed care plan, a carrier shall not deny a claim for emergency services necessary to screen and stabilize a covered person and shall not require prior authorization of the services if a prudent layperson would have reasonably believed that use of a contracted medical facility and/or health care professional would result in a delay that would worsen the emergency, or if a provision of federal, state, or local law requires the use of a specific medical facility and/or health care professional.

B. Health maintenance organizations shall also comply with the life or limb threatening emergency coverage provisions of § 10-16-407(2), C.R.S., in reviewing claims for emergency services necessary to screen and stabilize a covered person.

Section 10 Peer-to-Peer Conversation

A. In a case involving a prospective review determination, a carrier shall give the medical facility and/or health care professional rendering the service an opportunity to request, on behalf of the covered person, a peer-to-peer conversation regarding an adverse determination by the reviewer making the adverse determination. Such a request may be made either orally or in writing.

B. The peer-to-peer conversation shall occur within five (5) calendar days of the carrier's receipt of the request and shall be conducted between the medical facility and/or health care professional rendering the health care service and the reviewer who made the adverse determination or a clinical peer designated by the reviewer if the reviewer who made the adverse determination cannot be available within five (5) calendar days.

C. If the peer-to-peer conversation does not resolve the difference of opinion, the adverse determination may be appealed by the covered person. A peer-to-peer conversation is not a prerequisite to a first level review or an expedited review of an adverse determination.

D. For the purposes of § 10-3-1104(1)(i), C.R.S., a request for a peer-to-peer conversation shall not be considered a complaint.

Section 11 First Level Review

A. General requirements.

1. A carrier shall establish written procedures for the review of an adverse determination that does not involve an urgent care request in compliance with § 10-16-113, C.R.S., and this regulation. The procedures shall specify whether a first level review request must be in writing or may be submitted orally. The procedures shall also allow the covered person

to identify the medical facility and/or health care professionals to whom the carrier shall send a copy of the review decision.

2. A first level review shall be available to, and may be initiated by, the covered person. For purposes of this section, “covered person” includes the designated representative of a covered person.

3. Pursuant to § 10-3-1104(1)(i), C.R.S., all written requests for a first level review shall be entered into the carrier’s complaint record.

4. Within 180 calendar days after the date of receipt of a notice of an adverse determination sent pursuant to sections 7 or 8 or after the date of receipt of notification of a benefit denied due to a contractual exclusion, a covered person may file a grievance with the carrier requesting a first level review of the adverse determination. In order to secure a first level review after the receipt of the notification of a benefit denied due to a contractual exclusion, the covered person must be able to provide evidence from a medical professional that there is a reasonable medical basis that the exclusion does not apply. If the deadline for filing a request ends on a weekend or holiday, the deadline shall be extended to the next business day.

5. Full and fair review.

   a. Before issuing a final internal adverse benefit determination based on new and/or additional evidence, the carrier shall provide the covered person, free of charge, the new and/or additional evidence considered, relied upon, or generated by the carrier in connection with the claim. Such evidence shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 11.E. to give the covered person a reasonable opportunity to respond prior to that date.

   b. Before issuing a final internal adverse benefit determination based on new and/or additional rationale, the carrier shall provide the covered person, free of charge, with the rationale considered, relied upon, or generated by the carrier in connection with the claim. Such rationale shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 11.E. to give the covered person a reasonable opportunity to respond prior to that date.

B. Individual health coverage plans.

1. Covered persons shall be provided a choice between a written appeal review and a review meeting for their first level appeal.

2. Written appeal reviews shall comply with the requirements of section 11.C.

3. Review meetings shall comply with the requirements of section 12. The covered person’s right to a fair review shall not be made conditional on the covered person’s appearance at the review meeting.

4. The covered person is entitled to a single internal appeal review.

C. Conduct of first level written appeal reviews.

1. First level reviews shall be evaluated by a physician who shall consult with an appropriate clinical peer(s), unless the reviewing physician is a clinical peer. The physician and clinical peer(s) shall not have been involved in the initial adverse determination. However, a person that was previously involved with the denial may answer questions.

2. In conducting a review under this section, the reviewer(s) shall take into consideration all comments, documents, records, and other information regarding the request for services or benefits submitted by the covered person without regard to whether the information was submitted or considered in making the initial adverse determination. If the appeal is pursuant to § 10-16-113(1)(c), C.R.S., regarding the applicability of a contractual exclusion, the determination shall be made on the basis of whether the contractual exclusion applies to the denied benefit.

D. Covered person's rights for first level written appeal review for individual and group health coverage plans. A covered person is entitled to:

1. Submit written comments, documents, records, and other material relating to the request for benefits for the reviewer(s) to consider when conducting the review. For review of a benefit denial due to a contractual exclusion, the covered person shall provide evidence from a medical professional that there is a reasonable medical basis that the exclusion does not apply; and

2. Receive from the carrier, upon request and free of charge, reasonable access to, and copies of all documents, records, and other information relevant to the covered person's request for benefits. A document, record, or other information shall be considered "relevant" to a covered person's request for benefits if the document, record, or other information:

a. Was relied upon in making the benefit determination;

b. Was submitted, considered, or generated in the course of making the adverse determination, without regard to whether the document, record, or other information was relied upon in making the benefit determination;

c. Demonstrates that, in making the benefit determination, the carrier or its designated representatives consistently applied required administrative procedures and safeguards with respect to the covered person as with other similarly-situated covered persons; and/or

d. Constitutes a statement of policy or guidance with respect to the health coverage plan concerning the denied health care service or treatment for the covered person's diagnosis, without regard to whether the advice or statement was relied upon in making the benefit determination.

3. A covered person does not have the right to be present for the written appeal review.

E. Notification requirements.

1. A carrier shall notify and issue a decision in writing or electronically to the covered person within the time frames provided in section 11.E.2.

2. With respect to a request for a first level review of an adverse determination involving a prospective review request, the carrier shall notify and issue a decision within a reasonable period of time that is appropriate given the covered person's medical

condition, but no later than thirty (30) calendar days after the date of the carrier's receipt of the grievance containing a request for the first level review.

3. With respect to a request for a first level review of an adverse determination involving a retrospective review request, the carrier shall notify and issue a decision within a reasonable period of time, but no later than sixty (60) calendar days after the date of the carrier's receipt of a request for the first level review.

F. For purposes of calculating the time periods within which a determination is required to be made and notice provided under section 11.E.3., the time period shall begin on the date of the carrier's receipt of the grievance requesting the review provided in accordance with the carrier's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

G. The decision issued pursuant to section 11.E. shall set forth in a manner calculated to be understood by the covered person:

1. The name, title and qualifying credentials of the physician evaluating the appeal, and the qualifying credentials of the clinical peer(s) with whom the physician consulted. For the purposes of section 11, the physician and consulting clinical peers shall be called "the reviewers";

2. A statement of the reviewers' understanding of the covered person's request for a review of an adverse determination;

3. The reviewers' decision in clear terms; and

4. A reference to the evidence or documentation used as the basis for the decision.

H. A first level review decision involving an adverse determination issued pursuant to section 11.E. shall include, in addition to the requirements of section 11.G.:

1. The specific reason or reasons for the adverse determination, including the specific plan provisions and medical rationale;

2. A statement that the covered person is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant, as the term "relevant" is defined in section 11.D.2., to the covered person's benefit request;

3. If the reviewers relied upon an internal rule, guideline, protocol or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

4. If the adverse determination is based on a medical necessity, experimental or investigational treatment, or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the health coverage plan to the covered person's medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

5. Information sufficient for the covered person to be able to identify the claim involved and a statement describing the availability, upon request, of the diagnosis code and its corresponding meaning, and the treatment code and its corresponding meaning;

6. If applicable, instructions for requesting:

    a. A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 11.H.3.;

    b. The written statement of the scientific or clinical rationale for the determination, as provided in section 11.H.4.; and/or

    c. The information necessary to identify the claim, as provided in section 11.H.5.; and

7. A description of the procedures for obtaining an independent external review of the adverse determination pursuant to section 5 of Colorado Insurance Regulation 4-2-21.

8. For group health coverage plans, a description of the process to obtain a voluntary second level review, including:

    a. The written procedures governing the voluntary second level review, including the required time frames for the review;

    b. The right of the covered person to:

        (1) Request the opportunity to appear in person before a health care professional (reviewer) or, if offered by the carrier, a review panel of health care professionals, who have appropriate expertise, who were not previously involved in the appeal, and who do not have a direct financial interest in the outcome of the review;

        (2) Receive, upon request, a copy of the materials that the carrier intends to present at the review at least five (5) calendar days prior to the date of the review meeting. Any new material developed after the five-day deadline shall be provided by the carrier when practicable;

        (3) Present written comments, documents, records, and other material relating to the request for benefits for the reviewer or review panel to consider when conducting the review both before and, if applicable, at the review meeting;

            (a) A copy of the materials the covered person plans to present or have presented on his or her behalf at the review meeting should be provided to the carrier at least five (5) calendar days prior to the date of the review meeting;

            (b) Any new material developed after the five-day deadline shall be provided to the carrier when practicable;

        (4) Present the covered person’s case to the reviewer or review panel;

        (5) If applicable, ask questions of the reviewer or review panel; and

(6) Be assisted or represented by an individual(s) of the covered person's choice, including counsel, advocates, and health care professionals;

c. A statement that the carrier will provide to the covered person, upon request, sufficient information relating to the voluntary second level review to enable the covered person to make an informed judgment about whether to submit the adverse determination to a voluntary second level review, including a statement that the decision of the covered person as to whether or not to submit the adverse determination to a voluntary second level review will have no effect on the covered person's rights to any other benefits under the plan, the process for selecting the decision maker, and the impartiality of the decision maker.

d. A description of the procedures for obtaining an independent external review of the adverse determination pursuant to section 5 of Colorado Insurance Regulation 4-2-21 if the covered person chooses not to request a voluntary second level review of the first level review decision involving an adverse determination.

Section 12 General Requirements for First Level and Voluntary Second Level Review Meetings

A. A carrier shall establish procedures for a review process in which the covered person has the right to appear in person or by telephone conference at the review meeting before a health care professional (reviewer) or, if offered by the carrier, a review panel of health care professionals, selected by the carrier. The procedures shall allow the covered person to identify the medical facility and/or health care professional(s) to whom the carrier shall send a copy of the review decision. The purpose of the review meeting process is to give the covered person the opportunity to explain his or her grievance and to provide any relevant evidence in support of his or her claim for benefits.

B. For purposes of this section, "covered person" includes the designated representative of a covered person.

C. A complaint record entry shall be made for all review meeting requests, pursuant to § 10-3-1104(1)(i), C.R.S.

D. Covered person's review request filing requirements.

1. For individual health coverage plans, the requirements of section 11.A.4. apply.

2. For group health coverage plans, within sixty (60) calendar days after the date of receipt of a notice of a first level review adverse determination, the covered person may file a request with the carrier requesting a voluntary second level review of the adverse determination. If the deadline for filing a request ends on a weekend or holiday, the deadline shall be extended to the next business day.

E. The covered person's right to a fair review shall not be made conditional on the covered person's appearance at the review meeting.

F. Carrier's requirements.

1. The adverse determination or, with respect to a voluntary second level review of a first level review decision, the denial shall be reviewed by a health care professional (reviewer) or, if offered by the carrier, a review panel of health care professionals, who have appropriate expertise in relation to the case presented by the covered person.

2. The reviewer or each review panel member, shall meet the following criteria:

   a. Were not previously involved in the appeal;

   b. Do not have a direct financial interest in the appeal or outcome of the review; and

   c. Are not a subordinate of any person previously involved in the appeal.

3. The reviewer or the review panel shall have the legal authority to bind the carrier to the reviewer's or review panel's decision.

G. The carrier's procedures for conducting a review meeting shall include the following:

1. The reviewer or review panel shall schedule and hold a review meeting within sixty (60) calendar days of the carrier's receipt of a request from a covered person for a review meeting. The covered person shall be notified in writing at least twenty (20) calendar days in advance of the review meeting date. The carrier shall not unreasonably deny a request for postponement of the review meeting made by a covered person even if the postponement causes the review meeting to occur beyond the sixty (60) calendar day requirement.

2. Notice requirements. The notice to the covered person of the review meeting date shall include:

   a. The right of the covered person to present written comments, documents, records, and other material relating to the request for benefits for the reviewer or review panel to consider when conducting the review both before and, if applicable, at the review meeting.

   b. The right of the covered person to receive, upon request, a copy of the materials that the carrier intends to present at the review meeting at least five (5) calendar days prior to the date of the review meeting. Any new material developed after the five-day deadline shall be provided by the carrier when practicable.

   c. The responsibility of the covered person to submit a copy of the materials that the covered person plans to present or have presented on his or her behalf at the review meeting to the carrier at least five (5) calendar days prior to the date of the review meeting. Any new material developed after the five-day deadline shall be provided to the carrier when practicable.

   d. The responsibility of the covered person to, within seven (7) calendar days in advance of the review meeting, inform the carrier if the covered person intends to have an attorney present to represent such person's interests. If the covered person decides to have an attorney present after the seven-day deadline, notice shall be provided to the carrier when practicable.

   e. The carrier shall use this notification to advise the covered person if it intends to have an attorney present to represent the interests of the carrier.

   f. The carrier shall use this notification to advise the covered person that it will make an audio or video recording of the review meeting unless neither the covered person nor the carrier wants the recording made. The notice shall advise that this recording will be made available to the covered person and that if there is an external review, the audio or video recording shall be included in the

material provided by the carrier to the reviewing entity unless the covered person specifically requests that it not be included.

3. Carriers shall in no way discourage a covered person from requesting a face-to-face review meeting. Whenever a covered person has requested the opportunity to appear in person, the review meeting shall be held during regular business hours at a location reasonably accessible to the covered person, including accommodation for disabilities. In cases where a face-to-face meeting is not practical for geographic reasons, a carrier shall offer the covered person the opportunity to communicate, at the carrier's expense, by telephone conference call. A carrier may also offer video conferencing or other appropriate technology.

4. In conducting the review meeting, if applicable, the reviewer or review panel shall take into consideration all comments, documents, records, and other information regarding the request for benefits submitted by the covered person without regard to whether the information was submitted or considered in reaching the first level review decision. If the appeal is pursuant to § 10-16-113(1)(c), C.R.S., regarding the applicability of a contractual exclusion, the determination shall be made on the basis of whether the contractual exclusion applies to the denied benefit.

5. Full and fair review.

   a. Before issuing a final internal adverse benefit determination based on new and/or additional evidence, the carrier shall provide the covered person, free of charge, the new and/or additional evidence considered, relied upon, or generated by the carrier in connection with the claim. Such evidence shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 12.G.6. to give the covered person a reasonable opportunity to respond prior to that date.

   b. Before issuing a final internal adverse benefit determination based on new and/or additional rationale, the carrier shall provide the covered person, free of charge, with the rationale considered, relied upon, or generated by the carrier in connection with the claim. Such rationale shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 12.G.6. to give the covered person a reasonable opportunity to respond prior to that date.

6. The reviewer or review panel shall issue a written decision, as provided in section 12.H., to the covered person within seven (7) calendar days of completing the review meeting.

7. For purposes of calculating the time periods within which a review meeting is required to be scheduled, the time period shall begin on the date of the carrier’s receipt of the request for a review meeting provided in accordance with the carrier’s procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

H. A decision issued pursuant to section 12.G. shall include:

1. The name(s), title(s), and qualifying credentials of the reviewer or the members of the review panel;

2. A statement of the reviewer's or the review panel's understanding of the covered person's request for review of an adverse determination;

3. The reviewer's or the review panel's decision in clear terms;

4. A reference to the evidence or documentation used as the basis for the decision;

5. For a decision issued involving an adverse determination:

   a. The specific reason or reasons for the adverse determination, including the specific plan provisions and medical rationale;

   b. A statement that the covered person is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant, as the term "relevant" is defined in section 11.D.2., to the covered person's benefit request;

   c. If the reviewer or review panel relied upon an internal rule, guideline, protocol, or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

   d. If the adverse determination is based on a medical necessity, experimental or investigational treatment, or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the health coverage plan to the covered person's medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

   e. If applicable, instructions for requesting:

      (1) A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 12.H.5.c.; and

      (2) The written statement of the scientific or clinical rationale for the determination, as provided in section 12.H.5.d.; and

   f. A description of the procedures for obtaining an independent external review of the adverse determination pursuant to section 5 of Colorado Insurance Regulation 4-2-21.

Section 13 Expedited Review of an Adverse Determination

A. A carrier shall establish written procedures for the expedited review of urgent care requests or grievances involving an adverse determination. A carrier shall also provide an expedited review for a request for a benefit for a covered person who has received emergency services but has not been discharged from a medical facility. The procedures shall allow a covered person to request an expedited review under this section orally or in writing. The procedures shall also allow the covered person to identify a medical facility and/or health care professional(s) to whom the carrier shall send a copy of the review decision. Pursuant to § 10-16-113.5(7), C.R.S., a covered person requesting an expedited external review may request such review concurrently with a request for an expedited internal review.

B. An expedited review shall be available to, and may be initiated by, the covered person or the medical facility and/or health care professional acting on behalf of the covered person. For purposes of this section, "covered person" includes the designated representative of a covered person.

C. Pursuant to § 10-3-1104(1)(i), C.R.S., all written requests for an expedited review shall be entered into the carrier's complaint record.

D. Expedited appeal evaluations.

1. Expedited appeals shall be evaluated by an appropriate clinical peer(s) in the same or similar specialty as would typically manage the case under review. For the purposes of this section, the clinical peer(s) shall be called "the reviewer(s)". The clinical peer(s) shall not have been involved in the initial adverse determination.

2. In conducting a review under this section, the reviewer(s) shall take into consideration all comments, documents, records, and other information regarding the request for services submitted by, or on behalf of, the covered person without regard to whether the information was submitted or considered in making the initial adverse determination.

E. Covered person's rights. A covered person does not have the right to attend or to have a representative in attendance at the expedited review, but the covered person is entitled to:

1. Submit written comments, documents, records, and other materials relating to the request for benefits for the reviewer(s) to consider when conducting the review; and

2. Receive from the carrier, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the covered person's request for benefits, as described in section 11.D.2.

F. In an expedited review, all necessary information, including the carrier's decision, shall be transmitted between the carrier and the covered person or the medical facility and/or health care professional acting on behalf of the covered person by telephone, facsimile or similar expeditious method available.

G. In an expedited review, a carrier shall make a decision and notify the covered person or the medical facility and/or health care professional acting on the covered person's behalf as expeditiously as the covered person's medical condition requires, but in no event more than seventy-two (72) hours after the carrier's receipt of the request. If the expedited review is a concurrent review and an adverse determination is made, the health care service or treatment shall continue to be covered according to the provisions of the health coverage plan until the covered person has been notified of the determination by the carrier.

H. A carrier shall provide a written confirmation of its decision concerning an expedited review within three (3) calendar days of providing notification of that decision, if the initial notification was not in writing.

I. In the case of an adverse determination, the written decision shall comply with the requirements specified in sections 11.G. and 11.H. of this regulation.

J. For purposes of calculating the time periods within which a decision is required to be made under section 13.G., the time period within which the decision is required to be made shall begin on the date of the carrier's receipt of the request in accordance with the carrier's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

K. In any case where the expedited review process does not resolve a difference of opinion between the carrier and the covered person or the medical facility and/or health care professional acting on behalf of the covered person, the covered person or the medical facility and/or health care professional acting on behalf of the covered person may request an independent external review.

L. Retrospective adverse determinations are not eligible for the expedited review process.

Section 14 Rescission and Initial Eligibility Determinations

A. The rescission of coverage and denials of coverage to an individual based on initial eligibility determinations are considered adverse determinations for the purposes of this regulation.

B. A carrier shall provide notice thirty (30) calendar days in advance of the policy rescission to each person covered by the policy.

C. An individual has the right to appeal a rescission or denial of coverage based on an initial coverage determination in accordance with sections 11 and 12 of this regulation. However, a physician or panel of health care professionals is not required to evaluate these appeals or consult with an appropriate clinical peer pursuant to § 10-16-113(4)(b)(II), C.R.S.

D. The carrier's rescission notification or denial of coverage based on an initial coverage determination do not have to be reviewed and signed by a physician.

Section 15 Severability

If any provision of this regulation or the application of it to any person or circumstance is for any reason held to be invalid, the remainder of the regulation shall not be affected.

Section 16 Enforcement

Noncompliance with this regulation may result in the imposition of any of the sanctions made available in the Colorado statutes pertaining to the business of insurance, or other laws, which include the imposition of civil penalties, issuance of cease and desist orders, and/or suspensions or revocation of license, subject to the requirements of due process.

Section 17 Effective Date

This amended regulation is effective on June 1, 2019.

Section 18 History

Originally promulgated effective July 1, 1997.
Amended effective April 1, 2000.
Amended effective April 1, 2004 to comply with ERISA claims/appeals procedures.
Amended effective October 1, 2004, to correct internal references and to provide clarification with respect to the expedited appeal.
Emergency Regulation 05-E-5 effective January 1, 2006.
Amended effective February 1, 2006.
Amended regulation effective November 1, 2010.
Amended regulation effective December 1, 2013.
Amended regulation effective June 1, 2019.

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Tracking number: 2018-00349

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Insurance

on 02/13/2019

3 CCR 702-4 Series 4-2

LIFE, ACCIDENT AND HEALTH, Series 4-2 Accident and Health (General)

The above-referenced rules were submitted to this office on 02/19/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:44:07

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Regulatory Agencies

Agency

Division of Insurance

CCR number

3 CCR 702-4 Series 4-4

Rule title

3 CCR 702-4 Series 4-4 LIFE, ACCIDENT AND HEALTH, Series 4-4 Long Term Care 1 - eff 06/01/2019

Effective date

06/01/2019

DEPARTMENT OF REGULATORY AGENCIES

Division of Insurance

3 CCR 702-4

LIFE, ACCIDENT AND HEALTH

New Regulation 4-4-5

PROMPT INVESTIGATION OF LONG-TERM CARE INSURANCE CLAIMS INVOLVING UTILIZATION REVIEW AND DENIAL OF BENEFITS AND RULES RELATED TO INTERNAL CLAIMS AND APPEALS PROCESSES

Section 1 Authority

This regulation is promulgated and adopted by the Commissioner of Insurance under the authority of §§ 10-1-109, 10-3-1110, 10-16-109, and 10-16-113(2) and (10), C.R.S.

Section 2 Scope and Purpose

The purpose of this regulation is to set forth guidelines for insurer compliance with the provisions of §§ 10-3-1104(1)(h) and 10-16-113, C.R.S., in situations involving utilization review and certain denials of long-term care insurance benefits as described herein. Among other things, § 10-3-1104(1)(h), C.R.S., requires insurers to adopt and implement reasonable standards for the prompt investigation of claims arising from long-term care policies; promptly provide a reasonable explanation of the basis in the long-term care policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement; and refrain from denying a claim without conducting a reasonable investigation based upon all available information.

This regulation is designed to provide minimum standards for handling appeals and grievances involving utilization review determinations, certain denials of benefits for treatments excluded by long-term care policies, and as otherwise required by § 10-16-113, C.R.S.

Section 3 Applicability

The provisions of this regulation shall apply to all long-term care insurance policies marketed and issued in Colorado. Where a decision concerning a claim is not based on utilization review, an insurer is not required to use the specific procedures outlined in this regulation. However, this regulation shall apply to an insurer's denial of a benefit because the treatment is excluded by the long-term care policy if the covered person presents evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply. Nothing in this regulation shall be construed to supplant any appeal or due process rights that a person may have under federal or state law.

Section 4 Definitions

A. "Activities of daily living" mean, for the purposes of this regulation, bathing, continence, dressing, eating, toileting, and transferring.

B. "Adverse determination" means, for the purposes of this regulation:

1. A determination by an insurer or its designee that a request for a pre-service or post-service benefit has been reviewed and, based upon the information provided, does not meet the insurer's requirement for medical necessity, or that the benefit is not appropriate, effective, efficient, is not provided in or at the appropriate health care setting or level of care, and is therefore denied, reduced, or terminated;

2. A denial for a benefit excluded by a long-term care policy for which the covered person is able to present evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply to the denied benefit; and/or

3. A determination that the covered person has not met the necessary benefit trigger criteria.

C. "Ambulatory review" means, for the purposes of this regulation, a utilization review of health care services performed or provided in an outpatient setting.

D. "Applicable non-English language" means, for the purposes of this regulation, with respect to an address in any Colorado county to which a notice is sent, a non-English language that ten percent (10%) or more of the population residing in the county is only literate in as determined by the Secretary of the United States Department of Health and Human Services.

E. "Benefit trigger" means, for the purposes of this regulation, a contractual provision in the covered person's long-term care insurance policy conditioning the payment of benefits on a determination of the covered person's ability to perform activities of daily living; on cognitive impairment; or, for tax-qualified long-term care policies, that the covered person is a chronically ill individual.

F. "Case management" means, for the purposes of this regulation, a coordinated set of activities conducted for individual patient management of serious, complicated, protracted, or other health conditions.

G. "Chronically ill individual" means, for the purposes of this regulation, any individual who has been certified by a licensed health care professional as:

1. Being unable to perform, without substantial assistance from another individual, at least two (2) activities of daily living for a period of at least ninety (90) days due to a loss of functional capacity; or

2. Requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.

H. “Clinical peer” means, for the purposes of this regulation, a physician or other health care professional who holds a non-restricted license in a state of the United States and in the same or similar specialty as typically manages the medical condition or treatment under review.

I. “Complaint” means, for the purposes of this regulation, a written communication primarily expressing a grievance.

J. “Covered person” shall have the same meaning as found at § 10-16-102(15), C.R.S.

K. “Date of receipt of a notice” means, for the purposes of this regulation, the date that shall be calculated to be no less than three (3) calendar days after the date the notice is postmarked by the insurer.

L. “Designated representative” means, for the purposes of this regulation:

1. A person, including the treating health care professional or a person authorized by section 4.L.2., to whom a covered person has given express written consent to represent the covered person;

2. A person authorized by law to provide substituted consent for a covered person, including but not limited to a guardian, agent under a power of attorney, a proxy, or a designee of the Colorado Department of Health Care Policy and Financing;

3. In the case of an urgent care request, a health care professional with knowledge of the covered person’s medical condition; and/or

4. A family member of the covered person or the covered person’s treating health care professional only when the covered person is unable to provide consent.

M. “Discharge planning” means, for the purposes of this regulation, the formal process for determining, prior to discharge from a facility or service, the coordination and management of the care that a covered person receives following discharge from a facility.

N. “Facility” means, for the purposes of this regulation, a facility licensed or otherwise authorized to furnish health or long-term care services.

O. “Grievance” means, for the purposes of this regulation, a circumstance regarded as a cause for protest, including the protest of an adverse determination.

P. “Health care professional” means, for the purposes of this regulation, a physician or other health care practitioner licensed, accredited, or certified to perform specified health care services consistent with state law.

Q. “Health care services” shall have the same meaning as found at § 10-16-102(33), C.R.S.

R. “Insurer’s receipt” means, for the purposes of this regulation, the receipt date as date-stamped by the insurer in a legible manner; an electronically-formatted receipt date; a facsimile transmission date; or a receipt date imprinted on the document in some type of permanent manner. The earliest receipt date on the document will be considered the insurer’s receipt date.

S. “Long-term care insurance” shall have the same meaning as found at § 10-19-103(5), C.R.S. For the purposes of this regulation, it includes the term “long-term care policy”.

T. “Medical professional” means, for the purposes of this regulation, an individual licensed pursuant to the “Colorado Medical Practice Act”, article 36 of title 12, C.R.S.

U. “Prospective review” means, for the purposes of this regulation, a utilization review conducted prior to an admission or course of treatment. Also known as a “pre-service review”.

V. “Retrospective review” means, for the purposes of this regulation, utilization review conducted after services have been provided to a covered person, but does not include the review of a claim that is limited to an evaluation of reimbursement levels, veracity of documentation, accuracy of coding, or adjudication for payment. Also known as a “post-service review”.

W. “Voluntary second level review” means, for the purposes of this regulation, a request for a review of an adverse determination from a first-level appeal which is only available to persons covered under a group long-term care policy.

X. “Urgent care request” means, for the purposes of this regulation:

1. A request for a health care service or course of treatment with respect to which the time periods for making a non-urgent care request determination that could seriously jeopardize the life or health of the covered person or the ability of the covered person to regain maximum function; or for a covered person with a physical or mental disability, creates an imminent and substantial limitation on this or her existing ability to live independently.

2. Except as provided in section 4.X.3., in determining whether a request is to be treated as an urgent care request, a person acting on behalf of the insurer shall apply the judgment of a prudent layperson who possesses an average knowledge of health and medicine.

3. Any request that a physician with knowledge of the covered person’s medical condition determines and states is an urgent care request within the meaning of section 4.X.1. shall be treated as an urgent care request.

Y. “Utilization review” means, for the purposes of this regulation, a set of formal techniques designed to monitor the use of, or evaluate the medical necessity, appropriateness, efficacy, or efficiency of, health care services or settings. Techniques include ambulatory review, prospective review, second opinion, certification, concurrent review, case management, discharge planning, and retrospective review. It also includes reviews of a covered person's medical circumstances when necessary to determine if a policy exclusion applies in a given situation.

Section 5 Compliance Requirements

A. Pursuant to § 10-3-1104(1)(h)(IV), C.R.S., an insurer that does not use a procedure for investigating claims involving utilization review consistent with this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that an insurer refrain from denying a claim without conducting a reasonable investigation based upon all available information.

B. Pursuant to § 10-3-1104(1)(h)(III), C.R.S., an insurer using standards in the review of claims involving utilization review that are not in compliance with the rules contained in this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that an insurer use reasonable standards for the prompt investigation of claims.

C. Pursuant to § 10-3-1104(1)(h)(II), C.R.S., an insurer that does not investigate claims involving utilization review within the time frames set out in this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that an insurer promptly investigate claims.

D. Pursuant to § 10-3-1104(1)(h)(XIV), C.R.S., an insurer that does not follow the procedures for explaining the basis of a utilization review decision set forth in this regulation shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that an insurer promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim.

E. Pursuant to § 10-3-1104(1)(h)(IV), C.R.S., an insurer that does not allow an appeal, consistent with the procedures set forth in this regulation, of a benefit denial for a treatment excluded by the long-term care policy when the covered person presents evidence from a medical professional that there is a reasonable medical basis that a contractual exclusion does not apply shall be deemed to be in violation of the requirement under the unfair competition and deceptive practice insurance statutes of Colorado that an insurer refrain from denying a claim without conducting a reasonable investigation based upon all available information.

E. Insurers shall avoid conflicts of interest to ensure all benefit reviews and appeals are adjudicated in a manner designed to guarantee the independence and impartiality of the persons involved in making the decision. With respect to any person involved in the review of benefit requests and/or the review of appeals, decisions regarding hiring, compensation, termination, or promotion shall not be made based upon the likelihood that the person will support the denial of benefits.

Section 6 Form and Manner of Notices

A. Insurers shall provide all relevant notices in a culturally and linguistically appropriate manner as follows:

1. In the English versions of all notices, a statement prominently displayed in any applicable non-English language clearly indicating how to access the language services provided by the insurer; and

2. Shall provide, upon request, a notice in any applicable non-English language and shall allow the covered person the option of electing to receive all subsequent notices in the requested applicable non-English language.

B. Insurers shall provide oral language services in any applicable non-English language, providing assistance with answering questions about the filing of benefit requests and appeals.

Section 7 Standard Utilization Review

A. An insurer shall maintain written procedures pursuant to this section for making utilization review decisions and for notifying covered persons of its decisions. For purposes of this section, "covered person" includes the designated representative of a covered person.

B. Prospective review determinations.

1. Time period for determination and notification.

a. Subject to section 7.B.1.b., an insurer shall make the determination and notify the covered person and the covered person’s facility and/or health care professional of the determination, whether the insurer certifies the provision of the benefit or not, within a reasonable period of time appropriate to the covered person’s medical condition, but in no event later than fifteen (15) calendar days after the insurer’s receipt of the request. Whenever the determination is an adverse determination, the insurer shall make the notification of the adverse determination in accordance with section 7.E.

b. The time period for making a determination and notifying the covered person of the determination pursuant to section 7.B.1.a. may be extended one (1) time by the insurer for up to fifteen (15) calendar days, provided the insurer:

(1) Determines that an extension is necessary due to matters beyond the insurer's control; and

(2) Notifies the covered person prior to the expiration of the initial fifteen (15) calendar day time period, of the circumstances requiring the extension of time and the date by which the insurer expects to make a determination.

c. If the extension under section 7.B.1.b. is necessary due to the failure of the covered person to submit information necessary to reach a determination on the request, the notice of extension shall:

(1) Specifically describe the required information necessary to complete the request; and

(2) Give the covered person at least forty-five (45) calendar days from the date of receipt of a notice to provide the specified information. If the deadline for submitting the specified information ends on a weekend or holiday, the deadline shall be extended to the next business day.

2. Failure to meet the insurer's filing procedures.

a. Whenever the insurer receives a prospective review request from a covered person that fails to meet the insurer's filing procedures, the insurer shall notify the covered person of this failure and provide in the notice information on the proper procedures to be followed for filing a request.

b. Required notice.

(1) The notice required under section 7.B.2.a. shall be provided as soon as possible, but in no event later than five (5) calendar days following the date of the failure.

(2) The insurer shall provide the notice in writing.

c. The provisions of section 7.B.2. shall apply only in the case of a failure that:

(1) Is a communication by a covered person that is received by a person or organizational unit of the insurer responsible for handling benefit matters; and

(2) Is a communication that refers to a specific covered person, a specific medical condition, and a specific health care service, treatment or facility and/or health care professional for which authorization is being requested.

3. For an adverse determination regarding a prospective review decision that occurs during a covered person's facility stay or course of treatment, also known as concurrent review, the health care service that is the subject of an adverse determination shall continue to be covered according to the provisions of the long-term care policy until the covered person has been notified of the determination by the insurer.

4. The requirements of section 7.B. apply to all written requests involving utilization review received by the insurer which are submitted by a covered person or a facility and/or health care professional requesting a determination of coverage for a specific health care service for the covered person.

C. Retrospective review determinations.

1. For retrospective review determinations, an insurer shall make the determination and notify the covered person and the covered person's facility and/or health care professional of the determination within a reasonable period of time, but in no event later than thirty (30) calendar days after the insurer's receipt of the benefit request. Whenever the determination is an adverse determination, the insurer shall provide notice of the adverse determination to the covered person in accordance with section 7.E.

2. Time period for determination and notification.

a. The time period for making a determination and notifying the covered person of the determination pursuant to section 7.C.1. may be extended one (1) time by the insurer for up to fifteen (15) calendar days, provided the insurer:

(1) Determines that an extension is necessary due to matters beyond the insurer's control; and

(2) Notifies the covered person prior to the expiration of the initial thirty (30) calendar day time period, of the circumstances requiring the extension of time and the date by which the insurer expects to make a determination.

b. If the extension under section 7.C.2.a. is necessary due to the failure of the covered person to submit information necessary to reach a determination on the request, the notice of extension shall:

(1) Specifically describe the required information necessary to complete the request; and

(2) Give the covered person at least forty-five (45) calendar days from the date of receipt of a notice to provide the specified information. If the deadline for submitting the specified information ends on a weekend or holiday, the deadline shall be extended to the next business day.

D. Calculation of time periods.

1. For purposes of calculating the time periods within which a determination is required to be made under sections 7.B. and 7.C., the time period shall begin on the date of the insurer's receipt of the request in accordance with the insurer's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

2. Extensions.

a. If the time period for making the determination under sections 7.B. or 7.C. is extended due to the covered person's failure to submit the information necessary to make the determination, the time period for making the determination shall be tolled from the date on which the insurer sends the notification of the extension to the covered person until the earlier of:

(1) The date on which the covered person responds to the request for additional information; or

(2) The date on which the specified information was to have been submitted.

b. If the covered person fails to submit the information before the end of the period of the extension, as specified in sections 7.B. or 7.C., the insurer may deny the authorization of the requested benefit.

E. Requirements for adverse determination notifications.

1. Except for the adverse determinations described section 7.E.2., a notification of an adverse determination under this section shall, in a manner calculated to be understood by the covered person, set forth:

a. An explanation of the specific medical basis for the adverse determination;

b. The specific reason or reasons for the adverse determination;

c. Reference to the specific policy provisions on which the determination is based;

d. A description of any additional material or information necessary for the covered person to perfect the benefit request, including an explanation of why the material or information is necessary to perfect the request;

e. If the insurer relied upon an internal rule, guideline, protocol, or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

f. If the adverse determination is based on a medical necessity or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the long-term care policy to the covered person’s medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

g. Information sufficient for the covered person to be able to identify the claim involved and a statement describing the availability, upon request, of the diagnosis code and its corresponding meaning, and the treatment code and its corresponding meaning;

h. If applicable, instructions for requesting:

(1) A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 7.E.1.e.;

(2) The written statement of the scientific or clinical rationale for the adverse determination, as provided in section 7.E.1.f.; and/or

(3) The information necessary to identify the claim, as provided in section 7.E.1.g.;

i. A description of the insurer’s review procedures and the time limits applicable to such procedures; and

j. An explanation of the right of the covered person to appeal an initial adverse determination with a description of the procedures for requesting an appeal.

(1) For individual long-term care policies, the notice shall include:

(a) An explanation of the right to a single level of internal appeal through a written appeal review or, unless it is an expedited appeal, the ability to appear in person or by telephone conference at a review meeting; and

(b) A description of the process to schedule a review meeting including the covered person’s rights pursuant to section 11.

(2) For group long-term care policies, the notice shall advise that the covered person does not have the right to be present during the first level review.

2. For denials based on a contractual exclusion, the adverse determination notice shall include the long-term care policy’s specific exclusion language and shall advise the covered person of the right to appeal the applicability of the exclusion by providing evidence from a medical professional that there is a reasonable medical basis that the contractual exclusion does not apply.

3. An insurer shall provide the notice required under this section in writing, either on paper or electronically.

4. All written adverse determinations subject to the requirements of this regulation shall be reviewed and signed by a licensed physician familiar with standards of care in Colorado.

5. The notice of the initial adverse determination shall include information concerning the covered person's ability to request an internal and external expedited review on a concurrent basis. This information may be included in the letter or other notice advising the covered person of the finding of an adverse determination, or it may be included as a separate document within the same mailing.

F. The requirements of section 7 apply to all written requests involving standard utilization review received by the insurer which are submitted by a covered person or a facility and/or health care professional requesting a determination of coverage for a specific health care service for the covered person.

Section 8 Expedited Utilization Review

A. Procedures.

1. An insurer shall establish written procedures in accordance with this section for receiving benefit requests from covered persons and for making and notifying covered persons of expedited utilization review with respect to urgent care requests. For purposes of this section, "covered person" includes the designated representative of a covered person.

2. Notification requirements.

a. As part of the procedures required under section 8.A.1., an insurer shall provide that, in the case of a failure by a covered person to follow the insurer's procedures for filing an urgent care request, the covered person shall be notified of the failure and the proper procedures to be followed for filing the request.

b. The notice required under section 8.A.2.a.:

(1) Shall be provided to the covered person as soon as possible but not later than twenty-four (24) hours after the insurer's receipt of the request; and

(2) Shall be in writing.

c. The provisions of section 8.A.2. apply only in the case of a failure that:

(1) Is a communication by a covered person that is received by a person or organizational unit of the insurer responsible for handling benefit matters; and

(2) Is a communication that refers to a specific covered person, a specific medical condition or symptom, and a specific health care service, treatment or facility and/or health care professional for which approval is being requested.

B. Urgent care requests.

1. Notification requirements for insurer determinations.

a. For an urgent care request, unless the covered person has failed to provide sufficient information for the insurer to determine whether, or to what extent, the benefits requested are covered benefits or payable under the covered person's long-term care policy, the insurer shall notify the covered person and the covered person's facility and/or health care professional of the insurer's determination with respect to the request, whether or not the determination is an adverse determination, as soon as possible, taking into account the medical condition of the covered person, but in no event later than seventy-two (72) hours after the insurer's receipt of the request.

b. If the insurer's determination is an adverse determination, the insurer shall provide notice of the adverse determination in accordance with section 8.E.

2. Notification requirements for insufficient information.

a. If the covered person fails to provide sufficient information for the insurer to make a determination, the insurer shall notify the covered person either orally or, if requested by the covered person, in writing of this failure and state what specific information is needed as soon as possible, but in no event later than twenty-four (24) hours after the insurer's receipt of the request.

b. The insurer shall provide the covered person a reasonable period of time to submit the necessary information, taking into account the circumstances, but in no event less than forty-eight (48) hours after notifying the covered person of the failure to submit sufficient information, as provided in section 8.B.2.a.

c. The insurer shall notify the covered person and the covered person's facility and/or health care professional of its determination with respect to the urgent

care request as soon as possible, but in no event more than forty-eight (48) hours after the earlier of:

(1) The insurer's receipt of the requested specified information; or

(2) The end of the period provided for the covered person to submit the requested specified information.

d. If the covered person fails to submit the information before the end of the period of the extension, as specified in section 8.B.2.b., the insurer may deny the authorization of the requested benefit.

e. If the insurer's determination is an adverse determination, the insurer shall provide notice of the adverse determination in accordance with section 8.E.

C. Concurrent urgent care review requests.

1. For concurrent urgent care review requests involving a request by the covered person to extend the course of treatment beyond the initial period of time or the number of treatments authorized, if the request is made at least twenty-four (24) hours prior to the expiration of the authorized period of time or authorized number of treatments, the insurer shall make a determination with respect to the request and notify the covered person and the covered person's facility and/or health care professional of the determination, whether it is an adverse determination or not, as soon as possible, taking into account the covered person's medical condition, but in no event more than twenty-four (24) hours after the insurer's receipt of the request.

2. If the insurer's determination is an adverse determination, the insurer shall provide notice of the adverse determination in accordance with section 8.E. The health care service that is the subject of an adverse determination shall continue to be covered according to the provisions of the long-term care policy until the covered person has been notified of the determination by the insurer.

D. For purposes of calculating the time periods within which a determination is required to be made under sections 8.B. or 8.C., the time period shall begin on the date of the insurer's receipt of the request in accordance with the insurer's procedures established for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

E. Adverse determination notification requirements.

1. A notification of an adverse determination under this section shall, in a manner calculated to be understood by the covered person, set forth:

a. An explanation of the specific medical basis for the adverse determination;

b. The specific reasons or reasons for the adverse determination;

c. Reference to the specific policy provisions on which the determination is based;

d. A description of any additional material or information necessary for the covered person to perfect the benefit request, including an explanation of why the material or information is necessary;

e. If the insurer relied upon an internal rule, guideline, protocol, or other similar criterion to make the adverse determination, either the specific rule, guideline,

protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

f. If the adverse determination is based on a medical necessity or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the long-term care policy to the covered person's medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

g. Information sufficient for the covered person to be able to identify the claim involved and a statement describing the availability, upon request, of the diagnosis code and its corresponding meaning, and the treatment code and its corresponding meaning;

h. If applicable, instructions for requesting:

(1) A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 8.E.1.e.;

(2) The written statement of the scientific or clinical rationale for the adverse determination, as provided in section 8.E.1.f.; and/or

(3) The information necessary to identify the claim, as provided in section 8.E.1.g.;

i. A description of the insurer's expedited review procedures and the time limits applicable to such procedures; and

j. An explanation of the right of the covered person to appeal an initial adverse determination with a description of the procedures for requesting an appeal.

(1) For individual long-term care policies, the notice shall include an explanation of the right to a single level of internal appeal through a written appeal review and, because it is an expedited appeal, the inability to appear in person or by telephone conference at a review meeting.

(2) For group long-term care policies, the notice shall advise that the covered person does not have the right to be present during the first level review.

2. Additional notification requirements.

a. An insurer may provide the notice required under this section orally, in writing, or electronically.

b. If notice of the adverse determination is provided orally, the insurer shall provide a written or electronic notice of the adverse determination within three (3) calendar days following the oral notification.

3. All written adverse determinations shall be reviewed and signed by a licensed physician familiar with standards of care in Colorado.

4. The notice of the initial adverse determination shall include information concerning the covered person's ability to request an internal and external expedited review on a concurrent basis. This information may be included in the letter or other notice advising the covered person of the finding of an adverse determination, or it may be included as a separate document within the same mailing.

F. The requirements of section 8 apply to all written requests involving expedited utilization review received by the insurer which are submitted by a covered person or a facility and/or health care professional requesting a determination of coverage for a specific health care service for the covered person.

Section 9 Peer-to-Peer Conversation

A. In a case involving a prospective review determination, an insurer shall give the facility and/or health care professional rendering the service an opportunity to request, on behalf of the covered person, a peer-to-peer conversation regarding an adverse determination by the reviewer making the adverse determination. Such a request may be made either orally or in writing.

B. The peer-to-peer conversation shall occur within five (5) calendar days of the insurer's receipt of the request and shall be conducted between the facility and/or health care professional rendering the health care service and the reviewer who made the adverse determination or a clinical peer designated by the reviewer if the reviewer who made the adverse determination cannot be available within five (5) calendar days.

C. If the peer-to-peer conversation does not resolve the difference of opinion, the adverse determination may be appealed by the covered person. A peer-to-peer conversation is not a prerequisite to a first level review or an expedited review of an adverse determination.

D. For the purposes of § 10-3-1104(1)(i), C.R.S., a request for a peer-to-peer conversation shall not be considered a complaint.

Section 10 First Level Review

A. General requirements.

1. An insurer shall establish written procedures for the review of an adverse determination that does not involve an urgent care request in compliance with § 10-16-113, C.R.S., and this regulation. The procedures shall specify whether a first level review request must be in writing or may be submitted orally. The procedures shall also allow the covered person to identify the facility and/or health care professionals to whom the insurer shall send a copy of the review decision.

2. A first level review shall be available to, and may be initiated by, the covered person. For purposes of this section, "covered person" includes the designated representative of a covered person.

3. Pursuant to § 10-3-1104(1)(i), C.R.S., all written requests for a first level review shall be entered into the insurer's complaint record.

4. Within 180 calendar days after the date of receipt of a notice of an adverse determination sent pursuant to sections 7 or 8 or after the date of receipt of notification of a benefit denied due to a contractual exclusion, a covered person may file a grievance with the insurer requesting a first level review of the adverse determination. In order to secure a first level review after the receipt of the notification of a benefit denied due to a contractual exclusion, the covered person must be able to provide evidence from a

medical professional that there is a reasonable medical basis that the exclusion does not apply. If the deadline for filing a request ends on a weekend or holiday, the deadline shall be extended to the next business day.

5. Full and fair review.

a. Before issuing a final internal adverse benefit determination based on new and/or additional evidence, the insurer shall provide the covered person, free of charge, the new and/or additional evidence considered, relied upon, or generated by the insurer in connection with the claim. Such evidence shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 10.E. to give the covered person a reasonable opportunity to respond prior to that date.

b. Before issuing a final internal adverse benefit determination based on new and/or additional rationale, the insurer shall provide the covered person, free of charge, with the rationale considered, relied upon, or generated by the insurer in connection with the claim. Such rationale shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 10.E. to give the covered person a reasonable opportunity to respond prior to that date.

B. Individual long-term care policies.

1. Covered persons shall be provided a choice between a written appeal review or a review meeting for their first level appeal.

2. Written appeal reviews shall comply with the requirements of section 10.C.

3. Review meetings shall comply with the requirements of section 11. The covered person's right to a fair review shall not be made conditional on the covered person's appearance at the review meeting.

4. The covered person is entitled to a single internal appeal review.

C. Conduct of first level written appeal reviews.

1. First level reviews shall be evaluated by a physician who shall consult with an appropriate clinical peer(s), unless the reviewing physician is a clinical peer. The physician and clinical peer(s) shall not have been involved in the initial adverse determination. However, a person that was previously involved with the denial may answer questions.

2. In conducting a review under this section, the reviewer(s) shall take into consideration all comments, documents, records, and other information regarding the request for services or benefits submitted by the covered person without regard to whether the information was submitted or considered in making the initial adverse determination. If the appeal is pursuant to § 10-16-113(1)(c), C.R.S., regarding the applicability of a contractual exclusion, the determination shall be made on the basis of whether the contractual exclusion applies to the denied benefit.

D. Covered person's rights for first level written appeal review for individual and group long-term care policies. A covered person is entitled to:

1. Submit written comments, documents, records, and other material relating to the request for benefits for the reviewer(s) to consider when conducting the review. For review of a benefit denial due to a contractual exclusion, the covered person shall provide evidence from a medical professional that there is a reasonable medical basis that the exclusion does not apply; and

2. Receive from the insurer, upon request and free of charge, reasonable access to, and copies of all documents, records, and other information relevant to the covered person's request for benefits. A document, record, or other information shall be considered "relevant" to a covered person's request for benefits if the document, record, or other information:

    a. Was relied upon in making the benefit determination;

    b. Was submitted, considered, or generated in the course of making the adverse determination, without regard to whether the document, record, or other information was relied upon in making the benefit determination;

    c. Demonstrates that, in making the benefit determination, the insurer or its designated representatives consistently applied required administrative procedures and safeguards with respect to the covered person as with other similarly-situated covered persons; and/or

    d. Constitutes a statement of policy or guidance with respect to the long-term care policy concerning the denied health care service for the covered person's diagnosis, without regard to whether the advice or statement was relied upon in making the benefit determination.

3. A covered person does not have the right to be present for the written appeal review.

E. Notification requirements.

1. An insurer shall notify and issue a decision in writing or electronically to the covered person within the time frames provided in section 10.E.2.

2. With respect to a request for a first level review of an adverse determination involving a prospective review request, the insurer shall notify and issue a decision within a reasonable period of time that is appropriate given the covered person's medical condition, but no later than thirty (30) calendar days after the date of the insurer's receipt of the grievance containing a request for the first level review.

3. With respect to a request for a first level review of an adverse determination involving a retrospective review request, the insurer shall notify and issue a decision within a reasonable period of time, but no later than sixty (60) calendar days after the date of the insurer's receipt of a request for the first level review.

F. For purposes of calculating the time periods within which a determination is required to be made and notice provided under section 10.E.3., the time period shall begin on the date of the insurer's receipt of the grievance requesting the review provided in accordance with the insurer's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

G. The decision issued pursuant to section 10.E. shall set forth in a manner calculated to be understood by the covered person:

1. The name, title and qualifying credentials of the physician evaluating the appeal, and the qualifying credentials of the clinical peer(s) with whom the physician consulted. For the purposes of section 10, the physician and consulting clinical peers shall be called “the reviewers”;

2. A statement of the reviewers’ understanding of the covered person’s request for a review of an adverse determination;

3. The reviewers’ decision in clear terms; and

4. A reference to the evidence or documentation used as the basis for the decision.

H. A first level review decision involving an adverse determination issued pursuant to section 10.E. shall include, in addition to the requirements of section 10.G.:

1. The specific reason or reasons for the adverse determination, including the specific policy provisions and medical rationale;

2. A statement that the covered person is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant, as the term “relevant” is defined in section 10.D.2., to the covered person’s benefit request;

3. If the reviewers relied upon an internal rule, guideline, protocol or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

4. If the adverse determination is based on a medical necessity or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the long-term care policy to the covered person’s medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

5. Information sufficient for the covered person to be able to identify the claim involved and a statement describing the availability, upon request, of the diagnosis code and its corresponding meaning, and the treatment code and its corresponding meaning;

6. If applicable, instructions for requesting:

   a. A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 10.H.3.;

   b. The written statement of the scientific or clinical rationale for the determination, as provided in section 10.H.4.; and/or

   c. The information necessary to identify the claim, as provided in section 10.H.5.; and

7. A description of the procedures for obtaining an independent external review of the adverse determination pursuant to section 5 of Colorado Insurance Regulation 4-2-21.

8. For group long-term care policies, a description of the process to obtain a voluntary second level review including:

   a. The written procedures governing the voluntary second level review, including the required time frames for the review;

   b. The right of the covered person to:

      (1) Request the opportunity to appear in person before a health care professional (reviewer) or, if offered by the insurer, a review panel of health care professionals, who have appropriate expertise, who were not previously involved in the appeal, and who do not have a direct financial interest in the outcome of the review;

      (2) Receive, upon request, a copy of the materials that the insurer intends to present at the review at least five (5) calendar days prior to the date of the review meeting. Any new material developed after the five-day deadline shall be provided by the insurer when practicable;

      (3) Present written comments, documents, records and other material relating to the request for benefits for the reviewer or review panel to consider when conducting the review both before and, if applicable, at the review meeting;

         (a) A copy of the materials the covered person plans to present or have presented on his or her behalf at the review meeting should be provided to the insurer at least five (5) calendar days prior to the date of the review meeting.

         (b) Any new material developed after the five-day deadline shall be provided to the insurer when practicable;

      (4) Present the covered person's case to the reviewer or review panel;

      (5) If applicable, ask questions of the reviewer or review panel; and

      (6) Be assisted or represented by an individual(s) of the covered person's choice, including counsel, advocates, and health care professionals;

   c. A statement that the insurer will provide to the covered person, upon request, sufficient information relating to the voluntary second level review to enable the covered person to make an informed judgment about whether to submit the adverse determination to a voluntary second level review, including a statement that the decision of the covered person as to whether or not to submit the adverse determination to a voluntary second level review will have no effect on the covered person's rights to any other benefits under the policy, the process for selecting the decision maker, and the impartiality of the decision maker.

   d. A description of the procedures for obtaining an independent external review of the adverse determination pursuant to section 5 of Colorado Insurance Regulation 4-2-21 if the covered person chooses not to request a voluntary second level review of the first level review decision involving an adverse determination.

Section 11 General Requirements for First Level and Voluntary Second Level Review Meetings

A. An insurer shall establish procedures for a review process in which the covered person has the right to appear in person or by telephone conference at the review meeting before a health care professional (reviewer) or, if offered by the insurer, a review panel of health care professionals, selected by the insurer. The procedures shall allow the covered person to identify the facility and/or health care professional(s) to whom the insurer shall send a copy of the review decision. The purpose of the review meeting process is to give the covered person the opportunity to explain his or her grievance and to provide any relevant evidence in support of his or her claim for benefits.

B. For purposes of this section, "covered person" includes the designated representative of a covered person.

C. A complaint record entry shall be made for all reviews meeting requests, pursuant to § 10-3-1104(1)(i), C.R.S.

D. Covered person's review request filing requirements.

1. For individual long-term care policies, the requirements of section 10.A.4. apply.

2. For group long-term care policies, within sixty (60) calendar days after the date of receipt of a notice of a first level review adverse determination, the covered person may file a request with the insurer requesting a voluntary second level review of the adverse determination. If the deadline for filing a request ends on a weekend or holiday, the deadline shall be extended to the next business day.

E. The covered person's right to a fair review shall not be made conditional on the covered person's appearance at the review meeting.

F. Insurer's requirements.

1. The adverse determination or, with respect to a voluntary second level review of a first level review decision, the denial shall be reviewed by a health care professional (reviewer) or, if offered by the insurer, a review panel of health care professionals, who have appropriate expertise in relation to the case presented by the covered person.

2. The reviewer or each review panel member, shall meet the following criteria:

a. Was not previously involved in the appeal;

b. Did not have a direct financial interest in the appeal or outcome of the review; and

c. Are not a subordinate of any person previously involved in the appeal.

3. The reviewer or the review panel shall have the legal authority to bind the insurer to the reviewer's or review panel's decision.

G. The insurer's procedures for conducting a review meeting shall include the following:

1. The reviewer or review panel shall schedule and hold a review meeting within sixty (60) calendar days of the insurer's receipt of a request from a covered person for a review meeting. The covered person shall be notified in writing at least twenty (20) calendar days in advance of the review meeting date. The insurer shall not unreasonably deny a request for postponement of the review meeting made by a covered person even if the

postponement causes the review meeting to occur beyond the sixty (60) calendar day requirement.

2. Notice requirements. The notice to the covered person of the review meeting date shall include:

   a. The right of the covered person to present written comments, documents, records, and other material relating to the request for benefits for the reviewer or review panel to consider when conducting the review both before and, if applicable, at the review meeting.

   b. The right of the covered person to receive, upon request, a copy of the materials that the insurer intends to present at the review meeting at least five (5) calendar days prior to the date of the review meeting. Any new material developed after the five-day deadline shall be provided by the insurer when practicable.

   c. The responsibility of the covered person to submit a copy of the materials that the covered person plans to present or have presented on his or her behalf at the review meeting to the insurer at least five (5) calendar days prior to the date of the review meeting. Any new material developed after the five-day deadline shall be provided to the insurer when practicable.

   d. The responsibility of the covered person to, within seven (7) calendar days in advance of the review meeting, inform the insurer if the covered person intends to have an attorney present to represent such person’s interests. If the covered person decides to have an attorney present after the seven-day deadline, notice shall be provided to the insurer when practicable.

   e. The insurer shall use this notification to advise the covered person if it intends to have an attorney present to represent the interests of the insurer.

   f. The insurer shall use this notification to advise the covered person that it will make an audio or video recording of the review meeting unless neither the covered person nor the insurer wants the recording made. The notice shall advise that this recording will be made available to the covered person and that if there is an external review, the audio or video recording shall be included in the material provided by the insurer to the reviewing entity unless the covered person specifically requests that it not be included.

3. Insurers shall in no way discourage a covered person from requesting a face-to-face review meeting. Whenever a covered person has requested the opportunity to appear in person, the review meeting shall be held during regular business hours at a location reasonably accessible to the covered person, including accommodation for disabilities. In cases where a face-to-face meeting is not practical for geographic reasons, an insurer shall offer the covered person the opportunity to communicate, at the insurer's expense, by telephone conference call. An insurer may also offer video conferencing or other appropriate technology.

4. In conducting the review meeting, if applicable, the reviewer or review panel shall take into consideration all comments, documents, records, and other information regarding the request for benefits submitted by the covered person without regard to whether the information was submitted or considered in reaching the first level review decision. If the appeal is pursuant to § 10-16-113(1)(c), C.R.S., regarding the applicability of a contractual exclusion, the determination shall be made on the basis of whether the contractual exclusion applies to the denied benefit.

5. Full and fair review.

   a. Before issuing a final internal adverse benefit determination based on new and/or additional evidence, the insurer shall provide the covered person, free of charge, the new and/or additional evidence considered, relied upon, or generated by the insurer in connection with the claim. Such evidence shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 11.G.6. to give the covered person a reasonable opportunity to respond prior to that date.

   b. Before issuing a final internal adverse benefit determination based on new and/or additional rationale, the insurer shall provide the covered person, free of charge, with the rationale considered, relied upon, or generated by the insurer in connection with the claim. Such rationale shall be provided as soon as possible and sufficiently in advance of the date on which the notice of the final internal adverse benefit determination is required to be provided pursuant to section 11.G.6. to give the covered person a reasonable opportunity to respond prior to that date.

6. The reviewer or review panel shall issue a written decision, as provided in section 11.H., to the covered person within seven (7) calendar days of completing the review meeting.

7. For purposes of calculating the time periods within which a review meeting is required to be scheduled, the time period shall begin on the date of the insurer's receipt of the request for a review meeting provided in accordance with the insurer's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

H. A decision issued pursuant to section 11.G. shall include:

1. The name(s), title(s), and qualifying credentials of the reviewer or the members of the review panel;

2. A statement of the reviewer's or the review panel's understanding of the covered person's request for review of an adverse determination;

3. The reviewer's or the review panel's decision in clear terms;

4. A reference to the evidence or documentation used as the basis for the decision;

5. For a decision issued involving an adverse determination:

   a. The specific reason or reasons for the adverse determination, including the specific policy provisions and medical rationale;

   b. A statement that the covered person is entitled to receive, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant, as the term "relevant" is defined in section 10.D.2., to the covered person's benefit request;

   c. If the reviewer or review panel relied upon an internal rule, guideline, protocol, or other similar criterion to make the adverse determination, either the specific rule, guideline, protocol, or other similar criterion or a statement that a specific rule, guideline, protocol, or other similar criterion was relied upon to make the adverse

determination and that a copy of the rule, guideline, protocol, or other similar criterion will be provided free of charge to the covered person upon request;

d. If the adverse determination is based on a medical necessity or similar exclusion or limitation, either an explanation of the scientific or clinical judgment for making the determination, applying the terms of the long-term care policy to the covered person's medical circumstances or a statement that an explanation will be provided to the covered person free of charge upon request;

e. If applicable, instructions for requesting:

(1) A copy of the rule, guideline, protocol, or other similar criterion relied upon in making the adverse determination, as provided in section 11.H.5.c.; and

(2) The written statement of the scientific or clinical rationale for the determination, as provided in section 11.H.5.d.; and

f. A description of the procedures for obtaining an independent external review of the adverse determination pursuant to section 5 of Colorado Insurance Regulation 4-2-21.

Section 12 Expedited Review of an Adverse Determination

A. An insurer shall establish written procedures for the expedited review of urgent care requests for grievances involving an adverse determination. The procedures shall allow a covered person to request an expedited review under this section orally or in writing. The procedures shall also allow the covered person to identify a facility and/or health care professional(s) to whom the insurer shall send a copy of the review decision. Pursuant to § 10-16-113.5(7), C.R.S., a covered person requesting an expedited external review may request such review concurrently with a request for an expedited internal review.

B. An expedited review shall be available to, and may be initiated by, the covered person or the facility and/or health care professional acting on behalf of the covered person. For purposes of this section, "covered person" includes the designated representative of a covered person.

C. Pursuant to § 10-3-1104(1)(i), C.R.S., all written requests for an expedited review shall be entered into the insurer's complaint record.

D. Expedited appeal evaluations.

1. Expedited appeals shall be evaluated by an appropriate clinical peer(s) in the same or similar specialty as would typically manage the case under review. For the purposes of this section, the clinical peer(s) shall be called "the reviewer(s)". The clinical peer(s) shall not have been involved in the initial adverse determination.

2. In conducting a review under this section, the reviewer(s) shall take into consideration all comments, documents, records, and other information regarding the request for services submitted by, or on behalf of, the covered person without regard to whether the information was submitted or considered in making the initial adverse determination.

E. Covered person's rights. A covered person does not have the right to attend or to have a representative in attendance at the expedited review, but the covered person is entitled to:

1. Submit written comments, documents, records, and other materials relating to the request for benefits for the reviewer(s) to consider when conducting the review; and

2. Receive from the insurer, upon request and free of charge, reasonable access to, and copies of, all documents, records, and other information relevant to the covered person's request for benefits, as described in section 10.D.2.

F. In an expedited review, all necessary information, including the insurer's decision, shall be transmitted between the insurer and the covered person or the facility and/or health care professional acting on behalf of the covered person by telephone, facsimile or similar expeditious method available.

G. In an expedited review, an insurer shall make a decision and notify the covered person or the facility and/or health care professional acting on the covered person's behalf as expeditiously as the covered person's medical condition requires, but in no event more than seventy-two (72) hours after the insurer's receipt of the request. If the expedited review is a concurrent review and an adverse determination is made, the health care service shall continue to be covered according to the provisions of the long-term care policy until the covered person has been notified of the determination by the insurer.

H. An insurer shall provide a written confirmation of its decision concerning an expedited review within three (3) calendar days of providing notification of that decision, if the initial notification was not in writing.

I. In the case of an adverse determination, the written decision shall comply with the requirements specified in sections 10.G. and 10.H. of this regulation.

J. For purposes of calculating the time periods within which a decision is required to be made under section 12.G., the time period within which the decision is required to be made shall begin on the date of the insurer's receipt of the request in accordance with the insurer's procedures for filing a request without regard to whether all of the information necessary to make the determination accompanies the request.

K. In any case where the expedited review process does not resolve a difference of opinion between the insurer and the covered person or the facility and/or health care professional acting on behalf of the covered person, the covered person or the facility and/or health care professional acting on behalf of the covered person may request an independent external review.

L. Retrospective adverse determinations are not eligible for the expedited review process.

Section 13 Severability

If any provision of this regulation or the application of it to any person or circumstance is for any reason held to be invalid, the remainder of the regulation shall not be affected.

Section 14 Enforcement

Noncompliance with this regulation may result in the imposition of any of the sanctions made available in the Colorado statutes pertaining to the business of insurance, or other laws, which include the imposition of civil penalties, issuance of cease and desist orders, and/or suspensions or revocation of license, subject to the requirements of due process.

Section 15 Effective Date

This regulation is effective on June 1, 2019.

Section 16 History

New regulation effective June 1, 2019.

PHILIP J. WEISER
Attorney General

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Solicitor General

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Office of the Attorney General

Tracking number: 2018-00352

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Insurance

on 02/13/2019

3 CCR 702-4 Series 4-4

LIFE, ACCIDENT AND HEALTH, Series 4-4 Long Term Care

The above-referenced rules were submitted to this office on 02/19/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:44:21

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Public Health and Environment

Agency

Hazardous Materials and Waste Management Division

CCR number

6 CCR 1007-2

Rule title

6 CCR 1007-2 SOLID WASTE REGULATIONS 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission/Hazardous Materials and Waste Management Division

6 CCR 1007-2

PART 1 REGULATIONS PERTAINING TO SOLID WASTE SITES AND FACILITIES

Amendment of Section 1.7.5 Waste Grease Annual Fees

(Adopted by the Solid and Hazardous Waste Commission on February 19, 2019)

1) Revise paragraph (B) of Section 1.7.5 to read as follows:

Section 1

Administrative Information

1.7.5 Waste Grease Transporters, Facilities, and Personal Users of Waste Grease Annual Fees

(A) **Authorization**: The Department is authorized per Section 30-20-123(9)(a.5), C.R.S. as amended, to collect an annual registration fee for Waste Grease Transporters, Facilities and Personal Users of Waste Grease.

(B) **Applicability**: Beginning July 1, 2019 all "Waste Grease Transporters", "Waste Grease Facilities" and "Personal Users of Waste Grease Other than For Use as Biofuel", as defined in Section 1.2 of these regulations are subject to the following annual fees as noted below:

1. Waste Grease Transporter:

    a. $280 per vehicle per year; and

    b. $25 per set of five (5) temporary decals.

2. Waste Grease Facility: $700 per year

3. Personal Users of Waste Grease Other than For Use as Biofuel: $96 per year.

(C) *******

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission

Hazardous Materials and Waste Management Division

6 CCR 1007-2

STATEMENT OF BASIS AND PURPOSE
AND SPECIFIC STATUTORY AUTHORITY FOR

Part 1 – Regulations Pertaining to Solid Waste Sites and Facilities (6 CCR 1007-2)
Amendment of Waste Grease Regulations – Modification of waste grease transporter and facility annual fees requirements

(Adopted by the Solid and Hazardous Waste Commission on February 19, 2019)

Basis and Purpose

I. Statutory Authority

These amendments to 6 CCR 1007-2, Part 1 are made pursuant to the authority granted to the Solid and Hazardous Waste Commission in § 30-20-123, C.R.S.

II. Purpose of revised regulations

The Waste Grease Fund and registration fees were created in § 30-20-123, C.R.S. to provide funding to cover the Department's cost to implement the waste grease regulatory requirements. The Department has accrued a balance each year that is greater than the program administrative costs and needs to lower the annual registration fees for waste grease transporters and facilities.

III. Discussion of Regulatory Proposal

Annual Waste Grease Facility and Transporter Fees

The current fees charged to waste grease transporters and facilities pursuant § 30-20-123, C.R.S. and Section 1.7.5 of the solid waste regulations were estimated in 2012 as an estimate of Department cost to implement the regulatory requirements for Section 18, Waste Grease Transporters, Facilities, and Personal Users of Waste Grease. The Department has since found that the fees paid by waste grease registrants exceeds the cost to implement the program. The purpose of this change to the regulation is to lower the annual waste grease transporter and facility fees in Section 1.7.5 of the solid waste regulations to be in line with the cost to implement the program.

Section 1.7.5 will be changed to reflect a drop in annual registration fees for waste grease transporters from $570 per vehicle annually to $280 per vehicle annually. The annual registration fees for waste grease facilities will drop from $1,140 to $700

annually.

Issues Encountered During the Stakeholder Process

No issues were encountered during the stakeholder process.

Description of Local Government Involvement in the Stakeholder Process

Executive Order D 2011-005 (EO5), “Establishing a Policy to Enhance the Relationship between State and Local Government” requires state rulemaking agencies to consult with and engage local governments prior to the promulgation of any rules containing mandates. The Department completed an EO5 – Internal Communication Form – Internal Conception Phase which was transmitted to local governments. The revised recycling regulations will have little effect on local governments.

Cost/Benefit Analysis

A cost benefit analysis will be performed upon request.

PHILIP J. WEISER
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Office of the Attorney General

Tracking number: 2019-00010

Opinion of the Attorney General rendered in connection with the rules adopted by the

Hazardous Materials and Waste Management Division

on 02/19/2019

6 CCR 1007-2

SOLID WASTE REGULATIONS

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:55:03

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Public Health and Environment

Agency

Hazardous Materials and Waste Management Division

CCR number

6 CCR 1007-3

Rule title

6 CCR 1007-3 HAZARDOUS WASTE 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission/Hazardous Materials and Waste Management Division

6 CCR 1007-3

HAZARDOUS WASTE

User Fees for the Electronic Hazardous Waste Manifest System and Amendments to Manifest Regulations.

(Adopted by the Solid and Hazardous Waste Commission on February 19, 2019)

1) Revise the Table of Contents for Part 260 by adding listings for Sections 260.4 and 260.5 to read as follows:

PART 260 HAZARDOUS WASTE MANAGEMENT SYSTEM: GENERAL

Subpart A General

Sec.

****

2) Revise Part 260 by adding Section 260.4 to read as follows:

§ 260.4 Manifest copy submission requirements for certain interstate waste shipments.

(a) In any case in which the state in which waste is generated, or the state in which waste will be transported to a designated facility, requires that the waste be regulated as a hazardous waste or otherwise be tracked through a hazardous waste manifest, the designated facility that receives the waste shall, regardless of the state in which the facility is located:

(1) Complete the facility portion of the applicable manifest;

(2) Sign and date the facility certification;

(3) Submit to the e-Manifest system a final copy of the manifest for data processing purposes; and

(4) Pay the appropriate per manifest fee to EPA for each manifest submitted to the e-Manifest system, subject to the fee determination methodology, payment methods, dispute procedures, sanctions, and other fee requirements specified in subpart FF of 40 CFR part 264. 40 CFR part 264 is incorporated by reference to include those versions in effect as of the date this regulation was adopted, and does not include later amendments to the incorporated material. Materials incorporated by reference are available for public inspection during normal business hours from the Hazardous Materials and Waste Management Division, 4300 Cherry Creek Drive South, Denver, CO 80246. Copies may also be found at the Environmental Protection Agency through the Government Printing Office at https://www.govinfo.gov/app/collection/cfr/

3) Revise Part 260 by adding Section 260.5 to read as follows:

§ 260.5 Applicability of electronic manifest system and user fee requirements to facilities receiving state-only regulated waste shipments.

(a) For purposes of this section, “state-only regulated waste” means:

(1) A non-RCRA waste that a state regulates more broadly under its state regulatory program, or

(2) A RCRA hazardous waste that is federally exempt from manifest requirements, but not exempt from manifest requirements under state law.

(b) In any case in which a state requires a RCRA manifest to be used under state law to track the shipment and transportation of a state-only regulated waste to a receiving facility, the facility receiving such a waste shipment for management shall:

(1) Comply with the provisions of §§ 264.71 (use of the manifest) and 264.72 (manifest discrepancies) of this chapter; and

(2) Pay the appropriate per manifest fee to EPA for each manifest submitted to the e-Manifest system, subject to the fee determination methodology, payment methods, dispute procedures, sanctions, and other fee requirements specified in subpart FF of 40 CFR part 264.

4) Revise the Table of Contents for Part 262 by removing and reserving the listing for the Appendix to Part 262 as follows:

PART 262 STANDARDS APPLICABLE TO GENERATORS OF HAZARDOUS WASTE

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APPENDIX TO PART 262 - RESERVED

5) Revise paragraphs (a)(1) and (a)(2) of Section 262.20 to read as follows:

Subpart B Manifest Requirements Applicable to Small and Large Quantity Generators

§ 262.20 General requirements.

(a)(1) A generator that transports, or offers for transport a hazardous waste for offsite treatment, storage, or disposal, or a treatment, storage, or disposal facility that offers for transport a rejected hazardous

waste load, must prepare a Manifest (OMB Control number 2050-0039) on EPA form 8700-22 and, if necessary, EPA form 8700-22A.

(2) The revised manifest form and procedures in §§ 260.10, 261.7, 262.20, 262.21, 262.27, 262.32, 262.34, 262.54, and 262.60, shall not apply until September 5, 2006. The manifest form and procedures contained in §§ 260.10, 261.7, 262.20, 262.21, 262.32, 262.34, 262.54, and 262.60, of these regulations at the time of the May 2006 rulemaking hearing shall be applicable until September 5, 2006.

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6) Revise paragraphs (f)(5), (f)(6) and (f)(7) of Section 262.21 and add paragraph (f)(8) to read as follows:

§ 262.21 Manifest tracking numbers, manifest printing, and obtaining manifests.

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(f) Paper manifests and continuation sheets must be printed according to the following specifications:

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(5) The manifest and continuation sheet must be printed as five-copy forms. Copy-to-copy registration must be exact within 1/32nd of an inch. Handwritten and typed impressions on the form must be legible on all five copies. Copies must be bound together by one or more common stubs that reasonably ensure that they will not become detached inadvertently during normal use.

(6) Each copy of the manifest and continuation sheet must indicate how the copy must be distributed, as follows:

(i) Page 1 (top copy): “Designated facility to EPA’s e-Manifest system”.

(ii) Page 2: “Designated facility to generator”.

(iii) Page 3: “Designated facility copy”.

(iv) Page 4: “Transporter copy”; and

(v) Page 5 (bottom copy): “Generator’s initial copy”.

(7) The instructions for the manifest form (EPA Form 8700-22) and the manifest continuation sheet (EPA Form 8700-22A) shall be printed in accordance with the content that is currently approved under OMB Control Number 2050-0039 and published to the e-Manifest program's website. The instructions must appear legibly on the back of the copies of the manifest and continuation sheet as provided in this paragraph (f). The instructions must not be visible through the front of the copies when photocopied or faxed.

(i) Manifest Form 8700-22.

(A) The “Instructions for Generators” on Copy 5;

(B) The “Instructions for International Shipment Block” and “Instructions for Transporters" on Copy 4; and

(C) The “Instructions for Treatment, Storage, and Disposal Facilities” on Copy 3.

(ii) Manifest Form 8700-22A.

(A) The “Instructions for Generators” on Copy 5;

(B) The “Instructions for Transporters” on Copy 4; and

(C) The “Instructions for Treatment, Storage, and Disposal Facilities” on Copy 3.

(8) The designated facility copy of each manifest and continuation sheet must include in the bottom margin the following warning in prominent font: “If you received this manifest, you have responsibilities under the e-Manifest Act. See instructions on reverse side.”

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7) Revise paragraphs (c) and (e) of Section 262.24; remove and reserve paragraph (g); and add paragraph (h) to read as follows:

§ 262.24 Use of the electronic manifest.

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(c) **Restriction on use of electronic manifests**. A generator may use an electronic manifest for the tracking of hazardous waste shipments involving any RCRA hazardous waste only if it is known at the time the manifest is originated that all waste handlers named on the manifest participate in the use of the electronic manifest, except that:

(1) A generator may sign by hand and retain a paper copy of the manifest signed by hand by the initial transporter, in lieu of executing the generator copy electronically, thereby enabling the transporter and subsequent waste handlers to execute the remainder of the manifest copies electronically.

(2) [Reserved]

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(e) **Special procedures when electronic manifest is unavailable**. If a generator has prepared an electronic manifest for a hazardous waste shipment, but the national electronic manifest system becomes unavailable for any reason prior to the time that the initial transporter has signed electronically to acknowledge the receipt of the hazardous waste from the generator, then the generator must obtain and complete a paper manifest and if necessary, a continuation sheet (EPA Forms 8700-22 and 8700-22A) in accordance with the manifest instructions, and use these paper forms from this point forward in accordance with the requirements of § 262.23.

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(g) **Reserved**.

(h) Post-receipt manifest data corrections. After facilities have certified to the receipt of hazardous wastes by signing Item 20 of the manifest, any post-receipt data corrections may be submitted at any time by any interested person (e.g., waste handler) named on the manifest. Generators may participate electronically in the post-receipt data corrections process by following the process described in §264.71(l) of these regulations, which applies to corrections made to either paper or electronic manifest records.

8) Revise the Appendix to Part 262 by removing the Uniform Hazardous Waste Manifest and Instructions in their entirety and reserving the Appendix to Part 262 to read as follows:

Appendix to Part 262 -- RESERVED

9) Revise Section 263.20 by removing and reserving paragraph (a)(8) and adding paragraph (a)(9) to read as follows:

§ 263.20 The manifest system.

(a)(1) **Manifest requirements**. A transporter may not accept hazardous waste from a generator unless the transporter is also provided with a manifest signed in accordance with the provisions of § 262.23.

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(8) **Reserved**.

(9) **Post-receipt manifest data corrections**. After facilities have certified to the receipt of hazardous wastes by signing Item 20 of the manifest, any post-receipt data corrections may be submitted at any time by any interested person (e.g., waste handler) named on the manifest. Transporters may participate electronically in the post-receipt data corrections process by following the process described in §264.71(l) of these regulations, which applies to corrections made to either paper or electronic manifest records.

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10) Revise Section 263.21 to read as follows:

§ 263.21 Compliance with the manifest.

(a) Except as provided in paragraph (b) of this section, the transporter must deliver the entire quantity of hazardous waste which he/she has accepted from a generator or a transporter to:

(1) The designated facility listed on the manifest; or

(2) The alternate designated facility, if the hazardous waste cannot be delivered to the designated facility because an emergency prevents delivery; or

(3) The next designated transporter; or

(4) The place outside the United States designated by the generator.

(b)(1) **Emergency condition**. If the hazardous waste cannot be delivered in accordance with paragraph (a)(1), (2), or (4) of this section because of an emergency condition other than rejection of the waste by the designated facility or alternate designated facility, then the transporter must contact the generator for further directions and must revise the manifest according to the generator's instructions.

(2) **Transporters without agency authority**. If the hazardous waste is not delivered to the next designated transporter in accordance with paragraph (a)(3) of this section, and the current transporter is without contractual authorization from the generator to act as the generator's agent with respect to transporter additions or substitutions, then the current transporter must contact the generator for further instructions prior to making any revisions to the transporter designations on the manifest. The

current transporter may thereafter make such revisions if:

(i) The hazardous waste is not delivered in accordance with paragraph (a)(3) of this section because of an emergency condition; or

(ii) The current transporter proposes to change the transporter(s) designated on the manifest by the generator, or to add a new transporter during transportation, to respond to an emergency, or for purposes of transportation efficiency, convenience, or safety; and

(iii) The generator authorizes the revision.

(3) **Transporters with agency authority**. If the hazardous waste is not delivered to the next designated transporter in accordance with paragraph (a)(3) of this section, and the current transporter has authorization from the generator to act as the generator's agent, then the current transporter may change the transporter(s) designated on the manifest, or add a new transporter, during transportation without the generator's prior, explicit approval, provided that:

(i) The current transporter is authorized by a contractual provision that provides explicit agency authority for the transporter to make such transporter changes on behalf of the generator;

(ii) The transporter enters in Item 14 of each manifest for which such a change is made, the following statement of its agency authority: “Contract retained by generator confers agency authority on initial transporter to add or substitute additional transporters on generator's behalf;” and

(iii) The change in designated transporters is necessary to respond to an emergency, or for purposes of transportation efficiency, convenience, or safety.

(4) **Generator liability**. The grant by a generator of authority to a transporter to act as the agent of the generator with respect to changes to transporter designations under paragraph (b)(3) of this section does not affect the generator's liability or responsibility for complying with any applicable requirement under this chapter, or grant any additional authority to the transporter to act on behalf of the generator.

(c) If hazardous waste is rejected by the designated facility while the transporter is on the facility's premises, then the transporter must obtain the following:

(1) For a partial load rejection or for regulated quantities of container residues, a copy of the original manifest that includes the facility's date and signature, and the Manifest Tracking Number of the new manifest that will accompany the shipment, and a description of the partial rejection or container residue in the discrepancy block of the original manifest. The transporter must retain a copy of this manifest in accordance with § 263.22 of these regulations, and give the remaining copies of the original manifest to the rejecting designated facility. If the transporter is forwarding the rejected part of the shipment or a regulated container residue to an alternate facility or returning it to the generator, the transporter must obtain a new manifest to accompany the shipment, and the new manifest must include all of the information required in § 264.72(e)(1) through (6) or (f)(1) through (6) of these regulations or § 265.72(e)(1) through (6) or (f)(1) through (6) of these regulations.

(2) For a full load rejection that will be taken back by the transporter, a copy of the original manifest that includes the rejecting facility's signature and date attesting to the rejection, the description of the rejection in the discrepancy block of the manifest, and the name, address, phone number, and Identification Number for the alternate facility or generator to whom the shipment must be delivered. The transporter must retain a copy of the manifest in accordance with § 263.22 of these regulations, and give a copy of the manifest containing this information to the rejecting designated facility. If the original manifest is not used, then the transporter must obtain a new manifest for the shipment and comply with § 264.72(e)(1) through (6) of these regulations or § 265.72(e)(1) through (6) of these regulations.

11) Revise paragraphs (a)(2) and (j) of Section 264.71, and add paragraph (l) to read as follows:

§ 264.71 Use of manifest system.

(a)(1) If a facility receives hazardous waste accompanied by a manifest, the owner, operator or his/her agent must sign and date the manifest as indicated in paragraph (a)(2) of this section to certify that the hazardous waste covered by the manifest was received, that the hazardous waste was received except as noted in the discrepancy space of the manifest, or that the hazardous waste was rejected as noted in the manifest discrepancy space.

(2) If the facility receives a hazardous waste shipment accompanied by a manifest, the owner, operator or his/her agent must:

(i) Sign and date each copy of the manifest;

(ii) Note any discrepancies (as defined in § 264.72(a)) on each copy of the manifest;

(iii) Immediately give the transporter at least one copy of the manifest;

(iv) Within 30 days of delivery, send a copy (Page 2) of the manifest to the generator;

(v) Paper manifest submission requirements are:

(A) **Options for compliance on June 30, 2018**. Beginning on June 30, 2018, send the top copy (Page 1) of any paper manifest and any paper continuation sheet to the e-Manifest system for purposes of data entry and processing, or in lieu of submitting the paper copy to EPA, the owner or operator may transmit to the EPA system an image file of Page 1 of the manifest and any continuation sheet, or both a data file and image file corresponding to Page 1 of the manifest and any continuation sheet, within 30 days of the date of delivery. Submissions of copies to the e-Manifest system shall be made at the mailing address or electronic mail/submission address specified at the e-Manifest program website's directory of services. Beginning on June 30, 2021, EPA will not accept mailed paper manifests from facilities for processing in e-Manifest.

(B) **Options for compliance on June 30, 2021**. Beginning on June 30, 2021, the requirement to submit the top copy (Page 1) of the paper manifest and any paper continuation sheet to the e-Manifest system for purposes of data entry and processing may be met by the owner or operator only by transmitting to the EPA system an image file of Page 1 of the manifest and any continuation sheet, or by transmitting to the EPA system both a data file and the image file corresponding to Page 1 of the manifest and any continuation sheet, within 30 days of the date of delivery. Submissions of copies to the e-Manifest system shall be made to the electronic mail/submission address specified at the e-Manifest program website's directory of services; and

(vi) Retain at the facility a copy of each manifest for at least three years from the date of delivery.

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(j) **Imposition of user fee for electronic manifest use**.

(1) As prescribed in 40 CFR § 264.1311, and determined in 40 CFR § 264.1312, an owner or operator who is a user of the national electronic manifest system shall be assessed a user fee by EPA for the submission and processing of each electronic and paper manifest. EPA shall update the schedule of user fees and publish them to the user community, as provided in 40 CFR § 264.1313. 40 CFR part 264 is incorporated by reference to include those versions in effect as of the date this regulation was adopted, and does not include later amendments to the incorporated material. Materials incorporated by reference are available for public inspection during normal business hours from the Hazardous Materials and Waste Management Division, 4300 Cherry Creek Drive South, Denver, CO 80246. Copies may also be found at the Environmental Protection Agency through the Government Printing Office at https://www.govinfo.gov/app/collection/cfr/

(2) An owner or operator subject to user fees under this section shall make user fee payments in accordance with the requirements of 40 CFR § 264.1314, subject to the informal fee dispute resolution process of 40 CFR § 264.1316, and subject to the sanctions for delinquent payments under 40 CFR § 264.1315.

(k) Electronic manifest signatures. Electronic manifest signatures shall meet the criteria described in 40 CFR § 262.25.

(l) **Post-receipt manifest data corrections**. After facilities have certified to the receipt of hazardous wastes by signing Item 20 of the manifest, any post-receipt data corrections may be submitted at any time by any interested person (e.g., waste handler) shown on the manifest.

(1) Interested persons must make all corrections to manifest data by electronic submission, either by directly entering corrected data to the web based service provided in e-Manifest for such corrections, or by an upload of a data file containing data corrections relating to one or more previously submitted manifests.

(2) Each correction submission must include the following information:

(i) The Manifest Tracking Number and date of receipt by the facility of the original manifest(s) for which data are being corrected;

(ii) The item number(s) of the original manifest that is the subject of the submitted correction(s); and

(iii) For each item number with corrected data, the data previously entered and the corresponding data as corrected by the correction submission.

(3) Each correction submission shall include a statement that the person submitting the corrections certifies that to the best of his/her knowledge or belief, the corrections that are included in the submission will cause the information reported about the previously received hazardous wastes to be true, accurate, and complete:

(i) The certification statement must be executed with a valid electronic signature; and

(ii) A batch upload of data corrections may be submitted under one certification statement.

(4) Upon receipt by the system of any correction submission, other interested persons shown on the manifest will be provided electronic notice of the submitter's corrections.

(5) Other interested persons shown on the manifest may respond to the submitter's corrections with comments to the submitter, or by submitting another correction to the system, certified by the respondent as specified in paragraph (l)(3) of this section, and with notice of the corrections to other interested persons shown on the manifest.

12) Revise paragraphs (c)(4)(i) and (d)(4)(i) of Section 264.1086 to read as follows:

§ 264.1086 Standards: Containers.

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(c) **Container Level 1 standards**.

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(4) The owner or operator of containers using Container Level 1 controls shall inspect the containers and their covers and closure devices as follows:

(i) In the case when a hazardous waste already is in the container at the time the owner or operator first accepts possession of the container at the facility and the container is not emptied within 24 hours after the container is accepted at the facility (i.e., does not meet the conditions for an empty container as specified in § 261.7(b) of these regulations), the owner or operator shall visually inspect the container and its cover and closure devices to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. The container visual inspection shall be conducted on or before the date that the container is accepted at the facility (i.e., the date the container becomes subject to the Subpart CC container standards). For purposes of this requirement, the date of acceptance is the date of signature that the facility owner or operator enters on Item 20 of the Uniform Hazardous Waste Manifest (EPA Forms 8700-22 and 8700-22A), as required under Subpart E of this part, at § 264.71 of these regulations. If a defect is detected, the owner or operator shall repair the defect in accordance with the requirements of paragraph (c)(4)(iii) of this section.

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(d) **Container Level 2 standards**.

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(4) The owner or operator of containers using Container Level 2 controls shall inspect the containers and their covers and closure devices as follows:

(i) In the case when a hazardous waste already is in the container at the time the owner or operator first accepts possession of the container at the facility and the container is not emptied within 24 hours after the container is accepted at the facility (i.e., does not meet the conditions for an empty container as specified in § 261.7(b) of these regulations), the owner or operator shall visually inspect the container and its cover and closure devices to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. The container visual inspection shall be conducted on or before the date that the container is accepted at the facility (i.e., the date the container becomes subject to the Subpart CC container standards). For purposes of this requirement, the date of acceptance is the date of signature that the facility owner or operator enters on Item 20 of the Uniform Hazardous Waste Manifest (EPA Forms 8700-22 and 8700-22A), as required under Subpart E of this part, at § 264.71 of these regulations. If a defect is detected, the owner or operator shall repair the defect in accordance with the requirements of paragraph (d)(4)(iii) of this section.

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13) Revise paragraphs (a)(1), (a)(2) and (j) of Section 265.71, and add paragraph (l) to read as follows:

§ 265.71 Use of manifest system.

(a)(1) If the facility receives hazardous waste shipment accompanied by a manifest, the owner, operator or his/her agent must sign and date the manifest as indicated in paragraph (a)(2) of this section to certify that the hazardous waste covered by the manifest was received, that the hazardous waste was received except as noted in the discrepancy space of the manifest, or that the hazardous waste was rejected as noted in the manifest discrepancy space.

(2) If a facility receives a hazardous waste shipment accompanied by a manifest, the owner, operator or his/her agent must:

(i) Sign and date, by hand, each copy of the manifest;

(ii) Note any discrepancies (as defined in § 265.72(a)) on each copy of the manifest;

(iii) Immediately give the transporter at least one copy of the manifest;

(iv) Within 30 days of delivery, send a copy (Page 2) of the manifest to the generator;

(v) Paper manifest submission requirements are:

(A) **Options for compliance on June 30, 2018**. Beginning on June 30, 2018, send the top copy (Page 1) of any paper manifest and any paper continuation sheet to the e-Manifest system for purposes of data entry and processing, or in lieu of submitting the paper copy to EPA, the owner or operator may transmit to the EPA system an image file of Page 1 of the manifest and any continuation sheet, or both a data file and image file corresponding to Page 1 of the manifest and any continuation sheet, within 30 days of the date of delivery. Submissions of copies to the e-Manifest system shall be made at the mailing address or electronic mail/submission address specified at the e-Manifest program website's directory of services. Beginning on June 30, 2021, EPA will not accept mailed paper manifests from facilities for processing in e-Manifest.

(B) **Options for compliance on June 30, 2021**. Beginning on June 30, 2021, the requirement to submit the top copy (Page1) of the paper manifest and any paper continuation sheet to the e-Manifest system for purposes of data entry and processing may be met by the owner or operator only by transmitting to the EPA system an image file of Page 1 of the manifest and any continuation sheet, or by transmitting to the EPA system both a data file and the image file corresponding to Page 1 of the manifest and any continuation sheet, within 30 days of the date of delivery. Submissions of copies to the e-Manifest system shall be made to the electronic mail/submission address specified at the e-Manifest program website's directory of services; and

(vi) Retain at the facility a copy of each manifest for at least three years from the date of delivery.

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(j) **Imposition of user fee for electronic manifest use**.

(1) As prescribed in 40 CFR § 265.1311, and determined in 40 CFR § 265.1312, an owner or operator who is a user of the national electronic manifest system shall be assessed a user fee by EPA for the submission and processing of each electronic and paper manifest. EPA shall update the schedule of user fees and publish them to the user community, as provided in 40 CFR § 265.1313. 40 CFR part 265 is incorporated by reference to include those versions in effect as of the date this regulation was adopted, and does not include later amendments to the incorporated material. Materials incorporated by reference are available for public inspection during normal business hours from the Hazardous Materials and Waste Management Division, 4300 Cherry Creek Drive South, Denver, CO 80246. Copies may also be found at the Environmental Protection Agency through the Government Printing Office at https://www.govinfo.gov/app/collection/cfr/

(2) An owner or operator subject to user fees under this section shall make user fee payments in accordance with the requirements of 40 CFR § 265.1314, subject to the informal fee dispute resolution process of 40 CFR § 265.1316, and subject to the sanctions for delinquent payments under 40 CFR § 265.1315.

(k) **Electronic manifest signatures**. (1) Electronic manifest signatures shall meet the criteria described in 40 CFR § 262.25.

(l) Post-receipt manifest data corrections. After facilities have certified to the receipt of hazardous wastes by signing Item 20 of the manifest, any post-receipt data corrections may be submitted at any time by any interested person (e.g., waste handler) shown on the manifest.

(1) Interested persons must make all corrections to manifest data by electronic submission, either by directly entering corrected data to the web based service provided in e-Manifest for such corrections, or by an upload of a data file containing data corrections relating to one or more previously submitted manifests.

(2) Each correction submission must include the following information:

(i) The Manifest Tracking Number and date of receipt by the facility of the original manifest(s) for which data are being corrected;

(ii) The Item Number(s) of the original manifest that is the subject of the submitted correction(s); and

(iii) For each Item Number with corrected data, the data previously entered and the corresponding data as corrected by the correction submission.

(3) Each correction submission shall include a statement that the person submitting the corrections certifies that to the best of his/her knowledge or belief, the corrections that are included in the submission will cause the information reported about the previously received hazardous wastes to be true, accurate, and complete.

(i) The certification statement must be executed with a valid electronic signature; and

(ii) A batch upload of data corrections may be submitted under one certification statement.

(4) Upon receipt by the system of any correction submission, other interested persons shown on the manifest will be provided electronic notice of the submitter's corrections.

(5) Other interested persons shown on the manifest may respond to the submitter's corrections with comments to the submitter, or by submitting another correction to the system, certified by the respondent as specified in paragraph (l)(3) of this section, and with notice of the corrections to other

interested persons shown on the manifest.

14) Revise paragraphs (c)(4)(i) and (d)(4)(i) of Section 265.1087 to read as follows:

§ 265.1087 Standards: Containers.

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(c) **Container Level 1 standards**.

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(4) The owner or operator of containers using Container Level 1 controls shall inspect the containers and their covers and closure devices as follows:

(i) In the case when a hazardous waste already is in the container at the time the owner or operator first accepts possession of the container at the facility and the container is not emptied within 24 hours after the container is accepted at the facility (i.e., does not meet the conditions for an empty container as specified in § 261.7(b) of these regulations), the owner or operator shall visually inspect the container and its cover and closure devices to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. The container visual inspection shall be conducted on or before the date that the container is accepted at the facility (i;e;, the date the container becomes subject to the Subpart CC container standards). For purposes of this requirement, the date of acceptance is the date of signature that the facility owner or operator enters on Item 20 of the Uniform Hazardous Waste Manifest (EPA Forms 8700-22 and 8700-22A), as required under subpart E of this part, at § 265.71 of these regulations. If a defect is detected, the owner or operator shall repair the defect in accordance with the requirements of paragraph (c)(4)(iii) of this section.

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(d) **Container Level 2 standards**.

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(4) The owner or operator of containers using Container Level 2 controls shall inspect the containers and their covers and closure devices as follows:

(i) In the case when a hazardous waste already is in the container at the time the owner or operator first accepts possession of the container at the facility and the container is not emptied within 24 hours after the container is accepted at the facility (i.e., does not meet the conditions for an empty container as specified in § 261.7(b) of these regulations), the owner or operator shall visually inspect the container and its cover and closure devices to check for visible cracks, holes, gaps, or other open spaces into the interior of the container when the cover and closure devices are secured in the closed position. The container visual inspection shall be conducted on or before the date that the container is accepted at the facility (i;e;, the date the container becomes subject to the Subpart CC container standards). For purposes of this requirement, the date of acceptance is the date of signature that the facility owner or operator enters on Item 20 of the Uniform Hazardous Waste Manifest (EPA Forms 8700-22 and 8700-22A), as required under subpart E of this part, at § 265.71 of these regulations. If a defect is detected, the owner or operator shall repair the defect in accordance with the requirements of paragraph (d)(4)(iii) of this

section.

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15) Add Section 8.93 (Statement of Basis for the Rulemaking Hearing of February 19, 2019) to Part 8 of the Regulations to read as follows:

Statement of Basis and Purpose
Rulemaking Hearing of February 19, 2019

8.93 Basis and Purpose.

These amendments to 6 CCR 1007-3, Parts 260, 262, 263, 264, and 265 are made pursuant to the authority granted to the Solid and Hazardous Waste Commission in § 25-15-302(2), C.R.S.

User Fees for the Electronic Hazardous Waste Manifest System and Amendments to the Manifest Regulations

These amendments to the Colorado Hazardous Waste Regulations (6 CCR 1007-3) correspond to the Environmental Protection Agency (EPA) Hazardous Waste Electronic Manifest User Fee rule published in the Federal Register on January 3, 2018 {83 FR 420-462}, and which became effective on June 30, 2018.

The January 3, 2018 federal rule established the methodology the EPA will use to determine and revise the user fees applicable to the electronic and paper manifests to be submitted to the national electronic manifest system (e-Manifest system) that EPA developed under the Hazardous Waste Electronic Manifest Establishment Act, P.L. 112-195. That Act directed EPA to establish a national electronic manifest system (or e-Manifest system) and to impose reasonable user service fees as a means to fund the development and operation of the e-Manifest system.

EPA's Hazardous Waste Electronic Manifest rule was published in the Federal Register on February 7, 2014 {79 FR 7518-7563}. Corresponding amendments to the Colorado Hazardous Waste Regulations were adopted by the Colorado Solid and Hazardous Waste Commission on October 17, 2017, and became effective on November 30, 2017.

EPA began operation of its e-Manifest system on June 30, 2018. The goal of the e-Manifest system is to transition away from the use of paper manifests and move to a fully electronic process for tracking hazardous waste shipments. Establishment of an electronic tracking system for hazardous waste shipments will allow tracking to be conducted in a more cost-effective manner, and result in reduced paperwork and processing burdens to the regulated community, as well as to the regulators. The e-Manifest system should also provide more timely access to manifest data and shipment information, and improve data quality shared among users, regulators, and their data management systems.

As a state with an authorized RCRA program under 40 CFR Part 271, Colorado is required to revise its state program in order to be equivalent to, consistent with, and no less stringent than the requirements of the federal e-Manifest User Fee rule.

Many of the regulatory provisions promulgated in the federal e-Manifest User Fee rule were issued under the authority of the e-Manifest Act, and can only be administered and enforced by the EPA. Colorado is required to adopt these provisions in order to maintain manifest program consistency.

Two sets of provisions in the federal that can only be administered by the EPA include the following:

1) Manifest printing specifications of § 262.21(f)(5), (6), and(7). These provisions describe the revised printing specification for the five-copy paper manifest and continuation sheet paper forms, the revised copy distribution requirements to be printed on each copy of the form, and the revised specification for printing the appropriate manifest instructions on the back of the form copies. These printing specifications apply to registered manifest printers and are administered solely by EPA, and

2) Fee methodology and related fee implementation provisions of subpart FF of 40 CFR Parts 264 & 265. The user fee provisions of subpart FF describe the methods and processes that EPA will use in setting fees to recover its program costs, and in administering and enforcing the user fee requirements. Although Colorado cannot receive authorization to administer or enforce EPA's e-Manifest system, Colorado is adopting the required state analog to 40 CFR § 264.71(j) and § 265.71(j) to reference the federal subpart FF provisions. This is necessary to ensure that members of the regulated community are on notice of their responsibilities to submit their final manifest copies to the system and to pay user fees to EPA for the processing of their manifests.

Additional provisions being adopted as part of this rulemaking include the following amendments:

Regulation	**Subject**
§ 260.4	Copy submission requirements for interstate shipments.
§ 260.5	Applicability of e-Manifest system and fees to facilities receiving state-only regulated wastes.
§ 262.20(a)(1) and (a)(2)	Removal of references to the Appendix to Part 262
§ 262.24(c)(1)	Use of mixed paper/electronic manifests.
§ 262.24(e)	Removal of references to the Appendix to Part 262
§ 262.24(g)	Removal of paragraph regarding imposition of user fees for electronic manifest use.
§ 262.24(h)	Generators and post-receipt data corrections.
Appendix to Part 262	Removal of the manifest form and instructions in the Appendix to Part 262
§ 263.20(a)(8)	Removal of paragraph regarding imposition of user fees for electronic manifest use for Transporters.
§ 263.20(a)(9)	Transporters and post-receipt data corrections.
§ 263.21(b)	En route changes to transporters
§ 264.71(a)(2)(v) and § 265.71.(a)(2)(v)	Receiving facilities' required paper manifest submissions to system.
§ 264.71(j) and § 265.71(j)	Imposition of user fees on receiving facilities for their manifest submissions.
§ 264.71(l) and § 265.71(l)	Receiving facilities and post-receipt data corrections.
§ 264.1086(c)(4)(i) and (d)(4)(i) and § 265.1087(c)(4)(i) and (d)(4)(i)	Removal of references to the Appendix to Part 262

This Basis and Purpose incorporates by reference the applicable portions of the preamble

language for the EPA regulations as published in the Federal Register at 83 FR 420-462, January 3, 2018.

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Tracking number: 2019-00014

Opinion of the Attorney General rendered in connection with the rules adopted by the

Hazardous Materials and Waste Management Division

on 02/19/2019

6 CCR 1007-3

HAZARDOUS WASTE

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:55:43

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Public Health and Environment

Agency

Hazardous Materials and Waste Management Division

CCR number

6 CCR 1007-3

Rule title

6 CCR 1007-3 HAZARDOUS WASTE 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission/Hazardous Materials and Waste Management Division

6 CCR 1007-3

HAZARDOUS WASTE

Amendment of Section 262.14(a)

(Adopted by the Solid and Hazardous Waste Commission on February 19, 2019)

1) Revise paragraph (a) of Section 262.14 to read as follows:

§ 262.14 Conditions for exemption for a very small quantity generator.

(a) Provided that the very small quantity generator meets all the conditions for exemption listed in this section, hazardous waste generated by the very small quantity generator is not subject to the requirements of Part 262 (except §§ 262.9-262.14 and 262.43) through 268, and 100 of these regulations, and the very small quantity generator may accumulate hazardous waste on site without complying with such requirements. VSQGs generating 3 gallons or more of F001, F002, F004, or F005 hazardous waste in a calendar year must also comply with § 262.18. The conditions for exemption are as follows:

****

2) Add Section 8.93 (Statement of Basis for the Rulemaking Hearing of February 19, 2019) to Part 8 of the Regulations to read as follows:

Statement of Basis and Purpose
Rulemaking Hearing of February 19, 2019

8.93 Basis and Purpose.

These amendments to 6 CCR 1007-3, Part 262 are made pursuant to the authority granted to the Solid and Hazardous Waste Commission in § 25-15-302(2), C.R.S.

Amendment of the Section 262.14(a)

These amendments correct technical errors and inadvertent omissions in paragraph (a) of Section 262.14 of the Colorado Hazardous Waste Regulations (6 CCR 1007-3) that were identified after Colorado adopted state analogs to the federal Hazardous Waste Generator Improvements Rule on May 15, 2018, and after the previous HW Generator Improvement Amendments had been filed for the November 20, 2018 rulemaking hearing.

Paragraph (a) of the Section 262.14 conditions for exemption for a very small quantity generator (VSQG) of hazardous waste is being amended to:

1) Exempt VSQGs of hazardous waste from complying with the requirements of Part 263 (Standards Applicable to Transporters of Hazardous Waste). As § 262.14(a) is currently written, VSQGs are subject to the Part 263 requirements. VSQGs are not required to manifest their hazardous waste under RCRA, and it is not the Division's intent to require VSQGs to do so under the state regulations. This amendment corrects this issue.

2) Clarify that **only** VSQGs generating 3 gallons or more of F001, F002, F004, and/or F005 hazardous waste in a calendar year are required to comply with the requirements of § 262.18 (EPA identification numbers and re-notification for large quantity generators, small quantity generators, and very small quantity generators that generate 3 gallons or more in a calendar year of hazardous waste codes F001, F002, F004, and/or F005). As currently written, § 262.14(a) implies that **all** VSQGs are required to comply with the requirements of § 262.18. This amendment corrects the VSQG exemption to specify that only VSQGs generating 3 gallons or more of F001, F002, F004, and/or F005 hazardous waste in a calendar year are required to comply with the requirements of § 262.18.

This amendment is more stringent than the federal regulations. The Commission has evaluated the information presented at the rulemaking hearing, as well as the information in the Statement of Basis and Purpose. The Commission considers this information sufficient to justify adopting the proposed rule. The Commission finds that this rule is necessary to protect public health and the environment.

3) Add a reference to § 262.43 in Section 262.14 to require VSQGs to complete and return a Self-Certification Checklist if requested by the Division. VSQGs are already required to comply with the Self-Certification requirements of § 262.43 through § 262.10(a)(1)(i)(E). This amendment simply provides further clarification of this requirement.

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Tracking number: 2019-00012

Opinion of the Attorney General rendered in connection with the rules adopted by the

Hazardous Materials and Waste Management Division

on 02/19/2019

6 CCR 1007-3

HAZARDOUS WASTE

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:55:17

Philip J. Weiser
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by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Public Health and Environment

Agency

Hazardous Materials and Waste Management Division

CCR number

6 CCR 1007-3

Rule title

6 CCR 1007-3 HAZARDOUS WASTE 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission/Hazardous Materials and Waste Management Division

6 CCR 1007-3

HAZARDOUS WASTE

Amendment of the Part 279 Standards for the Management of Used Oil.

(Adopted by the Solid and Hazardous Waste Commission on February 19, 2019)

1) Revise the definition of "Petroleum refining facility" in Section 279.1 to read as follows:

Subpart A - Definitions

§ 279.1 Definitions.

****

Petroleum refining facility means an establishment primarily engaged in producing gasoline, kerosene, distillate fuel oils, residual fuel oils, and lubricants, through fractionation, straight distillation of crude oil, redistillation of unfinished petroleum derivatives, cracking or other processes (i.e. facilities classified as SIC 2911).

****

2) Remove and reserve paragraph (b)(3) of Section 279.10 to read as follows:

Subpart B - Applicability

§ 279.10 Applicability.

This section identifies those materials which are subject to regulation as used oil under this part. This section also identifies some materials that are not subject to regulation as used oil under this part, and indicates whether these materials may be subject to regulation as hazardous waste under Parts 260 through 268, and Part 100 of these regulations.

(a) Used oil. EPA presumes that used oil is to be recycled unless a used oil handler disposes of used oil, or sends used oil for disposal. Except as provided in § 279.11, the regulations of this part apply to used oil, and to materials identified in this section as being subject to regulation as used oil, whether or not the

used oil or material exhibits any characteristics of hazardous waste identified in Subpart C of Part 261 of these regulations.

(b) Mixtures of used oil and hazardous waste

****

(3) Reserved.

3) Revise paragraph (i) of Section 279.10 to read as follows:

Subpart B - Applicability

§ 279.10 Applicability.

****

(i) Used oil containing PCBs. Used oil containing PCBs (as defined at 40 CFR § 761.3) at any concentration less than 50 ppm is subject to the requirements of Part 279 unless, because of dilution, it is regulated under 40 CFR Part 761 as a used oil containing PCBs at 50 ppm or greater. PCB-containing used oil subject to the requirements of Part 279 may also be subject to the prohibitions and requirements found at 40 CFR Part 761, including § 761.20(d) and (e). Used oil containing PCBs at concentrations of 50 ppm or greater is not subject to the requirements of Part 279, but is subject to regulation under 40 CFR Part 761. No person may avoid these provisions by diluting used oil containing PCBs, unless otherwise specifically provided for in this Part 279 or 40 CFR Part 761. 40 CFR part 761 is incorporated by reference to include those versions in effect as of the date this regulation was adopted, and does not include later amendments to the incorporated material. Materials incorporated by reference are available for public inspection during normal business hours from the Hazardous Materials and Waste Management Division, 4300 Cherry Creek Drive South, Denver, CO 80246. Copies may also be found at the Environmental Protection Agency through the Government Printing Office at https://www.govinfo.gov/app/collection/cfr/

4) Revise Section 279.11 to read as follows:

§ **279.11 Used oil specifications.**

Used oil burned for energy recovery, and any fuel produced from used oil by processing, blending, or other treatment, is subject to regulation under this part unless it is shown not to exceed any of the allowable levels of the constituents and properties shown in Table 1. Once used oil that is to be burned for energy recovery has been shown not to exceed any allowable level and the person making that showing complies with §§ 279.72, 279.73, and 279.74(b), the used oil is no longer subject to this part.

Table 1--Used Oil Not Exceeding Any Allowable Level Shown Below Is Not Subject to this Part When Burned for Energy Recovery{1}

Constituent/property	Allowable level
Arsenic	5 ppm maximum.
Cadmium	2 ppm maximum.
Chromium	10 ppm maximum.
Lead	100 ppm maximum.
Flash point	100 EF minimum.

Total Halogens	4,000 ppm maximum.{2}

{1} The allowable levels do not apply to mixtures of used oil and hazardous waste that continue to be regulated as hazardous waste (see § 279.10(b)).

{2} Used oil containing more than 1,000 ppm total halogens is presumed to be a hazardous waste under the rebuttable presumption provided under § 279.10(b)(1). Such used oil is subject to Subpart D of Part 267 of these regulations rather than this part when burned for energy recovery unless the presumption of mixing can be successfully rebutted.
Note: Applicable standards for the burning of used oil containing PCBs are imposed by 40 CFR § 761.20(e).

5) Revise paragraph (d) of Section 279.22 to read as follows:

§ 279.22 Used oil storage.

****

(d) **Response to releases**. Upon detection of a release of used oil to the environment that is not subject to the requirements of 40 CFR Part 280, Subpart F, and which has occurred after the effective date of these regulations, a generator must perform the following cleanup steps:

(1) Stop the release;

(2) Contain the released used oil;

(3) Clean up and manage properly the released used oil and other materials; and

(4) If necessary to prevent future releases, repair or replace any leaking used oil storage containers or tanks prior to returning them to service.

Note: 40 CFR part 280, subpart F, is incorporated by reference to include those versions in effect as of the date this regulation was adopted, and does not include later amendments to the incorporated material. Materials incorporated by reference are available for public inspection during normal business hours from the Hazardous Materials and Waste Management Division, 4300 Cherry Creek Drive South, Denver, CO 80246. Copies may also be found at the Environmental Protection Agency through the Government Printing Office at https://www.govinfo.gov/app/collection/cfr/262.18

****

6) Revise paragraph (c)(2) of Section 279.44 to read as follows:

§ 279.44 Rebuttable presumption for used oil.

****

(c) If the used oil contains greater than or equal to 1,000 ppm total halogens, it is presumed to be a hazardous waste because it has been mixed with halogenated hazardous waste listed in Subpart D of Part 261 of these regulations. The owner or operator may rebut the presumption by demonstrating that the used oil does not contain hazardous waste (for example, by showing that the used oil does not contain significant concentrations of halogenated hazardous constituents listed in Appendix VIII of Part 261 of these regulations).

****

(2) The rebuttable presumption does not apply to used oils contaminated with chlorofluorocarbons (CFCs) removed from refrigeration units if the CFCs are destined for reclamation. The rebuttable presumption does apply to used oils contaminated with CFCs that have been mixed with used oil from sources other than refrigeration units.

7) Revise paragraph (h) of Section 279.45 to read as follows:

§ 279.45 Used oil storage at transfer facilities.

****

(h) **Response to releases**. Upon detection of a release of used oil to the environment that is not subject to the requirements of 40 CFR Part 280, Subpart F, and which has occurred after the effective date of these regulations, the owner/operator of a transfer facility must perform the following cleanup steps:

****

8) Revise paragraph (b)(6)(ii) of Section 279.52 to read as follows:

§ 279.52 General facility standards.

****

(b) Contingency plan and emergency procedures. Owners and operators of used oil processing and re refining facilities must comply with the following requirements:

****

(6) Emergency procedures.

****

(ii) Whenever there is a release, fire, or explosion, the emergency coordinator must immediately identify the character, exact source, amount, and areal extent of any released materials. He/she may do this by observation or review of facility records or manifests and, if necessary, by chemical analyses.

****

9) Revise paragraph (g) of Section 279.54 to read as follows:

§ 279.54 Used oil management.

****

(g) Response to releases. Upon detection of a release of used oil to the environment that is not subject to the requirements of 40 CFR Part 280, Subpart F, and which has occurred after the effective date of these regulations, an owner/operator must perform the following cleanup steps:

****

10) Revise paragraph (b)(2)(i)(B) of Section 279.55 to read as follows:

§ 279.55 Analysis plan.

****

(b) **On specification used oil fuel in § 279.72**. At a minimum, the plan must specify the following if § 279.72 is applicable:

(1) Whether sample analyses or other information will be used to make this determination;

(2) If sample analyses are used to make this determination:

(i) The sampling method used to obtain representative samples to be analyzed. A representative sample may be obtained using either:

(A) One of the sampling methods in Appendix I of Part 261 of these regulations; or

(B) A method shown to be equivalent under § 260.20 and § 260.21 of these regulations;

(ii) Whether used oil will be sampled and analyzed prior to or after any processing/re refining;

11) Revise paragraph (g) of Section 279.64 to read as follows:

§ 279.64 Used oil storage.

(g) **Response to releases**. Upon detection of a release of used oil to the environment that is not subject to the requirements of 40 CFR Part 280, Subpart F, and which has occurred after the effective date of these regulations, a burner must perform the following cleanup steps:

****

12) Revise paragraph (b) of Section 279.74 to read as follows:

§ 279.74 Tracking.

****

(b) **On specification used oil delivery**. A generator, transporter, processor/re refiner, or burner who first claims that used oil that is to be burned for energy recovery meets the fuel specifications under § 279.11 must keep a record of each shipment of used oil to the facility to which it delivers the used oil. Records for each shipment must include the following information:

****

****

13) Add Section 8.93 (Statement of Basis for the Rulemaking Hearing of February 19,

2019) to Part 8 of the Regulations to read as follows:

Statement of Basis and Purpose
Rulemaking Hearing of February 19, 2019

8.93 Basis and Purpose.

These amendments to 6 CCR 1007-3, Part 279 are made pursuant to the authority granted to the Solid and Hazardous Waste Commission in § 25-15-302(2), C.R.S.

Amendment of the Part 279 Standards for the Management of Used Oil

These amendments revise sections 279.1, 279.10, 279.11, 279.22, 279.44, 279.45, 279.52, 279.54 279.55, 279. 64, and 279.74 of Colorado's Part 279 Standards for the Management of Use Oil.

With the exception of the revisions to section 279.10, these amendments consist mainly of corrections to minor typographical and technical errors that exist in the Part 279 regulations. The more substantive changes to section 279.10 include the following:

1) **Amendment of Section 279.10(i) – Applicability of the Used Oil Management Standards to PCB contaminated used oil**. Paragraph (i) of section 279.10 is being amended to clarify the applicability of the RCRA used oil management standards to used oil containing PCBs. The amendment clarifies that used oil that contains less than 50 ppm of PCBs is generally subject to regulation under the RCRA used oil management standards. However, the amendment notes that the Toxic Substances Control Act (TSCA) prohibition against the dilution of PCB concentrations below regulatory thresholds (40 CFR 761.1(b)(5)) applies to the dilution of PCB-containing used oil Used oil, therefore, that contains, or contained prior to dilution, 50 ppm or greater of PCBs in not subject to regulation under the RCRA used oil management standards, because the TSCA regulations at 40 CFR Part 761 provide comprehensive management of such used oil.

2) **Removal of Section 279.10(b)(3) – Mixtures of used oil and very small quantity generator hazardous waste**. The Division is removing the provision at § 279.10(b)(3) to clarify the state's intent to be more stringent than the federal requirements regarding the management of mixtures of used oil and listed hazardous waste from very small quantity generators (VSQGs) of hazardous waste.

Pursuant to the federal provisions of §§ 262.13(f)(iii) and 279.10(b)(3), mixtures of VSQG listed hazardous waste and used oil are exempt from regulation under the hazardous waste management regulations, and may be managed as used oil under the used oil management standards of 40 CFR Part 279.

The Division believes that VSQG generated mixtures of used oil and listed hazardous waste should be managed in accordance with the same requirements applicable to mixtures of used oil and listed hazardous waste generated by small quantity generators and large quantity generators. Allowing VSQG generated mixtures of used oil and listed hazardous waste to be managed as used oil makes compliance assurance difficult and significantly reduces a VSQG's incentive to minimize the amount of listed hazardous waste it generates, and may also lead to management of the waste in a manner that is not protective of human health and the environment.

In adopting state analogs to the federal hazardous waste generator improvements rule on May 15, 2018, Colorado included more stringent language in § 262.13(f) regarding VSQG mixtures of used oil and hazardous waste.

Pursuant to the requirements of 6 CCR 1007-3, § 262.13(f)(iii), if a VSQG's characteristic hazardous wastes are mixed with used oil, and the resulting mixture does not exhibit any hazardous waste characteristic, the mixture is subject to the Part 279 used oil regulations. Any material produced from such a mixture by processing, blending, or other treatment is also regulated under the Part 279 regulations. However, pursuant to 6 CCR 1007-3, § 262.13(f)(iv), if a VSQG mixes any hazardous waste listed in subpart D of Part 261 of the Colorado Hazardous Waste Regulations (6 CCR 1007-3) with used oil, the resultant mixture is a newly generated listed hazardous waste and must be managed as hazardous waste. The VSQG must count both the resultant mixture amount plus all other hazardous waste generated in the calendar month to determine whether the total quantity exceeds the very small quantity generator calendar month quantity limits identified in the definition of generator categories found in § 260.10 of these regulations. If so, to remain exempt from the permitting, interim status, and operating standards, the very small quantity generator must meet the conditions for exemption applicable to either a small quantity generator or a large quantity generator. The very small quantity generator must also comply with the applicable independent requirements for either a small quantity generator or a large quantity generator.

In its adoption of the hazardous waste generator improvements rule, Colorado inadvertently failed to amend § 279.10(b)(3) to be consistent with the more stringent provisions of § 262.13(f), and to include a discussion of this more stringent provision in the Statement of Basis and Purpose for the May 18, 2018 rulemaking.

This amendment removing the provision at § 279.10(b)(3) clarifies the state's intent pursuant to § 262.13(f)(iv) to be more stringent than the federal requirements regarding the management of VSQG mixtures of used oil and hazardous waste.

This amendment is more stringent than the federal regulations. The Commission has evaluated the information presented at the rulemaking hearing, as well as the information in the Statement of Basis and Purpose. The Commission considers this information sufficient to justify adopting the proposed rule. The Commission finds that this rule is necessary to protect public health and the environment.

This Basis and Purpose incorporates by reference the applicable portions of the preamble language for the EPA regulations as published in the Federal Register at 68 FR 44659-44665, July 30, 2003 regarding the amendment of Section 279.10(i).

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Tracking number: 2019-00013

Opinion of the Attorney General rendered in connection with the rules adopted by the

Hazardous Materials and Waste Management Division

on 02/19/2019

6 CCR 1007-3

HAZARDOUS WASTE

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:55:30

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Public Health and Environment

Agency

Hazardous Materials and Waste Management Division

CCR number

6 CCR 1007-3

Rule title

6 CCR 1007-3 HAZARDOUS WASTE 1 - eff 05/30/2019

Effective date

05/30/2019

DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

Solid and Hazardous Waste Commission/Hazardous Materials and Waste Management Division

6 CCR 1007-3

HAZARDOUS WASTE

Proposed Acme Manufacturing F006 Delisting

(Adopted by the Solid and Hazardous Waste Commission on February 19, 2019)

1) Appendix IX of Part 261 is amended by adding Delisting #10 to read as follows:

PART 261, APPENDIX IX – WASTES EXCLUDED UNDER §§ 260.20 AND 260.22

****

DELISTING #: 10

FACILITY: Acme Manufacturing

ADDRESS: 4650 S. Leydon St., Unit A, Denver, Colorado 80216

WASTE: Wastewater treatment sludge from the on-site treatment of wastewater generated from zinc and chromate plating on cold rolled steel. EPA hazardous waste code F006 generated after the effective date of this delisting.

CONDITIONS: This delisting is valid only for the waste stream specified above and referenced in the delisting petition submitted on October 18, 2018 and under the following conditions:

a. Changes to Current Operations

1. Acme Manufacturing must notify the Hazardous Materials and Waste Management Division (the Division) at least 30-days prior to implementing any major change to the electroplating processes at the Facility. A major change is any change including alteration of the current wastewater treatment process or incorporating different chemicals or reagents into the process such that the composition of the wastewater treatment sludge is altered.

2. Acme Manufacturing must notify the Division within 15-days after implementing any change to the wastewater treatment or electroplating processes that causes a significant change in the type or concentration of any hazardous constituent in the waste or causes the waste to exhibit a hazardous waste characteristic. A significant change is defined as an increase in the total waste

concentration for any constituent identified below:

Constituent	Average Concentration (ppm)	2xs the Standard Deviation	Concentration Requiring Notification to the Division (Two Standard Deviations above the Average Concentration)
Arsenic	Non-detect	Non-detect	Detection
Barium	13.2	1.4	14.6
Cadmium	Non-detect	Non-detect	Detection
Chromium (Total)	1,740	193	1,933
Chromium VI	Non-detect	Non-detect	Detection
Copper	40.1	6.8	46.9
Cyanide (amenable)	Non-detect	Non-detect	Detection
Cyanide (free/reactive)	Non-detect	Non-detect	Detection
Lead	6.1	1.0	7.1
Mercury	Non-detect	Non-detect	Detection
Nickel	28.8	3.7	32.5
Selenium	Non-detect	Non-detect	Detection
Silver	Non-detect	Non-detect	Detection
Zinc	78,325	8,569	86,894

A significant change also includes the detection of any additional Part 264, Appendix IX hazardous constituents that are not identified in the above table.

3. The Division reserves the right to re-evaluate and, if necessary, remove this approval or modify these conditions in the event that a significant change, as defined above, is reported by Acme Manufacturing. In such case, the Division may remove this delisting or impose temporary requirements on the delisted waste until such time as an appropriate amendment to this delisting can be considered by the Solid and Hazardous Waste Commission.

b. Sampling Requirements

Acme Manufacturing shall conduct annual verification sampling of the delisted waste in January of each year to monitor for any significant change in the type or concentration of any hazardous constituents in the delisted waste. Annual verification sampling shall be submitted to the Division within sixty (60) days of the sampling event for review against initial criteria and sampling methodology.

c. Storage Requirements

1. The delisted waste generated by Acme Manufacturing may not be accumulated on-site for a period in excess of one year.

2. The volume of delisted waste accumulated on-site may not exceed 20 cubic yards at any given time.

3. The delisted waste must be stored in a container that is capable of being closed. The container must be marked or labeled to identify the contents as “delisted waste” and with an accumulation start date. The container must be kept closed except for when waste is being added to or removed from the container.

d. Recordkeeping Requirements

1. Acme Manufacturing shall maintain records of the disposal or recycling of all delisted waste that documents that such activities are in accordance with the delisting petition.

2. Acme Manufacturing shall maintain all records required by paragraph d.1 above for a period of at least three years.

e. Disposal Requirements

The delisted waste shall be disposed in a landfill meeting the requirements of the Colorado Solid Waste Regulations (6 CCR 1007-2) or recycled at an appropriate metals reclamation facility.

2) Section 8.93 {Statement of Basis and Purpose for the Rulemaking Hearing of February 19, 2019} is added to Part 8 of the Regulations to read as follows:

Statement of Basis and Purpose
Rulemaking Hearing of February 19, 2019

8.93 **Basis and Purpose**

This amendment to 6 CCR 1007-3, Part 261, Appendix IX is made pursuant to the authority granted to the Solid and Hazardous Waste Commission in § 25-15-302(2), C.R.S.

Amendment of Part 261, Appendix IX to Conditionally Delist F006 Hazardous Waste Generated by Acme Manufacturing located at 4650 S. Leydon St., Unit A in Denver, Colorado 80216.

Appendix IX of Part 261 is being amended to conditionally delist F006 hazardous waste generated at Acme Manufacturing in Denver, Colorado. This delisting will allow Acme Manufacturing to dispose of this waste at a solid waste landfill meeting the requirements of the Colorado Solid Waste Regulations (6 CCR 1007-2) or a metals recycling facility provided it complies with the conditions of the delisting. The Solid and Hazardous Waste Commission (the "Commission") is requiring an annual verification sampling of the delisted waste and the results of that verification sampling must be submitted to the Division within sixty (60) days of the sampling event for review against initial delisting criteria and sampling methodology.

Acme Manufacturing operates a manufacturing facility in Denver, Colorado for the production of steel threaded rods for use in the construction industry. Manufacturing processes at the facility include the zinc plating of steel parts, followed by either a clear or yellow chromate seal. Rinse water from these metal finishing operations is treated on-site in a wastewater treatment unit to remove heavy metals prior to discharging the treated wastewater to the publicly owned treatment works (POTW). The process of treating the wastewater generates wastewater treatment sludge. Pursuant to the listing description at § 261.31, wastewater treatment sludge generated from electroplating operations is classified as F006 hazardous waste.

The basis for the F006 hazardous waste listing is described in Appendix VII of Part 261 of the hazardous waste regulations. Each listing is based on hazardous constituents that are typically contained in the waste described by the listing. The hazardous constituents that formed the basis for the F006 listing include cadmium, hexavalent chromium (Chromium VI), nickel and complexed cyanide.

Samples of the wastewater treatment sludge generated at Acme Manufacturing were collected and submitted for analysis prior to submittal of the delisting petition. Four discrete samples of the wastewater treatment sludge were collected in accordance with a sampling and analysis plan that was reviewed and approved by the Hazardous Materials and Waste Management Division at the Colorado Department of Public Health and Environment. The waste samples were analyzed using the toxicity characteristic

leaching procedure (TCLP) to determine the leachability of contaminants from the waste as well as total concentrations.

TCLP results of the wastewater treatment sludge indicate that the sludge does not exhibit any of the hazardous waste characteristics. Sample results confirmed that the sludge does not contain any organic toxicity characteristic constituents above detection levels. In addition, the sludge does not exhibit the toxicity characteristic for the eight heavy metals. The waste also does not exhibit the hazardous waste characteristic of corrosivity, ignitability or reactivity.

Zinc concentrations in the waste sludge was also analyzed using TCLP. The results of the analysis indicate that zinc was present at an average concentration of 195 mg/L, with the State of Colorado Regulation 41 Domestic Water Supply – Drinking Water Standard for zinc being 5 mg/L. At such levels, zinc may leach out of the waste at concentrations that would not be protective of human health and the environment under unrestricted use standards.

The sample results indicated that the level of zinc that may leach from the waste is too high for unconditional delisting of the waste. However, further evaluation of the physical and chemical nature of the waste indicate that the waste does not pose an unacceptable risk to human health and the environment if subject to certain conditions regarding handling and disposal at a Subtitle D landfill. Zinc present in the sludge at 195 mg/L is less than 100 times the State of Colorado Regulation 41 Domestic Water Supply – Drinking Water Standard of 500 mg/L (5 mg/L X 100). Based on the zinc being present at levels less than 100 times the State of Colorado Regulation 41 Domestic Water Supply – Drinking Water Standard, using Table A2-1 of Appendix 2 of the Hazardous Materials and Waste Management Division's May 2002 Corrective Action Guidance, Option II: Restricted Use, the sludge may be disposed of as a solid waste in a Subtitle D landfill.

Total analysis of the wastewater treatment sludge also indicated that the petitioned sludge contains a hazardous constituent, nickel, which is a basis for listing the waste as a F006 hazardous waste. Based on the chemical analysis of the waste samples, the average total concentration for nickel is 28.8 parts per million (ppm). The total average concentration of nickel is below the EPA Residential and Industrial Soil Screening Level.

Hazardous constituents detected in the waste samples which were not a basis for listing the waste as a F006 hazardous waste include barium, chromium (Total), copper, lead and zinc. The average total concentration for these constituents is: 13.2 ppm barium, 1,740 chromium (Total), 40.1 ppm copper, 6.1 ppm lead, and 78,325 ppm zinc. The average total concentration for these constituents is below the EPA Residential Soil Screening Level with the exception of zinc, which is present greater than the EPA Residential Soil Screening Level of 23,000 ppm. Zinc present in the sludge at 78,325 ppm is less than 100 times the EPA Residential Soil Screening Level of 2,300,000 ppm (23,000 ppm X 100). Based on the zinc being present at levels less than 100 times the EPA Residential Soil Screening Level, using Table A2-1 of Appendix 2 of the Hazardous Materials and Waste Management Division's May 2002 Corrective Action Guidance, Option II: Restricted Use, the sludge may be disposed as a solid waste in Subtitle D landfill.

This delisting is being granted under conditions specifying disposal, record keeping, storage and sampling requirements for the delisted sludge. Conditional delisting of the waste also prohibits any major changes to the metal finishing operations or wastewater treatment process without prior notification, evaluation, and approval by the Division.

The Colorado Solid and Hazardous Waste Commission, after a public hearing on February 19, 2019, voted to tentatively approve the petition to delist F006 hazardous waste generated by electroplating operations at the Acme Manufacturing Facility located at 4650 S. Leydon St., Unit A in Denver, Colorado 80216. The Commission's tentative decision is subject to public written comment until April 24, 2019. If no adverse comments are received, the tentative decision will become the final decision, and the delisting will become effective on May 30, 2019 without further notice. If the Commission receives adverse comments, the Commission will publish a timely withdrawal in the Colorado Register informing the public

that the rule will not take effect.

This delisting does not apply to waste that demonstrates a "significant change" as defined in Delisting #010 in Part 261, Appendix IX—Wastes Excluded Under § 260.20 and 260.22(d), or if any of the conditions specified in Part 261, Appendix IX for this delisting are not met. Should either of these occur, the waste is and must be managed as a hazardous waste. While the Commission is approving this conditional delisting for this specific waste at this specific site, the findings and criteria associated with the approval are unique. Other petitions for delisting, even if similar in material or use, will be reviewed by the Division on a case-by-case basis.

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Office of the Attorney General

Tracking number: 2019-00011

Opinion of the Attorney General rendered in connection with the rules adopted by the

Hazardous Materials and Waste Management Division

on 02/19/2019

6 CCR 1007-3

HAZARDOUS WASTE

The above-referenced rules were submitted to this office on 02/21/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:54:43

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Labor and Employment

Agency

Division of Unemployment Insurance

CCR number

7 CCR 1101-2

Rule title

7 CCR 1101-2 REGULATIONS CONCERNING EMPLOYMENT SECURITY 1 - eff 04/15/2019

Effective date

04/15/2019

11.2.9 Conduct of Hearing. Hearings shall be conducted informally with as few technical requirements as possible. The hearing officer shall control the evidence taken during a hearing in a manner best suited to fully and fairly develop the relevant evidence, safeguard the rights of all parties, and ascertain the substantive rights of the parties based on the merits of the issue(s) to be decided. The appealing party shall be required to present evidence that supports the party's position on the issues raised by the appeal. Parties to the appeal may present any relevant evidence. However, the hearing officer is charged with ensuring that the record is fully developed to the extent practicable based on the evidence reasonably available at the time of the hearing, whether or not a party is represented. Therefore, the hearing officer should oversee the development of the evidence and participate in the interrogation process to the extent necessary to fully develop the record.

.1 Parties and witnesses shall ordinarily participate by telephone. However, based on the individual circumstances of a case, the chief hearing officer or designee shall have the discretion to determine the method of participation, that will best achieve the purposes of this rule 11.2.9 and to order the parties to participate in that manner.

.2 An interested party to a hearing must submit to the hearing officer any documents, subpoenaed documents, and any physical exhibits that can be reproduced that he or she intends to introduce at the hearing. Such materials must be submitted in time to ensure that the hearing officer receives them before the date of the scheduled hearing. Such party must also provide copies of all documents and physical exhibits sent to the hearing officer to any other interested party to the hearing or to that interested party's representative as shown on the hearing notice, in time to ensure the materials are received prior to the date of the scheduled hearing. Failure to timely submit such materials to the hearing officer, or to timely send the materials to the opposing party or such party's representative may result in their exclusion from the record. However, if a party has made a good faith effort to provide documents or physical exhibits in time to be received prior to the hearing, such materials shall not be excluded due to the failure of the hearing officer, the other interested party, or an interested party's representative to receive the materials. In any appropriate case where documents have been timely sent but not received in advance, an adjournment of the hearing may be permitted by the hearing officer pursuant to rule 11.2.11 unless waived on the record by both parties.

.3 Hearing Procedure. Prior to taking evidence, the hearing officer shall state the issues and the order in which evidence will be received. The hearing officer also shall inform the parties of any written documents or other tangible materials that have been received and explain the procedure for introducing the materials and offering them into evidence. The sequence of receiving testimony shall be in the hearing officer's discretion. Computer records of the division concerning continued weeks claimed or payment for continued weeks claimed are admissible as evidence and may be filed in the record as evidence without formal identification if relevant to the issues raised by the appeal. The hearing officer also may consider any other relevant division file documents without a

formal request or identification. However, parties shall be advised during the hearing of the division records and documents to be considered. All physical materials offered into the record shall be clearly identified and marked. Further, materials admitted shall be expressly received for the record. The hearing officer shall permit the parties to testify on their own behalf and present witnesses, and opposing parties may cross-examine each other and the others' witnesses. The hearing officer shall examine the parties and witnesses as necessary and, after notice to the parties, may hear such additional evidence as deemed necessary. All testimony shall be presented under oath and the hearing shall be timed. At the conclusion of the hearing, the hearing officer shall inform the parties of the time consumed by the hearing and the approximate cost of the preparation of the transcript of the hearing, if any, and shall instruct the parties that a decision will be promptly issued as to the issues brought forth at the hearing. The hearing officer shall also instruct the parties that such decision may be appealed and, if applicable, that the appellant must bear the cost of preparation of a transcript. The sum paid may, at a later date, be reimbursed by the panel without interest, if such appeal results in a decision favorable to the appellant. It shall also be stated to the parties that the cost of preparation of the transcript may be waived pursuant to rule 11.2.15. The hearing officer shall verify the accuracy of the addresses on file for the parties.

.4 New Issues. Parties are entitled to advance notice of the factual issues that may be considered at a hearing. The hearing officer shall not permit an interested party to present factual issues at a hearing that have not been disclosed to the other interested party(ies) in writing, as shown by the claim file. If good cause, as set forth in rule 12.1.8, is found for a party not providing proper notice of the factual issues it intends to present, the hearing officer may adjourn the hearing. If good cause is not found, the hearing shall proceed as scheduled, and those new factual issues raised shall not be considered. In determining whether there is good cause for permitting a new factual issue, the hearing officer shall give substantial weight to an absence of prejudice to the other interested party and to the overall interests of an accurate and fair resolution. An interested party may, at the hearing, waive the requirement that it be provided with proper notice.

11.2.13 Failure to Appear.

.1 Appealing Party. If the appealing party fails to participate in the hearing as directed, the appeal shall be dismissed and the decision that was the subject of the appeal shall become final. Written notice that the appeal has been dismissed shall be provided to the interested parties named in the caption. The appealing party may request that the appeal be reinstated and the hearing be rescheduled pursuant to the procedures set forth in part XII of the regulations. The request must be received by the division within twenty calendar days after the date the dismissal notice was mailed by the division. An untimely request that a hearing be rescheduled may be permitted by the division for good cause shown, pursuant to the procedure set forth in part XII of the regulations.

.2 Nonappealing Party. If any other interested party fails to participate as directed for a scheduled hearing, and a decision is issued by a hearing officer on the merits of the appeal, the party who failed to participate as directed may request that a new hearing be scheduled either by filing a written request with the panel or filing a written appeal from the hearing officer's decision. The written statement shall include details, pursuant to part XII of the regulations, to establish that he or she had good cause for the failure to participate in the appeal hearing. The request for a new hearing shall be filed with the panel in person, by mail, by facsimile machine, by panel-approved electronic means, or at a public employment office, the central office of the division, the office where the hearing officer is located, or by division-approved electronic means and shall be received by the panel within twenty calendar days after the date mailed on the hearing officer's decision. An untimely request for a new hearing may be permitted by the panel for good cause shown, pursuant to the procedure set forth in part XII of the regulations. If it is determined that the party has shown good cause for the failure to participate, the hearing officer's decision that was issued on the merits of the appeal shall be vacated and a new hearing scheduled forthwith.

12.1.3 Procedure.

.1 Whenever an interested party files an untimely appeal from a deputy's decision, a rebuttable presumption of good cause shall be established and a hearing shall be scheduled unless the appeal was received more than 180 days beyond the expiration of the timely filing period. The notice of hearing shall contain a statement indicating that the appeal was filed beyond the expiration of the timely filing period and that the nonappealing party may object to the hearing being granted at the time of the new hearing. If the nonappealing party fails at the time of the hearing to object to the hearing proceeding, that party waives the opportunity to object to the hearing going forward. If the nonappealing party objects at the time of the hearing to the matter being scheduled, the hearing officer shall determine whether good cause has been shown, pursuant to section 12.1.8, for permitting the untimely appeal. If the hearing officer determines that good cause has been shown for permitting the untimely appeal, the hearing shall proceed. If the hearing officer determines that good cause has not been shown for permitting the untimely appeal, the appeal shall be dismissed.

.2 In the event an interested party files an untimely appeal from a deputy's decision or makes a request for a new hearing and the appeal or hearing request is received more than 180 days beyond the expiration of the timely filing period, good cause may not be established, a hearing shall not be scheduled, the appeal shall be dismissed, and the deputy's decision shall become final.

.3 Whenever an interested party files an untimely appeal from a hearing officer's decision, or fails to participate as directed in a hearing held on an appeal from a deputy's decision and has filed a request for a new hearing, the panel shall determine if good cause has been shown, pursuant to section 12.1.8, for permitting the untimely appeal or excusing the failure to participate in the hearing as directed. The panel shall make a determination of good cause only if the untimely appeal or request for new hearing contains a statement of the reasons for which the party failed to act in a timely manner or if information within the appeal file supports a

determination of good cause. If the party's untimely appeal or request for a new hearing does not establish good cause, the panel may request an explanation in writing, by postal mail, by approved electronic means, or by telephone. The party shall respond to any such request within ten days.

.4 Whenever an appeal from a deputy's decision has been dismissed because the appealing party failed to participate as directed in a scheduled hearing before a hearing officer and the appealing party requests that a new hearing be scheduled, a rebuttable presumption of good cause shall be established and a new hearing shall be scheduled. The notice of the new hearing shall contain a statement indicating that the hearing is being rescheduled because the appealing party did not participate in the prior hearing AS DIRECTED and that the nonappealing party may object at the beginning of the new hearing to the matter being rescheduled. If, at the time of the new hearing, the nonappealing party objects to the matter being rescheduled, the hearing officer shall determine whether good cause has been shown, pursuant to section 12.1.8, to excuse the failure to participate in the hearing as directed. If, at the time of the hearing, the nonappealing party fails to object to the hearing proceeding, that party waives the opportunity to object to the hearing going forward. If the hearing officer determines that good cause has been shown to excuse the failure to participate in the hearing as directed, the hearing on the deputy's decision shall proceed. If the hearing officer determines that good cause has not been shown to excuse the failure to participate in the hearing as directed, the appeal shall be dismissed.

.5 Notwithstanding these provisions, good cause may not be established for the failure of an appealing party to participate in a second hearing AS DIRECTED which was set because that party failed to participate as directed in the first hearing. In the event that the appealing party fails to participate as directed in the first setting of a hearing on a deputy's decision and then subsequently fails to participate as directed iN the second setting of a hearing, the appeal shall be dismissed and the deputy's decision shall become final. Under such circumstances, the division shall issue a notice to all interested parties that the appeal has been dismissed and that no further rescheduled hearings shall be granted.

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Office of the Attorney General

Tracking number: 2019-00007

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Unemployment Insurance

on 02/22/2019

7 CCR 1101-2

REGULATIONS CONCERNING EMPLOYMENT SECURITY

The above-referenced rules were submitted to this office on 03/14/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 14, 2019 12:17:50

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Labor and Employment

Agency

Division of Oil and Public Safety

CCR number

7 CCR 1101-9

Rule title

7 CCR 1101-9 EXPLOSIVES REGULATIONS 1 - eff 05/01/2019

Effective date

05/01/2019

COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT

DIVISION OF OIL AND PUBLIC SAFETY

EXPLOSIVES REGULATIONS

7 C.C.R. 1101-9

Effective: May 1, 2019

Table of Contents

ARTICLE 1 GENERAL PROVISIONS

Section 1-1 Basis and Purpose

These regulations are promulgated to establish rules for the use, manufacture, possession, sale, storage, transport, or disposal of explosives materials or blasting agents in the interest of the life, health, and safety of employees and the general public, as well as the protection of property.

To this end, a procedure for the granting of explosives permits is contained herein whereby the opportunity to use, manufacture, possess, sell, store, transport, or dispose of explosives materials is restricted to such permittees and conditioned upon satisfactory continued compliance with these rules and regulations. Failure to comply with these rules and regulations subjects the permittee to suspension, denial, or revocation of the permit.

Adoption of these rules and regulations is intended to greatly clarify the Division of Oil and Public Safety requirements pertaining to the use of explosive materials, to ease the burden on the permittee where interpretation has been necessary, and to better incorporate the numerous requirements from other governmental agencies. These rules and regulations provide for uniformity of compliance and elimination of numerous areas of confusion and duplication in an effort to better serve and protect the public.

Section 1-2 Statutory Authority

The amendments to these regulations are created pursuant to Section 9-7-105, C.R.S. (2004) of the Colorado Revised Statutes. All prior rules for explosive materials are hereby repealed.

Section 1-3 Effective Date

These amended regulations shall be effective on May 1, 2019. The previous versions of these regulations were effective on December 1, 2018, March 10, 2015, and January 1, 2009.

Section 1-4 Scope

These rules and regulations shall apply to the use, manufacture, purchase, possession, sale, storage, transportation, and disposal of explosive materials in the State of Colorado by any individual, corporation, company, firm, partnership, association, or state or local government agency.

These rules and regulations shall not apply to:

(A) The shipment, transportation, and handling of military explosives by the Armed Forces of the United States or the State Militia.

(B) The normal and emergency operations of any government law enforcement agency including all departments, and divisions thereof, provided they are acting in their official capacity and in the proper performance of their duties and functions.

(C) Explosives in the forms prescribed by the official United States Pharmacopoeia or the National Formulary and used in medicines and medicinal agents.

(D) Explosive materials while in the course of transportation by for-hire commercial carriers via railroad, water, highway, or air when the explosive materials are moving under the jurisdiction of, and in conformity with, regulations adopted by any Federal Department or Agency.

(E) The components for hand loading rifle, pistol, and shotgun ammunition and/or rifle, pistol, and shotgun ammunition.

(F) The manufacture, sale and use (public display) of pyrotechnics commonly known as fireworks, including signaling devices such as flares, fuses, and torpedoes.

(G) Gasoline, fertilizers, installed propellant/powder-actuated safety devices or propellant/powder-actuated power tools.

(H) The use and storage of model rocket motors containing a propellant weight of 62.5 grams or less and which produce less than 17.92 pound seconds of total impulse.

No permit shall be required for the occasional purchase of explosives by a person for normal agricultural purposes where such person is known by the seller of such explosives, and a record is kept of such transactions by the seller, including the specific purpose for which such explosives will be used, the location of the purposed use, the signature of the purchaser, and the certification of the seller as to his personal knowledge of the purchaser. Violation of this record requirement shall cause the seller's permit to be canceled. A permit is required for any manufacturing, storage, dealing, or non-agricultural use of explosives as outlined in Article 3 of this regulation.

No person, firm, partnership, or corporation whose possession of explosive materials is for the purpose of underground mining, surface or underground metal mining, or surface or underground coal mining and whose use and storage is subject to regulation by the provisions of 30 Code of Federal Regulations (CFR) - Parts 56, 57, 75 or 77 shall be subject to the provisions of the Explosives Act, Sections 9-7-101, et seq., Colorado Revised Statutes (C.R.S.).

No person, firm, partnership, or corporation whose possession, use, or storage of explosive materials is subject to regulation by the provisions of Colorado Mining Law, Sections 34-21-104 and 34-21-110, C.R.S. shall be subject to the provisions of the Explosives Act, Sections 9-7-101, et seq., C.R.S.

A permit issued by the Division of Oil and Public Safety shall be required for the possession, use, or storage of explosives in mining operations whose use and storage is not subject to the provisions of 30 CFR - Parts 56, 57, 75 or 77 or Colorado Mining Law, Sections 34-21-104 and 34-21-110, C.R.S.

Except as noted in the foregoing, the Division of Oil and Public Safety may approve or disapprove the location for, and limit the quantity of, explosives or blasting agents which may be loaded, unloaded, reloaded, stored, or temporarily retained at any facility within the State of Colorado.

The Division of Oil and Public Safety may issue an explosive permit for continued use for a period of time not to exceed 36 months.

Section 1-5 Definitions

The following publications and codes are hereby incorporated by this reference:

- Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), U.S. Department of Justice, Publication ATF P 5400.7, ATF- Explosives Law and Regulations (2012) – Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), 99 New York Avenue, NE; Washington, DC 20226. https://www.atf.gov

- Title 49 CFR - Parts 100-177 (inclusive) https://www.govinfo.gov Parts 390-397 U.S. Department of Transportation (Revised September 27, 2012) – US DOT FMCSA, 1200 New Jersey Avenue, SE; Washington, DC 80590. https://www.fmcsa.dot.gov

- National Electric Code (NEC), 2017 Edition, National Fire Protection Association (NFPA) – NFPA (NEC), 1 Batterymarch Park, Quincy, MA 02169. https://catalog.nfpa.org

- Institute of Makers of Explosives (IME) Safety Library Publication No. 22 (February 2007) – IME, 1212 New York Avenue, NW, Suite 650; Washington, DC 20005. https://www.ime.org

- Institute Of Makers Of Explosives (IME) Safety Library Publication No. 20 (December 2011) - IME, 1212 New York Avenue, NW, Suite 650; Washington, DC 20005. https://www.ime.org

- The Avalanche Artillery Users of North America Committee (AAUNAC) Training Standard (Revised May 16, 2012) – AAUNAC, PO Box 8095, 8920 South Collins Road; Alta, UT 84092

These rules incorporate the editions and revisions specified. Subsequent editions and revisions have not been incorporated by this reference. The publications incorporated by this reference may be examined and a copy of them may be obtained upon request and payment of the cost of reproduction during regular business hours from the Colorado Department of Labor and Employment, Division of Oil and Public Safety, 633 17th Street, Suite 500, Denver, CO 80202, and may also be inspected at the state depository libraries.

The following words when used in these rules and regulations shall mean:

AIR OVERPRESSURE, OVERPRESSURE: The airborne shock wave or acoustic transient generated by an explosive.

AMERICAN TABLE OF DISTANCES: A quantity-distance table prepared and approved by the Institute of the Makers of Explosives, for storage of explosive materials to determine safe distances from inhabited buildings, public highways, passenger railways, and other stored explosive materials. See Section 4.6 of these regulations.

AMMONIUM NITRATE: The ammonium salt of nitric acid represented by the formula NH_4NO_3.

APPROVED STORAGE FACILITY (APPROVED MAGAZINE): A facility for the storage of explosives materials conforming to the requirements of these rules and regulations.

ATTEND(ED): The physical presence of an authorized person within the field of vision of explosives or the use of explosives.

AUTHORIZED, APPROVED, OR APPROVAL: Terms which mean approved, approval, or authorized by the Division.

AUTHORIZED PERSON: A person approved or assigned by the management to perform a specific type of duty or duties or to be at a specific location or locations at the job site.

ARMED CHARGE: An explosive cartridge that contains a detonator.

ARTIFICIAL BARRICADE: An artificial mound, berm, or wall of earth of a minimum thickness of 3 feet, or any other approved barricade that offers equivalent protection.

AVALAUNCHER: A compressed gas explosives delivery system designed for avalanche hazard mitigation.

BARRICADED: The effective screening of a building or magazine containing explosive materials from another magazine or building, railway, or highway by a natural or artificial barrier. A straight line from the top of any sidewall of the building or magazine containing explosives materials to the eave line of any magazine or building or to a point 12 feet above the center of a railway or highway shall pass through the barrier.

BINARY (TWO-COMPONENT) EXPLOSIVE: A blasting explosive formed by the mixing or combining of two precursor chemicals, (e.g., ammonium nitrate and nitromethane).

BLACK POWDER: A deflagrating or low explosive compound of an intimate mixture of sulfur, charcoal and an alkali nitrate (usually potassium or sodium nitrate).

BLAST AREA: Area of the blast within the influence of flying rock missiles, gases, vibration, and concussion.

BLASTER: A Type I permitted individual who is permitted by the Division to possess and control the use of explosives.

BLASTER IN CHARGE: A Type I permittee who is in charge of and responsible for the loading or preparing of the explosives charges, and either physically initiates the charge or is physically present when the charge is initiated at a specific job site. This individual is in charge of the planning of the blast at a specific job site, the supervision of all persons assisting on the blast and all persons in training, and is responsible for the inventory, inventory records, and blast records for the blast.

BLASTING AGENT: An explosive material which meets prescribed criteria for insensitivity to initiation.

For storage, Title 27, CFR, Section 55.11, defines a blasting agent as any material or mixture consisting of fuel and oxidizer intended for blasting, not otherwise defined as an explosive provided that the finished product, as mixed for use or shipment, cannot be detonated by means of a No. 8 Blasting Cap when unconfined (Bureau of Alcohol, Tobacco, Firearms, and Explosives Regulation).

For transportation, Title 49 CFR defines a blasting agent as a material designed for blasting which has been tested and found to be so insensitive that there is very little probability of accidental initiation to explosion or transition from deflagration to detonation (US Department of Transportation Regulation).

BLASTING MAT: A mat of woven steel, wire, rope, scrap tires, or other suitable material or construction to cover blast holes for the purpose of preventing flying rock missiles.

BLAST PATTERN, DRILL PATTERN: The plan of the drill holes laid out for blasting; an expression of the burden distance, the spacing distance and their relationship to each other.

BLAST SITE: Area where explosive material is handled during blasting operations, including the perimeter of blast holes and a distance of 50 feet in all directions from explosive charges, loaded boreholes or boreholes to be loaded.

BOOSTER: An explosive charge, usually of high detonation velocity and detonation pressure, designed to be used in the initiation sequence between an initiator or primer and the main charge.

BOREHOLE, BLAST HOLE, DRILL HOLE: A hole drilled in the material to be blasted, for the purpose of containing an explosive charge.

BULK MIX: A mass of explosive material prepared for use in bulk form without packaging.

BULK MIX DELIVERY EQUIPMENT: Equipment (usually a motor vehicle with or without a mechanical delivery device) which transports explosive material in bulk form for mixing and/or loading directly into blast holes.

BULLET-RESISTANT: Magazine walls or doors of construction resistant to penetration of a bullet of 150-grain M2 ball ammunition having a nominal muzzle velocity of 2,700 feet per second fired from a .30 caliber rifle from a distance of 100 feet perpendicular to the wall or door.

When a magazine ceiling or roof is required to be bullet-resistant, the ceiling or roof shall be constructed of materials comparable to the side walls or of other materials which will withstand penetration of the bullet described above when fired at an angle of 45 degrees from perpendicular.

Tests to determine bullet resistance shall be conducted on test panels or empty magazines which shall resist penetration of 5 out of 5 shots placed independently of each other in an area of at least 3 feet by 3 feet. Examples of construction that meet this definition are given in Article 4 as alternate construction standards for Type 1 and Type 2 magazines.

BULLET-SENSITIVE EXPLOSIVE MATERIAL: Explosive material that can be detonated by 150 grain M2 ball ammunition having a nominal muzzle velocity of 2,700 feet per second when the bullet is fired from a .30 caliber rifle at a distance of not more than 100 feet and the test material, at a temperature of 70-75 degrees Fahrenheit, is placed against a backing material of 2 inch steel plate.

BURDEN: The distance from the borehole and the nearest free face, or the distance between boreholes measured perpendicular to the spacing. Also, the total amount to be blasted by a given hole, which is usually measured in cubic yards or tons.

BUS WIRE: Expendable heavy gauge bare copper wire used to connect detonators or series of detonators in parallel.

CHARGE-PER-DELAY: Any charges firing within any 8-millisecond time period are considered to have a cumulative effect on vibration and air over-pressure effects. Therefore, the maximum charge-per-delay (w) is the maximum weight of all charges firing within any 8-millisecond (ms) time period from the time a blast starts until the time it ends. For example, if two 10-lb charges fire at 100 ms and one 15-lb charge fires at 105 ms, the maximum charge-per-delay (w) for this time period would be 35 lbs.

COLLAR: The mouth or opening of a borehole.

CONNECTING WIRE: Wire used to extend the firing line or leg wires in the electric blasting circuit.

CONTROL: To directly exercise authority or dominating influence over the use, manufacture, acquisition, purchase, sale, distribution, storage, transportation, or disposal of explosive materials.

CORNICE: An overhanging mass of windblown snow or ice, usually located near a sharp terrain break.

DATE-SHIFT CODE: A code, required by federal regulation (ATF), applied by manufacturers to the outside shipping containers, and, in many instances, to the immediate containers of explosive materials to aid in their identification and tracing. The code indicates the date, work shift and plant of manufacture.

DAY BOX: A portable magazine for the temporary and attended storage of explosives. Day boxes shall meet construction requirements of a Type 3 magazine.

DEALER: Any person engaged in the business of distributing explosive material at wholesale or retail.

DECK: An explosive charge that is separated from other charges in the blast hole by stemming or an air cushion.

DEFLAGRATION: An explosive reaction, such as rapid combustion, that moves through an explosive material at a velocity less than the speed of sound in the material.

DENSITY: The mass of an explosive per unit volume, usually expressed in grams per cubic centimeter or pounds per cubic foot.

DETONATING CORD: A flexible cord containing a center core of high explosives, which may be used to initiate other high explosives.

DETONATION: An explosive reaction that moves through an explosive material at a velocity greater than the speed of sound in the material.

DETONATOR: Any device containing any initiating or primary explosive that is used for initiating detonation. A detonator may not contain more than 10 grams of total explosives by weight, excluding ignition or delay charges. The term includes, but is not limited to, electric blasting caps of instantaneous and delay types, electronic detonators, blasting caps for use with safety fuses, detonating cord delay connectors, and non-electric instantaneous and delay blasting caps which use detonating cord, shock tube, or any other replacement for electric leg wires.

DIVISION: The Director of the Division of Oil and Public Safety of the Department of Labor and Employment or any designees thereof which may include certain employees of the Division of Oil and Public Safety or other persons.

DOWN LINE: A line of detonating cord or plastic tubing in a blast hole which transmits detonation from the trunkline or surface delay system down the hole to the primer.

ELECTRIC DETONATOR: A detonator designed for and capable of initiation by means of an electric current.

ELECTRONIC DETONATORS: A detonator that utilizes stored electrical energy as a means of powering an electronic timing delay element/module and that provides initiation energy for firing the base charge.

EMULSION: An explosive material containing substantial amounts of oxidizers dissolved in water droplets surrounded by an immiscible fuel, or droplets of an immiscible fuel surrounded by water containing substantial amounts of oxidizer.

EXPLOSIVE: Any chemical compound, mixture or device, the primary or common purpose of which is to function by explosion; the term includes, but is not limited to, dynamite and other high explosives, black powder, pellet powder, initiating explosives, detonators, safety fuses, squibs, detonating cord, igniter cord and igniters.

EXPLOSIVE MATERIALS: These include explosives, blasting agents, and detonators. The term includes but is not limited to dynamite and other high explosives; slurries, emulsions, and water gels, black powder, initiating explosives, propellant rockbreaking cartridges (such as Rockrackers™), detonators (blasting caps), safety fuses, squibs, detonating cord, igniter cord, and igniters. Binary explosives (such as Kinepak™ or Execon™), sold in two or more components, are considered an explosive material requiring a Division explosives permit.

EXPLOSIVE OILS: Liquid explosive sensitizers for explosive materials (.e.g., nitroglycerin, ethylene glycol dinitrate and metriol trinitrate).

EXTRANEOUS ELECTRICITY: Electrical energy, other than actual firing current or the test current from a blasting galvanometer, that is present at a blast site and that could enter a blasting circuit. It includes stray current, static electricity, electromagnetic waves, and time varying electric and magnetic fields.

FIRE EXTINGUISHER RATING: A rating set forth in the National Fire Code which may be identified on an extinguisher by a number (5, 20, 70, etc.) indicating the extinguisher's relative effectiveness, followed by a letter (A, B, C, etc.) indicating the class or classes of fires for which the extinguisher has been found to be effective.

FIRE-RESISTANT: Construction designed to provide reasonable protection against fire. For exterior walls or magazine constructed of wood, this shall mean fire resistance equivalency provided by sheet metal of not less than #26 gauge.

FIRING LINE: The wire(s) connecting the electrical power source with the electric or electronic blasting circuit.

FLYROCK: Dirt, mud, stone, fragmented rock or other material that is propelled from the blast site by the force of an explosion.

FREE FACE: A rock surface exposed to air or water which provides room for expansion upon fragmentation.

FUSE (SAFETY): A flexible cord containing an internal burning medium by which fire or flame is conveyed at a continuous and uniform rate from the point of ignition to a cut end. A fuse detonator is usually attached to that end, although safety fuse may be used without a detonator to ignite material such as deflagrating explosives.

FUSE DETONATOR, BLASTING CAP: A detonator which is initiated by a safety fuse or used in an avalauncher round; also referred to as an ordinary blasting cap. Also see detonator.

FUSE LIGHTERS: Pyrotechnic devices for the rapid and certain lighting of safety fuse.

FUEL: A substance which may react with oxygen to produce combustion.

GRAINS: In the avoirdupois system of weight measurement, 7,000 7000 grains are equivalent to one standard, 16-ounce pound (0.45 kg). A grain is 0.0648 grams in both the avoirdupois and troy systems.

GROUND VIBRATION: Shaking the ground by elastic waves emanating from a blast; usually measured in inches per second of particle velocity.

HARDWOOD: Red Oak, White Oak, Hard Maple, Ash, or Hickory, free from loose knots, wind shakes, or similar defects.

HIGH EXPLOSIVES: Explosives which are characterized by a very high rate of reaction, high pressure development and the presence of a detonation wave, including, but not limited to, dynamite, detonating cord, cast boosters, detonators, cap-sensitive slurry, emulsion, or water gels, and mixed binaries.

HOWITZER: A military cannon that delivers projectiles at medium muzzle velocity at low or high trajectories.

INHABITED AREA OR BUILDING: A building regularly occupied in whole or in part as a habitation for human beings, or any church, schoolhouse, railroad station, store, or other structure where people are accustomed to assemble, except any building or structure occupied in connection with the manufacture, transportation, storage, and use of explosive materials.

INSPECTOR: An Inspector of the Division.

INITIATION: The start of deflagration or detonation in an explosive material.

INITIATION SYSTEM: Combination of explosive devices and accessories (detonators, wire, cord, etc.) designed to convey a signal and initiate an explosive charge.

LAWFUL POSSESSOR: A Type II permittee who has legally purchased or acquired explosive materials.

LOADING DENSITY: The weight of explosive, expressed as pounds per foot or kilograms per meter of borehole.

LOW EXPLOSIVES: Explosives which are characterized by deflagration or a low rate of reaction and the development of low pressure.

MAGAZINE: Any building, structure, or container, other than an explosives manufacturing building, approved for the storage of explosive materials.

MAGAZINE DISTANCE: Shall mean the minimum distance permitted between any two storage magazines which is expected to prevent propagation of an explosion from one magazine to another from a blast.

MAKE-UP ROOM: A room located inside an uninhabited building which shall be used for the assembly of cap and fuse or for the arming of explosive charges used in avalanche mitigation work.

MANUFACTURER: Any individual, corporation, company, firm, partnership, association, or state or local government agency engaged in the business of manufacturing explosive materials for the purpose of sale, distribution or for his own use.

MASS DETONATION: When a unit or any part or quantity of explosive material detonates and causes all or a substantial part of the remaining material to detonate.

MISFIRE: A blast that fails to detonate completely after an attempt at initiation. This term is also used to describe the explosive material itself that has failed to detonate as planned.

MOTOR VEHICLE: A vehicle, machine, tractor, semi-trailer or other conveyance propelled or drawn by mechanical power. Does not include vehicles operated exclusively on rail.

NATURAL BARRICADE: Natural features of the ground, such as hills, or timber of sufficient density that the surrounding exposures which require protection cannot be seen from the magazine when the trees are bare of leaves.

NON-ELECTRIC DETONATOR: A detonator that does not require the use of electric energy to function.

OXIDIZER OR OXIDIZING MATERIAL: A substance, such as nitrite, that readily yields oxygen or other oxidizing substances to promote the combustion of organic matter or other fuel.

PERMANENT STORAGE MAGAZINE: Type 1 magazines or Type 2, Type 4, or Type 5 magazines that have been at the same location for longer than 90 days.

PARTICLE BOARD: A composition board made of small pieces of wood that have been bonded together.

PARTICLE VELOCITY: A measure of the intensity of ground vibration, specifically the velocity of motion of the ground particles as they are excited by the wave energy.

PERMITTEE: Any user, purchaser, manufacturer, dealer, storer, disposer, or transporter of explosives for a lawful purpose, who has obtained a permit from the Division.

PERSON: Any individual, corporation, company, firm, partnership, association, or state or local government agency.

PETN: Pentaerythritol tetranitrate.

PLACARDS: Division of Transportation Approved Title 49 CFR signs placed on vehicles transporting hazardous materials (including explosive materials) indicating the nature of the cargo.

PLYWOOD: Exterior construction-grade plywood.

POSSESS: The physical possession of explosives on one's person, or in the person's vehicle, magazine or building.

POWDER: A common synonym for explosive materials.

POWDER FACTOR: The amount of explosives used per unit of blasted material (see Loading Density).

PRIMER: A unit, package, or cartridge of explosives used to initiate other explosives or blasting agents, which contains either a detonator or a detonating cord to which a detonator designed to initiate the detonating cord is attached.

PROPELLANT/POWDER-ACTUATED POWER DEVICE: Any tool or special mechanized device or gas generator system which is actuated by a propellant or which releases and directs work through a propellant charge.

PUBLIC CONVEYANCE: Any railroad car, streetcar, ferry, cab, bus, aircraft, or other vehicle carrying passengers for hire.

PUBLIC HIGHWAY: Shall mean any public street, alley, or road.

PUBLIC HIGHWAY DISTANCE: Shall mean the minimum distance permitted between a public highway and an explosives magazine.

PUBLIC PLACE: A place which the public or a substantial number of the public has access, and includes but is not limited to, highways, transportation facilities, schools, places of amusement, parks, playgrounds, and the common areas of public and private buildings and facilities.

PURCHASER: A Type II permittee who acquires explosives.

PYROTECHNICS, FIREWORKS: Any combustible or explosive compositions or manufactured articles designed and prepared for the purpose of producing audible or visible effects.

RAILWAY: Any steam, electric, or other type of railroad or railway.

RESPONSIBLE PERSON: A Type I permitted individual who is directly responsible for a Type II permittee's compliance with the provisions of the Explosives Act, 9-7, C.R.S., and any rules and regulations promulgated thereunder.

SAFETY FUSE: A flexible cord containing an internal burning medium by which fire or flame is conveyed at a continuous and uniform rate from the point of ignition to a cut end. A fuse detonator is usually attached to that end, although safety fuse may be used without a detonator to ignite material such as deflagrating explosives.

SCALED DISTANCE (D_S): A factor relating similar blast effects from various weight charges of explosive material at various distances. Scaled Distances referring to blasting effects are obtained by dividing the distance of concern by a fractional power of the charge weight per delay of the explosive materials.

SECURED STORAGE: An area which is protected from weather and is theft-resistant and in compliance with the uniform fire code.

SEISMOGRAPH: An instrument that is useful in monitoring blasting operations for recording records

ground vibration. Particle velocity, displacement or acceleration is generally measured and recorded in three mutually-perpendicular directions.

SEMI-CONDUCTIVE HOSE: A hose used for pneumatic conveying of explosive materials, having an electrical resistance high enough to limit flow of stray electric currents to safe levels yet not so high as to prevent drainage of static electric charges to ground. A hose of not more than 2 megohms resistance over its entire length and of not less than 1,000 ohms per foot (3280 ohms per meter) meets this requirement.

SENSITIVITY: A physical characteristic of an explosive material classifying its ability to be initiated upon receiving an external impulse, such as heat impact, shock, friction, static electricity, stray current or other influence which can cause explosive decomposition.

SHALL: Means that the rule establishes a minimum standard which is mandatory.

SHOCK TUBE: A small diameter plastic tube containing reactive material used for initiating detonators. It contains only a limited amount of reactive material such that the energy that is transmitted through the tube by means of a detonation wave is guided through and confined within the walls of the tube.

SITE: Area where active blasting is taking place or the location of explosives storage magazines.

SLURRY/WATER GEL: An explosive material containing substantial portions of a liquid, oxidizers, and fuel, plus a thickener.

SMALL ARMS AMMUNITION: Any cartridge for a shotgun, rifle, pistol, or revolver, and cartridges for propellant-actuated power device and industrial guns. Military-type ammunition containing explosive bursting charges, or any incendiary, tracer, spotting, or pyrotechnic projectile is excluded from this definition.

SOFTWOOD: Douglas Fir, or other wood of equal bullet-resistance, free of loose knots, wind shakes, or similar defects.

SPACING: The distance between boreholes. In bench blasting, the distance is measured parallel to the free face and perpendicular to the burden.

STATIC ELECTRICITY: Electric charge at rest on a person or object. It is most often produced by the contact and separation of dissimilar insulating materials.

STEMMING: Inert material placed in a borehole on top of or between separate charges of explosive material, used for the purpose of confining explosive materials or to separate charges of explosive material in the same borehole.

STEEL: General purpose (hot or cold rolled) low carbon steel, such as specification ASTM A366 or equivalent.

STORAGE: The safekeeping of explosives in unattended magazines.

TEMPORARY STORAGE MAGAZINE: A Type 1, Type 2, Type 4, or Type 5 magazine that is at a location for a period not to exceed 90 days.

THEFT-RESISTANT: Construction designed to deter illegal entry into facilities used for the storage of explosive material.

TWO-COMPONENT: See binary explosive.

TRANSPORTATION: The conveyance or carrying of explosives from one place to another by means of a motorized vehicle or device.

TYPE I EXPLOSIVES PERMIT: A permit issued by the Division to individuals who possess and control explosive materials during the use, manufacture, acquisition, purchase, sale, distribution, storage, transportation, or disposal of explosives materials.

TYPE II EXPLOSIVES PERMIT: A permit issued by the Division to corporations, companies, partnerships, firms, individuals operating a business, associations, or state or local government agencies involved in the use, purchase, sale, manufacture, transportation, acquisition, distribution or disposal of explosives materials.

TYPE III EXPLOSIVES PERMIT: A permit issued by the Division to corporations, companies, partnerships, firms, individuals operating a business, associations, or state or local government agencies for the storage of explosives in approved magazines.

WEATHER-RESISTANT: Construction designed to offer reasonable protection against weather.

U.S. DEPARTMENT OF TRANSPORTATION EXPLOSIVE CLASSIFICATIONS FOR THE TRANSPORTATION OF EXPLOSIVES:

Division 1.1: Explosives that have a mass explosion hazard

Division 1.2: Explosives that have a projection hazard but not a mass explosion hazard

Division 1.3: Explosives that have a fire hazard and either a minor blast hazard or minor projection hazard or both, but not a mass explosion hazard

Division 1.4: Explosives that present minor explosion hazard

Division 1.5: Very insensitive explosives that have a mass explosion hazard, but are so insensitive that there is little probability of initiation or of transition from burning to detonation under normal conditions of transport (Blasting Agents)

ARTICLE 2 GENERAL REQUIREMENTS

Section 2-1 Miscellaneous Requirements

(A) No person shall sell, display, or expose for sale an explosive or blasting agent on any public way or public place.

(B) No person shall sell, deliver, or give possession and control of explosives materials to any person not in possession of a valid permit except an authorized for-hire commercial carrier transporting between two valid permittees.

(C) No person shall sell, purchase, store, transport, use or otherwise possess or control any explosive material without the authorization of the lawful possessor of the explosive material. The lawful possessor shall file a written list of authorized Type I permittees with the Division and shall notify the Division of any changes in writing.

(D) Any theft or loss of explosives or blasting agents, whether from a storage magazine or area, a vehicle in which they are being transported, or from a site where they are being used, or from any other location, shall immediately (but in no event later than 24 hours) be reported by the person having control of such explosives or blasting agents to the local sheriff or local police, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), and the Division.

(E) All individuals, corporations, companies, firms, partnerships, associations, or state or local government agencies conducting an operation or activity requiring the use, possession, purchase, sale, manufacturing, storage, acquisition, distribution, transportation or disposal of any explosive materials shall:

(1) Obtain a permit from the Division prior to conducting such operation or activity and shall be responsible for the results and any other consequences of any loading and firing of the explosive materials; and

(2) NOT delegate either performance of the blast or accountability for such performance to another person(s).

(F) The Division, Public Safety Section and local law enforcement authority shall be notified immediately by the permittee of any accident, explosion, fire, or misuse of explosives which occurs in connection with the use, manufacture, possession, sale, transportation, storage or disposal of explosives that results in the loss of life, personal injury, or damage to any property.

(G) The Division may inspect the site where any accident, explosion, fire, misuse, theft or loss of explosives occurred.

(H) A Division representative may enter during normal business hours, without advance notice, the premises of any permittee, including places of storage or use, for the purpose of inspecting or examining any records or documents required under these regulations and any explosives material used or stored at the premises.

(I) All corporations, companies, partnerships, firms, individuals operating a business, associations, or state or local government agencies conducting blasting operations shall have a certificate of liability insurance, be named as an also insured on another liability insurance policy, or shall have obtained a signed release of liability for damages from blasting operations from all parties who may be potentially affected by blasting operations. The U.S. Forest Service (USFS) should be notified prior to all blasting activities that occur on USFS land.

ARTICLE 3 EXPLOSIVES PERMIT

Section 3-1 Basic Legal Obligations

(A) Except as specifically allowed by these regulations, it is unlawful for any person to use, possess and control, manufacture, purchase, sell, store, transport, or dispose of any explosive material without possessing a valid permit from the Division (18-12-109 (2) and 9-7-101, et seq., C.R.S.).

Section 3-2 General Requirements

(A) Permits issued under these rules and regulations shall be dated and numbered. Each permit will indicate class of permit, and shall be valid for up to 36 months after the date of issue unless revoked or suspended by the Division, and shall be renewed on or before the expiration date. The application for renewal of permits shall be made to the Division prior to the renewal date to avoid possible lapse of said permit. The Division shall send a notice a minimum of 60 days prior to the expiration date. The failure of the permittee to receive timely notice from the Division shall not excuse the permittee's requirement to submit a renewal application not less than 30 days prior to the expiration date.

(B) Upon notice from the Division or any law enforcement agency having jurisdiction, a person using, manufacturing, purchasing, selling, storing, transporting, disposing, or otherwise in possession and control of any explosives without a permit shall immediately surrender any and all such explosives to the Division or to the law enforcement agency designated by the Division.

(C) The Division shall require, as a condition precedent to the original issuance of any explosives permit, fingerprinting and criminal history record checks for every individual applicant. Fingerprints shall be submitted on forms provided to the applicant by the Division. If a Type I permit holder submits a complete application for renewal, fingerprint cards are not required unless requested by the Division. As a condition precedent to renewal of any explosives permit for an individual, a criminal background check is required.

(D) No person shall withhold information or make any false statement or fictitious oral or written statement or furnish or exhibit any false, fictitious, or misrepresented identification, intended or likely to deceive for the purpose of obtaining or retaining an explosives permit.

(E) No person shall knowingly make any false entry in any record that a permittee is required to keep pursuant to these regulations.

(F) When a permit has expired and has not been renewed, the applicable County Sheriff's Department shall be notified by the Division, and the Type II permittee must turn over any remaining explosives which the permittee is in possession of directly to the Division or the law enforcement agency designated by the Division, or in the presence of the Division or the law enforcement agency designated by the Division, surrender control of all remaining explosives which the permittee is in possession of to a valid Type II permittee.

(G) All permittees shall take every reasonable precaution to protect their permits from loss, theft, defacement, destruction, or unauthorized duplication. The loss or theft of any permit shall be reported immediately to the local law enforcement agency and to the Division.

Section 3-3 Revocation, Suspension, or Denial of Explosives Permits

(A) The Division shall not issue a permit to any person who:

(1) Is under 21 years of age;

(2) Has been convicted in any court of a crime punishable by imprisonment for a term exceeding 1 year;

(3) Is currently charged with, or has a charge pending for a crime punishable by imprisonment for a term exceeding 1 year;

(4) Is a fugitive from justice;

(5) Has been convicted of a crime involving the illegal distribution of marijuana, any depressant or stimulant drug, or narcotic drug, perjury, fraud, false swearing, or bomb threats;

(6) Has been adjudicated developmentally disabled, mentally unstable, mentally ill or insane, or to be incompetent due to any mental disability or disease;

(7) Has been discharged from the armed forces under dishonorable conditions;

(8) Is an alien, other than an alien who is lawfully admitted for permanent residence or an alien who has obtained either a letter of clearance or letter of restoration of explosives privileges from the ATF; or

(9) Having been a citizen of the United States, has renounced citizenship.

(B) The Division shall deny or revoke and not renew the permit of any person who is currently charged with, has a charge pending or has been convicted of any of the following offenses:

(1) A crime punishable by imprisonment for a term exceeding 1 year;

(2) A crime involving the illegal distribution of marijuana, any depressant or stimulant drug, or narcotic drug, bomb threats, perjury, fraud, or false swearing, including making a false affidavit or statement under oath to the Division in an application or report; or

(3) A crime relating to use, manufacturing, sale, transportation, possession, or disposal of explosives.

(C) The Division may revoke and not renew the permit of any person when the violation of any law or regulation relating to explosive material or the misuse of explosive materials results in loss of life or serious injury to any person.

(D) A permit may be denied, suspended, or revoked by the Division because of, but not limited to the following:

(1) Unlawful use of, or addiction to, alcohol, narcotics or illegal drugs;

(2) Failure to exercise reasonable safeguards resulting in hazard to life, health, or property;

(3) Failure to show legitimate use for a permit;

(4) Failure to show sufficient proof of training or prior experience with explosives;

(5) Non-compliance with an order issued by the Division within the time specified in such order;

(6) Proof that the permittee or applicant advocates, or knowingly belongs to any organization or group that advocates the violent overthrow of, or violent action against any federal, state, or local government or institution;

(7) Failure to comply with the Colorado Explosives Act, these regulations and Bureau of Alcohol,

Tobacco, Firearms and Explosives (ATF), U.S. Department of Justice, Publication ATF P 5400.7, ATF- Explosives Law and Regulations (2012);

(8) Giving false information or a misrepresentation being willfully made to the Division and its investigators or inspectors to obtain or maintain a permit;

(9) Making a false affidavit or statement under oath to the Division in an application or report; or

(10) Other factors which, at the discretion of the Division, indicate an unfitness to hold an explosive permit in compliance with state and federal law and these regulations.

(E) The Division shall revoke the permit of any person adjudicated to be mentally unstable, mentally ill or insane, or to be incompetent due to any mental disability or disease. The Division shall not renew the permit until the person has been legally restored to competency.

Section 3-4 Procedure on Revocation, Suspension, or Denial of Explosives Permit

(A) In any case where the Division denies a permit or the permittee is subject to suspension or revocation for a violation of Section 3-3 of these regulations, the Division shall notify the applicant or permittee in writing by first-class mail of the grounds for denial for the violation. The notice shall state that the applicant or permittee may request a hearing in accordance with Sections 24-4-104 and 24-4-105 C.R.S.

(B) Upon notice of the revocation or suspension of any permit, the former permittee shall immediately surrender to the Division the permit and all copies thereof. In addition, the former permittee must surrender control of all explosive material in his/her possession to the Division or the law enforcement agency designated by the Division, or in the presence of the Division or the law enforcement agency designated by the Division surrender control of all explosive material in his/her possession to a valid Type II permittee until a final determination on the charges is made.

(C) The period of denial, suspension, or revocation shall be within the sound discretion of the Division.

(D) The Division may summarily suspend a permit if the Division has objective and reasonable grounds to believe that the public health, safety, or welfare requires emergency action. In such case, the Division shall notify the permittee in writing by first-class mail of the grounds for summary suspension and shall state that the permittee may request a hearing in accordance with 24-4-105 C.R.S.

(E) Any person aggrieved by a decision after a hearing may seek judicial review pursuant to the provisions of 24-4-106 C.R.S.

(F) Any person who has been denied a permit may not reapply to the Division for an explosives permit within one year of the decision, unless exception is made by the Division and the applicant establishes a substantial change in circumstances to indicate fitness to hold an explosive permit in accordance with the requirements of these regulations, State and Federal law.

(G) In case of revocation or suspension of a permit, the Division shall notify all vendors of explosives of such revocation or suspension .

Section 3-5 Permit Types and Classifications

Permits are separated according to type. A permit may have more than one designated classification; however, for each and every classification requested, the applicant must show legitimate use and qualifications.

3-5-1 Type I Explosives Permit

(A) All individuals who possess and control explosive materials shall have a valid Type I Explosives Permit issued by the Division.

(B) The requirements of permitting a Type I permittee shall be:

(1) An individual who possesses and controls explosive materials during the use, transportation, storage, distribution, manufacturing, sale, acquisition, or purchase of explosive materials.

(2) An individual who makes any or all of the following decisions:

(i) Decides total quantity of explosives used;

(ii) Decides borehole size, spacing, or depth;

(iii) Decides quantity of explosives in each borehole or charge;

(iv) Decides initiation system to be used;

(v) Decides timing delays to be used.

(3) An individual who directly supervises all personnel assisting in the use of explosives and supervises all personnel in training.

(4) An individual who shall also be physically present during the use of explosives, at the point of initiation when a charge is detonated and either initiates the detonation or gives the order to initiate the detonation of the charge.

(C) The classification of permits the applicant may apply for shall be:

(1) Construction

(i) Applicant must also apply for a Type I transporter permit, or provide to the Division a written plan documenting the manner in which explosives shall be legally transported to and from construction sites.

(2) Construction Limited

(i) Applicant may use or possess class 1.4 or 1.5 explosives or binary products only.

(3) Possession

(i) An individual who possesses explosive materials during the storage, distribution, component assembly, manufacturing, sale, acquisition or purchase of explosive materials. This endorsement does not allow an individual to exercise responsibilities as described in 3-5-1 (B) (2) through (4).

(ii) The requirement listed in 3-5-1(D)(3) does not apply to this classification.

(4) Quarry Operations

(5) Avalanche Mitigation

(6) Geophysical Research

(7) Transporter

(i) Applicant must submit a copy of his/her Commercial Driver's License with the Hazardous Material Endorsement included on it.

(ii) Required for the transportation of explosive materials and blasting agents in quantities required to be placarded across or over roads within the state.

(8) Well Perforation

(9) Manufacturer

(10) Special (special use or possession and control as described on the permit, including but not limited to fabrication, research and development, rock-breaker cartridges, demolition, law enforcement, unexploded ordnance disposal, purchasing agent, sales agent,.)

(D) Type I permittee qualifications

(1) The Type I permittee shall be able to understand and give written and oral orders.

(2) The Type I permittee shall be qualified by reason of training, knowledge, and experience in the field of using, transporting, possessing, storing and handling of explosives, and have a working knowledge of state, federal and local laws and regulations which pertain to explosives.

(3) The Type I permit applicant shall be required to submit proof of not less than one year of explosives experience or on the job training in explosives specific to at least one classification of permit. Avalanche mitigation applicants must meet training requirements as defined in Section 7-2.

(4) The Type I permit applicant shall be required to submit proof of not less than six months of explosive experience or on-the-job training in explosives specific to each additional classification of permit applied for.

(5) The Type I permittee shall be knowledgeable and competent in the use of each type of blasting method and initiation system used.

(6) A Type I permit applicant for a transportation classification permit only shall have a valid commercial driver's license with a hazardous materials endorsement and experience in the transportation of explosive materials for a period of not less than ninety days.

(E) Type I permit limitations

(1) A Type I permit shall be limited to possession and control of explosives while authorized by the Type II permittee(s) for whom the Type I permittee is employed or otherwise associated.

(2) The Type I permit shall be placed on inactive status by the Division upon notification in accordance with Section 3-9(D) that the Type I permittee is no longer authorized to possess and control explosives for a Type II permittee.

(3) Upon receipt of written notification by a Type II permittee of authorization and the return of the original Type I permit card, the Division shall return the Type I permit to active status and issue an updated permit card reflecting the change in employment or association.

(4) An active status Type I permit card shall be carried by the Type I permittee at all times when using, transporting, or possessing explosives.

3-5-2 Type II Explosives Permit

(A) Corporations, companies, partnerships, firms, individuals operating a business, associations, or state or local government agencies involved in the use, purchase, sale, manufacture, transportation, or disposal of explosives shall have a valid Type II Explosives Permit.

(B) Only one Type II permit shall be required of any corporation, company, partnership, firm, individual operating a business, association, or state or local government agency, and may be issued for all or any of the following classifications:

(1) CLASSIFICATION AS A MANUFACTURER OF EXPLOSIVES authorizes the possession, manufacture, and purchase of materials required in the process of manufacturing the finished product. A corporation, company, partnership, firm, individual operating a business, association, or state or local government agency that combines compounds to manufacture an explosive is engaged in the business of manufacturing explosives and shall be responsible for compliance with the provisions of 9-6-105 C.R.S., the Explosives Act, 9-7-101, et seq. C.R.S., and any rules and regulations promulgated thereunder.

(2) CLASSIFICATION AS A DEALER OF EXPLOSIVES authorizes the purchase, possession, and resale of explosives or blasting agents. A dealer permit is required of jobbers, wholesalers, distributors, dealers, and retailers, whether or not they physically handle, store, or have possession of the explosives or blasting agents. This permit is also required for all nonresidents who desire to sell explosives within the State of Colorado.

(3) CLASSIFICATION AS A PURCHASER OF EXPLOSIVES authorizes the purchase or acquisition and possession of explosives and blasting agents.

(4) CLASSIFICATION AS A PURCHASER LIMITED authorizes the purchase or acquisition and possession of 1.4 and 1.5 classes of explosives and binary products.

(5) CLASSIFICATION AS A USER OF EXPLOSIVES authorizes the possession and use of explosives and blasting agents by a corporation, company, partnership, firm, individual operating a business, association, or state or local government agency conducting an operation or activity which requires the use of such materials. User permits shall be issued for the following types of operations:

(i) Construction

(a) Applicant must also apply for a Type II transportation permit, or provide to the Division a written plan documenting the manner in which explosives shall be legally transported to and from construction sites.

(ii) Construction Limited

(a) Applicant's use and possession of explosives is limited to 1.4 and 1.5 classes of explosives and binary products.

(iii) Quarry Operations

(iv) Avalanche Mitigation

(v) Geophysical Research

(vi) Well Perforation

(vii) Manufacturer

(viii) Special (special use or possession and control as described on the permit, including but not limited to fabrication, research and development, rock-breaker cartridges, demolition, law enforcement, unexploded ordnance disposal, purchasing agent, , sales agent, etc.)

(6) A TRANSPORTATION permit authorizes the transportation of explosive materials and blasting agents in quantities that are required to be placarded across or over roads within the state when such transportation is in compliance with federal, state and local transportation laws and regulations.

(i) A copy of a Hazardous Materials Transport Permit issued by the Public Utilities Commission (PUC) shall be submitted with the application.

3-5-3 Type III Storage Permit

(A) Corporations, companies, partnerships, firms, individuals operating a business, associations, or state or local government agencies that store explosives shall have a valid Type III permit.

(B) Storage permits shall be issued to those persons who have approved storage magazine sites.

(C) Approval by the Division of a permanent storage magazine site shall include a site inspection by a Division representative. Written notification of the location of the permanent storage magazine site shall be made to the applicable fire district or department.

(D) Approval by the Division of temporary magazine sites shall be made for a period not to exceed 90 days upon written notification to the Division as to the location of the magazine site, the type(s) and supplier of the magazines being utilized, the type and quantity of explosives being stored and proof of written notification of the location of the storage magazine to the applicable fire district or department and county sheriff.

(E) An inspection shall be required at each permanent storage magazine site, including any added permanent storage magazine sites, prior to the renewal of the Type III permit.

Section 3-6 Permit Application

(A) Application for each type of original permit or renewal shall be made on forms available from the Division and shall provide the following information:

(1) The name and address of the applicant

(2) Front and reverse side copies of applicant's driver's license

(3) The reason for desiring to use, purchase, sell, store, manufacture, transport or dispose of explosives

(4) The applicant's citizenship, if the applicant is an individual

(5) If the Type II applicant is a partnership, the names and addresses of the Type I permitted partners and their citizenship

(6) If the Type II or Type III permit applicant is a corporation, company, firm, association or state or local government agency, the names and addresses of the Type I permitted owner(s), manager(s) or other designated individual thereof, and their citizenship

(7) Where application for a Type II explosives permit is made in the name of a corporation,

company, partnership, association, state or local government agency or firm, the application shall be signed by the permitted owner(s), partner(s), manager(s) or other designated individual(s) who will have access to explosive materials and be directly responsible for compliance with the provisions of the Explosives Act, 9-7-101, et seq. C.R.S., and any rules and regulations promulgated thereunder

(8) The name(s) of the valid Type II permittee the Type I permit applicant is employed by or associated with, and for whom the applicant will possess and control explosive materials

(9) Evidence that the Type I applicant is sufficiently trained and experienced in the use, transportation, storage, purchase, sale, disposal or manufacturing of explosives

(10) Such other pertinent information as the Division shall require to effectuate the purpose of these regulations

(B) Application forms may be obtained from the Division.

(C) The submission of an application shall be a certification by the Type I permit applicant that the applicant, or Type I permittee acting as the responsible person for the Type II or Type III permit applicant, has read, understands and accepts these regulations and shall comply with all requirements of these regulations.

(D) Payment of the application fee for a period of 36 months, according to the following list, must accompany each application for a permit.

Type I Explosives Permit:	$110.00
Type II Explosives Permit:	$225.00
Type III Explosives Permit:	$375.00

(E) A check or money order for the fee shall be made payable to the Division and submitted to the address provided on the application.

(F) The applicant may be asked to supply additional information requested by the Division in order to verify statements in an application or in order to facilitate a Division inquiry prior to the issuance or renewal of a permit.

(G) Each Type II application for a manufacturer or dealer permit shall be accompanied by a copy of the applicant's current federal license issued by The Bureau of Alcohol, Tobacco, Firearms and Explosives.

(H) The Type II application for a manufacturer or dealer permit shall list the location(s) in Colorado where explosives will be manufactured or from where explosives will be sold. This shall not be required for the manufacturers of binary explosives.

(I) A valid Type I permit shall be held by at least one of the individual owners, partners, managers or other designated individual for each classification of use requested on the Type II Explosives Permit application.

(J) Each application for an original Type II permit or a renewal permit shall be accompanied by a list of valid Type I permittees authorized to possess and control explosives on behalf of the Type II permittee. The Division shall be notified of any changes of such Type I permittees.

(K) An application for a Type III storage permit shall include the location of all storage facilities and types of magazines to be utilized.

(L) Each application for a Type II permit to purchase shall have a list of Type I permittees authorized to order and receive explosives on behalf of the purchaser. The list of Type I permittees authorized to order and receive explosives on behalf of the purchaser shall be provided to dealers prior to the purchase of explosives.

(M) In addition to the application form, all new Type I applicants, all Type I applicants requesting a change in classification of their permit, and all Type I applicants who have not renewed their permit within 60 days after expiration will be required to obtain a score of not less than 90% on a written examination prepared and administered by the Division. A Type I applicant failing the examination may retake the examination at any time. A Type I applicant failing the examination a second time must wait for a period of at least 14 days before retaking the exam.

(N) All Type I applicants renewing their permits are required to obtain a score of not less than 90% on a written examination prepared and administered by the Division every 3 years or provide proof of 16 hours attendance during the previous 3 years in a training course approved by the Division.

(O) The Division shall obtain a photograph of Type I permit applicants.

(P) Upon receipt of an incomplete application or an application requiring additional information, the applicant will be notified of the deficiency or additional requirements. If the deficiency is not corrected or if the Division does not receive the additional information within 180 days following the date of notification, the application shall be considered abandoned and the Division shall not retain the application.

(Q) Upon receipt of a completed Type I application the applicant will be sent an exam notification. If the Type I permit applicant fails to complete the exam within 180 days of the exam notification, the application shall be considered abandoned and the Division shall not retain the application.

(R) A Type I renewal applicant must complete the exam, if required, within 180 days of the date of the renewal notification letter sent by the Division. Should the renewal applicant fail to complete the exam within 180 days of the date of the renewal letter, the application shall be considered abandoned and the Division shall not retain the application.

Section 3-7 Protection and Exhibition of Permits

Permittees shall take every reasonable precaution to protect their permits from loss, theft, defacement, destruction or unauthorized duplication.

The loss or theft of any permit shall be reported immediately to the local law enforcement agency and to the Division.

Permits, or copies thereof, shall be exhibited in conformity with the following provisions:

(A) Manufacturer - the permit shall be posted at the facility where explosives or blasting agents are manufactured. Manufacturing permits for bulk mix trucks shall be posted in the office of the permittee.

(B) Dealer- the permit shall be posted in the office at the location where explosives or blasting agents are sold.

(C) Purchaser - the permit or a copy of the permit must be displayed at magazine/warehouse where explosives or blasting agents are received and stored.

(D) User - the permit shall be posted in the main office of explosives operations.

(E) Storage - a copy of the permit must be displayed at the office, warehouse, or in at least one

magazine where explosives or blasting agents are received for storage.

(F) A Type I permit card shall be carried by the Type I permittee at all times when using, transporting, or possessing explosives and presented to representatives of the Division and law enforcement officials, upon request, along with valid personal identification.

Section 3-8 Records of Transactions

All permittees shall keep a complete record of all transactions in, or operations involving explosives for five years following the year in which the transactions or operations involving explosives or blasting agents occurred. The permittees must retain copies thereof and furnish such copies to the Division during normal business hours upon request. When the permittee is employed by another person who holds a valid permit, the records of the employer shall be deemed to satisfy these record-keeping requirements.

3-8-1 Manufacturer

The records of a person having a permit to manufacture explosives or blasting agents shall include the following information:

(A) Amount and kinds manufactured.

(B) Amounts and kinds acquired for manufacture.

(C) Names and addresses of the persons from whom acquired and dates on which acquired.

(D) Amount and kinds sold or otherwise disposed of.

(E) Names, addresses and permit numbers of persons to whom sold or otherwise disposed of and dates of the sales or other dispositions.

(F) Amounts and kinds on hand at each location at the end of each day on which there are transactions or operations.

(G) The records kept in accordance with Section 6-1(U) shall meet the record requirements for the manufacture of binary products.

3-8-2 Dealer

The records of a person having a permit for dealer shall include the following information:

(A) Amounts and kinds acquired.

(B) Names and addresses of persons from whom acquired and dates on which acquired.

(C) Amounts and kinds sold or otherwise disposed of.

(D) Names, addresses, and permit numbers of persons to whom sold or otherwise disposed of and the dates of sales or other dispositions. This requirement shall not apply to the sale of smokeless powder.

3-8-3 Type II Permit

A person holding a Type II permit to use explosives or blasting agents shall maintain a record of all explosive material transactions including a daily inventory record of all explosives received, removed from, or returned to each storage magazine in accordance with Section 4-1(F)(6) of these regulations, and records completed by Type I permittees in accordance with Section 6-1(U) and Section 7-4(B)(11).

3-8-4 Type I Permit

Type I permittees shall complete and sign records of explosives used in accordance with Section 6-1(U) or Section 7-4(B)(11) of these regulations.

Section 3-9 Permit Changes

The Division shall be notified immediately when:

(A) There is a change in the permittee's permanent address.

(B) There is a change in the name of a permittee, or a change in the Type I permitted owner(s), manager(s), or other designated individual(s) acting as the responsible person of any Type II or Type III permittee.

(C) The location of an explosives storage facility is changed or added and the address of the new location shall be provided.

(D) There is a change in the Type II permitted employer or association for whom the Type I permittee will possess and control explosive materials.

(E) There is a change in the Type I permitted individuals authorized to possess and control explosives on behalf of a Type II permittee.

(F) A Type I Permit holder is currently charged with, has a pending charge of or has been convicted of any of the offenses listed in 3-3 (B) 1-3.

Section 3-10 Explosives Sales to Permittees

(A) When an order for explosives is placed by a purchaser, the dealer shall request proper authorization and identification from the purchaser and shall record the purchaser's permit number on the sales record.

(B) The purchaser shall provide to the dealer a list of Type I permittees authorized to order and receive explosives on behalf of the purchaser. A dealer shall not distribute explosive materials to a company or individual on the order of a person who does not appear on the most current list of authorized Type I permittees, and if the person does appear on the list, the dealer shall verify the identity of such person.

(C) The authorized Type I permittee who physically receives the purchased explosives shall present his permit and proper identification to the dealer. The receiver of the explosives shall sign a receipt documenting the explosives received with his legal signature and permit number.

(D) All such receipts shall be retained by the dealer for not less than 5 years from the date of purchase.

(E) The dealer shall keep a record of all explosives purchased and sold as required by federal regulations.

(F) Any package containing any explosive or blasting agent that is sold or is delivered for shipment by a dealer shall be properly labeled in accordance with 9-6-105 C.R.S. to indicate its explosive classification.

ARTICLE 4 STORAGE OF EXPLOSIVE MATERIALS

Section 4-1 General Requirements

(A) All explosive materials, special industrial explosive materials, and any newly developed and unclassified explosive materials shall be kept in magazines which meet the requirements as defined in these regulations, unless they are in the process of manufacture, being physically handled in the operating process, being used, or being transported to a place of storage or use. Refer to Section 4-3 for a summary of storage requirements.

(B) High explosives shall not be stored unattended outdoors, or in any building or structure, except in a Type 1 or Type 2 magazine.

(C) Detonators that will not mass detonate (1.4s and 1.4b classification) and are in the original and closed shipping container may also be stored in a Type 4 magazine.

(D) The requirements for the storage of binary explosives shall be:

(1) Storage of the flammable liquid component of a binary explosive shall be in secure storage that complies with the uniform fire code.

(2) Storage of the powder component of a binary explosive shall be in secure storage.

(3) Liquid and powder components shall not be stored together.

(E) Detonators shall not be stored in the same magazine in which other explosives are kept or stored except under the following circumstances:

(1) In a Type 1 or Type 2 magazine, detonators may be stored with delay devices, electric squibs, safety fuse, igniters, and igniter cord.

(2) In a Type 4 magazine, detonators that will not mass detonate (1.4s and 1.4b classification) may be stored with electric squibs, safety fuse, igniters, and igniter cord.

(F) Inventory and Responsibility

(1) Magazines shall be in the charge of a valid permittee at all times who shall be held responsible for the enforcement of all safety precautions.

(2) All explosives shall be accounted for at all times.

(3) Explosives not being used shall be kept in a locked magazine and the keys or combinations to the locks shall be unavailable to persons not holding a valid Type I permit.

(4) The Type II permittee shall maintain an inventory and use record of all explosive materials.

(5) Type I permittees shall record any receipt, removal, or return of explosives materials on inventory records within the magazine or at one central location on the business premises provided that transactions for each magazine are kept separate.

(6) The inventory records shall be maintained on forms approved by the Division and shall include:

(i) Type of explosive material product

(ii) Manufacturer's name or brand name

(iii) Identifying or date shift code

(iv) Amounts received, removed from or returned to the magazine

(v) The signature of the permittee receiving, removing or returning explosive materials

(vi) Total quantity remaining on hand

(7) Explosive materials shall be physically counted at least monthly.

(8) Explosive materials sold and received in individual unit quantities shall be inventoried as individual units.

(9) Explosive materials sold and received as pounds shall be inventoried as pounds when in unopened cases, and as individual cartridges or units when in opened cases.

(10) The Federal Bureau of Alcohol, Tobacco, Firearms and Explosives, the Division, and local law enforcement agencies shall be notified immediately of any loss, theft, or unauthorized entry into a magazine.

(G) Surrounding Area

(1) The land surrounding a magazine shall be kept clear of trash, dried grass, leaves or trees (except for live trees more than 10 feet tall) for a distance of at least 25 feet. Living foliage used to stabilize the earthen coverings of a magazine need not be removed.

(2) Any other combustible materials shall not be stored within 50 feet of magazines.

(3) Smoking, matches or an open flame shall not be permitted:

(i) In any magazine;

(ii) Within 50 feet of any outdoor magazine; or

(iii) Within any room containing an indoor magazine.

(4) Firearms shall not be permitted inside of, or within 50 feet of magazines.

(5) The premises on which all outdoor magazines are located shall be posted with signs with the words "DANGER—KEEP OUT" in letters at least 3 inches high. Signs shall be posted to warn any person approaching the magazine of the hazard, but shall be located so that a bullet passing through the sign will not strike the magazines.

(6) All normal access routes to outdoor explosives storage sites shall be posted with a sign with the words "DANGER- NEVER FIGHT FIRES ON THIS SITE. CALL _____" in letters at least 2 inches high. An emergency contact number shall be written on the sign.

(7) Indoor magazines shall be visibly marked with the words "DANGER – KEEP FIRE AWAY."

(H) Temporary storage at a site for blasting operations shall be located away from neighboring inhabited buildings, railways, highways, and other magazines in accordance with the American Table of Distances (see Section 4-5).

(I) Storage Within Magazines

(1) Packages of explosive materials shall be laid flat with top side up. Corresponding grades and brands shall be stored together in such a manner that brands and grade marks show. All stocks shall be stored so as to be easily counted and checked. Packages of explosives shall be stacked in a stable manner. When any kind of explosive is removed from a magazine for use, the oldest of that particular kind shall always be taken first.

(2) Packages of explosives requiring impact or potentially spark producing methods to open or to close shall not be opened or closed in a magazine, nor within 50 feet of a magazine or in close proximity to other explosive materials.

(3) Tools used for opening packages of explosives shall be constructed of non-sparking materials.

(4) Opened packages of explosives shall be securely closed before being returned to a magazine.

(5) Magazines shall not be used for the storage of any metal tools nor any commodity except explosives; however, this restriction shall not apply to the storage of blasting agents and non-metal blasting supplies.

(6) Magazine floors shall be regularly swept, kept clean, dry, and free of grit, paper, empty used packages, and rubbish. Brooms and other cleaning utensils shall not have any spark-producing metal parts. Sweepings from floors of magazines shall be properly disposed of. Magazine floors stained with nitroglycerin shall be cleaned according to instructions of the manufacturer.

(7) When any explosive has deteriorated to an extent that it is in an unstable or dangerous condition, or if nitroglycerin leaks from any explosives, then the person in possession of such explosives shall immediately proceed to destroy such explosives in accordance with the instructions of the manufacturer. Only Type I permittees experienced in the destruction of explosive materials shall be allowed to do the work of destroying explosives.

(8) When magazines need inside repairs, all explosives shall be removed and the floors cleaned. In making outside repairs, if there is a possibility of causing sparks or fire the explosives shall be removed from the magazine. Explosives removed from a magazine in order for repair shall either be placed in another class appropriate magazine, or placed a safe distance from the magazine where they shall be properly guarded and protected until repairs have been completed, at which time they shall be returned to the magazine.

(9) Explosive materials within a magazine are not to be placed against the interior walls and must be stored so as not to interfere with ventilation when required.

(10) Any person storing explosive materials shall open and inspect the magazine at least every 7 days. This inspection need not be an inventory, but must be sufficient to determine whether there has been unauthorized entry or attempted entry into the magazine, or unauthorized removal of the contents.

(11) Flammables, such as the liquid components of binary products, shall not be stored with other explosives.

(J) Lighting Within Magazines

(1) Battery-activated safety lights or battery-activated safety lanterns may be used in explosives storage magazines.

(2) Electric lighting, including wiring and fixtures, used in any explosives storage magazine must meet the standards prescribed by the National Electrical Code for the conditions present in

the magazine at any time. All electrical switches are to be located outside of the magazine and also meet the standards prescribed by the National Electrical Code.

(3) Light fixtures shall be enclosed to prevent sparks or hot metal from falling on the floor or on materials stored in the magazine.

(4) Interior magazine lights shall be turned off when the magazine is unattended.

(5) Copies of invoices, work orders or similar documents which indicate that the lighting complies with the National Electrical Code must be available for inspection by the Division.

Section 4-2 Classes of Explosive Materials and Examples

For the purposes of this article, there are three classes of explosive materials. These classes, together with the description of explosive materials comprising each class, are as follows:

(A) High Explosives - Explosive materials which can be caused to detonate by means of a detonator when unconfined. Examples include:

(1) Dynamite and detonators;

(2) Detonator-sensitive slurry/water gels and emulsions; and

(3) Mixed binaries.

(B) Low Explosives - Explosive materials which can be caused to deflagrate when confined. Examples include:

(1) Black powder;

(2) Pull wire igniters; and

(3) Safety fuse.

(C) Blasting Agents - Explosives materials consisting of fuel and oxidizer which cannot be detonated by means of a number 8 test detonator when unconfined. Examples include:

(1) Ammonium Nitrate/Fuel Oil mixture (ANFO); and

(2) Non detonator-sensitive slurry/water gels and emulsion products.

Section 4-3 Summary of Storage Requirements

Table 4-3	**Summary of Storage Requirements**
Storage Type	**Classes of Explosive Materials Which May Be Stored Therein**
Type 1 (Permanent)	High Explosives, Low Explosives, Blasting Agents
Type 2 (Portable, Mobile or Fixed)	High Explosives, Low Explosives, Blasting Agents
Type 3 (“Day Box” for Temporary Storage)	High Explosives, Low Explosives, Blasting Agents
Type 4 (Portable, Mobile or Fixed)	Blasting Agents, Low Explosives, Detonators (Original, Closed Cartons of 1.4b, 1.4c And 1.4s)

Type 5 (Portable, Mobile or Fixed)	Blasting Agents

Section 4-4 Storage Magazine Construction by Type

Table 4-4	Storage Magazine Construction By Type				
Construction Features	**Type 1**	**Type 2**	**Type 3**	**Type 4**	**Type 5**
Permanent	X			X	X
Portable or Mobile		X	X	X	X
Bullet-Resistant	X	X			
Fire-Resistant	X	X	X	X	X [(1)]
Theft- Resistant	X	X	X	X	X
Weather- Resistant	X	X	X	X	X
Ventilated	X	X		X	

[(1)] Over the road trucks or semi-trailers used as Type 5 magazines for temporary storage need not be fire resistant.

4-4-1 Type 1 Storage

A Type 1 magazine shall be a permanent structure, e.g., a building, an igloo or Army-type structure, a tunnel, or a dugout. It shall be bullet-resistant, fire-resistant, weather-resistant, theft-resistant, and ventilated.

(A) Buildings: All building-type magazines shall be constructed of masonry, wood, metal, or a combination of these materials and shall have no openings except for entrances and ventilation. The ground around building magazines shall slope away for drainage or other adequate drainage shall be provided.

(B) Masonry Wall Construction: Masonry wall construction shall consist of brick, concrete, tile, cement block, or cinder block and shall be not less than 8 inches in thickness. Hollow masonry units used in construction shall have all hollow spaces filled with well-tamped, coarse, dry sand or weak concrete (at least 1 part cement + 8 parts of sand with enough water to dampen the mixture while tamping in place). Interior walls shall be constructed of, or covered with, a non- sparking material.

(C) Fabricated Metal Wall Construction: Metal wall construction shall consist of sectional sheets of steel or aluminum, not less than #14 gauge, securely fastened to a metal framework. Metal wall construction shall be either lined inside with brick, solid cement blocks, hardwood not less than 4 inches thick, or shall have at least a 6-inch sand-fill between interior and exterior walls. Interior walls shall be constructed of, or covered with, a non-sparking material.

(D) Wood Frame Wall Construction: The exterior of outer wood walls shall be covered with steel or aluminum not less than #26 gauge. An inner wall of, or covered with, non-sparking material shall be constructed so as to provide a space of not less than 6 inches between the outer and inner walls. The space shall be filled with coarse, dry sand or weak concrete.

(E) Floors: Floors shall be constructed of, or covered with, a non-sparking material and shall be strong enough to bear the weight of the maximum quantity materials to be stored. Use of pallets covered with a non-sparking material is considered equivalent to a floor constructed of, or covered with, a non-sparking material.

(F) Foundations: Foundations shall be constructed of brick, concrete, cement block, stone, or wood posts. If piers or posts are used in lieu of a continuous foundation, the space under the buildings

shall be enclosed with metal.

(G) Roof: Except for buildings with fabricated metal roofs, the outer roof shall be covered with no less than #26 gauge steel or aluminum fastened to 7/8-inch sheathing.

(H) Bullet-Resistant Ceilings on Roofs: Where it is possible for a bullet to be fired directly through the roof and into the magazine at such an angle that the bullet would strike the explosives within, the magazine shall be protected by one of following methods:

(1) A sand tray with a layer of building paper, plastic, or other nonporous material filled with not less than 4 inches of coarse, dry sand, shall be located at the tops of inner walls covering the entire ceiling area, except that portion necessary for ventilation.

(2) A fabricated metal roof shall be constructed of 3/16-inch thick plate steel lined with 4 inches of hardwood. For each additional 1/16-inch of plate steel, the hardwood lining may be decreased by 1 inch.

(I) Doors: All doors shall be constructed of 1/4-inch plate steel and lined with 3 inches of hardwood. Hinges and hasps shall be attached to the doors by welding, riveting, or bolting (with nuts on the inside of the door). They shall be installed in such a manner that the hinges and hasps cannot be removed when the doors are closed and locked.

(J) Locks: Each door shall be equipped with at least one of the following types of locks:

(1) Two mortise locks

(2) Two padlocks fastened in separate hasps and staples

(3) A combination of a mortise lock and a padlock

(4) A mortise lock that requires two keys to open

(5) A three-point lock.

Padlocks shall have at least 5 tumblers and a case-hardened shackle of at least 3/8-inch in diameter. Padlocks shall be protected with 1/4-inch sheet hoods constructed so as to prevent sawing or lever action on the locks, hasps, and staples. These requirements shall not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock, or bar that cannot be actuated from the outside.

(K) Ventilation: Ventilation shall be provided to prevent dampness and heating of stored explosive materials. Ventilation openings shall be screened to prevent the entrance of sparks. Ventilation openings in sidewalls and foundations shall be offset or shielded for bullet-resistance purposes. Magazines having foundation and roof ventilators with the air circulating between the side walls and the floors and between the side walls and the ceiling shall have a wooden lattice lining or equivalent to prevent the packages of explosive materials from being stacked against the side walls and blocking the air circulation.

(L) Exposed Metal: No sparking material shall be exposed to contact with the stored explosive materials. All ferrous metal nails in the floor and sidewalls which might be exposed to contact with explosive materials shall be blind-nailed, countersunk, or covered with a non-sparking latticework or other non-sparking material.

(M) Igloos, Army-Type Structures, Tunnels, & Dugouts: Igloo, army-type structure, tunnel, and dugout magazines shall be constructed of reinforced concrete, masonry, metal, or a combination of these materials. They shall have an earth mound covering of not less than 24 inches on the top, sides,

and rear unless the ceiling or roof meets the bullet-resistant ceiling or roof requirements of this section. Interior walls shall be constructed of, or covered with, a non-sparking material. Magazines of this type shall also be constructed in conformity with the requirements of the floors, doors, locks, ventilation, and exposed metal portions outlined in this section.

4-4-2 Type 2 Storage

A Type 2 magazine shall be a portable or mobile structure such as a box, skid-magazine, trailer, or semi-trailer.

4-4-2-1 Outdoor Type 2 Magazines

Outdoor Type 2 magazines shall be bullet-resistant, fire-resistant, weather-resistant, theft-resistant, and ventilated. They shall be supported to prevent direct contact with the ground and, if less than 1 cubic yard in size, shall be securely fastened to a fixed object. The ground around outdoor magazines shall slope away for drainage or other adequate drainage shall be provided. When unattended, vehicular magazines shall have wheels removed or shall otherwise be effectively immobilized by methods approved by the Division.

(A) Exterior Construction: The exterior and covers or doors shall be constructed of 1/4-inch steel and shall be lined with 2 inches of hardwood. Magazines with top openings shall have lids with water-resistant seals or which overlap the sides by at least 1 inch when in a closed position.

(B) Hinges & Hasps: Hinges and hasps shall be attached to the covers or doors by welding, riveting, or bolting (with nuts on the inside of the door). Hinges and hasps shall be installed so that they cannot be removed when the doors are closed and locked.

(C) Locks: Each door shall be equipped with at least one of the following types of locks:

(1) Two mortise locks

(2) Two padlocks fastened in separate hasps and staples

(3) A combination of a mortise lock and a padlock

(4) A mortise lock that requires two keys to open

(5) A three-point lock.

Padlocks shall have at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter. Padlocks shall be protected with 1/4-inch steel hoods constructed so as to prevent sawing or lever action on the locks, hasps, and staples. These requirements do not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock, or bar that cannot be actuated from the outside.

(D) Ventilation: Ventilation shall be provided to prevent dampness and heating of stored explosive materials. Ventilation openings shall be screened to prevent the entrance of sparks. Ventilation openings in sidewalls shall be offset or shielded for bullet-resistance purposes. Packages of explosive materials shall not be stacked against the side walls and block the air circulation.

4-4-2-2 Indoor Type 2 Magazines

Indoor Type 2 magazines shall be fire-resistant and theft-resistant if the buildings in which they are stored provide protection from the weather and from bullet penetration. No indoor magazine may be located in a residence or dwelling. The indoor storage of high explosives may not exceed a quantity of 50 pounds.

More than one indoor magazine may be located in the same building if the total quantity of all explosive materials stored does not exceed 50 pounds. Detonators shall be stored in separate magazines.

(A) Exterior Construction: Indoor magazines shall be constructed of wood or metal according to one of the following specifications:

(1) Indoor magazines constructed of wood shall have sides, bottoms, and lids or doors constructed of two-inch wood and shall be well-braced at the corners. The magazines shall be covered on the exterior with sheet metal of not less than #26-gauge. Nails exposed to the interior of magazines shall be countersunk.

(2) Indoor magazines constructed of metal shall have sides, bottom, and lids or doors constructed of at least #12-gauge metal and shall be lined inside with a non-sparking material. Edges of metal covers shall overlap sides at least 1 inch.

(B) Hinges & Hasps: Hinges and hasps shall be attached to the covers or doors by welding, riveting, or bolting (with nuts on the inside of the door). Hinges and hasps shall be installed so that they cannot be removed when the doors are closed and locked.

(C) Locks: Each door shall be equipped with at least one of the following types of locks:

(1) Two mortise locks

(2) Two padlocks fastened in separate hasps and staples

(3) A combination of a mortise lock and a padlock

(4) A mortise lock that requires two keys to open

(5) A three-point lock.

Padlocks shall have at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter. Padlocks shall be protected with 1/4-inch steel hoods constructed so as to prevent sawing or lever action on the locks, hasps, and staples. Indoor magazines located in secure rooms, that are locked as provided in this paragraph, may have each door or opening locked with 1 steel padlock (which need not be protected by a steel hood) having at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter, if the lock hinges and hasps are securely fastened to the magazine and to the door frame. These requirements do not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock, or bar that cannot be actuated from the outside.

4-4-3 Alternate Construction Standards for Storage Facilities

It has been determined that a wide range of construction criteria meet the bullet-resistant requirements of ATF Rule 76-18 as published in Bureau Of Alcohol, Tobacco, Firearms, and Explosives, Department Of The Treasury, Publication ATF p 5400.7 (2012) for the construction of storage facilities for explosive materials.

In order to promote standards of safety and security in the storage of explosive materials while allowing the industry a wide latitude in the selection of construction materials, it is held that storage facilities (magazines) that are constructed according to the following minimum specifications are bullet-resistant and meet the requirements of the regulations as set forth in 27 CFR Part 55 (all steel and wood dimensions are actual thicknesses. To meet the concrete block and brick dimensions indicated, the manufacturers' represented thicknesses may be used).

(A) Exterior of 5/8-inch steel, lined with an interior of any type of non-sparking material.

(B) Exterior of 1/2-inch steel, lined with an interior of not less than 3/8-inch plywood.

(C) Exterior of 3/8-inch steel, lined with an interior of 2 inches of hardwood.

(D) Exterior of 3/8-inch steel, lined with an interior of 3 inches of softwood or 2¼ inches of plywood.

(E) Exterior of 1/4-inch steel, lined with an interior of 3 inches of hardwood.

(F) Exterior of 1/4-inch steel, lined with an interior of 5 inches of softwood or 5¼ inches of plywood.

(G) Exterior of 1/4-inch steel, lined with an intermediate layer of 2 inches of hardwood and an interior lining of 1½ inches of plywood.

(H) Exterior of 3/16-inch steel, lined with an interior of 4 inches of hardwood.

(I) Exterior of 3/16-inch steel, lined with an interior of 7 inches of softwood or 6¾ inches of plywood.

(J) Exterior of 3/16-inch steel, lined with an intermediate layer of 3 inches of hardwood and an interior lining of 3/4-inch of plywood.

(K) Exterior of 1/8-inch steel, lined with an interior of 5 inches of hardwood.

(L) Exterior of 1/8-inch steel, lined with an interior of 9 inches of softwood.

(M) Exterior of 1/8-inch steel, lined with an intermediate layer of 4 inches of hardwood and an interior lining of 3/4-inch plywood.

(N) Exterior of any type of fire-resistant material which is structurally sound, lined with an intermediate layer of 4 inches of solid concrete block, or 4 inches of solid brick or 4 inches of solid concrete; and, an interior lining of 1/2-inch plywood placed securely against the masonry lining.

(O) Standard 8-inch concrete block with voids filled with well-tamped sand/cement mixture.

(P) Standard 8-inch solid brick.

(Q) Exterior of any type of fire-resistant material which is structurally sound, lined with an intermediate 6-inch space filled with well-tamped dry sand or well-tamped sand/cement mixture.

(R) Exterior of 1/8-inch steel, lined with a first intermediate layer of 3/4-inch plywood, a second intermediate layer of 3⅝ inches of well-tamped dry sand or sand/cement mixture and an interior lining of 3/4-inch plywood.

(S) Second intermediate layer of 3⅝ inches well tamped dry sand or sand/cement mixture, a third intermediate layer of 3/4-inch plywood, and a fourth intermediate layer of two inches of hardwood or #14 gauge steel and an interior lining of 3/4-inch plywood.

(T) 8-inch thick solid concrete.

4-4-4 Type 3 Storage

A Type 3 magazine shall be a “day-box” or other portable magazine. It shall be fire-resistant, weather-resistant, and theft-resistant. A Type 3 magazine shall be constructed of #12-gauge metal lined with either 1/2-inch plywood or 1/2-inch Masonite-type hardboard. Doors shall overlap sides by at least 1 inch. Hinges and hasps shall be attached by welding, riveting or bolting (with nuts on the inside of the door). A single lock having at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter shall be sufficient for locking purposes. Explosive materials may not be left unattended in Type 3 magazines, but

must be removed to either a Type 1 or 2 magazine for unattended storage.

4-4-5 Type 4 Storage

A Type 4 magazine shall be a building, igloo or army-type structure, tunnel, dugout, box, trailer, or a semi-trailer or other mobile magazine.

4-4-5-1 Outdoor Type 4 Magazines

Outdoor Type 4 magazines shall be fire-resistant, weather-resistant, theft-resistant, ventilated and shall be at least 1 cubic yard in size, or securely fasted to a fixed object. The ground around outdoor magazines shall slope away for drainage or other adequate drainage shall be provided. When unattended, vehicular magazines shall have wheels removed or shall otherwise be effectively immobilized by other methods approved by the Division.

(A) Construction: Outdoor magazines shall be constructed of masonry, metal-covered wood, fabricated metal, or a combination of these materials. Foundation shall be constructed of brick, concrete, cement block, stone, or metal or wood posts. If piers or posts are used in lieu of a continuous foundation, the space under the buildings shall be enclosed with fire-resistant material. The walls and floors shall be constructed of, or covered with, a non-sparking material or lattice work. The doors or covers shall be metal or solid wood covered with metal.

(B) Hinges and Hasps: Hinges and hasps shall be attached to the covers or doors by welding, riveting, or bolting (nuts on inside of door). Hinges and hasps shall be installed so that they cannot be removed when the doors are closed and locked.

(C) Locks: Each door shall be equipped with at least one of the following types of locks:

(1) 2 mortise locks

(2) 2 padlocks fastened in separate hasps and staples

(3) A combination of a mortise lock and a padlock

(4) A mortise lock that requires two keys to open

(5) A three-point lock.

Padlocks shall have at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter. Padlocks shall be protected with 1/4-inch steel hoods constructed so as to prevent sawing or lever action on the locks, hasps, and staples. These requirements do not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock, or a bar that cannot be actuated from the outside.

(D) Ventilation: Ventilation shall be provided to prevent dampness and heating of stored explosive materials. Ventilation openings shall be offset or shielded and screened to prevent the entrance of sparks. The packages of explosive materials shall not be stacked against the side walls and block the air circulation.

4-4-5-2 Indoor Type 4 Magazines

Indoor magazines shall be fire-resistant and theft-resistant. They need not be weather-resistant if the buildings in which they are stored provide protection from the weather. No indoor magazine may be located in a residence or dwelling. The indoor storage of low explosives may not exceed a quantity of 50 pounds. More than one indoor magazine may be located in the same building if the total quantity of all

explosive materials stored does not exceed 50 pounds. Detonators that will not mass detonate shall be stored in separate magazines and the total number of detonators may not exceed 5,000.

(A) Construction: Indoor magazines shall be constructed of masonry, metal-covered wood, fabricated metal, or a combination of these materials. The walls and floors shall be constructed of, or covered with, a non-sparking material. The doors or covers shall be metal or solid wood covered with metal.

(B) Hinges & Hasps: Hinges and hasps shall be attached to the covers or doors by welding, riveting, or bolting (with nuts on the inside of the door). Hinges and hasps shall be installed so that they cannot be removed when the doors are closed and locked.

(C) Locks: Each door shall be equipped with at least one of the following types of locks:

(1) 2 mortise locks

(2) 2 padlocks fastened in separate hasps and staples

(3) A combination of a mortise lock and a padlock

(4) A mortise lock that requires two keys to open

(5) A three-point lock.

Padlocks shall have at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter. Padlocks shall be protected with 1/4-inch steel hoods constructed so as to prevent sawing or lever action on the locks, hasps, and staples. Indoor magazines located in secure rooms, that are locked as provided in this paragraph, may have each door or opening locked with one steel padlock (which need not be protected by a steel hood) having at least five tumblers and a case-hardened shackle of at least 3/8-inch diameter, if the lock hinges and hasps are securely fastened to the magazine and to the door frame. These requirements do not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock, or bar that cannot be actuated from the outside.

4-4-6 Type 5 Storage

A Type 5 magazine shall be a building, igloo or army-type structure, tunnel, dugout, bin, box, trailer, or a semitrailer or other mobile facility.

4-4-6-1 Outdoor Type 5 Magazines

Outdoor Type 5 magazines shall be weather-resistant, fire-resistant and theft-resistant. Over-the-road trucks or semi-trailers used as Type 5 magazines for temporary storage need not be fire-resistant. The ground around magazines shall slope away for drainage or other adequate drainage shall be provided. When unattended, vehicular magazines shall have wheels removed or shall otherwise be effectively immobilized by kingpin locking devices or other methods approved by the Division.

(A) Construction: The doors or covers shall be constructed of solid wood or metal.

(B) Hinges & Hasps: Hinges and hasps shall be attached to the covers or doors by welding, riveting, or bolting (with nuts on the inside of the door). Hinges and hasps shall be installed so that they cannot be removed when the doors are closed and locked.

(C) Locks: Each door shall be equipped with 1 padlock having at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter. Indoor magazines located in secure rooms, that

are locked as provided in this paragraph, may have each door or opening locked with 1 steel padlock (which need not be protected by a steel hood) having at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter, if the lock hinges and hasps are securely fastened to the magazine and to the door frame. These requirements do not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock or bar that cannot be actuated from the outside.

4-4-6-2 Indoor Type 5 Magazines

Indoor Type 5 magazines shall be theft-resistant. They need not be weather-resistant if the buildings in which they are stored provide protection from the weather. No indoor magazine may be located in a residence or dwelling. Indoor magazines containing quantities of blasting agents in excess of 50 pounds shall be subject to the American Table of Distances in Section 4-5-1 of this subpart.

(A) Construction: The doors or covers shall be constructed of wood or metal.

(B) Hinges and Hasps: Hinges and hasps shall be attached to the covers or doors by welding, riveting, or bolting (with nuts on the inside of the door). Hinges and hasps shall be installed so that they cannot be removed when the doors are closed and locked.

(C) Locks: Each door shall be equipped with 1 padlock having at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter.

Indoor magazines located in secure rooms that are locked as provided in this paragraph may have each door or opening locked with 1 steel padlock (which need not be protected by a steel hood) having at least 5 tumblers and a case-hardened shackle of at least 3/8-inch diameter if the lock hinges and hasps are securely fastened to the magazine and to the door frame. These requirements do not apply to magazine doors that are adequately secured on the inside by means of a bolt, lock or bar that cannot be actuated from the outside.

Section 4-5 Location of Magazines

(A) Outdoor magazines in which high explosives are stored shall be located no closer to inhabited buildings, passenger railways, public highways or other magazines in which high explosives are stored than the minimum distances specified in the American Table of Distances for Storage of Explosive Materials in Table 4-5-1.

(B) Outdoor magazines in which low explosives are stored shall be located no closer to inhabited buildings, passenger railways, public highways or other magazines in which explosives are stored than the minimum distances specified in the American Table of Distances for Storage of Low Explosives in Table 4-5-2. The distances shown therein may not be reduced by the presence of barricades.

(C) Outdoor magazines in which blasting agents are stored shall be located no closer to inhabited buildings, passenger railways or public highways than the minimum distances specified in the American Table of Distances for Storage of Explosive Materials in Table 4-5-1.

(D) Ammonium nitrate and magazines in which blasting agents are stored shall be located no closer to magazines in which high explosives or other blasting agents are stored than the minimum distances specified in the American Table of Distances for the Separation of Ammonium Nitrate and Blasting Agents in Table 4-5-3. However, the minimum distances for magazines in which explosives and blasting agents are stored from inhabited buildings, passenger railways or public highways may not be less than the distances specified in the American Table of Distances for Storage of Explosive Materials in Table 4-5-1.

Table 4-5-1		American Table of Distances for Storage of Explosive Materials							
		Distances in Feet							
Quantity of Explosive Materials [1,2,3,4]		Inhabited Buildings [9]		Public Highways with Traffic Volume of less than 3,000 Vehicles/Day [11]		Passenger Railways-Public Highways with Traffic Volume of more than 3,000 Vehicles/Day [10, 11]		Separation of Magazines [12]	
Pounds Over	Pounds Not Over	Barricaded [6,7,8]	Unbarricaded	Barricaded [6,7,8]	Unbarricaded	Barricaded [6,7,8]	Unbarricaded	Barricaded [6,7,8]	Unbarricaded
0	5	70	140	30	60	51	102	6	12
5	10	90	180	35	70	64	128	8	16
10	20	110	220	45	90	81	162	10	20
20	30	125	250	50	100	93	186	11	22
30	40	140	280	55	110	103	206	12	24
40	50	150	300	60	120	110	220	14	28
50	75	170	340	70	140	127	254	15	30
75	100	190	380	75	150	139	278	16	32
100	125	200	400	80	160	150	300	18	36
125	150	215	430	85	170	159	318	19	38
150	200	235	470	95	190	175	350	21	42
200	250	255	510	105	210	189	378	23	46
250	300	270	540	110	220	201	402	24	48
300	400	295	590	120	240	221	442	27	54
400	500	320	640	130	260	238	476	29	58
500	600	340	680	135	270	253	506	31	62
600	700	355	710	145	290	266	532	32	64
700	800	375	750	150	300	278	556	33	66
800	900	390	780	155	310	289	578	35	70
900	1,000	400	800	160	320	300	600	36	72
1,000	1,200	425	850	165	330	318	636	39	78
1,200	1,400	450	900	170	340	336	672	41	82
1,400	1,600	470	940	175	350	351	702	43	86
1,600	1,800	490	980	180	360	366	732	44	88
1,800	2,000	505	1,010	185	370	378	756	45	90
2,000	2,500	545	1,090	190	380	408	816	49	98
2,500	3,000	580	1,160	195	390	432	864	52	104
3,000	4,000	635	1,270	210	420	474	948	58	116
4,000	5,000	685	1,370	225	450	513	1,026	61	122
5,000	6,000	730	1,460	235	470	546	1,092	65	130
6,000	7,000	770	1,540	245	490	573	1,146	68	136
7,000	8,000	800	1,600	250	500	600	1,200	72	144
8,000	9,000	835	1,670	255	510	624	1,248	75	150
9,000	10,000	865	1,730	260	520	645	1,290	78	156
10,000	12,000	875	1,750	270	540	687	1,374	82	164
12,000	14,000	885	1,770	275	550	723	1,446	87	174
14,000	16,000	900	1,800	280	560	756	1,512	90	180
16,000	18,000	940	1,880	285	570	786	1,572	94	188
18,000	20,000	975	1,950	290	580	813	1,626	98	196
20,000	25,000	1,055	2,000	315	630	876	1,752	105	210
25,000	30,000	1,130	2,000	340	680	933	1,866	112	224
30,000	35,000	1,205	2,000	360	720	981	1,962	119	238
35,000	40,000	1,275	2,000	380	760	1,026	2,000	124	248
40,000	45,000	1,340	2,000	400	800	1,068	2,000	129	258
45,000	50,000	1,400	2,000	420	840	1,104	2,000	135	270
50,000	55,000	1,460	2,000	440	880	1,140	2,000	140	280
55,000	60,000	1,515	2,000	455	910	1,173	2,000	145	290
60,000	65,000	1,565	2,000	470	940	1,206	2,000	150	300
65,000	70,000	1,610	2,000	485	970	1,236	2,000	155	310
70,000	75,000	1,655	2,000	500	1,000	1,263	2,000	160	320
75,000	80,000	1,695	2,000	510	1,020	1,293	2,000	165	330
80,000	85,000	1,730	2,000	520	1,040	1,317	2,000	170	340
85,000	90,000	1,760	2,000	530	1,060	1,344	2,000	175	350
90,000	95,000	1,790	2,000	540	1,080	1,368	2,000	180	360
95,000	100,000	1,815	2,000	545	1,090	1,392	2,000	185	370
100,000	110,000	1,835	2,000	550	1,100	1,437	2,000	195	390
110,000	120,000	1,855	2,000	555	1,110	1,479	2,000	205	410
120,000	130,000	1,875	2,000	560	1,120	1,521	2,000	215	430
130,000	140,000	1,890	2,000	565	1,130	1,557	2,000	225	450
140,000	150,000	1,900	2,000	570	1,140	1,593	2,000	235	470
150,000	160,000	1,935	2,000	580	1,160	1,629	2,000	245	490
160,000	170,000	1,965	2,000	590	1,180	1,662	2,000	255	510
170,000	180,000	1,990	2,000	600	1,200	1,695	2,000	265	530
180,000	190,000	2,010	2,010	605	1,210	1,725	2,000	275	550
190,000	200,000	2,030	2,030	610	1,220	1,755	2,000	285	570
200,000	210,000	2,055	2,055	620	1,240	1,782	2,000	295	590
210,000	230,000	2,100	2,100	635	1,270	1,836	2,000	315	630
230,000	250,000	2,155	2,155	650	1,300	1,890	2,000	335	670
250,000	275,000	2,215	2,215	670	1,340	1,950	2,000	360	720
275,000	300,000	2,275	2,275	690	1,380	2,000	2,000	385	770

Table: American Table of Distances for Storage of Explosive Materials as Revised and Approved by the Institute of Makers of Explosives – June 1991

Table 4-5-2	Table of Distance for the Storage of Low Explosives			
Quantity of Explosives (In Pounds)		Distance in Feet		
Over	Not Over	From Inhabited Buildings	From Public Railways and Highways	From Above Ground Magazine
0	1,000	75	75	50
1,000	5,000	115	115	75
5,000	10,000	150	150	100
10,000	20,000	190	190	125
20,000	30,000	215	215	145
30,000	40,000	235	235	155
40,000	50,000	250	250	165
50,000	60,000	260	260	175
60,000	70,000	270	270	185
70,000	80,000	280	280	190
80,000	90,000	295	295	195
90,000	100,000	300	300	200
100,000	200,000	375	375	250
200,000	300,000	450	450	300

Table: Department of Defense Ammunition and Explosives Standards, Table 5–4.1 Extract; 4145.27 M, March 1969

Table 4-5-3		Table of Separation Distances of Ammonium Nitrate and Blasting Agents from Explosives or Blasting Agents[1,6]		
Donor Weight		Minimum Separation Distance of Acceptor when Barricaded[2] (ft.)		
Pounds Over	Pounds Not Over	Ammonium Nitrate[3]	Blasting Agent[4]	Minimum Thickness of Artificial Barricades[5] (in.)
	100	3	11	12
100	300	4	14	12
300	600	5	18	12
600	1,000	6	22	12
1,000	1,600	7	25	12
1,600	2,000	8	29	12
2,000	3,000	9	32	15
3,000	4,000	10	36	15
4,000	6,000	11	40	15
6,000	8,000	12	43	20
8,000	10,000	13	47	20
10,000	12,000	14	50	20
12,000	16,000	15	54	25
16,000	20,000	16	58	25
20,000	25,000	18	65	25
25,000	30,000	19	68	30
30,000	35,000	20	72	30
35,000	40,000	21	76	30
40,000	45,000	22	79	35
45,000	50,000	23	83	35
50,000	55,000	24	86	35
55,000	60,000	25	90	35
60,000	70,000	26	94	40
70,000	80,000	28	101	40
80,000	90,000	30	108	40
90,000	100,000	32	115	40
100,000	120,000	34	122	50
120,000	140,000	37	133	50
140,000	160,000	40	144	50
160,000	180,000	44	158	50
180,000	200,000	48	173	50
200,000	220,000	52	187	60
220,000	250,000	56	202	60
250,000	275,000	60	216	60
275,000	300,000	64	230	60

Table: National Fire Protection Association (NFPA) Official Standard No. 492, 1968

Explanatory Notes Essential to the Application of the American Table of Distances for Storage of Explosive Materials

NOTE 1 "Explosive materials" means explosives, blasting agents and detonators.

NOTE 2 "Explosives" means any chemical compound, mixture, or device, the primary or common purpose of which is to function by explosion. For quantity and distance purposes, detonating cord of 50 grains per foot should be calculated as equivalent to 8 lbs. of high explosives per 1,000 feet. Heavier or lighter core loads should be rated proportionately.

NOTE 3 "Blasting agents" means any material or mixture, consisting of fuel and oxidizer, intended for blasting, not otherwise defined as an explosive provided that the finished product as mixed for use or shipment, cannot be detonated by means of a No.8 test blasting cap when unconfined.

NOTE 4 "Detonator" means any device containing any initiating or primary explosive that is used for initiating detonation. A detonator may not contain more than 10 grams of total explosives by weight, excluding ignition or delay charges. The term includes, but is not limited to, electric blasting caps of instantaneous and delay types, electronic detonators**,** blasting caps for use with safety fuses, detonating cord delay connectors, and non-electric instantaneous and delay blasting caps which use detonating cord, shock tube, or any other replacement for electric leg wires. All types of detonators in strengths through No.8 cap should be rated at 1 1/2 lbs. of explosives per 1,000 caps. For strengths higher than No.8 cap consult the manufacturer.

NOTE 5 "Magazine" means any building, structure, or container, other than an explosives manufacturing building, approved for the storage of explosive materials.

NOTE 6 "Natural Barricade" means natural features of the ground such as hills, or timber of sufficient density that the surrounding exposures which require protection cannot be seen from the magazine when the trees are bare of leaves.

NOTE 7 "Artificial Barricade" means an artificial mound or wall of earth of a minimum thickness of three feet.

NOTE 8 "Barricaded" means the effective screening of a building containing explosive materials from the magazine or other building, railway, or highway by a natural or an artificial barrier. A straight line from the top of any sidewall of the building containing explosive materials to the eave line of any magazine or other building or to a point twelve feet above the center of a railway or highway shall pass through such barrier.

NOTE 9 "Inhabited Building" means a building regularly occupied in whole or part as a habitation for human beings, or any church, schoolhouse, railroad station, store, or other structure where people are accustomed to assemble, except any building or structure occupied in connection with the manufacture, transportation, storage or use of explosive materials.

NOTE 10 "Railway" means any steam, electric, or other railroad or railway which carries passengers for hire.

NOTE 11 "Highway" means any public street, public alley, or public road.

NOTE 12 When two or more storage magazines are located on the same property, each magazine must comply with the minimum distances specified from inhabited buildings, railways and highways, and, in addition, they should be separated from each other by not less than the distances shown for "Separation of Magazines," except that the quantity of explosive materials contained in detonator magazines shall govern in regard to the spacing of said detonator magazines from magazines containing other explosive materials. If any two or more magazines are separated from each other by less than the specified "Separation of Magazines" distances, then such two or more magazines, as a group, must be considered as one magazine, and the total quantity of explosive materials stored in such group must be treated as if stored in a single magazine located on the site of any magazine of the group, and must comply with the minimum of distances specified from other magazines, inhabited buildings, railways, and highways.

NOTE 13 Storage in excess of 300,000 lbs. of explosive materials, in one magazine is generally not required for commercial enterprises.

NOTE 14 This Table applies only to the manufacture and permanent storage of commercial explosive materials. It is not applicable to transportation of explosives or any handling or temporary storage necessary or incident thereto. It is not intended to apply to bombs, projectiles, or other heavily encased explosives.

NOTE 15 When a manufacturing building on an explosive materials plant site is designed to contain explosive materials, such building shall be located from inhabited buildings, public highways and passenger railways in accordance with the American Table of Distances based on the maximum quantity of explosive materials permitted to be in the building at one time.

American Table of Distances

The American Table of Distances applies to the manufacture and permanent storage of ***commercial*** explosive materials. The distances specified are those measured from the explosive materials storage facility to the inhabited building, highway or passenger railway, irrespective of property lines.

The American Table of Distances covers all ***commercial*** explosive materials, including, but not limited to, high explosives, blasting agents, detonators, initiating systems and explosives materials in process. The Table is not designed to be altered or adjusted to accommodate varying explosive characteristics such as blast effect, weight strength, density, bulk strength, detonation velocity, etc.

The American Table of Distances should not be used to determine safe distances for blasting work, the firing of explosive charges for testing or quality control work, or the open detonation of waste explosive materials. The American Table of Distances may be utilized as a guide for developing distances for the unconfined, open burning of waste explosive materials where the probability of transition from burning to high order detonation is improbable.

Notes to Table of Recommended Separation Distances of Ammonium Nitrate and Blasting Agents from Explosives or Blasting Agents

NOTE 1 Recommended separation distances to prevent explosion of ammonium nitrate and ammonium nitrate-based blasting agents by propagation from nearby stores of high explosives or blasting agents referred to in the Table as the "donor." Ammonium nitrate, by itself, is not considered to be a donor when applying this Table. Ammonium nitrate, ammonium nitrate-fuel oil or combinations thereof are acceptors. If Stores of ammonium nitrate are located within the sympathetic detonation distance of explosives or blasting agents, one-half the mass of the ammonium nitrate should be included in the mass of the donor.

NOTE 2 When the ammonium nitrate and/or blasting agent is not barricaded, the distances shown in the Table shall be multiplied by six. These distances allow for the possibility of high velocity metal fragments from mixers, hoppers, truck bodies, sheet metal structures, metal containers, and the like which may enclose the "donor." Where storage is in bullet-resistant magazines is recommended for explosives or where the storage is protected by a bullet-resistant wall, distances and barricade thicknesses in excess of those prescribed in the American Table of Distances are not required.

NOTE 3 The distances in the Table apply to ammonium nitrate and ammonium nitrate based materials that show "negative" (-) result in the UN Test Series 2 Gap Test and show "positive" (+) result in the UN Test Series 1 Gap Test. Ammonium nitrate and ammonium nitrate based materials that are DOT hazard Class 1 sensitive shall be stored at separation distances determined by the American Table of Distances.

NOTE 4 These distances apply to blasting agents which pass the insensitivity test prescribed in regulations of the U.S. Department of Transportation and the U.S. Department of the Treasury, Bureau of Alcohol, Tobacco and Firearms.

NOTE 5 Earth, or sand dikes, or enclosures filled with the prescribed minimum thickness of earth or sand are acceptable artificial barricades. Natural barricades, such as hills or timber of sufficient density that the surrounding exposures which require protection cannot be seen from the "donor" when the trees are bare of leaves, are also acceptable.

NOTE 6 For determining the distances to be maintained from inhabited buildings, passenger railways, and public highways, use the American Table of Distances for Storage of Explosives Materials on pages 58 and 59.

*For construction of bullet-resistant magazines see Bureau of Alcohol, Tobacco and Firearms, Department of the Treasury, Publication ATF P 5400.7 (9/00), *ATF-Explosives Law and Regulations.*

ARTICLE 5 TRANSPORTATION OF EXPLOSIVES

Section 5-1 General Requirements

(A) Transportation of explosives, blasting agents, and blasting supplies on public highways, railways, and airways shall be in accordance with the provisions of Title 42 Article 20 C.R.S. and any regulations promulgated pursuant thereto and Title 49 CFR Parts 171-179 and Parts 390-397, Motor Carriers.

(B) Requirements for the transportation of explosives, blasting agents and blasting supplies by motorized vehicle or conveyance on job sites shall be:

(1) No person shall smoke, carry matches or any other flame-producing device or carry firearms or loaded cartridges while in or near a motor vehicle or conveyance transporting explosives.

(2) No person shall drive, load or unload a vehicle or conveyance transporting explosives in a careless or reckless manner.

(3) Vehicles or conveyances transporting explosives, blasting agents or blasting supplies shall not be taken inside a garage or shop for repairs or servicing.

(4) Vehicles or conveyances used for transporting explosives shall be equipped to carry the load without difficulty and shall be in good mechanical condition.

(5) A motor vehicle or conveyance used for transporting explosives shall be given the following inspection prior to the transportation to determine that it is in proper condition for the safe transportation of explosives:

(i) Fire extinguishers shall be filled and in proper working order;

(ii) All electrical wiring shall be completely protected and securely fastened to prevent short-circuiting;

(iii) Chassis, motor, pan and underside of body shall be completely free of excess oil and grease;

(iv) Fuel tank and fuel line shall be secure and have no leaks;

(v) Brakes, lights, horn, windshield wipers and steering apparatus shall function properly;

(vi) Tires shall be checked for proper inflation and defects; and

(vii) The vehicle shall be in proper condition in every other respect and acceptable for handling explosives.

(6) All vehicles or conveyances used for transporting explosives shall have tight floors, and any exposed spark-producing metal on the inside of the body shall be covered with wood or other non-sparking materials to prevent contact with packages of explosives.

(7) Packages of explosives or blasting agents shall not be loaded above the sides of an open-body vehicle or conveyance.

(8) Explosives shall not be transported with other materials or cargoes in the same compartment. In no case shall flammable materials be carried on the same vehicle as explosives, with the exception of desensitizing agents.

(9) Each vehicle or conveyance used for transportation of explosives shall be equipped with at least one charged fire extinguisher each with an extinguisher rating of at least 4-A:10B:C. Extinguishers shall be located where they will be accessible for immediate use.

(10) Explosives shall be transferred from a disabled vehicle or conveyance to another vehicle or conveyance only when proper and qualified supervision is provided. Local fire departments and police departments shall be notified if a transfer occurs in a congested area. In remote areas, they shall be notified if appropriate.

(11) A motorized vehicle or conveyance which contains explosives or detonators shall not be parked under any of the following circumstances:

(i) On or within 5 feet of the traveled portion of a public street or highway; or

(ii) Within 300 feet of a bridge, tunnel, building, or place where people work, assemble, or congregate, except for brief periods when the necessities of operation require the vehicle or conveyance to be parked and make it impracticable to park the vehicle or conveyance in any other place.

(12) A motorized vehicle or conveyance transporting explosives, detonators, or blasting agents shall not be left unattended.

(13) A motorized vehicle or conveyance shall be deemed attended only when the driver or other attendant is physically on or in the vehicle or conveyance, or has the vehicle or conveyance within the driver or attendant's field of vision and can reach the vehicle or conveyance quickly and without any kind of interference; attended also means the driver or attendant is awake, alert, and not engaged in any other duties or activities which may divert his/her attention from the vehicle or conveyance.

(14) Detonators may not be transported in the same vehicle or conveyance with other explosives unless:

(i) The detonators and explosives are placed in separate locked Type 2 magazines secured within the body of the vehicle or conveyance;

(ii) The detonators and explosives are placed in a suitable locked container and separated by 4 inches of hardwood and the detonators are totally enclosed or confined by the hardwood construction;

(iii) The detonators and explosives are placed in separate locked containers or container compartments constructed in accordance with the Institute of Makers of Explosives Safety Library Publication No. 22, "IME Standard for the Safe Transportation of Detonators in a Vehicle with Other Explosives"; or

(iv) The detonators and explosives are placed in separate locked Type 3 magazines.

(C) Requirements for the transportation of explosives, blasting agents and blasting supplies to blasting areas by non-motorized means shall be:

(1) Explosives and blasting agents shall be carried in day boxes, original containers or shall be placed in bags or containers that are water-resistant and constructed of non-sparking and nonconductive material.

(2) Detonators shall be wrapped in suitable padding and carried in separate bags or containers from other explosives.

ARTICLE 6 USE OF EXPLOSIVE MATERIALS

Section 6-1 General Requirements

(A) While explosives are being handled or used, smoking, matches or any other source of fire or flame shall not be within 50 feet of the blast site.

(B) No person shall handle explosives while under the influence of intoxicating liquors, narcotics, or other dangerous drugs. This rule does not apply to persons taking prescription drugs and/or narcotics as directed by a physician providing such use shall not endanger the worker or others.

(C) When blasting is done in populated or residential areas or in close proximity to a structure, railway, or highway or any other installation that may be damaged, the following precautions shall be taken:

(1) The blast shall be covered, before firing, with a mat or material that is capable of preventing fragments from being thrown;

(2) The blast shall be loaded in compliance with the Table of Scaled Distance (Table 6-10) or be monitored by a seismograph; and

(3) All persons within the blast area shall be given reasonable notification prior to blasting operations and informed as to the type of warning signal that will be given prior to the blast.

(D) Blasters conducting blasting operations shall take every reasonable precaution, including but not limited to warning signals, flags and barricades to insure the safety of the general public and workers.

(E) Surface blasting operations shall be conducted during periods of daylight, when the blast area is clearly visible. Blasting operations conducted after periods of daylight shall be approved by the Division and local law enforcement agency prior to each blast. Approval shall only be granted if such approval serves the safety of the general public.

(F) The blaster shall perform all required notification to and obtain all required permits from local jurisdictions or authorities, including, but not limited to, the County Sheriff, local fire districts and fire departments before beginning blasting operations.

(G) Whenever blasting is being conducted in the vicinity of gas, electric, water, fire alarm, telephone, telegraph, steam utilities or transportation corridors, the blaster shall notify the appropriate transportation or utility representatives at least 24 hours in advance of blasting, specifying the location and intended time of such blasting.

(H) The blaster shall suspend all blasting operations and remove all persons from the blast site during the approach and progress of an electrical storm.

(I) No fire shall be fought where the fire is in imminent danger of contact with explosives. All employees shall be removed to a safe area and the fire area guarded against intruders.

(J) Detonators or other explosives shall never be carried in pockets of clothing.

(K) Detonators shall not be inserted in explosive materials that do not have a cap well without first making a hole in the cartridge with a non-sparking punch of proper size, or the appropriate pointed handle of a cap crimper.

(L) The detonator shall be secured within the primer so that no tension is placed on the leg wires, safety fuse, shock tube, plastic tubing or detonating cord at the point of entry into the detonator.

(M) The detonator shall be fully inserted into the primer cartridge or booster and shall not protrude from the cartridge.

(N) Cast primers and boosters shall not be used if the hole is too small for the detonator, and attempting to enlarge the hole in a cast primer or booster shall not be permissible.

(O) Primers are not to be prepared in a magazine or near large quantities of explosive materials.

(P) Explosives and blasting agents shall be kept separated from detonators until the charge is placed.

(Q) Only non-sparking metallic slitters may be used for opening fiberboard cases.

(R) Cartridges or packages of explosives showing signs of discoloration or deterioration must be carefully set aside and properly disposed of in accordance with manufacturer's recommendations.

(S) No explosive material shall be abandoned or left in any location for any reason, nor left in such a manner that they may easily be obtained by children or other unauthorized persons. All unused explosives shall be returned to proper storage facilities.

(T) A record of each blast shall be kept. All records, including seismograph reports, shall be retained at least five years, be available for inspection by the Division, and contain at least the following minimum data, as applicable:

(1) Person for whom blasting operations are conducted

(2) Name, permit number, and signature of the blaster

(3) Exact location or address of the blast, date and time of detonation

(4) Type of material blasted

(5) Number of holes, burden and spacing

(6) Diameter and depth of holes

(7) Types of explosives used

(8) Amount and type of explosive loaded in each borehole or used in each charge

(9) Total amount of each explosive used

(10) Maximum amount of explosives and holes detonated within 8 milliseconds

(11) Method of firing and type of circuit

(12) Direction, distance in feet, and identification of the nearest dwelling, house, public building, school, church, commercial or institutional building neither owned nor leased by the person or company conducting the blasting

(13) Weather conditions

(14) Type and height or length of stemming

(15) A statement as to whether mats or protection against flyrock were used

(16) Type of delay caps used and delay periods used

(17) The person taking the seismograph reading shall accurately indicate exact location of the seismograph if used and shall show the distance of the seismograph from the blast

(18) Seismograph records, where required, which shall include:

(i) Name of person and firm analyzing the seismograph record; and

(ii) Seismograph reading.

(19) Sketch of blast pattern including number of holes, burden and spacing distance, delay pattern, and if decking is used, a hole profile.

Section 6-2 Drilling and Loading

(A) Procedures that permit safe and efficient loading shall be established before the loading of explosive materials is started.

(B) All boreholes shall be sufficiently large to admit freely the insertion of the cartridges of explosives.

(C) Tamping shall be done only with wooden rods or with approved plastic tamping poles without exposed metal parts, but non-sparking metal connectors may be used for jointed poles. Violent tamping shall be avoided. The primer shall never be tamped.

(D) No boreholes shall be loaded except those to be fired in the next round of blasting. After loading, all remaining explosive materials shall be immediately returned to magazines or day boxes.

(E) No explosives or blasting agents shall be left unattended on a blast site.

(F) Drilling shall not be started until all remaining butts of old boreholes are examined for unexploded charges, and if any are found, they shall be refired or removed before work proceeds.

(G) No person shall be allowed to deepen boreholes that have contained explosives or blasting agents.

(H) Drilling shall not be conducted where there is a danger of intersecting a loaded borehole or misfired explosive material.

(I) Equipment, machines and all tools not used for loading explosives into boreholes shall be removed from the immediate location of boreholes being loaded with explosives. Equipment shall not be operated within 50 feet of loaded boreholes except when equipment is needed to add cover or mats.

(J) Loaded boreholes shall not be left unattended.

(K) The Type I permittee shall maintain an accurate, up-to-date record of explosives, blasting agents and all blasting supplies used in a blast and shall keep an accurate running inventory of all explosives and blasting agents stored on the operation.

(L) Pneumatic loading of blasting agents into blast holes primed with electric detonators or other static-sensitive initiation systems shall conform to the following requirements:

(1) A positive grounding device for the equipment shall be used to prevent the accumulation of static electricity.

(2) A semi-conductive hose shall be used.

(3) A qualified person shall evaluate all systems to assure that they will adequately dissipate static under potential field conditions.

(M) Primers shall be made up immediately prior to placing the primer in the borehole.

(N) Dropping or pushing a primer or any explosive with a lighted fuse attached into a borehole is prohibited.

(O) Detonators shall not be loaded into a hot hole or exposed to temperatures above 150° F unless specifically designed and approved by the manufacturer for higher temperatures.

Section 6-3 Electric Initiation of Blasts

(A) Electric detonators may be used for blasting operations in congested districts, or on highways, or adjacent to highways open to traffic, except where sources of extraneous electricity make such use dangerous.

(B) Electric detonator wires shall be kept short-circuited (shunted) until they are connected into the circuit for firing.

(C) Signs shall be posted warning against the use of mobile radio transmitters on all adjacent highways and roads.

(D) Mobile radio transmitters that are less than 100 feet away from electric detonators shall be de-energized and effectively locked when the detonators are not in the original containers.

(E) Electric detonators shall be used in compliance with the recommendations of IME with regard to blasting in the vicinity of radio transmitters as stipulated in Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the Use of Commercial Electric Detonators (Blasting Caps), IME Safety Library Publication No. 20, December 2011.

(F) Precautions in accordance with the recommendations of IME with regard to blasting in the vicinity of radio transmitters as stipulated in Safety Guide for the Prevention of Radio Frequency Radiation Hazards in the Use of Commercial Electric Detonators (Blasting Caps), IME Safety Library Publication No. 20, December 2011 shall be taken to prevent accidental discharge of electric detonators from current induced by radar, cellular telephones, radio transmitters, battery contact, lightning, adjacent power lines, static electricity, dust storms, blowing snow or other sources of extraneous electricity.

(G) Before adopting any system of electrical firing, the blaster shall conduct a thorough survey for extraneous currents, and all dangerous currents shall be eliminated before any holes are loaded.

(H) In any single blast using electric detonators, all detonators shall be of the same style or function and be of the same manufacture.

(I) Electric blasting shall be carried out by using blasting circuits or power circuits, in accordance with the electric detonator manufacturer's recommendations.

(J) The firing line shall be checked with an approved testing device at the terminals before being connected to the blasting machine or other power source.

(K) The circuit, including all detonators, shall be tested with an approved testing device before being connected to the firing line.

(L) When firing a circuit of electric detonators, care shall be exercised to ensure that an adequate quantity of delivered current is available, in accordance with the manufacturer's recommendation.

(M) Connecting wires and lead wires shall be insulated single solid wires of sufficient current- carrying capacity and shall not be less than #20 gauge (American wire gauge) solid core insulated wire.

(N) Firing line or leading wires shall be solid single wires of sufficient current carrying capacity, and shall be not less than #14 gauge (American wire gauge) solid core insulated wire. Bus wires depend on the size of the blast, but #14 gauge (American wire gauge) copper is recommended.

(O) The ends of lead wires which are to be connected to a firing device shall be shorted by twisting them together or otherwise connecting them before they are connected to the leg wires or connecting wires, and they shall be kept in the possession of the person who is doing the loading until loading is completed and the leg wires attached. Lead wires shall not be attached to the firing device until the blaster is ready to fire the shot and must be attached by the blaster.

(P) The ends of the leg wires on electric detonators shall be shorted in a similar manner and not separated until all holes are loaded and the loader is ready to connect the leg wires to the connecting wires or lead wires.

(Q) When firing electrically, the insulation on all firing lines shall be adequate and in good condition.

(R) A power circuit used for firing electric detonators shall not be grounded.

(S) When firing from a power circuit, the firing switch shall be locked in the open or "off" position at all times, except when firing. It shall be so designed that the firing lines to the cap circuit are automatically short-circuited when the switch is in the 'off' position. Keys to this switch shall be entrusted only to the blaster.

(T) Blasting machines shall be in good condition and the efficiency of the machine shall be tested periodically to make certain that it can deliver power at its rated capacity.

(U) When firing with blasting machines, the connections shall be made as recommended by the manufacturer of the electric detonators used.

(V) The number of electric detonators connected to a blasting machine shall not be in excess of its rated capacity. A series or circuit shall contain no more detonators than the limits recommended by the manufacturer of the electric detonators in use.

(W) The blaster shall be in charge of the blasting machines, and no other person shall connect the leading wires to the machine.

(X) Blasters, when testing circuits to charged holes, shall use only blasting testers especially designed for this purpose.

(Y) In electrical firing, only the person making leading wire connections shall fire the shot. All connections shall be made from the borehole back to the source of firing current, and the lead line wires shall remain shorted and not be connected to the blasting machine or other source of current until the charge is to be fired.

(Z) After firing an electric blast from a blasting machine, the leading wires shall be immediately disconnected from the machine and short-circuited.

(AA) When electric detonators have been used, workers shall not return to misfired holes for at least thirty minutes.

Section 6-4 Safety Fuse Initiation of Blasts

(A) A safety fuse that is deteriorated or damaged in any way shall not be used.

(B) The hanging of safety fuse on nails or other projections which will cause a sharp bend to be formed in the fuse is prohibited.

(C) Before assembling fuse detonators and safety fuse, a short length shall be cut from the end of the supply reel so as to assure a fresh cut end in each fuse detonator.

(D) Only cap crimpers specifically designed for the purpose of crimping caps shall be used for attaching fuse detonators to safety fuse. Crimpers shall be kept in good repair and accessible for use.

(E) No fuse detonators and safety fuse shall be assembled, or primers made up, in any magazine or near any possible source of ignition or initiation.

(F) The assembly of fuse detonators, safety fuse and making of primers shall only be done in a place selected for this purpose and at least 100 feet away from any storage magazine.

(G) The burning rate of the safety fuse in use at any time shall be measured, posted in conspicuous locations, and brought to the attention of all workers concerned with blasting.

(H) New rolls of fuse shall be tested for burn rate prior to use and all partial rolls shall be tested at least every 30 days. A record of the burn rate shall be kept by the permittee.

(I) The length of safety fuse shall be in accordance with the manufacturer's recommendations. In no case shall the length of fuse be less than 3 feet and shall not have a burn time of less than 120 seconds at the time of initiation.

(J) Lighting of safety fuse shall be done with hot wire lighters, pull-wire lighters, thermalite connectors, or igniter cord and thermalite connectors.

(K) Matches, cigarette lighters, cigarettes, pipes, cigars or other unsafe means shall not be used to ignite safety fuse.

(L) Igniters shall be used in accordance with the manufacturer's recommendations and shall not be attached to a safety fuse until the charge is at the blast site and the crew is fully prepared to light the charge.

(M) At least two persons shall be present when fuse detonator and safety fuse blasting is done by hand-lighting methods.

(N) When blasting with safety fuses, consideration shall be given to the length and burning rate of the safety fuse and shall be used in accordance with the manufacturer's recommendations. A sufficient time of not less than 120 seconds, with a margin of safety, shall always be provided for the blaster to reach a place of safety.

(O) No more than 12 safety fuses shall be lit by each blaster when hand lighting devices are used. However, when two or more safety fuses in a group are lit as one by means of igniter cord or other similar fuse-lighting devices, they may be considered as one fuse.

(P) Fuse detonators and safety fuse shall not be used for firing mud cap charges unless charges are separated sufficiently to prevent one charge from dislodging other shots in the blast.

(Q) Only sufficient primers for one day's use shall be made up at a time.

(R) Any loose cartridges of explosives, detonators, primers and assembled fuse detonators and safety fuse unused at the end of the shift shall be returned to their respective and separate magazines and locked up.

(S) Safety fuse shall not be used in blasting operations in populated areas, public areas, on highways or adjacent to roads open to traffic.

(T) When the fuse lighter has been ignited, the blaster shall assume initiation of the safety fuse has occurred.

(U) If the safety fuse does not show evidence of initiation, the blaster shall not attempt any further initiation and retreat to a safe location for at least one hour.

(V) When safety fuse is used, workers shall not return to a misfire for at least one hour.

(W) If explosives are suspected of burning, all persons in the endangered area shall move to a safe location and no one shall return to the area for at least one hour after signs of burning have ceased.

Section 6-5 Non-electric Initiation of Blasts

(A) Blasters shall be familiar with and follow the manufacturer's warnings and instructions, especially hook-up and safety precautions.

(B) Operations shall be discontinued during the approach and progress of electrical storms.

(C) Non-electric leads shall not be held during firing.

(D) Primary initiators shall not be attached to the round or shot until after all the connections have been made and the blasting area has been cleared.

(E) Non-electric delay connectors shall not be exposed to excessive impact, friction, flame, electrical discharge, static electricity or lightning.

(F) Delay detonators shall not be disassembled from the plastic connector block, nor shall the delay detonators be used without the block.

(G) Shock tube connections shall be at right angles to detonating cord.

(H) Connections with other initiation devices shall be secured in a manner that provides for uninterrupted propagation.

(I) Factory made units shall be used as assembled and shall not be cut except that a single splice is permitted on the lead-in trunkline during dry conditions.

(J) No tool shall be used to pry on any component containing a detonator, nor shall any tool be used to open, fasten or clean out any connector containing a detonating device.

(K) Care shall be taken to ensure that a vehicle is not driven over the tubing, connectors or any surface delay component.

(L) In multiple row blasts, the initiation system shall not be connected from row to row until all drilling and loading has been completed. In single row blasts, the components shall not be connected from hole to hole until all drilling and loading has been completed.

(M) A safety line consisting of trunkline or other non-electric tubing shall be connected to the last hole in each row and shall extend beyond the area of cover in a covered or matted blast and shall be used to check for complete detonation of each row.

(N) Before firing the shot, the blaster shall visually inspect and verify that all connections in the initiation system are made in accordance with the manufacturer's recommendations.

Section 6-6 Use of Detonating Cord

(A) Care shall be taken to select a detonating cord consistent with the type and physical condition of the borehole and stemming and the type of explosives used.

(B) Detonating cord shall be handled and used with the same respect and care given other explosives.

(C) If using a detonating type cord for blasting, the double-trunkline or loop systems shall be used.

(D) In multiple-row blasts, the trunkline layout shall be designed so that the detonation can reach each blast hole from at least two directions.

(E) All detonating cord knots shall be tight and all connections shall be kept at right angles to the trunklines.

(F) The line of detonating cord extending out of a borehole or from a charge shall be cut from the supply spool before loading the remainder of the bore hole or placing additional charges.

(G) Detonating cord shall be handled and used with care to avoid damaging or severing the cord during and after loading and hooking-up.

(H) Detonating cord connections shall be made in accordance with the manufacturer's recommended methods. Knot-type or other cord-to-cord connections shall be made only with detonating cord in which the explosive core is dry.

(I) Detonating cord shall be cut with a sharp knife, razor blade or cutters designed for use with detonating cord. Scissors or plier type cutters shall not be used.

(J) All detonating cord trunklines and branch lines shall be free of loops, sharp kinks, or angles that direct the cord back toward the oncoming line of detonation.

(K) All detonating cord connections shall be inspected before firing the blast.

(L) When detonating cord millisecond-delay connectors or short-interval-delay electric detonators are used with detonating cord, the practice shall conform strictly to the manufacturer's recommendations.

(M) When connecting a detonator to detonating cord, the detonator shall be taped or otherwise attached securely along the side or the end of the detonating cord, with the end of the detonator containing the explosive charge pointed in the direction in which the detonation is to proceed.

(N) When initiating detonating cord with fuse detonators and safety fuse, two fuse detonators shall be required.

(O) Detonators for firing the trunkline shall not be brought to the loading area nor attached to the detonating cord until the area has been cleared for the blast.

Section 6-7 Electronic Initiation of Blasts

(A) Permittees shall be trained in the manufacturer's procedures for use of electronic detonators and shall follow the manufacturer's warnings and instructions, especially hook-up and safety precautions.

(B) Test equipment and blasting machines designed for use with electric detonators shall not be used with electronic detonators.

(C) Manufacturer's recommended practices shall be followed to protect electronic detonators from electromagnetic, radio frequency or other electrical interference sources.

(D) Electronic detonators shall only be fired with the equipment and procedures recommended by the manufacturer.

(E) Electric detonators and electronic detonators shall not be used in the same blast, even when made by the same manufacturer, unless the manufacturer approves such use.

(F) Test equipment and blasting machines that are designed for electronic detonators shall not be used with electric detonators.

(G) Electronic detonator wires, connectors, coupling devices, shock tube or other components shall be protected from mechanical abuse and damage.

(H) Electronic detonators of different types and/or versions shall not be used in the same blast, even if made by the same manufacturer, unless such use is approved by the manufacturer.

(I) Equipment or electronic detonators that appear to be damaged or poorly maintained shall not be used.

(J) Only blasting machines, testers, or instruments that are specifically designed for the electronic detonator system shall be used.

(K) Never mix or use electronic detonators and equipment made by different manufacturers.

(L) The handling or use of electronic detonators shall be discontinued during the approach and progress of an electrical storm. Personnel must be withdrawn from the blast area and moved to a safe location.

(M) Electronic detonator systems shall not be exposed to or used in operational temperature and pressure ranges outside those specified by the manufacturer.

(N) Electronic detonators shall never be tested or programmed in a booster, cartridge or other explosive component (primer assembly) before it has been deployed in the borehole or otherwise loaded for final use.

(O) An electronic detonator shall not be held while it is being tested or programmed.

Section 6-8 Firing the Blast

(A) It shall be the duty of the blaster to determine the time of blasting. The blaster shall conduct all blasting operations and no shot shall be fired without the blaster's presence and approval.

(B) All blasting in congested areas or in close proximity to a structure, railway, highway or any other installation where the blasting may cause injury or damage by flying rock shall be covered with blasting mats or other protective material before firing.

(C) All persons within the blasting area shall be notified of the time of the blast and moved to a safe distance or under sufficient cover. Guards shall be posted to prevent entry into the blast area.

(D) All surplus explosive materials shall be removed to a safe location before blasting.

(E) Flaggers shall be safely posted on highways that pass through the danger zone so as to stop traffic during blasting operations.

(F) Guards shall be posted around the perimeter of the blasting area to prevent unauthorized entry into the blast area. Either visual or verbal communication must be possible between guards.

(G) Before the blast is fired, the warning signal shall be given by the blaster in charge or the individual designated by the blaster in charge.

(H) An inspection of the blast area to determine if all charges have detonated shall be done by the blaster before guards and flaggers are cleared by the blaster to leave their posts.

Section 6-9 Misfires

(A) The blaster shall provide proper safeguards for excluding all unauthorized persons from the danger zone if a misfire is found.

(B) No other work shall be performed except what is necessary to remove the hazard of the misfire and only those employees necessary to perform the work shall remain in the danger zone.

(C) Explosives shall not be extracted from a hole that has misfired unless it is impossible or hazardous to detonate any unexploded explosive materials by insertion of an additional primer.

(D) If there are any misfires while using fuse detonators and safety fuse, all employees shall remain away from the charge for at least one hour. Misfires shall be handled under the direction of the person in charge of the blasting. All fuses shall be carefully traced and a search made for the unexploded charges.

(E) When electric detonators have been used, workers shall not return to the blast area for at least 30 minutes unless the manufacturer recommends additional time before returning to the blast area. All wires shall be carefully traced and a search made for unexploded charges.

(F) When a completely non-electric initiation system, other than safety fuse, has been used, all employees shall remain away from the blast area for at least 15 minutes. All shock tubes shall be traced and a search made for unexploded charges.

(G) When electronic detonators have been used, workers shall not return to the blast area for at least 30 minutes unless the manufacturer recommends additional time before returning to the blast area.

(H) If explosives are suspected of burning in a hole, all persons in the endangered area shall move to a safe location and no one shall return to the hole for at least one hour after evidence of combustion ceases.

(I) No drilling, digging or picking shall be permitted until all missed holes have been detonated or the blaster in charge has approved that work can proceed.

(J) Explosive materials recovered from misfires shall not be reused and shall be disposed of in the manner recommended by the manufacturer.

Section 6-10 Blasting Vibration and Air Over-Pressure Standards

(A) In all blasting operations, blasters shall use one of the following methods to monitor or control the intensity of motion in the ground at the nearest dwelling, house, school, church, commercial or occupied building. These limits do not apply to property owned, leased or contracted by the blaster's company or property on which the owner provides a voluntary written waiver from these restrictions.

(1) Option 1 - Frequency Versus Particle Velocity graph. A blasting operation shall have the option to use the graph shown in Figure 6-10 to limit peak particle velocity based upon the frequency of the blast vibration. Allowable vibrations fall below the limits indicated by the central lines; non-allowable vibrationsNon-Allowable Vibrations lie above the lines. Seismographs shall meet the following requirements:

(i) Monitoring instruments shall have a flat frequency response between 2 and 250Hz for particle velocity.

(ii) The digitizing sampling rate for peak particle measurements shall be at least 1,024 samples per second.

(iii) Seismographs shall be capable of performing a self-test of velocity transducers and printed event records shall indicate whether or not the sensor test was successful.

(iv) Monitoring instruments shall be capable of recording particle velocities with intensities ranging from 0.02 to 5.0 inches per second.

(v) Monitoring systems shall be calibrated by a service center approved by the manufacturer within at least two years of the time of use. Certificates documenting date of calibration, issued by the approved service center, shall be kept by the user.

(vi) Monitoring systems shall be capable of printing hard-copy reports showing the date and time of monitoring, the maximum peak particle velocity (PPV) measurements, and plotted PPV-time waveform plots.

(vii) For all blasts with a scaled distance less than 100 ft/lb$^{0.5}$, seismographs monitoring motion shall be set to trigger at a level of 0.05 in/s.

The following equation shall be applied when calculating the scaled distance.

$$D_S = \frac{D}{\sqrt{W}}$$

Where: Ds = Scaled distance (ft/lb$^{0.5}$)

D = Distance to the nearest structure (ft)

W = Maximum weight of explosive detonated within any 8

millisecond window (lb)

(viii) Vibration analysis results must be presented in comparison with the RI 8507, adopted by United States Bureau of Mines (USBM) and as shown in Figure 6-10.

(ix) If a valid vibration record showing compliance with the MAPV limits shown in figure 6-10 is not available for inspection, the maximum charge weight per delay (W) must conform to the scaled distance limitations as prescribed in Option 2.

FIGURE 6-10

Option 1: Particle Velocity Versus Frequency

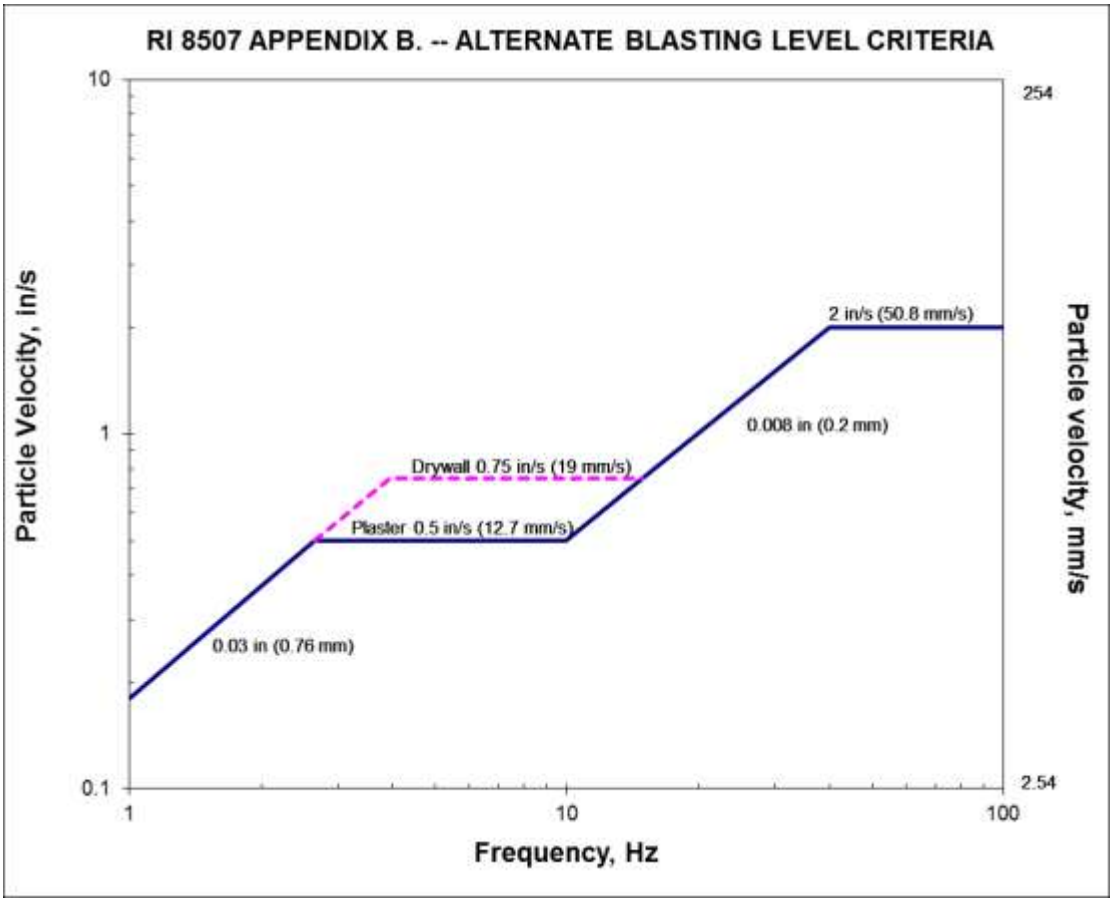

Table: U.S. Bureau of Mines RI 8507, 2009

(2) Option 2 Scaled Distance – when seismic monitoring is not performed, the maximum weight of the explosive detonating within any 8-millisecond time period shall not exceed the amount allowed by a calculation using the scaled distance factors given in Scaled Distance column of Table 6-10.

The following equation shall be applied when utilizing the scaled distance calculations to control blast-induced vibration.

$$W = \left(\frac{D}{D_s}\right)^2$$

Where: Ds = Scaled distance ($ft/lb^{0.5}$)

D = Distance to the nearest structure (ft)

W = Weight of explosive detonated within any 8 millisecond window (lb)

Example Maximum Charge Weight per Delay (W) Calculation:

Given: Ds = 55 ($ft/lb^{0.5}$)

D = 500 ft.

therefore

$W = (500 / 55)^2 = 82.6$ lb

Table 6-10	**Blasting Vibration and Air Over-Pressure Standards**
Distance From Blast (Ft)	**Option 2 Scaled Distance Factor Units Are $Ft/Lb^{0.5}$**
0 to 300	50
301 to 5000	55
5001 and Greater	65

(B) Air over-pressure (air blast) limitation: Air over-pressure at the nearest dwelling house, school, church, or otherwise occupied buildings shall not exceed 133 dB (0.0129 psi). Measuring air over-pressure is not required for all blasting operations. However, due to complaints or other circumstances, the Division may require blasters to monitor air over-pressure. All instruments used to measure air over-pressure compliance shall:

(1) Employ linear microphones with a flat frequency response between 2 and 200 Hz

(2) Have a digital sampling rate of at least 1024 samples per second; and

(3) Be capable of measuring air over-pressure from 120 to 140 dB-Linear (0.0029 to 0.029 psi).

ARTICLE 7 AVALANCHE MITIGATION

Section 7-1 General Requirements

(A) The use of explosives and blasting agents for avalanche mitigation shall comply with this article unless explosives are used in compliance with Article 6.

(B) The requirements of this article shall only be applicable to the use of explosives for avalanche mitigation. The use of explosives for other purposes, such as demolition, site clearing or construction shall be in compliance with Article 6.

(C) Explosives and blasting agents shall not be stored, kept, assembled, combined to form armed charges, or had in any inhabited areas, structures or buildings except in compliance with this Article or Article 4.

(D) Only blasters shall supervise the assembly, arming of explosive components, and detonation of explosive charges.

(E) Each avalanche mitigation blasting crew or team shall consist of a blaster and at least one assistant trained as applicable per Section 7-2. The crew may consist of two blasters, but only one shall act as the blaster in charge.

(F) Untrained personnel may accompany the blasting crew for training purposes but shall only participate in actual firing of charges for completion of training in accordance with Section 7-2(B)(1)(iii)(a)(3).

(G) The blaster in charge of each crew or team shall be responsible for all decisions made regarding preparation and placement of charges.

(H) Blasting operations shall be conducted during periods of daylight with personnel guarding the area, or when the area has been closed. Nighttime blasting operations shall be approved by the Division, and approval shall only be granted if such approval serves the safety of the general public.

(I) The blaster in charge shall pre-plan the escape route and all crew members shall understand the plan before initiating the charge.

(J) No person shall accept or be given a job assignment that is beyond the individual's ability, training, or qualifications.

(K) Cold temperatures, high winds, and heavy snowfall are conditions that should be anticipated in avalanche mitigation blasting. These conditions shall be considered in determining a person's physical ability, training, and qualifications for conducting safe blasting operations and in the management of safe blasting operations.

(L) Operations utilizing hanging or dangling charges must have a hang cord entanglement safety procedure.

Section 7-2 Training Requirements

(A) Type II Avalanche Mitigation permit applicants shall submit a training program for personnel involved in the use, storage and transportation of explosives to the Division. The Division shall approve the training program prior to issuance of the permit.

(B) The training program shall include at least the following for each personnel type:

(1) Blaster in Training:

(i) A minimum of 8 hours of classroom education and a written examination to include the following:

(a) Explosives Regulations of the Division

(b) Explosives Regulations of the Division and federal requirements for the storage of explosives and magazine locations, inventory procedures, and magazine access

(c) Safety procedures for explosives and blasting agents used within the company, including the properties and classification of each type of explosive, and consequences of the unsafe use of explosives

(d) Explosives Regulations of the Division for preparing, handling, and using hand charges to include:

(1) Hand charge assembly procedures for both field arming and make-up room arming;

(2) Crimping procedures;

(3) Transportation to blast site by skiing or aerial tramways for both field armed charges and make-up room armed charges;

(4) Use of igniters and determining successful initiation of fuse;

(5) Misfire procedures;

(6) Procedures for clearing and guarding the blasting area; and

(7) Deployment of initiated hand charges.

(e) Hazard training for cornice control operations

(f) Hang cord entanglement safety procedures

(g) Hazard training for avalauncher operations

(h) Record keeping procedures, including:

(1) Records of transactions;

(2) Explosive inventory record keeping;

(3) Explosive use and route log record keeping; and

(4) Misfire documentation.

(ii) Simulated Field Training for Hand Charges

(a) During weather conditions typical to avalanche mitigation and under the supervision of a blaster, the trainee shall:

(1) Attend demonstration with simulated components;

(2) Attach igniters to fuse without a detonator and successfully ignite fuse not less than 5 times;

(3) Attach igniters to fuse without a detonator and twice simulate an unsuccessful attempt to light the fuse and follow the procedures for a misfire;

(4) Attach igniters to fuse with a detonator and successfully ignite and deploy the detonator and fuse assembly not less than 5 times; and

(5) When training occurs at operations not utilizing a pre-manufactured detonator and safety fuse assembly, assemble detonator and fuse, attach igniters to fuse with detonator and successfully initiate and deploy the detonator and fuse assembly not less than 5 times.

(iii) Field Experience Training for Hand Charges

(a) Under the supervision of a blaster, the trainee shall:

(1) Accompany a blasting crew on 5 routes or the deployment of not less than 20 charges as an observer;

(2) Accompany a blaster, as an assistant only, for the initiation and deployment of not less than 20 charges; and

(3) Accompany a blaster and initiate and deploy not less than 20 charges under the direct supervision of the blaster.

(iv) Avalauncher Operator

(a) Trainee shall complete 8 hours classroom and field training before becoming an avalauncher operator. This training shall include:

(1) Operating instructions for each type of avalauncher used;

(2) Procedures on performing preventive maintenance inspections;

(3) Procedures on assembly of charges;

(4) Procedures for checking the elevation, aiming, and pressure settings of the avalauncher;

(5) Procedures for test firing the avalauncher;

(6) Procedures for loading charges in the avalauncher;

(7) Procedures for clearing and guarding the target area;

(8) Emergency procedures; and

(9) Requirements for securing the equipment.

(b) Qualifications for avalauncher operator shall be:

(1) One year experience as a blaster in charge;

(2) Must have assisted on the avalauncher crew not less than five times; and

(3) Must load and fire the avalauncher under the supervision of a qualified operator not less than 10 times.

(2) Howitzer Operator

(i) All Howitzer operations shall be conducted in accordance with the provisions of The Avalanche Artillery Users of North America Committee (AAUNAC) Standard (Revised May 16, 2012).

(3) Requirements for Annual Refresher Training

(i) All blasters shall attend a minimum of 4 hours of refresher training at the beginning of each season.

(a) Classroom training shall include:

(1) Review of operation techniques such as throwing techniques, air blasting, dangling charges, hang cord entanglement safety procedures, cornice blasting, avalauncher and howitzer procedures;

(2) Review of assembly and transportation procedures; and

(3) Review of snow safety program.

(b) Field training shall include:

(1) Review of initiation techniques;

(2) Review of misfire procedures; and

(3) A walk through of storage and make-up facilities.

(ii) Annual refresher training may count towards the 16-hour requirement of Section 3.6(N) of these rules when the refresher training program is specifically approved by the Division.

Section 7-3 Make-up Room Requirements

(A) Location of Make-up Rooms

(1) Make-up rooms shall not be located in buildings or structures that are at any time open to the public.

(B) Construction of Make-up Rooms

(1) The interior of the make-up room shall be finished and equipped to the following minimum standards:

(i) Walls shall be constructed of, or covered with, a non-sparking material. Nails or screws shall be countersunk, blind nailed or covered;

(ii) Floors shall be constructed of, or covered with, a non-sparking material;

(iii) The building and make-up room shall be well ventilated, and the ventilation system shall

discharge to the outside from the make-up room;

(iv) The make-up table shall be constructed of non-sparking, nonconductive material; and

(v) The make-up table shall be located away from the area where explosives are kept before and after assembly.

(2) The building in which the make-up room is located shall be theft-resistant and secured by at least one steel padlock having at least 5 tumblers and a case hardened shackle at least 3/8-inch in diameter. The door shall have hinges and hasps attached so that they cannot be removed from the outside when in the closed position with the lock in place.

(C) Make-up Room Restrictions

(1) Heating units shall be explosion proof, dust-proof and not depend on a combustion process when properly designed and located. National Electric Code-rated explosion-proof and dust-proof heating units may be located inside make-up rooms.

(2) Temperature control devices must be sufficiently designed to prevent overheating of make-up rooms where explosives are stored.

(3) Lighting fixtures shall be National Electric Code explosion-proof rated fixtures and all wiring shall be in sealed conduit.

(4) Electric control switches shall be located outside the make-up room.

(5) Electrical outlet boxes are not permissible inside the make-up room.

(6) Smoking, matches, open flames or flame or spark producing devices shall not be permitted inside the make-up room.

(7) Flammable liquids or flammable compressed gases shall not be stored or had in the make-up room.

(8) Occupancy of the make-up room shall be restricted to authorized and trained personnel when explosives are present.

(9) A make-up room shall not be used for the unattended storage of armed charges.

(10) Explosives stored inside the make-up room must be stored in at least a Type 2 storage magazine suitable for indoor storage.

(D) Make-up Room Housekeeping

(1) The make-up room shall be kept clean and orderly.

(2) Metal tools shall not be used or stored in the make-up room.

(3) Brooms used in the make-up room shall be made of non-sparking materials.

(4) Sweepings and empty explosive material containers shall be disposed of as recommended by the manufacturer.

(5) The make-up room shall be cleaned and all explosives materials shall be removed before any repairs are made to the make-up room.

(6) The make-up table or bench shall be cleaned regularly and shall be kept free of any materials or tools not used in the assembly of the charges.

Section 7-4 Use of Explosives

(A) General Requirements

(1) While explosives are being handled or used, smoking, matches, or any other source of fire or flame shall not be within 50 feet of the blast site.

(2) No person shall handle explosives while under the influence of intoxicating liquors, narcotics or other controlled substances. This rule does not apply to persons taking prescription drugs and/or narcotics as directed by a physician, providing such use shall not influence the blaster's ability to conduct safe blasting operations.

(3) Blasters conducting blasting operations shall take every reasonable precaution, including but not limited to warning signals, flags and barricades to insure the safety of the general public and workers.

(4) The blaster shall suspend all blasting operations and remove all persons from the blast site during the approach and progress of an electrical storm.

(5) No fire shall be fought where the fire is in imminent danger of contact with explosives. All employees shall be removed to a safe area and the fire area guarded against intruders.

(B) Explosives

(1) Explosives shall have a shelf life of at least 1 operating season in the storage facilities in which they will be stored.

(2) Blasting caps must be at least a No. 6 cap and no larger than a No. 8 cap except when recommended by the explosives manufacturer for a particular explosive used within a specific application.

(3) Detonator and safety fuse assemblies manufactured with thermalite connectors shall not be used for avalanche mitigation operations.

(4) Detonating cord used for initiating primers must be at least a 25-grain cord.

(5) Explosive materials chosen must have excellent water resistance and be capable of detonation in cold temperatures.

(6) Explosive materials that are damaged, show signs of deterioration, or have misfired shall not be used.

(7) Detonators and other explosive materials, with the exception of fuse igniters, shall never be carried in pockets of clothing.

(8) Should cartridges or packages of explosive materials show signs of discoloration or deterioration, such explosive materials must be carefully set aside and properly disposed of according to the manufacturer's recommendations.

(9) Only non-sparking metallic slitters may be used for opening fiberboard cases.

(10) No explosive material shall be abandoned or left in any location for any reason, nor left in such a manner that they may easily be obtained by children or other unauthorized persons.

All unused explosives shall be returned to the proper storage facilities.

(11) A record of each blast shall be completed and signed by the Type I permittee acting as the blaster in charge. All records shall be retained at least five years, shall be available for inspection by the Division, and shall contain at least the following data:

(i) Name of company or contractor;

(ii) Date, time and location of route;

(iii) Name, permit number and signature of blaster-in-charge of the route;

(iv) Number of charges used on each route;

(v) Names of employees on each route;

(vi) Types of explosives used;

(vii) Total amount of each explosive received and used;

(viii) Method of initiation;

(ix) Type of blasting (hand charge, cornice control, avalauncher);

(x) Weather conditions; and

(xi) Statement noting any misfires, the location of misfires, steps taken to recover or refire any misfires, and the date the misfire was found and disposed of.

(C) Hand Charges

(1) Safety Fuse

(i) Safety fuse that is deteriorated or damaged in any way shall not be used.

(ii) The hanging of safety fuse on nails or other projections which will cause a sharp bend to be formed in the fuse is prohibited.

(iii) Pre-manufactured detonator and fuse assemblies shall be used in accordance with the manufacturer's requirements.

(iv) Before assembling fuse detonators and safety fuse, a minimum of 1 inch shall be cut from the end of the supply reel so as to assure a fresh cut end in each fuse detonator.

(v) The burning rate of the safety fuse in use at any time shall be measured, posted in conspicuous locations, and brought to the attention of all workers concerned with blasting.

(vi) New rolls of safety fuse shall be tested for burn rate prior to use and all partial rolls shall be tested at least every 30 days. A record of the burn rate shall be kept by the Type II permittee.

(vii) Only a bench or hand-held cap crimpers designed for the purpose of crimping fuse detonators shall be used for attaching fuse detonators to safety fuse. Crimpers shall be kept in good repair and accessible for use.

(viii) No fuse detonators and fuse shall be assembled, or primers made up, in any magazine or near any possible source of initiation.

(ix) Assembly of fuse detonators and safety fuse and pre-arming of charges shall only be done in a warm, dry, well-lit make-up room.

(x) Any loose cartridges of explosives, detonators, and assembled fuse detonators and safety fuse unused at the end of the shift shall be returned to their respective and separate magazines and locked up.

(xi) Detonators, fuse detonator and fuse assemblies, armed charges or safety fuse igniters shall not be carried into nor stored in any magazine containing cartridge high explosives.

(xii) Detonators shall not be inserted in the explosives without first making a hole in the cartridge of proper size using a tool designed for that purpose.

(2) Arming of Charges With Detonators

(i) Cast primers and boosters shall not be used if the hole is too small for the detonator, and attempting to enlarge the hole in a cast primer or booster shall not be permissible.

(ii) The detonator shall be secured within the primer so that no tension is placed on the safety fuse at the point of entry into the detonator.

(iii) The detonator shall be fully inserted into the primer cartridge or booster and shall not protrude from the cartridge.

(iv) After the fuse detonator and safety fuse assembly is inserted, the explosive contains a sensitive detonator and is then vulnerable to premature detonation, therefore delaying the arming of a charge until just before tossing the charge should be standard procedure when wind and/or temperatures are not severe.

(v) When arming the charge at the blast site the blaster shall:

(a) Insure that the fuse detonator is installed on the correct length of fuse prior to transporting to blast sites;

(b) Place detonators in adequate protective padding or shields before placing in approved avalanche mitigation packs;

(c) Place detonators and explosives in separate approved avalanche mitigation packs while transporting to the blast site;

(d) Safety fuse igniters shall not be placed inside the pack when it contains explosives or detonators, but shall be carried in a separate pack;

(e) Insure that the detonator is secured to the charge before attaching fuse igniter.

(vi) Depending on weather condition, the charges may be armed in a make-up room as follows:

(a) All fuse detonators shall be installed on the required length of safety fuse before the explosive cartridges or primers are brought to the make-up area;

(b) Fuse detonator and safety fuse assemblies shall be secured correctly to each type of explosive charge being used;

(c) Fuse detonator and safety fuse assemblies shall not be attached to explosive charges until just before the time of distribution to patrol personnel;

(d) Each hand charge shall be placed in an area separate from the assembly area immediately after assembly is completed; and

(e) Distribution of hand charges into approved mitigation packs shall take place away from the assembly area.

(3) Initiation of Hand Charges

(i) The length of safety fuse shall be in accordance with manufacturer's recommendations, and shall be 3 feet in length or have a burn time of not less 120 seconds at the time of initiation.

(ii) The lighting of fuse shall be done with hot-wire lighters or pull-wire lighters.

(iii) Matches, cigarette lighters, cigarettes, pipes, cigars or other unsafe means shall not be used to ignite fuse.

(iv) Igniters shall be used in accordance with manufacturer's recommendations and shall not be attached to a safety fuse until the charge is at the blast site and the crew is fully prepared to initiate the charge.

(v) At least two persons shall be present when fuse detonators and safety fuse blasting is done by hand lighting methods.

(vi) When blasting with safety fuses, consideration shall be given to the length and burning rate of the safety fuse, and safety fuse shall be used in accordance with manufacturer's recommendations. A sufficient time of not less than 120 seconds, with a margin of safety, shall always be provided for the blaster to reach a place of safety.

(vii) When the fuse lighter has been placed on the fuse, the blaster shall assume initiation of the safety fuse has occurred.

(viii) If the safety fuse does not show evidence of initiation after the fuse lighter has been ignited, the blaster shall not attempt any further initiation of the charge but adequately mark the charge and retreat with the blasting crew to a safe distance for not less than 1 hour.

(ix) After waiting at least 1 hour, the blaster shall:

(a) Determine that initiation failed and ignite the uninitiated charge; or

(b) Determine that the initiation was successful and dispose of the misfired explosive charge with a secondary charge.

(4) Use of Detonating Cord

(i) Detonating cord shall be handled and used with the same respect and care given other explosives.

(ii) All detonating cord knots shall be tight and all connections shall be kept at right angles.

(iii) Detonating cord shall be handled and used with care to avoid damaging or severing the cord.

(iv) Detonating cord connections shall be made in accordance with approved and recommended methods. Knot-type or other cord-to-cord connections shall be made only with detonating cord in which the explosive core is dry.

(v) Detonating cord shall be cut with a sharp knife, razor blade, or cutters designed for use with detonating cord. Scissors or plier type cutters shall not be used.

(vi) All detonating cord connections shall be inspected before firing the blast.

(vii) When connecting a detonator to detonating cord, the detonator shall be taped or otherwise attached securely along the side of the end of the detonating cord with the end of the detonator containing the explosive charge pointed in the direction in which the detonation is to proceed.

(viii) Two fuse detonators shall be required for the initiation of detonating cord with fuse detonator and safety fuse.

(ix) Detonators shall not be attached to the detonating cord until the area has been cleared for the blast.

(5) Avalanche Mitigation Packs

(i) Mitigation packs shall be constructed of material that is water-resistant, non-sparking and non-conductive.

(ii) Mitigation packs shall have sufficient individual compartments to separate hand charges or explosive components from tools or other equipment or supplies that may be carried in the pack.

(iii) Tools or other equipment shall not be placed in compartments containing explosives.

(iv) Each compartment used for hand charges or explosive components shall have an independent means of closure.

(v) Mitigation packs shall be inspected daily for holes, faulty compartments or closures and explosive residue. Packs shall not be used until adequately repaired or cleaned.

(vi) Mitigation packs shall not be left unattended, or used for storing explosives. All explosive material shall be returned to the approved storage facility at the end of individual mitigation routes.

(vii) Individual mitigation team members shall not carry more than 35 pounds of explosives material in avalanche mitigation packs.

(D) Avalauncher and Launcher

(1) All personnel assigned to work on an avalauncher or launcher crew shall be trained in the following:

(i) All operating instructions;

(ii) Safety precautions;

(iii) Emergency procedures; and

(iv) Securing requirements for equipment.

(2) All equipment shall be in good working condition and maintained as recommended by the manufacturer.

(3) The components of projectile assemblies shall not be interchanged and shall be assembled and used in accordance with the manufacturer's instructions.

(4) All projectiles shall be inspected before transporting them to the firing location. Such inspection shall include:

(i) Cast explosives for cracks, dents, fractures and smooth nose surface;

(ii) Cap wells should be clear of obstructions and debris and centered and straight for proper alignment of the cap; and

(iii) Fin assembly should be inspected for properly-functioning components and safety items, including pressures plate, pressure plate arming wire, bore rider pin, safety pin, magnet and firing pin.

(5) Defective projectiles shall not be used and shall be disposed of or returned to the manufacturer.

(6) Safety devices or components shall not be removed.

(7) If explosives are not at least 20 feet from the avalauncher/launcher during firing procedures, they shall be kept in a closed Type 3 magazine.

(8) The transport safety pin shall not be removed until just prior to inserting the projectile into the barrel.

(9) Avalaunchers/Launchers must be fired with compressed nitrogen gas only.

(10) Avalaunchers/Launchers shall be connected to the compressed nitrogen source through a satisfactory pressure regulator.

(11) The pressure regulator shall be set to limit the launch pressure to the maximum recommended by the manufacturer.

(12) The first round fired in a mitigation mission shall be a test fire to test the proper functioning of the launcher without a projectile.

(13) The blaster in charge, trained assistants, and blasters in training shall be the only personnel within 100 feet of the avalauncher/launcher during loading and firing.

(E) Misfires

(1) An explosive charge or any part of an explosive charge that fails to detonate after initiation shall be considered a misfire.

(2) If a misfire occurs, the blaster shall note the location of the misfired explosive and shall not approach the misfired explosive for at least 1 hour.

(3) Explosives which are aflame or emitting smoke shall not be approached for at least 1 hour after evidence of combustion ceases.

(4) The area shall remain guarded or closed until a search of the area has been done and the misfire hazard is removed or the blaster-in-charge pronounces the area safe.

(5) Misfires shall be handled by the blaster-in-charge and only those employees necessary to remove the hazard and the area shall remain guarded.

(6) Impact to explosive materials shall be avoided when searching for nonvisible misfired charges.

(7) A misfired armed charge shall be disposed of where it is found with a secondary charge.

Section 7-5 Transportation

(A) Transportation of explosives, blasting agents, and blasting supplies on public highways, railways, and airways shall be in accordance with the provisions of title 42 Article 20 C.R.S., any regulations promulgated pursuant thereto and Title 49 CFR Parts 171-179 and Parts 390-397, Motor Carriers.

(B) Requirements for the transportation of explosives, blasting agents and blasting supplies by motorized vehicles on job sites shall be:

(1) No person shall smoke, carry matches or any other flame-producing device or carry firearms or loaded cartridges while in or near a motor vehicle transporting explosives.

(2) No person shall drive, load or unload a vehicle transporting explosives in a careless or reckless manner.

(3) Vehicles transporting explosives, blasting agents or blasting supplies shall not be taken inside a garage or shop for repairs or servicing.

(4) Vehicles used for transporting explosives shall be equipped to carry the load without difficulty and shall be in good mechanical condition.

(5) A motor vehicle used for transporting explosive materials shall be inspected prior to loading to determine that it is in proper condition for the safe transportation of explosive materials.

(6) All cargo areas of vehicles used for transporting explosive materials shall have tight floors and any exposed spark-producing metal on the inside of the cargo area shall be covered with wood or other non-sparking materials to prevent contact with packages of explosive materials.

(7) Packages of explosive materials shall not be loaded above the sides of an open-body vehicle.

(8) Explosive materials shall not be transported with other materials or cargoes in the same compartment. In no case shall flammable materials be carried on the same vehicle as explosive materials.

(9) A motorized vehicle which contains explosive materials shall not be parked under any of the following circumstances:

(i) On or within 5 feet of the traveled portion of a public street or highway;

(ii) On private property; or

(iii) Within 300 feet of a bridge, tunnel, building, or place where people work, assemble, or congregate.

(10) A motorized vehicle transporting explosive materials shall not be left unattended.

(11) A motorized vehicle shall be deemed attended only when the driver or other attendant is physically on or in the vehicle or conveyance or has the vehicle within the driver's or attendant's field of vision and can reach the vehicle or conveyance quickly and without any kind of interference; attended also means the driver or attendant is awake, alert and not engaged in any other duties or activities which may divert his/her attention from the vehicle.

(12) Detonators may not be transported in the same vehicle with other explosives unless:

(i) The detonators and explosives are placed in separate locked Type 2 magazines secured within the body of the vehicle or conveyance;

(ii) The detonators and explosives are placed in suitable locked containers and separated by 4 inches of hardwood, and the detonators are totally enclosed or confined by the hardwood construction; or

(iii) The detonators and explosives are placed in separate locked containers or container compartments constructed in accordance with the IME Safety Library Publication No. 22, "IME Standard for the Safe Transportation of Detonators in a Vehicle with Other Explosives"; or

(iv) The detonators and explosives are placed in separate locked Type 3 magazines.

(C) Requirements for the transportation of explosives on passenger tramways when the public is present shall be:

(1) Explosives shall not be transported in the same enclosed passenger tramway carrier with the public.

(2) Transportation of explosives on non-enclosed passenger tramways shall require the following:

(i) Explosives shall be attended at all times;

(ii) Warning signs indicating that explosives are currently being transported on the tramway and passengers may ride the tramway at their own discretion shall be clearly posted at the tramway entrance;

(iii) Passengers shall not be allowed to ride the passenger tramway in the opposing direction of the explosives;

(iv) A minimum distance of 200 feet shall be maintained in front of and behind the chair transporting explosives and chairs transporting the public;

(v) The amount of explosives being transported shall not exceed50 pounds per carrier; and

(vi) Nothing in Section 7-5(C)(2) is intended to limit liabilities as set forth in the Colorado Ski Safety Act (C.R.S. 33-44-101 thru 114).

ARTICLE 8 GEOPHYSICAL RESEARCH

Section 8-1 General Requirements

(A) Seismic Blasting shall conform to the requirements of Articles 4, 5 and 6 of these regulations for the storage and transportation of all explosive materials, for the preparation of charges, for the loading of charges and for the detonation of charges.

(B) Surface charges, above-surface charges, and armed charges loaded in seismic drill holes less

than 20 feet in depth shall not be left unattended.

(C) Charges which have not been armed may be left unattended in holes less than 20 feet deep provided that:

(1) The hole has been loaded such that the charge has been anchored, cannot be removed and is capped with a hole plug;

(2) The charge does not exceed an amount that would cause damage to persons or property on the surface if accidentally detonated; and

(3) The backfill material in the loaded hole is a continuous column from the charge to the collar of the drill hole. Any drill holes in which the backfill material has bridged and the hole has not been fully backfilled shall not be left unattended.

(D) Armed or unarmed charges loaded in seismic drill holes greater than 20 feet deep may be left unattended provided that:

(1) The hole has been loaded such that the charge has been anchored, cannot be removed and legwires have been made inaccessible and capped with a hole plug;

(2) The charge does not exceed an amount that would cause damage to persons or property on the surface if accidentally detonated; and

(3) The backfill material in the loaded hole is a continuous column from the charge to the collar of the drill hole. Any drill holes in which the backfill material has bridged and the hole has not been fully backfilled shall not be left unattended.

(E) Armed and unarmed charges that are loaded in inhabited areas shall not be left unattended.

(F) Blasting signs shall be posted on roads and trails leading to the blast site.

ARTICLE 9 BLACK POWDER EXPLOSIVES

Section 9-1 General Requirements

(A) Black powder shall be stored in shipping containers as required by regulations of the U.S. Department of Transportation, 49 CFR, Section 173.60, as currently published.

(B) Black powder intended for personal use shall be sold and stored according to the Uniform Fire Code (sections 77.202, 77.203, and 77.203a).

ARTICLE 10 ALTERNATE METHODS AND EMERGENCY VARIANCES

Section 10-1 Alternate Methods or Procedures

(A) The permittee, on specific approval by the Division as provided by this paragraph, may use an alternate method or procedure in lieu of a method or procedure specifically prescribed in these regulations.

(B) The Division may approve an alternate method or procedure, subject to stated conditions, when found that:

(1) Good cause is shown for the use of the alternate method or procedure;

(2) The alternate method or procedure is within the purpose of, and consistent with the effect intended by, the specifically prescribed method or procedure and is substantially equivalent to that specifically prescribed method or procedure; and

(3) The alternate method or procedure will not be contrary to any provision of law and will not result in an increase in cost to the Division or hinder the effective administration of these regulations.

(C) Where the permittee desires to employ an alternate method or procedure, the permittee shall submit a written application to the Division. The application shall specifically describe the proposed alternate method or procedure and shall set forth the reasons for it.

(D) Alternate methods or procedures may not be employed until the application is approved by the Division.

(E) The permittee shall, during the period of authorization of an alternate method or procedure, comply with the terms of the approved application.

(F) Authorization of any alternate method or procedure may be withdrawn whenever, in the judgment of the Division, the effective administration of this article is hindered by the continuation of the authorization.

(G) As used in this paragraph, alternate methods or procedures include alternate construction or equipment.

Section 10-2 Emergency Variances from Requirements

(A) The Division may approve construction, equipment, and methods of operation other than as specified in this part, where it is found that an emergency exists and the proposed variations from the specified requirements are necessary and the proposed variations:

(1) Will afford security and protection that are substantially equivalent to those prescribed in these regulations;

(2) Will not hinder the effective administration of these regulations; and

(3) Will not be contrary to any provisions of law.

(B) Variations from requirements granted under this paragraph are conditioned on compliance with the procedures, conditions and limitations set forth in the approval of the application.

(C) Failure to comply in good faith with the procedures, conditions and limitations shall automatically terminate the authority for the variations and the permittee shall fully comply with the prescribed requirements of regulations from which the variations were authorized.

(D) Authority for any variation may be withdrawn when, in the judgment of the Division, the effective administration of these regulations is hindered by the continuation of the variation.

(E) Where the permittee desires to employ an emergency variation, the permittee shall submit a written application to the Division.

(F) The application shall describe the proposed variation and set forth the reasons for it. Variations may not be employed until the application is approved, except when the emergency requires immediate action to correct a situation that is threatening to life or property. Corrective action may then be taken concurrent with the filing of the application and notification of the Division via telephone.

Section 10-3 Retention of Approved Variations

(A) The permittee shall retain, as part of his records available for examination by the Division, any application approved by the Division under this section.

ARTICLE 11 ENFORCEMENT

Section 11-1 Enforcement Program

The Division provides these regulations to assist operators with maintaining safe use, manufacture, possession, sale, storage, transport, or disposal of explosives materials or blasting agents. When circumstances regarding regulated explosives materials or blasting agents are found to be not in compliance with these regulations, the Division will pursue enforcement actions against the operator.

The enforcement process will include requiring the permittee to make repairs and/or upgrades, provide records, and complete other actions necessary to come back into compliance. During and following the enforcement process, the Director will continue to assist the operator to remain in compliance. The enforcement process may include monetary penalties up to $1,000 per violation per day according to statute (C.R.S. 8-20-104) if the enforcement obligations are not implemented according to the required schedule.

Section 11-1-1 Notice of Violation

(A) A notice of violation (NOV) may be issued when a regulated party is found to be out of compliance with these regulations (7 C.C.R. 1101-9) and/or statutes (C.R.S. 8-20, 9-6 and 9-7). The notice of violation may include fines and/or an order to cease explosives-related operations until all violations are satisfactorily corrected.

(B) Within 10 working days after an NOV has been issued, the person issued the NOV may file a written request with the Division for an informal conference regarding the NOV. Upon receipt of the request, the Division shall provide the alleged violator with notice of the date, time and place of the informal conference. During the conference, the alleged violator and Division personnel may present information and arguments regarding the allegations and requirements of the NOV.

(C) Within 20 days after the informal conference, the Division shall uphold, modify, or strike the allegations within the NOV in the form of a settlement agreement or an enforcement order.

(D) If the alleged violator fails to timely request an informal conference, the terms of the NOV become a binding enforcement order not subject to further review.

Section 11-1-2 Enforcement Order

(A) An enforcement order may be issued when the violations included within an NOV are not resolved within the prescribed time frame or the schedule set forth in a settlement agreement is not met.

(B) An enforcement order may include increased fines up to $1,000 per violation for each day of violation. In addition, the enforcement order may include shut-down of the explosives-related operation, suspension and/or revocation of an explosives permit.

(C) An alleged violator may appeal the enforcement order to the Division for a hearing under C.R.S. 24-4-105. The Division shall then issue a final decision which is subject to judicial review under C.R.S. 24-4-106.

PHILIP J. WEISER
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Office of the Attorney General

Tracking number: 2019-00009

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Oil and Public Safety

on 02/28/2019

7 CCR 1101-9

EXPLOSIVES REGULATIONS

The above-referenced rules were submitted to this office on 03/01/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:57:25

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Permanent Rules Adopted

Department

Department of Local Affairs

Agency

Division of Housing

CCR number

8 CCR 1302-5

Rule title

8 CCR 1302-5 RESOLUTION NO. 23 - LIMITS FOR REVOLVING LOAN PROGRAM 1 - eff 04/14/2019

Effective date

04/14/2019

DEPARTMENT OF LOCAL AFFAIRS

Division of Housing

RESOLUTION # 23 – LIMITS FOR REVOLVING LOAN PROGRAM

8 CCR 1302-5

[Editor's Notes follow the text of the rules at the end of this CCR Document.]

~~Low-income families are those with incomes of less than 80% of median family income for specific geographical areas and family size as determined by the United States Department of Housing and Urban Development's Section 8 Program. Moderate-income families are those with incomes of less than 100% of the median family for specific geographical areas and family size as determined by the United States Department of Housing and Urban Development's Section 8 Program.~~

~~**Resolution #23, DEFINITION OF SINGLE PERSON AS AN ELIGIBILITY CRITERIA FOR ASSISTANCE FROM THE HOME INVESTMENT TRUST FUND**~~

~~BE IT RESOLVED BY THE STATE HOUSING BOARD OF THE STATE OF COLORADO: THAT PURSUANT TO C.R.S. 24-32-717(4)(a) et. seq. as amended, the State Housing Board adopts the following definition of single person as an eligibility criteria for persons and affordable housing projects seeking assistance from the Colorado Housing Trust Fund.~~
~~A single person is an unmarried person and is eligible for assistance under the Home Investment Trust Fund when such person's income, added to the income(s) of any persons residing at the same address, do not, in total, exceed the limits established by the State Housing Board under C.R.S. 24-32-717(4)(b).~~

ATTEST:

Thomas Hart,Director Colorado Division of Housing
DATED:12/15/92

Lee S. Mendel, ChairmanColorado State Housing Board
DATED: 12-15-92

Editor's Notes

History

Entire rule eff. 01/30/1993.

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Tracking number: 2018-00697

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Housing

on 02/12/2019

8 CCR 1302-5

RESOLUTION NO. 23 - LIMITS FOR REVOLVING LOAN PROGRAM

The above-referenced rules were submitted to this office on 02/12/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 01, 2019 11:06:49

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Emergency Rules Adopted

Department

Department of Revenue

Agency

Division of Motor Vehicles

CCR number

1 CCR 204-32

Rule title

1 CCR 204-32 SEX DESIGNATION 1 - eff 03/08/2019

Effective date

03/08/2019

Rule 1. Sex Designation

For purposes of Article 2 of Title 42, and all rules, regulations, and forms related to Article 2 of Title 42, "sex" or "gender" means female, male, or intersex.

Rule 2. Amendment of the Sex Designation

Before changing the sex on a driver 's license, identification card, or identification document issued by the Motor Vehicles Division, the Department must:

A. Confirm the name on the driver's license, identification card, or identification document and the name of the individual for whom the change is requested match or can be linked through submitted documentation.

B. Receive, in the form and manner prescribed by the Department, a letter from a licensed treating medical or behavioral healthcare provider confirming the individual has received appropriate clinical treatment for their correct sex. The letter must be signed and include the provider's license or certificate number and the issuing U.S. State/Foreign Country.

i. Nothing in this rule should be read to require an individual to undergo any specific surgery, treatment, clinical care, or behavioral healthcare.

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DEPARTMENT OF REVENUE
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Jared Polis
Governor

Colorado Department of Revenue
Motor Vehicles Division
Emergency Rules

New Rule, Division of Motor Vehicles – Driver's License Section, 1 CCR 204-32, Rule Numbers:

Rule 1 – Rule defining the term sex for purposes of a driver's license, identification card, or identification document

Rule 2 – Rule for changing the sex designation on a driver's license, identification card, or identification document

Statement of Emergency Justification and Adoption

Pursuant to sections 24-4-103(6), 24-4-104, 42-1-201, 42-1-204, 42-2-107, 42-2-108, 42-2-302, 42-2-303, 42-2-403, 42-2-505, C.R.S., I, Heidi Humphreys, Interim Executive Director of the Colorado Department of Revenue, hereby adopt as emergency rules, Rules 1 and 2 attached hereto.

Section 24-4-103(6), C.R.S., authorizes the executive director to adopt an emergency rule if the executive director finds that the immediate adoption of the rule is imperatively necessary to comply with a state law or federal law or for the preservation of public health, safety, or welfare, and that compliance with the requirements of section 24-4-103, C.R.S. would be contrary to the public interest.

I find that the immediate adoption of Rules 1 and 2 is imperatively necessary to comply with the statutory mandates of Article 2 of Title 42 of the Colorado Revised Statutes and section 24-4-104, C.R.S., and that immediate adoption of these rules is necessary for the preservation of public health, safety, and welfare. Finally, I find that compliance with the requirements of section 24-4-103, C.R.S. would be contrary to the public interest.

The Department is adopting Rule 1 on an emergency basis to give the public immediate notice of the Department's non-binary definition of "sex" for purposes of a driver's license, identification card, or identification document issued by the Motor Vehicles Division. The Department is adopting Rule 2 on an emergency basis to provide the public immediate notice of how to change the sex designation on an existing driver's license, identification card, or identification document.

Rules 1 and 2 are necessary to ensure the Motor Vehicles Division accurately records and represents over time an individual's sex on their driver's license, identification card, or identification document. Rules 1 and 2 are also necessary to ensure Coloradans can obtain driver's licenses, identification cards, and

identification documents that designate their correct sex, as determined by them and their licensed treating medical or behavioral healthcare provider.

Additionally, while the Department previously adopted both Rules 1 and 2 as emergency rules, they will expire on March 8, which would leave a gap in the applicability of the rules until permanent rules are adopted, leaving applicants for license and ID cards without clear guidance on sex designation. Further, the Colorado Department of Public Health and Environment (CDPHE) has proposed rule amendments regarding the sex designation on Colorado birth certificates that have or will allow for intersex sex designations and enable individuals to amend their birth certificates to designate their correct sex, as determined by them and their licensed treating medical provider. Thus, adopting Rules 1 and 2 will ensure consistency with CDPHE practices and documents, which documents are a vital source of information for the Motor Vehicles Division.

Statutory Authority

The statutory authorities for Rules 1 and 2 are cited above.

Purpose

The purpose of Rules 1 and 2 is to ensure the accuracy of the sex designation on driver's licenses, identification cards, and identification documents issued by the Motor Vehicles Division. Rules 1 and 2 allow individuals to obtain a correct sex designation on their license, identification card, or identification document. Rules 1 and 2 also ensure that the Motor Vehicles Division collects and maintains accurate sex designation data.

Pursuant to Rule 1, an applicant may choose from one of three sex designations, including female, male, and intersex. Under Rule 2, the holder of an existing license, identification card, or identification document may amend their sex designation using a form created by the Department, which form requires confirmation from a licensed treating medical or behavioral healthcare provider that the individual has received appropriate clinical treatment for their correct sex. The rule does not require that an individual undergo any specific surgery, treatment, clinical care, or behavioral healthcare. The rule also does not require that the treating medical or behavioral healthcare provider be licensed by the State of Colorado, and may instead be licensed in another jurisdiction.

Rules 1 and 2 are consistent with a recent Colorado federal district court decision ordering the U.S. Department of State to issue a passport with an intersex sex designation to a Colorado citizen. *See Zzyym v. Pompeo*, Case No. 15-CV-2362-RBJ, 2018 WL 4491434 (D. Colo. Sept. 19, 2018). Adopting Rules 1 and 2 will also make the Motor Vehicle Division's practices consistent with American Association of Motor Vehicle Administrators (AAMVA) Standards as well as the practices of four other states and the District of Columbia.

The Department will comply with permanent rulemaking procedures, and afford interested persons an opportunity to submit written data, views, or arguments, or present the same orally, for the Department to consider prior to adopting permanent rules, all in accordance with rule-making procedures found in section 24-4-103, C.R.S.

Adoption

For the reasons set forth above, I hereby adopt emergency rules 1 CCR 204-32, Rule 1 and Rule 2, which are attached hereto and which shall be effective on 3/8/19, 2019. These emergency rules shall be in force and effect until the earlier of the date on which they are replaced by permanent rules, or for a period of one hundred and twenty days from the date of adoption.

Adopted this 19th day of February, 2019.

Heidi Humphreys
Interim Executive Director
Colorado Department of Revenue

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Office of the Attorney General

Tracking number: 2019-00080

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Motor Vehicles

on 02/19/2019

1 CCR 204-32

SEX DESIGNATION

The above-referenced rules were submitted to this office on 02/20/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:52:57

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Emergency Rules Adopted

Department

Department of Labor and Employment

Agency

Division of Oil and Public Safety

CCR number

7 CCR 1101-18

Rule title

7 CCR 1101-18 UNDERGROUND DAMAGE PREVENTION SAFETY COMMISSION REGULATIONS 1 - eff 02/14/2019

Effective date

02/14/2019

COLORADO DEPARTMENT OF

LABOR AND EMPLOYMENT

DIVISION OF OIL AND PUBLIC SAFETY

UNDERGROUND DAMAGE PREVENTION

SAFETY COMMISSION REGULATIONS

7 C.C.R. 1101-18

Effective: 02/14/2019

UNDERGROUND DAMAGE PREVENTION SAFETY COMMISSION REGULATIONS

COLORADO DEPARTMENT OF LABOR AND EMPLOYMENT
DIVISION OF OIL AND PUBLIC SAFETY

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ARTICLE 1 GENERAL PROVISIONS

Section 1-1 Statement of Basis and Purpose

These regulations are promulgated to establish rules for the Underground Damage Prevention Safety Commission (Safety Commission) responsibilities within the Excavation Requirements Act (the Act), Title 9 Article 1.5 Colorado Revised Statutes (CRS). The purpose of Safety Commission is to prevent injury to persons and damage to property.

Section 1-2 Statutory Authority

These regulations have been created pursuant to Section 104.2 (2)(d) of the Act.

Section 1-3 Effective Date

These regulations shall be effective on February 14, 2019.

Section 1-4 Definitions

Terms in these regulations shall have the same definitions as those found in the Act or as defined below.

ASCE 38. The standard for defining the quality of an underground facility location as defined in the current edition of the American Society of Civil Engineers' "Standard Guideline for the Collection and Depiction of Existing Subsurface Utility Data (CI/ASCE 38-02)" or an analogous successor standard as determined by the safety commission.

DAMAGE. Includes the penetration or destruction of any protective coating, housing, or other protective device of an underground facility, the denting or partial or complete severance of an underground facility, or the rendering of any underground facility inaccessible.

EMERGENCY SITUATIONS. Includes ruptures and leakage of pipelines, explosions, fires, and similar instances where immediate action is necessary to prevent loss of life or significant damage to property, including, without limitation, underground facilities, and advance notice of proposed excavation is impracticable under the circumstances.

EXCAVATION. means any operation in which earth is moved or removed by means of any tools, equipment, or explosives and includes augering, backfilling, boring, ditching, drilling, grading, plowing-in, pulling-in, ripping, scraping, trenching, hydro excavating, postholing, and tunneling. "Excavation" does not include:

(1) Routine maintenance on existing planted landscapes; or

(2) An excavation by a rancher or a farmer, as defined in section 42-20-108.5, CRS, occurring on a ranch or farm when the excavation involves:

(a) Any form of existing agricultural activity that is routine for that ranch or farm;

(b) Land clearing if the activity does not involve deep ripping or deep root removal of trees or shrubs; or

(c) Routine maintenance of:

(i) An existing irrigation facility if the facility has been subjected to maintenance in the previous 24 months; or

(ii) Existing fence lines.

FARMER. A person or such person's agent or contractor engaged in the production or raising of crops, poultry, or livestock.

FRIVOLOUS COMPLAINT. A complaint filed with the Safety Commission that is entirely without merit and is made with the intention of causing inconvenience, harassment or expense.

GRAVITY-FED SYSTEM. Any underground facility that is not pressurized and that utilizes gravity as the only means to transport its contents. These systems include sanitary sewer lines, storm sewer lines, and open-air irrigation ditches.

LICENSED PROFESSIONAL ENGINEER. A professional engineer as defined in section 12-25-102, CRS.

NOTIFICATION ASSOCIATION. The statewide notification association of owners and operators of underground facilities created in section 9-1.5-105, CRS, also known as Colorado 811 and the Utility Notification Center of Colorado.

OPERATOR or OWNER. Any person, including public utilities, municipal corporations, political subdivisions, or other persons having the right to bury underground facilities in or near a public road, street, alley, right-of-way, or utility easement. Operator or owner in these regulations does not include any railroad.

PERSON. Any individual acting on his or her own behalf, sole proprietor, partnership, association, corporation, or joint venture; the state, any political subdivision of the state, or any instrumentality or agency of either; or the legal representative of any of them.

ROUTINE MAINTENANCE. A regular activity that happens at least once per year on an existing planted landscape if earth is not disturbed at a depth of more than twelve inches by nonmechanical means or four inches by mechanical means and if the activities are not intended to permanently lessen the ground cover or lower the existing ground contours. Mechanical equipment used for routine maintenance tasks shall be defined as aerators, hand-held rototillers, soil injection needles, lawn edgers, overseeders, and hand tools.

SAFETY COMMISSION. Also known as the “Underground Damage Prevention Safety Commission.” The enforcement authority as established by statute.

SUBSURFACE UTILITY ENGINEERING NOTIFICATION. A notice to the notification association that a project is being designed by a licensed professional engineer and that the project will include the investigation and depiction of existing underground facilities that meet or exceed the ASCE 38 standard.

SUBSURFACE UTILITY ENGINEERING-REQUIRED PROJECT. A project that meets all of the following conditions:

(1) The project involves a construction contract with a public entity, as that term is defined in section 24-91-102, CRS;

(2) The project involves primarily horizontal construction and does not involve primarily the construction of buildings;

(3) The project:

(a) Has an anticipated excavation footprint that exceeds two feet in depth, not including rotomilling, and is a contiguous one thousand square feet, not including fencing and signing projects; or

(b) Involves utility boring.

(4) The project requires the design services of a licensed professional engineer.

UNDERGROUND FACILITY. Any item of personal property which is buried or placed below ground for use in connection with the storage or conveyance of water or sewage, electronic, telephonic, or telegraphic communications or cable television, electric energy, or oil, gas, or other substances. An item of personal property, as used in this definition, includes, but is not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments thereto.

VIOLATION. A determination by the Safety Commission that a violation of the Act has occurred.

VIOLATION, MAJOR. A violation where any of the following has occurred:

(1) The violation is a causal factor in an injury or fatality.

(2) The violation is a causal factor in the striking of high pressure gas or electric facilities.

(3) Excavator does not notify Colorado 811 prior to excavation activities.

(4) Willful or malicious removal of marking except in the excavation.

(5) The excavator does not use nondestructive means of excavation to identify a facility, does not use reasonable care to protect a facility, or does not expose the facility when requested by the facility owner or permit issuing entity.

(6) The excavator does not report underground facility damage to the facility owner and, if the damage is to a high pressure gas facility, to 911.

(7) The Review Committee finds the violation to be in blatant disregard for the best practices and the potential for injury to the public or property is highly probable.

VIOLATION, MINOR. A violation where any of the following has occurred:

(1) A Cancel Request is not submitted prior to the expiration of the "Locate by Date."

(2) The violation involves administrative management of data or reporting of information.

(3) Any violation of Section 104.2 of the Act caused by the Safety Commission.

(4) Failure of the excavator to properly notify property owners in the event of the removal of underground facilities.

(5) The Review Committee finds the violation to be relevant, and the potential for injury to the public or property is not a factor.

(6) Frivolous complaint.

VIOLATION, MODERATE. A violation where any of the following has occurred:

(1) Facility owner does not appropriately respond to a locate request.

(2) Excavator fails to request a reverification of markings or facility owner fails to reverify the markings within a reasonable time.

(3) A person performing maintenance does not notify Colorado 811 and the facility owner/operator when it is discovered.

(4) In emergency situations, the excavator does not take reasonable precautions to avoid damage to facilities.

(5) Failure of Colorado 811 to re-notify a facility owner when a positive response is not completed by the owner.

(6) A person performing maintenance does not take reasonable care when disturbing the soil.

(7) A new facility is installed after August 8, 2018, and is not electronically locatable.

(8) The Review Committee finds the violation to not within best practices and the potential for injury to the public or property is foreseeable.

Section 1-5 Scope

These regulations apply to requirements defined in Sections 104.2, 104.4, 104.7 and 104.8 of the Act, although they may refer to other Sections of the Act.

Section 1-6 Safety Commission

The Safety Commission will conduct itself according to its adopted Bylaws and Code of Conduct, and these regulations.

ARTICLE 2 ENFORCEMENT OF VIOLATIONS

Section 2-1 Enforcement Process

The Safety Commission provides these regulations to denote its process for reviewing complaints and conducting hearings. When a person is found to be in violation of the Act and/or these regulations, the Safety Commission will pursue penalties or remedial actions against the person.

Section 2-2 Complaints

(1) The Safety Commission may review complaints from any person of alleged violations of the Act.

(a) A person who brings a frivolous complaint, as determined by the Safety Commission, commits a minor violation and is subject to a fine.

(b) The person filing the complaint may voluntarily withdraw the complaint prior to a hearing.

(2) The review of a complaint shall be completed by a Review Committee. The Review Committee shall:

(a) Be comprised of three to five members of the Safety Committee.

(b) Have an equal number of members representing excavators and owners/operators.

(c) Include at least one member who does not represent either excavators or owners/operators.

(3) The complaint process shall include:

(a) A complaint form, and if applicable a damage form, being completed and submitted to the Safety Commission.

(b) Within 90 days of the complaint form being received a hearing will be scheduled.

(i) Both the person filing the complaint and the alleged violator will be sent hearing notification letters to advise them of the logistics for the hearing.

(ii) Both parties shall receive a copy of the complaint form, and as applicable damage form.

(iii) The scheduled hearing date can be modified by mutual agreement of all parties and when the Review Committee is available.

(c) If applicable, the Safety Commission will file a Data Request Form with Colorado 811, to gain ticket information.

Section 2-3 Hearing

(1) Hearings shall be conducted in the following manner, unless otherwise directed by the Review Committee:

(a) Presentation of positions - every party to the proceeding shall have the right to present their case by oral and documentary evidence and shall provide eight copies of supporting documentation.

(b) The Review Committee shall utilize the Complaint and (as applicable) Damage Forms the presentations, the response to the Colorado 811 Data Request Form, and their experience in the field in their discussion and finding of facts.

(c) Any member of the Review Committee may ask questions to any person involved in the hearing.

(2) Hearings shall be conducted in the following order, unless otherwise directed by the Review Committee:

(a) Complaint Report # is called.

(i) Introduction of Review Committee members and explanation of the proceedings.

(ii) Determination of whether any Review Committee members have a conflict of interest; this can be determined prior to the formation of a Review Committee, and will be reviewed at the start of the hearing.

(b) Presentation of position and submittal of documentation or other material by the person filing the complaint.

(c) Presentation of position and submittal of documentation or other material by the person alleged to be in violation, in the complaint.

(d) Rebuttal by the person filing the complaint.

(e) Questions from the Review Committee to both parties.

(f) Discussion by the Review Committee on the findings of fact and recommendations for remedial action (if applicable).

(3) Maximum time allowed for hearings shall be the following, unless otherwise directed by the Review Committee:

(a) Each party shall have 20 minutes to present their case.

(i) The Review Committee may allow additional time for presentations.

(ii) If the Review Committee grants additional time to one person, the same amount of additional time will be offered to the other person.

(b) The person filing the complaint shall have five minutes for rebuttal.

(c) The Review Committee shall take as much time as is necessary to ask questions and discuss the complaint.

(4) Burden of Proof

(a) The person filing the complaint has the burden to prove by a preponderance of the evidence that the alleged violator committed a violation.

(5) Application of Technical Knowledge

(a) The Review Committee may utilize its experience, technical competence, and specialized knowledge in the evaluation of the evidence presented to it.

(b) The Review Committee may take notice of general, technical, or scientific facts within its knowledge, but only if the fact so noticed is specified in the record or is brought to the attention of the persons involved in the

complaint before final decision and both the person filing the complaint and the person alleged to be in violation is afforded an opportunity to controvert the fact so noticed.

(6) Representation by Counsel

(a) Any person permitted or compelled to testify or to submit data or evidence shall be entitled to the benefit of legal counsel of his or her own choosing and at his or her own expense, but a person may appear for his or her self.

(b) An attorney who is a witness may not act as counsel for the person calling him or her as a witness.

Section 2-4 Final Decision

(1) Review Committee's Finding of Facts:

(a) After due consideration of written and oral statements, and accompanying documentation, the Review Committee shall determine whether a violation of the law has occurred and, if appropriate, recommend remedial action, or make such determination of the matter as it shall deem appropriate consistent within the Act.

(b) Within seven business days after the completion of the hearing, the Review Committee shall provide to the Safety Commission a report of its findings and recommendations.

(2) Safety Commission's Final Determination:

(a) The Safety Commission shall review the Review Committee's findings and recommendations at their next scheduled meeting.

(i) The Safety Commission is bound by the Review Committee's findings of fact and decision.

(ii) The Safety Commission may adjust the Review Committee's recommendation of remedial action or penalty if an adjustment is supported by at least 12 members of the Safety Commission.

(b) Within 10 business days after the Safety Commission's meeting to review the Review Committee's findings and recommendations, the Safety Commission shall provide both parties involved in the complaint a summary of the Review Committee's findings and the Safety Commission's final determination with respect to any required remedial action or penalty.

(c) The decision of the Safety Commission is final agency action subject to review by the District Court pursuant to section 24-4-106, CRS.

Section 2-5 Remedial Actions

(1) A recommendation of remedial action that includes a fine requires a unanimous vote of the Review Committee.

(2) The Review Committee shall not recommend remedial action or a fine against a Homeowner, Rancher, or Farmer (as defined), unless the Review Committee finds by clear and convincing evidence that a violation of the law has occurred.

(3) The Safety Commission may consider training, support services, or other remediation measures that will improve the behavior of the person found in violation.

(4) Guidance for the recommendation of remedial action shall be consistent with the following principles:

(a) Is the alleged violation classified as a Minor, Moderate or Major violation (as defined).

(b) For a person that has not had a violation in the previous 12 months, the Safety Commission may consider alternatives to fines.

(c) The number of violations, relative to the number of notifications received, are a part of the consideration.

(d) The maximum fines are in Table 2-5.

Table 2-5: Potential Enforcement Penalties				
Type of Violation	**Number of Violations within the previous 12 months**			
	1	**2**	**3**	**4**
Frivolous	$100	$200	$500	$2,000
Minor	$250	$500	$1,000	$5,000
Moderate	$1,000	$2,500	$5,000	$25,000
Major	$5,000	$25,000	$50,000	$75,000

Section 2-6 Home Rule Entity

(1) This enforcement process shall not apply to a home rule county, city and county, municipality, or power authority established pursuant to 29-1-204 (1), CRS; except that if the Safety Commission identifies an alleged violation by the home rule entity, the Safety Commission shall:

(a) Inform the home rule entity of the alleged violation.

(b) If requested by the home rule entity, suggest corrective action.

(2) Every home rule entity described in subsection (1) shall:

(a) Adopt by resolution, ordinance, or other official action either:

(i) Its own damage prevention safety program similar to that established pursuant to the Act; or

(ii) A waiver that delegates its damage prevention safety program to the Safety Commission.

(b) Notify the Safety Commission of the decision in subsection (a).

ARTICLE 3 BEST PRACTICES

(1) The Safety Commission shall advise the Notification Association and other state agencies, the general assembly, and the local government on:

(a) Best practices and training to prevent damage to underground utilities.

(b) Policies to enhance public safety, including the establishment and periodic updating of industry best standards, including marking and documentation best practices and technology advancements.

(c) Policies and best practices to improve efficiency and cost savings to the Colorado 811 program, including the review, establishment, and periodic updating of industry standards, to ensure the highest level of productivity and service for the benefit of both excavators and owners and operators.

COLORADO
Department of
Labor and Employment

Division of Oil and Public Safety
Underground Damage Prevention Safety Commission
633 17th Street, Suite 500
Denver, CO 80202-3610
303-318-8525 | www.colorado.gov/ops

JUSTIFICATION FOR EMERGENCY RULING

The Underground Damage Prevention Safety Commission (Safety Commission) has a statutory requirement for its review committee to schedule complaint hearings within 90 days of receiving complaints.

Although the Safety Commission was not in place until January 1, 2019, the 90-day hearing scheduling requirement was effective August 8, 2018.

The statutes require that hearing procedures be included in regulations, so in order to schedule hearings for the complaints that were received in 2018, the Safety Commission needs to have regulations in place as soon as possible.

PHILIP J. WEISER
Attorney General

NATALIE HANLON LEH
Chief Deputy Attorney General

ERIC R. OLSON
Solicitor General

JUNE TAYLOR
Chief Operating Officer

STATE OF COLORADO
DEPARTMENT OF LAW

RALPH L. CARR
COLORADO JUDICIAL CENTER
1300 Broadway, 10th Floor
Denver, Colorado 80203
Phone (720) 508-6000

Office of the Attorney General

Tracking number: 2019-00070

Opinion of the Attorney General rendered in connection with the rules adopted by the

Division of Oil and Public Safety

on 02/14/2019

7 CCR 1101-18

UNDERGROUND DAMAGE PREVENTION SAFETY COMMISSION REGULATIONS

The above-referenced rules were submitted to this office on 02/14/2019 as required by section 24-4-103, C.R.S. This office has reviewed them and finds no apparent constitutional or legal deficiency in their form or substance.

March 04, 2019 10:50:12

Philip J. Weiser
Attorney General
by Eric R. Olson
Solicitor General

Terminated Rulemaking

Department

Department of Regulatory Agencies

Agency

Division of Conservation

CCR number

4 CCR 752-1

Tracking number

2019-00103

Termination date

03/15/2019

Reason for termination

On March 1, 2019, the Division of Conservation filed this rulemaking notice. It contained the incorrect hearing date. This error was not discovered until after the March 1 notice was published in the Colorado Register, Vol. 42, No. 5, March 10, 2019. The proposed rules were refiled on 3/15/2019, tracking number 2019-00116.

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 02/25/2019

Department

Department of Health Care Policy and Financing

Agency

Medical Services Board (Volume 8; Medical Assistance, Children's Health Plan)

COLORADO
Department of Health Care Policy & Financing

PUBLIC NOTICE

February 28, 2019 through March 30, 2019

Home- and Community-Based Services (HCBS) Waiver Amendment Public Comment

The Department intends to submit waiver amendments for the following Home- and Community Based-Services (HCBS) waivers:

- Persons with Brain Injury (BI)
- Children's Home- and Community-Based Services (CHCBS)
- Children with a Life-Limiting Illness (CLLI)
- Community Mental Health Supports (CMHS)
- Persons who are Elderly, Blind, and Disabled (EBD)
- Persons with a Spinal Cord Injury (SCI)

The proposed waiver amendments include the following changes:

- Update language related Post Payment Review (PPR) Function and Oversight (BI, CHCBS, CLLI, CMHS, EBD, SCI)
- Update Performance Measures for multiple Quality Improvement Strategies sections (BI, CHCBS, CLLI, CMHS, EBD, SCI)
- Update the Supported Living Program (SLP) rate methodology (BI)
- Update Cost Neutrality Projections (BI, CHCBS, CLLI, CMHS, EBD, SCI)

The Department will post the amendments for public notice from February 28, 2019 through March 30, 2019. The Department will ask for an effective date of June 30, 2019 for these amendments.

For a more detailed summary of all changes, please go to the Department's website at https://www.colorado.gov/pacific/hcpf/hcbs-waiver-transition to view the full draft waivers and the amendment fact sheet. You may also obtain a paper or electronic copy by calling 303-866-3684 or by writing or visiting the Department at 1570 Grant St, Denver, CO 80203.

To provide public comment or request a paper or electronic copy of any materials, please contact LTSS.PublicComment@state.co.us; submitted by phone at 303-866-

3684; submitted by fax at 303-866-2786 ATTN: HCBS Waiver Amendments; or in-person at 1570 Grant Street, Denver CO 80203.

Public Comments will be accepted February 7 through March 9, 2019.

General Information

A link to this notice is posted on the Department's website. Written comments may be addressed to: Department of Health Care Policy and Financing, ATTN: HCBS Waiver Amendments, 1570 Grant Street, Denver CO 80203.

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 03/20/2019

Department

Department of Health Care Policy and Financing

Agency

Medical Services Board (Volume 8; Medical Assistance, Children's Health Plan)

COLORADO
Department of Health Care Policy & Financing

PUBLIC NOTICE

March 25, 2019

Supplemental Medicaid Payment for Private Nursing Facilities

Effective April 1, 2019, the Department proposes to submit a State Plan Amendment to increase the total amount allowable of a supplemental payment to reimburse private nursing facilities for the nursing care of chronically acute, long-stay patients currently treated in an inpatient hospital setting.

Due to available room under the federal upper payment limit for private nursing facilities, the Department is able to increase supplemental payments to private nursing facilities. The payment will be $1,400,000 payable to private nursing facilities. This is an increase of $400,000 from the previously allowed amount of $1,000,000. This increase in payment amount is a result of the change to the current state budget bill through the supplemental process. This proposed supplemental payment will be made after all other rate payments through the Medicaid Management Information System (MMIS) and other supplemental payments, including provider fee payments to private nursing facilities have been made. Aggregate payments to private nursing facilities will remain under the federal upper payment limit for private nursing facilities in Colorado.

This payment will be funded by an intergovernmental transfer from Denver Health and Hospital Authority to the Department and matching federal Medicaid funds. No state general funds will be used.

General Information

A link to this notice will be posted on the Department's website starting on March 25, 2019. Written comments may be addressed to:

Director, Health Programs Office
Department of Health Care Policy and Financing
1570 Grant Street
Denver, CO 80203.

County Contact Information

Copies of the proposed changes are available for public review at the following county locations:

County Name	Official Name	Physical Address	Mailing Address
Adams	Adams County Human Services Department	11860 Pecos Street Westminster, CO 80234	Same as physical
Alamosa	Alamosa County Department of Human Services	8900 C Independence Way, Alamosa, CO 81101	PO Box 1310, Alamosa, CO 81101
Arapahoe	Arapahoe County Human Services	14980 E. Alameda Dr., Aurora, CO 80012	14980 E. Alameda Dr., Aurora, CO 80012
Arapahoe	Satellite Office	1690 W. Littleton Blvd., Littleton, CO 80120	
Archuleta	Archuleta County Human Services	551 Hot Springs Blvd., Pagosa Springs, CO 81147	PO Box 240, Pagosa Springs, CO 81147
Baca	Baca County Department of Social Services	772 Colorado St. Ste #1, Springfield, CO 81073	Same as physical
Bent	Bent County Social Services	138 6th Street, Las Animas, CO 81054	Same as physical
Boulder	Boulder County Department of Housing & Human Services	3400 Broadway, Boulder, CO 80304	PO Box 471, Boulder, CO 80306
Broomfield	Broomfield Health and Human Services	100 Spader Way, Broomfield, CO 80020	Same as physical
Chaffee	Chaffee County Department of Human Services	448 E. 1st St, Ste 166, Salida, CO 81201	PO Box 1007, Salida, CO 81201
Cheyenne	Cheyenne County Department of Human Services	560 W. 6 N, Cheyenne Wells, CO 80810	PO Box 146, Cheyenne Wells, CO 80810
Conejos	Conejos County Department of Social Services	12989 Cty. Rd. G.6, Conejos, CO 81129	PO Box 68, Conejos, CO 81129
Costilla	Costilla County Department of Social Services	233 Main St, San Luis, CO 81152	Same as physical
Crowley	Crowley County Department of Human Services	631 Main Street Ste 100, Ordway, CO 81063	Same as physical

Custer	Custer County Department of Human Services	205 S. 6th St., Westcliffe, CO 81252	PO Box 929 Westcliffe, CO 81252
Delta	Delta County Department of Human Services	560 Dodge St, Delta, CO 81416	Same as physical
Denver	Denver Department of Human Services	1200 Federal Blvd, Denver, CO 80204	Same as physical
Dolores	Dolores County Department of Social Services	409 Main Street, Dove Creek, CO 81324	PO Box 485 Dove Creek, CO 81324
Douglas	Douglas County Department of Human Services	4400 Castleton Court, Castle Rock, CO 80109	Same as physical
Eagle	Eagle County Department of Human Services	551 Broadway, Eagle, CO 81631	PO Box 660, Eagle, CO 81631
El Paso	El Paso County Department of Human Services	1675 W. Garden of the Gods Road, Colorado Springs, CO 80907	Same as physical
Elbert	Elbert County Health and Human Services	75 Ute. Ave, Kiowa, CO 80117	PO Box 924, Kiowa, CO 80117
Fremont	Fremont County Department of Human Services	172 Justice Center Road, Canon City, CO 81212	Same as physical
Garfield	Garfield County Department of Human Services	195 W. 14th St., Rifle, CO 81650	Same as physical
Gilpin	Gilpin County Department of Human Services	2960 Dory Hill Rd. Ste 100, Black Hawk, CO 80422	Same as physical
Grand	Grand County Department of Social Services	620 Hemlock St., Hot Sulphur Springs, CO 80451	PO Box 204, Hot Sulphur Springs, CO 80451
Huerfano	Huerfano County Department of Social Services	121 W. 6th St., Walsenburg, CO 81089	Same as physical
Jackson	Grand County Department of Social Services	620 Hemlock St., Hot Sulphur Springs, CO 80451	PO Box 204, Hot Sulphur Springs, CO 80451
Jefferson	Jefferson County Human Services	900 Jefferson County Parkway, Golden, CO 80401	Same as physical
Kiowa	Kiowa County	1307 Maine St., Eads,	PO Box 187, Eads, CO

	Department of Social Services	CO 81036	81036-0187
Kit Carson	Kit Carson County Department of Human Services	252 S. 14th St., Burlington, CO 80807	PO Box 70, Burlington, CO 80807
La Plata	La Plata County Department of Human Services	10 Burnett Court 1st Floor, Durango, CO 81301	Same as physical
Lake	Lake County Department of Human Services	112 W. 5th St. Leadville, CO 80461	PO Box 884 Leadville, CO 80461
Larimer	Larimer County	1501 Blue Spruce Drive	Same as physical
Las Animas	Las Animas County Department of Human Services	204 S. Chestnut St., Trinidad, CO 81082	Same as physical
Lincoln	Lincoln County Department of Human Services	103 3rd Ave, Hugo, CO 80821	PO Box 37, Hugo, CO 80821
Logan	Logan County Department of Human Services	508 S. 10th Ave, STE B, Sterling, CO 80751	Same as physical
Mesa	Mesa County Department of Human Services	510 29 1/2 Rd, Grand Junction, CO 81504	PO Box 20000, Grand Junction, CO 81502
Mineral	Rio Grande/Mineral County Department of Social Services	1015 6th St, Del Norte, CO 81132	Same as physical
Moffat	Moffat County Department of Social Services	595 Breeze St., Craig, CO 81625	Same as physical
Montezuma	Montezuma County Department of Social Services	109 W. Main St. Room 2013, Cortez, CO 81321	Same as physical
Montrose	Montrose County Health & Human Services	1845 S. Townsend Ave., Montrose, CO 81401	PO Box 216, Montrose, CO 81402-216
Morgan	Morgan County Department of Human Services	800 E. Beaver Ave., Fort Morgan, CO 80701	PO Box 220, Fort Morgan, CO 80701
Otero	Otero County Department of Human Services	215 Raton Ave, La Junta, CO 81050	PO Box 494, La Junta, CO 81050
Ouray	Ouray DSS	177 Sherman St., Unit 104, Ridgway, CO 81432	PO Box 530 Ridgway, CO 81432

Phillips	Phillips County Department of Social Services	127 E Denver St., Holyoke, CO, 80734	Same as physical
Pitkin	Pitkin County Department of Health and Human Services	0405 Castle Creek Rd., Suite 104, Aspen, CO 81611	Same as physical
Pueblo	Pueblo County Department of Social Services	201 W. 8th St, Pueblo, CO 81003	320 W. 10th St, Pueblo, CO 81003
Rio Blanco	Rio Blanco County Department of Health and Human Services	345 Market St., Meeker, CO 81641	Same as physical
Routt	Routt County Department of Human Services	135 6th St., Steamboat Springs, CO 80477	PO Box 772790, Steamboat Springs, CO 80477
Saguache	Saguache County Department of Social Services	605 Christy Ave, Saguache, CO 81149	PO Box 215, Saguache, CO 81149
San Miguel	San Miguel DSS	333 W. Colorado Ave, Telluride, CO 81435 (San Miguel);	PO Box 96 Telluride, CO 81435
Sedgwick	Sedgwick County Human Services	118 W. 3rd St., Julesburg, CO 80737	PO Box 27, Julesburg, CO 80737
Washington	Washington County DHS	126 W. 5th St., Akron, CO 80720	PO Box 395, Akron, CO 80720
Yuma	Yuma County Department of Human Services	340 S. Birch, Wray, CO 80758	Same as physical

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 03/20/2019

Department

Department of Public Health and Environment

Agency

Water Quality Control Commission (1002 Series)

COLORADO
Water Quality
Control Commission
Department of Public Health & Environment

NOTICE OF PUBLIC INFORMATIONAL HEARING
BEFORE THE
COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

Triennial review of the commission's current regulation titled:

"The Basic Standards for Ground Water," Regulation #41 (5 CCR 1002-41).

PURPOSE OF HEARING:

This hearing is to fulfill State statutory requirements for triennial review of control regulations.

SCHEDULE OF IMPORTANT DATES:

Written comments due	05/01/2019	Additional submittal information below
Public Hearing	**05/13/2019** **9:00 a.m.**	**Florence Sabin Conference Room** **Department of Public Health and Environment** **4300 Cherry Creek Drive South** **Denver, CO 80246**

PROCEDURAL MATTERS:

The commission encourages input from interested persons, either in writing prior to the hearing or orally at the hearing. Interested persons should provide their opinions or recommendations as to whether the foregoing regulation should be continued in its current form, repealed, or changed and if so in what respect.

The commission will receive all written submittals electronically. Submittals must be provided as PDF documents and may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the date shown above. Written comments will be available to the public on the commission's web site.

Any suggested changes deemed by the commission to require further action will be proposed as regulatory changes for subsequent public rulemaking. Recommendations for changes should be concise and supported by reference to the evidence that would be offered if the commission moved forward to formally consider the recommended regulatory amendments. At this informational hearing the commission does not desire to hear the full evidence that would be presented at a rulemaking hearing that would follow. The commission requests only the information needed to determine whether

or not to propose a regulatory change. Oral public comment will be accepted at the hearing.

AUTHORITY FOR PUBLIC HEARING:

The provisions of 25-8-202(1)(f) C.R.S. and section 21.5 B of the "Procedural Rules" (5 CCR 1002-21) provide the authority for this hearing.

PARTY STATUS:

This is not a rulemaking hearing; therefore, party status provisions of 25-8-101 et. seq., and 24-4-101 et. seq., C.R.S. do not apply. Party status requests shall not be considered by the commission.

Dated this 20th day of March 2019 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 03/20/2019

Department

Department of Public Health and Environment

Agency

Water Quality Control Commission (1002 Series)

COLORADO
Water Quality
Control Commission
Department of Public Health & Environment

NOTICE OF PUBLIC INFORMATIONAL HEARING
BEFORE THE
COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

Triennial review of the commission's current regulation titled:

"Site-Specific Water Quality Classifications and Standards for Ground Water," Regulation #42 (5 CCR 1002-42).

PURPOSE OF HEARING:

This hearing is to fulfill State statutory requirements for triennial review of control regulations.

SCHEDULE OF IMPORTANT DATES:

Written comments due	05/01/2019	Additional submittal information below
Public Hearing	**05/13/2019 9:00 a.m.**	**Florence Sabin Conference Room Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246**

PROCEDURAL MATTERS:

The commission encourages input from interested persons, either in writing prior to the hearing or orally at the hearing. Interested persons should provide their opinions or recommendations as to whether the foregoing regulation should be continued in its current form, repealed, or changed and if so in what respect.

The commission will receive all written submittals electronically. Submittals must be provided as PDF documents and may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the date shown above. Written comments will be available to the public on the commission's web site.

Any suggested changes deemed by the commission to require further action will be proposed as regulatory changes for subsequent public rulemaking. Recommendations for changes should be concise and supported by reference to the evidence that would be offered if the commission moved forward to formally consider the recommended regulatory amendments. At this informational hearing the commission does not desire to hear the full evidence that would be presented at a rulemaking hearing that would follow. The commission requests only the information needed to determine whether

or not to propose a regulatory change. Oral public comment will be accepted at the hearing.

AUTHORITY FOR PUBLIC HEARING:

The provisions of 25-8-202(1)(f) C.R.S. and section 21.5 B of the "Procedural Rules" (5 CCR 1002-21) provide the authority for this hearing.

PARTY STATUS:

This is not a rulemaking hearing; therefore, party status provisions of 25-8-101 et. seq., and 24-4-101 et. seq., C.R.S. do not apply. Party status requests shall not be considered by the commission.

Dated this 20th day of March 2019 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 03/20/2019

Department

Department of Public Health and Environment

Agency

Water Quality Control Commission (1002 Series)

COLORADO
Water Quality
Control Commission
Department of Public Health & Environment

NOTICE OF PUBLIC INFORMATIONAL HEARING
BEFORE THE
COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

Triennial review of the commission's current regulation titled:

"Dillon Reservoir Control Regulation", Regulation #71 (5 CCR 1002-71).

PURPOSE OF HEARING:

This hearing is to fulfill State statutory requirements for triennial review of control regulations.

SCHEDULE OF IMPORTANT DATES:

Written comments due	05/01/2019	Additional submittal information below
Public Hearing	**05/13/2019** **9:30 a.m.**	**Florence Sabin Conference Room** **Department of Public Health and Environment** **4300 Cherry Creek Drive South** **Denver, CO 80246**

PROCEDURAL MATTERS:

The commission encourages input from interested persons, either in writing prior to the hearing or orally at the hearing. Interested persons should provide their opinions or recommendations as to whether the foregoing regulation should be continued in its current form, repealed, or changed and if so in what respect.

The commission will receive all written submittals electronically. Submittals must be provided as PDF documents and may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the date shown above. Written comments will be available to the public on the commission's web site.

Any suggested changes deemed by the commission to require further action will be proposed as regulatory changes for subsequent public rulemaking. Recommendations for changes should be concise and supported by reference to the evidence that would be offered if the commission moved forward to formally consider the recommended regulatory amendments. At this informational hearing the commission does not desire to hear the full evidence that would be presented at a rulemaking hearing that would follow. The commission requests only

the information needed to determine whether or not to propose a regulatory change. Oral public comment will be accepted at the hearing.

AUTHORITY FOR PUBLIC HEARING:

The provisions of 25-8-202(1)(f) C.R.S. and section 21.5 B of the "Procedural Rules" (5 CCR 1002-21) provide the authority for this hearing.

PARTY STATUS:

This is not a rulemaking hearing; therefore, party status provisions of 25-8-101 et. seq., and 24-4-101 et. seq., C.R.S. do not apply. Party status requests shall not be considered by the commission.

Dated this 20th day of March 2019 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 03/20/2019

Department

Department of Public Health and Environment

Agency

Water Quality Control Commission (1002 Series)

COLORADO
Water Quality
Control Commission
Department of Public Health & Environment

NOTICE OF PUBLIC ADMINISTRATIVE ACTION HEARING
BEFORE THE
COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

At the date, time and location listed below, the Water Quality Control Commission will hold a public Administrative Action Hearing to consider approval of the 2018 update to the water quality management plan (section 208 plan) for the North Front Range Water Quality Planning Association. The proposed plan is available at the following link.

https://www.nfrwqpa.org/pdf/208_Plan_Update/2018208PlanMarch2019final.pdf

SCHEDULE OF IMPORTANT DATES:

Written comments due	May 1, 2019	Additional submittal information below
Public Administrative Action Hearing	**May 13, 2019 9:45 a.m.**	**Florence Sabin Conference Room Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246**

PROCEDURAL MATTERS:

The commission encourages input from interested persons, either in writing prior to the hearing or orally at the hearing. Interested persons should provide their opinions or recommendations regarding the proposed intended use plans.

The commission will receive all written submittals electronically. Submittals must be provided as PDF documents and may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, on a CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the due date. Written comments will be available to the public on the commission's web site.

AUTHORITY FOR PUBLIC HEARING:

The provisions of 25-8-202(1)(g),(h), (i), (o) and (2) C.R.S. and Section 21.5 B of the "Procedural Rules", Regulation #21 (5 CCR 1002-21) provide the authority for this hearing.

PARTY STATUS:

This is not a rulemaking hearing; therefore, party status provisions of 25-8-101 et. seq., and 24-4-101 et. seq., C.R.S. do not apply. Party status requests shall not be considered by the commission.

Dated this 20th day of March 2019 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator

Nonrulemaking Public Notices and other Miscellaneous Rulemaking Notices

Filed on 03/20/2019

Department

Department of Public Health and Environment

Agency

Water Quality Control Commission (1002 Series)

COLORADO
Water Quality
Control Commission
Department of Public Health & Environment

NOTICE OF PUBLIC ADMINISTRATIVE ACTION HEARING
BEFORE THE
COLORADO WATER QUALITY CONTROL COMMISSION

SUBJECT:

At the date, time and location listed below, the Water Quality Control Commission will hold a public Administrative Action Hearing to consider approval of the Water Quality Control Division's proposed submittal of projects for FY19 Section 319 nonpoint source funds.

SCHEDULE OF IMPORTANT DATES:

Initial list of recommended projects available	Apr. 5, 2019	On commission's web at https://www.colorado.gov/pacific/cdphe/wqcc-administrative-action-hearings
Written comments due	Apr.17, 2019	Additional submittal information below
Final list of recommended projects available	May. 1, 2019	On commission's web at https://www.colorado.gov/pacific/cdphe/wqcc-administrative-action-hearings
Public Administrative Action Hearing	**May 13, 2019 10:30 a.m.**	**Florence Sabin Conference Room Department of Public Health and Environment 4300 Cherry Creek Drive South Denver, CO 80246**

PROCEDURAL MATTERS:

The commission encourages input from interested persons, either in writing prior to the hearing or orally at the hearing. Interested persons should provide their opinions or recommendations as to whether the proposed list should be approved by the commission and forwarded to EPA.

The commission will receive all written submittals electronically. Submittals must be provided as PDF documents and may be emailed to cdphe.wqcc@state.co.us, provided via an FTP site, on a CD or flash drive, or otherwise conveyed to the commission office so as to be received no later than the due date. Written comments will be available to the public on the commission's website.

AUTHORITY FOR PUBLIC HEARING:

The provisions of 25-8-202(1)(h), (i) and (2) C.R.S. and Section 21.5 B of the "Procedural Rules", Regulation #21 (5 CCR 1002-21) provide the authority for this hearing.

PARTY STATUS:

This is not a rulemaking hearing; therefore, party status provisions of 25-8-101 et. seq., and 24-4-101 et. seq., C.R.S. do not apply. Party status requests shall not be considered by the Commission.

Dated this 20th day of March 2019 at Denver, Colorado.

WATER QUALITY CONTROL COMMISSION

Trisha Oeth, Administrator

Calendar of Hearings

Hearing Date/Time	Agency	Location
04/18/2019 09:15 AM	Division of Gaming - Rules promulgated by Gaming Commission	17301 W. Colfax Ave., Suite 135, Golden, CO 80401
04/18/2019 09:15 AM	Division of Gaming - Rules promulgated by Gaming Commission	17301 W Colfax Ave, Suite 135, Golden, CO 80401
04/15/2019 10:00 AM	Division of Professions and Occupations - Office of Barber and Cosmetology Licensure	1560 Broadway, 19th Floor - Conference Room 1250 A
04/18/2019 09:00 AM	Division of Conservation	1560 Broadway - Conf Room 110-D Denver
04/16/2019 09:00 AM	Division of Oil and Public Safety	633 17th St., Suite 500, Denver, CO 80222