TIERNEY PAUL LAWRENCE LLP

Martha M. Tierney
Direct Dial: 303-376-3711
mtierney@tplfirm.com

May 15, 2015

VIA EMAIL

The Honorable Wayne Williams, Secretary of State
Colorado Department of State
1700 Broadway
Denver, CO 80290
SOS.Rulemaking@sos.state.co.us

Re: Election Rules – 8 CCR 1505-1

Dear Secretary Williams:

I am writing on behalf of the Colorado Democratic Party to comment on the working draft of proposed rules concerning Elections noticed on May 8, 2015. The Colorado Democratic Party takes this opportunity to comment on one of the proposed rules and point out some significant concerns related thereto.

Proposed Rules 7.2.6 – Mail Ballot Return Envelope

Rule 7.2.6 is not properly amended as proposed because the entire rule expires today, May 15, 2015 by law. The General Assembly, in the Rules Review Bill this year (SB 15-100), did not extend Rule 7.2.6, thus it has expired. The legislative history from the December 19, 2014 committee makes clear that one of the primary reasons it was not extended is because the committee viewed it to be beyond the scope of the SOS' rulemaking authority. See attached Minutes of December 19, 2015 Committee on Legal Services, pp 33-37.

Additionally, in the event that this Rule is promulgated again, the Rule exceeds the SOS' rulemaking authority for several reasons. First, requiring a voter to put the name of a person to whom they give their ballot for delivery is not required by law and is likely to cause confusion for voters. The law limits the number of ballots to ten that any one person may receive for mailing or delivery in any election. CRS §1-7.5-107(4)(b)(I)(B). The law does not place any burden to enforce the ten ballot limit on a voter who gives her ballot to another person for delivery. Mandating voters to include the name of a person the voter has chosen to deliver her

ballot on the outside of the ballot is contrary to law and is likely to chill participation for those who would choose to give their ballot to another person for mailing or delivery.

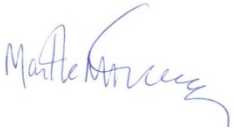
A Rule similar to Rule 7.2.6 will also lead to voter confusion, election administration uncertainty, and implementation chaos. What is the intended result if the line is left blank? Neither the Secretary nor the county clerks have any authority to reject a ballot that does not contain the name of the person who delivered it on the outside. Furthermore, how will the county clerks determine if the person whose name is written on the envelope is the person delivering the ballot? Does the Secretary envision that county clerks will staff all drop off locations and request identification from each person who delivers more than one ballot? What will happen to ballots delivered by someone who delivers more than 10 ballots? Some County Clerks may interpret the rule to require such actions which creates the prospect of disparate treatment and violations of equal protection.

The above-described rule appears to exceed the rulemaking authority of the Secretary because it directly conflicts with existing statutory provisions and is not based on a reasonable interpretation of Colorado law.

Thank you for the opportunity to comment. Please do not hesitate to contact me should you desire additional information or wish to discuss these positions further.

Sincerely,

TIERNEY PAUL LAWRENCE LLP



By: Martha M. Tierney

Office of Legislative Legal Services

Colorado General Assembly

Director
Dan L. Cartin

Deputy Director
Sharon L. Eubanks

Revisor of Statutes
Jennifer G. Gilroy

Assistant Directors
Deborah F. Haskins
Bart W. Miller
Julie A. Pelegrin

Publications Coordinator
Kathy Zambrano

Colorado State Capitol
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Tel: 303-866-2045 Fax: 303-866-4157
Email: olls.ga@state.co.us

Managing Senior Attorneys
Jeremiah B. Barry
Christine B. Chase
Michael J. Dohr
Gregg W. Fraser
Duane H. Gall
Jason Gelender
Robert S. Lackner
Thomas Morris

Senior Attorneys
Brita Darling
Edward A. DeCecco
Kristen J. Forrestal
Kate Meyer
Nicole H. Myers
Jery Payne
Jane M. Ritter
Richard Sweetman
Esther van Mourik

Senior Attorney for Annotations
Michele D. Brown

Staff Attorneys
Jennifer A. Berman
Yelana Love

SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

December 19, 2014

The Committee on Legal Services met on Friday, December 19, 2014, at 10:02 a.m. in HCR 0112. The following members were present:

Senator Steadman, Vice-chair
Senator Brophy
Senator Guzman
Senator Johnston (present at 12:10 p.m.)
Senator Roberts
Representative Foote
Representative Gardner
Representative Kagan (present at 10:06 a.m.)
Representative McCann

Senator Steadman called the meeting to order.

10:03 a.m. – Brita Darling, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a – Rules of the State Board of Human Services, Department of Human Services, concerning restricted use of electronic benefits transfer cards for the Temporary Assistance for Needy Families / Colorado Works program and financial cash benefits, 9 CCR 2503-5 and 9 CCR 2503-6 (LLS Docket No. 140496; SOS Tracking No. 2014-00601).

Ms. Darling said agenda items 1a and 1b are connected because they contain identical objectionable language. Item 1a relates to electronic benefit transfer (EBT) card use in the Colorado works program, which is our temporary assistance to needy families (TANF) program. Item 1b relates to EBT card use in the low-income energy assistance program (LEAP). The good news is that because the board used identical language in its rule-making for both programs, our legal objections to both rule-making actions are also identical. However, they are separate rule-making processes so you'll have to vote separately on 1a and 1b. To save you time, I'm going to give a more detailed presentation as to our reasons for not extending the Colorado works EBT rules, and then I'll just give a summary presentation on the identical language in the LEAP rules. Your votes on both should probably be the same for consistency's sake.

Ms. Darling said Rule 3.520.4 D. 6. and Rule 3.602.1 E. 2. k. are state board of human services rules for the Colorado works program that describe the locations where Colorado works clients are prohibited from making cash withdrawals from automated teller machines (ATMs). The statute already contains language specifically related to the locations where EBT use is prohibited for public assistance programs, including the Colorado works program. Section 26-2-104, C.R.S., says clients shall not be allowed to access cash benefits through the electronic benefits transfer service from automated teller machines in this state located in licensed gaming establishments, in-state simulcast facilities, tracks for racing, commercial bingo facilities, stores or establishments in which the principal business is the sale of firearms, or retail establishments licensed to sell malt, vinous, or spirituous liquors. In the Colorado works program there are two rules that contain identical language. The first rule, Rule 3.520.4 D. 6., which relates to the application process for Colorado works, states the interview shall include an explanation provided regarding the process of utilizing the EBT card and this explanation shall include prohibited establishments, including but not limited to, liquor stores, gambling establishments, adult-oriented establishments, and marijuana shops, and an explanation that the cash portion issued on the EBT card may be suspended with identified misuse. Comparing the board's rules to the statute, the rules include additional locations that are not included in the statutory list, specifically marijuana shops and adult-oriented establishments. We are not objecting to the inclusion of adult-oriented establishments in the Colorado works rules because section 26-2-105, C.R.S., allows the board to comply with federal requirements for TANF funding and federal law was recently amended to include the prohibition of EBT card use at adult-oriented establishments. However, the state board exceeded its rule-making authority when it added marijuana shops as a prohibited location. Neither state law nor federal TANF law prohibits the use of EBT cards at marijuana shops. Let me state clearly for the record that the Office takes no position as to whether EBT card use should be prohibited at marijuana shops. To be fair to the state board, when they instituted this rule-making, it was to add the federal requirement that applicants be

informed that they can't use EBT cards at gambling establishments, adult-oriented businesses, or liquor stores. As part of the rule-making process, they added marijuana shops because that made sense to the board. Our objection to the rules is not based on the policy, but on the General Assembly's right to make that policy, not the executive branch agency. An agency's rule-making authority is delegated authority from the General Assembly. Our position is that in enacting section 26-2-104 (2) (a), C.R.S., containing a list of prohibited locations for EBT use, the General Assembly has expressed its clear intent to exercise its legislative power to make policy in this area. Pursuant to section 24-4-103 (8), C.R.S., in the "State Administrative Procedure Act", an agency shall not adopt any rule that exceeds the power delegated to the agency. Here, the board exceeded its rule-making authority by adopting rules in an area where the General Assembly has expressed its intent to make public policy and for that reason the EBT rules should not be extended. In fact, if changes need to be made to the EBT rules, the General Assembly has the power to amend the statute and add additional locations, including marijuana shops, or give the board the authority to add locations at its discretion. I do have permission to tell you that the department is going to be seeking legislation on this issue to amend the statute.

Ms. Darling said the second reason the rules should not be extended is because they don't comply with state statute and are confusing and potentially misleading both to the county administrators and workers and Colorado works clients. You may have noticed, comparing the statutes to the rules, that the rules also omit several locations where EBT use is specifically prohibited by state statute. Missing from the board's EBT rules are in-state simulcast facilities, tracks for racing, commercial bingo facilities, and stores or establishments in which the principal business is the sale of firearms. As you know, agencies don't have to promulgate rules on issues already addressed in state law. People are expected to know what's in the state statutes. If, for example, eligibility for Colorado works was in state statute, we wouldn't need state board rules on eligibility, but here, where an agency has gone down the path of adopting rules in an area that specifically overlaps with statute, the agency must accurately repeat the statute. In this case it's really more of a sin of omission. Pursuant to section 24-4-103, C.R.S., rule-making must comply with state law and the rule must be clearly and simply stated so that its meaning will be understood by parties required to comply with the regulation. The whole purpose for adopting these EBT rules is to require county workers to interview clients during the application process and tell them where EBT card use is prohibited. By including some of the locations like liquor stores and gaming establishments it sounds like the rules are providing the information about where it's prohibited, but, as we know, it omits specific places prohibited under state law. It's not reasonable to assume that county workers and especially very low-income Colorado works clients will be fairly put on notice through the interviews that they can also not use their EBT card at simulcast facilities, racetracks, or firearms dealers. Furthermore, the state board

doesn't solve the confusing and potentially misleading nature of the rules by adding the language "including but not limited to" before the list. This just begs the question, are there additional prohibited locations and if not listed in the very rules that purport to list those locations where would they be found? By omitting locations, the rules fail to comply with statute and the "including but not limited to" language creates uncertainty as to the completeness and accuracy of the rules and, therefore, the EBT rules should not be extended. In conclusion, either one of my arguments provides sufficient reason under the "State Administrative Procedure Act" to reject the board's EBT rules. We therefore recommend that Rules 3.520.4 D. 6. and 3.602.1 E. 2. k. not be extended.

10:13 a.m.

Hearing no further discussion or testimony, Senator Steadman moved to extend Rules 3.520.4 D. 6. and 3.602.1 E. 2. k. of the State Board of Human Services and asked for a no vote. The motion failed on a vote of 0-8, with Senator Brophy, Representative Foote, Representative Gardner, Senator Guzman, Representative Kagan, Representative McCann, Senator Roberts, and Senator Steadman voting no.

10:14 a.m. – Brita Darling addressed agenda item 1b – Rules of the State Board of Human Services, Department of Human Services, concerning the Low-Income Energy Assistance Program ("LEAP") Update, 9 CCR 2503-7 (LLS Docket No. 140564; SOS Tracking No. 2014-00899).

Ms. Darling said the state board also adopted Rule 3.751.44 concerning the locations where EBT card use is prohibited for persons receiving benefits under LEAP. For purposes of the record, with one minor exception, all of the legal arguments that applied to the Colorado works program EBT rules apply to this LEAP EBT rule and I'm incorporating my comments from my last presentation. I'll summarize those arguments. Section 26-2-104, C.R.S., prohibits EBT card cash withdrawals from ATMs located in certain establishments. This list does not include marijuana shops or adult-oriented establishments. The LEAP rule has language identical to the board's language in the Colorado works program. Added to the rule but not prohibited under state law are adult-oriented establishments and marijuana shops. This is slightly different from Colorado works because unlike the federal changes to the TANF law, I'm not aware of any federal law related to LEAP that requires a prohibition on EBT card use at adult-oriented establishments. With respect to the LEAP rule, we're objecting to the inclusion both of the marijuana shops and the adult-oriented establishments. Further, like the Colorado works rule, the LEAP rule does not list many of the locations specifically prohibited under state law and, finally, the rule also contains the confusing "including but not limited to" language before the list of prohibited locations. Therefore, the LEAP rule should not be extended because the board exceeded its delegated authority by including in the

rule marijuana shops and adult-oriented establishments as locations where EBT card use is prohibited, because the General Assembly, by enacting specific law in this area, has demonstrated its clear intent to make public policy in this area with respect to LEAP, and because the rule does not comply with section 26-2-104 (2) (a), C.R.S., because it omits the locations that are prohibited under state law and fails to give fair notice to regulated persons as to where EBT card use is prohibited using clear and simple language. For the foregoing reasons, we therefore recommend that Rule 3.751.44 not be extended.

10:17 a.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend Rule 3.751.44 of the State Board of Human Services and asked for a no vote. The motion failed on a vote of 0-8, with Senator Brophy, Representative Foote, Representative Gardner, Senator Guzman, Representative Kagan, Representative McCann, Senator Roberts, and Senator Steadman voting no.

10:18 a.m. – Thomas Morris, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1c – Rules of the Colorado Oil and Gas Conservation Commission, Department of Natural Resources, concerning practice and procedure, 2 CCR 404-1 (LLS Docket No. 140483; SOS Tracking No. 2014-00587).

Mr. Morris said there are three sets of rule issues. They all arise under three recently enacted statutes. Just this past year, Representative Foote was the prime sponsor of House Bill 14-1356, regarding the penalty schedule. It increased penalties and made other specific changes to the statutes that I'll get into later. The commission does have specific rule-making authority regarding that and I'll talk about that later. Also this past session, House Bill 14-1077 changed the cap that the oil and gas conservation and environmental response fund is subject to. It raised it from $4 million to $6 million. The commission doesn't have any specific rule-making authority with regard to that cap. And back in 2010, the General Assembly enacted House Bill 10-1235 regarding incorporation by reference standards, and the commission again has no specific rule-making authority about that.

Mr. Morris said the commission's rule-making authority is in section 34-60-105, C.R.S., and it is fairly broad and general. The commission has the power to make and enforce rules necessary to carry out the provisions of the oil and gas article. This past July, the commission completely repromulgated its major rule regarding practice and procedure. None of the changes in that rule were intended to be substantive; it was more in line with the Governor's direction to make rules easier to understand. This past Monday the commission held a rule-making hearing to address the penalties issue and the fund cap issue, but because the rule-making in

July had already occurred, those rules came to me. The commission wasn't able to fix the rules by our deadline that we have each year and so the rules that the commission has not yet adopted but has held the rule-making hearing on, and which may continue until early January, would supersede these rules if the committee were to vote to not extend these particular rules. We have a procedure in place so that there is no gap in the coverage.

Mr. Morris said the first rule relates to the penalties. I would say at this point that the rule is listed as contested but I think somebody from the commission will be here to talk about how they are maybe not seriously contesting it. House Bill 14-1356 made four major changes to the penalty statute, section 34-60-121, C.R.S. The legislature changed the maximum daily penalty from $1,000 to $15,000; then there was an aggregate penalty cap of $10,000 that was repealed; the rules had to establish the basis for when violations began and ended; and then there was a new provision that talked about other types of nonmonetary penalties such as the commission can prohibit the issuance of new permits to an operator or suspend an operator's certificate of clearance based on certain grounds that the bill changed. In Rule 523. there were no changes that relate to the four items that I just mentioned. In particular, Rule 523. A. (1) still contains the $1,000 per day maximum fine; Rule 523. a. (3) still contains the maximum $10,000 aggregate penalty cap; and Rule 523. c, which has a base fine schedule, still reflects the $1,000 per day maximum fine. Finally, Rule 525. b specifies the grounds upon which the commission can impose these nonmonetary penalties and that rule refers to a knowing and willful pattern of violation and if that happens the commission can issue an order that prohibits the issuance of new permits. Rule 525. b does not list the suspension of an operator's certificate of clearance as a potential penalty and does not include the additional ground of a gross negligence that results in an egregious violation, and therefore the rule conflicts with section 34-60-121 (7), C.R.S., which was amended by the penalties bill from last year. Therefore, we recommend that these four rules not be extended.

Mr. Morris said this next rule issue is even more straightforward and relates to the fund cap. House Bill 14-1077 increased the two-year average of the unobligated portion of the oil and gas conservation and environmental response fund from $4 million to $6 million. That statute is section 34-60-122 (1) (b), C.R.S. Rule 710. still includes the $4 million cap. My understanding is that the commission is proposing to strike the rule, but, regardless, it is clear that this particular rule conflicts with the statute and should not be extended.

Mr. Morris said the third rule issue relates to incorporation by reference. Several years ago the legislature updated its incorporation by reference standards and we are continually seeing old rules that have not been updated. Essentially, the rule must state where copies of the incorporated material are available from the organization

that originally issued the incorporated material. That's in section 24-4-103 (12.5) (a) (IV), C.R.S. Rules 604. c. (2) G., 605. a. (1), and 605. a. (4) don't include that particular statement, and Rules 604. c. (2) G. and 605. a. (4) don't comply with some of the other requirements. Those rules conflict with the incorporation by reference statute and therefore should not be extended.

10:27 a.m. – Bob Randall, Deputy Director, Department of Natural Resources, testified before the Committee. He said when we first received notice of the deficiency from the Office in mid-November, we were uncertain, largely due to some staff changes at the commission, as to what the deficiencies were. In a telephone conversation I had with Mr. Morris at the time, I indicated that we would contest these matters largely as a placeholder. I'm here today to say that we do not contest the expiration of these rules but I would like to provide a little bit of context. First with regard to Rules 604. c. (2) G., 605. a. (1), and 605. a. (4), which were identified as deficient for failure to include the incorporation by reference language, the commission on Monday of this week took final action on proposed changes that will cure this deficiency. These changes will go into effect on February 14, 2015, so therefore we don't contest the expiration of the superseded rules. With regard to Rule 710., and the reference to the oil and gas conservation and environmental response fund, which was identified as being out of date for not comporting with changes made last year in House Bill 14-1077, the commission is expected to delete this rule entirely on January 5, because Rule 710. is outdated not only as to the number but as to some other provisions and redundant. That change could go into effect as early as March 2, 2015, and so therefore we wouldn't contest the expiration of the rule because by the time that comes about, by function of the rule review bill, it won't exist. Third, with regard to Rules 523. a. (1), 523. a. (3), 523. c, and 523 d., which were identified as being out of date due to changes adopted last year via House Bill 14-1356, the commission is expected to adopt final amendments to Rules 522 and 523 that will update these rules as to the penalty schedule and penalty per day maximum and address the other deficiencies identified by the Office staff. Again, these changes could go into effect as early as March 2, 2015, and we therefore wouldn't contest their expiration. The one small wrinkle with Rule 525. b., which was identified as deficient for not including the suspension of an operator's certificate of clearance as a potential penalty for rule violations and for not including gross negligence as an additional ground for imposition of penalties, is that the rule was not included in the commission's notice of rule-making hearing for the penalty and enforcement rules largely because we were not made aware of the alleged deficiency in the initial communication from the Office staff. In addition, we believe that the statute is likely self-implementing and the commission could always utilize the provisions of the bill in a particular enforcement matter if that was appropriate. Nevertheless, we believe that the proposed amendments to Rules 522 and 523, which we anticipate the commission taking final action on January 5, would address the substance of Rule 525. b. These changes would go into effect as

early as March 2, as would the others, and so therefore we don't contest the expiration of this rule. I just wanted to provide a little bit of context and that concludes my remarks.

10:30 a.m.

Hearing no further discussion or testimony, Representative Foote moved to extend Rules 523. a. (1), 523. a. (3), 523. c, 525. b., 604. c. (2) G., 605. a. (1), 605. a. (4), and 710. of the Oil and Gas Conservation Commission and asked for a no vote. The motion failed on a vote of 0-8, with Senator Brophy, Representative Foote, Representative Gardner, Senator Guzman, Representative Kagan, Representative McCann, Senator Roberts, and Senator Steadman voting no.

10:32 a.m. – Jennifer Berman, Staff Attorney, Office of Legislative Legal Services, addressed agenda item 1d – Rules of the Parks and Wildlife Commission, Department of Natural Resources, concerning river outfitters, 2 CCR 405-3 (LLS Docket No. 140533; SOS Tracking No. 2014-00757).

Ms. Berman said I come to you on Rule # 300 5. b., concerning commercial vehicle insurance requirements for river outfitters. The issue here is that the commission lacks statutory authority to promulgate rules concerning insurance requirements for commercial vehicles. That authority is vested exclusively with the chief of the Colorado state patrol pursuant to section 42-4-235 (4) (a), C.R.S. It says the chief shall adopt rules for the operation of all commercial vehicles, and the chief shall use as general guidelines the standards contained in the current rules and regulations of the department of transportation relating to insurance. Therefore, it is the chief of the Colorado state patrol and not the parks and wildlife commission that has the authority to promulgate rules concerning commercial vehicles insurance requirements. Thus, the commission lacks statutory authority to promulgate Rule # 300 5. b., which sets minimum insurance levels for commercial vehicles operated by river outfitters. We therefore recommend that the rule not be extended.

Ms. Berman said in adopting Rule # 300 5. b., the commission adopted insurance requirements that conflict with the chief's Rule V. A. The chief set the minimum levels of insurance for commercial vehicles at $1.5 million for those vehicles with a seating capacity of 15 or fewer passengers and at $5 million for those vehicles with a seating capacity of 16 or more passengers. The commission, without any statutory authority to do so, reduced the insurance requirements for river outfitters to $1 million for the smaller vehicles, and $1.5 million for the larger vehicles. While section 42-4-235, C.R.S., contains two statutory exemptions, one concerning commercial vehicles operated for certain agricultural purposes and the other for commercial vehicles regulated by the public utilities commission, neither of those exemptions applies to river outfitters. Had the General Assembly intended such an

exemption, it could have provided so expressly in statute as it had done for the other two. The only mention of insurance within the statutes governing river outfitters, which is in article 32 of title 33, C.R.S., is in section 33-32-105 (1) (b), C.R.S., which requires proof of liability insurance in the amount of three hundred thousand dollars for property damage and bodily injury. The commission's own rules make it clear that they did not interpret this as applying to motor vehicles. In Rule # 300 5. a. (1) the commission provides that a river outfitter can fulfill this obligation by providing water craft liability insurance. Such insurance clearly does not cover motor vehicles. Therefore, there is no statutory authority in article 32 of title 33, C.R.S., for the commission to set commercial vehicle insurance requirements. Also, it makes no sense for the commission to have such statutory authority because it doesn't make sense for two agencies to have rule-making authority over the same subject matter. Such interpretation would place the statutes in direct conflict and would create the very situation we have here where there are two conflicting rules on the minimum insurance levels that river outfitters should follow. Instead, the statutes should be read in harmony, giving effect to both of them, so that the express grant of rule-making authority set in section 42-4-235 (4) (a), C.R.S., is considered the exclusive authority. I raised some issues in my memo that I anticipated the commission would raise. I'm happy to discuss these issues perhaps after they've made their presentation.

Representative Foote said with regard to section 2-4-205, C.R.S., and general provisions as opposed to special or local provisions, in this case which are you referring to as the special or local provision and which is the general provision? Ms. Berman said for this argument I raised in the memo in anticipation of what the commission would argue with respect to general versus special legislation, I would first point out that I don't think we need to go there because there is no conflict in the statutes. The statutes can be read in harmony so you don't have to look at which one is general and which one is special with regard to which one would prevail. Really, I think the commission's rules are more general. They concern river outfitters generally while the chief's rules are more specific with respect to the operation of commercial vehicles.

10:38 a.m. – Ken Brink, Assistant Director for Parks and Outdoor Recreation programs with Colorado Parks and Wildlife, and Kris Wahlers, Program Manager with Colorado Parks and Wildlife, testified together before the Committee. Mr. Brink said Colorado parks and wildlife (CPW) provided the Committee a memo responding to the memo submitted by the Office questioning the rule. I don't want to repeat it here as I'm more of a field staff person and a policy-level person, but I do want to make a few comments and answer any questions you might have from the agency perspective. Back in 1984, CPW was granted the authority to regulate commercial river rafting in Colorado. This included the specific authority to regulate transportation for the purpose of river running in sections 33-32-102 (6)

and 33-32-103, C.R.S. The river outfitter act also established minimum insurance requirements for river outfitters in section 33-32-105, C.R.S., as mentioned earlier. This baseline is $300,000 but I would add that many outfitters carry much higher levels of liability insurance and we are even involved with that in many cases where they seek special permits to operate in specific properties. CPW has been working closely with and regulating commercial river outfitters since 1984. I'd like to emphasize that river outfitter licensing is a proactive program that requires the documentation of all of their requirements up front before the season starts. Mr. Wahlers documents that compliance has been met before they are issued that license, which I think provides a particularly proactive approach to this and protects the public quite well from our experience. CPW also recognizes that the state patrol has regulatory authority over the operation of all commercial vehicles in Colorado, including insurance requirements, at least since the addition of that specific authority in 2009, and including those vehicles that might be used by river outfitter to transport clients to and from the river. It's worth noting that commercial vehicle use by river outfitters is arguably somewhat different than many of the types of commercial interstate vehicles. They drive on summer condition roads, often at lower speeds, normally much shorter distances than most commercial vehicles, and they are also very familiar with the routes they drive because they drive them on a routine basis. That's not to say that accidents cannot occur but these are differences that are worth noting today. CPW has always understood the authority of CPW and the Colorado state patrol to coexist and that they work concurrent in nature and so when issues came up concerning whether river outfitters had access to motor vehicle liability insurance at the levels generally required by the federal department of transportation for interstate transportation purposes – those standards are generally incorporated into the state patrol regulations – CPW immediately consulted with the state patrol and the affected river outfitters on how to address or resolve this issue in a practical manner, keeping in mind that it was just before the height of this year's season and we wanted to come up with a solution quickly. State patrol granted an exception for river outfitters from those recently increased federal standards for 2014 and CPW investigated and then adopted specific insurance requirements for river outfitters that applied during the 2014 season. This regulation was what CPW expects the state patrol will use as its guideline for future regulatory action. CPW understands the Office's argument but does not believe the exception to the state patrol's general regulatory authority, which was created for the public utilities commission in 2011 or the instances where the General Assembly has specifically authorized areas of concurrent jurisdiction between state agencies, established a manifest intent to repeal by implication the specific authority granted to CPW or prevent any recognition that the regulation on motor vehicle liability insurance for vehicles used by river outfitters is an area of concurrent jurisdiction between the two agencies. That is particularly the case where, as required by section 2-4-205, C.R.S., two statutory authorities can be easily reconciled, as the past actions of the agencies have shown. CPW can coordinate with the state patrol in investigating and adopting

motor vehicle liability insurance requirements for river outfitters and then those standards can be used by the state patrol in adopting its regulatory requirements for commercial vehicle insurance. That's how the agencies have worked together in the past and how we expect to work together in the future. We feel that this agency cooperation has resulted in an outcome that serves the needs of both the river outfitter industry and the public that hires them to guide them on river trips. Our ongoing relationship with the outfitters and our proactive approach to documenting insurance and other requirements related to safety will best ensure that the public is protected at levels that are reasonable. In the past 30 years that we've worked with this industry, we have had an excellent safety record in regard to transporting clients to and from the river, and it's our hope that you will consider allowing us to continue with this regulatory rule on liability insurance while working in concert with our partners at the Colorado state patrol, whom we have had numerous meetings and discussions with about how to best provide this service to the public.

Mr. Wahlers said I manage the river outfitters licensing program within CPW. I don't have a statement in addition to Mr. Brinks but would like to make myself available for program questions.

Representative Gardner said I'm looking at an April 30, 2014, letter, which is an emergency exception that expired on September 30, 2014. Assuming for the moment that the Committee would determine that CPW has this authority, would there ultimately be a permanent exception? Is it authorized by federal law? Mr. Brink said pending the outcome of today's meeting and direction from the Committee, our intent would be to make that regulation permanent.

Representative Foote said I want to ask something related to the memo Mr. Brink provided us regarding repeal by implication. When you look at the language in section 42-4-235, C.R.S., it says the state patrol shall adopt rules for the operation of all commercial vehicles. Given that language I'm wondering if this isn't a repeal by implication, but if this is a straight up superseding of the statute. Obviously you disagree so tell me why you think that's incorrect. Mr. Brink said I think based on the long history of the program and the language that's in the statutes for the last 30 years, we do feel like there is concurrent jurisdiction on that. We've been in close contact with the state patrol and been well-supported by their legislative folks and their leadership as far as this goes. Clearly, if there's a disagreement in that, then we'll continue to work with the state patrol to regulate this and try to make it as safe as we can for the public. Our belief rests on the belief that we have concurrent jurisdiction based on the historic river outfitter licensing statutes.

Representative McCann said I'm still a little bit unclear about how the chief of the state patrol justified adopting an emergency temporary exception for the river outfitters' motor vehicles. How does the chief have the authority to do that? Mr.

Brink said I don't know that I would be the proper person to address that particular question. I believe people from the state patrol are here today but I was not involved in that particular discussion.

Representative McCann said it appears that this could be fixed very simply through legislation because there are other statutory exceptions. Have you considered trying to do this statutorily? Mr. Brink said we definitely have been in conversation with the folks at the state patrol about how we can best resolve this. This was done to try to provide a practical solution in a short amount of time for the industry during a big river outfitting year. It's a tough industry in that you have good years and not so good years and it's very seasonal, so I believe that state patrol and parks and wildlife were trying to work in a practical manner to create a solution for this summer. I think we'll continue to work together to come up with a more permanent solution.

Representative McCann said I'm very sympathetic to what you have done. It's actually encouraging to see state agencies work together for a practical solution to allow an important business to continue in Colorado. I applaud you for doing that. What I'm struggling with is whether or not you really had the authority to do that. I don't know where I'm going to land on this one but if it turns out that we don't extend the rule, I would encourage you to seek a legislative fix because it seems like it would be very simple.

Senator Guzman asked if we extend the rule will you also go for a legislative fix in the future? Mr. Brink said we haven't spoken in specifics about that other than my understanding is they are very supportive of having us work with this. We have this specific program and this specific relationship and – I don't want to put words in the mouth of the state patrol leadership – that specific relationship and ongoing communication would in our minds add value to how we manage this. I can't speak for the state patrol but I think we'll continue to communicate and make sure there is a practical solution.

10:52 a.m. – David Hall, Legislative Liaison, Colorado State Patrol, testified before the Committee.

Representative McCann asked could you explain the authority to create this temporary exception that the chief did in April? Mr. Hall said under section 42-4-235, C.R.S., the chief of the state patrol is authorized to adopt federal rules regarding regulation of commercial motor carriers. The chief also has the authority to not adopt those rules or to provide temporary lifting of rules such as, for example, in emergency situations where we're trying to bring in or out natural gas supplies. For instance during the flooding the chief had the authority to suspend federal rules on hours of operation for the drivers of commercial motor vehicles. So, the chief has

that authority to do so. Doing that does in fact put the state patrol in jeopardy of losing federal motor carrier funds so it's something that we do not take lightly at all. In this specific instance related to the river rafting outfitters, we felt there was a compelling need to provide that emergency relief as we entered into the rafting season earlier in the spring of this year, so that there was not a potentially devastating impact on these important businesses for tourism.

Representative McCann said I'm assuming you would not be adverse to a legislative fix creating an exception for river outfitters. Mr. Hall said I wouldn't be against a legislative fix but the very reason that we're here today is to say that we don't believe a legislative fix is necessary. We believe that the department of natural resources already has the authority in statute to promulgate this rule in concurrent jurisdiction with the chief of the Colorado state patrol. While we would not be opposed to a legislative fix, we, as a simple matter of argument, don't believe that a fix is necessary.

Representative Gardner said maybe I'm missing something, but while I see that CPW has this regulation, I also have a letter from the department of public safety, which is acting under its authority under section 42-4-235, C.R.S., that does set the limit. I'm wondering if the state patrol doesn't, in fact, under this statute and under federal law, have the authority to do that and this was done under that authority and not under the other statutory authority. We seem to have purported to act under the authority of the state patrol on the one hand, but then river outfitters licensing acted as well. Do you see where I'm coming from? Mr. Hall said I do see where you're coming from. However, in this case of concurrent jurisdiction, I'll give you another example. The public utilities commission has the ability to provide financial responsibility rules for taxis and limos. While we can promulgate the rule on financial responsibility for river outfitters, with the mechanism in which we adopt federal regulations there are strings attached to that financially from the federal government that require us to import the rules as a whole with the exception of an intrastate carrier, which is the case with river outfitters, and they are being regulated by another state agency. We don't have the ability under federal regulation to create rules that counter the rules we are required to adopt under federal regulation.

Representative Gardner said just so I understand, the ability to do this temporary emergency exception statutorily depends on there being some other state regulation that allows you to do that with respect to the federal government. Am I understanding the overlay of the two structures? Mr. Hall said creating a temporary exemption for any federal regulation that we adopt is not contingent on there being an adoption by another state agency. We can temporarily suspend them and we do – I wouldn't say frequently because it's a really dangerous deal for the state patrol to do that – but we have the ability because we're voluntarily adopting those federal regulations instead of creating our own regulations internally. But the reason we

don't want to do a temporary emergency exemption versus a permanent fix to this particular problem, which is what we consider the rule to be, is because that has the potential consequence of us losing federal motor carrier safety dollars which is obviously something we're very protective of. So, we're not required to have another agency do those if we're doing just a temporary emergency exemption. The rule before you is the thing that allows us not to have to do that next year.

Representative Gardner said so if we as a state for an intrastate activity vest the regulatory authority in another agency, that gets you off the hook with respect to the federal regulations and they can go regulate that. I'm just trying to figure out not only what we ought to do today but if it doesn't come out as your department would wish then what is the right legislative fix. Mr. Hall said again, we don't think there is a need for a legislative fix. We think the parks act in 1984 properly gives the authority to the department of natural resources to promulgate this rule.

Representative Gardner said it seems to me that from a policy standpoint, we either need to decide that in fact this authority is with CPW or we ultimately need to give them that legislative authority, otherwise it is a problem for the department of public safety. Is that a fair statement? Mr. Hall said I think there are certain circumstances in statute and regulatory schemes that allow for concurrent jurisdiction and this is a prime example of that. You've had representatives from the department of natural resources and the state patrol testifying before you that we're working together to help regulate an industry that's important to tourism in this state and the statute is perfectly reasonable to allow for concurrent jurisdiction because the department of natural resources regulates every other aspect of river outfitters' operations, including how much training the guides need and what type of equipment they need to have in the rafts. By allowing for concurrent jurisdiction in statute, the department of natural resources may not have all the answers on how to regulate the transportation portion of that and so we have the ability to help them draft those types of rules. Or we don't absolutely need to if we can consult with them as they are promulgating those rules. There are very few examples like this in Colorado in the position of the state patrol, but this is one of those very rare niche areas that makes sense for how the current statutory scheme is written. It allows both agencies to promulgate rules. We just feel that in this instance the department of natural resources is the better place to promulgate those rules.

Senator Roberts said from your perspective, this is less about the river outfitters and more about the ability of the chief to be able to utilize this mechanism for concurrent rule-making and decision-making. I'm particularly struck by the example of the flooding scenarios and being able to move more flexibly and quickly on the fly with proper authority. If I'm not mistaken, from your perspective, it's not so much about river outfitters but the authority to quickly respond. Presumably if public safety were ever an issue, the chief wouldn't do it – that you have the ability

to say no to whichever state agency you're dealing with, so it really is concurrent. Is that right? Mr. Hall said you're exactly right. I think Mr. Brink made the point that the river outfitting industry as a whole has an incredible safety record, in particular with the ground transportation portion of that. You're right. Allowing for the department of natural resources to promulgate a rule, which they already have the statutory authority to do in our opinion, is appropriate, and if we felt that there was a public safety need that was not being addressed we still have the mechanism in place to work toward addressing that. In this particular case, there is no need for the state patrol to be involved with that.

Senator Roberts said your position of you wouldn't oppose legislation but it isn't needed is actually a significant position to take because we set a precedent. If in this instance we say you need legislation, it encroaches on the chief's ability, short of getting legislation. We're only in session from January to May, so you got a large portion of the year where, with our action on this, it could have greater impact. Is that fair to say? Mr. Hall said that is fair to say. There is nothing we take more seriously in the state patrol than transportation safety. We're not in the business of just giving up control of our ability to promulgate rules. We do not feel that this is an area that the state patrol has the primary interest in and, by following the statutory scheme that is in place that allows for the department of natural resources to promulgate these rules, we're supportive of that.

Representative Gardner said I don't have the federal statutory scheme in front of me and that's what I'm struggling with because it seems to allow the state patrol to not regulate in areas and not lose funding. But what troubles me a little bit is that what I hear the state patrol saying is that you want to have it both ways. You want to regulate in this area, you want to maintain the control, but in order to have the permanent ability to have a different rule for an intrastate activity, that needs to be done by somebody else. I understand the state patrol's concern and desire to have input over that but I get a feel that the department of public safety – for good reasons – is trying to hang on in a way that doesn't vest the regulation of that intrastate activity with a different agency. It could be that the federal scheme sort of anticipates that you either regulate it or you don't regulate it. Mr. Hall said I would argue that the General Assembly in 1984 made that decision for the state patrol when they passed legislation that allowed for the regulation of river outfitters in statute.

Representative Kagan said if this rule were allowed to be extended and we implicitly acknowledge the concurrent jurisdiction thesis that you're putting forward – and in this particular case the state patrol and parks and wildlife agreed as to what the appropriate rule is – how would it work if there was not agreement between the two departments? Would one automatically trump the other in your view? Mr. Hall said both the department of natural resources and the Colorado state patrol reside

within the executive branch and I would imagine that if there was a disagreement between executive branch agencies that the Governor's office would probably be the final determinate of who supersedes who.

Representative Gardner said I know of cases where departments have conflicting regulations. I'm just wondering when a river outfitter is involved in an accident and one rule says $1 million of insurance and another says $5 million, which one of those is the controlling regulation at that point? Mr. Hall said if this Committee were to allow this rule to continue, there would not be a conflicting rule on the amount of the insurance. The Colorado state patrol would adopt the rule the department of natural resources promulgates and the amounts therein.

Senator Roberts said I'm struggling with the word "concurrent". I think it's concurrent as long as state patrol agrees. It's more like your assent is necessary and that parks and wildlife can present certain proposals but ultimately safety trumps all. Is it concurrent jurisdiction with equal weight or is it concurrent jurisdiction with a priority given to state patrol? Mr. Hall said I think certainly if it was a matter of public safety, we could make a compelling argument in whatever the case might be. In this particular instance we're talking about financial responsibility. Whatever the Committee decides here today is not going to keep a bus on or off the road or involved in a crash. So, I would say that the Colorado state patrol has a diminished concern when it comes to this particular aspect because we're talking about more of a consumer protection argument than a public safety argument.

Senator Roberts said that wasn't exactly what I was thinking. Sometimes you have partners but not necessarily partners with equal weight, so that you can have shared decision-making but one partner is the ultimate determiner of whether or not you go forward. There's a question there from my perspective. I think what we're talking about is concurrent jurisdiction as long as state patrol agrees, so it's not really equal weight. Is that fair to say? Clearly the chief wouldn't issue this emergency temporary exception, and but for that we wouldn't have this situation in front of us. You wouldn't have worked it out without this letter. Therefore, he actually has more weight in your concurrent jurisdiction scenario.

Senator Steadman said this was a question in my mind as well. Prior to the execution of this letter by the chief, was there really concurrent jurisdiction or did parks not have an opportunity to have jurisdiction and promulgate rules over this matter until the chief created this exception and effectively delegated that authority to someone else? Mr. Hall said I think that prior to this letter coming out, this was a situation that was brought to our attention. This was not something the state patrol was actively seeking out, about whether or not the river outfitters had this necessary federal rule. I'm not entirely sure of the history and somebody who is testifying after me might have a better idea of the history. We were not entirely aware that this

requirement even existed and so once it came to our attention in the spring and we realized there was a real opportunity that this could potentially put businesses out of business by trying to comply with the federal regulation, we did the temporary suspension and then we looked at who has the authority to promulgate these rules. That's when the department of natural resources, their attorney general representative, and the Colorado state patrol all agreed that they already had the statutory authority to promulgate that rule. I would also say that who is in the primary position when you have two partners and is one supreme to the other, I think that it's on a case-by-case basis. I will not make the argument that the state patrol is more dominant than the department of natural resources or any other state agency. I think it's on a case-by-case basis depending on what are the particular facts of the moment. I still think my explanation that this particular issue before you today is not as much of a public safety argument as it is an argument on financial responsibility puts the state patrol not necessarily in the dominant position on who should be promulgating this rule, which is why we agreed that the department of natural resources should be promulgating this rule.

11:15 a.m. – Tim Monahan, First Assistant Attorney General, Attorney General's Office, testified before the Committee. He said I act as general counsel to parks and wildlife. I'm here today speaking on behalf of parks and wildlife; I'm not here speaking on behalf of the Attorney General. Parks and wildlife has waived privilege with regard to the advice and conversations we've had. If I'm able to answer your questions I'm happy to do so.

Representative Gardner asked you're here but you're not here on behalf of the Attorney General of the state of Colorado? You're not here as the legal advisor to the executive branch of the state of Colorado? Mr. Monahan said I'm here on behalf of Colorado parks and wildlife as their legal advisor. The matters that I can discuss have not been discussed directly with the Attorney General. This is day-to-day legal advice that I've given my client.

Representative Gardner said let me just say for the benefit of the river outfitters that I think this is good public policy and I want to make it happen, but this Committee is concerned with grants of legislative authority and whether departments act within the authority that's been granted to them. What really puzzles me is that there seems to be out there a federal regulatory structure that we want to avail ourselves of as a state and be a part of voluntarily because there's federal funding that flows from that, and that there are some things that can be carved out like intrastate motor carrier activities – so if they're regulated by somebody else they don't have to be regulated by the department of public safety. I'm sitting here looking at a letter dated April 30, 2014, that the department of public safety felt compelled to put out and at the same time argue that parks and wildlife has the authority to set this liability insurance limit. First of all, if we extend this regulation is there going to be

another letter extending this for all time or will the extension of this regulation obviate the need for any letter whatsoever because we will have said this is intrastate activity and it's been vested with the division of parks and wildlife? Mr. Monahan said I'd like to help on that issue but the state patrol and their statutes and the federal statutes that control their activities are not my area of expertise. What I understand with regard to the general process that would take place moving into the future if the rule is extended is that the state patrol likely would reference the state intrastate regulation with regard to river outfitters in their rule-making scheme.

Representative Kagan said I'd like to revert to the question that I asked the previous witness. In this case parks and wildlife and state patrol were in agreement about the appropriate course of action to take. In a situation where the folks that provide intrastate transportation between Denver and the ski country or some other similar issue, where the state patrol and another department did not agree, is it your belief that if we leave the status quo as it is the state patrol would trump the other department because they have the general authority or would the other department trump the state patrol or would we, as the previous witness said, argue it out in the Governor's office? Mr. Monahan said in a concurrent jurisdiction scheme, it would be my opinion that the stricter of the two regulations would rule the day. That would be the requirement that would be applied whatever the activity was that was subject to the two different regulations.

Representative Kagan asked on what legal basis would that be the rule? Mr. Monahan said concurrent jurisdiction means that the two bodies have equal authority to regulate in a matter. In the hypothetical situation where one was more stringent than the other, they still have their independent jurisdiction to be able to adopt that regulation and apply it to whatever the activity is.

Representative Kagan said I think what you're saying is that the regulated entity would have to comply with both and therefore it would have to comply with both the more stringent one and the less stringent one and that would end up being the more stringent one dominates. Mr. Monahan said that's how I believe the regulatory scheme would play out in the case where there is some hypothetical conflict between the two where the agencies can't come to agreement with regard to what the standard should be.

Representative McCann asked how do you square the concurrent jurisdiction argument with the specific statements that the state patrol shall adopt rules for the operation of all commercial vehicles? I'm just curious as to how you come to the conclusion that there's concurrent jurisdiction. Mr. Monahan said what I think happens in a case where you have two regulatory agencies that have authority over the same subject matter is we're given specific direction by the General Assembly through the construction of statutes statute, which is section 2-4-205, C.R.S., which

says when there is an overlap or a conflict, the two statutes should be construed together whenever possible. That's what happened here. Parks and wildlife has the authority under river outfitters and state patrol has the general authority under their motor vehicle regulatory authority, and they came together, construed their statutes, and came up with a regulation that addressed the issue.

Representative Foote said there doesn't seem to be any evidence here that there is any express concurrent jurisdiction. That's not in play here, so it's almost like implied concurrent jurisdiction. You cited section 2-4-205, C.R.S., and I think what you were saying is how this implied concurrent jurisdiction could exist. I want to make sure first of all that that is what you mean by that and secondly, if that's how you're saying we can have concurrent jurisdiction even though there is nothing expressed in the statute. Mr. Monahan said I think that is exactly the case. There is no express statement of concurrent jurisdiction but because of the existence of the two statutory programs it is implied.

11:25 a.m. – Jennifer Berman addressed the Committee again. She said as has been discussed, there is nothing express in the statute that authorizes both the chief of the Colorado state patrol and the commission to adopt rules concerning commercial vehicle insurance requirements. I just don't believe that it's a proper type of concurrent jurisdiction practically speaking. Looking through the statutes where I've seen concurrent jurisdiction, it tends to be with respect to enforcement, so that you have two or more agencies that would have some jurisdiction over certain actors or certain situations and that either one of those agencies could find a violation and could then act on it or prosecute it, essentially. But here we're talking about rule-making and you have two separate agencies that have rule-making authority over one set of actors and you have two sets of rules. In fact, right now both sets of rules are in play. The chief's letter expired on September 30 and so the $1.5 million and the $5 million set by the chief of the state patrol currently applies to river rafters but so do the commission's rules. What you get in that kind of situation is no certainty. How do river outfitters know which rule to even follow? Right now they're under two separate rules and they have no guidance as to which one controls. This idea that the agencies are working harmoniously and so that won't be a problem, even when they're working harmoniously that is currently a problem. As Representative Kagan mentioned, when they're not working harmoniously, what happens? I think that we've gotten into a lot of legal acrobatics in talking about this and we've come up with this tortured reading of the statutes, but if you read the statutes according to their plain language, then it's very clear that the chief of the Colorado state patrol has this authority. It is not clear that the commission has this authority. The commission has general authority over the regulation of river outfitters. There's nothing in that language that necessarily means that they have the authority to determine insurance requirements for commercial vehicles used by river outfitters.

Representative Gardner said there are a lot of legal acrobatics going on here and my experience with that is that people engage in legal acrobatics because there is some problem out there that nobody wants to talk about. I think I know what it is but no one will either abuse me or disabuse me of that. Have you seen this April 30 letter? Ms. Berman said yes I have.

Representative Gardner asked do you believe this April 30 letter is permitted under our state law? Ms. Berman said I think it's in doubt whether the chief has the authority to do that. The chief's rule-making authority is expressly set out in statute and it states that the chief has the authority to regulate all commercial vehicle operators. So, for the chief to, through rule-making or through an informal letter, set up its own carve out from that, I don't know that they have the authority to do that. Carve outs have been set up in statute and there are two of them. One of them is for the commercial vehicles subject to the public utilities commission.

Representative Gardner asked have you looked at the federal set of regulations that are what drive a lot of this? Ms. Berman said I've looked at them a bit with respect to this issue and looking for guidance on what they mean with respect to the chief's rule-making authority. They need to be referenced in terms of what the chief has actually done because they reference the federal rules. I would say that it's important to look at the state statutes with respect to their rule-making authority and that the federal rules and statutes give guidance on areas they may want to consider in rule-making. Also, there's been a lot of discussion about pulling away federal funding but under state statute, that's where the rule-making authority is set up.

Representative Gardner said if you know from looking at the federal regulations, assuming the state statutes and regulations allowed this letter, would it be permitted under the federal law? Ms. Berman said I don't know that I can speak to that. I didn't see anything that federal law would disallow it. Again, it might be an issue that they lose funding. I can't really speak to that.

Representative McCann said one of the things that supports the argument of the commission is that, under the definition of river outfitter, it includes transportation for the purpose of river running. It says any person advertising to provide or providing river-running services in the nature of facilities, guide services, or transportation for the purpose of river-running. And then the commission has the authority to promulgate rules that govern the licensing of river outfitters, to regulate river outfitters, guides, etc., to ensure the safety of associated river-running activities. I think you could read that to include transportation to and from the river because it says transportation for the purpose of river running. How do you interpret that and argue that it doesn't include their ability to regulate the insurance required for transportation? Ms. Berman said I don't read it that broadly. I think transportation would also concern the actual river running and that even though

operating vehicles to get the passengers from one place to another may be an ancillary activity that river running outfitters conduct, I don't think it means they have rule-making authority over that. Just because they have the general rule-making authority over river running activities, I don't read that to mean every ancillary activity that a river runner might engage in the commission has rule-making authority over.

11:34 a.m.

Hearing no further discussion or testimony, Representative McCann moved to extend Rule # 300 5. b. of the Parks and Wildlife Commission and asked for a yes vote. Representative McCann said this is a tough issue and I think both sides have presented themselves well. I read the definition of river outfitters to include transportation and I think the commission arguably has concurrent jurisdiction. I'd be a little more comfortable if it was done legislatively and maybe that's still something to be done because we don't know exactly how this rule is going to be extended or if it's going to be made permanent, but I'm leaning yes. Representative Gardner said with respect to everyone on the Committee that's wrestling with this – and let me express my support for the underlying policy – the question we have here is grants of legislative authority. I'm going to vote no, but I am going to make this observation: There's a huge problem here that's festering. The problem is that we have said that the chief of the Colorado state patrol shall adopt rules for the operation of all commercial vehicles. We did that at a particular point in time. I think that sitting back there in the background is a federal regulatory structure that allows us to do certain things but if we do other things we lose federal funding. I think we can accommodate, both statutorily and on a regulatory basis, river outfitters and ought to do so, but I think there may be a little category of other things that we're issuing letters on that we may really not have the authority to do. Maybe there's not a regulation that says these rules for operation allow certain exceptions. I'm just really troubled that there's a lot going on in the regulatory scheme that's not being addressed and if we push ourselves to the envelope – and I understand how my colleagues might be able to do that – and say there's concurrent jurisdiction, we will have just sidestepped a whole category of other things for which we may be issuing letters on without authority. It's just not clear to me that that's the case. Senator Roberts said I'm going to land where Representative McCann is and while I certainly would support a legislative fix next session, I specifically want to say that I don't think it's necessary because I think that could set a bad precedent in other cases. Concurrent may be equal to some but I cannot imagine an industry where they would want higher public safety standards than the state patrol. I think 99%, if not 100%, of the time state patrol is going to be putting public safety first and have the more stringent standard. I'm not feeling tortured getting to an aye vote on this although I do appreciate the issue having been raised. Senator Brophy said I'm not at all confused by the state patrol's letter but I don't really think it's part of the issue

that's before us today. The issue before us today is whether or not this rule is authorized by statute. I think if you look at the statute that Representative McCann referred to – section 33-32-103, C.R.S. – we have very narrowly and specifically carved out the ability of parks and wildlife to regulate this type of activity including the transportation of people to and from the sites where the river rafting activity would occur. So, that very specific legislative authority overrules the general authority of the state patrol to have authority over all commercial carriers because that's the precedent: The specific overrules the general and the legislature very specifically gave this authority to parks and wildlife. For that reason I'll be a yes vote and I'll urge everybody to be a yes. Representative Gardner said I understand what Senator Brophy is saying and I agree but I don't think the state patrol agrees with you is what bothers me. It needs a big fix and a real analysis and I'm sorry I'm not going to be here to do it because there's something else here that has not been addressed in terms of our interface with state and federal law. I respect your vote and you almost persuade me but I just can't get past the fact that the state patrol itself feels the need to issue this letter and if they do it's because they don't necessarily agree. Senator Steadman said I think Representative McCann makes a very good point and I think this is a very close call. I'm more in the Representative Gardner camp. Something he said earlier that's really important to come back to is that it's good public policy and I want to make it happen. I think the important thing for us to realize is that it already happened. This was really about the 2014 season and that season has concluded hopefully it was very successful and we all feel good about that. If this needs to be done again for the 2015 season, there's an opportunity to address this during the legislative session. I really do think we have a little bit of a problem in the statutes and I'm more inclined to go for a no vote just to set up the statutory fix, although I totally respect where my colleagues might come down on the yes side of this. It is a close call, but this managed to solve the problem for this year and there's ample opportunity to solve the problem for next year. That's part of why I would rather see us go the route that forces a little more work and more thorough solution. The motion passed on a vote of 5-3, with Senator Brophy, Senator Guzman, Representative Kagan, Representative McCann, and Senator Roberts voting yes and Representative Foote, Representative Gardner, and Senator Steadman voting no.

11:43 a.m. – Jery Payne, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1e – Rules of the Division of Motor Vehicles, Department of Revenue, Rule 8 – Driver testing and education program rules and regulations, 1 CCR 204–30 (LLS Docket No. 140296; SOS Tracking No. 2013-01120).

Mr. Payne said I bring before you rules dealing with commercial driving schools. I understand that the division has decided to not contest these rules and is planning to make changes to the rules, so I'll give a short presentation on the division's core mistake and then I think they intend to explain their plans. These schools teach

people to drive motor vehicles. There are two kinds of schools. One are schools that merely teach driving. The student learns at the schools and takes the exam at the DMV or the student might even already be licensed, such as in a court-ordered remedial school. The second are schools that administer the license exam to drivers. The student learns at the school and the student also takes the exam at the school. The problem with the rules is that the schools are lumped together. The rules are drafted overbroadly. The division has more authority to regulate exam schools but the division has applied these rules across the board to all driving schools including schools that merely teach driving skills. They don't have this authority over these schools. The rules in question are Rule 8 (200) g), which requires general liability insurance; Rule 8 (200) h), which requires a surety bond of $10,000; Rule 8 (200) j), which forbids substantially similar names; Rule 8 (300) d), which requires instructors to be physically able to operate a motor vehicle and to train others; Rule 8 (300) e), which requires school employees to have a background check; Rule 8 (300) f), which authorizes the department to deny certification if an employee has been convicted of a felony; Rule 8 (300) h), which prohibits driving instructors from having eight or more points assessed against their license in the last three years; Rule 8 (300) l), which requires the school to notify the department when an employee changes driving status or departs; Rule 8 (400), which establishes a code of conduct; and Rule 8 (900) e), which allows the department to revoke certification for fraudulent or criminal activity by a school employee. As I said, the department does not have the authority to issue these rules over all types of driving schools. We therefore recommend that they not be extended.

11:45 a.m. – Mike Dixon, Senior Director for the Division of Motor Vehicles, Department of Revenue, testified before the Committee. He said we want to be in compliance with the law. We have had the opportunity to meet with Office staff to address concerns they have with regard to the rules that are in place. Let me give you a little background so you understand the purpose. We have these programs and rules in place to support a working unit within the division under the driver's license section that oversees 117 commercial driving schools in the state, 17 of which only provide training – there's no testing at those schools. Every one of the 117 schools does provide training that's proscribed in Colorado statute that the legislature has determined important for our citizens to have before they get their permit or driver's license. Those are the only schools we have taken the opportunity to provide the oversight of because of statutory requirements to do that. We do not license any schools in the state with regard to this program. As I mentioned, these schools are essential to the state. We view them as our partners and they are critical to us to be able to provide the service we provide across the state. They provide 57% of the driving tests for Colorado residents and they provide 10% of the written tests for Colorado residents. We provide the rest of that. The driving test out of house has been increasing over the last three years and has gone up 18%, so they have an increasing role. As you may have heard, we're trying to reduce wait times in our

offices and, with the resources we've been given, one of the ways is to provide this opportunity for Colorado residents to have that training. They are critical partners. This program we have in place with the rules gives us the ability to certify those schools. As you may know we've had previous laws where we've had programs where we're required to do things that we could not actually enforce, so really you wanted us to do something that we couldn't do. In this case these rules are intended to give some guidelines for our folks and the schools as to what the requirements are to administer the program according to state law and to make sure our employees are in compliance. In our discussion with Office staff, we do acknowledge that the way it was written as a rule may have been overly general, but what we agreed upon was to provide a statement that says who these rules are applicable to. There was some concern that perhaps these would be extended upon other schools that are out there that do exist. For example, court-ordered driving schools are out there. If somebody wants to reduce their time or not lose their license they have to go to a school and we do not regulate that; we have no involvement in those schools. We did agree that we would modify the rule to put that applicability in there and that would seem to be in compliance with the law. Our contesting the rule had to do with the interpretation of the law. We know that when the law was first in place in the 1990s it was a licensing issue. We've never taken that approach; this has always been for us a certification process.

Representative McCann said if I'm clear then these schools that don't give the test would then not be subject to these requirements that are in the rules, like being physically and safely able to operate a motor vehicle or having to have a background check. Mr. Dixon said that's correct. Today we're not doing that either. In the case of a driving school you're looking to make sure they comply with state driving rules, so the person that's testing them needs to comply with those. If you're providing instruction then the rules aren't applicable and we need to clarify that in the rules.

11:51 a.m. – Randall Cherry, First Assistant Attorney General, Attorney General's Office, testified before the Committee. He said I represent the department of revenue and I'm here on behalf of the department of revenue today and not on behalf of the Attorney General's office. My client has waived privilege as to communications with regard to the concerns raised by the Office, but not to the substantive issues regarding the rule. One clarification on the fix to the rules: The rules apply to folks who are training as well, not just examinations. The clarification in the rule would be that it won't apply to those folks who are not doing statutorily required training or examination. And to sort of give you the context of the rules and how they evolved and where they are today, the originating statute that controls commercial driving schools goes back to before1963. It was repealed in large part in 1994. A statute was enacted in 1989 – section 42-2-111 (1) (b), C.R.S., – which gave the department specific authority to certify these third-party agencies who

provide the training and examination. In 1994 when the statute was repealed regarding commercial driving schools, these rules already existed. Until 1989 there was no provision for the certification process. The rules were already in place going back before 1983, perhaps 1963 depending on the history. The department promulgated rules in 1993 to deal with the rules in 1989. Those rules were consolidated with the old rule from 1993 regarding the commercial driving schools in 2001 to create a certification process that would only apply to these statutorily required programs, the ones providing statutorily required training. That rule in essence repealed, in practical terms, the rule from 1983 that was based on article 15 of title 12, C.R.S. That rule was amended in 2006 and again in 2014 and the Office noted that the language in the current rule appears to cover all of those organizations that would have existed or been licensed under article 15 of title 12, C.R.S., that was repealed in 1993. All of the issues that were raised sort of relate to that repealer and through discussions back and forth we now understand that the issue really is that those rules that are in place today are authorized under section 42-2-111 (1) (b), C.R.S. They are all relevant to regulating the folks in the industry, but they would not be supported under the broad terms of the old article 15 of title 12, C.R.S., which is now repealed. The clarification that we're providing that resolves the problem simply clarifies that this only applies to those people under section 42-2-111 (1) (b), C.R.S., with the exception of one rule. There's a rule that provides for name regulation and we agree that we don't have the authority under any of the statutes to do that. There's a little bit of a spillover that adds to the confusion here and that is that they did not repeal article 15 of title 12, C.R.S., in its entirety because there are still provisions in that article that relate to federal law and programs and how they apply to the rules today and the statutes today. In essence, while it's a very complicated history and very complicated set of statutes, at the end of the day it boils down to the one issue that we need to clarify that this is limited to those folks and doesn't apply to that universe of providers.

11:58 a.m. – Jery Payne addressed the Committee again. He said I have been talking with the department but I can't comment on any rules until they've gone through the process. If they do as we contemplate they'll do, then I wouldn't have any problem approving them at that point.

11:58 a.m.

Hearing no further discussion or testimony, Senator Roberts moved to extend Rule 8 (200) g), (200) h), (200) j), (300) d), (300) e), (300) f), (300) h), (300) l), (400) a), and (900) e) of the Division of Motor Vehicles and asked for a no vote. The motion failed on a vote of 0-8, with Senator Brophy, Representative Foote, Representative Gardner, Senator Guzman, Representative Kagan, Representative McCann, Senator Roberts, and Senator Steadman voting no.

12:00 p.m.

The Committee recessed.

12:10 p.m.

The Committee returned from recess.

12:11 p.m. – Michael Dohr, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1f – Rules of the State Board of Health, Department of Public Health and Environment, concerning the medical marijuana research grant program, 5 CCR 1006-2 (LLS Docket No. 140552; SOS Tracking No. 2014-00743).

Mr. Dohr said before I get to the two issues, I want to go over a little background that you're probably very familiar with. A Coloradoan who suffers from a debilitating medical condition as specified in the constitution has the authority to use medical marijuana without criminal sanction assuming that the person has complied with the registration requirements and is using it within the constitutional limits. In addition to the debilitating medical conditions that are specified in the constitution, the department also has the authority to add medical conditions to the debilitating medical conditions specified in the constitution. Over the years the department has received petitions to add medical conditions to the debilitating medical conditions list and, up until this point, has denied all of those petitions, frequently citing the lack of scientific-based medical research regarding the medical efficacy of marijuana on the particular condition in the petition. That brings us to the medical marijuana health research grant program, which was passed by the General Assembly during last session. The program is designed to provide research funding for medical research regarding the efficacy of marijuana on particular medical conditions. The hope is that the department will then be able to use that information in the future when they are presented with petitions to add medical conditions to the debilitating medical conditions lists.

Mr. Dohr said the first issue deals with the scientific advisory council, which was created as a part of the grant program. The council was created in statute, membership is specified in statute, and the statute gives the council two duties and two duties only. The first is to provide a peer review process that guards against funding research that is biased in favor of or against particular outcomes. The second is to submit recommendations for grant proposals to the state board of health. The regulation at issue here is Regulation 6. D. 3., which tasks the council with additional duties not listed in statute, including reviewing petitions to add a medical condition to the list of debilitating medical conditions and making recommendations to the department on those petitions. The department has rule-

making authority regarding the process and manner in which it can add conditions to the debilitating medical conditions list. Specifically, they have rule-making authority regarding the manner in which it may consider adding debilitating medical conditions to the list found in the constitution. Despite this broad authority over the process for adding conditions to the debilitating medical conditions list, they don't have the statutory authority to add duties to the scientific advisory council. The council's duties are set by statute and therefore the state board of health lacks the statutory authority to give additional duties to the council. Therefore we recommend that the Regulation 6. D. 3. not be extended.

Representative Gardner said the problem is not that the board can't determine how it wants to get its recommendations about debilitating conditions. The problem is the council doesn't have the authority to do that activity. Is that correct? Mr. Dohr said yes. Since the statute already has determined the duties of the council, the state board doesn't have the authority to give the council additional duties.

Senator Steadman said I understand the argument but where I'm struggling is that it seems like a distinction without a difference. The board can create any other group of experts to consult on this matter and as long as their name is not scientific advisory council, it would be okay, but that name is somehow reserved in statute for these expressly limited purposes. Mr. Dohr said I think that I can see your point that the department would have the authority to create a different group to review these petitions and make recommendations. If they were doing that, I would not be bringing that issue before you today, but it is a bigger issue of a department, through its rule-making authority, giving additional duties to a statutorily created body. That implicates some separation of powers issues that go beyond just this particular issue here and this issue has the potential for setting precedent in terms of the limits or bounds of a department's rule-making authority when it comes to statutorily created entities and their duties.

Senator Johnston said I assume the board also has the authority to remove conditions from the list. Mr. Dohr said no, they do not. The list that is in the constitution is the floor and then the department has the ability to add to that.

Senator Johnston said but the enumerated list in the constitution envisions potential other additions that are not through statute but through department rule. Mr. Dohr said yes. The constitution has given the department the authority to add those conditions as opposed to the General Assembly adding them through statute.

Senator Johnston said so this is really a nondelegation issue that you're raising. You don't think that the board has the ability to delegate these powers to a sub-council. Mr. Dohr said I think that the department does not have the authority to give this entity additional powers that aren't specified by statute. I think it's up to the General

Assembly as the creating entity of the council to determine its duties unless it specifically gave the department the authority to add additional duties.

Senator Steadman said I think another way to understand this is that it's the Office's opinion that the board has the authority to empanel an advisory group to help them with this but they do not have the authority to enlarge the jurisdiction of the council, even though the group that they could empanel for this purpose could be identical to the membership of the council. Is that fair? Mr. Dohr said yes, I think your language about adding to the jurisdiction of the council is a very apt description of the problem that we have identified.

Senator Johnston said and because this council is statutorily created and not board created. Where the statute endeavored to create it the statute is designed to limit it. Mr. Dohr said that's correct.

Representative Gardner asked could the state board designate every member of the advisory council to be something else, and then vest this task of doing recommendations? Would that violate any kind of grant of authority? Mr. Dohr said I think they could use the same membership to do the review of the debilitating medical conditions petitions and make those recommendations if they were doing it outside of the scientific advisory council process and name.

Mr. Dohr said the second issue deals with timelines for board applications. Pursuant to section 25-1.5-106.5 (2) (b) (I), C.R.S., the board is directed to promulgate rules for the administration of the grant program including the procedures and timelines by which an entity may apply for a program grant. The board promulgated a rule entitled "Timelines for grant application", but the rule does not include timelines. The rule specifically states grant applications may be solicited on dates determined by the department. So instead of actually promulgating timelines, the rule has improperly delegated that authority to the department. The statute requires the timelines be promulgated in rule by the board. Therefore, the state board does not have the authority to delegate that to the department and we recommend that Regulation 14. A. 2. not be extended.

12:23 p.m. – Ann Hause, Director of the Office of Legal and Regulatory Compliance, Department of Public Health and Environment, testified before the Committee. She said you've heard the background about the program and the addition of new debilitating medical conditions to the medical marijuana program. It is accurate that no additional conditions have been added beyond the eight originally specified in the Colorado constitution. The department does have statutory authority through the board of health to pass rules that designate the process for adding debilitating medical conditions to the list. In fact, prior to the passage of this rule that is currently contested, there was an ad hoc advisory committee that was

established through rule by the board of health that would review petitions at the department's request and provide advice about whether or not those petitions should go forward to add debilitating medical conditions. With the passage of Senate Bill 155 during the last legislative session and the creation of the scientific advisory council, which consists of medical experts in various fields ranging from epidemiology, clinicians with experience in designing and conducting clinical trials, medical toxicologists, neurologists, pediatricians, and the list goes on, these folks are tasked with reviewing grant applications for the newly established medical marijuana grant program. The department considered the list of expertise included in this council and realized that this council was very closely connected to the issues that would be presented to the department in the form of petitions to add debilitating medical conditions. For purposes of efficiency, it made a great deal of sense to have one body, this scientifically comprised body, perform both tasks. When the rules were amended the ad hoc advisory committee was replaced with the scientific advisory council. As you've heard today, there is no delegation in statute for the advisory council to perform the review of debilitating medical conditions, but I would suggest that the work done by this council is not final agency action conducted by the department. They are a type 2 board or commission. In other words, they make recommendations and provide advice to the department – and in this case to the board – and in that capacity the department felt it perfectly appropriate to ask this council to perform both roles on behalf of the department. To date we've not heard concerns, other than the legal issue raised by Mr. Dohr, from this body about performing this work.

Ms. Hause said the second issue pertains to the requirement in statute that the board set both procedures and timelines for the medical marijuana grant program in rule. The rule that was passed by the board states that applications will be solicited on dates determined by the department. That is as definitive as the rules get with respect to timelines. The solicitation language certainly applies to the method through which the department will find grantees. We did pursue a request for applications. In fact, I would commend the department on the speed with which this process was implemented, and grants were awarded this week to eight grantees through this brand new program. Between July of this year and just this Wednesday, the board adopted regulations, the council was empaneled, they reviewed applications that were solicited, they met in late November and made recommendations, and the board on Wednesday reviewed those recommendations and unanimously approved eight grantees. Again, the rule refers to the department soliciting applications on the dates to be set. That solicitation was posted on the department's website. We had 57 applications that were received, 47 of which met the minimum qualifications and then were reviewed by the scientific advisory council. I provide you all with this background by way of saying those timelines were well-known and well-announced. There is a board of health member who participated in the review conducted by the council of the grant applications. That is

common practice in the department when we review grant applications. We typically ask a board member to sit on the advisory committee or at a minimum review the grant applications along with us so there is connectivity between the review process and the board. That did occur in this case. One of our members reviewed applications with the advisory council. The board has other sets of rules that pertain to grant processes, such as Amendment 35 tobacco tax dollars that are granted out for tobacco control purposes, our CCPD program, and others. In all of these scenarios, the board has consistently adopted rules and not included specific dates in the rules around this solicitation process. As you might imagine, it would create an administrative inefficiency, to put it mildly, to try to address various specified time frames in a rule because the creation of a request for applications or proposals of any sort and the receipt and review of those are fluid. The department's efforts to make that timeline known through the very public process that it participated in in the review of those applications did indeed satisfy the requirement that we have timelines in place.

12:31 p.m. – Michael Dohr addressed the Committee again. He said as to the first issue, I think this is an issue that is bigger than the merits of whether the scientific advisory council is the appropriate body to review and make recommendations regarding additions to debilitating medical conditions. I think it goes back to the General Assembly's statutory authority and the department impeding on that statutory authority by providing additional duties to the statutorily created entity. I think it's up to the General Assembly to make the policy decision as to whether it's appropriate for the scientific advisory council to have that additional duty. As to the timeline issue, I just want to make it clear that it's not that we would expect that there would be particular dates in a rule relating to timelines, but that there would be some indication as to how the timelines would work, such as there will be a review done within 30 days or 90 days or something like that – that actually provides some sort of indication as to the timelines associated with the process. It wouldn't have to necessarily be specific dates in order to comply with the statutory requirement of including timelines within the rules.

Representative Gardner said you think it would satisfy the requirement if applications would be submitted or solicited on a date set by the board and then we would say 30, 45, or 90 days after submission. Is that what you're getting at? Mr. Dohr said yes. I think that would satisfy the term "timelines", that it doesn't have to be so specific as to be tied to specific calendar dates but rather time periods.

Senator Steadman said I was the sponsor of Senate Bill 155 this past session. It was a bill I carried on behalf of the Joint Budget Committee. It was part of the Governor's budget proposals that were submitted to us a year ago. On the issue of the role of the scientific advisory council, I can tell you in putting this bill together and working with my colleagues on the JBC, we contemplated the fact that the state

board's role in considering petitions for additional conditions would be aided by the council. It was discussed during the course of the debate on the bill. It didn't get written into the statute, obviously, which is why we have this before us. The fact that the board had refused all prior petitions to expand the list of conditions up until this point was something that was well-known. Their refusals were on the basis of lack of scientific evidence of efficacy, which is understandable. The whole point of this grant program was to produce scientific evidence of efficacy, so it's not surprising that the studies that the council would be recommending could result in findings that could lend credence to the council's recommendations to the state board of health that medical marijuana may be efficacious for these diseases or conditions. What we have in front of us is something that was completely contemplated at least by those of us who were actively involved in crafting this legislation, but it was not written into the black letter of the law. It's a little bit of a dilemma and I think the way I posed the issue earlier in that you have a situation here where arguably the rule expands the jurisdiction or role and responsibilities of the council but in an advisory capacity, whereas the legislature was more explicit and limited in how they expressed that body's role in statute. And for me, I think on principle, we probably shouldn't let agencies expand the roles of bodies like this. However, given that they have the authority to empanel a body to advise them for this purpose, the fact that it happens to be named scientific advisory council and be the same people, I don't know that it should be fatal to what they've set up and how they structured this because I think it does carry out exactly the intent that was present for those of us that were working on the legislation. I don't know if that helps anybody with how to resolve the issue but I thought I'd give you a little bit more of the background.

12:37 p.m.

Hearing no further discussion or testimony, Representative Kagan moved to extend Regulation 6. D. 3. and Regulation 14. A. 2. of the State Board of Health and asked for a no vote. Representative McCann asked Senator Steadman if he is recommending a yes or no on the motion? It sounds like this is what you intended to have happen. It's a pretty technical objection to the rule. Senator Steadman said thank you for the question. That puts me on the spot because I was going to vote last. I'm struggling with this because I think there is a legitimate issue there about an agency expanding the role of an advisory council that we created in statute, and we should be mindful of the precedent that we may be creating. And yet, in this instance, the precedent we're creating is no net change because they could still do this under another power, by another name. I don't know that I'm really bothered by the precedential value of extending the rule. With the deadline thing there are a couple issues to talk about there. The other thing is that I tend to be a little bit pragmatic or outcome-oriented about some of these things. They've already been through their first round of grant applications and have had their recommendations

and acted on them. I think there will be a second round and that may be accomplished prior to May 15 next year when the rule would expire if we do not extend it. As a practical matter, I think the agency is able to do what they're supposed to do and has plenty of time to react to this, so I don't know that not extending the rule causes a big problem for the grant program or for the agency. It just sort of kicks them into some emergency rule-making or another rule-making cycle on this that, frankly, could be avoidable. It doesn't seem like these issues rise to the level that we should trigger that kind of administrative response from the agency. I'm probably going to vote yes on this motion although I understand why Representative Kagan has asked for a no vote. Representative Gardner said I understand the Chair's reasoning and as trivial as it sounds I encourage the department, if they want to continue to use the council since we didn't give it to them – however we might have wanted to or however the sponsors might have contemplated it – to give it another name and when it adjourns it reconvenes under a different title. I can name numerous instances where a particular body sits as one thing for one purpose and one thing for another. I worry about the precedent that may come back around to expand particular councils. It doesn't impose an insurmountable problem. Senator Johnston said on one side I think we do want to give departments a certain autonomy to lead and get things done that they need to and if it is only in an advisory capacity the damage done by getting advice from a working group or council seems limited in terms of the nondelegation issue. But as I think back about it from other legislation like this that I've been a part of where we have created councils and tasked councils with enumerated items to take on, the reason why we often do that is there are other items and other topics that can become so distracting and so all-consuming that they impinge on the council's ability to do its enumerated work. I think there is a reason why we put in statute what we ask the council to do and why we don't put in statute what we don't ask them to do. Also, amendment 20 right now feels sort of like the Tenth Amendment to the U.S. constitution which says everything else that you might ever think of can also be included. I'm not convinced that we need to keep adding enumerated items to the list of medical conditions. I think, if anything, we probably ought to work on contracting the universe of folks who would have availed themselves of recreational marijuana if it were available then but only medical was around and so they went that way when they weren't in the category of intended users. To enhance a power to increase leverage to expand the list that to me doesn't need to be expanded errs on the side of the legislature meant what they said and said what they meant, which is if you wanted the council to do one thing we should keep them to do it and if the department needs advice another way they should empanel it differently. I'll be a no vote to stand for the principle that we ought to believe that the words the legislature use matter in terms of what you want the council's job to be. The motion failed on a vote of 2-7, with Representative McCann and Senator Steadman voting yes and Senator Brophy, Representative Foote, Representative Gardner, Senator Guzman, Senator Johnston, Representative Kagan, and Senator Roberts voting no.

12:44 p.m.

Representative Kagan moved to extend Rule 7.2.6 of the rules of the Secretary of State and asked for a no vote. He said this does not appear on the agenda but I do make that motion and request that we discuss the matter.

Senator Steadman said let me put this in context for the Committee. We are now moving to agenda item 1g., which are rules of the secretary of state. This rule that Representative Kagan has called out is subsumed within the larger packet of rules. Staff had not brought this before the Committee for a recommendation. Staff did not see a problem with it. Representative Kagan, however, has made a motion to not extend this particular rule. It might be helpful if we take this rule in isolation since we have a motion on the table and we'll get to the rest of the rule subsequent to dealing with Representative Kagan's motion.

12:46 p.m. – Jason Gelender, Managing Senior Attorney, Office of Legislative Legal Services, addressed the Committee. He said I'll explain why the Office does not think that Rule 7.2.6 creates an issue. This issue concerns a statutory limitation on delivery of ballots by a third party and then a secretary of state rule related to that. The specific statute is section 1-7.5-107 (4) (b) (I) (B), C.R.S., which imposes a 10-ballot limit on third-party delivery of mail ballots in an election. There are no additional statutory provisions that specify how the limit is to be enforced and there is no specific rule-making authority tied directly to this statute for the secretary of state to enforce the provision. Having said that, the rule-making authority of the secretary of state over elections is broad. There are two sources for that authority. The first and most general is section 1-1-107 (2) (a), C.R.S., which gives the secretary of state authority to promulgate rules necessary for the proper administration and enforcement of the election laws. More specific to this issue and the main basis for our belief that there's not an issue with the rule is section 1-7.5-106 (1) (a), C.R.S., which gives the secretary of state specific rule-making authority to prescribe the form of materials to be used in the conduct of mail ballot elections and specifically requires that all mail ballot packets include a ballot, instructions for completing the ballot, a secrecy envelope, and a return envelope. There's also additional specific authority there to establish procedures for conducting mail ballot elections. What the secretary of state has done in Rule 7.2.6 is require the mail ballot return envelope to include an affirmation of the voter saying that for third-party delivery, I'm voluntarily giving my ballot to a specific person, require the name and address of that person, and then it goes on to say how they've marked and sealed the ballot in private and not allowed it to be observed, etc. We believe that, under the secretary of state's authority to prescribe the form of mail ballot election materials, this rule falls under that authority. I don't know if there are folks here from the secretary of state's office or not to further explain the rule.

Senator Steadman said on this part about marking and sealing the ballot in private and not allowing any person to observe the marking of the ballot, is there any requirement in statute that voters are prohibited from having someone observe them marking their ballot? Mr. Gelender said that answer I actually do not know for certain. I do know that when you go to the voting booths you are put in privacy and that there is a general expectation that that's how it will be done.

Senator Steadman said but in the privacy of one's home where we're marking mail ballots, can every eligible voter in the household sit together at the kitchen table and mark their ballots in sight of each other and perhaps even discuss with each other how they're marking the ballots? There's nothing prohibiting that in statute is there? Mr. Gelender said no, I don't believe there is.

Senator Steadman said yet the rule appears to create that prohibition because the voter is required to affirm that they've done this in private when there's no statutory obligation on them to do so. Mr. Gelender said yes.

Representative Kagan asked do you think that the authority to prescribe the form of the materials encompasses the authority to prescribe the content of the materials? Mr. Gelender said that's a very interesting question. I think that in this case when you're looking at what the materials are, the form, to at least some degree, is the content. I suppose there would be some limits in contradiction of other statutes if they, for example, required who you are voting for to be on the outside of the envelope or something like that. This particular language to me falls within the realm of form.

Representative Kagan asked do you think that relevant to this discussion is the requirement that the procedures that the secretary of state is authorized to establish must be consistent with section 1-7.5-107, C.R.S.? That section is very proscriptive. In parts it says the wording that should be on these forms and it specifies that the ballot may be delivered to any person of the elector's own choice for delivery directly or delivery in the mail. Do you think it's consistent with section 1-7.5-107, C.R.S., to make requirements that you must tell us who the person is who you gave your ballot to – and this only applies to persons who have their ballot delivered – and you have to mark your ballot in private? Do you think that's consistent with the structure in section 1-7.5-107, C.R.S.? Mr. Gelender said with regard to your first question, I do believe that the language about identifying the third-party delivery is supported by rules. The reason why is the secretary of state has broad authority to enforce election laws. We do have a law that a person may deliver no more than 10 mail ballots on behalf of another. There's nothing that specifies how the secretary of state is to attempt to track or enforce that and under a rational basis test I think that it's not irrational for them to say if we make them list these people on the ballots we

can see if the same name and address shows up more than 10 times. That part of it is very clearly in by rule. The bit about marking and sealing in private, I'm not aware of anything that specifically conflicts with requiring that oath. Nothing requires it to be there but I don't know of anything that conflicts with it.

Senator Steadman said as a voter I have the right to mark my ballot with you watching, do I not? Mr. Gelender said as far as I know, yes.

Senator Steadman said as a voter I have a right to give my ballot to a third party to deliver to the clerk's office on my behalf, don't I? Mr. Gelender said yes.

Senator Steadman said given that I have a right to do both of those things, doesn't this rule conflict with my rights as a voter? Mr. Gelender said the first part of it I think clearly does not for the reasons I've specified. In no way does indicating who you're giving it to impinge on your ability to give it to somebody.

Representative Gardner said I think it interesting this question about can you show everyone as a matter of law your ballot as you're marking it because in election standards the notion is that a voter is supposed to vote in secrecy. Setting that aside, this issue is new on the agenda and I'm a little disturbed. I respect my colleague Representative Kagan for wanting to bring an issue forward. Bringing issues forward that staff has not is something this Committee can do. I guess in my own experience the way that has been done is to ask staff to look at the issue and write a memo. It seems to me like we have an issue before us that needs some work as well as the ability of the department to come forward. I would point out that while I will not be here for this, the rule review bill will come back to this Committee on two occasions in each house. I would ask and request of Representative Kagan that perhaps we lay this over and ask staff to do a memo and ask the secretary of state to state their position. I think the issues you raise are extremely legitimate, but it does seem that it ought to be done in a more informed way and with the assistance of staff as well as the department. I'll point out also that we will have a new secretary of state who may have a different view of the regulation. I would ask the Chair to lay this over.

Senator Steadman said I should advise you all that I was made aware yesterday that this would be an issue. I discussed the matter with staff. I asked the staff to advise the department of state and they were advised and had an opportunity to be here. This rule is part of the larger group of rules that are before us on the agenda that were uncontested until this new wrinkle. It's been on the agenda and the department of state was notified, albeit about 24 hours ago. Representative Kagan has a motion on the floor and I consider it in order. I understand the suggestion that we spend more time on this, but that will be for the Committee to decide. I'm not going to take it off the table.

Senator Johnston said to the last conversation about whether this is a close call about regulatory authority under the statutes or not, this doesn't actually look like a close call at all. If you look at section 1-7.5-107 (4) (b) (I) (B), C.R.S., it says deliver the ballot to any person of the elector's own choice or to any duly authorized agent of the county clerk and recorder or designated election official for mailing or personal delivery, except that no person other than a duly authorized agent of the county clerk and recorder or designated election official may receive more than 10 mail ballots in any election for mailing or delivery. There is nothing in that statute that authorizes any additional rule-making or burden beyond what that statute prescribes. The statute intentionally carved out the less than 10 exception as the section of statute that is exempt from other rule-making. The more than 10 exceptions are the ones under subsection (4)(b)(I)(A), which refers to the county clerk and recorder, designated election official, voter service, polling center, or drop-off location. The statute very intentionally regulated and specified 10 and over and very intentionally did not for 10 and under. For me this is not at all a close call that there's rule-making power here. I would say if someone wants to change this they should run a bill, but I don't see anything that grants power to a rule-making agency to change that. I would support Representative Kagan's motion.

Representative Gardner said to clarify, is the motion to extend?

Representative Kagan said the motion is to extend the rule and I'm urging a no vote.

Representative Gardner said I'm going to be a yes vote. I think there is a legitimate question raised here. Let me express my concern that we have a very specific rule item and I regret that the secretary of state's office has not seen fit to come and defend its rule or to say that it's uncontested. I do feel an obligation to the process to vote yes to extend and then were I to be successful I don't think that should preclude further consideration on this on the two more occasions this will come before the Committee.

Senator Roberts said I'll echo Representative Gardner not just because I'd like us to be on the same page on one of his last acts, but I'm troubled by the process. I understand that maybe there was 24 hour notice but this is certainly new to me. We get this information and the paperwork at least a week in advance and it gives us time to consider it and put it in context and with the expectation that the agency would have enough time. Who knows why 24 hours wasn't notice sufficient for them to send someone over. For the same idea that perhaps it's a conversation worthy to have, it feels a little procedurally insufficient including to the agency involved. For that reason I'll be an aye vote.

Senator Brophy said for all of those reasons, I would respectfully ask that the motion be withdrawn. I don't think it's appropriate to vote on it without giving more of an opportunity for the secretary of state's office to come over and respond. Notice was less than 24 hours ago. I realize that it's now 24 hours ago that notice was given, but there was no guarantee when this meeting started that the issue would be taken up in excess of 24 hours. As Representative Gardner pointed out, the Committee will meet two more times with the ability to vote on whether to extend this rule or not. At that point give the secretary of state the appropriate amount of time to either prepare a defense of their rule or say we agree and we're seeking a legislative remedy.

Representative Kagan said thanks for the suggestion. I'm going to decline to withdraw the motion. One of my concerns is that this rule, in my opinion, is putting requirements on voters and a subclass of voters – those voters who choose lawfully and as authorized by statute to give their ballot to somebody else for delivery. Statute says that should be a person of their own choosing. This rule seeks to put an additional requirement on those voters. To me, that's a very serious matter. It directly impacts the ballot and it is not explicitly or even implicitly authorized, I believe, by statute. I think it would be a mistake to allow a rule that without statutory authorization puts a burden and a restriction on a subclass of voters – those who are not able for whatever reason or who do not choose for whatever reason to go to the ballot box themselves or to put a stamp on the ballot themselves. This is a very serious matter and I consider it a matter of urgency. I am declining to withdraw the motion.

Senator Roberts said I have to say that I think what Representative Kagan has just done is given a policy-based rationale for this and yet what we've heard is more of a process. This Committee has kind of prided itself on focusing on process. It doesn't bode well going into this next year where we have some changes coming up in the chambers. I'll just say my opinion is it feels much more partisan than policy. I hope that's not the case because we have some changes coming around the corner and this Committee has oftentimes steered away from the more partisan positions. I need to leave to catch a plane but I think it's somewhat disrespectful to the agencies impacted.

Representative Gardner said ironically I may agree with you on the policy aspect of this. As Senator Roberts notes, the process seems to me to be wholly inadequate and it's very disturbing to me. For that reason, I'll be an aye vote.

The motion failed on a vote of 0-6, with Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting no.

1:09 p.m. – Jason Gelender addressed agenda item 1g – Rules of the Secretary of State, Department of State, concerning elections, 8 CCR 1505-1 (LLS Docket No. 140595; SOS Tracking No. 2014-00684).

Mr. Gelender said again we're dealing with secretary of state rules concerning elections. These rules are pretty clear. The discretion of county clerks and recorders to request criminal background checks for election judges is quite clearly delineated in statute and we have portions of three rules that in two cases unduly restrict that discretion and in one case improperly enlarges it. Section 24-72-305.6, C.R.S., establishes the discretion of the county clerks and recorders to request criminal background checks for election judges. There's a distinction here. In subsection (1) of that section the statute makes it mandatory for the clerk and recorder to request criminal history records for staff. In subsection (2), it specifically distinguishes election judges, who in many cases are volunteers, from the mandatory requirement and says instead that a county clerk and recorder may request in his or her discretion the criminal history records. We have two rules that conflict with that. Rule 6.5 impinges on the statutory discretion of the clerks by saying that the county clerk must arrange for a criminal background check on a supervisor judge. A supervisor judge is in fact an election judge. Rule 6.4.1 cross references that criminal background check as described in Rule 6.5. For those reasons we believe that both Rule 6.5 and Rule 6.4.1 conflict with section 24-72-305.6 (2), C.R.S., and should not be extended.

Mr. Gelender said Rule 6.5 (a) does the opposite. Rather than restricting discretion of the county clerks, it enlarges it. Section 24-72-305.6 (3), C.R.S., indicates that when a county clerk and recorder decides to do a criminal background check, it's very specific on how they have to do it. They have to go through the public web site maintained by the Colorado bureau of investigation. They can do that directly or in the limited situation where they don't have a credit card or access to do that, they can request that the county sheriff do it instead. In either case, the only place they're authorized to do their check from is the web site of the CBI. Rule 6.5 (a) indicates that the criminal background check must be conducted by or through the CBI – which is fine – the county sheriff's department – which is fine – or similar state or federal agency. The only one of those around is the FBI, which is explicitly left out of the statute. Because Rule 6.5 (a) allows the clerks and recorders to use additional entities, specifically the FBI, to do criminal background checks in conflict with the statute, we don't think that Rule 6.5 (a) should be extended. The recommendation is that the first paragraph of Rule 6.5, Rule 6.4.1, and Rule 6.5 (a) of the rules of the secretary of state concerning elections all not be extended.

1:14 p.m.

Hearing no further discussion or testimony, Representative Gardner moved to extend the first paragraph of Rule 6.5, Rule 6.4.1, and Rule 6.5 (a) of the rules of the Secretary of State and asked for a no vote. The motion failed on a vote of 0-7, with Representative Foote, Representative Gardner, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting no.

1:15 p.m. – Debbie Haskins, Assistant Director, Office of Legislative Legal Services, addressed agenda item 2 – Approval of the Rule Review Bill and Sponsorship of the Rule Review Bill.

Ms. Haskins said the draft rule review bill is pretty short and right now only contains the two rules that the Committee voted on at the last meeting in October. What we typically do is bring the bill before you at the December meeting and get permission from you to redraft the bill to incorporate your votes from today on the rule issues, and that would be the version that is introduced in the General Assembly. The bill is drafted to postpone the automatic expiration for the rules by department with the exception of the ones that get listed as exceptions in the bill. The rule review bill for this year covers those rules that were adopted or amended on or after November 1, 2013, and before November 1, 2014, and which are scheduled for expiration on May 15, 2015. Just for your edification, the rule review bill covers 595 sets of rules and 18,435 pages of rules that your staff reviewed for you this year. I need to have the Committee approve the bill as drafted with amendments incorporating your votes today and then we will ask for sponsors.

1:17 p.m.

Hearing no further discussion or testimony, Representative Foote said so moved. The motion passed on a vote of 6-1, with Representative Foote, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting yes and Representative Gardner voting no.

Senator Steadman agreed to be the prime sponsor for the rule review bill. Representatives Foote and McCann agreed to be the other co-prime sponsors for the bill. Representative Kagan, Senator Guzman, and Senator Johnson agreed to be co-sponsors of the bill.

1:20 p.m. – Debbie Haskins addressed agenda item 3 – Discussion of Opt-out Bill Draft.

Ms. Haskins said you all have a copy of the bill draft that we drafted per your direction from the last meeting. You asked us to come back to you with a bill that would implement a voluntary system so that legislators could opt out of receiving the e-mail notices if they were a co-sponsor of legislation and we've identified that

rules have been submitted that implement the newly enacted legislation. We brought this issue to you at the last meeting and there was a discussion about it and the Committee directed that you were interested in doing an opt out rather than amending the statute and striking the co-sponsors. I want to also bring up that in discussing this bill and what to do with this situation, it occurred to Dan Cartin and me that there was an alternative to doing a bill and that would be similar to what we are doing with implementing the part of the notice requirement from Senate Bill 13-030 that requires that the Office notify the current members of the committees of reference who are still in the General Assembly when rules come in implementing bills that were heard by a committee of reference. The Office has decided that we would be informing the legislators who are members of the committees of reference by one e-mail notice that would go out in January and it would send them a link to our web site and there would be a hyperlink to the bills for that particular committee. Our alternative is that we could send the same information to all the members of the General Assembly in January one time and we feel that would cover the co-sponsors. We would still send out the notices to the prime sponsors as required by the statute. We wanted to offer that as an alternative, so maybe you don't need to do this bill.

Representative Gardner said I wasn't at the last meeting. Why is this a problem? Are people unhappy with the number of notices they're getting?

Senator Steadman said yes. The opt out was my idea last time. I would actually advocate going beyond the co-sponsors and include the prime sponsors. However, how much of a problem is this really is a good question. Does it rise to the level of needing to run a bill or is there an alternative solution to mitigate the deluge of e-mails we get after we get out of session? I just heard about this staff alternative this morning and my concern is for those people who do want to see this notice, who do find it valuable, who really follow up on all of this. Is cramming it all into one e-mail and one massive spreadsheet going to be meaningful and adequate notice for them? For those of us who would prefer not to be inundated with this information, it's a great solution, but for those that actually wanted this and would find this useful, would we make it less useful to them if we do that.

Representative McCann said it seems to me you either want to opt out or you don't, so to me one e-mail is fine. I don't need to be notified every time rules are implemented for some bill I signed onto that wasn't my bill, but I signed on because I supported it. I would rather do it in the beginning and say I really don't want to receive all of these e-mails. If I'm the prime sponsor then they will continue to send them to me, but as a co-sponsor I don't need to know every time rules are adopted.

Representative Kagan said I'm a little confused about what would happen if we implement this policy. Would we only get one annual omnibus e-mail telling us all the rules that had been implemented in the previous year?

Ms. Haskins said once a year all the legislators currently serving in the General Assembly would get an e-mail from our Office and inside of that e-mail there would be a link to the chart, which is on our web site, that would identify the bill number and the rules that have come in that are implementing that legislation, and there would also be a link to the rules in the chart. It's not every rule that comes in; it's every rule that comes in that implements legislation that the General Assembly has passed.

Senator Steadman asked is it limited to legislation from the previous session? Ms. Haskins said because we're doing it annually, it would be snapshot of a year, but it's only going to identify the rules that are implementing past legislation. Some agencies are slow in adopting their rules to implement legislation, so I think it's possible that we will be getting rules that are implementing two-year-old bills and if the rules come in in that one-year snapshot, they'll be on that chart.

Representative Kagan asked would this be only rules that have been extended and are now permanent? Ms. Haskins said it would be any rules that are promulgated by the agency to implement any legislation that was passed by the General Assembly. It isn't really whether it was extended or not extended in the rule review bill. This is more about what's out there in the code.

Representative Kagan said I was just wondering what stage the rule has to reach to merit inclusion in this record.

Senator Steadman said I think that's important. I wonder if we're focusing on the wrong tree in the forest. I'm looking at the statute and it refers to rules that were adopted. Maybe we ought to step back and ask what is the statute intending to do for members of the General Assembly. Is it more useful to you to know about a pending rule-making and for you to see the draft rules and participate in the comment and rule-making process for your bill prior to the rule's promulgation? Was the bill trying to help sponsors be more on their toes about being involved in the initial implementation of their laws? Or is it I've served eight years in the House and I'm on my second term in the Senate now and the rules from some bill I co-sponsored 14 years ago are being revised and I got a notice for that because I happen to be still in the body. I don't think that's what this statute was trying to accomplish. For me, the more meaningful thing for the sponsor would be to be notified when the rule-making has started, when the draft rule is out there for public comment, and when there's going to be a rule-making hearing. Those are things I can see a sponsor wanting to know about and that's not what this statute accomplishes.

Representative Foote said I haven't spoken up too much on this issue over the last couple meetings because I don't have a great preference one way or the other, but I would agree that if we are to do a notification, I think notification before the rule-making makes a lot more sense. I would note that, at least in my experience for those rule-makings that I'm interested in, I tend to be in touch with the department ahead of time so I can follow them. On the other hand, the e-mails that I get now, if they're e-mails I'm not interested in, it's pretty easy just to delete them and that's what I do for most of them. I think that's why I don't have too much of a preference, but what Senator Steadman brought up about prior to the rule-making makes a lot of sense.

Senator Johnston said I would suggest that we do one e-mail notice to legislators telling them the options and the expectation is opt out of notice as a prime sponsor, opt in to notice as a co-sponsor, and opt in to notice for pre-rulemaking notifications. So, if you don't respond to the e-mail, you're going to keep getting e-mails for all the bills on which you are prime sponsor and you'll get nothing else. If you ask for more, you can get access to bills on which you were co-sponsors or bills on which you were a prime sponsor that's pre-rulemaking.

Senator Steadman said on the notice of pending rulemaking, is the Office in a good position to be the messenger and help bring that to our attention?

Ms. Haskins said no, I really don't think we are and I think there are adequate methods for people to check the Colorado Register that gives the proposed rule-making. We really don't want to add another responsibility to this statute.

1:33 p.m. – Dan Cartin, Director, Office of Legislative Legal Services, addressed the Committee. He said I would echo Ms. Haskins' comments and I think, as you all know, that particular notification would go beyond the language of the current law. I would say that if that is the Committee's direction, keeping in mind the administrative workload it may generate, which we can come back to you on, that may drive an amendment to the statute.

Ms. Haskins said yes, it would.

Representative McCann said I think the whole point of this was that some people don't like to get these continual notifications that rules have been passed because they sign their names as co-sponsors of a bill. The prime sponsors may very well be interested in the rules implementing their legislation, but I think there are some members, myself included, who don't have time to look at rules that were promulgated by a colleague's bill and I'm not going to because it wasn't my primary bill. I think we're making this awfully complicated. I think the question

really is is it alright for the Office to send a general e-mail out in the beginning of the session saying do you wish to be notified when rules have been passed when you are a co-sponsor of a bill but not a prime sponsor. I don't think you have to list the bills; you can do a link to your web site if you want people to see what the bills are. If you say yes, you want to be notified, then you will get notified of every bill you co-sponsored when rules are promulgated. And if you are the prime sponsor, you will get notified. I think it's fair for the Office to send this general e-mail in the beginning and each of us can decide if we want to get the individual notifications of bills we co-sponsored.

Senator Johnston asked Mr. Cartin can you tell us what you would like us to do on this? What would your staff like us to do that's easiest for you to manage? Mr. Cartin said I think the reason Ms. Haskins came back with the one-time notice to all the members linking to the spreadsheet that contains all of the rules that have been adopted from legislation that passed in the previous session, is because that's the most streamlined way that we also feel complies with current law. We wanted to float that to the Committee as an option, but if it's the Committee's desire, consistent with Representative McCann's suggestion that the bill would, I think, address, we can contact the members and find out who wants to opt out of being notified as a co-sponsor. We can do that, too.

Senator Johnston said so then what would happen is I would get that e-mail and it would have all the bills that have rules and I would look down that list and the list would presumably include bill numbers, bill prime sponsors, and something about the topic. I could look and find my own bills and if I find another interesting bill that I was curious about that I wasn't a prime sponsor on but I would like to know what the rule-making was, I can click through it. Now, because there is only one e-mail coming, the trade off you make as a legislator is instead of sifting through 30-40 e-mails you can spend five minutes with that one e-mail to look down all the bills you might be interested in and click through the ones that you want. If that's your recommendation, that seems eminently reasonable to me.

Mr. Cartin said I think we can build it that way. The devil is in the details. If what you link to has that information on it – although we haven't parsed out the details – I think that's the type of information that would be on that link.

Senator Johnston said it would be easier for your staff to send that e-mail one time then have to send 500 e-mails for each bill that had rules made to a separate list of sponsors. Mr. Cartin said yes, administratively it's easier but also I would want to reiterate that the reason we came to the Committee in the first place is because of the feedback we were getting from members. So, to the extent that it's one time instead of 500 times, I think it would probably address both sides of the issue.

Senator Steadman asked what is the pleasure of the Committee? Does anyone want to make a motion on the bill draft or should we move on?

Senator Johnston asked what would we be motioning? The draft as it currently is? What is Mr. Cartin's recommendation?

Senator Steadman said we have before us a draft that would allow the co-sponsors to opt out. We can choose not to introduce this bill and just instruct the Office to implement their alternative proposal.

Senator Johnston asked what is the Chair's pleasure?

Senator Steadman said I wish I thought more about this bill when it went through originally. I'm in the camp that found it annoying to get all the notices. I was wanting to have a little bit more ability to control the communication that law dictates the staff to have with me. I liked the opt out and I'm still concerned that the staff alternative of consolidating this into one e-mail may not really satisfy the people that advocated for this law and that are using it in ways we may not be. That one e-mail a year may not be timely for them or there may be so much information in that one e-mail that they miss the thing that they really ought to be seeing. I'm a little apprehensive about the alternative. I wish I could go back and vote no on this bill because I don't think this was a burning problem that needed to be solved in the first place. I remember when the bill went through I thought do I really need legislative staff to be watching something for me that I could watch myself if I cared about it anyway, particularly assigning that function to the Office, when I've got other staff in my office or in our caucus that might have been assigned this function. The Office has implemented this and it's not an insignificant amount of work is my understanding.

Representative McCann said it sounds like we would probably be better off with the bill because that puts it in statute that people can opt out and it gives the statutory authority to the Office to do this, so there isn't any question that they did this on their own. That will give people who don't want to change it the opportunity to talk about it on the floor or in committee.

Senator Steadman said I think I want to move forward with the opt-out bill. However, I'm looking at the bill title and given that we've had a number of alternatives and discussion about prime sponsors, I'm wondering if maybe we should introduce this opt-out bill with a little bit broader title in case someone wants to get to a different solution. The title is limited to co-sponsors right now. There's the issues of rules that were adopted versus notice of pending rule-makings. Someone could want to make this more complicated. When this bill was originally debated, I don't think people had it in the context that we have now, having been

through a cycle of getting these e-mails. Maybe we'll hear more input with a bill with an amenable title that goes through. Does that seem like a workable way to proceed?

1:44 p.m.

Hearing no further discussion or testimony, Representative McCann moved to move forward with a bill that deals with the topic of legislators being able to opt out of rule notices. Senator Steadman said for clarification, your motion would move forward the draft we have before us, LLS No. 15-0209, with a broader title. Representative McCann said yes, and with a broader title if wanted. The motion passed on a vote of 7-0, with Representative Foote, Representative Gardner, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting yes.

Senator Steadman agreed to be the prime sponsor for the opt-out bill. Representative McCann agreed to be the other prime sponsor for the bill. Representative Foote, Representative Kagan, Senator Guzman, and Senator Johnson agreed to be co-sponsors of the bill.

1:47 p.m. – Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 4 – Sponsorship of Other Committee on Legal Services Bills: Bill to Enact the C.R.S.; and Revisor's Bill.

Ms. Gilroy said I would ask for your consideration of sponsoring both the publications bill and the revisor's bill. You'll recall that the publications bill is a bill that's introduced very early in the session, one of the very first bills introduced, annually sponsored by this Committee. Essentially what it does is put together all of the compilation of the Colorado Revised Statutes: The 2013 version with all of the bills that were enacted last session plus any changes that we made to it by revision – grammatical, capitalization, spelling corrections – and harmonizing bills that may have conflicted without changing intent. This year also was the inclusion of changes to titles 22 and 24 as a result of the passage of Proposition 104 on school board meeting requirements. All those are compiled into the 2014 Colorado Revised Statutes that you all approve by the publications bill. In case you didn't see it, Nate Carr authored a blog on it on our LegiSource blog. It's a great explanation of what the publications bill does. That's the publications bill and I would ask for your consideration in sponsoring it again.

1:49 p.m.

Hearing no further discussion or testimony, Representative Kagan moved that the Committee sponsor the publications bill. The motion passed on a vote of 7-0, with

Representative Foote, Representative Gardner, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting yes.

Senator Johnston agreed to be the prime sponsor for the bill to enact the C.R.S. Representative Kagan agreed to be the other prime sponsor for the bill. Representative Foote, Representative McCann, Senator Guzman, and Senator Steadman agreed to be co-sponsors of the bill.

Ms. Gilroy said the other bill is the revisor's bill. This bill is introduced at the very end of the session. It's a corrective bill. We are at about 80 sections in the bill right now. Our staff meticulously goes through the C.R.S. every year and finds any errors or mistakes that are nonsubstantive and we put them in this bill. We also get input from members of the public such as attorneys. This bill is nonsubstantive; we endeavor to make sure we don't make any substantive changes to the law. We ask that you consider sponsoring it again this year to make those nonsubstantive changes to the Colorado Revised Statutes.

Senator Steadman said the vote today is to draft the bill for introduction but will we see it again prior to introduction? Ms. Gilroy said no, you will not. The prime sponsors will. This is not one that we typically provide a copy like the rule review bill. You have to trust the staff and your prime sponsors. This is a bill that is introduced with an attached appendix that explains every single change that we make in the bill – it's the only bill that is introduced that way – so that we are very transparent in showing you exactly what the changes are. Last year I did a blog on it so you have an idea of what we include in the bill and what we try very hard not to include in the bill.

1:52 p.m.

Hearing no further discussion or testimony, Representative McCann moved that the Committee sponsor the revisor's bill. The motion passed on a vote of 7-0, with Representative Foote, Representative Gardner, Senator Guzman, Senator Johnston, Representative Kagan, Representative McCann, and Senator Steadman voting yes.

Senator Johnston agreed to be the prime sponsor for the revisor's bill. Representative Kagan agreed to be the other prime sponsor for the bill. Representative Foote, Representative McCann, Senator Guzman, and Senator Steadman agreed to be co-sponsors of the bill.

1:55 p.m. – Bob Lackner, Managing Senior Attorney, Office of Legislative Legal Services, addressed agenda item 5 – Litigation Update.

Mr. Lackner said I'm pleased to present to you at this time the 2014 edition of the summary of litigation affecting the General Assembly as of today's date. I'm honored to be the person who coordinates the production of this document, but this 2014 edition represents the work of approximately half the attorneys in our Office. As you may know, all the attorneys in our Office monitor the lawsuits in their areas of subject matter expertise as part of their regular responsibilities. We prepare the summary once a year. It's divided into two parts: The first part are cases in which the General Assembly as the institution or a member of the General Assembly is a party in a lawsuit; and the second part are cases of interest divided by subject matter. To get included in this category, it represents a subjective determination on our part of cases in which we think you or your colleagues may be interested. These tend to be cases in which the legality of legislation or an agency rule is at issue or cases that otherwise involve some important or significant issue of public policy. We also post this summary on our web site. In the interest of time, I will not be discussing the contents any further. If you have questions about a case that's discussed in the summary, you'll see that there is a contact listed for each case, who is the attorney in our Office that monitors that case. We encourage you to contact them if you have questions. Further, if you have a question about litigation in general – maybe you've read about a case that's not featured and that you want to know more about – we're happy to answer your questions, or if you'd like us to follow a particular case for purposes of the summary, please contact us.

Representative Gardner said on the LVW case. Really? Wow.

1:57 p.m. – Dan Cartin addressed the Committee. He said Representative Gardner missed the last meeting, so just a brief update. The General Assembly won in the trial court on that particular issue. LVW has appealed to the Court of Appeals and so we're waiting for certification of the record.

Representative McCann said on the Kerr case, a petition for cert is pending in the Colorado Supreme Court, right? Mr. Lackner said the Governor, in his official capacity, has filed a petition for a writ of certiorari with the United States Supreme Court. As I understand it, the briefing on that is still ongoing.

2:00 p.m. – Senator Steadman addressed an item not listed on the agenda – Out-of-cycle Rules.

Senator Steadman said we talked about this at the last meeting. There was a discussion about requests for the Office to review rules out of cycle. Apparently, the Office does not have a written, explicit policy on this matter. It has been a practice for many, many years that members have been able to request the Office to review a rule out of cycle. For everyone's recollection, the rule cycle is November 1 through October 31 of the following calendar year. Out of cycle would be a rule not in that

defined one-year period. It may have predated it or it may be a rule that was just passed recently. The question is whether the Office ought to have more guidance for staff and for members to understand your power to make this request of them and how that's going to be handled. We have in front of us a draft that we didn't receive ahead of the meeting. It might not be fair to discuss this now, but this has been an ongoing discussion of the Committee.

2:02 p.m. – Debbie Haskins addressed the Committee. The reason I was asking to bring this back before you was to try to get some clarification on one piece of it and that was who to notify when the Office has received a request to review a rule out of cycle. The Committee had a pretty long discussion about who should be notified and the direction was that we should notify the Chair of the Committee and then there was this concept about having the highest ranking member of the minority party be notified, but it wasn't clear to us if it was the highest ranking member in the same house as the Chair or the opposite house. With divided chambers next year and possibly in the future, there's this issue of not notifying both parties. We think that's not necessarily the best policy, so we're thinking that it should be to notify the Chair and Vice-chair and the highest ranking member in the House and Senate. The other question is we don't know how highest ranking member is determined.

Representative Gardner asked couldn't you simply say the Chair and the highest ranking member of the party opposite the Chair? That may be the Vice-chair or sometimes that may be the ranking member. I don't know how you can decide the House or Senate, but you ought to tell two people.

Senator Steadman said let me interject a little more context into the discussion. The reason for this notice question is if staff reviews a rule out of cycle and brings it to us, that's a little more unexpected than rules that are in cycle. It's about the Chair's knowledge that that's possible and that it's afoot as well as members of the minority party. I think we were all working under the previous paradigm when we were talking about this last time because minority and majority were more clear. Notice is important not only so that if staff brings us a recommendation we're not caught off guard but also because what's more likely to happen is that there is going to be a request to review a rule out of cycle and if it's an old rule it was already reviewed once and so chances that staff is going to review it a second time and come to a different conclusion is not as likely to occur. When this happens and somebody wants an old rule reviewed and staff comes back and says we looked at it a second time and still don't have a problem with it, we may end up with a motion being made in committee, or we may end up with amendments on the floor, but we're not really aware that it's even an issue. So, the question is should we have this notice provision so that everyone is on notice that there is an issue lurking out there and it may bubble up. I think that's useful to the process because I've been in a situation where there were floor amendments proposed to the rule review bill and it caught us

off guard. Should this Committee have a closer relationship to the work that the Office does and when there is something like this in the works, who should know about it? Is that an improvement to our process?

Representative Gardner said I have made at least one request but I never brought it to the Committee. I don't know whether that was treated as an out-of-cycle rule review or just a request for an opinion on the rule. It seems to me that I ought to have the ability to request assistance from the Office without that being reported to the opposing party or any other member of the General Assembly. There ought to be a clear delineation for when this is reported to the Committee. I have thought a lot about various rules and whether or not they ought to be brought up out of cycle. I have been used to operating as a member of the General Assembly with complete confidentiality with respect to the Office until such time as I say publish or something. This seems to infringe on that a bit. Shouldn't I be able to have all those conversations for a long time before the Chair or the other party is notified?

Senator Steadman said I think we discussed this last time, too, and you raise a very good point. I think we as a Committee, in our oversight role for the Office, should be jealous about guarding the attorney-client privilege that the Office owes to each individual member. Perhaps we've picked the wrong point in time for the notice to occur. Maybe if upon out-of-cycle review the Office decides they're going to bring something to us, at that point they let the Chair and members of the Committee know that there's been a request for out-of-cycle review and something is coming of it. The requesting member can be told at that point that it's going to become an agenda item for the Committee and has to be disclosed. I think that's their expectation: If they're successful in their request for out-of-cycle review, that's what they want to have happen.

Representative Gardner said I guess I was always under the impression that were I to do so I needed to go to the Chair of the Committee and say I want this on the agenda. I don't know what would have happened if I was told we're not going to put it on the agenda, but notice would have been satisfied and I think I would have pushed it forward anyway.

Senator Steadman said you raised an issue that we also talked about quite a bit last meeting. Senator Brophy and I had quite a dialogue about this and were in agreement. I was questioning whether if someone makes an out-of-cycle request and staff, upon their second review, decides there is an issue and wants to bring it to us, are we giving the requestor the ability to set the agenda for this Committee when it really should be the prerogative of the Chair. As I recall, Senator Brophy and I were in agreement about wanting to protect the prerogative of the Committee Chair to control the agenda. However, if you are Chair and you say no I don't want this on the agenda, then you invite opportunities for things like what sort of happened here

today to happen again. That's something that happens and is within the rules of procedure.

Representative Gardner said even better, your case can be brought on the floor of the House or Senate when the rule review bill comes to the floor.

Ms. Haskins said we were hoping to get our policy written so that we would have some guidance about what to do and print it in the handbook we've been working on for the Committee. It feels, however, that maybe we don't have consensus about this confidentiality piece and I really don't want to print a handbook with a policy that the Committee is not completely accepting of. Maybe Mr. Cartin and I need to think about what to do on this and we can put the handbook printing on hold for the moment.

2:11 p.m. – Dan Cartin addressed the Committee. He said we could take that piece out and canoodle some more. My suggestion would be to print the handbook, but take that piece out and leave it silent, and canoodle some more on it to the extent that we think it's meritorious.

Senator Steadman said let's take this off the table, then.

2:12 p.m. – Senator Steadman addressed agenda item 6 – Scheduled Meetings for the Committee During the Session.

Senator Steadman said our next meeting is January 9, 2015. That will be a very quick meeting at 8:30 in the morning and the only item of business will be the election of Chair and Vice-chair for the Committee. Other than that, we'll be meeting the first Friday of each month over the lunch hour starting in February.

2:13 p.m. – Dan Cartin and the Committee acknowledged Representative Gardner and thanked him for his service on the Committee.

2:16 p.m.

The Committee adjourned.