EXECUTIVE BRANCH AGENCIES

I. THE ADMINISTRATIVE ORGANIZATION ACT OF 1968.

Article 1 of title 24, C.R.S., was enacted in 1968 and implemented the constitutional amendment approved in 1966 calling for the reorganization of the state government's executive branch into not more than twenty principal departments. The article includes a listing of the principal departments and sets forth the statutorily-created divisions, sections, boards, commissions, etc., placed within a department. To keep article 1 current and to define clearly the status of newly-created agencies within the context of executive reorganization, a bill creating a new executive agency with substantive powers (i.e., an agency other than a strictly advisory board or committee), transferring such an agency from one department to another, or abolishing such an agency must include an appropriate amendment to article 1 of title 24, C.R.S.

Section 24-1-105, C.R.S., defines three types of transfers that determine the relationship between an agency and the principal department. All drafters should be thoroughly familiar with these types of transfers since each new agency and each agency transferred must be designated as functioning pursuant to a specific type of transfer.

A **type 1** transfer denotes a relationship in which the subordinate division, board, or other agency exercises its powers, duties, and functions independently of the executive director of the department within which the agency is placed. The most important powers retained by a **type 1** agency - powers which may be exercised in whatever way the agency determines, even without the approval of the executive director - are the promulgation of rules and the rendering of administrative findings, orders, and adjudications.

In a **type 2** transfer, all powers, duties, and functions of the division, board, or other agency belong to the executive director of the department. In both a **type 1** and a **type 2** transfer, the executive director of the department is vested with "budgeting, purchasing, and related management functions".

A **type 3** transfer involves the transfer of *all* functions of an agency to another agency and the abolition of the old agency; it is rarely used.

Type 1, **2**, and **3** transfers *only* apply to executive branch agencies and not to judicial or legislative branch agencies.

When drafting a bill involving the creation of a new agency or the transfer of an existing one, the drafter must add a new subsection, paragraph, or subparagraph to the section in article 1 of title 24, C.R.S., concerning the department to which the agency is being added or transferred. For a new agency, the text should refer to the type of transfer and state that

the agency shall exercise its powers, etc., *as if* it were transferred by a **type 1** or **type 2** transfer since a new agency is not actually being transferred. If the agency is to be in the department of regulatory agencies, the standard language regarding the applicability of the Sunset Law (section 24-34-104, C.R.S.) must be added in the statute governing the agency, and the agency must be added to the list in section 24-34-104. If the new agency is a department, an entire new section must be added to article 1 of title 24 and section 24-1-110, C.R.S., must be amended to add the new department to the list of principal departments. If a bill involves the transfer of an existing agency, the relevant subsection, paragraph, or subparagraph must be repealed from the section concerning the department from which the agency is transferred.

Similar language defining the type of transfer should be included in the substantive law governing the agency created or transferred. For example, see section 24-32-202 (2), C.R.S.

Occasionally certain functions of one agency are transferred to another agency without the agency itself being transferred. Unless such functions are already specified in article 1 of title 24 (for instance, see section 24-1-120 (3)), it is not necessary to amend article 1. The drafter should consult with the sponsor about whether the transfer of duties (or the transfer of agencies) involves the transfer of employees, property, contracts, appropriations, and the continuity of administrative rules and regulations. The drafter should be alert to any potential problems and should include standard provisions in any transfer bill if they are appropriate. Such provisions belong in the substantive law affecting the agency transferred - not in article 1 of title 24, C.R.S. See section 24-37-105, C.R.S.

In past attempts to solve the problem of numerous conforming amendments required by a bill transferring agencies or functions some drafters have included a section to the effect that "Whenever in any law concerning _____ reference is made to the division of _____, such term shall be deemed to refer to the division of _____". These attempts are confusing, and the Office of Legislative Legal Services prefers to include specific conforming amendments to all statutory sections affected by the transfer unless such amendments are absolutely not feasible in light of available time. (See, for example, section 11-30-124 (6), C.R.S., which authorizes the Revisor of Statutes to make conforming amendments in connection with a 1989 bill that created the division of financial services.) The computer statutory search program makes the location of affected sections much easier.

Colorado currently has nineteen principal departments - one less than the constitutional maximum of twenty principal departments. If twenty departments were to be reached again, the creation of a new department would require an existing one to be abolished. (See section 22 of article IV of the state constitution.)

II. THE STATE PERSONNEL SYSTEM.

When drafting bills involving the state personnel system, a drafter should keep in mind two provisions of the state constitution concerning the state personnel system that have occasionally caused problems. These provisions are as follows: (1) The provision governing which state employees and officials must be included in the state personnel system; and (2) The provision designating the appointing authority for these employees.

The state constitution states that the personnel system comprises "all appointive public officers and employees of the state", except those specifically exempted *by the constitution*. In other words, all state officers and employees, other than elected officials, must be within the personnel system unless constitutionally exempted. The major exemptions are for the following categories of persons:

(1) Members of boards and commissions serving without compensation except per diem and expense reimbursement;

(2) Certain named boards (the Public Utilities Commission, the State Board of Land Commissioners, the State Parole Board, the State Personnel Board, and the Colorado Tax Commission, which is now the Board of Assessment Appeals, and the Industrial Commission, which has been abolished);

(3) Assistant attorneys general;

(4) Legislative and judicial department members, officers, and employees;

(5) Employees in the offices of the governor and lieutenant governor whose functions and duties are confined to the administration of those offices; and

(6) Faculty members and certain administrators of educational institutions and departments.

Also exempted are officers specified elsewhere in the constitution; for instance, cabinet officers, who are exempted by section 22 of article IV, the commissioner of insurance, who is exempted by section 23 of article IV, and other officers named in the state constitution such as the Commissioner of Mines.

It follows that a constitutional exemption from the personnel system must be found if a bill establishes any officer to serve as a gubernatorial appointee with the exception of cabinet members.

Issues arise in connection with the attempt to establish full-time boards whose members are exempt from the personnel system. At the time the personnel system amendment was adopted, the list of exempt boards included virtually all the full-time boards in state government. Section 40-2-101 (2), C.R.S., requires public utilities commissioners

to "devote their entire time to the duties of their office to the exclusion of any other employment". The salaries of such commissioners are fixed by the General Assembly on an annual basis and are "for the full-time services of the persons involved". (See section 24-9-102 (2), C.R.S.) Section 17-2-201 (1), C.R.S., provides that parole board members "shall devote their full time to their duties as members of the board". Although not explicitly stated, the constitutional exemption for board members receiving per diem and expense reimbursement has, with one exception, been used exclusively for part-time boards composed of citizen members.

Two bills from the 1977 session raised the issue of whether the General Assembly can use the general constitutional exemption from the state personnel system for members of boards and commissions receiving only per diem and reimbursement for expenses to create new full-time boards composed of appointed officials outside the personnel system by setting the per diem high enough to attract full-time board members. One of these bills did not pass; the other was in effect for a few years and the mechanism was not challenged. The better practice would appear to be not to create full-time boards exempt from the personnel system without a constitutional amendment.

From time to time the impression has existed that there may be an administrative rule, either of the State Controller or of the State Personnel Board, that provides that any person who receives more than some specific amount in any year in per diem compensation is presumed to be a full-time employee and therefore subject to the state personnel system. So far as the Office of Legislative Legal Services is able to determine, no such rule is currently in effect. Even if such a rule existed, its constitutionality might be in doubt and the legal question would still remain as to whether the constitution permits full-time state employment outside the personnel system without specification in section 13 of article XII.

The question of inclusion in the personnel system was addressed by an Attorney General's memorandum dated October 26, 1976, which sets forth criteria for the approval of personal service contracts. This is a slightly different issue since it requires construction of the constitutional provisions governing temporary employment, which is another constitutional exemption from the personnel system. The memorandum reflects the assumption that all "employment", as opposed to contractual relationships, must be according to the constitutional provisions governing the personnel system. The memorandum distinguishes between "employees" and "independent contractors" and states that an independent contractor, among other things, is not subject to the control of the state as to the means and methods of accomplishing the results of his or her work, selects his clients and is free to work for one or more during any given interval, determines the time and place work will be performed, generally does not receive regular amounts at stated intervals and may agree to perform specific services for a fixed price, and is usually subject to a temporary contract used primarily where special expertise is required for a definite period to accomplish a limited task. Based on the foregoing criteria, it seems probable that a full-time board member would be an employee and not an independent contractor.

Subsection (7) of section 13 of article XII provides that the head of each principal

department is "the appointing authority for the employees of his office and for heads of divisions, within the personnel system, ranking next below the head of such department". Division heads are the appointing authorities for all personnel system positions within their divisions.

There are at least two common ways of contravening these provisions. The first occurs when a governor-appointed board or commission is created within a department either by a **type 1** or **type 2** transfer and it is desired to give the board a permanent staff. Perhaps an entirely new division is sought. If the new board, which is presumably exempt from the personnel system because its members receive only per diem and expenses, is made the head of the division, the constitution requires that it also be the appointing authority for all the employees of the division. It may not want to be involved in this kind of administrative detail (or in other day-to-day administrative duties). Alternatives are to make the board a part of the office of the executive director, in which case the executive director would appoint the staff or, if the staff is to be large enough to warrant a staff director or executive secretary, to make that director, who would be under the personnel system, the head of the division. In the latter case, the director would of course have to be appointed by the executive director of the department and *not* by the board; the statute could specify that the appointment be made only after consultation with the board. See section 24-34-302, C.R.S., which requires the executive director of the department of regulatory agencies give good faith consideration to the recommendations of the civil rights commission before appointing the director of the civil rights division. Another possibility might be to direct that a member of the board sit on any panel convened to interview candidates for the position.

The language of section 13 (7) quoted above might be construed to require that all heads of divisions must be within the personnel system. Although the great majority of division heads are personnel system employees, since there is no exception in section 13 (2) for the entire class of division heads and such an exception was defeated by the voters at the 1976 general election, this reading poses problems for agencies like the Colorado Racing Commission, which is specifically named head of the Division of Racing Events. Since the commission is exempt from the personnel system (because it is compensated on a per-diem-plus-expenses basis), it makes no sense to read subsection (7) to require commission members to be personnel system employees appointed by the executive director; the alternative under this reading of the "within the personnel system" language is to construe subsection (7) to require that division heads be individuals and not exempt boards or commissions and that such individuals must be within the personnel system.

Statutory provisions concerning appointments that were enacted prior to 1970 (the year section 13 of article XII of the state constitution was adopted) may not conform to the constitution. A drafter should be very careful not to use these statutes as models for new agencies. Suggestions for good models are the State Housing Board and the State Director of Housing (part 7 of article 32 of title 24, C.R.S.) and the Civil Rights Commission and the director thereof (part 3 of article 34 of title 24, C.R.S.).

The second problem area is encountered when one attempts to have the executive

director of a principal department (who is not within the state personnel system) also hold the office of division director or, conversely, to have a division director act ex officio as the head of a department. The constitution does not seem to contemplate this kind of arrangement. For instance, how can an executive director (who is exempt from the personnel system) appoint himself to a position within the personnel system? Could the governor designate someone who already holds a personnel system position (as the head of a division) to fill the exempt position of department head? Furthermore, in a wholly new department, how could a division head exist without there having been an executive director appointed previously? The three examples of this problem that appeared in the statutes were altered to conform to the constitution in 1971 (the executive director of the Department of Health (now known as the Department of Public Health and Environment) was ex officio the head of the Division of Administration, the executive director of the Department of Labor and Employment was ex officio the director of the Division of Labor, and the Chief Engineer was ex officio the head of the State Department of Highways (now known as the Department of Transportation)).

In spite of the apparent absurdity of these situations, at least one example exists in current law. Section 24-30-1001, C.R.S., enacted in 1976 and amended in 1995, requires that the executive director of the Department of Administration (now Personnel) be the head of the Division of Administrative Hearings. This case, however, is to be distinguished from the situation in which a position may exist but has not in fact been funded. The director of the Division of Registrations in the Department of Regulatory Agencies is created by statute, but the executive director of the department, for periods in the past, has performed all of the duties connected with the position.

III. SUNSET LAW - "SUNSETTING" AN AGENCY OR ITS FUNCTIONS.

It is not unusual for a drafter to be asked to prepare a bill affirmatively terminating an agency or its functions even though the agency or functions would be terminated according to the schedule in section 24-34-104, C.R.S., whether or not the General Assembly took any legislative action. Under such circumstances, it is important to ascertain from the sponsor exactly what is the desired result. For example, is the statutory function to be completely abolished? Or are the functions to be assumed by another administrative unit? In other words, in each case the drafter should determine whether all the powers, duties, and functions of an agency should be repealed, transferred elsewhere, or assumed by some other entity and what provision, if any, is to be made for staff, property, records, and so forth. The provisions of the law creating the agency may have to be repealed as well as any provisions that are so closely tied to the agency as to have no meaning or effect if the agency is gone. Additionally, the paragraph listing the agency in section 24-34-104, C.R.S., should be repealed, and care should be taken to insure that this repeal is effective on the same date as the repeal of the provisions creating the agency.

If the sponsor of a bill abolishing an agency that is subject to the sunset process wants

that agency to have the one-year period for "winding up its affairs" as provided in section 24-34-104 (5) (b), C.R.S., the bill should have either an effective date clause making any repeals effective on July 1 of the year following the scheduled termination date or language similar to section 24-34-104 (12.5), C.R.S., which states that nothing in the repeal invalidates the windup period. If the sponsor wishes to abolish the agency without the one-year windup period, a non-applicability clause should be added stating that section 24-34-104 (5) (b) shall not be applicable to the agency.

In an effort to maintain consistency in the sequence of termination dates for divisions, boards, and agencies subject to the sunset law, section 24-34-104, C.R.S., contains various subsections categorized by date of termination and subdivided by department or division in which the board or agency being terminated is found. When drafting a bill that includes a termination, include the new information in the proper subsection, or if necessary, add a new subsection or paragraph that maintains the sequence of section 24-34-104, C.R.S.

When a new board, division, or agency is created in the department of regulatory agencies, it should be subject to the sunset law, and a bill dealing with this should:

(1) Add language indicating that the provisions of section 24-34-104, C.R.S., are applicable to the new entity;

(2) Add language to section 24-34-104, C.R.S., specifying the termination date.

When an agency subject to the sunset law is to be continued, the paragraph listing the agency should be repealed and the agency should be relisted in a new subsection with the appropriate termination date and a corresponding effective date in the same manner as a new agency.

When a board or agency is in its windup period under sunset, it is reestablished rather than continued. The language shown in the sample bill below should be added to the section providing for termination in the article where the board or agency is created:

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 12-54-104 (2), Colorado Revised Statutes, is amended to read:

12-54-104. Board of mortuary science - membership - termination. (2) THE BOARD WHICH TERMINATED ON JULY 1, 1981, ACCORDING TO THE PROVISIONS OF SECTION 24-34-104, C.R.S., IS HEREBY REESTABLISHED WITH THE POWERS, DUTIES, AND FUNCTIONS SPECIFIED IN THIS PART 1. The provisions of section 24-34-104, C.R.S., concerning the termination schedule for regulatory bodies of the state unless extended as provided in that section,

are applicable to the board of mortuary science created by this section.

SECTION 2. 24-34-104 (4.5) (b), Colorado Revised Statutes, is amended BY THE ADDITION OF A NEW SUBPARAGRAPH to read:

24-34-104. General assembly review of regulatory agencies for termination, continuation, or reestablishment. (4.5) (b) (IX) BOARD OF MORTUARY SCIENCE, CREATED BY SECTION 12-54-104, C.R.S.

SECTION 3. Repeal. 24-34-104 (4) (b) (XIII), Colorado Revised Statutes, is repealed.

SECTION 4. Effective date. This act shall take effect July 1, 1982.

SECTION 5. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

In working with bills either continuing or reestablishing any division, board, or agency, special attention should be given to section 24-34-104 (11) (a), C.R.S., which provides that "No more than one such division, board, or agency shall be continued or reestablished or its functions amended in any bill for an act, and such division, board, or agency shall be mentioned in the bill's title." When drafting and checking bills that continue a division, board, or agency subject to termination under the "Sunset Law" (section 24-34-104), include in the title of the bill some mention of the name of the division, board, or agency.

IV. SUNSET OF ADVISORY BODIES.

In the same manner as the general sunset law, section 2-3-1203, C.R.S., requires that all newly created advisory committees have a life not to exceed ten years and a corresponding repeal provision in the statutory section creating the committee. In addition, section 2-3-1203 (3), C.R.S., must be amended to add the advisory committee to the appropriate year for termination contained in that section.

V. OTHER SPECIAL STATUTORY REQUIREMENTS.

Pursuant to direction from the legislative leadership, the Office of Legislative Legal Services is responsible for informing members of bills that are affected by certain statutory requirements in addition to the regular legislative procedures. Drafters should identity five

types of bills subject to special statutory requirements in addition to regular legislative procedures. If a bill is identified, the Office informs the prime sponsor of the special statutory requirements, attaches a letter to the bill when introduced that indicates the special requirements, and gives a copy of the letter to the chair of the committee of reference to which the bill is referred.

A. Health care coverage mandates.

Section 10-16-103, C.R.S., requires the submission of a report with any bill mandating a health coverage or offering of a health coverage by a health care coverage (health insurer) entity. The report must address the social and financial impacts of such a requirement, and the statute sets forth the specifics to be included in the report. This statute is silent on what, if anything, the legislative committee of reference must do with the report. An office memorandum detailing how the General Assembly should implement section 10-16-103, C.R.S., is found in Appendix F of this manual.

B. Impacts on criminal justice system.

Section 2-2-701, C.R.S., requires any bill that is introduced at any session that affects criminal sentencing and that may result in a net increase or a net decrease in periods of imprisonment in state correctional facilities to be reviewed by the director of research of the legislative council for the purpose of providing information to the General Assembly on the long-term impact that may result from the passage of the bill. Section 2-2-702, C.R.S., requires all bills affecting criminal sentencing that would result in a net increase in periods of imprisonment in a state correctional facility to be assigned or referred to the appropriations committee of the house of origin. Section 2-2-703, C.R.S., requires that any bill that results in a net increase in periods of imprisonment in state correctional facilities must include an appropriation of moneys sufficient to cover any increased capital construction costs and increased operating costs that are the result of such bill in each of the first five years in which there is a fiscal impact related to the bill. Exceptions to this requirement are permitted if the exception is expressed in the bill itself. The costs of the bill may be offset by corresponding reductions to other criminal sentences in the same bill or some other bill so long as the connection is clearly made. Examples of statutory appropriations and exceptions from the requirement to comply with this provision can be found in Appendix E of this manual.

C. Capital Development Committee.

Section 2-3-1304 (1), C.R.S., gives the Capital Development Committee jurisdiction for purposes of determining the priority to be accorded proposals made by entities of state government for capital construction, controlled maintenance, and capital asset acquisitions. The committee is to make determinations based upon information available to the committee based on estimates of revenue available for these purposes.

D. "Sunrise" issues.

If a drafter is asked to draft a bill that involves new regulation of a profession or occupation not previously regulated, the drafter should consult with the sponsor about the applicability of section 24-34-104.1, C.R.S., which requires that anyone proposing new regulation submit certain information to the department of regulatory agencies for sunrise review. That section requires the department to submit a report to the General Assembly and discusses the introduction of legislation based on such report. While failure to comply with the statutory procedure probably does not invalidate a bill for new regulation, the sponsor should be aware that the issue could arise.

E. Mandated continuing professional education.

Section 24-34-904 (1) (n), C.R.S., requires that information concerning the need for any proposed mandatory continuing education program be submitted to the office of the executive director of the department of regulatory agencies prior to introduction of a bill to mandate the requirement. The executive director analyzes the proposal and files a written report with the General Assembly on whether the requirement would likely protect the public served by the professional group. This law does not apply to occupations that had mandatory continuing education requirements prior to July 1, 1991, or to any bill introduced as a result of an interim committee study. In practice, reports from the executive director on bills imposing a continuing education requirement are usually prepared concurrently with the drafting and introduction of the bill and are considered by a committee of reference when acting on the bill.

VI. RULE-MAKING AUTHORITY.

A bill may require a provision that authorizes a state agency to promulgate rules or regulations. For example, this may occur when a bill either creates a new state agency or creates a new program within an existing state agency. In drafting such a provision, it is important to keep in mind the following items.

A. Delegation of authority to state agency - constitutional requirements.

The General Assembly may delegate to an agency the authority to promulgate rules to carry out the legislative purposes of an act of the General Assembly. In so doing, the General Assembly is delegating *legislative power* to an agency in the executive branch.

Concurrent with such a delegation of legislative power, the General Assembly must include sufficiently clear standards to ensure that the fundamental policy decisions made by

the elected legislative representatives of the people will not be altered by agency personnel. *Dodge v. Department of Social Services*, 657 P.2d 969 (Colo. App. 1982); *Elizondo v. State*, 194 Colo. 113, 570 P.2d 518 (1978). Otherwise, the delegation may constitute an unconstitutional delegation of legislative power. The test for determining the propriety of a legislative delegation is not simply whether the delegation is guided by standards but whether there are sufficient statutory standards and safeguards, in combination, to protect against the unnecessary and uncontrolled exercise of discretionary power. *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981).

A proper statutory grant of rule-making power allows the General Assembly to establish the policy and principles to guide the state agency and gives the state agency rule-making authority to fill in the details that cannot be addressed by the statute. The grant to the agency of rule-making power consistent with the policy and principles is not a delegation of the General Assembly's policy determination function but is at most the delegation of the power to establish rules for the achievement of that policy. See Sutherland Stat. Const. § 4.15.

B. Drafting considerations.

The drafter should consider the following factors when drafting a rule-making provision:

1. *Generally*.

a. What specific individual, board, or other entity has rule-making authority? A delegation of rule-making authority to a "department" or "division" may create ambiguity and should be avoided.

b. Which entity or officer in the state agency has historically been given rule-making authority? Are there existing rule-making provisions for that agency that may provide examples?

c. Is the rule-making authority mandatory or discretionary?

d. Determine if the state agency will be or has been created by a **type 1** or a **type 2** transfer. Section 24-1-105, C.R.S., describes these types of transfers and should be reviewed in connection with this determination. Under section 24-1-105 (1) and (4), a **type 1** agency exercises its delegated rule-making power independent of the head of the principal department to which it is allocated, but the power delegated to a **type 2** agency to promulgate rules is exercised by the head of the principal department to which the agency is allocated.

Therefore, be aware that a delegation of rule-making authority to a **type 2** agency may raise issues as to whether that delegation is intended to be consistent with section 24-1-105,

C.R.S. Specifically, it may be unclear whether rule-making is to be performed by the agency itself or by the head of the agency's principal department.

If the delegation of rule-making authority involves a **type 2** agency, the following options should be considered:

i. Rule-making authority may be delegated to the executive director of the principal department in which the **type 2** agency is located. Two examples of such a delegation are as follows:

Example 1.

X-X-XXX. Powers and duties of executive director. (1) In order to perform his duties, the executive director shall have power to:

(a) Promulgate rules in accordance with article 4 of title 24 for the controller and the staff of the division of accounts and control in the collection of debts referred to that office, including such matters as referrals to collection agencies or practicing attorneys for out-of-state collection of debts, authority to write off, release, or compromise, authorization of suit filings, and methods of collection of judgments;

* * *

Example 2.

X-X-XXX. Surplus and excess equipment and supplies. (1) The executive director shall promulgate rules to be utilized by the division in governing:

(a) The sale, lease, or disposal of surplus equipment and supplies by public auction or competitive sealed bidding, but no public employee, which for the purposes of this subsection (1) includes elected officials, shall be entitled to purchase any such equipment and supplies unless such purchase satisfies the conditions specified in subsection (2.1) of this section; and

(b) The transfer of excess equipment and supplies.

* * *

ii. If, under the circumstances, it is appropriate for the rule-making authority to be held by someone other than the executive director, rule-making authority may be delegated to a **type 1** board, commission, division, etc. having authority over the **type 2** agency. An example of such a delegation is as follows:

Example 3.

X-X-XXX. Child care centers - rules. The state board of health, after consultation with the division in the department of human services involved in licensing child care centers and if the committee formed in section X-X-XXX recommends the establishment of child care facilities in nursing homes, shall promulgate reasonable rules in accordance with article 4 of title 24, C.R.S., establishing any necessary requirements for operating a day care center in a nursing home facility. Such rules shall include, but need not be limited to, the following:

* * *

iii. Rule-making authority may be delegated to a **type 2** agency when the delegation contains a specific exception to the general rule in section 24-1-105 (4), C.R.S., that rule-making delegated to a **type 2** agency is to be exercised by the head of the principal department. An example of such a delegation is as follows:

Example 4.

X-X-XXX. Division of gaming - creation. There is hereby created, within the department of revenue, the division of gaming, the head of which shall be the director of the division of gaming. The director shall be appointed by, and shall be subject to removal by, the executive director of the department of revenue. The division of gaming, the Colorado limited gaming control commission created in section X-X-XXX, and the director of the division of gaming shall exercise their respective powers and perform their respective duties and functions as specified in this article under the department of revenue as if the same were transferred to the department by a **type 2** transfer, as such transfer is defined in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S.; except that the commission shall have full and exclusive authority to promulgate rules in accordance with article 4 of title 24, C.R.S., related to limited gaming without any approval by, or delegation of authority from, the department.

iv. Rule-making authority may be delegated to a specific person or entity in the **type 2** agency rather than to the agency in general. The delegation to a specific person or entity may be sufficient to override the general rule in section 24-1-105 (4), C.R.S., that rule-making delegated to a **type 2** agency is

to be exercised by the head of the principal department. However, the drafter may also want to reinforce this intention by including an express exception, as in the preceding example An example of such a delegation without an express exception is as follows:

Example 5.

X-X-XXX. Rules. The director of the division of local government of the department of local affairs may, after consultation with the affected departments or agencies, if any, promulgate, adopt, amend, and repeal such rules in accordance with article 4 of title 24, C.R.S., as may be necessary for the implementation and administration of this section.

v. If the delegation of rule-making authority is to a newly created agency, it may be appropriate to establish the agency by a **type 1** transfer instead of a **type 2** transfer if the powers, duties, and functions of the agency are actually of a **type 1** variety. If the grant of rule-making authority is in connection with an existing **type 2** agency that actually has **type 1** powers, it may be appropriate to amend the statute and change the agency to a **type 1** agency.

e. Rule-making authority may be inappropriate for an advisory committee or board.

2. *Information from sponsor*.

a. Does the bill sponsor have an idea of specific limits on the agency's rule-making authority? If so, is there a way to tailor the rule-making provision so that it specifically delineates the areas or subjects the rules will address? Examples of rule-making provisions granting limited or specific authority are contained in Appendix H of this manual.

b. If possible, get a feel for what the agency intends to do through future rule-making, see if it matches the sponsor's intent, and draft the provision to specifically target the rule-making authority to those intentions.

c. Consider carefully whether a grant of broad rule-making authority is appropriate or will create problems. Potential issues that may arise from broad authority should be raised even if all interested parties agree that the agency should be given that authority. Examples of rule-making provisions granting an agency broad authority are contained in Appendix H of this manual.

3. *Future considerations*.

Look down the road to the day when the agency's rules may come to the office during the rule review process. Will it be difficult to determine or understand at that time exactly what authority the agency has for the rule or rules? Try to avoid a situation where you, as the drafter of the rule-making provision, have to tell a member or agency that there is confusion over what the language means.

C. Use of terminology.

1. *Use of the term "rules".*

a. Section 24-4-102 (15) of the State Administrative Procedure Act provides that "rule" includes "regulation". Therefore, it is unnecessary to authorize an agency to promulgate "rules and regulations". The statutes, however, contain many examples of state agencies or agency directors that are authorized to make or promulgate "rules and regulations", "rules", "regulations", "standards", "guidelines", "procedures", etc. These terms have frequently been used interchangeably. Notwithstanding the past use of these various terms, the drafter should use the term "rules" unless another term is clearly warranted. For example, the term "guidelines" may be appropriate when an agency is called upon to describe conduct that is desirable but not required.

b. Two examples of appropriate terminology in rule-making grants are as follows:

Example 6.

X-X-XXX. Rules. The commissioner may promulgate rules necessary for the administration and enforcement of this article. Such rules shall be promulgated in accordance with article 4 of title 24, C.R.S.

Example 7.

X-X-XXX. Rules. (1) In order to carry out the purposes of this part 15, the state manager shall promulgate rules in accordance with article 4 of title 24, C.R.S., governing the following:

(a), (b), (c), etc., limiting the subject matter the rules will address.

* * *

2. *Cross-referencing the State Administrative Procedure Act.*

a. It is appropriate to cross-reference the State Administrative Procedure Act (article 4 of title 24, C.R.S.) in grants of rule-making authority to a state agency (see Examples 6 and 7 above). The way in which the State APA is cross-referenced will depend on whether the grant of rule-making authority is permissive or mandatory.

b. Permissive rule-making. Where the grant of rule-making authority provides that the state agency *may* make rules, the grant of authority should be contained in a statement separate from the cross-reference to the State APA. Failure to separate the delegation and cross-reference may result in ambiguity. Two examples of a *correct* delegation of permissive rule-making authority and a cross-reference to the State APA are as follows:

Example 8.

X-X-XXX. Rules. The executive director may promulgate rules necessary for the administration of this article. Such rules shall be promulgated in accordance with article 4 of title 24, C.R.S.

Example 9.

X-X-XXX. Rules. (1) The director may promulgate rules necessary for the administration of this part 2 governing the following:

(a), (b), (c), etc., limiting the subject matter the rules will address.

(2) Promulgation of the rules authorized by subsection (1) of this section shall be in accordance with article 4 of title 24, C.R.S.

An example of an *incorrect* delegation of permissive rule-making authority and a cross-reference to the State APA is as follows:

Example 10.

X-X-XXX. Rules. The executive director may promulgate rules necessary for the administration of this article in accordance with article 4 of title 24, C.R.S.

Example 10 is incorrect because it could mean that compliance with the State APA is permissive but not mandatory.

c. Mandatory rule-making. Where the grant of rule-making authority provides that the agency *shall* make rules, the cross-reference to the state APA may be

included in the grant (see Example 7 above) or the cross-reference may be stated separately as follows:

Example 12.

X-X-XXX. Rules. The director shall promulgate rules for the licensure of applicants under this part 2. Such rules shall be promulgated in accordance with article 4 of title 24, C.R.S.

D. Overly broad grants of rule-making authority.

Avoid extremely vague grants of rule-making authority such as "The board may adopt rules that are not inconsistent with this article." As noted under section VI. A. above, such standardless grants of authority are potentially unconstitutional.

E. Ambiguous statements of delegation.

In referring to administrative rule-making, use the verb "promulgate" and refer to "rules". If the sponsor wants an agency to engage in formal rule-making, say "The department shall promulgate rules..." Do not substitute an inaccurate or ambiguous statement such as "The department shall adopt standards..." or "The department shall establish guidelines..." The presumption should be that any standards or guidelines are to be adopted through the "State Administrative Procedure Act". However, if the sponsor does not want to require rule-making, but wants the agency to establish policies or procedures make that clear by stating that the agency need not promulgate the required procedures, standards, or guidelines as rules under the "State Administrative Procedure Act".

F. Additional examples.

Additional examples of statutory provisions authorizing rule-making are contained in Appendix H of this manual.

G. Rule review.

When a state agency with statutory rule-making authority promulgates rules, it must do so pursuant to the "State Administrative Procedure Act", which is contained in article 4 of title 24, C.R.S. Section 24-4-103 (8) (d), C.R.S., requires the agency to submit those rules to the Office of Legislative Legal Services for review by staff to determine whether the rules are within the agency's rule-making authority. A rule that staff determines is not within the agency's constitutional or statutory authority is presented to the Committee on Legal Services for the action prescribed in section 24-4-103 (8), C.R.S.

VII. CREATION OF ENTITIES THAT ARE TEMPORARY IN NATURE.

Occasionally, drafters are asked to create temporary boards, commissions, committees, or task forces that are established for a single, one-time only purpose and that can accomplish its purpose within a relatively short period of time. A temporary board does not include what are normally called "advisory" boards or any other board that has a continuing function. A number of practical problems have arisen in the past when the enabling legislation for such temporary entities was so sketchy that it failed to anticipate the activities and functions needed by the entity. Often the financial expenses of carrying out the functions are not anticipated. The following issues should be considered in creating temporary entities. Sample language for temporary entities is included in Appendix F of this manual.

A. Establish clear purpose.

Establish the clear purpose for the creation of the temporary board (for purposes of this example, "board" is used although it could be called a commission, committee, task force, etc.). A temporary board is one that is established for a single, one-time only purpose and that can accomplish its purpose within a relatively short period of time.

B. Membership.

The following issues relating to membership should be considered:

(1) Establish the number of members.

(2) Establish qualifications for appointments (optional):

(a) Political balance;

(b) Geographic representation;

(c) Ethnic balance;

(d) Representation from specific groups, occupations, fields of knowledge or training, etc.

(3) Establish how appointments are made and when.

(4) Establish chair of board

(5) Establish compensation provisions:

(a) Can provide that members serve without compensation;

(b) Executive branch officials generally serve without compensation;

(c) If the board has legislative members, they generally get reimbursed for necessary expenses and get the per diem allowed members of interim committees. (Note: this will drive a fiscal note - the fiscal note may be eliminated by putting in language that says the compensation is paid from available appropriations to the General Assembly.) The term "compensation" generally covers both per diem and expenses.

(d) If all members are paid compensation, this will drive a fiscal note.

C. Meetings.

Establish the minimum number of meetings (this will affect the fiscal note) and when the first meeting should be held.

D. Duties.

Establish duties and responsibilities of the board or issues to be studied if needed to supplement the language establishing the purpose and objective of the board.

E. Staff support.

(1) Establish what legislative agencies and/or executive agencies are to provide staff support for the board.

(2) Establish which of the legislative or executive agencies will serve as the lead staff agency.

(3) Establish whether the legislative agencies and/or executive agencies will need an additional appropriation in order to provide staff support (this may drive a fiscal note - the fiscal note may be eliminated by putting in language that says staff assistance will be provided from available appropriations to the agency). If an appropriation is necessary, an appropriation can be made to all affected agencies or can be made to the lead agency only with that agency making payments to the other affected agencies.

F. Recommendations.

(1) Establish to whom the recommendations of the board are to be made and when.

(2) Establish in what form the recommendations are to be made.

(a) Are the recommendations to be made in the form of a bill or bills?

(b) If in the form of a bill or bills, are they to be presented to the Legislative Council like other interim committee bills and do the rules relating to interim committee bills apply?

G. Sunset provisions.

Establish a repeal date for the section establishing the board in accordance with sunrise/sunset provisions.

VIII. REFERENCES TO UNITS OF GOVERNMENT NOT CREATED BY STATUTE OR REFERENCES TO NON-GOVERNMENTAL GROUPS OR ENTITIES.

As a general rule, a drafter should not refer to a division, section, or unit of state government by name unless that division, section, or unit is created by statute. If a division, section, or unit of state government has been statutorily created, it is most likely contained in and the proper name may be found in the "Administrative Organization Act of 1968", article 1 of title 24, C.R.S. However, if a sponsor requests that a bill contain a specific reference to an existing division, section, or unit that is not created by statute and has been created administratively, the drafter should include language that makes this fact clear to the reader. For example, the drafter could include a citation to section 24-1-107, C.R.S., which authorizes department heads to establish, combine, or reallocate divisions, sections, or units within their departments. Such a reference would read: "... the division of tax collectors, created pursuant to section 24-1-107, C.R.S." Another option would be to say "... the division in the department responsible for tax collectors".

Similarly, a drafter should not refer to non-governmental groups or entities in a bill. Such a reference may raise legal issues for the bill. Examples of possible concerns are: (1) Is there a violation of the constitutional prohibition on special legislation in section 25 of article V of the constitution; (2) Is there a violation on the constitutional prohibition on appropriations to private institutions in section 34 of article V of the constitution; (3) Is there an unlawful delegation in violation of section 35 of article V of the constitution? Additionally, such a reference might imply that the group or entity can be required to perform certain government-like functions. However, the group or entity can not be required to continue or begin to perform certain functions. The group or entity might be dissolved or simply go out of business. If a sponsor requests that a bill contain a specific reference to such a group or entity, the drafter should use general descriptive terminology. For example, the drafter could include a general reference to groups or entities that perform certain functions. Such a reference would read: "...a contract may be awarded to a nationally organized group or entity that provides services determined by the director to be the equivalent of the services specified in this section" or "a representative of a nonprofit organization that advocates for the homeless may be appointed to the board."