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STATE OF COLORADO
DEPARTMENT OF LAW

Office of the Attorney General

FORMAL)
OPINION)
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OF)
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No. 20-01

December 4, 2020

Patty Salazar, Executive Director of the Colorado Department of Regulatory Agencies and designee of Governor Jared Polis, requested this Formal Opinion on behalf of the Governor under § 24-31-101(1)(d)(II), C.R.S. (2020).

QUESTIONS PRESENTED AND SHORT ANSWERS

Questions Presented.

- (1) When the effective date of enacted legislation to renew a regulatory program that is scheduled for sunset repeal falls on a date subsequent to the repeal date listed in the regulatory program's organic act, but within the one-year wind-up period following that repeal date, is the enacted legislation effective as a matter of law in renewing the regulatory program?
- (2) Is the Occupational Therapy Practice Act at § 12-270-101, *et seq.*, C.R.S., as amended by House Bill 20-1230, effective as a matter of law, despite having been legislatively renewed by House Bill 20-1230 which held an effective date falling after the Acts statutory sunset repeal date on September 1, 2020?

Short Answers.

- (1) Yes. Because the provisions of § 24-34-104(2)(b), C.R.S., ensure that any regulatory program scheduled for sunset repeal shall continue for one year following the program's scheduled sunset repeal date, that regulatory program's organic act remains in effect as a matter of law for one year after the formal date set for sunset repeal. The General Assembly, therefore, is free to amend that organic act at any time during the one-year wind-up period without engaging in a full-text, omnibus reenactment of the entire organic act that otherwise would be required when a statute has expired and is no longer law.

- (2) Yes. The Occupational Therapy Practice Act, as amended by House Bill 20-1230 is the effective law of the State because the General Assembly enacted amendments to the Act with an effective date within the one-year wind-up period following the scheduled sunset repeal date of September 1, 2020. Therefore, the version of the Act reflecting the amendments enacted by House Bill 20-1230, now 2020 Colo. Laws ch. 274, is the positive law of Colorado.

FACTUAL BACKGROUND

The Occupational Therapy Practice Act (“the Act”), first enacted in 2008, was amended in 2013 to continue the regulatory program which defines the practice of occupational therapy and requires licensure for occupational therapists and occupational therapy assistants, through 2020. *See* 2013 Colo. Laws ch. 411, § 1 (SB 13-180). The Act set a sunset date for the program to repeal as of September 1, 2020. *Id.*; § 12-270-120, C.R.S.

On January 31, 2020, House Bill 20-1230 (“HB 20-1230”) was introduced to extend the Act for ten years. *See* HB 20-1230, §§ 1, 2.¹ As introduced, the bill included a petition clause making the measure effective ninety days following adjournment *sine die* of the 2020 regular session of the General Assembly, unless subject to a referendum petition. Therefore, absent a referendum, HB 20-1230 had a presumptive effective date of August 6, 2020, based on an assumed adjournment date of May 6, 2020. *See id.* § 16.

However, while HB 20-1230 was pending before the General Assembly, the legislature temporarily adjourned in light of the COVID-19 pandemic. The General Assembly did not resume the regular session until two months later, on May 27, 2020. During this time, the bill remained pending before the legislature. Ultimately, the bill received full approval by the House of Representatives and Senate, and the Governor signed the bill into law on July 11, 2020.

The General Assembly adjourned *sine die* on June 15, 2020, some forty days later than the previously anticipated adjournment date of May 6, 2020.

Despite the fact that the anticipated adjournment date had shifted well past May 6, 2020, the text of HB 20-1230 continued to carry the original petition clause language specifying the measure’s implementation ninety days following the legislature’s adjournment *sine die*. With the actual adjournment occurring on June 15, 2020, the bill’s petition clause specified that it became effective on September 14,

¹ Available at https://leg.colorado.gov/sites/default/files/documents/2020A/bills/2020a_1230_01.pdf.

2020—two weeks *following* the existing statutory repeal date set for September 1, 2020.²

The questions presented to the Attorney General stem from whether the September 1, 2020, repeal date fully extinguished the Occupational Therapy Act from state law because HB 20-1230 had not formally taken effect—and thereby had not extended the September 1, 2020, repeal date—until September 14, 2020.

ANALYSIS

I. **A Regulatory Program with a Statutorily Required Sunset Repeal Date Does Not Repeal From Law Until One Year After the Specified Repeal Date.**

Under C.R.S. § 24-34-104(2)(b), when a regulatory licensing function is scheduled for a sunset repeal, that function nevertheless “continues to be performed” for one year after the repeal date. This requirement is referred to in the Colorado Revised Statutes as the regulatory “wind-up” period:

(b) Upon repeal, an agency continues in existence, or, in the case of the repeal of a function, the function *continues to be performed, until the date that is one year after the specified repeal date* for the purpose of winding up affairs. During the wind-up period, the repeal *does not reduce or otherwise limit* the powers or authority of the agency; except that a license issued or renewed during the wind-up period expires at the end of the period and original license and renewal fees are prorated accordingly. Upon the expiration of one year after the repeal, the agency shall cease all activities or, in the case of the repeal of a function, the function must cease. When a license issued or renewed before repeal is scheduled to expire after the cessation of activities, the license expires at the end of the wind-up period, and the agency shall refund the portion of the license fee paid that is attributable to the period following the cessation of activities. Any criminal penalty for engaging in a profession or activity without being licensed is not enforceable with respect to activities that occur after an agency has ceased its activities pursuant to this section.

² Correspondence to the Colorado Department of Regulatory Agencies from the bill drafter with the Office of Legislative Legal Services (“OLLS”) indicates that the failure to correct the petition clause language in the bill was an unintentional oversight during the legislative process, rather than an intentional decision by the bill’s prime sponsors. However, for purposes of this Formal Opinion, the question of intent is immaterial; the analysis presented here does not depend on whether or not the oversight was inadvertent or deliberate.

§ 24-34-104(2)(b), C.R.S. (emphasis added).

Under the plain language of § 24-34-104(2)(b), the regulatory regime—including all statutory functions, licenses issued, enforcement activities, and fees—remains in full force during the “wind-up” period. *Id.* During this wind-up period, the licensing program’s powers are “not reduc[ed] or otherwise limited” in any way other than that “a license issued or renewed during the wind-up period expires at the end of the period.” *Id.* Indeed, the statute itself makes clear that the cessation of a regulation program does not occur until “the expiration of one year after the repeal.” *Id.*

Nothing in the language of the “wind-up” statute requires, or even contemplates, that the statutory provisions controlling a licensing program should disappear immediately upon the sunset date. To the contrary, the statute clearly calls for the regulatory function to continue without interruption until the one-year anniversary of the sunset date. *See id.* In other words, § 24-34-104(2)(b) imposes a statutory delay on a repeal date imposed elsewhere in statute. Therefore, a “repealed” licensing program does not cease, and is not actually removed from law, until one year following the stated repeal date.

This understanding of the meaning of a sunset “repeal” for a regulatory program has been confirmed through various decisions of administrative law judges who have enforced the regulatory requirements of a “repealed” program even after the program’s sunset date because the provisions of § 24-34-104(2)(b), C.R.S., specify that the regulatory program “continues to be performed” in full for the duration of the one-year wind-up period. *See, e.g., Director of the Div’n of Real Estate, Community Ass’n Mgr. Program v. Stiver*, OAC No. RC 2018-0008 (Dec. 21, 2018) (“Though the [community association manager (“CAM”)] licensing law is repealed, the CAM Program continues in existence for one year after repeal. . . . During the wind-up period, the Director retains authority to enforce the CAM licensing law. . . . [T]he repeal of the CAM licensing law does not prevent the Director from pursuing the present action or imposing discipline if a violation of the licensing law is proven.”).

The plain language of § 24-34-104(2)(b), C.R.S., states that a regulatory program that is in its sunset repeal wind-up period has not actually expired. The statutory provisions of that regulatory program’s organic act remain in force. The actual expiration of the regulatory program does not occur until one year *after* the sunset date set in the statute, that is, following the completion of the one-year wind-up period. *See* § 24-34-104(2)(b), C.R.S.³

³ In contrast to the mechanics of a sunset repeal specified in § 24-34-104(2)(b), C.R.S., the General Assembly clearly has the power to create – and has in the past previously created – mechanisms for an immediate repeal of a program or agency without any post-sunset wind-up period. Thus, for example, the repeal language for the Office Public Guardianship establishes that the article creating

To argue the contrary—that a sunset program’s organic statute expires from law on its exact repeal date—directly contradicts the statutory command of § 24-34-104(2)(b), C.R.S.. State law expressly provides that the wind-up period continues a program beyond its statutory repeal date, with only one limitation in authority—that licenses issued or renewed during the wind-up period expire at the end of that period. Holding that a regulatory program which has met its repeal date should see its entire organic statute removed from the positive law of Colorado on the date of repeal would necessarily mean that the entire regulatory scheme cannot be implemented during the one-year wind-up period. However, § 24-34-104(2)(b), C.R.S., directs precisely the opposite, requiring that such regulatory schemes shall continue for one full year. *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990) (“Constructions that defeat the obvious legislative intent should be avoided.”);

Finally, because a regulatory program that is in its wind-up period continues to have a fully enforceable, valid organic act that remains the law for one year following the statutory sunset date, the General Assembly may take action during that wind-up period to amend that law as it may with any other law. In this context, a legislative amendment during a statute’s wind-up period to amend the statutory repeal date would fully comply with the provisions of the Colorado Constitution if the text of the statutory section containing the repeal date is “published at length” in the amendment, thus showing how that repeal date is to be amended by the new measure. *See* Colo. Const. Art. V, section 24 (“No law shall be revived, or amended, or the provisions thereof extended or conferred by reference to its title only, but so much thereof as is revived, amended, extended or conferred, shall be re-enacted and published at length.”). In this context, a regulatory statute that is in its one-year sunset wind-up period has not expired, or otherwise ceased, and it therefore need not be “revived.” Rather, a regulatory program in its sunset wind-up period may be “amended” by the General Assembly by revising the date set for the sunset of the statute through an amendment that publishes both the current repeal date and the new amended repeal date as enacted by the legislature. In so doing, the amendment conforms to the requirements of Article V, section 24 of the state constitution.

the agency “is repealed, effective December 31, 2023,” with the following arrangement for how the office should wind up its affairs: “If the general assembly has adjourned the legislative session beginning in January of 2023 *sine die* without enacting legislation to continue or expand the office, the office shall implement its discontinuation plan developed pursuant to section 13-94-105 and wind-up its affairs prior to the repeal of this article 94.” § 13-94-111(2), C.R.S. This formulation demonstrates, first, that the General Assembly knows how to terminate an agency as of a specified repeal date with no post-termination continuation of the agency, and further, that the provisions § 24-34-104(2)(b) are entirely different and call for a very different one-year continuation of a regulatory program following a sunset date.

II. The Sunset Repeal Date of the Occupational Therapy Practice Act Has Been Properly Amended to Extend the Program to September 1, 2030.

The statutory provisions of the Occupational Therapy Practice Act as enacted in 2013 specified that the program would enter its one-year sunset repeal wind-up period on September 1, 2020. *See* 2013 Colo. Laws ch. 411, § 1.

Under the provisions of HB 20-1230, the Act’s repeal date was amended to establish a new date for the start of a new one-year sunset wind-up period beginning on September 1, 2030. *See* 2020 Colo. Laws ch. 274, § 1. This amendment conformed to the requirements of the state constitution in that the legislative measure “published at length” the text of § 12-270-120, C.R.S., showing a strike-through of the 2020 date and the insertion of the 2030 date. *See id.*

Moreover, the fact that this amendment occurred *during* the prior sunset wind-up period that began September 1, 2020—as a result of the petition clause in House Bill 20-1230 that caused the measure to go into effect on September 14, 2020—is immaterial in light of the provision of § 24-34-104(8), C.R.S., which specifies that the General Assembly may reestablish a regulatory program during its wind-up period. *See* § 24-34-104(8), C.R.S. (“If an agency or function repeals pursuant to the provisions of this section and the [G]eneral [A]ssembly reestablishes the agency or function during the wind-up period with substantially the same powers, duties, and functions, the agency or function continues.”). This language makes clear that a regulatory program which is amended during its wind-up period so as to shift the program’s repeal date out to a later date will continue “with substantially the same powers, duties, and functions.” *Id.*

In this context, the Occupational Therapy Practice Act has been amended through HB 20-1230 so as to continue the program with substantially the same powers, duties, and functions except as otherwise amended through the additional provisions of the 2020 bill. Thus, the positive law of Colorado as it exists today is that the Act remains in force, as amended by House Bill 20-1230, through the start of a new sunset repeal wind-up period beginning September 1, 2030.⁴

⁴ It bears noting that the Revisor of Statutes and the OLLS, when evaluating the same legal questions as addressed by this Formal Opinion, reached an alternative conclusion, determining that the Occupational Therapy Practice Act is no longer the positive law of Colorado. Furthermore, the General Assembly’s Committee on Legal Services, at its meeting on October 27, 2020, declined to exercise its discretion to direct the Revisor of Statutes to “clarify existing laws . . . as the committee directs,” thereby continuing to exclude the as-amended text of the Occupational Therapy Practice Act from the printing of the state’s positive law. § 2-3-703, C.R.S. While the Revisor’s decision concerning the publishing of the Colorado Revised Statutes is within her statutory authority, this Formal Opinion concludes that the Occupational Therapy Practice Act, as amended by House Bill 20-1230, remains fully in effect regardless of whether the as-amended text of the Act is formally published. Nevertheless, the importance of a complete and accurate record of all fully enacted laws within the

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/s/ Phillip J. Weiser
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published Colorado Revised Statutes is of high importance—for both the public, and, particularly, the regulated profession. Therefore, while the position of the Attorney General is that the as-amended Act remains in force today, the Attorney General notes that the General Assembly would eliminate any confusion by reintroducing and reenacting the full text of the as-amended Act via a new bill during the 2021 regular session of the General Assembly. Such action would serve as the basis, under the Revisor’s legal interpretation, for a full printing of the Act in the printed volume of Title 12 of the Colorado Revised Statutes, thereby ending the present quandary in which an effective law remains absent from the State’s published statutes.