Attachment A

COLORADO

Department of Regulatory Agencies

Colorado Office of Policy, Research & Regulatory Reform

2018 Sunset Review: Refund Anticipation Loans Act

October 15, 2018

COLORADO
Department of Regulatory Agencies
Executive Director's Office

October 15, 2018

Members of the Colorado General Assembly
c/o the Office of Legislative Legal Services
State Capitol Building
Denver, Colorado 80203

Dear Members of the General Assembly:

The Colorado General Assembly established the sunset review process in 1976 as a way to analyze and evaluate regulatory programs and determine the least restrictive regulation consistent with the public interest. Since that time, Colorado's sunset process has gained national recognition and is routinely highlighted as a best practice as governments seek to streamline regulation and increase efficiencies.

Section 24-34-104(5)(a), Colorado Revised Statutes (C.R.S.), directs the Department of Regulatory Agencies to:

- Conduct an analysis of the performance of each division, board or agency or each function scheduled for termination; and

- Submit a report and supporting materials to the office of legislative legal services no later than October 15 of the year preceding the date established for termination.

The Colorado Office of Policy, Research and Regulatory Reform (COPRRR), located within my office, is responsible for fulfilling these statutory mandates. Accordingly, COPRRR has completed the evaluation of the Refund Anticipation Loans Act. I am pleased to submit this written report, which will be the basis for COPRRR's oral testimony before the 2019 legislative committee of reference.

The report discusses the question of whether there is a need for the regulation provided under Article 9.5 of Title 5, C.R.S. The report also discusses the effectiveness of the Attorney General's Office staff in carrying out the intent of the statutes and makes recommendations for statutory changes.

Sincerely,

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Executive Director

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COLORADO

Department of
Regulatory Agencies

Colorado Office of Policy, Research &
Regulatory Reform

2018 Sunset Review
Refund Anticipation Loans Act

SUMMARY

What is the Program?
The Refund Anticipation Loans Act (Act) requires refund anticipation loan (RAL) facilitators to provide certain disclosures to consumers detailing, among other things, interest rates and fees. RALs are short-term loans, based on anticipated income tax refunds.

Why was it Created?
The Act was created to provide disclosure statements, written and oral, to consumers who choose to utilize an RAL.

Who is regulated?
RAL facilitators are required to provide consumers with a written disclosure statement highlighting the fee schedule including examples of RAL annual percentage rates for loans in the amount of $200, $500, $1,000, $1,500, $2,000 and $5,000. RAL facilitators must also provide oral disclosures to consumers stating, among other things, that if a consumer's tax refund is less than expected, the consumer is liable for the full amount of the loan and must pay the difference.

Who is Responsible for Oversight?
The Attorney General's Office is responsible for oversight of the Act, which includes, among other things, issuing cease and desist orders to RAL facilitators and imposing civil penalties, when necessary.

What does it cost?
There are no direct costs associated with the oversight.

What Enforcement Activity is there?
In the past five fiscal years, there have not been any complaints or discipline imposed on RAL facilitators.

Key Recommendations

Sunset the Act.

Since the creation of the Act in Colorado, which requires certain written and oral disclosure requirements to consumers who choose to utilize RALs, the popularity of the RALs has diminished. In fact, the Attorney General's Office did not receive any complaints nor did it impose discipline on RAL facilitators in the past five fiscal years. As such, the continued state-mandated disclosure requirements for RAL facilitators by the Act come into question, since the first sunset criterion asks whether regulation to protect the public welfare and safety is necessary. It is therefore questionable whether governmental interference in the marketplace, over and beyond federal oversight, is necessary. As such, the General Assembly should sunset the Act.

Methodology

As part of this review, Colorado Office of Policy, Research and Regulatory Reform staff interviewed Attorney General's Office staff, stakeholders, interviewed officials with state and national professional associations, reviewed Colorado statutes and rules, and reviewed the laws of other states.

Major Contacts Made During This Review

Attorney General's Office
Consumer Financial Protection Bureau
National Consumer Law Center
The Bell Policy Center

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether they should be continued by the legislature. Sunset reviews focus on creating the least restrictive form of regulation consistent with protecting the public. In formulating recommendations, sunset reviews consider the public's right to consistent, high quality professional or occupational services and the ability of businesses to exist and thrive in a competitive market, free from unnecessary regulation.

Sunset Reviews are prepared by:
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Table of Contents

Background 1
Introduction 1
Types of Regulation 2
Licensure 2
Certification 3
Registration 3
Title Protection 3
Regulation of Businesses 4
Sunset Process 4
Methodology 4
Profile of the Profession 5
Legal Framework 7
History of Regulation 7
Legal Summary 7
Program Description and Administration 9
Collateral Consequences – Criminal Convictions 9
Analysis and Recommendations 10
Recommendation 1 – Sunset the Refund Anticipation Loans Act. 10

Background

Introduction

Enacted in 1976, Colorado's sunset law was the first of its kind in the United States. A sunset provision repeals all or part of a law after a specific date, unless the legislature affirmatively acts to extend it. During the sunset review process, the Colorado Office of Policy, Research and Regulatory Reform (COPRRR) within the Department of Regulatory Agencies (DORA) conducts a thorough evaluation of such programs based upon specific statutory criteria[1] and solicits diverse input from a broad spectrum of stakeholders including consumers, government agencies, public advocacy groups, and professional associations.

Sunset reviews are based on the following statutory criteria:

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

[1] Criteria may be found at § 24-34-104, C.R.S.

- Whether the agency through its licensing or certification process imposes any disqualifications on applicants based on past criminal history and, if so, whether the disqualifications serve public safety or commercial or consumer protection interests. To assist in considering this factor, the analysis prepared pursuant to subparagraph (i) of paragraph (a) of subsection (8) of this section shall include data on the number of licenses or certifications that were denied, revoked, or suspended based on a disqualification and the basis for the disqualification; and
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

Types of Regulation

Consistent, flexible, and fair regulatory oversight assures consumers, professionals and businesses an equitable playing field. All Coloradans share a long-term, common interest in a fair marketplace where consumers are protected. Regulation, if done appropriately, should protect consumers. If consumers are not better protected and competition is hindered, then regulation may not be the answer.

As regulatory programs relate to individual professionals, such programs typically entail the establishment of minimum standards for initial entry and continued participation in a given profession or occupation. This serves to protect the public from incompetent practitioners. Similarly, such programs provide a vehicle for limiting or removing from practice those practitioners deemed to have harmed the public.

From a practitioner perspective, regulation can lead to increased prestige and higher income. Accordingly, regulatory programs are often championed by those who will be the subject of regulation.

On the other hand, by erecting barriers to entry into a given profession or occupation, even when justified, regulation can serve to restrict the supply of practitioners. This not only limits consumer choice, but can also lead to an increase in the cost of services.

There are also several levels of regulation.

Licensure

Licensure is the most restrictive form of regulation, yet it provides the greatest level of public protection. Licensing programs typically involve the completion of a prescribed educational program (usually college level or higher) and the passage of an examination that is designed to measure a minimal level of competency. These types of programs usually entail title protection – only those individuals who are properly licensed may use a particular title(s) – and practice exclusivity – only those individuals who are properly licensed may engage in the particular practice. While these requirements can be viewed as barriers to entry, they also afford the highest level of consumer protection in that they ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Certification

Certification programs offer a level of consumer protection similar to licensing programs, but the barriers to entry are generally lower. The required educational program may be more vocational in nature, but the required examination should still measure a minimal level of competency. Additionally, certification programs typically involve a non-governmental entity that establishes the training requirements and owns and administers the examination. State certification is made conditional upon the individual practitioner obtaining and maintaining the relevant private credential. These types of programs also usually entail title protection and practice exclusivity.

While the aforementioned requirements can still be viewed as barriers to entry, they afford a level of consumer protection that is lower than a licensing program. They ensure that only those who are deemed competent may practice and the public is alerted to those who may practice by the title(s) used.

Registration

Registration programs can serve to protect the public with minimal barriers to entry. A typical registration program involves an individual satisfying certain prescribed requirements – typically non-practice related items, such as insurance or the use of a disclosure form – and the state, in turn, placing that individual on the pertinent registry. These types of programs can entail title protection and practice exclusivity. Since the barriers to entry in registration programs are relatively low, registration programs are generally best suited to those professions and occupations where the risk of public harm is relatively low, but nevertheless present. In short, registration programs serve to notify the state of which individuals are engaging in the relevant practice and to notify the public of those who may practice by the title(s) used.

Title Protection

Finally, title protection programs represent one of the lowest levels of regulation. Only those who satisfy certain prescribed requirements may use the relevant prescribed title(s). Practitioners need not register or otherwise notify the state that they are engaging in the relevant practice, and practice exclusivity does not attach. In other words, anyone may engage in the particular practice, but only those who satisfy the prescribed requirements may use the enumerated title(s). This serves to indirectly ensure a minimal level of competency – depending upon the prescribed preconditions for use of the protected title(s) – and the public is alerted to the qualifications of those who may use the particular title(s).

Licensing, certification and registration programs also typically involve some kind of mechanism for removing individuals from practice when such individuals engage in enumerated proscribed activities. This is generally not the case with title protection programs.

Regulation of Businesses

Regulatory programs involving businesses are typically in place to enhance public safety, as with a salon or pharmacy. These programs also help to ensure financial solvency and reliability of continued service for consumers, such as with a public utility, a bank or an insurance company.

Activities can involve auditing of certain capital, bookkeeping and other recordkeeping requirements, such as filing quarterly financial statements with the regulator. Other programs may require onsite examinations of financial records, safety features or service records.

Although these programs are intended to enhance public protection and reliability of service for consumers, costs of compliance are a factor. These administrative costs, if too burdensome, may be passed on to consumers.

Sunset Process

Regulatory programs scheduled for sunset review receive a comprehensive analysis. The review includes a thorough dialogue with agency officials, representatives of the regulated profession and other stakeholders. Anyone can submit input on any upcoming sunrise or sunset review on COPRRR's website at: www.dora.colorado.gov/opr.

The disclosure requirements required under the Refund Anticipation Loans Act (Act) as enumerated in Article 9.5 of Title 5, Colorado Revised Statutes (C.R.S.), shall terminate on September 1, 2019, unless continued by the General Assembly. During the year prior to this date, it is the duty of COPRRR to conduct an analysis and evaluation of the disclosure requirements under the Act pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed requirements should be continued and to evaluate the Act's requirements and the staff of the Attorney General's Office (Office). During this review, the Office staff must demonstrate that the program serves the public interest. COPRRR's findings and recommendations are submitted via this report to the Office of Legislative Legal Services.

Methodology

As part of this review, COPRRR staff interviewed Office staff, stakeholders and officials with state and national professional associations. Additionally, COPRRR staff reviewed Colorado statutes and rules, as well as the laws of other states.

A refund anticipation loan (RAL) is,

> a loan on an individual's upcoming tax refund. The tax refund anticipation loan is not provided by the U.S. Treasury or the [Internal Revenue Service] and is subject to interest and fees set by the lender.[2]

RALs are short-term loans, based on anticipated income tax refunds. Federal Internal Revenue Service (IRS) regulations require commercial tax preparers who offer RALs to:

- Disclose RAL loan fees and interest rates;
- Inform consumers that they can file their return electronically without applying for an RAL, how much electronic filing costs, and how long it will take to get a refund;
- Charge the same fee for basic electronic filing, regardless of whether a customer also pays for the RAL, irrespective of the amount of their refund; and
- Inform consumers that they are financially responsible for the RAL if the IRS delays their refund, reduces the refund amount, or denies the refund completely.

In 2008, there were an estimated 8.4 million RALs provided nationwide.[3] Most national tax preparation chains assist clients in applying for an RAL and provide the proceeds quickly. In fact, an RAL loan could be dispensed in a day or two, after tax preparation fees and other fees are withheld.[4]

Typically, a person goes into a tax preparer's office, has his or her tax return prepared, and, because the information necessary to apply for a loan is already contained in the tax return, the preparer, with the taxpayer's permission, electronically submits both the tax return to the IRS and the RAL application to a lending institution, simultaneously. By acting in this fashion, the tax preparer is *facilitating* procurement of the RAL. The client pays an application fee for this extra service, in addition to the tax preparation fee. The bank providing the loan also pays the facilitator, or the facilitator's employer, a fee or *incentive*.

There is more than one type of RAL product available to consumers. One national preparer offers a Federal Refund Anticipation Check, for people who need the money within 8-15 days. A Classic RAL funds the same day as the application or up to two days after the application is submitted and requires no out-of-pocket preparation fees. An Instant RAL funds within minutes and requires no out-of-pocket preparation fees. And lastly, there are State Refund Anticipation Checks.

There are also "pay stub" and "holiday" RALs. These are made by banks prior to the tax filing season and before a taxpayer receives an actual IRS W-2 Form. These RALs are

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[2] Investopedia. *Tax Refund Anticipation Loan, RAL*. Retrieved June 25, 2018, from https://www.investopedia.com/terms/t/tax-refund-anticipation-loan.asp

[3] National Consumer Law Center and Consumer Federation of America. *Major Changes in the Quick Tax Refund Loan Industry*. Retrieved September 9, 2018, from http://www.nclc.org/images/pdf/high_cost_small_loans/report-ral-2010.pdf

[4] Creditcards.com. *Don't Take the Tax Refund Loan Bait*. Retrieved August 7, 2018, from https://www.creditcards.com/credit-card-news/refund-anticipation-loans-1264.php

based on an estimated tax refund calculated from a consumer's most recent pay stub. Repayment is expected from tax refund proceeds and not from current income.[5]

In 2010, "the IRS announced that it would stop providing the debt indicator, which is a service that helped tax preparers and banks make RALs by acting as a form of credit check."[6] Further,

> the debt indicator revealed whether a taxpayer's refund would be paid or would be intercepted for certain debts, such as child support, defaulted student loans and debts owed to the federal government.[7]

As a result, the utilization of RALs by tax preparers declined dramatically.

Between 2009 and 2012, most banks that made RALs either stopped voluntarily or were forced out by federal regulators.[8]

Since federal regulators increased enforcement of RALs, a "new generation" of RALs began to be utilized. These RALs are promoted as tax return advances that do not charge fees to taxpayers. Consumers utilize the "new generation" RALs much less frequently than older generation RALs. For example, in 2017, an estimated 1.7 million "new generation" RALs were made to consumers,[9] which is much smaller than the 8.4 million RALs made in 2008.

The reason, at least partially, for the popularity of "new generation" RALs, is that tax refunds for recipients of the Earned Income Tax Credits (EITC) and Additional Child Tax Credit (ACTC) were delayed until late February 2015, as a result of the 2015 Protecting Americans from Tax Hikes Act. The delay likely drove demand for RALs by EITC and ACTC recipients.

[5] Letter dated December 18, 2006, from the National Consumer Law Center, Consumer Federation of America, AARP, California Reinvestment Coalition, Community Reinvestment Ass'n of NC, Consumer Action, Consumers Union, National Association of Consumer Advocates, Neighborhood Economic Development Advocacy Project, U.S. Public Research Interest Group, and Woodstock Institute to John C. Dugan, Comptroller of the Currency, p. 1.

[6] National Consumer Law Center and Consumer Federation of America. *End of the Rapid Rip-Off: An Epilogue for Quickie Tax Loans*. Retrieved September 9, 2018, from https://consumerfed.org/wp-content/uploads/2010/08/RAL-report-2011-final.pdf

[7] National Consumer Law Center and Consumer Federation of America. *End of the Rapid Rip-Off: An Epilogue for Quickie Tax Loans*. Retrieved September 9, 2018, from https://consumerfed.org/wp-content/uploads/2010/08/RAL-report-2011-final.pdf

[8] National Consumer Law Center and Consumer Federation of America. *Tax-Time Products 2018: New Generation of Tax-Time Loans Surges in Popularity*. Retrieved May 1, 2018, from http://www.nclc.org/images/pdf/pr-reports/2018-tax-time-financial-products.pdf

[9] National Consumer Law Center and Consumer Federation of America. *Tax-Time Products 2018: New Generation of Tax-Time Loans Surges in Popularity*. Retrieved May 1, 2018, from http://www.nclc.org/images/pdf/pr-reports/2018-tax-time-financial-products.pdf

Legal Framework

History of Regulation

In 2010, the Colorado Office of Policy, Research and Regulatory Reform conducted a sunrise review on Refund Anticipation Loan (RAL) facilitators, which was published on February 11, 2010. The sunrise review determined that consumers were being harmed by unregulated RAL facilitators and should be regulated by the State of Colorado. The sunrise review stated, among other things, that there is a potential for consumers to be financially harmed by RAL facilitators.

In 2010, the General Assembly passed House Bill 10-1400, which, among other things, required certain disclosure requirements, written and oral, for RAL facilitators in Colorado.

Legal Summary

The Refund Anticipation Loans Act (Act) is created in section 5-9.5-101, *et seq.*, Colorado Revised Statutes. The Act requires RAL facilitators to be (or be employed by) an electronic return originator.[10] An electronic loan originator is a person who is authorized by the Internal Revenue Service (IRS) to originate the electronic submission of income tax returns to the IRS.

RAL facilitators are also required to provide written and oral disclosures to consumers, in both English and Spanish. Written disclosures reference the fee schedule for RALs. In fact, the fee schedule must be in every place of business that facilitates RALs.[11] The fee schedule must be posted detailing the current fees for RALs and for the electronic filing of a consumer's tax return.[12]

Further, the fee schedule is required to include examples of RAL annual percentage rates for $200, $500, $1,000, $1,500, $2,000 and $5,000.[13]

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[10] § 5-9.5-104, C.R.S.
[11] § 5.9-5-105(2), C.R.S.
[12] § 5-9.5-105(2), C.R.S.
[13] § 5-9.5-105(2)(b), C.R.S.

The fee schedule must also contain the following statement (in at least 28 point, bold-faced type):[14]

> **When you take out a refund anticipation loan, you are taking out a loan by borrowing money against your tax refund. If your tax refund is less than expected, you still owe the entire amount of the loan. If your refund is delayed, you may have to pay additional costs. YOU CAN USUALLY GET YOUR REFUND IN 8 TO 15 DAYS WITHOUT GETTING A LOAN OR PAYING EXTRA FEES. You can have your tax return filed electronically and your refund direct-deposited into your own bank account without obtaining a loan or other paid product. You can make complaints regarding your refund anticipation loan to the administrator of the Uniform Consumer Credit Code in the Colorado State Attorney General's office…**

When consumers apply for RALs, the RAL facilitators are also required to provide oral disclosures, made available in English and Spanish, which include information stating:[15]

- That an RAL is a loan that only lasts one to two weeks;
- That if the consumer's tax refund is less than expected, the consumer is liable for the full amount of the loan and must pay the difference;
- The amount of the RAL fee; and
- The interest rate of the RAL.

In addition to the required written fee schedule and oral disclosures, RAL facilitators are required to provide a written statement to consumers containing the following information:[16]

- That an RAL loan is a loan and is not the borrower's actual income tax refund;
- That the consumer may file an income tax return electronically without applying for an RAL;
- That the consumer is responsible for repayment of the loan and related fees if the tax refund is not paid or is insufficient to repay the RAL;
- Any fee(s) that will be charged if the loan is not approved; and
- The average time, as published by the IRS, within which a taxpayer can expect to receive a refund for an income tax return filed.

The Attorney General's Office is responsible for enforcement of the Act and is authorized to, among other things:[17]

- Act on complaints,
- Issue cease and desist orders,
- Impose civil penalties up to $1,000 per violation.

[14] § 5-9.5-105(2)(c), C.R.S.
[15] §§ 5-9.5-105(3)(a)(I-IV), C.R.S.
[16] §§ 5-9.5-105(4)(a)(I-V), C.R.S.
[17] §§ 5-9.5-107(1)(a),(b), and (d), C.R.S.

Program Description and Administration

The Program Description and Administration portion of sunset reports highlights, among other things, the number of practitioners, complaints, disciplinary actions and, if applicable, fines. The Refund Anticipation Loans (Act) is unique because it is not a traditional regulatory program; it simply requires certain disclosure requirements. For example, the Act does not require refund anticipation loan (RAL) facilitators to become registered or licensed prior to providing services to consumers. Instead, the Act outlines the information that is required to be communicated both written and orally to consumers who utilize RALs. As a result, Attorney General's Office (Office) staff was unable to provide quantitative data regarding the number of RAL facilitators operating in Colorado.

Violations of the required disclosure requirements are subject to fines, which may be imposed by Office staff. Office staff stated that there were no complaints filed, or fines imposed, on RAL facilitators in the past five fiscal years.

Collateral Consequences – Criminal Convictions

Section 24-34-104(6)(b)(IX), C.R.S., requires the Colorado Office of Policy, Research and Regulatory Reform to determine whether the agency under review, through its licensing processes, imposes any disqualifications on applicants or registrants based on past criminal history, and if so, whether the disqualifications serve public safety or commercial or consumer protection interests.

Since the regulation of RAL facilitators does not require practitioners to obtain a license or registration prior to practicing, this criterion is inapplicable.

Analysis and Recommendations

Recommendation 1 – Sunset the Refund Anticipation Loans Act.

When the disclosure requirements concerning Refund Anticipation Loans (RALs) were created in Colorado, RALs were a popular product that consumers often utilized. In fact, the Colorado Office of Policy, Research and Regulatory Reform conducted a sunrise review in 2010, and ultimately determined that regulation of RALs was necessary to protect the public. The General Assembly passed House Bill 10-1400, which created the disclosures, written and oral, that must be provided to consumers prior to utilizing RALs.

Not long after the disclosure requirements were created in Colorado, federal regulators began to enforce regulations that were created to provide protection to consumers by, among things, requiring RAL facilitators to disclose interest rates and fees associated with RALs. The aggressive enforcement, at least partially, contributed to the drastic, national decline of the use of RALs. In fact, the utilization of the "new generation" of RALs, which do not include fees, is used much less than during the mid-2000s.

During this sunset review, Attorney General's Office (Office) staff stated that there have been no complaints filed by consumers against RAL facilitators in the past five fiscal years. There are two possible conclusions for this. First, as mentioned above, the popularity of RALs has declined, across the nation, drastically; it is reasonable to conclude that Colorado consumers are also not utilizing RALs as much as during the mid-2000s, when federal oversight was not as robust.

Also, the lack of complaints may be due to the increased oversight by federal regulators. Recall that when federal oversight increased beginning in 2008, the number of RALs, and banks offering RALs, experienced a substantial decrease.

As such, the continued state-mandated disclosure requirements for RAL facilitators by the Refund Anticipation Loans Act (Act) come into question, since the first sunset criterion asks whether regulation to protect the public welfare and safety is necessary. This sunset review did not identify instances where consumers were harmed by RAL facilitators. It is therefore questionable whether governmental interference in the marketplace, over and beyond federal oversight, is necessary.

As such, the General Assembly should sunset the Act. Importantly, oversight of the industry will continue through the federal government.