

OFFICE OF LEGISLATIVE LEGAL SERVICES

COLORADO GENERAL ASSEMBLY



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AGENDA

Committee on Legal Services

Wednesday, October 7, 2015

1:30 p.m.

HCR 0112

1. Review of New Rules (rules adopted or amended on or after November 1, 2014, and before November 1, 2015, and scheduled to expire May 15, 2016):
 - a. Rules of the Tax Group, Taxpayer Service Division, Department of Revenue, concerning income tax refund interest, 1 CCR 201-2 (LLS Docket No. 150146; SOS Tracking No. 2014-01129).
Staff: Esther van Mourik
(Status: Uncontested)
 - b. Rules of the Division of Real Estate, Department of Regulatory Agencies, concerning community association manager licensing, 4 CCR 725-7 (LLS Docket No. 150350; SOS Tracking No. 2015-00347).
Staff: Jennifer Berman
(Status: Uncontested)
2. Implementation of Voluntary Opt-out for Legislative co-sponsors from receiving SB 13-030 Notices in accordance with SB 15-047.
Staff: Debbie Haskins

3. Authority of OLLS Director to sign vouchers - statutory change.
Staff: Dan Cartin
4. Does the Committee prefer a 10:00 a.m. or 9:00 a.m. Start Time for the December 15 Meeting?
5. Other.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Esther van Mourik, Office of Legislative Legal Services

DATE: September 30, 2015

SUBJECT: Rules of the Tax Group, Taxpayer Service Division, Department of Revenue, concerning income tax refund interest, 1 CCR 201-2 (LLS Docket No. 150146; SOS Tracking No. 2014-01129).¹

Summary of Problem Identified and Recommendation

Section 39-22-622, C.R.S., requires the Department of Revenue (Department) to pay refunds within the applicable periods listed in statute. If a refund is not made within one of those periods, § 39-22-622 (3), C.R.S., requires interest to accrue from the due date of the refund until the refund is mailed to the taxpayer. While the statute does not specifically state what constitutes the official paying or making of a refund, the requirement that interest accrue until the refund is mailed implies that a refund is paid or made when the refund is mailed. But Regulation 39-22-622 (3) (a) specifies that a refund is paid or made on the date the refund is printed, not when it is mailed, so long as the refund is mailed within a reasonable time. **Because Regulation 39-22-622 (3) (a) conflicts with the statute, we recommend that Regulation 39-22-622 (3) (a) of the rules of the Department concerning income tax refund interest not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

Rule-making Authority

The Department has authority under § 39-21-112, C.R.S., to adopt rules governing the tax statutes. Section 31-21-112 (1), C.R.S., states:

39-21-112. Duties and powers of the executive director. (1) It is the duty of the executive director to administer the provisions of this article, and he or she has the power to adopt, amend, or rescind such rules not inconsistent with the provisions of this article, articles 22 to 29 of this title, and article 3 of title 42, C.R.S.,...

Notwithstanding this broad grant of rule-making authority, Regulation 39-22-622 (3) (a) conflicts with § 39-22-622 (3), C.R.S., as discussed in the Analysis portion of this memo.

Analysis

If the Department does not pay a refund when due, the statute requires the Department to add interest from the due date until the refund is mailed.

Regulation 39-22-622 concerns income tax refund interest. If a taxpayer makes an overpayment, it is returned to a taxpayer in the form of a credit or a refund. Section 39-22-622, C.R.S., requires the Department to pay refunds within the applicable periods listed in subsection (2) of that section. Section 39-22-622 (2) and (3), C.R.S., state:

39-22-622. Refunds. (2) (a) The department of revenue shall pay refunds within the applicable time period specified in paragraph (b) of this subsection (2). For purposes of this subsection (2), the date of filing shall be the date of receipt of any income tax return by the department of revenue; except that the date of filing of any income tax return received during the month of April shall be deemed to be May 1.

(b) (I) Refunds for income tax returns filed by January 31 of any given year shall be made within fourteen calendar days of the date of filing.

(II) Refunds for income tax returns filed after January 31 but prior to or on the last day of February of any given year shall be made within twenty-one calendar days of the date of filing.

(III) Refunds for income tax returns filed after the last day of February but prior to or on March 31 of any given year shall be made within twenty-eight calendar days of the date of filing.

(IV) Refunds for income tax returns filed after March 31 of any given year shall be made within forty-five calendar days of the date of filing.

(3) If any refund due under this article is not paid when due, **interest shall be added** thereto at the rate imposed under section 39-21-110.5 **from the due date of the refund**, as prescribed in subsection (2) of this section, **until the refund is mailed** to the taxpayer by the department of revenue. In addition to the interest, a penalty equal to five percent of the amount of tax to be refunded shall be added. **(emphasis added)**

The statute does not specifically state what the Department must do to consider a refund as paid. However, the requirement that interest accrue until the refund is mailed implies that a refund is paid when the refund is mailed.

Regulation 39-22-622 (3) (a) states:

- (3) When a Return is Filed.
 - (a) A return is "filed" on the date the Department physically or electronically receives the return. A **refund is "paid"** or "made" **on the date the refund is printed** by the Department so long as the refund is mailed within a reasonable time, or when a financial institution holding state funds is directed to transfer funds to the taxpayer. If the "filed" or "paid" date is on a weekend or legal holiday, then such date is extended to the next day that is not a weekend or legal holiday. **(emphasis added)**

There would be no conflict between the statute and the rule if the refund check is mailed on the same day it is printed, but that is not guaranteed. In fact, Regulation 39-22-622 (3) (a) makes this lack of guarantee clear by allowing for a "reasonable time" to mail the printed check. Under this rule, interest will only accrue until the date the refund is printed, not until the date the refund is mailed. This means the refund could sit around at the Department for a "reasonable time" until mailed, accruing no interest. The statute requires the interest to be added from the due date of the refund until the refund is mailed. Regulation 39-22-622 (3) (a) therefore conflicts with the statute and should not be extended.

Conclusion

We recommend that Regulation 39-22-622 (3) (a) of the rules of the Department concerning income tax refund interest not be extended because it conflicts with the controlling statute.

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MEMORANDUM

TO: Committee on Legal Services

FROM: Jennifer Berman, Office of Legislative Legal Services

DATE: September 30, 2015

SUBJECT: Rules of the Division of Real Estate, Department of Regulatory Agencies, concerning community association managers, 4 CCR 725-7 (LLS Docket No. 150350; SOS Tracking No. 2015-00347).¹

Summary of Problem Identified and Recommendation

Section 12-61-1003 (5) (a) (III) and (5) (b), C.R.S., require community association managers to complete a Colorado law portion and a general portion of an examination to become licensed. Section 12-61-1003 (5) (c), C.R.S., provides that the validity of the results of the Colorado law portion of the examination expire after one year, and a person who does not apply for a license within one year after taking that portion of the examination must retake that portion of the examination. In contrast, the statute provides no expiration for the results of the general portion of the examination. But Rule A-5), promulgated by the Director of the Division of Real Estate (Director), provides that the validity of the results of both the Colorado law portion and the general portion of the examination expire after one year. **Because Rule A-5) conflicts with the statute, we recommend that Rule A-5) not be extended.**

¹ Under § 24-4-103, C.R.S., the Office of Legislative Legal Services reviews rules to determine whether they are within the promulgating agency's rule-making authority. Under § 24-4-103 (8) (c) (I), C.R.S., the rules discussed in this memo will expire on May 15, 2016, unless the General Assembly acts by bill to postpone such expiration.

Rule-making Authority

Section 12-61-1002 (2), C.R.S., provides the Director's rule-making authority. The provision states:

12-61-1002. License required – rule-making authority – violations - administrative and legal remedies. (2) The director may promulgate rules as necessary to enable the director to carry out the director's duties under this part 10.

Notwithstanding this broad grant of rule-making authority, Rule A-5) conflicts with section 12-61-1003 (5) (c), C.R.S., as discussed in the Analysis portion of the memorandum.

Analysis

Rule A-5) conflicts with the statute because the rule limits the duration of the validity of the results of the general portion of the examination, but the statute provides no such limitation.

Section 12-61-1003 (5), C.R.S., provides in pertinent part:

12-61-1003. Application for license – criminal history record check - examination – rules. (5) (a) An applicant for a [community association] manager's license must:

(III) Submit to and pass an examination with **two separate portions**, which may be administered separately. The examination must measure the competency of the applicant in carrying out the core functions of community association management, referred to as the “**general portion**” of the examination, and in understanding the basic provisions of legal documents and Colorado law with which managers are required to comply, referred to as the “**Colorado law portion**” of the examination.

(b) The separate portions of the examination developed under subparagraph (III) of paragraph (a) of this subsection (5) must assess an applicant's competency in the following subject matter areas:

(I) For the **Colorado law portion** of the examination, legal documents; statutes, including the “Colorado Common Interest Ownership Act”; and other applicable provisions of Colorado law; and

(II) For the **general portion** of the examination, other core competencies of community association management, as specified by the director.

(c) **Examination results** measuring an applicant's knowledge of the matters **described in subparagraph (I) of paragraph (b) of this subsection (5) are valid for one year.** A person who takes the examination and does not apply for

a license within one year thereafter **must retake that portion** of the examination before applying. (**emphasis added**)

In contrast, Rule A-5) states:

A-5) Community Association Manager license examination and application requirements.

The CAM license examination is made up of two parts, a general portion and a Colorado law portion. An applicant holding a credential pursuant to § 12-61-1003 (5) (a) (I) (D), C.R.S., must sit for and successfully pass both portions of the examination. If the applicant fails one or both parts of the examination, the applicant may retake the failed portion(s). **A passing score for either part of the examination is valid for one year only.** If an applicant holds a credential pursuant to § 12-61-1003 (5) (a) (I) (A), (B), or (C), C.R.S., and has maintained said credential in good standing, such applicant need only sit for and successfully pass the Colorado law portion of the examination. If the applicant fails the Colorado law portion, the applicant may retake the failed portion. An application received by the Division must be accompanied by the statutory fee, proof of completion of the required credential and proof of successful completion of the required portion(s) of the examination within the year prior to the application being received by the Division. **No examination score for either portion of the examination will be considered valid after one year.** (**emphasis added**)

The statute specifies that the validity of the results of the Colorado law portion of the examination expire after one year. It further provides that a person must retake “that portion” of the examination if he or she has not applied for a license within one year after taking the examination. The statute provides no such limitation for the duration of the validity of the general portion of the examination. “Under the rule of interpretation *expressio unius exclusio alterius*, the inclusion of certain items implies the exclusion of others.”² “[T]he General Assembly’s failure to include particular language [in a statute] is a statement of legislative intent.”³ By imposing a one-year limitation on the results of the general portion of the examination, the Director promulgated a rule in conflict with the statute’s exclusion of such limitation.

Furthermore, the portion of Rule A-5) stating “[n]o examination score for either portion of the examination will be considered valid after one year” renders the last sentence in § 12-61-1003 (5) (c), C.R.S., meaningless because that sentence clearly specifies that only one portion of the examination need be retaken if a person has not

² *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001).

³ *Specialty Rests. Corp. v. Nelson*, 231 P.2d 393, 397 (Colo. 2010).

applied for a license within one year after taking the examination. In contrast, Rule A-5) would require such a person to retake both portions of the examination because neither portion will be considered valid after one year. Therefore, the rule conflicts with § 12-61-1003 (5) (c), C.R.S., because a determination that the rule is authorized requires an interpretation of the statute that renders its last sentence meaningless. In addition, the portion of the first sentence specifying “the matters described in subparagraph (I) of paragraph (b) of this subsection (5)” would need to be completely disregarded. “[C]onstrutions that would render meaningless a part of the statute should be avoided.”⁴ Section 2-4-201 (1) (b), C.R.S., which concerns statutory interpretation, provides: “In enacting a statute, it is presumed that the entire statute is intended to be effective.”

Conclusion

We therefore recommend that Rule A-5) of the rules of the Division of Real Estate concerning community association managers not be extended because it conflicts with § 12-61-1003 (5) (c), C.R.S.

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⁴ *People v. Terry*, 791 P.2d 374, 376 (Colo. 1990).