Department of Regulatory Agencies

Office of Policy, Research and Regulatory Reform

2009 Sunset Review: Obesity Treatment Pilot Program

October 15, 2009

Consumer Protection

Department of Regulatory Agencies

Executive Director's Office
D. Rico Munn
Executive Director

Bill Ritter, Jr.
Governor

October 15, 2009

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 mission of the Department of Regulatory Agencies (DORA) is consumer protection. As a part of the Executive Director's Office within DORA, the Office of Policy, Research and Regulatory Reform seeks to fulfill its statutorily mandated responsibility to conduct sunset reviews with a focus on protecting the health, safety and welfare of all Coloradans.

DORA has completed the evaluation of the Colorado Obesity Treatment Pilot Program. I am pleased to submit this written report, which will be the basis for my office's oral testimony before the 2010 legislative committee of reference. The report is submitted pursuant to section 24-34-104(8)(a), of the Colorado Revised Statutes (C.R.S.), which states in part:

> The department of regulatory agencies shall conduct an analysis of the performance of each division, board or agency or each function scheduled for termination under this section...
>
> The department of regulatory agencies shall 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 report discusses the question of whether there is a need for the program provided under Article 5 of Title 25.5, C.R.S. The report also discusses the effectiveness of the Department of Health Care Policy and Financing and staff in carrying out the intent of the statutes.

Sincerely,

D. Rico Munn
Executive Director

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2009 Sunset Review:
Obesity Treatment Pilot Program

Summary

What Is the Program?
The General Assembly authorized the Department of Health Care Policy and Financing (HCPF) to create an Obesity Treatment Pilot Program (Program). The Program was intended to help people with obesity-related health problems—such as hypertension and diabetes—manage their weight and improve their overall health, while saving the state money on medical services premiums.

What Does It Cost?
Because it was never implemented, there are no costs associated with the Program.

Where Do I Get the Full Report?
The full sunset review can be found on the Internet at: www.dora.state.co.us/opr/oprpublications.htm.

Key Recommendations

Sunset the Obesity Treatment Pilot Program.
The intent behind the creation of the Program was certainly worthy, and the Program might have offered a significant public benefit. However, it was never implemented. By law, the sole funding source for the Program is grants, gifts, and donations, and no such gifts, grants or donations were ever received.

Because it was never funded or established, the provisions relating to the Program should be repealed.

Major Contacts Made During This Review

Colorado Department of Health Care Policy and Financing

What is a Sunset Review?

A sunset review is a periodic assessment of state boards, programs, and functions to determine whether or not 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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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 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;
- Whether administrative and statutory changes are necessary to improve agency operations to enhance the public interest.

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

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.

Regulation, then, has many positive and potentially negative consequences.

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. To facilitate input from interested parties, anyone can submit input on any upcoming sunrise or sunset review via DORA's website at: www.dora.state.co.us/pls/real/OPR_Review_Comments.Main.

The Obesity Treatment Pilot Program (Program) created pursuant to Article 5 of Title 25.5, Colorado Revised Statutes (C.R.S.), shall terminate on July 1, 2010, unless continued by the General Assembly. During the year prior to this date, it is the duty of DORA to conduct an analysis and evaluation of the Program pursuant to section 24-34-104, C.R.S.

The purpose of this review is to determine whether the currently prescribed Program should be continued for the benefit of the public and to evaluate the performance of the Department of Health Care Policy and Financing (HCPF). During this review, HCPF must demonstrate that the Program serves to protect the public health, safety or welfare. DORA's findings and recommendations are submitted via this report to the legislative committee of reference of the Colorado General Assembly.

Methodology

As part of this review, DORA staff interviewed HCPF staff and reviewed Colorado statutes.

About Obesity

According to guidelines from the Centers for Disease Control and Prevention (CDC), a person with a body-mass index (BMI)[2] of 30 or greater is considered obese.[3] The number of obese men and women has risen steadily over the past 10 years: from 19.4 percent of the general population in 1997 to 27.4 percent in 2008.[4] Even in Colorado, which the CDC consistently ranks as the leanest state, the obesity rate has doubled since 1995. Currently nearly one in five Colorado adults is considered obese.[5]

[2] The body-mass index is considered a reliable way of measuring body fat. A person's BMI equals his or her weight in kilograms divided by height in meters squared. (BMI=kg/m^2).
[3] Centers for Disease Control. *About BMI for Adults.* Retrieved on June 22, 2009, from http://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html
[4] Centers for Disease Control and Prevention, *Prevalence of Obesity among adults aged 20 years and over: United States, 1997-March 2008*. Retrieved on June 24, 2009 from http://www.cdc.gov/nchs/data/nhis/earlyrelease/200809_06.pdf
[5] "Colorado's Expanding Obesity Threat " by Anne Warhover, the Denver Post, November 13, 2008.

The rise in obesity rates poses a significant concern to health care providers and public health advocates. Evidence suggests a strong link between obesity and certain health problems, including diabetes, hypertension, sleep apnea, gallbladder disease, cardiovascular disease and stroke, infertility, depression, complications during pregnancy, certain cancers and premature mortality.[6] One recent study found that obese people suffer from a 67 percent increase in chronic conditions compared with normal-weight individuals.[7]

With the increased incidence of chronic conditions, there is a commensurate increase in health care spending. Obese individuals spend approximately 36 percent more than the general population on health care services, more even than daily smokers, who spend roughly 21 percent more than the general population, and heavy drinkers, who spend 14 percent more.[8] This increased expense is passed on to all Americans via higher health insurance premiums and increased Medicaid and Medicare spending.

The intent behind the enabling legislation for the Obesity Treatment Pilot Program was two-fold: to help obese Medicaid recipients with obesity-related comorbidities—such as diabetes or hypertension—manage their weight, thereby improving their general health, and to reduce obesity-related health care expenditures.

[6] Colorado Health Foundation. *Obesity: What the Research Shows, 2008 Supplement to Colorado Health Report Card*. Retrieved on June 24, 2009, from http://www.coloradohealth.org/WorkArea/showcontent.aspx?id=3362.
[7] RAND Corporation. *The Health Risks of Obesity.* Retrieved on June 24, 2009 from http://www.rand.org/pubs/research_briefs/RB4549/index1.html
[8] RAND Corporation. *The Health Risks of Obesity.* Retrieved on June 24, 2009 from http://www.rand.org/pubs/research_briefs/RB4549/index1.html

Legal Framework

History of Regulation

The General Assembly created the Obesity Treatment Pilot Program (Program) in 2006 with the passage of Senate Bill 219. Section 25.5-5-317, Colorado Revised Statutes (C.R.S.), which establishes the Program, was just a small part of the nearly 250-page bill, which reorganized and amended statutes relating to all programs administered by the Department of Health Care Policy and Financing (HCPF).

Summary of Statute

The General Assembly created the Program to provide services to certain overweight people. To be eligible for the Program, a person would have to:[9]

- Be a Medicaid recipient;
- Have a body-mass index of 30 or greater; and
- Have a diagnosis of an obesity-related comorbidity such as diabetes, hypertension, or coronary heart disease.

The Program would treat participants using behavioral modification and self-management techniques, and medication when medically necessary.[10]

The statute directed HCPF to develop and implement the Program only if it received sufficient gifts, grants and donations to fund it.[11]

The statute explicitly prohibited the General Assembly from appropriating money from the General Fund to support the Program[12] for fiscal years 05-06 and 06-07. If an independent study of the Program had demonstrated that the Program reduced state expenditures for medical services premiums, then the General Assembly would have been permitted to transfer funds that would have otherwise been spent on such premiums to the Program.

[9] § 25.5-5-317(1)(a), C.R.S.
[10] § 25.5-5-317(1)(a), C.R.S.
[11] § 25.5-5-317(3)(b), C.R.S.
[12] § 25.5-5-317(1)(b), C.R.S.

Program Description and Administration

Section 25.5-5-317, Colorado Revised Statutes, granted the Department of Health Care Policy and Financing (HCPF) the authority to establish an Obesity Treatment Pilot Program (Program). The statute expressly states that the development and implementation of the Program was contingent on HCPF receiving sufficient grants, gifts, and donations to fund it. Because no funding was ever secured, HCPF did not develop and implement the Program.

Analysis and Recommendations

Recommendation 1 – Sunset the Obesity Treatment Pilot Program.

Section 25.5-5-317, Colorado Revised Statutes, granted the Department of Health Care Policy and Financing the authority to establish an Obesity Treatment Pilot Program (Program).

The Program was intended to help people with obesity-related health problems such as hypertension and diabetes manage their weight and improve their overall health, while saving the state money on medical services premiums. The underlying assumption of the enabling statute is that helping Program participants effectively manage their chronic conditions would reduce health care costs over time.

The Program, however, was never implemented. By law, the sole funding source for the Program is grants, gifts, and donations, and no such gifts, grants and donations were ever received.

The intent behind the creation of the Program was certainly worthy, and the Program might have offered a significant public benefit. Because it was never funded or established, however, the provisions relating to the Program should be repealed.