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## RE: Administrator's Interpretive Opinion Letter: GAP Refund Notices (C.R.S. section 5-9.3-106(3) and GAP Cancellation Fees (C.R.S. section 5-9.3-106(4)) (Effective January 1, 2024)

**FROM:** Administrator, Colorado Uniform Consumer Credit Code

**TO:** Interested Parties, Licensees, Notification Filers

Guaranteed Asset Protection ("GAP") is sold to consumers who finance their purchase of a vehicle. If a consumer's vehicle is totaled in an accident, the consumer's insurance typically pays only the fair market value of the vehicle, which often is less than the amount owed on the consumer's loan.[1] GAP applies in that situation to waive the remaining balance owed on the loan. The term of the GAP agreement is typically the same length as the loan.

A GAP agreement can end before the expiration of its term. Consumers may change their minds after entering into a GAP agreement, and these consumers may cancel the GAP agreement ("cancellations"). A GAP agreement can also terminate before the end of the term because (1) the loan is paid off early or (2) the vehicle serving as collateral for the loan is repossessed ("terminations").

In the 2023 legislative session, the Colorado General Assembly passed House Bill 23-1181 to be codified as C.R.S. section 5-9.3-101, et seq. ("Act"), which updates GAP agreement requirements previously regulated under 4 CCR 902-1:8 ("Rule 8"). The Act takes effect January 1, 2024.

### GAP Refunds Notices

The Administrator has received inquiries about the operation, and specifically the timing, of C.R.S. section 5-9.3-106(3). This section deals with assignees' obligations with respect to "refunds of unearned GAP fees" ("GAP refunds"). A GAP refund is due as a result of a termination if either (1) the finance agreement is prepaid prior to maturity, or (2) the creditor repossess the vehicle. C.R.S. section 5-9.3-106(1). Assignees are required to "send notice to the original creditor requesting, on behalf of the consumer, a refund of the unearned GAP fee pursuant to the GAP agreement." C.R.S.

[1] Cars may be financed through consumer loans (C.R.S. section 5-1-301(11) or consumer credit sales (C.R.S. section 5-1-301(15). For ease of reference, the term "loan" is used here for all such transactions.

section 5-9.3-106(3)(a). “Upon receipt of such notice from the assignee, the original creditor shall provide the unearned GAP fee to the consumer within thirty days.” Id. “If the original creditor has not refunded the unearned GAP fee to the consumer within thirty days ... the assignee shall provide the refund to the consumer, and the original creditor or GAP administrator shall reimburse the assignee for the amount of such refund no later than forty-five days after the original creditor or GAP administrator has received notice from the assignee.” Id. at section 5-9.3-106(3)(b).

The Administrator has received inquiries asking when the assignee must send the notice, when the 30-day period begins to run, and if any additional time can be added to these time periods. The Administrator views these questions as a matter of statutory interpretation.

When interpreting a statute, the court “look[s] to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings.” UMB Bank, N.A. v. Landmark Towers Ass'n, Inc., 408 P.3d 836, 840 (Colo. 2017). “When the statutory language is clear, [the court] appl[ies] it as written and [does] not resort to other rules of statutory construction. Id. It “respect[s] the legislature’s choice of language” and does “not add words to the statute or subtract words from it.” *Id*.

The Administrator applies the time periods according to their plain and ordinary meaning. C.R.S. section 5-9.3-106(3)(a). When a refund of an unearned GAP fee is triggered and due (as a result of a prepayment or repossession), the assignee must send notice to the original creditor. Thirty days after the original creditor receives the notice, if the original creditor does not pay the GAP refund, then the assignee must pay it. The original creditor must then reimburse the assignee no later than 45 days after the assignee sent the notice and the original creditor received it. The statute does not add in any other words to add more time.

Some inquiries have suggested time should be added to the thirty-day period to permit service of the notice by mail. Prior versions of the Colorado Rules of Civil Procedure extended the time to respond by three days when service was made by mail. C.R.C.P. 6(e) (repealed). Notably, the rules did not extend time for service by fax. Id. The purpose of this rule was to prevent the time required for mail delivery from systematically shortening the period for responses. State Bd. of Registration for Pro. Engineers & Pro. Land Surveyors v. Brinker, 948 P.2d 96, 99 (Colo. App. 1997). C.R.C.P. 6(e) was repealed in 2011 (effective January 1, 2012), so the 3-day mailing rule no longer applies. Moreover, even when the rule was in effect, courts would not add the three days when the statute established a specific time period. State Bd. of Registration for Pro. Engineers & Pro. Land Surveyors v. Brinker, 948 P.2d 96, 99 (Colo. App. 1997).

Accordingly, there is no additional time is added under C.R.S. section 5-9.3-106(3). Even so, this regime is more flexible for assignees than under Rule 8. Under Rule 8, the original creditor and assignee are jointly and severally required to ensure the consumer receives their GAP refund. The assignee triggered this liability the moment the GAP refund was due. Under C.R.S. section 5-9.3-106(3), the assignee does not trigger this liability, but is only obligated to send notice to the original creditor and is not required to refund the consumer unless the original creditor does not pay the GAP refund within 30 days. Moreover, the original creditor is obligated to reimburse the assignee within 45 days if the assignee pays the GAP refund.

This current regime encourages robust and efficient communication between assignees, original creditors, and GAP administrators. It incentivizes communication via automatic and/or electronic means, as this will provide assignees, original creditors, and GAP administrators the

most amount of time to complete these GAP refunds. Finally, if the assignees, original creditors, and GAP administrators are regularly engaged and operating at scale, they might be advised to incorporate a system of processes to automate these GAP refunds.

## GAP Cancellation Fees

The Administrator has received inquiries about C.R.S. section 5-9.3-106(4) concerning cancellation fees. C.R.S. section 5-9.3-106(4) provides:

> (4) A cancellation fee of not more than twenty-five dollars may be charged to a consumer if the consumer cancels the GAP agreement more than thirty days after the effective date of the GAP agreement.

C.R.S. section 5-9.3-106(4). Specifically, the Administrator has been asked whether this cancellation fee provision applies to both cancellations and terminations. The Administrator concludes that the cancellation fee provision only applies to cancellations.

In pertinent part, the cancellation fee provision only applies "if the consumer cancels the GAP agreement more than thirty days after the effective date of the GAP agreement." Id. (emphasis added). The Act describes the cancellation process in detail. C.R.S. section 5-9.3-103(1)(b)(I). The creditor must provide the consumer "a separate, written cancellation form", and the consumer must "complete and return the cancellation form" or send other written notice of cancellation to creditor to a specified mailing or email address to cancel.2 If the consumer cancels within 30 days after the effective date of the GAP agreement, the creditor must make a "full refund" to the consumer; however, if the consumer cancels after 30 days, the creditor may charge a cancellation fee. C.R.S. section 5-9.3-106(4). Thus, the consumer is provided a "cooling off" period to determine whether the consumer wants to maintain coverage. If not, the consumer needs to affirmatively elect to cancel using a specific form or sending notice to a specified mailing or email address.

By contrast, the consumer need not take an affirmative act to terminate the GAP agreement. Indeed, if the consumer's vehicle is repossessed this is a wholly involuntary act. Moreover, the consumer does need to complete a separate form to effectuate a termination, and there is no "cooling off" period needed as a prepayment or repossession often occurs years after the consumer enters a GAP agreement. Therefore, C.R.S. section 5-9.3-106(4) does not apply to terminations.[3]

[2] The creditor may also specify an alternative cancellation form so long as it is "clearly and conspicuously" disclosed in the GAP agreement with instructions. C.R.S. section 5-9.3- 103(1)(b)(II).

[3] This is consistent with Rule 8. Under Rule 8, "the consumer may cancel GAP for any or no reason within thirty (30) days after GAP was purchased and receive a full refund of the GAP fee or premium …." Rule 8(b)(5); see also Rule 8(c)(2) ("the consumer has an unconditional right to cancel GAP for a full refund within thirty (30) days after it was purchased.") The creditor must provide the consumer with "a separate written cancellation form" that the consumer must use to affirmatively elect to cancel. If the consumer voluntarily chooses to cancel the GAP agreement no later than 30 days after the GAP was purchased, the creditor must provide a "full refund." Id. If the consumer cancels after 30 days, the creditor may charge a cancellation fee. Similarly, under Rule 8, if the GAP agreement terminated in the normal course, either because the consumer loan was prepaid prior to maturity or the creditor repossessed the vehicle, then the creditor owes the consumer "the unearned fee or premium" (calculated using the pro rata method.) Rule 8(h). Because the creditor owed the consumer the unearned fee, it must pay the consumer the full amount of the unearned fee and cannot deduct a cancellation fee. The Administrator enforced this interpretation of Rule 8 consistently, and has required creditors to refund cancellation fees improperly charged to consumers for terminations.

Under C.R.S. section 5-9.3-109, the Administrator is authorized to enforce the Act pursuant to Article 6 of the UCCC against any creditor (or assignee) or GAP administrator who violates the Act. Article 6 permits the Administrator to bring action against a creditor for "for making or collecting charges in excess of those permitted by this code." C.R.S. section 5-6-114(a). Additionally, "[i]f it is found that an excess charge has been made, the court shall order the respondent to refund to the consumer the amount of the excess charge and to pay a penalty to the consumer as provided in sections 5-5-201 and 5-5-202." Id. (emphasis added). C.R.S. section 5-5- 201 authorizes penalties "up to ten times the amount of the excess charge" if the creditor refuses to make a refund within reasonable time after demand. C.R.S. section 5-5-201(3). If a creditor is on notice of a UCCC violation and charges "an excess charge in deliberate violation of or in reckless disregard for this code," the UCCC also authorizes a penalty up to "ten times the amount of the excess charge."

THE ADMINISTRATOR OF THE
UNIFORM CONSUMER CREDIT CODE

Martha Fulford