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MEMORANDUM

April 3, 2013

TO: Donna Smith and Nathan Wilkes

FROM: Legislative Council Staff and Office of Legislative Legal Services

SUBJECT: Proposed initiative measure 2013-2014 #11, concerning a state public health insurance program

Section 1-40-105 (1), Colorado Revised Statutes, requires the directors of the Colorado Legislative Council and the Office of Legislative Legal Services to "review and comment" on initiative petitions for proposed laws and amendments to the Colorado constitution. We hereby submit our comments to you regarding the appended proposed initiative.

The purpose of this statutory requirement of the Legislative Council and the Office of Legislative Legal Services is to provide comments intended to aid proponents in determining the language of their proposal and to avail the public of knowledge of the contents of the proposal. Our first objective is to be sure we understand your intent and your objective in proposing the amendment. We hope that the statements and questions contained in this memorandum will provide a basis for discussion and understanding of the proposal.

Purposes

The major purposes of the proposed amendment to the Colorado constitution appear to be:

1. To create the Colorado health services program (program) for all Colorado residents in order to provide the same level of necessary medical, mental health, dental, and long-term care services at least as broad in scope as required under the federal "Patient Protection and Affordable Care Act";
2. To define "medically necessary services" and state what is included under "covered medical services";

3. To create the Colorado health services board to administer the program;
4. To direct the program to implement a system of electronic health records and medical billing;
5. To set the requirements for eligibility in the program;
6. To state that variations in premiums will not be allowed based on health status, claims history, age, gender, geography, occupation, industry, family size, or smoking status;
7. To create the health services trust in which premiums collected are deposited;
8. To direct the Colorado health services board to establish fair and equitable premiums based on a combination of payroll and income taxes;
9. To allow the state of Colorado to authorize other sources of revenue;
10. To set requirements for health care providers to submit claims for the payment of medical services;
11. To allow Colorado residents registered in the program to select, without restraint, a medical home;
12. To state that the program shall be the primary payer for medical services received by Colorado residents registered in the program;
13. To state that patients shall not pay co-pays or deductibles the first three years the program is in operation and that any cost-sharing structure that is instituted later shall be minimal and not create economic hardship; and
14. To specify that the state shall pursue all available waivers for federal funds currently used to cover or subsidize health care for residents of Colorado.

Technical Comments

The following comments address technical issues raised by the form of the proposed initiative. These comments will be read aloud at the public meeting only if the proponents so request. You will have the opportunity to ask questions about these comments at the review and comment meeting. Please consider revising the proposed initiative as suggested below.

Amending Clause

1. To conform to the standard format for amending clauses, the amending clause in the proposed initiative should be changed as follows:

In the constitution of the state of Colorado, **add** article XXX as follows:

Format/Organization of Initiative and Headnotes

2. It is standard drafting practice to center article headings in the Colorado constitution. For example:

ARTICLE XXX
Establishment of a Statewide Universal
Public Health Insurance Program

3. It is standard drafting practice to insert a left tab at the beginning of the first line of each new section, subsection, paragraph, or subparagraph, including amending clauses and section headnotes. See the example in #4 below.
4. Each headnote should end with a period and should be in mixed-case letters, with the first letter of the first word capitalized and the remaining words lower case. A headnote should precede each new section in the proposed initiative. It is standard drafting practice for the first subsection, or the first line of the section if there are no subsection, to immediately follow the headnote on the same line instead of the first subsection or first line appearing on a separate line from the headnote. For example:

Section 5. Information technology. (1) THE COLORADO HEALTH SERVICES PROGRAM SHALL IMPLEMENT A SYSTEM . . .

(2) THIS SYSTEM SHALL BE AVAILABLE FOR PROVIDERS TO SUBMIT MEDICAL BILLING CLAIMS ELECTRONICALLY.

Numbering

5. Numbered provisions should be in order. Section 9 of the proposed initiative has a subsection (4) at the end that is out of numeric order. Also, the proposed initiative has two Section 13s.

Small Caps and Capitalization

6. It is standard drafting practice to use SMALL CAPITAL LETTERS to show the language being added to the Colorado constitution. See the example in #4 above.
7. Note that although the text of the proposed initiative should be in small capital letters, a large capital letter should be used to indicate capitalization where appropriate. The following should be large capitalized: The first letter of the first word of each sentence; and the first letter of proper names. Also, headnotes should not be in small capital letters, but should be in regular, bold-faced type.
8. It is standard drafting practice to capitalize only proper names, such as the names of cities or states. Therefore, it is unnecessary to capitalize words and phrases such as "health services program," "article," "state," "health services board," "governor," "legislature," "health benefit exchange," "all-payer claims database," "department of health care policy and financing," "social security," "governing board," "health services trust," "general fund," "medicaid," "medicare," "accountable care organization," "medical home," "state innovation waiver," et cetera.

Commas

9. The preferred method for separating a series in a list is to include a comma after the second to last item in the series. Instead of "apples, oranges and pears" use "apples, oranges, and pears." For example, in Section 1 of the proposed initiative, "an increasing strain on family, business, municipal and state budgets" should be "an increasing strain on family, business, municipal, and state budgets." Please note that there are many places in the proposed initiative where a serial comma should be added.
10. It is standard drafting practice to:
 - a. Set off certain phrases (i.e., introductory or parenthetical phrases) with commas;
 - b. Use commas to connect two independent clauses;
 - c. Separate coordinate adjectives with a comma.

Definitions

11. The following standard drafting language should be added to Section 2 of the proposed initiative, following the headnote: "As used in this article, unless the context otherwise requires:".
12. Definitions should be in alphabetical order.
13. It is standard drafting practice to use the terms that have been defined for a particular article, without having to refer to full names repeatedly. For example, the proponents have defined "ACA" to mean the federal "Patient Protection and Affordable Care Act." Instead of referring to the full name of the act in the proposed initiative, the proponents should instead refer to the ACA. Likewise, the proponents may want to consider defining the Colorado health services program as the "program" or the "CHSP" and then referring to it throughout the proposed initiative with the shortened, defined name. Another name the proponents may want to consider defining is the Colorado health services board.
14. To avoid confusion, it is standard drafting practice to use the terms that have been defined for a particular article consistently throughout the article. For example, "medically necessary services" is a defined term, but Section 12 (3) of the proposed initiative refers to "medically necessary health care services" and the first Section 13 (3) refers to "necessary medical services." Similarly, "licensed health care provider" is a defined term, but "participating provider," "health care providers," and "provider" are used instead throughout the proposed initiative.
15. Unless the term is defined, it is standard drafting practice to refer to the full name of an act, entity, or program. The proponents should consider either defining the following terms or referring to them by their full names: HIPAA, COBRA, CHS, CHSP, DRG, SCHIP, VA, and IHS.

References

16. When referencing a federal act, it is standard drafting practice to refer to the correct short title of the act, to put the name of the act in quotes, and to add "as amended" after the name of act to include any amendments to the act. For example:

. . . THE FEDERAL "PATIENT PROTECTION AND AFFORDABLE CARE ACT" OF 2010, AS AMENDED.

17. In Section 11 (1) of the proposed initiative, the reference to "Section 6" should be written as "SECTION 6 OF THIS ARTICLE."
18. In Section 15 of the proposed initiative, the reference to "Section 1(4) of Article V" should be written as "section 1 (4) of article V of this constitution."

Spelling and Hyphens

19. Compound adjectives should be hyphenated. This includes words such as "high-quality," "long-term," "four-year," and "cost-sharing."
20. In the second section of Section 1 of the proposed initiative, "effecting" should be spelled "affecting."

Active Voice/Verb Tense/Authority Verbs

Prior to the 2012 legislative session, the Office of Legislative Legal Services revised its drafting guidelines pertaining to verb tense, active voice, and authority verbs (e.g., shall, shall not, may). These guidelines emphasize writing in active voice, writing in the present tense (rather than future tense), and using authority verbs only to mandate, prohibit, permit, or impose conditions on a person or entity. Accordingly, the proponents may want to consider implementing the guidelines in the proposed initiative. Following are a few examples:

- a. Instead of writing "All Colorado residents will be covered," write "All Colorado residents are covered."
- b. Instead of "the Legislature cannot remove funds," write "the legislature shall not remove funds."
- c. Instead of "Fair and equitable premiums shall be established by the Colorado Health Services Board," write "the Colorado health services board shall establish fair and equitable premiums."

Miscellaneous

21. Numbers should be spelled out as words.
22. It is standard drafting practice to use the word "that" instead of "which" when indicating a restrictive clause, meaning the word, clause, or phrase following the word "that" is necessary to the meaning of the sentence and is not simply additional or descriptive information.
23. In the first sentence of Section 1 of the proposed initiative:
 - a. The phrase "more businesses are finding private insurance premiums to be unaffordable and resulting in reduced global competitiveness" doesn't seem to make sense. It may need to be rewritten as "more businesses are finding private insurance premiums to be unaffordable, which has resulted in reduced global competitiveness" if that is what the proponents intend.
 - b. The word "that" should be deleted in the phrase "and that the interests of the public are best served."

24. In Section 3 (2) of the proposed initiative, "room and board" should have double quotation marks.
25. In the first sentence of Section 4 of the proposed initiative, "comprising 15 to 21 members" should state "which shall be comprised of fifteen to twenty-one members" to be grammatically correct.
26. In Section 5 of the proposed initiative:
 - a. In subsection (5), "a identification card" should be "an identification card";
 - b. In subsection (7), "Health Benefits Exchange" should be "health benefit exchange" as that is the correct name and "All Payer Claims" should be "all-payer claims," as that is the correct spelling.
27. Sometimes the Colorado health services board is referred to as the "governing board" and sometimes it is referred to as the "health services board" throughout the initiative. To be consistent, the proponents may want to refer to it as the "health services board."
28. In Section 8 (1) of the proposed initiative, "health services trust" is referred to, but elsewhere in the initiative, it is referred to as the "health services trust fund" or "trust."
29. In Section 9 (the second (4)) of the proposed initiative, "rules and regulations" is redundant and should just say "rules."
30. In Section 14 of the proposed initiative:
 - a. "this section" should be "this article";
 - b. "ands" should be "and";
 - c. The phrase "shall supersede conflicting state statutory, local charter, ordinance, or resolution, and other state and local provisions" should be rewritten as "shall supersede conflicting state statutes; local charters, ordinances, or resolutions; and other state and local provisions" to be grammatically correct.
31. In Section 15 of the proposed initiative, "voter hereon" should be "vote thereon."

Substantive Comments and Questions

The substance of the proposed initiative raises the following comments and questions:

1. Section 1 (5.5) of article V of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Article 16 of title 10, Colorado Revised Statutes, governs the private insurance industry. Article 22 of title 10, Colorado Revised Statutes, creates the Colorado Health Benefit Exchange. Is it your intent that this proposed constitutional amendment preempt this existing state law?
3. In section 3 (1) of the proposed initiative, what is meant by the "same level of" necessary services "at least as broad in scope" as required under the Patient Protections and Affordable Care Act?
4. Usually it is the senate that approves appointments made by the governor. Section 4 requires the board members appointed by the governor be approved by the senate and by "the majority of house members from each respective district." What is meant by the majority of house members from each district? Do you mean a majority of the members of the house of representatives?
5. In Section 8 (5), what is meant by "constitutional power to contain costs"?
6. Section 10 requires the Colorado Health Services Program to pay for all medically necessary services. What if the medically necessary service is not a covered service pursuant to Section 3?
7. Would you like to define some of the terms used in the proposed amendment such as "balance billing," "global billing," "fee-for-service," and "cost sharing" to make the meanings of these terms clear?
8. Section 11 (2) allows all residents to have free choice of any licensed health care provider or hospital. What if the provider or hospital has not agreed to a negotiated rate or standard rate for medical services pursuant to Section 10 (7)?
9. Section 1332 of the Patient Protection and Affordable Care Act allows a state to opt out of implementing a state exchange or opt out of participating in a national exchange if certain conditions are met and the state is granted a waiver by the federal government. Would you like to include a section that repeals this proposed constitutional amendment if the necessary waivers are not granted?