

# STATE OF COLORADO

## Colorado General Assembly

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### MEMORANDUM

January 26, 2010

**TO:** Jon Caldara and Linda Gorman

**FROM:** Legislative Council Staff and Office of Legislative Legal Services

**SUBJECT:** Proposed initiative measure 2009-2010 #40, concerning the Right to Health Care Choice

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 appear to be:

1. To amend article II of the Colorado constitution to add a new section 32, entitled "Right to health care choice";
2. To declare that all persons have the right of health care choice;
3. To prohibit any statute, regulation, resolution, or policy adopted or enforced by the state, its departments, or agencies, either independently or at the instance of the United States, from:
  - a. Requiring any person to participate in any public or private health benefit plan or system;
  - b. Denying, restricting, or penalizing the right of any person to make or receive direct payments for lawful health benefit services; or
  - c. Denying, restricting, or penalizing the right of any person to purchase and use health insurance products or other health benefit plans or systems legally for sale in another state if such plans or systems are duly licensed or otherwise qualified and in good standing in the plan or system provider's home state;
4. To specify that the new constitutional provision does not apply to, affect, or prohibit:
  - a. Emergency services required by law to be provided or performed by hospitals, health facilities, or other health practitioners; or
  - b. Health benefits provided in connections with workers' compensation or other similar insurance.
5. To define "lawful health care services" as those services or treatments that are permitted or not prohibited by any provision of law;
6. To declare that the intent of the section is to reflect and affirm the powers reserved to the state by article X of the United States constitution and to implement the powers reserved to the people by Article V of the Colorado constitution;
7. To specify that the section is to become effective upon proclamation by the governor, is to be self implementing in all respects, and is to supersede any provision in the state constitution or other provision of law that is contrary to the section; and
8. To declare the provisions of the section severable and specify that if any provision of the section or the application of a provision to any person, entity, or circumstances is held invalid, the invalidity of the provision does not affect other provisions or applications of the section that can be given effect without the invalid provision.

### 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.

1. When proposing new constitutional or statutory language, standard drafting procedures require the use of SMALL CAPS to show any new material being proposed.
2. It is standard drafting practice to insert a left tab at the beginning of the first line of each new paragraph, including amending clauses and section headings. It is also standard practice to bold the section number.
3. Subsection (1) of the measure consists of a single, lengthy sentence with multiple concepts that may be difficult for the average reader to follow. The proponents might consider using additional punctuation to separate some of the concepts in the sentence to make it a bit easier to understand. For example, the proponents could insert a colon after the word "shall" in the third line of subsection (1), and then list each item or concept as a separate lettered paragraph, separated by semicolons, as follows:

"(1) ALL PERSONS SHALL HAVE THE RIGHT OF HEALTH CARE CHOICE. NO STATUTE, REGULATION, RESOLUTION, OR POLICY ADOPTED OR ENFORCED BY THE STATE OF COLORADO, ITS DEPARTMENTS AND AGENCIES, INDEPENDENTLY OR AT THE INSTANCE OF THE UNITED STATES, SHALL:

(a) REQUIRE ANY PERSON TO PARTICIPATE IN ANY PUBLIC OR PRIVATE HEALTH BENEFIT PLAN OR SYSTEM;

(b) DENY, RESTRICT, OR PENALIZE THE RIGHT OF ANY PERSON TO MAKE OR RECEIVE DIRECT PAYMENTS FOR LAWFUL HEALTH BENEFIT SERVICES; OR

(c) DENY, RESTRICT, OR PENALIZE THE RIGHT OF ANY PERSON TO PURCHASE AND USE HEALTH INSURANCE PRODUCTS OR OTHER HEALTH BENEFIT PLANS OR SYSTEMS LEGALLY FOR SALE IN ANY OTHER STATE WHERE THE PROVIDER OF SUCH PLANS OR SYSTEMS IS DULY LICENSED OR OTHERWISE QUALIFIED AND IN GOOD STANDING IN THE PROVIDER'S HOME STATE."

Similarly, in subsection (2), each new lettered paragraph should begin on a new line, with the first letter capitalized, and with a left tab, consistent with standard drafting practices.

4. In the third line of subsection (1), the phrase "independently or at the instance of the United States" appears to be a clause that describes how the state or its departments or agencies might act. It is standard drafting practice to set clauses off by commas.
5. Under standard drafting procedures, a series of three or more items is set off by commas,

including a comma between the second-to-last item and the conjunction. In particular, the proponents might consider adding commas in the following locations:

- a. In subsection (1), in the second line, between "resolution" and "or";
  - b. In subsection (1), in the fifth and sixth lines, between "restrict" and "or";
  - c. In subsection (2), between "affect" and "or";
  - d. In subsection (2), between "facilities" and "or";
  - e. In subsection (5), between "respects" and "and"; and
  - f. In subsection (6), in lines 1 and 2, between "entity" and "or".
6. When beginning a sentence with a negative phrase, it is standard drafting practice to use the conjunction "or" rather than "nor." According to *Garner's Modern American Usage*, by Bryan A. Garner, Oxford University Press, 2003, p. 553, "When the negative of a clause or phrase has appeared at the outset of an enumeration, and a disjunctive conjunction is needed, 'or' is generally better than 'nor.' The initial negative carries through to all the enumerated elements."
  7. In subsection (1), in the eighth line, it appears that the proponents may have intended for the word "legal" to be "legally".
  8. It is standard drafting practice to use the term "workers' compensation" with the apostrophe following the "s" rather than before the "s", with respect to subsection (2).
  9. Subsection (3) defines the term "lawful health care services." However, that term is not used in the measure. The term "lawful health benefit services" appears in subsection (1) of the measure. If this is the term the proponents intend to define in subsection (3), the preferred drafting method is to use consistent terminology. If the definition in subsection (3) is not intended to define the term used in subsection (1), what is the intent or purpose of the definition in subsection (3)?
  10. Under standard drafting guidelines, the use of capitalization is limited and would not be used for words like "state," "article," "people," "governor," and "constitution." In addition, the phrase "to read:" in the amending clause should be lower case, according to standard drafting practice.
  11. With regard to subsection (6), 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.

## 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. As a change to the Colorado constitution, the proposed initiative may only be amended by a subsequent amendment to the constitution. Is this your intention?
3. If the United States congress enacts any legislation that conflicts with all or any portion of the measure, would the federal legislation preempt the state constitution? Would the proponents explain whether or how the proposal may be impacted by federal legislation that would appear to preempt the state law?
4. Subsection (1) states that every person has the right of "health care choice." The term "health care choice" is not defined in the measure. Do the proponents intend the remaining language in subsection (1) to explain or define what constitutes "health care choice" and what would be an infringement on a person's "health care choice"? Would the proponents please explain the intended meaning of "health care choice"?
5. Will the proponents please explain the meaning of the phrase "at the instance of the United States" in subsection (1) of the measure?
6. What do the proponents mean by the term "health benefit plan or system"? The term "health benefit plan" has been defined in section 10-16-102 (21), Colorado Revised Statutes, as follows:

(21) (a) "Health benefit plan" means any hospital or medical expense policy or certificate, hospital or medical service corporation contract, or health maintenance organization subscriber contract or any other similar health contract subject to the jurisdiction of the commissioner available for use, offered, or sold in Colorado.

(b) "Health benefit plan" does not include: Accident only; credit; dental; vision; medicare supplement; benefits for long-term care, home health care, community-based care, or any combination thereof; disability income insurance; liability insurance including general liability insurance and automobile liability insurance; coverage for on-site medical clinics; coverage issued as a supplement to liability insurance, workers' compensation or similar insurance; or automobile medical payment insurance. The term also excludes specified disease, hospital confinement indemnity, or limited benefit health insurance if such types of coverage do not provide coordination of benefits and are provided under separate polices or certificates. Solely with respect to the provisions of section 10-16-118 (1) (b) concerning creditable coverage for individual policies, the term excludes individual short-term limited duration health insurance policies issued after January 1, 1999. This means such policies do not have to recognize creditable coverage. For the purpose of this paragraph (b), "short-term limited duration health insurance policy" means a nonrenewable individual health benefit plan with a specified duration of not more than six months that meets the following requirements:

(I) The short-term limited duration health insurance policy is issued only to individuals who have not had more than one such policy providing the same or similar nonrenewable coverage from any carrier within the past twelve months and so states in all marketing materials, application forms, and policy forms. An applicant shall be deemed to be eligible for coverage if a short-term carrier includes in its application form the following: "Have you or any other person to be insured been covered under two or more nonrenewable short-term policies during the past twelve months? If "yes", then this policy cannot be issued. You must wait six months from the date of your last such policy to apply for a short-term policy."

(II) The short-term limited duration health insurance policy contains the following disclosure in ten-point or larger bold-faced type in all marketing materials, application forms, and policy forms: "This policy does not provide portability of prior coverage. As a result, any injury, sickness, or pregnancy for which you have incurred charges, received medical treatment, consulted a health care professional, or taken prescription drugs within twelve months of the effective date of this policy will not be covered under this policy."

Does this statutory definition describe the scope of "health benefit plan" for purposes of the measure? Would policies that are excluded under the statutory definition be included in the constitutional term? What is a "health benefit system"? Would the proponents consider defining "health benefit plan or system" to clarify the scope of the term?

7. In the last clause of subsection (1), the measure refers to health benefit plans or systems that are "duly licensed or otherwise qualified and in good standing in the provider's home state." Generally, a health benefit plan or system is not "licensed" and is not "in good standing." Rather, the producer or agent that offers the plan is "licensed" and the company that engages in the business of making contracts of insurance is issued a "certificate of authority" to engage in the business of insurance in a particular state. Additionally, the producer or insurance company would be "in good standing", not the health benefit plan or system. Accordingly, would the proponents consider modifying the language in the second to last line of subsection (1) to specify that it is the "provider" of the plan or system that must be duly licensed or otherwise qualified and in good standing? In other words, "where such plans or systems are" could be rephrased as "where the provider of such plans or systems is . . ."
8. Is the last clause in subsection (1) of the measure intended to allow Coloradans to purchase health insurance that is offered or sold in another state but is not authorized for sale in Colorado, either because the insurance company is not authorized to do business in Colorado or the plan does not meet the requirements of Colorado's insurance laws? If so, what protections or recourse would the Colorado purchaser of an out-of-state product have against the insurance company in the event of a dispute over an alleged covered benefit, claims of bad faith, or other issues arising under a health insurance policy? Would the Colorado purchaser have to travel to the other state or work through the other state's insurance commissioner? Would the Colorado commissioner of insurance have any jurisdiction over the out-of-state provider?