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MEMORANDUM

TO: David Silverstein and Andrew Graham
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: January 23, 2018
SUBJECT: Proposed initiative measure 2017-2018 #118, concerning Transparency in Healthcare Billing

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 directors of 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.

An earlier version of this proposed initiative, proposed initiative 2017-2018 #85, was the subject of a memorandum dated December 19, 2017. Proposed initiative 2017-2018 #85 was discussed at a public hearing on December 21, 2017. The substantive and technical comments and questions raised in this memorandum do not include comments and questions on initiative 2017-2018 #85 not addressed in this revised proposal. To the extent applicable, those comments and questions are hereby incorporated.

This initiative is one of a series identified as initiatives 2017-2018 #118 to #122. The comments and questions raised in this memorandum do not include comments and questions addressed in the memoranda for proposed initiatives 2017-2018 #119 to #122.

Purposes

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

1. To require health care providers maintaining a physical presence to receive and treat patients, including individual providers in private practice settings and health care facilities such as hospitals and community clinics, to publish, in a form and manner specified by the executive director of the Colorado Department of Public Health and Environment, their fee schedules or other lists of gross billed charges the providers bill for specific health care services before applying any discounts, rebates, or other charge adjustment mechanisms;
2. To require a provider that does not maintain its own physical presence and instead delivers health care services at a health care facility to provide the provider's list of gross billed charges to the facility, and to require the facility to post the provider's charges list in the form and manner specified by the executive director of the Colorado Department of Public Health and Environment;
3. To require providers to provide any other information required by the executive director of the Colorado Department of Public Health and Environment in the form and manner specified by the executive director;
4. To except a provider from the requirement to post its entire fee schedule if the provider's entire fee schedule is based on a percentage of the CMS fee schedule, require a provider to publish any portion of the fee schedule that is not based on the CMS fee schedule, and to require a provider that bases a portion of its fee schedule on a percentage of the CMS fee schedule to publish information specified by the executive director of the Colorado Department of Public Health and Environment, which must include, at a minimum, the date of the CMS schedule the provider used, the percentage

- amount that is the basis of the charges in the provider's fee schedule, and any other information necessary to determine charges;
5. To require a provider to update its published fee schedules promptly upon any change in the information and maintain records of all changes to charges listed in its published fee schedule;
 6. To prohibit a provider from billing a patient or third-party payer for health care services rendered to the patient if the provider has failed to publish its fee schedule as required by the proposed measure but allow the noncomplying provider to bill the insurance carrier as long as the patient is held harmless for any balance not paid by the insurance carrier;
 7. To require a provider to include in every bill sent to a patient an itemized detail of each health care service provided, the charge for the service, and how any payment or adjustment by the patient's health insurer was applied to each line item in the bill;
 8. In situations where an individual provides health insurance information to the provider, to require the health care provider to disclose whether the provider participates in the individual's health insurance plan; whether the services the provider will render will be covered as an in-network or out-of-network benefit; and whether the individual will receive a service for an out-of-network provider at an in-network facility;
 9. To require health insurers to post on their websites and provide, in writing upon request from a covered person:
 - a. The specific basis for determining the payment or reimbursement amount the insurer provides to a health care provider rendering health care services to a person covered under a plan issued by the insurer;
 - b. Items that appear as charges on an explanation of benefits or provider billing statement that the carrier does not pay;
 - c. Detailed coverage and negotiated payment information by plan type and participating provider; and
 - d. Prescription drug prices in a form and manner determined by the commissioner.

10. To require health insurers to annually, or more frequently if required by the commissioner of insurance, publish detailed information, in a form and manner determined by the commissioner of insurance, regarding all forms of remuneration derived from rebates or other forms of incentive received as the result of health care services or purchases of prescription drugs or medical devices;
11. To require the commissioner of insurance, on or before April 30, 2019, to adopt rules necessary to implement, administer, and enforce the requirements imposed on health insurers and to thereafter revise the rules as necessary;
12. To require every pharmacy to publish, in a form and manner determined by the Colorado State Board of Pharmacy, promptly update as specified by the pharmacy board, and maintain records of changes to, as specified by the pharmacy board, its retail drug prices, which is a list of the prices the pharmacy charges to an insured or uninsured person for prescription drugs it administers or dispenses, before any rebates, discounts, or other price adjustment mechanisms are applied;
13. To require the pharmacy board, on or before April 30, 2019, to adopt rules necessary to implement, administer, and enforce the requirements imposed on pharmacies and to thereafter revise the rules as necessary;
14. To repeal article 49 of title 25 of the Colorado Revised Statutes, which is the "Transparency in Health Care Prices Act."
15. To prohibit any contract between a health insurer and health care provider issued, amended, or renewed on or after April 30, 2019, from including any provision that restricts the ability of a provider or health insurer to provide patients with the health care service charge information required to be published by the proposal and to specify any such provision is void and unenforceable;
16. To require the executive director of the of the Colorado Department of Public Health and Environment to adopt any rules necessary to implement, administer, and enforce the measure;
17. To define terms used in the measure; and
18. To specify that the measure takes effect on April 30, 2019.

Substantive Comments and Questions

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

1. Article V, section 1 (5.5) of the Colorado constitution requires all proposed initiatives to have a single subject. What is the single subject of the proposed initiative?
2. Section 8 of the initiative proposal provides that the "act takes effect April 30, 2019." However, sections 3, 4, and 7 require the promulgation of rules to implement, administer, and enforce the act by April 30, 2019. There is no authority to promulgate rules prior to the effective date of the act. Therefore, it would be impossible for agencies to promulgate rules by the date required in sections 3, 4, and 7.
3. The initiative proposal delegates separate regulatory authority to an agency and two different appointed officials: the Colorado State Board of Pharmacy, the commissioner of insurance, and the executive director of the Colorado Department of Public Health and Environment. With the exception of new section 10-16-147, the initiative proposes to place the new statutory provisions in article 20 of title 6. Have you considered placing the sections of the proposal that involve each agency in the title and an article specifically related to that agency? For example, section 4 of the proposal regarding pharmacy drug prices might be better placed in article 42.5 of title 12. Section 6 regarding insurance contracts might be better placed in article 16 of title 10 along with section 3 of the proposal.
4. Throughout the measure, reference is made to something that is to be "specified by the executive director" (see section 6-20-103 (1)(a), (2), (3), and (4)(b)); "determined by the commissioner" (see section 10-16-147 (2)(d) and (3)); or "determined by the board" or "as specified by the board" (see section 6-20-106 (1) and (2)). Do the proponents intend that the executive director, commissioner of insurance, and pharmacy board, respectively, adopt formal rules in accordance with the requirements of the "State Administrative Procedure Act," article 4 of title 24, C.R.S.? Or can the executive director, commissioner, and pharmacy board simply issue a guidance or bulletin, without formal rulemaking, to specify or determine the particular matter? If the proponents intend to require formal rulemaking, would the proponents consider adding "by rule" to each instance in the measure where a matter is to

be determined or specified by the executive director, commissioner, or board?

5. Section 2 of the proposal contains definitions in section 6-20-102.
 - a. It might be useful to revise the definition in subsection (1) to "'board' means the state board of pharmacy created in section 12-42.5-103."
 - b. The definition of "commissioner" in subsection (5) could reference the "commissioner of insurance appointed pursuant to section 10-1-104."
 - c. The definition of "executive director" in subsection (6) could reference the "executive director of the department of public health and environment appointed pursuant to section 25-1-105."
 - d. "Telemedicine" is included in the definition of "healthcare service" in subsection (11). There is a statutory definition of "telemedicine" in section 12-36-102.5 (8), C.R.S. Might it add clarity to cross-reference this existing definition instead of adding a new description of telemedicine in section 6-20-102 (11)?
 - e. The proposal would be more consistent with current law if the definition of "pharmacy" cross-referenced the existing definition of the "practice of pharmacy" in section 12-42.5-103 (31), C.R.S.
 - f. The definition of "retail drug price" is unclear. The definition refers to the price charged by a pharmacy to "the uninsured or insured." Because every buyer will either be "uninsured or insured," is there a substantive reason to reference the status of the purchaser's insurance? Does this distinction suggest the pharmacy is billing differently to the insured or uninsured? The definition of retail price also is a price "before the application of discounts, rebates, negotiations, or other forms of charge reduction or adjustment." Would the exclusion of charge reductions in the definition of retail price include or exclude reductions negotiated by carriers as provided in the definition of "prescription drug price"?
6. Section 6-20-103 (2) appears to allow the executive director to require a health care provider to "provide any other information" the executive director chooses to require. Is the proponents' intent to limit "any other information" to information pertaining to a provider's fee schedule or charges, and if so, would the proponents consider specifying that limitation?

7. Section 6-20-103 (3) refers to the "CMS fee schedule," but that term is not defined in the measure. What is intended by the term "CMS fee schedule"? Would the proponents considering defining the term?
8. Section 6-20-103 (5) in section 2 of the proposal provides that a health care provider who fails to publish a fee schedule or chargemaster "shall not bill the patient or third-party payer for the healthcare services rendered" but "may bill a carrier." However, the definition of "third-party payer" includes a "health insurance carrier." Would you consider revising section 6-20-103 (5) to remove this contradiction?
9. Section 6-20-103 in the proposal requires health care providers to publish fee schedules. Subsection (5) states that if a health care provider fails to publish as required by the section, the patient "shall be held harmless by both provider and carrier for any balance." To "hold harmless" is a legal concept typically included in private contracts to release one party from liability for damages resulting from the negligent actions of another party. The intent of this subsection appears to be a prohibition on balanced billing and not an assignment of liability for negligence. Have you considered removing the "hold harmless" reference and simply stating that a patient shall not be responsible for paying the balance of the charges?
10. In section 3 of the proposal, the commissioner of insurance is required to "promulgate rules as are necessary for the implementation, administration, and enforcement" of section 10-16-147. Do you intend the commissioner of insurance to enforce 10-16-147 in the same manner authorized under existing insurance laws?
11. Section 4 of the proposal requires the Colorado State Board of Pharmacy to promulgate rules to implement, administer, and enforce section 6-20-106. Section 7 requires the executive director of the Colorado Department of Public Health and Environment to promulgate rules as are necessary to implement, administer, and enforce all of article 20 of title 6 except for section 6-20-106. In each of these grants of rule-making authority, what type of "enforcement" would the agency or official be allowed to adopt? If you intend enforcement to include discipline of licensees, the failure to comply with the applicable statute or the agency rules adopted under those sections should be added to the grounds for discipline in the applicable licensure statutory provision.

12. In section 3 of the measure, section 10-16-147 (2) requires health insurers to post specified information on their website and to provide the information in writing upon request. Paragraph (d) of that provision requires information about "prescription drug prices in a form and manner determined by the commissioner." Is it the proponent's intent to only require a health insurer to post and provide the written information about prescription drug prices "in a form and manner determined by the commissioner"? As written, the commissioner is not authorized to determine the form and manner of posting and providing the information specified in paragraphs (a), (b), and (c). If the proponents intend the commissioner to determine the form and manner for a health insurer to post all of the information specified in paragraphs (a), (b), (c), and (d), the proponent should consider moving the phrase "in a form and manner determined by the commissioner" to the introductory language in subsection (2), to precede and apply to all of those paragraphs.
13. Under section 1-40-105.5, C.R.S., the director of research of the Legislative Council is required to prepare an initial fiscal impact statement, which includes an abstract that appears on petition sections for each initiative that is submitted to the Title Board. In preparing the statement, the director is required to consider any fiscal impact estimate prepared by the proponents.
- a. Will you submit the initiative to the Title Board? If so, when do you intend to do so?
 - b. Are you submitting a fiscal impact estimate today? If not, do you plan to submit an estimate in the future, and if so, when do you intend to do so?
 - c. To ensure that there is time for consideration, you are strongly encouraged to submit your estimate, if any, at least 12 days before the measure is scheduled for a Title Board hearing. The estimate should be submitted to the legislative council staff at BallotImpactEstimates.ga@state.co.us.

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. The term "healthcare" is used throughout the proposed initiative. However, throughout the Colorado Revised Statutes, the term is spelled "health care." Consider changing all instances of "healthcare" to "health care."
2. Sections 1, 4, 6, and 7 of the proposed initiative each add a new part 1 to article 20 of title 6. Because the entire part 1 is being repealed and reenacted in section 2 of the proposed initiative, the language in sections 1, 4, 6, and 7 should be moved to and combined with section 2 under a single amending clause, with the new sections 6-20-100, 6-20-106, 6-20-107, and 6-20-108 included under the single amending clause.
3. Citations to sections in the Colorado Revised Statutes should have a space between the section number and the subsection number. For example, the citation in 6-20-102 (8) should be "10-16-102 (34)" instead of "10-16-102(34)."
4. A reference to a subsection of the Colorado Revised Statutes should indicate every element of the subsection referenced as well as the section in which that subsection can be found. For example, the reference in 6-20-102 (10)(f) should, presumably, be "To the extent not covered by subsections (10)(a) through (10)(e) of this section..."
5. The word "section" or "subsection," as appropriate, should precede a citation to the Colorado Revised Statutes. For example, the reference in 6-20-106 in section 7 of the measure should be written "...except for section 6-20-106 ..."
6. Because the language that begins section 6-20-105 is an introductory portion leading to other subsections, it must begin with a (1), and subsections (1), (2), and (3) that follow should be relabeled as (a), (b), and (c). Additionally, because the current subsections (1), (2), and (3) are elements of a list that are only one sentence long, they should each end with a semi-colon instead of a period. The end of subsection (2) should end with either an "and" or an "or" after the semi-colon, depending on the meaning the proponents wish to convey.
7. Statutory text should immediately follow each headnote. For example, the text in subsection (1) of section 10-16-147 should be moved to follow "**rules.**" instead of appearing on the next line.
8. The end of 10-16-147 (2)(a)(II) should end with a semi-colon instead of a period to denote that the list of which it is a part continues in the next subsection, (2)(b).
9. The terms as defined in the proposed measure in section 6-20-102 apply only to those terms as they appear in part 1 of article 20 of title 6 and do not apply to

the terms as used in the proposed section 10-16-147, which is located in a different area of statute. So, for example, the term "prescription drug price" is defined in section 6-20-102 (13), and that definition applies as the term is used in part 1 of article 20 of title 6. That term, however, is not otherwise used in part 1 of article 20 of title 6, so the term should not be included in the definitions section 6-20-102. The term **is** used in section 10-16-147, but the defined term in section 6-20-102 (13) does not apply to section 10-16-147, and the term is not included in the definitions section that applies to section 10-16-147. Proponents should move the defined term to section 10-16-147 or add it to the list of defined terms in section 10-16-102, which applies to all of article 16 of title 10.

10. The first word following a new subsection should be capitalized, even if it is the continuation of a sentence that begins in a previous subsection. For example, the first word in 10-16-147 (2)(d), "prescription," should be capitalized.