

DEPARTMENT OF LAW
FY 2018-19 JOINT BUDGET COMMITTEE HEARING AGENDA

Monday, November 27, 2017
3:00 pm – 5:00 pm

3:00-3:15 INTRODUCTIONS AND OPENING COMMENTS

3:15-4:00 DECISION ITEM REQUESTS

R1: Medicaid Fraud Investigator

- 1 The JBC Staff Briefing Document referenced a federal review of the Medicaid Fraud Control Unit that found that the Unit was not adequately prioritizing abuse, neglect, and exploitation cases. Does that finding have financial implications for the State's Medicaid funding? Please explain.

Response:

No. Because the Unit has accepted the Office of the Inspector General's recommendation, and has already increased its investigations in this priority area, it does not anticipate any adverse implications for federal funding.

The Social Security Act contains the conditions that must be met in order for individual states to receive Federal matching dollars for "State plans for medical assistance" (Medicaid). Title 42 U.S.C. 1396a (a) (61) of the Act requires that a state "must demonstrate that it operates a Medicaid fraud and abuse control unit described in section 1396b (q) of this title that effectively carries out the functions and requirements described in such section, as determined in accordance with standards established by the Secretary" in order to receive federal matching funds for their Medicaid program. To ensure that Medicaid Fraud Control Units are adhering to federal requirements, they must be recertified annually and are periodically audited by the Office of the Inspector General of the Department of Health and Human Services (DHHS).

During last year's DHHS audit, it was determined that the Colorado Medicaid Fraud Control Unit (COMFCU) was not meeting the federal performance standards which require a balance between the number of fraud cases and the number of abuse, neglect and exploitation cases that are investigated, as only four (4) percent of the cases investigated by COMFCU fell into the latter category. As a result, DHHS formally recommended that COMFCU take steps to increase the number of abuse, neglect and exploitation cases that it investigates. COMFCU has accepted this recommendation and has increased its focus on this area, and there has been an increase in the number of such cases that are investigated. As long as that effort is sustained, then there should not be an issue regarding the annual recertification of COMFCU and the roughly four (4) billion dollars in federal matching funds that Colorado receives for Medicaid should not be at risk. The Department's budget request for one additional Medicaid fraud

investigator to focus on abuse, neglect, and exploitation cases will help increase the number of these cases that are investigated by COMFCU.

- 2 How does the request for an additional Medicaid fraud investigator focused on abuse, neglect, and exploitation interact with bills the General Assembly has passed in recent years regarding reporting and enforcement of abuse and neglect. Please explain the roles of the Department and local authorities.

Response:

There has been an increase in the number of reports of abuse following the recent passage of bills that require the mandatory reporting of abuse, neglect and exploitation cases involving at-risk elders or an at-risk adults with an intellectual and developmental disability. These laws require that within twenty-four (24) hours of learning of abuse or forming a reasonable belief that abuse has taken place that the matter be reported to a law enforcement agency and that agency must report the same to the District Attorney's Office and to the county in which the event occurred.

Local law enforcement has indicated that there has been an uptick in reports of abuse involving both of these vulnerable populations, but have expressed a frustration that is shared by COMFCU that there is no statewide database available to law enforcement to track or review such reports. If an investigator receives a report of abuse or neglect, there is no way to determine if the alleged perpetrator of that abuse or neglect has been subject to such reports previously or elsewhere in Colorado. Additionally, when a report is made to a law enforcement agency there is no way for them to determine whether a report involving the same victim and alleged perpetrator has been submitted to and is being investigated by another law enforcement agency.

COMFCU has sought to establish and maintain working relationships with other law enforcement agencies. When notified of a potential matter, COMFCU contacts local law enforcement to determine whether they are investigating the same matter and if they require assistance on their investigation or need guidance or support. In some instances, law enforcement will refer cases to COMFCU when they have made the determination that they do not have the manpower or expertise to work the matter. At the request law enforcement agencies, COMFCU has provided training regarding the investigation of such cases.

- 3 Please discuss the scale of Medicaid fraud as an issue. Does the Department have estimates of Medicaid Fraud nationally and in Colorado? What is the return on investment for additional investigations?

Response:

CMS and the FBI estimate that between \$82 and \$272 billion in government health care spending is lost to fraud and abuse each year. At the midrange, this equates to roughly ten (10) percent of program

spending nationally. There is no reason to suspect that Colorado is an outlier on either end of the spectrum with regard to health care fraud and its percentages would probably be roughly the same.

A return on investment assessment should not be based upon the number of cases, but rather upon the size of the recoveries. For example, six or seven low difficulty and low recovery cases can be investigated in the time that it takes to investigate a case with significantly higher complexity and greater potential recovery. Using a recovery metric, as shown below the COMFCU over the past six years has recovered funds ranging from a low of 11.40 times to a high of 57.57 times the finding that it received from the state.

Fiscal Year	Total Recoveries by COMFCU	Colorado Funding for COMFCU	Recoveries by COMFCU were ___ times state funding
2010	\$12,552,629.97	\$398,126.00	31.53
2011	\$7,115,986.86	\$483,702.79	14.71
2012	\$28,160,136.79	\$489,110.71	57.57
2013	\$8,131,661.57	\$511,656.72	15.89
2014	\$9,999,945.37	\$403,881.21	24.76
2015	\$4,707,135.00	\$412,754.50	11.40
2016	\$14,617,470.00	\$544,674.75	26.84

- 4 How does this request relate to the new payment system in Medicaid? How does the new system relate to the fraud investigation process?

Response:

The Department's request is not related to the new Medicaid payment system . The Unit anticipates that the new system will increase the number of cases opened based upon data analysis rather than reports from impacted parties

COMFCU was not involved in the selection or the implementation of the new system. Based upon information from the vendor and HCPF, the new system is expected to both prevent and aid in the detection of Medicaid overbilling. HCPF continuously establishes and amends program billing rules. In the past, there were rule violations that the old billing system could not detect. This led to a "pay and chase" scenario wherein providers were paid when they should not have been and the efforts were made to then recover those funds. The new system has the ability to recognize HCPF's billing rules and reject

claims for payment that violate such rules. Additionally, the vendor of the new billing system has indicated that data analytics tools will eventually be available that will make the discovery of overbilling possible. This will change the fraud investigation process as it is anticipated that a greater number of cases will be opened based upon data analysis rather than reporting by impacted parties. The hope is that this will improve the response time for investigation and resolution of overbilling practices, thus minimizing losses.

- 5 Please explain why Medicaid fraud investigations are housed within the Department of Law and how the Medicaid Fraud Control Unit relates to quality assurance and fraud efforts in other departments such as Health Care Policy and Financing and Human Services.

Response:

Federal law requires Medicaid Fraud Control Units to be housed within an agency separate from the state Medicaid agency. These units operate in 49 states and the District of Columbia, and are usually a part of the State Attorney General's office. The Department's Medicaid Fraud Control Unit, HCPF, and CDPHE have memoranda of understandings in place to facilitate information sharing and cooperation on investigations.

Title 42 U.S.C. §§ 1396b (q) (1-2) defines a state Medicaid Fraud Control Unit as a single identifiable entity of the State government which the Secretary certifies (and annually recertifies) as meeting the following requirements:

- (1) The entity (A) is a unit of the office of the State Attorney General or of another department of State government which possesses statewide authority to prosecute individuals for criminal violations, (B) is in a State the constitution of which does not provide for the criminal prosecution of individuals by a statewide authority and has formal procedures, approved by the Secretary, that (i) assure its referral of suspected criminal violations relating to the program under this subchapter to the appropriate authority or authorities in the State for prosecution and (ii) assure its assistance of, and coordination with, such authority or authorities in such prosecutions, or (C) has a formal working relationship with the office of the State Attorney General and has formal procedures (including procedures for its referral of suspected criminal violations to such office) which are approved by the Secretary and which provide effective coordination of activities between the entity and such office with respect to the detection, investigation, and prosecution of suspected criminal violations relating to the program under this subchapter.
- (2) The entity is separate and distinct from the single State agency that administers or supervises the administration of the State plan under this subchapter.

For COMFCU to be annually recertified, it must exist under § 1396b (q) (1) (A) in the Department of Law (DOL) as an investigatory and prosecutorial body, since DOL possesses statewide authority to prosecute individuals for criminal violations. Or it may exist under subsection § 1396b (q) (1)(C) as only a prosecutorial body that is referred cases which have been investigated by outside law enforcement agencies. Title 42 § 1396b (q) (1) (B) is not an option, as such a constitutional restriction does not exist in Colorado.

While federal law requires COMFCU to exist as a separate and distinct entity from HCPF, this does not prevent the organizations from working together to fight fraud within the Medicaid program. The COMFCU has entered into a Memorandum of Understanding (MOU) with HCPF that ensures cooperation on cases, permits COMFCU to provide policy recommendations based upon matters that are under investigation, and allows for case referrals between the two organizations. COMFCU has recently entered into an MOU with CDPHE that ensures cooperation on the investigation of abuse, neglect and exploitation cases and also allows for the referral of cases between the two organizations.

R2: P.O.S.T. Compliance Inspector

- 6 The request includes an increase of \$93,093 cash funds from the P.O.S.T. Board Cash Fund and 1.0 FTE to add a compliance inspector to increase the frequency of compliance inspections of law enforcement academies. Please discuss the impact of legislation passed in recent years such as H.B. 17-1050 (Annual In-service Training for County Sheriffs). How have those bills affected the need for additional inspections? Does the Department anticipate increased efficiencies? Has the Department experience increased efficiencies? Please explain.

Response:

H.B. 17-1050 clarified the training requirements for elected sheriffs. The POST Board has oversight to ensure compliance with the training requirements, however, this bill did not impact the inspection responsibilities of POST staff. H.B. 15-1287, in part, modified the makeup of the POST Board and established subject matter expert (SME) committees to assist POST staff with academy inspections. Neither of these bills provided avenues for efficiencies. However, HB 15-1287 has provided a greater breadth of oversight with inspection responsibilities.

Each law enforcement training academy requires four physical onsite inspections--one each for the areas of academics, driving, firearms and arrest control. The inspection for each area requires the use of three SMEs, along with the Compliance Investigator. These SMEs are volunteers from law enforcement agencies who have been accepted to one of the POST SME committees specific to that discipline. These inspections take an average of two hours each, not including travel time to and from the various academies, which are located all over the state. The DOL anticipates that the additional Compliance Investigator will improve academy compliance due to the increased frequency of inspections and correspondence.

- 7 Please describe the various instructional models used at the law enforcement academies and how the P.O.S.T. Board evaluates the academies' instructional models.

Response:

Each academy is encouraged to utilize a wide range of instructional methodologies to account for the full spectrum of adult learning styles, but POST does not mandate a specific instructional model.

- 8 The request argues that the current inspection rate (complete inspections of each academy every five years on average) is inadequate and seeks to increase the frequency of inspections to a three-year cycle. Please explain how many of the law enforcement academies in Colorado are accredited and how that accreditation impacts the P.O.S.T. Board's compliance workload. For example, does accreditation reduce the need for frequent P.O.S.T. Board inspections? Is a five-year cycle really too long? Please explain.

Response:

An academy may seek accreditations from various organizations; however, they must meet Colorado POST's specific inspection requirements. POST inspections involve comparing the academy's program against the minimum requirements of a law enforcement training program as determined by the POST Board. These inspections focus on the required hours, rather than hours taught, learning conditions, effectiveness of instructors, etc.

A five-year inspection schedule does not allow for adequate oversight of these very important training programs. In a recent example, an academy's Director was acting as the lead driving instructor, but lacked the appropriate certifications from POST to perform this role. As a result, an unapproved driving track was being utilized and a student was injured from the unauthorized use of a firearm during driving instruction. Upon investigation by POST, it was discovered that the two previous academy classes at this training academy were also deficient in the area of driving. While this training academy was justifiably shut down, this information could have resulted in the decertification of nearly 40 officers who had graduated from the previous two academy sessions until they were all able to attend and pass a certified driver's training course. POST allowed each affected officer to take a "test out" exam to show proficiency, and they all passed. Had all 40 of these officers been decertified, numerous agencies across the state would have been severely impacted.

During 2017, nine law enforcement training academies have received new Directors. In 2016, six law enforcement training academies received new Directors. The result of this turnover is that half of all of the law enforcement training academies in Colorado have academy Directors with less than two years' experience. This lack of experience amongst the training academies results in more errors and a lack of knowledge and experience in meeting POST's minimum requirements. The Compliance Investigator meets individually with each and every new Academy Director to review POST standards and

expectations, but this cannot guarantee the success of the academy, nor their compliance with the necessary POST rules.

A nationwide survey of other state's POST agencies revealed some interesting facts. 23 POST agencies responded.

- Four states did not require inspections, or lacked resources to do so. (Arkansas, Alaska, Oklahoma, Massachusetts) However, Massachusetts did require POST staff to be on-site on the first day of each academy, but this was not considered an inspection. Arkansas conducted inspections only upon a complaint. (17%)
- Only one other state, Minnesota, conducted inspections every 5 years. However, in this case, this inspection is related to a mandatory top-to-bottom recertification of each and every law enforcement training academy. (4.3%)
- Five states (Missouri, New Mexico, California, Georgia, Virginia) inspect academies every three years. Missouri's inspection takes a full two days to complete and is a top-to-bottom review. (22%)
- Two states (Maryland, Idaho) completes academy inspections every two years. (8.7%)
- Six states (Nebraska, Nevada, Pennsylvania, Tennessee, Louisiana, Michigan) conduct annual inspections of their academies. Louisiana places their 27 academies on a four-year rotation for a two to three day full evaluation. (26%)
- Three states (Wisconsin, Ohio, Florida) require more than annual inspections. Wisconsin requires their Field Representatives to be present at least once during each academy. Ohio requires two per each academy session. Last year, Florida conducted 175 facility inspections for 40 academies (or 4.4 inspections each), while 40 classes were monitored. (13%)
- Two states (Maine, Montana) have academies co-located with their sole training academy. (8.7%)

Colorado's law enforcement training academy five-year inspection schedule is less frequent than 78.4% of the respondents.

R3: Combine Marijuana Appropriations in P.O.S.T.

- 9 The request seeks to shift \$286,766 cash funds from the Marijuana Tax Cash Fund and 1.0 FTE currently appropriated to the Special Prosecutions Unit to the P.O.S.T. Board to consolidate marijuana-related training funds within the P.O.S.T. Board line item. Please discuss the need for marijuana funding in P.O.S.T. and how this request fits in with overall uses of the Marijuana Tax Cash Fund. Is the additional marijuana funding needed in P.O.S.T.?

Response:

Yes, the additional marijuana funding is needed in POST. It is essential for Colorado to ensure its peace officers, across the entire state, are well-trained to enforce marijuana laws to minimize the likelihood of

federal intervention and to ensure Colorado is doing its job to combat the illegal diversion of marijuana and other crimes related to marijuana legalization.

Marijuana legalization impacts local communities in a variety of ways. Many of these impacts require local law enforcement involvement to ensure compliance with state law, and to minimize negative impacts. POST has been teaching a Marijuana 101 course, funded by the Marijuana Tax Cash Fund, to local law enforcement, which has been very well received. Officers need to know what is legal, what is illegal, and the best methods of enforcing marijuana law. Case law regarding marijuana enforcement is constantly evolving and local law enforcement needs to be regularly educated on these updates, such as the impact of marijuana on K9 drug sniffs. Outside of large law enforcement agencies, there is a general lack of knowledge across the state on how to legally and successfully interdict illegal grow operations that feed the black market both inside and outside of Colorado. POST is the logical organization to train peace officers statewide on these issues since part of its core purpose is to facilitate peace officer training around the state. This request solidly fits the overall uses of the Marijuana Tax Cash Fund.

- 10 The request proposes to eliminate 1.0 FTE currently allocated to the Special Prosecutions Unit to eliminate an administrative support position. How does the Department intend to use the marijuana funds in P.O.S.T., including specifically the savings generated by eliminating the support position?

Response:

The DOL will use the \$286,766 Marijuana Tax Cash Fund to retain 1.0 FTE. The DOL is estimating roughly \$90,000 annually in costs associated with the salary and state paid benefits for this training position. The balance of the dollars will bolster the current marijuana training grants that are distributed to the training regions and to local peace officer jurisdictions, thereby helping meet the specific training needs in each locality.

Department of Law Opioid Response

- 11 Please discuss the sunset timeline for the task forces supporting the State's opioid response. For example, does the Department intend to pursue an extension of the Colorado Substance Abuse Trend and Response Task Force? If so, please explain the Department's strategy.

Response:

The Department is proposing legislation to extend the Substance Abuse Trend and Response Task Force, which continues to serve as a central group with a large network of stakeholders from across the state who are working collaboratively to address the following statutory requirements:

- Monitoring drug trends in Colorado and reporting these trend to the Colorado General assembly
- Determining collaborative approaches to addressing current and emerging drug abuse trends
- Assisting local communities in addressing the impact of drug abuse through prevention, treatment and criminal justice approaches.

- Generating policy recommendations to the Colorado General Assembly.

In addition to the membership of the Task Force, there is a large network of stakeholders through the three committees of the Task Force:

- Data Committee: Colorado State Epidemiological Work and Outcome Workgroup
- Substance-Exposed Newborns Committee: 1) Fetal Alcohol Syndrome Subcommittee; 2) Colorado Hospital and Quality Improvement Learning Community.
- Prescription Drug Abuse Prevention Committee: Colorado Consortium for prescription Drug Abuse Prevention.

- 12 As part of its partnership efforts, the Department is funding the distribution of Naloxone to law enforcement. Has the Department (and the State) considered alternatives for the use of funding? Please discuss the overall strategy needed to address opioid addiction, including the potential need for other resources (such as buildings, recovery facilities, etc.).

Response:

The opioid epidemic requires a multifaceted response. The Department has made it a strategic priority to identify opportunities to increase coordination and collaboration with partners and stakeholders for targeted efforts to address this crisis, including the identification of funding sources and necessary resources. As part of this strategy, the Department has taken and will continue to take action in a variety of areas.

The Department created an internal opioid working group populated from all its various sections to best align resources and knowledge in this area of law. This group promotes the coordination of the Department's legal efforts and expertise within the office. The Department has prioritized its opioid-related actions, such as criminal investigations or prosecutions, professional license cases related to over-prescribing or diversion, consumer protection investigations of opioid manufacturers and distributors, and community outreach initiatives.

The Department will also continue to work through the Substance Abuse Trend and Response Task Force and the Colorado Consortium of Prescription Drug Abuse Prevention on the identification of, and implementation of, strategies to address the opioid epidemic. Through the Office of Community Engagement, the Department looks at ways to support the priority strategies coming from the various work groups of the Consortium. Previously, the Department funded the development and implementation of the public awareness campaign of the Consortium known as Take Meds Seriously. Recently, the Department partnered with the Consortium and the Colorado Department of Public Health and Environment on a campaign to promote the use of local medication take-back collection sights. No funds were allocated by the Department, just staff time to help promote the campaign.

Through the Substance Abuse Trend and Response Task Force and the partnership with the Consortium, the following areas have been identified as priorities for addressing the opioid epidemic:

- Expanding access to medicating-assisted treatment
- Helping bridge law enforcement with public health professional and substance abuse treatment professionals
- Expanding permanent medication take back location sites so that there is at least one site in every county. Many sites are at law enforcement agencies and there is funding through CDPHE for implementing this program
- Expanding utilization of the Prescription Drug Monitoring program
- Expanding prescriber education
- Partnering with local communities on supporting and improving local responses to the opioid crisis.

General Questions

- 13 The Department of Regulatory Agencies (DORA) accounts for 23.7 percent of appropriations for agencies' purchase of legal services from the Department of Law in FY 2017-18. Please explain the major consumers of legal services within DORA and what drives the utilization of services within that Department.

Response:

The DOL provides general counsel services to the boards, programs, program staff, divisions, management, and directors within DORA and its various Divisions. This may range from advising and working on issues related to rulemaking, assisting with CORA responses, drafting and developing policies, advising on general legal issues and risk, and advising on investigations, referrals, and related activities.

Additionally, the DOL provides litigation services to all of its DORA-related clients including licensing and cease & desist, and other administrative actions in the Office of Administrative Courts, injunctive actions in the state District Courts, and all appellate work in the Colorado Court of Appeals and the Colorado Supreme Court. The DOL also represents DORA and its divisions in any non-state court actions, including federal district and bankruptcy court and out-of-state actions where necessary or appropriate.

The DOL bills time against 63 distinct clients within DORA. Within the Division of Professions and Occupations, there are 44 clients ranging from the Board of Accountancy to the Board of Veterinary Medicine. Other clients include, in part, the Division of Banking, the Division of Insurance, the Division of Securities, the Public Utilities Commission, and the Real Estate Commission.

Significant users of legal services include the Public Utilities Commission, the Division of Insurance, Division of Securities, and the Real Estate Commission.

- 14 Current statute (as enacted in H.B. 07-1170) sets a statutory minimum salary of \$130,000 per year for locally elected district attorneys and requires the State to fund 80.0 percent of the minimum salary for each judicial district statewide. Local authorities must cover the remainder of the minimum salary and may pay more than the minimum salary if local funds are available. Please discuss potential disparities between local judicial districts in the ability to pay local district attorneys. Does the Department believe there is a discrepancy that should be addressed by the State, particularly between urban and rural districts? Please explain. Please also address the impact of inflation given that the minimum salary has not changed since 2012.

Response:

There exists pay disparity between prosecuting attorneys employed by a local rural district attorney's office and the larger, more urban districts. This discrepancy may create hiring and retention challenges for the rural district attorney's offices. It is generally difficult to attract and retain quality candidates to rural areas when better paying opportunities exist elsewhere.

- 15 Please discuss the effectiveness and impact of the Rural District Attorneys Fellowship Program.

Response:

The Colorado Commission of Higher Education is appropriated \$356,496 of General Fund to fund the Prosecution Fellowship Program. The Colorado District Attorneys' Council (CDAC) administers the program and facilitates the placement of recent graduates from the state's two major laws school into one year prosecution fellowships in rural districts. Per § 23-19.3-102(4) C.R.S., the CDAC is to provide a report to committees of reference in January, 2019.

The Rural District Attorney Fellowship Program was a positive step by the State to address the issues set forth in the preceding answer. This program places new law school graduates in the district attorneys' offices in rural jurisdictions that otherwise have difficulty in attracting new attorneys. These attorneys must make a time commitment to these offices as part of their participation in the program. This allows the attorneys to gain valuable training and establish themselves in a community in which they otherwise might not have considered, while provided much needed resources to those offices who hire a Fellow. In speaking to both District Attorneys who have hired these new attorneys as well as the attorneys who have participated in the program, it appears that this program is an overwhelming success. The program is still relatively new, thus the long-term benefits have yet to be seen.

- 16 Page 13 of the JBC Staff Briefing Document briefly discusses the Department of Personnel's State Risk Management Office and the State Claims Board. Please explain:

- a. What types of cases are under the jurisdiction of the Risk Management Office and State Claims Board and how many of those cases are settled as compared to proceeding to litigation?
- b. Where do the funds used to pay Risk Management claims come from (how does the State support those payments)?

Response:

Cases that fall under the Risk Management Act and the Risk Management Fund, §24-30-1510(3), C.R.S., involve torts subject to the Colorado Governmental Immunity Act (CGIA), compensatory damages under the Job Protection and Civil Rights Enforcement Act of 2013, §24-34-405, C.R.S., workers' compensation claims against state agencies, and cases involving federal constitutional claims or federal law that could result in monetary damages against the state. The majority of these cases are settled either prior to litigation or in the early stages of litigation. A fair amount are dismissed at the early stages of litigation. Few cases proceed to trial, with the exception of workers' compensation matters. The State Claims Board becomes involved if the settlement amount is above \$100,000 (§24-30-1515, C.R.S.).

All money used to pay risk management claims comes from common policy allocations to user agencies. The Department of Personnel & Administration (DPA) allocates costs to user agencies through the common policy mechanism for all three of the Risk Funds (Property, Liability, and Workers' Comp) using differing allocation methodologies. Specific information on allocation methodologies are outlined in the bullet points below.

- **Workers Compensation:** The Workers' Compensation program is used to pay workers' compensation benefits to State employees. The State is self-insured for workers' compensation claims, however it pays premiums for excess insurance policies that limit the State's exposure in any one occurrence to \$10 million and cover the next \$50 million. Each year the DPA contracts with an actuary to estimate the two primary components of the overall workers' compensation allocations for each department. First, the actuary estimates the total current liability the State is facing based on a three year analysis of actual losses and/or claims by each department. Next, the actuary estimates the allocation for each department as a percent of the total. Once these allocations are calculated by the actuary, the calculations to determine the allocable cost pool begin. The allocable pool is determined by adding estimated overhead costs, program and policy costs, and a fund balance adjustment. Finally, the actuary's allocations are applied to the allocable pool.
- **Property:** The Property Program manages the State's incurred costs for self-insured property exposures (e.g., floods, wind, fires, and theft). The Risk Management Unit administers large policy deductibles, and pursuant to statute, State agencies and institutions of higher education pay the first \$5,000 per claim. The DPA surveys state agencies annually to determine the total value of the State's building and building contents. Allocations are assigned proportionally, based on a department's or institutions' percentage of assets or holdings relative to the State's total asset pool. Once the DPA has determined the property allocations, calculations to determine the allocable cost pool begin. The allocable pool is determined by adding estimated overhead costs, program and policy costs, and a fund balance adjustment. Finally, the property allocations are

applied to the allocable pool.

- **Liability:** The Liability Program manages claims and lawsuits filed against the State for negligence in occurrences such as automobiles, accidents, employment discrimination, and road maintenance. By industry standards, the State of Colorado is considered self-insured as it covers the liability for losses in these areas at least up to the first \$100,000, though many losses are covered to a considerably higher limit. The excess policies carried by the State protect it from extreme cases where a particular loss could jeopardize the overall solvency of the risk management funds. The Department contracts with an actuary to estimate two primary components of the liability allocations for each department. First, the actuary estimates the total current liability the State is facing based upon a multi-year analysis of the actual losses and/or claims by each department. Second, using the same loss/claim data, the actuary estimates the allocation for each department as a percentage of the total liability. Once these actuarial allocations are determined, calculations to determine the allocable cost pool begin. The allocable cost pool is determined by adding estimated overhead costs, program and policy costs, and a fund balance adjustment. Finally, the actuary's allocations are applied to the allocable cost pool.

4:00-5:00 PENDING LITIGATION AGAINST THE STATE (IF THE COMMITTEE WOULD LIKE ADDITIONAL INFORMATION, BEYOND WHAT IS PRESENTED BELOW, THE ATTORNEY GENERAL SUGGESTS THAT THE COMMITTEE GO INTO EXECUTIVE SESSION)

Hepatitis C Litigation (Departments of Corrections and Health Care Policy and Financing)

- 17 Please discuss the cost estimates underlying the projected financial impacts of the two Hepatitis C cases (Departments of Corrections and Health Care Policy and Financing). The Department is assuming \$60,000 to \$90,000 per patient. Are those assumptions still current? Please explain.

Response:

These assumptions are no longer correct. There was a recent market decrease in the cost of the anti-viral medications reducing the cost to approximately \$26,000 per patient, depending on which medication is used.

- 18 If the State were to lose either of the Hepatitis C cases, what precedent would that set for other insurance markets? Would such a precedent create an obligation for other insurance as well? Please explain.

Response:

Other insurance markets are not impacted by the legal issues raised in the suits against the Department of Corrections (DOC) and Health Care Policy and Financing (HCPF) because these suits involve distinct areas of law unrelated to insurance markets. Specifically, the suit against the Department of Corrections is based on the State's duty to provide medical care for those whom it incarcerates, because the

deprivation of his liberty leaves the inmate unable to obtain care for himself. And, the case against HCPF focuses exclusively challenges to its approval criteria for treatment based on HCPF's obligations under the Social Security Act.

- 19 Please explain how the Department of Corrections case would change the current treatment of Hepatitis C patients in the Department. What are the current treatment criteria and how would the current system change if the State were to lose the case?

Response:

The Department of Law is handling the litigation in the matter, not the policy decisions that could be made based on the outcome of the litigation. In the proposed class-action suit against the DOC, Plaintiffs allege that the DOC maintains policies such that not all individuals who test positive for chronic Hepatitis C are given DAA treatment. Therefore, if the Plaintiffs receive all the relief requested, the DOC would have to treat every offender who is chronically infected with Hepatitis C (F1 and above) with DAA medications in a time frame required by the Court.

- 20 Are Corrections and Health Care Policy and Financing using different criteria for the treatment of Hepatitis C? Does a difference in criteria create additional legal challenges in the current litigation? Please explain.

Response:

Yes, the two Departments utilize different criteria. DOC's treatment criteria are based on its obligation to provide care for incarcerated inmates in line with the Eighth Amendment. DOC is referring inmates with a fibrosis score (F score) of F-2 or above for additional testing. DOC then triages offenders based upon their F score, and with the limited resources available, provides DAA to only those offenders with the highest F scores. HCPF's treatment decisions are founded in its authority under the Social Security Act, and are driven by medical necessity. Because the cases involve distinct legal issues, it is unlikely that differences in criteria will present additional legal challenges.

- 21 The two Hepatitis C cases revolve around the use of direct acting anti-viral medications. Has the State explored the potential for other avenues of treatment? Would the State have discretion to offer other means of treatment through a settlement process (such as treating patients internationally)? Please discuss.

Response:

We defer the policy questions about other avenues for treatment to DOC and HCPF. Settlement may offer some flexibility, but even in a settlement, DOC and HCPF will still be bound to follow applicable laws.

Tobacco Litigation

- 22 Please provide an update on the ongoing Tobacco Master Settlement litigation and arbitration.

Response:

Colorado and 19 other states commenced arbitration on the 2004 NPM Adjustment dispute beginning with hearings on common issues in February 2016. Several more hearings were held leading up to the Common Case in June 2017, a hearing similar to opening arguments in a trial. State specific hearings began in November 2017, and prior to the commencement of state specific hearings, two states were released from the arbitration and do not have to defend their diligent enforcement of the NPM statutes. Colorado's individual hearing is scheduled for January 22-26, 2018, with final Panel rulings expected in spring 2019.

- 23 How likely is success in the 2004 disputed payment arbitration proceedings? What are the consequences if arbitration is unsuccessful? Are there ways to mitigate this risk?

Response:

Due to the nature of this request, the Attorney General suggests going into Executive Session to discuss these questions.

- 24 Please discuss the Department of Law's use of Tobacco Master Settlement funds. Are there restrictions on the Department's use of the funds? Please explain.

Response:

§ 24-22-115(1) (a) C.R.S., establishes the Tobacco Litigation Settlement Cash Fund. Additionally, in §24-22-115(2) (a) C.R.S., establishes an account within the Tobacco Litigation Settlement Cash Fund called the Tobacco Settlement Defense Account. Statutorily, this account funds the DOL efforts "to defend the state in lawsuits arising out of the challenges to or arising under the provision of the master settlement agreement, the smokeless tobacco master settlement agreement" and specific consent decrees.

The DOL has two separate appropriations related to the Tobacco Settlement Defense Account. Currently, the DOL is appropriated \$230,410 from this fund within the Consumer Protection and Antitrust line item. This appropriation covers the salaries, state paid benefits, and associated operating for an attorney and a legal assistant. This unit monitors compliance with the settlement and ensures Colorado's interests are protected in the MSA's payment calculations. This unit also enforces statutes that require Non Participating Manufacturers (NPMs) to pay an escrow on their sales that approximates what they would owe under the settlement. The Colorado Department of Revenue (DOR) also has enforcement responsibilities with regard to these escrow requirements, and this unit works closely with DOR on this enforcement. Additionally, these moneys fund the Tobacco Litigation line item. This line item accomodates all

costs associated with litigation efforts, primarily the payments to outside counsel in their representation of state interests.

Other Cases

- 25 Please discuss any other pending cases that may have a significant financial impact. For example, please provide updates regarding the following cases as well as any others of which the Department thinks the Committee should be aware.
- a. Gold King Mine interstate litigation.
 - b. Parole eligibility in the Department of Corrections.

Response:

- a. The Supreme Court denied New Mexico's petition on June 26, 2017. Although New Mexico immediately indicated that it planned to pursue recovery from Colorado through other avenues, no other claims against Colorado have materialized.
 - b. The Office receives numerous Notices of Claim and lawsuits from inmates regarding the Department of Correction's sentence time computation based upon parole eligibility, presentence confinement credit, sentence discharge dates, and a host of other issues involving sentence computation. None of these would have a significant financial impact upon the state.
- 26 Please discuss whether and how the Department works with the Office of Legislative Legal Services regarding "cases of note."

Response:

The DOL, typically does not work with the Office of Legislative Legal Services (OLLS) on its identification of cases of note. The OLLS reviews every published Colorado appellate decision and all Colorado federal opinions (District of Colorado, 10th Circuit, and US Supreme Court) to determine whether there any holdings regarding the Colorado Constitution or the Colorado Revised Statutes (CRS). If so, OLLS prepares an annotation of the opinion and publishes the annotation in the relevant portion of the CRS. Additionally, the OLLS has established various criteria to help develop the "Cases of Note" reports to the legislature.

- 27 Please discuss any other significant pending legal cases (that do not necessarily meet the financial threshold for the Controller's Report) of which the Committee should be aware.

Response:

The Controller's Report addresses pending or threatened litigation, claims, and assessments involving amounts exceeding five million dollars individually or items involving lesser amounts which exceed ten million dollars in the aggregate, brought against the State and to which the

Attorney General's Office has devoted substantial attention on behalf of the State of Colorado. The monetary thresholds are set by the State Controller based on his obligations related to disclosures in the Comprehensive Annual Financial Report (CAFR), as required by Generally Accepted Accounting Principles. Due to the myriad of variables that may impact pending legal cases, these thresholds are appropriate for notification for the CAFR and to the Joint Budget Committee.

- 28 The Colorado Court of Appeals has issued a decision in favor of the plaintiffs in the *Agilent Technologies v. Department of Revenue* case. Please explain, for this case and others, how the State would pay the necessary refunds in the event of a loss for the State. For example, does the Department of Revenue hold disputed funds in escrow in case of a need for repayment? If the State is required to refund money in the *Agilent Case* or others, how will those refunds be made? Should the State create a fund for the payment of large judgements? Please discuss.

Response:

In the *Agilent Technologies* matter, the taxpayers paid the amount due when they appealed the matters to the District Court. The Department of Revenue ("Revenue") does not currently hold funds in escrow in case of a need for repayment.

Revenue pays refunds from current collections with statutory interest. Corporate income tax and estimated corporate income tax are collected to the General Fund. The General Fund also receives collections from individual income tax, estimated individual income tax, and income wage withholding tax. These income tax collections average over a half billion per month. The current collections can cover the payout of this refund, but the ability to pay out such a refund is a separate issue from how the state's budget would handle the loss of revenue from the refund.

For income tax cases that cross fiscal years, the Department books a payable on the state's financial statement at fiscal year-end for such court cases. *Agilent Technologies* is a case that crosses multiple fiscal years. The payable amount is calculated with interest. At the end of Fiscal Year 2017, Revenue booked a corporate income tax payable of \$85 million. Revenue does not estimate a payable for each court case individually; instead, the agency averages all court cases of the same tax type. To get the payable amount, Revenue calculates an average payable rate from recently closed court cases. This payable rate is forecast over existing open court cases to get the payable amount to book at year-end.

Regarding the impact of such a payout on state budget forecasts, Revenue does not forecast state revenue collections. However, if Revenue believes that collections will not cover future refunds it advises OSPB, Legislative Council, the State Controller, and other appropriate officials

- 29 Please provide an update on the status of the EpiPen settlement and liability cases involving the public release of private information. If there is a similar large settlement in the public information cases, how would settlement funds be distributed to the states?

Response:

The Epi-Pen matter reached a settlement in late August 2017, and Colorado signed and returned the settlement agreement on September 7. Colorado's recovery from this settlement is over \$5.5 million (\$5,558,523.59). This number reflects Colorado Medicaid program losses plus penalties and interest. The direct losses from Mylan's failure to pay rebates would be approximately \$4.1 million, with the remainder representing substantial penalties (at a 1.34 to 1 recovery ratio). The amount apportioned to Colorado is directly based on our share of the drug sales and rebates nationwide. On November 1, we received payment (distributed through the NY Attorney General) and forwarded it to HCPF, as the money was designated to the General Fund and credited to HCPF.

In May of 2017, the Department joined 46 other states in settling an investigation of Target's 2013 data breach. Under the settlement, Target had to adopt a comprehensive information security program and hire an independent third-party to conduct a comprehensive information security assessment, among other things. The settlement also required Target to pay \$18.5 million to the states, of which Colorado received \$278,914. Additionally, the Department is participating in a multistate investigation of the Equifax data breach that occurred this summer.

Many factors are taken into account in each multistate case regarding distribution of any settlement funds and what respective states will receive. These factors include: the state's role in the investigation, population, and where the consumers are located who were impacted.

ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED

- 30 Provide a list of any legislation that the Department has: (a) not implemented, or (b) partially implemented. Explain why the Department has not implemented or has only partially implemented the legislation on this list. Please explain any problems the Department is having implementing any legislation and any suggestions you have to modify legislation.

Response:

The Department of Law is not aware of any compliance issues with legislation or other statutory requirements.

- 31 Does the Department have any HIGH PRIORITY OUTSTANDING recommendations as identified in the "Annual Report: Status of Outstanding Audit Recommendations" that was published by the State Auditor's Office and dated June 30, 2017 (link below)? What is the Department doing to resolve the HIGH PRIORITY OUTSTANDING recommendations? Please indicate where in the Department's budget request actions taken towards resolving HIGH PRIORITY OUTSTANDING recommendations can be found.

<http://leg.colorado.gov/audits/annual-report-status-outstanding-audit-recommendations-june-30-2017>

Response:

There are two performance audit recommendations that are still outstanding. Neither of the outstanding recommendations are considered high priority. The two outstanding recommendations address two funds that are currently out of fund balance compliance requirements. The Insurance Fraud Cash fund will be in fund balance compliance at the end of Fiscal Year 2017-18. The Uniform Consumer Credit Code cash fund is projected to be in fund balance compliance at the end of Fiscal Year 2018-19. The DOL has included these projections in the Schedule 9 for each of these cash funds in the budget request.

- 32 If the Department receives federal funds of any type, please respond to the following:
- a. Please provide a detailed description of any federal sanctions or potential sanctions for state activities of which the Department is already aware. In addition, please provide a detailed description of any sanctions that MAY be issued against the Department by the federal government during FFY 2017-18 or 2018-19.
 - b. Are you expecting any changes in federal funding with the passage of the FFY 2017-18 or 2018-19 federal budget? If yes, in which programs, and what is the match requirement for each program?
 - c. Does the Department have a contingency plan if federal funds are eliminated?

Response:

The DOL is not aware of any current sanctions or future sanctions that would impact the DOL federal grant.

- 33 Is the Department spending money on public awareness campaigns? If so, please describe these campaigns, the goal of the messaging, the cost of the campaign, and distinguish between paid media and earned media. Further, please describe any metrics regarding effectiveness and whether the Department is working with other state or federal departments to coordinate the campaign?

Response:

The DOL Consumer Protection section is constantly on alert, identifying and prosecuting unscrupulous business practices and educating communities on topics like common scams and identity theft year around.

To bolster these efforts, the DOL launched this month the first annual Colorado Consumer Protection Month. This new initiative will focus on raising awareness and providing education about consumer fraud issues including common scams, financial abuses, and fraud affecting Coloradans across the state. The Colorado Attorney General's Office is partnering with law enforcement, regulatory entities, and non-profit programs statewide to help Coloradans learn how to identify, prevent, and report fraudulent activity.

Additionally, the DOL is supporting the Stand Up Colorado Campaign. This campaign addresses prevention of relationship violence (domestic violence and sexual assault). This is a partnership with the Colorado Department of Human Services Relationship Violence Program, the Colorado Department of Public Safety Division of Criminal Justice, the Denver City Attorney's Office, the Colorado Coalition Against Domestic Violence, the Denver Foundation, Verizon Foundation, and others. The DOL

contribution to this effort is \$732,044. Other funders are the Denver Foundation, Verizon Foundation, Wells Fargo and some small private foundations.

- 34 Based on the Department’s most recent available record, what is the FTE vacancy and turnover rate by department and by division? To what does the Department attribute this turnover/vacancy? Do the statewide compensation policies administered by the Department of Personnel help or hinder in addressing vacancy or turnover issues?

Response:

The Department of Law’s total vacancy rate was 6.8% for FY 17. The vacancy rate is a calculation of total hours paid by position divided by the total annual hours for each position. This FTE count is then subtracted against the total appropriated FTE in each line item. The vacancy rate is also reflective of the time it takes to fill positons. In some instances, the DOL did not staff up to appropriated FTE in a particular line item.

Line Item	FY 17 FTE Vacancy Rate	Total Vacant FTE
Administration	15.9%	(7.2)
Office of Community Engagement	26.7%	(1.6)
Legal Services to State Agencies	5.6%	(14.5)
Special Prosecution	5.3%	(2.0)
Appellate Unit	7.2%	(2.8)
Medicaid Fraud Control Unit	8.2%	(1.4)
CERCLA	5.7%	(0.2)
Consumer Protection and Antitrust	1.1%	(0.3)
Consumer Credit Unit	10.5%	(2.1)
CORA and OML Attorney	66.7%	(0.6)
Department of Law Total	6.7%	(32.7)

Additionally, the DOL’s turnover rate has averaged 15% for both FY 16 and FY 17. The turnover remains highest in critical positions such as AAG’s (line attorneys), Criminal Investigators, and administrative support. While the turnover rate reflects some of the typical reasons such as retirements and opportunities at private law firms (for attorneys and paralegals), the DOL has experienced turnover attributed to higher salaries being offered for both public and private sector jobs opportunities. Further, the DOL is experiencing its most difficulty in recent history with recruiting and hiring new employees in these critical areas. Generally, the number of interested candidates applying for positions is down over past years and often when a recruitment is completed, candidates report that the salary offered would require them to take a cut in pay for similar work.

- 35 Please provide an update on the Department's status, concerns, and plans of action for increasing levels of cybersecurity, including existing programs and resources. How does the Department work with the Chief Information Security Office (CISO) in the Office of Information Technology (OIT)? Have your information technology infrastructure and policies been audited for cybersecurity capabilities? If so, was the audit completed by the legislative auditor or an outside entity? Do you have dedicated cybersecurity personnel? How do your cybersecurity staff interact with the CISO in OIT? What unique security issues does your Department have? Do you handle private or sensitive data? What unique cybersecurity processes or tools do you use to protect this data?

Response:

The DOL maintains an extensive documented cyber security program updated yearly. The Cyber security efforts address concerns and provides plans of actions and milestones for completion. Additionally, DOL has engaged with OIT's Office of Information Security on issues around information security strategies and other initiatives. The DOL collaborates closely with the CISO in areas of cyber security information sharing, training, and other opportunistic and strategic imperatives.

The DOL engaged an external security auditor during FY 2016-17. An internal policy audit by the state took place 8-12-2017. The DOL employs two dedicated cyber security personnel: the DOL Chief Information Security Officer and a Security Administrator. In addition to their day- to-day efforts with ensuring the integrity of the infrastructure and data from security risks, these employees interact with the State CISO and OIT in policy development, project collaboration, monthly meetings, and on-going correspondence.

Because of the type of data that the DOL possesses, the DOL must follow various security schemes The DOL utilizes a combination of strategic planning, policies, training, and numerous security tools and protocols to protect the agencies' data.

- 36 What impact do the SMART Act and Lean processes have on your budget requests? Could they be used more effectively?

Response:

The DOL uses the SMART Act in part to assess potential budget requests. Additionally, the DOL uses Consumer Protection complaints, public correspondence on the DOL website and twitter accounts, and input from interactions the Attorney General and other department staff have with Colorado citizens to help identify trends and issues that the DOL can address.

The DOL has raised LEAN analyses within the annual SMART Act and DOL Strategic Plan. The DOL through various analyses, attempts to address program delivery concerns through process improvements and efficiency analyses, thereby addressing increasing workload effectively within existing resources. In some instances, the DOL may determine that additional resources are necessary and develop a budget request for legislature consideration

Additionally, the DOL incorporates input from sister agencies and partners. For example, the Medicaid Fraud Investigator budget request and the POST Compliance Investigator request emerge in part from a review of current processes by our partner federal agency, with respect to the Medicaid Fraud Investigator and from the POST Board, with respect to the Compliance Investigator. In each of these instances, the DOL analyzed current and trending workload, the skill sets of current staff, and the business processes involved.

- 37 Does your Department use evidence-based analysis as a foundation for your budget request? If so, please provide a definition for your use of “evidence-based,” indicate which programs are “evidence-based,” and describe the evidence used to support these programs.

Response:

The DOL does not use “evidence based” budgeting to develop its annual budget request. The DOL has not incorporated the rigorous research and qualitative and quantitative analysis that is required for evidence based budgeting. However, the DOL tracks and analyzes various data and processes associated with program delivery to help influence resource allocation and assess resource needs.

- 38 Please identify how many rules you have promulgated in the past two years (FYs 2015-16 and 2016-17). With respect to these rules, have you done any cost-benefit analyses pursuant to Section 24-4-103 (2.5), C.R.S., regulatory analyses pursuant to Section 24-4-103 (4.5), C.R.S., or any other similar analysis? Have you conducted a cost-benefit analysis of the Department’s rules as a whole? If so, please provide an overview of each analysis.

Response:

On Dec 14, 2015, the Peace Officer Standards and Training Board amended 17 rules (1, 4, 5, 7, 8, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, 26, 28), and adopted new Rule 29, with an effective date for all of January 31, 2016. Cost Benefit Analyses were completed in November of 2015 for rule changes for this hearing.

Rule 29 was adopted to outline minimum recommended hiring standards for Basic, Provisional, or Reserve officers and officers renewing their Basic certification, upon appointment to an agency, to include background investigation and to require physical and psychological examinations and submission of affirmation (Form 6) to POST for any new appointment to an agency. The statute requiring those examinations is unclear; it says that the examinations are required “prior to the date of appointment.”

Financial impact will be to agencies hiring any officer, as POST will require a physical and psychological exam anytime an officer is appointed to a new agency, whether holding a Basic, Provisional or Reserve certification. The cost of these examinations is typically covered by the hiring agency, some of which already require these exams upon hiring, while many agencies, particularly smaller agencies, do not. The cost of the examinations may be a burden to some smaller or less well-funded agencies.

On March 24, 2017, the POST Board amended 14 rules (7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 21, 28) with an effective date for Rule 28 of January 1, 2018 and all others effective July 1, 2017. No Cost Benefit Analysis was requested.

- 39 Describe the expected fiscal impact of proposed changes to PERA made by both the Governor's Office and the PERA Board of Directors. In addition to direct budgetary impacts, please describe any anticipated secondary impacts of an increase in employee contribution rates. For instance, does the Department anticipate a need to increase employee salaries to compensate for the increase in PERA contributions?

Response:

The DOL is not aware of any direct or secondary budget impacts that will result from the two PERA proposals.

- 40 Senate Bill 17-267 required Departments, other than Education and Transportation that submit budgets to OSPB to propose a budget that is 2.0 percent below the total funds budget in FY 2017-18. Please highlight the following regarding the 2.0 percent reduction:
- Where these reductions can be found in the Department's request;
 - What programs are impacted by the reduction; and
 - Total amount of the reduction.

Response:

SB 17-267 does not apply to the DOL. As such, the DOL did not propose budget reductions associated with this bill. However, the DOL annually analyzes the department budget against estimated spending needs. In the current budget request, the DOL is requesting reductions in specific line items to better align budget with anticipated need.

- 41 Please provide the following information for the Department's custodial funds and continuously appropriated funds:
- Name of the fund;
 - Amount of funds received;
 - Whether the revenues are one-time or multi-year;
 - Current cash fund balance;
 - Source(s) of the funds;
 - A list of FY 2015-16 and FY 2016-17 expenditures from these funds;
 - Expected uses of the funds in FY 2017-18 and FY 2018-19; and
 - Legal authorization and restrictions/limitations on the Department's use of these funds.

Response:

Below is a chart that articulates the fund name, funds received over the past two fiscal years, cash balance, and previous two year expenditures.

Fund	Fund Name	Unobligated Cash/Fund Balance as of FY18, Period 3	FY 17 Total Revenue	FY17 Total Expenditures	FY 16 Total Revenue	FY16 Total Expenditures
1460	Consumer Protection Custodial Fund	\$31,653,646.44	\$3,209,332.87	\$5,304,962.96	\$2,958,372.47	\$3,159,682.62
1470	Special Prosecution Custodial Fund	\$219,323.97	\$76,601.20	\$10,821.34	\$95,630.69	\$135,698.70
16B0	Uniform Consumer Credit Counsel Custodial Fund	\$5,215,706.40	3,794,511	\$393,015.03	\$7,907,760.52	\$10,120,794.26
19A0	Collection Agency Board Custodial Fund	\$3,548,265.87	\$209,230.28	\$361,405.24	\$2,148,409.04	\$6,327.88
14D0	Mortgage Fraud Settlement Fund	\$3,457,386.78	\$45,628.81	\$544,926.80	\$3,091,693.12	\$738,102.21

In most instances, funds are received in a single payment. However, in a few settlements, funds are paid on a periodic payment plan over a determined period of time. All settlements include provisions specifying payment timing and amounts, as well as permissible uses for the funds. For example, settlement language requires funds paid into the Consumer Protection Custodial Fund to be held in trust by the Attorney General and used at her sole discretion to reimburse the State for costs and attorney fees, to pay any restitution to victims, to fund future fraud and antitrust enforcement, to fund consumer education, and for public welfare purposes, or, in some instances, public health initiatives. Similarly, language associated with the Uniform Consumer Credit Counsel Custodial Fund are to be used in the Attorney General's sole discretion for consumer restitution, consumer or creditor educational purposes, or consumer credit or consumer protection enforcement efforts.

The Consumer Protection Custodial Fund accommodates the salaries, benefits, and associated operating costs related to the classified employees in the Consumer Protection and Antitrust line item, as well as investigation and litigation costs associated with Consumer Protection enforcement efforts. The Department has a Custodial Advisory Group to oversee use of the funds for consumer education, public welfare, and public health initiatives.

The Special Prosecution Custodial Fund, which accommodates for the DOL's portion of any asset seizures can be used for permissible law enforcement efforts established by the Department of Justice's Equitable Sharing Program. Acceptable uses, in part, include law enforcement investigations, training, equipment, and specified education and awareness programs.

The Uniform Consumer Credit Counsel and the Collection Agency Board Custodial funds can be used within the parameters of specific court orders, which can include restitution, education purposes, and enforcement efforts.

The Mortgage Fraud Settlement Fund resulted from the National Mortgage Settlement, and is to be held in trust by the Attorney General and used for programs relating to foreclosure prevention, loan modification and housing, and for future consumer protection and antitrust enforcement and education efforts.

- 42 What is the Department's process for engaging in (or disputing) federal land, environmental, jurisdictional, and/or water policy issues? How do you coordinate with other departments, the Governor's Office, local governments, and/or citizens?

Response:

The DOL counsels its clients on these issues regularly, and they can arise in a large number of diverse contexts. In these situations, the role of the Attorney General's Office is to offer the best legal advice possible to allow the clients to pursue what they view as appropriate policy within the bounds of the law.

DEPARTMENT OF LAW
FY 2018-19 JOINT BUDGET COMMITTEE HEARING AGENDA

Monday, November 27, 2017
3:00 pm – 5:00 pm

3:00-3:15 **INTRODUCTIONS AND OPENING COMMENTS**

3:15-4:00 **DECISION ITEM REQUESTS**

R1: Medicaid Fraud Investigator

- 1 The JBC Staff Briefing Document referenced a federal review of the Medicaid Fraud Control Unit that found that the Unit was not adequately prioritizing abuse, neglect, and exploitation cases. Does that finding have financial implications for the State's Medicaid funding? Please explain.
- 2 How does the request for an additional Medicaid fraud investigator focused on abuse, neglect, and exploitation interact with bills the General Assembly has passed in recent years regarding reporting and enforcement of abuse and neglect. Please explain the roles of the Department and local authorities.
- 3 Please discuss the scale of Medicaid fraud as an issue. Does the Department have estimates of Medicaid Fraud nationally and in Colorado? What is the return on investment for additional investigations?
- 4 How does this request relate to the new payment system in Medicaid? How does the new system relate to the fraud investigation process?
- 5 Please explain why Medicaid fraud investigations are housed within the Department of Law and how the Medicaid Fraud Control Unit relates to quality assurance and fraud efforts in other departments such as Health Care Policy and Financing and Human Services.

R2: P.O.S.T. Compliance Inspector

- 6 The request includes an increase of \$93,093 cash funds from the P.O.S.T. Board Cash Fund and 1.0 FTE to add a compliance inspector to increase the frequency of compliance inspections of law enforcement academies. Please discuss the impact of legislation passed in recent years such as H.B. 17-1050 (Annual In-service Training for County Sheriffs). How have those bills affected the need for additional inspections? Does the Department anticipate increased efficiencies? Has the Department experience increased efficiencies? Please explain.

- 7 Please describe the various instructional models used at the law enforcement academies and how the P.O.S.T. Board evaluates the academies' instructional models.
- 8 The request argues that the current inspection rate (complete inspections of each academy every five years on average) is inadequate and seeks to increase the frequency of inspections to a three-year cycle. Please explain how many of the law enforcement academies in Colorado are accredited and how that accreditation impacts the P.O.S.T. Board's compliance workload. For example, does accreditation reduce the need for frequent P.O.S.T. Board inspections? Is a five-year cycle really too long? Please explain.

R3: Combine Marijuana Appropriations in P.O.S.T.

- 9 The request seeks to shift \$286,766 cash funds from the Marijuana Tax Cash Fund and 1.0 FTE currently appropriated to the Special Prosecutions Unit to the P.O.S.T. Board to consolidate marijuana-related training funds within the P.O.S.T. Board line item. Please discuss the need for marijuana funding in P.O.S.T. and how this request fits in with overall uses of the Marijuana Tax Cash Fund. Is the additional marijuana funding needed in P.O.S.T.?
- 10 The request proposes to eliminate 1.0 FTE currently allocated to the Special Prosecutions Unit to eliminate an administrative support position. How does the Department intend to use the marijuana funds in P.O.S.T., including specifically the savings generated by eliminating the support position?

Department of Law Opioid Response

- 11 Please discuss the sunset timeline for the task forces supporting the State's opioid response. For example, does the Department intend to pursue an extension of the Colorado Substance Abuse Trend and Response Task Force? If so, please explain the Department's strategy.
- 12 As part of its partnership efforts, the Department is funding the distribution of Naloxone to law enforcement. Has the Department (and the State) considered alternatives for the use of funding? Please discuss the overall strategy needed to address opioid addiction, including the potential need for other resources (such as buildings, recovery facilities, etc.).

General Questions

- 13 The Department of Regulatory Agencies (DORA) accounts for 23.7 percent of appropriations for agencies' purchase of legal services from the Department of Law in FY 2017-18. Please explain the major consumers of legal services within DORA and what drives the utilization of services within that department.

- 14 Current statute (as enacted in H.B. 07-1170) sets a statutory minimum salary of \$130,000 per year for locally elected district attorneys and requires the State to fund 80.0 percent of the minimum salary for each judicial district statewide. Local authorities must cover the remainder of the minimum salary and may pay more than the minimum salary if local funds are available. Please discuss potential disparities between local judicial districts in the ability to pay local district attorneys. Does the Department believe there is a discrepancy that should be addressed by the State, particularly between urban and rural districts? Please explain. Please also address the impact of inflation given that the minimum salary has not changed since 2012.
- 15 Please discuss the effectiveness and impact of the Rural District Attorneys Fellowship Program.
- 16 Page 13 of the JBC Staff Briefing Document discusses the Department of Personnel's State Risk Management Office and the State Claims Board. Please explain:
 - a. What types of cases are under the jurisdiction of the Risk Management Office and State Claims Board and how many of those cases are settled as compared to proceeding to litigation?
 - b. Where do the funds used to pay Risk Management claims come from (how does the State support those payments)?

4:00-5:00 PENDING LITIGATION AGAINST THE STATE

Hepatitis C Litigation (Departments of Corrections and Health Care Policy and Financing)

- 17 Please discuss the cost estimates underlying the projected financial impacts of the two Hepatitis C cases (Departments of Corrections and Health Care Policy and Financing). The Department is assuming \$60,000 to \$90,000 per patient. Are those assumptions still current? Please explain.
- 18 If the State were to lose either of the Hepatitis C cases, what precedent would that set for other insurance markets? Would such a precedent create an obligation for other insurance as well? Please explain.
- 19 Please explain how the Department of Corrections case would change the current treatment of Hepatitis C patients in the Department. What are the current treatment criteria and how would the current system change if the State were to lose the case?
- 20 Are Corrections and Health Care Policy and Financing using different criteria for the treatment of Hepatitis C? Does a difference in criteria create additional legal challenges in the current litigation? Please explain.

- 21 The two Hepatitis C cases revolve around the use of direct acting anti-viral medications. Has the State explored the potential for other avenues of treatment? Would the State have discretion to offer other means of treatment through a settlement process (such as treating patients internationally)? Please discuss.

Tobacco Litigation

- 22 Please provide an update on the ongoing Tobacco Master Settlement litigation and arbitration.
- 23 How likely is success in the 2004 disputed payment arbitration proceedings? What are the consequences if arbitration is unsuccessful? Are there ways to mitigate this risk?
- 24 Please discuss the Department of Law's use of Tobacco Master Settlement funds. Are there restrictions on the Department's use of the funds? Please explain.

Other Cases

- 25 Please discuss any other pending cases that may have a significant financial impact. For example, please provide updates regarding the following cases as well as any others of which the Department thinks the Committee should be aware.
- a. Gold King Mine interstate litigation.
 - b. Parole eligibility in the Department of Corrections.
- 26 Please discuss whether and how the Department works with the Office of Legislative Legal Services regarding "cases of note."
- 27 Please discuss any other significant pending legal cases (that do not necessarily meet the financial threshold for the Controller's Report) of which the Committee should be aware.
- 28 The Colorado Court of Appeals has issued a decision in favor of the plaintiffs in the Agilent Technologies v. Department of Revenue case. Please explain, for this case and others, how the State would pay the necessary refunds in the event of a loss for the State. For example, does the Department of Revenue hold disputed funds in escrow in case of a need for repayment? If the State is required to refund money in the Agilent Case or others, how will those refunds be made? Should the State create a fund for the payment of large judgements? Please discuss.
- 29 Please provide an update on the status of the EpiPen settlement and liability cases involving the public release of private information. If there is a similar large settlement in the public information cases, how would settlement funds be distributed to the states?

ADDENDUM: OTHER QUESTIONS FOR WHICH SOLELY WRITTEN RESPONSES ARE REQUESTED

- 30 Provide a list of any legislation that the Department has: (a) not implemented, or (b) partially implemented. Explain why the Department has not implemented or has only partially implemented the legislation on this list. Please explain any problems the Department is having implementing any legislation and any suggestions you have to modify legislation.
- 31 Does the Department have any HIGH PRIORITY OUTSTANDING recommendations as identified in the "Annual Report: Status of Outstanding Audit Recommendations" that was published by the State Auditor's Office and dated June 30, 2017 (link below)? What is the Department doing to resolve the HIGH PRIORITY OUTSTANDING recommendations? Please indicate where in the Department's budget request actions taken towards resolving HIGH PRIORITY OUTSTANDING recommendations can be found.
- <http://leg.colorado.gov/audits/annual-report-status-outstanding-audit-recommendations-june-30-2017>
- 32 If the Department receives federal funds of any type, please respond to the following:
- Please provide a detailed description of any federal sanctions or potential sanctions for state activities of which the Department is already aware. In addition, please provide a detailed description of any sanctions that MAY be issued against the Department by the federal government during FFY 2017-18 or 2018-19.
 - Are you expecting any changes in federal funding with the passage of the FFY 2017-18 or 2018-19 federal budget? If yes, in which programs, and what is the match requirement for each program?
 - Does the Department have a contingency plan if federal funds are eliminated?
- 33 Is the Department spending money on public awareness campaigns? If so, please describe these campaigns, the goal of the messaging, the cost of the campaign, and distinguish between paid media and earned media. Further, please describe any metrics regarding effectiveness and whether the Department is working with other state or federal departments to coordinate the campaign?
- 34 Based on the Department's most recent available record, what is the FTE vacancy and turnover rate by department and by division? To what does the Department attribute this turnover/vacancy? Do the statewide compensation policies administered by the Department of Personnel help or hinder in addressing vacancy or turnover issues?
- 35 Please provide an update on the Department's status, concerns, and plans of action for increasing levels of cybersecurity, including existing programs and resources. How does the Department work with the Chief Information Security Office (CISO) in the Office of Information Technology (OIT)? Have your information technology infrastructure and policies been audited for

cybersecurity capabilities? If so, was the audit completed by the legislative auditor or an outside entity? Do you have dedicated cybersecurity personnel? How do your cybersecurity staff interact with the CISO in OIT? What unique security issues does your Department have? Do you handle private or sensitive data? What unique cybersecurity processes or tools do you use to protect this data?

- 36 What impact do the SMART Act and Lean processes have on your budget requests? Could they be used more effectively?
- 37 Does your Department use evidence-based analysis as a foundation for your budget request? If so, please provide a definition for your use of “evidence-based,” indicate which programs are “evidence-based,” and describe the evidence used to support these programs.
- 38 Please identify how many rules you have promulgated in the past two years (FYs 2015-16 and 2016-17). With respect to these rules, have you done any cost-benefit analyses pursuant to Section 24-4-103 (2.5), C.R.S., regulatory analyses pursuant to Section 24-4-103 (4.5), C.R.S., or any other similar analysis? Have you conducted a cost-benefit analysis of the Department’s rules as a whole? If so, please provide an overview of each analysis.
- 39 Describe the expected fiscal impact of proposed changes to PERA made by both the Governor’s Office and the PERA Board of Directors. In addition to direct budgetary impacts, please describe any anticipated secondary impacts of an increase in employee contribution rates. For instance, does the Department anticipate a need to increase employee salaries to compensate for the increase in PERA contributions?
- 40 Senate Bill 17-267 required Departments, other than Education and Transportation, that submit budgets to OSPB to propose a budget that is 2.0 percent below the total funds budget in FY 2017-18. Please highlight the following regarding the 2.0 percent reduction:
- Where these reductions can be found in the Department’s request;
 - What programs are impacted by the reduction; and
 - Total amount of the reduction.
- 41 Please provide the following information for the Department’s custodial funds and continuously appropriated funds:
- Name of the fund;
 - Amount of funds received;
 - Whether the revenues are one-time or multi-year;
 - Current cash fund balance;
 - Source(s) of the funds;
 - A list of FY 2015-16 and FY 2016-17 expenditures from these funds;
 - Expected uses of the funds in FY 2017-18 and FY 2018-19; and

- Legal authorization and restrictions/limitations on the Department's use of these funds.
- 42 What is the Department's process for engaging in (or disputing) federal land, environmental, jurisdictional, and/or water policy issues? How do you coordinate with other departments, the Governor's Office, local governments, and/or citizens?