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Colorado General Assembly

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MEMORANDUM

TO: David Silverstein and Andrew Graham
FROM: Legislative Council Staff and Office of Legislative Legal Services
DATE: February 20, 2018
SUBJECT: Proposed initiative measure 2017-2018 #146 concerning Transparency in Health Care 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.

This proposed initiative was submitted with proposed initiative 2017-2018 #147. The comments and questions raised in this memorandum will not include comments and questions addressed in the memorandum for proposed initiative 2017-2018 #147, except as necessary to fully understand the issues raised by this proposed initiative. Comments and questions addressed in the memorandum for proposed initiative 2017-2018 #147 may also be relevant, and those questions and comments are hereby incorporated by reference in this memorandum.

Moreover, earlier versions of this proposed initiative, proposed initiatives 2017-2018 #85, #118, #119, #120, #121, #122, and #123 were the subject of prior memorandums and discussed at public hearings as follows: 2017-2018 #85 was the subject of a memorandum dated December 17, 2017, and discussed at a public hearing on December 21, 2017; 2017-2018 #118, #119, #120, #121, and #122 were the subject of memorandums dated January 23, 2018, and discussed at a public hearing on January 25, 2018; and 2017-2018 #123 was the subject of a memorandum dated January 24, 2018, and discussed at a public hearing on January 26, 2018. The substantive and technical comments and questions raised in this memorandum will not include comments and questions that were addressed at the earlier meetings, except as necessary to fully understand the issues raised by the revised proposed initiative. However, the prior comments and questions that are not restated here continue to be relevant and are hereby incorporated by reference in this memorandum.

Purposes

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

1. Starting June 1, 2019, 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 public, easy-to-find, and easy-to-access location, 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 specify that publishing requires, at a minimum, that the provider make the fee schedule available in printed form, upon request, for use while an individual is present at the provider's location, and in commonly used downloadable formats on the provider's website, as specified by the executive director of the Colorado department of public health and environment;
3. To specify that if the provider does not maintain a website, the provider is required to provide the fee schedule in printed or electronic format upon request of an individual;
4. 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 as specified by the executive director of the Colorado department of public health and environment;

5. To specify the minimum information providers must include in the fee schedule and allow the executive director of the Colorado department of public health and environment to further specify the information required to be included;
6. 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 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;
7. To require a provider to include information about its billing policies and practices with the published fee schedule;
8. To require a provider to publish a list of all health care professionals or professional practice groups that provide health care services and include information about the nature of the relationship between the professional or practice group and the provider, and any other information specified by the executive director of the Colorado department of public health and environment;
9. 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;
10. Starting June 1, 2019, 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 and to specify that the patient and a third-party payer are not responsible for paying the charges of a noncomplying provider;

11. Starting June 1, 2019, 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;
12. Starting June 1, 2019, 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 from an out-of-network provider at an in-network facility;
13. Starting June 1, 2019, to require every pharmacy to publish, in a public, easy-to-find, and easy-to-access location and in a form and manner determined by the Colorado state board of pharmacy (board), to promptly update as specified by the board, and to maintain records of changes to, as specified by the board, its retail drug prices, which are 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;
14. To specify that publishing requires, at a minimum, that the pharmacy make its retail drug prices available in printed form, upon request, while the requesting individual is present at the pharmacy, and in commonly used downloadable formats on the pharmacy's website;
15. To specify that if the pharmacy does not maintain a website, the pharmacy is required to provide its retail drug prices in an electronic format upon request of an individual;
16. To require the board to adopt rules necessary to implement, administer, and enforce the requirements imposed on pharmacies, to specify that the rules must take effect by April 1, 2019, and to require the board to revise the rules as necessary thereafter;
17. To authorize the board to suspend or revoke the license of a pharmacy violating the requirements or impose a civil fine of up to \$50,000 per violation, and impose a per-day civil fine of up to \$50,000 if the violation continues;

18. To prohibit any contract between a health insurer and health care provider issued, amended, or renewed on or after June 1, 2019, from including any provision that restricts the ability of a provider or health insurer to provide patients with the information required to be published by the proposal and to specify any such provision is void and unenforceable;
19. To require the executive director of the Colorado department of public health and environment, on or before April 1, 2019, to adopt any rules necessary to implement, administer, and enforce the measure;
20. To require health insurers, starting June 1, 2019, to post on their websites and provide in writing upon request from a covered person in a form and manner determined by the commissioner of insurance (commissioner) the following information for each provider, health care service, and health insurance plan:
 - a. The contract terms, which are the negotiated payment or reimbursement amounts under the contract between the carrier and a provider;
 - b. The cost-sharing arrangement, which is the cost for health care services that are not reimbursed by the carrier; and
 - c. Prescription drug prices, which are the prices carriers have negotiated with providers, pharmacies, or distributors;
21. To require health insurers, starting June 1, 2019, to annually, or more frequently if required by the commissioner, publish detailed information, in a form and manner determined by the commissioner, regarding remuneration from rebates or other forms of incentive received as the result of paying for health care services or purchasing prescription drugs or medical devices;
22. To require the commissioner to adopt rules necessary to implement, administer, and enforce the requirements imposed on health insurers, to require the initial rules to take effect by April 1, 2019, and to require the commissioner to revise the rules as necessary thereafter;
23. To authorize the commissioner to suspend or revoke the license of an insurance carrier for violating the requirements or impose a civil fine of up to

\$50,000 per violation, and impose a per-day civil fine of up to \$50,000 if the violation continues;

24. To repeal article 49 of title 25 of the Colorado Revised Statutes, which is the "Transparency in Health Care Prices Act";
25. To defined terms used in the measure; and
26. To specify that the measure takes effect on January 1, 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. Sections 6-20-107 (4) and 10-16-147 (5) authorize penalties for violation of the new statutory provisions. The penalty provisions are identical except that section 6-20-107 (4) authorizes the state board of pharmacy to impose penalties on pharmacies, and section 10-16-147 (5) authorizes the commissioner of insurance to impose penalties on insurance carriers.
 - a. The language in each section allows either a license-related penalty *or* a civil fine, but not both (emphasis added). Do the proponents intend that only one type of penalty and not the other is allowed? It is also unclear if the “per day” civil fine might be applicable to both an initial license-related penalty and an initial civil fine. Alternatively, might the per day civil fine only be applicable if a civil fine was initially imposed for a violation and the violation continues?
 - b. The language appears to grant discretion to the state board of pharmacy and the commissioner of insurance to impose a higher civil fine if the violator "continues" to violate the statute. While discretion to levy penalties may be delegated to a public agency or official, the limits of that discretion must also be clear. Is it your intent that the word "continues" means that a violation of more than a single day could justify a per-day fine?
 - c. It appears that the civil fines would be cumulative in that the first day could be penalized by a fine up to \$50,000, and if the violation continued into a second day, the fine could be up to \$50,000 per day for each of the two days.

The result would then be a \$150,000 total fine for a two-day violation. Is that the proponents' intent?

- d. What would guide the state board of pharmacy or commissioner of insurance in exercising their discretion to impose fines for a continuing violation? Might it be clearer to tie the severity of the penalty to the type of violation, the length of time to correct the violation, or some other stated factor?
3. Section 6-20-109 also authorizes the executive director of the department of public health and environment to adopt rules to “implement and administer” health care transparency requirements on health care providers. However, the executive director is not specifically authorized to impose penalties on health care providers who violate transparency requirements. Is that the proponents' intent? If there is some other statutory basis for the executive director to impose penalties for violations, either license-related or civil fines, have you considered cross-referencing that authority?
4. Under section 1-40-105.5, Colorado Revised Statutes, 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. In section 6-20-102 (3), the antecedent "they" to the pronoun "marketplace" is not clear. In the phrase, "prices will be fair and will be determined by the marketplace, whether or not they personally review all prices in advance of healthcare services," please consider a word that more clearly defines who "they" are.
2. Lettered or numbered paragraphs that follow a colon should end with a period if they are complete sentences. For example, section 10-16-147 (1)(b) contains a series of complete sentences, and so the last sentence in that paragraph should end with a period.
3. Although the text of the proposed initiative should be in small capital letters, use an uppercase letter to indicate capitalization where appropriate. The following should be large-capitalized:
 - a. The first letter of the first word of each entry of an enumerated or lettered paragraphed after a colon (see the lettered sub-subparagraphs under section 10-16-147 (6)(h)(V)).
4. "That" indicates a restrictive clause that is necessary to identify or define the word modified. Restrictive clauses are not set off by commas. For example, in 10-16-147 (6)(h), "which results" should be "that results."
5. "Which" indicates a nonrestrictive clause that provides additional or descriptive information about the word modified. Nonrestrictive clauses are set off by commas. For example, in the introductory portion to 10-16-147 (6)(h)(V), "Carve-outs which" should be "Carve-outs, which."
6. The following words are misspelled: The preferred spelling for "healthcare" in the Colorado Revised Statutes is "health care," for both the noun and adjective forms. The preferred spelling for "cost sharing" in the Colorado Revised Statutes is "cost-sharing," for both the noun and adjective forms. "Third-party," as a noun, should not be hyphenated.