

# STATE OF COLORADO

## 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:** December 19, 2017  
**SUBJECT:** Proposed initiative measure 2017-2018 #85, concerning Disclosure of Health Care Charges

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.

### Purposes

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

1. To enact price transparency in health care billing.
2. To provide patients with the ability to shop around for health care services on the basis of price.

3. To ensure that Colorado's health care system begins to function in a normal manner where health care service price information is available to anyone and everyone at all times.

## **Substantive Comments and Questions**

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

1. Article V, section 1 (8) of the Colorado constitution requires that the following enacting clause be the style for all laws adopted by the initiative: "Be it enacted by the People of the State of Colorado." To comply with this constitutional requirement, this phrase should be added to the beginning of the proposed initiative.
2. 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?
3. An initiative proposal should indicate where the text of the proposed measure will be located in the Colorado Revised Statutes. The first, an unnumbered section in the proposed initiative, and sections 3 and 5 do not indicate where the text of the proposed measure will be located. Have you considered placing those sections in article 20 of title 6?
4. The proposal includes a March 31, 2019, effective date. The initiative imposes obligations on health care providers, pharmacies, and insurance carriers to collect and publish information, requires the commissioner of insurance to promulgate rules, and changes the law as it applies to health care provider and insurance carrier contracts. If the voters approve the initiative in November 2018, will there be sufficient time for the commissioner, health care providers, pharmacies, and insurance carriers to implement it by March 31, 2019?
5. Article II, section 11 of the Colorado constitution prohibits "impairing the obligation of contracts." Section 5 of the proposal restricts health care provider and carrier contracts "issued, amended, renewed, or delivered" on or after the effective date of the initiative. Could an otherwise valid contract "delivered" after the effective date be impaired by this section? Have you considered delaying the application of section 5 to permit more time for providers and carriers to comply with the requirement in section 5?
6. The legislative declaration states that the purpose "is to ensure that Colorado's healthcare system begins to function in a normal manner." If the health care

- system has not yet begun to function in the intended manner, is it accurate to refer to the intended manner as "normal"? Is this provision meant to suggest that the health care system should begin to function like other systems in the economy or, alternatively, that the health care system should return to functioning as it did sometime in the past? Which alternative better describes the proposal's intent?
7. In section 6-20-102 (2), the term "chargemaster" is limited to a "hospital's gross billed charge." Is the intent to only apply this term in the case of charges by a hospital and not other types of health care facilities or health care providers?
  8. It is standard drafting practice not to use "and/or" in the Colorado Revised Statutes. Using the word "or" has the same meaning as "and/or." Instead of using "and/or" in section 3(2), it is preferable to use "A or B or both."
  9. The phrase "from time to time" is used in sections 6-20-102 (2) and (3), and 6-20-103 (2)(c). Is the intent of this phrase to apply those sections to any word or term that is similar to or has the same meaning as the terms used in those sections? Have you considered replacing "from time to time" with a clear statement that the sections apply to all words or terms that are similar or have the same meaning as the terms in those sections?
  10. Sections 6-20-102 (1), (2), and (3) are defined terms that all contain similar, but not identical, language regarding the computation of "discounts, rebates, negotiations, or other forms of charge reduction." If the intent is that this phrase within each definition has the same meaning, it would add clarity if the last phrase in all three definitions were identical.
  11. Section 6-20-102 (8) defines "healthcare provider." Not included in the definition are unlicensed health care facilities such as urgent care clinics. Is the intent to exclude these facilities even if they provide health care services to individuals?
  12. Section 6-20-102 (9)(a) defines "healthcare service." This definition includes both individual services, procedures, and treatments and a "group" of services, procedures, or treatments. As the term "healthcare service" is used in the proposal, the intent appears to be to require health care providers to break down or itemize the cost of individual services. However, the definition of "healthcare service" could allow a health care provider to "group" all their services into a single identified service charge. Is that the intent?

13. Section 6-20-102 (13) defines the term "price." Price is either what a provider ultimately receives or is reimbursed "without regard to the proportions of said payment allocated to the patient." However, in section 6-20-103 (3), the term "price" is used to identify what a patient will pay. The definition in section 6-20-102 (13) and use of that term in section 6-20-103 (3) do not seem to align. Also, in section 3, the terms "list price" and "retail price" are used but not defined. As "price" is a defined term, the use of that term in section 3 seems to contradict the definition because "price" in section 3 would include the amount of any discounts or rebates.
14. In section 6-20-103 (1)(a)(II) and 1(b), the proposal identifies types of technology and electronic products that would be acceptable for use by a health care provider. Technology changes rapidly. Have you considered delegating the authority to set specific technology and electronic document standards by rule? Section 10-16-147 (3) requires the commissioner of insurance to adopt rules regarding that section. Might you consider adding that the commissioner shall adopt rules regarding electronic technology requirements?
15. The proposal requires health care providers to delineate charges, prices, and polices. In section 6-20-103 (1), (2), and (4), the proposal states what information a health care provider must publish or make available. In subsection (3) of that section, the health care provider must provide information "such that a patient has sufficient information to independently determine the price."
  - a. How would a health care provider determine what is "sufficient information" for a particular patient? Must the health care provider consider the varying abilities or challenges of particular patients? Could this requirement be met by a single standard disclosure, or might it require multiple disclosures for patients of differing abilities?
  - b. What would be the process or mechanism to determine what constitutes "sufficient information"?
  - c. The requirement in the proposal is that a patient be able to "independently determine the price." Does this mean that if a patient receives both information and assistance in determining the price, the statutory requirement has not been met?
16. In section 6-20-103 (4)(a), might it be more useful to require disclosure of "board certifications" a physician holds, rather than "specialties" the physician holds?

17. The term "contract management company" is used in section 6-20-103 (4)(b), but this term is not defined. Have you considered defining this term? Please also note #19 in the technical comment section of this memorandum. "Healthcare facility" is not a defined term. Should the undefined term "healthcare facility" in section 6-20-103 (4)(b) be replaced by the defined term "healthcare provider" from section 6-20-102 (8)?
18. Section 6-20-103 (5) requires health care providers to "promptly" update information. What does "promptly" mean in this context? Have you considered requiring updates at specified intervals or within a specific period of time following a change?
19. Section 6-20-103 (6) prohibits billing a patient or third-party payor for a health care service if the service provider failed to publish its fee schedule or chargemaster in accordance with subsections (1) and (2) of that section. It also states that a patient shall not be responsible for paying the charges. The subsection does not state that a third-party payor is not responsible for paying the charges, simply that a health care provider cannot bill a third-party payor. Is this distinction intentional? If there were a dispute between a health care provider and a patient regarding responsibility for payment, how would this dispute be resolved? Might this provision conflict with existing contractual obligations between providers, patients, and third-party payors?
20. Both sections 6-20-105 and 6-20-106 require health care providers to make disclosures. The proposal does not specify whether the disclosures must be in writing. Would it be sufficient to make an oral disclosure under these sections?
21. In section 6-20-106 (2)(b) and 2(c), a health care provider must inform a patient whether the provider's services would be "in-network" or "out-of-network" benefits under the patient's health insurance plan. Is this a determination that a health care provider would make, or would the insurance carrier make this determination?
22. The proposal includes health care services rendered through a hospital emergency room. Have you considered whether the proposal should include any specific provisions related to emergency care?
23. A health care provider must provide insurance-related information to patients in accordance with section 6-20-106 (2). It is not clear from that section when the information must be provided to the patient. The introductory portion of subsection (2) suggests the requirement applies during or before the service is

- rendered, but subsection (2)(b) permits notice for a service previously rendered. This section should be clarified.
24. Health care providers must provide certain insurance-related disclosures based on information the patient provides. What would happen if the patient provided outdated, inaccurate, or false insurance information? Can a health care provider reasonably rely on the information provided by the patient?
  25. Section 10-16-147 (1)(b) makes clear that it only applies when a covered person has received treatment and been billed. Therefore, the last sentence in subsection 1(b) appears unnecessary and could be removed. Is there a substantive reason to include the last sentence in this subsection?
  26. In section 10-16-147 (2)(a)(I), the words "and not listed here" could be removed without changing the substantive meaning of the sentence.
  27. Section 10-16-147 (2)(c) requires disclosure of "detailed information." What would be considered "detailed information" in this context? Also, the last sentence in this subsection uses the phrase "at not greater cost." Might you consider rephrasing as "at no greater cost"?
  28. Section 3 raises a number of questions:
    - a. As referenced in #13, the section uses the terms "retail price" and "list price." These terms are not defined and seem to conflict with the defined term "price."
    - b. The section requires pharmacies and carriers to "publish" prices but does not specify how, when, or where to publish.
    - c. Is it accurate to refer to "carrier prices," and if so, who is being charged by the carrier and for what service? Or, is the intent to require carriers to publish reimbursement amounts rather than prices?
    - d. Elsewhere in the proposal there are references to how prices or charges might be discounted or negotiated. Should this section mirror that language to provide consistency?
    - e. Is there a penalty associated with failing to publish? Have you considered adding rule-making authority to clarify the obligations under this section and the appropriate consequences or penalties that should apply?
  29. In addition to the absence of penalty provisions from section 3, the proposal does not include penalties for violating the other requirements of the statutes as amended. Have you considered if there should be penalties for noncompliance, and if so, the nature and severity of penalties?

30. 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 that 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](mailto: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. Before the amending clause, number each section, part, etc. that is being amended or added with a section number (e.g., SECTION 1., SECTION 2.). For example:

**SECTION 1.** In Colorado Revised Statutes, **repeal and reenact, with amendments**, part 1 of article 20 of title 6 as follows:

The first section in the proposed initiative entitled "A Legislative Declaration from the People of Colorado" does not have a section number. It should be numbered as **SECTION 1.**

2. The title of the first section of the proposed initiative states that it is a "legislative declaration" from the people of Colorado. A legislative declaration indicates a declaration made by the state legislature. Since the proposed

initiative is not being enacted by the state legislature, the word "Legislative" should be removed.

3. Each constitutional and statutory section being amended, repealed, or added is preceded by a separate amending clause explaining how the law is being changed. For example, if you intend to add a new part to article 1 of title 39 of the Colorado Revised Statutes, you would include the following amending clause:

In Colorado Revised Statutes, **add** part 2 to article 1 of title 39 as follows:

4. The instruction word or phrase in the amending clause should appear in bold-faced type. The instruction word or phrase indicates what change is being made in the section. In the example in #3, above, "**add**" is the instruction word.

The first section in the proposed measure and sections 3 and 5 do not have amending clauses.

In the remaining sections with amending clauses, the instruction words or phrases should be in bold-faced type.

5. The words "part," "article," and "title" should not be capitalized unless they are at the beginning of a sentence. See the amending clause example in #3, above.
6. It is standard drafting practice to use SMALL CAPITAL LETTERS [rather than ALL CAPS] to show the language being added to and stricken type, which appears as ~~stricken type~~, to show language being removed from the Colorado constitution or the Colorado Revised Statutes.
7. The Colorado Revised Statutes are divided into sections, and each section may contain subsections, paragraphs, subparagraphs, and sub-subparagraphs as follows:

**X-X-XXXX. Headnote.** (1) Subsection.

(a) Paragraph

(I) Subparagraph

(A) Sub-subparagraph

(B) Sub-subparagraph

(II) Subparagraph

(b) Paragraph



(2) Subsection

(3) Subsection

The first section in the proposed measure has three unnumbered paragraphs. They should be numbered as subsections (1), (2), and (3).

8. The following words are misspelled throughout: "healthcare" should be spelled "health care" and "third party payer" should be "third-party payor." Although "payer" is a correct spelling, in the Colorado Revised Statutes, the word "payor" is used.

Additionally, "froms" in section 6-20-102 (1) and (13) should be "forms"; "forpersons" in section 6-20-102 (8)(a) should be "for persons"; "herapist" in section 6-20-102 (8)(d) should be "therapist"; "therefore" in section 6-20-102 (13) should be "therefor"; "non-proprietary" in section 6-20-103 (1)(a)(II) and (1)(b) should be "nonproprietary"; "email" in section 6-20-103 (1)(b) should be "e-mail"; "avaialble" in section 6-20-103 (1)(b) should be "available"; "not" in section 6-20-106 (2)(c) should be "no"; "publish" in section 5 (1) should be "published."

9. Each section in the Colorado Revised Statutes has a section number and a headnote. Section numbers should be in numeric order. Headnotes should briefly describe the content of the section and should be in **bold-faced type**.

In Section 1 of the proposed measure, which repeals and reenacts part 1 of article 20 of title 6, the number 6-20-104 was skipped. Sections 6-20-105 and 6-20-106 should be renumbered as 6-20-104 and 6-20-105, respectively.

The headnotes in sections 3 and 5 should be in bold-faced type.

10. When a provision of the Colorado Revised Statutes is repealed and reenacted, the entire provision should be shown in small caps. In sections 6-20-101 and 6-20-102, portions of the text are shown in lowercase type. They should be changed to small caps.
11. A definition section should be organized in alphabetical order, like a dictionary. In section 6-20-102, the defined terms should be reorganized into alphabetical order.
12. Rather than putting an acronym in parentheses following a phrase, it is better to define the acronym in the definitions section. In section 6-20-102 (5), (6), and (7), "CMS" is shown in parentheses and quotation marks. In this case, the term "CMS" is not being used anywhere as a substitute for the term "centers for

- medicare and medicaid services" so "CMS" is not necessary and should be removed.
13. There should be a period at the end of section 6-20-102 (6).
  14. The comma following "price" in section 6-20-102 (13) is unnecessary because you should not separate the subject and verb in a sentence with a comma.
  15. The introductory portion to section 6-20-103 (1)(a)(I) is underlined. It is not standard drafting practice to underline introductory portions.
  16. When paragraphs follow an introductory portion and are not complete sentences, they should end with a semi-colon, except for the last paragraph, which should end with a period. In section 6-20-103 (2)(d), the paragraph should end with a semi-colon rather than a period.
  17. 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 sentence;
    - b. The first letter of the first word of each entry of an enumeration paragraphed after a colon; and
    - c. The first letter of proper names.
  18. Paragraph letters should not be shown in capital letters or small caps. For example, in section 6-20-103 (4), the citation should read "SECTION 6-20-102 (7)(a), (7)(b), (7)(c), OR (7)(d)."
  19. Section 6-20-103 (4) refers to a "healthcare facility described in section 6-20-102 (7)(A),(7)(B), (7)(C), or (7)(D)," however "healthcare facility" is not defined in section 6-20-102 at all. Did you intend to reference the definition of "healthcare provider," which is in section 6-20-102 (8)?
  20. In section 6-20-106 (2)(c), there is an extra hyphen before the phrase "in-network."
  21. It is standard drafting practice to include the word "rules" in a headnote when a state agency is being directed to promulgate rules. In section 10-16-147 (3), the commissioner is being directed to promulgate rules, so it would be helpful to add "- **rules**" to the end of the headnote.

22. In section 10-16-147 (1)(a), the phrase "as defined in section 10-16-102" should be set off with commas rather than parentheses. Additionally, it is helpful to the reader to specify which subsection a word is defined in if it is unclear what exactly is being defined. For example, is the phrase "insurance carrier" defined or just the word "carrier"? By including "(8)" in the citation, the reader can more easily find the defined term.
23. In section 3 (1) of the proposed measure, the comma following "or" does not appear to serve any purpose.
24. In section 3 (2), should the word "list" be inserted before "prices"? The sentence appears to be missing some language.
25. In sections 5(1) and 6, when specifying a date, it is standard drafting practice to show it as "March 31, 2019," rather than "March 31<sup>st</sup>, 2019."
26. Section 6 of the proposed measure should include the headnote "**Effective date.**"
27. For purposes of this statutory initiative, the word "shall" is defined in section 2-4-401 (13.7), Colorado Revised Statutes, and it means "that a person has a duty." The related word "must," which is defined in section 2-4-401 (6.5), Colorado Revised Statutes, "means that a person or thing is required to meet a condition for a consequence to apply." Furthermore, "'must' does not mean that a person has a duty."