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Memorandum

TO: The Colorado Health Foundation

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SUBJECT: ColoradoCare: Analysis of Legal Issues

DATE: April 26, 2016

In November, 2016, Colorado voters will be asked to approve or reject a proposed ballot initiative to consolidate the financing and delivery of health care services in the State of Colorado. This ballot initiative, known as Amendment 69, would establish a government-operated, universal coverage health care system throughout this State. As requested by The Colorado Health Foundation, this report reviews Amendment 69 to identify and assess issues that may arise if Amendment 69 is enacted.

Our analysis is intended for educational purposes to assist in understanding and evaluating relevant issues that may arise if Amendment 69 is implemented. This report presents an objective legal analysis and does not express an advocacy position regarding the proposed system of universal coverage. No such position should be inferred from the discussion herein.

I. Executive Summary

Amendment 69 would create ColoradoCare, a new payer entity responsible for financing the delivery of health care services within the state. Creation and implementation of ColoradoCare would by design significantly change the way in which health care is delivered and compensated for many (although not all) persons in the state, with a variety of intended and unintended consequences. If enacted, Amendment 69 will require numerous actions needing approval and implementation by the federal government, Colorado legislature, executive agencies and the Board of ColoradoCare to successfully become operational. As a result, even if passed by voters, development of the new system would require a substantial effort and present a variety of legal uncertainties.

The broad scope of ColoradoCare and its potential impact may inspire certain legal challenges, the outcome of which cannot be known or predicted with assurance. Opponents may

challenge all or part of Amendment 69 as being preempted (i.e., displaced) by various federal laws, including without limitation the Employee Retirement Income Security Act ("ERISA") and Title XIX of the Social Security Act ("SSA"), which governs the administration of Medicaid. Issues may also arise regarding Colorado constitutional provisions, including the Taxpayer's Bill of Rights ("TABOR"), recall election rights for ColoradoCare Trustees, and voter qualification. Finally, requirements to obtain waivers of federal law may also create implementation issues that could delay or prohibit implementation of ColoradoCare.

If ColoradoCare is passed and successfully resolves the noted issues, there will be a number of remaining policy matters to address. Open questions include the future of the workers' compensation system, interaction between ColoradoCare and the Division of Insurance, and the consequences to state agencies (e.g., the Colorado Department of Health Care Policy and Financing or "HCPF") and their employees after ColoradoCare assumes many existing agency functions.

As reflected by ongoing Patient Protection and Affordable Care Act ("ACA") developments, the delivery and financing of health care is an inherently controversial area which generates strong passions among different constituents. It is possible that ColoradoCare could follow a course similar to the ACA, with a series of lawsuits challenging implementation for a long period following enactment. Moreover, if ColoradoCare survives whatever legal attacks arise, it will still face operational challenges, as acknowledged by the final section of Amendment 69 authorizing the Board to discontinue operations if ColoradoCare cannot obtain necessary approvals from the federal government to operate in a fiscally sound manner.[1] These potential legal and operational issues are discussed in greater detail below.

II. Background

A. Amendment 69: Overview

Amendment 69 would establish under the State Constitution a new health care coverage and payment system throughout Colorado. This new system, ColoradoCare, would be administered on a permanent basis by a twenty-one member Board of Trustees elected by

[1] Amendment 69, § 16.

ColoradoCare Members from seven electoral districts across the state.[2] ColoradoCare would be funded by a ten percent payroll tax on Colorado employers and employees, with approximately two-thirds of the new funds to come from employers and one-third from employees.[3] There would also be a ten percent tax imposed on "non-payroll income."[4]

ColoradoCare would function as a "political subdivision" of the state. A political subdivision is a separate component of Colorado government which does not operate under the auspices of the executive branch (i.e., the governor's office) as an executive agency.[5]

To promote clarity, some key definitions from the text of Amendment 69 are set forth below:

- "Amendment 69" means the text of the ballot initiative that would create ColoradoCare.
- "Beneficiary" means an individual entitled to ColoradoCare benefits. Amendment 69 defines this to include *all* residents of Colorado. Importantly, however, Medicare beneficiaries will continue to receive primary benefits from Medicare, as will persons covered through the Veteran's Administration, Indian Health Services or other remaining insurance policies purchased by employers or individuals after enactment.
- "Board" means the ColoradoCare Board of Trustees. Depending on context, this may mean the interim, appointed Board or the elected Board that will take the interim Board's place after ColoradoCare becomes operational.
- "ColoradoCare" refers to the new health care coverage and payer entity that will be created upon approval of Amendment 69 by voters.
- "Member" means a Beneficiary, as defined above, who is at least 18 years old and has lived in Colorado for at least one continuous year.

[2] Amendment 69, § 5.
[3] Amendment 69, § 9(2).
[4] Amendment 69, § 2(12). "Nonpayroll income" means total income from all sources specified on lines 8-10, 12-18, and 20-21 on the I.R.S. Form 1040 for tax year 2014. Non-payroll income does not include pension or annuity income which is not subject to Colorado income taxes pursuant to Colo. Rev. Stat. § 39-22-104(f)(4).
[5] Amendment 69, § 3.

- "Trustee" means a member of the Board.[6]

B. Guidelines for Legal Decision-Making

In assessing issues presented by ColoradoCare, it is helpful to outline several principles used by courts to reconcile legal conflicts which may potentially arise.

1. Federal Law Preempts Conflicting State Law

First, federal law preempts and prevails over conflicting state law.[7] In overall terms, courts recognize and apply two types of preemption: express and implied. Federal laws that expressly preempt state law, such as ERISA, specifically identify the areas of state law overruled by federal law.[8] In addition, implied preemption occurs where Congress passes a law that is silent regarding preemption, but in fact operates to preempt certain aspects of state law.

For Amendment 69, the established supremacy of federal law means ColoradoCare must avoid both types of preemption to be sustained as lawful. If, on review, express or implied preemption conflicts are found to exist, Amendment 69 may be limited or blocked by conflicting federal law to the extent of such preemption.

2. State Constitutional Provisions Supersede State Statutes

Next, within the confines of Colorado state law, Amendment 69 will supersede any conflicting Colorado statutes or regulations by virtue of its status as an amendment to Colorado's Constitution.[9] Although legal issues will be settled under this established hierarchy of decision-making authority, ColoradoCare's interaction with other Colorado statutes will raise a number of other variables and considerations.

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[6] Amendment 69, § 2; other key Amendment 69 definitions are defined in the context of the applicable discussion below.
[7] U.S. Const., art. VI., § 2 (commonly known as the Supremacy Clause).
[8] *See* 29 U.S.C. § 1144(a); discussed in more detail below.
[9] *Alexander v. People*, 7 Colo. 155 (1884); *In re: Matter of Title, Ballot Title and Submission Clause for 2013-2014 #129*, 333 P.3d 101, 106 (Colo. 2014).

3. Later Enacted Laws Take Precedence Over Earlier Laws

A final consideration in this context will be Amendment 69's interaction with other provisions of the Colorado Constitution. Several elements of Amendment 69 may arguably conflict, in whole or in part, with other sections of the Colorado Constitution, including:

- TABOR;[10]
- Constitutional election requirements related to recall of elected officers;[11]
- Constitutional requirements for elector qualifications;[12] and
- The single-subject rule, which restricts the content of ballot initiatives.[13]

Each of these subjects is discussed in more detail below, but the general rule is that a reviewing court will first attempt to harmonize any conflict between constitutional provisions, before declaring one provision of the Constitution more important that another.

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[10] Colo. Const. art. X, § 20.
[11] Colo. Const. art. XXI, § 1.
[12] Colo. Const. art. VII, § 1.
[13] Colo. Const. art. V, § 5.5.

III. Federal Law Issues

The implementation of ColoradoCare would necessarily implicate several key provisions of federal law including:

A. Medicaid's single state agency requirement;

B. ERISA;

C. Medicaid and ACA waivers;

D. Medicare and other coverage programs; and

E. The Health Insurance Portability and Accountability Act ("HIPAA").

These federal programs and pronouncements, along with their possible interaction with ColoradoCare, are discussed in the following sections.

A. Medicaid's Single State Agency Requirement

Federal Medicaid rules require each state to designate a "single state agency" appointed by the Governor to administer the Medicaid program within the state.[14]

What ColoradoCare says

Amendment 69 does not specifically address the single state agency requirement, but does direct the Colorado government to transfer all functions and funds related to the operation of the Medicaid and the Child Health Plan Plus ("CHP+") programs to ColoradoCare.[15]

Legal analysis

The single state agency requirement has potentially significant ramifications for Colorado's Medicaid Program. With limited exceptions, HCPF as the current single state agency is designated to administer Medicaid in Colorado and responsible for ensuring compliance with Medicaid requirements as set forth in the State Plan (the organizational document for each state's Medicaid program). The single state agency must have the authority to: (i) administer or

[14] 42 U.S.C. § 1396a(a)(5) (SSA § 1902(a)(5)).
[15] Amendment 69, §§ 8, 12(1)(c).

supervise administration of the plan; and (ii) make rules and regulations that it follows in administering the plan or that are binding upon local agencies administering the plan.[16]

Because Amendment 69 expressly disclaims ColoradoCare's designation as an "agency" of the state, it is possible that the federal Centers for Medicare and Medicaid Services ("CMS") could object to its designation as the single state agency for Medicaid purposes, particularly given Amendment 69's direction that ColoradoCare would not be "subject to administrative direction or control by any state executive, department, commission, board, bureau, or agency."[17] ColoradoCare will not be permitted to operate the Medicaid program without obtaining a Section 1115 waiver from CMS (discussed below) that specifically permits it to do so. While significant effort may be required and there is no guarantee, on balance it seems likely the federal single state agency requirement could be successfully addressed and should not derail implementation of ColoradoCare.

B. ERISA

ERISA is a broad federal law limiting a state's ability to regulate group health plans sponsored by self-insured employers or employee organizations (such as labor unions) in deference to overall national policy goals. Regardless of whether ERISA ultimately reflects positive or negative policy determinations, it is important to assess ERISA's potential application to ColoradoCare.

What ColoradoCare says

Amendment 69 is silent on ColoradoCare's interaction with and impact on employer-sponsored and other health benefit plans regulated by ERISA.

Legal analysis

As noted, ERISA is a federal law governing the implementation of health benefit plans sponsored by employers or employee organizations and known as "employee welfare benefit plans." The scope of ERISA includes:

[16] 42 C.F.R. § 431.10(b).
[17] Amendment 69, § 3(1).

> [A]ny plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in Section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).[18]

In a nutshell, ERISA regulates many health care coverage plans offered by employers or employee organizations engaged in interstate commerce.[19] Amendment 69 does not address the intersection of the new law with plans regulated under federal ERISA law. Certainly, Amendment 69 permits an employer to continue offering and operating existing health benefit plans to employees in addition to paying ColoradoCare taxes, regardless of whether such a decision would be economically feasible or desirable. That said, it seems unlikely that many self-insured employers will choose to incur both the payroll tax imposed by Amendment 69 and the additional expense of maintaining their existing ERISA plans, with as-yet unknown consequences for multi-state employers doing business in Colorado which currently sponsor such plans here and elsewhere.

In practical terms, ERISA may serve to undercut ColoradoCare since ERISA contains a preemption clause that on its face preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[20] ERISA preemption is extremely broad and imposes significant federal limitations on state innovation or regulation of health care coverage. Courts have addressed the scope of ERISA preemption involving three categories of state laws:

- State laws that "reference" ERISA plans, meaning a state law that "acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operations;

[18] 29 U.S.C. § 1002(1).
[19] 29 U.S.C. § 1003(a) (with limited exceptions).
[20] 29 U.S.C. § 1144(a).

- State laws that have an impermissible "connection with" ERISA plans, meaning a state law that "governs a central matter of plan administration or interferes with nationally uniform plan administration; and
- State laws that force an ERISA plan to adopt a certain scheme of substantive coverage or effectively restrict its choice of insurers.[21]

If Amendment 69 passes, ColoradoCare may well face litigation from aggrieved employers, unions or others alleging whole or partial preemption under ERISA. ColoradoCare proponents would be expected to defend Amendment 69 by arguing its requirements are in addition to and do not replace or interfere with the implementation of ERISA plans, but such an argument may not succeed. Very recently, in a 6-2 vote following Justice Scalia's death, ERISA's preemptive force was reaffirmed by the U.S. Supreme Court.[22] In *Gobeille v. Liberty Mutual Insurance Co.*, the Supreme Court invalidated a Vermont law that required health insurers to provide health care claims and related data for the purpose of establishing a statewide information database, a decision with possible implications for Colorado's own All Payer Claims Database, among other things.[23] The Supreme Court found the Vermont information reporting requirement to be preempted by ERISA's reporting requirement.[24]

The effect of preemption here would likely exclude ERISA plans from any provision of Amendment 69 that might be successfully attacked as preempted. The exact impact of excluding ERISA plans would depend upon the provisions of Amendment 69 that are challenged, but there may be significant fiscal and other repercussions for ColoradoCare if (for example) the payroll tax were held to be preempted for employers which sponsor ERISA plans.

Employers which offer ERISA plans are likely to argue they should be exempt from payment of ColoradoCare taxes and ColoradoCare benefit requirements pursuant to existing precedent. Union-sponsored welfare plans may raise similar arguments. The ultimate

[21] *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 943 (2016).
[22] *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936 (2016).
[23] *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 943 (2016).
[24] *Gobeille v. Liberty Mutual Ins. Co.*, 136 S. Ct. 936, 943 (2016).

consequences of these challenges for ColoradoCare are difficult to estimate, but could be far reaching in terms of overall impact to the program.

C. Waivers of Federal Law

As a state law pronouncement, ColoradoCare must be reconciled with and accommodate several requirements of federal law to receive contemplated federal funding in an acceptable and legally compliant manner. These requirements are outlined below.

What ColoradoCare says

Amendment 69 requires ColoradoCare to obtain a waiver from the Federal government for the purpose of suspending the Colorado Health Benefit Exchange, the State's health insurance exchange established under the ACA.[25] In addition, Amendment 69 authorizes the elected Board to seek any other waivers that may be necessary for ColoradoCare's successful implementation and operation.[26] Colorado's various state agencies are specifically directed to assist ColoradoCare in implementing these waivers.[27]

In the event that ColoradoCare is unable to obtain the necessary waivers or exceptions, the Board is authorized to shut down ColoradoCare operations and return health insurance and related functions back to the status quo existing prior to enactment of Amendment 69.[28]

Legal analysis

The ACA, SSA and other federal laws impose interrelated and far-reaching requirements upon the states. States which seek alternative coverage and payment models require waivers of law from the federal government which may or may not be granted on an ad hoc basis. There are many types of waivers, each tied to a specific section of the enabling act passed by Congress. In the Medicaid context, Section 1915(c) waivers expand Medicaid coverage to include services provided in home and community-based settings.[29] Section 1915(b) waivers allow states to

[25] Amendment 69, Section 4(2)(c).
[26] Amendment 69, Section 5(5)(b).
[27] Amendment 69, Section 8(1)(a).
[28] Amendment 69, Section 16.
[29] For Medicaid waivers, section numbers generally refer to sections of the SSA. The waivers are codified in the United States Code, but the original SSA sections are used more frequently for specific provisions. In this case, Section 1915(c) waivers are found at 42 U.S.C. § 1396n(c).

implement managed care delivery systems for their Medicaid programs.[30] Section 1115 waivers allow states to attempt new and innovative delivery and financing mechanisms for Medicaid beneficiaries.[31] Finally, ACA Section 1332 waivers allow states the opportunity to opt out of specific ACA requirements. The State of Colorado has 12 active Medicaid waivers, each of which must be addressed as part of ColoradoCare implementation. ColoradoCare will also need to obtain an ACA Section 1332 waiver, as described in more detail below.

1. Section 1332 Waivers

Amendment 69 identifies the need for a Section 1332 waiver of the ACA's requirements regarding mandatory insurance coverage and availability of an insurance marketplace.[32] Commonly known as State Innovation Waivers, Section 1332 allows states to opt out of the ACA's requirements related to:

- The establishment of qualified health plans;
- Health insurance exchanges; and
- Employer and individual shared responsibility.[33]

To obtain these waivers, states must demonstrate a plan meeting a number of specific criteria, which include:

- Providing coverage that is at least as comprehensive as would be available absent the waiver;
- Providing coverage in a manner that is at least as affordable absent the waiver;
- Covering at least the same number of people; and
- Accomplishing the stated goals without increasing the federal deficit.[34]

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[30] 42 U.S.C. § 1396n(b).
[31] 42 U.S.C. § 1315.
[32] In this case, Section 1332 refers to the provisions of the ACA, rather than the SSA. *See* 45 C.F.R. § 155.1300 *et seq.*
[33] *See* 77 Fed. Reg. 11700 (Feb. 27, 2012).
[34] 45 C.F.R. § 155.1308(f)(3)(iv).

In support of a waiver application, states are required to submit detailed financial data and analysis, including actuarial certifications and a 10-year budget that is deficit-neutral to the federal government.[35]

Applying for a federal waiver is a time-consuming and labor-intensive process. Helpfully, the U.S. Department of Health and Human Services ("HHS") is preparing a unified waiver approval process for both Section 1332 and Medicaid waivers.[36] Even with this accommodation, the waiver approval timeline may stretch over a long period of time. Importantly, before submitting an application for a Section 1332 waiver, a state must conduct a compliant public notice and comment process that includes the opportunity for feedback at public forums.[37]

Once the state's public notice and comment process is completed, the state may submit its proposed waiver application, with supporting data, to the Secretary of HHS. Assuming the waiver also relates to provisions of the ACA, the application is reviewed for completeness by both HHS and the Department of Treasury over a 45-day period.[38] Once the application has been deemed complete, a 180-day public notice and comment period begins.[39] During the second notice and comment period, the public may provide further input.[40] HHS is directed to issue a decision after the 180 day notice period and, if approved, a state may then implement the waiver's provisions. The state will be subject to a number of continuing transparency and reporting requirements over the waiver's lifetime.

2. Section 1115 Waivers

Section 1115 waivers are available for state demonstration projects related to the provision of health care services under the Medicaid program.[41] Written broadly, Section 1115 allows states to apply for a waiver of any provision of Section 1902 of the SSA, potentially

[35] 45 C.F.R. § 155.1308(f)(4).
[36] 45 C.F.R. § 155.1302(a).
[37] *See* 45 C.F.R. § 155.1312.
[38] 45 C.F.R. § 155.1308(c)(1).
[39] 45 C.F.R. § 155.1316(c).
[40] 45 C.F.R. § 155.1316.
[41] 42 C.F.R. § 431.400.

creating many opportunities for innovative health care delivery strategies involving Medicaid beneficiaries.[42] Section 1902 contains several requirements potentially relevant to ColoradoCare's operations, including:

- The single state agency requirement (discussed above);
- Limitations on enrollment fees, premiums, deductions, cost sharing, and other similar charges;
- Equal access requirements;
- Other specific rules related to coverage and benefits under the Medicaid program.[43]

It seems likely that ColoradoCare will need to pursue a Section 1115 waiver to operate the state's Medicaid program. Until ColoradoCare is actually implemented, and the Board begins to flesh out the benefit categories, payment models, and other details necessary to implement the new, universal-coverage system, it is difficult to know the exact scope of the necessary Section 1115 waiver. Amendment 69 anticipates that Medicaid beneficiaries will continue to receive the federal mandatory Medicaid benefit package as well as protections from copayments and deductibles. Consequently, the benefits design and cost sharing provisions may not need a Section 1115 waiver, but this circumstance may complicate ColoradoCare operations by requiring multiple benefit packages and enrollment categories.

In terms of process and timeline, beginning in 2017 states should be able to apply for new Section 1115 waivers using the same process applicable to the Section 1332 waiver process. However, Section 1115 waivers applications do have unique requirements. Specifically:

- The state must provide at least a 30-day public notice and comment period, and supply the public with specific information required by CMS regulations to evaluate the waiver proposal;

[42] 42 U.S.C. § 1315.
[43] 42 U.S.C. § 1396a.

- The relevant information must be published online via the CMS and state agency's websites; and
- At least 20 days prior to submitting an application, states must hold at least two public hearings regarding the proposal.[44]

Once the public notice process is completed, the informational requirements for 1115 waiver application are similar to the requirements for a Section 1332 waiver and include:

- A comprehensive program description of the demonstration, including goals and objectives;
- A description of the proposed health care delivery system, eligibility requirements, benefit coverage and cost sharing obligations (premiums, copayments, and deductibles) required of affected individuals to the extent such provisions would vary from the state's current practices and those of SSA § 1902;
- An estimate of expected changes in enrollment and expenditures, including historic enrollment or budgetary data, if applicable;
- Current enrollment data, if applicable, and enrollment projections expected over the term of the demonstration for each category of beneficiary whose health care coverage is impacted by the demonstration;
- Other program features of the demonstration that would modify in the state's Medicaid and CHIP programs;
- The specific waiver and expenditure authorities that the state believes necessary to authorize the demonstration;
- The research hypotheses that are related to the demonstration's proposed changes, goals, and objectives, a plan for testing the hypotheses in the context of an evaluation, and, if a

[44] 42 C.F.R. § 431.408(a)(2), (3).

quantitative evaluation design is feasible, the identification of appropriate evaluation indicators; and

- Written documentation of the state's compliance with the public notice requirements, with a report of the issues raised by the public during the comment period, and how the state considered those comments when developing the waiver application.[45]

Once the application has been received by CMS, the waiver will be subject to a second, federal notice and comment process, which can be extended up to sixty days.[46] The approval process itself must take, but is not limited to, forty-five days from the date the application is received.[47] Waiver approvals are prospective only, and federal financial participation (i.e., federal matching money for the Medicaid program) is not available for portions of the demonstration that CMS does not approve.[48] Even after approval, the state will continue to have ongoing data collection and reporting requirements.[49]

To summarize, implementation of ColoradoCare will require significant effort and attention to technical compliance requirements in order to obtain federal approvals necessary for continued receipt of federal matching funds under the Medicaid program. These efforts could well be successful but will require allocation of significant human and financial resources.

D. Interaction with Medicare and Other Federal Health Care Programs

The relationship of Colorado to other federally-funded health care coverage programs is an important element in the overall analysis of legal issues involving ColoradoCare.

What ColoradoCare says

Amendment 69 provides that ColoradoCare will not pay for services that are covered by, or would have been covered by, Medicare.[50] Amendment 69 also permits ColoradoCare to

[45] 42 C.F.R. § 431.408(a)(1).
[46] 42 C.F.R. § 431.412(c)(3).
[47] 42 C.F.R. § 431.416(a)(1).
[48] 42 C.F.R. § 431.412(d).
[49] 42 C.F.R. §§ 431.420 - .428.
[50] Amendment 69, § 11(2).

operate Medicare Advantage and MediGap plans.[51] Amendment 69 does not address the applicability of Veteran's Administration ("VA") health services, TRICARE, the Federal Employee Health Benefits Plan ("FEHBP") or other federally-funded programs such as Indian Health Services ("IHS"), but public materials made available by ColoradoCare proponents suggest ColoradoCare is not designed to interfere with or supersede these federal health care coverage programs, at least as primary payers.[52]

Legal analysis

Amendment 69 takes the path of least resistance regarding Medicare, TRICARE, FEHBP and IHS, by not interfering with their current operation. Colorado residents who are eligible for Medicare will continue to receive Medicare coverage and benefits; the same result would apply to VA-eligible residents and persons covered under FEHBP and IHS programs.[53] Certain supplemental benefits may be available from ColoradoCare, depending upon the ultimate benefits selected and implemented by the Board. In operational terms, the ColoradoCare Board will likely need to clarify a variety of beneficiary and provider issues regarding benefits and reimbursement in the affected areas through rulemaking on a periodic basis.

E. HIPAA

ColoradoCare does address the protection of individual health information as required by federal law.

What ColoradoCare says

While Amendment 69 does not expressly reference HIPAA, the proposal does require ColoradoCare to comply with all federal and state laws related to the protection of patient medical records.[54] In addition, Amendment 69 requires ColoradoCare to adopt regulations to protect patient confidentiality while allowing public access to health information databases.[55]

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[51] Amendment 69, § 8(4).
[52] ColoradoCare Informational Booklet, 10 (June 2015) *available at* http://coloradocareyes.co/wp-content/uploads/2016/02/ColoradoCare-booklet-optimized-v6.6-2.5.16.pdf.
[53] It is unclear what impact ColoradoCare might have on federal employers and employees. Amendment 69's definitions of these terms refer to standard W-2 withholdings as the basis for inclusion as an employer or employee.
[54] Amendment 69, § 5(4)(k)(III).
[55] Amendment 69, § 5(4)(i).

Legal analysis

As the language of Amendment 69 suggests, ColoradoCare will indeed be subject to applicable federal and state laws related to the privacy and protection of patient health information. The most significant of these provisions is HIPAA, under which ColoradoCare as a health plan will be considered a "covered entity."[56] Under HIPAA, ColoradoCare will be required to comply with existing federal privacy and security requirements, the details of which are beyond the scope of this memo but do not materially change the compliance environment involving confidentiality of protected data existing before Amendment 69.

IV. State Law Issues

ColoradoCare will necessarily interact in numerous significant ways with existing Colorado state statutes and regulations. While all such consequences cannot be predicted with certainty, some important expected ramifications are noted below.

A. Funding

What ColoradoCare says

ColoradoCare is primarily funded through a 10% payroll tax paid by all employers and employees in the State of Colorado.[57] "Employer" and "employee" are defined broadly, to include all entities and individuals subject to income withholding and reporting requirements.[58] Two-thirds of this tax will be paid by employers, and one-third will be covered by employees.[59] Employers are permitted, but not required to, pay the employee portion on behalf of their employees.[60]

Amendment 69 also requires that existing Colorado state agencies, through the action of the Colorado legislature, transfer other state and federal funds related to ColoradoCare's health care programs (e.g., Medicaid and CHP+) to ColoradoCare.[61] Where possible, Amendment 69

[56] 45 C.F.R. § 160.103 (definition of "covered entity").
[57] Amendment 69, § 9(2); There is also a 10% tax on "non-payroll income" of Beneficiaries.
[58] Amendment 69, § 2(7), (8).
[59] Amendment 69, § 9(2).
[60] Amendment 69, § 9(5).
[61] Amendment 69, § 12(2).

mandates future allocations of federal health care dollars are to be provided directly to ColoradoCare.[62]

Legal analysis

Amendment 69 does not specifically address how ColoradoCare will handle the flow of funds received, or how the legislature will actually segregate the payroll tax revenue it receives for ColoradoCare purposes. It is possible, although currently unknown, that funding for ColoradoCare will work similarly to funding under Amendment 23, a 2000 constitutional amendment designed to increase funding for K-12 education in Colorado.[63]

Under Amendment 23, tax revenue equivalent to one third of one percent is transferred directly to the State Education Fund, which is established by the constitutional provision.[64] The money is not subject to TABOR limits or restrictions.[65] ColoradoCare funding could work in a like manner, with the additional tax revenue segregated from the general fund and placed into a separate fund dedicated to ColoradoCare. Addressing this process may be one of the first issues the interim Board will need to examine and resolve.

From a federal perspective, the Board and legislature will need to work together to ensure that money collected for ColoradoCare satisfies the state share requirements for the receipt of federal financial participation (federal funding) for the Medicaid program. Similar care will need to be observed in the context of other state share components of Medicaid financing, such as the hospital provider fee. CMS will also impose certain conditions on the funding arrangements, in connection with the Section 1332 and 1115 waiver process described above.

B. Organizational Issues

The structure, format and operations of ColoradoCare will require considerable attention.

[62] Amendment 69, § 8(1)(b).
[63] Colo. Const. art. 9, § 17(4).
[64] Colo. Const. art. 9, § 17(4).
[65] Colo. Const. art. 9, § 17(4).

What ColoradoCare says

Amendment 69 establishes ColoradoCare as a "political subdivision" of the State of Colorado, independent of the influence of any branch of the State government.[66]

Legal analysis

Neither current Colorado state law nor Amendment 69 specifically defines "political subdivision" for the purpose of ColoradoCare operations. The closest analogues to ColoradoCare's designation as a "political subdivision" may be Denver Health and Hospital Authority ("Denver Health") and the University of Colorado Hospital Authority ("UCHA"), which operate as "bodies corporate and political subdivisions" of the State, and are separated from other agencies, branches, or departments of state and local government.[67] Where appropriate, we compare and contrast these political entities under the topics described below:

1. ColoradoCare and the Executive Branch

ColoradoCare is intended to be an independent, quasi-governmental political subdivision of the State of Colorado. Functionally, it may operate in a manner similar to the current conduct of commercial insurance companies in the field. As it is not an executive agency, ColoradoCare will not operate pursuant to the Administrative Organization Act or like other state agencies such as HCPF, which currently administers the Colorado Medicaid program.[68]

2. ColoradoCare Rulemaking

Although Amendment 69 expressly disclaims ColoradoCare's status as an "agency" of the State of Colorado, it may nonetheless be subject to the requirements of the Colorado Administrative Procedure Act ("APA"). The APA defines an "agency" broadly, to include "any board, bureau, commission, department, institution, division, section, or officer of the state" with limited, non-applicable exceptions.[69] ColoradoCare is tasked with issuing many different rules, policies and procedures, but Amendment 69 doesn't specifically address how the Board will implement such provisions; while unknown, it seems likely the body will track the familiar APA

[66] Amendment 69, § 3(1).
[67] Colo. Rev. Stat. §§ 25-29-103(1); 23-21-503(l).
[68] *See* Colo. Rev. Stat. § 24-1-101 *et seq.*
[69] Colo. Rev. Stat. § 24-4-102(3).

format to proceed in a fair manner informed by legal precedent. By comparison, Denver Health and UCHA are exempt from the requirements of the APA, due to specific statutory exemptions found in each entity's respective enabling act.[70] Unless the Colorado legislature enacts a similar provision for ColoradoCare, the APA (with its "notice and comment" provisions for public input and other due process protections) will likely inform, if not control, the ColoradoCare rulemaking process. Many important operational details affecting Members, providers and other stakeholders (e.g., payment methodology and mechanisms for care furnished out of state) will need to be resolved through some type of rulemaking apparatus. Amendment 69 does not require the General Assembly to exempt ColoradoCare from the APA, so the ultimate procedural outcome remains unclear.

3. Open Records and Open Meetings

ColoradoCare is a political subdivision of the State of Colorado, and, without more, would likely fall within the requirements of the Colorado Open Records Act ("CORA").[71] However, Amendment 69 instead refers to CORA only by requiring the Board to pass regulations related to transparency that are at least as open as CORA would otherwise require,[72] suggesting the Amendment's drafters may have intended CORA not to apply. CORA has a specific definition of "political subdivision" that includes "every county, city and county, city, town, school district, special district, public highway authority, and housing authority within this state."[73] Although ColoradoCare may not precisely fit any of these categories, Colorado courts have generally construed the open records law very broadly to support the public policy favoring governmental transparency.[74] Our expectation is that the Board will be subject to transparency requirements akin to CORA if not CORA itself.

[70] Colo. Rev. Stat. §§ 25-29-112(1)(m); 23-21-513(l)(m).
[71] Colo. Rev. Stat. § 24-72-201 *et seq.*
[72] Amendment 69, § 4(2)(b)(IV).
[73] Colo. Rev. Stat. § Colo. Rev. Stat. § 24-72-202(5).
[74] *Dawson v. State Compensation Ins. Authority*, 811 P.2d 406 (Colo. Ct. App. 1990).

Colorado law expressly provides that board meetings, such as the meetings of the ColoradoCare Board are subject to the requirements of the Colorado Sunshine Act apart from the related CORA question regarding transparency of public records.[75]

4. State Procurement Code

The State Procurement Code ("SPC") was enacted to codify in a single place the laws regarding State procurement to increase public confidence, ensure fairness and equity in contracting, promote efficiency, foster competition, and maintain the integrity of the purchasing process.[76] The initial scope of the SPC's requirements was limited to the executive branch, which would arguably exclude ColoradoCare from the SPC's requirements.[77] The SPC specifically authorizes political subdivisions to adopt some or all of its provisions for their own use, further strengthening the argument that the SPC should not apply to ColoradoCare.[78]

The SPC specifically extends, however, to any contracts that are financed in whole or in part with "federal assistance moneys."[79] Given that ColoradoCare will administer the Medicaid and CHP+ programs, may administer a Medicare Advantage program, and will interact with other federal-state health care programs, many ColoradoCare contracts will involve federal dollars, thus implicating the SPC for those contracts to the extent there are not conflicting federal requirements.[80] Some elements of the SPC will not apply. The State centralized contract management statute specifically excludes "any contract to which the State is a party under Medicare, Medicaid, CHP+, or the Colorado Indigent Care Program."[81] Exemption from the centralized contract management system may not eliminate all compliance with the SPC code.

The final piece of the procurement puzzle is Amendment 69 itself, which requires the Board to establish a "central purchasing authority" to negotiate favorable prices for prescription

[75] Amendment 69, § 13.
[76] Colo. Rev. Stat. § 24-101-102(2).
[77] Colo. Rev. Stat. § 24-101-105(1)(a).
[78] Colo. Rev. Stat. § 24-101-105(2).
[79] Colo. Rev. Stat. § 24-101-105(1)(d).
[80] Colo. Rev. Stat. § 24-111-103.
[81] Colo. Rev. Stat. § 24-102-205(2).

drugs, medical equipment, and other products and services required by ColoradoCare.[82] There is no additional information provided relating to this purchasing authority, and it is unclear if the central purchasing authority would be subject to the SPC. Given the amount of federal money in ColoradoCare's contractual arrangements, however, it seems likely that the purchasing authority may follow applicable SPC provisions in its operations.

5. State Personnel System

It does not appear that State Personnel System ("SPS") requirements will apply to ColoradoCare. Although Amendment 69 calls for the hiring of specific ColoradoCare administrative personnel (i.e., a CEO, CFO, and Chief Medical Officer), the Amendment does not specifically reference applicable personnel procedures for such employees.[83] The SPS is a constitutionally-established hiring process that applies to all appointive officers and employees of the State.[84] It does not expressly apply to political subdivisions of the State. Political subdivisions are expressly permitted to contract with the State Personnel Department for personnel services and the Colorado Supreme Court has, in at least one case, considered this provision to exempt political subdivisions from SPS participation.[85]

Given this exception, it seems more probable than not that the interim Board will formulate regulations and processes for hiring and firing ColoradoCare personnel without participation in the SPS. The Board will need to specifically address what happens to personnel currently employed by the State of Colorado who might be transferred to ColoradoCare (e.g., current HCPF personnel who might be needed before or after the Medicaid transition). In fact, the *Regents* case referenced above related specifically to UCHA's attempts to limit transferring state employees' option to remain on the SPS to a maximum of two years.[86] The Court overturned this limitation, and the current statutes for both Denver Health and UCHA

[82] Amendment 69, § 5(4)(c).
[83] Amendment 69, § 5(4)(b).
[84] Colo. Const. art. 12, § 13(2).
[85] Colo. Const. art. 12, § 13(4); *Colorado Ass'n of Public Employees v. Board of Regents of the University of Colorado*, 804 P.2d 138 (1990).
[86] *Colorado Ass'n of Public Employees v. Board of Regents of the University of Colorado*, 804 P.2d 138 (1990).

specifically permit employees to remain a part of their prior employment systems indefinitely.[87] It is unclear what impact, if any, ColoradoCare's status as a constitutional entity might have in the event of a similar challenge.

C. TABOR

Compliance with TABOR restrictions on tax increases will likely receive significant scrutiny.

What ColoradoCare says

Amendment 69 specifically provides ColoradoCare is exempt from TABOR as codified in the Colorado Constitution.[88] Nonetheless, some of TABOR's tax limitation concepts are incorporated into the text of the initiative in a parallel manner, as discussed below.

Legal analysis

TABOR is a constitutional restriction on taxation and growth of state and local government spending in the State of Colorado.[89] Under TABOR, "fiscal year spending," meaning the amount of revenue generated by the government on an annual basis, is limited to the rate of inflation plus the percentage change in Colorado's population.[90] If revenues exceed this cap, the State is required to refund the excess to taxpayers, unless a special vote permits the government to keep and utilize the excess funds.[91] TABOR effectively limits Colorado's ability to collect and retain state revenue, and to finance a number of State programs. Many tax increases are forbidden unless authorized by a vote of the affected electorate.

Taken at face value, ColoradoCare is exempt from TABOR's limitations on raising taxes and on government spending. This would mean, among other things, that:

- ColoradoCare revenue is not subject to or restricted by TABOR's limitations;
- Increases in taxes related to ColoradoCare will not require voter approval; and

[87] Colo. Rev. Stat. §§ 23-21-507(1) (UCHA), 25-29-107(1) (Denver Health).
[88] Colo. Const. art. X, § 20.
[89] Colo. Const. art. X, § 20.
[90] Colo. Const. art. X, § 20(2)(e), (7).
[91] Colo. Const. art. X, § 20(3)(c).

- Surpluses in ColoradoCare revenue need not be refunded.

As a practical matter, any exemption from or exception to TABOR is not unlikely to trigger a challenge from TABOR supporters. Opponents of Amendment 69 may rely on TABOR's introductory paragraph, which provides that TABOR's provisions prevail over any conflicting state law, including constitutional provisions.[92] Despite this language, and as previously noted, later constitutional amendments generally prevail over prior-enacted amendments, although Colorado courts have interpreted TABOR as a restriction that emphasizes voter approval of new or increased taxes.[93] In one case, the Colorado Supreme Court found that "[TABOR] altered who ultimately must approve imposition of new taxes, tax rate increases, and tax policy changes by requiring voter approval before they can go into effect."[94] Under the rationale of *Huber* and similar cases, ColoradoCare proponents can argue, with force, that voters have specifically approved the tax increases and exemption to TABOR, protecting Amendment 69 from a TABOR prohibition. While impossible to predict with certainty, challengers to the implementation of ColoradoCare are likely to face substantial barriers to success.

While ColoradoCare attempts to exempt itself from TABOR, the text of Amendment 69 does in fact require ColoradoCare to follow several requirements that are similar to TABOR's restrictions on the growth of government spending:

- The Board is required to develop procedures for managing surplus funds, including maintaining sufficient reserves, increasing benefits, or issuing refunds to Members.[95] The Board must also report on its decisions to the public on an annual basis.

- Premium increases may only be implemented if a majority of the Members of ColoradoCare approves the increase, by increasing the applicable premium taxes at an election held no more than once per fiscal year, i.e., no additional taxes can be levied to

[92] Colo. Const. art. X, § 20(1).
[93] *Huber v. Colo. Mining Ass'n*, 264 P.3d 884 (Colo. 2011).
[94] *Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 891 (Colo. 2011).
[95] Amendment 69, § 5(4)(f).

support ColoradoCare spending increases without a vote of the people, as is specifically intended by TABOR.[96]

D. Single Subject Rule for Ballot Initiatives

Colorado law requires any ballot initiative to encompass only a single issue. While Amendment 69 may not meet this requirement, the time to challenge this requirement has passed absent court intervention.

What ColoradoCare says

ColoradoCare addresses a multitude of State law issues. While these requirements may arguably not have been met in a strict sense, Amendment 69 did receive approval from the State Title Board on April 15, 2015 which clears a major legal hurdle regarding compliance with the constitutional single-subject requirement discussed below.[97]

Legal analysis

The Colorado Constitution and Colorado statutes place restrictions on the content of new citizen initiatives and referenda by requiring that each initiative encompass only a single subject.[98] The purpose of this requirement is twofold: (i) to ensure that each measure placed before the voters is approved or voted down on its own merits; and (ii) to prevent fraud or surprise for voters who may not otherwise understand the full reach of the measure they're enacting.[99]

Colorado's election statutes contain a specific process for setting the title of proposed ballot initiatives and addressing concerns related to the single subject requirement. The proponents of any proposed ballot measure are required to submit the measure to the State Title Board, which evaluates the measure and assigns it an appropriate title.[100] The title-setting process provides an administrative procedure for evaluation of a proposed measure's compliance

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[96] Amendment 69, § 9(8).
[97] A list of ballot initiatives pending in front of or approved by the State Title Board is available here: http://www.sos.state.co.us/pubs/elections/Initiatives/titleBoard/index.html.
[98] Colo. Const. art. V, § 5.5; Colo. Rev. Stat. § 1-40-106.5.
[99] Colo. Rev. Stat. § 1-40-106.5(1)(e).
[100] Colo. Rev. Stat. § 1-40-106.

with the single subject requirement. Opponents or concerned citizens may request a rehearing within seven days of the Title Board's initial decision, and may appeal the Title Board's decision on rehearing directly to the Colorado Supreme Court.[101]

Regardless of the theoretical merits of the issue, potential opponents of Amendment 69 have missed the seven day statutory window to challenge Amendment 69's compliance with the single subject requirement. Therefore, it seems likely that a reviewing court would refuse to hear a later challenge to Amendment 69 on single subject grounds at this time. There is, at least in theory, case law that suggests a direct challenge under the constitutional single subject rule might be permissible.[102] It is uncertain, however, whether such a challenge could be successfully presented at this late date. We are glad to analyze this topic in greater detail if it would be helpful to do so—please let us know.

E. Auto Insurance Medical Benefits

ColoradoCare does not on its face appear to impact the current framework for auto insurance medical benefits, but may practically limit the amount of additional coverage for medical benefits purchase by consumers as part of their auto insurance policy.

What ColoradoCare says

Amendment 69 does not specifically reference ColoradoCare's interaction with existing mandatory auto insurance medical benefits, other than a uniform prescription that ColoradoCare be the secondary payer to any *health insurance* plan in which a beneficiary is enrolled.[103]

Legal analysis

Colorado insurance law requires auto insurance policies to provide at least $5,000 in medical benefits payable for injuries resulting from the operation of a vehicle.[104] These funds are statutorily reserved for the first responders and trauma care providers who furnish health care

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[101] Colo. Rev. Stat. § 1-40-107.
[102] *Polhill v. Buckley*, 923 P.2d 119 (Colo. 1996).
[103] Amendment 69, § 11(1).
[104] Colo. Rev. Stat. § 10-4-635 (there is a limited exception if the named insured specifically rejects medical payments coverage in writing).

services immediately after an accident takes place.[105] Once these providers have been paid, any remaining funds may be distributed to other types of health care providers.[106]

While there is a possibility of conflict between auto insurers and ColoradoCare, by virtue of Amendment 69's establishment as secondary payer to all *health insurance* plans (as opposed to all sources of medical benefits), the auto insurance statutes resolve this issue in favor of ColoradoCare because medical payment coverage under auto insurance is primary to any other health insurance coverage available to the insured.[107] As such, unless the Colorado legislature amends the insurance law, auto insurers will likely need to continue funding medical benefits to their customers.

One unresolved issue is whether the public policy rationale for mandatory auto insurance medical benefits would be lessened by the passage of Amendment 69. These benefits are designed to ensure that at least some coverage is available for trauma and related care provided in the wake of an auto accident. If Amendment 69 passes, it seems likely that the pool of individuals who are ColoradoCare beneficiaries will overlap to a large extent with the pool of individuals who have Colorado-issued auto insurance policies subject to the medical benefit requirements. Because the treatment for these injuries would be covered under ColoradoCare, auto insurance for medical benefits could be less desirable. At the least, the number of individuals opting out of additional medical benefits coverage is likely to increase.

F. <u>Election Issues</u>

The text of Amendment 69 creates a new Colorado election and a number of new election laws including who is eligible to vote for ColoradoCare Trustees and how those Trustees are governed following their election.

[105] Colo. Rev. Stat. § 10-4-635(2).
[106] Colo. Rev. Stat. § 10-4-635(2)(c).
[107] Colo. Rev. Stat. § 10-4-636(4)(b).

What ColoradoCare says

Amendment 69 contains a number of election-related provisions:

Following the terms of the interim, appointed Board members, who are tasked with beginning implementation of ColoradoCare, the program will be governed by a 21 member elated Board of Trustees.[108] The Board will be comprised of three Trustees elected from each of seven electoral districts to be established by the interim Board.[109] Each electoral district must have substantially the same number of residents, and the election of the new Board will be nonpartisan.[110]

Although the interim Board will establish rules governing the selection of Trustee candidates and other election requirements, Amendment 69 does provide that the Trustees must be elected from among the Members residing in each of the electoral districts.[111] Elected Trustees are not subject to recall elections, but may be removed by a majority vote of the other Trustees and replaced by a new delegate from the same district.[112]

Legal analysis

1. Voter Eligibility

The first substantive legal question related to ColoradoCare elections is who is eligible to vote for the elected Board. Taken at face value, Amendment 69 appears to provide the opportunity for all "Members" to vote in the Board elections. The definition of Member, however, is much broader than typical voter eligibility in state-wide elections.

In general, the Colorado Constitution requires individuals to meet four substantive criteria. In order to be eligible to vote in elections, the person must be:

- A United States citizen;
- At least 18 years of age;

[108] Amendment 69, § 5(1).
[109] Amendment 69, § 5(1).
[110] Amendment 69, § 4(2)(e), (f).
[111] Amendment 69, § 5(1).
[112] Amendment 69, § 5(2)(b), (c).

- A resident of Colorado for at least the time period prescribed by law; and
- Duly registered as a voter (if so required by law).[113]

State election statutes generally repeat these requirements, and include a few other practical limitations—electors, for example, must have a valid mailing address in order to properly register.[114]

Amendment 69, however, appears to open Board elections to all ColoradoCare Members. Members include any Beneficiary who is at least 18 years of age and has been a Colorado resident for at least twelve consecutive months. The only criteria for Beneficiary status is residence in Colorado. Consequently, the pool of potential voting "Members" is broader than the constitutional and statutory criteria for state-wide elections described below. A Member could, hypothetically, be a 21-year-old Colorado resident who is not a United States citizen. This creates legal ambiguity and a potential battlefield for proponents and opponents of ColoradoCare. Because the interim Board has the authority to promulgate regulations related to the conduct of elections, it is *possible* the Board will mitigate the conflict by adopting Colorado's recognized election standards for public offices.[115] However, if the Board follows the literal text of Amendment 69, the voting pool for ColoradoCare could raise a variety of election law issues unrelated on their face to health care coverage overall.

The constitutional criteria set forth above are the general standards for Colorado elections; political subdivisions are granted authority by statute to amend or adopt elector qualification requirements as permitted by their authorizing legislation.[116] "Authorizing legislation" is defined to include "the provisions of the state constitution or statutes or of a local charter authorizing the existence and powers of a political subdivision and providing for the call

[113] Colo. Const. art. VII, § 1.

[114] Colo. Rev. Stat. § 1-2-102(1)(a) (in general, a person's residence is his/her home or primary place of abode; if an individual is homeless, he or she must have a mailing address that is not a P.O. Box or general delivery to a post office).

[115] Even if the Board passed rules limiting electoral participation, those rules could, themselves, be challenged by advocates for wider input into ColoradoCare operations based on the constitutional language.

[116] Colo. Rev. Stat. § 1-2-104; while Colorado law defines a "political subdivision" in many different ways, this particular statute does not contain such a definition.

and conduct of the political subdivision's election."[117] Read together, these provisions arguably grant ColoradoCare increased flexibility in establishing its elector qualifications.

Assuming the ColoradoCare Board concludes that elections are open to all Members as defined by Amendment 69, this position might be vulnerable to legal challenge on the following grounds:

- While Colorado's election laws grant additional flexibility to political subdivisions, the requirement of U.S. citizenship for qualified electors is a constitutional requirement, and cannot be waived absent an express intent to do so. Amendment 69 does not explicitly repeal the Constitution's voter criteria.
- Amendment 69's definition of "Member" may not be specific enough to reflect an intent to alter the standard criteria for elector eligibility. Because authorization to amend the traditional eligibility requirements must come from a political subdivision's "authorizing legislation," the Board may not be able to expand the eligibility of qualified electors on that basis.[118]

These substantive election law questions appear to raise issues of first impression for Colorado courts. There is no governing case law interpreting the provisions of C.R.S. § 1-2-104, so it is difficult to predict what the outcome of such a challenge (if raised) might be. Even if an expanded scope of voter eligibility was upheld, there are other operational challenges to consider, through rulemaking or otherwise, which include addressing voter registration, identification, and other requirements necessary to ensure an efficient and fair election process.

2. Voter Residency

Assuming the Board does not enact its own regulations regarding residency requirements, the general Colorado election statute establishes residency requirements to register to vote. The statute provides that, as a general rule, "the residence of a person is the principal or primary

[117] Colo. Rev. Stat. § 1-1-104(1.5).
[118] Colo. Rev. Stat. § 1-2-104.

home or place of abode."[119] It is the place "in which a person's habitation is fixed and to which that person, whenever absent, has the present intention of returning after a departure or absence, regardless of the duration of the absence."[120] Residency determinations must take into consideration business pursuits, employment, income sources, age, marital status, location of real and personal property, motor vehicle registration and other circumstantial factors.[121]

Ultimately under Colorado law, residency is determined by testing physical presence and intent. There are nuances to the general rule; such as exceptions for students away at institutions of higher learning, and the special address requirements for homeless individuals noted above.[122] It is possible but unlikely that ColoradoCare will alter the presence and intent standard in a meaningful way.

3. Recall of Trustees

As noted above, Amendment 69 provides that elected Trustees are not subject to recall petitions. This statement may unwittingly conflict with the Colorado constitutional requirement that every elected public officer be subject to recall by the electors eligible to vote for his or her successor.[123] "Elective officers" is broadly defined, and includes:

> Every person having authority to exercise or exercising any public or governmental duty, power or function . . . or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers.[124]

The Trustees would seemingly be subject to recall under this constitutional provision and the enabling legislation absent the specific language in Amendment 69.[125]

[119] Colo. Rev. Stat. § 1-2-102(1)(a)(I).
[120] Colo. Rev. Stat. § 1-2-102(1)(a)(I).
[121] Colo. Rev. Stat. § 1-2-102(1)(a)(I).
[122] Colo. Rev. Stat. § 1-2-102(1)(b).
[123] Colo. Const. art. XXI, § 1; Colo. Rev. Stat. § 1-12-101.
[124] Colo. Const. art. XXI, § 4.
[125] Colo. Rev. Stat. § 1-12-101.

As a practical matter, this tension will probably be resolved in the same manner as the TABOR exemption outlined above—a later-enacted constitutional amendment generally takes precedence over a prior-enacted amendment. It is worth noting, however, that the proposal does have a real impact on existing Colorado law and may add additional controversy unrelated to health care coverage to the ColoradoCare implementation process.

4. Removal of Trustees

Amendment 69 contains one additional provision related to removal of Trustees, allowing that a Trustee may be removed "for cause" by a majority vote of the other Trustees. "Cause" is not defined by Amendment 69, which means that the Board will likely promulgate or apply its own definitions as part of the regulatory process. As guidance, however, the Board might look to other removal provisions found in the Colorado Constitution. The governor's constitutional removal powers for appointed officers are limited to cases of incompetency, neglect of duty, or malfeasance in office.[126] Justices and judges, in another example, may be removed for willful misconduct in office, willful or persistent failure to perform their duties, intemperance, violation of a canon of judicial conduct, or in the case of a disability that interferes with their ability to perform their judicial duties.[127]

The removal provision may have been added because typical recall options have been eliminated, but raises additional questions for Board consideration, including the definition of "for cause." For example, if a majority of the Board is composed of elected Trustees from one or another political party, could this majority too readily find cause to remove Trustees from the other political party? If removed, the majority of the Board would appoint the removed Trustee(s)' successor(s), which could interfere with the expressed will of the electorate in specific districts.[128] The appointed successors must be from the same district, offering some check on the will of the Board majority, but the potential remains (absent clear operational rules to the contrary) for political divisiveness to invade the ColoradoCare program process.[129]

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[126] Colo. Const. art. 4, § 6.
[127] Colo. Cost. Art. VI § 23(3)(d).
[128] Amendment 69, § 5(2)(d).
[129] Amendment 69, § 4(2)(f).

As with the recall provisions discussed above, the legality of the removal process may be sustainable by ColoradoCare's establishment as a constitutional authority for the provision of health insurance, but may have unintended consequences.

G. Colorado Governmental Immunity Act

The Colorado Governmental Immunity Act ("CGIA") protects the State of Colorado and designated public entities from most types of tort liability.

What ColoradoCare says

Amendment 69 is silent regarding the protection available to ColoradoCare under state law, but does provide that ColoradoCare will be a "political subdivision" of the State.[130]

Legal analysis

The CGIA is Colorado's statutory adaptation of the common law doctrine of sovereign immunity, which bars most types of tort liability for the State of Colorado and designated public entities.[131] "Public entities" are broadly defined, and include the state, judicial department, counties, cities and counties, municipalities, school districts, special improvement districts, and *every other kind of district, agency, instrumentality, or political subdivision* thereof organized pursuant to law.[132] ColoradoCare fits within this broad definition, and can be expected to enjoy the CGIA's protection from tort liability.

CGIA immunity grants a public entity relief from tort liability unless that immunity is specifically waived.[133] To illustrate, statutory waivers include the operation of a motor vehicle by a public employee, the operation of a public hospital, and certain "dangerous conditions" existing in and around public facilities.[134] While ColoradoCare itself would enjoy CGIA immunity, it is unlikely this immunity would pass through to ColoradoCare's contracted health

[130] Amendment 69, § 3.
[131] Colo. Rev. Stat. § 24-10-101 *et seq.*
[132] Colo. Rev. Stat. § 24-10-103(5).
[133] Colo. Rev. Stat. § 24-10-106.
[134] Colo. Rev. Stat. § 24-10-106(1).

care providers.[135] Public employees are protected by the CGIA's provisions, but this protection does not extend to independent contractors.[136]

H. Workers' Compensation

ColoradoCare eliminates the current structure of health coverage for injuries sustained by employees in the course of their employment and includes such care in the ColoradoCare health care coverage program.

What ColoradoCare says

Amendment 69 requires ColoradoCare to assume responsibility for payment for all reasonable and necessary medical expenses for workers injured in the course of their employment.[137] This coverage is limited to those employees and employers for which workers' compensation coverage is mandated by the existing Workers' Compensation Act of Colorado.[138] In support of this fundamental shift in workers' compensation coverage, ColoradoCare makes other key changes to the existing workers' compensation system, including:

- ColoradoCare's subrogation rights supersede those of a workers' compensation insurer.[139]
- The General Assembly is specifically instructed to repeal or amend those portions of the Workers' Compensation Act that relate to the provision of medical care, as well as the payment of premiums for medical benefits.[140]

Legal analysis

Workers' compensation laws represent a kind of bargain between employers and employees relative to on-the-job injuries and accidental deaths. In exchange for general immunity from tort liability, employers offer an established set of medical and disability benefits

[135] Assuming the provider does not have a separate claim to sovereign immunity under the CGIA.
[136] Colo. Rev. Stat. § 24-10-103(4)(a).
[137] Amendment 69, § 6(2)(b).
[138] *See* Colo. Rev. Stat. §§ 8-40-201 *et seq.* -301 *et seq.*
[139] Amendment 69, § 11(3)(a).
[140] Amendment 69, § 12(1)(f).

to injured workers through the workers' compensation system.[141] Amendment 69 proposes to alter the medical portion of that bargain by transferring responsibility for the medical care needed by injured workers to ColoradoCare.

As a preliminary matter, Amendment 69 tasks the Colorado legislature with determining a mechanism to transfer workers' compensation medical benefits to the ColoradoCare program. These amendments will require legislative consideration of several potential legal and operational issues, including:

- Scope of benefits: Amendment 69 provides that injured workers formerly covered by the workers' compensation system will be entitled to the same scope of benefits as a typical ColoradoCare beneficiary.[142] Although ColoradoCare has a minimum benefit package as outlined in Amendment 69, we won't know until the Board issues rules whether this change means that injured workers are entitled to more or less comprehensive medical care when injured in the course of their employment than before the Amendment's passage, with potential consequences in the occupational health field.

- Cost saving measures: The Workers' Compensation Act contains a number of operational limitations on its medical benefits that are designed to both control costs and prevent fraud, abuse, and waste within the workers' compensation system. Examples of these limitations include medical treatment guidelines and accreditation of physicians who evaluate workers' compensation beneficiaries.[143] Presumably, some of these safeguards will be replaced by rules issued by the ColoradoCare Board, but some proposed changes may be philosophically inconsistent with a more general program of medical benefits available to all beneficiaries. If some of the cost-saving measures incorporated into the workers' compensation system are not adopted by ColoradoCare, the costs of treating injured workers could potentially increase.

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[141] Colo. Rev. Stat. § 8-41-102.
[142] Amendment 69, § 6(2)(b).
[143] 7 Colo. Code Regs. 1101-3, Rule 17 (2016) *available at* https://www.colorado.gov/cdle/node/20291. Information on physician accreditation is available at https://www.colorado.gov/pacific/cdle/physicians-accreditation.

- Limitations on tort liability: The biggest unresolved legal question in the Workers' Compensation context relates to employers' general immunity from tort liability.[144] While this immunity remains intact for disability and death claims, which appear to be preserved under the workers' compensation system post-Amendment 69, it is possible that injured employees could challenge employers' traditional immunity from suit for more standard (i.e., medical benefit only) injuries that do not have a lasting or permanent impact on workers' health.

It is hoped the General Assembly will address some of these issues as part of the required amendment process for the Workers' Compensation Act. Nonetheless, Amendment 69 will undoubtedly represent a fundamental shift in the treatment of injured workers, with various consequences to be determined.

I. Health Benefit Exchange

ColoradoCare will have a significant impact on Connect for Health Colorado, the state's existing ACA health benefit exchange.

What ColoradoCare says

Amendment 69 requires the legislature to suspend operation of the Colorado Health Benefit Exchange (the "Exchange") and transfer its resources to ColoradoCare.[145] Amendment 69 also requires ColoradoCare to apply for such a waiver of the ACA's exchange-related requirements.[146]

Legal analysis

Two actions are required to suspend operation of the Exchange. First, the legislature will need to repeal the existing exchange statute and transfer the resources of the Exchange to ColoradoCare. Second, the Board may need to coordinate with CMS to obtain a Section 1332 waiver (discussed above) that permits Colorado to waive certain requirements of the ACA, including those related to operation of a health insurance exchange. A full waiver would,

[144] Colo. Rev. Stat. § 8-41-101 *et seq.*
[145] Amendment 69, §§ 4(2)(c), 12(1)(b).
[146] Amendment 69, § 4(2)(c).

presumably, seek to exempt Colorado from both operating the current state exchange and opting into use of the federal exchange. While such a process may be feasible, in practical terms timing may be challenging, since the Board, CMS, and the State will need to orchestrate the continuity of Exchange plans until ColoradoCare is fully operational.

J. Insurance Regulation

It is unclear if ColoradoCare will be considered an insurance entity for Division of Insurance regulatory purposes.

What ColoradoCare says

Amendment 69 states that, as a political subdivision, ColoradoCare will not be subject to the administrative direction or control of any state executive, department, commission, board, bureau, or agency.[147] The Board is also required to provide funds to the Commissioner of Insurance to establish separate ombudsmen for beneficiaries and providers. The ombudsmen will have the capacity to investigate, respond to inquiries and complaints and make recommendations to the Board.[148] Finally, Amendment 69 provides that payment of the premium tax required to fund ColoradoCare does not constitute the purchase of a health insurance policy by any employer or taxpayer.[149]

Legal Analysis

The primary question is whether or not ColoradoCare will be considered an insurance entity for Division of Insurance regulatory purposes. Amendment 69 describes the tax paid by employers and employees as a "premium tax," which gives some impression that ColoradoCare's operations might fall within the scope of Colorado's insurance laws and Division of Insurance purview. That said, the strength of Amendment 69's language regarding ColoradoCare's exclusion from oversight by other state agencies could arguably limit the Division's ability to enforce traditional insurance law requirements against ColoradoCare. Even the ombudsmen offices, as specifically established by Amendment 69, are ultimately limited to

[147] Amendment 69, § 3(2).
[148] Amendment 69, § 5(4)(d).
[149] Amendment 69, § 9(3).

making recommendations to the ColoradoCare Board for appropriate action.[150] At the very least, the language of Amendment 69 creates potential for conflict between ColoradoCare and the Division of Insurance regarding what regulatory powers, if any, the Division will be able to exercise. In addition, the development within ColoradoCare of appropriate consumer protections parallel to those existing in the state's current insurance laws may be an important item for future consideration, regardless of how the noted jurisdictional issues are resolved.

V. Conclusion

We hope this analysis is responsive to TCHF's request, and appreciate the opportunity to assist in this important project. Please contact Gerry Niederman (303.583.8204; gniederman@polsinelli.com) or Jennifer Evans (303.583.8211; jevans@polsinelli.com) if there are questions or comments—we are available to discuss any item in further detail or provide additional information upon request. Thank you.

[150] Amendment 69, § 5(4)(d).