

|   |                        |  |
|---|------------------------|--|
| <b>DISTRICT COURT, DENVER COUNTY,<br/>COLORADO</b><br>1437 Bannock Street<br>Denver, Colorado 80202<br>720-865-8301   |                        |  |
| Plaintiff:<br><br>COLORADO HOSPITAL ASSOCIATION, a<br>Colorado non-profit corporation,<br><br>v.<br><br>Defendants:<br><br>COLORADO DIVISION OF INSURANCE;<br>MICHAEL CONWAY, Colorado Insurance<br>Commissioner, in his official capacity;   |                        |  |
| <i>Counsel for Plaintiff Colorado Hospital Association:</i><br>Colin C. Deihl, #19737<br>Gerald A. Niederman, #12449<br>Jennifer L. Evans, #30117<br>Ann C. McCullough, #18919<br>POLSINELLI PC<br>1401 Lawrence St., Suite 2300<br>Denver, CO 80202<br>Phone Number: (303) 572-9300<br>Email: <a href="mailto:cdeihl@polsinelli.com">cdeihl@polsinelli.com</a><br><a href="mailto:gniederman@polsinelli.com">gniederman@polsinelli.com</a><br><a href="mailto:jevans@polsinelli.com">jevans@polsinelli.com</a><br><a href="mailto:amccullough@polsinelli.com">amccullough@polsinelli.com</a> | Case No.<br><br>Cttrn: |  |
| <p style="text-align: center;"><b>COMPLAINT</b></p>   |                        |  |

Plaintiff Colorado Hospital Association (“CHA”), through undersigned counsel, for its complaint against Defendants Colorado Division of Insurance and Michael Conway, Colorado Insurance Commissioner (collectively, the “Division”), states and asserts:

## **I. NATURE OF CASE**

1. This case challenges Defendants' improper and illegal enactment of Emergency Regulation 20-E-01 (the "Emergency Regulation") which was promulgated on Christmas Day and became effective on New Year's Day, with no input or public comment in direct violation of the Colorado Administrative Procedure Act (the "APA") and the Colorado Reinsurance Program Act, C.R.S. § 10-16-1101 *et. seq.*, (the "Act.")

2. The Emergency Regulation requires all Colorado hospitals to elect a payment method by January 15, 2020 for each hospital's share of a \$40 million Special Fee assessment and to pay that Special Fee assessment by June 30, 2020, even though the Act only authorized the Commissioner to assess the Special Fee for fiscal years 2020-2021 and 2021-2022. The Emergency Regulation also purports to authorize the Division to revoke or suspend a hospital's license for non-compliance – authority never granted to Defendants under the Act or any other statute.

3. CHA seeks a declaration that the "Emergency Regulation" is invalid because it was enacted in violation of the APA and exceeds the authority granted under the Act. CHA also seeks a preliminary and permanent injunction preventing the Division from enforcing the "Emergency Regulation" against any hospital in Colorado.

## **II. PARTIES, JURISDICTION, AND VENUE**

4. Plaintiff CHA is a Colorado non-profit corporation with a principal place of business at 7335 East Orchard Road, Greenwood Village, Colorado 80111. CHA serves as the leading voice of the Colorado hospital and health system community. CHA's members include over 100 hospitals and health systems in Colorado. It is CHA's members who will pay the Special Fee required by the Act and who are directly impacted by the Emergency Regulation.

5. Defendant Conway is the Commissioner of Insurance for the State of Colorado. The Commissioner's principal place of business is 1560 Broadway, Suite 850, Denver, Colorado 80202. The Commissioner is the chief executive of the Division and is responsible for the overall administration of the Division.

6. The Division of Insurance regulates the insurance industry in Colorado as a component of the Colorado Department of Regulatory Agencies. The Division's principal place of business is 1560 Broadway, Suite 850, Denver, Colorado 80202.

7. The Court has subject matter jurisdiction over this matter under Article 6, Section 9 of the Colorado Constitution.

8. Venue is proper in the City and County of Denver because both Defendants are located in Denver County and the actions leading to the claims arose in Denver.

### **III. FACTUAL ALLEGATIONS**

#### **The Colorado Reinsurance Act**

9. In May 2019, Colorado enacted into law HB 19-1168, known as the Colorado Reinsurance Program Act, C.R.S. § 10-16-1101 *et. seq.* The Act directed the Commissioner to create a reinsurance program intended to reduce health insurance costs in Colorado.

10. To help pay for the program, the Act authorizes the Commissioner to assess “special fees” against hospitals not to exceed \$40 million per year for two calendar years. (the “Special Fee”). C.R.S. §§ 10-16-1104 (f) and 1108(1)(a)(I).

11. CHA member hospitals are required to pay the Special Fee from their general revenues and are prohibited from passing the Special Fee onto consumers in any manner. C.R.S. § 10-16-1108(3).

12. CHA member hospitals set their budgets and cash flow plans for 2020 well before the end of 2019. Some hospitals’ budgets are set by local governments in accordance with statutory time requirements and cannot be adjusted on short notice.

13. The Act specifically limits the Commissioner’s authority to assess the Special Fee to the 2020 and 2021 calendar years. C.R.S. § 10-16-1103(2) and 1108(1)(a)(I). This limitation is reflected in the final fiscal note to HB 19-1168, which confirms that the Special Fee will not take effect until state fiscal year 2020-2021, which begins on July 1, 2020. *See* Fiscal Note, attached as **Exhibit A**, at p.3, Table 2, (no money from special fee is included for state fiscal year 2019-2020.).

14. The Act grants the Division the authority to adopt rules to implement the Act in accordance with the APA and specifically requires the Division to establish a group of stakeholders who will be affected by the rule as required by C.R.S. § 24-4-103(2). *See* Act at C.R.S. § 10-16-1104(1)(i).

15. The Act authorizes the Division to enforce payment of the Special Fee by using powers conferred by the “insurance laws” of Colorado. C.R.S. §10-16-1108(5).

#### **The Emergency Regulation**

16. Shortly after the Act was signed by Governor Polis on May 17, 2019, the Colorado Hospital Association (“CHA”) and its member hospitals, as stakeholders, began requesting information from the Division about the Special Fee. CHA continued to request information and provide input throughout the summer and fall of 2019.

17. CHA member hospitals needed the requested information to plan for the Special Fee in setting their 2020 budgets and some hospitals needed approval from local governments to set those budgets.

18. Despite ongoing requests for information, the Division did not initiate any rulemaking under the APA, or constitute a stakeholder group as required by the Act, to determine how the Special Fee provision would be implemented.

19. Upon information and belief, late in the fall of 2019, the Division became concerned that the Special Fee might cause the state to violate the revenue cap contained in the Taxpayer Bill of Rights (“TABOR”), Colo. Const. art X, § 20(7)(a) and (d), which might potentially trigger a tax refund to Colorado taxpayers and otherwise have a negative impact on the program.

20. Upon information and belief, the Commissioner thereafter determined to collect the Special Fee in state fiscal year 2019- 2020, rather than waiting until the next year, as required by the Act.

21. On Christmas Day, 2019, the Division issued Emergency Regulation 20-E-01. Attached as **Exhibit B**.

22. The Emergency Regulation became effective on January 1, 2020, New Year’s Day. **Exhibit B**, Emergency Regulation, Section 9.

23. The Emergency Regulation was enacted without compliance with the notice and comment rulemaking procedures in the APA, C.R.S. § 24-4-103.

24. On Christmas Day at 2:55 pm Mountain Time, the Division emailed CHA and other stakeholders requesting comments on the Emergency Regulation. That email stated that the comments were due by 5 p.m. on January 3, 2020--two days after the effective date of the Emergency Regulation. *See* **Exhibit C**, email.

25. The Emergency Regulation requires the Division to collect the Special Fee from hospitals in the amount of \$40 million by June 30, 2020. **Exhibit B**, Emergency Regulation, Section 5.A.

26. The Emergency Regulation also requires CHA member hospitals to select a payment method for each hospital’s share of the \$40 million Special Fee assessment by January 15, 2020, despite the fact that each hospital’s share of the Special Fee has not yet been calculated. **Exhibit B**, Emergency Regulation, Section 5.B.

27. The Emergency Regulation states that each hospital is to specify how it wants to pay for its share of the amounts “owed in 2019-2020,” even though the Act only allow the Division to assess the Special Fee for the 2020 and 2021 calendar years. **Exhibit B**, Emergency Regulation, Section 5.B.

28. The Emergency Regulation authorizes the state to automatically deduct the Special Fee using the state’s electronic fund payment system. **Exhibit B**, Emergency Regulation, Section 5.E.

29. Upon information and belief, the Division intends to start automatically deducting the Special Fee from hospitals in February 2020.

30. The Emergency Regulation states that a hospital's noncompliance with the Emergency Regulation may result in the "suspension or revocation of a hospital's license." Emergency Regulation, Section 8.

31. On information and belief, the Division enacted the Emergency Regulation in an improper and unlawful attempt to increase the Division's jurisdictional and enforcement authority over Colorado hospitals. The Division does not have, and has never been delegated by the Colorado legislature, the power to "suspend or revoke a hospital's license," yet the Emergency Regulation purports to authorize the Division the power to threaten a Hospital's license, and prevent a hospital from continuing to serve patients if that hospital fails to pay the Special Assessment or otherwise fails to comply with the Emergency Regulation.

32. On information and belief, the Emergency Regulation was promulgated on Christmas Day in an improper effort to force Colorado hospitals to pay the \$40 million Special Fee assessment for the 2019-2020 state fiscal year, even though the Act only authorizes the Commissioner to assess the Special Fee for the 2020 and 2021 calendar years.

33. On information and belief, the Division enacted the Emergency Regulation in an effort to avoid a potential violation of TABOR.

34. On information and belief, the Division adopted the Emergency Regulation in an improper effort to collect the Special Assessment during three state fiscal years instead of the two years authorized by the Act.

#### **IV. CLAIMS FOR RELIEF**

##### **FIRST CLAIM FOR RELIEF**

##### **(Violation of Colorado APA – Special Fee Payment)**

35. CHA incorporates the foregoing allegations as if fully stated herein.

36. The Colorado Reinsurance Program Act authorizes the Division to assess up to \$40 million in Special Fees for the 2020 and 2021 calendar years for a total of up to \$80 million. C.R.S. § 10-16-1103(2) and 10-16-1108(1)(a)(I).

37. Reflecting legislative intent, the final fiscal note of HB 19-1168 included no revenue from the Special Fee for state fiscal year 2019-2020.

38. Despite this clearly limited statutory direction, the Emergency Regulation requires the state's hospitals to pay \$40 million dollars in the Special Fee for state fiscal year 2019-2020 by June 30, 2020.

39. As a result, CHA's hospital members will be required to pay \$40 million in state fiscal year 2019-2020, and then an additional \$40 million in state fiscal year 2020-2021, and another \$40 million in state fiscal year 2021- 2022, for a total of \$120 million.

40. The Emergency Regulation's requirement that the state's hospitals pay the Special Fee before June 30, 2020 exceeds the authority granted by the Act, is contrary to law, is arbitrary and capricious, and is an abuse of the Division's discretion.

41. The Emergency Regulation's related requirement that the state's hospitals select a payment schedule for each hospital's share of the Special Fee by January 15, 2020 without even knowing the amount of such payment is arbitrary and capricious, and an abuse of the Division's discretion.

**SECOND CLAIM FOR RELIEF**  
**(Violation of APA – Enforcement Provision)**

42. CHA incorporates the foregoing allegations as if fully stated herein.

43. The Act grants the Division authority to use its powers under Colorado's insurance laws to enforce payment of the Special Fees in accordance with the time periods established by rule.

44. Colorado's insurance laws do not include the right to suspend or revoke a hospital's license, and the Division has no such enforcement authority.

45. The Emergency Regulation purports to provide that the Commissioner may impose "civil penalties, issuance of cease and desist orders and/or suspensions or revocations of license" against hospitals who fail to comply with the Emergency Regulation. **Exhibit B**, Emergency Regulation, Section 8.

46. The Emergency Regulation's enforcement provision is contrary to law, arbitrary and capricious, and an abuse of the Agency's discretion.

**THIRD CLAIM FOR RELIEF**  
**(Violation of APA Emergency Rulemaking Provision,**  
**C.R.S. § 24-4-103(6)(C))**

47. CHA incorporates the foregoing allegations as if fully stated herein.

48. The Act authorized the Division to adopt rules necessary to implement, administer and enforce the Act. In adopting those rules, the Division was required to comply with the APA, explicitly including "the requirement to establish a representative group of participants pursuant to Section 24-4-103(2)." C.R.S. § 10-16-1104(i).

49. C.R.S. § 24-4-103(2) mandates that the Division “establish a representative group of participants with an interest in the subject matter of the rulemaking to submit views ... on the proposed rules.”

50. Despite this statutory mandate in the Act, the Division did not seek input on the Emergency Regulation from stakeholders and instead enacted the Emergency Regulation on Christmas Day, a national holiday.

51. To justify its use of the Emergency Regulation, the Division found that “immediate adoption of this regulation is imperatively necessary for the preservation of public health, safety, or welfare,” and found that compliance with the rulemaking requirements of the APA, C.R.S. § 24-4-103, “would be contrary to the public interest.” **Exhibit B**, Emergency Regulation, Section 2. The Division supplied no basis to support these findings.

52. The Division’s use of emergency rulemaking threatens public health, safety and welfare. CHA member hospitals must comply with tight budgets while serving the health needs of the community. By requiring the state’s hospitals to budget and pay for the Special Fee within six months instead of a year, the Emergency Regulation threatens some hospitals’ ability to provide necessary emergency and other vital health services. CHA member hospitals’ budgets and cash flow plans for 2020 were set and approved months ago. The Emergency Regulation’s acceleration of the \$40 million Special Fee payment for the first six months of 2020 is particularly problematic for hospitals controlled by local governments who are often required to comply with statutory budgeting requirements that cannot be adjusted on short notice.

53. The Commissioner’s use of the emergency rulemaking authority under C.R.S. § 24-4-103(6)(a) is arbitrary and capricious; a denial of a statutory right; contrary to CHA’s members’ due process rights; in excess of the Commissioner’s statutory authority; not in accord with the requirements of the Act; an abuse or clearly unwarranted exercise of discretion; and otherwise contrary to law.

## **V. PRAYER FOR RELIEF**

WHEREFORE, Plaintiff Colorado Hospital Association prays for judgment in its favor and against Defendants Colorado Division of Insurance and Michael Conway, Colorado Insurance Commissioner, as follows:

A) Finding that Division of Insurance Emergency Regulation 20-E-01 is unlawful, invalid and unenforceable;

B) Preliminarily and permanently enjoining the Division from enforcing the Emergency Regulation against any hospital in Colorado;

C) Declaring that the Colorado Reinsurance Program Act permits the Commissioner to assess the Special Fee only in state fiscal year 2020- 2021 and state fiscal year 2021- 2022;

D) Preliminarily and permanently enjoining the Division from collecting the Special Fee from hospitals until after June 30, 2020;

E) Declaring that the Division may not suspend or revoke the license of any hospital in the State of Colorado;

F) Preliminarily and permanently enjoining the Division from suspending or revoking the license of any hospital in the State of Colorado;

G) Ordering the Division to adopt rules implementing the Act in compliance with the Colorado Administrative Procedure Act, including establishment of a stakeholder group to participate in public rule-making proceedings on such proposed rules as required by C.R.S. § 24-4-103(2); and

H) Any further relief the Court deems just and appropriate.

Dated: January 14, 2020

POLSINELLI PC

*s/ Colin C. Deihl*

Colin C. Deihl

*Counsel for Plaintiff*

Plaintiff's Address:

7335 East Orchard Road  
Greenwood Village, Colorado 80111

A copy of the foregoing Complaint, has been sent to:

Phil Weiser, Colorado Attorney General  
1300 Broadway  
Denver, CO 80203



# **EXHIBIT A**



Legislative  
Council Staff

*Nonpartisan Services for Colorado's Legislature*

**HB 19-1168**

**FINAL  
FISCAL NOTE**

|                         |  |                        |   |
|-------------------------|--|------------------------|---|
| <b>Drafting Number:</b> | LLS 19-0513                                  | <b>Date:</b>           | August 15, 2019                                   |
| <b>Prime Sponsors:</b>  | Rep. McCluskie; Rich<br>Sen. Donovan; Rankin | <b>Bill Status:</b>    | Signed into Law                                   |
|                         |  | <b>Fiscal Analyst:</b> | Max Nardo   303-866-4776<br>max.nardo@state.co.us |

**Bill Topic:** STATE INNOVATION WAIVER REINSURANCE PROGRAM

**Summary of Fiscal Impact:**

|  |   |
|--|---|
| <input checked="" type="checkbox"/> State Revenue                | <input type="checkbox"/> TABOR Refund                       |
| <input checked="" type="checkbox"/> State Expenditure            | <input type="checkbox"/> Local Government                   |
| <input checked="" type="checkbox"/> State Transfer and Diversion | <input checked="" type="checkbox"/> Statutory Public Entity |

The bill requires the Commissioner of Insurance to seek federal approval to establish a reinsurance program as a state enterprise to lower health insurance premiums. The bill requires one-time funding to seek the federal waiver. Conditional upon federal approval, the bill increases state revenue and expenditures, and triggers General Fund transfers and diversions, through FY 2021-22.

**Appropriation Summary:** For FY 2019-20, the bill requires and includes an appropriation of \$785,904 to the Department of Regulatory Agencies. Expenditures from the Reinsurance Program Cash Fund are conditional upon federal approval of the program and the fund is continuously appropriated.

**Fiscal Note Status:** The fiscal note reflects the enacted bill.

**Table 1  
State Fiscal Impacts Under HB 19-1168**

|                                 |                        | FY 2019-20           | FY 2020-21           | FY 2021-22           |
|---------------------------------|------------------------|----------------------|----------------------|----------------------|
| <b>Revenue</b>                  | Reinsurance Cash Fund  | -                    | \$40,000,000         | \$40,000,000         |
|                                 | <b>Total</b>           | <b>-</b>             | <b>\$40,000,000</b>  | <b>\$40,000,000</b>  |
| <b>Expenditures</b>             | Cash Funds             | \$38,810,904         | \$77,065,122         | \$39,040,122         |
|                                 | Federal Funds          | \$71,527,500         | \$143,055,000        | \$71,527,500         |
|                                 | Centrally Appropriated | \$50,296             | \$67,062             | \$67,062             |
|                                 | <b>Total</b>           | <b>\$110,388,700</b> | <b>\$220,187,184</b> | <b>\$110,634,684</b> |
| <b>Total FTE</b>                |                        | <b>3.0 FTE</b>       | <b>4.0 FTE</b>       | <b>4.0 FTE</b>       |
| <b>Transfers and Diversions</b> | General Fund           | (\$15,836,200)       | (\$49,632,184)       | (\$9,632,184)        |
|                                 | Reinsurance Cash Fund  | \$15,000,000         | \$48,550,000         | \$8,550,000          |
|                                 | DOI Cash Fund          | \$836,200            | \$1,082,184          | \$1,082,184          |
|                                 | <b>Total</b>           | <b>\$0</b>           | <b>\$0</b>           | <b>\$0</b>           |
| <b>TABOR Refund</b>             |                        | -                    | -                    | -                    |

## Summary of Legislation

The bill requires the Commissioner of Insurance in the Department of Regulatory Agencies (DORA) to seek a State Innovation Waiver under the federal Affordable Care Act to create a jointly funded reinsurance program in Colorado. If federal approval is granted, the reinsurance program will be in effect for calendar year 2020 and 2021 health plans sold on the individual health insurance market.

The commissioner will set the payment parameters of the reinsurance program. These include the attachment point, above which claims are eligible for reinsurance payments; the coinsurance rate; and the reinsurance cap, above which claims are no longer eligible for reinsurance payments. The bill directs the commissioner to set the parameters of the program so that claims costs are reduced as follows:

- between 30 and 35 percent in geographic rating areas five and nine (Mesa County and western Colorado);
- between 20 and 25 percent in geographic rating areas four, six, seven, and eight (Larimer, Weld, and Pueblo counties, the eastern plains, and southern Colorado); and
- between 15 and 20 percent in geographic rating areas one, two, and three (Boulder, El Paso, and Teller counties, and the Denver metro area).

The reinsurance program is created as a state enterprise that, subject to approval by the General Assembly and Governor, may issue revenue bonds. The establishes special fee assessments on hospitals and General Fund transfers and diversions to finance the state share of the program. Hospital fee assessments may be up to \$40.0 million per calendar year, but combined with other fees on hospitals, may not exceed 6 percent of total patient revenue. Revenue to the reinsurance program is exempt from the state's TABOR limit. Hospitals are prohibited from passing the special fee on to consumers in any manner. Procedures will be created to exempt certain hospitals from the special fees based on parameters included in the bill. If the federal government suspends the Health Insurance Provider Fee, created under the Affordable Care Act, the commissioner must assess a fee of 2.2 percent of premiums collected by carriers or at a rate imposed by the federal government. If funding is inadequate to achieve the target claims cost reductions, new payment parameters will be established within the available funding amount.

Hospitals are required to provide quarterly reports to the commissioner, as outlined in the bill. The Division of Insurance is required to report on the reinsurance program each year as part of DORA's SMART Act hearing. The program is scheduled to repeal on September 1, 2023.

## Background

**Reinsurance.** Reinsurance is a type of insurance available to insurance carriers to transfer a portion of their risk to one or more other carriers, thereby reducing the risk of having to pay high-cost claims. By covering a portion of costs for high-cost claims, reinsurance can allow insurance carriers to charge lower premiums to consumers.

**State innovation waivers.** Section 1332 of the federal Affordable Care Act allows states to apply for a waiver of various requirements of the federal law to pursue innovative strategies for providing residents with access to high-quality, affordable health care. To apply for a waiver, the state must show that the waiver provides access to quality health care that will be at least as comprehensive and affordable as it would be absent the waiver; that coverage is provided to a comparable number of residents as would be provided absent the waiver; and that the changes under the waiver do not increase the federal deficit.

**Federal health insurance subsidies.** In 2018, Coloradans received about \$636 million in federal advance premium tax credits to purchase health insurance through Connect for Health Colorado, the state's health insurance exchange. These subsidies are based on household income, premium amount paid, and the cost of a benchmark health plan. Subsidies are available to persons with income between 133 and 400 percent of the federal poverty level.

**Colorado's individual market.** As of January 2019, an estimated 251,000 individuals receive health insurance coverage through Colorado's individual market. About half of this population receives federal tax credits to pay a portion of their premiums.

### **State Revenue, Transfers, and Diversions Related to Reinsurance Program Payments**

The bill increases fee revenue to the Reinsurance Program Cash Fund by \$40.0 million in each FY 2020-21 and FY 2021-22. The bill also transfers and diverts \$15 million in FY 2019-20, \$48.6 million in FY 2020-21, and \$8.6 million in FY 2021-22 from the General Fund to the Reinsurance Program Cash Fund.

In total, these actions will result in an estimated \$152.1 million in available funds for the Reinsurance Program Cash Fund. These details are shown in Table 2 and described below.

**Table 2**  
**State Share of Reinsurance Payments Under HB 19-1168**

|  | <b>FY 2019-20</b>   | <b>FY 2020-21</b>   | <b>FY 2021-22</b>   |
|--|---------------------|---------------------|---------------------|
| <b>Fee Revenue</b>                           |                     |                     |                     |
| Hospital Fee Assessment                      | -                   | \$40,000,000        | \$40,000,000        |
| <b>Subtotal (Fee Revenue)</b>                | -                   | <b>\$40,000,000</b> | <b>\$40,000,000</b> |
| <b>General Fund Transfers and Diversions</b> |                     |                     |                     |
| Triggered by Passage of HB 19-1245           | \$15,000,000        | \$40,000,000        | -                   |
| Incremental Premium Tax Revenue              | -                   | \$8,550,000         | \$8,550,000         |
| <b>Subtotal (Transfers and Diversions)</b>   | <b>\$15,000,000</b> | <b>\$48,550,000</b> | <b>\$8,550,000</b>  |
| <b>Total</b>                                 | <b>\$15,000,000</b> | <b>\$88,550,000</b> | <b>\$48,550,000</b> |

**Hospital fee revenue.** Conditional upon the federal waiver being approved, the bill will increase state cash fund revenue by about \$40.0 million in each FY 2020-21 and 2021-22 from fee assessments on hospitals. Fees may be assessed in an amount up to \$40.0 million per calendar year, but may not exceed 6 percent of total patient revenue when combined with other fees on hospitals. The fiscal note assumes that the full \$40.0 million will be collected in each calendar year. Fee revenue is deposited into the Reinsurance Program Cash Fund, and is not subject to state revenue limits under TABOR.

**General fund transfers.** Conditional upon the passage of House Bill 19-1245, which modifies the vendor fee, the bill transfers \$15.0 million in FY 2019-20 and \$40.0 million in FY 2020-21 from the General Fund to the Reinsurance Program Cash Fund. HB 19-1245 was signed into law; therefore, these transfers will take place.

**Insurance premium tax diversions.** The bill diverts revenue to the Reinsurance Program Cash Fund that would otherwise be credited to the General Fund in an amount equal to an incremental increase in year-over-year insurance premium tax collections. Based on the March 2019 LCS forecast, these transfers will be \$8.6 million in each FY 2020-21 and FY 2021-22.

**Insurance carrier fee revenue.** If the federal government suspends the Health Insurance Provider Fee, created by the Affordable Care Act, the commissioner must assess a fee of 2.2 percent of premiums collected by insurance carriers. The fiscal note does not include an estimate reflecting this scenario.

### **State Diversions Related to Program Administration in DORA**

The bill diverts up to \$836,200 from the General Fund in FY 2019-20 and up to \$1,082,184 in FY 2020-21 and FY 2021-22 for program administration in DORA. This revenue diversion occurs because the bill increases costs in the Division of Insurance in DORA, which is funded with premium tax revenue that would otherwise be credited to the General Fund.

**State Expenditures**

The bill increases expenditures in DORA by \$110.4 million and 3.0 FTE in FY 2019-20, \$220.2 million and 4.0 FTE in FY 2020-21, and \$110.6 million and 4.0 FTE in FY 2021-22. The majority of these costs are conditional upon federal approval of the state waiver. These costs, which are paid from cash funds and federal funds, are summarized in Table 3 and described below.

**Table 3  
Expenditures Under HB 19-1168**

|  | <b>FY 2019-20</b>    | <b>FY 2020-21</b>    | <b>FY 2021-22</b>    |
|--|----------------------|----------------------|----------------------|
| <b>Reinsurance Program Payments*</b>     |                      |                      |                      |
| Reinsurance Payments – Cash Funds        | \$38,025,000         | \$76,050,000         | \$38,025,000         |
| Reinsurance Payments – Federal Funds     | \$71,527,500         | \$143,055,000        | \$71,527,500         |
| <b>Subtotal (Reinsurance Payments)</b>   | <b>\$109,552,500</b> | <b>\$219,105,000</b> | <b>\$109,552,500</b> |
| <b>Program Administration in DORA</b>    |                      |                      |                      |
| Personal Services and Operating Expenses | \$274,104            | \$339,122            | \$339,122            |
| Contractor and Consultant Services       | \$511,800            | \$676,000            | \$676,000            |
| Centrally Appropriated Costs**           | \$50,296             | \$67,062             | \$67,062             |
| FTE – Personal Services                  | 3.0 FTE              | 4.0 FTE              | 4.0 FTE              |
| <b>Subtotal (Administration)</b>         | <b>\$836,200</b>     | <b>\$1,082,184</b>   | <b>\$1,082,184</b>   |
| <b>Total Cost</b>                        | <b>\$110,388,700</b> | <b>\$220,187,184</b> | <b>\$110,634,684</b> |
| <b>Total FTE</b>                         | <b>3.0 FTE</b>       | <b>4.0 FTE</b>       | <b>4.0 FTE</b>       |

\* Reinsurance payments are displayed as they will align with the calendar years that the payments will reimburse insurers for; actual payments will be made by August 15 of the following year.

\*\* Centrally appropriated costs are not included in the bill's appropriation.

**Reinsurance payments.** The bill requires the reinsurance program to be sized such that claims paid by insurance carriers for plans sold on the individual market are reduced by amounts specified in the bill and detailed in the Summary of Legislation section, subject to available funding. Achieving these reductions would require about a 21 percent statewide reduction for calendar years 2020 and 2021. Based on actuarial analyses commissioned by DORA in April 2019, this would require reinsurance program expenditures of \$294 million per year, 65 percent (\$191 million) of which will be federally funded, necessitating \$103 million in state funding each year. The fiscal note estimates that \$76.1 million in state funds will be available per year, as discussed in the revenue section, which is about 75 percent of the identified need. This level of state funding is anticipated to generate a proportional federal match of \$143.1 million per year, which combined will be sufficient to achieve 75 percent of the claims costs reduction targets specified in the bill. The estimates shown are prorated to reflect a half year of implementation in FY 2019-20 and FY 2021-22.

**Reinsurance program administration.** To create the reinsurance program beginning in calendar year 2020, DORA will need to apply for a federal waiver and develop payment parameters. This will require 3.0 FTE in FY 2019-20, and 4.0 FTE in FY 2019-20 and FY 2021-22. DORA will also require contractor support for claims processing, insurance carrier audits, and in the ongoing evaluation of payment parameters; this will require 1,560 contractor hours at a rate of \$325 per hour (\$507,000) in FY 2019-20, and 2,080 hours at \$325 per hour (\$676,000) in FY 2020-21 and

FY 2021-22. DORA will require \$4,800 for a healthcare consultant to assist with the waiver application in FY 2019-20. Ongoing administration may be financed with the Reinsurance Program Cash Fund, but it is unknown when these funds will become available for this purpose; therefore, the fiscal note identifies these costs as paid from the Division of Insurance Cash Fund.

**Centrally appropriated costs.** Pursuant to a Joint Budget Committee policy, certain costs associated with this bill are addressed through the annual budget process and centrally appropriated in the Long Bill or supplemental appropriations bills, rather than in this bill. These costs, which include employee insurance and supplemental employee retirement payments, are estimated to be \$50,296 in FY 2019-20 and \$67,062 in FY 2020-21 and FY 2021-22.

### **Statutory Public Entity**

**Connect for Health Colorado.** The state's health insurance exchange is funded primarily through a health insurance carrier fee charged on plans purchased through the marketplace. The fee is set at 3.5 percent of premiums for 2019. A reduction in premiums will result in a decrease in revenue to Connect for Health Colorado. This may be partially offset by an increase in demand for health insurance policies.

### **Effective Date**

The bill was signed into law by the Governor and took effect on May 17, 2019.

### **State Appropriations**

For FY 2019-20, the bill requires and includes an appropriation from the Division of Insurance Cash Fund of \$785,904 to the Department of Regulatory Agencies, and an allocation of 3.0 FTE.

### **State and Local Government Contacts**

Colorado Health Benefit Exchange  
Information Technology  
Personnel  
State Auditor

Health Care Policy and Financing  
Law  
Regulatory Agencies

# **EXHIBIT B**



# DEPARTMENT OF REGULATORY AGENCIES

## Division of Insurance

### 3 CCR 702-4

#### LIFE, ACCIDENT AND HEALTH

##### Emergency Regulation 20-E-01

##### CONCERNING HOSPITAL SPECIAL FEE COLLECTION FOR THE COLORADO REINSURANCE PROGRAM

|            |   |
|------------|---|
| Section 1  | Authority                                   |
| Section 2  | Scope and Purpose                           |
| Section 3  | Applicability                               |
| Section 4  | Definitions                                 |
| Section 5  | Hospital Special Fee Collection Methodology |
| Section 6  | Severability                                |
| Section 7  | Incorporated Materials                      |
| Section 8  | Enforcement                                 |
| Section 9  | Effective Date                              |
| Section 10 | History                                     |

##### **Section 1 Authority**

This regulation is promulgated and adopted by the Commissioner of Insurance under the authority of §§ 10-1-109(1), 10-16-109, 10-16-1104(1)(i), and 10-16-1108(2), C.R.S.

##### **Section 2 Scope and Purpose**

The purpose of this regulation is to establish the process and procedures for the assessment and collection of special fees against hospitals pursuant to § 10-16-1108, C.R.S.

The Division of Insurance finds, pursuant to § 24-4-103(6)(a), C.R.S., that immediate adoption of this regulation is imperatively necessary for the preservation of public health, safety, or welfare, in order to ensure that hospitals are able to comply with the requirements found at § 10-16-1108, C.R.S., for the 2020 plan year pursuant to HB 19-1168. Therefore, compliance with the requirements of § 24-4-103, C.R.S., would be contrary to the public interest.

##### **Section 3 Applicability**

This regulation applies to all hospitals subject to the requirements found in Title 10, Article 16, Part 11.

##### **Section 4 Definitions**

- A. "Hospital" shall have the same meaning as found at § 10-16-1103(6), C.R.S.
- B. "Critical Access Hospital" shall have the same meaning as found at 42 CFR § 485.601-647.

- C. "Reinsurance program" shall have the same meaning as found at § 10-16-1103(12), C.R.S.
- D. "Reinsurance payment" shall have the same meaning as found at § 10-16-1104(11), C.R.S.

## **Section 5 Hospital Special Fee**

- A. The Division of Insurance (Division) shall collect the hospital special fee assessment for fiscal year 2019-2020, in the amount of forty (40) million dollars, by June 30, 2020.
- B. Three billing schedule options are available for hospitals. Each hospital shall select the billing schedule that best accommodates their budgetary needs. Hospitals shall notify the Division of their billing schedule selection by January 15, 2020 for fiscal year 2019-2020. The billing schedule options are:
  - 1. Monthly installments of one-sixth the hospital's total amount owed in 2019-2020.
  - 2. Quarterly installments of one-half the hospital's total amount owed in 2019-2020.
  - 3. A single, lump sum payment of the hospital's entire amount owed, to be paid on a date requested by the hospital and approved by the Division.
- C. Due to their unique cash flow scenarios, Critical Access Hospitals (CAHs) may apply for an extended repayment schedule to extend the billing period through September 30, 2020. CAHs requesting an extension must notify the Division of their request by January 15, 2020 for fiscal year 2019-2020. The extended repayment schedule options for CAHs are:
  - 1. Monthly installments of one-ninth the hospital's total amount owed in 2019-2020.
  - 2. Quarterly installments of one-third the hospital's total amount owed in 2019-2020.
  - 3. A single, lump sum payment of the hospital's entire amount owed, to be paid on a date requested by the hospital and approved by the Division.
- D. The collection of the assessed hospital special fee must comply with the requirements found at 42 CFR § 433.68. As such, the percentage of the reinsurance fee for which each hospital shall be responsible equals the percentage of the outpatient services fee for which each hospital is responsible pursuant to 10 CCR 2505-10, Section 8.3003.A.3. The special fee amounts specific to each hospital will be calculated by the Colorado Department of Health Care Policy and Financing (HCPF).
- E. The Automated Clearing House (ACH) debit process as provided in 10 CCR 2505-10, Section 8.3002.B.1. will be used to collect the special fees from hospitals and the Electronic Funds Transfer (EFT) payment process as provided in 10 CCR 2505-10, Section 8.3002.B.1. will be used to deposit reinsurance payments.
- F. The hospital special fee will reduce the need of hospitals to shift the cost of providing uncompensated care for uninsured individuals to other payers.
  - 1. All monies generated from the hospital special fee shall be credited to the cash fund, and the use of such monies is restricted to the reinsurance program's statutorily-defined purposes, including increasing the number of insureds on the individual market by decreasing premiums for health insurance, making private health insurance coverage more accessible and affordable, stabilizing the health insurance market, and

2. This will encourage increased carrier participation in rural parts of the state. These goals benefit hospitals by increasing the likelihood that patient have consistent access to affordable health coverage and health care.
- G. The hospital special fee shall aid hospitals in improving cost efficiency, patient safety, and clinical and administrative processes by supporting carriers' implementation of care management protocols for their members.
1. All carriers that participate in the reinsurance program are required to file care management protocols with the Commissioner of Insurance. These protocols are intended to promote cost-effective health care coverage and assist carriers in working with hospitals and other providers to manage claims within the reinsurance payment parameters.
  2. Carriers' implementation and support of care management protocols will aid hospitals in transitioning to value-based reimbursement models, which are becoming more prevalent in Medicare, Medicaid, and commercial lines of business. Enhanced care management and care coordination are typically necessary in order for hospitals to successfully participate in value-based payment programs.
- H. All hospital special fees for the reinsurance program shall be deposited in the reinsurance program cash fund established pursuant to § 10-16-1107(1), C.R.S.
1. All monies generated from the hospital special fee shall be expended for the reinsurance payments under the reinsurance program; and for the administrative and operating expenses of the reinsurance program pursuant to § 10-16-1107(3), C.R.S.
  2. None of the monies generated from the fee are available for the general expenses of the state, nor are those monies credited to the state's general fund.

## **Section 6 Severability**

If any provision of this regulation or the application of it to any person or circumstances is for any reason held to be invalid, the remainder of this regulation shall not be affected.

## **Section 7 Incorporated Materials**

10 CCR 2505-10:8.3002.B.1, published by the Colorado Secretary of State shall mean 10 CCR 2505-10:8.3002.B.1, as published on the effective date of this regulation and does not include later amendments to or editions of 10 CCR 2505-10:8.3002.B.1. A copy of 10 CCR 2505-10:8.3002.B.1, may be examined during regular business hours at the Colorado Division of Insurance, 1560 Broadway, Suite 850, Denver, Colorado 80202. A certified copy of 10 CCR 2505-10:8.3002.B.1, may be requested from the Colorado Division of Insurance for a fee. A copy may also be obtained online at <https://www.sos.state.co.us>.

42 CFR § 433.68, published by the Government Printing Office shall mean 42 CFR § 433.68 as published on the effective date of this regulation and does not include later amendments to or editions of 42 CFR § 433.68. A copy of 42 CFR 433.68 may be examined during regular business hours at the Colorado Division of Insurance, 1560 Broadway, Suite 850, Denver, Colorado 80202. A certified copy of 42 CFR § 433.68 may be requested from the Colorado Division of Insurance for a fee. A copy may also be obtained online at <https://www.ecfr.gov>.

## **Section 8 Enforcement**

Noncompliance with this regulation may result in the imposition of any of the sanctions made available in the Colorado statutes pertaining to the business of insurance, or other laws, which include the imposition

of civil penalties, issuance of cease and desist orders, and/or suspensions or revocation of license, subject to the requirements of due process.

**Section 9      Effective Date**

This emergency regulation shall become effective January 1, 2020.

**Section 10      History**

Emergency regulation effective January 1, 2020.

DRAFT

# **EXHIBIT C**

**From:** Division of Insurance

<[DORA.Colorado.Insurance@public.govdelivery.com](mailto:DORA.Colorado.Insurance@public.govdelivery.com)>

**Date:** December 25, 2019 at 1:55:21 PM PST

**To:** Katherine Mulready <[katherine.mulready@cha.com](mailto:katherine.mulready@cha.com)>

**Subject:** Request for Comment on Draft Emergency Regulation 20-E-01 - Concerning Hospital Special Fee Collection for the Colorado Reinsurance Program

**Reply-To:** [DORA.Colorado.Insurance@public.govdelivery.com](mailto:DORA.Colorado.Insurance@public.govdelivery.com)

Having trouble viewing this email? [View it as a Web page.](#)



**COLORADO**  
Department of  
Regulatory Agencies  
Division of Insurance

## Request for Comment on Draft Emergency Regulation 20-E-01 - Concerning Hospital Special Fee Collection for the Colorado Reinsurance Program

The Division is seeking comments on the following draft emergency regulation relating to the Colorado Reinsurance Program:

[DRAFT Emergency Regulation 20-E-01 - Concerning Hospital Special Fee Collection for the Colorado Reinsurance Program](#)

The purpose of this regulation is to establish the process and procedures for the assessment and collection of special fees from hospitals pursuant to § 10-16-1108, C.R.S.

Comments are due to the Division by 5 p.m. on January 3rd, 2020. This draft emergency regulation, and other draft regulations on which the Division is seeking informal public comment can be found on the Division's website via the button below. Comments may be submitted to [dora\\_ins\\_RulesandRecords@state.co.us](mailto:dora_ins_RulesandRecords@state.co.us).

### DOI Draft Regulations for Comment

Drafts of all of the regulations relating to health insurance initiatives can be found on the Division's website on the "Health Insurance Initiatives and Legislation" page via the button below:

### Health Insurance Initiatives and Legislation

**Please do not reply to this email as your response will not be read or forwarded.**



**Subscriber Services:**

---

Update your subscriptions, modify your password or email address, or stop subscriptions at any time on your [Subscriber Preferences Page](#). You will need to use your email address to log in. If you have questions or problems with the subscription service, please visit [subscriberhelp.govdelivery.com](http://subscriberhelp.govdelivery.com).

This service is provided to you at no charge by [Colorado Department of Regulatory Agencies](#).

---

This email was sent to [katherine.mulready@cha.com](mailto:katherine.mulready@cha.com) using GovDelivery Communications Cloud, on behalf of: Colorado Department of Regulatory Agencies · 1560 Broadway, Suite 110 · Denver, CO 80202

---

This electronic mail message contains CONFIDENTIAL information which is (a) ATTORNEY - CLIENT PRIVILEGED COMMUNICATION, WORK PRODUCT, PROPRIETARY IN NATURE, OR OTHERWISE PROTECTED BY LAW FROM DISCLOSURE, and (b) intended only for the use of the Addressee(s) named herein. If you are not an Addressee, or the person responsible for delivering this to an Addressee, you are hereby notified that reading, copying, or distributing this message is prohibited. If you have received this electronic mail message in error, please reply to the sender and take the steps necessary to delete the message completely from your computer system.

---