September 29, 2017

The Honorable Byron Mallott
Lieutenant Governor
P.O. Box 110015
Juneau, Alaska 99811-0015

Re: *17HCAK & 17QHIA Ballot Measure Applications Review*
AGO Nos. JU2017200520 & JU2017200521

Dear Lieutenant Governor Mallott:

You asked us to review applications for two initiative bills related to healthcare and health insurance. The first is entitled "An Act relating to Alaska's Medicaid and Denali KidCare programs," and was designated by the Division of Elections ("Division") as 17HCAK. The second, designated as 17QHIA, is entitled "An Act relating to health insurance." Because both applications comply with the specific constitutional and statutory provisions governing the initiative process, we recommend that you certify both applications.

I. The proposed initiative bills.

A. 17HCAK

17HCAK would enact new laws governing Alaska's Medicaid program. Medicaid is a joint federal-state program that funds health care for needy people. Federal law sets minimum standards for who is eligible to receive care through a state's Medicaid program; it also allows a state to cover additional groups of needy people. Alaska's Medicaid program covers not only those people eligible under the minimum federal standards but also additional groups of needy people. Alaska's Medicaid program also covers people who are eligible for expanded Medicaid under the federal Affordable Care Act of 2010 (the ACA). 17HCAK addresses both eligibility for Alaska's Medicaid program and the payment rates for medical providers who provide services through the program.

17HCAK is three sections long. The first section adds a lengthy statement of findings and purpose to the uncodified law of the state, and the third section is a severability clause. The substance of the bill is contained in the second section, which would add a new provision to AS 47.07, entitled "Maintenance of Minimum Eligibility Standards."

Section 2 of the bill would provide that the "eligibility standards, methodologies, and procedures for determining eligibility to receive medical assistance" under Medicaid and Denali KidCare "shall be no more restrictive than those in effect on January 1, 2017." People who meet eligibility standards for these programs as of that date, including

those eligible under the ACA's 2010 expansion, "shall be deemed to be within the category of eligible individuals" for these programs notwithstanding any change to federal law.

This section would further provide that nothing therein should be construed to prevent the State, the Legislature, or the people by initiative from "expanding eligibility or adopting less restrictive eligibility standards, methodologies, or procedures."

Finally, this section would provide that payments to providers of medical services under these programs "shall be made at a rate not less than 100 percent of the payment rate that applied to such care and services on January 1, 2017," notwithstanding an existing law that allows the Department of Health and Social Services (DHSS) to cut payment rates when there is a funding shortfall.

B. 17QHIA

17QHIA would enact new laws on private health insurance. The initiative is four sections long. The first section would add a statement of findings and purpose to the uncodified law and the fourth section is a severability clause. The third section of the bill makes harmonizing amendments to Title 21 of the Alaska Statutes in order to achieve consistency with Section 2 of the bill, which contains the substantive provisions of the Act.

Section 2 of the bill would add a new chapter to Title 21 of the Alaska Statutes governing insurance, entitled "Individual and Group Health Insurance Reforms." It contains new statutory provisions guaranteeing issuance of coverage in the individual and group market; guaranteeing renewability of coverage; prohibiting preexisting condition exclusions or other discrimination based on health status; providing dependent coverage for individuals to age 26; and requiring many insurance plans to guarantee coverage for ten types of essential benefits. The act would limit beneficiaries' out-of-pocket expenses to those in effect under federal law on January 1, 2017, and would prohibit lifetime limits on essential health benefits.

The bill also provides that the State of Alaska "has the responsibility to take necessary action to preserve its individual health insurance market and access to affordable coverage for people of all income levels, including the provision of income-based assistance that makes the cost of coverage affordable to middle and low-income residents." The bill would prohibit co-pays, co-insurance, or deductibles for preventative care, and would limit premiums for elderly subscribers to no more than three times higher than premiums for younger subscribers with the same coverage.

II. Analysis.

Under AS 15.45.070, the lieutenant governor must review an application for a proposed initiative bill within sixty calendar days of receipt and either "certify it or notify the initiative committee of the grounds for denial." The application for the 17HCAK initiative was filed on August 1, 2017. The sixtieth calendar day after the filing of the initiative is October 2, 2017.[1] The application for the 17QHIA initiative was filed on August 4, 2017. The sixtieth calendar day after the filing date is October 3, 2017.

Under AS 15.45.080, certification shall only be denied if: "(1) the proposed bill to be initiated is not confined to one subject or is otherwise not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors."

A. Form of the proposed initiative bill.

In evaluating an application for an initiative bill, you must determine whether the application is in the "proper form."[2] Specifically, you must decide whether the application complies with "the legal procedures for placing an initiative on the ballot, and whether the initiative contains statutorily or constitutionally prohibited subjects which should not reach the ballot."[3]

The form of an initiative bill is prescribed by AS 15.45.040, which requires four things: (1) that the bill be confined to one subject; (2) that the subject be expressed in the title; (3) that the bill contain an enacting clause stating: "Be it enacted by the People of the State of Alaska"; and (4) that the bill not include prohibited subjects. An initiative includes a prohibited subject when it makes or repeals appropriations; enacts local or special legislation; dedicates revenue; or creates courts, defines their jurisdiction, or prescribes their rules.[4]

---

[1] With respect to 17HCAK, Saturday, September 30, 2017 is actually the sixtieth calendar day. However, AS 01.10.080 suggests that the next business day, October 2, 2017, is the legal deadline.

[2] Alaska Const. art. XI, § 2.

[3] *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 87 n.7 (Alaska 1988).

[4] AS 15.45.010; *see also* Alaska Const. art. XI, § 7 (prohibiting dedicating revenue, creating courts, defining court jurisdiction or prescribing court rules).

Both initiative bills meet the first three requirements of AS 15.45.040. They are each confined to one subject—healthcare and health insurance. The subjects are expressed in the titles, and each bill has the required enacting clause.

With respect to the final requirement, in determining whether an initiative bill contains a prohibited subject, the Alaska Supreme Court has adopted a "deferential attitude toward initiatives"[5] and has consistently recognized that the constitutional and statutory provisions pertaining to the use of the initiative should be liberally construed in favor of allowing an initiative to reach the ballot.[6] Indeed, the court has "sought to preserve the people's right to be heard through the initiative process wherever possible."[7] With respect to concerns "grounded in general contentions that the provisions of an initiative are unconstitutional," you may deny certification only if "controlling authority leaves no room for argument about its unconstitutionality."[8]

But even though liberal access to the initiative process is required, the constitutional restrictions on that process are nevertheless important conditions that require strict compliance.[9] Both of these bills arguably implicate the restriction against making or appealing appropriations by initiative.[10] But we conclude that neither bill violates that restriction. Although these bills would maintain eligibility for one statutory entitlement and create a new statutory entitlement, they do not require the legislature to fund those entitlements. Because the legislature would retain the power to decide whether to spend state funds and how to allocate them among competing needs, these bills do not violate the ban on appropriations by initiative.

The Alaska Supreme Court has ruled that an initiative bill violates the ban on appropriations by initiative when it would contravene the two "core objectives" of that constitutional limitation: "(1) to prevent give-away programs that appeal to the self-interest of voters and endanger the state treasury; and (2) to preserve legislative discretion by ensuring that the legislature, and only the legislature, retains control over the

---

5 *Yute Air Alaska, Inc. v. McAlpine*, 698 P.2d 1173, 1181 (Alaska 1985).

6 *McAlpine*, 762 P.2d at 91; *Yute Air*, 698 P.2d at 1181.

7 *Hughes v. Treadwell*, 341 P.3d 1121, 1125 (Alaska 2015); *Pebble Ltd. P'ship ex rel. Pebble Mines Corp. v. Parnell*, 215 P.3d 1064, 1076 (Alaska 2009).

8 *Id*. (internal citations and quotations omitted).

9 *Citizens for Tort Reform v. McAlpine*, 810 P.2d 162, 168 n.14 (Alaska 1991).

10 Alaska Const. Art. IX, § 7.

allocation of state assets among competing needs."[11] The court has never considered an initiative bill that revises or creates a statutory entitlement program. Instead, most of the court's decisions on this issue have concerned initiative bills involving non-monetary assets such as state lands[12] and fish,[13] and the "core objectives" test has developed largely in that context. It is therefore difficult to predict how the court will apply this test to initiative bills involving monetary entitlement programs.

On one hand, bills involving entitlement programs have some of the elements mentioned in the first "core objective" of the ban against appropriation by initiative. Entitlement programs like Medicaid, which covers the cost of health care for needy people, and 17QHIA's "income-based assistance," which would provide subsidies to help people purchase insurance, could be characterized as "give-away programs." They also appeal to the financial self-interest of voters—both those who need the assistance and the medical providers who would benefit from greater state spending on health care.

On the other hand, these initiative bills do not mandate or restrict state spending, which is the ultimate danger the ban on appropriations by initiative targets. For example, 17HCAK establishes eligibility for Medicaid. It contains no language requiring the Legislature to appropriate a specific amount of money to fund Medicaid coverage generally or to fund coverage for the specific categories of people whose eligibility the initiative would guarantee. And the mere existence of an entitlement in statute does not directly authorize payment, nor does it require the legislature to appropriate money for payment.[14] Because 17HCAK's eligibility provisions do not deprive the legislature of

---

[11] *Lieutenant Governor of State v. Alaska Fisheries Conservation Alliance, Inc.,* 363 P.3d 105, 108 (Alaska 2015).

[12] *E.g.*, *McAlpine v. Univ. of Alaska*, 762 P.2d 81, 89 (Alaska 1988) (holding that transfer of land and other tangible assets from University of Alaska to community college system violated ban on appropriations by initiative); *Thomas v. Bailey*, 595 P.2d 1, 2 (Alaska 1979) (ruling that initiative authorizing homesteading of state lands violated ban on appropriations by initiative).

[13] *E.g., Alaska Fisheries Conservation Alliance*, 363 P.3d at 108 (ruling that initiative banning use of set nets to catch salmon in Cook Inlet violated ban on appropriations by initiative); *Pullen v. Ulmer*, 923 P.2d 54, 64 (Alaska 1996) (ruling that initiative giving preference to subsistence, personal use, and sport fishers over commercial fishers violated ban on appropriations by initiative).

[14] *See* Alaska Const. Art. IX, § 13 ("No money shall be withdrawn from the treasury except in accordance with appropriations made by law."); *Simpson v. Murkowski*, 129 P.3d 435 (Alaska 2006) (declining to mandate funding for longevity bonus provided in statute when the Governor vetoed the appropriation of funds to pay bonuses) ("legislatures do not have to fund or fully fund any program (except, possibly, constitutionally mandated programs)").

control over how much money to appropriate to Medicaid or over how to allocate funds within the program, they neither "endanger the state treasury" nor deprive the legislature of discretion to allocate state assets among competing needs.

17HCAK also requires that payments to medical providers under Medicaid and Denali KidCare shall be made at rates no lower than rates in effect on January 1, 2017, "[n]otwithstanding AS 47.07.036(a) – (c)." In effect, 17HCAK would prevent DHSS from cutting provider payment rates in a projected Medicaid funding shortfall, as DHSS is currently able to do. This provision could be viewed as a give-away to medical providers—when forced to cut costs, DHSS might have to deny some medical services to individuals instead of cutting payment rates, shielding providers somewhat from the effect of a funding shortfall.[15] And it may invite medical providers to vote in their own financial self-interest. But like the eligibility provisions, the payment rate provision does not "endanger the state treasury" because it does not actually require the Legislature to appropriate any specific amount to the Medicaid program. Nor does it limit the legislature's discretion to decide how to allocate Medicaid funds among competing coverage priorities.

17QHIA presents a similar analysis. The bill would enact new standards for health insurance sold in Alaska and make it the State's "responsibility" to preserve "access to affordable coverage" with "income-based assistance." Although vague, this provision seems to call for a state subsidy, in one form or another, for the purchase of health insurance. Yet the bill does not expressly appropriate any specific sum of money for subsidies. And although the bill makes it the State's "responsibility" to preserve access with subsidies, that provision creates no legal basis to force the legislature to appropriate money for subsidies.[16] The bill does not reduce the legislature's power to decide whether to fund the subsidies the initiative calls for, so it neither endangers the state treasury nor diminishes the legislature's discretion to allocate state funds among competing needs.

In sum, these bills do not threaten the legislature's power to control state spending, so they probably do not violate the ban on appropriations by initiative.

---

15 Alaska Statute 47.07.036 currently provides that DHSS must, when funds appropriated to Medicaid will not be enough to meet all the program's costs for the fiscal year, use cost control measures like cutting payment rates or more closely scrutinizing the need for certain services before it can deny coverage for any services. 17QHIA would preclude DHSS from cutting rates, possibly forcing it to deny services to beneficiaries in a funding shortfall.

16 *See Simpson v. Murkowski*, 129 P.3d at 446-47.

B. Form of the application.

The form of an initiative application is prescribed by AS 15.45.030, which provides that the application must include the

> (1) proposed bill;
>
> (2) printed name, the signature, the address, and a numerical identifier of not fewer than 100 qualified voters who will serve as sponsors; each signature page must include a statement that the sponsors are qualified voters who signed the application with the proposed bill attached; and
>
> (3) designation of an initiative committee consisting of three of the sponsors who subscribed to the application and represent all sponsors and subscribers in matters relating to the initiative; the designation must include the name, mailing address, and signature of each committee member.

Both applications on their face meet the first and third requirements, as well as the latter portion of the second requirement regarding the statement on the signature page. With respect to the first clause of the second requirement, we understand that the Division of Elections has determined that the application contains the signatures and addresses of 171 qualified voters for 17HCAK and 175 qualified voters for 17QHIA.

C. Number of qualified sponsors.

As noted above, AS 15.45.030(2) requires an initiative application to contain the signatures and addresses of not fewer than 100 qualified voters who sponsor the initiative. We understand that the Division of Elections has determined that both 17HCAK and 17QHIA meet this requirement.

III. Proposed ballot and petition summaries.

We have prepared two ballot-ready petition titles and summaries to assist you in complying with AS 15.45.090(2) and AS 15.45.180, as is our practice. Under AS 15.45.180, the title of an initiative is limited to twenty-five words and the body of the summary is limited to the number of sections in the proposed law multiplied by fifty.

"Section" in AS 15.45.180 is defined as "a provision of the proposed law that is distinct from other provisions in purpose or subject matter." Alaska Statute 15.45.180 requires that the ballot proposition "give a true and impartial summary of the proposed law."

A. 17HCAK Ballot Summary Proposal.

This bill has three sections. Therefore, the maximum number of words in the summary may not exceed 150. There are ten words in the title and 110 words in the following summary, which we submit for your consideration:

An Act Relating to Alaska's Medicaid and Denali KidCare Programs

This act would maintain eligibility standards for Alaska's Medicaid and Denali KidCare programs. Those standards could not be stricter than the standards in effect on January 1, 2017, but they could be made broader. Under the act, persons eligible for expanded Medicaid (people with incomes at or below 133% of the federal poverty line) would stay eligible under Alaska law, even if Congress reduces federal funding for expanded Medicaid. The act would set minimum payment rates for health care providers under these programs. Provider rates could not be lower than those in effect on January 1, 2017. Medicaid and Denali KidCare would remain subject to appropriations by the legislature.

Should this initiative become law?

This summary has a Flesch test score of 39.79. While this is below the target readability score of 60, the subject of the bill is complicated and the Alaska Supreme Court has upheld ballot summaries scoring as low as 33.8; therefore, we believe the summary satisfies the target readability standards of AS 15.80.005.[17]

B. 17QHIA Ballot Summary Proposal

This bill has four sections. Therefore, the maximum number of words in the summary may not exceed 200. There are six words in the title and 171 words in the following summary, which we submit for your consideration:

[17] Under AS 15.80.005(b), "The policy of the state is to prepare a neutral summary that is scored at approximately 60." This office has previously recommended a proposed ballot summary with a Flesch test score as low as 33.8 for a complicated ballot initiative. That summary was upheld verbatim by the Alaska Supreme Court. *See* 2007 Op. Att'y Gen. (Oct. 17; 663-07-0179); *Pebble*, 215 P.3d at 1082-84.

An Act Relating to Health Insurance

The act would create new laws governing private individual and group health insurance plans sold in Alaska. The act would require these plans to have certain protections for consumers. The act would guarantee renewability of coverage. The act would prohibit insurers from denying coverage to people with pre-existing conditions. The act would require insurers to allow children up to 26 years old to be covered under their parents' plan. The act would require certain health plans to offer coverage for ten types of essential benefits. The act would limit out-of-pocket expenses to the amount allowed by federal law on January 1, 2017. The act would prohibit lifetime limits on essential health benefits. This act would require the State to preserve its health insurance market and access to affordable coverage by providing income-based assistance to help make health insurance affordable, subject to appropriations by the legislature. The act would prohibit co-pays, co-insurance, or deductibles for preventative care. The act would limit insurance premiums for elderly subscribers.

Should this initiative become law?

This summary has a Flesch test score of 46.59. We believe the summary satisfies the target readability standards of AS 15.80.005.

IV. Conclusion.

The proposed bills and applications are in the proper form and the application complies with the constitutional and statutory provisions governing the use of the initiative. We therefore recommend that you certify both initiative applications and notify the initiative committees of your decision. You may then begin to prepare petitions in accordance with AS 15.45.090.

Please contact us if we can be of further assistance to you on this matter.

Sincerely,

ED SNIFFEN per the attached delegation
DEPUTY ATTORNEY GENERAL

By:
Elizabeth M. Bakalar
Assistant Attorney General

EMB/rjc