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## LEGAL MEMORANDUM

TO: The Joint Budget Committee  
FROM: Office of Legislative Legal Services  
DATE: December 7, 2015  
SUBJECT: Reduction in hospital provider fee revenue<sup>1</sup>

### Legal Questions and Short Answers

1. Governor Hickenlooper's proposed budget for fiscal year 2016-17 (budget) proposes a \$100 million dollar decrease in hospital provider fee (HPF) revenue. Would decreasing HPF revenue by \$100 million dollars require additional legislation?

**Short Answer:** No. Under current law, the Medical Services Board (state board) in the Department of Health Care Policy and Financing (department) is required to set the amount of the HPF approximately equal to the General Assembly's appropriation specified for the fee. If the General Assembly reduces the HPF cash fund appropriation in the annual general appropriation act, the state board should reduce the HPF, thereby reducing HPF revenue to match the appropriation.

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<sup>1</sup> This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

2. Governor Hickenlooper's budget proposes reducing HPF revenue by \$100 million dollars without any reduction in medical benefits or eligibility. Under current law, could HPF revenues be reduced by \$100 million dollars without any reduction in medical benefits or eligibility?

**Short Answer:** No. If HPF revenues and federal matching funds are insufficient to fully fund all of the purposes for the HPF, the HPF statute requires HPF revenue to be used first to fully fund hospital reimbursement and incentive payments and certain administrative expenses relating to the fee, with any remaining HPF revenue used to fund the expansion of medical benefits or eligibility. Without legislation amending the HPF statute, the state board is required to adopt rules, to be approved by the Joint Budget Committee, that reduce medical benefits or eligibility to match available HPF revenue.

3. Any state board rules that reduce medical benefits or eligibility pursuant to the requirement in the HPF statute must comply with the requirement in the "State Administrative Procedure Act"<sup>2</sup> that agency rules not conflict with other provisions of law. Would state board rules adopted pursuant to the HPF statute that reduce medical benefits or eligibility conflict with other provisions of law?

**Short Answer:** Partly, yes. State and federal law enacted subsequent to the enactment of the HPF statute limits, in part, the state board's authority to reduce medical benefits or eligibility pursuant to the HPF statute.

4. State TABOR<sup>3</sup> revenue for FY 2016-17 is forecast to exceed the state spending limit by over \$250 million.<sup>4</sup> Governor Hickenlooper's budget proposes reducing HPF revenue by \$100 million, which would reduce the forecasted TABOR refund by \$100 million and make \$100 million of additional general fund money available for expenditure. By increasing available general fund money, does the proposal convert the HPF from a fee into a tax and trigger TABOR voter approval requirements?

**Short Answer:** No. Based on relevant Colorado Supreme Court precedents, the HPF currently satisfies all legal requirements for classification under TABOR as a fee rather than a tax. Reducing the amount of HPF revenue collected as

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<sup>2</sup> Section 24-4-101, C.R.S., et seq.

<sup>3</sup> *The Taxpayer's Bill of Rights*, Colo. Const., art X, sec. 20.

<sup>4</sup> Colorado Legislative Council Staff Economics Section, *Focus Colorado: Economic and Revenue Forecast*, September 21, 2015.

proposed does not convert the HPF from a fee to a tax and does not trigger TABOR voter approval requirements.

## Discussion

### 1. The HPF statute requires the state board to establish the HPF approximately equal to the General Assembly's appropriations specified for the fee.

The state board has the authority to establish the amount of the HPF and the rules governing the fee.<sup>5</sup> However, the state board's authority to establish the amount of the HPF is tied to the General Assembly's power to appropriate HPF cash funds. All money in the HPF cash fund is "subject to federal matching as authorized under federal law and subject to annual appropriation by the general assembly . . ." for the purposes set forth in the HPF statute.<sup>6</sup> Section 25.5-4-402.3 (3) (b), C.R.S., reads in part:

**25.5-4-402.3. Providers - hospital - provider fees - legislative declaration - federal waiver - fund created - rules - advisory board - repeal.** (3) (b) The provider fees shall be assessed pursuant to rules adopted by the state board, pursuant to section 24-4-103, C.R.S. **The amount of the fee shall be established by rule of the state board** but shall not exceed the federal limit for such fees. **In establishing the amount of the fee** and in promulgating the rules governing the fee, **the state board shall:**

(III) **Establish the amount of the provider fee** so that the amount collected from the fee is **approximately equal to or less than the amount of the appropriation specified for the fee in the general appropriation act** or any supplemental appropriation act. (**emphasis added**)

Pursuant to section 25.5-4-402.3 (3) (b), C.R.S., if the General Assembly were to reduce its appropriation of HPF cash funds in the annual general appropriations act from the amount appropriated in the previous year, the state board would be required to adopt rules for the assessment of the fee that result in HPF revenue that approximates the General Assembly's reduced appropriation. Therefore, without additional legislation, a \$100 million dollar reduction in the General Assembly's appropriation of HPF cash funds should result in a reduction in the HPF and the collection of approximately \$100 million dollars less in HPF revenue.

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<sup>5</sup> Section 25.5-4-402.3 (3) (b), C.R.S.

<sup>6</sup> Section 25.5-4-402.3 (4) (b), C.R.S.

**2. The HPF statute contemplates that HPF revenue may be insufficient to fully fund all of the statutory purposes for the HPF.**

**2.1. The HPF statute prioritizes the use of HPF revenue when revenue is insufficient to fully fund all of the statutory purposes for the HPF.**

The statutory purposes for the HPF are set forth in section 25.5-4-402.3 (4) (b), C.R.S. That section reads in part:<sup>7</sup>

**25.5-4-402.3. Providers - hospital - provider fees - legislative declaration - federal waiver - fund created - rules - advisory board - repeal.**

(4) (b) **All moneys in the fund shall be subject to federal matching as authorized under federal law and subject to annual appropriation by the general assembly for the following purposes:**

(I) To **maximize the inpatient and outpatient hospital reimbursements to up to the upper payment limits** as defined in 42 CFR 447.272 and 42 CFR 447.321;

(II) To **increase hospital reimbursements under the Colorado indigent care program** to up to one hundred percent of the hospital's costs of providing medical care under the program;

(III) To **pay the quality incentive payments** provided in section 25.5-4-402 (3);

(IV) **Subject to available revenue from the provider fee and federal matching funds, to expand eligibility for public medical assistance by:**

(A) Increasing the eligibility level for **parents and caretaker relatives** of children who are eligible for medical assistance, pursuant to section 25.5-5-201 (1) (m), from sixty-one percent to **one hundred thirty-three percent** of the federal poverty line;

(B) Increasing the eligibility level for **children and pregnant women** under the **children's basic health plan** to up to **two hundred fifty percent** of the federal poverty line;

(C) Providing eligibility under the state medical assistance program for a **childless adult** or an adult without a dependent child in the home, pursuant to section 25.5-5-201 (1) (p), who earns up to **one hundred thirty-three percent** of the federal poverty line;

(D) Providing a **buy-in program** in the state medical assistance program for **disabled adults and children** whose families have income of up to **four hundred fifty percent** of the federal poverty line;

(V) To provide **continuous eligibility for twelve months for children** enrolled in the state medical assistance program;

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<sup>7</sup> Details of the state department's actual administrative costs and repealed provisions have been omitted.

(VI) To pay the **state department's actual administrative costs** of implementing and administering this section, including but not limited to the following costs:

[ . . . ]

(VII) To offset the loss of any federal matching funds due to a decrease in the certification of the public expenditure process for outpatient hospital services for medical services premiums that were in effect as of July 1, 2008. (**emphasis added**)

While HPF revenue may be used for all of the enumerated purposes, in the event revenue is insufficient to fully fund all of the purposes, the HPF statute prioritizes the use of the existing HPF revenue. Section 25.5-4-402.3 (5) (b), C.R.S., reads in part:

**25.5-4-402.3. Providers - hospital - provider fees - legislative declaration - federal waiver - fund created - rules - advisory board - repeal.** (5) (b) If the revenue from the provider fee **is insufficient to fully fund all of the purposes described in paragraph (b) of subsection (4) of this section:**

(II) The **hospital provider reimbursement and quality incentive payment increases** described in **subparagraphs (I) to (III) of paragraph (b) of subsection (4)** of this section and the **costs** described in **subparagraphs (VI) and (VII) of paragraph (b) of subsection (4)** of this section **shall be fully funded** using revenue from the provider fee and federal matching funds **before any eligibility expansion is funded;** and (**emphasis added**)

Pursuant to section 25.5-4-402.3 (5) (b) (II), C.R.S., in the event there is insufficient revenue to fully fund all of the enumerated purposes, the hospital reimbursements and payments described in subparagraphs (4) (b) (I) to (4) (b) (III) must be "**fully funded using revenue from the provider fee . . . before any eligibility expansion is funded**". This includes maximizing the inpatient and outpatient hospital provider reimbursements up to the upper payment limits, increasing hospital reimbursements under the Colorado Indigent Care Program up to one hundred percent, and making quality incentive payments. In addition, fully funding the department's administrative costs and offsetting the loss of federal matching funds in certain circumstances pursuant to subparagraphs (4) (b) (VI) and (4) (b) (VII) take priority over funding any expanded medical benefits or eligibility.

Statutory language further supports the elevation of subparagraphs (4) (b) (I) to (4) (b) (III), (4) (b) (VI), and (4) (b) (VII) over the expansion of medical benefits or eligibility. Subparagraph (4) (b) (IV), which lists expansions in medical benefits and eligibility criteria, begins with the introductory phrase "[s]ubject to available revenue from the provider fee". No such limiting language introduces the other statutory purposes for the HPF enumerated in paragraph (4) (b). Therefore, HPF revenue must first be used to accomplish the goals described in subparagraphs (4) (b) (I) to (4) (b) (III), (4) (b)

(VI), and (4) (b) (VII) before any remaining "available" revenue is used for expanded medical benefits or eligibility pursuant to subparagraph (4) (b) (IV).

Further, while the phrase "to maximize the inpatient and outpatient hospital reimbursements to up to the upper payment limit" in subparagraph (4) (b) (I) is not defined in statute, the language of section 25.5-4-402.3, C.R.S., taken as a whole, provides some basis for discerning legislative intent. Given the entire statutory scheme creating the HPF and the numerous references to "fully" funding hospital reimbursements before "any" revenue is used to fund the expansion of medical benefits or eligibility, the phrase "to maximize the inpatient and outpatient hospital reimbursements to up to the upper payment limit" in subparagraph (4) (b) (I) may fairly be interpreted to mean fully funding hospital reimbursements by increasing reimbursements to the highest practicable level allowed by federal guidelines governing the upper payment limit and by the General Assembly's appropriation.

**2.2. When revenue is insufficient to fully fund all of the statutory purposes for the HPF, the state board must adopt rules reducing medical benefits or eligibility to the level of available HPF revenue.**

The HPF statute specifically contemplates that HPF revenue may be insufficient to fully fund all of the statute's purposes. If medical benefits or eligibility has already been expanded pursuant to subparagraph (4) (b) (IV), in the event HPF revenue is insufficient, the state board, with the approval of the Joint Budget Committee, must reduce medical benefits or eligibility to the level necessary to match available HPF revenue. Section 25.5-4-402.3 (5) (b) (III), C.R.S., reads in part:

**25.5-4-402.3. Providers - hospital - provider fees - legislative declaration - federal waiver - fund created - rules - advisory board - repeal.**

(5) (b) If the revenue from the provider fee is insufficient to fully fund all of the purposes described in paragraph (b) of subsection (4) of this section:

(III) (A) **If the state board promulgates rules that expand eligibility for medical assistance to be paid for pursuant to subparagraph (IV) of paragraph (b) of subsection (4) of this section, and the state department thereafter notifies the advisory board that the revenue available from the provider fee and the federal matching funds will not be sufficient to pay for all or part of the expanded eligibility, the advisory board shall recommend to the state board reductions in medical benefits or eligibility so that the revenue will be sufficient to pay for all of the reduced benefits or eligibility. After receiving the recommendations of the advisory board, the state board shall adopt rules providing for reduced benefits or reduced eligibility for which the revenue shall be sufficient and shall forward any**

**adopted rules to the joint budget committee.** Notwithstanding the provisions of section 24-4-103 (8) and (12), C.R.S., following the adoption of rules pursuant to this sub-subparagraph (A), the state board shall not submit the rules to the attorney general and shall not file the rules with the secretary of state until the joint budget committee approves the rules pursuant to sub-subparagraph (B) of this subparagraph (III).

(B) **The joint budget committee shall promptly consider any rules adopted by the state board** pursuant to sub-subparagraph (A) of this subparagraph (III). The joint budget committee shall promptly notify the state department, the state board, and the advisory board of any action on such rules. **If the joint budget committee does not approve the rules, the joint budget committee shall recommend a reduction in benefits or eligibility so that the revenue from the provider fee and the matching federal funds will be sufficient to pay for the reduced benefits or eligibility.** After approving the rules pursuant to this sub-subparagraph (B), the joint budget committee shall request that the committee on legal services, created pursuant to section 2-3-501, C.R.S., extend the rules as provided for in section 24-4-103 (8), C.R.S., unless the committee on legal services finds after review that the rules do not conform with section 24-4-103 (8) (a), C.R.S. **(emphasis added)**

Therefore, in the event that HPF revenue is insufficient to fully fund all of the statute's enumerated purposes, HPF revenue must be used first to fully fund hospital reimbursements and incentive payments and administrative costs and, subject to the limitations discussed in section 3 of this memo, the state board must adopt rules reducing medical benefits or eligibility to match the remaining HPF revenue.

**3. Without statutory changes or other state action, the state board's ability to adopt rules reducing medical benefits and eligibility in response to insufficient HPF revenue is limited, in part, by other state and federal law.**

Except as provided in section 25.5-4-402.3 (5) (b) (III), C.R.S., relating to delayed filing of the rules, the state board's rules reducing medical benefits or eligibility in response to reduced HPF revenue must comply with the "State Administrative Procedure Act".<sup>8</sup> Section 24-4-103 (4) (b), C.R.S., prohibits the adoption of rules that conflict with other provisions of law.

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<sup>8</sup> Section 24-4-101, C.R.S., et seq.

Subsequent to the enactment of the HPF statute in 2009, Congress passed the Affordable Care Act<sup>9</sup> (ACA) in 2010. The ACA made numerous changes to the Medicaid program, including increasing income eligibility levels for existing eligibility groups and expanding eligibility to childless adults. Colorado elected to participate in the ACA's expanded Medicaid eligibility for childless adults. In 2013, the General Assembly enacted S.B. 13-200, which amended section 25.5-5-201, C.R.S., relating to optional Medicaid groups. In S.B. 13-200, the General Assembly removed language in section 25.5-5-201 (1) (m) and (1) (p), C.R.S., that specifically permitted the state board to use the mechanism set forth in the HPF statute to reduce income and eligibility levels for parents and caretaker relatives and childless adults in the event HPF revenue is insufficient to fully fund all of the purposes for the HPF. Further, until 2019, the ACA prohibits Colorado from reducing income eligibility for children under the Medicaid program and the Children's Basic Health Plan.<sup>10</sup>

With respect to the expanded medical benefits or eligibility that may be reduced by rule of the state board, state and federal law do not appear to limit the ability of the state board to reduce certain medical benefits or eligibility described in section 25.5-4-402.3 (4) (b) (IV), C.R.S. These medical benefits or eligibility include the Medicaid buy-in program for adults and children with disabilities, continuous eligibility for children enrolled in the Medicaid program, and income eligibility for pregnant women under the Children's Basic Health Plan. However, eliminating these programs may not result in a reduction of \$100 million dollars in services.

Therefore, if HPF revenue is reduced by \$100 million dollars as proposed in the Governor's budget, absent changes to state law and state action relating to Colorado's Medicaid program and the Children's Basic Health Plan, state and federal law enacted subsequent to the enactment of the HPF statute limits some, but not all, of the state board's authority to adopt rules reducing medical benefits and eligibility in response to a reduction in HPF revenue.

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<sup>9</sup> Patient Protection and Affordable Care Act, 42 U.S.C. sec 18001 et seq.

<sup>10</sup> Section 25.5-8-101, C.R.S., et seq.



**4. The HPF currently satisfies all legal requirements for classification under TABOR as a fee rather than a tax, and reducing the amount of HPF revenue collected as proposed does not convert it into a fee or require voter approval under TABOR.**

**4.1. As currently imposed, the HPF is a fee, not a tax, for purposes of TABOR.**

Section (4) (a) of TABOR requires "voter approval in advance" for "any new tax, tax rate increase, . . . extension of an expiring tax, or . . . tax policy change directly causing a net tax revenue gain," but does not require such voter approval for increases in other government-imposed charges, such as fees, fines, and penalties, that do not increase tax revenue. TABOR does not define the term "tax", but the Office of Legislative Legal Services has developed a sequential series of tests, based upon Colorado judicial decisions, for the purpose of determining whether a charge is a "tax" for purposes of TABOR. Applying the tests in order, to the extent necessary, to the HPF establishes that the HPF is a fee, not a tax.

The first test is whether the charge being examined is imposed by legislative authority to raise money for a public purpose. If so, it may be a tax. Because the HPF is imposed pursuant to statute and raises money that is used to fund state medical assistance program and Colorado indigent care program services, it satisfies the first test.

The second test requires a determination as to whether the HPF is a type of governmental charge that is not a tax, such as a fee, fine, or penalty. Colorado Supreme Court decisions indicate that while a tax is imposed for the purpose of raising revenue to defray general expenses of government,<sup>11</sup> a fee is a charge that: (1) Is imposed to defray the cost of a particular governmental service; (2) Is imposed in an amount that is reasonably related to the overall cost of the service, even though mathematical exactitude is not required; and (3) At the time it is first imposed, is not made primarily for the purpose of raising revenue for general public purposes.<sup>12</sup>

The General Assembly originally imposed and has continued to impose the HPF not to defray general expenses of government, but instead for the limited purpose of "obtaining federal financial participation under the state medical assistance program . . . and the Colorado indigent care program . . ." so that it can increase reimbursement to

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<sup>11</sup> For example, the vast majority of revenue generated by the state income tax and the state sales and use taxes is credited to the general fund and accounts for over 96% of general fund revenue.

<sup>12</sup> See *Tabor Foundation v. Colorado Bridge Enterprise*, 2014 COA 106, PP 21-44; *Barber v. Ritter*, 196 P.3d 238, 248-49 (Colo. 2008); *Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989).

hospitals for services provided under the state medical assistance program and the Colorado indigent care program, cover more people with public medical assistance, and defray its own administrative costs of implementing and administering the HPF program.<sup>13</sup> In addition, the requirement that HPF-funded services be limited or prioritized, as detailed in section 2 of this memorandum, when HPF revenue is insufficient to fund hospital reimbursements to the upper payment limit supports the conclusion that the HPF is imposed at a level that is reasonably related to the cost of the HPF program. Because the HPF therefore meets the requirements of a fee, it is not a tax for purposes of TABOR.

**4.2. Reducing HPF revenue by \$100 million would not convert the HPF from a fee into a tax and would not trigger TABOR voter approval requirements.**

HPF revenue is included in state fiscal year spending (TABOR revenue) and counts against the state fiscal year spending limit (limit). For a fiscal year in which TABOR revenue exceeds the limit, reducing HPF revenue reduces TABOR revenue and thereby also reduces the amount of the TABOR refund, which is paid from the general fund, on a dollar for dollar basis until TABOR revenue no longer exceeds the limit. Because such a reduction in the amount that must be refunded from the general fund makes more general fund money available for expenditure, it has been suggested that reducing HPF revenue converts the HPF from a fee into a tax and requires voter approval. But Colorado Supreme Court precedent establishes that such a conversion does not occur.

Between 2001 and 2004, in order to increase the amount of general fund money available to fund various state programs and services during and following an economic downturn, the general assembly enacted legislation that transferred a total amount of over \$442 million from various cash funds to the general fund. The money transferred from the cash funds had originally been generated by various state-imposed fees, surcharges, and special assessments, and had, like HPF revenue, been counted as TABOR revenue when first received by the state.

In a lawsuit filed against the state, fee and surcharge paying plaintiffs alleged that "the transfers from the special funds to the general fund represented a tax policy change directly causing a net tax revenue gain, a new tax, or a tax rate increase, without voter approval in violation of [TABOR] because the transferred monies, which [plaintiffs alleged] became general tax dollars as a result of the transfer, would be expended to defray general governmental expenses unrelated to the respective purposes for which

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<sup>13</sup> Section 25.5-5-402.3 (3) (a), C.R.S.

the cash funds were created.<sup>14</sup> The Colorado Supreme Court rejected the claim, stating that "the primary purpose for which the legislature originally imposes a charge is the dispositive criteria in determining whether that charge is a fee or a tax," that "[i]t is undisputed here that, while the monies resided in the special cash funds, they were fees," that "[t]he fact that the fees were eventually transferred to the general fund does not alter their essential character as fees because the transfer does not change the fact that the primary object for which they were collected was not to defray the general cost of government," and that "[a]t most, the transfer of fees to a general fund where, as here, the statutes authorizing assessment of those fees do not contemplate the generation of revenue for general use, incidentally makes funds available to defray the general cost of government," and "does not transform a fee into a tax."<sup>15</sup> Here, the HPF as currently imposed satisfies the tests for classification as a fee for TABOR purposes, and the relevant judicial precedent establishes that even a direct transfer of HPF fees to the general fund would not convert the HPF into a tax. Accordingly, the proposed reduction of HPF revenue, which does not transfer any HPF revenue or cause HPF revenue to be used for any purpose for which it is not already used, clearly would not effect such a conversion and, since TABOR voter approval requirements do not apply to fees, would not require voter approval.

## Conclusion

Under current law, the General Assembly may trigger a reduction in the HPF and the resulting revenue by reducing HPF cash fund appropriations by \$100 million dollars. If the resulting HPF revenue is insufficient to fully fund all of the purposes for the HPF, the existing HPF revenue would be allocated pursuant to the prioritization in the HPF statute. Under current law, HPF revenue and the federal matching funds must be used first to fully fund hospital reimbursements and incentive payments and the department's administrative costs, before any remaining available revenue is used to fund the expansion of medical benefits or eligibility. The state board is directed to adopt rules reducing medical benefits or eligibility to match available HPF revenue. However, absent changes to state law and state action relating to Colorado's Medicaid program and the Children's Basic Health Plan, state and federal law enacted subsequent to the enactment of the HPF statute limits some, but not all, of the state board's authority to adopt rules reducing medical benefits and eligibility in response to

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<sup>14</sup> *Barber*, 196 P.3d at 244 (internal quotations omitted).

<sup>15</sup> *Id.*, at 249-50 and 249 n.13 (internal citations omitted).

insufficient HPF revenue. Finally, the General Assembly may act to reduce HPF revenue without voter approval.