

My name is John Dundon and I am testifying on behalf of the Colorado Society of Enrolled Agents (CoSEA) in Opposition to HB26-1223, Modifying Certain Tax Expenditures. The Colorado Society of Enrolled Agents is a professional membership organization dedicated to representing, promoting and enhancing the Enrolled Agent profession. Enrolled Agents are equipped to handle the most complex tax returns for individuals, partnerships, corporations and LLCs, and are nationally enrolled to represent tax payers before all administrative levels of state and federal taxing entities.

CoSEA's has two primary concerns with HB 1223:

CoSEA's first concern is with taxing software products, especially for our members. This change will increase costs for our members, who are small businesses and often sole proprietors and operate on already thin margins. We respectfully request an amendment to exempt small businesses from this new tax.

CoSEA's second concern is with the proposed language amending Colo. Rev. Stat. § 32-13-107 to subject "computer software as tangible personal property" to district sales/use tax beginning January 1, 2027, without a separate election, would comply with the Colorado Constitution.

Colorado TABOR generally requires advance voter approval for "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain." Precedent has been set in Colorado's high court ruling that the City of Lakewood's local tax on certain telecommunications services is invalid, creating potential for refunds.

Colorado's high court treated municipal ordinance changes expanding the persons/services subject to tax as "new taxes" requiring voter approval. It noted that an expansion to a new class of goods or activity may constitute a new tax, except possibly where the revenue effect is merely incidental and de minimis to the legislation's purpose.

- The Colorado Supreme Court ruled that the City of Lakewood's local tax on certain telecommunications services is invalid, creating potential for refunds. As a result, the City of Lakewood is rumored to be considering a bankruptcy filing.

If district taxation of software is not already within the voter-approved tax base, the amendment would likely be characterized as expanding the tax to a new category of property/transactions. The further constitutional problem is that the amendment appears to let the district begin taxing a category that may not already be within the district's local tax base—computer software treated as tangible personal property—without necessarily requiring a new election.

Under Colorado TABOR case law, an expansion of an existing tax to a new class of transactions or property may be treated as a new tax requiring advance voter approval, rather than merely an administrative clarification. That risk is especially high because the draft says "[n]otwithstanding any law to the contrary" and then deems software taxable unless the district affirmatively elects a compliant definition as of January 1, 2027.

These are our other concerns:

1. The statutory structure of special district sales taxes raises a separate base-conformity issue

The draft amends § 32-13-107(1)(a)(I), which already authorizes the district, once approved by voters, to levy a uniform sales/use tax “upon every transaction or other incident with respect to which a sales and use tax is levied by the state, pursuant to” article 26 of title 39, with the aviation fuel carveout. That structure suggests the district’s base is meant to track the state base as defined under Article 26 of Title 39.

Colorado statutes also show that the General Assembly treats state-based changes and local-based changes cautiously. In particular, Colo. Rev. Stat. § § 39-26-127 and 39-26-212 provide that legislative modification of the state sales/use tax base generally does not automatically change local government sales/use tax bases, except as specifically provided for RTD and the Scientific and Cultural Facilities District, beginning January 1, 2014.

This matters because the draft is trying to do more than merely interpret existing voter-approved language; it is trying to specify that software is taxable by the district notwithstanding contrary law, tied to how software is defined in § 39-26-102(15)(c) as of certain dates. If the district historically has not taxed software in that manner, the provision looks operationally like a base expansion. Even if the General Assembly can define the statutory base for this district, TABOR still limits whether that base expansion can take effect without another election.

2. The proposed language appears self-executing

The most constitutionally problematic clause is the first sentence of the proposed subsection.

- (II): “NOTWITHSTANDING ANY LAW TO THE CONTRARY, THE SALE AND USE OF COMPUTER SOFTWARE AS TANGIBLE PERSONAL PROPERTY ... ON DECEMBER 31, 2026, IS SUBJECT TO TAXATION BY THE DISTRICT ...”

That reads as an immediate legislative declaration that the district’s tax applies to software, rather than conditioning effectiveness on voter approval or on a district action already authorized by voters.

- The follow-on clause—“unless the district elects to define computer software ... on January 1, 2027, in a manner and method that complies with section 20 of article X”—does not cure the issue.

In effect, the draft appears to presume taxability first and constitutional compliance second. If the district must make an election “in a manner and method that complies with” TABOR, that is an implicit acknowledgment that the change may require a TABOR-compliant step. But as drafted, the statute still appears to impose the tax unless the district acts otherwise. That sequencing is risky because it creates opportunities for several rebuttable presumptions.

3. If software is already taxable under the district’s voter-approved base, the amendment may be

unnecessary; if not, it needs a CITIZEN vote

There are two possible theories:

Clarification theory: software already falls within the district's existing voter-approved base because the district tax tracks state article 26, and software is already treated as taxable tangible personal property under that framework; or

Expansion theory: software is not clearly within the district's currently authorized base, so the amendment adds it.

If the first theory is correct, then broad "notwithstanding" language and date-specific statutory deeming language are unnecessary and may actually undermine the clarification argument by implying a substantive change.

If the second theory is correct, the draft likely triggers TABOR because it adds a taxable class and may directly cause a net tax-revenue gain without voter approval. The Lakewood decision strongly points that way when a tax is expanded to additional services/providers/categories. Colorado Supreme Court rules that the City of Lakewood's local tax on certain telecommunications services is invalid, creating potential for refunds.

4. Drafting concerns

- It references software "as tangible personal property, as those terms are defined in section 39-26-102(15)(c)."
 - That appears imprecise because subsection 39-26-102(15)(c) is commonly used in Colorado sales tax law to address software exclusion questions, not simply to categorically define all taxable software.
- The phrase "on December 31, 2026," followed by "on January 1, 2027," is awkward and may create ambiguity as to whether the statute freezes a definition as of one date or imposes tax beginning on another date.
- "Unless the district elects to define" suggests the district can alter the base by local choice, but if the district is a statutory district, that discretion itself may need to be clearly granted and bounded.
- "In a manner and method that complies with section 20 of article X" is too conclusory. If voter approval is required, the statute should say so directly.

In summary, the ballot question is critical. If the electors approved a tax tied dynamically to the state sales/use tax base "upon every transaction ... with respect to which a sales and use tax is levied by the state," there may be an argument for inclusion; but § 39-26-127 and § 39-26-212 show Colorado law does not always let local bases automatically move with state-base changes, which weakens any automatic-conformity argument.

Thank you for your consideration and please vote NO on HB26-1223.

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