MEMORANDUM

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RE: A Provider Fee Enterprise Could Be Structured as a Constitutional Solution to the Colorado Hospital Provider Fee State Budget Conflict

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The Colorado Health Care Affordability Act (the "HCAA") became law in 2009. The law requires Colorado hospitals to pay a fee to the state, which is matched through a federal government program. The combined fee and federal funds are then distributed to hospitals for healthcare services provided to individuals covered by Medicaid. The fee assessed under the HCAA will reach $805 million in state fiscal year 2015-16. Because fees paid by hospitals are currently counted as state revenue under TABOR, the state will be forced to cut General Fund spending in order to cover refunds driven by the HCAA. This situation has created an imminent state fiscal crisis.

One proposed solution would repeal the HCAA and enact a new program under which a new government-owned business within the Department of Health Care Policy and Financing ("HCPF") would charge, collect, and administer a fee (the "Provider Fee"), similar to the fee collected under the HCAA. The new entity would be structured to qualify as an enterprise in accordance with TABOR, and the Provider Fee would be exempt from state revenue calculations. Our legal analysis concludes that a Provider Fee enterprise could be structured via legislation in a manner that is consistent with the state constitution.

On December 31, 2015, the Office of Legislative Legal Services ("OLLS") issued a memorandum (the "OLLS Memorandum") analyzing whether the fee currently administered by HCPF under the HCAA could be administered by an enterprise. The memorandum was likely a helpful primer for the legislators who requested it, but it did not provide an in-depth analysis of how our courts would resolve a constitutional challenge to a Provider Fee enterprise created by the legislature, nor does it appear to have been intended to do so. OLLS is a highly regarded institution, and its memo should not be mischaracterized as a comprehensive, complete, or definitive ruling related to the ultimate question of whether some type of Provider Fee

enterprise would be constitutional. It would also not be appropriate to rely on the preliminary analysis contained in the OLLS Memorandum as a basis for refusing to contemplate a Provider Fee enterprise in future legislation. In fact, the legislature could use the OLLS Memorandum as an aide in helping to avoid any potential constitutional challenges.

As discussed below, a thorough and complete review of Colorado law demonstrates that an entity created to charge and administer the new Provider Fee could qualify as an enterprise under TABOR, and that such an enterprise would be upheld by Colorado courts under the strong presumption of constitutionality enjoyed by statutes enacted by the General Assembly.

I. THE PROPOSED ENTITY WOULD QUALIFY AS AN ENTERPRISE UNDER TABOR

The State of Colorado operates a number of enterprises which represent a majority of the state's TABOR-exempt revenues. An "enterprise" must be designated as such by statute and is defined as:

> (1) a government-owned business;
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> (2) that is authorized to issue its own revenue bonds; and
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> (3) receives less than 10% of its annual revenue from all Colorado state and local governments combined.

Colo. Const. art. X, § 20(2)(d); *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 868 (Colo. 1995). Since the enactment of TABOR in 1992, there have been only two Colorado appellate cases that have addressed what qualifies as a "government-owned business" under TABOR. *See Nicholl*, 896 P.2d at 868; *TABOR Found. v. Colorado Bridge Enter.*, 2014 COA 106. The Colorado Supreme Court denied *certiorari* in *Colorado Bridge Enterprise* on June 29, 2015.

As the OLLS Memorandum notes, the second and third factors set forth above would present no obstacle to the qualification of the proposed entity as a TABOR enterprise: the bill to create the entity would give it the authority to issue its own revenue bonds, and the entity would receive all of its revenues from the provider fee paid by hospitals and federal sources. Thus, the entity would be entirely self-sufficient, financing its operations and paying its employees without state or local government funding. However, the OLLS Memorandum's analysis of the first factor—"government-owned business"—finds no support in Colorado law.

To begin with, the OLLS Memorandum concluded, incorrectly, that the new entity "would lack the characteristics of a business required for and shared by [] TABOR-exempt enterprises." As the Supreme Court and the Court of Appeals have held, "business" is "an activity which is conducted in the pursuit of benefit, gain or livelihood." *Nicholl*, 896 P.2d at 868; *Colorado Bridge Enter.*, 2014 COA 106, ¶ 51. "An entity that generates revenue by collecting fees from service users is a business," as the Court of Appeals held in *Colorado Bridge Enterprise*, 2014 COA 106, ¶ 51. In that case, the Court of Appeals specifically rejected the assertion that "an enterprise must gain its revenue from market exchanges taking place in a competitive,

arms-length manner." *Id.* at ¶ 58 (internal quotation marks and citation omitted). Accordingly, no competitive exchange is necessary for the entity to meet the definition of an enterprise. *Id.* at ¶¶ 58-59. Here, the proposed enterprise would generate revenue by collecting the Provider Fee and federal funds, and would provide valuable services to the hospitals as discussed below.[1]

The OLLS Memorandum recognized that an entity qualifies as a "business," if it provides a service "in exchange for some sort of payment." OLLS Mem. p. 5. Yet, it summarily concluded that the new entity would lack those characteristics, based on the erroneous assertion that the enterprise itself would be purchasing hospital services and would not be providing any service to the hospitals. That analysis hinges on an inaccurate assumption of how the new entity would operate.

Colorado hospitals provide significant levels of services to low-income Coloradans for which they are not fully reimbursed, forcing hospitals to pass the costs of uncompensated care on to their paying and fully-insured patients. The fee assessed under the HCAA has lessened this burden. By paying the Provider Fee to the proposed enterprise, hospitals will receive the enterprise's services in attaining reimbursements that more closely align with the cost of delivering care. In other words, the Provider Fee is a fee to access a program that helps hospitals defray the costs of providing medical services to Coloradans who could not otherwise afford to pay for health care.

In effect, the service provided by the proposed enterprise would be similar to investment services provided by insurance and investment brokers. By virtue of their licenses and memberships, insurance and investment brokers have access to services to which their clients do not have access. For instance, only members of the New York Stock Exchange and other similar exchanges may directly buy and sell the stocks traded there. Clients pay exchange members to obtain access to those markets.

Similarly, the enterprise would reimburse hospitals more than the fees paid by hospitals by obtaining federal matching funds. By virtue of its status as a government-owned business, the enterprise would have access to the federal matching funds that its clients (the hospitals) would not be able to obtain themselves. The fact that only the state is able to obtain the federal match does not defeat this analogy, as both *Nicholl* and *Colorado Bridge Enterprise* indicate. *Nicholl*, 896 P.2d at 868 (government enterprise acts as a business in "providing access to a public roadway in exchange for the payment of tolls and user fees"); *Colorado Bridge Enter.*, 2014 COA 106, ¶¶ 3, 60 (finding that a government enterprise, charged with replacing "any designated bridge in the Colorado highway system," is a business "because it pursues a benefit and generates revenue by collecting fees from service users").

[1] In an earlier memorandum, OLLS analyzed the question of whether the Provider Fee is more akin to a tax under TABOR. OLLS Mem. dated Dec. 7, 2015. OLLS correctly concluded that under the test announced by the Colorado Supreme Court, the Provider Fee is not a tax but, instead, meets all of the requirements of a fee. Moreover, the Provider Fee enterprise will not even have the power to tax. This is a critical point, which cuts strongly in favor of the statute creating the enterprise being found constitutional, as explained in the text, below.

More significant than whether only the state can participate is the manner by which the government-owned business finances its operations. The OLLS Memorandum highlighted this issue but included an incomplete quotation from the *Nicholl* case that significantly alters the outcome of the analysis. In *Nicholl*, the Supreme Court explained that, while the government enterprise at issue in that case acted as a business in certain respects, it functioned in a manner atypical of a business because it could: "levy a sales or use tax"; "establish an employment tax"; and set up a "tax on the privilege of conducting any trade, business, occupation, or profession." 896 P.2d at 898-69. The Supreme Court summed up its concerns by stating that the "ability to levy general taxes is inconsistent with the characteristics of a business." *Id.* at 869.

The OLLS Memorandum asserts that the "ability of a new state entity 'to finance its operations in a manner not typical of a 'business' as that term is commonly used . . . is inconsistent with the characteristics of a business' that can qualify as a TABOR-exempt enterprise." OLLS Mem. p. 7 (quoting *Nicholl*, 896 P.2d at 868-69). What the ellipsis leaves out, however, is *Nicholl*'s central holding that the power to tax is what makes financing operations atypical of a business. Any doubt that the Supreme Court's reasoning centered on the taxing power was put to rest in 1996, when the General Assembly amended the underlying statute to conform to the *Nicholl* opinion by removing the power to tax from the government entity at issue in that case. *See* C.R.S. § 43-4-502(3) ("Since the Colorado supreme court in *Nicholl v. E-470 Public Highway Authority*, 896 P.2d 859 (Colo. 1995), determined that the power to impose taxes is inconsistent with the establishment of a public highway authority as an 'enterprise' under section 20 of article X of the state constitution, those powers of taxation are hereby eliminated . . . .").

Here, the proposed Provider Fee enterprise would not have the power to levy general—or any other—taxes. Instead, similar to the government-owned business in *Colorado Bridge Enterprise*, only a fee would be collected in exchange for the enterprise's services. *See* 2014 COA 106, ¶¶ 57-60. As a result, the enterprise would not run afoul of *Nicholl*, and the statute creating it would be deemed constitutional. *See id.*

The OLLS Memorandum also recognized that procuring additional federal money that hospitals would not be able to otherwise obtain would be a service to the hospitals that pay the Provider Fee. OLLS Mem. p. 6. However, the OLLS Memorandum claimed, without citation to legal authority, that because there is no "private-sector parallel," the enterprise's "supposed business activity would be very different from the business activities engaged in by TABOR-exempt enterprises." *Id.*

First, neither TABOR, nor *Nicholl* or *Colorado Bridge Enterprise* impose the requirement that the government-owned business have a private-sector parallel. In fact, as previously stated, the Colorado Court of Appeals in *Colorado Bridge Enterprise* made clear that a market-equivalent is not required and expressly rejected the portion of the Attorney General's Opinion that had concluded otherwise. *See* 2014 COA 106, ¶¶ 58-59.

Second, as discussed above, there in fact is a private-sector parallel for such services. In addition, there are private-sector businesses, such as grant-writing firms, that assist companies

and individuals in obtaining grants[2] much like a Provider Fee enterprise would help hospitals qualify for and obtain federal matching funds.

Third, the fee paid by hospitals could be used (in part) to pay for services that are akin to services provided by private businesses, including:

- Facilitating negotiations between the state and federal government over the distribution of funds and reimbursement rates.

- Actuarial Services to set reimbursement rates and supplemental payment rates. The information used to develop these rates would be shared with hospitals, and can be utilized for various business purposes.

- Eligibility determinations to verify whether potential enrollees meet federal income, citizenship, and identification requirements.

- Fraud and abuse monitoring to prevent payment of funds for illegitimate claims, thereby preserving the availability of funds for legitimate claims.

- Accounting services to monitor and manage collection of the Provider Fee and federal matching funds. The accounting services are also necessary to ensure ongoing compliance with revenue obligations imposed by federal law.

- Compliance monitoring to ensure that Medicaid providers are properly enrolled in the program, and that Colorado Medicaid and accompanying regulations fulfill obligations established in federal law.

Fourth, a bill that would create the Provider Fee enterprise could give the enterprise broader authority to add to the services it provides to hospitals. This would enhance the status of the enterprise as a government-owned business. The proposed enterprise could be structured to provide services to hospitals that improve cost efficiency or clinical effectiveness as the Medicaid program moves to outcome—and value—based reimbursement, as opposed to the current fee-for-service reimbursement model. Pending federal approval, under a current proposal, a material portion of Medicaid payments—$837 million annually—may be structured to be paid based on outcome rather than volume. The enterprise could provide fee-based services to assist hospitals in adapting and transitioning to the new payment system. Services may include real-time sharing of data, metrics, and benchmarking, consulting services on adapting clinical and/or administrative processes to outcome—and value—based measures, among other services.

The OLLS Memorandum assumed that the only "profit" of the new enterprise would be the federal matching funds which are "available only to states," thus "no private entity could engage in a similar 'business.'" OLLS Mem. p. 6. As noted above, there is no requirement that

[2] *See, e.g.*, http://www.grantexperts.com.

the government-owned business have a private-sector analog. There is also no requirement that the proposed entity operate for profit to qualify as an enterprise. In fact, the Colorado Court of Appeals has expressly held that a non-profit corporation may qualify as an enterprise. *See Bd. of Cnty. Comm'rs, Cnty. of Eagle, State of Colo. v. Fixed Base Operators, Inc.*, 939 P.2d 464, 468 (Colo. App. 1997), as *modified on denial of reh'g* (May 1, 1997). As the Attorney General has noted, the government is by definition non-profit, and the entity qualifies as a business if it conducts "activities in business-like manner." Atty. Gen. Op. No. 95-07, n. 2.

The proposed enterprise would pursue a benefit and livelihood by charging a portion of the Provider Fee to finance its operations, contract with entities to provide services, pay its employees, and maintain its technology, vendors, and infrastructure. Moreover, simply paying, *i.e.*, providing a livelihood to, the enterprise's employees would suffice to meet the "government-owned business" requirement of TABOR. Indeed, for many privately-held professional services companies like law and accounting firms, the only "profit" realized is payment to workers who generate the companies' revenue.

It is also worth examining the purpose for TABOR's enterprise exemption. TABOR restricts government's growth and taxing and spending powers. Enforcement of TABOR's restriction on government growth is accomplished in part by its refund mechanism when government revenue exceeds established spending limits. But TABOR recognizes that enterprises, self-sufficient entities with little or no support from state and local governments, should be exempt from its restrictions. *See* Atty. Gen. Op. 95-07, at 5:

> Since the provisions of TABOR focus primarily on establishing limits on "district" revenues, spending, and incurrence of debt, the provision's reference to restraining the growth of government seems to apply to restraining the growth of "districts." Under TABOR, an "enterprise" is not a district. Indeed, no provision of TABOR appears intended to restrain the growth of enterprises. This exemption for enterprises appears to be an invitation to restrain the growth of districts through appropriate "decentralization" of those portions of government entities capable of being qualified as enterprises.

For instance, the University of Colorado ("CU") is an enterprise and its revenue is therefore excluded from State revenue for TABOR purposes. If the state is at its spending limit and CU increases enrollment, and thus revenue from tuition, that additional revenue should not—and would not—trigger a refund. Under TABOR, CU is permitted to grow and prosper without restriction because its growth as the result of adding students is not the kind of tax-payer-funded growth of government that TABOR seeks to limit.

It is entirely consistent with TABOR for a Provider Fee enterprise to enjoy the same treatment as CU. An increase in revenue to a self-sufficient Provider Fee enterprise should not trigger or move the state closer to making a refund. The growth of the enterprise because of an increased demand for health care, and thus an increase in fees paid by hospitals, is not the kind of tax-payer-funded growth of government that TABOR seeks to limit. In other words, not only would a Provider Fee enterprise meet the technical requirements of TABOR, it would also be

consistent with the purposes behind TABOR's exclusion of enterprise revenue from the calculation of state revenue.

II. THE STATUTE CREATING THE PROPOSED ENTERPRISE WILL BE ENTITLED TO A STRONG PRESUMPTION OF CONSTITUTIONALITY

The OLLS Memorandum briefly referenced, but did not discuss, the standard under which the statute creating the proposed Provider Fee enterprise would be evaluated by the courts.

The General Assembly has the power and duty to set policy for the State of Colorado. *See Mosko v. Dunbar*, 309 P.2d 581, 583 (Colo. 1957) ("only the legislature can enact laws and it is the legislature's right and duty to determine what laws are desirable. . . . [I]t is within the exclusive province of the legislature to determine the necessity, expediency, wisdom, fairness and justness of the law enacted."). The statutes enacted by the General Assembly thus enjoy a strong presumption of constitutionality and will not be overturned unless the statute is unconstitutional beyond a reasonable doubt. *Id.*

The Supreme Court has expressly held that the same strong presumption of constitutionality applies to challenges under TABOR. *See Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011) ("Such a high burden - [showing of unconstitutionality beyond a reasonable doubt] - acknowledges that declaring a statute or a constitutional amendment to be unconstitutional is one of the gravest duties impressed upon the courts. Our presumption of a statute's constitutionality is based on the deference we must afford the legislature in its law making duties.") (citations omitted); *Mesa Cnty. Bd. of Cnty. Comm'rs v. State*, 203 P.3d 519, 527 (Colo. 2009) ("the presumption of constitutionality applies to a statute challenged under article X, section 20 [TABOR]"); *Barber v. Ritter*, 196 P.3d 238, 247-48 (Colo. 2008) (same).

Given the high burden of showing that the statute is unconstitutional beyond a reasonable doubt—a standard ordinarily used only for criminal convictions—the conclusion of the OLLS Memorandum that the proposed entity would be unconstitutional should not be relied on by the members of the General Assembly to abrogate their duties to enact laws and set policy for the state. OLLS is not the state's final or binding authority with respect to the constitutionality of proposed or enacted laws. Its function is to provide for the "best **technical** advice and information to be available to the general assembly" and to assist in drafting and publishing laws. C.R.S. § 2-3-501 (emphasis added). Only the state's judiciary has the power to determine whether the law is constitutional, and it can only do so applying the high burden discussed here.

As set forth above, a Provider Fee enterprise would meet all requirements of TABOR. OLLS has offered a contrary opinion. However, considering both arguments together under the presumption and high standard afforded to statutes, our courts simply could not reach the conclusion that the proposed Provider Fee enterprise is unconstitutional.