

Date: November 03, 2016	POLICY BRIEF PREPARED FOR THE BOARD OF DIRECTORS	
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HOSPITAL PROVIDER FEE ENTERPRISE PROPOSAL

[FY2016-17 UPDATE – NOVEMBER, 2016]

Background on the Hospital Provider Fee, TABOR, and Proposals to Create a State Enterprise to Remove the Hospital Provider Fee from the TABOR Revenue Limitations

Issue Summary

In the 2015 and 2016 Colorado legislative sessions, proposals were introduced to make the Hospital Provider Fee (HPF) a state enterprise, which would have exempted the program’s fee-generated revenue from caps required by Referendum C and TABOR. Though those efforts failed, with the release of the Governor’s FY2017-18 Budget Request, there is renewed discussion of making this change via legislation in the coming session. With current economic forecasts, the governor’s request anticipates a \$195 million rebate to taxpayers in 2018; combined with other new required spending, the governor’s request anticipates a funding gap of more than \$500 million that will require a variety of spending reductions and transfers of funding away from other cash funds. Removing the Hospital Provider Fee from the rebate calculations via the enterprise proposal could make many of these cuts unnecessary.

Medicaid Provider Fees and the Colorado Hospital Provider Fee

Per the National Conference of State Legislators (NCLS), a provider fee (or assessment or tax) is a state program that collects revenue from specified categories of health providers. In most states, it is used to generate new state funds and match them with federal Medicaid funds. In a majority of cases, the cost of the fee is paid back to providers through an increase in the Medicaid reimbursement rate.

Federal Rules about Medicaid Provider Fees

Under federal law, a state’s ability to use provider-specific fees to fund the state share of Medicaid expenditures has limits. Those fees cannot generally exceed 25% of the non-federal share of Medicaid expenditures, and the state cannot provide a guarantee to the providers that the taxes will be returned to them. This is aided by a "hold harmless" rule — if the fees returned to a provider are less than 6 percent of the provider’s net patient revenues, the prohibition on guaranteeing the return of funds is not violated. As a result, a state may be able to impose a provider fee, receive a federal match for those amounts, and then return some or all of those revenues directly or indirectly back to those providers in the form of a Medicaid ‘payment’.¹

Colorado Hospital Provider Fee

In 2009, Colorado passed the Health Care Affordability Act of 2009 (HB09-1293) to create the Hospital Provider Fee in an effort to reduce increased costs from uncompensated care at hospitals.² Broadly, the funds were to be used to “increase reimbursement to hospitals for providing medical care under [Medicaid and CACP]” and to “increase the number of persons covered by public medical assistance.”

¹ National Conference of State Legislatures. Health Provider and Industry State Taxes and Fees. Updated 11/1-0/2014. Accessed November 11, 2015 at: <http://www.ncsl.org/research/health/health-provider-and-industry-state-taxes-and-fees.aspx>

² Health Care Affordability Act of 2009, HB09-1293, Section 1. Available at: [http://www.leg.state.co.us/clics/clics2009a/csl.nsf/billcontainers/D71C48DD229F80CD872575540079F3A0/\\$FILE/1293_enr.pdf](http://www.leg.state.co.us/clics/clics2009a/csl.nsf/billcontainers/D71C48DD229F80CD872575540079F3A0/$FILE/1293_enr.pdf)

After increasing reimbursements to hospitals under Medicaid and CICP, the law allocated new revenue to several expansions of public health programs:

- Expanded eligibility for Medicaid to (subject to federal authorization):
 - Parents of children eligible for medical assistance or CHP+ up to 100% of the federal poverty level;
 - Disabled individuals participating in the Medicaid buy-in program up to 450% of the federal poverty level; and
 - Childless adults or adults without a dependent child in the home up to 100% of the federal poverty level.
- Provided for continuous eligibility in Medicaid for children for 12 months.
- Expanded eligibility for children and pregnant women under CHP+ to up to 250% of the federal poverty level.³

Importantly, this law was passed prior to the passage of the Affordable Care Act (ACA), which enabled the state to further expand Medicaid eligibility with other federal funds beginning in 2014. Prior to the ACA, in the fiscal note studying the proposed Health Care Affordability Act of 2009, it was estimated that the program would bring in nearly \$390 million in fees in 2010-2011, with a matching amount of new federal funds.⁴ A fiscal note for the 2016 effort to turn the program into a state enterprise estimated that the total fee revenue in FY2017-18 would be more than \$770 million, with a matching amount of federal funds.⁵ The rapid growth in Provider Fee revenue is partially an effect of the increased Medicaid enrollment under the ACA: more funded hospital bed days result in more paid hospital fees.

	FY 2014-15*	FY 2015-16	FY 2016-17	FY 2017-18
Hospital Provider Fee Revenue	\$528.8 million	\$805.5 million	\$656.7 million	\$772.7 million

*Source: Legislative Council Staff Economic and Revenue Forecast, March 2016, and House Bill 16-1405.
Preliminary and un-audited revenue collections.

The Taxpayer’s Bill of Rights and Referendum C – Relevant Portions of TABOR spending and revenue caps

Article X, Section 20 of the Colorado Constitution, better known as the Taxpayer’s Bill of Rights (TABOR), was passed in 1992 to install procedural requirements on state finances such as election provisions, as well as spending and revenue limitations on state and local governments. TABOR limits revenue increases at the state level to the increase in population plus inflation.⁶ During periods of strong economic growth, the TABOR limit causes regular rebates to taxpayers, such as the \$3.2 billion returned between 1997 and 2001. However, during economic downturns, the TABOR formula caused a ratcheting down of the revenue cap.

³ Health District of Northern Larimer County. HB 1293 Hospital Provider Fee Pro/Con Analysis. March 17, 2009. Accessed November 11, 2015 at: <http://www.healthdistrict.org/sites/default/files/legislative-analyses/hb09-1293.pdf>

⁴ Colorado Legislative Council. Fiscal Note for HB09-1293. May 5, 2009. Accessed November 11, 2015 at http://www.leg.state.co.us/clics/clics2009a/csl.nsf/fsbillcont3/D71C48DD229F80CD872575540079F3A0?Open&file=HB1293_f1.pdf

⁵ Colorado Legislative Council. Fiscal Note for HB16-1420. May, 10, 2016. Accessed November 3, 2016 at [http://www.leg.state.co.us//clics/clics2016a/csl.nsf/billcontainers/16D59DF343435AA487257F2400641439/\\$FILE/HB1420_r2.pdf](http://www.leg.state.co.us//clics/clics2016a/csl.nsf/billcontainers/16D59DF343435AA487257F2400641439/$FILE/HB1420_r2.pdf)

⁶ Bell Policy Center, The Road to 2016: More than three decades of constitutional amendments, legislative acts and economics ups and downs. Oct. 20, 2015. Accessed November 11, 2015 at <https://www.bellpolicy.org/sites/default/files/uploadFiles/Roadto2016.pdf>

To remedy this ratcheting effect of TABOR, in 2005, voters passed Referendum C, which allowed a five year time-out on TABOR refunds and a subsequent new “excess state revenues cap” that no longer includes a ratchet down effect during downturns. Importantly, however, the revenue cap includes state general fund and cash fund revenue, but not federal funds. However, if the revenue limits are reached, the refunds are funded solely out of the general fund.

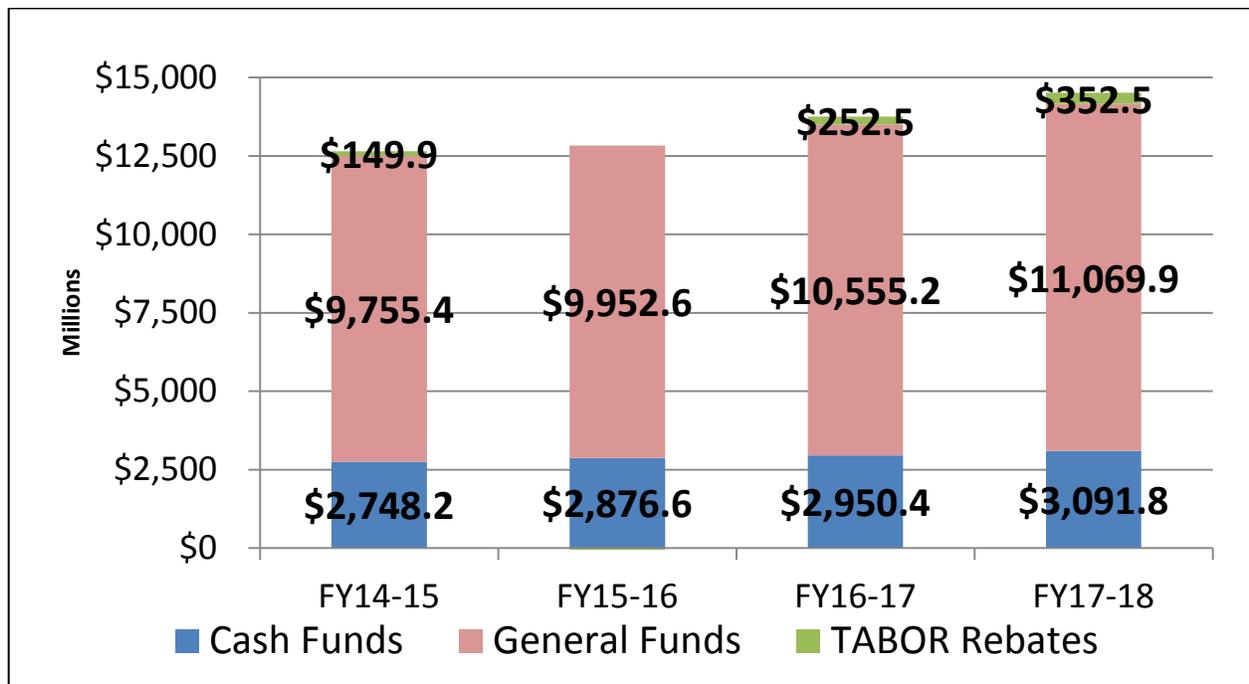
General Fund - General Funds are those funds the state receives from general tax revenues, such as the state sales and income taxes. The General Fund is like the state’s general checking account. It is, in many ways, the least restrictive of the five funds and therefore the most competitive. The fund pays for many state programs and operations.

Cash Fund - Cash Funds are funds received from taxes, fees and fines. These are funds earmarked for specific programs and are related to the identified revenue source.

Colorado Fiscal Institute. Colorado Budget Basics

<http://www.coloradofiscal.org/wp-content/uploads/2015/01/Colorado-State-Budget-Basics-2015.pdf>

The following chart by the Bell Policy Center demonstrates the breakdowns of General vs Cash Funds and estimated rebates in several fiscal years.⁷ Note that this chart was published in mid-October 2015, prior to the revenue estimates that were used in the Governor’s FY2016-17 budget request and more than a year before the Governor’s FY2017-18 budget.



⁷ Bell Policy Center, Projected TABOR Rebates in Eight Charts. October 19, 2015. Accessed November 11, 2015 at <https://www.bellpolicy.org/research/projected-tabor-rebates-eight-charts>

The distinction between cash and general funds revenue as applied to potential rebates is especially important with the Hospital Provider Fee, which has grown in recent years to more than \$700 million. This fee is a cash fund, earmarked specifically for the purposes described previously with the Health Care Affordability Act of 2009. However, the TABOR rebates that are required because of the revenue cap being exceeding must compete with other state programs funded out of the General Fund.

In the governor's FY 2017-18 Colorado State budget request, this forced rebate in the general fund will cause the reduction in a number of programs. With only \$426 million in new General Fund revenue available, the state must fund \$731 million in new General Fund expenditures plus \$195 million in rebates (totaling \$926.1 million in required new General Fund Expenditures).⁸ To eliminate the impact of this \$195 million TABOR rebate on the General Fund, the FY2017-18 budget request seeks to reduce the amount of revenue that will come into the Hospital Provider Fee by \$195 million (which will lead to a reduction in federal funding of an additional \$195 million).

By reducing the revenue in the Hospital Provider Fee this way, there will be a subsequent reduction in total revenue and a reduction in the required rebate from the General Fund by the same amount. This will reduce the necessary cuts in other General Fund line items that would have been required to fund the rebate.

“Think of a bucket of water, with a spigot at the top. Cash revenues are at the bottom of the bucket, general funds on top of that. When TABOR-eligible cash revenues increase, the water level rises, and pushes general funds out through the spigot in the form of TABOR refunds.”

-The Colorado Statesman, May 6, 2015⁹

Hospital Provider Fee Enterprise Proposal

Late in the 2015 legislative session and again in 2016, bills were introduced that would have turned the Hospital Provider Fee into a state enterprise, a designation that would exempt the revenue that flows into it from TABOR and Referendum C revenue limits, allowing the state budget to have more room under the caps before rebates are necessary. HB15-1389 passed the Colorado House on a party-line vote then was postponed indefinitely in the Senate State, Veterans, and Military Affairs Committee. HB16-1420 had a similar fate, ultimately failing in the Senate Finance Committee (though had it received a vote on the floor of the Senate, more than half of all Senators, all Democrats and one Republican, would have likely voted in favor).

TABOR Enterprises

The importance of an enterprise is that TABOR's provisions apply to government “districts,” which specifically does not include “enterprises.” The Colorado Supreme Court has looked at the TABOR definition of enterprise and created a four-part test:¹⁰

- 1) Is the enterprise government owned?
- 2) Is the enterprise a business?
- 3) Does the enterprise have the authority to issue its own revenue bonds?

⁸ Colorado Governor's Office of State Planning and Budgeting (OSPB). Accessed November 3, 2016 at <https://drive.google.com/file/d/0B0TNL0CtD9wXTjBnQzRDd25CZEO>

⁹ The Colorado Statesman. Hospital Provider Fee bill dies, but it'll be back. May 6, 2015. Accessed November 11, 2015 at <http://www.coloradostatesman.com/content/995659-hospital-provider-fee-bill-dies-it%3Fll-be-back>

¹⁰ Rufien, Paul. Taming TABOR by Working from Within. The Colorado Lawyer, July 2003. 101.

- 4) Does the enterprise receive less than 10 percent of its annual revenue in grants from all Colorado state and local governments combined?

Meeting these requirements, an enterprise does not operate as a separate legal entity: it is an accounting method. Control and operations are still under the control of the government. Examples of other enterprises are universities and colleges, the Colorado Lottery, Parks and Wildlife, and the Colorado Bridge Enterprise. Generally, these entities exist to collect a fee and to then provide a service to payers of the fee.¹¹ Their existence as an enterprise allows their revenue to not be accounted for with other state revenue.

Hospital Provider Fee Enterprise

The proposal to make the Hospital Provider Fee (HPF) an enterprise under TABOR is strongly supported by a variety of groups, most vocally the Colorado Hospital Association, which argues that its members will face significant cuts under the governor’s budget balancing proposals. In FY2017-18 alone, the governor proposes reducing HPF revenues by \$195 million, which in turn eliminates \$195 million in federal matching funds, for a nearly \$400 million total impact.

Moving the HPF to an enterprise would exempt more than \$700 million in fee revenue from the TABOR and Referendum C revenue caps. This would eliminate the estimated \$195 million in rebates, allowing many other proposed cuts and transfers to be reduced or eliminated, without also reducing the HPF funding.

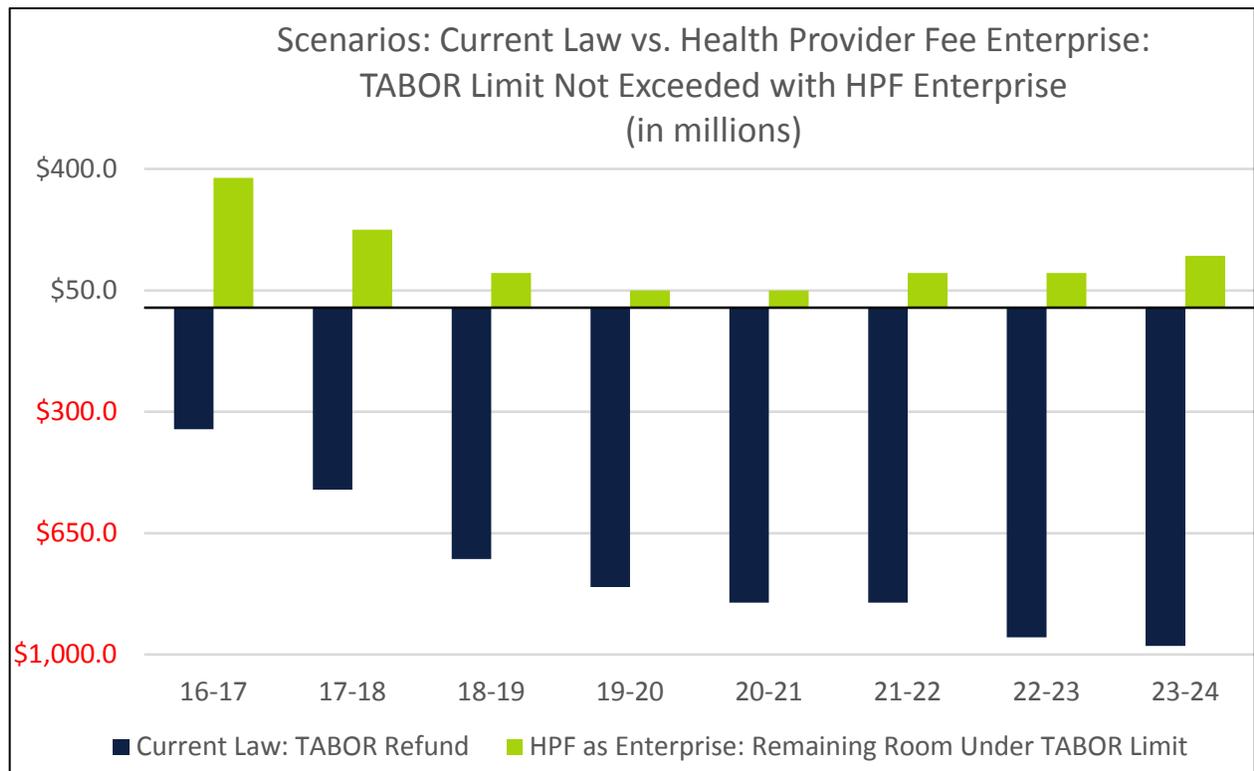


Figure 1 Colorado Hospital Association. Hospital Provider Fee Enterprise Presentation. August 2015

¹¹ Rufien, 2003.

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Proponents of this approach argue that it meets the requirements under TABOR to be an enterprise. As noted previously, the courts have created a four-part test to determine whether a program is an enterprise. Using the language in the 2016 bill, the HPF might meet this test in the following ways:

- 1) *Is the enterprise government owned?* The HPF enterprise would operate under the Department of Health Care Policy and Financing. The existing oversight and advisory board would be abolished and a new enterprise board would be created within HCPF.
- 2) *Is the enterprise a business?* The opening of HB16-1420 discusses the nature of the business service that the state department provides to hospitals. Essentially, that service would be charging a fee and providing the service of collecting funds from the federal government to improve reimbursement to the hospitals that pay the fee in order to cover more of the cost of providing health care for those with public health insurance.
- 3) *Does the enterprise have the authority to issue its own revenue bonds?* HB16-1420 would have explicitly granted this authority to the new enterprise.
- 4) *Does the enterprise receive less than 10 percent of its annual revenue in grants from all Colorado state and local governments combined?* The HPF enterprise would be funded only by the fee and federal funds, so this requirement would likely be met.

TABOR Base and the HPF Enterprise

Under TABOR, “when an existing entity becomes an enterprise, its revenue is exempted from the state TABOR limit, and a corresponding downward adjustment is made to the level at which the TABOR limit is set. This adjustment is not required when a new enterprise is created.”¹² In the text of TABOR, this is referred to as changing the “district bases and future year limits.”

When the Health Care Affordability Act of 2009 created the Hospital Enterprise Fee, it could have made it an enterprise and exempted it from TABOR. Changing it to an enterprise later may require consideration of whether the TABOR and Referendum C limits should be lowered to account for the change. Instead, HB16-1420 would not have converted the existing HPF to an enterprise, but would have terminated the authority of HCPF to charge the fee and then created a new enterprise to charge the fee.¹³ The text of HB16-1420 stated that this did not require adjustment of the fiscal year limit.

Reasons to Support the creation of an HPF Enterprise

- The revenue from the HPF helps to maintain existing health provider reimbursement and helps to assure funding to cover the costs of Coloradoans that are covered by public health programs by legally drawing down federal dollars. The enterprise proposal would prevent the annual capping of this fund to reduce rebates that must be paid out of the general fund, and thus prevent cuts of \$195 million to health care providers.
- This move would create room under the TABOR and Referendum C revenue limits to increase spending on programs as the economy continues to improve. Without the change, rebates will be required this year and into the future.
- Many of the FY2017-18 cuts and transfers proposed by the governor could be eliminated or dramatically reduced with this change.

¹² Colorado Legislative Council. Fiscal Note for HB15-1389. April 30, 2015. Accessed November 11, 2015 at [http://www.leg.state.co.us/clics/clics2015a/csl.nsf/billcontainers/DFC28E4AB6E817CD87257DA200616DFB/\\$FILE/HB1389_00.pdf](http://www.leg.state.co.us/clics/clics2015a/csl.nsf/billcontainers/DFC28E4AB6E817CD87257DA200616DFB/$FILE/HB1389_00.pdf)

¹³ HB16-1420, p8 Line 2

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- Some believe that many voters who passed TABOR and Ref C did not intend for state funding for critical programs such as education to be cut when federal funding dedicated to other essential services, such as health care, rose.
- The 2016 effort to create a hospital provider fee enterprise was supported by a large coalition, including:
 - Health District of Northern Larimer County
 - Colorado Hospital Association
 - Governor Hickenlooper
 - Colorado State University
 - University of Colorado
 - Signal Behavioral Health
 - Rocky Mountain Health Plans
 - Mental Health Partners
 - Kaiser Foundation
 - Denver Metro Chamber of Commerce
 - Colorado Municipal League
 - Colorado Medical Society
 - Colorado Education Association
 - Colorado Consumer Health Initiative
 - Colorado Coalition for the Medically Underserved
 - Colorado Children’s Campaign
 - Colorado Center on Law and Policy
 - City of Fort Collins

Reasons to Oppose the creation of an HPF Enterprise

- This proposal’s passage would reduce direct taxpayer rebates in FY2016-17 and beyond.
- There may be a question of whether the TABOR base would need to be adjusted down with the qualification of the HPF as an enterprise. In 2016 there was a large debate about the constitutionality of reclassifying the fee, with court and legal opinions on both sides of the argument.¹⁴
- Some see this effort as circumventing the will of the voters that passed TABOR.
- Opponents of the 2016 HPF Enterprise proposal included:
 - Americans for Prosperity
 - Republican Party Leadership
 - Pro-TABOR groups
 - National Federation of Independent Business (NFIB)

About this Document

This summary was prepared by Health District of Northern Larimer County staff to assist the Health District Board of Directors in determining whether to take an official stand on various health-related issues. The Health District is a special district of the northern two-thirds of Larimer County, Colorado, supported by local property tax dollars and governed by a publicly elected five-member board. The Health District provides medical, mental health, dental, preventive and health planning services to the communities it serves. For more information about this summary or the Health District, please contact Dan Sapienza, Policy Coordinator, at (970) 224-5209, or e-mail at dsapienza@healthdistrict.org.

¹⁴ <http://www.coloradoindependent.com/157054/hospital-provider-fee-explained>