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Office of the Attorney General

February 29, 2016

Governor John W. Hickenlooper
136 State Capitol Bldg
Denver, CO 80203

RE: Formal Legal Opinion

Dear Governor Hickenlooper:

I am enclosing Attorney General Formal Opinion 16-01 which I have signed and issued.

This Opinion is being issued pursuant to your request regarding whether the Hospital Provider Fee may be established as a TABOR-exempt "enterprise," as that term is defined under Article X, Section 20 of the Colorado Constitution and interpreted by Colorado courts.

Please let me know if you have any questions.

Sincerely,

Cynthia H. Coffman

CYNTHIA H. COFFMAN
Colorado Attorney General

Enclosure

C:w/Encl. Jacki Cooper Melmed, Chief Legal Counsel, Office of the Governor

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FORMAL OPINION

of

CYNTHIA H. COFFMAN
Attorney General

No. 16-01

February 29, 2016

Governor John W. Hickenlooper, through his Chief Legal Counsel, Jacki Cooper Melmed, requested this opinion under § 24-31-101(1)(b), C.R.S. (2015).

This opinion analyzes the constitutionality of a legislative proposal to create an enterprise that would administer Colorado's Hospital Provider Fee ("HPF"). The HPF, a part of the State's Medicaid program, is a fee that is collected from Colorado hospitals, used to obtain matching funds from the federal government, and spent to increase the compensation hospitals receive for serving low-income patients. If organized as an enterprise, the HPF would be exempt from the spending limits contained in the Taxpayer's Bill of Rights. Colo. Const. art. X, § 20 ("TABOR").

QUESTION PRESENTED AND SHORT ANSWER

Question: Under current case law interpreting the requirement that enterprises be "government-owned businesses," may the General Assembly establish a TABOR-exempt enterprise to collect and administer the Hospital Provider Fee?

Answer: Yes. Considering both judicial interpretations of TABOR and the General Assembly's prior decision to classify the HPF as a fee rather than a tax, organizing the HPF as an enterprise would not contravene the three considerations that determine an entity's status as a government-owned business: an HPF enterprise would (1) lack the power to tax, (2) provide government services in exchange for involuntary fees levied on service recipients, and (3) be financially distinct from its parent agency.

BACKGROUND

I. The Taxpayer's Bill of Rights and its exceptions.

The Taxpayer's Bill of Rights requires that voters participate in making certain government fiscal policies. This includes, for example, tax increases and government spending above certain limits. Colo. Const. art. X, § 20(4)(a), (7)(d); *see Campbell v. Orchard Mesa Irrigation Dist.*, 972 P.2d 1037, 1039 (Colo. 1998) (explaining that TABOR's "objective is to prevent governmental entities from enacting taxing and spending increases above [certain] limits without voter approval"). If voters decline to approve either a tax increase or government spending that exceeds TABOR's limits,[1] the government must refund any excess funds to taxpayers. Colo. Const. art. X, § 20(1), (7)(d).

These voter-approval requirements are not absolute. TABOR is subject to both express exceptions and judicial decisions that have circumscribed its scope. Three of these limitations are pertinent to this opinion.

First, "fees" are distinct from "taxes" and are only partially subject to TABOR. Unlike taxes, fees need not be approved by the voters when they are imposed or increased. *See Barber v. Ritter*, 196 P.3d 238, 241–42, 250–51 (Colo. 2008). Revenue from fees, however, must be counted toward TABOR's spending limits, *id.* at 251, and may therefore trigger taxpayer refunds if they cause government revenue to exceed those limits.

Second, "federal funds," even those that pass through or are administered by the State or local governments, are outside the scope of TABOR. Colo. Const. art. X § 20(2)(e); § 24-77-102(7)(b)(III), C.R.S. (2015). Federal funds therefore do not count toward government spending limits and cannot trigger TABOR's taxpayer refund provisions.

Third, certain entities are exempt from TABOR, such that neither their revenue nor their spending is subject to TABOR's voter-approval and refund requirements. *See, e.g.*, *Campbell*, 972 P.2d at 1040 (holding that irrigation districts formed under a 1921 law are not subject to TABOR because they do not "exact revenue from the public at large for general governmental purposes"); *Olson v. City of Golden*, 53 P.3d

[1] In 2005, the People approved Referendum C, which allows the State to retain and spend, subject to certain restrictions, revenue that exceeds TABOR's spending limit but falls below an annually adjusted "excess state revenues cap." § 24-77-103.6, C.R.S. (2015). Revenue that exceeds this cap must be refunded to taxpayers.

747, 753–54 (Colo. App. 2002) (holding that an urban renewal authority "has no authority to levy taxes" and is not subject to TABOR).

Among the entities excluded from TABOR are "enterprises," which TABOR defines as "government-owned business[es] authorized to issue [their] own revenue bonds and receiving under 10% of annual revenue in grants from all Colorado state and local governments combined." Colo. Const. art. X, § 20(2)(d).

II. The origin of the Hospital Provider Fee.

The Hospital Provider Fee was enacted by the General Assembly in 2009 as part of the Colorado Health Care Affordability Act (the "Act"). The Act was intended to expand the federal-state Medicaid program to, among other things, address the problem of "hospital providers within the state incur[ring] significant costs by providing uncompensated emergency department care and other uncompensated medical services to low-income and uninsured populations." § 25.5-4-402.3(2), C.R.S. (2015). The funding mechanism the Act employed to address this problem was the HPF.

The Act imposed the HPF on most Colorado hospitals[2] based on inpatient and outpatient services, and created the Hospital Provider Fee Cash Fund ("HPF Fund"), to which the HPF must be credited. § 25.5-4-402.3(3), (4)(a). After HPF funds are collected, they are matched with federal funds through the Medicaid program. § 25.5-4-402.3(4)(b). The federal matching rate is determined through a statutory formula; it cannot be less than 50 percent (i.e., a dollar-for-dollar match) or more than 83 percent. 42 U.S.C. § 1396d(b)(1).

Money in the HPF Fund is restricted; it must be used, directly or indirectly, to increase reimbursements to hospitals that pay the HPF. § 25.5-4-402.3(4)(b). Among other things, the HPF Fund is dedicated to (1) increasing amounts paid to hospitals under Medicaid and the Colorado Indigent Care Program, (2) encouraging hospitals to improve the quality of care and health outcomes for their patients through incentive payments, (3) expanding Medicaid coverage to prevent hospitals from

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[2] Some hospitals, including state-licensed or -certified psychiatric hospitals, Medicare-certified Long Term Care hospitals, and state-licensed and Medicare-certified rehabilitation hospitals, are exempted from paying the HPF with federal approval. § 25.5-4-402.3(3)(c)(I). Other specific services or provider types pay the HPF at a discounted rate. § 25.5-4-402.3(3)(c)(III). *See, e.g.*, Colo. Dep't of Health Care Policy & Fin., *Revised Fed. Fiscal Year 2014–15 Hosp. Provider Fee & Supplemental Payments* 3–4 (Mar. 17, 2015), https://www.colorado.gov/pacific/sites/default/files/2015%203%2017%20Hospital%20Provider%20Fee%20Overview.pdf.

being required to serve low-income populations through unpaid emergency and other care, and (4) paying the administrative costs of running the HPF program. *Id.*

Before the Act was passed, members of the General Assembly asked the Office of Legislative Legal Services ("OLLS") whether the HPF could be classified as a fee rather than a tax to avoid TABOR's voter-approval requirement. In response, OLLS issued a memorandum in December 2008, concluding that the HPF could be classified as a fee because its intent was "to increase reimbursements to hospitals paying the fee, not to increase revenue for general governmental purposes." Memorandum from Office of Legis. Legal Servs. to Sen. M. Keller at 2 (Dec. 22, 2008). In the 2009 Act, the General Assembly ultimately made its own judgment that the HPF could be classified as a fee rather than a tax and imposed without voter approval.

III. The proposal to organize the HPF as a TABOR-exempt enterprise.

A. The Governor's 2015 legislative proposal and 2016–17 budget proposal.

During the 2015 legislative session, Governor Hickenlooper sent a letter to the members and leadership of the General Assembly addressing the effect of the HPF on the State's budget. Letter from Governor J. Hickenlooper to Rep. D. Hullinghorst et al. (Apr. 16, 2015). He explained that because the HPF is a fee, its collection as part of the HPF program is counted towards TABOR's fiscal limits. *Id.* at 2. But because money in the HPF Fund must be spent in specified ways—namely, to increase compensation paid to hospitals that provide care to low-income patients—it cannot be allocated to pay TABOR refunds. Thus, as the HPF program grows, TABOR refunds caused by that growth must be paid at the expense of other programs that are funded through the State's General Fund. To address this issue, the Governor suggested that the HPF program be restructured as an enterprise so that the fees collected in the HPF Fund would not count towards TABOR's fiscal limits and would not trigger taxpayer refunds. *Id.* at 3. In May 2015, the General Assembly considered House Bill 15-1389, which would have addressed the Governor's proposals. That bill did not become law.

In November 2015, in preparation for the 2016 legislative session, the Governor transmitted his fiscal year 2016–17 budget request to the Joint Budget Committee. The request again explained that growth in the HPF program will trigger TABOR refunds that will have to be paid from the General Fund, and it identified a $373 million gap between available revenues and General Fund requirements. Budget Request from Governor J. Hickenlooper to Sen. K. Lambert at 4, 11 (Nov. 2, 2015).

In an attempt to address these budget constraints, the Governor continues to advocate organizing the HPF program as an enterprise. A bill similar to House Bill 15-1389 has not been introduced this session.[3]

B. The December 2015 memorandum by the Office of Legislative Legal Services.

In December 2015, OLLS issued a memorandum analyzing whether the HPF program could be organized as a TABOR-exempt enterprise. Memorandum from Office of Legis. Legal Servs. to Sen. B. Cadman (Dec. 31, 2015). The OLLS Memorandum concluded that the HPF program could not be organized as an enterprise,[4] reasoning that an HPF enterprise would not "engage in business activities that private-sector entities also engage in." *Id.* at 6. In the view of the OLLS Memorandum, an entity must have a "private-sector parallel" to qualify as a TABOR-exempt enterprise, and the HPF's function of "leveraging [state] money to obtain more money from the federal government" is "very different from the business activities engaged in by TABOR-exempt enterprises that have a private-sector parallel." *Id.*

ANALYSIS

Under TABOR, an entity must meet three conditions to qualify as an enterprise: (1) it must be a "government-owned business"; (2) it must have the authority to issue its own revenue bonds; and (3) grants to the entity from state and local governments (but not the federal government) must constitute less than 10 percent of its annual revenue. Colo. Const. art. X § 20(2)(d); § 24-77-102(7)(b)(III); *see also TABOR Found. v. Colo. Bridge Enter.*, 353 P.3d 896, 906 (Colo. App. 2014) (holding that federal funds received and administered by an enterprise did "not count towards the [enterprise's] state grant cap").

Nothing suggests that the General Assembly, in organizing the HPF as an enterprise, would be unable to satisfy the second and third of these requirements.

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[3] Organizing the HPF program as an enterprise would alleviate current budget concerns only if it did not also reduce current state spending limits imposed by TABOR and Referendum C. *See* § 24-77-103.6. The effect of a newly designated HPF enterprise on state spending limits is beyond the scope of this formal opinion.

[4] The OLLS Memorandum also concluded that organizing the HPF as an enterprise "would likely violate [federal law] and make the new entity ineligible to obtain federal matching money." OLLS Memorandum from Office of Legis. Legal Servs. to Sen. B. Cadman 4 n.15 (Dec. 31, 2015). That federal-law question is beyond the scope of this formal opinion.

This opinion therefore analyzes only the first: whether an HPF enterprise would meet the definition of "government-owned business" under current law.

I. The term "government-owned business" includes a wide range of entities that fund government services using fees.

The Colorado Supreme Court has held, in the context of TABOR, that "[t]he term 'business' is generally understood to mean an activity which is conducted in the pursuit of benefit, gain or livelihood." *Nicholl v. E-470 Pub. Highway Auth.*, 896 P.2d 859, 868 (Colo. 1995). This general definition provides little guidance regarding the scope of the term "government-owned business." Indeed, the definition has proven to be broad and, perhaps as a result, the General Assembly has increasingly relied on TABOR-exempt enterprises for a variety of functions.

The General Assembly's enterprise designations have included entities that serve narrow functions, *e.g.*, § 24-82-103, C.R.S. (2015) (creating an enterprise to manage state-owned parking lots), as well as those that serve broader purposes, including

- managing statewide transportation infrastructure projects, § 43-4-805, C.R.S. (2015);
- operating the myriad programs within the Division of Parks and Wildlife, § 33-9-105, C.R.S. (2015); and
- administering Colorado's unemployment insurance program, § 8-71-103, C.R.S. (2015).

For some enterprises, federal funds represent a significant portion—and even a majority—of the enterprises' budgets. *See, e.g.*, § 8-72-109, C.R.S. (2015) (requiring the Division of Unemployment Insurance to cooperate with the federal government to maintain eligibility for federal funds). These enterprise designations represent the General Assembly's institutional interpretation of TABOR and are entitled to a presumption of constitutionality. *See Barber*, 196 P.3d at 247; *cf. Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 5 (Colo. 1993) (noting that the General Assembly is entitled, through legislation, to "define certain terms used in [TABOR]").

Critics argue that enterprises have become "fronts for traditional governmental public works projects paid for by forced fees (taxes) outside TABOR's ... spending limit." *Bruce v. City of Colo. Springs*, 252 P.3d 30, 32 (Colo. App. 2010) (quoting plaintiff); *cf. Bruce v. City of Colo. Springs*, 131 P.3d 1187, 1191 (Colo. App. 2005) (noting that the broad definition of "special fees [could] lead ... to almost any governmental service being structured as a fee, thereby escaping TABOR" but that

it would be inappropriate for the court of appeals "to change a test announced by our supreme court ... [or] rewrite TABOR"); *cf. also In re Ravenna Metro. Dist.*, 522 B.R. 656, 673 (Bankr. D. Colo. 2014) (noting that "[s]ince the enactment of TABOR, the enterprise vehicle has been commonly employed to finance the creation and operation of water and sewer systems" to "surmount th[e] obstacle" of "obtain[ing] voter approval"). Others argue that an expansive definition of "government-owned business" is "not a circumvention of TABOR ... [and] do[es] not render TABOR a nullity." Paul C. Rufien, *Taming TABOR by Working from Within*, COLO. LAW., July 2003, 101, 105. Instead, they argue, the expansive definition offers a "permissible means by which [the government] may effectively exercise an appropriate level of flexibility and discretion in its fiscal operations." *Id.*

This debate has become largely academic, both as a matter of practice and as a matter of law. As a practical matter, enterprises have grown to represent the largest share of state-level TABOR-exempt revenue,[5] with growth of enterprise revenue outpacing growth of revenue subject to TABOR's spending limits by more than 350 percent over the past 20 years. *See* Colo. Legis. Council Staff, *State Enterprises*, Issue Br. No. 15-09, at 2 (May 6, 2015) (reporting TABOR and enterprise revenue since FY 1993–94).

As a legal matter, courts have declined to restrict the General Assembly's use of enterprises. The Colorado Supreme Court's decision in *Nicholl* is the only published decision that has struck down an enterprise designation and, as explained below, the General Assembly amended the relevant statute to bring the entity into compliance with *Nicholl*'s broad test for enterprise status, without changing any powers the enterprise had previously exercised.

A. The courts have articulated three considerations that govern an entity's status as a "government-owned business."

Colorado courts have relied upon three considerations to determine whether an entity satisfies *Nicholl*'s definition of "government-owned business." The first, threshold consideration—whether the entity has the power to tax—categorically disqualifies an entity as an enterprise. Assuming the absence of this first consideration, the second and third considerations—whether the entity provides a government service for a fee and whether the entity is financially distinct from its government owner—together are sufficient to qualify an entity as an enterprise.

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[5] *See, e.g.*, Colo. Legis. Council Staff, Memorandum, *State Spending Limitations: TABOR and Referendum C*, at 5 (July 6, 2009).

Prohibition on the Power to Tax. The threshold consideration is whether the entity has the power to levy a general tax. If so, it cannot be a government-owned business. In *Nicholl*, the Colorado Supreme Court considered whether the E-470 Public Highway Authority, an entity that "function[ed] as the operator of a limited access highway," was a "government-owned business" under TABOR. *Nicholl*, 896 P.3d at 867–68. The Court noted that the Authority engaged in activities that fit the broad definition of a "government-owned business" by levying tolls and vehicle registration fees to fund the construction and operation of toll roads. *Id.* at 868.

But the Authority also had the power, although never exercised, to levy general sales and use taxes, and because "[t]he ability to levy general taxes is inconsistent with the characteristics of a business," the Court concluded that the Authority was not an enterprise. *Id.* at 869. The power to tax, in other words, categorically disqualified the Authority as an enterprise and subjected it to TABOR's voter-approval requirements. *Id.*[6]

This problem was easily remedied, however. In the legislative session following the *Nicholl* decision, the General Assembly removed the Authority's unexercised power to tax but left in place its other powers, including the power to charge tolls and involuntary vehicle registration fees. *See* ch. 13, sec. 1, § 43-4-502(3), 1996 Colo. Sess. Laws 35.

Fee-for-Service. The next consideration, and the first of two conjunctive factors sufficient to qualify an entity as an enterprise, is that the entity must charge a fee in exchange for a government service. Two notable court decisions have applied and explained this factor.

First, in *Nicholl*, the Colorado Supreme Court agreed that the E-470 Public Highway Authority's activities, excluding its power to tax, fit the definition of a "government-owned business." 896 P.2d at 868. The Authority was established as a fee-for-service entity: it charged tolls and vehicle registration fees in return for "access to a public roadway." *Id.* These were activities conducted in the pursuit of "benefit, gain or livelihood" and the Authority therefore fit the definition of a "government-owned business." *Id.*

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[6] *See also In re Ravenna*, 522 B.R. at 672 ("[E]nterprises do not have the power to levy taxes. They are businesses."); *Colo. Bridge Enter.*, 353 P.3d at 903 (explaining that the power of general taxation is inconsistent with the concept of a "government-owned business"); *cf. Campbell*, 972 P.2d at 1040 (noting that an entity with general tax authority is subject to TABOR, while an entity that lacks general tax authority may be exempt from TABOR).

Second, in *Colorado Bridge Enterprise*, the court of appeals applied the fee-for-service factor from *Nicholl*, concluding that an entity that imposed a surcharge on registered vehicles to "finance, repair, reconstruct, and replace any designated bridge" in the State was a government-owned business "because it pursues a benefit and generates revenue by collecting fees from service users." *Colo. Bridge Enter.*, 353 P.3d at 898, 905. This was true even though the surcharge was involuntary and was paid by owners of vehicles that would never travel on designated bridges. *Id.* at 904. In the view of the court of appeals,[7] a fee-for-service arrangement—broadly construed—is nearly synonymous with enterprise status: "An entity that generates revenue by collecting fees from service users is a business." *Id.*; *see also id.* at 905 (holding that an enterprise is an entity that "provid[es] a government service for a fee"). Other court decisions and legal commentary reinforce this understanding of the fee-for-service factor.[8]

Financially Distinct. The final consideration, and the second conjunctive factor, is that an enterprise must be financially distinct from its government owner, and any fees it collects must be dedicated to the enterprise's purposes. In *Colorado Bridge Enterprise*, the court of appeals observed that "[a]lthough the [enterprise] is within [its parent agency], the two have separate financial accounting and reporting systems and maintain separate financial administration." *Id.* at 899. The court explained that "[r]evenue generated from [involuntary bridge surcharge fees] is credited to the [enterprise's] treasury account, and the use of such revenue is restricted to the [enterprise's] statutorily-defined purpose of financing, repairing, reconstructing, and replacing any designated Colorado highway bridge." *Id.*; *see also id.* at 906 (noting that the financially distinct enterprise, and not its parent agency, applied for and controlled federal grants, reinforcing the conclusion that the federal

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[7] The Colorado Supreme Court, over one dissent, declined to grant certiorari to review the court of appeals' opinion. *TABOR Found. v. Aden, No.* 14 SC 766, 2015 Colo. LEXIS 596 (Colo. June 29, 2015).

[8] *See In re Ravenna*, 522 B.R. at 662, 672–73 (noting that a local water activity enterprise charged involuntary fees to provide water infrastructure); *Bd. of Cty. Comm'rs v. Fixed Base Operators, Inc.*, 939 P.2d 464, 468 (Colo. App. 1997) (holding that a non-profit corporation that collected federally authorized "passenger facility charges" to build and operate an airport terminal was a "government-owned and controlled business"); Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1316–18 (2007) (noting that enterprise status hinges on the distinction between fees and taxes and "TABOR thus makes the tax/fee distinction a general question of constitutional law"); Rufien, *supra*, at 103 ("The service-for-fee concept is the foundation for the determination of whether an enterprise operates as a business."); Amy Kennedy & Dee P. Wisor, *Enterprises Under Article X, § 20 of the Colorado Constitution—Part I*, COLO. LAW., Apr. 1998, 55, 57 (noting that *Nicholl*'s broad definition of "government-owned business" suggests "any activity that is conducted by a government and is supported by user fees rather than taxes can be a government-owned business").

grants did not disqualify the entity as an enterprise). Other courts and authorities have similarly held that to qualify as an enterprise, an entity must be financially distinct from its government owner and must not be intended to create a revenue stream to fund general government functions.[9]

B. The courts have rejected the requirement that "government-owned businesses" have private-sector analogues and have declined to limit enterprises' receipt or administration of federal funds.

Since TABOR's enactment, commentators and litigants have suggested that, in addition to the three factors discussed above, two other restrictions apply to the definition of "government-owned business": first, that a "government-owned business" must operate like a private-sector company by earning revenue through competitive market transactions and, second, that an enterprise's receipt and administration of federal funds must be limited. These restrictions, however, have been affirmatively rejected by the courts and the General Assembly.

Private-Sector Analogue. After the Colorado Supreme Court decided *Nicholl*, commentators debated whether an entity must have "a private business analogue" in order to qualify as a TABOR-exempt enterprise. Amy Kennedy & Dee P. Wisor, *Enterprises Under Article X, § 20 of the Colorado Constitution—Part I*, COLO. LAW., Apr. 1998, 55, 57. This concern was particularly acute "with respect to a 'business' that does not have customers who freely choose to use it" and instead "is dependent on involuntary exactions to exist." *Id.* But these commentators also argued that, given the breadth of *Nicholl*'s holding, no "private sector analogue" is in fact required. *Nicholl* instead implied that "any activity that is conducted by a

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[9] *See In re Ravenna*, 522 B.R. at 674 (holding that an enterprise must be "something separate from the district that owns it in order to claim the exemption from TABOR's restrictions"). Formal opinions written by Attorney General Gale Norton likewise have applied the "financially distinct" factor. *E.g.*, Colo. Att'y Gen. Op. No. 95-07 (Dec. 22, 1995). General Norton opined that an entity would qualify as an enterprise "so long as the enterprise is financially distinct from [its parent agency]." *Id.* at 1. She reasoned that this element ensures an enterprise's operations are not funded indirectly by government grants: "This requirement is necessary to eliminate the concern that [a transaction with the enterprise] is merely a subterfuge designed to circumvent ... TABOR." *Id.* at 6; *see also* Colo. Att'y Gen. Op. No. 97-01, at 3 (Mar. 11, 1997) ("The very concept of an enterprise under TABOR envisions an entity that is owned by a government institution, but is financially distinct from it."). Commentators agree with this understanding. *E.g.*, Rufien, *supra*, at 103 ("[A]n enterprise should not increase fees for the sole purpose of creating a situation where a financial contribution to government functions would be possible. As set forth in *Nicholl*, user fees should be designed to pay the costs of the enterprise operations.").

government and is supported by user fees rather than taxes can be a government-owned business." *Id.*

Read closely, *Nicholl* supports this broader understanding of "government-owned business." In *Nicholl*, the plaintiff contended that the E-470 Public Highway Authority could not qualify as a government-owned business because its activities were "essentially governmental in nature." *Nicholl*, 896 P.2d at 868 n.9. The Colorado Supreme Court disagreed, holding that this interpretation is "not supported by the text of [TABOR]." *Id.*[10] Indeed, the Authority itself engaged in activities that were "essentially governmental" and which no private-sector company could engage in: it levied involuntary vehicle registration fees to fund its operations. *Id.* at 863, 868 (noting that the Authority had "the power to ... assess and collect vehicle registration fees" and that it "finance[d] its operations" through those fees). Yet only the power to levy general taxes, and not the power to levy involuntary fees, disqualified the Authority as an enterprise. *Id.* at 868–869. The clear implication was that entities could engage in activities private-sector companies do not engage in, like levying mandatory fees, without being disqualified as an enterprise.

Indeed, even before *Nicholl*, it was widely presumed that no such test was required under TABOR. The General Assembly and local governments often funded enterprises using involuntary fees, beginning immediately after TABOR was enacted. *See* Gregory J. Hobbs, Jr., *Water Activity Enterprises*, COLO. LAW., Dec. 1993, 2555, 2556 (explaining that a water conservancy district, organized under state statute, could, "in the conduct of an enterprise, ... expend water revenues, fees and other user-based charges in the pursuit of a water activity without limitation by TABOR"). The courts implicitly acknowledged that involuntary fees lack a "private-sector analogue" and yet do not disqualify entities from being enterprises. *Cf. Bruce*, 252 P.3d at 35 (rejecting, on single-subject grounds, a local ballot proposal that would have in part "prohibit[ed] [local] enterprises from charging fees to ... residents who do not specifically consent to certain services or who do not have voluntary contracts with the [local] enterprise"); *see Bd. of Cty. Comm'rs v. Fixed Base Operators, Inc.*, 939 P.2d 464, 468 (Colo. App. 1997) (noting that the enterprise at issue collected fees that could "only be 'imposed' by public agencies with the approval of the Federal Aviation Administration"). For years, however, no court "directly rule[d] on whether 'businesses' under [TABOR] must provide services that also are offered in the private sector." Kennedy & Wisor, *supra*, at 58.

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[10] Attorney General Gale Norton interpreted this aspect of *Nicholl* to mean that an entity could be designated as an enterprise despite the "governmental nature" of its activities. Colo. Att'y Gen. Op. No. 95-07, at 5.

Finally, nearly two decades after *Nicholl* was decided, a published court of appeals opinion directly addressed and rejected the "private-sector analogue" test. In *Colorado Bridge Enterprise*, the court concluded that an enterprise need not "gain its revenue from 'market exchanges taking place in a competitive, arms-length manner.'" 353 P.3d at 905 (citation omitted). Enterprises need only "provid[e] a government service for a fee," even if that fee is involuntary and is imposed to provide benefits not just to fee-payers, but also to the general public and even to "visitors to the state." *Id.* at 902, 905.[11]

Colorado Bridge Enterprise thus cemented the accepted understanding of *Nicholl*, making clear that the "private-sector analogue" test is not an element of the definition of "government-owned business." The December 2015 OLLS Memorandum neglected to consider the portions of *Nicholl* and *Colorado Bridge Enterprise* that foreclose the "private-sector analogue" test, leading to the erroneous conclusion that the HPF program cannot be organized as an enterprise. Read in its entirety, however, those cases make clear that the "private-sector analogue" test does not determine whether an entity qualifies as a "government-owned business" and therefore does not determine whether an entity may be classified as an "enterprise" under TABOR.

Administering Federal Funds. Litigants have sometimes argued that entities cannot act as conduits for federal funding while meeting the definition of "government-owned business." This restriction on enterprises also lacks support, however, both as a matter of case law and in light of enterprises that are currently operating in Colorado.

In *Colorado Bridge Enterprise*, the court of appeals directly held that an entity's enterprise status is not endangered if it accepts and disburses federal funds. There,

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[11] In arriving at this holding, the court of appeals considered and rejected one portion of a formal opinion by Attorney General Gale Norton, which opined that an enterprise "must engage in the kind of activity that is commonly carried on for profit outside the government." Colo. Att'y Gen. Op. No. 95-07, at 6; *see also* Colo. Att'y Gen. Op. No. 97-01, at 3. The court noted that the entity in *Nicholl* did not engage in "competitive market exchange[s]" and yet this did not preclude that entity from being designated an "enterprise." *Colo. Bridge Enter.*, 353 P.3d at 905. As a result, the court of appeals "respectfully decline[d] to follow" the portions of the Norton formal opinion requiring enterprises to engage in activities resembling those carried out by for-profit companies. *Id.* The court did not call into question other portions of Attorney General Norton's analysis.

Notably, some previous enterprise statutes appear to have incorporated the notion that enterprises should be akin to private-sector companies. *E.g.*, § 23-5-101.5(1.5)(c), C.R.S. (1997) (requiring education auxiliary enterprises to "[e]ngage[ ] in the type of activities that are commonly carried on for profit outside the public sector"). But the General Assembly's more recent legislation has not attempted to analogize TABOR-exempt enterprises to private-sector companies.

the entity qualified as an "enterprise" even though it "applied for and received $14.4 million from the [Federal Highway Administration] for reimbursement for bridge projects." 353 P.3d at 899. This federal money represented a significant portion of the entity's budget; as the district court found, in a single fiscal year nearly 15 percent of the enterprise's total revenues came from federal funds. *TABOR Found. v. Colo. Bridge Enter.*, No. 12 CV 3113, slip op. at 4–5 (Denver Dist. Ct. July 19, 2013). A second relevant court decision, also from the court of appeals, recognized that an entity may qualify as an enterprise even though it depends entirely on funds that can only be obtained with federal approval. *Fixed Base Operators*, 939 P.2d at 468 (upholding the enterprise status of an entity whose purpose was to collect charges that required federal approval to collect).

The notion that TABOR-exempt enterprises cannot be conduits for federal funds is further contradicted by other enterprises currently operating in Colorado, each of which must be presumed constitutional. *See infra* Section II.A. Some of these existing enterprises were organized in significant part to obtain federal funds and distribute them throughout the State. For example, one of the central duties of the Division of Parks and Wildlife is to "receive and disburse federal moneys to carry out the purposes of a comprehensive statewide outdoor recreation plan." § 33-10-108(1)(d), C.R.S. (2015). Similarly, a central function of the Division of Unemployment Insurance is to obtain and disburse federal funds to workers who lose their jobs. § 8-72-109 (requiring the division to cooperate with the federal government to maintain eligibility for federal funds).

In light of these authorities, the fact that an enterprise accepts, administers, and distributes federal funds is not relevant to its potential enterprise status.

II. Organizing the HPF as an enterprise would not contravene current law.

The question here is whether the HPF satisfies the law governing enterprise status and, in particular, the law defining the term "government-owned business." As discussed above, that question turns on three considerations: a "government-owned business" must (1) lack the power to tax, (2) charge a fee for services, and (3) be financially distinct from its government owner.

Before reaching that analysis, however, this formal opinion must consider the effect of the General Assembly's 2009 legislation establishing the HPF as a fee rather than a tax.

A. Statutes enacted by the General Assembly are presumed constitutional and, absent a clear constitutional infirmity, the Attorney General has the duty to defend an enacted law.

The 2009 legislation designating the HPF as a fee rather than a tax raises two relevant considerations.

First, the Colorado Supreme Court has consistently affirmed the principle that legislative enactments are presumed constitutional, including legislation that implicates TABOR. As the Court noted in *Barber v. Ritter*, there is a "heavy presumption of constitutionality enjoyed by [state] statutes." 196 P.3d at 247. Thus, the General Assembly's 2009 decision to establish the HPF as a fee rather than a tax will be overturned only if proved "unconstitutional beyond a reasonable doubt." *Id.*

Second, this office has a duty to defend a law duly enacted by the People or their representatives, absent clear, binding precedent demonstrating the law to be unconstitutional. Attorney General Gregory F. Zoeller, *Duty to Defend and the Rule of Law*, 90 IND. L.J. 513, 545 (2015) (describing a rare circumstance in which the Colorado Attorney General declined to defend a statute because it clearly violated United States Supreme Court precedent); *see generally id.* at 542–51. This office is currently fulfilling the duty to defend in *TABOR Foundation v. Colorado Department of Health Care Policy and Financing*, No. 2015 CV 32305 (Denver Dist. Ct.), a lawsuit that challenges the General Assembly's 2009 decision to designate the HPF as a fee rather than a tax.[12] At the same time, in issuing formal opinions, this office must use its "independent judgment" in opining on the constitutionality of proposed legislation, considering "constitutional text, history, and doctrine available at the time." Zoeller, *supra*, at 553, 555. Formal opinions "may well take account of how [a] statute is likely to fare in litigation" and whether an opinion could "complicate [the statute's] defense" if the statute is challenged in court. *Id.* at 551, 553. Given the pending *TABOR Foundation* litigation, the analysis in this opinion reflects positions already adopted in defense of the HPF.

[12] The *TABOR Foundation* litigation remains pending. This office, representing the Department of Health Care Policy and Financing and other state defendants, filed a motion to dismiss the case, and that motion was fully briefed in October 2015. The parties await the district court's ruling, which could result in further proceedings, including appeals. This opinion considers the law as it currently exists.

B. Organizing the HPF as an enterprise would not violate the three considerations governing an entity's status as a "government-owned business."

In light of the presumption of constitutionality and this office's duty to defend enacted legislation, this opinion concludes that an HPF enterprise would not contravene the three considerations in current law that determine an entity's status as a "government-owned business."

First, an HPF enterprise would not "levy general taxes" in violation of *Nicholl*. 896 P.3d at 869. The General Assembly has already enacted the HPF as a fee, *see* § 25.5-4-402.3(3)–(6), and future HPF legislation would adopt that structure, *see* H.B. 15-1389, 70th Gen. Assem., 1st Reg. Sess., at 4:18–5:3 (Colo. 2015) (citing *Nicholl* in disclaiming any power on the part of the proposed HPF enterprise to levy taxes). Accordingly, this opinion applies a presumption of constitutionality to the non-tax structure of the HPF, which has already been enacted by the General Assembly.

Second, this office is already committed to defending the General Assembly's decision to classify the HPF as a fee-for-service program. *See TABOR Found.*, No. 2015 CV 32305 (Denver Dist. Ct.). Briefs filed in support of the motion to dismiss in *TABOR Foundation* argue that the HPF pays for "services ... that reduce the amount of uncompensated care [hospitals] are exposed to." *Id.*, Mot. to Dismiss at 16 (Sept. 2, 2015). Given these arguments, this opinion concludes that, consistent with *Colorado Bridge Enterprise*, organizing the HPF as an enterprise would create "[a]n entity that generates revenue by collecting fees from service users." 353 P.3d at 904. *See* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 75–76 (Emily Myers, ed., 2013) (noting that "issues in litigation before a court" are "topics deemed inappropriate" for formal opinions by attorneys general); *see also* Zoeller, *supra*, at 554–55 (noting that attorneys general generally refrain from providing formal opinions regarding the subject of pending litigation).

Finally, the HPF enterprise would be financially distinct from its parent agency, the Department of Health Care Policy and Financing, and the fees collected by the enterprise would be in segregated accounts "restricted to the [enterprise's] statutorily-defined purpose." *See Colo. Bridge Enter.*, 353 P.3d at 899, 906. House Bill 15-1389 structured the proposed enterprise in precisely this way. Colo. H.B. 15-1389, at 12:13–14:12.

CONCLUSION

The term "government-owned business" has, for purposes of TABOR, been broadly interpreted by the courts, and the General Assembly has repeatedly relied on the enterprise exception to enact fiscal policy at the state level without seeking voter

approval. The purpose of this formal opinion, and any other, is not to comment upon the wisdom or desirability of the General Assembly's past or prospective legislation or the courts' decisions; it is only to apply independent judgment to a question of law, in light of current legal authority. Based on these considerations, this formal opinion concludes that organizing the HPF as a TABOR-exempt enterprise would not contravene current law.

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