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Memorandum

TO: Members of the Legislative Audit Committee

FROM: Sally Symanski, CPA
State Auditor

DATE: October 20, 2009

RE: Higher Education TABOR Enterprise Status

Under Section 23-5-101.7, C.R.S, a higher education governing board may designate its respective institution(s) as an enterprise for purposes of Article X, Section 20, of the Colorado Constitution (Taxpayer's Bill of Rights or TABOR). Entities that meet the definition of a TABOR enterprise are exempt from the revenue growth and spending limitations of TABOR. The Office of the State Auditor and the Legislative Audit Committee (Committee) are required to review whether such designations meet the requirements of a TABOR-exempt enterprise. In August 2004, the Legislative Audit Committee reviewed and approved the designation of the University of Colorado as a TABOR enterprise for Fiscal Year 2005. In 2005, the Committee reviewed and approved the designation of ten additional higher education institutions as TABOR enterprises for Fiscal Year 2006. In 2007, the Committee approved Colorado State University's request to combine its separate enterprises for the Fort Collins and Pueblo campuses into one enterprise.

Final determination of enterprise status is made at the end of each fiscal year after final financial information is known. This memo provides the final enterprise status of the institutions for Fiscal Year 2009 and their projected enterprise status for Fiscal Year 2010. Based on our review, three institutions (Adams State College, Fort Lewis College, and Mesa State College) did not qualify as TABOR-exempt enterprises for Fiscal Year 2009. It is projected that one institution (Fort Lewis College) will not qualify as a TABOR enterprise for Fiscal Year 2010. We provide some background information below and our analysis of enterprise status begins on page 4.

Background: Fee-For-Service Contract Purchases and College Opportunity Fund Stipends

The General Assembly passed Senate Bill 04-189 during the 2004 Legislative Session, which changed the process for funding postsecondary education. The Bill established the College Opportunity Fund (COF) as a trust fund to provide financial assistance to eligible undergraduate college students through stipend payments. To obtain the stipend, an eligible undergraduate student must apply for the stipend and be admitted to a state or private participating institution of higher education. Once this is accomplished, an institution requests CollegeAssist to provide the stipend payment to the institution so the funds can be applied against the student's in-state tuition cost. Qualified students receive stipend payments on a credit hour basis for undergraduate instruction up to a life-time limitation of 145 credit hours. If students have already completed their baccalaureate degree under the COF program, they may receive stipend payments for an additional 30 undergraduate credit hours. The stipend payment initially appropriated for Fiscal Year 2009 was $92 per credit hour. Because of shortfalls in state revenues, the Fiscal Year 2009 stipend payment was reduced to $68 per credit hour, which is also the stipend payment for Fiscal Year 2010.

Senate Bill 04-189 also directed the Colorado Commission on Higher Education (Commission) to acquire educational services from state institutions of higher education. On behalf of the Commission, the Department of Higher Education was authorized to enter into fee-for-service contracts with higher education governing boards to purchase such services. The Bill, as amended in subsequent years, authorized the purchase of the following services:

- Educational services in rural areas or communities in which the cost of delivering the educational services is not sustained by the amount received in student tuition.

- Educational services required by the Commission to meet its obligations under reciprocal agreements (i.e., agreements for obtaining waivers of the nonresident differential in tuition rates for Colorado residents attending higher education institutions in other states in exchange for Colorado institutions waiving the nonresident differential in tuition rates for residents of the other states).

- Graduate school services.

- Educational services that may increase economic development opportunities in the State, including courses to assist students in career development and retraining. Beginning with Fiscal Year 2008, the Department of Higher Education decided not to purchase economic development and preservation services, but purchase other services instead.

- Specialized educational services and professional degrees including, but not limited to, the areas of dentistry, medicine, veterinary medicine, nursing, law, forestry, and engineering.

For Fiscal Year 2009, the initial appropriation for the College Opportunity Fund Program (excluding COF stipends for private institutions) was $678.8 million. Because of shortfalls in state revenues, the COF appropriation was subsequently reduced by 21 percent. To make up for revenue shortfalls, the Governor's Office made $150.1 million of federal funds available to the state's higher education institutions for Fiscal Year 2009 (and also for Fiscal Years 2010 and 2011) from the American Recovery and Reinvestment Act of 2009. Final COF Program expenditures for state institutions during Fiscal Year 2009 totaled $534.2 million. Participating private institutions (i.e., University of Denver and Regis University) received an additional $1.1 million of COF stipends. Of the total COF Program expenditures for state institutions, $261.6 million was for COF stipends and $272.6 million was for fee-for-service contracts.

For Fiscal Year 2010, the total amount appropriated to the College Opportunity Fund Program for state institutions is $535.3 million. The appropriation for additional COF stipends for participating private institutions (i.e., University of Denver, Regis University, and Colorado Christian University which qualified for Fiscal Year 2010) is $816 thousand. Of the total COF appropriation for state institutions, $271.5 million is for COF stipends and $263.8 million is for fee-for-service contracts.

The services to be purchased from higher education institutions through fee-for-service contracts and the appropriated amount of COF stipends for Fiscal Year 2010 are shown in the table on the following page.

HIGHER EDUCATION TABOR ENTERPRISES FEE-FOR-SERVICE CONTRACT PURCHASES AND APPROPRIATED COF STIPENDS FISCAL YEAR 2010						
	GRADUATE EDUCATION	**RECIPROCAL AGREEMENTS AND VESTIBULE LABS (Note 1)**	**HIGH-COST SPECIALIZED EDUCATION (Note 2)**	**FEE-FOR-SERVICE TOTALS**	**COLLEGE OPPORTUNITY FUND (COF) STIPENDS**	**TOTAL**
ADAMS STATE COLLEGE	$ 1,731,315	---	$ 7,761,927	$ 9,493,242	$ 2,656,080	$ 12,149,322
COLORADO COMMUNITY COLLEGE SYSTEM	---	$ 2,263,200	$ 20,111,312	$ 22,374,512	$ 95,759,640	$118,134,152
COLORADO SCHOOL OF MINES	$ 2,514,961	---	$ 10,752,304	$ 13,267,265	$ 5,526,360	$ 18,793,625
COLORADO STATE UNIVERSITY SYSTEM	$ 21,736,308	---	$ 50,359,520	$ 72,095,828	$ 41,524,200	$113,620,028
FORT LEWIS COLLEGE	---	$ 1,068,000	$ 2,983,542	$ 4,051,542	$ 4,706,280	$ 8,757,822
MESA STATE COLLEGE	$ 654,748	---	$ 10,218,884	$ 10,873,632	$ 9,014,760	$ 19,888,392
METROPOLITAN STATE COLLEGE OF DENVER	---	---	$ 5,200,568	$ 5,200,568	$ 34,578,000	$ 39,778,568
UNIVERSITY OF COLORADO SYSTEM	$ 49,901,717	---	$ 50,150,385	$100,052,102	$ 59,051,880	$159,103,982
UNIVERSITY OF NORTHERN COLORADO	$ 7,721,383	---	$ 11,700,575	$ 19,421,958	$ 15,754,920	$ 35,176,878
WESTERN STATE COLLEGE OF COLORADO	---	---	$ 6,970,867	$ 6,970,867	$ 2,921,280	$ 9,892,147
TOTAL	$ 84,260,432	$ 3,331,200	$176,209,884	$263,801,516	$ 271,493,400	$535,294,916

Source: Services purchased is based on information provided by the Department of Higher Education. COF stipends are based on Long Bill appropriations.

Note 1: Reciprocal agreements involve the waiver of the nonresident differential in tuition rates for out-of-state students attending Colorado colleges in exchange for the same waiver for Colorado students attending college in other states. Vestibule labs provide instruction and guidance at community colleges for students to obtain skills for degree completion and career development.

Note: 2: This includes engineering programs, medical programs, courses at rural community colleges, and other educational programs that are high cost.

Final Enterprise Status for Fiscal Year 2009 and Projected Status for Fiscal Year 2010

To qualify as an enterprise, the Taxpayer's Bill of Rights (TABOR) requires an entity to be a "government-owned business authorized to issue its own revenue bonds and receiving under 10 percent of its annual revenue in grants from all Colorado state and local governments combined." During our review of TABOR enterprise designations in 2004 and 2005, we found that the State's higher education institutions possess the characteristics of a government-owned business and have the authority to issue revenue bonds. Regarding the limitation on receipt of governmental support from state and local grants, TABOR does not define what is meant by "grants." The General Assembly through enabling legislation (Section 23-5-101.5 (2) (b) (I), C.R.S.) defines a grant to be any direct cash subsidy or other direct contribution of money from the State or any local government which is not required to be repaid.

During Fiscal Year 2009, none of the higher education institutions received any direct cash subsidies or contributions from local governments, and all but one (Metropolitan State College of Denver) received some financial support from the State. The table on page 5 shows the amount of revenue earned and state support received by the higher education enterprises for Fiscal Year 2009. This table shows that seven of the institutions received less than 10 percent of their total revenue from the State and thereby qualified for TABOR enterprise status. However, Adams State College, Fort Lewis College, and Mesa State College exceeded the 10 percent threshold and did not qualify. The amount of capital contributions received from the State caused the institutions to exceed the 10 percent limitation on governmental support. Even though the three institutions as a whole did not qualify for TABOR-exempt status, each institution retained certain auxiliary facilities or activities which qualify as TABOR-exempt enterprises. Such facilities or activities included continuing education and student and faculty services.

HIGHER EDUCATION TABOR ENTERPRISE STATUS
ACTUAL REVENUE AND STATE SUPPORT
FISCAL YEAR 2009

	TOTAL REVENUE	STATE SUPPORT GENERAL FUND APPROPRIATIONS	STATE SUPPORT CAPITAL CONTRIBUTIONS (Note 1)	OTHER STATE SUPPORT	TOTAL STATE SUPPORT	STATE SUPPORT AS A PERCENTAGE OF TOTAL REVENUE (Note 2)
ADAMS STATE COLLEGE	**$ 50,384,735**	**---**	**$ 8,475,890**	**---**	**$ 8,475,890**	**16.8%**
COLORADO COMMUNITY COLLEGE SYSTEM	$ 493,317,681	$ 3,625,022 **(Note 3)**	$ 8,432,144	$ 1,985,806 **(Note 4)**	$ 14,042,972	2.8%
COLORADO SCHOOL OF MINES	$ 158,208,847	---	$ 4,617,529	$ 333,414 **(Note 4)**	$ 4,950,943	3.1%
COLORADO STATE UNIVERSITY SYSTEM	$ 953,109,514	---	$ 31,228,248	$ 5,936,027 **(Note 5)**	$ 37,164,275	3.9%
FORT LEWIS COLLEGE	**$ 70,685,313**	**---**	**$ 9,566,702**	**$ 160,425 (Note 4)**	**$ 9,727,127**	**13.8%**
MESA STATE COLLEGE	**$ 92,007,534**	---	**$ 17,925,215**	**$ 729,999 (Note 4)**	**$ 18,655,214**	**20.3%**
METROPOLITAN STATE COLLEGE OF DENVER	$ 138,779,080	---	---	---	---	0.0%
UNIVERSITY OF COLORADO SYSTEM	$2,226,167,892	---	$ 21,436,488	$31,967,043 **(Note 6)**	$ 53,403,531	2.4%
UNIVERSITY OF NORTHERN COLORADO	$ 160,309,798	---	$ 1,386,840	$ 572,689 **(Note 4)**	$ 1,959,529	1.2%
WESTERN STATE COLLEGE OF COLORADO	$ 37,181,555	---	$ 1,707,872	$ 1,040,766 **(Note 4)**	$ 2,748,638	7.4%

Source: Amounts are from Fiscal Year 2009 unaudited financial statements, with some amounts for annual lease-purchase payments discussed in Notes 4 and 5 added by the Office of the State Auditor.
Note 1: Represents available capital funds used during Fiscal Year 2009 and may not equal capital funds appropriated for any one year.
Note 2: Institutions that receive 10 percent or more in state support do not qualify as a TABOR enterprise.
Note 3: Includes appropriations for Colorado First Customized Job Training and other programs. Distributions made to local school districts and other local entities to support career and technical education programs are not reported as state support.
Note 4: Represents the state support received for capital projects financed by the State of Colorado through annual lease-purchase payments.
Note 5: Consists of $4,750,000 of appropriations for Wildfire Preparedness, Forest Restoration, and the Colorado Water Resource Institute, and $1,186,027 of state support received for capital projects financed by the State of Colorado through annual lease-purchase payments.
Note 6: Consists of a $13,125,600 appropriation for annual lease payments for Fitzsimons Certificates of Participation, $17,997,300 of appropriations primarily for various programs and operations of the Anschutz Medical Campus, and $844,143 of state support received for capital projects financed by the State of Colorado through annual lease-purchase payments.

The table on page 8 shows the estimated amount of revenue to be earned and state support to be received by higher education enterprises for Fiscal Year 2010. Based on current projections, one institution (Fort Lewis College) is projected to exceed the 10 percent threshold for governmental support for Fiscal Year 2010. The amount of capital contributions to be provided by the State is the reason the threshold is projected to be exceeded.

The disqualification of an institution as a TABOR-exempt enterprise has several consequences. An adjustment to the TABOR base for the State is made to ensure comparability between the base and current year nonexempt revenue. The TABOR base is used to calculate the limit on fiscal year spending and the amount required to be refunded or the amount of excess revenue to be retained. Because of the passage of Referendum C in 2005, which allows the State to retain all revenue in excess of TABOR spending limits for Fiscal Years 2006 through 2010, the disqualification of any higher education institution as TABOR enterprises will not affect the amount of revenue that the State is allowed to retain during this time period. However, beginning in Fiscal Year 2011, the State will again be required to refund revenue collected in excess of applicable limits. If a higher education institution does not qualify as a TABOR enterprise and it experiences a more rapid rate of growth in revenue than allowed under TABOR, the institution could contribute disproportionately to any required taxpayer refund, which historically has been paid from General Fund resources.

Other consequences resulting from the loss of TABOR enterprise status include:

- The accounting burden for the institution, as well as other state departments doing business with the institution, is increased because of the need to change the categories of how revenues and expenses are recorded for TABOR purposes.

- The institution's sources of revenue available to pledge for the payment of principal, interest, and reserve requirements on revenue bonds is reduced. In addition to other sources of revenue that may be used, Section 23-5-103 (1), C.R.S., allows a higher education institution designated as a TABOR enterprise to pledge up to 10 percent of its tuition revenues for payment of bond debt and reserve requirements. Without TABOR enterprise status, an institution loses its ability to pledge up to 10 percent of its tuition for such purpose.

During our review of TABOR enterprise status, a question arose about whether lease-purchase payments made from a fund containing comingled federal and state moneys should be considered a state grant (governmental support) to higher education institutions. In the 2008 legislative session, the General Assembly enacted legislation authorizing the State of Colorado to enter into a lease-purchase agreement to finance higher education capital projects. Senate Bill 08-218 directed that some of the federal mineral lease (FML) revenues received by the State be distributed to the Higher Education Federal Mineral Lease Revenue Fund (FML Revenue Fund) and used to pay obligations under the lease-purchase agreement.

Senate Bill 08-233 authorized the issuance and sale of instruments by the lessor (Trustee) to investors. On November 6, 2008, the State Treasurer entered into a lease-purchase agreement under which a Trustee issued $230.8 million of Certificates of Participation. The Certificate proceeds are being used to finance 12 renovation and construction projects at selected higher education institutions. Semi-annual lease payments are paid partially by the State and partially by three institutions for projects they elected to finance through the Certificates. The State's share of the first lease-purchase payment made in May 2009 was $10.0 million. Payments in future years are to be made twice a year in November and May. After Fiscal Year 2009, the State's share of the two payments made each year totals $16.6 million.

During the 2009 legislative session, the General Assembly passed Senate Bill 09-280 which included a transfer of $26.6 million from the Capital Construction Fund to the FML Revenue Fund. This resulted in the FML Revenue Fund having both federal and state moneys available for the State's share of payments under the lease-purchase agreement. When the May 2009 lease-purchase payment was made, the FML Revenue Fund had $3.2 million of federal (FML) moneys and $26.6 million of state (Capital Construction Fund) moneys available for the payment. Subsequent to the May 2009 payment, an additional $14.2 million of FML revenues was deposited in the FML Revenue Fund for Fiscal Year 2009. This resulted in the FML Revenue Fund having a balance of $34.3 million as of June 30, 2009.

As mentioned above, enabling legislation for TABOR defines a grant to be any direct cash subsidy or other direct contribution of money from a state or local government which is not required to be repaid. We sought legal advice from the Office of Legislative Legal Services (OLLS) to determine whether all or part of the State's May 2009 lease-purchase payment (and similar payments to be made in the future) should be counted as a grant from the State to higher education institutions. OLLS advised us that the portion of a lease-purchase payment that consists of federal moneys is not a state grant. This is because state statute defines a grant to exclude any federal funds, regardless of whether such federal funds pass through the State prior to receipt by an enterprise. However, the portion of the payment from state moneys transferred from the Capital Construction Fund constitutes a grant to higher education institutions. OLLS indicated that there are no legal provisions or case law to provide direction on how to calculate the portion of state versus federal moneys in a comingled fund. In the absence of such direction, OLLS indicated that the State Controller should employ a consistent, prorated method to determine the portion of lease-purchase payments that are state moneys and thereby constitute a state grant to higher education institutions.

Upon discussion with the State Controller, the State Controller stated that the Capital Construction Fund appropriation of $26.6 million to the FML Revenue Fund was the full amount of the State's share of lease-purchase payments for May 2009, November 2009, and May 2010. There were no provisions in Senate Bill 09-280 indicating in what manner the $26.6 million appropriation should be spent. Since the amount of the Capital Construction Fund appropriation coincides with the State's share of the May 2009, November 2009, and May 2010 lease-purchase payments, the State Controller indicated it is reasonable to apply the full appropriation to these payments. Under this approach, the lease-purchase payments for those dates consist entirely of state moneys. As such, a prorated portion of each payment represents a state grant to the higher education institutions benefiting from the payments.

We followed the State Controller's methodology for calculating the amount of state support received by higher education institutions from the lease-purchase payments for Fiscal Year 2009 and Fiscal Year 2010. We allocated a portion of the State's lease payments to each institution that was a TABOR enterprise and had capital projects financed by the State. The amount of state support received from the lease-purchase payments for applicable enterprises is reflected in the column titled "Other State Support" on pages 5 and 8 of this memorandum. The amount of state support received is generally small for most institutions and does not adversely affect the TABOR enterprise status of any higher education institution for Fiscal Year 2009 or Fiscal Year 2010.

HIGHER EDUCATION TABOR ENTERPRISE STATUS
ESTIMATED REVENUE AND STATE SUPPORT
FISCAL YEAR 2010

	TOTAL REVENUE	STATE SUPPORT GENERAL FUND APPROPRIATIONS	STATE SUPPORT CAPITAL CONTRIBUTIONS (Note 1)	OTHER STATE SUPPORT	TOTAL STATE SUPPORT	STATE SUPPORT AS A PERCENTAGE OF TOTAL REVENUE (Note 2)
ADAMS STATE COLLEGE	$ 43,856,643	---	$ 395,350	---	$ 395,350	0.9%
COLORADO COMMUNITY COLLEGE SYSTEM	$ 517,983,565	$ 3,625,022 **(Note 3)**	$ 3,796,050	$ 3,100,000 **(Note 4)**	$10,521,072	2.0%
COLORADO SCHOOL OF MINES	$ 156,182,289	---	$ 2,603,345	$ 555,419 **(Note 4)**	$ 3,158,764	2.0%
COLORADO STATE UNIVERSITY SYSTEM	$ 949,114,540	---	$ 26,400,000	$ 8,175,748 **(Note 5)**	$34,575,748	3.6%
FORT LEWIS COLLEGE	**$ 71,810,516**	**---**	**$ 8,107,359**	**$ 267,244** **(Note 4)**	**$ 8,374,603**	**11.7%**
MESA STATE COLLEGE	$ 90,036,063	---	$ 4,509,281	$ 1,216,072 **(Note 4)**	$ 5,725,353	6.4%
METROPOLITAN STATE COLLEGE OF DENVER	$ 146,214,845	---	---	---	---	0.0%
UNIVERSITY OF COLORADO SYSTEM	$2,582,909,240	---	$ 2,467,627	$ 31,686,152 **(Note 6)**	$34,153,779	1.3%
UNIVERSITY OF NORTHERN COLORADO	$ 194,648,461	---	$ 800,000	$ 954,017 **(Note 4)**	$ 1,754,017	0.9%
WESTERN STATE COLLEGE OF COLORADO	$ 37,435,616	---	$ 822,541	$ 1,733,765 **(Note 4)**	$ 2,556,306	6.8%

Source: Information provided by higher education institutions based on estimates for Fiscal Year 2010, with some amounts for annual lease-purchase payments discussed in Notes 4 and 5 added by the Office of the State Auditor.

Note 1: Represents estimated capital funds to be used during Fiscal Year 2010 and may not equal capital funds appropriated for any one year.

Note 2: Institutions that receive 10 percent or more in state support are projected to not qualify as a TABOR enterprise in Fiscal Year 2009.

Note 3: Includes appropriations for Colorado First Customized Job Training and other programs. Distributions made to local school districts and other local entities for career and technical education programs are not reported as state support.

Note 4: Represents the state support received for capital projects financed by the State of Colorado through annual lease-purchase payments.

Note 5: Consists of $6,200,000 of appropriations for Wildfire Preparedness, Forrest Restoration, and the Colorado Water Resource Institute, and $1,975,748 of state support received for capital projects financed by the State of Colorado through lease-purchase payments.

Note 6: Consists of a $13,129,932 appropriation for annual lease payments for Fitzsimons Certificates of Participation, $17,150,000 of appropriations primarily for various programs and operations of the Anschutz Medical Campus, and $1,406,220 of state support received for capital projects financed by the State of Colorado through lease-purchase payments.

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