

# Congress of the United States

Washington, DC 20515

October 16, 2023

The undersigned Members of Congress from the state of Colorado submit the following comment regarding the Internal Revenue Service's proposed guidance in *Notice 2023-56*. We appreciate the opportunity to provide the below input given the potential impact of this guidance on Coloradans due to our state's unique and nuanced tax structure.

TABOR has been part of Colorado's Constitution since 1992. It requires the State to return excess state revenues from sales tax that the State has not been authorized to retain. TABOR refund amounts are determined based on individuals' adjusted gross incomes, which are set to a six-tier calculation. This calculation is updated annually to appropriately reflect the state's population and income. Since the constitutional amendment was enacted, Colorado has issued TABOR refunds in 1997, 1998, 1999, 2000, 2001, 2005, 2015, 2021, and 2022. Colorado is expected to issue an additional refund in 2023.

TABOR payments derive from *excess* state revenue from sales tax payments. Until the recent proposed guidance by the Internal Revenue Service (IRS), TABOR refunds have never been considered federal taxable income, regardless of whether these sales tax refunds are issued through income tax returns, and that process should have no effect on the IRS's decision on how the proposed guidance will impact TABOR refund payments.

Based on the guidance under *Notice 2023-56*, the IRS derives the basis of taxation for State Tax Refunds, as referenced in Section 3.02, determined under *Maines v. Commissioner*, 144 T.C. 123, 132 (2015). The case in question determined the federal tax treatment of various state tax credits.

However, the TABOR refunds paid by Colorado are not a comparable example under *Maines*. More specifically, the Colorado Constitution notes that these payments are specifically "refunds" due to excess sales tax revenue. Compared to the examples explained in the guidance and the basis for the decision set out in *Maines*, there is no clear indication as to why TABOR refunds should be considered includible in an individual's Federal gross income and, therefore, be subject to further taxation.

Furthermore, the Department of the Treasury and the IRS have specifically requested comments on the "*Federal income tax treatment of payments that are characterized under State law as State sales tax refunds in light of the fact that it may not be practicable to determine the amount*

*of State sales tax an individual paid during a particular taxable year.”* We appreciate your understanding and inquiry of the unique structure under the Colorado Constitution, given the fact that the issuance of these refunds is a complicated and nuanced process. However, as noted above, the Colorado Constitution notes that these refunds are due to excess sales tax refunds, *Maines* does not apply to TABOR refunds, and therefore TABOR refunds are not subject to federal income taxation.

The proposed guidance notes that *“State payments that are properly treated as State tax refunds generally are not includible in the recipient’s Federal gross income because, as the return of an overpayment of the recipient’s State tax liability, these refunds are not an accession to wealth.”* This essentially describes the TABOR refund– a repayment of excess tax by the state, which should, therefore, be exempt from further Federal income tax liability– as is consistent with the previous 30 years of precedent.

Based on the examples explained in the guidance and the basis for the decision set out in *Maines*, it is clear that TABOR refunds should not be considered includible in an individual’s Federal gross income and therefore should not be subject to further taxation. In addition, based on *Notice 2023-56*, it would appear that the proposed guidance was only issued following an increase in state payments during the COVID-19 pandemic. TABOR refunds have long existed prior to the pandemic, and Coloradans should not be penalized as a result.

The TABOR Amendment was a constituent-driven initiative approved by Colorado voters. It is our hope that the above comments provide the necessary insight into the unique circumstance in Colorado and the implications *Notice 2023-56* could have on our constituents. We greatly appreciate the opportunity to review and provide our insight on the proposed guidance.

Respectfully,



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Joe Neguse  
Member of Congress



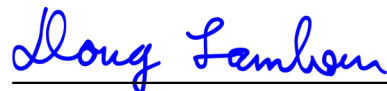
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Michael F. Bennet  
United States Senator



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John Hickenlooper  
United States Senator



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Doug Lamborn  
Member of Congress



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Diana DeGette  
Member of Congress



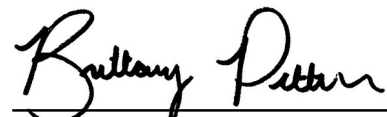
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