NY Medicaid veto replacement effort:

1. Rangel and Congressional Delegation must be involved in the deal and the announcement of it

   The Governor's office should not be lead

2. The veto message and some other public statements have been harsh.

   Whatever NY was doing was done to help poor people

   The wording of the announcement should make it clear that NY was not devious or illegal, and that all of this is for a good cause. There should be a "regret" --apology-- for indications to the contrary

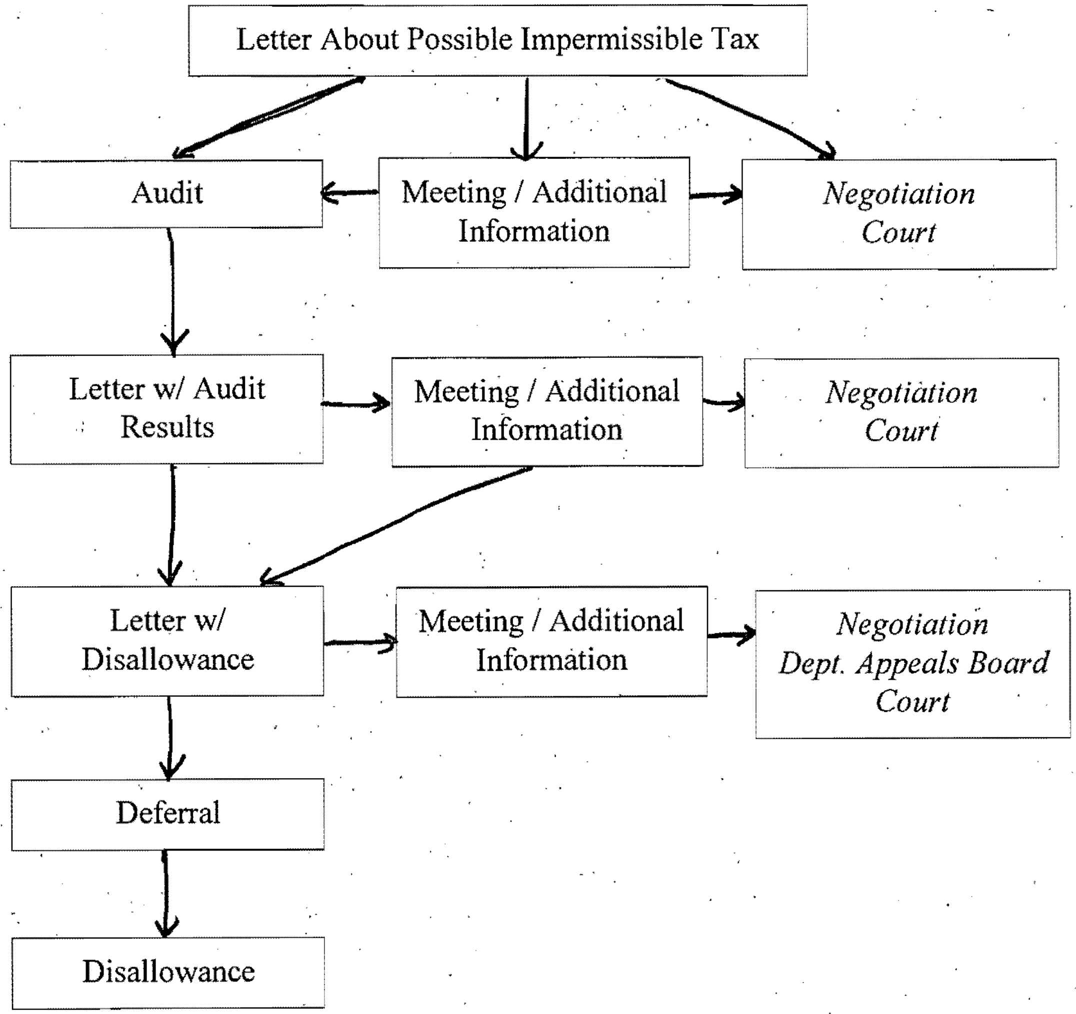
3. Don't hurt NY's program. This is money for hospitals that serve the poor.

   Forgive any past amounts HCFA may think are owed; work for future changes if necessary.

   Federal budget baselines were not counting on this money (that we know of)

To → Chris Jennings (through Hillary)
FR → Office of Rep. Charles Rangel
(Janice Mays)
DT → 9/20/97

Sequence of Events



NEW YORK LINE-ITEM VETO

Q: POLITICIANS IN NEW YORK ARE SAYING THAT YOU HAVE AGREED TO WORK OUT THE PROVIDER TAX ISSUE. HAS THE ADMINISTRATION AGREED TO A COMPROMISE TO HELP THE STATE OF NEW YORK?

A: **I have not changed my position on the line-item veto of the New York provider tax provision.** Some provider taxes have been used in the past to drive up the costs of Medicaid. Many of them are clearly impermissible under law. Others, such as New York's regional tax, might be allowable. During the budget negotiations, we offered a legislative proposal that would have clarified its permissibility. Congressional negotiators rejected this solution so that there was no other choice but to veto the provision.

I have directed the Department of Health and Human Services, OMB and my staff to look into administrative clarifications of provider tax provisions. They expect to get back to the state of New York and other states with similar provider tax issues within the next two weeks.

Q: **What is your response to Moynihan's new bill which would override the President's line-item veto?**

A: We strongly stand behind our decision to use the line item veto authority to eliminate the provision that statutorily legalized all currently utilized provider taxes in New York. We consistently made our position clear on this issue during the budget negotiations. We have indicated our desire to have the Department of Health and Human Services discuss options and to determine if HCFA could clarify administratively that New York's regional tax is permissible. The Department is setting up a process to begin discussions with New York.

Q: **How do you respond to Senator Moynihan's suggestion that the Administration never indicated any problems with this provider tax until the line-item veto?**

That is simply untrue. We communicated both orally and in writing our opposition to statutorily legalizing all of these provider taxes. On July 2, Office of Management and Budget Director Frank Raines wrote a letter that was circulated to every Conferee in which he specifically stated that, "the Senate bill would deem provider taxes as approved for one State. We have serious concerns about these provisions and would like to work with the Conferees to address the underlying problems." We also had numerous discussions with staff on the Finance committee and initially with Senator Moynihan's staff outlining our major concerns. We also offered alternative proposals but were informed by staff that they were not acceptable.

THE WHITE HOUSE

WASHINGTON

September 22, 1997

MEMORANDUM TO THE PRESIDENT

FROM: Jack Lew, Josh Gotbaum, Chris Jennings

SUBJECT: New York Medicaid Provider Tax Issue

In response to schemes in many states to tax health care providers and then rebate funds to obtain additional Federal Medicaid matching, Congress in 1992 passed a limitation on the eligibility for matching of certain state provider taxes. One of the vetoed items in the Balanced Budget Act was a provision that would have legislatively exempted several New York taxes on health care providers from the 1992 law. In BBA negotiations, the Administration offered an alternative to target the particular taxes (i.e., those on regional providers) that should have been exempted, but these were rejected.

At the time of the cancellation, the Administration said that it would seek to use its existing regulatory authority to allow matching of the regional provider taxes. In a letter to Governor Pataki on September 10, you promised that Frank Raines would call and work with the state to resolve these issues. Since then, HHS, OMB, Justice and the White House reviewed the situation, not just for New York but for all states. Within the two weeks, we expect that HHS will be able make an announcement along the following lines:

- A regulatory notice that would modify the test for regional provider taxes. (This would allow NY state to get matching funds for these taxes, which account for almost two-thirds of its 1993 to 1997 claims);

- Other limited changes in the current HHS tests that would make eligible other state provider taxes; and

- Disapproval of waiver requests on other taxes from various states (including some NY taxes). This, in turn, would begin a process under which HHS audits and then possibly negotiates with states to decide both (a) that states will cease levying inappropriate provider taxes, and (b) how much of the arrearages (matching funds already paid on those taxes) the state must repay.

We are developing a plan for announcement of these changes. Within New York, there is intense interest not only from Pataki, but also from the New York delegation (Moynihan and Rangel in particular), Dennis Rivera and the unions and the hospital associations. For other states, the news will be mixed, since many state taxes (including some NY taxes) will continue to be ineligible and those states will have an obligation to repay them. Regardless of whether these actions are announced jointly or separately, a careful roll-out strategy is in order before any public announcement.

LB quite conservative on these

issues (e.g.*) + may lean over backward to work w/ Rep. (* Frow mining Retirement age) w/o protection

Furthermore Jack, Cy + John warned Mervin difficult dilemma Democratic. You should note that B. Rubin.

B. Perry -

Tom Jones - may be consider as co-chair. While Democrat, he is not known politically and is a top Business exec., may be effective at driving process.

The main risk that identified w/ Bruce is that those who know him best feel there is little position he would not oppose if within we find highly - as a new ideas but could resist new or innovative advocating the did not agree measure with.

NEW YORK LINE-ITEM VETO

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I have directed the Department of Health and Human Services, OMB and my staff to look into administrative clarifications of provider tax provisions. They expect to get back to the state of New York and other states with similar provider tax issues within the next two weeks.

well known, spokesperson, credibility
w/ lib, traditional D. groups
but would also likely need
to maintain indep. trusts jobs
B. G. while not currently MCA
expert, would become one soon
great credib. w/ L.Z. groups +
members of Cong. Again,
h., would be trusted working closely
one too certainly value indep.
+ voice.

---

* BR - good candid.

CHAIR.

✓ Ray
✓✓ Benton.
We sent you several names. 2 you checked LB 2
BR. * We discussed them as well as others.
Including three Rep. (H. Baker - R. Klein
we should review it and we are).
Much of our group thought that
AR strong candidate - best candidate.
While she is not politically indep+, counsels
[illegible] NOT clear she can do it.

SENSITIVE ISSUE LB. your thoughts on LB.
received initial favorable views from members of Econ team,
but serious caution/concern from top h.c. people + [illegible]
(JH, JL, CB) + they were concerned

BACKGROUND FOR THE NEW YORK DELEGATION MEETING

Tuesday, September 30, 1997, 9am, House Members' Dining Room

MEDICAID PROVIDER TAXES

Runaway Medicaid cost growth in the late 1980s / early 1990s was in part due to states' use of health care provider taxes. States would use these taxes to "borrow" money from provider, use that money as their state contribution to Medicaid, and return it to the providers through higher Medicaid payments. Both states and hospitals benefited from this arrangement.

HISTORY OF FEDERAL ACTIONS

A 1991 law restricted this practice by imposing 3 criteria on a Medicaid provider tax. It must be: (1) "broad based" (ie., tax all providers); (2) uniform (applied to all providers uniformly); and (3) not in a "hold harmless" arrangement (where the State agrees to repay the provider tax in full).

Final regs were published in August 1993. A letter was sent to a set of states (including NY) in December 1994 outlining concerns about certain of their taxes and requesting additional information. Since that time, little action has occurred.

NEW YORK AND THE CURRENT PLAN

The Balanced Budget Act exempted <u>all</u> of New York's questionable provider taxes from potential Medicaid disallowances. The President vetoed this provision on the grounds that it was overly broad and affected only one state. However, as we indicated at the time, possible administrative and regulatory remedies to some of their concerns would be reviewed.

As a result of this review, there will be three actions affecting New York (amounts shown are the size of the possible disallowance for 1993 to 1997 -- PRELIMINARY NOT PUBLIC):

- Taxes approved ($1.028 billion): Allowed through a correcting amendment to regs.
- Taxes not approved ($545 million): Taxes that violate the broad-based and uniformity rules will be disallowed and subject to audit, possible negotiation and settlement;
- Taxes requiring further information ($2 million).

OTHER STATES' DISALLOWANCES AND GENERAL ROLL-OUT

Because provider taxes affect many more states than NY, we have decided that we will not decide on NY's issues separately. About 15 states (including Missouri and Florida) will also have taxes disapproved, another 10 or so will learn that their taxes are permissible. The plan is:

- Finalize the letters, q.s. and as, and fact sheets the week of September 29
- Send letters to all states on the morning of October 10 (tentative)
- Meet with NY state people in the afternoon of October 10 (tentative)

HHS will conduct a large roll-out strategy, including meetings with the NGA, Governors' representatives' offices, Congressional staff, and other affected parties.

Christopher C. Jennings
09/29/97 07:40:17 PM

Record Type: Record

To: Erskine B. Bowles/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: NY Provider Tax Update

We held a conference call with HCFA today in an attempt to get closure on all our outstanding provider tax policy decisions. Although Nancy Ann is doing all she can to move the Department to forward the information we need to finalize White House/OMB clearance on these policies, she reported that HCFA will be unable to produce the materials we need to start this process until later tonight or tomorrow.

As long as we get the information by noon or so tomorrow, we should be able to expedite final White House review and clearance. If we do not get it, we may ask you to call to shake the information loose.

OMB, NEC, Intergovernmental Affairs and I are planning to request a Monday briefing for you on the status of our final decisions on the provider tax issue. As you know, since so many states use these financing mechanisms, there is a great deal of interest amongst the Governors about what decisions will be made. There is little doubt that some states will be hit less as a result of our expected clarifications on Administration positions on various provider taxes. However, as you well know, few states will acknowledge any positive decisions to any significant degree, particularly if there remains outstanding Federal claims on inappropriate uses of provider taxes. This means that a politically sensitive, communications-savy roll-out will be essential -- thus the necessity for a meeting with you.

As it now stands, (and of course this will not be made pubic until next week) New York is likely to be waived of about two-thirds of its liability. However, since there will remain at least $500 million of provider tax liability, New York being New York probably will not jump up and down with joy.

Tomorrow, Gene, HHS' Assistant Secretary of Legislation (Rich Tarplin), and I will attend New York's Congressional Delegation morning meeting to go over the status of our provider tax review process. Charlie Rangel seemed very appreciative when I told him we were coming. We will give you a report on the discussion after we return.

cj

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REMARKS:

Jeanne & Bonnie
In response to Jeanne's # 4
See attached Congressional Record

IF FAX MACHINE RETRANSMISSION IS NECESSARY PLEASE CALL:

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working to assure that Virginia will not be penalized under this bill. This legislation ensures that Medicaid plans for disproportionate hospitals submitted prior to November 26 will not be affected by this bill. The Virginia General Assembly is due to take under consideration, in January, an amended Medicaid plan submitted to the Health Care Financing Administration [HCFA] on November 18. I am pleased that the administration has confirmed that this legislation will allow my State to proceed with its plans. We must assure that Medicaid funding of indigent care may continue to be provided to those hospitals most heavily burdened by this most pressing public health priority.

Mr. DURENBERGER. The application of this legislation as articulated above by my colleagues from Virginia is correct.

Mr. MOYNIHAN. I wonder if the senior Senator from Minnesota would yield to a question?

Mr. DURENBERGER. I would be glad to yield.

Mr. MOYNIHAN. Mr. President, paragraph (2)(E) of new subsection (w) of section 1903 authorizes the Secretary to grant a waiver from the uniformity requirement of the broad-based provider specific tax provisions if the State establishes that the tax is redistributive in nature and the waiver is not a backdoor way to hold the providers harmless for the tax.

New York has had a system of assessments of hospitals used to reimburse some of the costs of those hospitals that provide charity care. The assessments vary by region but are uniform within each region. These variations are of long standing. The system is still redistributive, and serves a strong public policy goal of spreading the cost of charity care among those able to bear that cost. Can the distinguished Senator confirm that this is the type of case which would probably be covered by the waiver provision?

Mr. DURENBERGER. Yes, in the case you describe, where the tax is redistributive in nature notwithstanding the regional variations, the Secretary might well be expected to grant a waiver from the uniformity requirement.

Mr. MOYNIHAN. I thank the Senator. Mr. President, I yield the floor.

Mr. DURENBERGER. Mr. President, I urge the adoption of the Durenberger-Rudman amendment.

Mr. BENTSEN. Mr. President, we have no request for amendments on this side. We are prepared to move on the pending legislation.

The PRESIDING OFFICER. The question is on agreeing to the amendment of the Senator from Minnesota.

The amendment (No. 1448) was agreed to.

Mr. BENTSEN. Mr. President, I move to reconsider the vote.

Mr. DURENBERGER. I move to lay that motion on the table.

Mr. DOLE addressed the Chair.

The PRESIDING OFFICER. The Republican leader.

The question is on the motion to lay on the table the motion to reconsider.

Mr. DOLE. Mr. President, I suggest the absence of a quorum.

Mr. DURENBERGER. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

The PRESIDING OFFICER. The question is on the motion to lay on the table the motion to reconsider the substitute amendment.

Without question, the motion to lay on the table is agreed to.

The motion to lay on the table was agreed to.

Mr. LIEBERMAN. Mr. President, I am very pleased that the Senators from Texas and Minnesota have greed to include language extending the date for changes in disproportionate share hospitals proposed by Senator Dodd and myself in the Medicaid moratorium legislation. It is my understanding that pursuant to this language those States which submitted State plan amendments to HCFA on or before November 26, 1991 will be able to change the designation of disproportionate share hospitals in their States to include all hospitals which have a Medicaid or low-income utilization percentage at or above the statewide arithmetic mean Medicaid or low-income utilization rate. It is further our understanding that States which have submitted plan amendments on or before November 26, 1991 will be allowed to modify those plans after November 26, 1991 to come into compliance with these criteria.

Mr. DODD. Mr. President, I want to reiterate what my friend from Connecticut has just said. The agreed upon language which we have proposed provides that the September 30, 1991 deadline does not apply to States that had submitted plans on or before November 26, 1991 and/or that submit subsequent modifications to these plans if these plans change the designation for disproportionate share hospitals in their States to include any hospitals which have a utilization percentage for care of low-income or Medicaid patients at or above the statewide arithmetic mean Medicaid or low-income utilization rate.

Is this the understanding of the Senators from Minnesota and Texas?

Mr. DURENBERGER. Yes, that is correct. The language proposed by the Senators from Connecticut would change the effective date of the moratorium on changes in State treatment of disproportionate share hospitals for those States which have submitted plans to HCFA between September 30, 1991 through November 26, 1991 or which have submitted modifications to those plan amendments subsequent to November 26, 1991 which are otherwise approvable under the HCFA [illegible] of October 31, 1991. [illegible] to this [illegible] those States [illegible] be allowed to [illegible] disproportionate share hospitals [illegible] institutions have a utilization percentage for care of low-income or Medicaid patients at or above the statewide arithmetic mean Medicaid or low-income utilization rate. I also understand that the administration has agreed to this language. Is that also the understanding of the distinguished chairman of the Finance Committee?

Mr. BENTSEN. Yes, that is my understanding also.

Mr. McCONNELL. Mr. President, we are coming to the end of a long battle that has taken place mostly behind the scenes, and this is one of those outcomes that reminds me of the saying, "In legislating, there are no victories, only varying degrees of defeat."

This summer, the Health Care Financing Administration proposed new regulations that would essentially prohibit States from using health provider taxes to match Federal dollars under the Medicaid Program.

Needless to say, the response to these regulations has been deafening. Kentucky, and many other States, would be forced to choose between fiscal insolvency and simply closing the doors of the health care system to the poor.

Adding insult to injury, the administration explained the need for these regulations by saying that States were using revenue-raising scams to qualify for Federal matching funds. I can't speak for other States, but I can speak for Kentucky, in assuring the administration that Kentucky is not using any scams to fund its Medicaid Program.

Responding to this health care crisis, the House of Representatives passed H.R. [illegible], a bill introduced by Congressman Waxman, which would provided for a 1-year moratorium on implementation of these extremist regulations. The bill passed the House by an overwhelming margin of [illegible] to [illegible].

Shortly thereafter, I introduced a companion bill to H.R. [illegible] in the Senate. To say, I [illegible] a [illegible] amount of time to resolve a [illegible] complicated issue that involved the budgets and health care systems of 50 States and the Federal Government.

I was pleased that several of my Senate colleagues joined me in this endeavor, and we were well on the way to halting these regulations and allowing some breathing room to work out a more reasonable, acceptable middle ground.

Our efforts toward a moratorium also put pressure on the administration to negotiate with the States on this critical issue, rather than try to dictate the rules of the game unilaterally.

These negotiations, between HCFA and the National Governors Association, have [illegible]

Disallowances

Attached is a list of disallowances in 1994, 1995 and 1996 organized by state, reason for disallowance and dollar amount.

HCFA-DIVISION OF FINANCIAL MGT.

MEDICAID DISALLOWANCES FISCAL YEAR 1994

FILE	DATE	AMOUNT	ISSUE
CA94-001	03/07/94	$7,592,786	THIRD PARTY LIABILITY (TPL) SETTLEMENTS
CA94-002	03/11/94	$83,897	PROVIDER OVERPAYMENTS (O/P)
CT94-001	08/03/94	$25,039,504	EXCESSIVE TAX REVENUE
DC94-001	04/28/94	$510,578	DOCUMENTATION
GA94-001	01/10/94	$3,416,193	TIMELY CLAIMS FILING
LA93-001	02/04/94	$13,605,926	NURSING FACILITY (NF) REIMB.-SPECTRUM REVIEW
MO93-001	03/04/94	$1,173,525	REIMB. UNDER STATE PLAN;O/P
MT94-001	11/22/93	$6,854	LESS THAN EFFECTIVE (LTE) DRUGS
NJ93-002	11/09/93	$399,480	SKILLED PROFESSIONAL MEDICAL PERSONNEL (SPMP)-MEDICAL SO
NJ94-001	03/30/94	$591,690	O/P
NY93-013	10/27/93	$309,460	MMIS INDIRECT COSTS
NY93-014	10/27/93	$899,104	MMIS WELFARE MGT. SYSTEM(WMS)/NYC
NY93-015	10/27/93	$73,134	NONAPPROVED ADP SYS.-CLIENT NOTIFICATION SYSTEM(CNS)
NY93-017	11/10/93	$22,040,060	INELIGIBLE RECIPIENTS
NY93-016	02/24/94	$14,227,618	ICF/MR DECERTIFICATION
NY93-018	03/03/94	$351,577	MMIS INDIRECT COSTS
NY93-019	03/04/94	$938,261	MMIS Welfare Management System (WMS)/NYC
NY93-020	03/04/94	$162,507	NONAPPROVED ADP SYS.-CNS
NY94-003	05/20/94	$354,812	MMIS INDIRECT COSTS
NY94-004	05/25/94	$933,857	MMIS WMS/NYC
NY94-005	05/25/94	$121,195	NONAPPROVED ADP SYS.-CNS
NY94-007	08/26/94	$282,598	MMIS INDIRECT COSTS
NY94-008	09/23/94	$1,143,194	MMIS WMS/NYC
NY94-009	09/23/94	$184,742	NONAPPROVED ADP SYS.-CNS
PA93-001	10/28/93	$99,719,160	STATE PLAN EFFECTIVE DATE-PUBLIC NOTICE
PA94-001	09/07/94	$2,062,500	CONTRACT;PRIOR APPROVAL
PA94-002	08/18/94	$43,553,633	EXCEEDED DSH PAYM.LIM.
UT94-001	12/20/93	$20,166	MMIS DIRECT COST
# OF CASES	28	$239,798,011	

ED DAVIES 10/11/90

MEDICAID DISALLOWANCES FISCAL YEAR 1995

FILE	DATE	AMOUNT	ISSUE
AZ95-005	09/25/95	$116,071,308	UNDOCUMENTED ALIENS;EMERGENCY SVCS@WRONG RATE
CA94-003	11/18/94	$178,568	MMIS PROVIDER RELATIONS
CA95-001	03/01/95	$315,233,627	MEDI-CAL ADMINISTRATIVE CLAIMING(MAC)
CA95-003	05/09/95	$63,509,734	MAC CLAIMS
CA95-004	07/11/95	$134,761,217	PRENATAL SERVICES FOR UNDOCUMENTED ALIENS
CA95-006	09/21/95	$706,850	MMIS-PROV.REL.GROUP
CT95-001	08/31/95	$2,432,611	STATE PLAN EFFECTIVE DATE-DSH
DC95-001	01/25/95	$907,552	REIMBURSEMENT;ICF/MRS
GA95-001	10/06/94	$109,583	MMIS COSTS
KY95-001	01/11/95	$4,528,066	EXCESSIVE TAX REVENUE
MO94-001	11/08/94	$3,526,227	TIMELY CLAIMS FILING;REIMB.SETTLEMENT
NJ94-002	03/21/95	$1,004,872	IMD TRANSFERRED TO ACUTE CARE 21-64
NJ95-002	03/21/95	$464,631	O/P
NY94-006	10/25/94	$20,687,621	IMD FOLLOWUP AUDIT
NY94-010	11/15/94	$322,915	MMIS INDIRECT COST
NY94-011	12/07/94	$846,258	MMIS-WMS/NYC
NY94-012	12/07/94	$163,096	NONAPPROVED ADP-CNS
NY94-014	02/23/95	$275,426	MMIS INDIRECT COST
NY94-015	02/24/95	$1,295,515	MMIS-WMS/NYC
NY95-002	06/15/95	$290,973	MMIS INDIRECT COST
NY95-003	06/15/95	$750,363	MMIS-WMS/NYC
NY94-002	07/03/95	$8,629,646	IMD;ACUTE CARE 21-64
NY95-005	08/02/95	$265,633	MMIS INDIRECT COST
NY95-006	08/02/95	$1,471,347	MMIS-WMS/NYC
NY95-001	08/08/95	$6,854,498	INTEREST COST;OMH
NY95-007	08/25/95	$1,261,556	IMD;QMBS
OH94-001	11/08/94	$154,579	ESRD DUPL.PAYM.
PA94-004	12/28/94	$6,757,991	DRUG UPPER LIMIT

ED DAVIES 10/11/90

SC95-001	08/23/95	$14,216,000	DSH;ST.PLAN
TN95-001	09/29/95	$4,323,358	MMIS-ACCENT;EXC.90%LIMIT
WA95-001	06/09/95	$75,395	TPL SETTLEMENTS
WV94-001	11/22/94	$1,381,638	REIM.-CAPITAL COSTS
		$713,458,654	

OF CASES 32

HCFA-DIVISION OF FINANCIAL MGT.

MEDICAID DISALLOWANCES FISCAL YEAR 1996

AS OF AUGUST 20, 1996

FILE	DATE	AMOUNT	ISSUE
AZ96-002	04/05/96	$13,065,209	ILLEGAL ALIENS
AZ96-003	04/09/96	$6,005,318	ILLEGAL ALIENS
AZ96-005	07/08/96	$5,818,016	ILLEGAL ALIENS
CA95-008	10/10/95	$17,391,107	MAC CLAIMS
CA95-009	11/03/95	$76,464,541	MAC CLAIMS
CA96-001	01/18/96	$414,229,624	MAC CLAIMS
CA96-004	04/03/96	$17,127,134	MAC CLAIMS
CA96-006	07/15/96	$121,125	MAC CLAIMS
LA95-001	01/29/96	$407,483	INTEREST EARNED
MO96-001	02/23/96	$257,126	O/P
NJ96-001	04/15/96	$5,788,451	EXCEEDED DSH ALLOTMENT-FY 93
NJ96-002	05/15/96	$12,048,936	EXC.DSH ALLOT-FY 95
NJ96-003	07/12/96	$18,969,854	ST.PL.EFF.DATE:DSH ALLOT.
NJ96-004	07/12/96	$52,693,012	ST.PL.EFF.DATE:DSH ALLOT.
NY95-004	02/28/96	$998,589	MMIS POSTAGE+PRINTING COST
NY95-009	10/10/95	$291,981	IMD-ACUTE CARE TRANSF.22-64
NY95-010	11/28/95	$251,068	MMIS INDIRECT COST
NY95-011	11/28/95	$713,625	WMS/NYC
NY96-002	03/11/96	$200,370	MMIS INDIRECT COST
NY96-003	03/11/96	$1,260,298	WMS/NYC
NY96-009	05/16/96	$3,958,168	VIOLATION STATE LAW
NY96-007	05/21/96	$347,415	MMIS INDIRECT COST
NY96-008	05/21/96	$812,486	WMS/NYC
OH95-001	10/16/95	$494,113	TIMELY CLAIMS-LTE
OK95-001	10/26/95	$7,165,817	REIM;ST.PL.;UPPER LIM.
# OF CASES	25	$656,880,866	

ED DAVIES 10/11/90

Christopher C. Jennings
09/29/97 07:40:17 PM

Record Type: Record

To: Erskine B. Bowles/WHO/EOP

cc: See the distribution list at the bottom of this message
Subject: NY Provider Tax Update

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OMB, NEC, Intergovernmental Affairs and I are planning to request a Monday briefing for you on the status of our final decisions on the provider tax issue. As you know, since so many states use these financing mechanisms, there is a great deal of interest amongst the Governors about what decisions will be made. There is little doubt that some states will be hit less as a result of our expected clarifications on Administration positions on various provider taxes. However, as you well know, few states will acknowledge any positive decisions to any significant degree, particularly if there remains outstanding Federal claims on inappropriate uses of provider taxes. This means that a politically sensitive, communications-savy roll-out will be essential -- thus the necessity for a meeting with you.

As it now stands, (and of course this will not be made pubic until next week) New York is likely to be waived of about two-thirds of its liability. However, since there will remain at least $500 million of provider tax liability, New York being New York probably will not jump up and down with joy.

Tomorrow, Gene, HHS' Assistant Secretary of Legislation (Rich Tarplin), and I will attend New York's Congressional Delegation morning meeting to go over the status of our provider tax review process. Charlie Rangel seemed very appreciative when I told him we were coming. We will give you a report on the discussion after we return.

cj

Message Copied To:

NEW YORK LINE-ITEM VETO

Q: POLITICIANS IN NEW YORK ARE SAYING THAT YOU HAVE AGREED TO WORK OUT THE PROVIDER TAX ISSUE. HAS THE ADMINISTRATION AGREED TO A COMPROMISE TO HELP THE STATE OF NEW YORK?

A: **I have not changed my position on the line-item veto of the New York provider tax provision.** Some provider taxes have been used in the past to drive up the costs of Medicaid. Many of them are clearly impermissible under law. Others, such as New York's regional tax, might be allowable. During the budget negotiations, we offered a legislative proposal that would have clarified its permissibility. Congressional negotiators rejected this solution so that there was no other choice but to veto the provision.

I have directed the Department of Health and Human Services, OMB and my staff to look into administrative clarifications of provider tax provisions. They expect to get back to the state of New York and other states with similar provider tax issues within the next two weeks.

THE WHITE HOUSE

WASHINGTON

September 22, 1997

MEMORANDUM TO THE PRESIDENT

FROM: Jack Lew, Josh Gotbaum, Chris Jennings

SUBJECT: New York Medicaid Provider Tax Issue

In response to schemes in many states to tax health care providers and then rebate funds to obtain additional Federal Medicaid matching, Congress in 1992 passed a limitation on the eligibility for matching of certain state provider taxes. One of the vetoed items in the Balanced Budget Act was a provision that would have legislatively exempted several New York taxes on health care providers from the 1992 law. In BBA negotiations, the Administration offered an alternative to target the particular taxes (i.e., those on regional providers) that should have been exempted, but these were rejected.

At the time of the cancellation, the Administration said that it would seek to use its existing regulatory authority to allow matching of the regional provider taxes. In a letter to Governor Pataki on September 10, you promised that Frank Raines would call and work with the state to resolve these issues. Since then, HHS, OMB, Justice and the White House reviewed the situation, not just for New York but for all states. Within the two weeks, we expect that HHS will be able make an announcement along the following lines:

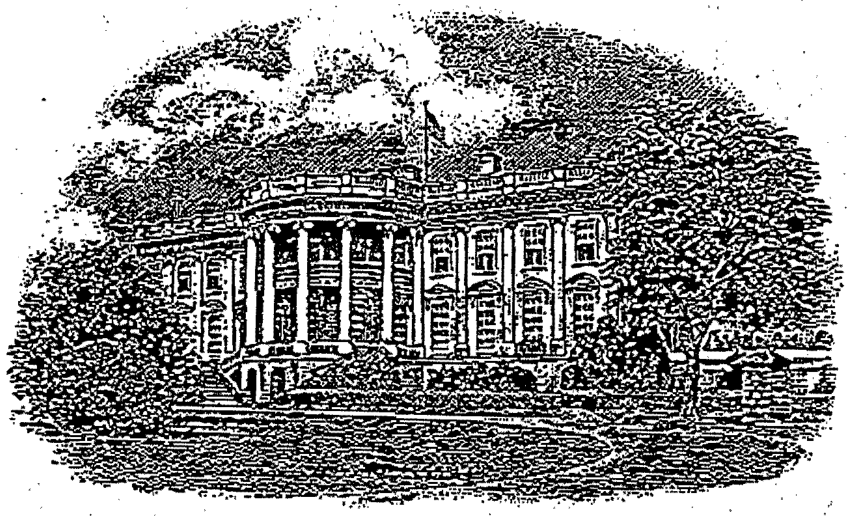
- A regulatory notice that would modify the test for regional provider taxes. (This would allow NY state to get matching funds for these taxes, which account for almost two-thirds of its 1993 to 1997 claims);

- Other limited changes in the current HHS tests that would make eligible other state provider taxes; and

- Disapproval of waiver requests on other taxes from various states (including some NY taxes). This, in turn, would begin a process under which HHS audits and then possibly negotiates with states to decide both (a) that states will cease levying inappropriate provider taxes, and (b) how much of the arrearages (matching funds already paid on those taxes) the state must repay.

We are developing a plan for announcement of these changes. Within New York, there is intense interest not only from Pataki, but also from the New York delegation (Moynihan and Rangel in particular), Dennis Rivera and the unions and the hospital associations. For other states, the news will be mixed, since many state taxes (including some NY taxes) will continue to be ineligible and those states will have an obligation to repay them. Regardless of whether these actions are announced jointly or separately, a careful roll-out strategy is in order before any public announcement.

EXECUTIVE OFFICE OF THE PRESIDENT



Office of Management and Budget

FAX TRANSMITTAL COVER SHEET

Number of pages (including cover sheet) 2

Date: 9-22-

To: Jeanne Lambreau
Bonnie Washington

x6 7431
Fax No. X 53910 Voice No.

Comments:

From: Lori Althoff

Fax No. (202) 395-3174 Voice No. (202) 395-3060

New York Medicaid Provider Tax Issue

In response to some ~~schemes in many~~ states ~~to tax~~ use of health care provider taxes ~~and then rebate funds~~ use to obtain additional Federal Medicaid matching, ~~Congress in~~ a 1992 law passed a limitation on the ~~eligibi~~lity of certain state provider taxes. One of the vetoed items in the Balanced Budget Act was a provision that would have legislatively exempted several New York taxes on health care providers from the 1992 law. In BBA negotiations, the Administration offered several alternatives to target those particular taxes that ~~should have~~ could be exempted, but these were ~~rebuffed~~ rejected.

At the time of the cancellation, the Administration said that it would ~~use its~~ see whether we could existing regulatory authority to allow matching of some of the NY taxes (i.e., those on regional providers). In a letter to Governor Pataki on September 10, you promised that ~~Frank Raines would call~~ and work with the state to resolve these issues.

Since then, HHS, OMB, Justice and the White House reviewed the situation, not just for New York but for all states. Within the next two weeks, HHS hopes to announce:

- A regulatory notice that would modify the test for regional provider taxes. (This would allow NY state to get matching funds for these taxes, which account for more almost two-thirds of its total claim.)
- Other changes in the current HHS tests that would make eligible other state provider taxes.
- Disapproval of waiver requests on other taxes from various states (including some smaller NY taxes). This, in turn, would begin a process under which HHS audits and then negotiates with states to decide both (a) that states will cease levying inappropriate provider taxes, and (b) how much of the arrearages (matching funds already paid on those taxes) the state must repay.

We are also developing a plan for announcement of these changes, both to NY and other states. The news will also be negative for ~~mixed, sin~~ce many state taxes (including some NY taxes) will continue to be ineligible and those states will have an obligation to repay them. Within New York, there is intense interest, not only from Pataki, but also from the New York delegation (Moynihan and Rangel in particular) and others such as Dennis Rivera and the unions and the hospital associations. A careful roll-out strategy is in order.

This must be done carefully since

5-7224

Elizabeth R. Newman
08/13/97 10:48:07 AM

Record Type: Record

To: Christopher C. Jennings/OPD/EOP
cc:
Subject: 1997-8-11 line item veto remarks

--------------------- Forwarded by Elizabeth R. Newman/WHO/EOP on 08/13/97 10:48 AM ---------------------------

SUNTUM_M @ A1
08/11/97 01:17:00 PM

Record Type: Record

To: See the distribution list at the bottom of this message
cc:
Subject: 1997-8-11 line item veto remarks

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 11, 1997

REMARKS BY THE PRESIDENT
ON THE LINE ITEM VETO

The Oval Office

12:30 P.M. EDT

THE PRESIDENT: Last week we took historic action to put America's economic house in order when I signed into law the first balanced budget in a generation, one that honors our values, invests in our people, prepares our nation for the 21st century.

It includes the largest increase in college aid since the G.I. Bill, largest increase in children's health since the creation of Medicaid over 30 years ago, tax cuts that are the equivalent of a $1,000 raise in take-home pay for the average family with two children -- and much more that is good for America.

The new balanced budget law also offers the first opportunity to use a powerful new tool to protect taxpayers -- the line item veto; a tool designed to fight against waste and unjustifiable expenditures, to ensure government works for the public interests, not the private interests.

In the past, good legislation could be cluttered up with unjustifiable or wasteful spending or tax provisions, leaving the President no choice but to sign or veto the overall legislation. With the line item veto, the President can sign an overall bill into law that cancelled a particular spending project or a particular tax break that benefits only a handful of individuals or companies.

Forty-three governors throughout our nation already have the line item veto power. Last year I signed the federal line item veto into law. Last month the United States Supreme Court, on procedural grounds, rejected a challenge to this authority. Today, for the first time in the history of our country, the President will use the line item veto to protect taxpayers and to ensure that national interests prevail over narrow interests.

In reaching agreement with Congress on how to balance the budget, we worked very hard to be fair to all Americans and to avoid wasting our citizens' tax dollars. For the same reason, I've asked the members of my administration to work carefully over the final legislation to identify any specific spending or tax provisions that I should consider cancelling. Here's what I told the budget team.

First, any provision I cancel must be one that was not included -- and let me emphasize -- not included -- as a part of the balanced budget agreement process with Congress. Our agreement was entered into in good faith, and I will keep it. Second, any provision I cancel must be one that benefits just a few individuals, corporations or states at the expense of the general interest. Finally, any provision I cancel must be one that is inconsistent with good public policy. Just because something benefits a small number of people doesn't necessarily mean that it hurts the public interest or the American people at large.

After careful scrutiny and numerous meetings with my staff and Cabinet members, we have found three provisions that meet those criteria. In a few moments I will use the power of the line item veto to cancel a provision that would allow financial service companies to shelter income in foreign tax havens to avoid all U.S. taxation.

I will also cancel a provision that singles out New York by allowing it to tap into the federal Treasury to reduce its state expenditures through the use of health provider tax to match federal Medicaid dollars that are impermissible in every other state in the country and actually in existence now in several other states. No other state in the nation would be given this provision, and it is unfair to the rest of our nation's taxpayers to ask them to subsidize it.

Finally, I will cancel a provision that, though well-intended, is poorly designed. This provision would have allowed a very limited number of agribusinesses to avoid paying capital gains taxes possibly forever on the sales of certain assets to farmers' cooperatives. And it could have benefited not only traditional farm co-ops, but giant organizations which do not need and should not trigger the law's benefits.

Because I strongly support family farmers, farm cooperatives, and the acquisition of production facilities by co-ops, this was a very difficult decision for me. And I intend to work with Congressman Stenholm and Hulshof and Senators Daschle, Dorgan, and Conrad and other interested members of the Congress to redesign this effort so that it is better targeted and not susceptible to abuse.

The actions I take today will save the American people hundreds of millions of dollars over the next 10 years, and send a signal that the Washington rules have changed for good -- and for the good of the American people. From now on, Presidents will be able to say no to wasteful spending or tax loopholes, even as they say yes to vital legislation. Special interests will not be able to play the old game of slipping a provision into a massive bill in the hope that no one will notice.

For the first time, the President is exercising the power to prevent that from happening. The first balanced budget in a generation is now also the first budget in American history to be strengthened by the line item veto. And that will strengthen our country.

And now I want to go and sign these provisions.

(The President signs the provisions.)

Q Mr. President, is that the only pork you can find in that budget?

THE PRESIDENT: I think that my staff is going to brief you about it, but let me say that they have -- the relevant Cabinet and staff members have gone over this quite extensively. Keep in mind, the primary use of the line item veto overwhelmingly was meant to be in the appropriations process, which is not even started yet. I don't have the first appropriations bill.

There are only a few spending items in this balanced budget that are part of the so-called entitlements process, so that, for example, you had the New York Medicaid provision there on provider taxes. With regard to the taxes, there were 79 items certified to me, but that was only because of their size -- that is, the number of people affected by it. Of those 79, 30 or more were actually recommendations by the Treasury Department to fix flaws in the present laws or to ease the transitions in the tax laws. And another dozen or more were put in by Congress by agreement with the Treasury Department to fix procedural problems in the law. Then there were a number of others that I agreed were good policy.

So these are the ones that I think -- and then there were several others that I might have line-item-vetoed, but they were plainly part of the understandings reached with Congress as a part of the budget process. So these seemed to me to be the ones, after being briefed by my staff, that both involved significant amounts of money and met the three criteria that I mentioned. And I believe it was the appropriate thing to do.

Q May I ask another way, sir, the last question another way? Were these the most glaring examples of why you were given this power and, therefore, they might hold up better in a court challenge?

THE PRESIDENT: Well, I wouldn't say that. I expect the most glaring examples to come up in the appropriations process, at least if the past is any prologue. Now, it may be that the use of the line item veto here will mean that it won't have to be used as much in the appropriations process, and that would please me greatly. But I think it's important that the American people understand that when the line item veto was given to the President, the primary assumption was that it would take out special projects that were typically funded in big bills, and those are those big appropriations bills, none of which have come to me yet.

But I do believe that this should withstand court challenge because the process by which the matters were reviewed at least was a very careful, exhaustive process, and I received input from people all over the country that had interests in it -- through of my Cabinet and staff members. But we worked very hard on this.

And -- well, since I told you, after my press conference on Thursday that I would be meeting with my staff and I had meetings and conversations each day since then before finally making these decisions.

Claire.

Q Mr. President, it sounds as though, given the deliberations among your staff and the talk about the court challenge and the difficulty finding items in this particular tax and spending legislation, that you decided to act now largely for symbolic reasons instead of --

THE PRESIDENT: No, I wouldn't say that. I think these three things are appropriate. But I just want to point out that I think that when the Congress certified, for example, 79 tax items to me, people said, well, maybe you ought to veto 76 of them. And I think it's important to recognize that there really never were 79 candidates for a line item veto there. The Congress is required -- the Joint Tax Committee is required by law to certify to the President all the tax items that benefit fewer than 100 people, and there were -- the vast majority of those were either put in by the Treasury Department or by the congressional committees with the support of the Treasury Department to actually clean up procedural problems in the law. So that the numbers were smaller.

Then there were a number of things that, as I said, I might well have line-item-vetoed, but they were part of the overall budget process and that did a lot of good for the American people, and I have to honor the agreements that were made and the process of it.

So these things I hope will be both real and symbolic in the sense that I'm hopeful that this will work out pretty much the way it did when I was governor. That is, when you know the President is prepared to use the line item veto, that tends to operate as a deterrent against the most egregious kinds of projects that would otherwise not be funded. So it would suit me if, after a while, the use of the veto became quite rare because there was a disciplined agreement not to have projects that ought not be funded in the first place.

Q Sir, can you tell me where in the Constitution the President is given this kind of power that hasn't been exerted until now?

THE PRESIDENT: Well, the power is given by legislation. The real question is, does the Constitution permit or forbid the Congress to give the President this kind of power. I believe that since -- if you look at the fact that 43 states have this power for the governor, and it has been upheld in state after state after state, the provisions of most state Constitutions are similar to the provisions of the federal Constitution in the general allocation of executive authority and legislative authority.

So I think it is an implicit thing. As long as the legislature has the right to override the executive, then for the legislature to allow the executive to make reasoned judgments about particular items in these omnibus bills, I do not believe is an unconstitutional delegation of the legislature's authority to the President.

So, keep in mind, they can override this. If they decide that they think I'm wrong, and two-thirds of them agree, they can override this.

Q Do you welcome a challenge?

Q Mr. President, Senator McCain sent you a note last week saying you ought to consider putting off a line item veto until you get the appropriations bills, on the grounds that it might be a blow to the spirit of cooperation that produced the tax cut and the balanced budget bills in the first place. Did you give that any consideration?

THE PRESIDENT: Absolutely. And when Senator McCain came to seem me about the campaign finance issue and our common support for his legislation, we talked about it a little bit. As I've already said to you, that one of the reasons that we have decided on a relatively small number is I didn't want to touch anything that I thought where there was even a question that it might have been part of the negotiating process and a cooperative spirit with Congress.

If you look at these three things, they present three entirely different problems, but I think all three are outside the scope of the budget negotiating process and all three are the kinds of things that the line item veto was meant for. The first, the avoidance of federal taxation in an inappropriate way. The second, giving a break to one state in a way that would immediately disadvantage several others and potentially disadvantage all the other states. And the third, as I said, I believe a very worthy goal, having incentives for farmers' co-ops to integrate with production facilities in a way that is over-broad and could lead to the total avoidance of taxation under circumstances which are inappropriate, which would require a more discipline fix. I think those are the kinds of things that the line item veto was meant to deal with in these contexts.

Now, when you get to the appropriations process it will be somewhat more straightforward -- should this project be built or not; should this road be built or not; should this money be given to this agency or not for this program. And I think that those are the things where typically it's in use at the state level. But in the context of taxes and the entitlements, I thought each of these three things presented a representative case where the veto was intended to be used.

Q Are you running out of travel money, sir? (Laughter.)

THE PRESIDENT: I hope not, I'm trying to go on holiday. (Laughter.)

END 12:45 P.M. EDT

Message Sent To: ______________________________

Julie E. Mason
April Mellody
Darby E. Stott
Julia R. Green
Lorraine L. Wytkind
Laura D. Schwartz
Lori E. Abrams
Lori Anderson
Brenda M. Anders
Eli G. Attie
Robin J. Bachman
Kris M Balderston
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Lanny A. Breuer
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Richard Socarides
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CAPLAN_P @ A1@CD@LNGTWY
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LIZIK_C @ A1@CD@LNGTWY
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RILEY_R @ A1@CD@LNGTWY
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newsdesk @ usnewswire.com@INET@LNGTWY
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MEMORANDUM

TO: **Gene**

FR: **Chris J.**

RE: **Medicaid Veto Talking Points**

As per your request is a set of talking points on the potential Medicaid line-item-veto provisions. I hear OMB is attempting some too, but I assume that you will find these a little more to your liking for the principals.

I have done it two ways: (1) A one-pager with both issues outlined and (2) a two pager, with larger print, that allocates a page to each issue.

Call with questions. Hope you find helpful.

LINE-ITEM VETO PROVISIONS FOR SPENDERS

Higher Medicaid Matching Rate for Alaska

- The final balanced budget presented to the President raised Alaska's Federal Medicaid matching rate (FMAP) from 50 percent to 59.8 percent for fiscal years 1998, 1999 and 2000. According to CBO, this costs about $200 million over 5 years.

- This provision was designed to address a perceived inequity. Alaska has a higher cost of living which the matching formula does not address.

- We are sympathetic to the need to fix the Medicaid matching rate. The formula, based only on per capita income, penalizes higher cost states like Alaska, Hawaii, and New York. It also does not take into account factors like a state's number of poor people or ability to afford Medicaid, which matters to states like Georgia and Texas. In fact, since 1994, the President has supported reexamining this formula and included a commission to do so in his last two budgets.

- However, fixing the matching rate on a state-by-state basis is unfair to other states that also perceive themselves disadvantaged by the current formula. It would also set a precedent for these states to ask for similarly favorable treatment, which would lead to significantly higher Federal costs.

— Other mechanisms, like a Federal waiver, can be used to enable Alaska to access of additional Federal dollars without setting precedence nationwide

—

THE WHITE HOUSE

Office of the Press Secretary

For Immediate Release August 11, 1997

TEXT OF A LETTER FROM
THE PRESIDENT TO THE SPEAKER OF
THE HOUSE OF REPRESENTATIVES AND
THE PRESIDENT OF THE SENATE

August 11, 1997

Dear Mr. Speaker: (Dear Mr. President:)

In accordance with the Line Item Veto Act, I hereby cancel two limited tax benefits, as specified in the attached reports, contained in the "Taxpayer Relief Act of 1997" (Public Law 105-34; H.R. 2014). I have determined that each of these cancellations will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest. This letter, together with its attachments, constitutes a special message under section 1022 of the Congressional Budget and Impoundment Control Act of 1974, as amended.

Sincerely,

WILLIAM J. CLINTON

# # #

CANCELLATION OF LIMITED TAX BENEFIT
Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Taxpayer Relief Act of 1997" (H.R. 2014)

1(A). Limited Tax Benefit: Section 1175. This item is identified as a limited tax benefit at Section 1701(54) of the bill. Section 1175, "Exemption for Active Financing Income", is canceled in its entirety.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: Prior to 1987, income earned in connection with the active conduct of foreign financial services businesses, including interest, dividends and certain gains, generally was exempt from current U.S. tax. However, the Tax Reform Act of 1986 eliminated or curtailed this benefit based on serious concerns regarding the mobility of such income and the ease with which financial services entities could shift income to tax-haven jurisdictions. See P.L. 99-514, section 1221(a)(1). The canceled item would have enacted a new exemption for such income for a single year (1998), and would not have addressed adequately the concerns that led to the repeal of the prior exemption in 1986. The one-year restoration of an exemption for this income would have decreased Federal receipts, would have allowed the tax-haven abuses that previously existed, and would have provided preferential tax treatment to a limited group of taxpayers. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Budgetary, and Economic Effect of Cancellation: As a result of the cancellation, Federal receipts will not decrease by an estimated $317 million over 5 years. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

1(F). Adjustments to Discretionary Spending Limits: Not applicable.

CANCELLATION OF LIMITED TAX BENEFIT
Report Pursuant to the Line Item Veto Act, P.L. 104-130

Bill Citation: "Taxpayer Relief Act of 1997" (H.R. 2014)

1(A). Limited Tax Benefit: Section 968. This item is identified as a limited tax benefit at Section 1701(30) of the bill. Section 968, "Nonrecognition of Gain on Sale of Stock to Certain Farmers' Cooperatives", is canceled in its entirety.

1(B). Determinations: This cancellation will reduce the Federal budget deficit, will not impair any essential Government functions, and will not harm the national interest.

1(C), (E). Reasons for Cancellation; Facts, Circumstances, and Considerations Relating to or Bearing upon the Cancellation; and Estimated Effect of Cancellation on Objects, Purposes, and Programs: The canceled item would have allowed deferral of gain recognition on the sale of certain corporate stock of farm-product refiners and processors to an eligible farmers' cooperative, thereby providing an exception to the general rule that gain is recognized when stock is sold. Under current law, gain deferral is permitted on the sale of qualified securities of a corporation to an employee stock ownership plan (ESOP) or an eligible worker-owned cooperative; however, these provisions of current law contain appropriate restrictions that would not have applied to transactions covered by the canceled item, notably restrictions that the seller's stock must not be traded on a securities market and that the seller must not be a corporation. While the Administration wants to encourage value-added farming through the purchase by farmers' cooperatives of refiners or processors of agricultural goods, the cancellation of this provision is nonetheless compelled by two narrow but important considerations. First, the canceled item would have created opportunities for complete avoidance of tax on the gain from a sale of a refiner or processor because it lacks the safeguards that apply to sales of stock to ESOPs. Second, this provision failed to target its benefits to small-and-medium-size cooperatives. The canceled item would not have benefitted farmers generally, would have decreased Federal receipts, would have created opportunities for abusive tax planning, and would have provided preferential tax treatment to a limited group of taxpayers. The legislative history and purposes of this provision were considered, but did not outweigh the foregoing reasons for cancellation.

1(D). Estimated Fiscal, Budgetary, and Economic Effect of Cancellation: As a result of the cancellation, Federal receipts will not decrease by an estimated $98 million over 5 years and $155 million over 10 years. This will have a commensurate effect on the Federal budget deficit and, to that extent, will have a beneficial effect on the economy.

1(F). Adjustments to Discretionary Spending Limits: Not applicable.

Attachment 1

States with Occupied Bed and Patient Day Taxes that Requested Uniformity Waivers and Failed the Waiver Test
(Estimated FFP Calculated Through 9/30/96)

State	Tax	FFP
AL	Inpatient hospital patient day tax ($25)	$ 7,500,000
DC	Nursing facility patient day tax ($11.68)	4,339,000*
DC	ICF/MR patient day tax ($15.29)	1,800,000*
FL	Nursing facility occupied bed tax ($1.50)**	*
LA	ICF/MR occupied bed tax ($8.74)	45,935,699
MS	Nursing facility occupied bed tax ($2)**	22,423,277
MT	Nursing facility occupied bed tax ($2.80)	29,627,326
SC	ICF/MR occupied bed tax ($8.50)	12,303,634
UT	Nursing facility occupied bed tax ($1)	4,529,946*
UT	ICF/MR occupied bed tax ($1)	Included above
WI	Nursing facility occupied bed tax ($32)**	47,146,994
WI	ICF/MR occupied bed tax ($68)**	Included above
WI	ICF/MR occupied bed tax ($97)**	Included above
WI	ICF/MR occupied bed tax ($100)**	Included above
	Total	$175,605,876

*not including periods for which state did not report tax collections

**would still require waiver for broad based requirement

Date: 8-11-97

FAX

Health Division

Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

To: Chris / Jack Lew
Fax:
Phone:

From: MM

Number of Pages (not including cover):

Subject:

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Health Division (Front Office)	202/395-3910
Health Division (Room 7001)	202/395-7840

FAX COVER SHEET

HCFA

OFFICE OF LEGISLATION

Number of Pages: ________ Date: ________

To: Mark Miller 7840	From: Dan Johnson
Fax:	Fax: 202-690-8168
Phone:	Phone:

REMARKS: NY letter

HEALTH CARE FINANCING ADMINISTRATION
200 Independence Ave., SW
Room 341-H, Humphrey Building
Washington, DC 20201

DEPARTMENT OF HEALTH & HUMAN SERVICES

Health Care
Financing Administration

Refer to

Region II
Federal Building
26 Federal Plaza
New York NY 10278

December 19, 1994

Mr. Michael J. Dowling
Commissioner
New York State Department of Social Services
Ten Eyck Office Building
40 North Pearl Street
Albany, New York 12243-0001

Dear Mr. Dowling:

On August 13, 1993, HCFA published in the Federal Register a final rule implementing Public Law 102-234, "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991".

This law amended provisions of Title XIX of the Social Security Act and established new limitations on Federal financial participation (FFP) when States receive funds donated by providers and revenues generated by certain health care related taxes.

The law also established a definition of the types of health care related tax revenues States are permitted to receive, without a reduction in FFP. Such taxes are broad based taxes which apply to all health care providers in a given class in a uniform manner and which do not hold taxpayers harmless for their tax costs. Consequently, to the extent a State adopts a health care related tax program that otherwise meets the statutory provisions, the State will have acted within the limits of the law.

HCFA is aware that the State of New York imposes the following taxes:

1. A general hospital tax, effective 1/1/91 through 12/31/93, which averaged 5.48% Statewide on hospital rates for all non-Medicare and non-Medicaid payers,

2. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .23% on hospital rates for all non-Medicare and non-Medicaid payers,

3. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .235% on hospital rates for all non-Medicare and non-Medicaid payers,

Page 2 - Mr. Michael Dowling

4. A general hospital tax, effective 1/1/91 through 12/31/93, applied at a rate of .1% of gross receipts from

   all patient care services,

5. A patient care services tax, effective 1/1/91 through 3/31/94, applied at a rate of .6% on gross receipts from all patient care services. This tax is imposed on the following entities: general hospitals, residential health care facilities (NF), diagnostic and treatment centers, certified home health agencies, long-term home health care programs, personal care providers, ICFs/MR, mental retardation day treatment providers, mental retardation specialty and residential treatment facilities for children,

6. A residential health care facility (NF) tax, effective 4/1/92 through 3/31/94 applied at a rate of 1.2% of gross receipts.

7. An ICF/MR tax, effective 4/1/92 through 3/31/93, applied at a rate of 2.4% of gross receipts. The tax is also imposed on mental retardation day treatment centers and mental retardation specialty hospitals.

8. An HMO tax, effective 7/1/92 through 12/31/93, applied at a rate up to 9% of inpatient hospital reimbursement rates for HMOs,

9. A commercial insurance tax, effective 4/1/92 through 3/31/93, applied at a rate of 11% on inpatient reimbursement rates for commercial insured,

10. A charge/fee of $.50 per triplicate prescription form, effective 4/1/76. This form is used by certain providers dispensing certain controlled substances.

11. A narcotics dispensing fee, effective 4/1/89, applied at a rate from $50 to $600 charged against dispensers of controlled substances, including general hospitals and nursing homes,

12. An application fee of $1,000 for CON submission, plus an additional fee of .4% of project costs for projects going before the State Hospital Review and Planning Council, effective 4//1/89,

13. A mortgage development fee of .9%, and a mortgage operational fee of .2% of the mortgage loan amount charged against eligible hospital and nursing home borrowers, effective 5/19/72,

14. A Statewide Planning and Research Cooperative System (SPARCS) fee, which is a flat fee established annually by the State, and is charged uniformly to all general hospitals, effective 1/1/86. There is a maximum cap of .1% of total costs.

15. A mortgage closing fee and mortgage refinancing fee of .9% of mortgage closing and .5% of mortgage refinancing, of both Federally aided mortgage loans and loans through the New York State Dormitory Authority, applied to health care facilities, effective 4/1/89.

Section 1903(w)(3)(B) of the Social Security Act specifies that the term broad based health care-related tax means a health care-related tax which is imposed with respect to a class of health care items or services or with respect to providers of such items or services and which, is imposed at least with respect to all items or services in the class furnished by all non-Federal, nonpublic providers in the State (or, in the case of a tax imposed by a local unit of government, the area over which the unit has jurisdiction) or is imposed with respect to all non-Federal, nonpublic providers in the class and is imposed in a uniform manner.

Section 1903(w)(3)(C) of the Social Security Act and 42 CFR 433.68(d) specify that a tax is considered to be imposed uniformly, if in the case of a tax consisting of a licensing fee or similar tax on a class of health care items or services (or providers of such items or services), the amount of the tax imposed is the same for every provider providing items or services within the class; if in the case of a tax consisting of a licensing fee or similar tax on a class of health care items or services (or providers of such items or services) on the basis of the number of beds (licensed or otherwise) of the provider, the amount of the tax imposed is the same for each bed of each provider of such items or services within the class; if in the case of a tax based on revenues or receipts with respect to a class of items or services (or providers of items or services) the tax is imposed at a uniform rate for all items and services (or providers of such items and services) in the class on all the gross revenues or receipts, or net operating revenues relating to the provision of all such items or services (or all such providers) in the State; or in the case of any other tax, the State establishes to the satisfaction of the Secretary that the tax is imposed uniformly.

The taxes mentioned above do not meet the broad based and/or uniformity requirements contained in section 1903(w)(3)(B) and (C) of the Social Security Act.

Therefore, in accordance with section 1903(w)(3)(E) of the Social Security Act and 42 CFR 433.72, please submit to HCFA, a request for approval of a waiver of the broad based and/or uniformity requirements for each of these tax programs. We request that you submit the request for waiver of the broad based and/or uniformity requirements for each of these tax programs within 30 days from your receipt of this letter. A letter, dated November 16, 1993, from the Medicaid Bureau Director to you outlined the procedure for requesting a waiver of these requirements.

If you have any questions, please contact Arthur O'Leary, Associate Regional Administrator for Medicaid at (212) 264-2511.

Sincerely,

William Toby, Jr.

William Toby, Jr.
Regional Administrator

PRESIDENT CLINTON ANNOUNCES LINE ITEM VETO OF SPENDING AND TAX PROVISIONS

August 11, 1997

BACKGROUND ON THE LINE ITEM VETO ACT

Today, President Clinton announced that he will line item veto two tax provisions and a spending provision under the authority of the Line Item Veto Act which was signed into law April 9, 1996. Under the Line Item Veto Act, the President is authorized to cancel tax and spending items if he determines that cancellation will:

- **(i)** reduce the Federal budget deficit;
- **(ii)** not impair any essential government functions;
- **(iii)** not harm the national interest.

In addition to the above, the Act requires the President to transmit to Congress a "special message" explaining his decision to cancel any tax or spending item pursuant to the Act.

The items chosen for cancellation were carefully reviewed by experts at the Department of Treasury and other relevent agencies. The President believes canceling these items will not only achieve savings, but, even more importantly, will serve as a deterrent to future attempts to include special interest or poorly drafted provisions that lead to abuse or serve to benefit only a select number of taxpayers or states as opposed to serving the broader public interest.

BACKGROUND ON 79 OF THE TAX AND SPENDING PROVISIONS SUBJECT TO THE LINE ITEM VETO

Under the Line Item Veto Act, the Joint Committee on Taxation (JCT) is responsible for identifying "limited tax benefits". In generall, the list of 79 items have been identified by JCT as "limited tax benefits" because JCT has determined either that (1) they are revenue-losing provisions that will have 100 or fewer beneficiaries in any fiscal year, or (2) they are transition rules that will benefit 10 or fewer taxpayers in any fiscal year.

Of the 70 provisions identified as limited tax benefits, approximately one-third represent Administration initiatives; approximately 40 percent represent provisions that have a basis in sound tax or social policy, or were important to certain members of Congress and were agreed to in the spirit of bipartisan cooperation; and approximately 25 percent represent reasonable transition relief-- ensuring that new changes in law don't unfairly harm taxpayers who relied on prior law.

SPECIFIC ITEMS CANCELED BY THE LINE ITEM VETO

Tax

- **Active Financing Income of Foreign Corporations:** U.S. corporations generally are required to pay current U.S. tax on easily movable income earned by their foreign subsidiaries. U.S. taxation of other income of a foreign subsidiary, such as income earned in a foreign manufacturing or service business, may be deferred until the earnings are paid into the U.S. Prior to1986, income earned from an active foreign financial services business, including interest, dividends and certain gains, generally was eligible for deferral. However, in 1996 Congress curtailed deferral opportunities for this inome based on concerns about financial services entities' ability to shift income to tax-haven jurisdicitions. *The canceled item would have allowed a small number of major U.S. banks, financing companies, insurance companies and securities firms to avoid current tax on their income from overseas operations. While the primary purpose of the provision was proper, it was drafted in a manner that would have permitted substantial abuse and created major tax loopholes for these companies.*

Estimated Fiscal Effect of Cancellation: $317 million* over five years.

- **Deferral of Gain on Certain Sales of Farm Product Refiners and Processors:** An individual may defer recognition of gain on the sale of certain stock in a corporation to an employee stock ownership plan (ESOP) or an eligible worker-owned cooperative, provided the individual reinvests the proceeds in certain other property. Gain is recognized later, when the taxpayer disposes of the replacement property. To qualify for this treatment, a number of requirements must be met to safeguard against abuse. The canceled item would have extended this deferral to a sale to a farmers' cooperative of stock in a qualified refiner or processor of agricultural goods, allowing a number of large corporations to sell their processing facilities tax-free. *While the Administration supports the goal of encouraging value-added farming so that farmers can obtain protection against price swings in their product, this provision would have been more likely to benefit the corporations that*

LINE-ITEM VETO PROVISIONS FOR SPENDERS

New York Medicaid Provider Tax Exemption

- The final balanced budget presented to the President allowed several types of health care provider taxes in New York that had previously been considered impermissible. According to CBO, this costs about $200 million; the entire amount is assumed to be lost in 1998.

- The Administration supports the permissibility of the one of these taxes. The "regional tax" was intended to be allowed under the 1991 law.

- However, the other types of taxes are clearly impermissible. Taxes that fail to meet the broad-based and uniformity requirements were banned in 1991. States used them to "borrow" money from providers, use that money as their state contribution to Medicaid, and return it to the providers through higher Medicaid payments. If allowed, New York's exemption would open the door to many other states requesting similar forgiveness. According to HHS, 15 states currently have illegal provider taxes totaling $3.5 billion.

- This is an example of a provision drafted in an overly broad way that leaves us no recourse but to veto. We cannot alter the current provision to respond to our concerns. We can and we will follow up on the line-tem veto with an immediate change in the Federal regulation that would exempt New York from a disallowance for its regional tax. This would ensure that New York is credited for about half of the $200 million CBO estimated the original provision to have cost.

July 31, 1997

FAX

Health Division

Office of Management and Budget
Executive Office of the President
Washington, D.C. 20503

To: Chris Jennings
Fax:
Phone:

From: Mark Miller

Number of Pages (not including cover): 7

Subject: FYI

Primer on Line Item Veto Act.

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Fax Numbers:

Health Division (Front Office)	202/395-3910
Health Division (Room 7001)	202/395-7840

LINE-ITEM VETO ACT, PUBLIC LAW 104-130

The Line-Item Veto Act (LIVA), P.L. 104-130 was signed into law on April 9, 1996 and goes into effect January 1, 1997. As one of the primary goals of the Contract with America, LIVA provides the President with "enhanced" rescission authority allows him to cancel entire dollar amounts of discretionary spending, any item of new direct spending, and limited tax benefits in any bill or joint resolution. This cancellation authority also extends to committee reports and charts and the statement of managers. The canceled amounts are "locked away" towards deficit reduction.

Supporters of LIVA touted it as a law that would help reduce government spending and eliminate wasteful spending on "pork" projects which would reduce the deficit. However, others believe that LIVA will not have much of an effect on reducing government spending since discretionary spending only represents about a third of total federal spending. Whether or not LIVA will actually contribute to deficit reduction remains to be seen, but LIVA is very likely to influence the budget process and how Congress appropriates money.

This primer is meant to provide some initial guidance for Health Division staff as LIVA goes into effect next January. The primer begins with a brief summary of the Act, discusses the Presidents cancellation authority under LIVA and the "lockbox mechanism" which restricts canceled funds for deficit reduction purposes. The next section provides some general examples of what would and would not be considered cancelable in the House appropriations and Senate committee bills and reports, and highlights key items which may or may not be cancelable. The attached charts (Tab 1) identify potential LIVA candidates in the bills, reports and tables for each appropriations account. The last section briefly discusses the implications of LIVA on the budget process, policy options for the Health Division and suggestions for an Health Division process as the appropriations process begins next year. For reference, a copy of the Act (Tab 2) and the conference report (Tab 3) is attached.

LIVA affects appropriations, direct spending and limited tax benefits. This primer is not designed to answer all questions. We have decided to focus primarily on appropriations because this could have the most implications for the Health Division workload.

Summary of the Act

Rescission Authority Prior to LIVA. Presidents have been requesting the line-item veto in various forms since 1876. Title X of the Congressional Budget Act of 1974, which was passed to increase Congress' role in the budget process and carefully define and limit the President's ability to impound federal funds, provided the President with authority to propose rescissions to reduce Congressional appropriations. Congress had to approve these reductions within 45 days, otherwise the money would be spent. Although Congress has enacted rescissions on its own, between 1974 and 1995, Congress has only approved $23.7 billion out of $74 billion in rescissions proposed by Presidents. [1]

[1] Senate Report 104-9

Enhanced Rescission Authority in LIVA. LIVA shifts some of the power to enact rescissions to the President. As an addition to Title X of the Congressional Budget Act of 1974, LIVA provides the President with enhanced rescission authority, which allows the President's cancellations to go into effect immediately upon submission of a special message to Congress. To undo any cancellations, Congress must enact a disapproval bill within thirty session days after receiving the special message to be considered under expedited procedures[2]. A two-thirds majority is needed to override a Presidential veto of the disapproval bill[3].

Deficit Reduction. LIVA was passed as another legislative attempt to reduce the federal deficit following such legislation as the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudmann-Hollings) and the Budget Enforcement Act of 1990. Instead of focusing on specific deficit targets and penalties for increasing the deficit, LIVA focused on reducing spending and trying to cut "pork" out of the federal budget to reduce the deficit.

President's Cancellation Authority. LIVA provides the President with carefully defined enhanced rescission authority. The President can only cancel entire dollar amounts of discretionary budget authority, an item of new direct spending or a targeted tax benefit if it will reduce the federal deficit and not harm any "essential" government functions or the national interest. The President cannot change the dollar amounts or cancel or alter any of the conditions, restrictions (e.g., provisions specifying that no federal funding can be used for abortions), or limitations contained in any appropriations law. Congress could potentially state in an appropriations bill that all of the provisions contained in the bill are not subject to LIVA, which would prevent the President from canceling any provisions. The Act sunsets in 2005.

Unlike the line-item veto authority granted to some governors which allows them to strike out specific items before spending legislation is passed, LIVA only allows the President cancellation authority after the bill has been signed into law. The President must veto the entire spending bill if he does not agree with, or wants to alter, any other provisions of the appropriations law besides specified dollar amounts.

-- **Discretionary budget authority** that the President may cancel includes budget authority:

- explicitly stated in appropriations law or in a specific proviso in an appropriations which requires budget authority to be spent but no dollar amount is specified;

- listed separately in charts, tables or "explanatory text" in the statement of managers or governing committee report of the appropriations bill. This extension of cancellation

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[2] If a disapproval bill is not acted upon within 30 days, the bill can be considered under regular procedures governing bills.

[3] Only a simple majority is needed to pass a disapproval bill.

authority to committee reports and tables was not provided to reflect increased legal importance of committee reports or to broaden the President's authority, but to allow the President to cancel agreed upon amounts represented in committee reports.[4] The report tables also contain potential LIVA candidates.

- where other non-appropriations laws (e.g., authorizations) require money to be allocated for a specific program, activity or project from an appropriations account;

- referred to in appropriations and non-appropriations law that requires a specific quantity of a product to be purchased from accounts, programs, projects, or activities where budget authority is allocated in appropriations law. The dollar amount would be the estimated procurement cost multiplied by the quantity of the product specified in the appropriations or other law.

-- **New Direct Spending** includes any legal provision which results in an increase in budget authority or outlays above the baseline. The President may cancel the specific legal obligation to expend funds in any law that results in an increase in direct spending. Examples of new direct spending include H.R. 3103, which provides funding for fraud and abuse in HHS' Office of the Inspector General, and P.L. 104-121 which requires funding to be appropriated for alcohol and substance abuse treatment under SAMHSA. Other provisions which would result in an increase in direct spending include indexing for inflation.

Cancellation authority is not only limited to those direct spending items that cause a net increase in direct spending. Increases in direct spending that are offset by other provisions that reduce direct spending overall are also subject to cancellation. The reauthorization or extension of a major entitlement program would not be considered new direct spending under LIVA,[5] while an expansion of existing entitlement programs would be considered an increase in direct spending.

-- **Limited Tax Benefits** include "any revenue-losing provision that is designed to provide a Federal tax deduction, credit, exclusion, or preference to 100 or fewer beneficiaries" or a provision that "provides transitional relief to 10 or fewer beneficiaries."[6] Beneficiaries can be an individual taxpayer or a business entity. If the benefit applies equally to everyone but happens to effect 100 or fewer beneficiaries, then it is not subject to cancellation. If the Joint Tax Committee (JCT) identifies certain provisions in a bill or report as limited tax benefits, the President can only cancel these provisions. If the JCT does not identify any provisions as limited tax benefits, the President may determine what is a limited tax benefit and apply his cancellation authority.

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[4] Conference Report, p. 32

[5] Conference Report, p. 36

[6] Conference Report, p. 37

The President may not cancel:

- budget authority canceled or rescinded in existing appropriations law. For example, the House proposed $53 million in rescissions for vaccines in OCRA 1996.

- any restrictions, limitations, or conditions in an appropriation law or committee report. For example, funding for voluntary family planning projects under HRSA includes the restriction that "the amounts provided...shall not be expended for abortions,"[7] and funding for injury prevention and control under CDC "may [not] be used to advocate or promote gun control." [8]

Special Message. To cancel any spending items, the President must submit a special message to Congress within five calendar days after an appropriations bill or a bill requiring new direct spending or a limited tax benefit, becomes law. This message should include the canceled item and the corresponding reference number; supporting documentation that the cancellation will reduce the budget deficit, not hinder any necessary government functions or harm the national interest; the estimated fiscal, economic, and budgetary effects of the cancellation; the impact of cancellation on affected items; adjustments made to spending caps and subsequent effects on sequestration. If applicable, the special message must also include: the account, department, government functions and specific projects affected by the canceled BA; the specific states and congressional districts affected by the cancellation; and the total number of cancellations in the current Congressional session affecting the states and districts listed above for canceled discretionary budget authority and direct spending.

Lockbox Mechanism. LIVA also contains a "lockbox mechanism" which "locks away" the canceled funds towards deficit reduction. The President cannot cancel an item to increase spending in other areas. The lockbox mechanism is incorporated into existing budget reporting requirements under the Budget Enforcement Act of 1990.

- **Discretionary Spending:** Five calendar days after appropriations legislation is enacted, LIVA requires OMB to estimate the budget authority and outlay savings that result from cancellations in appropriations law and calculate the reduction to the discretionary spending caps based on the reduced budget authority and outlays. After the 30 day Congressional review period for cancellations plus 10 calendar days, OMB must adjust the discretionary spending caps downward in its next sequester report.

- **Direct Spending and Limited Tax Benefits:** OMB must record the amount of deficit reduction due to canceled new direct spending and tax benefits as a separate entry in its PAYGO report. Essentially, no credit is given for PAYGO purposes in the cancellations

[7] House Labor, HHS and Education Appropriations bill, July 11, p. 23

[8] Ibid, p. 26

of direct spending or limited tax benefits and the cancellations cannot be used to offset other increases in direct spending. The cancellation is not scored as savings.

The lowering of discretionary spending caps and the non-offset for PAYGO purposes for direct spending and limited tax benefits means that any cancellations will be "locked away" to reduce the federal deficit and unavailable to transfer to other priorities.

Analysis of Potential Line-item Vetoable Items in the FY 1997 House Appropriations and Senate Committee Appropriations

The following section attempts to illustrate what may be considered a cancelable item. General Counsel will provide very little specific guidance before LIVA becomes effective (January 1, 1997) and will only determine what is and is not cancelable when specific items are presented to them for review. The identification of potential LIVA candidates will largely be left up to individual examiners. The attached charts illustrate the potential line-item vetoable earmarks for the Health Division accounts in the latest House appropriations and Senate Committee (IHS, FDA) appropriations bills and the accompanying committee reports and tables (if they provide different information from the reports) based on our understanding of the Act. Increases above FY 1996 and the President's Budget have also been identified in the charts if General Counsel determines that these are cancelable amounts. The list is meant to help examiners think through the universe of possibilities under LIVA and is not definitive.

Below is a discussion of the general possibilities in the FY 1997 House bills, followed by highlighted discussions of specific or peculiar areas where we would need to seek further clarification.

General Comments:

LIVA allows the President to cancel entire dollar amounts that are clearly identifiable in the appropriations bill or committee reports and charts and represent "an indivisible whole with which Congress has previously agreed," [9] even if the dollar amount is not specified in appropriations law. Account totals (if it only includes discretionary budget authority), program subtotals, and individual items within each program which are explicitly outlined in committee reports or charts, may be subject to cancellation. If a dollar amount only appears in the committee report chart and nowhere else in the appropriations law or committee report, it could be canceled under LIVA.

Clearly identifiable, but not explicitly stated dollar amounts which may be cancelable include: 1) percentages of appropriated amounts which are required to be spent on a particular program by

[9] Committee Report, p. 31

either appropriation or other law (i.e., authorizing statute), or 2) requirements to fund a particular program or provide a specific grant. An example of percentages where dollar amounts are not specified includes HRSA's authorizing legislation which requires 30 percent of the appropriated funds for scholarships for disadvantaged students to go towards nursing programs. For requirements to fund a particular project or provide a specific grant, it would be necessary to estimate the total amount of the project or grant and cancel that entire amount. Specific guidance provided in committee reports to fully fund particular programs (e.g., full funding of Tuskegee reimbursement program under CDC), could be potentially vetoable because it represents an agreed upon amount even though the exact dollar figure is not provided.

Some specific examples of what may or may not be cancelable items for the Health Division include:

Discretionary Spending

-- Transfers from Medicare Trust Funds (Office of Secretary, Departmental Management) could be considered vetoable because they are considered discretionary budget authority.

-- User fees (FDA) are not considered discretionary BA under LIVA because they represent offsetting collections rather than discretionary BA that could be canceled for deficit reduction purposes and therefore are probably not subject to LIVA.

Direct Spending

-- Medicaid, as an appropriated entitlement, is not subject to LIVA. Congress was very careful to exclude existing entitlement programs from the President's cancellation authority unless a new or expanded part of an entitlement program was added.

-- Spending mandated by another law, such as for fraud and abuse in H.R. 3103 (OIG) if it became law, and mental health under P.L. 104-121 (SAMHSA), could be subject to LIVA because it is considered an increase in direct spending. These would be vetoable in the respective authorizing laws, not in the appropriations bills.

Further Clarification Needed

Increases[10] above the previous year's appropriations or the President's budget might be cancelable, but the law and conference report provide little guidance. In committee reports, the language states that "an increase of x amount is provided to go towards x program," and the report tables provide exact dollar amount comparisons between the committee allocations and the previous year's appropriations and the President's budget. Whether these increases represent an

[10] Outlined in the chart as possible LIVA candidates.

"entire" dollar amount of discretionary budget authority is unclear since they are separate, identifiable amounts of budget authority, but do not represent "whole items."[11]

The ability to cancel one percent evaluation set-asides is also unclear. The conference report tables represent these set-asides as specified dollar amounts under ACHPR, CDC, and OS accounts, but since they are not shown separately in the source accounts (i.e., NIH), they would not be cancelable in our opinion.

Specified dollar limits on appropriated funds may also be cancelable. The bill language usually states that "an amount not to exceed x dollars will be available for x activity." For example, in the Office of Civil Rights, no more than $3,314,000 may be transferred from the HI and SMI trust funds.[12] Similar provisions exist under HRSA for P.L. 104-73 and the vaccine injury compensation fund, AHCPR in its one percent transfer authority, and under the General Provisions for official reception expenses. The stated amounts would be the most likely candidates for cancellation, although since HHS is not required to spend this amount by law, the President could potentially cancel less than the specified amount.

Agency-Specific Items to Note in FY 1997 House Appropriations and Senate Committee bills

The comments below accompany the charts and highlight key items for particular agencies.

HRSA

As stated above, the authorizing statute for scholarships for disadvantaged students requires 30 percent of the amounts appropriated for this program to go to nursing scholarships. The President could potentially cancel the $5,602,800 represented by this requirement even though this amount is not explicitly stated anywhere in the appropriations bill, report, or tables. Similarly, under the MCH Block Grant, the 85% of $6,000,000 for states ($5,100,000) and the 15% for SPRANS, would be cancelable as well as the 12.75% for CISS and 87.25% for the 85/15 allocation for amounts over $6,000,000.

The appropriations for interest subsidies on loans and loan guarantees within the Medical Facilities Guarantee and Loan Fund and the Health Education Assistance Loans Program (HEAL) are required appropriations. The administrative expenses for the HEAL program are discretionary appropriations. All of the appropriations for the Vaccine Injury Compensation Program Trust Fund and the Vaccine Injury Compensation Program are required.

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[11] Committee Report, p. 34

[12] Labor/HHS/Appropriations bill, p. 40

IMPERMISSIBLE TAXES BY STATE
(dollars in millions, estimated FFP calculated through 9/30/96)

State	Amount of Disallowance (Unadjusted)	Amount of Disallowance (Adjusted)*
Alabama	$7.50	$0.00
Connecticut	555.80	555.80
District of Columbia	6.14	0.00
Florida	342.39	342.39
Hawaii	11.25	11.25
Illinois	88.54	88.54
Indiana	30.67	30.67
Louisiana	234.31	188.37
Massachusetts	559.02	559.02
Maine	7.69	7.69
Minnesota	67.62	67.62
Mississippi	22.42	0.00
Missouri	892.32	892.32
Montana	29.63	0.00
New Hampshire	21.05	21.05
Nevada	27.61	27.61
New York	1,436.06	436.06
South Carolina	12.304	0
Tennessee	251.27	251.27
Utah	4.53	0
Wisconsin	47.15	0
Total	***$4,655.26***	***$3,479.65***

* Includes an adjustment for 10 states that have taxes that can be remedied without taking a disallowance. New York's has $1 billion in FFP for regional taxes that can be deemed permissible through a minor regulatory change.
9 states have a total of $175 million in FFP for occupied bed/patient day taxes that can be made permissible by a letter from HCFA.

October 3, 1997

MEMORANDUM TO THE CHIEF OF STAFF

cc: Sylvia Matthews, John Podesta, Bruce Reed, Gene Sperling, Frank Raines, Rahm Emanuel, John Hilley, Mickey Ibarra, Jack Lew, and Josh Gotbaum

FROM: Chris Jennings

RE: **NEW YORK AND THE PROVIDER TAX ISSUE**

On Monday, we (DPC, OMB and HHS) will brief you on the status of our Medicaid provider tax enforcement plans for New York and other states who may be out of compliance with current law and regulations. As you well know, this issue is extremely controversial. Therefore, it is critically important that the we have Administration-wide agreement and understanding on how we will announce our position on outstanding provider taxes and on how we will subsequently negotiate with affected states. This memo provides you with background information to help prepare you for the Monday briefing.

BACKGROUND

Financing scheme. During the late 1980s, many states established financing schemes that had the effect of increasing their Federal Medicaid funds without using additional state resources. Typically, states would raise funds from health care providers (through provider taxes or "donations"), then pay back those providers through increased Medicaid payments. Since the Federal government pays at least half of Medicaid payments, the provider taxes or donations would be repaid in large part by Federal matching payments. Using this mechanism, the state was left with a net gain because it only had to repay part of the provider tax or donation it originally received. This led to an unprecedented drain on the Federal Treasury — the major reason why Federal Medicaid costs more than doubled between 1988 and 1992.

The law and regulatory interpretation of the law. Because provider taxes and donations were effectively siphoning off potentially billions of dollars from the Federal Treasury, the Congress limited states' use of these schemes in a bill enacted by President Bush in 1991. It is important to note that the subsequent regulatory interpretation of these limits -- the very regulations that we are now planning to enforce -- was negotiated with the states and the National Governors' Association in 1993.

States' continued reliance on impermissible provider taxes and our enforcement record. Despite the new law and the regulations, many states continued to use provider taxes that at least appeared to be out of compliance. To date, these possibly impermissible taxes total an estimated $2 to 4 billion and, in the future, will cost billions more. In response, HCFA issued letters and discussed its concerns about certain taxes with states, but -- for a variety of reasons -- never took any final action (called a "disallowance"). Unfortunately, this has meant that a number of states have continued using these taxes, believing that HCFA might never enforce the law, or that if they did, they could seek recourse through the White House or the Congress. (In fact, since we do not have a good track record on enforcement, budget examiners at CBO and in the Administration have already written off Federal revenue raised through these provider taxes; this is important to know since it means we could waive past "abuses" retrospectively and it might not be scored as a cost.)

The New York provision in the balanced budget. To ensure that New York would never be vulnerable to Medicaid provider tax enforcement actions, Senator Moynihan and Senator D'Amato successfully added a provision to the Balanced Budget Act to exempt all of its provider taxes (it has dozens), both retrospectively and prospectively, from disallowances. Both in writing and orally we repeatedly objected to this provision. Moreover, we provided alternative statutory language that would have addressed about two-thirds (over $1 billion worth) of the problem. As you know, however, the Senators (through their staff) rejected our offer and insisted on their original provisions.

Line-item veto and New York's reaction. In announcing the line-time veto on August 11, we raised concerns about the cost and ramifications of singling out as permissible one state's provider taxes. Although our actions were generally viewed as responsible and defensible by those who know the program and/or who are budget experts, the same clearly cannot be said of New York's political establishment. The Governor's office, the New York Congressional delegation, the Mayor, providers and unions reacted strongly and negatively to the veto. Among a host of complaints, they charged that they were singled out and were never made aware that this provision could be subject to the line-tem veto. Most recently they have criticized us for our delay in getting back to them and our willingness to support fixes for the other two vetoed provisions without addressing their problem.

Review of provider taxes in New York and other states. In August, we began a review of the options to address provider taxes in New York and other states. At the time, we well knew that this action would force us to finally attempt to move to enforce laws against provider taxes in all 36 states that may be out of compliance. We also knew that we had to take this position to support our justification for the line-item veto that no individual state be singled out for special treatment.

Wednesday's actions. We believe that our discussion with New York next Wednesday about their provider tax status necessitates that we concurrently release similar information to every other potentially affected state. Three types of actions resulting from this comprehensive review will be announced. First, HCFA will clarify its interpretation of the law and correct the regulation affecting one of the largest New York provider taxes. These policy clarifications will provide relief to 10 states, the largest amount (over $1 billion) going to New York.

Second, HCFA will issue letters to 9 other states notifying them that one or several of their taxes may be impermissible. Two more states, New York and Louisiana, will also receive this news, but it will be in a letter that also provides some good news about other provider taxes in their states. HCFA will immediately contact these states to begin discussions. The letters do not contain final decisions nor are they legally binding; however, they tell these states that, without further information, HCFA could conduct an audit.

Third, HCFA will ask another 17 states for more information on one or more of their provider taxes, to assess if they are permissible. (Nine other states who are in one of the top two categories will get similar requests.) For these states, we simply do not have sufficient information to determine the legality of at least some of their taxes. As we discuss this issue with these states, however, we will also make certain they are aware that they may be eligible for waivers that make their taxes permissible and/or that the provision of additional information may well clarify the legality of their taxes. [NOTE: All states affected are listed in the attached document; dollar amounts are not listed because we will not know them until/unless the states are audited.]

Discussions and negotiations. The follow up to these letters will be, we hope, immediate discussions between HCFA and the states. Our primary goal is to protect the Federal Treasury prospectively. We may have to trade getting only a fraction of the retrospective disallowed taxes in return for expeditious agreements to prevent future use of impermissible taxes. However, the Department of Justice, which must approve all settlements, has not yet decided how it will evaluate these settlements. This information is crucial to HCFA's ability to negotiate with states in good faith.

Implications. Very few of the states who receive notices will be pleased. For example, although HCFA is relieving approximately two-thirds of New York's past impermissible tax claims (worth over $1 billion), there is still at least $500 million in taxes that HCFA probably cannot consider legal. The New York delegation has already put us on notice that nothing less than a "hold harmless" solution is acceptable. They define this as meaning that they want us to waive all current taxes both retrospectively and prospectively; in other words, they want the provisions we line-item vetoed.

Those states most displeased will be the 10 others receiving letters that say that we believe that one or more of their provider taxes clearly appear to be out of compliance. They are: Hawaii, Illinois, Indiana, Louisiana, Maine, Massachusetts, Minnesota, Missouri, Nevada, and Tennessee. Governor Carnahan, who met with Jack Lew recently to discuss Medicaid issues, made it clear that he considers his taxes legal and will go to court if necessary. There is no question that Missouri has the largest problem — they could owe nearly $1 billion.

Another complication is that we anticipate that many of these states will appeal to you or the President to over-ride these preliminary or subsequent decisions. Since this is an enforcement action, we all need to be extremely careful about intervening. We must ensure that you and others who might be talking with Governors are well briefed on the issues, arguments and process.

Finally, some states will inevitably seek legislative solutions, like New York's balanced budget provision. While we probably should not encourage this action (for the same reasons that we vetoed the New York provision), we also should not foreclose the possibility that some type of comprehensive legislative clarification could be helpful as we aim to end the practice of illegitimately using provider taxes.

Roll-out strategy. Obviously, our rationale and process for explaining our enforcement actions is crucial. DPC/NEC and OMB are working with HHS and HCFA to ensure that we have an effective roll-out. This will include how we provide information to the Congress, the states, interested providers and unions, experts who will validate our enforcement action and influence elite media coverage, and -- of course -- a carefully orchestrated New York strategy.

We will provide more details of the roll-out on Monday. We thought providing you this information first, however, would facilitate a more efficient discussion of this issue and how we are going to deal with it.

PROVIDER TAXES BY STATE
(Estimated federal share (FFP). If amount is not yet calculated, it is "unknown.")

State	Permissible Tax 1/	Impermissible Tax 2/	Potentially Impermissible Tax 3/	Total Potential Liability
Alabama	($7,500,000)	$0	$12,582,794	$12,582,794
Arkansas	0	0	11,000,000	11,000,000
Connecticut	n/a	0	472,304,676	472,304,676
District of Columbia	(6,139,000)	0	0	0
Florida	unknown 4/	0	431,734,302	431,734,302
Georgia	n/a	0	20,861,637	20,861,637
Hawaii	n/a	11,285,542	10,072,653	21,358,195
Illinois	n/a	88,544,909	7,922,410	96,467,319
Indiana	n/a	30,674,059	0	30,674,059
Iowa	n/a	0	8,882,659	8,882,659
Kansas	n/a	0	13,336,915	13,336,915
Kentucky	0	0	15,000,000	15,000,000
Louisiana	(85,343,568)	186,860,145	2,155,500	189,015,645
Massachusetts	n/a	658,129,757	0	658,129,757
Maine	n/a	7,687,661	0	7,687,661
Michigan	n/a	0	19,458,181	19,458,181
Minnesota	n/a	unknown	387,511,331	387,511,331
Mississippi	(32,291,176)	0	0	0
Missouri	n/a	1,008,734,099	19,824,555	1,028,558,654
Montana	(29,885,317)	0	0	0
Nebraska	n/a	0	730,450	730,450
New Hampshire	n/a	0	111,609,880	111,609,880
Nevada	n/a	27,605,684	850,041	28,455,725
New York	(1,027,507,994)	545,335,326	21,261,313	566,596,639
Ohio	unknown	0	0	0
Oklahoma	n/a	0	4,405,506	4,405,506
Oregon	n/a	0	557,961	557,961
Pennsylvania	n/a	0	10,837,317	10,837,317
Rhode Island	0	0	31,000,000	31,000,000
South Carolina	(17,835,270)	0	0	0
Tennessee	n/a	269,593,730	393,382,678	662,976,408
Texas	0	0	157,000	157,000
Utah	(6,012,829)	0	10,054,156	10,054,156
Vermont	n/a	0	1,426,217	1,426,217
Washington	n/a	0	34,263,712	34,263,712
Wisconsin	(48,384,465)	0	0	0
Total	($1,260,899,618)	$2,834,450,912	$2,053,183,844	$4,887,634,756

1/ 11 states submitted waivers for taxes HCFA determined permissible, including NY's regional tax 9 states with an occupied bed tax, and 2 states with a change in tax rate.

2/ 11 states submitted waivers for taxes deemed impermissible by HCFA for failing the generally redistributive test, violating the hold harmless provision, or bad classes of taxes.

3/ 26 states submitted waivers which require more information to determine permissibility and/or have licensing and user fees that require a waiver.

4/ Florida has an occupied bed tax that will be deemed permissible pending additional information.

DRAFT: Provider Tax State Letters, October 8, 1997

Thirty-six states in total will receive letters. Since most states have multiple health care-related provider taxes, these letters contain multiple findings about one ore more of these taxes.

States:		Type of Findings
Only permissible tax	6	10 permissible
Permissible tax & more information needed	2	
Permissible tax, impermissible tax & more information needed	2	11 impermissible
Only possible impermissible tax	3	
Possible impermissible tax & more information needed	6	
Only more information needed	17	27 more information
TOTAL	**36 states**	**48 types of findings**

Permissible

(1) Policy revision: Change regional tax
(2) Policy revision: No longer need waiver for uniformity test (occupied beds / patient days).
(3) Policy revision: No longer need waiver for uniformity test (uniform change in tax rate).

Impermissible

(4) Tax program appears to not be **broad based** (impermissible class of providers).
(5) Tax program appears to not be **uniform** (fails generally redistributive waiver test).
(6) Tax program appears to fail **hold harmless rule.**

More Information Needed

(7) Tax program waiver requires more information.
(8) Licensing / user fees require more information.

State	Permissible	Possibly Impermissible	More Information Needed
Alabama	✔ (2)		✔ (7)
Arkansas			✔ (7, 8)
Connecticut			✔ (7, 8)
District of Columbia	✔ (2)		
Florida			✔ (7, 8)
Georgia			✔ (7, 8)
Hawaii		✔ (6)	✔ (7)
Illinois		✔ (6)	✔ (8)
Indiana		✔ (6)	
Iowa			✔ (8)
Kansas			✔ (8)

State	Permissible	Possibly Impermissible	More Information Needed
Kentucky			✔ (7, 8)
Louisiana	✔ (2)	✔ (6)	✔ (8)
Maine		✔ (6)	
Massachusetts		✔ (5)	
Michigan			✔ (8)
Minnesota		✔ (4)	✔ (7)
Mississippi	✔ (2)		
Missouri		✔ (6)	✔ (8)
Montana	✔ (2)		
Nebraska			✔ (7, 8)
Nevada		✔ (5)	✔ (8)
New Hampshire			✔ (8)
New York	✔ (1,3)	✔ (4, 5)	✔ (7, 8)
Ohio	✔ (3)		
Oklahoma			✔ (7, 8)
Oregon			✔ (7, 8)
Pennsylvania			✔ (8)
Rhode Island			✔ (7, 8)
South Carolina	✔ (2)		
Tennessee		✔ (6)	✔ (7, 8)
Texas			✔ (7, 8)
Utah	✔ (2)		✔ (7)
Vermont			✔ (8)
Washington			✔ (7, 8)
Wisconsin	✔ (2)		
TOTAL: 36 STATES*	**10**	**11**	**27**

* NOTE: 12 states have more than one type of finding (e.g., both a permissible tax and one that needs more information) so that there are more findings (48) than there are states receiving letters (36).

DRAFT

FACT SHEET ON MEDICAID HEALTH CARE-RELATED TAXES

October 8, 1997

BACKGROUND

During the late 1980s, many States established financing schemes that had the effect of increasing their Federal Medicaid funds without using additional State resources. Typically, States would raise funds from health care providers (through provider taxes or "donations"), then pay back those providers through increased Medicaid payments. Since the Federal government pays at least half of Medicaid payments, the provider taxes or donations would be repaid in large part by Federal matching payments. Using this mechanism, the State was left with a net gain because it only had to repay part of the provider tax or donation it originally received.

The widespread use of these financing mechanisms contributed to the extraordinary increases in Federal Medicaid expenditures in the late 1980s and early 1990s. One report found that provider tax revenue rose from $400 million in 6 states in 1990 to $8.7 billion in 39 States in 1992. There was a similar increase in Federal Medicaid spending, which more than doubled between 1988 and 1992, with an average annual rate of over 20 percent. The number of people served by Medicaid did not rise by nearly so much and, in fact, unofficial reports suggested that some States used the funds generated through this scheme for non-Medicaid purposes such as roads and stadiums.

In response to this unprecedented drain on the Federal Treasury, Congress passed "The Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991" (Public Law 102-234). The first stand-alone piece of Medicaid legislation in the program's history, this law permits States to use revenue from health care-related taxes to claim Federal Medicaid matching payments only to the extent that these taxes are broad based (i.e., applied to all providers in a definable group); uniform (i.e., same for all providers within the group); and are not part of a "hold harmless" arrangement (i.e., the taxes are not devised to repay dollar-for-dollar the provider who was initially assessed). The law also precluded States from using provider donations, except in very limited circumstances. In addition, the law introduced limits on how much States could pay hospitals through disproportionate share hospital (DSH) program — the primary way that States repaid their provider taxes or donations.

The final regulation for this law was published in 1993 after extensive consultation with the States and the National Governors' Association. The regulation defined which taxes are permissible, HCFA's methodology for determining permissibility of taxes, and a process for requesting waiver approval for tax programs that are either not broad based and/or uniform.

HCFA has communicated with States — through letters, a national conference, and State contacts at the regional level — about the Administration's concerns with many of these tax programs. Many states have responded with waiver requests and questions about their programs or HCFA interpretations. Today, policy guidance about our current interpretation of the provider tax law and regulations is being described in a State Medicaid Directors' letter and a *Federal Register* notice . HCFA will also send some States letters about its preliminary findings about their particular taxes' compliance with the law and/or the need for additional information.

POLICY CLARIFICATIONS

In its ongoing review and update of regulations, HCFA has determined that several changes in its implementation of the Medicaid provider tax provisions are appropriate, as described in today's letter to State Medicaid Directors (dated October 8, 1997). First, HCFA will clarify its interpretation of taxes that are considered uniform. It will permit taxes on occupied beds or patient days to be considered uniform (previously, only taxes on all beds and all days were considered uniform). Second, the letter states that States do not need to submit a new waiver request for a tax subject to an existing waiver if there is a uniform change in the tax rate. The letter also reminds States that they may suggest additional classes of providers to qualify as "broad based" and that they should submit quarterly reports on their provider taxes and donations. These clarifications have resulted in the determination that 11 States' taxes are permissible and require no further review.

In addition, HCFA has published in the October 8, 1997 *Federal Register* a correcting amendment to the provider tax regulation regarding its interpretation of the uniformity test. It lowers the threshold for allowable tax programs based on regional variations, enacted and in effect prior to November 24, 1992. The correction is to conform the regulation to HCFA and Congress's intent to recognize such taxes as generally redistributive.

CONCERNS AND QUESTIONS ABOUT CERTAIN STATES' TAXES

Today, HCFA will also send letters to some States discussing their particular provider taxes — specifically, notifying them that some of their tax programs are permissible, may be out of compliance with current law, and/or require additional information to be assessed.

HCFA has identified several health care-related tax programs that appear to be inconsistent with the statutory provisions. These provider taxes may fail to be broad based; uniform; and/or contain a hold harmless provision. There is sufficient concern about these States' programs to justify an audit if additional information is not offered. However, these letters are intended as a starting point for discussions. In no instance will HCFA disallow payments without discussions with the affected State and a financial audit.

In addition, HCFA has asked some States for more information on their tax programs. It has identified a series of tax programs that appear to fail either the broad based or uniform test but could possibly qualify for a waiver. HCFA is notifying these States that they should provide additional information needed for waiver requests. Similarly, HCFA has asked States with certain licensing and user fees to provide additional in order to determine their permissibility.

Thirty-six States will receive letters. Ten of these States will be notified that their some of their questionable taxes are permitted through the policy clarifications described above. Eleven States will be informed that they may have impermissible taxes; two of these States also will be notified that some of their taxes are permissible. Another 17 States will be asked to supply additional information needed to evaluate their provider taxes.

HCFA will immediately contact each State to schedule a meeting at the earliest possible point to exchange information and discuss all issues relating to their taxes. HCFA's goal is to establish whether the taxes in question are impermissible and, if so, end their use. We encourage States to fully engage in discussions with HCFA to facilitate equitable and expeditious resolutions.