

Medicaid Provider rates
File

October 9, 1997

TO: DISTRIBUTION

FROM: Chris Jennings and Jeanne Lambrew

RE: MEDICAID PROVIDER TAX MATERIAL: EMBARGOED UNTIL 4PM

Attached are the Department of Health and Human Services' materials for release this afternoon. This includes:

- DHHS Press Release
- Summary (for internal use)
- Fact sheet
- Questions and answers
- Letter being sent to State Medicaid Directors

The public documents will be presented at briefings of the Congressional committees of jurisdiction, the National Governors' Association, a meeting with the New York gubernatorial staff, and the New York delegation beginning at 4pm.

Given the sensitive nature of the material, these are close hold until 4pm.

Please call with questions.



DEPARTMENT OF HEALTH AND HUMAN SERVICES

Health Care Financing Administration

Press Office
Washington, DC 20201

**STATEMENT BY SALLY RICHARDSON
DIRECTOR, CENTER FOR MEDICAID AND STATE OPERATIONS
HEALTH CARE FINANCING ADMINISTRATION**

Thursday, October 9, 1997

HCFA Center for Medicaid and State Operations Director Sally Richardson issued the following statement regarding today's policy clarification on state provider taxes used to obtain federal matching funds for Medicaid.

We have a responsibility to make sure that state taxes collected from health care providers and then used to generate federal matching funds for Medicaid are levied in a way that is fair and equitable among all states. Permitting some states to use improper provider taxes to obtain federal funds threatens Medicaid's fiscal integrity and is unfair to states that play by the rules.

We are today clarifying policy on taxes collected from health care providers based on patient days or occupied beds. This action makes clear that certain taxes are acceptable in 10 states that have asked us for waivers. Because of the complexity of the law there are states that have other taxes that still require review.

Given the outstanding questions, we are today announcing our intention to work with Congress and the states to enact legislation that codifies the tests for whether a state provider tax is permissible. This legislation will also enhance the Secretary's authority to resolve current liabilities for states that come into full compliance with the law. We sincerely hope such legislation will expeditiously end the use of impermissible taxes. However, if such legislation is not passed by next August, HCFA will apply with full force the current policies.

We realize this is a big undertaking, and stand ready and willing to work with Congress and the states in this effort.

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SUMMARY: MEDICAID PROVIDER TAXES

- **What is being released.** Today, the Department of Health and Human Services (DHHS) has sent a letter to State Medicaid Directors. This letter clarifies how DHHS will implement the law and regulations on states' use of health care-related taxes for their share of Medicaid. There will also be a notice in the Federal Register containing a correcting amendment to the regulation to make it consistent with Congressional intent.

The State Medicaid Director letter also includes an announcement of our support for legislation that (a) codifies current regulations that contain the tests to determine that a tax is permissible; and (b) would concentrate authority in the Department to resolve impermissible tax liabilities if a state comes into full compliance by ending the use of impermissible taxes. This legislative approach may more expeditiously end the use of impermissible taxes. If, however, by August 1998 no legislation is passed, the Secretary will move forward to complete the process already begun to apply with full force the current law.

- **Why action is needed?** States' use of impermissible provider taxes poses a major threat to Medicaid's fiscal integrity. During the late 1980s, health care provider tax programs were used to increase Federal Medicaid funding without using additional state resources. These schemes contributed to the doubling of Federal Medicaid spending between 1988 and 1992.

Today, a number of states continue to use potentially impermissible provider taxes. To maintain the integrity of the Medicaid program, we must be certain that the Federal Treasury is not impermissibly being tapped to underwrite costs that are the responsibilities of the states. To not do so would be unfair to those states (and their taxpayers) which are in compliance.

- **Why now?** This review, which has been on-going at DHHS for many months, has drawn increased attention recently due to the line-item veto of a Medicaid provider tax provision in the Balanced Budget Act. Under this provision, all of New York's over 30 provider taxes would be deemed approved. The President vetoed this provision because it was too broad and singled out a single state for special treatment. However, he promised that DHHS would intensify its review of its interpretation of the law for New York and all states. Today's action is a result of this review.
- **Impact on New York.** One of New York's major concerns have been that Medicaid regulations have not grandfathered the State's "regional" tax. Given evidence of Congressional intent for this tax treatment, the Administration will publish a correcting amendment to the regulation in the Oct. 15 *Federal Register*. This action relieves New York of over \$1 billion of provider tax liability.

No final resolution on New York's other provider taxes has been reached. However, HCFA will be contacting New York and other states to gather further information on taxes.

- **Impact on other states.** 10 States will benefit from the clarification that the Department is providing today. States will be contacted with requests for additional information. It is our hope that all states and their representatives will work toward legislation that protects the Federal Treasury as well as treats States fairly as we move to ensure that all states are in compliance with the law (D.C., Alabama, Louisiana, Ohio, Mississippi, Montana, New York, South Carolina, Utah, Wisconsin).

FACT SHEET ON MEDICAID HEALTH CARE-RELATED TAXES

October 9, 1997

Medicaid, enacted in 1965, is a Federally-guaranteed health insurance program for certain low-income individuals, primarily pregnant women, children, the elderly and the disabled. It is a state/Federal partnership where the Federal government sets broad eligibility standards and pays states a portion of their Medicaid costs. States must commit funds in order to receive Federal financial participation (FFP). The source of certain State funds has been contentious, as described below.

BACKGROUND

During the late 1980s, many States established new taxes 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 realized a net gain because it had to repay only 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.

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 the 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.

Since the regulation, HCFA has communicated with States — through letters, a national conference, and State contacts at the regional level — about the provider tax policies. However, given the complexity of health care financing, some issues intended to be resolved by the 1991 law, the 1993 regulations, and subsequent HCFA interpretations are still questioned by some States. This has led to a review by HCFA of its interpretations of these policies.

POLICY CLARIFICATIONS

Today, the results of HCFA's review of its interpretation of the provider tax law and regulations are being described in a State Medicaid Directors' letter and a *Federal Register* notice. 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 9, 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 certain taxes in 10 States are permissible and require no further review.

In addition, HCFA will publish in the October 15, 1997 *Federal Register* a correcting amendment to the provider tax regulation regarding its interpretation of the uniformity test. It corrects 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.

PLANS FOR ENDING THE USE OF IMPERMISSIBLE TAXES

In its effort to apply the law and end the use of impermissible provider taxes, HCFA will open discussions with the States individually to understand better their specific provider taxes and their issues resulting from the current law.

The Administration's goal is to end the use of impermissible taxes as soon as possible. To achieve rapid and full compliance, it is willing to work with States to resolve impermissible tax liabilities. The Administration believes that this will be facilitated by legislation that codifies the tests to determine that a tax is permissible and concentrates in the Department greater authority to work with States to resolve impermissible tax liabilities in return for States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however, legislation is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

It is our hope that States will be responsive and cooperative so we can resolve these issues in a mutually satisfactory way.

FOR INTERNAL USE

HEALTH CARE RELATED TAX QUESTIONS & ANSWERS

GENERAL QUESTIONS ABOUT PROCESS

- 1.Q. What is HCFA's rationale for a change in some of its policies regarding these taxes?**
- A. Since the original publication of the regulation, HCFA has communicated with States — through letters, a national conference, and State contacts at the regional level — about the provider tax policies. However, given the complexity of health care financing, some issues intended to be resolved by the 1991 law, the 1993 regulations, and subsequent HCFA interpretations are still questioned by some States. This has led to a review by HCFA of its interpretations of these policies.
- 2.Q. HCFA could tomorrow begin enforcing the provider tax laws. Aren't you avoiding the hard decisions that you could make under current law by introducing legislation?**
- A. Quite the opposite: we think that legislation could make enforcing the provider tax laws more efficient and timely. Given the complexity of the provider taxes and questions that states have about HCFA's interpretation, it could take years of costly audits, appeals and possible law suits to resolve each state's case. Legislation offers the opportunity to clarify the ways that a tax may be identified as permissible and concentrates the Department's authority to work with states to resolve their current liabilities if the states comes into full compliance as soon as possible.
- 3.Q. Isn't HCFA just issuing these policy clarifications to provide cover for President Clinton's retreating on his use of the line-item veto of a special fix for New York's improper provider taxes in the Balanced Budget Act?**
- A. No. HCFA has been reviewing provider tax policies for some time. The policy review described today was in the pipeline prior to the President's action but has received increased attention as a result of the line item veto. The item canceled by President Clinton would have given preferential treatment to New York by allowing that state to continue relying on potentially impermissible taxes to fund its share of the Medicaid program.

FOR INTERNAL USE

4.Q. Does HCFA's policy change resolve most of state provider taxes problems or are some still open to dispute?

- A. The policy changes affect some but not all of state provider tax concerns. After review of our interpretation of the law, we have clarified our interpretations of three types of taxes. First, we have determined that one of the types of taxes we questioned — those imposed on providers based on patient days or the occupied beds — are indeed uniform. In addition, we have determined that States do not need to submit a new waiver request for a tax under its existing waiver if there is a uniform change in the rate. Thirdly, HCFA has published in the *Federal Register* a correcting amendment to the uniformity test in the regulation lowering the threshold for allowable tax programs based on regional variations, enacted and in effect prior to November 24, 1992.

These policy clarifications and corrections will apply to all States, and we think that certain taxes in at least 10 States will immediately be considered permissible and require no further review (Alabama, District of Columbia, Louisiana, Ohio, Mississippi, Montana, New York, South Carolina, Utah, Wisconsin).

However, many issues remain unresolved. HCFA will attempt to resolve these issues through discussions with States and will support legislation to assist in these efforts. The Administration will support legislation that codifies the tests to determine that a tax is permissible and concentrates in the Department greater authority to work with States to resolve impermissible tax liabilities in return for States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however, it is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

5.Q. Many states have had waiver applications at HCFA for several years. Why has this action take so long?

- A. Reviewing the state waiver requests has taken longer than we would have liked. The evaluation of each waiver request is a lengthy and complicated process that often requires HCFA to seek additional information from states and for states to resubmit calculations that may have been done in error. Resolving some of these tax issues could involve lengthy litigation. That is why the Administration will support a legislative codification of what qualifies as a permissible tax.

FOR INTERNAL USE

6.Q. Are some states getting a better deal than others? Can you say unequivocally that this policy is being applied fairly among all the states?

A. Yes, we can say that no state is getting "a better deal" than another state. The HCFA policy has a national application and effect. For instance, all state hospital taxes that are based on the number of days that patients are in the hospital (occupied bed/or patient days) or only make a uniform change in the rate of a tax that is otherwise broad-based are now considered to be permissible taxes, to the extent these tax programs do not contain a hold harmless provision.

7.Q. What is the White House's involvement in this issue?

A. Medicaid enforcement actions are handled directly by the Department of Health and Human Services, and the Health Care Financing Administration (HCFA) in particular. As we do for all similar types of policy issues, the White House and the Office of Management and Budget have reviewed HCFA's policy interpretations. However, the White House has no direct involvement with compliance actions affecting specific states.

NEW YORK QUESTIONS

8.Q. The "correcting amendment" would change the generally redistributive waiver test threshold from 0.85 to 0.7. Is it true that this new number benefits only the State of New York? Is this another attempt by New York to get some sort of special fix? Why is HCFA so determined to give NY special treatment in the first place?

A. While it is HCFA's understanding that the State of New York is the only State that has a tax program of this nature, the correcting amendment is not an attempt to give the State of New York preferential treatment. HCFA is simply bringing its regulation into compliance with the Congressional intent.

FOR INTERNAL USE

9.Q. New York's Governor and Congressional Delegation have made it clear that no less than a "hold harmless" outcome (meaning the state owes no money to the Federal government) to the Administration's review of provider taxes would be acceptable. They may feel that HCFA's failure to give them a hold harmless will harm the State's Medicaid program. Don't you care about the hospitals and the poor people that the Medicaid program serves?

A. First, the President's record of support for the Medicaid program is longstanding and clear. He fought long and hard to ensure that the program would not be block granted and that guarantee of health coverage for millions of Americans would be preserved.

Second, the announcement today makes clear that New York cannot be held liable for over \$1 billion in regional provider taxes that were previously in question. This is -- without question -- the largest provider tax that New York relied on, and today's action relieves the state of major budgetary concerns.

Third, the outstanding provider taxes still in question are just that -- still in question. HCFA will be contacting the State asking for more information if needed on some of its taxes. New York will have the opportunity to provide information to illustrate that their provider taxes are consistent with the law.

But let's be clear: to maintain the integrity of the Medicaid program and the confidence of the taxpayers who support it, we must be certain that the Federal Treasury is not impermissibly being tapped to underwrite costs that are the responsibility of the states. To not do so would damage the integrity of the Medicaid system and would be unfair to those other states (and the taxpayers who support them) which are in compliance

10.Q. The Mayor's Office, the Governor's Office, the New York Hospital Association, and even Al Sharpton are threatening to sue the Federal Government over this provider tax issue. Do you have any response to these threats?

A. They certainly have the right to sue, but we would hope that these parties would allow the Governor's office and the Health Care Financing Administration to work through either an administrative or legislative process that meets the Administration's criteria before they pursue a lengthy and potentially expensive legal response.

FOR INTERNAL USE

11.Q. What about the issue of the constitutionality of the line item veto and Senator Moynihan's indication that he supports a challenge of the President's veto?

A. We believe that the President's line item veto power authority, which was authorized in statute by the Congress, would be upheld in any court challenge.

12.Q. Doesn't your action leave New York \$500 million in hole? The state is claiming that you are still leaving them with a huge liability that will jeopardies their ability to run their Medicaid program.

A. The amount of the provider tax dollars that may be out of compliance is unclear. It is true that HCFA does have questions about some of New York's provider taxes. The agency will request more information from the state about these taxes, and the state will have the opportunity to provide information to illustrate that their taxes are consistent with the law.

POLICY QUESTIONS

13.Q. How will you make sure vulnerable people are not hurt, or kicked off Medicaid rolls if the federal government recoups its overpayments from states?

A. The Administration's record of protecting Medicaid and the people it serves is well documented. One of the major reasons why the President vetoed the 1995 Republican budget bill was its intent to dramatically reduce its Medicaid funding and eliminate the guarantee of health care to low income and disabled Americans. It would not support policies that disadvantage Medicaid beneficiaries. It is, however, HCFA's responsibility to run this program in a way that is fair and consistent across all states. Such management will increase the public's confidence in the Federal oversight of the Medicaid program.

FOR INTERNAL USE

14.Q. What is impermissible about provider taxes? What does “broad based and uniform” mean?

- A. Impermissible health care related taxes fall into three general categories: taxes imposed on groups not listed in the statute or regulation (“bad classes”); taxes returned to the taxpayers (“hold harmless”); and taxes that fail the broad based and/or uniformity waiver test. In general a broad based health care related tax is one that applies to all members of a recognized class or category. Uniform health care related taxes mean a tax which is levied at the same rate for all those in a particular group or class. A “hold harmless” means that the taxes are returned to the taxpayer at the expense of the Federal government.

15.Q. How much in total does the Federal government expect to recover?

- A. Recovery is not HCFA’s primary goal; it is to end the use of impermissible taxes. There is no precise estimate of how much money is at stake since audits must be performed to determine the exact amount of revenue collected from impermissible health care related taxes. However, based on initial estimates through March 1997, HCFA estimates the total amount of impermissible taxes to be between \$2 and \$4 billion.

ALL STATES - GENERAL POLICY LETTER

Dear State Medicaid Director:

We are writing to inform you of several policy interpretations which the Health Care Financing Administration (HCFA) has recently adopted. These interpretations relate to the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991, Pub. L. No. 102-234 § 2(a) (codified at section 1903(w) of the Social Security Act (the Act)), and related regulations, and were adopted as part of a review of HCFA's policies in the area of provider taxes.

As you know, the Medicaid Voluntary Contribution and Provider Specific Tax Amendments were enacted to limit Federal financial participation (FFP) in States' medical assistance expenditures when the States receive funds from, among other sources, impermissible health care related taxes. Under the Act, States may continue to receive FFP with respect to ~~bro~~ad based~~ed~~ and ~~uni~~form~~ed~~ health care related taxes. According to section 1903(w)(3)(B), a broad based health care related tax means a health care related tax which is imposed with respect to a permissible class of items or services on all providers in that class. In addition, under section 1903(w)(3)(C) of the Act, a uniform health care related tax means a tax which is imposed with respect to a permissible class of items or services at the same rate for all providers. For those taxes which are not broad based or uniform, the Secretary may grant waivers if she finds that the taxes in question are "generally redistributive,"~~ed~~ pursuant to section 1903(w)(3)(E) of the Act.

In this letter, we first clarify HCFA's interpretation of the requirement that health care related taxes be applied uniformly. Second, we clarify that, when the Secretary has granted a waiver with regard to a health care related tax because she has concluded that the tax is generally redistributive, a later uniform change in the rate of tax will not require the State to submit a new waiver request. Third, we are reminding States of their opportunity to propose additional classes of providers, items, or services which the Secretary may consider including as permissible classes. Fourth, we are reminding States that all provider related donation revenue and health care related tax revenue, which includes licensing fee revenue, must be reported to HCFA on the HCFA-form 64.11A. Lastly, we commit to working with States to consider ways, including legislation, to expedite the identification of impermissible taxes and end their use.

First, with regard to the requirement that health care related taxes be uniformly imposed, the implementing Federal regulation at 42 C.F.R. § 433.68(d)(iv) specifies that a health care related tax will be considered uniformly imposed if the tax is imposed on items or services on a basis other than those provided by statute, and the State establishes to the satisfaction of the Secretary that the amount of the tax is the same for each provider of such items or services in the class. We are clarifying that HCFA interprets 42 C.F.R. § 433.68(d)(iv) to include health care related taxes on the occupied beds of a facility or the patient days of a facility. HCFA has concluded that, to the extent the rate of a health care related tax is the same for each occupied bed or patient day and the tax is applied to all providers in the permissible class of services, a health care related tax program based on occupied beds or patient days will be considered uniformly applied. Previously, HCFA had interpreted the Act to require that the tax be applied to all beds or all days to be considered uniform.

Second, where States have sought and obtained waivers for existing health care related tax programs, HCFA is clarifying that a uniform change in the rate of tax will not require a new waiver. To the extent a State makes no other revisions to an existing health care-related tax program (e.g., modifications to provider or revenue exclusions), HCFA would not view a uniform change in the tax rate as a new health care related tax program.

Third, section 1903(w)(7)(A)(ix) of the Act states that the Secretary may establish, by regulation, classes of health care items and services, other than those listed by statute. The implementing regulation, at 42 C.F.R. § 433.56 specifies 10 additional permissible classes of items and services. In addition, the preamble to the implementing regulation indicates that the Secretary will consider adding additional classes if States can demonstrate the need for additional designations and that any proposed class meets the following criteria: 1) the revenue of the class is not predominantly from Medicaid and Medicare (not more than 50 percent from Medicaid and not more than 80 percent from Medicaid, Medicare, and other Federal programs combined); 2) the class is clearly identifiable, for example, by designation through State licensing programs, recognition for Federal statutory purposes, or inclusion as a provider in State plans; and 3) the class is nationally recognized rather than unique to a State. This is a reminder and an invitation to States that they may identify additional classes.

Fourth, section 1903(w)(7)(F) of the Act defines the term ~~tax~~ to include any licensing fee, assessment, or other mandatory payment. Therefore, any licensing fee applied to the items or services listed by statute and/or regulation must comply with the

law. Furthermore, section 42 C.F.R. 433.56(a)(19) requires that for health care items or services not listed by regulation on which the State has enacted a licensing fee or certification fee, the fee must be broad based, uniform, not contain a hold harmless provision, and the aggregate amount of the fee cannot exceed the State's estimated cost of operating the licensing or certification program. Section 42 C.F.R. 433.68(c)(3) states that waivers from the uniform and broad based requirements will automatically be granted in cases of variations in licensing and certification fees for providers if the amount of such fee is not more than \$1,000 annually per provider and the total amount raised by the State from the fees is used in the administration of the licensing or certification program. This is a reminder to States that any licensing or certification fee imposed on providers of health care items or services is considered a health care related tax.

Furthermore, section 1903(d)(6)(A) of the Act requires that States include in their quarterly expenditure reports, information related to provider-related donations and health care-related taxes. This is a reminder to report all provider-related donation revenue and health care-related tax revenue on the HCFA-form 64.11A

The Administration remains committed to ending the use of impermissible taxes. Failure to end their use undermines the integrity of the Medicaid program and would be unfair to those States that are in compliance as well as to the taxpayers who pay for the program.

HCFA will continue to apply the current provider tax laws. As a part of this process, HCFA will have discussions with States individually to understand their existing provider taxes and, where necessary, to develop better compliance plans that recognize the challenges that States may face.

The Administration's goal is to end the use of impermissible taxes as soon as possible. To achieve rapid and full State compliance, it is willing to work with States to resolve impermissible tax liabilities. The Administration believes that this will be facilitated by legislation that codifies the tests to determine that a tax is permissible and concentrates in the Department greater authority to work with States to resolve current tax liabilities in return for States coming into full compliance. In the development of this legislation, the Administration will work with States, the National Governors' Association, and Congress to address the concerns States have raised with respect to current law. If, however, legislation is not enacted by August 1998, the Secretary will move forward to complete the process already begun to apply with full force the current law.

If you have any questions concerning these policy clarifications, please contact your regional office.

Sincerely,

Sally K. Richardson
Director
Center for Medicaid and State
Operations

cc: All Regional Administrators

All HCFA Associate Regional Administrators
Division of Medicaid and State Operations

Lee Partridge
American Public Welfare Association

Joy Wilson
National Conference of State Legislatures

Jennifer Baxendell
National Governors' Association

INCENTIVES FOR STATES TO NEGOTIATE WITH THE SECRETARY ON PENALTIES OWED FOR CURRENT OR PREVIOUS IMPERMISSIBLE TAXES

requires a disallowance equal to the amount revenue raised by the impermissible tax or donation) if either of the following factors exists:

- (1) for taxes initiated prior to the new legislation, the impermissible tax is terminated within a limited time (consistent with new transition period) after enactment of the new legislation, regardless of any notice by HCFA;
 - (2) the tax is acceptable under the new legislation even if previously considered impermissible.
 - (3) the impermissible tax did not place a significant burden on the Medicaid program (marginally failed redistributive test),
 - (4) number of years of non-compliance.
- this recommendation would allow the Secretary the prescribed authority to act unilaterally, without the Department of Justice, only when a State has terminated the impermissible health care related tax and/or provider related donation program.
 - the recommended transition period would not apply to any impermissible health care related tax programs and/or provider related donation programs enacted after the new legislation. These taxes would be subject to current statutory enforcement requirements.

b. Deferred Repayment

As an alternative to or in conjunction with a graduated transition system, a deferred payment system could afford States a longer period to repay past penalties.

- we recommend that this system be used in conjunction with the new transition period repayment system. This system would not create the same incentive as the graduated system if it required total repayment of impermissible health care related taxes and/or provider related donations.

**INCENTIVES FOR STATES TO NEGOTIATE WITH THE SECRETARY ON
PENALTIES OWED FOR CURRENT OR PREVIOUS IMPERMISSIBLE TAXES**

- 20
- As an alternative to this schedule, States could have up to five (5) years to repay past liabilities with a minimum repayment of 20 percent of the transition period repayment per year.

OTHER OPTIONS:

We considered blanket forgiveness for those States that may have impermissible health care licensing and/or user fees. In light of the information collected from States in late 1997, it would be administratively inefficient to try and collect the minimal past liabilities.

Other settlement factors that were considered:

- (1) the full penalty will have a significant impact on the state program, and/or
- (2) whether the revenue from the tax was used to promote state health care programs. The Secretary should also have the authority to extend the amount of time states have to repay large penalties.

In addition, we considered defining a point in time where States may have had a complete understanding of HCFA policy on the use of health care related taxes and provider related donations. Dates that were considered were;

August 13, 1993	publication of the final regulation
February 1995	HCFA held a tax and donation conference in Dallas
July 1, 1995	June 21, 1995 all State Medicaid Directors policy letter based on Dallas conference

The team decided that such date would not strengthen HCFA's goals.

Background on Provider Taxes. In 1991, Congress enacted Medicaid Voluntary Contribution and Provider-Specific Tax Amendments Act to curb the tremendous growth in the Medicaid Disproportionate Share Hospital Program (DSH). The growth resulted from states use of DSH payments and related special provider tax and donation financing mechanisms to effectively lower the state share of Medicaid. The 1991 law prohibited provider taxes and donations if the incidence of the tax falls disproportionately on the Medicaid program.

In spite of the legislation, HCFA believes that some states continue to levy impermissible taxes. However, the Administration never audited these states or taken a disallowance penalty. Thirty states reported income from provider taxes, fees, or donations to HCFA for which audits will be necessary. **HCFA's rough estimates suggest that revenue from impermissible taxes could total nearly \$5 billion.** Reliable estimates will not be available until HCFA audits the states.

Pending Legislation. State's use of impermissible taxes gained increased scrutiny in August 1997, when the President used his line item veto authority to cancel the BBA provision that would have permitted New York to levy impermissible taxes in the event HCFA attempted to enforce the law. In press statements following the veto, the Administration promised legislation to end the use of these taxes.

On April 2, 1998, HHS transmitted to the Congress new provider tax legislation designed to encourage states to comply with the 1991 law. The legislation provides the Secretary with greater authority negotiate favorable financial settlements with states for past non-compliance with the 1991 law. To qualify for a settlement, a state must end its impermissible taxes. The legislation also codifies existing regulations to underscore the intent of the 1991 provider tax and donation law.

In its transmittal letter, HHS informed Congress of its intention to enforce the existing law if legislation is not enacted by this August -- resulting in audits and disallowances. **To date, Congress has not acted on the legislation.**

Disallowance Process. A disallowance reduces future Federal contribution for the non-compliant state's Medicaid program. A disallowance action -- especially given the size of some state's impermissible tax liability -- could disrupt the state's Medicaid, waiver, and/or children's health programs.

Step One: Audits Before a disallowance, HCFA must perform a lengthy audit process to determine the amount of federal funds to be recovered from each state. Because of limited resources, HCFA plans to stagger the audits by prioritizing states who have most clearly violated the law:

- In August, HCFA will begin notifying the states with impermissible taxes and begin conducting audits in September (HI, IL, IN, LA, ME, MN, MO, NY, TN). These states' taxes are impermissible because they violated the "hold harmless" provision of the law.

DRAFT

- Concurrently, HCFA will review and, if necessary, begin audits for states that have submitted waivers for their taxes. (AL, CT, FL, HI, MA, MN, NV, NH, TN, UT).
- By the end of October, HCFA begin the audit process for states with questionable taxes and user fees. (AL, CT, CO, FL, MD, MI, MN, MT, NV, NJ, NC, OH, OK, PA, SC, TX, UT, WV, WI, WY). The last round of audits should be complete by the end October.

The initial audit may take up to 60 days, followed by a draft report and state comment period. Once a final audit report is issued to a state, the state 30 days to return the requested federal funds or HCFA begins a formal disallowance action. HCFA anticipates that the entire audit process will have been completed in every state before August, 1999.

Step Two: Disallowances The disallowance process begins with HCFA issuing a formal disallowance letter to the state detailing which funds are impermissible, how much money is owed to the Federal government, and how HCFA will recover the money by reducing the state's future Medicaid grant awards.

Step 3: Appeals The state may appeal the disallowance to the Departmental Appeals Board. The state may retain the disallowed funds through the appeals process. If the state loses the appeal, then it may pursue the action in court. Resolution of these court cases may take several years.

Next Steps: Before any action is taken, HCFA plans to brief Congress and the NGA on the process. Chris Jennings would like these briefings to take place as soon as possible. HCFA will try to meet with the NGA this Monday, and follow up the meeting with a more detailed letter. (See tabs A&B)

Attachments

- Tab A: HCFA's Draft Disallowance Process Letter for Congress/NGA
- Tab B: HCFA's Proposed Timeline for Disallowance Process
- Tab C: Summary of Administration's Provider Tax Legislation

Tab A

HCFA draft

Nancy-Ann Min DeParle, Administrator
Health Care Financing Administration
200 Independence Ave., SW
Washington, DC 20201

Dear Ms. DeParle:

I was very encouraged by the legislative proposal, the Medicaid Provider Tax and Donation Amendment of 1998, that your agency sent to Congress earlier this year. I am glad to see that HCFA has been taking action in pursuing its goal to end the use of impermissible provider taxes and donations. The continuing use of these taxes undermines the integrity of the Medicaid program and is unfair to States that operate in compliance with the law. It is unfortunate that more progress wasn't made in moving the bill forward during this legislative session.

If I recall correctly, last fall you announced that you would be working with States to develop this legislation. At that time you also made it clear that if, by August of this year, it did not look as if the bill would be enacted, you would have to proceed in your efforts to resolve this issue within the constraints of current law. I would like to know how HCFA intends to proceed, if Congress does not act on this legislation before the end of the session.

Specifically, I am interested in the agency's timetable for taking action in states that have impermissible tax programs, the list of states that will be involved, and the potential amounts of money at issue in each of those states. In addition, I would like to know more about what specific steps are necessary to complete the process of ending the taxes and recovering disallowed matching funds, what appeal rights if any the states will have, and how those appeals will affect the timeliness of the entire process.

While I feel that it would be unfortunate for the situation to be handled with the procedures available under current law rather than those outlined in your legislative proposal I understand your need to move forward in your efforts to end these impermissible taxes. I look forward to hearing from you.

*****Please note that this represents the maximum amount of information that would be included in the letter. We will work to target the letter and tighten it up once we have received the incoming and everyone has had a chance to comment*****

The Honorable _____
United States House of Representatives

Dear Congressman _____:

Thank you for your inquiry regarding HCFA's intended plan of action with respect to the continued use of impermissible health care related taxes and donations. Our goal is to end the use of these taxes and donations as quickly as possible. To that end we transmitted a bill, The Provider Tax and Donation Amendments of 1998, to Congress for consideration earlier this year. We began working on the bill in October of 1997. It was also at that time that we announced that if, by August of 1998, it did not appear that our bill would be enacted before the end of the 105th Congress, we would have no choice but to proceed on this matter within the constraints of current law.

You had asked us for some specific information regarding the steps necessary to end the use of impermissible taxes, and our time table for taking those actions. You had also asked for a list of the states that would be affected and the amounts of money at issue in each of those states. Finally, you wanted some information about the administrative appeals process and how that process might affect the length of time needed to resolve these issues.

Description of the Agency's Plan of Action

States will be divided into three groups. The Administration plans to address these groups in order. The first group will be made up of states with impermissible taxes that violate provisions of the statute that cannot be waived under our regulations. Examples of these kinds of taxes include taxing programs that hold the taxpayer harmless, using either direct or indirect repayment mechanisms, and tax programs that levy taxes on classes of health care services or providers that are not permitted under the statute or regulations.

There are two provisions of our tax laws that states can request be waived. These are the requirements that all health care related taxes be broad-based (i.e. the tax is levied on every provider or service within a defined class) and uniform (i.e. that every provider or service that is subject to the tax is taxed at the same rate). States that have requested waivers of these provisions must demonstrate that their taxes are generally redistributive and do not place an undo burden on Medicaid providers or service. Depending on a state's tax program structure, this demonstration is accomplished by calculating one of two numerical tests and producing a result that falls within a defined range of values.

Several states currently have waiver applications pending. HCFA must review those tax programs and act on the waiver requests. If HCFA determines that the tax programs do not meet the standards of the waiver tests, or that the tax is not eligible to receive a waiver, and therefore not in compliance with current law, we will proceed with the audit and disallowance process to recover the improperly paid federal funds.

The 1991 Provider Tax Law also covers the receipt of health care related donations and the imposition health care related licensing and user fees. Our regulations provide a presumption of permissibility for licensing fees that do not exceed \$1000 per individual per year and donations that do not exceed \$5,000 per individual provider or \$50,000 per health care organization or entity per year. Several States have reported receiving income from donations and/or other mandatory fees that fall both within and outside of these limits. Each of these mandatory fee programs and donation records would have to be reviewed and evaluated for compliance with tax and donation laws and regulations. Should any impermissible fees or donations be uncovered, we will proceed with the audit and disallowance process to recover the federal funds associated with these impermissible fees.

The steps necessary to determine the amounts of federal funding associated with the impermissible taxes, fees and donations are essentially the same for each of the three groups of states. Although the start dates will be staggered due to resource constraints, each of the three groups will be handled concurrently so that the entire process will have been completed in every state before August of 1999.

In August of this year we will begin notifying the states with impermissible taxes of our finding that the tax is impermissible. We will then design an audit and review plan for each state. Auditors from our regional offices should be conducting audits by September of this year in these states. The audits are necessary to determine the amounts of federal funds to be recovered from each state and should take between 30 and 60 days to complete.

Following the completion of the on-site audits, staff will write a draft audit report. This report will explain the findings of the audit, detail the amount of federal funds involved, and request the return of those funds. The draft audit reports will be issued to states between October and November of this year. States will have thirty (30) days to respond to these draft audit reports.

Preparation of the final audit reports will begin by November or December of this year. The final audit reports will incorporate state comments where appropriate. Once these final audit reports are issued, states will have 30 days in which to return the requested federal funds. If the state does not meet this deadline, HCFA will begin the formal disallowance process.

While the audits are being conducted in the first group of states, HCFA will be making the final decisions on the pending waiver applications from the second group of states. Audits in these states should be underway by mid-September of this year. Following the completion of the

audits in the those states, our auditors will be dispatched to the remaining states to begin the last round of audits by the end of October. The remainder of the steps will be completed in a similarly staggered fashion so that the entire process should be completed in each of the states by July of 1999.

Description of the Formal Disallowance and Appeals Processes

The disallowance process begins with HCFA issuing a formal disallowance letter to the state detailing which of the state funds were not eligible for federal matching funds and how much money is owed to the Federal government. It also outlines the procedure HCFA will use to recover the money by reducing the state's future Medicaid grant awards.

The issuance of the disallowance letter is an appealable action. The state is usually given 30 days to respond to the letter and file a formal appeal with the Departmental Appeals Board. Any state that loses its appeal to the DAB has the option to pursue the action within the (State/Federal) courts system. Should a state decide to pursue this option, the final resolution of the case could take a number of years.

States are permitted to retain the disputed funds during the appeals process. However, should the state ultimately lose its appeal, it is liable for payment of interest on those amounts from the date of the disallowance letter.

List of States and Amounts at Issue

HCFA does not have a comprehensive list of states with impermissible taxes. A total of thirty (30) states have reported income from provider taxes, fees, or donations to HCFA for which believes audits will be necessary. At a minimum, each of these states will be subject to a review of their tax and donation history since 1993. Over the last several weeks, HCFA staff have been reviewing documentation provided by States and dividing the states into the three groups for the first, second, and third round of audits.

The total amount of money at issue cannot be determined at this time and will not be known until all of the audits have been completed. While it is true that HCFA has attempted to estimate these numbers in the past, the reliability and usefulness of those estimates are severely limited at best. An on-site, detailed audit of State financial records is the only credible method for making these determinations.

Thank you again for your inquiry. I hope that we have provided you with a level of detail that clearly explains HCFA's plan of action. If you have any questions regarding the information this letter or about the taxes and donation issue in general please do not hesitate to contact _____ or myself.

Sincerely,

Nancy-Ann Min DeParle
Administrator

Tab B

DATE: July 15, 1998
NOTE TO: The Administrator
SUBJECT: HCFA's Review Plan for Impermissible Taxes and Donations
FROM: Acting Deputy Director, Office of Legislation

You have requested an update on HCFA's strategy for enforcement of the current provider tax and donation statute. Consistent with HCFA's October 1997 announcement to end the use of impermissible taxes and donations, beginning August 1, 1998 HCFA is prepared to enforce the statutory provisions of section 1903(w) of the Social Security Act. The proposed strategy includes a time line of the steps necessary to enforce the recovery of FFP attributable to impermissible provider taxes and donations and a chart identifying the estimated resources required within each Region.

The time line is arranged into three concurrent phases based on a grouping of states. States can be divided into three categories; a) States which we know have impermissible taxes and for which those taxes are not eligible for a waiver (i.e. 'hold harmless' or 'impermissible class' taxes), b) States that have potentially impermissible taxes for which waiver applications are pending, and c) the remainder of the States that reported the collection of provider donations, and/or other mandatory payments including licensing fees and user fees.¹

- A. Impermissible taxes - ineligible for waiver applications
HI, IL, IN, LA, ME, MN, MO, NY, TN²
- B. Potentially impermissible taxes - waiver applications pending decisions
AL, CT, FL, HI, MA, MN, NV, NH, TN, UT
- C. Permissibility undetermined - provider donations, licensing and user fees - no waivers pending
AL, CT, CO, FL, MD, MI, MN, MT, NV, NJ, NC, OH, OK, PA, SC, TX, UT, WV, WI, WY

¹ The State groupings are based on State reports from the HCFA-form 64.11A and the November 1997 information collection exercise. The preliminary number of States impacted by this strategy is 30.

² The impermissible tax programs in HI, IL, IN, and ME have been terminated.

The plan is to address the states with impermissible taxes first (category A), followed by the waiver states (category B), and then the donation/licensing fee states (category C). This time line assumes that the different steps involved in the process will be able to occur concurrently among the three phases (i.e. step three will be occurring in Phase A at the same time that step two is occurring in Phase B and step one is occurring in Phase C).

The chart identifies states with impermissible tax and/or donation programs, the estimated number of hours required to enforce, and the amount of travel expenses associated with that enforcement. Given that the resources were assessed for only one iteration of the entire process, this may not be possible. If that is true, the time needed to complete the process for all taxes and all states will be longer than is indicated in the chart.

Please let me know if you wish to discuss.

Bonnie Washington

HCFA's Review Plan for Impermissible Taxes and Donations

Steps	Time line Phase A	Time line Phase B	Time line Phase C
<p>August of 1998</p> <p>Step #1 Review in-house info on impermissible taxes <i>Tasks: [Central Office]</i></p> <ul style="list-style-type: none"> - Review HCFA-64.11 reports to identify states with impermissible taxes. - Assign states to groups based on type of tax, waiver status and reporting history. - Review federal statutes, regulations, and HCFA policy regarding taxes. 	<p>Day 1</p> <p>Day 9</p>	<p>N/A</p> <p>Completed during Phase A</p>	<p>N/A</p> <p>Completed during Phase A</p>
<p>August-October of 1998</p> <p>Step #2A Notify states with impermissible taxes <i>Tasks: [Central Office]</i></p> <ul style="list-style-type: none"> - Develop specific review plans for each state. - Send letters to states notifying them of our determination that they have an impermissible tax and outlining our timetable for action. <p>Step #2B Take Action on Pending Waiver Requests <i>Tasks: [Central Office]</i></p> <ul style="list-style-type: none"> - Send letter to States indicating we will begin making final waiver decisions (allow States 15 days to provide additional information) - Review incoming information from States - Deny or grant waiver request and notify State of our decision. - Move to step 2A. <p>Step #2C Notify States of Potential Audits <i>Tasks: [Central Office]</i></p> <ul style="list-style-type: none"> - Send letter to States outlining our plan and inform them that, while we have no information that they have any impermissible taxes, we will be conducting audits on licensing fees, user fees, and donations. - Move to Step 2A 	<p>Day 10</p> <p>Day 15</p> <p>N/A</p> <p>N/A</p> <p>N/A</p> <p>N/A</p>	<p>Day 45</p> <p>Day 50</p> <p>Day 15</p> <p>Day 50</p> <p>N/A</p> <p>N/A</p>	<p>Day 90</p> <p>Day 95</p> <p>N/A</p> <p>N/A</p> <p>Day 20</p> <p>Day 95</p>

Even in cases where waiver applications are approved audits may still have to be conducted to determine the amount of penalty owed for the period prior to the waiver application

<p>September-December of 1998 Step #3 - Conduct Audits <i>Tasks: [Regional Offices]</i></p> <ul style="list-style-type: none"> - Discuss tax programs with state officials. - Review state records. - Ascertain time periods when taxes were in effect. - Determine impact of impermissible taxes on FFP for FYs in question. 	<p>Day 30 Day 45</p>	<p>Day 85 Day 90</p>	<p>Day 120 Day 135</p>
<p>September of 1998 - February of 1999 Step #4 Prepare & issue draft audit reports <i>Tasks: [Regional Offices]</i></p> <ul style="list-style-type: none"> - Write letter that explains findings, shows FFP effect and requests return of improperly paid FFP. - Obtain OGC and CO concurrence with report and recommendations. - Issue report (letter) to state with 30-day response period. 	<p>Day 60 Day 90 Day 95</p>	<p>Day 105 Day 135 Day 140</p>	<p>Day 150 Day 180 Day 185</p>
<p>Beginning October 1, 1998 - Decision Point - Deferral of Current FFP Claims HCFA must decide if current claims for the quarter ending June 30, 1998 will be deferred. If claims are deferred and disallowed, states will not have the option of retaining funds during the appeal process. Will cause an immediate adverse fiscal impact.</p>			
<p>December of 1998 - June of 1999 Step #5 Prepare & issue final audit report <i>Tasks: [Regional Offices]</i></p> <ul style="list-style-type: none"> - Review state comments and make appropriate revisions to report. - Obtain OGC and CO concurrence with final report. - Issue report to state and request return of improperly claimed FFP. - Set deadline for return of FFP (normally 30 days). - If FFP is not returned, proceed with disallowance process. 	<p>Day 150 Day 180 Day 185 Day 215</p>	<p>Day 195 Day 225 Day 230 Day 260</p>	<p>Day 240 Day 270 Day 275 Day 305</p>
<p>December of 1998. - April of 1999 <i>Tasks: [Regional Offices]</i> Step #6 Disallowance Process</p> <ul style="list-style-type: none"> - Prepare draft disallowance letter. - Obtain OGC and CO clearance. - Issue disallowance letter to state.⁴ - If no appeal, recover FFP through grant award process. 	<p>Day 220</p>	<p>Day 265</p>	<p>Day 310</p>

⁴ This is an appealable action, the State is usually given at least 30 days to respond to our disallowance letter.

April of 1998.....

Step #7 Appeal Process

Tasks:

- If state appeals to DAB, state may retain funds during appeal but is at risk for interest from the date of disallowance if appeal is unsuccessful.

Day 251

Day 296

Day 341

Original

Tab C



THE SECRETARY OF HEALTH AND HUMAN SERVICES
WASHINGTON, D.C. 20201

April 2, 1998

The Honorable Albert Gore, Jr.
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

Enclosed for the consideration of the Congress is the Administration's draft bill, the "Medicaid Provider Tax and Donation Amendments of 1998".

Our goal is to end the use of impermissible provider taxes and donations. To that end, we have spent the last several months working with States to identify changes to the existing legislation that would make administration of tax programs less burdensome and give States stronger incentives to end the use of impermissible tax and donation programs. This bill is the culmination of those efforts.

The bill would amend the Medicaid statute (title XIX of the Social Security Act) to strengthen and clarify the provisions that define impermissible provider taxes and donations and to reduce record-keeping burdens on States. In addition, the bill would concentrate in the Department time-limited authority to work with States to resolve current tax liabilities in return for States eliminating impermissible tax and donation programs. Key features of the bill are outlined below. The provisions of the bill are described in greater detail in the enclosed section-by-section summary.

The bill would (1) provide that a tax consisting of a licensing fee or similar charge will not be treated as an impermissible tax if (A) the revenues from the tax are only used for administration of the program for which they are collected, and (B) the State Governor (or other official specified by the Secretary) provides

Page 2 - The Honorable Albert Gore, Jr.

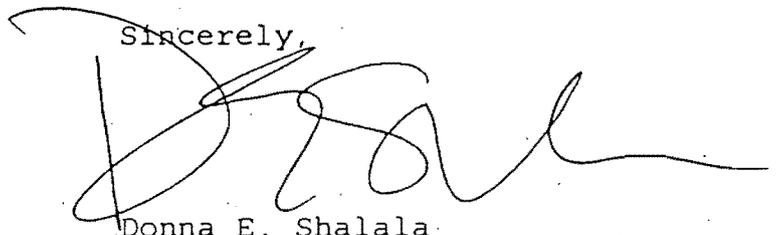
appropriate certification; (2) in the case of States that act quickly to eliminate all impermissible tax and donation programs in effect prior to enactment, require the Secretary to adjust the amount of the penalty that would otherwise be taken with respect to certain revenues raised from such programs; (3) clarify the manner in which a State must perform the "generally redistributive" test when it seeks a waiver from the Secretary for taxes that are not broad-based and uniform, and add a provision that would allow States to aggregate classes when performing such test; and (4) expand the list of classes of items and services on which a broad-based tax may be imposed, and specify the criteria to be used by the Secretary in establishing additional permissible classes.

This draft bill affects a program that is subject to the pay-as-you-go requirement of the Omnibus Budget Reconciliation Act of 1990. The Office of Management and Budget's scoring estimate of the draft bill is zero.

We urge the Congress to give the draft bill its prompt and favorable consideration.

The Office of Management and Budget has advised that there is no objection to the submission of this legislative proposal to the Congress, and that its enactment would be in accord with the program of the President.

Sincerely,

A handwritten signature in black ink, appearing to read "Donna", with a long horizontal flourish extending to the right.

Donna E. Shalala

Enclosure

"Medicaid Provider Tax and Donation Amendments of 1998"

Section-by-section Summary

(Except as otherwise indicated, this bill amends provisions of the Social Security Act. References to the "Secretary" are to the Secretary of Health and Human Services.)

SEC. 2. HEALTH CARE LICENSING FEES.

Section 2 makes various amendments to provisions of 1903(w) that specify the types of health care related taxes that will be treated as "impermissible taxes" for purposes of determining whether a State will be subject to a disallowance of medical assistance expenditures eligible for Federal matching payments. These amendments provide that a tax consisting of a licensing fee or similar charge will not be subject to a disallowance if (1) the total amount of revenue raised by the State from such tax will be used in the administration of the licensing program for which the charge was assessed or for regulation of the entities subject to the charge, and the State maintains on file a certification by the Governor (or other official specified by the Secretary) to that effect; and (2) the tax does not contain a hold-harmless provision.

The bill also provides that if the Secretary finds that the State has used any revenue from a tax described above for purposes other than those described in a certification, the Governor (or other certifying official) is subject to a civil monetary penalty of not to exceed \$10,000. The bill specifies the administrative procedures that will apply if the Secretary imposes a civil monetary penalty pursuant to this authority.

SEC. 3. SECRETARY'S AUTHORITY TO ADJUST CERTAIN AMOUNTS OWED BY STATES.

Section 3 amends section 1903(w)(1)(A) (which requires that the amount of State medical assistance expenditures eligible for Federal matching payments be reduced by the amount of State revenues from certain impermissible taxes and donations (the "standard reduction") and adds new subparagraphs (H) and (I) to section 1903(w)(1). The amendments require the Secretary to reduce the amount of the standard reduction attributable to

revenues from impermissible tax or donation programs in effect prior to the date of enactment of the bill if the State eliminates all such impermissible programs within two years of enactment of the bill. The Secretary is not authorized to adjust the amount of the standard reduction for revenues (1) received more than one year after the enactment of the bill; or (2) from impermissible tax or donation programs initiated after the enactment of the bill.

The bill requires the Secretary to determine an appropriate adjustment percentage within a range that varies depending on the date by which the State eliminates all such past tax or donation programs (the "compliance date"). For a State with a compliance date that is (1) within one year after the enactment of the bill, the range is 20 to 60 percent of the standard reduction; and (2) more than one year, but less than two years, after such enactment, the range is 50 to 80 percent of the standard reduction.

In determining the appropriate percentage within the ranges described above, the Secretary is required to consider the following factors: (1) whether the tax or donation program is permissible under the bill; (2) whether the tax or donation program was initiated prior to the enactment of the Medicaid Voluntary Contribution and Provider-Specific Tax Amendments of 1991; (3) the number of years the impermissible tax or donation program was in effect; and (4) whether the State cooperated with the Secretary after the enactment of the bill by informing the Secretary of all impermissible tax or donation programs, providing the Secretary with all information necessary for the evaluation of such programs, and expeditiously eliminating such programs.

The bill authorizes the Secretary to take adjusted reductions against States over a five year period. The Secretary is required to take a minimum of 20 percent of a State's reduction amount per fiscal year, unless the State agrees to allow the Secretary to take the remaining balance in fewer than five years.

SEC. 4. GENERALLY REDISTRIBUTIVE WAIVER TEST.

Section 4 amends section 1903(w)(3)(E) (the "waiver"

authority under which a tax that does not otherwise meet the requirements for treatment as a broad-based and uniform tax will be so treated if the Secretary finds that it is generally redistributive and does not include a hold-harmless provision). The amendments clarify that a tax cannot be considered generally redistributive unless the burden it places on the Medicaid program is no greater than the burden that would be placed on the Medicaid program by a tax that is broad-based and uniform.

The amendments also prescribe elements of the method for performing the calculation to determine whether a proposed tax is generally redistributive. Specifically, a State must compare (A) the revenues that would be raised if the State were to tax all health care items, services, or providers within the class or classes that the State proposes to tax (including all Medicare and Medicaid revenues and receipts), with (B) the revenues that would be raised from only those items, services, or providers that are subject to the proposed tax.

Finally, the amendments add a new provision that allows a State that seeks to impose a tax on more than one class of health care items, services, or providers to consider in the aggregate the net impact of the tax on all such classes when performing the generally redistributive test.

SEC. 5. ADDITIONAL PERMISSIBLE HEALTH CARE CLASSES.

Section 5 amends section 1903(w)(7)(A) (which specifies the classes of items or services on which a broad-based tax may be imposed). First, the bill adds as permissible classes (1) health insurance coverage; and (2) every health care item or service within a State. Second, in order to clarify the conditions under which the Secretary may establish an additional class, the bill adds language from the preamble to the final provider tax and donation regulation published on August 13, 1993, specifying that the additional class must meet the following criteria: (1) no more than 50 percent of the gross revenues or receipts of the class may be derived from Medicaid; (2) no more than 80 percent of such revenues or receipts may be derived from Medicaid, the Children's Health Insurance Program, Medicare, and any other Federal health care program; (3) the class is a designated category for purposes of State licensing or Federal regulation or taxation, is included as a type of health care provider under

Medicare or Medicaid, or is otherwise clearly identifiable; and
(4) the class is not unique to a State.

DRAFT: States with Provider Taxes

This is the preliminary list of states reporting some type of provider taxes on the required forms (HCFA 64.11 form).

Alabama
Arkansas
Connecticut
District of Columbia
Florida
Georgia
Hawaii
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Massachusetts
Michigan
Minnesota
Mississippi
Missouri
Montana
Nebraska
Nevada
New Hampshire
New York
Ohio
Oklahoma
Oregon
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Vermont
Washington
Wisconsin

Done! also

225-3121
-4365-

- Ufo

225-0816

- Royal

- Bill Vaughn

226-4969

x 3625

- Wags & M

As per your request