DEPARTMENT OF HEALTH & HUMAN SERVICES
Health Care Financing Administration

Center for Medicaid and State Operations
7500 Security Boulevard
Baltimore, MD 21244-1850

October 9, 1997

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 "broad based" and "uniform" 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," 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,

/s/

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