EXECUTIVE COMMITTEE MEETING

FRIDAY, NOVEMBER 22, 1991

U.S. Senate

Committee on Finance

Washington, D.C.

ORIGINAL

The meeting was convened, pursuant to notice, at 10:44 a.m., in Room SD-215, Dirksen Senate Office Building, the Hon. Lloyd Bentsen (Chairman) presiding.

Also present: Senators Moynihan, Mitchell, Pryor, Riegle, Rockefeller, Daschle, Breaux, Packwood, Roth, Danforth, Chafee, Durenberger, Symms, Grassley, and Hatch.

Also present: Vandra McMurtry, Staff Director and Chief Counsel; and Edmund Mihulski, Chief of Staff, Minority.

Also present: Dr. Gail Wilensky, Administrator, Health Care Financing Administration; Dr. Marina Weiss, Chief, Healthy Analyst, Majority; Tom Scully, Deputy Associate Director for Health and Income Maintenance, OMB; and Janis Guerney, Health Counsel, Majority.

(The press release announcing the meeting follows:)

The Chairman. Would you please be seated and cease conversation. We will get underway here.

Today we have before us the Waxman Bill. What I am proposing as an amendment to that is one that would impose a short-term moratorium on the administration's issuance of final regulations on voluntary donations, provider specific taxes and intergovernmental transfers.

The proposal would also freeze States from expanding their provider donations and their tax programs during the moratorium period. I would ask Dr. Wise to walk us through that amendment and that proposal.

Dr. Weiss. Yes, Mr. Chairman.

Mr. Chairman. And we have Dr. Wilensky here, of course; and Ms. Guerney to supplement the comments and tell us the administration's position.

Dr. Weiss. Yes, Mr. Chairman.

Mr. Chairman. Let me state the procedures that I would hope we can do. Hopefully we can report out the Waxman Bill as amendment. But then I would urge the consideration of an alternative.

We have a proposal between the governors and the administration. They have made considerable progress in working toward a resolution of these concerns. But the problem that we face is that we do not have the final language. My understanding was we had language, the first

language, at 4:00 yesterday afternoon. But then I am advised that there was revision of that language subsequent to that, and we have not seen that.

I would like to report that one out without recommendation, only because we do not know the final language and have not fully resolved it, and then hopefully we could get that one done. Time is short in trying to get this accomplished. So I am offering these two alternatives in trying to resolve it, to give us time over the weekend to see what can be done on it.

But with that in mind I would like to move first on my proposed amendment to the Waxman Bill will is a freeze.

If you would go ahead, Dr. Weiss.

Dr. Weiss. Mr. Chairman, a moratorim would be imposed on HCFA's issuance of final regulations on the States' use of provider donations until April 1, 1992. There would be a mortorium on the imposition of HCFA's issuance of final regulations on the States' use of provider-specific taxes until the same date, April 1, 1992.

A moratorium would also be imposed on HCFA's issuance of final regulations on the States' use of intergovernmental transfers until April 1, 1992. A moratorium would be imposed on HCFA's issuance of final regulations on payments to or designation of disproportionate share hospitals until April 1, 1992.

There would be base-line protection through which the Office of Management and Budget would be prohibited from assuming for purposes of the President's FY-93 budget base line any affects or potential affects on Federal expenditures that result from the issuance of a proposed interim final or final regulation relating to provider specific taxes, voluntary donations, intergovernmental transfers, disproportionate share payments or designation of disproportionate share hospitals.

There would, in addition, be sequester protection, in order to preclude a sequester of that period of time during which the freeze is in effect any expenditures during that period of time.

For the period January 1, 1992 to April 1, 1992 States would be prohibited from increasing the amount of the State share of Medicaid expenditures derived from voluntary donations above one-quarter of the amount which they derived from such donations in the prior Federal fiscal year.

For the period from January 1, 1992 to April 1, 1992 there would be no Federal match for the State share of Medicaid expenditures derived from taxes on any type of provider that were not established on or before November 22 -- today's date -- pursuant to State or local legislation enacted or before or in effect on November 22.

There could be no additional types of entities taxed and no increased in the tax rate during the period of the moratorium.

Further, there would be a prohibiton on penalty actions relating to the moratorium period, that is to say HCFA would be prohibited from taking any disallowance, penalty, compliance or other action to recovery Federal matching funds paid to a State during that period of time because of the State's expenditures on which the matching funds were based were paid for with revenues derived from either voluntary donations, provider-specific taxes or through intergovernmental transfers.

That prohibition would apply for State expenditures made during the period of the moratorium only. There would be a prohibition on revision of estimated amounts. With respect to the moratorium period, HCFA would be prohibited from reducing quarterly expenditure estimates submitted by the States or from withholding amounts paid in quarterly grants to the States solely because the expenditures would be paid for with revenues derived from voluntary donations, provider specific taxes or intergovernmental transfers.

The Congressional Budget Office advises us that they score no cost to this proposal.

Mr. Chairman. Are there questions?

Senator Durenberger. Mr. Chairman?

Mr. Chairman. Yes, Senator Durenberger.

Senator Durenberger. Mr. Chairman, like you and several of our colleagues I sat through over three hours of hearings last week and was substantially informed by those hearings.

I think we now know that just in the last year or so a lot of the States have caught onto a scheme, if you will, that only a few were aware of and everybody has been fast refining in the last year.

To have said that is not to accuse the States of doing anything that I suppose we would not do if we were not in the same sort of desparate financial straight, but it is only to say that this is the committee of responsibility to do something about it; and yet it comes to us at the very end of a very difficult session.

But I want to take just a minute to describe how outrageous these programs can become. Pennsylvania had a $208 million shortfall in its Medicaid hospital budget so a group of hospitals in the State formed a non-profit corporation, borrowed $365 million from a bank and donated the funds to the State. The State then increased its disproportionate share payments to these hospitals from a maximum of 2.5 percent of Medicaid reimbursement to over 53 percent.

That enabled the State to return the $365 million donation to the hospitals in the form of disproportionate share payments. The State then claimed the $365 million payment for

Federal matching and was reimbursed $208 million by the Federal government which enabled Pennsylvania to use the Federal funds to eliminate its $208 million Medicaid hospital budget shortfall.

This is not necessarily the most outrageous, but I can understand why in the New York Times today I see a quotation from the National Association of Public Hospitals, the National Association of Children's Hospitals, the lobbyists of the American Hospital Association all objecting to an agreement that people have been trying desparately to work out before the end of this session saying, ''The poor people could be harmed by the proposed limits on payments to hospitals serving large numbers of low income patients.''

I want to say that poor people will be harmed by the inability to come to an agreement on this issue and it is for that reason, even though I believe that a freeze is unfair to South Dakota, Oregon, Rhode Island, Delaware, Kansas, Idaho and Iowa in particular, to California, Oklahoma, Texas and Louisiana in the more specific, who have not gotten into this business who will have to sit and watch their more creative colleagues pick up large Federal bucks, I do not think it is fair to them.

I hate these provider taxes. I hate the idea. If everybody in this country had to pay their hospital bills, think of the outrage that we would see if they were also

paying somebody else's hospital bills at the same time in the form of a tax.

So personally I do not like the notion of these taxes, but I think the legislative process needs to deal with that larger issue. What we need to deal with, and what the Chairman is giving us an opportunity to deal with here, is a very difficult bind between the regulatory process and where the Governors and the legislatures would like to be at, and hopefully they can come together.

So, Mr. Chairman, with one amendment, which I intend to propose either now or at the appropriate time related to disproportionate share hospitals, I would support your proposal, but I would have to draw our attention to the one provision relating to base line protection.

As I understand the proposal, the administration could not assume in its budget base line any savings throughout the entire fiscal year from issuance of both the voluntary donations or the provider tax regulations and the regulation on reclassifying disproportionate share hospitals, which I hope to delete.

This clearly appears to violate the budget agreement. So I just wonder if -- I do not know how that is going to be dealt with here, but I must say that if my conclusion is correct about that particular portion of this, maybe we ought to figure out how best to deal with that as well.

Mr. Chairman. Let me tell you the realities of what we are facing here. HCFA came out with its regulations in September, highly controversial, great opposition by the States, West Room, brought them back, still a problem. We have very little time left before we hopefully adjourn for this recess.

What you are talking about on the governor's side, which I really want to see worked out if we can, is still highly complex if we were to get it through in the Senate. We will probably have troubles on the House side in working this one out. I don't want these two measures to fail, these two alternatives to fail. Then we are left with the HCFA regulations. That is our alternative.

But if we can put a freeze on, on both sides, now insofar as the base I want to be sure that we have some flexibility as to what we do in coming up with a solution and not to have to raise a whole bunch of extra money in that regard.

So I would hope that -- And it is my further understanding from what I heard from OMB this morning that maybe we can come to an agreement on that base and they will come up with a letter that helps us in that regard. If that is the case, something acceptable, then I would support an amendment on the floor to try to take care of it. I have not seen that yet.

But I would like for us to be able to proceed and get this amendment adopted and then listen to Dr. Wilensky and the

administration as to how that base might be handled to resolve the concerns of both of us. I will certainly give that consideration.

Senator Durenberger. Mr. Chairman, thank you very much.

If, in fact, that kind of an agreement can develop, and I think you have been given some tenative assurance that it could, I would not oppose it on that basis. But I would like to propose, if this is the appropriate time.

Mr. Chairman. That is fine. Let's have it.

Senator Durenberger. I think I have discussed this with you and with the Majority Leader also, to strike the language in the Chairman's proposal that would impose a moratorium on HCFA's issuance of final regulations on designation of disproportionate share hospitals until 1, 1992. Just take out that section of the moratorial language.

Mr. Chairman. Dr. Weiss, do you have a comment on that?

Dr. Weiss. Yes.

Mr. Chairman, I believe Dr. Wilensky wanted to comment on this. We may have a way that we can address the problem.

Mr. Chairman. All right. Dr. Wilensky, I would be happy to hear it.

Dr. Wilensky. The issue was raised, although this would only be true if the moratorium, in fact, ended as of March 31, that the practical situation is that the final regulation we would not want to be prevented from putting out our other

proposed regulation with regard to disproportionate share, but the final regulation with regard to disproportionate share which was raised earlier in all practical affects probably could not come out before the end of March. That is, the comment period ends in January and the likelihood of being able to turn a final rule around, again, our willingness to indicate that in a letter form would be only insofar as the moratorium actually ended in March and no later.

Mr. Chairman. Well that might take care of the situation. Do you think it would, Dr. Weiss?

Dr. Weiss. I know a number of the States would prefer to have the language that prohibits the publication of the regulations. But if you are interested on working on a compromise this is an approach you might wish to take.

Senator Mitchell. Mr. Chairman, might I ask a question?

Mr. Chairman. The Majority Leader.

Senator Mitchell. Mr. Chairman, first, I want to strongly commend you for the manner in which you have proposed to deal with this serious problem. It demonstrates genuine leadership and innovation and I think the dual track method that you have suggested of proceeding with respect to the Governor's agreement in the hopes that can be worked out, and in the meantime of offering an alternative in the event it does not, so that this wole thing does not fall through the cracks

represents the most prudent and sensible approach at this time.

I have discussed the matter at some length with the Governor of my State, including I had a telephone conversation yesterday. As a consequence I am persuaded that the Governor's agreement is the best way to go if it can be done. If it cannot, then I think some form of moratorium.

I had two questions that are somewhat related, particularly in view of Dr. Wilensky's most recent comment. On the moratorium itself, which you have proposed, Mr. Chairman, our Governor relayed to me his concern that in our State the fiscal year ends on June 30 and the legislature will not be in session as of March 31 or April 1 when the moratorium is now scheduled to expire.

He has felt strongly and as a result has persuaded me that if we are not to proceed with a moratorium, it makes a great deal more sense to have it expire on June 30 and at least it is his impression that this is not a unique fiscal year situation for our State, but is a common place one and, therefore, many other States will be in comparable situations.

For a variety of reasons many States are now struggling through the most severe budget crises in recent years. Independent of the Medicaid financing problem, this is, however, a very great and added complication to their difficulties. I know that is true in my own State from my own

personal participation. I believe it is true in many other States as well.

If it does not adversely affect any State, and I would hope it does not, I would suggest that we consider if you proceed with the moratorium alternative having it continue until June 30 which is coterminous with the end of the fiscal year with what I believe are many States and would permit States to address it in at least a less difficult circumstance than would otherwise be the case.

Now that is implicated in the suggestion that Senator Durenberger has made to strike the authority of HCFA to issue the disproportionate share regulations because I was going to ask Dr. Wilensky if she is familiar with a situation in my State where a State plan amendment has been filed with HCFA. I wanted to inquire whether if Senator Durenberger's suggestion were adopted it would have an adverse affect upon the State of Maine's State Plan Amendment or whether they will be able to proceed with that.

Dr. Wilensky. As I understand what Maine has done, it would not have an adverse effect. Ultimately a State plan is approved as of the day it was submitted, once it is ultimately approved. So the effective date for Maine's State plan relating to disproportionate share would be prior to September 30.

It raises though two related issues. The first is that my comment that in practical grounds the disproporiate share final regulation would not be out probably until March anyway just of the nature in terms of turnaround time is not obviously true if the moratorium is extended through June.

Then we would either want to have an amendment such as Senator Durenberger's that freezes designation and amounts of disproportionate share as of a certain time period or we would want to proceed with our regulations regarding disproportionate share. Because while it is true that it probably would not be out by March we would hope it would surely be out before June 30. So that is an issue as to needing to go one way or another, particularly if it is extended.

The other issue with regard to the extension is it becomes even more critical for the administration as to the moratorium snapshot so to speak. As you are aware, we have great concern about the current snapshot of November 22 as being the time that captures the freeze period for the first quarter of calendar year 1992.

Our concern is that a great amount of activity has occurred in this period since September 30, both with States that were already planning to capture their last quarter of donations before they knew the door was going to shut and they knew that since October of 1990; and also because after

September 12 States had a pretty clear understanding of what we are about and there has been an unusual amount of activity since that period.

So to use the time period that it would go until say November 22 would cost a substantial amount of money. We believe very conservatively of $.5 billion. I think, frankly, since I know of almost $.5 billion without searching the rest of the States, that is probably an underestimate. That time period becomes very important and the longer the moratorium goes the more critical it becomes.

There are two other issues I would like to address. The first is to remind the Senators that the NGA administration proposal does actually for all those States who had a donation and tax program provide a moratorium until a quarter after the end of their own fiscal year. Presumably, if it were enacted, and the Congress decided, say, in the spring or early summer that the policy that starts kicking in no sooner than October 1 was not to its liking, it would have ample time to, in fact, introduce changes.

So people may not have looked at it that way, but you actually could look at the NGA administration proposal as a moratorium, although allowing States who have not participated in this activity at all a chance to come in and then a new set of policies that start to take effect no earlier than October

1, 1992 and for some States as late as June 1993. So it is actually a moratorium already built in.

A second issue is that as the --

Mr. Chairman. You have taken me through about six issues, but go ahead.

Dr. Wilensky. Sorry. One more, if I may.

Mr. Chairman. All right.

Dr. Wilensky. If you were to proceed with the moratorium as you have described, there is an additional problem that we have in having taxes and provider donations either established on enacted.

The reason that is a problem is that some States in the last quarter of 1991 had donation programs that were being converted into tax programs, tax programs that would start as of January 1, but that frequently had been enacted sometime in the fall of 1991.

We would not like to have in the presence of a moratorium those States be able to both capture the full amount of their donations and the full amount of the tax that was designed to replace the donation. We think if the concept would be introduced that if an ''and'' were included, that is, donation and taxes, they both had to be in effect at the same time in order for both to be carried forward into the moratorium.

Mr. Chairman. That is an interesting proposal.

How do you react to that, Dr. Weiss? You are trying to listen to people. I understand that. But did you get the gist of what Dr. Wilensky was saying?

Dr. Weiss. Yes, Gail and I have talked about it ahead of time and I think I knew what she was going to say, unless she has changed her position.

It is correct to say that there is interaction between the effective date of the moratorium, the point at which it closes, and the disproportionate share regulation promulgation.

I would just call the members' attention to the fact that Dr. Wilensky feels that if we go with the short-term moratorium that she would be able to supply you with a letter that would lay out exactly what HCFA intends to do. If we go with a longer term, as proposed by the leader, then we may have a bit of a problem with respect to their willingness to commit to not putting out those regulations in that interval.

Mr. Chairman. But was it my understanding that the action taken by the Maine legislature will be implemented before the end of the year was and, therefore, that concern is taken care of? Is that correct?

Dr. Wilensky. The concern that I understand the Leader had with regard to Senator Durenberger's amendment is not an issue that would adversely affect Maine.

Mr. Chairman. Okay.

Senator Mitchell. But provided the moratorium is not extended beyond?

Dr. Wilensky. No, that is not correct.

Senator Mitchell. It would be no problem?

Dr. Wilensky. Actually, it would not, irrespective of that. The reason is because Senator Durenberger freezes in place designation and disproportionate share rates as of a time; and that time would not be prior to September 30. The State of Maine is covered as of that period.

Senator Mitchell. Dr. Wilensky, I cannot do any better than get an assurance from you; and I take you at your word it will not adversely affect Maine's situation. Therefore, I will not object to that. I could not get a clearer assurance than that and I appreciate it.

Mr. Chairman. I must say what I really want is to see the Governors and the administration work this out. I want them to have time to do it. I am concerned that they do not have that time under the procedures we have in the Senate, that that can be blocked and, therefore, this freeze would give them the time to evolve that.

Then you get into procedures in the Senate where the majority ultimately is going to prevail. In this instance, from what you advise me, you have a super majority, so to speak, if that holds out.

Senator Rockefeller. Mr. Chairman?

Mr. Chairman. Yes, Senator Rockefeller?

Senator Rockefeller. I might just add this. West Virginia is in the interesting position of being better off if the HCFA regulations promulgated in September and finalized October 31 are in effect, so that in going along with a willingness to work out a compromise we want to try to be helpful on that.

I do want to make the point that over half of all babies in West Virginia are born under Medicaid. This is not something which is just of casual interest to me. It is a lot more than that. Our proposals were put into effect under the laws, as passed by Congress. Everything was done according to the way it should be. I want to see this worked out, too. I very much doubt it can get worked out in four days. But I do want to see it worked out.

But I also understand my State's interest in this.

Mr. Chairman. I understand.

Are there further comments? Yes, Dr. Weiss?

Dr. Weiss. Mr. Chairman, let me just clarify one thing. In Senator Durenberger's notice, since we have not seen the language of the amendment I wanted to clarify that the plan amendment submitted prior to the 30th of September would not be affected by this amendment; is that correct?

Senator Durenberger. What I proposed is just to delete the language that you have.

Dr. Weiss. Bullet number four.

Senator Durenberger. Yes, Bullet number four.

And as I understand Gail's interpretation, as long as Maine's plan was in before September 30, Maine's plan, assuming it gets approved, is not altered by this agreement.

Dr. Wilensky. Again, it has nothing to do with his amendment, as I understand it. HCFA procedure, which is any State plan amendment that is ultimately approved is regarded as having been approved as of the date it was submitted. Therefore, it is the submittal date, not the final approval date, that is at risk.

Mr. Chairman, that, of course, is true for Texas as well. Texas has made a number of disportionate shares State plan amendments that were designated prior to September that were submitted to us prior to September 30, some several hundred million dollars, as I recall, worth of State plan amendments with regard to disproportionate share designations.

Any State plan amendment that was submitted prior to September 30, which I believe if not all of them represents the bulk of them. I do not know if somebody can assure me of that. I know that at least the bulk of them were submitted prior.

All of those will be incorporated into Senator Durenberger's amendment, that is with a moratorium on no additional designations and no additional rate changes in

effect as of the date that the administration would need, that is September 30, any State plan amendment with regard to designation or rates of disproportionate share as Texas has done and as Maine has done, would not be adversely affected by the amendment.

Even though they have not been approved, they have been submitted to us and under common HCFA procedures it is the date of submittal that determines the relevant date.

Mr. Chairman. The question is the date of submittal. So I will speak to my own State then. Where are we in that regard?

Dr. Weiss. Mr. Chairman, Ms. Guerney has a question about what Gail is explaining which appears not to be exactly the amendment that is being submitted here.

Senator Durenberger. Could I try to clarify it, Mr. Chairman?

Mr. Chairman. Well, let's be sure that we understand what the question is on your amendment, unless you are clairvoyant on that.

Senator Durenberger. No, I submitted ahead of time to everyone an Amendment No. 1 and an Amendment No. 2. The Amendment No. 1 was just to strike out bullet number four. In case that failed for some reason that we could not agree on, then Amendment No. 2 said what is good for the goose is good for the gander. If there is going to be a freeze on HCFA

regulations, then there should be a freeze on the State's changing their designated share of hospitals.

That ladder is not the amendment before us. The amendment before us just takes out bullet number four.

Mr. Chairman. Well, we have a problem with that then.

Dr. Wilensky. Amendment No. 2 does not adversely affect Maine or Texas.

Amendment No. 1 would allow us to put out a final rule. Our final rule -- may, I do not know that it affects Texas -- definitely affects Maine.

But Amendment No. 2 provides protection to both Texas and Maine.

Senator Mitchell. Mr. Chairman, I did not know there were two amendments until just this minute, so that obviously accounts for the confusion.

Mr. Chairman. Frankly, I did not either.

Senator Mitchell. I ask the Senator whether he would consider offering offering Amendment No. 2.

Senator Durenberger. I would be pleased to offer Amendment No. 2 if that will help the cause, because I think we ought to get going and get something out of here.

Mr. Chairman. It sure sounds like it.

Now, do you see any problem with that, Dr. Weiss?

Dr. Weiss. Again to clarify, Amendment No. 2, which we

have not seen, would, in fact, protect those States that where plan amendments were submitted prior to the 30th of September.

Senator Durenberger. I am sorry. I thought you had seen it. I apologize.

Mr. Chairman. Do you think we are all right on that one?

Dr. Weiss. Yes.

Mr. Chairman. All right.

If there is not further objection, why don't you offer your amendment?

Senator Durenberger. Mr. Chairman, I offer the amendment as follows for the period from January 1, 1992 to April 1, 1992 States would be prohibited from reclassifying any of their hospitals into the category of Disproportionate Share Hospitals and would be precluded from changing reimbursement rates for Disproportionate Share Hospitals. Disproportionate Share Hospital Classifications that were in effect on September 30, 1991 would remain in effect through the period January 1, 1992 to April 1, 1992.

Mr. Chairman. Let us have a chance to look at the amendment.

(Pause)

Mr. Chairman. All right. You offer the amendment, do you, Senator?

Senator Durenberger. I move the amendment, Mr. Chairman.

Mr. Chairman. The amendment seems to address the concerns and not give us a problem.

Is there a second?

Senator Symms. Second.

Mr. Chairman. Further discussion?

(No response.)

Mr. Chairman. All in favor of the amendment, make it known by saying aye.

(A chorus of ayes.)

Mr. Chairman. Opposed?

(No response.)

Mr. Chairman. Amendment carried.

All right, now I would like to have a motion on my amendment. Is it prepared?

Senator Mitchell. Mr. Chairman?

Mr. Chairman. Yes, Senator.

Senator Mitchell. I wanted to raise the question again about extending it to June 30. I do not know whether that is something the other Senators have an interest in. I have already discussed it. The reasons are simple and straightforward. I would hope Senators would join in supporting that.

I, therefore, move that the moratorium be extended until June 30 instead of -- I do not know whether it reads March 31

or April 1 now. But in any event, substitute the date of June 30 for that date.

Mr. Chairman. Senator, let me say insofar as my State that is not a problem, but I want to see where the administration is. I was concerned that some of the things she had agreed to, Dr. Wilensky, were based on the March 31 date. I am not sure about that. I want to understand that further.

Senator Mitchell. Before she begins, Mr. Chairman, could I repeat, I favor the agreement between the administration and the governors. I prefer that. I am supportive of the administration's effort and the governor's efforts. I commend them for what they have done.

What we are talking about here is sort of a backup or an alternative to that if that does not go through for whatever reason. In that event, I think this moratorium, until three months prior to the end of the physical year for most States and coming at a time when most State's legislatures will not be in session, poses a tremendous problem for many States.

I, for that reason, hope that Senators will support the amendment.

Mr. Chairman. I would say to the Majority Leader, I support the agreement, too, from what I know of it thus far. I want to see the final written statement insofar as this agreement and that seems to keep evolving.

The only reason I am proposing the alternative of the freeze is in case the thing is not accomplished in the short period of time that we have.

Now I heard some commitments by Dr. Wilensky that are important to you and me. I just do not want to avoid them if they were predicated on March 31.

Dr. Wilensky. They were predicated on March 31 and I think we would need to be able to go back to see whether there was any cost implication. We are not dismissing out of hand the notion of going through June 30. But when we looked at the issue as to cost it assumed a snapshot as of September 30 and an end date as of March 31.

We would just need to look at the issue as to budget. We hope that we will get the final language, the final bill language, to you. What is happening, it obviously has caused some unhelpful confusion, is that the States have and the committee also had the draft of bill language. All day yesterday people were working out uncertainties and confusions and inconsistencies and we are just waiting to have that final draft language now be available. We hope that it will both help the committee and the States as well.

We will try to get back on the cost issue as quickly as we can.

Senator Mitchell. Mr. Chairman, might I respond just briefly.

Mr. Chairman. Yes.

Senator Mitchell. As I understood the prior discussion, the question involved the earlier date, that is the September 30 date, and whether or not a State plan amendment on disproportionate share hospitals had been filed prior to that date.

There was no legal or other relationship as to when the moratorium might expire, other than as to your ability to issue regulations at that time; and we understand and accept that. But insofar as the affect of the Durenberger amendment on State plans filed, the only question there is whether the plans were filed prior to or subsequent to September 30. In the case of these two States they were filed prior to September 30.

Dr. Wilensky. Correct.

Senator Mitchell. Is that correct?

Dr. Wilensky. Correct.

Senator Mitchell. All right.

Mr. Chairman. The problem is, I want to be sure what Dr. Wilensky promised us is not negated by going to June 30. I would be delighted to go to June 30 as long as we do not blow a commitment here.

Dr. Wilensky. There are two reasons that September 30 is important. One has to do with what is it that is covered

under a moratorium, that is the donation and tax programs that were in effect as of the day time.

Mr. Chairman. Doctor, I think we went through that and I understand that and we are in agreement.

Dr. Wilensky. All right.

Mr. Chairman. I am now concerned about the March 31 or June 30. If it goes to June 30, does that violate the commitment you have made to us? That is what I am asking you. Because I would like to go to June 30 at the request of the Majority Leader, if that still leaves you committed to us.

Dr. Wilensky. Mr. Chairman, while they are consulting on this matter, let me just raise the base line issue again. There is protection in this mark that is before you with respect to the budgetary questions that are under discussion here.

Senator Mithcell. I am sorry, Dr. Weiss, I do not understand the full implication of what you have said.

Dr. Weiss. One of the points that Dr. Wilensky had raised was that there might be some budgetary or scoring implications were we to delay the effective date of the end of the moratorium to June 30. If we retain the base line protection or some alternative to it that is before you in this proposal the Chairman has developed, then you do not have a scoring problem.

Senator Mithcell. Do not have this.

Dr. Wilensky. And we just do not know at this point if you were to extend from March 31 to June 30, we cannot give the assurance that we gave with regard to the March 31.

Senator Mitchell. Good.

Mr. Chairman. I wonder if we can handle that, if you can get that kind of an assurance, I wonder if we can handle that by an amendment on the floor. I just do not want to negate her commitment to us.

Dr. Wilensky. The commitment is there as of March 31. That was given.

Senator Mitchell. I feel like I am presented with a true dilemma, Mr. Chairman.

Mr. Chairman. We are both presented with it.

Senator Mitchell. Yes. Unfortunately, since the commitment is based upon the September 30 date I do not comprehend why it should be withdrawn if there is a change in the end date of the moratorium. There is no relationship between the end date of the moratorium and the question of whether or not a State plan amendment was filed prior to September 30.

Mr. Chairman. You get her to say that and I am with you.

Senator Mitchell. Well, I am trying to, Mr. Chairman.

Dr. Wilensky. What we had been asked for prior and what we gave you was an assurance with regard to what we would do with respect to letters in terms of base lines as of March 31.

At this point, I cannot give you the same assurance with regard to the extension, although your logic is somewhat compelling. Assuming again -- I want to be sure everybody understandings, this assumes the snapshot is as of September 30, not November 22 as is currently in your moratorium.

Senator Mitchell. Right. But let me make a further point, the commitment consists of a statement by you that you will follow the practices you have always followed, which is to treat amendments when they are approved as of the date they are filed on.

Dr. Wilensky. That does not change. That is not at risk. It is the assurance with regard to base line and scoring.

Mr. Chairman. That is right. That is what I want to be sure of.

Dr. Wilensky. Your issue with regard to when a State plan is effective, that is a general HCFA policy that is not being impacted.

Senator Mitchell. So, Mr. Chairman, there is not any change in that.

Mr. Chairman. Yes, but it is the base line I am deeply concerned about. I sure do not want to find us with a situation where we have to raise several billion dollars in this committee.

Senator Mitchell. I understand that, Mr. Chairman. But I

think the point is clear that is unrelated to the commitment with respect to the disproportionate share situation.

Dr. Wilensky. Right.

Senator Mitchell. That is the point I wanted to make.

Mr. Chairman. I am not arguing that.

Senator Mitchell. So that is clear. Now the question is base line. That is a separate issue.

Dr. Wilensky. Correct.

Senator Mitchell. That is a separate issues.

Dr. Wilensky. That is right.

Senator Mitchell. What you are saying -- Let me see if I understand it. This is a question. Do I understand you to say that you agree with respect to the base line question provided the moratorium expires on March 31, but if the moratorium is going to be any longer you do not agree, at least as of yet, with respect to base line score?

Dr. Wilensky. Correct.

Senator Mitchell. My question question to you is: What is the logic of that? What is the intellectual rationale that says there is no scoring if a moratorium expires on April 1, but there might be change if the moratorium expires on April 2, April 3, April 30, June 30 or some other date? What is the intellectual, what is the rationale for that difference?

Dr. Wilensky. It is actually a much simpler rationale, which is, as you know, the official scorers are OMB and I have

not gotten assurance of that. So I do not wish to make that statement as an administration statement without having had that.

Senator Mitchell. That is the least reassuring answer you have given this morning, Dr. Wilensky.

(Laughter)

Senator Mitchell. But really now, you have been extremely cooperative and this has got nothing to do with you. But what we are seeing here is that once again scoring decisions are used as a way of gaining support for policy decisions. In effect, if you agree with my policy I will score it one way; if you do not agree with my policy, I am going to score it another way. There is no other rationale.

Dr. Wilensky. Senator Mitchell, we had been asked to consider what our response with regard to scoring of the whole issue of directed scoring and if not directed scoring a letter of assurance had all been predicated on a particular date and a particular set of policies.

As you well know, that is a very sensitive and touchy issue and I think we tried to provide the reassurance we were asked to give for a particular configuration. All I have said is that if you want to change that, then you have to let us have some time to think through to make sure that any other assurance would in fact be one that we could live up to.

We were asked for something and we have given it.

Senator Mitchell. Please understand, I have absolutely no criticism of you. I think you have been very forthcoming and I appreciate what you have said. My comments go directly to OMB and everybody here understands what is happening. Everybody here understands what is happening.

It has nothing to do with logic. It has nothing to do with reason. It has to do with trying to get support for a particular policy and manipulating scoring decisions as a mechanism in that process.

Senator Pryor. Mr. Chairman?

Mr. Chairman. Yes, Senator Pryor.

Senator Pryor. Mr. Chairman, I have not been a participant here, but I really thought we had worked out something that was going to work out, but maybe we have not.

I think what we are really all trying to do is to ascertain is, when that one great score comes to write against our States, we want to know what the rules are going to be. Dr. Wilensky is trying under very difficult circumstances to provide us with some sort of a guideline. But I keep -- and I hope I am not getting personal, nor is this out of order, but I see Mr. Scully whispering in Dr. Wilensky's ear, and I wonder if he might not whisper to us at the same time; and maybe we would get a clarification.

Mr. Chairman, I do not want to press that unless that is the desire of the committee.

Mr. Chairman. No, because what the Majority Leader is asking is a critical question, very much for us on the committee.

Senator Pryor. Is that appropriate for Mr. Scully?

Mr. Chairman. Sure. Fine. Let's have it.

Mr. Scully. Thank you, Senator. I am happy to whisper in your ear.

Senator Pryor. Thank you.

Mr. Scully. The base line scoring issues are incredibly complicated. I think the CBO would agree to that for a variety of reasons. For example, if you look at the moratorium that starts on September 30 versus the one that starts on November 22, as Gail said, we probably have a half a billion dollars of increased spending just in that month and a half.

That alone moves the base line up and down by a $.5 billion. So anything I think at CBO or OMB that could tell you on a particular day right now what any of these base lines would be, no one has any idea.

I spent all last night with my staff trying to figure out what the base lines would be. No one knows until we figure out exactly what our policy is.

The difference between March 31 and July 31, at least right now, is that the only way any delay in our regulation

right now, from January 31, any delay at all, technically would probably imply some scoring change.

What we said is, because we would like to be flexible for the agreement, we might unilaterally agree because the scoring is done versus the assumption, the moratorium expires on January 1. The scoring has always been done on the assumption that the day that moratorium expires, the administration will come out with a long planned regulation. The scoring has been against that.

What we have said from the beginning is, there would be a scoring impact against that. If you had a three-month moratorium which we might universally agree is a good delay to work things out until March 31, we might unilaterally agree to delay the effective date on our regulation for those three months so that there would be no scoring impact.

Delaying it until July we just do not know what the effects of that would be and we would effectively, to have a zero scoring effect, have to agree to delay the implication until July. That is roughly what it is.

Now I would like to think that we try to be as flexible as we possible can to work out an agreement here. We are certainly not trying to game anybody with scoring.

Senator Mitchell. Can you tell us when it is likely that we could get a response from the administration as to whether

or not there would be a scoring change if the moratorium were moved from March 31 to June 30?

Mr. Scully. I would like to look at it at least for a few hours today. I hope this afternoon. I would bet that most likely the issue is probably unilateral among the -- If the administration even right now said we were not going to delay our regulation from January to March, we are going to put it out January 1, there would be a scoring implication already, even on the March 31 date.

But we have said, basically, we prefer to have the NGA administration agree on it. But if a two-sided moratorium is the preferred option, then we may agree unilaterally to delay our regulation three months.

I believe, and I am not certain, I would like to check, that most likely if we unilaterally agreed to delay another three months there may not be a scoring implication.

Dr. Weiss. One question that you may wish to have the administration speak to, Mr. Chairman, is the current regulation that would go into effect presumably on January, assumes that they will continue to make payments, FFP, during the period to July 1 if I am not mistaken.

So there is a question about scoring implications here as well.

Mr. Scully. Senator Mitchell, can I just state by the way that even under our regulation it is extremely unlikely that

Maine or any other State, there is a very broad waiver authority in there that allows every State to get to at least the end of their fiscal year.

So in any circumstances, even under our regulation or under this delay, it is extremely unlikely, in my opinion anyway, that Maine would be adversely affected before the end of July.

Senator Mitchell. Mr. Chairman?

Mr. Chairman. Yes.

Senator Mitchell. I feel I have unduly complicated your life and tried the patience of our colleagues and I do not want to do that.

In light of what has been said and in light of your obvious interest in proceeding, I will withhold my amendment on extending the moratorium first in the hopes that we can get the administration to agree there will be no scoring implication; and if not, in line with your suggestion that we go ahead and vote this out and then I reserve the right to do that on the floor in the event it is deemed necessary.

Mr. Chairman. I appreciate the majority leader's support in that.

All right, we have the amendment then before us. All in favor -- We voted that. You lost me.

Then we have my amendment to the legislation, to the Waxman legislation. May I have a motion on that?

Senator Mitchell. I move to adopt the amendment.

Mr. Chairman. Is there further discussion?

(No response.)

Mr. Chairman. Do I have a second?

Senator Moynihan. Second.

Mr. Chairman. All in favor of the amendment, make it known by saying aye.

(A chorus of ayes.)

Mr. Chairman. Opposed, a similar sign.

Senator Grassley. Mr. Chairman, I would like to appear on the record as opposing.

Mr. Chairman. All right.

Senator Rockefeller. Mr. Chairman?

Mr. Chairman. Yes.

Senator Rockefeller. Can I just make a comment? It is fascinating, really, what we are about. It is like we are storming Normandy Beach when it comes to worrying about the cost and inconvenience of pregnant women.

Mr. Chairman. Senator, let me announce that the ayes have it. The ayes have it. The amendment is carried.

Now, if you would proceed.

Senator Rockefeller. I apologize.

That discussing Medicaid, it is an easy program to put down. It involves the poor, pregnant women and children. You

know, it is called what the States are trying to help and it is called a scam and it is called a scheme.

If it has something to do with luxury or capital gains or shelters or whatever, it is called the way the world works. I am sort of offended by this whole concept, that States in trying to help the poor in a program which does not even pay 50 percent of the cost of providers are engaged in some gigantic conspiracy and we have to wade through this inch-by-inch, baby-by-baby.

Mr. Chairman. All right. Next we have the proposed agreement between the National Governors Association and the administration, which I would like to see reported out without recommendation and hopefully on the floor we will be able to state that the Chairman is in favor of it.

The motion is made. Is there a second?

Senator Moynihan. I second it.

Mr. Chairman. All right.

All in favor of the motion as stated, make it known by saying aye.

(A chorus of ayes.)

Mr. Chairman. Opposed?

(No response.)

Mr. Chairman. The motion is carried. Thank you.

Do we have anything further, Dr. Weiss?

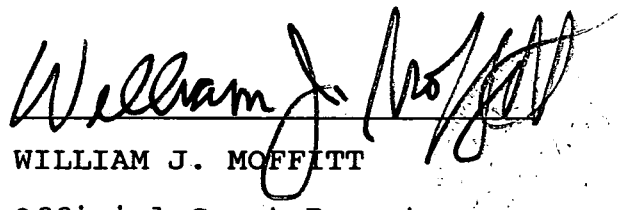
Dr. Weiss. No, Mr. Chairman.

Mr. Chairman. All right. Thank you. We are adjourned.

(Whereupon, the meeting was adjourned at 11:37 a.m.)

C E R T I F I C A T E

This is to certify that the foregoing proceedings of a Executive Committee Meeting, Committee on Finance, United States Senate, held on November 22, 1991, were transcribed as herein appears and that this is the original transcript thereof.



WILLIAM J. MOFFITT
Official Court Reporter

My Commission Expires April 14, 1994.

UNITED STATES SENATE
COMMITTEE ON FINANCE

Executive Session

Friday, November 22, 1991 - 10:00 AM
SD-215 Dirksen Senate Office Building

A G E N D A

To consider a temporary moratorium related to the issues of Medicaid voluntary donations, provider-specific taxes, and intergovernmental transfers.

11/20/91

MARK-UP DOCUMENT
MEDICAID TEMPORARY MORATORIUM PROPOSAL

Present Law

Medicaid is financed by the States and Federal government. The Federal matching rate varies by State, based on its per capita income, and currently range from 50 percent (the statutory floor) to about 83 percent. Since the inception of the Medicaid program in 1965, the statute has required that each State contribute at least 40 percent of its non-Federal share; the remainder of the State's non-Federal share can be derived from localities, provided that Medicaid spending does not vary by the locality.

Under present law, States essentially are free to use donations from health care providers, transfers from other public agencies (local and State), and taxes collected from health care providers toward their share of Medicaid without limitation.

A 1985 regulation governs the use of voluntary donations and inter-governmental transfers.[1] The Omnibus Budget Reconciliation Act of 1990 (OBRA 1990) governs the use of provider-specific taxes.

The Health Care Financing Administration (HCFA) has been prevented from promulgating a final regulation regarding the use of provider donations or taxes pursuant to a moratorium enacted in the Technical and Miscellaneous Revenue Act of 1988 and extended in subsequent legislation, including OBRA 1990. Under OBRA 1990, this moratorium expires December 31, 1991. Thereafter, HCFA is free to regulate the use of voluntary donations.

OBRA 1990 established a permanent policy with respect to provider-specific taxes. Effective January 1, 1991, FFP is

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[1] Public funds may be used if they are: appropriated directly to the State or local Medicaid agency; transferred from other public agencies to the Medicaid agency, and under its administrative control; or certified by the contributing public agency as representing expenditures eligible for Federal matching (e.g., are spent by the transferring agency to treat Medicaid patients).

Private funds may be used if they are transferred to and under the administrative control of the Medicaid agency and do not revert to the use of the donor unless the donor is a non-profit organization and the Medicaid agency decides to use the donor's facility.

available for State funds raised through provider-specific taxes, except where the funds are used "to reimburse [hospitals, nursing facilities or intermediate care facilities for the mentally retarded] for the costs attributable to taxes imposed by the State solely with respect to hospitals or facilities."

The conference report described this provision as an amendment "to exclude taxes from a provider's cost base for purposes of Medicaid reimbursement."

Interim Final and Proposed Regulations

On September 12, 1991, HCFA issued an interim final rule (with comment period) addressing the States use of voluntary donations and provider-specific taxes. HCFA withdrew this rule and re-issued a replacement on October 31, 1991, along with a proposed rule regulating the designation of disproportionate share hospitals.

Under the interim final rule, donations by or on behalf of providers would not qualify for FFP, effective January 1, 1992. For taxes collected from certain providers -- hospitals, nursing facilities and intermediate care facilities for the mentally retarded (ICFs/MR) -- FFP would not be available if the provider receives any Medicaid reimbursement deemed to be "linked" to the tax payment. This is also effective January 1, 1992. A more detailed description of the interim final and proposed rules is attached.

Proposal

I. Moratorium on Issuance of final regulations

- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of provider donations until April 1, 1992.
- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of provider-specific taxes until April 1, 1992.
- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of intergovernmental transfers until April 1, 1992.
- A moratorium would be imposed on HCFA's issuance of final regulation on payments to or designation of disproportionate share hospitals until April 1, 1992.

II. Baseline Protection

- The Office of Management and Budget would be prohibited from assuming, for purposes of the President's FY 1993 budget

baseline, any effects or potential effects on Federal expenditures resulting from the issuance of a proposed, interim final, or final regulation relating to provider-specific taxes, voluntary donations, inter-governmental transfers, disproportionate share payments, or designation of disproportionate share hospitals.

III. Freeze on State Donation and Tax Revenues

- For the period from January 1, 1992 to April 1, 1992, States would be prohibited from increasing the amount of the State share of Medicaid expenditures derived from voluntary donations above one-fourth of the amount derived from such donations during FY 1991 pursuant to programs in effect on September 30, 1991.

- For the period from January 1, 1992 to April 1, 1992, there would be no Federal matching for the State share of Medicaid expenditures derived from taxes on any type of provider that were not established on or before November 22, 1991, pursuant to State or local legislation enacted or before, or in effect on November 22, 1991. There could be no additional types of entities taxed or increase in the tax rate during the moratorium.

IV. Related Provisions

- Prohibition on penalty actions related to moratorium period

  HCFA would be prohibited from taking any disallowance, penalty, compliance, or other action to recover Federal matching funds paid to a state solely because the State's expenditures on which the matching funds were based were paid for with revenues derived from voluntary donations, provider-specific taxes, or intergovernmental transfers. The prohibition would apply for State expenditures made during the period of the moratorium.

- Prohibition on revision of estimated amounts

  With respect to the moratorium period, HCFA would be prohibited from reducing quarterly expenditure estimates submitted by the States or from withholding amounts paid in quarterly grants to the States solely because the expenditures would be paid for with revenues derived from voluntary donations, provider-specific taxes or intergovernmental transfers.

CBO Estimate

CBO reports that the proposal would have no cost.

SUMMARY OF OCTOBER 31 INTERIM FINAL AND PROPOSED RULES

The salient features of the October 31 interim final rule on provider donations and taxes (effective January 1, 1992) are:

- Donations: All Federal financial participation (FFP) would be denied for donations made to a State Medicaid agency by or on behalf of Medicaid providers (of any type).

- Provider-specific taxes: Payments would be denied for taxes imposed on hospitals, nursing facilities and intermediate care facilities for the mentally retarded (ICFs/MR) if the cost of the tax is included in the provider's cost report or cost base used to determine reimbursement.

- Where Medicaid payments to a are "linked" to provider-specific taxes received from a hospital, nursing facility or ICF/MR, FFP would be denied for the lower of the payment received or tax paid. [EXAMPLE: A hospital pays a tax of $100, receives a "linked" Medicaid payment of $200; FFP would be denied for $100.] (The September 12 rule could be read to deny only on the portion of the tax representing Medicaid's share of that provider's business.)

  Payments are "linked" when: (1) a payment is "related integrally" to the tax program (e.g., where the tax revenues go into a special fund to be used for reimbursement increases); (2) providers are "held harmless" by a guarantee they will be repaid the tax; or (3) a provider's tax payment is "correlated significantly" to the State's reimbursement to the provider.

- Deferred effective date: A State could get a deferral of the effective date of the rule for 6 months (until July 1, 1992) if, by January 2, 1992, the State Medicaid Director certifies that steps will be taken to come into compliance with the rule, and those steps have been taken, by July 1, 1992.

The October 31 proposed regulation (no effective date as yet) would restrict hospitals that can be considered **disproportionate share** hospitals to those whose Medicaid or "low-income" utilization rate is at or above the respective Statewide mean utilization rate.

Proposal

I. Moratorium on Issuance of final regulations

- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of provider donations until April 1, 1992.

- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of provider-specific taxes until April 1, 1992.

- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of intergovernmental transfers until April 1, 1992.

- A moratorium would be imposed on HCFA's issuance of final regulation on payments to or designation of disproportionate share hospitals until April 1, 1992.

II. Baseline Protection

- The Office of Management and Budget would be prohibited from assuming, for purposes of the President's FY 1993 budget baseline, any effects or potential effects on Federal expenditures resulting from the issuance of a proposed, interim final, or final regulation relating to provider-specific taxes, voluntary donations, inter-governmental transfers, disproportionate share payments, or designation of disproportionate share hospitals.

III. Freeze on State Donation and Tax Revenues

- For the period from January 1, 1992 to April 1, 1992, States would be prohibited from increasing the amount of the State share of Medicaid expenditures derived from voluntary donations above one-fourth of the amount derived from such donations during FY 1991 pursuant to programs in effect on September 30, 1991.

- For the period from January 1, 1992 to April 1, 1992, there would be no Federal matching for the State share of Medicaid expenditures derived from taxes on <u>any</u> type of provider that were not established on or before November 22, 1991, pursuant to State or local legislation enacted or before, or in effect on November 22, 1991. There could be no additional types of entities taxed or increase in the tax rate during the moratorium.

IV. Related Provisions

- <u>Prohibition on penalty actions related to moratorium period</u>

  HCFA would be prohibited from taking any disallowance,

penalty, compliance, or other action to recover Federal matching funds paid to a state solely because the State's expenditures on which the matching funds were based were paid for with revenues derived from voluntary donations, provider-specific taxes, or intergovernmental transfers. The prohibition would apply for State expenditures made during the period of the moratorium.

- Prohibition on revision of estimated amounts

  With respect to the moratorium period, HCFA would be prohibited from reducing quarterly expenditure estimates submitted by the States or from withholding amounts paid in quarterly grants to the States solely because the expenditures would be paid for with revenues derived from voluntary donations, provider-specific taxes or intergovernmental transfers.

November 21, 1991
10:00 a.m.

BROAD BASED PROVIDER TAXES AND DSH LIMITS

Donations

States would not receive federal matching funds for revenues obtained from donations by or on behalf of providers.

- Donations for direct costs related to initial eligibility processing and outreach, including training, by out-stationed workers in hospitals, clinics, and similar settings would be permitted. For any state, the total amount of donations permitted under this provision may not exceed 10 percent of the total administrative expenditures for Medicaid in a state.

- Donations to the state by entities that directly benefit from Medicaid payment are prohibited under this proposal.

- Donations to the state not prohibited under this proposal are allowable.

Taxes

Replace the OBRA '90 provider-specific tax provisions with language stipulating that federal matching will be available to match revenues from provider-specific taxes as the state share of Medicaid only if the tax is broad-based; that is, it uniformly applies to all providers in a class and all class-related business of providers.

- Examples of a broad-based tax include a gross receipts tax on all revenues, a tax on all net operating revenues, a tax based on all inpatient days, a head tax on all patients, or a tax on all beds of providers (although the tax could exclude Medicaid business of the providers). If a hospital or other provider is part of a larger entity that includes non-Medicaid provider business, business of a different class of providers, or Medicaid business in another state, the state would not be required to tax that other business of the entity. Services could not be unbundled from what is normally considered to be part of a provider's business.

- Only taxes that apply to all providers in a class at the same rate and on the same tax base would be considered to "uniformly" apply to all providers.

- A "class" of providers refers to, for example, all hospitals, all physicians, or all nursing homes practicing in the state.

- States could exempt from any tax state hospitals and/or other public hospitals or other public entities. States could also apply to the Secretary of HHS for a waiver to exclude other providers in a class from a broad-based provider tax, or to provide for exemptions, deductions, credits or regional differences, if the exemptions, deductions, or credits do not violate the spirit of a broad-based redistributive tax on a class of providers. Examples of permissable waivers would include exemptions for rural or sole community providers, or for facilities with high Medicaid or low-income utilization.

- A state may not guarantee or otherwise agree with providers that all or a portion of the tax will be returned to them. These provisions would not prevent use of the tax to reimburse members of the class for Medicaid services, nor preclude states from relying on such reimbursement to justify or explain the tax. But they would prevent states from holding providers harmless, in whole or in part, for the costs of the tax in any way, including, but not limited to: tax rebates, credits, or Medicaid payments (or a portion thereof) related only to the amount of the total tax paid.

- The provisions of OBRA '90, to the extent they prohibit the denial of or limits on payments to a state for expenditures for medical assistance for items or services attributable to taxes of general applicability would be retained.

For purposes of calculating federal matching, total revenues from these broad-based provider tax revenues could not exceed 25 percent of the state share of Medicaid during federal fiscal years 1993-1995.

- The amount of allowable provider-specific tax revenues would be calculated by multiplying the 25 percent figure by the state share of Medicaid expenditures less any revenue derived from donations or provider-specific tax programs that do not meet the requirements of this proposal. The resulting figure represents the permissible revenues from allowable provider-specific taxes that would qualify as expenditures for federal matching purposes.

- Any state in which the revenues from provider donations and provider-specific taxes were in excess of 25 percent in state fiscal 1992 based on the state's Medicaid program and state plan amendments submitted to HCFA by September 30, 1991, would be permitted to use broad-based provider-specific taxes up to that fiscal 1992 percentage, instead of up to 25 percent. This applies whether or not the donations and provider-specific taxes used in fiscal 1992 met the standards of this proposal.

<u>Related Provisions</u>

- Providers will not be precluded from including the cost of broad-based provider-specific taxes on cost reports submitted to the state. Section 1903(i)(10) will be repealed.

- Nothing in this proposal shall be construed to address states' use of funds transferred to the state from, or expended by, counties, cities, specific purpose districts, or other governmental entities within the state as the non-federal share of Medicaid expenditures, unless the transferred funds were generated by the governmental entity as donations or taxes that would not otherwise be recognized as the non-federal share under this proposal. HCFA will reinstate its pre-existing regulation on the use of public funds, and provide therein that transferred or certified funds do not lose their character merely because the transferring or certifying entity is also a Medicaid provider.

- HCFA could not refuse federal matching on the "net expenditure" theory for expenditures prior to the effective date of these provisions for any expenditure otherwise permitted by this proposal or under current law while it is applicable.

- Arizona is exempt from all provisions of this agreement as long as it is covered by its Section 1115(b) waiver.

DSH Upper Payment Limits

Existing law that limits aggregate Medicaid payments to all hospitals (exclusive of disproportionate share payments) to the aggregate amount that would have been paid under Medicare payment principles would remain unchanged. The prohibition in existing law on limiting federal matching for Medicaid DSH payments would be repealed. A separate upper payment limit would be calculated for Medicaid disproportionate share payments. The total of all DSH payments in federal fiscal 1993 and in any future year will not exceed 12 percent of total Medical assistance expenditures in that year.

- There would be no limit on DSH payments prior to January 1, 1992. After January 1, 1992, DSH payments would be limited to the amount of such payments pursuant to plans in place on or submitted to HCFA by September 30, 1991, or enacted by state legislatures by that date.

- Any state whose DSH payments in federal fiscal 1992 exceeded 12 percent of total Medicaid program expenditures in that year would be entitled in subsequent years to receive federal matching for DSH payments up to the amount of such payments in federal fiscal 1992 that were pursuant to plans in place on or submitted to HCFA by September 30, 1991, or enacted by state legislatures by that date. This limit would remain in effect until DSH payments in that state fell to the specified percentage cap, at which time the state would be entitled to increase DSH payments in proportion to total Medicaid program growth.

- Any state whose percentage of DSH payments in federal fiscal 1992 is less than 12 percent of total Medicaid program expenditures will be entitled in subsequent years to federal matching for additional DSH payments as follows.

(a) The level of federal fiscal 1992 payments will be increased by the same percentage as the increase in total Medicaid program expenditures in that state for the year in question compared to federal fiscal 1992;

(b) The state will receive an allocated share of the "DSH growth factor" derived from those states whose DSH payment remain limited by the level of federal fiscal 1992 DSH payments, provided that the overall percentage of DSH payments in the state does not exceed 12 percent of total Medicaid program expenditures.

- The "DSH growth factor" for each state governed by the federal fiscal 1992 payment limit is equal to DSH payments recognized for federal fiscal 1992 times the percentage increase in total Medicaid expenditures for the year in question over the comparable figure for federal fiscal 1992. The aggregate of the DSH growth factor" for all such states will be pooled, reduced and distributed to all other states, as described in the following paragraphs.

- The total "DSH growth factor" pool will first be reduced as necessary to assure that total DSH payments by all states will not exceed in the year 12 percent of total Medicaid program expenditures in the year by all states. HCFA will estimate the amount of the pool each year based on estimates of total program expenditures and DSH payments. The figures will be reconciled at the end of each year, and reconciling adjustments will be made in the estimates for the subsequent year.

- The "DSH growth factor" pool, as reduced in accordance with the preceding paragraph, will be allocated first as necessary to bring up to $1 million the federal fiscal 1992 DSH payment figure for all states whose DSH payments in that year were below that number. The balance of the pool will be allocated in accordance with total Medicaid program expenditures for the year in question of the states participating in the pool.

- In summary, the concept is that states whose federal fiscal 1992 DSH payments are above the national cap will be frozen at that level until program growth brings their percentage down to the national cap. All other states would be entitled to use the growth that otherwise would have been available to those states, subject to an individual state limit and a national spending limit of 12 percent of total Medicaid program expenditures.

- The provisions of Section 1923(c) would remain in effect and would be amended to provide that states may not vary payments by type of hospital so as to assure payors of provider-specific taxes that their taxes will be reimbursed without regard to their level of Medicaid participation or low-income utilization.

- HCFA would be precluded from restricting or defining the class of hospitals that states could include in the disproportionate share hospital category.

- The special rule of Section 1923(e) would be retained.

Effective Dates

- The effective date for the donation and provider-specific tax prohibitions would be October 1, 1992, for programs in effect or reflected in state plan amendments as of September 30, 1991. For those states with a fiscal year ending between July 1, and October 1, 1992, the effective date would be January 1, 1993. For those states whose legislatures do not have a regularly scheduled session in 1992, the effective date would be July 1, 1993.

- For the period January 1, 1992, to the effective date, donations and provider-specific taxes not meeting the requirements of a broad-based tax covered by the preceding paragraph are acceptable up to the amount included or specified in state budget documents, submissions to HCFA, or legislation in existence on September 30, 1991.

- Except for the preceding paragraphs, the provisions prohibiting the use of donations or of provider-specific taxes that do not meet the broad-based standard would take effect on January 1, 1992.

- This proposal would not affect provider-specific taxes assessed or donations made on or before December 31, 1991.

Reporting Requirements

- States must provide annually to the Secretary, information related to all provider-specific taxes and donations raised by the state in the aggregate (and for individual facilities) in the preceeding year.

Proposal

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- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of provider-specific taxes until April 1, 1992.

- A moratorium would be imposed on HCFA's issuance of final regulations on the States' use of intergovernmental transfers until April 1, 1992.

- A moratorium would be imposed on HCFA's issuance of final regulation on payments to or designation of disproportionate share hospitals until April 1, 1992.

II. Baseline Protection

- The Office of Management and Budget would be prohibited from assuming, for purposes of the President's FY 1993 budget baseline, any effects or potential effects on Federal expenditures resulting from the issuance of a proposed, interim final, or final regulation relating to provider-specific taxes, voluntary donations, inter-governmental transfers, disproportionate share payments, or designation of disproportionate share hospitals.

III. Freeze on State Donation and Tax Revenues

- For the period from January 1, 1992 to April 1, 1992, States would be prohibited from increasing the amount of the State share of Medicaid expenditures derived from voluntary donations above one-fourth of the amount derived from such donations during FY 1991 pursuant to programs in effect on September 30, 1991.

- For the period from January 1, 1992 to April 1, 1992, there would be no Federal matching for the State share of Medicaid expenditures derived from taxes on <u>any</u> type of provider that were not established on or before November 22, 1991, pursuant to State or local legislation enacted or before, or in effect on November 22, 1991. There could be no additional types of entities taxed or increase in the tax rate during the moratorium.

IV. Related Provisions

- Prohibition on penalty actions related to moratorium period

  HCFA would be prohibited from taking any disallowance,

penalty, compliance, or other action to recover Federal matching funds paid to a state solely because the State's expenditures on which the matching funds were based were paid for with revenues derived from voluntary donations, provider-specific taxes, or intergovernmental transfers. The prohibition would apply for State expenditures made during the period of the moratorium.

- Prohibition on revision of estimated amounts

  With respect to the moratorium period, HCFA would be prohibited from reducing quarterly expenditure estimates submitted by the States or from withholding amounts paid in quarterly grants to the States solely because the expenditures would be paid for with revenues derived from voluntary donations, provider-specific taxes or intergovernmental transfers.

DURENBERGER AMENDMENT NUMBER 2

FREEZE ON STATE RECLASSIFICATION OF HOSPITALS

INTO DISPROPORTIONATE SHARE CATEGORY

For the period from January 1, 1992 to April 1, 1992, States would be prohibited from reclassifying any of their hospitals into the category of Disproportionate Share Hospitals and would be precluded from changing reimbursement rates for Disproportionate Share Hospitals. Disproportionate Share Hospital Classifications that were in effect on September 30, 1991 would remain in effect through the period January 1, 1992 to April 1, 1992.