Janet T. Mills
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Jeanne M. Lambrew, Ph.D.
Commissioner

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March 2, 2020

Senator Benjamin Chipman, Chair
Representative Ryan Tipping, Chair
Joint Standing Committee on Taxation
#100 State House Station
Augusta, Maine 04333-0100

Dear Senator Chipman, Representative Tipping, and Members of the Joint Standing Committee on Taxation:

Please find attached a report from the Department of Health and Human Services and the Department of Administrative and Financial Services in response to Resolve 2019, chapter 81 (LD 892): *Resolve, To Require the Examination of Alternatives to the Service Provider Tax.*

Sincerely,

Jeanne M. Lambrew, Ph.D.
Commissioner

JML/klv

Report on the Service Provider Tax and Alternatives
Pursuant to Resolve 2019, chapter 81 (LD 892)
March 2, 2020

This report is in response to Resolve 2019, chapter 81 (LD 892): "Resolve, To Require the Examination of Alternatives to the Service Provider Tax." The text of the law states:

> "… The Department of Health and Human Services in partnership with the Department of Administrative and Financial Services and other state agencies that the departments determine should be included shall examine the service provider tax imposed pursuant to the Maine Revised Statutes, Title 36, chapter 358 and alternatives to that tax. The departments shall submit a report on their findings and recommendations to the Joint Standing Committee on Taxation by March 1, 2020 describing the advantages and disadvantages of the service provider tax and alternatives that were examined. The committee may submit a bill related to the report to the Second Regular Session of the 129th Legislature."

This report was drafted in partnership between the Department of Health and Human Services (DHHS) and the Department of Administrative and Financial Services (DAFS).

The Service Provider Tax

The Maine Service Provider Tax was created in 2004 and is codified at Title 36, Chapter 358. See 36 M.R.S. § 2552(1). In PL 2015, c. 267, Part TTTT the rate was changed from 5 to 6 percent effective January 1, 2016 and remains at that rate. This tax covers the following twelve services:

1. Cable and satellite television or radio services;
2. Fabrication services;
3. Rental of video media and video equipment;
4. Rental of furniture, audio media and audio equipment pursuant to a rental-purchase agreement as defined in Title 9-A, section 11-105;
5. Telecommunication services;
6. The installation, maintenance or repair of telecommunications equipment;
7. Private nonmedical institution services;
8. Community support services for persons with mental health diagnoses;
9. Community support services for persons with intellectual disabilities or autism;
10. Home support services;
11. Ancillary services (defined at § 2551(1-C) as meaning a service associated with or incidental to the provision of telecommunications services); and
12. Group residential services for persons with brain injuries.

Maine Revenue Services has calculated that the total tax revenue from the Service Provider Tax for fiscal year 2019 is $109,437,678. Of this revenue, that from the five health care service providers was $50,424,722, 46 percent of the total amount. Since its inception, the health care providers have been subject to the same tax amount as non-health care service providers.

Advantages

The Service Provider Tax is a component of Maine's overall tax structure and total revenue forecast. These are state revenues available for operations of state government. Of advantage to DHHS is the ability to use revenues, including those from the Service Provider Tax and others, to support MaineCare services. All states except for Alaska have one or more provider taxes that support Medicaid consistent with federal policy.

Disadvantages

The U.S. Department of Health and Human Services, Centers for Medicare and Medicaid Services (CMS) sent letters to the Maine Department of Health and Human Services on September 10, 2018 and October 15, 2019 regarding the Service Provider Tax. In these communications, CMS expressed concern that the Service Provider Tax is an impermissible source of non-federal share that is used to finance Medicaid payments, citing Section 1903(w) of the Social Security Act, the implementing regulations, and a 2014 State Health Official letter (SHO 14-001) as bases for its concerns. It urged Maine "to (1) repeal the impermissible taxes or reduce the total amount of the state's Medicaid expenditures by the amount of revenue the state collects from impermissible health care-related taxes in accordance with section 1903(w)(1)(A) of the Act, (2) replace the tax with an allowable source of non-federal share effective July 1, 2016, and (3) resolve backlogged SPAs." It further stated, "if Maine is unable [to] generate a permissible source of non-federal share before the end of the state's legislative session in June 2020, CMS intends to begin a process to defer and/or disallow any related claims on and after July 1, 2020." In that event, the Department would have an opportunity to challenge CMS's interpretation before an administrative appeals board and, if necessary, before a federal court.

In response to CMS's letters, the Department sent letters dated December 3, 2018 and February 12, 2019 defending the Service Provider Tax as a permissible tax under federal law and the 2014 State Health Official letter. CMS has not formally responded to these letters.

The issues described above – as well as Maine DHHS' response to this Legislative resolve to assess the Service Provider Tax and alternatives – have been complicated by the proposed Medicaid Fiscal Accountability Rule (MFAR) published on November 18, 2019. Among other proposals, this rule would substantially change federal policy regarding health care provider taxes, although the full dimensions of those changes are unclear as the proposed rule also provides CMS with broad discretion with respect to implementation and oversight. It has significant implications for Medicaid financing in Maine and every other state. Several summaries have been posted (e.g., https://www.kff.org/medicaid/issue-brief/what-you-need-to-know-about-the-medicaid-fiscal-accountability-rule-mfar/).[1]

The public comment period closed on February 1, 2020. Approximately 4,000 comments were submitted, including letters from Maine DHHS (all comment letters are posted at https://www.regulations.gov/docket?D=CMS-2019-0169). It appears that most comments were

[1] The Department has on several occasions briefed the Joint Committees on Health and Human Services and Appropriations and Financial Services on both the CMS concern about the Service Provider Tax and MFAR.

critical of the proposed rule, calling for it to be withdrawn. As the U.S. Chamber of Commerce wrote, "Although we support the goals detailed in the preamble, the Proposed rule could: have detrimental economic ramifications on communities across the country; put patient access to critical services in jeopardy, exacerbate cost-shifting onto privately insured communities; and violate state sovereignty and ability to manage state programs and populations by providing CMS unprecedented discretion over its evaluation of state financing and payment approaches." However, the President's recently released budget highlighted the importance that the Administration places on this rule. As of February 28, 2020, this rule has not been finalized.

The introduction of MFAR makes it challenging to conclusively evaluate the Service Provider Tax as it relates to MaineCare financing. The rule could be finalized as proposed, or it could be changed to make the Service Provider Tax permissible, either as currently structured or with modifications. The proposed rule could also be withdrawn, which might strengthen the position that the Service Provider Tax is permissible under existing law.

Similarly, the MFAR proposal's broad reach also makes it challenging to predict whether and under what circumstances *alternative* sources of financing will be permissible. As the Maine Hospital Association noted in its comment letter, "The rule also contains significant changes to healthcare-related taxes (provider taxes), 'bona fide' provider donations, intergovernmental transfers and certified public expenditures, including definitional changes to supplemental hospital categories and public funds."

CMS could finalize this rule before the 129th Session of the Maine State Legislature adjourns. If the final rule bears any resemblance to the proposal, however, MFAR would still leave open questions as to whether Maine's current or proposed financing system would be acceptable to CMS. The proposed rule creates several vague tests, which substantially expand CMS's discretion to make case-by-case determinations of which state financing systems it deems permissible. As the National Association of Medicaid Directors wrote, "This subjectivity creates uncertainty for states, both in terms of what current programs would remain allowable and what future programs would be approved by CMS." This one of several reasons why the National Governors Association, along Maine, urged CMS to withdraw the rule.

Conclusion

Because MFAR's potential impacts are both substantial and uncertain, the Departments are not able, at this time, to meaningfully assess the relative merits of repealing or retaining the Service Provider Tax or adopting alternative approaches. Should MFAR be finalized before the end of the 129th Session, the Departments will provide the Legislature with an update of this report. Until such time, the Departments recommend that the Committee pause its consideration of the Service Provider Tax.