FAMILIESUSA
THE VOICE FOR HEALTH CARE CONSUMERS

July 14, 2025

The Honorable Mehmet Oz, M.D.
Administrator
Centers for Medicare and Medicaid
500 Security Boulevard
Baltimore, MD 21244-1850

Submitted electronically via Medicaid.gov

RE: Medicaid Program; Preserving Medicaid Funding for Vulnerable Populations—Closing a Health Care-Related Tax Loophole Proposed Rule [CMS–2448–P]

Dear Administrator Oz,

On behalf of Families USA, thank you for the opportunity to comment on the Centers for Medicare and Medicaid Services' (CMS) intention to put in place more stringent requirements for states to obtain health care-related tax waivers. Families USA is the leading national, non-partisan voice for health care consumers, dedicated to achieving high-quality, affordable health care and improved health for all. In service to that mission, Families USA urges CMS to allow for a fair and appropriate transition period for states to adapt to this dramatic change, since a short one-year or nonexistent transition time would endanger the continued and sustainable Medicaid financing that is crucial for the nearly 80 million Americans served by state Medicaid programs.

CMS proposes a major policy change to its existing waiver process concerning health care-related taxes—important funding mechanisms that help states finance their share of Medicaid costs. In the weeks since CMS released this proposal, Congress passed the 2025 Budget Reconciliation Act (H.R. 1), essentially codifying in the Medicaid statute the provisions included in this proposed rule.[1] Although both the statute and proposed rule would directly and immediately impact health care-related tax programs in only seven states, this new regime would limit the flexibility of *all* states to design new programs to fund the non-federal share of Medicaid expenditures.

While we are deeply concerned with this effort to curtail states' ability to use health care-related taxes to fund state Medicaid programs, we recognize the law now grants statutory authority to CMS to move forward with this regulatory change. As such, our comments are not on the appropriateness of the new requirements nor the impending state budget crises they are likely to create—with significant negative impacts on low-income working families, providers, rural hospitals, people with disabilities, and others.

We comment here to emphasize for CMS that since the new law represents a *significant* shift in approach, states need a realistic transition period to effectuate the substantial structural changes to Medicaid funding that may be required in their jurisdictions. The rule, as proposed, does not make use of H.R. 1's statutory flexibility to put in place an appropriate transition period.

We urge CMS to allow a fair and appropriate multi-year transition period, one that takes into consideration the effort required to modify existing state tax structures, abides by applicable statutory

requirements, follows former and current CMS precedent, and recognizes that this rule change comes at a time when Congress has enacted other unprecedented cuts to state Medicaid programs, including additional and monumental changes to state taxes on health care-related entities.

Statutory basis for fair transition period.

Under existing law, states can request a waiver from requirements that health care-related taxes be "broad-based" and "uniform" if the state can show the tax is still "generally redistributive"—that is, the tax generally derives revenue from taxes on non-Medicaid services and uses that revenue to finance the state's share of Medicaid payments for services.[2] Since 1993, CMS has used specific statistical tests to assess whether a waiver-eligible tax is generally redistributive. This rule and the now-passed budget reconciliation bill both introduce more stringent requirements on top of existing statistical tests, meaning that current waivers in at least seven states will no longer be considered to meet the "generally redistributive" definition.

CMS proposes to provide a one-year transition period for any state tax that does not comply with new requirements, but *only if* CMS approved the tax waiver more than two years prior to the effective date of the final rule. However, states that obtained tax waivers within the past two years—California, Michigan, Massachusetts, and New York, according to a recent CMS press release[3]—would not be eligible for *any* transition period. These states would be required to comply with the new requirements as of the effective date of the final rule or risk a reduction in federal Medicaid funding.

With no transition period for recent waivers, these four states may have as little as 60 days to comply after the final rule is published, a practical impossibility for states that may have to make significant structural changes—including changes to state laws or regulations related to state taxes—and will need to engage with affected providers and other constituents as they re-evaluate state tax structures. But even for states who qualify for the proposed transition period, one year may not be enough to make necessary adjustments given the enormity of the task and the timing of when legislative sessions and budget cycles fall.

Furthermore, while CMS references "seven states with existing loophole waivers that we have identified as of the date of this proposed rule"[4] (which presumably includes the four states previously named by CMS), more states may be vulnerable to an adverse interpretation of their tax structure if the proposed rule becomes final. *All* states find themselves in a vulnerable position here because they can no longer depend on existing statistical tests—in place since 1993—to assess whether current provider taxes continue to meet regulatory requirements. CMS itself will need time to sort out which states violate new regulations, and a one-year transition period does not afford sufficient buffer for states to prepare.

We strongly urge CMS to reconsider their approach and instead implement an adequate, multi-year transition period to all affected states, regardless of when their waivers were approved. This change is necessary to ensure fairness and prevent avoidable disruptions to state Medicaid programs.

CMS justifies its very short or nonexistent transition period because, as the proposed rule notes, past administrations signaled *possible* reforms to health care-related taxes. The agency's argument is that states were on notice that changes similar to those proposed in the current rule could be coming and state lawmakers should have planned differently. However, while both the Obama Administration and the previous Trump Administration explored changes in this area, none of those proposed reforms became law.[5] It is unreasonable to expect states to anticipate or act on unfinalized regulatory intentions. States developed and submitted waivers for health care-related taxes in full compliance with then-existing federal laws and

regulations—and with full knowledge and approval of CMS—and CMS should not penalize states retroactively for their then-compliant actions by refusing them a reasonable transition period to adjust to new policies.

Indeed, Congress does not favor retroactivity and does not provide administrative agencies authority to create rules that have retroactive effect, unless the language of the parent statute(s) "conveyed by Congress in express terms" allows for such retroactive rulemaking.[6] The *Administrative Procedures Act* defines a rule as "an agency statement of general or particular applicability and ***future effect*** designed to implement, interpret, or prescribe law or policy…" (emphasis added).[7]

Here, neither of the two parent statutes expressly allow for retroactivity. First, the *Medicaid Voluntary Contribution and Provider Specific Tax Amendments of 1991* sets up the statutory structure on which states can generate Medicaid funding through health care-related taxes.[8] Second, H.R. 1 gives CMS the authority to redefine what it means for a health care-related tax to be generally redistributive.[9] While both statutes confer the rulemaking power to CMS to promulgate the current proposed rule, neither expressly allows for retroactive rulemaking. In fact, while the new health care-related tax provisions of H.R. 1 are effective upon enactment (July 4, 2025), the statute does not state that CMS should cancel current waivers. Instead, Congress encourages a fair transition period, authorizing the Secretary of Health and Human Services to allow up to "3 fiscal years"—through September 30, 2028—before the new conditions take effect. Given Congress' clear intention that CMS provide a prospective transition period, we urge CMS to reconsider their approach under proposed §433.68(e)(4).

Recent precedent for transition periods after regulatory changes that affect Medicaid waivers.

CMS should follow the extensive precedent that exists for applying a fair and uniform *prospective* transition period for changes to health care-related taxes. The *Deficit Reduction Act of 2005* (DRA) included significant changes to health care tax policy by expanding the permissible class of services to include all Managed Care Organization (MCO) services.[10] In its subsequent rulemaking, CMS gave states until 2009 to conform with new regulations—an 18-month transition period from the time the rule was finalized and nearly four years after passage of the DRA. In offering this lengthy transition, CMS recognized that "States would need time to address financial impacts within their State budgets and enact potentially necessary legislative modifications to health care-related tax programs."[11]

More recently, during the current Trump Administration, CMS has used other methods to ensure a uniform prospective transition procedure that allows states time to adjust to new Medicaid waiver policies:

- On March 4, 2025, CMS released an informational bulletin rescinding previous guidance on health-related social needs (HRSNs) waivers. However, CMS states that their new guidance does not automatically nullify existing HRSN approvals: "CMS will consider states' applications to cover these services and supports on a case-by-case basis to determine whether they satisfy federal requirements… ."[12]
- On April 10, 2025, CMS announced a change in policy stating it does not intend to approve new or extend existing requests for federal matching funds for state expenditures for Designated State Health Programs (DSHPs) or Designated State Investment Programs (DSIPs) waivers, stating: "…the Center for Medicaid and CHIP Services (CMCS) will conduct direct outreach to states with existing DSHP and DSIP authority to emphasize that the time-limited authority for DSHP or DSIP will not be extended beyond the currently approved demonstration period… ."[13]

The post-DRA final rule and the March 4th and April 10th CMS guidance letters offer three different prospective transition approaches to states that have Medicaid waivers or other policies in place that need to be adjusted based on CMS regulatory change:

(1) setting out a specific time-based transition period;
(2) assessing future state efforts on a case-by-case basis; or
(3) sunsetting current waivers at their natural expiration date.

CMS' recent transition approaches allow states to continue with their current waivers in place in the short term, honoring the initial agreement the agency made with the state and giving the state a reasonable opportunity to adjust programs going forward. Importantly, a fair transition period—unlike that put forward in the proposed rule—gives state leaders confidence that they can rely on approvals from CMS. Just as CMS asks states to adjust to future regulatory changes, so too should states have the right to ask CMS to respect state action based on past statutory and regulatory authority. This is foundational to Medicaid's success as a state-federal *partnership*.

In this instance, a fair and appropriate transition period would be a hybrid of (1) and (3) above: under this approach, CMS would allow current waivers in place to sunset at their expiration, if that date is within three fiscal years of the passage of H.R. 1 (the maximum allowable transition under the statute); where current waivers extend beyond these three years, we think an appropriate approach would be for CMS to notify afflicted states that their waivers will be considered expired three years after the date of enactment of H.R. 1. This approach would offer a transition period that aligns with Congressional intent and former and current CMS precedent.

***Interaction with other provisions in H.R. 1*.**

This regulatory effort comes at a time when Congress, through the its budget reconciliation bill, has just enacted the biggest cut to the Medicaid program in history through mandatory work reporting requirements, eligibility and paperwork hurdles, sharp restrictions on state use of provider taxes to fund Medicaid, and a parade of other means that would slash $930 billion from state Medicaid budgets.[14] As states navigate enormous funding gaps and administer burdensome new eligibility systems set forth under the reconciliation bill, states need time to adjust so they may develop legally compliant financing arrangements.

Given this new reality, CMS should, at the very least, give states maximum leeway to adjust to a new regulatory framework. **We strongly urge CMS to set a fair, appropriate, multi-year transition period under proposed §433.68(e)(4).** Allowing waivers to expire over a three fiscal year transition period (as described above and as allowable under H.R. 1) is crucial in recognition of not only the significant structural changes necessary to effectuate change in existing health care-related tax arrangements, but of the practical procedures and the enormous hurdles states will have to confront to adapt to changes in numerous other aspects of their state Medicaid programs as a result of the reconciliation bill.

For questions or comments regarding the recommendations made in this letter, please reach out to Mary-Beth Malcarney, Senior Advisor on Medicaid Policy, Families USA at: mmalcarney@familiesusa.org.

Thank you for your time and consideration.

Sincerely,

Sophia Tripoli
Senior Director of Heath Policy
Families USA

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[1] H.R. 1, 119th Congress § 71117 (2025), https://www.congress.gov/bill/119th-congress/house-bill/1/text.
[2] 42 U.S.C. 1396b, https://www.ssa.gov/OP_Home/ssact/title19/1903.htm; Medicaid Program; Limitations on Provider-Related Donations and Health Care-Related Taxes; Limitations on Payments to Disproportionate Share Hospitals, 58 Federal Register 43156 (August 13, 1993), https://archives.federalregister.gov/issue_slice/1993/8/13/43152-43183.pdf#page=5.
[3] "CMS Moves to Shut Down Medicaid Loophole—Protects Vulnerable Americans, Saves Billions," Centers for Medicare and Medicaid Services, May 12 2025, https://www.cms.gov/newsroom/press-releases/cms-moves-shut-down-medicaid-loophole-protects-vulnerable-americans-saves-billions.
[4] Medicaid Program; Preserving Medicaid Funding for Vulnerable Populations—Closing a Health Care-Related Tax Loophole Proposed Rule, 90 Federal Register 20578, 20591 (Proposed May 15, 2025) https://www.govinfo.gov/content/pkg/FR-2025-05-15/pdf/2025-08566.pdf.
[5] Arielle Kane, "CMS Proposes To Limit Provider Taxes," Health Affairs, May 15, 2025, https://www.healthaffairs.org/content/forefront/cms-proposes-limit-provider-taxes
[6] *Portlock v. Barnhart,* 208 F. Supp. 2d 451 (D. Del. 2002).
[7] 5 U.S. Code § 551(4).
[8] Pub. L. 102-234, enacted December 12, 1991.
[9] H.R. 1, 119th Congress § 71117 (2025).
[10] Deficit Reduction Act of 2005, 109th Congress (2005-2006), https://www.congress.gov/bill/109th-congress/senate-bill/1932.
[11] Medicaid Program; Health Care-Related Taxes, 73 Federal Register 9685 (February 22, 2008), https://www.govinfo.gov/content/pkg/FR-2008-02-22/pdf/E8-3207.pdf; Medicaid Program; Preserving Medicaid Funding for Vulnerable Populations—Closing a Health Care-Related Tax Loophole Proposed Rule, 90 Federal Register 20578, 20583 (Proposed May 15, 2025) https://www.govinfo.gov/content/pkg/FR-2025-05-15/pdf/2025-08566.pdf.
[12] "CMCS Informational Bulletin: Rescission of Guidance on Health-Related Social Needs," Department of Health and Human Services, Centers for Medicare and Medicaid, March 4, 2025, https://www.medicaid.gov/federal-policy-guidance/downloads/cib03042025.pdf.
[13] "State Medicaid Director Letter: RE: Designated State Health Programs and Designated State Investment Programs," Department of Health and Human Services, Centers for Medicare and Medicaid, April 10, 2025, https://www.medicaid.gov/resources-for-states/downloads/dshp-dsip.pdf.
[14] H.R. 1, 119th Congress (2025); "Estimated Budgetary Effects of an Amendment in the Nature of a Substitute to H.R. 1, the One Big Beautiful Bill Act, Relative to CBO's January 2025 Baseline," Congressional Budget Office, June 29, 2025, https://www.cbo.gov/publication/61534.