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## REPORT TO THE MEMBERSHIP

## State budget dominates 2007 legislative session, fewer bills become law

With the state's fiscal crisis taking the legislative steam out of many bills and with the Governor making frequent use of his veto powers, this session's volume of new laws was far lower than that of past years.

Real and projected revenue shortfalls made the annual Battle of the Budget even more acrimonious and discouraging than usual. For physicians, the new state budget brings higher licensure fees and, for many physicians, a new kind of tax. (See articles below and on page 5.)

RIMS' legislative package accounted for a significant share of the health care bills became law. RIMS Public Laws Chair Michael E. Migliori, MD, commented "Our priorities for this year survived virtually intact. We had great sponsors for our bills, and those legislators worked hard to make sure that our efforts to support practicing physicians were successful."

RIMS' legislative package included:

**Temporary credentials** As of July 1st, physicians are entitled to payment for services rendered to patients during the period between the payer's approval of a physician's application for credentials and the issuance of a billing number. The further question of payment for care provided to patients prior to the approval decision remains pending and is to be among the issues addressed by a new task force convened by the Office of the Health Insurance Commissioner.

**"Pay for performance"** RIMS was successful in securing legislative language that would prohibit any health insurer from requiring any physician to participate in any financial or reimbursement program of the kind commonly termed "pay-for-performance," unless the program has met the guidelines

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## Precedent-setting state "provider tax" targets physicians

The fiscal 2008 Rhode Island state budget, which was passed by the General Assembly in June and took effect on July 1, includes myriad changes in the state tax code, including several that will affect physicians. One new kind of tax targets physicians.

Rather than the comprehensive redesign of the state's tax code that many knowledgeable observers called for, the Governor and the legislators opted instead for a June blizzard of confusing, often arbitrary and perhaps contradictory changes

affecting corporate, personal income and public utilities taxes.

While the Governor and the General Assembly sparred over many points of the budget, one thing they agreed upon was the Governor's proposal to create an "Outpatient Health Care Facility Surcharge" and an "Imaging Services Surcharge."

The former imposes a surcharge of 2% on the gross patient revenue received each month by outpatient health care facilities, which are defined in such a way as to limit the applicability of the surcharge to ambulatory surgical

centers and endoscopy centers.

The budget's imaging surcharge affects a larger number of physicians. It imposes a 2% tax on the gross patient revenue received each month by physicians from imaging services they provide for diagnosis or treatment. "Imaging services" are defined as "all the professional and technical components of x-ray, ultrasound (including echocardiography), computed tomography (CT), magnetic resonance imaging (MRI), positron emission tomography (PET), positron

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emission tomography/computed tomography (PET/CT), general nuclear medicine, and bone densitometry procedures.”

(Note: The actual language of the budget describes both taxes as applying to “net” revenues. However, under the definition of “net” in the statute, the taxable “net” revenues are actually equivalent to the gross revenues.)

These new taxes on physicians are payable by the 25th day of the month following the month in which the revenues were received. At most, any physician would be subject to just one of the new taxes, not both.

For reasons that remain somewhat mysterious, if not totally opaque, the budget excludes the following from the imaging services surcharge: hospitals (which are subject to their own separate surcharge of 3.48% of net patient services revenue); non-profit ambulatory care facilities (including community health centers); facilities performing fewer than 200 radiological procedures per month; dentists; podiatrists; veterinarians.

However, one thing is quite clear regarding the focus on taxing physicians alone: the idea originated within the Carcieri administration and reflects a line of thinking that is evident both in last year’s debate over CON (Certificate of Need) and in this year’s discussions about the plight of community hospitals. That line of thinking runs contrary to the demonstrated preferences of patients, doctors and payers alike, and goes something like this: physician entrepreneurship, especially in the creation of free-standing imaging, surgery and endoscopy facilities, tends to drive up the overall cost of health care and undermine the financial stability of hospitals. Therefore, barriers (like CON) and disincentives (like taxes) are deemed by state leaders to be desirable as strategies to contain and discourage physician investment in free-standing facilities.

### The new taxes on doctors raise red flags

The Rhode Island Medical Society has expressed alarm at the arbitrary targeting of physicians in the new state budget, as well as the precedent the taxes set. Once established as a source of state revenue,

any tax is unlikely ever to go away if it is not challenged. The far more likely future probability is that these new taxes on doctors will be increased and expanded from time to time to meet the state’s fiscal needs – and those needs, already seriously unmet in 2008, are projected to grow to still more frightening proportions in 2009 and 2010. Ultimately, all professionals as well as small businesses in general have a stake in seeing these provisions of the state budget overturned.

Indeed, as many doctors have pointed out, the unanticipated consequences of the state’s grab at physicians could prove to be dire indeed. Any special tax on doctors adds another layer to the burden, popularly known as “the Rhode Island penalty,” that already places the state at a marked disadvantage in attracting and retaining physicians to care for the population.

The Rhode Island Medical Society has taken several steps in response to this situation:

- RIMS has charged its legal advisors to research the options for mounting a court challenge to these taxes.
- The RIMS Council, at its regular June meeting, empowered the Executive Committee to authorize the RIMS Treasurer to sue the state in the name of the Society. (The decision to initiate litigation has not been made as of this writing.)
- RIMS has assembled and convened a group of physicians and other stakeholders, their business managers and legal advisors.
- RIMS and its legal team have personally briefed and engaged the Litigation Center of the American Medical Association.
- RIMS has alerted national medical specialty groups and equipment manufacturers that have reason to share RIMS’ concerns about the precedents that the Rhode Island budget sets regarding “provider taxes.”
- With authorization of the Council, RIMS has put out a highly unusual, urgent call to all Rhode Island physicians for a voluntary assessment for

the purpose of building a Legal Advocacy Fund. RIMS has long contemplated the need for such a dedicated legal war chest so that the Society can be armed and ready to act expeditiously through the courts when necessary. The initial response to RIMS’ appeal has been quick and heartening, but the expense of formulating and pursuing an effective challenge to the state will be daunting. Success will likely depend upon the willingness of particular interested parties to contribute substantially to the effort.

- RIMS President Barry W. Wall, MD, published an opinion piece in the July 9 edition of the *Providence Business News* drawing attention to the precedent-setting nature of the new taxes and the broader threat they represent to the business community. His commentary is reprinted on page 5 of this newsletter.

At this writing, RIMS’ stakeholder group has met twice to hear RIMS’ attorneys’ assessment of the situation and of the possible avenues for contesting the taxes.

RIMS’ legal team is led by Jeffrey F. Chase-Lubitz, Esq., who heads the new Providence office of the Boston law firm of Donaghue Barrett & Singal. The firm specializes in health care law and also has relevant experience and expertise in challenging state statutes.

The legal issues are complex. While other states have threatened or imposed “provider taxes” in various forms, no other state has even considered a tax as narrow and arbitrary as Rhode Island’s, and no obvious precedent exists for a successful challenge. Some other states have taxed physicians broadly as a general class and then channeled the resulting tax receipts back into health care in order to increase Medicaid reimbursements, for example. The equal protection provisions of the U.S. and Rhode Island constitutions appear to offer the most promising basis for contesting these narrowly applied taxes. RIMS’ legal research continues. ❖

This commentary was published in the July 9 edition of the Providence Business News.

## State’s new tax a concern to all small businesses

BARRY W. WALL, MD

Small business owners in Rhode Island will want to take careful note of at least one novel feature of the recently approved state budget. The Governor’s original budget proposal included, and the final budget package retained, a new kind of tax on small businesses. This new tax is precedent-setting in ominous ways.

First of all, despite the fact that Rhode Island law generally exempts professional services from taxation, the new budget imposes a new 2% tax on gross receipts from diagnostic and therapeutic imaging services provided in doctors’ offices, and on medical services from physician-owned ambulatory surgery and endoscopy centers, where a large and growing proportion of outpatient procedures are performed. (While the budget language was amended to speak of “net” rather than “gross” receipts, the budget’s definition of “net” makes this a distinction without a difference.)

Hundreds of physicians, their patients and employees stand to be affected by this new tax. Specialized imaging has become an increasingly standard part of complete, quality patient care in more and more areas of medicine. Not only surgeons of every kind, but cardiologists, pulmonologists, ENTs, ophthalmologists, gastroenterologists, neurologists, rheumatologists, oncologists and other specialists make important use of various imaging modalities to provide better and better care to their patients. Indeed, even the larger primary care practices will be affected by this new tax, right along with all the other doctors who offer the convenience of imaging, surgery and endoscopy to their patients in their own medical offices.

This is an exceedingly narrow and arbitrary tax. Moreover, the provisions of the budget are so convoluted and ambiguous that compliance will be a challenge. Nevertheless, once the state establishes a new revenue source, it rarely ever gives it up. On the contrary, the state will surely expand the tax from time to time in the future, as revenue needs grow. So if the state can tax these professional services at the level of 2% of gross receipts today, it can and will tax these and other professional services at a higher rate tomorrow. Today the doctors, tomorrow the accountants, the barbers, the lawyers, the landscapers, etc.

Physicians are a peculiarly vulnerable group, because unlike other business owners, they are unable to pass their expenses on to those who receive their services. Physicians long ago lost the ability to set their own fees – an odd and precarious situation for professionals. Doctors are at the mercy of what insurance companies will pay them. Hence the paradoxical business model of medical practice today: overhead costs (notably including liability insurance) rise year after year, but fees stagnate and even

decline. For example, federal Medicare, an important market player, is once again scheduled to cut the rate at which it pays all physicians by 10% next year and 40% over the next four years!

The impact of such absurd cuts on Rhode Island promises to be especially harsh, given the state’s high proportion of elderly and its well-established status at the bottom in the entire northeastern U.S. for all physician compensation. Thus, Rhode Island is already at a marked disadvantage in the competition to recruit and retain new physicians at a time when it is recognized that the U.S. as a whole ought to be training about 30% more doctors to meet the needs of our aging population. (Our nation struggles to close the gap now by robbing the rest of the world of physicians, superbly trained at public expense in other countries.)

Clearly, this is a train wreck in the making, to which the new “provider tax” only adds momentum.

In light of all this, the most perverse aspects of this new state tax may be its futility and counter-productivity. The state number crunchers clearly have no idea how much revenue this new tax will actually generate. The \$4 million figure they attach to it is quite optimistic. One suspects it was conveniently sized to fit the gaping budget holes, rather than being based on data.

Even supposing the number might be in the ball park, the tax comes with risks that are out of proportion with the insignificant dent it might possibly make in the state’s budget deficit. Given a little time, its real impact might actually turn out to go the other way, as the availability and volume of these taxable services decreases as a direct result of the new tax burden on operations that are already marginal. Access to mammography is already difficult and subject to long waits in Rhode Island. It is not hard to imagine ambulatory surgery and endoscopy centers clustered just across the border in Massachusetts and completely unavailable in Rhode Island some day soon.

While we all recognize that the State’s fiscal crisis is real, we must also recognize that these problems were not unforeseen and did not develop overnight. Nor has any plan been put forward to date that would bring the state’s deficit under control in the next few years. Budget projections through 2010 are even worse than this year’s dilemma.

The state needs leadership to deal with its fiscal problems. Phantom revenue numbers and arbitrary odd taxes that punish small businesses and bring unintended consequences are no substitute for sound fiscal policy.