



A Passionate Voice for Compassionate Care

May 31, 2011

The Honorable Douglas H. Shulman
Commissioner of Internal Revenue
Internal Revenue Service
SE:T:EO:RA:G (Notice 2011-20)
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Submitted electronically to notice.comments@irscounsel.treasury.gov

Re: Notice 2011-20

Dear Commissioner Shulman:

On behalf of the Catholic Health Association of the United States (CHA), the national leadership organization of more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities, and related organizations, I welcome the opportunity to submit comments regarding Internal Revenue Service (IRS) Notice 2011-20 published on March 31, 2011 Considering Application of the Provisions of the Internal Revenue Code Governing Tax-exempt Organizations to Hospitals or Other Health Care Organizations Recognized as 501(c)(3) Organizations participating in the Medicare Shared Savings Program (MSSP).

CHA and its members are committed to transforming the U.S. health care system so that it will serve patients better and more efficiently. In this regard, we view the Accountable Care Organization (ACO) concept as promising and one that could be fully compatible with our members' mission orientation. Accordingly, we appreciate the tax guidance for tax-exempt organizations, including tax-exempt hospitals, participating in the Medicare Shared Savings Program (MSSP) contained in Notice 2011-20.

We are pleased that the IRS expects that participation by tax-exempt hospitals in the MSSP through ACOs would not put at risk their tax-exempt status. Providing services to Medicare beneficiaries has long been recognized as a charitable activity in that such promotes health and lessens the burden of government. CHA members have a great deal of experience in structuring arrangements with private parties that meet the requirements of Section 501(c)(3) and the

applicable regulations. Thus, we welcome the IRS's conclusion that, in general, an exempt hospital's participation in an ACO will be analyzed in the same manner as is currently applicable to health-related joint ventures.

Having said that, there are a few items in the Notice that we believe should be clarified.

First, the Notice states that a tax-exempt organization's share of MSSP payments must be proportional to its ownership interest. This statement appears to be based on some confusion about the types of payments that an exempt hospital might receive from an ACO participating in the MSSP. In most cases, it is likely that a hospital will have two relationships with an ACO: (1) as an owner; and (2) as a contractual provider of health care services. Thus, there will be two streams of income that the hospital may receive from the ACO: (1) as an owner, distributions; and (2) as a provider, payments for services rendered, which will likely include "incentive" payments based on MSSP savings under a methodology spelled out in the contract. While we understand analyzing the ownership distribution stream under the "proportional" benefits test, such test should not apply to the hospital's stream of income derived from services provided, regardless of whether such includes a component based on MSSP savings.

Second, the IRS needs to recognize that neither the majority voting control "requirement" for joint venture under Rev. Rul. 98-15 nor the "control over charitable aspects" test for joint ventures under Rev. Rul. 2004-51 make sense in the ACO context. Under CMS's proposed ACO requirements, ACOs must have proportional representation from all participating providers. Thus, we request the IRS to make clear that, so long as an ACO meets the MSSP governance requirements, the exempt organization will not jeopardize its tax status if it does not have majority control over the ACO or control over the ACO's charitable aspects.

Finally, with respect to participation of tax-exempt organizations in ACOs for non-MSSP activities, CHA seeks guidance on the types of activities which would put tax exempt-organization status at risk. For example, the Center for Medicare and Medicaid Innovation has recently proposed a Medicare Pioneer ACO Model under which ACO participants are expected to have entered outcomes-based contracts with non-Medicare purchasers such that the majority of the ACO's total revenues (including Medicare) will be derived from such arrangements, and applicants must commit to doing so in its application. CHA believes that participation of a tax-exempt hospital in such an ACO, under the participation terms and conditions identified in Notice 2011-20, should not put the tax-exempt status of that hospital at risk. In addition, with respect to participation in ACOs for commercially-insured patients, such is no different from any of the other type of commercial insurance or HMO arrangements that tax-exempt providers enter into every day. Such activities further the exempt purpose of promoting community health and also, as the health insurance exchanges are implemented, will lessen the burdens of government within the intent of the Patient Protection and Affordable Care Act.

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We hope the preceding comments are helpful. If you have any questions about these comments or need more information, please do not hesitate to contact me or Kathy Curran, Senior Director Public Policy, at 202-721-6300.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa J. Gilden". The signature is fluid and cursive, with the first name "Lisa" and last name "Gilden" clearly legible.

Lisa J. Gilden
Vice President, General Counsel