



# Community Benefit Webinar: Complying with IRS Regulations under Section 501(r)

Dec. 14, 2016

3 – 4 p.m. ET

© The Catholic Health Association of the United States



## Reflection for Today's Program

God of peace and comfort,

Guide us now, more than ever, to be peace bringers to an ever- increasing violent world. Give us the wisdom and the courage to make a difference so that violence does not rip apart families and communities. Bring peace to the families of Newtown whose lives have been forever changed. Bring knowledge to the teachers in the rest of the nation who are having to face their classes and answer questions they should never have to answer.

Guide the leaders of the United States to bring needed changes in the country's legislations on weapons, to ensure that such rampages will no longer occur.

Give us the wisdom to know that this shocking violence is everyday violence in other parts of the globe. Bring peace and comfort to all those places experiencing violence during this advent season. While we as a church are waiting the celebration of the arrival of Christ, let the world wait for the arrival of peace, and please let that peace come very soon.

© The Catholic Health Association of the United States

2

## Preston Quesenberry

Preston Quesenberry advises clients throughout the nonprofit sector on a wide variety of legal and strategic issues, including qualification for tax-exempt status, unrelated business income tax (UBIT), charitable contributions, domestic and international grant-making, joint ventures, lobbying and political activities and executive compensation. He has a particular depth of experience advising charitable hospitals and other tax-exempt organizations on regulatory issues related to the Patient Protection and Affordable Care Act.

A former senior attorney in the Tax Exempt and Government Entities Division of the IRS Office of Chief Counsel, Mr. Quesenberry drafted many of the Treasury regulations and other published guidance that play a critical role in his clients' business structures and operations. For example, during his tenure at the IRS, he was extensively involved in several guidance projects relating to the Affordable Care Act, such as regulations under § 501(r) and guidance on affordable care organizations. He also helped draft regulations regarding supporting organizations and program-related investments.

In addition, Mr. Quesenberry supported the Department of Justice and field attorneys with litigation and supervised attorneys in issuing private letter rulings and determination letters on exempt organization issues, including matters related to UBIT, private foundation excise taxes, political activities, and qualification for tax-exemption under a wide-variety of Code sections.



### *Of Counsel*

901 New York Avenue NW  
Suite 300 East  
Washington, DC 20001  
pquesenberry@loeb.com  
202.524.8470

### **Practice Areas:**

Nonprofits and Tax-Exempt Organizations  
Tax  
Tax Controversy and Litigation  
Healthcare

### **Education:**

Yale Law School, J.D., 2003  
Editor, *Yale Law Journal*, Editor, *Yale Journal on Regulation*  
Emory University, M.A., 1996  
Duke University, B.A., 1992, *magna cum laude*,  
*Phi Beta Kappa*

### **Admissions:**

District of Columbia

### **Clerkships:**

U.S. Court of Appeals,  
Fourth Circuit

3

© 2016 LOEB &amp; LOEB LLP



## Complying with IRS Regulations under Section 501(r)

December 14, 2016

Presented by Preston Quesenberry, Loeb & Loeb LLP



© 2016 LOEB &amp; LOEB LLP

# Complying with IRS Regulations under Section 501(r)

December 14, 2016

Presented by Preston Quesenberry, Loeb & Loeb LLP



© 2016 LOEB & LOEB LLP

## Overview

- When the IRS Comes Knocking
- Section 501(r)(4) Compliance
- Section 501(r)(5) Compliance
- Section 501(r)(6) Compliance
- Section 501(r)(3) Compliance



## When the IRS Comes Knocking.

- Audits for § 501(r) compliance are underway
- EO work plan: As of 6/30/16, 692 reviews, 166 exam referrals
- By 10/25/16, EO was reporting 300 exam referrals
- Reviews will continue in 2017

7

© 2016 LOEB &amp; LOEB LLP



## Compliance with Statute or Regulations?

- § 501(r) is effective tax years beginning after 3/23/10
  - 3/23/12 for § 501(r)(3)
- Final § 501(r) regulations are effective tax years beginning in 2016
- IRS reviews reportedly covering the 2012-2014 period
- Do questions on IDRs implicate regulations?
- Recommendation: Check compliance with regulations going back to 2012

8

© 2016 LOEB &amp; LOEB LLP



## Compliance Checks: What if Errors Are Discovered?

- Error occurring or continuing into 2016: Begin correcting error asap
  - Hospital must be in process of correcting upon IRS contact if it wants error to be excused pursuant to Rev. Proc. 2015-21
  - If Form 990 for year in which error is discovered comes due and error is more than minor, disclose failure and correction in Part VI of Sch H
- If error occurred in tax years beginning before 2016 and did not recur or continue in 2016 tax year, you have two options:
  - Correct (and, if more than minor, disclose) as described above; or
  - Argue that hospital complied with the statute

9

© 2016 LOEB &amp; LOEB LLP



## Section 501(r)(4) Compliance

- Do policies contain everything they're supposed to?
  - FAP (and associated documents)
  - Billing and collection policy
  - Emergency medical care policy
- Were policies widely publicized ?
- Were policies properly adopted and implemented?

10

© 2016 LOEB &amp; LOEB LLP



## Were Policies Widely Publicized?

- Most of the § 501(r)(4) IDRs appear to be related to widely publicizing
- Sample IDRs:
  - IDR #1: Were all of the FAP documents available on a website during the year?
  - IDR #2: Provide a copy of any translated FAP documents
  - IDR #3: Describe the methodology used to ensure that LEP populations served by the hospital have access to the translated documents



## Website Posting and Translation

- The following documents need to be available on a website and translated:
  - FAP
  - Plain language summary (PLS)
  - FAP application
  - AGB percentages (if separate)
  - Billing and collection policy (if separate)
  - List of providers (if separate)? (See Notice 2015-46)
- The above also need to be available upon request as paper copies by mail and in public locations in hospital



## Translation Methodology

- Prior to 2016, are translations required at all?
- Prior to 2016, hospitals clearly may use threshold of 10% of community served
- For 2016: the lesser of 1,000 individuals or 5% of the community served by the hospital or of the population “likely to be affected or encountered” by the hospital
  - Quoted language from HHS’s Guidance on Title VI Prohibition on Discrimination Against LEP Populations.
  - Different and narrower concept than “community served by the hospital facility”



## Notifying Patients of the Hospital

- IDR #4: Make arrangements for an onsite tour of all signage and publications on FAP in hospital
  - Public display or other means of attracting patient’s attention
  - Has to be in emergency room and admission areas
  - Has to say how and where to obtain more information about the FAP and FAP application process and to obtain FAP documents
- IDR #5: Provide a copy of a representative billing statement
  - Telephone # of relevant hospital office or department
  - Website address where copies of FAP documents may be obtained.



## Remaining “Widely Publicizing” Requirements

- Must offer a paper copy of the PLS to patients as part of the intake or discharge process
- Notifying broader community
  - Can target efforts on those community members who are most likely to require financial assistance from the hospital facility
  - Evidence?

15 © 2016 LOEB & LOEB LLP



## Were Policies Properly Adopted and Implemented?

- “Establishing” a FAP (or other policy) requires both adoption by an “authorized body” and consistently carrying out the policy
- IDR #6. Provide a list of all of the committees of the Board of Directors/Trustees and copy of the minutes of the meetings held by the Board of Directors
  - Authorized body can be full board, authorized committee, or authorized individual
  - Evidence of approval and (w/ committee or individual) evidence of authority
- IDR #7. Provide copies of any complaints, including legal complaints, in which a patient alleged that a hospital failed to comply with its FAP or § 501(r)(4).
  - If you have received complaints, document how they were resolved

16 © 2016 LOEB & LOEB LLP



## Section 501(r)(5) Compliance

- Not listed in EO work plan as area being reviewed
- Question 1: Do the § 501(r)(5) requirements only apply to FAP-eligible individuals?
- Answer: Yes, but...
  - “FAP-eligible” is defined without regard to whether an individual has applied
  - If individual hasn’t applied, hospital won’t always know that s/he is not FAP-eligible
  - If hospital doesn’t know, should follow “safe harbor” in § 501(r)-5(d):
    - If later determined to be FAP-eligible → refund
    - Don’t request or charge more than AGB as a pre-condition for providing medically necessary care

17 © 2016 LOEB & LOEB LLP



## Section 501(r)(5) Compliance (cont)

- Question 2: Can AGB calculation be based on when care was provided as opposed to when it was allowed by health insurer?
- For years prior to 2016, yes
  - For future years: Request IRB guidance?
  - What dollar amount would be used for care provided at the very end of the 12-month measurement period?
  - Does 120-day phase-in period permit actual amount allowed to be used for care provided during 12-months?

18 © 2016 LOEB & LOEB LLP



## Section 501(r)(6) Compliance

- Listed in EO Work Plan as area of review
- Only aware of one related IDR
- If no ECAs → reasonable efforts requirements do not apply
- Presumptive FAP-eligibility determinations
- Notification and processing applications
- Special notice when ECA = deferring or denying care

19 © 2016 LOEB & LOEB LLP



## Presumptive FAP-eligibility Determinations

- Must describe in FAP
- If presumptively granted free care (or most generous discount), reasonable efforts have been made
- If less than most generous discount and want ability to engage in ECAs to collect discounted amount, then must—
  - Notify how to apply for more generous assistance
  - Give a reasonable period of time to apply for more generous assistance

20 © 2016 LOEB & LOEB LLP



## Notification and Processing Applications

- Wait 120 days after first post-discharge bill before engaging in ECAs
- At least 30 days before ECAs are initiated--
  - Provide a written notice about ECAs (30-day ECA notice), plus PLS
  - Attempt to call or orally notify
- Process any applications received 240 days after the first post-discharge bill.
  - Will be >240 days if--
    - No 30-day ECA notice sent as of day 210 (and/or deadline stated in notice is later)
    - Incomplete application was submitted toward the end of the application period

21 © 2016 LOEB & LOEB LLP



## Details on Processing Complete Applications

- Suspend ECAs
- Notify in writing of eligibility determination and basis
- If eligible, then—
  - Reverse ECAs
  - If other than free care, corrected billing statements that shows how amount was determined and AGB for care
  - Refund overpayment

22 © 2016 LOEB & LOEB LLP



## Processing when ECA is denying care


- Instead of 30-day ECA notice, provide FAP application and notice stating deadline for submitting FAP application
- Process applications received before deadline on an expedited basis



## Section 501(r)(3) Compliance: IDRs

1. Provide a copy of hospital facility's CHNA conducted during the tax year or in either of the two immediately preceding tax years
2. Provide the dates that each CHNA was adopted by an authorized body of the hospital facility and evidence of each CHNA's adoption (i.e., copies of board meeting minutes or resolutions, etc.)
3. Provide a copy of the written implementation strategy (IS) that your facility adopted with respect to CHNA
4. Provide the dates that each IS was adopted by an authorized body of the hospital facility and evidence of each IS's adoption (i.e., copies of board meeting minutes or resolutions, etc.)
5. Identify a person from your facility who has knowledge of actions taken to solicit public input from persons who represent the broad interest of your community and who was responsible for the content the CHNA and the IS





CHA  
Catholic Health Association  
of the United States

# Q&A

© The Catholic Health Association of the United States

25