IRS WEIGHS IN ON FINANCIAL ASSISTANCE

BY INDU SPUGNARDI

On June 22, 2012, the Internal Revenue Service (IRS) issued a Notice of Proposed Rulemaking interpreting key provisions of Section 9007 of the Affordable Care Act, "Additional Requirements for Charitable Hospitals." The proposed rules are related to financial assistance policies, limitations on charges, and billing and collection requirements under Section 501(r) of the Internal Revenue Code (IRC). Proposed regulations concerning community health needs assessment will be issued separately.

It is important for tax-exempt hospitals to review these proposed rules now. Even though all the regulations aren't in effect, the notice points to the future — it displays IRS thinking about requirements, and it allows organizations time to begin reviewing their policies and procedures for compliance with the regulations to come.

WHAT'S IN THE NEW SECTION 501(R)?

By adding Section 501(r) to the Internal Revenue Code, the Affordable Care Act requires hospitals to satisfy the following new requirements in order to qualify for tax-exempt status under IRC Section 501(c)(3). (Note that the new requirements apply to each hospital facility a hospital organization operates):

- Conduct a community health needs assessment at least once every three years and adopt an "implementation strategy" to meet the needs identified by the assessment
- Establish, implement and make widely available written policies regarding financial assistance and emergency medical care
- Limit the amount charged for emergency or other medically necessary care provided to individuals eligible for financial assistance to not more than the amounts generally billed to individuals who have insurance covering such care, and refraining from using gross charges
- Refrain from "extraordinary collection actions" (lawsuits, arrests, liens or other similar actions) until "reasonable efforts" have been made to determine whether a patient is eligible for financial assistance

In issuing the notice, the IRS sought to balance two important goals: to ensure that patients and communities have access to information about a hospital's financial assistance policies and to preserve hospitals' flexibility to meet the particular health needs of the communities they serve.

Specifically, the notice describes the information that a hospital must include in its financial assistance policy (FAP) and its policy regarding the provision of care for emergency conditions. It describes how a hospital may determine the maximum amounts it can charge eligible individuals for emergency care and other medically necessary care, and it sets out the actions that are considered "extraordinary collection actions" and the "reasonable efforts" a hospital must make to determine eligibility before engaging in such actions. The IRS notice also provides guidance as to which entities must meet each of these requirements by defining the terms "hospital organization" and "hospital facility."

FINANCIAL ASSISTANCE AND EMERGENCY CARE

The proposed regulations require a hospital facility's financial assistance policy to include:

- A description of all financial assistance programs the hospital offers, and the eligibility criteria for each program
- The basis for calculating amounts charged to patients
- How to apply for financial assistance
- In the case of an organization that does not have a separate billing and collections policy, actions the organization may take in the event of nonpayment

■ Measures to widely publicize the financial assistance policy within the community served by the hospital facility

The proposed regulations specify four types of measures that the hospital will take to widely publicize its policy: 1) make paper copies available upon request, in public locations and by mail; 2) inform and notify visitors about the policy through highly visible public displays or other measures reasonably calculated to attract attention; 3) inform and notify community residents about the policy "in a manner reasonably calculated to reach those members of the community who are most likely to require financial assistance"; and 4) make current and complete versions of the policy, the application form and a plain language summary of the policy widely available on a website.

The proposed regulations also require a hospital to establish a written policy that requires the hospital to provide, without discrimination, care for emergency medical conditions (within the meaning of the Emergency Medical Treatment and Labor Act), regardless of whether the individual is eligible for financial assistance under the hospital facility's policy.

AMOUNTS GENERALLY BILLED

The proposed regulations describe two methods for determining the maximum amounts hospitals can charge policy-eligible individuals for emergency and other medically necessary care. Those amounts cannot be more than the amounts generally billed to individuals with insurance covering that care. The two methods are mutually exclusive, and a hospital facility may use only one method to determine amounts generally billed. After choosing a method, a hospital facility must continue to use that method.

■ Under the "look back" method, the amount generally billed is determined by multiplying the hospital's gross charges for emergency and medically necessary care provided by a generally billed percentage. There may be one or multiple (service-specific) percentages. The percentage is the sum of what either 1) Medicare fee-for-service or 2) Medicare fee-for-service and all private health insurers paid in full to the hospital during the previous 12 months, divided by the gross charges for those claims. This percentage and the method by which it is calculated must be made available to the public.

■ The second method is a "prospective Medicare method," in which the hospital determines how much fee-for-service Medicare (and the Medicare beneficiary) would pay for the services in question, and that amount is the maximum amount that can be charged to a patient eligible for financial assistance.

BILLING AND COLLECTION ACTIVITY

The proposed regulations state that a hospital satisfies the requirements of Section 501(r)(6) if the hospital does not engage in "extraordinary collection actions" against an individual before making "reasonable efforts" to determine whether the individual is eligible for financial assistance. The proposed regulations address two key aspects of the core Section 501(r)(6) limitations on a hospital's collection practices. First, the regulations provide a multi-step process, with time frames, for making "reasonable efforts" to determine whether an individual is eligible for financial assistance before the hospital may engage in "extraordinary collection actions" against that individual. Second, the regulations provide a list of actions that may constitute "extraordinary collection actions" for purposes of Section 501(r)(6). This list includes reporting to credit agencies and selling debt.

If the hospital facility refers or sells an individual's debt to a third party (for example, to a collection agency) the hospital must obtain a legally binding written agreement ensuring that the third party will adhere to all regulations applicable to the hospital regarding extraordinary collection actions during the relevant time frames.

The proposed rules do not address the consequences of noncompliance with 501(r) requirements, indicating that issue will receive separate guidance in the future.

CHA COMMENTS

During the official comment period, CHA submitted a letter about the notice. CHA has long advocated for and worked to promote just, compassionate and respectful financial assistance policies and procedures, and it supported the financial assistance and billing provisions in the Affordable Care Act.

In its comment letter, CHA urged the IRS to use the agency's notice on community health needs assessment as a model for the regulations concerning financial assistance policies and billing and collections. The community health needs assessment notice, issued in July 2011, asks hospi-

tals to describe how they are carrying out the requirements. It does not tell hospitals exactly what they must do.

CHA recognized that while the notice of proposed rulemaking emphasized accountability over substantive requirements with respect to the content of financial assistance policies and of financial assistance applications, in other areas it specified detailed requirements that could hinder the law's underlying goal — to make sure individuals eligible for assistance get the help they need in a timely and manageable manner.

Other specific recommendations that CHA raised in its letter included:

- Allowing hospitals to satisfy the emergency medical care policy requirements by complying with the Emergency Medical Treatment and Labor Act
- Allowing a variety of means to calculate the generally billed amount, including state-mandated discounts and, at the very least, a third option under the look-back method that excludes Medicare and allows use of claims paid only from private health insurers
- Clarifying that the generally billed amount does not apply to insured individuals, which will allow hospitals to continue to assist insured patients who struggle to pay deductibles and co-pays
- Modeling requirements related to contracted collection agencies after the approach used by the Department of Health and Human Services, which requires a hospital to take reasonable steps to cure material breaches or violations of contracts, and, if unsuccessful, terminate the contract
- Giving hospitals more flexibility in how they provide information about financial assistance policies in their bills, given their own existing billing practices and available resources
- Allowing hospitals' use of alternate methods of determining eligibility to constitute reasonable effort
- Implementing an enforcement mechanism that gives hospitals the opportunity to correct any failures to comply with these rules, to develop a plan of correction and to be found in compliance after corrective action is taken

PREPARING FOR FINAL RULES

Hospitals should carefully review the requirements in this notice of proposed rulemaking. The Section 501(r) requirements addressed by the proposed regulations are in effect now. Even though these proposed regulations are not final regulations and, in that sense, are not effective, they do represent the IRS' current thinking about the existing Section 501(r) requirements. Therefore, tax-exempt hospitals should begin assessing how their existing policies and procedures align with the proposed regulations as soon as reasonably possible.

Some specific things a hospital might consider:

- Review existing financial assistance policies to assess compliance with proposed regulations and develop plans to implement necessary changes
- Develop a checklist to assess how affected policies align with the proposed regulations. For example:
  - Do our policies specify all financial assistance that is available?
  - Do our policies specify all eligibility criteria for each type/level of assistance?
  - Do our policies describe how an individual applies for financial assistance, including information and documentation that must be submitted?
  - How do we publicize and notify patients of our policies?
  - How do we discount care versus AGB requirements?
  - Do our policies specify what collections practices will be used, define "reasonable efforts" and "extraordinary actions" and describe how the organization monitors collection practices?
- Prepare for board adoption and implementation of policies that comply with regulations. The proposed regulations state that a hospital will have established policies only if an "authorized body of the hospital organization has adopted the policy for the hospital facility," and the facility has "consistently carried out the policies"

To read the notice of proposed rulemaking and CHA's comments, please visit the Community Benefit section of the CHA website at www.chausa.org/communitybenefit. CHA members also can visit the CHA Learning Center for access to a recent webinar presented by the IRS lawyer who drafted the notice of proposed rulemaking.

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