October 12, 2010

The Honorable Douglas H. Shulman
Commissioner
Internal Revenue Service
CC:PA:LPD:PR (Notice 2010-39)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: Notice 2010-39, Regarding Additional Requirements for Certain Hospitals under Internal Revenue Code Section 501(r)

Dear Commissioner Shulman:

The American Institute of Certified Public Accountants (AICPA) is pleased to submit comments on the new Internal Revenue Code section 501(r). These comments were developed by the AICPA Section 501(r) Task Force and approved by our Exempt Organizations Tax Technical Resource Panel and Tax Executive Committee.

The AICPA is the national professional organization of certified public accountants comprised of approximately 360,000 members. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized business, as well as America's largest businesses. It is from this perspective that we offer comments regarding the following issues on additional requirements for certain hospitals under section 501(r): (1) the definition of a hospital organization; (2) the applicability of this definition to hospitals with more than one facility; (3) community health needs assessment requirements; (4) financial assistance policy requirements; (5) the limitation on medical charges to individuals qualifying for financial assistance; (6) billing and collection procedures; (7) reporting on Form 990; (8) group exemptions; and (9) the attachment of audited financial statements.

Definition of Hospital Organization, Section 501(r)(2)(A)

Under section 501(r)(2)(A), the new rules generally apply to "an organization which operates a facility which is required by a state to be licensed, registered, or similarly recognized as a hospital…."

The reference to state licensing requirements, which can vary significantly from state to state, will result in disparate treatment at the federal level. Furthermore, some states, such as New York, have a broad definition of hospital that includes, *inter alia*, nursing homes, diagnostic centers, and dental clinics which are licensed under the same statutory provisions. We do not believe that it is the intention of Congress to impose the new requirements on nursing homes, community clinics or other healthcare organizations that do not provide "hospital care."

The same issue exists for Form 990, Schedule H, Hospitals. The definition of a "hospital organization" on the Instructions for Schedule H is "a facility that is, or is required to be, licensed, registered, or similarly recognized by a state as a hospital."

The AICPA suggests that the IRS clarify the definition of hospital, for purposes of both section 501(r) and Schedule H. We recommend the following definition: "A hospital organization is an organization (i) that is regulated as a hospital by a state Department of Health or its equivalent or (ii) holds itself out to the public as a hospital or provider of hospital based services, which means (x) a place that is devoted primarily to the maintenance and operation of facilities for the diagnosis, treatment or care over a period exceeding twenty-four hours of two or more nonrelated individuals suffering from illness, injury, or deformity or (y) a place that is devoted primarily to the rendering over a period exceeding twenty-four hours of obstetrical or other medical or nursing care or files a state or Medicare cost report intended to be filed by hospitals."

Hospitals with More than 1 Facility, Section 501(r)(2)(B)(ii)

If a hospital organization operates more than one hospital facility, the requirements of section 501(r) must be met separately with respect to each facility;[1] an organization is not treated as described in section 501(c)(3) with respect to any facility for which such requirements are not separately met.[2] Notice 2010-39 specifically requests comments on the tax consequences of a failure with respect to some, but not all, facilities.

The AICPA requests that this provision would only apply in the event of a "substantial failure" that is not cured within the 3 year grace or cure period described below. A "substantial failure" requirement would allow inadvertent violations to be corrected before the loss of section 501(c)(3) status.

The AICPA recommends a grace or cure period of not less than three years before the facility is not treated as described in section 501(c)(3). Such a grace period, similar to the three-year cycle for the community health needs assessment, allows a facility to discover and correct failures to meet any requirement of section 501(r). In addition, we suggest that, during the grace period, there should be no impact on the status of any outstanding tax-exempt bonds. If the facility

[1] IRC section 501(r)(2)(B)(ii).
[2] *Id.*

cannot meet the requirements of section 501(r) within the grace period, the facility would then be treated as not described in section 501(c)(3) beginning with the following fiscal year.

If one of the facilities within the hospital organization ultimately is deemed not to be described under section 501(c)(3), we suggest that the activity of that specific facility be treated as a trade or business. The facility would report its activities on Form 990-T, Exempt Organization Business Income Tax Return, for that specific year and for each year that the facility continues to fail to meet the requirements of section 501(r). We also suggest that if the facility operates at a loss, then such loss should offset taxable income from other unrelated business activity of the organization and that any unused loss would carry forward to future years. Finally, we recommend that the facility's treatment as a non-exempt hospital be limited to the year(s) in which the facility does not meet the requirements of section 501(r).

In order for the IRS to gather information from taxpayers regarding whether facilities have satisfied the requirements of section 501(r), we recommend that the IRS add the following questions to Schedule H:

1. If the organization operates more than one facility, did any facility fail to meet the requirements of section 501(r) in the current year? If yes, please provide additional information in Part VI, Supplemental Information.

2. If the organization operates more than one facility, did any facility fail to meet the requirements of section 501(r) in the previous three years,[3] but met the requirements of section 501(r) in the current year? If yes, please provide additional information in Part VI, Supplemental Information.

Finally, if one or more facilities are deemed to not be exempt, the AICPA seeks guidance on the circumstances, if any, that would jeopardize the exempt status of the entire organization. Also, please provide information on the impact of a facility's loss of exemption on tax-exempt bonds issued by the facility or entire organization.

Community Health Needs Assessment, Section 501(r)(3)

In order to qualify as tax-exempt, a hospital organization must conduct a Community Health Needs Assessment (CHNA) once every three years, adopt an implementation strategy to meet the needs identified in the CHNA, and make the CHNA widely available to the public.[4] Notice 2010-39 specifically requests comments on appropriate requirements for a CHNA.

[3] As discussed under the section "Hospitals with more than 1 Facility, section 501(r)(2)(B)(ii)," the AICPA recommends a grace or cure period of not less than three years before a facility is not treated as described in section 501(c)(3).
[4] IRC section 501(r)(3).

The AICPA recommends that if a CHNA is conducted by a local public health agency, for example, for a specific metropolitan area, all of the hospitals in such metropolitan area shall be permitted to use the CHNA to adopt the required implementation strategy. The local hospitals that want to participate could jointly fund or participate in the CHNA, minimizing resources that are being diverted from the provision of health care.

Second, due to the diversity of hospital organizations and recognizing the differences in resources available to conduct CHNAs, we recommend that a CHNA be defined as broadly as possible. We recommend the following definition: "A Community Health Needs Assessment involves collecting and analyzing data from a variety of sources to learn about the strengths and needs of the people and services within a community."

Third, we recommend that the IRS permit organizations to make a CHNA "widely available" by posting the document on the entity's website.

Finally, with respect to disclosure of CHNA information and any implementation strategy, the AICPA recommends the addition of the following questions to Schedule H, Part I:

> 6b - Has each organization conducted, or collaborated with a public health agency or another nonprofit organization that conducted a community health needs assessment in the applicable taxable year or in either of the two taxable years immediately preceding such taxable year?
>
> 6c - Does each organization make the community health needs assessment available to the public?
>
> 6d - Does the community health needs assessment conducted by each organization take into account input from persons who represent the broad interests of the community served by each hospital facility, including those with special knowledge of or expertise in public health?
>
> 6e - Has each organization adopted an implementation strategy for meeting the community health needs indentified in the assessment?
>
> 6f - Have you described in Part VI, Supplemental Information, how each organization is addressing the needs identified in the community health needs assessment, any needs that are not being addressed, and the reasons why such needs are not being addressed?
>
> 6g - If the answer to any of the above questions 6b – 6g is "no," provide the name of the hospital facility and an explanation in Part VI, Supplemental Information.

In regard to the new CHNA requirements, the AICPA also suggests a need for clarification or guidance on the following issues:

(1) How will the IRS define or assess an implementation strategy as required by section 501(r)(3)(A)(ii)?

(2) How much detail is sufficient on the CHNA? Will minutes of focus groups or town hall meetings be adequate, or must taxpayers provide quantitative and qualitative research data?

(3) Please provide information on how the IRS intends to use the CHNA information, in addition to reviewing the community benefit activities of every tax-exempt hospital as required by amended section 6033(b).

Finally, the AICPA seeks confirmation on whether the CHNA will become part of the Form 990. If yes, we suggest that you consider electronic filing issues as soon as possible. Specifically, we suggest that you ensure that all portable document format (PDF) documents, regardless of size, may be attached to the Form 990.

Financial Assistance Policy, Section 501(r)(4)

Under section 501(r)(4), an organization is required to establish a written financial assistance policy and a policy relating to the provision of emergency medical care.

In order for the IRS to obtain such information from taxpayers, we recommend the following changes to Schedule H as a new Part I, question 7:

7a - Has the hospital adopted, implemented and widely publicized its written financial assistance policy?

7b - Does the financial assistance policy indicate the eligibility criteria for financial assistance and whether such assistance includes free or discounted care?

7c - For those patients eligible for discounted care, does the policy indicate how the amount is determined for billing the patient?

7d - Does the organization's financial assistance policy provide information on how individuals can apply for assistance?

7e - Does the organization's financial assistance policy clearly indicate the actions (e.g., contacting collections agencies and reporting information to credit rating agencies) a hospital may take in regards to individuals who fail to apply for assistance or fail to make partial payments?

In regards to the policy relating to the provision of emergency medical treatment, the AICPA requests confirmation that if an organization has met the provisions of the Emergency Medical

Treatment and Active Labor Act (EMTALA), then such organization has also met the same requirement of section 501(r)(4)(B). EMTALA, which was passed as part of the Consolidated Omnibus Budget Reconciliation Act of 1986, generally governs when and how a patient may be (1) refused treatment or (2) transferred from one hospital to another when he or she is in an unstable medical condition. Please confirm that these rules are not inconsistent with section 501(r)(4)(B), which requires an organization to establish a written policy requiring it to provide, without discrimination, care for emergency medical conditions to individuals regardless of their eligibility under a financial assistance policy.

Limitation on Charges, Section 501(r)(5)

An organization must limit the amounts charged for emergency or other medically necessary care provided to individuals eligible for assistance under the financial assistance policy to no more than the amounts generally billed to individuals who have insurance covering such care.[5]

In order to gather information necessary to determine whether taxpayers are compliant with section 501(r)(5), the AICPA recommends the addition of the following question to Schedule H:

> Are the amounts billed to those individuals who qualify for financial assistance based on the best, or an average of the three best, negotiated commercial rates or on Medicare rates?

Billing and Collection, Section 501(r)(6)

An organization cannot engage in extraordinary collection actions before the organization has made reasonable efforts to determine whether the individual is eligible for assistance under the organization's (or specific facility's) financial assistance policy.[6]

The AICPA requests guidance as to the definitions of "extraordinary collection actions" and "reasonable efforts." We suggest that the IRS provide a specific list of examples of what would and, perhaps more importantly, would not qualify under section 501(r)(6).

In regards to the "reasonable efforts" requirement, we suggest that if assistance forms are provided and explained during the admission process, but such forms are never completed, the organization may rely on its admission procedures to satisfy the above rule.

[5] IRC section 501(r)(5).
[6] IRC section 501(r)(6).

Reporting on Form 990, Schedule H, Hospitals

The AICPA recognizes that a number of health systems need to file the entire Schedule H on a consolidated basis in order to most accurately reflect their data. (This is common where a health system provides different levels of charity care in different communities, and only by presenting such information on a consolidated basis can the IRS and public get a true picture of the extent of charity care provided.) On the other hand, many health organizations do not need to report consolidated information and should not be subject to additional reporting requirements if such information provides no additional value to the IRS or public.

In order to ensure that the information presented provides the general public and the IRS with the most accurate information, we recommend that you provide the health systems with an option. Specifically, we suggest adding a column (g) to the current Schedule H, Part I, Question 7. The reporting entity would report amounts in column (f) and have the option of also reporting amounts on a consolidated basis in column (g).

If a redesign of the form is not feasible, we alternatively suggest that you consider permitting entities to file an additional Schedule H on a consolidated basis.

Group Exemptions

Many health systems are in the process of filing for group exemptions. The IRS currently permits such applications provided that all entities within an organization are exempt under section 501(c). In order to minimize administrative burden, the AICPA recommends that the IRS continue to permit the filing of group exemptions for health systems, regardless of whether the systems have clinics, foundations, etc. (which are statutorily exempt under section 501(r)).

Attachment of Audited Financial Statements, Section 6033(b)(15)(B)

Under section 6033(b)(15)(B), exempt organizations subject to section 501(r) must furnish annually audited financial statements of such organization.

The AICPA seeks confirmation that the audited financial statements of an organization will become part of the Form 990. If yes, we suggest that you consider electronic filing issues as soon as possible. Specifically, we suggest that you add audited financial statements to the list of permissible attachments, communicate with tax software vendors regarding the new requirement, and update IRS computer systems to accept such attachments prior to the first filing deadline for organizations that have a tax year that began after March 23, 2010. In regards to the Form 990, we also suggest that you add the following question for Schedule H:

> Has a copy of the organization's audited financial statements been attached to the return?

The AICPA also seeks confirmation that, if the audited financial statements become part of the Form 990, such attachment will be submitted to GuideStar at the same time as the return.

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If you would like to discuss these comments in more depth or have any questions, please contact Sara Elizabeth J. Hyre, Chair of the AICPA Section 501(r) Task Force at (425) 709-6200 or sehyre@clarknuber.com; or Melissa M. Labant, AICPA Technical Manager, at (202) 434-9234 or mlabant@aicpa.org.

Sincerely,

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Chair, Tax Executive Committee

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