

THE SECOND SHOE DROPS: THE TREASURY DEPARTMENT AND THE IRS JOINTLY ISSUE A NOTICE ON COMMUNITY HEALTH NEEDS ASSESSMENTS

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As predicted in this publication last year [describe date of publication], the community health needs assessments (“CHNAs”) are shaping up to be among the most dramatic changes in history for tax-exempt hospitals. Specifically, the Patient Protection and Affordable Care Act (the “PPACA”) that was enacted on March 23, 2010 targeted tax-exempt hospitals in a number of ways including, importantly, the adoption of new Section 501(r) of the Internal Revenue Code (the “Code”). As previously reported, Section 501(r) creates new limits on billing and collection activities, creates new limitations on hospital charges, establishes extraordinary new requirements regarding the publication of financial assistance policies, and, for tax years commencing on or after March 23, 2012, creates a new CHNA requirement for each tax-exempt hospital. In an uncommon step, the Treasury Department (the “Department”) and the Internal Revenue Service (the “IRS”) just issued Notice 2011-52 (the “Notice”) on July 7, 2011, soliciting comments for the anticipated regulations for Section 501(r). More importantly, the Notice identifies some of the Federal government’s predispositions for the enforcement of Section 501(r).

The Notice clarifies that the a tax-exempt hospital will be deemed to meet the CHNA requirements with respect to individual taxable years *only if* the organization has (a) conducted a CHNA that meets the requirements of Section 501(r)(3)(B) in the taxable year in question or in the previous two taxable years and (b) has adopted an “implementation strategy” to meet the community health needs identified through the CHNA. The CHNA must, in order to comply with the anticipated regulations, identify and assess the health needs of and take into account input from persons who represent the “broad interests of” the community served by the hospital facility. Furthermore, the Notice indicates that the implementation strategy must be adopted in the same year in which the CHNA is completed. While all penalties and repercussions of an organization’s failure to meet these new requirements are not yet known and while the Notice expressly indicates that additional penalties are under consideration, the Department and the IRS have confirmed that any organization that fails to properly complete a CHNA and to adopt an implementation strategy will be subject to an *annual excise tax per non-compliant hospital* of \$50,000.

In sum and substance, the Notice identifies at least twelve categories of regulations that are anticipated and some of the current positions of the Department and the IRS. The categories addressed by the Notice include (a) the documentation of the CHNA, (b) the meaning of the concept of the community served by the hospital, (c) persons who may represent the broad interests of the community, (d) the implementation strategy and (e) new reporting requirements to be anticipated. Importantly, the Notice confirms what had been previously reported about Section 501(r): that compliance would be determined *on a hospital by hospital* basis regardless of the corporate structure of the tax-exempt entity. See Code Section 501(r)(2)(B). Bluntly, the

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Notice states that the Department “. . . and the IRS intend to require a hospital organization to conduct a CHNA and adopt an implementation strategy for each hospital facility it operates.” As a palliative, the Department and the IRS are soliciting comments about alternative methods by which governmental hospitals may satisfy the requirements of an implementation strategy and how a systemic reporting for multiple hospital facilities together in one written report “might improve the quality of the CHNAs, while still ensuring that information for each hospital facility is clearly presented and easily accessible.”

The outline of the documentation requirements for a CHNA is extraordinary. At minimum, the following is required:

- A description of the community served by the hospital and how determined;
- A description of the process and methods used to conduct the assessment including “information gaps” that impact the hospital organization’s ability to assess the health needs of its community. The specific identity of all individuals and entities working with the hospital will need to be disclosed;
- A description of how the hospital took into account input from persons who represent the “broad interests” of the community, including when and under what conditions consultations were effected “(whether through meetings, focus groups, interviews, surveys, written correspondence, etc.)” and the specific names, titles and experience of those consulted;
- A prioritized description of *all* of the community health needs identified and the process by which prioritization occurred; and
- A description of the existing health care facilities and other resources within the community available to meet identified community needs.

The Notice confirms that the implementation strategy will require a hospital organization to “specifically address” each of the community health needs identified by describing how the hospital facility plans to meet the needs or identifying the health need(s) that the hospital does not intend to meet and explain why the hospital facility does not intend to meet them.

Finally, the Notice confirms that, in addition to other access and publication requirements, the CHNAs for individual hospitals will, for taxable years after March 23, 2012, be appended to all Forms 990 and applicable excise taxes disclosed. Tax-exempt hospitals should begin planning now for wholly new reporting requirements and community needs assessments, the likes of which have never been seen before.

Comments regarding CHNA requirements will be accepted by the Department and the IRS until September 23, 2011. Comments should be forwarded to Internal Revenue Service, DD:PA:LPD:PR (Notice 2011-52), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044 or by e-mail to Notice.Comments@irscounsel.treas.gov with “Notice 2011-52” in the subject line.