

Clarifications to the Requirement in the Treasury Regulations Under § 501(r)(4) that a Hospital Facility's Financial Assistance Policy Include a List of Providers

Notice 2015-46

SECTION 1. PURPOSE

This notice provides clarification with respect to how a charitable hospital organization may comply with the requirement in § 1.501(r)-4(b)(1)(iii)(F) of the Treasury Regulations that a hospital facility include a provider list in its financial assistance policy (FAP). The list must include any providers, other than the hospital facility itself, delivering emergency or other medically necessary care in the hospital facility and specify which providers are and are not covered by the hospital facility's FAP.

SECTION 2. BACKGROUND

Section 9007 of the Patient Protection and Affordable Care Act, Public Law 111-148 (124 Stat. 119 (2010)), enacted § 501(r) of the Internal Revenue Code, which imposes additional requirements on charitable hospital organizations. On December 29, 2014, the Department of the Treasury ("Treasury Department") and the Internal Revenue Service ("IRS") released final regulations (TD 9708) that contain guidance on the requirements of § 501(r) and the consequences for failing to meet any of these requirements.

Section 501(r)(1) provides that a hospital organization described in § 501(r)(2) will not be treated as described in § 501(c)(3) unless the organization meets the requirements of § 501(r)(3) through (r)(6). Section 501(r)(2)(A) defines a hospital

organization as including any organization that operates a facility required by a state to be licensed, registered, or similarly recognized as a hospital. Section 501(r)(2)(B) requires a hospital organization that operates more than one hospital facility to meet the requirements of § 501(r) separately with respect to each hospital facility.

Although a hospital organization's tax-exempt status depends on its compliance with the requirements of § 501(r), not all failures to satisfy the requirements of § 501(r) will necessarily result in revocation. A failure to meet the requirements of § 501(r) that is neither willful nor egregious is excused if the hospital facility corrects and discloses the failure in accordance with Rev. Proc. 2015-21 (2015-13 I.R.B. 817). See § 1.501(r)-2(c). Additionally, a hospital facility's omission or error relating to the § 501(r) requirements that is minor and either inadvertent or due to reasonable cause will not be considered a failure to meet a requirement of § 501(r) if the hospital facility corrects such omission or error as promptly after discovery as is reasonable given the nature of the omission or error. See § 1.501(r)-2(b).

Section 501(r)(4) requires a hospital organization to establish a written FAP. On June 26, 2012, the Treasury Department and the IRS published a notice of proposed rulemaking (REG-130266-11, 77 FR 38148) (2012 proposed regulations) requiring each hospital facility to establish a FAP that applies to all emergency or other medically necessary care provided by the hospital facility. A number of commenters responding to the 2012 proposed regulations noted that patients, including emergency room patients, are commonly seen by private physician groups or other third-party health care providers while in the hospital facility. Many commenters asked for clarification regarding the extent to which a hospital facility's FAP must cover these other providers,

such as non-employee providers in private physician groups or hospital-owned practices. Some commenters indicated that the FAP should apply only to the care provided by employees of the hospital facility itself. Other commenters noted that, even though emergency room physicians in some hospital facilities separately bill for emergency medical care provided to patients, the hospital facility's FAP should apply to the care provided by all emergency room physicians. Other commenters requested that the final regulations clearly require the hospital facility's FAP to cover all providers of emergency or other medically necessary care in a hospital facility (or all services provided in the hospital facility for the treatment of a medical emergency or the provision of other medically necessary care).

Under the final regulations, a hospital facility's FAP must apply to all emergency and medically necessary care provided in the hospital facility only to the extent the care is provided by the hospital facility itself or a substantially-related entity. See § 1.501(r)-4(b)(1)(i); § 1.501(r)-1(b)(28) (defining "substantially-related entity" generally as a partnership in which the hospital organization owns a capital or profits interest, or a disregarded entity of which the hospital organization is the sole member or owner, that provides emergency or other medically necessary care in the hospital facility unless the provision of such care constitutes an unrelated trade or business). However, the Treasury Department and the IRS also agreed with commenters that, because patients are typically unaware of the relationships between a hospital facility and the healthcare providers working in the hospital facility, it is important for a hospital facility's FAP to clearly disclose which services provided in the hospital facility are covered by the FAP and which are not. Such information may be valuable not only for patients seeking to

understand what financial assistance they may qualify for individually, but also for those seeking to understand the health needs of the community and the resources available to meet them. Therefore, in response to comments and in order to provide transparency for patients and communities, the final regulations require a hospital facility's FAP to include a list of providers, other than the hospital facility itself, delivering emergency or other medically necessary care in the hospital facility and specify which providers are covered by the hospital facility's FAP and which are not ("provider list"). See § 1.501(r)-4(b)(1)(iii)(F).

Recently, concerns regarding the provider list requirement have been expressed, particularly with respect to large hospital facilities where the number of providers delivering emergency or medically necessary care can be quite large. Commenters have noted that the provider list may change frequently because physicians move or change aspects of their practice and providers' relationships with a hospital facility may be complicated and subject to change. Commenters have stated that creating a provider list and keeping it up to date will be difficult. However, community advocates have indicated that although providing this information may require some additional effort by hospitals, it is valuable information that is often impossible for patients or community members to obtain otherwise and is necessary in order to evaluate what financial assistance is available.

Additionally, practical questions regarding the provider list have been raised. For example, some commenters have questioned whether the entire provider list must be included in the FAP itself, or whether it could be provided in a separate document, as is allowed for the disclosure of the percentage of gross charges that a hospital facility uses

under § 1.501(r)-5(b)(3) to determine the amounts generally billed for any emergency or medically necessary care it provides to an individual who is eligible for assistance under its FAP. Further, some have questioned whether the provider list could specify the emergency or other medically necessary care covered by the FAP by department or by type of service, if all of the providers in the department or of the service are covered by the hospital facility's FAP.

In response to these comments and questions, this notice provides hospital facilities with clarification regarding how a hospital facility may comply with the provider list requirement.¹

SECTION 3. SPECIFICATION OF PROVIDERS AND CARE COVERED BY THE FAP

.01 Provider list. A hospital facility's FAP must include a list of any providers, other than the hospital facility itself, providing emergency or other medically necessary care in the hospital facility that specifies which providers are covered by its FAP and which are not. See § 1.501(r)-4(b)(1)(iii)(F). For purposes of this requirement, a hospital facility may list the names of individual doctors, practice groups, or any other entities that are providing emergency or medically necessary care in the hospital facility by the name used either to contract with the hospital or to bill patients for care provided. For example, if all of the doctors in a practice group that provides emergency or other medically necessary care in the hospital facility are covered by the hospital facility's FAP, the hospital facility may include the name of the practice group, rather than the name of each individual doctor, in its provider list and indicate which services of the

¹ The final regulations contain a collection of information that has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. § 3507(d)) under control number 1545-0047. This notice clarifies, but makes no material change to, one of these collections of information. Accordingly, this notice has no impact on the estimated annual reporting burden provided in the final regulations.

practice group are covered by the FAP. Alternatively, a hospital facility may specify providers by reference to a department or a type of service if the reference makes clear which services and providers are covered. For example, if all providers of all services in a department of a hospital facility are covered by the FAP, the hospital facility's FAP may include the department, rather than the specific names of doctors or practice groups, in its provider list and indicate that the services in that department are covered by the FAP. Similarly, if no providers of services in a department of the hospital facility are covered by the FAP, the provider list may include the department and indicate that none of the services provided in the department are covered by the FAP.

.02 Partial coverage of emergency or other medically necessary care. If a provider is covered by a hospital facility's FAP in some circumstances but not in others, the hospital facility must describe the circumstances in which the emergency or other medically necessary care delivered by the provider will and will not be covered by the FAP. For example, if the hospital facility has a contract with an outside provider to deliver certain specialty services in the hospital facility's emergency room that are covered by the FAP but other emergency or medically necessary care delivered in the hospital facility by the provider is not covered by the FAP, the hospital facility must describe the circumstances in which the outside provider's services will and will not be covered by the FAP.

.03 Providers covered by policies other than the hospital facility's FAP. A hospital facility's provider list must indicate whether the services of a particular provider are or are not covered by the hospital facility's FAP but is not required to indicate whether that provider's services are (or may be) covered by another entity's financial aid policy or

program.

.04 Maintaining the provider list in a document separate from the FAP. A hospital facility may maintain the list of providers in a document separate from the FAP, such as in an appendix, provided that the document includes the date on which it was created or last updated. If a hospital facility maintains its provider list in a document separate from the FAP, the hospital facility's FAP must state that the list of providers is maintained in a document separate from the FAP and explain how members of the public may readily obtain it free of charge, both online and on paper.

SECTION 4. UPDATING THE PROVIDER LIST

Under § 501(r)(4), a hospital organization is required to establish a FAP for each hospital facility it operates. A hospital organization has established a FAP for a hospital facility only if an authorized body of the hospital facility has adopted the policy for the hospital facility and the hospital facility has implemented the policy. See § 1.501(r)-4(d)(1). If the only change a hospital facility makes to its FAP is to update the provider list (whether the provider list is in the FAP or in a separate document), the FAP does not need to be adopted by an authorized body of the hospital facility again in order for the FAP to continue to be considered "established."

SECTION 5. OMISSIONS AND ERRORS IN THE PROVIDER LIST

Minor omissions and errors that are either inadvertent or due to reasonable cause are not considered failures to meet a requirement of § 501(r) if they are promptly corrected, and hospital organizations are not required to disclose such omissions or errors. See § 1.501(r)-2(b)(1). Omissions or errors in a hospital facility's provider list, including a failure to include a provider in that list or to identify a service covered by the

FAP, will be considered minor and either inadvertent or due to reasonable cause if the hospital facility takes reasonable steps to ensure that its list of providers is accurate. A hospital facility that updates its list of providers by adding new or missing information, correcting erroneous information, and deleting obsolete information at least quarterly will be considered to have taken reasonable steps to ensure that its list is accurate and will be considered to have corrected any minor omissions or errors in the list for purposes of § 1.501(r)-2(b).

SECTION 6. EFFECTIVE DATE

This notice is applicable with respect to taxable years beginning after December 29, 2015. See § 1.501(r)-7(a).

SECTION 7. DRAFTING INFORMATION

The principal author of this notice is Stephanie N. Robbins of the Office of Associate Chief Counsel (TEGE). For further information regarding this notice, contact Stephanie N. Robbins at (202) 317-5800 (not a toll-free call).