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IRS PROPOSED REGULATIONS ON NEW REQUIREMENTS FOR CHARITABLE HOSPITALS: PART IV - THE BILLING AND COLLECTION PROVISIONS

This Health Care Tax News article is Part IV in a series discussing the Proposed Regulations under Code Section 501(r). The *first installment* provided an overview of the Proposed Regulations, including the definitions of "Hospital Organizations" and "Hospital Facilities," the *second installment* addressed the requirements for maintaining written financial assistance policies and written emergency medical care policies, and the *third installment* explained the "limitations on charges" provisions.

Included among the provisions of the Patient Protection and Affordable Care Act ("ACA") are restrictions on the billing and collections activities of Hospital Organizations with respect to individuals who are eligible for financial assistance pursuant to the financial assistance policy ("FAP") of the Hospital Organization and its Hospital Facility(s). Specifically, a Hospital Organization is now required under Section 501(r)(6) of the Internal Revenue Code of 1986, as amended (the "Code"), to make "reasonable efforts" to determine whether an individual is eligible for assistance under the Hospital Organization's FAP before it engages in any extraordinary collection actions ("ECAs") with respect to that individual. The recently released Proposed Regulations from the Internal Revenue Service ("IRS") set out the conditions necessary for a Hospital Organization and its Hospital Facility(s) to be considered compliant with such restrictions.

The requirements that have been announced under Proposed Regulation Section 1.501(r)-6 are very detailed and specific. Most notably and as further described below, they define what actions are considered to be ECAs, explain what constitutes "reasonable efforts," address notification requirements and discuss how to address incomplete versus complete FAP Applications.

Extraordinary Collection Actions

ECAs include any actions that require a legal or judicial process and are taken by a Hospital Facility related to acquiring payment of a bill for services covered under the Hospital Facility's FAP. In addition, reporting adverse information about the individual to consumer credit reporting agencies or credit bureaus as well as selling an individual's debt to a third party are ECAs. Under the Proposed Regulations, actions that require a legal or judicial process include, but are not limited to, the following:

- Placing a lien on an individual's property.
- Foreclosing on an individual's real property.
- Attaching or seizing an individual's bank account or any other personal property.
- Commencing a civil action on an individual's bank account or other personal property.
- Causing the arrest of an individual.
- Causing an individual to be subject to a writ of body attachment.
- Garnishing an individual's wages.

Interestingly, the Proposed Regulations do not define ECAs to include *referring* (as opposed to selling) an individual's debt to a third party. Moreover, the Proposed Regulations do not include the deferring or denying of care to an individual based upon a pattern of nonpayment, the requiring of deposits before providing care or the charging of interest as ECAs. A Hospital Facility, however, must consider EMTALA requirements and applicable state law restrictions before taking any of these actions.

Reasonable Efforts

A Hospital Facility is deemed to have made reasonable efforts to determine whether an individual is eligible for financial assistance under its FAP if the Hospital Facility completes the following three steps (each of which is discussed in further detail below):

- Notifies the individual about the FAP.

- In the case of an individual who submits an incomplete FAP application, the Hospital Facility provides the individual with information relevant to completing the FAP.
- In the case of an individual who submits a complete FAP application, the Hospital Facility makes and documents its determination as to whether the individual is eligible for assistance under its FAP.

A Hospital Facility must comply with both a "notification period" and an "application period" in satisfying the above requirements. The notification period is the period during which the Hospital Facility must notify the individual about its FAP. This period begins on the date that care is provided to the individual and ends on the 120th day after the Hospital Facility provides the first billing statement to the individual. If the Hospital Facility has met (and documents that it has met) all of its notification requirements and the individual fails to submit a FAP application by the end of the notification period, the Hospital Facility may take an ECA with respect to that individual. Nevertheless, even after a Hospital Facility is allowed to take an ECA against an individual, it must still process FAP applications submitted prior to the end of the application period to be considered to have made reasonable efforts to determine whether an individual is FAP-eligible.

The application period is the period during which a Hospital Facility must accept and process FAP applications submitted by an individual. This application period ends on the 240th day after the Hospital Facility provides the individual with the first billing statement.

Notification to Individuals About the FAP

The Proposed Regulations require that a Hospital Facility distribute a plain language summary (as defined in the Proposed Regulations) of its FAP and offer a FAP application to an individual before he or she is discharged. Furthermore, a Hospital Facility must include a plain language summary of the FAP with all (and at least three) billing statements and all other written and oral communications regarding the bill delivered during the notification period.

The Hospital Facility is also required to provide the individual with at least one written notice that informs the individual about the ECAs that may be taken if the individual does not submit a FAP application or pay the billing statement by the deadline specified in the notice, which may not be earlier than the last day of the notification period. The Hospital Facility must provide this notice at least 30 days before the deadline specified in the notice.

If an individual submits a complete or incomplete FAP application to a Hospital Facility during the application period, the Hospital Facility will be deemed to have met the notification requirements as of the time the FAP application is submitted. Consequently, once a Hospital Facility receives a FAP application from an individual, the Hospital Facility does not need to continue notifying that individual about the FAP. However, the submission of a FAP application during the application period triggers other requirements with which the Hospital Facility must comply in order to have made reasonable efforts to determine whether the individual is FAP-eligible.

Incomplete FAP Applications

If an individual submits an incomplete FAP application during the application period, the Hospital Facility will be deemed to have made reasonable efforts if it takes three steps.

- The Hospital Facility must suspend any ECAs against the individual.
- The Hospital Facility must provide the individual with a written notice that describes the additional information and/or documentation the individual must submit to complete his or her FAP application and include a plain language summary of the FAP with the written notice.
- The Hospital Facility must provide the individual with at least one written notice that informs the individual about the ECAs that the Hospital Facility or other authorized party may initiate or resume if the individual does not complete the application or pay the amount due by a deadline (which must be specified in the notice) that is no earlier than the later of 30 days from the date of the written notice or the last day of the application period. The Hospital Facility must provide this written notice regarding ECAs at least 30 days before the specified deadline.

If a Hospital Facility takes the above measures and the individual fails to complete the FAP application by the deadline, the Hospital Facility will be deemed to have made reasonable efforts to determine whether the individual is FAP-eligible and therefore may initiate or resume

ECAs against the individual.

Complete FAP Applications

If a Hospital Facility receives a complete FAP application from an individual during the application period, the Hospital Facility will be deemed to have made reasonable efforts to determine whether the individual is FAP-eligible only if it suspends any ECAs against the individual, makes (and documents) an eligibility determination in a timely manner and notifies the individual in writing of the determination and the basis for such. In addition, if the Hospital Facility has determined that the individual is FAP-eligible, the Hospital Facility must take the following three additional steps in a timely manner:

- Provide the individual with a billing statement that indicates the amount the individual owes as a FAP-eligible individual. This billing statement must also show (or describe how the individual can get information regarding) the AGB for the care provided and how the Hospital Facility determined the amount the individual owes as a FAP-eligible individual.
- Refund any excess payments made by the individual.
- Take all reasonably available measures to reverse any ECA (except a sale of debt) taken against the individual to collect the debt at issue. Thus, the Hospital Facility must take measures to vacate any judgment against the individual, lift any liens or levies on the individual's property and remove from the individual's credit report any adverse information reported to a consumer reporting agency or credit bureau.

If a Hospital Facility takes the above measures, the Hospital Facility will be deemed to have made reasonable efforts to determine whether the individual is FAP-eligible and therefore may initiate or resume ECAs against the individual.

MISCELLANEOUS PROVISIONS

In addition to the provisions identified above, the Proposed Regulations add the following requirements:

- An "anti-abuse rule" that prohibits a Hospital Facility from basing an individual's FAP eligibility determination on information the Hospital Facility has reason to believe is unreliable or incorrect or on information obtained from the individual under duress or through the use of coercive practices.
- Rules regarding agreements for the referral or sale of an individual's debt by a Hospital Facility to a third party.
- Rules regarding when a third party's ECAs are treated as a Hospital Facility's ECAs.
- Rules regarding an individual's waiver of assistance under a FAP.
- Rules requiring the clear and conspicuous placement of a FAP summary.

CONCLUSION

Hospital Organizations and their Hospital Facilities must become familiar with these billing and collection regulations and will need to review their financial assistance and collection policies and practices to ensure that they are in compliance with these Proposed Regulations.

Should your organization require assistance in evaluating the Proposed Regulations, please contact Gregory J. Melgares at (414) 721-0459 or gmelgares@hallrender.com, Jeffrey L. Carmichael at (317) 977-1443 or jcarmichael@hallrender.com, Calvin R. Chambers at (317) 977-1459 or cchambers@hallrender.com or your regular Hall Render attorney.