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Firm Forwards Amicus Brief on Hospital Community Benefit Reporting.

Catherine Livingston of Jones Day, on behalf of the American Hospital Association, has provided Treasury with a copy of an [amicus brief the firm](#) filed with the Supreme Court in *Perez v. Mortgage Bankers Association*, describing how the IRS changed its position retroactively on hospital community benefit reporting without notice or explanation.

October 17, 2014

Ms. Emily McMahon
Deputy Assistant Secretary (Tax Policy)
Department of the Treasury
Room 3120
1500 Pennsylvania Avenue, N.W.
Washington, DC 20220

Dear Emily:

I am writing on behalf of our client, the American Hospital Association (“AHA”) to provide you with a copy of the brief we have filed with the Supreme Court of the United States as amici curiae in *Perez v. Mortgage Bankers Association*, describing how the IRS changed its position retroactively on the reporting of hospital community benefit without notice or explanation. You will recall that AHA and other stakeholders were deeply concerned by the change to the Schedule H form instructions made abruptly last December, not only because the substantive position was problematic but also because the process that was followed was so flawed.

The rules for reporting community benefit expenditures are contained exclusively in the instructions for Form 990 Schedule H (Hospital). Notwithstanding their status as form instructions, they function as rules given the penalties that can apply for failure to file a complete and accurate return and given the lack of any other guidance on measuring community benefit through expenditures. From 2008 when the instructions were first issued through 2012, the instructions for Schedule H consistently treated all hospital expenditures for research funded by the government or another tax-exempt entity as community benefit expenditures that were to be included in computing the hospital’s net community benefit percentage. In December of 2013, the IRS issued draft instructions reversing that position and excluding research expenditures for projects specifically funded by grants from government or tax-exempt entities from net community benefit expenditures. The IRS finalized these instructions eleven days later, never explaining the change. AHA and others submitted comments in December of 2013 objecting to the change as it had the nonsensical effect of treating most medical research as something other than a community benefit activity. AHA also met with Ms. Tamera Ripperda, Director of Exempt Organizations, and other IRS representatives on June 9, 2014 to express its concerns. The IRS has never issued a public explanation for the change.

As explained in the brief, the lack of transparency and explanation is entirely counter to the open process that was followed in developing Schedule H and its instructions. The community benefit standard was created in revenue rulings, and there is no published guidance whatsoever on measuring community benefit through expenditures. The process for developing Schedule H and its instructions respected those facts and provided notice and comment. Moreover, the substantive position adopted in the draft instructions is illogical and contrary to the considered position on the same issue that was adopted in 2008 after notice and comment.

The substantial majority of medical research funding in this country comes from the federal government. It does not have the infrastructure or talent to perform all the medical research the public is seeking. Therefore, the federal government funds research performed in hospitals and universities all over the country that invest in the infrastructure and recruit and support the scientists needed to perform the research. The Schedule H instructions appear to take the position that hospitals are not providing a community benefit when they conduct research projects to find new ways to delay and prevent type 1 diabetes or to find new therapies for Alzheimer's disease because the instructions treat most of the dollars spent on these activities as not being net community benefit expenditures. That makes no sense. The hospital's research infrastructure and scientific personnel are critical to converting the grant dollars into research activities. The research is a public good, not a service to a particular patient where it may be relevant whether the hospital or a third party payor is covering the cost. The relevant consideration for exemption is the amount of community benefit generated by the hospital. The change to the Schedule H instructions was certainly not propelled by changes to the law as section 501(c)(3) has not changed since 2008, and the enactment of section 501(r) does not change the community benefit standard or the treatment of medical research as an activity that promotes the health of the community as a whole.

The IRS issued draft instructions for the 2014 Schedule H last month and retained the language used in the 2013 Schedule H instructions with respect to the reporting of research expenditures for purposes of determining net community benefit expenditures. On behalf of AHA, I would like to reiterate the concerns with this language and the continuing lack of sound rationale or explanation for the change and ask that the language adopted after the 2008 notice and comment process be reinstated.

Sincerely,

Catherine E. Livingston
Jones Day
Washington, DC

Enclosure