January–February 2020

Journal of Health Care Compliance

Balance

Guidance

HHS Races to Modernize Stark and Anti-Kickback Statute through Regulatory Sprint Rulemaking

DOJ and OIG Health Care Fraud Enforcement in 2020 and Beyond

Maintaining Medicare Enrollment Data: Managing the Ongoing High-Hurdles Race

Compliance Officers Who Wear Multiple Hats Can Extend Their Influence with the Four Cs: Competence, Connection, Conversation, and Consequences

Effectiveness

Wolters Kluwer

10041440-0190

Journal of
Health Care Compliance

Volume 22, Number 1
January–February 2020

Columns

3 **Letter from the Editor**—Roy Snell
Don't Underestimate the Importance of Critical Thinking

37 **Best Practices**—Julene Brown
Change is Constantly on the Horizon

39 **Audits**—Alice G. Gosfield
Heightened Peril from Physician Audits

41 **Exit Interviews**—Richard Kusserow
Exit Interviews as Another Significant Communication Channel

45 **Tax Implications**—Ralph Levy, Jr.
IRS Revokes Tax-Exempt Status of Nonprofit Foster Agency

47 **Settlements**—Allison Cohen / Talia Linneman
Expanding Telemedicine Coverage under Medicare Advantage

53 **ACOs**—Donna Schneider / Jennie C. Henriques
Compliance Program Implementation When You Are Not In the Same Family

57 **Research**—David Staley
L.E.A.D.: A Research Compliance Credo

Features

5 **Kristen McDermott Woodrum/ Maureen Furino**
HHS Races to Modernize Stark and Anti-Kickback Statute through Regulatory Sprint Rulemaking

17 **Kirk Ogrosky/Allison Shuren**
DOJ and OIG Health Care Fraud Enforcement in 2020 and Beyond

25 **Daniel F. Shay**
Maintaining Medicare Enrollment Data: Managing the Ongoing High-Hurdles Race

31 **Gary Jones/Tomi Hagan**
Compliance Officers Who Wear Multiple Hats Can Extend Their Influence with the Four Cs: Competence, Connection, Conversation, and Consequences

For the Record

35 **Roy Snell**
Panama—Fighting Corruption with Compliance, Transparency, and Governance

Ralph Levy, Jr.

IRS Revokes Tax-Exempt Status of Nonprofit Foster Agency

Ralph Levy, Jr. is of counsel in the Nashville, Tenn. office of Dickinson Wright PLLC. He can be reached at 615/620-1733 or by email at rlevy@dickinsonwright.com. Dickinson Wright PLLC is a full-service law firm with over 400 attorneys with offices in Michigan, Tennessee, Arizona, Nevada, Ohio, Kentucky, Washington, D.C., and Toronto, Ontario.

Nonprofit Health Care Providers Should Adopt and Adhere to Policies and Procedures Designed to Comply with IRS Requirements

The Internal Revenue Service (IRS) recently released a Final Adverse Determination Letter dated January 30, 2019[1] (the Letter) that revoked the federal tax-exempt status of a nonprofit foster agency. This action by the IRS should serve as a reminder that nonprofit health care providers should adopt and adhere to policies and procedures designed to comply with the operational requirements imposed on federal tax-exempt entities.

In the Letter, the IRS found that the nonprofit foster agency (NFP) had not established that it was being operated for tax-exempt purposes and that no part of the NFP's net earnings did not inure to the benefit of any private shareholder or individual. These operational requirements are imposed by Internal Revenue Code Section 501(c)(3) and its regulations.

As a result, contributions to NFP will no longer be tax deductible by their donors, and NFP must file Form 1120 U.S. corporate federal income tax returns. Finally, the IRS indicated that it was going to advise the appropriate state officials of revocation of the tax-exempt status of NFP.

The Letter included a separate explanation of the facts and law relied on by the IRS in reaching the conclusions stated in the Letter. Interestingly, both the officers of NFP and its counsel had agreed to the findings by the IRS in the Letter. This unusual procedural posture was likely a result of NFP's decision to discontinue its operations based on its operating losses, which had resulted in NFP's auditors indicating that these ongoing losses and NFP's inconsistent ability to maintain sufficient cash with which to support its operations raised substantial doubt about its ability to continue as a going concern.

The primary reason relied on by the IRS to determine that NFP was not being operated for a tax-exempt purpose was NFP's highly limited attempts to recruit foster parents, which the NFP's governing documents indicated was its purpose. Since NFP's chief executive officer (CEO) was employed as a full-time school social worker/counselor, the agency's activities to recruit and certify foster parents were highly limited.

The remainder of the explanation that accompanied the Letter related to the IRS finding of private inurement based on the compensation, reimbursement, and other payments made by NFP to CEO and others. Treasury Reg. § 1.501(c)(3)-(1)(c)(2) provides that a tax-exempt entity is not operated exclusively for tax-exempt purposes "if its net earnings inure in whole or in part to the benefit of private shareholders or individuals."

The IRS cited several facts to support its finding of private inurement based on NFP's payment of excessive compensation to its CEO:

- The CEO was paid compensation in excess of the compensation limits specified in NFP's governance documents and board resolutions.
- As a result of NFP's payment of compensation to CEO, NFP had incurred employment taxes, at least a portion of which had not been paid by NFP.
- Even though for certain payroll periods, NFP had withheld from CEO's wages the required income tax withholdings and remitted the withheld amounts, the IRS had reallocated at least a portion of these withheld taxes to satisfy a portion of NFP's unpaid employment taxes. As a result, NFP's CEO had claimed credit on her personal income tax return for withheld income taxes in excess of the amount "deemed paid" by NFP on CEO's benefit.
- To make things worse, NFP had failed to withhold taxes from wages paid to CEO for three quarters, and NFP also failed to pay Social Security and Medicare taxes on the wages paid to CEO during those periods.

Although the IRS did not indicate how NFP's unpaid employment taxes constituted excessive compensation, it concluded that NFP had paid CEO excessive compensation, which resulted in private inurement to her benefit.

In addition to private inurement based on NFP's payment of excessive compensation to CEO, the IRS found that NFP had improperly reimbursed CEO for mileage and business meals. In response to requests for same, NFP did not provide the IRS with substantiation of the business trips for which CEO had been reimbursed by NFP for mileage or with documentation to support the reimbursements to CEO for business meals.

Finally, the IRS indicated that NFP made certain payments to CEO's father and to NFP's chief financial officer, but during the audit process NFP had not provided substantiation or justification for these payments.

In summary, the IRS concluded that private inurement took place as a result of NFP's payment of excessive compensation to CEO, improper reimbursements of mileage, expenses for business meals of CEO, and also due to payments to CEO's father and NFP's chief financial officer as to which NFP had not provided the IRS with substantiation.

Tax exempt health care providers should use the Letter as a blueprint *not* for how to comply with the operational requirements imposed on tax-exempt organizations but as guidance as to practices that a tax-exempt organization should avoid.

To minimize exposure in this area, a tax-exempt health care provider should form a Compensation Committee from its governing body, and this committee should

Continued on page 63

scrutiny, it is worth focusing attention around explaining why the services were rendered to each patient on each date of service—not in a summary format. Every single date of service should be addressed in explanation directing the auditor to the specific documentation that supports what was done. The point is to make it as difficult as possible for the reviewer to not see the precise documentation that substantiates the appropriateness of the services. On the other hand, even if the auditors are focused on one particular issue, they do have the authority to deny or reverse payment on other services as well.

Before the voluntary repayment rules were published, where records were sub-optimal and it was obvious on initial review before they were submitted, it was my standard advice to repay those claims before the audit and not dispute them in the audit. The new rules, however, confound this advice because once the practice repays any of those claims, that triggers an entirely new and separate obligation to look back six years to evaluate claim submission for the same types of services. Today, my advice is to wait for the results of the audit.

We now come finally to the real implications of an audit with a result that finds monies are owed; it is certainly legitimate to appeal that determination. Once the appeals process is concluded, even if the audit was for the previous two years, the repayment rules would, however, require the audit subject to look back to include a full six years of evaluation, based on the evidence that the audit produced, which as noted above, is always considered credible. There are many challenges in the voluntary repayment rules, including how to identify the size of the overpayment, how and whether to extrapolate, how to use legal counsel, how and to whom to report, and more. There, however, has been little appreciation of the new perils that arise from audits, given those rules.

Endnotes

1. For a deeper consideration of voluntary repayments by physicians generally, *see* Gosfield, "The Oxymoronic Landscape of Voluntary Repayments," HEALTH LAW HANDBOOK, (2017 edition) WestGroup a Thomson Company, pp. 71-99, *www.gosfield.com/images/Publication_Files/AGG.TheOxymoronicLandscape.Final.122116.pdf*.
2. 42 CFR 401.303 et seq.
3. 81 *Fed Register* 7661 (2/12/16).
4. See 81 *Federal Register* 7659, (Feb 12, 2016).
5. 81 *Federal Register* 7667, (February 12, 2016).
6. *Id.*

Tax Implications

Continued from 46

consider whether to engage the services of outside experts to conduct a compensation review and to advise the Compensation Committee and the board or other governing body of the organization regarding its conflicts of interest and compensation policies and its expense reimbursement procedures. Another approach to support a defense of a private inurement claim by the IRS would be for the tax-exempt health care provider to conduct a self-audit or third-party audit to confirm adherence to all compensation, reimbursement, and payment policies and procedures.

Endnote

1. The Letter is IRS Release Number 201922036, released on May 31, 2019.