25th Annual Health Sciences Tax Conference

Assorted tax topics for exempt health care organizations

December 9, 2015
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Topics

► Telemedicine and unrelated business income
► Issues in population management, including ACOs
► Charitable giving – compliance issues with non-cash charitable contribution reporting
► Political and lobbying activities
► Tangible property regulations and small taxpayer qualifier
Telemedicine and unrelated business income
Introduction

► What is telemedicine?
  ► Telemedicine seeks to improve a patient’s health by providing two-way, real-time interactive communication between the patient and a physician at a distant site.

► With the passage of the Affordable Care Act (ACA) the use of telemedicine is expected to grow.
  ► The ACA is placing pressure on providers to reduce cost of care while raising quality and safety.
  ► Telemedicine is viewed as a cost-effective alternative to the more traditional face-to-face way of providing medical care.
Telemedicine delivery models

- Real-time interactions between patient and provider
- Provider remotely monitors patient
- Provider reviews images, test results, samples
  - Asynchronous (store and forward)
- Provider-to-provider consult
Telemedicine and unrelated business income

- Basic definition of unrelated business income (UBI)
  - Income from a trade or business that is regularly carried on by an exempt organization and that is not substantially related to the organization’s exempt purpose
- To date, there has not been any IRS guidance or rulings on the unrelated business income treatment of telemedicine services.
Historic UBI principles governing health care services

► The Internal Revenue Service has adopted a patient/non-patient approach for health care services:
  ► Not a patient: UBI
  ► A patient: not UBI, as the income is substantially related to the hospital’s exempt purposes
► Patient/non-patient approach focuses on whether the hospital (its employee or agent) is providing “hands-on” health care services.
► Alternative theory: IRC §513(a)(2) – a trade or business carried on by a section 501(c)(3) organization “primarily for the convenience of its … patients” is not considered an unrelated trade or business.
Who is a patient?

Definition of a patient (Revenue Ruling 68-376)

► A person admitted to a hospital as an inpatient
► A person receiving general or emergency diagnostic, therapeutic or preventive health services from outpatient facilities of a hospital
► A person referred by a private physician to a hospital’s outpatient facilities for specific diagnostic or treatment procedures
► A person refilling a prescription written during the course of treatment at the hospital
► A person receiving medical services (from hospital staff) as part of a hospital-administered home care program
► A person receiving medical care in a hospital-affiliate
Services for patients

► Patients of a hospital include patients of another hospital or health care provider that is under common control with the first hospital or is in a joint venture, joint operating agreement or joint affiliation with the first hospital.
► Private patients of members of the hospital medical staff are not patients of the hospital.
Historic UBI principles governing health care services

- Exceptions to the unrelated business income rules may apply when the services are provided to non-patients:
  - Casual sales
  - Shortage of similar services in the community
  - Specialized services not readily available in the community
  - Services that contribute to medical education or training
  - Services to small hospitals at or below cost (§513(e))
Unrelated business income analysis for telemedicine

► The IRS has not yet published a position or guidance on the applicability of the UBI rules to telemedicine services.
► Presumably, the IRS will apply existing principles when analyzing telemedicine services.
  ► Patient/non-patient approach
Unrelated business income factors for telemedicine

- Factors that may be relevant in determining whether an individual is a patient of the hospital in a telemedicine setting:
  - Direct interaction between the individual and the physician
  - Billing responsibility
  - Treatment consent
  - Medical record
  - Medical staff admission and credentialing
  - Malpractice liability reach/insurance coverage
State level – unrelated business income

► If the telemedicine activity generates unrelated business income and the activity crosses state lines, income may need to be apportioned to different states.
  ► Some states use payroll, property and sales factors.
  ► Some states use a “single sales factor” method.

► Other considerations
  ► Where does the sale of personal services occur?
    ► Where the services are performed?
      ► Some states look to where the costs of performance are predominantly incurred.
      ► Some states look to where the time is spent performing the services.
    ► Where the customer/patient is located?
Issues in population management, including ACOs
Introduction

► Population health – different forms
  ► Accountable Care Organizations (ACOs)
  ► Clinically integrated networks

► Legal structures
  ► Single member limited liability companies (LLCs)
  ► LLCs
  ► Corporations – for-profit and taxable nonprofit
  ► Joint operating agreements

► Driving tax issues
  ► Furthering exempt purpose
  ► Definition of patient
  ► Private benefit use of tax-exempt bond-financed facilities
IRS guidance on Notice 2011-20: general principles

► Participation in the Medicare Shared Savings Program (MSSP) through an ACO furthers tax-exempt purposes by lessening the burdens of government.

► Control by exempt organization (EO) partners is not required in order for an ACO that participates in the MSSP to further its charitable purposes.

► Shared savings income of EO participants from an ACO’s participation in the MSSP will not be UBI.

► Serving Medicaid or indigent populations through an ACO will further charitable purposes of relief for the poor and distressed.
IRS guidance on Notice 2011-20: avoiding private benefit and private inurement

The Notice identifies five factors to be considered:

- Terms of the EO’s participation in the MSSP through the ACO must be set forth in advance in a written agreement negotiated at arm’s length.
- The Centers for Medicare & Medicaid Services (CMS) has accepted the ACO into, and has not terminated the ACO from, the MSSP.
- The EO’s share of economic benefits derived from the ACO is proportional to the benefits or contributions the EO provides to the ACO (including capital contributions).
- The EO’s share of the ACO’s losses does not exceed its share of the ACO’s economic benefits.
- All contracts and transactions entered into by the EO with the ACO and the ACO’s participants, and by the ACO with the ACO’s participants and any other parties, are at fair market value.
Exemption considerations for exempt organizations participating in CINs and ACOs

► General principles applicable to other IRC Section 501(c)(3) organizations apply to Clinically Integrated Networks (CINs) and ACOs seeking tax exemption.
  ► Substantial non-exempt activities will jeopardize exemption.
  ► Private benefit and private inurement is prohibited.
  ► Joint venture guidance is in Revenue Rulings 98-15 and 2004-51.
UBI considerations for exempt organizations participating in ACOs and CINs

- When established as a joint venture, the IRS is likely to follow typical flow-through analysis to the income received by the CIN.
  - Control by the exempt organization member
  - May consider patient versus non-patient analysis
  - Triggers for earning shared savings distributions (e.g., quality measures)

- Other considerations for UBI subject to taxation include:
  - Services provided by a CIN and ACO to physicians and other taxable parties
  - Services provided by exempt parent to a taxable CIN and ACO
  - Section 512(b)(13) tax on interest, annuity, royalty or rent
ACOs conducting non-MSSP activities

► Notice 2011-20 does not address whether non-MSSP activities through an ACO will be consistent with IRC Section 501(c)(3) exemption or not result in UBI.
  ► ACO enters into shared savings arrangements with other types of health insurance payers.
  ► This is unlikely to lessen the burdens of government.
  ► Negotiating with private health insurers on behalf of unrelated parties generally is not a charitable activity regardless of whether the agreement negotiated involves a program aimed at achieving cost savings in health care delivery.
  ► Promotion of health has been recognized as a charitable purpose; however, not every activity that promotes health supports tax exemption under IRC Section 501(c)(3).
Unanswered questions for ACOs conducting non-MSSP activities

► The IRS requests comments regarding how a tax-exempt organization’s participation in non-MSSP activities through an ACO furthers an exempt purpose.
  ► How does a tax-exempt organization’s participation in non-MSSP activities through an ACO substantially relate to or further an exempt purpose?
  ► What criteria requirements or safeguards need to be present in non-MSSP activities in the absence of safeguards similar to those present for MSSPs?
    ► MSSPs have regulatory requirements imposing quality performance standards.
    ► MSSPs have oversight and monitoring by a government agency – the CMS.
Private business use (PBU) guidance for EOs participating in ACOs

- Notice 2014-67 provides interim guidance on whether an EO will have PBU due to participation in an ACO.
- The guidance provides six factors to avoid PBU and mirrors the criteria identified in Notice 2011-20 for an EO to avoid private inurement and excess private benefit from its participation in a MSSP ACO.
- Additionally, Notice 2014-67 provides an update to Revenue Procedure (Rev. Proc.) 97-13 regarding conditions under which management contracts do not result in private use.
- The Notice is effective for bonds sold on or after January 22, 2015, but it may also apply to those bonds that were sold before that date.
Notice 2014-67 criteria to avoid private business use

► The terms of the EO’s participation in the MSSP are set forth in advance in a written agreement negotiated at arm’s length.
► CMS has accepted the ACO into the MSSP.
► The EO’s share of economic benefits derived from the ACO is proportional to the benefits or contributions the EO provides to the ACO.
► The EO’s share of the ACO’s losses does not exceed the share of ACO economic benefits to which the EO is entitled.
► All contracts and transactions entered into by the EO with the ACO and the ACO’s participants are at fair market value.
► The EO does not contribute or otherwise transfer the property financed with exempt bonds to the ACO, unless the ACO is an IRC Section 501(c)(3) entity or a governmental person.
Private business use considerations from management contracts

► Notice 2014-67 further provides that management contracts must be structured to avoid PBU where the EO is participating in the MSSP through an ACO.

► The Notice amplifies permitted productivity rewards and types of permissible arrangements described in Rev. Proc. 97-13 that do not result in PBU.
Private business use considerations from management contracts

► Notice 2014-67 specifies that productivity rewards for services in any annual period during the term of the contract generally will not cause the compensation to be based on a share of net profits of the facility if:

► The eligibility for the rewards is based on quality of services under the management contract and not charges in facility revenues or expenses

► The amount of the award is a stated, periodic fixed, or tiered amount based solely on the level of performance.
Private business use considerations from management contracts

  ▶ Compensation for services must be based on a stated amount, periodic fixed fee, a capitation fee, a per-unit fee or a combination of the preceding.
  ▶ It may include a percentage of gross revenues, adjusted gross revenues or expenses of the facility, but not both revenues and expenses.
  ▶ The term of the contract cannot exceed five years, including renewal options, but does not need to be terminable prior to the end of the term.
► The Notice is effective for management contracts entered into, materially modified or extended (other than under a renewal option) on or after January 22, 2015.
Tax timing differences for taxable ACO corporation: revenue recognition

► ACO’s recognition of income occurs in the year all events have occurred that fix the taxpayer’s right to receive income and the amount of income can be determined with reasonable accuracy (Reg. Sections 1.446-(c)(1)(ii) and 1.451(a)).

► However, advance payments for prepaid services to be performed in a later year generally require the payment to be included in gross income in the year the payment is received.

► There is a limited exception under Rev. Proc. 2004-34 to defer recognition of income for an advance to the following year of prepayment if an agreement exists for such services to be rendered at the end of year two.

► Advance payments received by an ACO from payers and providers promoting the ACO may be accelerated into taxable income in the year payment is received.
Tax timing differences for taxable ACO corporation: expense deduction

► ACO deductions for savings payments to participants may generally be deducted in the year when services are rendered by ACO participants, or when payments to participants are made if it can be reasonably expected that the services will be performed by ACO participants within three and a half months of payment.

► All events test – A taxpayer may not deduct an expense until the year in which all events have occurred which determine the fact of the liability, and the amount of such liability can be determined with reasonable accuracy (IRC Section 461(h)).

► Economic performance generally occurs when property or service is provided or, in certain situations, when payment is made (Reg. Sections 1.461-4(d)(2) and 1.461-4(d)(6)(ii)).
Tax timing differences for taxable ACO corporation: expense deduction

► IRC Section 404(d) and Treas. Reg. Section 1.404(b)-1T
  ► An accrual-basis taxpayer may not generally deduct accrued expenses payable to an independent contractor unless the compensation is paid within 2.5 months of the taxpayer’s year-end in which the services were performed.
  ► Cash-basis provider (i.e., independent physicians).
  ► Amounts are deductible for the taxable year in which an amount attributable to the compensation is includable in the gross income of the independent contractor.
Tax timing differences for taxable ACO corporation: whipsaw potential

► ACO intended to be an entity with zero net income over time
► ACO advance payments causing accelerated income recognition, coupled with deferral of deductions to ACO participants
► Equals unwanted tax liability
► Problem if net operating losses (NOLs) are created after carryback period is expired and not allowed
Other tax considerations for taxable ACO corporations

► Transfer pricing
► Fair market value fees for services performed to assist taxable ACO corporations are generally required to ensure arm’s length transactions.
► Certain low margin and non-integral services may be charged at cost without generating UBI.
Joint operating agreements (JOAs) re-emerging in the market

► JOAs between or among tax-exempt entities must substantially further the entities’ tax-exempt purposes to avoid UBI and/or jeopardizing their tax-exempt status.

► Goals
  ▶ Establish clinically integrated networks
  ▶ Coordinate services to improve patient care
  ▶ Increase efficiencies
  ▶ Avoid duplicative services
  ▶ Conduct joint venture activities

► Arrangements are either contractual, where integration occurs by agreement, or structural, where a “super parent” is created.
General characteristics of exempt JOA arrangements with Newco parent

► Public Letter Rulings (PLRs) 9609012, 9623011 and 19944046 provide examples of arrangements that further exempt purposes.

► Newco parent is created to establish certain governance, administrative, financial and consulting services to the hospitals in the network.

► Newco parent’s board is the sole governance authority over the network, and appoints the board, senior executives and medical staff of underlying network hospitals.

► No more than 20% of the members of Newco parent are physicians.

► JOA provides for the operation but not the ownership of the network facilities.
Benefits of exempt Newco parent JOA arrangements

► It allows the hospitals to share the financial risks and rewards of providing key health care services to the community and otherwise develop a closely integrated regional health care delivery network.

► Network participants effectively accomplish financial integration through annual payments between and among hospitals based on a weighted average of ratios specified in the JOA (example metrics: net assets, net income, net cash flow and/or capital expenditures).

► JOA will not alter the bond obligations for any of the underlying hospital facilities, and the bonds for each facility continue to qualify as “qualified hospital bonds” under Section 145(c).
Benefits of exempt Newco parent JOA arrangements

► Newco parent organization may be considered to be carrying out an integral part of the activities of the network hospitals (and the parts of the hospital systems that are completely financially integrated) under all the facts and circumstances.

► Under the integral part basis for exemption:
  ► Newco parent performs essential services for an exempt organization and the services, if performed by the exempt organization directly, would not be an unrelated trade or business.
  ► Newco parent exercises sufficient control and close supervision, based on all facts and circumstances, to establish the equivalent of a parent and subsidiary relationship.
UBI considerations for other contractual JOA arrangements

Where Newco parent entity is formed, and hospitals create a JOA on a less-formal contractual basis, UBI may be incurred or prohibited private benefit may be generated in several ways, including the following:

- Provision of managed care contracting services, consulting or administrative services to a third party (e.g., physician groups or other providers in the network) by a tax-exempt hospital
- Fees charged by one tax-exempt hospital to another tax-exempt hospital for management services that do not qualify under the exception of Section 513(e) for small rural hospitals
Charitable giving – compliance issues with non-cash charitable contribution reporting
Substantiation

- Substantiation is required in order for the donor to take a tax deduction for charitable contributions.
  - Failure to meet substantiation requirements means the donor is not entitled to a charitable deduction.

- Substantiation requirements are based on the value and type of property donated.
Substantiation – non-cash contributions

► Less than $250
  ► Receipt, letter or other written communication from charity
    ► Name of charitable organization
    ► Date and location of charitable contribution
    ► Reasonably detailed description of property donated
  ► Reliable written records for each item donated (including fair market value (FMV) and basis)

► $250 to $500
  ► Contemporaneous written acknowledgement from charity
    ► Satisfy requirements of receipt of property under $250
    ► State whether charity gave any goods or services
    ► If goods or services provided by charity, a description and good faith estimate of value
      ► Contemporaneous: before donor’s return filed or return due date
    ► Written records for receipt of property under $250
Substantiation – non-cash contributions

► $500 to $5,000
  ▶ Contemporaneous written acknowledgement and written records
  ▶ Additional records
    ▶ How property was obtained by donor
    ▶ Date acquired
    ▶ Cost or other basis and any adjustments

► Over $5,000
  ▶ Contemporaneous written acknowledgement and written records
  ▶ Appraisal of donated property from qualified appraiser – exceptions:
    ▶ Securities with readily available market quotations
    ▶ Non-publicly traded stock of $10,000 or less
    ▶ Vehicle, if deduction limited to gross proceeds from its sale
    ▶ Stock in trade, inventory or property held primarily for sale to customers in ordinary course of trade or business
### Assorted tax topics for exempt health care organizations

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**Form 8283**

**Noncash Charitable Contributions**

- **Attachment to your tax return** if you claimed a deduction of more than $5,000 for all charitable contributions.
- Information about Form 8283 and its separate instructions is at www.irs.gov/Form8283

**Note:** Figure the amount of your contribution deduction before completing this form. See your tax return instructions.

**Section A. Donated Property of $5,000 or Less and Publicly Traded Securities**

- List the section only if you claimed a deduction of $5,000 or less. Also list publicly traded securities even if the deduction is more than $5,000 (see instructions).

**Part I. Information on Donated Property**

- If you need more space, attach a statement.

<table>
<thead>
<tr>
<th>#</th>
<th>Information on Donated Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Name and address of the donor organization</td>
</tr>
<tr>
<td>B</td>
<td>Value of property (see instructions)</td>
</tr>
<tr>
<td>C</td>
<td>Date of transfer</td>
</tr>
<tr>
<td>D</td>
<td>Description of property (see instructions)</td>
</tr>
<tr>
<td>E</td>
<td>Method used to determine fair market value</td>
</tr>
</tbody>
</table>

**Note:** If the amount you claimed as a deduction for an item is $500 or less, you do not have to complete columns (A), (D), and (E).

**Part II. Partial Interests and Restricted Use Property**

- Complete lines 1a through 2e if you gave less than an entire interest in a property listed in Part I. Complete lines 3a through 4d if conditions were placed on a contribution listed in Part I; also attach the required statement (see instructions).

<table>
<thead>
<tr>
<th>#</th>
<th>Partial Interests and Restricted Use Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Enter the letter from Part I that identifies the property for which you gave less than an entire interest</td>
</tr>
<tr>
<td>b</td>
<td>Total amount claimed as a deduction for the property listed in Part I</td>
</tr>
<tr>
<td>c</td>
<td>Name and address of each organization to which any such contribution was made in a prior year (complete only if different from the donee organization above)</td>
</tr>
<tr>
<td>d</td>
<td>City or town, state, and ZIP code</td>
</tr>
<tr>
<td>e</td>
<td>Name of any person, other than the donee organization, having actual possession of the property</td>
</tr>
</tbody>
</table>

**Part III. Partial Interests and Restricted Use Property**

- Complete lines 1a through 2e if you gave less than an entire interest in a property listed in Part I. Complete lines 3a through 4d if conditions were placed on a contribution listed in Part I; also attach the required statement (see instructions).

**Note:** Complete lines 2a-2d only if the organization gave this property to another charitable organization (successor donee).

**Part II. Information on PREVIOUS DONEES**

- Complete this part only if the organization was not the first donee to receive the property. See the instructions before completing lines 1a through 4d.

<table>
<thead>
<tr>
<th>#</th>
<th>Information on PREVIOUS DONEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>a</td>
<td>Name of original donee</td>
</tr>
<tr>
<td>b</td>
<td>Employer identification number</td>
</tr>
<tr>
<td>c</td>
<td>Address (number, street, and room or suite no.) (if P.O. box no. is not delivered to the street address)</td>
</tr>
<tr>
<td>d</td>
<td>City or town, state, and ZIP code</td>
</tr>
</tbody>
</table>

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**Form 8282**

**Donee Information Return**

(Sale, Exchange, or Other Disposition of Donated Property)

- See instructions.

**Parts To Complete**

- If the organization is an original donee, complete identifying information, Part I (lines 1a-1d and, if applicable, lines 2a-2d), and Part III.

**Identifying Information**

- Name of charitable organization (donee) |
- Employer identification number |
- Address (number, street, and room or suite no. or P.O. box no. if mail is not delivered to the street address) |
- City or town, state, and ZIP code |

**Part I. Information on ORIGINAL DONOR and SUCCESSOR DONEE Receiving the Property**

<table>
<thead>
<tr>
<th>#</th>
<th>Information on ORIGINAL DONOR and SUCCESSOR DONEE Receiving the Property</th>
</tr>
</thead>
<tbody>
<tr>
<td>1a</td>
<td>Name of original donor of the property</td>
</tr>
<tr>
<td>1b</td>
<td>Identifying number(s)</td>
</tr>
<tr>
<td>1c</td>
<td>Address (number, street, and room or suite no.) (P.O. box no. if mail is not delivered to the street address)</td>
</tr>
<tr>
<td>1d</td>
<td>City or town, state, and ZIP code</td>
</tr>
</tbody>
</table>

**Part II. Information on PREVIOUS DONEES**

- Complete this part only if the organization was not the first donee to receive the property. See the instructions before completing lines 1a through 4d.

<table>
<thead>
<tr>
<th>#</th>
<th>Information on PREVIOUS DONEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>3a</td>
<td>Name of original donee</td>
</tr>
<tr>
<td>3b</td>
<td>Employer identification number</td>
</tr>
<tr>
<td>3c</td>
<td>Address (number, street, and room or suite no.) (if P.O. box no. is not delivered to the street address)</td>
</tr>
<tr>
<td>3d</td>
<td>City or town, state, and ZIP code</td>
</tr>
<tr>
<td>4a</td>
<td>Name of preceding donee</td>
</tr>
<tr>
<td>4b</td>
<td>Employer identification number</td>
</tr>
<tr>
<td>4c</td>
<td>Address (number, street, and room or suite no.) (if P.O. box no. is not delivered to the street address)</td>
</tr>
<tr>
<td>4d</td>
<td>City or town, state, and ZIP code</td>
</tr>
</tbody>
</table>
Reporting – non-cash contributions

- For donated property of $500 or less:
  - No form 8283 is required.
- For donated property over $500 but $5,000 and for gifts of publicly traded securities, the donor must complete:
  - Section A, Part I of Form 8283
  - Section A, Part II of Form 8283 for gifts of partial interests and restricted use property listed in Part I
For donated property over $5,000 (that are not publicly traded securities):

- The donor must complete Schedule B, Part I and Part II (if applicable) of Form 8283.
- If an appraisal is required, the appraiser must complete Part III of Schedule B (Form 8283) and a copy of the appraisal may need to be attached.
- The charity must complete and sign Part IV of Section B (Form 8283), acknowledging receipt of property.

<table>
<thead>
<tr>
<th>Part IV</th>
<th>Donee Acknowledgment – To be completed by the charitable organization.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>This charitable organization acknowledges that it is a qualified organization under section 170(c) and that it received the donated property as described in Section B, Part I, above on the following date.</td>
</tr>
<tr>
<td></td>
<td>Furthermore, this organization affirms that in the event it sells, exchanges, or otherwise disposes of the property described in Section B, Part I (or any portion thereof) within 3 years after the date of receipt, it will file Form 8282, Donee Information Return, with the IRS and give the donor a copy of that form. This acknowledgment does not represent agreement with the claimed fair market value.</td>
</tr>
<tr>
<td></td>
<td>Does the organization intend to use the property for an unrelated use?</td>
</tr>
<tr>
<td></td>
<td>□ Yes □ No</td>
</tr>
<tr>
<td>Name of charitable organization (donee)</td>
<td>Employer identification number</td>
</tr>
<tr>
<td>Address (number, street, and room or suite no.)</td>
<td>City or town, state, and ZIP code</td>
</tr>
<tr>
<td>Authorized signature</td>
<td>Title</td>
</tr>
</tbody>
</table>
For donated property over $5,000 (that are not publicly traded securities) (cont’d):

- If the charity disposes of the property within three years after the date of donation, the charity must generally file Form 8282 with the IRS and give the donor a copy.
Qualified appraisals attached to the return

► A copy of the appraisal of the non-cash contribution must be attached to Form 8283 for contributions of:
  ► Art, if total deduction for art is $20,000 or more
  ► Clothing and household items that are not in good used condition or better if deduction is more than $500
  ► Qualified conservation contribution for easement on exterior of building in registered historic district
  ► Other property, if deduction is more than $500,000 for a single item or group of similar items
Proposed regulations on donee reporting procedures

► Background
  ► On September 17, 2015, the IRS issued proposed regulations to implement the exception to the “contemporaneous written acknowledgement” (CWA) requirement for substantiating charitable contributions of $250 or more.
  ► Proposed rules specify the time and manner for donee reporting to satisfy the exception.
  ► The rules would apply to contributions made on or after final regulations are published.

► Proposed regulations
  ► Form of reporting: The IRS intends to develop a specific information return for donee organization reporting.
    ► The IRS plans to develop the form prior to the issuance of final regulations.
  ► Donee organizations opting to use donee reporting would be required to provide a copy of the return to the donor and the IRS.
Proposed regulations on donee reporting procedures

- Proposed regulations
  - Required information for reporting
    - Donor’s name, address and taxpayer identification number
    - Amount of cash and description (but not value) of any non-cash contributed
    - Whether the donee provided any goods or services and a good faith estimate of the value of any goods or services provided
  - Donee reporting optional
  - Timing of reporting: no later than February 28th of the year following the year in which the contribution is made

- Comment period: The IRS is accepting comments on these proposed regulations.
  - Comment period ends: December 15, 2015
Recommendations

► Substantiation
  ► Provide the donor with a written acknowledgement containing requirements for type and amount of property contributed
  ► Understand appraisal requirements to assist donor with obtaining proper appraisal

► Reporting
  ► Be familiar with Form 8283 and when the organization is required to complete certain sections of that form
    ► Advise the donor on his or her responsibility to prepare Form 8283
  ► Be familiar with Form 8282 and when the organization is required to file it
Political and lobbying activities
Requirements for §501(c)(3) exemption

► Organization “does not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of (or in opposition to) any candidate for public office.”
  ► Political campaign activities

► No substantial part of the activities of the organization is “carrying on propaganda, or otherwise attempting to influence legislation.”
  ► Lobbying activities
Contrast lobbying with political campaign activity

► Lobbying
  ► Focuses on legislation
  ► Not prohibited so long as the amount of the activity is not substantial

► Political campaign activity
  ► Focuses on candidates and campaigns for election
  ► Outright prohibition
  ► No *de minimis* amount
Political campaign activity

- An activity that favors or opposes candidates for public office, including:
  - Endorsement of candidates
  - Contributions
    - To candidates
    - To political action committees (PACs)
  - Public statements for/against a particular candidate
  - Allowing a candidate to use an organization’s assets or facilities on a preferential basis
  - Distributing materials prepared by the organization itself or others that favor or oppose candidates
- All facts and circumstances will be considered.
Allowable political activity

- Nonpartisan political debates or forums
  - All candidates must be invited.
  - No statements endorsing or opposing a candidate may be made.
  - No political fundraising can occur.
- Nonpartisan voter guides
  - Must state candidates’ positions on a broad range of issues
  - Cannot indicate bias favoring or opposing a candidate
- Nonpartisan voter registration or “get out the vote” drives
- Speeches by candidates in a “non-candidate” capacity
Lobbying

- Attempts to influence legislation
  - Covers legislation at the national, state or local level
  - Covers action by the public in a referendum or similar type ballot-measure initiative
  - Does not cover actions taken by the executive, judicial or administrative bodies
  - Covers communications for the purposes of:
    - Proposing legislation
    - Supporting the passage of legislation
      Or
    - Opposing legislation
Types of lobbying

► Direct lobbying – communications directed at legislators
  ► Presentations of testimony at a public hearing held by a committee of a legislature
  ► Correspondence and conferences with legislators and their staffs
  ► Meetings with the staff of a legislative committee
  ► Publication of documents advocating one or more forms of legislative action

► Grassroots lobbying – indirect communications through the general public
  ► Appeals to the general public, or segments of the general public, to contact legislators or take other specific action regarding legislative matters
**What is not lobbying?**

- Nonpartisan study, analysis and research
  - As long as the dissemination of such analysis does not advocate the adoption of legislation to implement its findings

- Examinations of broad social, economic and similar problems
  - As long as such materials do not support or oppose legislation, or encourage readers to take actions with respect to legislation

- Requests for technical advice or assistance
  - Provision of technical advice to a governmental body, or committee or subcommittee, in response to a written request by the ranking majority or minority member
What is “substantial” lobbying?

► “Substantial” is not defined in the IRC or regulations.
  ► Facts and circumstances determination. Factors include:
    ► Amount of the expenditures
    ► Amount of effort and time involved
      ► Amount of volunteer time devoted to lobbying
    ► Amount of publicity the organization assigns to its lobbying
    ► Continuous or intermittent nature of the organization’s attention
to lobbying
  ► Substantial lobbying could result in loss of exemption and an excise tax.

► Safe harbor – Section 501(h) election
  ► Provides bright-line definitions and rules in the form of dollar limitations as
to the amount of lobbying that is permissible
    ► Up to $1,000,000 in total lobbying expenditures and $250,000 in grassroots
lobbying – sliding scale based on level of total exempt-purpose expenditures
### Safe harbor – expenditure test

<table>
<thead>
<tr>
<th>Exempt purpose expenditures</th>
<th>Total non-taxable lobbying</th>
<th>Grassroots non-taxable lobbying</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to $500,000</td>
<td>20%</td>
<td>5%</td>
</tr>
<tr>
<td>$500,000-$1 million</td>
<td>$100,000 + 15% of excess over $500,000</td>
<td>$25,000 + 3.75% of excess over $500,000</td>
</tr>
<tr>
<td>$1 million-$1.5 million</td>
<td>$175,000 + 10% of excess over $1 million</td>
<td>$43,750 + 2.5% of excess over $1 million</td>
</tr>
<tr>
<td>$1.5 million-$17 million</td>
<td>$225,000 + 5% of excess over $1.5 million</td>
<td>$56,250 + 1.25% of excess over $1.5 million</td>
</tr>
<tr>
<td>Over $17 million</td>
<td>$1,000,000</td>
<td>$250,000</td>
</tr>
</tbody>
</table>
Section 501(h) election

► Who is eligible to make the election?
  ► An organization exempt under §501(c)(3) that is not:
    ► A private foundation
    ► A church

► Procedures for making and revoking the election
  ► The election is made by filing Form 5768.
  ► The election is effective for the designated tax year and all subsequent years until revoked.
  ► To revoke election, you must file Form 5768.
    ► Revocation will not be effective until the following year.

► Affiliated group rules
Section 501(h) election

► Penalties
  ► 25% excise tax is imposed for exceeding the non-taxable amount in any one year.
  ► Loss of exemption
    ► This happens only if the organization exceeds either the overall or grassroots non-taxable amount by more than 50% over a four-year period.
Coverage in the Form 990

► Form 990, Part IV
► Question 3. Did the organization engage in direct or indirect political campaign activities on behalf of or in opposition to candidates for public office? If “Yes,” complete Schedule C, Part I.
► Question 4. Did the organization engage in lobbying activities, or have a section 501(h) election in effect during the tax year? If “Yes,” complete Schedule C, Part II.
Tangible property regulations (TPRs) and small taxpayer qualifier
TPRs

Final TPR regulations released
- Amounts paid to acquire, produce or improve tangible property – TD 9636, 9/13/2013
- Dispositions of tangible property – TD 9689, 8/18/2014

- Regulations affect all taxpayers with tangible property.
  - Applicable to tax years beginning on or after January 1, 2014.
TPRs

Scope of regulations:
- Materials and supplies: definition, types and timing, interaction with *de minimis* rule
- Acquisition or production of tangible property: *de minimis* expensing rule, capitalized acquisition costs
- Improvement of tangible property: unit of property, repair vs improvement, routine maintenance
- Disposition of tangible property; dispositions, partial dispositions and general asset accounts (GAAs)
TPRs

► Apply final rules by filing of 2014 tax returns
  ► Requires review of current methods used in tax return and assess where method changes and elections are needed to comply with the tangible property regulations.
  ► Will require changes to accounting methods on Form 3115, computation of section 481(a) adjustments and/or election statements to be filed with the 2014 tax return.
  ► Process changes
    ► Possible annual elections needed each year
    ► Possible methods and/or elections require new schedule M-1s
  ► Tax compliance efforts include assessments, calculations, completion of additional forms and elections with duplicate filings.
  ► Additional work effort/hours will be needed to comply with new regulations in connection with 2014 tax return preparation.
TPR – small taxpayer qualifier

► Rev. Proc. 2015-20
  ► Are total assets (net book value) on the balance sheet as of the first day of the taxable year less than or equal to $10,000,000?
    ► Total assets include all assets (cash, etc.), not just fixed assets such as buildings or equipment.
  ► Are average annual gross receipts for the prior three taxable years less than or equal to $10,000,000?
  ► Both tests are determined on an entity-by-entity basis.
TPR – small taxpayer qualifier

Apply final rules by filing of 2014 tax returns

- Rev. Proc. 2015-20 provides that qualified small taxpayers may apply the tangible property regulations in the 2014 tax year without computing a § 481(a) adjustment and without filing an accounting method change.
  - However, the simplified procedures do not eliminate the requirement to treat amounts incurred on or after January 1, 2014, in a manner consistent with the final regulations. Many small taxpayers will include election statements on their 2014 tax returns.
- Possible annual election needed each year.
Questions?
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