



The Tax Man Cometh...

Perspectives on Recent IRS 501(r) Audits



Your Presenters



Andrew represents healthcare clients with respect to a variety of issues, including regulatory, compliance, reimbursement, transactional, contracting, and tax-exemption matters. He received his Juris Doctor from Creighton University School of Law, magna cum laude, where he graduated with a concentration in Business, Taxation and Commercial Transactions. Andy also holds a Bachelor of Science in Business Administration, with an emphasis in accounting, summa cum laude, from Creighton University.

Selected Practice Highlights

- Advising clients on the impact of Stark, anti-kickback, and tax-exempt principles on contractual and other arrangements
- Representing hospitals in physician practice acquisitions
- Representing hospitals in mergers & divestitures, and acquisitions of ambulatory surgical centers
- Assisting in the preparation and submission of Stark self-disclosures under the Self-Referral Disclosure Protocol
- Structuring and advising clients on the creation of Accountable Care Organizations
- Preparing and negotiating a wide variety of other health care contractual arrangements

Professional & Civic Affiliations

- OneWorld Community Health Centers, Inc., Past Board Member & Past President
- Nebraska Chapter of the Healthcare Financial Management Association, President-Elect
- Beautiful Savior Lutheran Church, Board Member
- Down Syndrome Alliance of the Midlands, Board Member (2010-2011)
- American Health Lawyers Association
- Iowa Society of Healthcare Attorneys, Secretary

Education

- Creighton University School of Law, J.D., magna cum laude, 2006
- Creighton University, B.S.B.A, summa cum laude, 2003

Bar & Court Admissions

- Iowa, 2006
- Nebraska, 2007



Andrew D. Kloeckner
Attorney at Law
Partner

Your Presenters



Wendy is a Certified Public Accountant licensed to practice in the State of Nebraska, with over 14 years of public accounting experience. She provides tax compliance and planning services to not-for-profit clients, including hospital systems, social services, religious and cultural organizations, as well as private foundations.

Wendy graduated with honors from Midland University in Fremont, Nebraska with a Bachelor of Science degree in Business Administration with concentrations in Accounting and Management. She is a member of the American Institute of Certified Public Accountants and the Nebraska Society of Certified Public Accountants, and is active in civic and social organizations, including serving on the Board of Directors for Girls, Inc. and as Treasurer of the Elkhorn Soccer Club.

Wendy provides the following services to the firm's not-for-profit clients:

- Federal tax exemption applications
- Transactional and general tax consulting
- Tax return preparation (Forms 990, 990-T, 990-EZ, and 990-PF)
- Management of IRS and State audits and compliance checks
- Consultation regarding state sales, real property and income tax



Wendy R. Cooley
CPA
Senior Tax Manager

Your Presenters



Barbara J. Fajen

CPA

Tax Services Partner

Barb has been with Seim Johnson since August of 1999. Barb provides tax and financial planning services to individuals and to business clients in the service, not-for-profit, insurance, retail and software industries. Prior to joining the firm, Barb was with an international public accounting firm and a smaller local firm where she provided tax compliance and consulting services for 18 years to individual and business clients. Barb is a member of the American Institute of Certified Public Accountants and the Nebraska Society of Certified Public Accountants. She is also active in civic and social organizations, including formerly serving on the Board of Directors of Girls, Inc., Partnerships in Aging, and the Endowment Board for St. Timothy's Lutheran Church.

Barb provides the following services to the firm's not-for-profit clients:

- Federal tax exemption applications
- Federal private letter ruling request
- Tax planning for joint ventures
- Management of IRS and State audits and compliance checks
- Tax return preparation (Forms 990, 990-T, 990-EZ, 990-PF, and 5227)
- Comprehensive tax reviews of not-for-profit organizations, including private inurement "audits"
- Consultation regarding state sales, real property and income tax

Agenda

- Introductions
- Background
- IRC 501(r)
- Schedule H Analysis
- Audit Challenges
- War Stories
- Best Practices

Background

- § 9007 of the Patient Protection and Affordable Care Act
- Requirements of § 501(r)
 - Written financial assistance policy (FAP)
 - Limitations on charges
 - Prohibition on certain collection efforts
 - CHNA

Background

- Proposed regs – June 26, 2012
- Final regs – December 29, 2014
 - Compliant with final regs - First tax year following December 29, 2015
 - Every hospital should be compliant with final regs at this time

Resources

Reg. 1.501(r)(3)

Community health needs assessment and written implementation strategy.

Reg. 1.501(r)(4)

Written financial assistance policy and emergency medical care policy.

Reg. 1.501(r)(5)

Limitation on charges for medically necessary healthcare services and emergency medical care.

Reg. 1.501(r)(6)

Reasonable efforts with respect to billing and collections before proceeding with extraordinary collection actions.

IRS Mandatory Reviews

- IRS performs, by statute, a desk review of every hospital's Schedule H at least once every three years
- These reviews lead to referral out for audit

What Leads to Audit?

- Website, website, website
 - FAP information on your website needs to:
 - Be easy to find/access
 - Have all of the documents/information required by the final regulations
 - FAP policy
 - Plain Language Summary
 - Billing and collection policy
 - CHNA/Implementation strategy (current and past 2)
 - AGB calculation
 - Providers who are and are not part of FAP
 - Translations

What Leads to Audit?

- “Dual status” hospitals
- Form 990 - Inaccurate/red flags
 - Policy on website but it’s not
 - Check the “wrong” box

Schedule H Analysis

- Screen shots of 2016 Schedule H
- Data-driven decision making – data mining
- Potential “triggers” for IRS audit
- Common Schedule H errors
- Dual Status Hospitals – Consider completing a Schedule H

Schedule H Analysis

Schedule H, Part I

Part I Financial Assistance and Certain Other Community Benefits at Cost		Yes	No
1a	Did the organization have a financial assistance policy during the tax year? If "No," skip to question 6a . . .		
b	If "Yes," was it a written policy?		
2	If the organization had multiple hospital facilities, indicate which of the following best describes application of the financial assistance policy to its various hospital facilities during the tax year. <input type="checkbox"/> Applied uniformly to all hospital facilities <input type="checkbox"/> Applied uniformly to most hospital facilities <input type="checkbox"/> Generally tailored to individual hospital facilities		
3	Answer the following based on the financial assistance eligibility criteria that applied to the largest number of the organization's patients during the tax year.		
a	Did the organization use Federal Poverty Guidelines (FPG) as a factor in determining eligibility for providing <i>free</i> care? If "Yes," indicate which of the following was the FPG family income limit for eligibility for free care: <input type="checkbox"/> 100% <input type="checkbox"/> 150% <input type="checkbox"/> 200% <input type="checkbox"/> Other _____ %		
b	Did the organization use FPG as a factor in determining eligibility for providing <i>discounted</i> care? If "Yes," indicate which of the following was the family income limit for eligibility for discounted care: <input type="checkbox"/> 200% <input type="checkbox"/> 250% <input type="checkbox"/> 300% <input type="checkbox"/> 350% <input type="checkbox"/> 400% <input type="checkbox"/> Other _____ %		
c	If the organization used factors other than FPG in determining eligibility, describe in Part VI the criteria used for determining eligibility for free or discounted care. Include in the description whether the organization used an asset test or other threshold, regardless of income, as a factor in determining eligibility for free or discounted care.		

Make sure answers to line 3a and 3b are consistent throughout Schedule H – questions repeated in Part V, Section B, question 13 and are consistent with hospital policy

Schedule H Analysis

Schedule H, Part I

- 4 Did the organization's financial assistance policy that applied to the largest number of its patients during the tax year provide for free or discounted care to the "medically indigent"?
- 5a Did the organization budget amounts for free or discounted care provided under its financial assistance policy during the tax year?
- b If "Yes," did the organization's financial assistance expenses exceed the budgeted amount?
- c If "Yes" to line 5b, as a result of budget considerations, was the organization unable to provide free or discounted care to a patient who was eligible for free or discounted care?
- 6a Did the organization prepare a community benefit report during the tax year?
- b If "Yes," did the organization make it available to the public?
- Complete the following table using the worksheets provided in the Schedule H instructions. Do not submit these worksheets with the Schedule H.

4		
5a		
5b		
5c		
6a		
6b		

IRS Trigger – if
answered "yes"

Schedule H Analysis

Schedule H, Part III

Section C. Collection Practices

- 9a** Did the organization have a written debt collection policy during the tax year?
- b** If "Yes," did the organization's collection policy that applied to the largest number of its patients during the tax year contain provisions on the collection practices to be followed for patients who are known to qualify for financial assistance? Describe in Part VI

9a		
9b		

IRS Trigger if answered "no"

Instructions state that a "written debt collection policy" includes a written billing & collections policy or a written FAP. 501(r)(4) requires a written FAP. Must be answered "yes".

Schedule H Analysis

Schedule H, Part V, Section B

Required

Community Health Needs Assessment

- 1 Was the hospital facility first licensed, registered, or similarly recognized by a state as a hospital facility in the current tax year or the immediately preceding tax year?
- 2 Was the hospital facility acquired or placed into service as a tax-exempt hospital in the current tax year or the immediately preceding tax year? If "Yes," provide details of the acquisition in Section C
- 3 During the tax year or either of the two immediately preceding tax years, did the hospital facility conduct a community health needs assessment (CHNA)? If "No," skip to line 12

If "Yes," indicate what the CHNA report describes (check all that apply):

- a ☐ A definition of the community served by the hospital facility
- b ☐ Demographics of the community
- c ☐ Existing health care facilities and resources within the community that are available to respond to the health needs of the community
- d ☐ How data was obtained
- e ☐ The significant health needs of the community
- f ☐ Primary and chronic disease needs and other health issues of uninsured persons, low-income persons, and minority groups
- g ☐ The process for identifying and prioritizing community health needs and services to meet the community health needs
- h ☐ The process for consulting with persons representing the community's interests
- i ☐ The impact of any actions taken to address the significant health needs identified in the hospital facility's prior CHNA(s)
- j ☐ Other (describe in Section C)

	Yes	No
1		
2		
3		

Should be able to check all boxes a through i

Schedule H Analysis

Schedule H, Part V, Section B

CHNA is required to be posted to website – IRS will check

- 4 Indicate the tax year the hospital facility last conducted a CHNA: 20 ____
- 5 In conducting its most recent CHNA, did the hospital facility take into account input from persons who represent the broad interests of the community served by the hospital facility, including those with special knowledge of or expertise in public health? If "Yes," describe in Section C how the hospital facility took into account input from persons who represent the community, and identify the persons the hospital facility consulted
- 6 a Was the hospital facility's CHNA conducted with one or more other hospital facilities? If "Yes," list the other hospital facilities in Section C
- b Was the hospital facility's CHNA conducted with one or more organizations other than hospital facilities? If "Yes," list the other organizations in Section C
- 7 Did the hospital facility make its CHNA report widely available to the public?
If "Yes," indicate how the CHNA report was made widely available (check all that apply):
- a ☐ Hospital facility's website (list url): _____
- b ☐ Other website (list url): _____
- c ☐ Made a paper copy available for public inspection without charge at the hospital facility
- d ☐ Other (describe in Section C)

5		
6a		
6b		
7		

The tax year represents the calendar year that falls within the fiscal year.
June 30, 2017 FYE = 2016 Tax Year

Schedule H Analysis

Schedule H, Part V, Section B

8	Did the hospital facility adopt an implementation strategy to meet the significant community health needs identified through its most recently conducted CHNA? If "No," skip to line 11	8		
9	Indicate the tax year the hospital facility last adopted an implementation strategy: 20_____			
10	Is the hospital facility's most recently adopted implementation strategy posted on a website?	10		
a	If "Yes," (list url): _____			
b	If "No," is the hospital facility's most recently adopted implementation strategy attached to this return?	10b		
11	Describe in Section C how the hospital facility is addressing the significant needs identified in its most recently conducted CHNA and any such needs that are not being addressed together with the reasons why such needs are not being addressed.			
12a	Did the organization incur an excise tax under section 4959 for the hospital facility's failure to conduct a CHNA as required by section 501(r)(3)?	12a		
b	If "Yes" to line 12a, did the organization file Form 4720 to report the section 4959 excise tax?	12b		
c	If "Yes" to line 12b, what is the total amount of section 4959 excise tax the organization reported on Form 4720 for all of its hospital facilities? \$			

The implementation strategy must be adopted by the 15th day of the fifth month after the end of the taxable year in which the hospital completes the CHNA.

Schedule H Analysis

Schedule H, Part V, Section B

CHNA Requirement and Deadline Summary

Every tax-exempt Section 501(c)(3) hospital, including “dual status” government hospitals, must complete a Community Health Needs Assessment (CHNA) and adopt an Implementation Strategy every three years.

Original Adopters year end	Due Date of Initial CHNA Report*	Date the Initial CHNA Implementation Plan must be adopted*	Due Date of 2 nd CHNA Report*	Date the 2 nd CHNA Implementation Plan must be adopted*	Due Date of 3 rd CHNA Report*	Date the 3 rd CHNA Implementation Plan must be adopted*
12/31/13	12/31/13	05/15/14	12/31/16	05/15/17	12/31/19	05/15/20
06/30/13	06/30/13	11/15/13	06/30/16	11/15/16	06/30/19	11/15/19
09/30/13	09/30/13	02/15/14	09/30/16	02/15/17	09/30/19	02/15/20

Schedule H Analysis

Schedule H, Part V, Section B

	yes	no
13 Did the hospital facility have in place during the tax year a written financial assistance policy that: Explained eligibility criteria for financial assistance, and whether such assistance included free or discounted care? If "Yes," indicate the eligibility criteria explained in the FAP:		
a <input type="checkbox"/> Federal poverty guidelines (FPG), with FPG family income limit for eligibility for free care of ___ ___ % and FPG family income limit for eligibility for discounted care of ___ ___ %		
b <input type="checkbox"/> Income level other than FPG (describe in Section C)		
c <input type="checkbox"/> Asset level		
d <input type="checkbox"/> Medical indigency		
e <input type="checkbox"/> Insurance status		
f <input type="checkbox"/> Underinsurance status		
g <input type="checkbox"/> Residency		
h <input type="checkbox"/> Other (describe in Section C)		
14 Explained the basis for calculating amounts charged to patients?		

- Question 13 – required to explain eligibility criteria under 1.501(r)-4(b)(1)(iii)(A) & 1.501(r)-4(b)(2) – consistent response to Schedule H, Part I, line 3a and 3b
- Question 14 – required to explain basis for amounts charged under 1.501(r)-4(b)(1)(iii)(B) & 1.501(r)-4(b)(2)
- Various examples in the regulations

Schedule H Analysis

Schedule H, Part V, Section B

16 Was widely publicized within the community served by the hospital facility?	16		
If "Yes," indicate how the hospital facility publicized the policy (check all that apply):			
a <input type="checkbox"/> The FAP was widely available on a website (list url): _____			
b <input type="checkbox"/> The FAP application form was widely available on a website (list url): _____			
c <input type="checkbox"/> A plain language summary of the FAP was widely available on a website (list url): _____			
d <input type="checkbox"/> The FAP was available upon request and without charge (in public locations in the hospital facility and by mail)			
e <input type="checkbox"/> The FAP application form was available upon request and without charge (in public locations in the hospital facility and by mail)			
f <input type="checkbox"/> A plain language summary of the FAP was available upon request and without charge (in public locations in the hospital facility and by mail)			
g <input type="checkbox"/> Individuals were notified about the FAP by being offered a paper copy of the plain language summary of the FAP, by receiving a conspicuous written notice about the FAP on their billing statements, and via conspicuous public displays or other measures reasonably calculated to attract patients' attention			
h <input type="checkbox"/> Notified members of the community who are most likely to require financial assistance about availability of the FAP			
i <input type="checkbox"/> The FAP, FAP application form, and plain language summary of the FAP were translated into the primary language(s) spoken by LEP populations			
j <input type="checkbox"/> Other (describe in Section C)			

IRS will check your website for posting of the items in a, b and c.

Schedule H Analysis

Schedule H, Part V, Section B

Policy Relating to Emergency Medical Care

21 Did the hospital facility have in place during the tax year a written policy relating to emergency medical care that required the hospital facility to provide, without discrimination, care for emergency medical conditions to individuals regardless of their eligibility under the hospital facility's financial assistance policy?

21

If "No," indicate why:

- a** ☐ The hospital facility did not provide care for any emergency medical conditions
- b** ☐ The hospital facility's policy was not in writing
- c** ☐ The hospital facility limited who was eligible to receive care for emergency medical conditions (describe in Section C)
- d** ☐ Other (describe in Section C)

Schedule H Analysis

Schedule H, Part V, Section B

	Yes	No
22 Indicate how the hospital facility determined, during the tax year, the maximum amounts that can be charged to FAP-eligible individuals for emergency or other medically necessary care.		
a <input type="checkbox"/> The hospital facility used a look-back method based on claims allowed by Medicare fee-for-service during a prior 12-month period		
b <input type="checkbox"/> The hospital facility used a look-back method based on claims allowed by Medicare fee-for-service and all private health insurers that pay claims to the hospital facility during a prior 12-month period		
c <input type="checkbox"/> The hospital facility used a look-back method based on claims allowed by Medicaid, either alone or in combination with Medicare fee-for-service and all private health insurers that pay claims to the hospital facility during a prior 12-month period		
d <input type="checkbox"/> The hospital facility used a prospective Medicare or Medicaid method		
23 During the tax year, did the hospital facility charge any FAP-eligible individual to whom the hospital facility provided emergency or other medically necessary services more than the amounts generally billed to individuals who had insurance covering such care?		
If "Yes," explain in Section C.		
24 During the tax year, did the hospital facility charge any FAP-eligible individual an amount equal to the gross charge for any service provided to that individual?		
If "Yes," explain in Section C.		

If 23 and 24 are answered "yes" – IRS trigger

Seim Johnson IRS Exam Experiences

- F/S audits for 80-90 hospitals; governmental, 501(c)(3), & dual-status
- Hospitals of all sizes receiving IRS exams: \$7.0 - \$197.0 MM in gross revenues
- 5 hospitals have had IRS examinations; policy or CHNA “deficiencies” found in all

Seim Johnson IRS Exam Experiences

- Others, not IRS-audited (yet)
 - Through policy reviews, found 2 with policies needing revision
 - Through Form 990 preparation, found 1 CHNA deficiency resulting in a \$50,000 penalty.
- Expect a LOT of personnel time and a LOT of POA time to be incurred.
- Expect a site visit

Common Audit Challenges

- Wide variance in agent experience and education
 - Need to provide 501(r) education to some agents
- Wide variance in agent thoroughness
- Need to provide 501(r) education to some client personnel

Common Audit Challenges

- What law applies?
 - IRS auditing tax years prior to effective date of final regs
- Statute
 - Good faith, reasonable interpretation of the statute
 - Proposed regulations = safe harbor
- Even when all agree that statute applies, IRS looks to proposed regulations for authoritative guidance

Common Audit Challenges

- IRS is auditing 2014 tax years in 2017
 - Prior year policies have not been retained
 - Client has had personnel turnover
 - Lack of knowledge of prior year website content (Beware of “WayBack Machine”)

Common Audit Challenges

- Audit may start as “limited scope”, but expect expansions.
- Broadening scope of audit:
 - Current policy may be okay after conversation regarding applicable law BUT
 - Current policy is not compliant with final regulations and hospital is past the date of required compliance
 - Additional years become subject of audit

Common Audit Challenges

- Translation
 - IRS finds it hard to believe when a hospital doesn't need to translate under the regulatory standard
 - Documentation that you actually did the work important (and update it annually)
- Poor signage

Common Audit Challenges

- “Small” Issues
 - Even when looking at the statute, IRS looking for specific language
 - Not looking at 501(r) issues
 - Beneficiary Inducement
 - “Unfair” language

Common Audit Challenges

- Exams that don't go well can lead the IRS to examine other areas of the hospital, such as:
 - Payroll
 - Employee benefits
 - Unrelated business income

Common Audit Challenges

- Good News (So Far):
 - No SJ client audits have turned into full-scope audits
 - No audits have expanded to compensation or other information reporting
 - No detailed reviews of revenues or expenses, EXCEPT when looking for UBI

Audit Results

- Another Bit of Good News – Some IRS agents accept that the hospital is doing its best to comply.
- Ideally no errors exist or they are “minor” and either “inadvertent” or due to “reasonable cause”

Audit Results

- More likely: Closing letter
 - Very difficult to get IRS to agree that “no” errors exist
 - Agree to correct as soon as possible
 - Disclose in the next Form 990
 - But see PLR 201731014
 - Egregious and willful
 - Loss of exemption

Audit Results



Recent IRS Audit War Stories

Best Practices

- Monitor compliance with IRC 501(r) on an ongoing basis
 - Self Assessments
 - Internal audit procedures
 - Consult with an external advisor
- Ensure appropriate documents are available on the website and translated if necessary
- Ensure appropriate URLs are provided on the Schedule H of Form 990

Questions ?????

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