



United South and Eastern Tribes, Inc.

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June 4, 2013

Dr. Yvette Roubideaux
Director, Indian Health Service
801 Thompson Avenue, Suite 400
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Dear Dr. Roubideaux:

The United South and Eastern Tribes, Inc. (USET) is in receipt of your May 15, 2013 letter responding to our April 2, 2013 request for assistance with a taxation issue faced by tribal health care professionals employed by tribes that operate Indian Health Service (IHS) programs under the Indian Self-Determination and Education Assistance Act. In our April 2, 2013 letter, we requested that the IHS Office of General Counsel (OGC) provide written guidance to the Internal Revenue Service clarifying that payments made to tribal health care professionals under the Medicaid Electronic Health Record (EHR) Incentive Payment Program should not be considered taxable income to them when they assign such payments to a tribal health care facility.

We were disappointed to see in your May 15, 2013 letter that OGC has declined to assist tribal health care facilities and tribal health care professionals with this increasingly important issue. While we can certainly understand your position that the IHS OGC cannot "represent" tribal health care professionals before the Internal Revenue Service (IRS), we did not intend in our letter to request that OGC represent tribal health care professionals. We requested that OGC revise its letter to the IRS to include tribal health care professionals. We believed this letter was intended as an interagency communication to the IRS advocating that it take steps to clarify that IHS employees should not be taxed on EHR incentive payments. Our request was that any such interagency communication make the case that tribal health care employees should be accorded the same treatment as IHS employees. Your May 15, 2013 letter states that the letter to the IRS was prepared for use by IHS health care professionals when filing their tax returns with the IRS, and as such constituted "representation" of IHS health care professionals. We did not understand this to be the case when we made our request, and we do not believe your letter offers an effective solution to this issue.

The solution proposed in your May 15, 2013 letter does not solve the underlying problem with the IRS. Under your proposal, IHS health professionals would use the OGC letter when filing their tax returns, and tribal health professionals would use a letter developed by their own attorneys when filing their tax returns in an effort to avoid having EHR incentive payments attributed to them as income. This proposal is resource and time intensive and does nothing to solve the underlying problem.

Rather than IHS and the Tribes preparing letters for our health care professionals to use when filing their returns, the IRS should issue guidance confirming that these payments should be neither reportable nor taxable to health care professionals when such payments are assigned to non-taxable entities like the IHS and tribal health care programs.

We remain concerned that IHS does not appear to appreciate the gravity and immediacy of this issue for tribal health care programs. The IRS Office of General Counsel recently took the position that EHR incentive payments are reportable to individual health care professionals even when they assign those payments to a health care facility. In a letter to the IRS Director of Tribal Governments dated January 14, 2013 (Attached), the IRS Office of Chief Counsel opined that: (1) health care professionals are required to report EHR incentive payments as income unless they are acting as a conduit

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or agent of another; (2) that CMS (which means the States in the case of Medicaid EHR incentive payments) have an obligation to report EHR incentive payments (issue a 1099) to health care professionals, whether they assign those payments to their health care facility or not; and (3) when health care professionals assign payments to a health care facility, they too must issue a 1099 to the health care facility. Under this interpretation, when a health care professional assigns their EHR incentive payment to the health care facility, the IRS will require a State Medicaid program to issue a 1099 to the health care professional, and then the health care professional will have to issue a 1099 to the health care facility.

State Medicaid programs are changing their policies to comply with this new IRS OGC opinion, and are beginning to issue 1099s to health care professionals, regardless of whether those professionals assign their EHR payments to a health care facility. Under the IRS OGC opinion, it will be the responsibility of the health care professional to issue a 1099 to the health care facility.

Of course, it makes little sense to require two sets of 1099s to be issued, particularly when the entity that ultimately receives the EHR incentive payment is a non-taxable entity like the IHS or a tribal facility. Requiring health care professionals to do so will have a chilling effect on the desire to participate in this program at all.

We would like the assistance of the IHS in working with the IRS to confirm that payments made to a health care professional who assigns his or her EHR incentive payment to the IHS or a tribal facility are not attributable as income to them. As the IRS OGC letter indicates, "recipients must include the incentive payments in gross income unless they receive the payments as a conduit or an agent of another and are thus unable to keep the payments." IRS should confirm that where a health care professional is required by law to assign the payment to IHS, or required by contract to assign the payment to a tribal health facility, they are in fact acting as an agent and conduit of another and are unable to keep the payment, thereby making the payment non-taxable to them. IRS should also confirm that in the event of such assignments, there is no need for the health care professionals to issue a 1099 to the health care facility.

As you know, attracting and keeping quality health care professionals can be a challenge for IHS and tribal facilities, particularly those in remote locations. Federal policies should not be designed so as to increase the reporting and taxing burdens already imposed upon health care professionals working in Indian Country. Nor should federal policies be designed to force tribal programs to choose between increasing such burdens on their health care professional staff and receiving much needed incentive payments to bring their health records systems into the 21st century. Yet that is precisely the effect that the IRS' position would have. We look forward to working with you on this important issue.

Sincerely,



Kitcki A. Carroll, Executive Director

"Because there is strength in Unity"