



Community Health Needs Assessments and Implementation: The Board's Ongoing Responsibility

By Donald Stuart, Esq., Waller Lansden Dortch & Davis, LLP

Many hospital boards believe that they have satisfied the 501(r) community health needs assessment (CHNA) requirements by completing their organization's CHNA report and adopting an implementation strategy. After doing that, the board may feel ready to focus on other pressing issues until the next three-year CHNA deadline. However, board members need to be aware that their hospital must also annually provide up-to-date descriptions of the actions actually taken during the year to address the significant health needs identified. The community, advocacy and interest groups, unions, local media, and other interested parties will be keeping watchful eyes on the hospital's progress with meeting the identified needs. In addition, the IRS will now be shifting to an enforcement phase with the 501(r) requirements and boards need to understand the new rules around correcting any errors or omissions with their CHNA.

Background

The Affordable Care Act imposed several requirements on 501(c)(3) organizations that operate hospitals, including facilities they operate through joint ventures, in order to maintain their tax-exempt status. These requirements (referred to as the "501(r) requirements") include conducting a CHNA every three years and adopting an implementation strategy to meet the community health needs identified. Other 501(r) requirements focus on establishing financial assistance policies, limiting amounts charged for emergency or other medically necessary care to individuals eligible under the hospital's financial assistance policy, and refraining from certain collection actions.

With the final regulations on the 501(r) requirements issued at the end of last year and the general sense within the healthcare industry that the Affordable Care Act is now here to stay, any continued thoughts that hospital boards and executives have that the 501(r) requirements may be modified or not survive should now have

dissipated. The IRS will be shifting from an interpretation phase of the rules to an enforcement phase with 501(r) and boards need to be shifting from a soft compliance and "wait and see" approach to a long-term formalized compliance and review approach with 501(r).

Hospitals needed to complete their first CHNA before the end of the organization's first taxable year beginning after March 23, 2012. As a result, by now all hospital organizations subject to the 501(r) requirements (regardless of their particular tax year) should have completed their first CHNA and implementation. The next CHNA would be completed three years thereafter.

Note: The board should verify that their hospital has completed the CHNA process and all action steps for the first year and that the appropriate "authorized body" was involved in the process. Boards also need to review the correction and disclosure procedures for their organization to follow if they fail to meet one of the CHNA requirements.

CHNA Process and Action Steps

The following action steps are required for each CHNA to be completed every three years:

- Define the community the hospital serves.
- Assess the health needs of the community.
- Complete a written CHNA report.
- Formally adopt the CHNA report and document such action.
- Formally adopt written plans for implementation strategies to address each of the identified significant health needs of the community.
- Make the CHNA report widely available to the public (typically through the hospital's Web site).
- Include a copy of the adopted implementation strategy or a Web site reference to such strategy in the hospital's Form 990 filed with the IRS.

Note: The date for adoption of the implementation strategy by the board has been extended. What was required to be done at the end of the hospital's tax year, can now be adopted up until the date on or before the 15th day of the fifth month after the end of such tax year. This due date for adoption of the implementation strategy now matches the due date (without extensions) of the hospital's Form 990 for the tax year in which the CHNA is conducted.

Do You Have the Appropriate "Authorized Body" Involved in the CHNA Process?

Critical to the IRS's 501(r) requirements is that an "authorized body" of the hospital must be the party reviewing, making decisions, and approving the organization's CHNA efforts. This is required not only for adoption of the CHNA report and implementation strategy, but also for the ongoing monitoring required.

Depending on the structure of the ownership and operation of your hospital, several alternatives are available, and the regulations permit some flexibility as to who is the authorized body for 501(r) purposes. Hospitals may decide this is a key item to be kept solely at the board level of responsibility or may decide to delegate that responsibility to another party. A permissible "authorized body" is one of the following:

- The governing body of the organization that operates the hospital (e.g., the board of directors if a non-profit corporation, board of trustees if a foundation, and board of managers if a limited liability company)
- A committee of the governing body (e.g., the executive committee or community benefit committee)
- Another party authorized by the governing body (e.g., authorized senior executives at the hospital)

If the hospital is going to rely on a committee or other party to act as the authorized body, it will need to first verify that they are permitted under state law to act on behalf of the governing body. A single individual could constitute either a committee of the governing body or a party authorized by the governing body to act on its behalf. The board will need to verify that their applicable state law allows a committee or single individual to act in either of these capacities.

Note: Boards need to involve general counsel or other legal counsel to verify that their state law

permits such delegation of authority. Bylaws should also be reviewed. States may differ on permissible parties. If it is later determined by the IRS that the committee or individual did not have appropriate authority under state law, the CHNA adoption actions will be essentially "null and void" under the regulations and trigger a violation of the 501(r) requirements.

The board should understand the risk of delegating the CHNA responsibilities to a committee. If that committee or another individual is making CHNA decisions without any oversight by the full board, the board may be jeopardizing their fiduciary obligations. It is better to view the delegated party in an advisory role subject to the ultimate oversight and direction of the full board. The full board needs to be engaged in the CHNA process.

Note: Boards need to be cautious in delegating responsibility of 501(r) CHNA review and approval duties. Consider adopting a specific resolution if you are going to delegate 501(r) CHNA authority setting forth the parameters and limitations. Actions by committees and others on the CHNA should be ratified by the board.

The Board's Ongoing CHNA Duties

The work is not done after the CHNA action items described above are completed for the year. The CHNA report is not a document to be completed and filed away by the board. It must be a "living" document for the hospital along with the implementation strategy plans attached to it. Although the detailed preparation, compilation, and communication aspects of the CHNA may be delegated or contracted out, the oversight and decision-making responsibilities with respect to the organization's current CHNA and implementation actions should be kept as a standing review item at regular board meetings. The board, general counsel, and management need to have a clear understanding of the continuing oversight of 501(r) and compliance duties.

The board should make sure it is reviewing and documenting the following items each year:

- A description of the actions taken during the year by the hospital to address the significant health needs identified through its most recent CHNA.
- The reasons why no actions were taken, if any, with respect to any identified significant health needs.

This can be deemed the "execution" phase and should include actual steps taken during each year

to execute the organization's implementation strategy. This information will also be required on the Form 990 for subsequent years. The final regulations now require that the next CHNA report the hospital will complete (following the last CHNA report completed) include an evaluation of the impact of any actions that were taken to address the significant health needs identified in the hospital's prior CHNA reports. The IRS will not be the only party interested in this information. The media, constituents, and other stakeholders, will also be closely watching the actions taken by the hospital in this execution phase. The CHNA is a public document, and the board needs to stay informed about how the organization is meeting the identified community health needs each year and whether any actions need to be added or revised.

CHNA Failures and Corrections

A failure to meet the CHNA reporting requirements or adopt an implementation strategy for a hospital facility will generally result in a \$50,000 penalty each year of the failure. Loss of tax-exempt status for the hospital organization is also possible. Recent IRS guidance, however, has provided some beneficial exceptions and relief that the board should understand and be ready to utilize if necessary.

Note: Boards need to be well informed and understand the new rules that provide correction and disclosure procedures for their hospital to follow if they fail to meet one of the 501(r) requirements. These rules can provide the board with certain relief and avoid the adverse consequences from not just an IRS penalty, but also from possible adverse public fallout if they discover an error with their CHNA.

Minor Omissions and Errors

If the hospital does not meet the CHNA requirements due to an omission of required information or an error with respect to the CHNA report or implementation, it will not be considered a

"failure" to meet the 501(r) requirements (i.e., no \$50,000 penalty) if:

- The omission or error was *minor* and either inadvertent or due to reasonable cause.
- The hospital *corrects* the omission or error promptly after discovery.

The board needs to make sure such correction includes the establishment (or review/revision) of hospital practices or procedures that are reasonably designed to promote and facilitate overall 501(r) compliance.

Major Omissions and Errors

If there is a major omission or error with the CHNA, *but not willful*, and certain procedures are followed, the IRS will not pursue a revocation of the hospital's tax-exempt status. The \$50,000 penalty, however, will still be applicable. The board should take note that a timely correction and disclosure of the CHNA error or omission may be a factor used by the IRS to determine that the failure was not willful. The procedures to be followed include:

- Correction that is reasonable and appropriate for the CHNA failure and that is made promptly after discovery.
- Implementation or modification of safeguards to reduce the likelihood of a reoccurrence.
- Disclosure of the failure on the hospital's Form 990, including a description of the error, actions taken to correct it, and practices and policies implemented to prevent a reoccurrence.

Hospital boards, executive teams, and general counsel need to work together through the complexity of the 501(r) requirements and ensure that they are continuing to meet the ongoing compliance requirements for their hospital's CHNA. Adequate board actions, resolutions, and documentation are critical components that can establish the board is meeting its fiduciary duties each year.

The Governance Institute thanks Donald Stuart, Esq., a Partner with Waller Lansden Dortch & Davis, LLP, for contributing this article. Don also serves as the Chair of the Tax and Finance Practice Group of the American Health Lawyers Association. He can be reached at don.stuart@wallerlaw.com.

