

May 22, 2018

Submitted via the Federal eRulemaking Portal: <http://www.regulations.gov>

David J. Kautter  
Acting Commissioner  
Internal Revenue Service  
111 Constitution Avenue NW  
Washington, D.C. 20224

Steven T. Mnuchin  
Secretary  
U.S. Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

**Re: Priority Guidance Plan; Public Comment Invited on Recommendations for 2018-2019  
[Notice 2018-43]**

Dear Secretary Mnuchin and Acting Commissioner Kautter:

Vizient, Inc., appreciates the opportunity to comment on the Department of the Treasury (Treasury Department) and the Internal Revenue Service (Service) request for public comment on recommendations for items that should be included on the 2018-2019 Priority Guidance Plan.

**Background**

Vizient, Inc., is the largest member-driven health care performance improvement company in the country. At Vizient, our purpose is to ensure our members deliver exceptional, cost-effective care. Vizient is member-driven and member-minded, working tirelessly to amplify each organization's impact by optimizing every interaction along the continuum of care.

Vizient provides innovative data-driven solutions, expertise and collaborative opportunities that lead to improved patient outcomes and lower costs. Vizient serves a diverse membership and customer base including academic medical centers, pediatric facilities, community hospitals, integrated health delivery networks and non-acute health care providers. Vizient is headquartered in Irving, TX with locations in Chicago, Washington, D.C., and other cities across the country.

**Recommendations**

Vizient welcomes this opportunity to share our views with the Treasury Department and the Internal Revenue Service.

**I. Community Benefit**

Vizient represents thousands of not-for-profit hospitals nationwide and is dedicated to the success of non-profit, community-based healthcare. As such, we can speak to the difficulties engendered by

the lack of clarity in the definition of “community benefit” as it relates to social determinants of health. Vizient asks that the Service engage stakeholders in a review of this definition in light of well-documented evidence that social determinants — economic stability, education, food, housing, transportation — have a significant and undeniable positive effect on the promotion of health. Not-for-profit hospitals need guidance and assurance from the Service that their efforts to improve community health vis-à-vis social determinants constitute a community benefit. Simply put, the Service’s guidance is outdated and does not reflect current realities. We further ask that such guidance be incorporated into IRS Form 990, Schedule H, *Hospitals*, and the corresponding instructions.

Currently, Schedule H and the corresponding instructions seem to dictate what constitutes a community benefit. This reverse engineering should be corrected. IRS forms should instead be based on legal guidance, issued by IRS Chief Counsel, with approval of the Treasury Department and with the opportunity for public comment, concerning what constitutes community benefit. Established legal standards, not the Service’s information-gathering objectives, should dictate the content and questions in Schedule H and the corresponding instructions.

For example, Vizient has previously expressed concern that in 2013, the IRS reversed its prior position that “direct offsetting revenue” did not include “restricted grants.” This new position was not announced in legal guidance, but rather in the 2013 instructions to the Schedule H.<sup>1</sup> Attached is our prior letter indicating why the position taken unilaterally and retroactively in 2013 via IRS form instructions is inconsistent with recognized accounting principles, published guidance, and contrary to the intent of Congress.

Similarly, and also previously brought to the attention of the Service, guidance (and corollary changes to Schedule H and the instructions) is needed in the area of “Community Building Activities.” The Service unveiled the first Schedule H in 2008 – the structure of which still largely exists today. Notably, the schedule requires filers to report on “Community Building Activities” in Part II, separate and apart from reporting on other activities that are established community benefits. This delineation is not supported by law, guidance, or even by the instructions which acknowledge that some community building activities may also meet the definition of community benefit. Under the status quo, tax-exempt hospitals filing the Schedule H are not getting full recognition for expenditures in this area, and corrections are needed to ensure that these expenditures are properly treated as equal components of community benefit.

On February 15, 2018, Senators Orrin Hatch (R-UT) and Charles Grassley (R-IA) sent the IRS a letter requesting specific information regarding the agency’s oversight activities of nonprofit hospitals. In addition to requesting details regarding the agency’s monitoring and enforcement practices, the Senators listed specific questions, including how the Service uses the Schedule H data to ensure compliance with the law. For the reasons outlined above, Vizient is concerned that due to the lack of up-to-date guidance and a Schedule H that properly captures this guidance, the IRS will be unable to provide Congress with meaningful information. Accordingly, sound tax administration requires the IRS to add a guidance project as we have described to the 2018-2019 Priority Guidance Plan.

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<sup>1</sup> The instructions released on December 2013 (and those subsequently released) stated, “[d]irect offsetting revenue’ also includes restricted grants or contributions that the organizations uses to provide a community benefit, such as a restricted grant to provide financial assistance or fund research.” 2013 Instructions for Schedule H (Form 990). Available at <https://www.irs.gov/pub/irs-prior/i990sh--2013.pdf>. The instructions in the year prior (and dating back to 2008) said the opposite, “Direct offsetting does not include restricted or unrestricted grants or contributions that the organization uses to provide a community benefit.” E.g. 2012 Instructions for Schedule H (Form 990). Available at <https://www.irs.gov/pub/irs-prior/i990sh--2012.pdf>.

## II. Accountable Care Organizations

Vizient would also urge the Treasury Department and the Service to prioritize guidance in the 2018-2019 cycle on accountable care organizations (ACOs), specifically with respect to participation of not-for-profit hospitals to utilize or operate ACOs outside of the Medicare Shared Savings Program (MSSP). In IRS Notice 2011-20, 2011-16 I.R.B. 652, the IRS conceded that “certain non-MSSP activities may further or be substantially related to an exempt purpose.” The notice then explicitly states that it does not address whether and under what circumstances a tax-exempt organization’s participation in non-MSSP activities through an ACO will be consistent with an organization’s status but sought public comments on this topic. No formal guidance was issued after Notice 2011-20 on this subject. However, in April of 2016, the IRS issued a private letter ruling denying a section 501(c)(3) exemption application for an ACO outside of the MSSP. I.R.S. Priv. Ltr. Rul. 201615022 (Apr. 8, 2016). Even though private letter rulings have no precedential effect, the 2016 ruling has made other hospital ACOs wary of entering this arena.

Vizient submitted a comment letter in response to Notice 2011-20 which is also attached for your convenience. Although it is not necessary to restate our position here, we believe our request for guidance made years ago continues to be urgent, particularly given the uncertainty caused by the private letter ruling issued in 2016 – and will reduce the potential for future controversy.

### **Conclusion**

For the foregoing reasons, we urge the Treasury Department and the Service to prioritize guidance that will bring certainty and clarity to not-for-profit hospitals. Such guidance must be promulgated only after stakeholders are provided the opportunity to comment. Vizient would welcome the opportunity to provide comments on specific proposals so that we can inform the Treasury Department and Service on how such proposals will impact our members.

Vizient membership includes a wide variety of hospitals ranging from independent, community-based hospitals to large, integrated health care systems that serve acute and non-acute care needs. Additionally, many are specialized, including academic medical centers and pediatric facilities. Individually, our members are integral partners in their local communities, and many are ranked among the nation’s top health care providers.

In closing, on behalf of Vizient, Inc., I would like to thank you for providing us this opportunity to provide recommendations for the 2018-2019 Priority Guidance Plan. Please feel free to contact me at (202) 354-2600 or Chelsea Arnone, Director of Regulatory Affairs & Government Relations ([chelsea.arnone@vizientinc.com](mailto:chelsea.arnone@vizientinc.com)), if you have any questions or if Vizient can provide any assistance as you consider these issues.

Respectfully submitted,



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Vizient, Inc.

Enclosures (2)

CC: David Horton, Acting Commissioner TE/GE, IRS  
Victoria Judson, Associate Chief Counsel (TEGE), IRS Chief Counsel