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From: [redacted]
Sent: Wednesday, June 9, 2021 10:36:44 AM
To: [redacted]
Cc: [redacted]
Bcc:
Subject: Section 162(f) -- FMIS Reports and Health Care Fraud

Good morning. This email responds to your request for expedited supplemental informal advice.

Previously, by an email dated March 24, 2021, we provided informal advice regarding the application of the pre-TCJA version of IRC § 162(f) to False Claims Act ("FCA") cases for which the settlement agreement does not address the federal tax treatment of the settlement amount. Specifically, we addressed the significance of the Financial Management Information Systems Report ("FMIS Report") prepared by the Department of Justice ("DOJ"). As explained in that advice, it is important to obtain the FMIS Report from DOJ when determining how much of the settlement is compensatory and how much is punitive. The FMIS Report reflects DOJ's receipt of the total settlement amount and the disbursement of the total to all sources. The FMIS Report provides evidence of the allocation of the settlement proceeds between compensatory and punitive amounts because it shows how DOJ categorized each component of the total settlement when complying with the requirements of the Miscellaneous Receipts Act ("MRA"), 31 U.S.C. § 3302(b). As explained in the previous advice, the amount deposited into the Treasury General Fund is punitive and not deductible under IRC § 162(f).

Recently, you asked us to interpret the FMIS Report for a FCA case involving health care fraud because the accounts used for health care fraud differ from FCA cases generally. Specifically, a FMIS Report for a FCA case involving non-compensatory multiple damages for health care fraud will not include a reference to the Treasury General Fund because, under 42 U.S.C.A. § 1395i(k)(2)(C), there are no transfers to the Treasury General Fund pursuant to the MRA for such FCA health care fraud cases. Instead, these non-compensatory amounts are tracked as a separate category of payments to the Federal Hospital Insurance Trust Fund for use in a special account. As explained below, based on our quick research of this issue, we think that the net amount of that category is punitive and not deductible under IRC § 162(f). This email advice should be read in conjunction with our previous informal advice, which provided a detailed description of the FCA and the MRA.

By way of background, the Government Accountability Office ("GAO") described the change in the law for health care fraud cases as follows:

> To help combat fraud and abuse in health care programs such as Medicare and Medicaid, Congress enacted the Health Care Fraud and Abuse Control (HCFAC) program as part of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). HHS and the Department of Justice (DOJ) jointly administer the HCFAC program. HIPAA requires that HHS and DOJ issue a joint annual report to Congress no later than January 1 of each year on (1) amounts deposited to the Federal Hospital Insurance Trust Fund (HI trust fund) pursuant to HIPAA (HCFAC deposits) for the previous fiscal year and the source of such amounts and (2) amounts appropriated from the HI trust fund for HCFAC activities each year and the justification for the expenditure of such amounts.

GAO-11-446, Health Care Fraud and Abuse Control Program: Improvements Needed in Controls over Reporting Deposits and Expenditures at 2 (2011) ("GAO Report") (footnotes omitted) (available at https://www.gao.gov/assets/gao-11-446.pdf). The annual reports are available at https://oig.hhs.gov/reports-and-publications/hcfac/index.asp.

The general statutory provisions for the Federal Hospital Insurance Trust Fund ("Trust Fund") are contained in 42 U.S.C.A. § 1395i. Subsection (a) of that section addresses the creation of the Trust Fund, deposits into the fund, and transfers from the Treasury General Fund. Subsection (g) addresses transfers into the Trust Fund from other funds.

HIPAA amended 42 U.S.C.A. § 1395i by adding subsection (k), which contains the statutory provisions for the Health Care Fraud and Abuse Control Account ("Account"). See Pub. L. No. 104-191, § 201(b), 110 Stat. 1936, 1993 (Aug. 21, 1996). Section 1395i(k)(1) establishes in the Trust Fund an expenditure account to be known as the "Health Care Fraud and Abuse Control Account." Section 1395i(k)(2)(A) provides that in general the following amounts are appropriated to the Trust Fund—

> (i) such gifts and bequests as may be made as provided in subparagraph (B);
> (ii) such amounts as may be deposited in the Trust Fund as provided in sections 242(b) and 249(c) of the Health Insurance Portability and Accountability Act of 1996, and subchapter XI; and
> (iii) such amounts as are transferred to the Trust Fund under subparagraph (C).

Section 1395i(k)(2)(C) provides:

> The Managing Trustee shall transfer to the Trust Fund, under rules similar to the rules in section 9601 of the Internal Revenue Code of 1986, an amount equal to the sum of the following:
>
> (i) Criminal fines recovered in cases involving a Federal health care offense (as defined in section 24(a) of Title 18).

> (ii) Civil monetary penalties and assessments imposed in health care cases, including amounts recovered under this subchapter and subchapters XI and XIX, and chapter 38 of Title 31 (except as otherwise provided by law).
>
> (iii) Amounts resulting from the forfeiture of property by reason of a Federal health care offense.
>
> (iv) **Penalties and damages obtained and *otherwise creditable to miscellaneous receipts of the general fund of the Treasury* obtained under sections 3729 through 3733 of Title 31 (known as the False Claims Act), in cases involving claims related to the provision of health care items and services (*other than funds awarded to a relator, for restitution* or otherwise authorized by law).**

(Emphasis added.) Section 1395i(k)(3) provides that certain amounts are appropriated to the Account for fraud and abuse programs, subject to certain limitations.

As explained by the GAO:

> Funds for the HCFAC program are appropriated from the HI trust fund to an expenditure account, referred to as the Health Care Fraud and Abuse Control Account (HCFAC account) maintained within the HI trust fund. Annually, the HHS Secretary and the Attorney General jointly certify amounts appropriated from the HI trust fund to the HCFAC account as necessary to finance health care fraud and abuse control activities based on statutory limits. HIPAA, as amended, prescribes the maximum amount that may be certified in a given fiscal year. Any unexpended amounts are carried forward to the next fiscal year. Once HCFAC funds have been certified, CMS's Division of Accounting Operations performs the accounting for appropriations transferred to the HCFAC account. CMS makes funds available by creating allotments in its accounting system to fund related HCFAC expenditures. …

GAO Report at 8 (footnotes omitted).

In the instant case, there were payments to the relator and a 3% working capital fund. As noted in our previous advice, the deduction of such amounts is not precluded by § 162(f). Of particular importance here, there were also payments to "HHCF --CENTER FOR MEDICARE & MEDICAID" and "TRTF --TREASURY HCF TRUST FUND." Based on our understanding of § 1395i and the procedures applicable to FCA health care fraud cases, we think that the net payments to "HHCF --CENTER FOR MEDICARE & MEDICAID" are deductible and the net payments to "TRTF --TREASURY HCF TRUST FUND" are not deductible.

The difference between these amounts is shown by the simple table listing transfers/deposits used in the annual reports prepared by the Department of Health and Human Services ("HHS") and DOJ. For example, in the table on page 5 of the 2015 annual report, there is a clear distinction between the line for "Penalties and Multiple

Damages" under the "Department of the Treasury" heading and the line for "Restitution/Compensatory Damages" under the "Centers for Medicare & Medicaid Services" heading. HHS and DOJ, Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2015 at 5 (2016) (available at https://oig.hhs.gov/publications/docs/hcfac/FY2015-hcfac.pdf). (See also the "Restitution/Compensatory Damages to Federal Agencies" section on the same table and the GAO Report at 5, Figure 1: Overview of HCFAC Funding Stream.) This distinction reflects the substantive difference in the types of payments – one type is compensatory and paid to the "Centers for Medicare & Medicaid Services" and the other type is attributable to non-compensatory multiple damages and paid to the Account pursuant to appropriations and § 1395i(k)(2)(C)(iv) ("Penalties and damages obtained and otherwise creditable to miscellaneous receipts of the general fund of the Treasury …"). As explained in our previous advice, only the non-compensatory part of multiple damages is required to be paid to the Treasury General Fund under the MRA.

Pursuant to established procedures, a copy of this email will be released to the public as Emailed Chief Counsel Advice (with our names redacted). This advice may not be used or cited as precedent. Please call me if you have any further questions.