
Tax Exemption and Charity Care in the Long-Term Care Context

Sonja C. Rajki and James D. Vail
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Many long term care providers know that nonprofit nursing homes and residential care facilities are “exempt from taxation” but often do not understand there exist different bases for exemption from different taxes. Knowledge of the different bases for tax exemption is critical to enable a facility to maintain its various exemptions.

This paper provides information on the laws that entitle nursing homes, residential care facilities and home health agencies to federal and state exemption from income and property tax and provides action steps for management and boards to maintain their facility’s exemptions.

Exemption From Federal Income Tax

Federal tax law provides certain tax benefits to nonprofit organizations recognized by the Internal Revenue Service as exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code. These benefits include exemption from federal income tax, eligibility to receive tax deductible charitable contributions, possible access to tax exempt financing, and recognition by state officials in granting exemption from state income, sales and property tax.

Section 501(a) of the Internal Revenue Code provides federal income tax exemption for organizations described in IRC §501(c)(3), including entities operated exclusively for charitable purposes. One recognized type of “charitable purpose” is the “promotion of health”. “Promotion of health” includes the establishment or maintenance of hospitals, clinics, **homes for the aged**, and other providers of health care; advancement of medical and similar knowledge through research; and the maintenance of conditions conducive to health. (*Rev. Rul. 69-545, 1969-2 C.B. 117; also Restatement of Trusts (2d ed. 1959) §§368, 372 (1959); IV Scott of Trusts (3d ed. 1967) §§ 368, 372*). Although hospitals base their exemption on Revenue Ruling 56-185 (1956) which specifically discusses the tax exemption of hospitals, nonprofit nursing homes and residential care facilities base their exempt status upon Revenue Ruling 72-124 which addresses homes for the aged.

Long term care providers with a **home health agency** can base its federal exempt status on its provision of healthcare and services to the elderly. The promotion of health and care of the elderly has long been recognized as a charitable purpose. *See e.g. Revenue Rulings: 72-209, 69-545 and 56-185 as modified by 69-545.*

Home For the Aged

Revenue Ruling 72-124, released in 1972, confirmed that a home for the aged would be deemed to be tax exempt as a charitable entity if it met the primary needs of the aged: housing, health care, and financial security. *See also Rev. Rul. 75-198, 1975.* Revenue Ruling 72-124 defines these needs as follows:

- a. The need for **housing** is generally satisfied if the home “provides residential facilities that are specifically designed to meet some combination of the physical, emotional, recreational, social, religious, and similar needs” of the aged.
- b. The need for **healthcare** is generally satisfied if the home “either directly provides some form of healthcare, or in the alternative, maintains some continuing arrangement with other organizations, facilities, or health personnel, designed to maintain the physical and, if necessary, mental well-being of its residents.”
- c. The need for **financial security** has two elements: the home must (1) maintain in the residence “any persons who become unable to pay their regular charges” and (2) provide its services “at the lowest feasible cost.” To meet this condition the organization must be committed to an established policy, whether written or in actual practice, of maintaining in residence any persons who become unable to pay their regular charges. *See Rev. Rul. 72-124.* Although the IRS does not mandate a written policy regarding maintaining residents who become unable to pay their fees, Ohio law does require written documentation of this policy as a condition to obtaining property tax exemption. See the discussion of property tax exemption below.

ACTION STEPS:

- Educate board members regarding reasoning for exemption.
- Review corporate documents (*Articles of Incorporation, Code of Regulations*) to ensure that they adequately reflect the charitable purposes of the organization.
- Complete IRS Form 990 filing requirements
- Ensure the facility has written documentation in resident agreements that residents will be maintained even if they become unable to pay their fees. (See further discussion in property tax exemption section below.)

IRS Rules For Taxation on Unrelated Business Income

Under Internal Revenue Service unrelated business income rules, a facility could be subject to taxation for income it receives from an “unrelated business”. This subject is outside the scope of this paper, but each facility should consider whether it is carrying on any unrelated business for which it may be subject to federal income taxation.

Although a 501(c)(3) facility is generally not subject to federal income tax, it can be subject to federal income tax on net income from the operation of a “trade” or “business” that is: (a) regularly carried on by the organization, and (b) is not substantially related to the organization’s furtherance of its exempt purpose or function. See IRC §512(a); Reg. 1.513-1(a).

The theory underlying taxation of unrelated business income (UBI) is that an exempt organization should not be permitted to compete with for-profit entities that are subject to federal income tax because the organization’s tax exempt status provides it with an unfair advantage that would permit it to price its products or services below those of for-profit entities.

Whether an activity constitutes a trade or business and whether such trade or business is substantially related to the organization’s exempt purposes depends upon the facts and circumstances of each individual case.

Engaging in unrelated business activities can have two consequences:

- (1) the organization may be required to file a Form 990-T and pay the applicable tax; and
- (2) if the organization has excessive revenue constituting UBI, its 501(c)(3) exempt status can be revoked.

Examples of unrelated business activities that could result in UBI might include some aspects of a gift shop¹, catering services for events not related to the organization’s exempt purpose, and space rental for events not related to the organization’s exempt purpose.

ACTION STEPS:

- Evaluate whether your organization operates any unrelated trade or business and determine if it is necessary to file IRS Form 990-T.
- Ensure that your organization does operate unrelated trade or business such operation to a degree that jeopardizes the organization’s tax exempt status.

¹ But see IRS Rev-Rule 69-267 which determined that a hospital gift shop was not subject to UBTI because it was substantially related to the hospital’s exempt purposes.

Exemption from State Tax

Unless a corporation operating in Ohio is entitled to exemption, it must pay corporate franchise tax, sales tax and real property tax. Exemptions from these taxes are based upon state law; mere recognition by the IRS as a charitable organization under Section 501(c)(3) does not - by itself - exempt an entity from all tax under Ohio law. Federal recognition as a Section 501(c)(3) organization is, however, one requirement that must be met to obtain exemption from state tax.

This section discusses nursing home, residential care facility and home health organization's exemption or partial exemption from these state taxes.

Franchise Tax

Nonprofit nursing homes, residential care facilities and home health agencies are automatically exempt from the Ohio Corporation Franchise Tax. For-profit corporations and nonprofit agricultural and consumer cooperative organizations must pay a Corporate Franchise Tax in Ohio. Other Ohio nonprofit corporations are not subject to the Franchise Tax. *See Ohio Revised Code §§5733.01, 5733.02, 5733.16.*

Sales Tax

Sales tax is levied on each retail sale made in the state (*see Ohio Revised Code 5739.02*). However, Ohio sales tax does not apply to sales to (a) organizations exempt from taxation under 501(c)(3), (b) other nonprofit organizations operated exclusively for charitable purposes in Ohio, or (c) sales to offices administering one or more homes for the aged or one or more hospital facilities exempt under §140.08 of the Revised Code.

Notwithstanding the above, sales of the following are not exempt from sales tax:

- a. sales to any organization for use in the operation or carrying on of a trade or business; or
- b. sales to a home for the aged for use in the operation of independent living facilities as defined in division (A) of ORC §5709.12.

See ORC §5739.02 (B)(12).

Therefore, sales to a long term care facility for use in the operation of its nursing home, residential care facility and/or home health agency are exempt from Ohio sales tax, but sales for the operation of the independent living facilities are subject to the Ohio sales tax.

Facilities should note the requirement that sales for use in operating or carrying on of a trade or business are subject to sales tax. For example, if a facility has a gift shop or a restaurant that caters to persons other than residents/visitors/employees it may be carrying on a trade or business and may have to obtain a vendors license and collect and remit sales tax. Casual Sales (sales and events if the sale is not held more than six times a year) are exempted.

If goods or services are purchased by a facility but it is unknown at the time of the purchase whether the goods or services will be used for an exempt purpose, the facility can purchase the goods or services under an Ohio Department of Taxation Blanket Exemption Certificate. The facility must track the usage of the goods or services or use a predetermined allocation formula to allocate the costs between exempt and taxable categories. If it is later determined that some of the goods or services are subject to sales tax because they are used in the independent living portion of the facility or used for the operation of a trade or business, then the facility may file a use tax return with the Ohio Department of Taxation.

ACTION STEPS:

- *Track expenditures made for goods and services that will be used in operating independent living units. These are not exempt purposes and the facility must pay sales tax.*
- *Determine if the facility operates a trade or business for which it must pay sales tax*
- *Obtain vendor's license for any business for which must collect and remit sales tax*
- *If it is unclear, at the time of purchase, whether goods or services will be used for exempt or non exempt purposes, complete a Ohio Department of Taxation Blanket Exemption Certificate and then either track or use a predetermined formula to allocate the expenditure between taxable and exempt categories.*

Property Tax Exemption

Home For the Aged

Any nonprofit entity that is (a) used as and licensed as a “home for the aged” under Ohio Revised Code §5709.12 or (b) is a hospital facility under Ohio Revised Code §140.08 will not be subject to Ohio property tax.

“Home for the aged” includes nursing homes, residential care facilities, or adult care facility, as defined in the Ohio Revised Code; “Home for Aged” does not include independent living facilities. ORC §5709.12(B).

To be eligible for property tax exemption, the “home for the aged” must meet the following criteria:

- (1) It is owned by a corporation, unincorporated association, or trust of a charitable, religious, or fraternal nature, which is organized and operated not for profit, which is not formed for the pecuniary gain or profit of, and whose net earnings or any part of whose net earnings is not distributable to, its members, trustees, officers, or other private persons, and which is exempt from federal income taxation under section 501 of the “Internal Revenue Code of 1986,” 100 Stat. 2085, 26 U.S.C. 1. (*Basically it must be a 501(c)(3) organization*); and
- (2) It is open to the public without regard to race, color, or national origin; and
- (3) It does not pay, directly or indirectly, compensation for services rendered, interest on debts incurred, or purchase price for land, building, equipment, supplies, or other goods or chattels, which compensation, interest, or purchase price is unreasonably high; and
- (4) It provides services for the life of each resident without regard to the resident’s ability to continue payment for the full cost of the services.

This last requirement does not prevent a home from requiring a resident with financial need to apply for any applicable financial assistance or require a home to retain a resident who willfully refuses to pay for services for which the resident has contracted even though the resident has sufficient resources to do so. *See Ohio Revised Code §5701.13(B)*

The Ohio Supreme Court has held that if a home for the aged maintains the right to discharge a resident based on nonpayment of fees it can lose its property tax exemption. Even if a home for the aged has a policy to provide hardship discounts to residents and has never discharged a resident for nonpayment, the facility must include in its admission agreement that it will not terminate the agreement if a resident becomes unable to pay their fees unless such nonpayment is willful. *See Ohio Presbyterian Homes v. Kinney 9 Ohio St.3d 90, 94, 459 N.E.2d 500, 503 (Ohio,1984); Toledo Jewish Home for the Aged, Inc. V. Limbach, 53 Ohio St.3d 52, 559 NE2d 451, 453 (Ohio 1990); Brentwood Life Care Center v. Tracy, BTA 94-K-819 (7-28-95)*. The admission agreement should also ensure that (1) the non-termination provision applies only to those who are unable to pay and not for residents who could otherwise pay, but refuse to do so or impair their ability to pay because of unauthorized transfers of assets, and (2) that residents take full advantage of Medicare/Medicaid reimbursement when they are eligible.

ACTION STEPS:

- *Ensure that all areas able to be licensed as a residential care facility have been licensed as such so as to maximize property tax exemption.*
- *Ensure that the facility's resident agreements specify:*
 - *The agreement shall not be terminated solely for Resident's financial inability to pay the monthly fees;*
 - *Resident agrees to not transfer assets if the transfer would impair Resident's ability to pay the monthly fees;*
 - *Resident agrees to apply for all applicable government assistance before the facility extends charitable care. (If this language is not included in the residency agreement it could result in a determination that the facility is a third party resource for Medicaid purposes and medical assistance could be denied.)²*
- *Monitor financial assets to ensure that there are no improper transfers of assets by Resident.*
- *Ensure that the residency agreement does not call for third party guarantee of payment. Not only does the IRS frown upon this, federal law prohibits Medicaid and Medicare facilities from requiring third party guarantors. (See 42. CFR §483.12(d)(12)) A facility can however require that the resident's personal representative/power or attorney sign as a guarantor to make payments from the resident's own funds.*

Independent Living Facilities

Any property solely used as an independent living facility will be subject to real property taxation. *See ORC §5709.12(B)*. The only exception to this is if the independent living units are operated exclusively for the benefit of members of charitable, religious, fraternal or educational organizations who are retired, aged, or infirm and who receive such benefits *without charge* in consideration of their voluntary services to the organization. Independent living units qualifying under this exception must be operated in conjunction with or at the same site as a home for the aged as described in ORC §5701.13(B)(2).

Home for the Aged Operated in Conjunction with Independent Living

If a facility is licensed as a home for the aged and is operated in conjunction with an independent living facility, then the common areas used by residents of both facilities, including kitchens, dining rooms, clinics, entry ways, maintenance and storage areas, and land necessary for access to common areas used by both residents of the home for the aged and residents of independent living facilities are also exempt from taxation. *ORC §5709.12(C)(1)*.

Home Health Agency

If a home health agency owns real property, a determination of its property tax exemption would be made under ORC §5709.12(B) which exempts from taxation "real and tangible personal property belonging to institutions that is used exclusively for charitable purposes..." and ORC §5709.121 which exempts real property and tangible personal property belonging to a charitable institution if it is used by such institution for charitable purposes.

² Ohio Administrative Code §5101:1-39-02.2 provides: "Philanthropic long-term care facility. (1) An aged, blind or disabled person, living in a philanthropic long-term care facility, who has entered into a life care contract with the LTCF, is eligible for medicaid, if all medicaid eligibility requirements and the following conditions are met: (a) The philanthropic LTCF must provide evidence that it is financially unable to operate. The LTCF must show that the total financial situation, of the LTCF, indicates the LTCF is financially unable to fulfill its responsibilities under the life care contract (rather than showing the individual has exhausted the amount of money turned over to the long-term care facility); and(b) The entrance fee would be depleted had the individual paid the facility at the medicaid long-term care rate for a comparable facility.(2) An individual residing in a philanthropic long-term care facility who has not entered into a life care contract must have eligibility for medical assistance determined in accordance with Chapter 5101:1-39 of the Administrative Code."

In a 2007 decision, the Ohio Supreme Court addressed the issue of tax exemption of an in-home nursing care and hospice provider. In that case, *Community Health Professionals, Inc. v. Levin*, 113 Ohio St.3d 432, the Tax Commissioner argued that Ohio law does not permit a provider's property to be exempt from real estate tax unless that provider offers services at its own expense or on a sliding scale based on a patient's ability to pay. Community Health Professionals, a 501(c)(3) organization, argued that while some financial surplus existed, no individuals made a profit from the business activities of the company and that the company did provide services without regard to patients' ability to pay and that no patients have been denied services due to their inability to pay. The Ohio Supreme Court acknowledged that the Tax Commissioner's position had some merit, but concluded that the question of whether Community Health Professionals was a charitable institution was not before the court for technical reasons and ultimately found that Community Health Professionals' property was exempt from taxation under ORC §5709.121.

While the issue of the Community Health Professionals' status as a charitable institution was not before the Ohio Supreme Court in the Community Health Professionals' case, a provider's charitable status was before the Court in *Bethesda Healthcare, Inc. v. Wilkens*, 101 Ohio St.3d 420 (2004). In that case the Court stated, "Whether an institution renders sufficient services to persons who are unable to afford them to be considered as making charitable use of property must be determined on the totality of the circumstances; there is no absolute percentage."

ACTION STEPS:

- Consider your home health agency charitable care or sliding scale policy in light of property tax exemption issues.

Timing issues in obtaining property tax exemption.

To receive real property tax exemption, a residential care facility or nursing home must be licensed to operate as a residential care facility or nursing home as of January 1, the tax lien date, of the applicable tax year. (*West Side Deutscher Frauen Verein v. Tracy* (Ohio 04-02-1997) 78 Ohio St. 3d 124, 676 N.E.2d 895, 1997-Ohio-228, reconsideration denied 78 Ohio St.3d 1517, 679 N.E.2d 312.) The facility must apply for exemption before March 31 of the year in which it seeks exemption. It can only obtain exemption if the property for which exemption is sought is entitled to exemption as of January 1 of the year in which the application is made. Thus, a facility must have obtained residential care facility or nursing home licensure before the beginning of the year in which it seeks to apply for property tax exemption. For example, if a facility receives a license to operate a residential care facility on August 1, 2009, the facility would not be granted tax exemption until January 2010, the tax lien date for the following year.

Charity Care and Community Benefit

Recently the issue of the amount of charity care provided by nonprofit hospitals has come under increased scrutiny by Congress and by communities that wish to eliminate tax exemption to nonprofit entities because of their diminishing tax revenue. Some members of Congress question what makes some nonprofit hospitals different than their for profit counterparts if little or no charity care is provided by the nonprofit hospitals. State tax commissioners and the school districts that lose monies when a nonprofit entity is granted property tax exemption are lobbying for hospitals to lose their property tax exemption if they cannot demonstrate that they have provided charity care. As a result, the Catholic Health Association and the American Hospital Association have each released guidelines for hospitals on charity care. Further, the IRS Form 990 Return for Organizations Exempt from Taxation has been redesigned and now includes a separate Schedule H for hospitals on which they must provide information about their charity care.

Charity care has become an issue when organizations seek property tax exemption. Several cases involving hospitals seeking property tax exemption have received national attention. For example, the Provena Covenant Medical Center's property tax exemption was revoked by a local County Board of Review. The Illinois Department of Revenue and the Illinois Court of Appeals both affirmed recommendations of the Champaign County Board of Review to revoke the property tax exemption of Provena, which now must pay approximately \$1 Million in property taxes. The Board of Review found Provena had not demonstrated it was a charitable institution under Illinois law, despite the fact that Provena provided \$1 Million annually in charity care, subsidized its Medicaid-paid services by nearly \$3 Million annually and provided \$250,000 annually in outreach services to the community. Provena has petitioned the Illinois Supreme Court to review the Appellate Court ruling and the Illinois Supreme Court has allowed but not acted on the appeal.

In Ohio, the Cleveland Clinic Foundation was denied property tax exemption for a community outpatient clinic and surgery center in Beachwood. The Beachwood School District claimed the property, while owned by the nonprofit Cleveland Clinic, did not provide sufficient charitable care at this Beachwood facility. The Cleveland Clinic argues the facility is used in furtherance of and is incidental to the Cleveland Clinic's larger goals of providing area-wide healthcare. In denying the property tax exemption, the State of Ohio Tax

Commissioner noted that only 1.4 to 1.7% of the services provided at the Beachwood facility were uncompensated or charitable care to indigent persons or those who cannot afford the full costs of care.

These recent attacks on property tax exemption for lack of charity care have focused on hospitals. Additionally, the Catholic Health Association and American Hospital Association's guidelines are both targeted at hospitals and the IRS Form 990 has no schedule regarding the provision of charity care for entities other than hospitals.

While some guidance about the provision of charity care is emerging for hospitals, there is little guidance for nonprofit senior living facilities regarding appropriate levels of charity care.

The issue of charity care is currently less important in Ohio for nursing homes and residential care facilities. The statutory basis for real estate tax exemption for these organizations does not require charity care beyond providing "services for the life of each resident without regard to the resident's ability to continue payment for the full cost of the services." *ORC 5701.13(B)(1)(e)*.

There have been no cases in Ohio challenging the property tax exemption of a home for the aged based on a lack of charity care. Challenges in other states typically turn on whether the long term care facility is a charity; in these cases there is no specific statutory exemption like Ohio's. The following discusses how charity care can be defined and whether charity care is required in the long term care arena.

What is Charity Care?

Most jurisdictions do not define "charity care". Utah is one jurisdiction that does, and its definitions are aimed particularly at hospitals and nursing homes. In Utah, exempt organizations must provide a "gift to the community" (*Utah County v. Intermountain Health Care, Inc.*, 709 P.2d 265, 269 (Utah 1985)) which is defined: "either by a substantial imbalance in the exchange between the charity and the recipient of its services or in the lessening of a government burden through the charity's operation". The following are specific types of contributions which courts, legislatures and tax authorities in Utah and other states have recognized as countable toward an organization's charity care obligations:

- Monetary Donations to the Organization. The organization should be able to show that the donations were actually used to further its charitable objectives.
- Care provided to Medicare and Medicaid Residents. In Utah an organization may count "the reasonable value of unreimbursed care provided to residents covered by Medicare or Medicaid. The measurement for such care is: the difference between (a) standard charges, as reduced by the average of reductions afforded to all patients who are not covered by government entitlement programs, and (b) actual reimbursement." *Evangelical Lutheran Good Samaritan Soc'y v. Bd of Equalization of Latah County*, 804 P2d 299. However, Illinois (in the context of hospitals) imposes stricter requirements and the provision of services to Medicaid patients constitute charity care only to the extent that reimbursement is "less than the facility's cost of providing the services." The Catholic Health Association, in its guide on quantifying community benefit, states that "[t]here is a general consensus that traditional charity care should be reported in terms of costs, not charges." *Catholic Health Ass'n of the U.S., Cmty. Benefit Reporting Guidelines & Standard Definitions for the Cmty. Benefit Inventory for Social Accountability* (June 9, 2004).
- Volunteer Hours. Volunteer hours are a "gift to the community". The value of volunteer hours is measured by "volunteer hours times a reasonable rate for services performed." Volunteer hours should be documented. An assisted living facility was denied a property tax exemption in part because it failed to present any evidence regarding how much of the volunteer labor actually benefited residents. *Cmty. Mem'l Home as Osakis, Minn., Inc v. County of Douglas*, 573 N.W.2d 83,87 (Minn. 1997). Note that unlike Ohio, in Minnesota there is no specific statutory property tax exemption for nursing homes or assisted living facilities; instead property tax exemption is based on being a "charity".
- Bad Debt. It is unclear whether or not bad debt is a community benefit - although this has been addressed primarily in the hospital context. Some courts indicate that when calculating how much charity is provided, an organization may count billings it has been unable to collect, even if it first attempts to collect the bills (*Wilson Area School Dist. V. Easton Hosp.*, 708 A.2d 835 (Pa. Commv. Ct. 1998 (holding a hospital exempt)). In other jurisdictions, only bad debt from those unwilling to pay may be counted; not bad debt from those who are unable to pay. (*Ill. Community Benefits Act PA 93-0480*; 210 Ill Comp. Stat. Ann 76/10 (2007) (statute applies only to hospitals with more than 100 beds)). In the assisted living context, a Nebraska assisted living facility was granted an exemption from real estate tax based on a variety of "good facts", one of which was that the facility had never filed a suit to collect delinquent accounts. (*Bethesda Fdn v. Buffalo County Bd. Of Equalization*, 640 N.W.2d 398 (Neb. 2002)). Note that unlike Ohio, Nebraska does not have a specific statutory provision exempting nursing homes or assisted living facilities from property tax.

- Other Critical Services or Programs that may not otherwise be offered in the community. The Nebraska Supreme Court held an assisted living facility exempt, in part because it provided various services that met community needs, such as religious worship programs, games and exercise classes, around-the-clock nursing services, and transportation for residents. (*Bethesda Fdn v. Buffalo County Bd. Of Equalization*, 640 N.W.2d 398 (Neb. 2002)).

How much Charity Care is Required?

The IRS Revenue Rulings 72-124, 79-18 and 75-198 reflect the IRS's position that a charity need not provide direct financial assistance to the elderly if the facility meets the need for health care, financial security and residential facilities designed to meet specific physical, social, and recreational requirements of the elderly. *See also Southminster, Inc. v. Justus*, 459 S.E.2d 793, (N.C. Ct. App. 1995) in which the court cited to the IRS Revenue Rulings in determining that a 196-unit independent and common living facility within a CCRC complex was exempt from sales and use taxes even though it served mostly affluent populations and it had financially assisted only three residents with the costs of the entrance fees and nine residents with monthly payments; and *Wittenberg Lutheran Village Endowment Corp. v. Lake County Property Tax Assessment Bd. Of Appeals*, 782 N.E.2d 487 (Ind. T.C. 2003) in which an independent living complex within a CCRC was exempt from property tax even though it did not provide any care to the indigent and only applicants that were financially sound were accepted. In Indiana, property is exempt from property taxation if it is owned, occupied and used for charitable purposes. In this case, the Court found that caring for the aged by meeting the needs of the aging, specifically, relief of loneliness and boredom, decent housing adapted to their age, security, well-being, emotional stability, and attention to problems of health, was a charitable purpose.

Some jurisdictions have set standards to quantify how much charity care is required (e.g. Utah, Texas and Pennsylvania) or base exemption on income levels of residents (Washington State), but most do not. Ohio has not quantified how much charity care is required for CCRCs because Ohio has a statutory scheme for exemption not dependent upon charity care.

For more information on this article please contact:

Sonja C. Rajki and James D. Vail
216.696.4200
srajki@ssrl.com and jvail@ssrl.com

This paper is not intended to be exhaustive on the subject matter nor to provide legal advice to the reader.

1111 SUPERIOR AVENUE
SUITE 1000
CLEVELAND, OHIO 44114
216.696.4200
www.ssrl.com