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CONFIDENTIAL MEMORANDUM

February 27, 2004

TO: Board of Directors, Massachusetts Health Data Consortium, Inc.
FROM: David S. Szabo
RE: Creation of Mass Share, LLC

This memorandum will summarize the reasoning behind my recommendation that the Massachusetts Health Data Consortium create a limited liability company (“LLC”) to be called Mass Share, LLC for the purpose of entering into the key legal agreements needed to implement the Meds Info ED project and future Mass SHARE projects.

What is a Limited Liability Company?

A limited liability company (sometimes referred to an “LLC”) is a legal entity, much like a corporation, whose permitted purposes, powers and other characteristics are set forth in state law. A limited liability company is created by filing a one-page certificate with the Secretary of State and paying a filing fee of \$500.00. The rules for the operation and governance of the company are set forth in a document called an “operating agreement,” which is similar to a partnership agreement or the bylaws of a corporation.

Who will own the company? How is it governed?

The owners of limited liability companies are called “members.” Mass Share, LLC will have one member, the Consortium. LLCs can be governed directly by their members, or the members can appoint “managers” to govern and administer the LLC. For simplicity’s sake, I have drafted the proposed operating agreement of Mass Share LLC so that its sole member, the Consortium, manages the company. This allows direct control of the LLC by the Consortium’s Board of Directors, Executive Committee and Executive Director, as appropriate.

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Does the LLC pay taxes? Will it's existence affect the tax-exempt status of the Consortium?

Mass Share, LLC will not have to pay any taxes. A single member LLC is disregarded for federal and state income tax purposes, and every item of income and expense generated by Mass Share, LLC will appear on the books of the Consortium for federal and state income tax purposes. The financial activity of Mass Share, LLC should be reported on the Consortium's information tax return, Form 990. Mass Share, LLC in and of itself will have no effect on the tax-exempt status of the Consortium so long as it only engages in activities that the Consortium could have engaged in directly.

Why Should We Set Up an LLC?

A limited liability company, like a corporation, is a limited liability entity. As a general matter, members of an LLC are not responsible for the debts and liabilities incurred by the LLC. We will endeavor to have all Meds Info agreements, such as the agreement with the technical vendor, entered into in the name of Mass Share, LLC. Thus, claims arising out of the operation of the LLC, whether by contract, or otherwise, will properly be made against the new company and its assets, and not against the Consortium and its assets. While not every possible legal risk can be avoided or minimized in this manner, I feel this is a prudent step to protect the assets of the Consortium. It should be noted that Mass Share, LLC will not protect other participants in the project, such as the health plans or the pilot hospitals.

Why Not Set Up a New Charity to Operate Meds Info?

A single member LLC can be set up much more quickly, and with much less expense, than a new charitable corporation. A new charity would require additional tax filings (Form 1023) to obtain approval of tax-exempt status, with months of additional delay, at best. An LLC can be organized in a few days, with no approval from the IRS required.

What Other Actions Should the Consortium Take?

Once the LLC certificate is filed and the operating agreement is signed, a Form SS-4 should be filed with the IRS. This will enable the LLC to obtain an employer identification number and officially document its "disregarded entity" status with the IRS. Once this number is obtained, the LLC can open a bank account, which can be funded by the Consortium. The LLC can obtain letterhead, and its identity and purpose can be described on the Consortium's web site. The Consortium can consider filing trademark applications for "Mass Share" or "Meds Info" at a future time. The creation of Mass Share should be documented in the minutes of the Consortium's board meetings, and the original implementing resolution for the Mass Share project should be amended to reflect the existence and role of the new company.



A copy of the draft certificate of the LLC and operating agreement are attached.

Attachments

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