



NATIONAL ASSOCIATION OF  
Community Health Centers

**NACHC ANALYSIS:**

**Federal Tort Claims Act Coverage: Reducing Exposure for  
Common “Gap” Areas**

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## Federal Tort Claims Act Coverage: Reducing Exposure for Common “Gap” Areas

The Federally Supported Health Centers Assistance Act (P.L. 102-501 (1992) and P.L. 104-73 (1995)) extends coverage to Section 330-funded Federally Qualified Health Centers (FQHCs)<sup>1</sup> and to the qualified employees and certain other individuals and independent contractors of eligible FQHCs for malpractice liability under the Federal Tort Claims Act (FTCA) in accordance with Section 224 of the Public Health Service Act. FTCA provides occurrence-based coverage for professional malpractice to a health center that is “deemed” eligible by the U.S. Department of Health and Human Services (DHHS), Health Resources and Services Administration (HRSA) only for acts or omissions by the health center, its qualified individual providers and/or other eligible individuals that:

- Occur on or after the effective date that HRSA determined the health center met the requirements for FTCA coverage (*i.e.*, approval of the deeming application); AND
- Are within that health center's approved scope of project; AND
- Are within the scope of employment, contract for services, or duties as an officer or director of the corporation.<sup>2</sup>

Increasingly, health centers are relying upon a variety of methods and arrangements (both through internal resources and in conjunction with other community-based providers) to deliver services to their patients as well as to their medically underserved communities. By improving health outcomes while reducing disparities, utilizing innovative approaches to care is beneficial to both the patient and the community at large. Recent determinations by DHHS, however, have raised doubts as to whether certain provider activities that fall outside of the general coverage requirements but commonly thought to be FTCA-covered services are, in actuality, ineligible for FTCA coverage.

This Analysis reviews common activities that do not meet the general FTCA coverage requirements but nevertheless satisfy the conditions for coverage based on “pre-approved” regulatory exceptions. This Analysis also addresses certain common activities that may present potential “gaps” in coverage, resulting in exposure to unanticipated risk and liability for the health center and offers suggestions (including model contract language) on how health centers can minimize some of these risks.

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<sup>1</sup> Grantees eligible to be deemed by the Secretary of Health and Human Services for coverage under the FTCA are: Section 330-funded Community Health Centers [section 330(e)]; Migrant Health Centers [section 330(g)]; Health Care for the Homeless [section 330(h)]; and Health Care for Residents of Public Housing [section 330(i)]. Entities designated as FQHC “Look-Alikes” are not eligible for FTCA coverage. See HRSA Program Information Notice (PIN) 99-08 (Health Centers and the Federal Tort Claims Act).

<sup>2</sup> See 42 C.F.R. § 6.6.

### **General Requirements for FTCA Coverage<sup>3</sup>**

To understand what is not (or may not be) covered by FTCA, it is important to briefly review the general FTCA coverage requirements. FTCA covers malpractice claims or suits filed against a deemed health center that arise from services and sites properly within the health center's HRSA-approved scope of project. In addition to covering the deemed health center, FTCA coverage extends to the health center's employees, whether full-time or part-time, as well as individually contracted clinicians who otherwise meet FTCA eligibility requirements and who provide services to health center patients at the health center site for at least 32 ½ hours a week annually, provided that the activity performed is within the eligible provider's scope of employment or contract. There is no minimum hours-per-week requirement, however, for individually contracted clinicians who provide services in the fields of family practice, general internal medicine, general pediatrics, and obstetrics/gynecology.

Under limited circumstances, certain inpatient or residential provider services furnished to health center patients (*e.g.*, rounding activities conducted in hospitals and nursing homes) and certain services provided to non-health center patients and/or at non-health center sites (*e.g.*, on-call or cross coverage arrangements that meet specific regulatory requirements) may also be covered. The latter services are discussed in greater detail below.

### **FTCA Coverage for Services Provided to Non-Health Patients and/or at Non-Health Center Sites**

Typically, FTCA will not cover services provided to non-health center patients and/or at non-health center sites, unless the health center obtains specific approval of such arrangements. Notwithstanding, DHHS has published regulatory examples that constitute exceptions to this general rule, thus establishing coverage for certain health center activities involving the provision of services to non-health center patients and/or at non-health center sites, without the need to obtain specific clarification or a particularized determination of coverage<sup>4</sup>, provided that:

- All requirements of the regulatory example are met; and

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<sup>3</sup> The requirements regarding FTCA coverage for health centers are set forth in the following HRSA policies: Program Assistance Letter (PAL) 99-15, and Policy Information Notices (PINs) 99-08 and 2001-11; discussion of FTCA can also be found in PIN 2008-01 (Scope of Project guidance and PINs 2001-16 and 2002-22 (FQHC credentialing and privileging requirements). All of these policies are available at <http://www.bphc.hrsa.gov/policy/>. NACHC anticipates that HRSA will soon issue a new draft PIN that will consolidate and update these older PINs but not necessarily actually revise HRSA policy. When that draft PIN is issued, NACHC will alert health centers.

<sup>4</sup> See 42 C.F.R. § 6.6(e); Regulatory notice published at 60 Fed. Reg. 49417 (Sept. 25, 1995).

- The activity is listed and described on the health center’s scope form (generally, Form 5 – Part C, which lists “Other Activities/Location) and documented and described in the health center’s Section 330 grant application narrative, with sufficient detail to ensure that there is no confusion regarding the type, level and intensity of services provided.

***Pre-Approved Regulatory Examples***

As long as the conditions discussed above are met, FTCA will cover deemed health centers and their qualified providers for the activities performed under the following regulatory examples, regardless of the fact that services are provided to non-health center patients and/or at non-health center sites:

- **Hospital or emergency room on-call arrangements:** The health center requires its physicians to obtain staff privileges at a community hospital, and the community hospital as a condition of obtaining such privileges (and thus being able to admit the center's patients to the hospital), requires the health center and/or its physicians to agree to provide periodic hospital or hospital emergency room call. The physician’s employment agreement or contract for services must clearly require that such privileges are a condition of employment or required under the contract.
- **After-hours cross coverage arrangements with community providers:** The health center makes arrangements with local community providers for after-hours coverage of its patients, and agrees to provide the services of its providers for after-hours cross-coverage. The provider’s employment agreement or contract for services must require periodic after-hours cross-coverage for the patients of the community providers.
- **School-based or school-linked clinics:** The health center’s staff provides primary and preventive health care services at a facility located in a school or on school grounds based on a written affiliation agreement with the school.
- **Immunizations and health fairs:** The health center’s staff conducts an event to immunize children against infectious childhood illnesses, or a health fair to attract community members for purposes of performing health assessments. Such events may be held in the health center, on its grounds, or elsewhere in the community served by the health center (such as community centers).
- **Outreach for homeless persons or migrant and seasonal farm-workers:** The health center’s staff travels to a shelter for homeless persons, a street location where homeless persons congregate, or a migrant farmworker residence camp to conduct intake screening to determine those in need of clinic services (which may mean health care is provided at the time of such intake activity or during subsequent clinic staff visits at the same location).

### *Particularized Determinations of FTCA Coverage*

To ensure coverage for activities provided pursuant to a pre-approved regulatory example, HRSA urges deemed entities to ensure that their proposed activities fit squarely within one of the examples provided.<sup>5</sup> In cases where an activity does not meet either the general coverage requirements or one of the examples exactly, the deemed entity should seek a “particularized determination” of FTCA coverage.<sup>6</sup> The regulations establish three approval criteria for particularized determination requests, any one of which can be used to justify a determination of coverage:

- The provision of the services to non-health center patients benefits the health center’s patients as well as the general populations that could be served by the health center through community-wide intervention efforts conducted within the communities served by the health center.
- The provision of the services to non-health center patients facilitates the provision of services to the health center’s patients.
- The services rendered are otherwise required to be provided to the non-health center patients under an employment contract or similar arrangement between the health center and the covered provider.

### **Areas of Concern that May Present FTCA Coverage Gaps**

As noted earlier, health centers enter into a variety of service delivery arrangements, many of which are considered by the medical community to be part of the usual and customary practice of medicine (and, ultimately, result in high quality efficient health care for the health center’s patients). Recent determinations by DHHS, however, have raised doubts as to whether the provider activities furnished under those arrangements are covered under FTCA. In particular, issues have been raised regarding coverage for services provided by health center providers to non-health center patients and/or at non-health center sites under arrangements that are similar to but do not fit squarely within the pre-approved regulatory examples discussed above. The balance of this Analysis discusses three common “gap-related” scenarios faced by many health centers and provides approaches (including model contract language) to minimizing risks associated with each.<sup>7</sup>

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<sup>5</sup> See 42 C.F.R. § 6.6(e); Regulatory notice published at 60 Fed. Reg. 49417 (Sept. 25, 1995).

<sup>6</sup> See 60 Fed. Reg. 49418.

<sup>7</sup> Please note that, as of the date of this Analysis, HRSA’s position on these approaches has not been stated in written agency guidance. Thus, we cannot state definitively that any specific arrangement that deviates from the pre-approved regulatory examples will be covered by FTCA. To protect the health center and its qualified providers, in addition to complying with the advice provided herein, we suggest that health centers follow the recommendations on establishing and documenting compliance with FTCA requirements in general, which are discussed in a NACHC news release entitled *Attention Health Centers Applying for*

### *Hospital or Emergency Room On-Call Not Required for Privileges*

As discussed above, if a health center requires its physicians to obtain admitting privileges at a community hospital and as a condition of obtaining such privileges the physicians must agree to provide periodic hospital or emergency room call, the services furnished while meeting on-call obligations will be covered by FTCA provided that the other requirements for FTCA coverage are met. In the intervening years since the regulatory exceptions were first promulgated, changes have occurred in connection with the practice of medicine which in many cases have resulted in changes to the management of on-call rotations. For example:

- With increasing frequency hospitals nationwide are abandoning the requirement that physicians participate in on-call in exchange for obtaining admitting or staff privileges.
- Health centers may no longer require all or some of their physicians to maintain admitting privileges, while still requiring participation by these same physicians in on-call rotation to ensure that the health center's patients will have access to appropriate hospital or emergency care when the patients' health center provider is otherwise unavailable.

Recognizing the importance of keeping current with practice trends, we believe that FTCA coverage could cover services provided during hospital or emergency room on-call regardless of whether participation is required by the hospital to obtain admitting privileges or whether the health center requires admitting privileges as a condition of employment, provided that the health center:

- Requires on-call participation as a condition of employment; and
- Includes this requirement in the physician's employment agreement or job description or, at a minimum, in the employee handbook.<sup>8</sup>

Additionally, as discussed above, it is important to ensure that: (1) the on-call arrangement is included in the health center's HRSA-approved scope of project by listing and describing the arrangement in the center's grant application; and (2) there is adequate and appropriate documentation to support performance of the on-call activities (*i.e.*, a written agreement between the health center and the hospital). A further description of each of these recommendations (along with model language, as appropriate) is provided below:

#### **1. Physician employment agreement, job description, or employee handbook**

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*FTCA Deeming Renewal or for Initial FTCA Deeming*, issued on April 21, 2008 and is posted on the NACHC website at <http://www.nachc.com/press-releases.cfm?month=4&year=2008>.

<sup>8</sup> See footnote #7.

To minimize or avoid potential confusion regarding whether participation in hospital and/or emergency room on-call by the health center's physicians is a condition of their employment, we recommend including in the employment agreement, job description and/or employee handbook language similar to the following:

All health care services shall be provided by Physician in accordance with Physician's Employment Agreement (as applicable), Physician's Job Description, Health Center's Principles of Practice, and Health Center's Scope of Project as it is defined for purposes of coverage under the Federal Tort Claims Act (FTCA) pursuant to Section 224(g) of the Public Health Service Act.

Physician shall participate in hospital and/or emergency room on-call rotations for hospital care and/or emergency coverage furnished to Health Center and non-Health Center patients in accordance with all requirements of applicable on-call agreement(s) executed by Health Center and Hospital(s), Health Center's policies and procedures and clinical standards of care, and the clinical work schedule developed by Health Center. Health Center shall make reasonable efforts to ensure that on-call obligations are reasonably allocated among the medical staff. Physician shall promptly prepare and file accurate and complete time records and reports of hours worked pursuant to such agreements. All services provided by Physician pursuant to a hospital and/or emergency room on-call arrangement shall be provided in accordance with, at a minimum, Physician's Job Description and Health Center's Scope of Project as it is defined for purposes of FTCA coverage.

## **2. Health center's grant application**

It is essential that the arrangement be documented in both the health center's grant narrative and the applicable scope form. HRSA Policy Information Notice (PIN) 2008-01 (*Defining Scope of Project and Policy for Requesting Changes*, December 31, 2008) indicates that the health center should:

- List the arrangement on Form 5 – Part C (which lists “Other Activities/Locations”), along with the general location/facility (*e.g.*, “hospital”) and the frequency with which the health center's physicians furnish these services under the arrangement, as appropriate (*e.g.*, as required for hospital and emergency room on-call); AND
- Indicate in the description portion of Form 5 – Part C the specific hospitals involved in such arrangement (including their specific locations) and whether non-health center patients are seen during such arrangements, as required by the hospital; AND

- Describe the arrangement with sufficient specificity in the application narrative, emphasizing how it contributes to the provision of comprehensive primary care services to the health center’s patients and overall community.

### **3. Written agreement between the health center and the hospital**

To further document the on-call arrangement, the health center and hospital should enter into a written agreement, describing the arrangement and any specific services to be provided as part of such arrangement. This is particularly important given that the FTCA coverage determination process conducted by the government includes a review of all applicable documentation to establish compliance with the required terms of the arrangement in question. We recommend including language in the on-call agreement similar to the following:

Health Center shall furnish, through its employed and/or contracted physicians, [add field/type of service] hospital and/or emergency room on-call services, including in-patient and emergency services, to patients presenting at Hospital, as set forth below [or “as set forth in Exhibit A, attached hereto and incorporated herein by reference”], in accordance with a schedule to be mutually developed and arranged between the Parties, or as otherwise required as back-up or in an emergency. Services shall be furnished in the same professional manner and pursuant to the same professional standards as are generally provided to Health Center’s own patients, and in accordance with applicable Hospital bylaws and policies based upon the mutual agreement of the Parties as to the specific terms thereof that shall be applicable hereunder. Health Center’s physicians shall see patients in a timely manner, and without questioning the need for a consult or a request for transfer of a patient from a first-call provider (or first responder) to the care of such physician.

#### ***Cross Coverage Arrangements with Community Providers Not Limited to After-Hours***

As discussed above, if a health center makes arrangements with local community providers for after-hours coverage of its patients, and agrees to provide the services of the its own providers for after-hours cross-coverage, the services furnished by the health center provider while participating in cross coverage (or reciprocal call coverage) will be covered by FTCA provided that the other requirements for FTCA coverage are met. Similar to hospital or emergency room on-call, however, changes have occurred in the manner by which health centers and their local community providers collaborate on coverage arrangements.

In particular, many cross coverage (or reciprocal call coverage) arrangements are no longer limited solely to “after-hours” coverage. Rather, health centers often enter into cross coverage arrangements with community partners (such as community call or coverage groups) that include coverage for intermittent capacity shortages when, among

other things: (1) the health center's providers are on vacation or personal leave (or are otherwise unavailable); and/or (2) the center experiences a relatively unanticipated temporary increase in patients beyond its current capabilities. Given the significant increases in the costs of securing locum tenens arrangements or other arrangements for additional capacity on a temporary basis, many community providers, including health centers, are forming these community call or coverage groups with increasing regularity, thus ensuring that their patients have access to necessary services.

As with hospital and emergency room on-call, our understanding (based, in part, on informal discussions with HRSA) is that FTCA coverage could cover services provided during non-after hours cross coverage arrangements, provided that the health center:

- Requires cross coverage participation as a condition of employment; and
- Includes this requirement in the provider's employment agreement, job description, or, at a minimum, in the employee handbook.<sup>9</sup>

Additionally, as discussed above, it is important to ensure that: (1) the cross coverage arrangement is included in the health center's HRSA-approved scope of project by listing and describing the arrangement in the health center's grant application; and (2) there is adequate and appropriate documentation to support performance. A further description of each of these recommendations (along with model language, as appropriate) is provided below:

### **1. Provider employment agreement, job description, or employee handbook**

To minimize or avoid potential confusion regarding whether participation in the health center's cross coverage arrangement is a condition of employment, we recommend including in the employment agreement, job description and/or employee handbook language similar to the following:

All health care services shall be provided in accordance with Provider's Employment Agreement (as applicable), Provider's Job Description, Health Center's Principles of Practice, and Health Center's Scope of Project as it is defined for purposes of coverage under the Federal Tort Claims Act (FTCA) pursuant to Section 224(g) of the Public Health Service Act.

Provider shall participate in Health Center's cross coverage arrangements with local community providers for medical care furnished to Health Center and non-Health Center patients in accordance with all requirements of applicable cross-coverage arrangement(s) executed by Health Center, Health Center's policies and procedures and clinical standards of care, and the clinical work schedule developed by Health Center. Health Center shall make reasonable efforts to ensure that cross coverage obligations are

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<sup>9</sup> See footnote #7. .

reasonably allocated among the medical staff. Provider shall promptly prepare and file accurate and complete time records and reports of hours worked pursuant to such agreements. All services provided by Provider pursuant to a cross coverage arrangement shall be provided in accordance with, at a minimum, Provider's Description and Health Center's Scope of Project as it is defined for purposes of FTCA coverage.

## **2. Health center's grant application**

It is essential that the cross coverage arrangement be documented in both the health center's grant narrative and the applicable scope form. Similar to hospital or emergency on-call, PIN 2008-01 indicates that the health center should:

- List the arrangement on Form 5 – Part C, along with the general location/facility (as applicable) and the estimated frequency with which the health center providers' furnish services under the arrangement, as appropriate; AND
- Provide a brief description of the arrangement in the description portion of Form 5 – Part C; AND
- Describe the arrangement with sufficient specificity in the application narrative, emphasizing how it contributes to the provision of comprehensive primary care services to the health center's patients and the overall community

## **3. Written agreement between the health center and the cross coverage partner**

To further document the cross coverage arrangement, the health center and its cross coverage partner(s) should enter into a written agreement, describing the arrangement and any specific services provided. This is particularly important given that the FTCA coverage determination process conducted by the government includes a review of all applicable documentation to establish compliance with the required terms of the arrangement in question. We recommend including in the cross coverage agreement language similar to the following<sup>10</sup>:

Each Party, through their employed or contracted health care professionals, shall furnish [add field/type of service] cross-coverage services, as set forth below [or "as set forth in Exhibit A, attached hereto and incorporated herein by reference"], to such other Party's patients who are under the care of, and to supplement the services provided by, the other Party's health care professionals, in accordance with a schedule to be mutually developed and arranged between the Parties, or as otherwise required as back-up or in an emergency. Services shall be furnished in the

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<sup>10</sup> Since both parties are agreeing to provide services under a cross-coverage arrangement, it is also important to clarify that FTCA coverage will apply solely to the health center and its clinicians and not to the other provider(s) who will secure and maintain its own professional liability insurance.

same professional manner and pursuant to the same professional standards as are generally provided to a Party's own patients, and in accordance with each Party's applicable policies and procedures based upon the mutual agreement of the Parties as to the specific terms thereof that shall be applicable hereunder. Each Party shall see the other Party's patients in a timely manner, and without questioning the need for a consult or a request for transfer of a patient from a first-call provider (or first responder) to the care of a Party. Reciprocal cross-coverage shall include, but is not limited to:

(i) Formal and informal telephone coverage of the Parties' patients, as needed and in accordance with relevant policies;

(ii) Consultation regarding high risk patients, as needed and in accordance with relevant policies; and

(iii) Reciprocal on-call coverage to supplement the call coverage provided by each Party's respective health care professionals.

### ***Hospital Reciprocity Care***

Increasingly, health center providers find themselves in the following situation: The health center provider is on site at a hospital for the purpose of caring for a health center patient who has been hospitalized (*i.e.*, rounding) or to fulfill his/her on-call obligations. Assuming that rounding and/or on-call activities are included within both the health center's approved scope of project and the provider's scope of employment, they are covered by FTCA without question. However, while caring for his/her patient, the hospital requests that the health center provider treat, or assist in treatment of, an inpatient who is not a registered health center patient (*i.e.*, hospital reciprocity care).

Typically, FTCA coverage is denied in such cases because the situations do not fit squarely within the pre-approved regulatory exceptions for hospital or emergency room on-call or for after-hours cross coverage arrangements, and are outside the scope of approved "rounding." Nevertheless, in the vast majority of cases, the health center provider will respond affirmatively to the hospital's request for one or more reasons:

- Reciprocity care may be included in the hospital's bylaws, with which the provider agrees to comply in order to participate in on-call or rounding activities.
- The usual and customary medical practice in the community includes responding to requests to assist another provider.
- The provider is under an ethical duty to furnish necessary patient care when no other provider is available.
- By doing so, the provider is helping to assure that the health center's patients have access to similar reciprocity care when hospitalized and without access to a health center provider.

Given the importance (for both the health center and its patients) of participating in hospital reciprocity care arrangements among community providers, such arrangements should be covered under FTCA. In this regard, NACHC believes that FTCA coverage could be based on the existing particularized determination standards that grant coverage for services provided to non-health center patients that benefit the health center's patients and the population served by the health center, or because the provision of services facilitates the provision of services to the health center's patients, as long as:

- The underlying service (*e.g.*, rounding, hospital or emergency room on-call) and the provider are within the health center's approved scope of project,
- The center has been "deemed," and
- All other FTCA eligibility requirements are met.

However, without definitive guidance (formal or informal) from HRSA indicating that hospital reciprocity care would be covered by FTCA, whether coverage exists for this type of care remains unclear, potentially exposing the health center and its providers to significant risk. Given this lack of guidance, we cannot recommend specific contract language at this time. Nevertheless, health centers that want to proceed with arrangements for hospital reciprocity care should consider submitting a request for a "particularized determination" of FTCA coverage, as discussed above. Short of obtaining such determination, at a minimum, health centers should follow the following general guidance:

- Ensure that the reciprocity care arrangement is included in the health center's HRSA-approved scope of project by listing and describing the arrangement in the center's grant application;
- Require participation in the reciprocity care arrangement as a condition of employment;
- Include the reciprocity care requirement in the provider's employment agreement, job description or, at a minimum, in the employee handbook (perhaps noting that, while performing on-call or rounding activities, the provider may be asked by another provider or by the hospital to render care in emergency situations); and
- Ensure that there is adequate and appropriate documentation to support performance (*i.e.*, a written agreement between the health center and the hospital that documents reciprocity care obligations).

Further, as noted above, on April 21, 2008, NACHC issued a news release entitled *Attention Health Centers Applying for FTCA Deeming Renewal or for Initial FTCA Deeming*, advising health centers to document compliance with all requirements to establish and maintain FTCA coverage for reciprocity care, and providing several specific recommendations.<sup>11</sup> Thus, it is advisable to review and comply with the recommendations, as appropriate.

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<sup>11</sup> The news release and recommendations can be accessed on the NACHC website at <http://www.nachc.com/press-releases.cfm?month=4&year=2008>.

It is important to remember that neither HRSA nor any other government agency (*i.e.*, Department of Justice) have officially “sanctioned” any of the recommendations noted above. NACHC has urged HRSA to recognize explicitly that FTCA coverage eligibility extends to hospital reciprocal care, such as by issuing a broad “particularized determination” to provide FTCA coverage eligibility in those situations and/or through a Federal Register notice. In response, the Spring 2009 DHHS semi-annual regulatory agenda included a proposed Notice of Proposed Rulemaking (NPRM) submitted by HRSA to amend the FTCA regulations by adding to the current pre-approved regulatory examples situations under which health center providers furnish hospital reciprocity care. However, as of the date of this Issue Brief, a timeline for the NPRM has not yet been established. In the meantime, to minimize potential liabilities, health centers should: (1) clearly define and describe reciprocity activities in all written agreements between the health center and its providers and as well as agreements with the center’s hospital partners; and (2) use best efforts to comply with FTCA coverage requirements.

For additional information on FTCA, please contact Roger Schwartz, NACHC’s Associate Vice President of Executive Branch Liaison, at 202-296-0158 or [rschwartz@nachc.com](mailto:rschwartz@nachc.com).