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HEALTH INDUSTRY ALERT

NEW YORK MEDICAID INSPECTOR GENERAL ISSUES SELF-DISCLOSURE GUIDANCE

On March 12, the New York State Office of Medicaid Inspector General (OMIG) announced the release of its Provider Self-Disclosure Guidance ("Guidance") to assist providers in identifying, disclosing and returning overpayments received from the Medicaid program. This Guidance comes on the heels of other significant steps taken by New York over the past few years in response to widespread allegations of fraud and abuse in its Medicaid program. This Guidance serves as further evidence that OMIG will continue to make concerted efforts to maximize recoveries from New York health care providers.

In 2006, the OMIG was created, and, in 2007, James Sheehan, a former prosecutor and well-known trailblazer in health care fraud enforcement in the Eastern District of Pennsylvania, was appointed to take the helm. Since taking office, Sheehan has made major strides in overhauling New York's Medicaid program, which is the biggest Medicaid program in the country. One of Sheehan's bolder moves was to pledge that New York would recover $1.6 billion over four fiscal years (or pay the shortfall to the federal government) in exchange for receipt of federal money for health care reform. In response to skepticism as to whether the goal could be met, Sheehan triumphed by not only meeting the first year's goal of $215 million, but far exceeding it with recoveries totaling $551 million. To accomplish this, the OMIG significantly increased its staff, which allowed it to shorten audit lifecycles and expand the number and scope of audits conducted. Additionally, the Bureau of Allegations and Complaints was created to respond to tips and disclosures. Furthermore, in January of 2009, the OMIG published regulations establishing requirements for mandatory compliance programs for all Medicaid providers, including hospitals, nursing homes, home care providers, medical equipment service agencies, mental health facilities and any other provider for which Medicaid comprises "a substantial portion of their business operations." These efforts resulted not only in an increase in recoveries, but also the exclusion of 417 providers and termination of 28 others.

Now, with the release of the Guidance, the OMIG is hoping to incentivize providers to work with it upon the discovery of an overpayment. The Guidance notes that participating providers could potentially "reduce their legal and financial exposure." In exchange for cooperating with the OMIG in good faith on the investigation, a self-disclosing provider could be eligible for a number of benefits. While the specific benefits available vary depending upon the situation, the Guidance lists the potential for forgiven or reduced interest, flexible repayment plans, waived penalties and/or sanctions, a decrease in the likelihood of imposing a corporate integrity program and possible preclusion of subsequently filed False Claims Act qui tam actions based on disclosed matters.

The Guidance replaces the New York State Department of Health disclosure protocol and establishes the process for participating in the OMIG's self-disclosure program. It notes that it is "significantly more expansive in scope than the protocol of the federal Department of Health and Human Services Office of the Inspector General, which focuses on potential violations of criminal, civil or administrative law." By contrast, the OMIG self-disclosure program lists as issues appropriate for disclosure the following: substantial routine errors, systematic errors, patterns of errors and potential violations of fraud and abuse laws. Both self-disclosure programs advise that minor and insignificant matters should be addressed through administrative billing processes. However, the OMIG Guidance strongly warns against attempting to avoid self-disclosure when facts warrant its use. Acknowledging the complexity of issues surrounding self-disclosures, the Guidance recommends providers consider obtaining the advice of experienced health care legal counsel or consultants.

Upon discovering an overpayment and deciding to disclose, the Guidance directs a provider to make an initial report including, at a minimum, the context of the problem, the rules potentially implicated and corrective actions taken. This report can be made via telephone or formal letter, or providers can use the OMIG's self-disclosure form, which is available on its Web site. After consideration of the initial disclosure, the OMIG will determine the appropriate process for proceeding, but providers should be prepared to present a detailed summary of the underlying cause of the issue and corrective actions, a detailed list of the claims that comprise overpayments and the names of individuals involved. Assuming full cooperation on the part of the provider, the OMIG estimates the disclosure process will be completed within six months of submission.

During an investigation, providers are expected to reply promptly to the OMIG's requests to provide documents and generally to be cooperative with respect to supplying relevant facts and evidence. The Guidance states that a "lack of information may make it difficult for the OMIG to determine the nature and extent of the conduct which caused the improper payment," but notes that the OMIG will work with provider's counsel to find ways to gain access to those facts without requiring the waiver of privilege.

Finally, the Guidance discusses payment terms, noting that OMIG expects the provider either to reimburse the state of New York for the overpayment with a check for the full amount or to enter into a repayment agreement. Input on the repayment amount and the need to pursue further administrative action will be sought from the provider's respective state oversight agency. The Guidance notes that the OMIG will work with providers to establish repayment terms, which may include some forgiveness of interest and/or extended repayment. OMIG's determination will be based on several factors such as the nature of the problem, the dollar amount involved, the effectiveness of the provider's compliance program and the provider's efforts to prevent the problem from recurring.

Of note, Sheehan has pledged $322 million in fiscal year 2009 Medicaid fraud and abuse recoveries. In this environment, it is of paramount importance that providers in New York state be familiar with the many initiatives taken by the OMIG, including mandatory compliance programs and the self-disclosure program. The Guidance and disclosure forms can be accessed at http://www.omig.state.ny.us/.

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