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NEWSLETTER OF THE HEALTHCARE INDUSTRY PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

### CLIENT ALERT – New York State Publishes Proposed New Compliance Program Requirements for Medicaid Providers

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#### Background

On January 14, 2009, the New York State Office of the Medicaid Inspector General (OMIG) published a proposed rule in the *New York State Register* governing mandatory compliance programs for Medicaid providers. When finalized, the regulations will implement Section 363-d of the NYS Social Services Law, enacted in 2006, which requires Medicaid providers to develop and implement compliance programs aimed at detecting fraud, waste and abuse. The proposed rule specifies which providers are required to have compliance programs and the components such programs must contain.

**Comments on the proposed regulations must be submitted to OMIG by February 28, 2009.**

Section 363-d became effective January 1, 2007, for the types of providers specifically listed in the statute. The proposed rule indicates that those providers should fully implement their compliance programs by the time the proposed regulations take effect. Providers not identified in the statute but covered by the OMIG rule will have 90 days from the date the regulations take effect to have a compliance program in place. It is unclear at this time when a final rule will be issued.

Federal law requires entities with \$5 million in annual Medicaid revenues to adopt policies and implement employee and vendor education programs designed to detect and prevent Medicaid waste, fraud and abuse. The New York State law and regulations, however, apply to a broader range of

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organizations and require covered entities to adopt a more comprehensive compliance program.

### **Providers Required to Adopt Compliance Programs**

The statute requires entities licensed under Article 28 or 36 of the Public Health Law or Article 16 or 31 of the Mental Hygiene Law to maintain compliance programs. These entities include hospitals, nursing homes, diagnostic and treatment centers, home health agencies, mental health clinics, and providers of services to mentally retarded and developmentally disabled individuals.

The statute grants OMIG the authority to identify other types of organizations doing substantial business with Medicaid that are subject to the statutory mandate. The proposed rule extends the mandate to any entity that orders, submits claim,s or receives payment for services or supplies under Medicaid with a value of at least \$500,000 annually. It also covers companies that submit bills to Medicaid on behalf of such entities. The proposed rule, therefore, would apply to smaller health care providers and billing companies that are not expressly subject to the statute.

### **Scope of Compliance Programs**

The proposed rule would require all "required providers" to adopt compliance programs addressing, among others, the following issues:

- billing
- payment
- medical necessity and quality of care
- governance
- mandatory reporting
- credentialing
- other risk areas that the provider should identify using due diligence

### **Required Elements of Compliance Programs**

The proposed rule sets out the required elements of a compliance program. The elements are familiar, tracking the compliance plan principles frequently articulated by the federal Health and Human Services Office of the Inspector General (HHS OIG). They include:

- Written policies and procedures on compliance;
- Designation of a compliance officer with direct reporting

to senior leadership and the organization's governing body;

- Training and education of employees and others on compliance issues;
- Communication lines to the compliance officer that are accessible and allow for anonymous reporting;
- Disciplinary policies to encourage compliance, including sanctions for failing to report problems;
- Systems for routine identification of compliance risk areas specific to the provider type;
- Systems for investigating and responding to compliance issues as they are raised and for self-reporting; and
- A policy of non-intimidation and non-retaliation for good faith reporting of suspected violations and participation in the compliance program.

In addition to describing the common elements of an appropriate compliance program, the proposed rule indicates that OMIG will be publishing compliance program guidance for specific types of required providers. To date, OMIG has published compliance guidance for hospitals, and guidance for health plans is expected to be issued shortly.

Providers would have to certify annually that they maintain a compliance program meeting all applicable requirements.

The proposed rule gives OMIG and the Commissioner of Health the authority to audit providers and determine the adequacy of any provider's compliance program. However, it also provides that any compliance program "accepted" by the federal HHS OIG shall be deemed in compliance with NY State requirements. It is unclear what "acceptance" means in this context.

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#### FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:



[Robert D. Belfort](#) Mr. Belfort has extensive experience representing healthcare organizations on regulatory compliance and transactional matters. He has particular expertise in issues around Fraud and Abuse, HIPAA and Health Information Privacy and Managed Care and Compliance. His clients include hospitals, community health centers, mental health providers, pharmacy chains, health insurers, IPAs, pharmaceutical manufacturers, pharmacy benefit managers, information technology vendors and a variety of other businesses in the healthcare industry.



[Andrea G. Cohen](#) Ms. Cohen provides advice on legal issues, policy, advocacy and strategy to healthcare and not-for-profit clients. Before joining Manatt, she served as Health and Oversight Counsel to the U.S. Senate Finance Committee, where she members of the Committee on legislative and investigative matters relating to Medicaid, Medicare, and the Children's Health Insurance Program. In that role, she participated actively in negotiating and drafting the Medicare Modernization Act of 2003.

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