

New York Office of the Medicaid Inspector General Issues Proposed Compliance Plan Regulations

On January 14, 2009, New York's Office of the Medicaid Inspector General (OMIG) published long-anticipated [proposed regulations](#) requiring providers that participate in the state's Medicaid program to have "effective compliance plans." When issued in final form, the regulations will implement—after a delay of several years—the OMIG's obligation to establish compliance program guidance under its 2006 enabling statute (i.e., Section 363-d of New York's Social Services Law). The proposed rule is subject to a public comment period of 45 days. After taking into account comments, OMIG will issue a final rule, which, in turn, will become binding only when 90 days have elapsed from publication of the final rule.

Scope

The proposed rule mandates adoption of a compliance program meeting the OMIG's specifications by any facility licensed under Articles 28 or 36 of the Public Health Law (including general hospitals, nursing homes and home care agencies); agencies that serve the mentally ill or the developmentally disabled under Articles 16 or 31 of the Mental Hygiene Law; and any "other persons, providers or affiliates who provide care, services or supplies" under the Medicaid program to the extent that Medicaid payments constitute "a substantial portion of their business operations." (Emphasis added). "Substantial portion" is defined expansively to include any entity that receives, claims or orders \$500,000 or more from Medicaid in any consecutive 12-month period, either directly or on behalf of another person. Therefore, the OMIG intends its guidance to apply to a vast number of providers, suppliers, practitioners and even third-party billing companies—covering, according to its estimate, approximately 95% of Medicaid billings in the state.

Mandatory Compliance Program Elements

The proposed rule sets forth the following eight elements, closely modeled on the HHS Office of Inspector General's long-standing hospital guidance, that a compliance program must contain to be deemed "satisfactory" by the OMIG and avoid sanction:

- Written policies and procedures, including a code of ethics for employees;
- A designated compliance officer with direct reporting to the entity's chief executive officer or another senior administrator designated by the chief executive;
- Periodic training and education for all affected employees, senior executives and members of the governing body;
- Open lines of communication for addressing employees' compliance concerns;
- Disciplinary policies that are fully and fairly enforced to encourage participation in the compliance program;
- Internal auditing and monitoring of compliance risks;

- Procedures for promptly identifying, investigating and correcting compliance problems when raised, including self-reporting to the OMIG or the State Department of Health and refunding overpayments; and
- Non-intimidation and non-retaliation policies for employees who report compliance program elements.

Background and Additional Information

In commentary to the rule, the OMIG states that it is developing “compliance guidance for various types of providers” to be posted on the OMIG’s website when completed. In contrast with the generic, high-level guidance of the proposed rule, this website information is expected to be provider-specific and thus may prove more detailed and prescriptive. In any case, given the severe sanctions that the OMIG may visit on providers whose compliance programs are found to be deficient—up to and including revocation of their Medicaid numbers—all Medicaid-participating providers in New York are well advised to take a fresh look at their current compliance efforts. Providers will be required to certify that a satisfactory compliance program is in place as part of the Medicaid provider application process and each December thereafter.

If you have questions about the proposed OMIG regulations or the adequacy of your compliance program, please contact your regular Ropes & Gray attorney.

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