

Mr. James G. Sheehan
Medicaid Inspector General
Office of the Medicaid Inspector General
800 North Pearl St.
Albany, NY 12204

August 16, 2010

Dear Mr. Sheehan:

We write on behalf of our clients, the Healthcare Association of New York State, the New York Association of Homes and Services for the Aging, the New York State Health Facilities Association, the Home Care Association of New York State and the Greater New York Hospital Association and their collective memberships to address a recent action of the Office of the Medicaid Inspector General (OMIG), specifically the assertion that a Medicaid Update has the force of law and that providers are thus required to screen for excluded providers each month "at a minimum." We believe it would be productive if we could meet with you to discuss the implications of this action.

Background: Communications Regarding Exclusion Checks

In a June 2010 webinar presented by the OMIG, the obligation to comply with statements in the Medicaid Update was asserted to be a "condition of participation" in the New York Medicaid program. The underlying April 2010 Medicaid Update was then asserted to have the force of law. This was the first time that such a statement had been made of the Medicaid Update's significance. Providers routinely refer to the Medicaid Update for information and, at times, clarity, and we have always advised our members and clients that they should monitor and comply with the notices in the Medicaid Update. However, it has never been held out as a binding document.

Moreover, the April 2010 Medicaid Update – in addition to having the inherent limitations of a Medicaid Update described below – merely included a short "reminder" of providers' obligations to review the exclusion lists posted by the OMIG, Office of the Inspector General (OIG) and General Services Administration (GSA) to determine if individuals or entities have been excluded from participating in the Medicare or Medicaid program or barred from contracting with the federal government. In the Medicaid Update, the OMIG indicates that providers "should" rescreen employees monthly "at a minimum" but no authority is cited for this statement.

During the webinar, the OMIG referred to a January 2009, Centers for Medicare and Medicaid Services (CMS) "Dear State Medicaid Director" letter regarding screening for excluded persons. In that letter, CMS indicates that states "should advise" Medicaid providers to screen for exclusions and specifies that "states should require providers to search the HHS-OIG website monthly," yet we are not aware that any such advice was given to New York's Medicaid providers from the State. This letter also warns states that the federal government will not reimburse them for the federal share of Medicaid funds paid to excluded individuals or entities, but it does not go further to establish a provider directive, and it certainly does not confer additional regulatory or other authority to the states for agency rulemaking.

Finally, we note that the OMIG also referenced other guidance documents, including a prior State Medicaid Director Letter and prior Medicaid Updates to support its statement that providers are required to go through the screening process monthly. However, none of these documents mentioned a monthly screening requirement.

Medicaid Update: Limitations of the Publication

Thus, the OMIG appears to be grounding its argument in the issuance of the April 2010 Medicaid Update. However, this document is not intended to have, as the OMIG claims, the force of law, and, while recognizing the legitimacy of the Medicaid Update as a means of transmitting information, we are concerned about characterizing adherence to Medicaid Update notices as a requirement of the Medicaid program and characterizing its contents as equivalent to a rule or regulation. Though the Updates have been used to clarify existing regulatory requirements and to explain Medicaid program policies, the contents of the Updates are not themselves rules or regulations, and the Updates certainly do not satisfy the notice, comment and publication requirements of agency rule making. Indeed, we are not aware of any public process that goes into the development of the Update.

Rather, the Medicaid Update is a monthly publication by the Department of Health (DOH) regarding Medicaid program issues. It is a self-described "newsletter" on issues of interest to any and all persons or entities participating in the Medicaid program. The Medicaid Updates contain a host of technical and sundry information -- names and addresses, contact information, practical tips -- that is supposed to help providers navigate the shoals of the Medicaid system. It has not been used nor was intended to serve as a vehicle for imposing new provider requirements, beyond those contained in the regulations. What is more, successive Medicaid Updates can and do change the content of prior articles. OMIG's position, if accepted, would mean that Medicaid provider requirements may change on a monthly basis and that providers must comply with a constantly changing landscape of requirements without notice or opportunity for input.

Incidentally, we note that the Medicaid Updates are transmitted electronically and stored on the DOH Web site. That Web site, however, includes a blanket caveat indicating that DOH does not "guarantee or warrant that the information on this web site is complete, accurate or up-to-date." It is difficult to accept that the content of the Medicaid Update must be implemented and may be enforced, given DOH's description and explicit refusal to assume responsibility for subsequent use of information posted in the Update.

Nonetheless, the OMIG is asserting that adhering to the Medicaid Update is a "condition of participation," based on the provider claim certification form providers are required to submit. This claim form, however, is also written unilaterally by New York State; providers have no input

or ability to negotiate this so-called contract. We note too that the certification form includes language discussing compliance with applicable rules and regulations, bulletins and other publications of the Department of Health, among other things.

In articulating and differentiating between these different sources of information, the certification form underscores our concern: a rule or regulation differs from an online publication, and they must be treated accordingly. Providers of course strive for substantial compliance with all program requirements, but it is simply not the case that the mention of an issue in a Medicaid Update makes it equivalent to a regulation or law. Finally, we note that the regulatory basis for the certification form in question is found in 18 NYCRR §540.7(8). Yet that regulation refers only to compliance with the Civil Rights Act of 1964. Thus, the scope of a provider's attestation recited on the form on which the OMIG appears to rely far exceeds the scope of attestation in the regulation on which it is based, again suggesting that the certification form is created arbitrarily.

Confusion Stemming From the Medicaid Update

We are also genuinely confused by the "guidance" included in the April Medicaid Update. Bluntly, we are uncertain as to what providers are *required* to do. We question whether the April article is indeed guidance from OMIG, reminding providers that they *should* check exclusion lists monthly at a *minimum* as is written, or is considered a requirement that they *must* follow as was verbally asserted. The language used is ambiguous. Previous federal and state communications as well as Corporate Integrity Agreements entered into by the OIG and (until recently) OMIG -- with individuals and entities identified as warranting heightened oversight and scrutiny -- have required checking lists annually or every six months. Until the April Medicaid Update, providers had not been informed that monthly checks were required, so that the monthly-check "reminder" had no precedent in the New York Medicaid program. Though providers endeavor to proceed appropriately in all of their relationships, it is both fair and meaningful to advise them of their legal obligations -- which should be provided with appropriate notice and opportunity for input -- versus desired best practices.

Further, in a Question and Answer document posted on the OMIG web site, OMIG states that the Medicaid Update article is "in effect" now. We are uncertain as to how this statement would play out. Would a provider's failure to check the exclusion lists monthly "at a minimum" subject the provider to sanctions, regardless of whether any excluded individual or entity is ever employed or used by the provider? OMIG's statement that the article is a "reminder" and the Department of Health's treatment of Medicaid Updates as "information" suggest that the article is a recommended best practice, but not an enforceable regulatory requirement. Conversely, OMIG's statement that the Medicaid Update directive is "in effect" and compliance is mandatory, indicates that OMIG intends to enforce the "reminder" as if it were a rule or regulation. Again, providers would appreciate and deserve clarity.

Member providers have also raised other practical implementation questions and logistical difficulties regarding this directive which we would be happy to share with you when we meet.

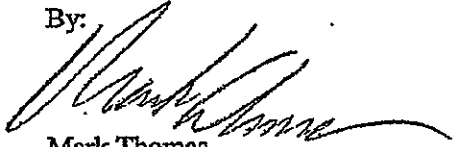
We would welcome the opportunity to meet with you to discuss the foregoing and to explore alternative ways to achieve our shared compliance objectives.

Thank you for your consideration and we look forward to hearing from you.

Very truly yours,

Healthcare Association of New York State
Home Care Association of New York State

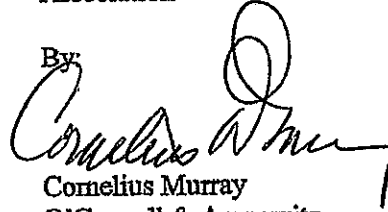
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