

OMIG PROPOSES DETAILED SELF-DISCLOSURE PROGRAM REGULATIONS

On July 13, 2022, the New York State Office of the Medicaid Inspector General (“OMIG”) published a significant set of proposed compliance-related rules. If finalized, the new rules would repeal the existing regulations governing provider compliance programs (found in 18 NYCRR Part 521), and replace them with three new subparts concerning, respectively: (i) Compliance Programs (proposed 18 NYCRR Subpart 521-1); (ii) Medicaid Managed Care Organization Fraud, Waste and Abuse Prevention (proposed 18 NYCRR Subpart 521-2); and (iii) OMIG’s Self-Disclosure Program (“SDP”) (proposed 18 NYCRR Subpart 521-3).

In a [prior Alert](#), we addressed the newly proposed compliance program regulations. This Alert addresses OMIG’s proposed SDP regulations. These proposed regulations follow the 2020 statutory amendments to NY Social Services Law (“SOS”) § 363-d that expressly codified into New York law the obligation to report, return and explain Medicaid overpayments and outlined requirements relating to OMIG’s SDP. While OMIG self-disclosures have been common for years, and the amendments to the SOS are more than two years old, the proposed regulations amplify the SOS’s requirements, and create the first defined regulatory framework governing New York’s Medicaid program self-disclosure process.

Highlights of OMIG’s newly proposed SDP rules include the following:

- **Reporting, Returning and Explaining Overpayments.** Consistent with existing law under both the SOS and the federal Patient Protection and Affordable Care Act (“ACA”), the proposed regulations mandate that any “person” (including providers and Medicaid Managed Care Organizations and their subcontractors or network providers) who has received an overpayment under the Medicaid program (either directly or indirectly) report, return and explain the overpayment. Also consistent with the SOS and the ACA, the deadline for reporting, returning and explaining the overpayment (and interest, if applicable) is the later of (i) sixty (60) days after the date on which the overpayment is “identified,” or (ii) the date any corresponding cost report is due, if applicable. The proposed regulations mandate the “submission of a Self-Disclosure Statement” to the OMIG SDP in order to satisfy this obligation.
- **SDP Eligibility.** The proposed rules specify when a person is “eligible” to participate in OMIG’s SDP. Specifically, under the proposed rules, a person is eligible to participate in the SDP if the person: (i) is not currently under audit, investigation or review by OMIG or if the overpayment being disclosed does not relate to an existing audit, investigation or review; (ii) is disclosing an overpayment and related conduct that OMIG has not identified at the time of the disclosure; (iii) reports the overpayment and related conduct by the deadline for doing so; *and* (iv) is not currently a party to, or the subject of, any criminal investigation related to their participation in the Medicaid program being conducted by the Medicaid Fraud Control Unit or a United States government agency. Significantly, however, the proposed rules also make clear that, *regardless of “eligibility,”* if an overpayment has been received, a Self-Disclosure Statement must be submitted to OMIG. Under the proposed rules, OMIG may, in its discretion, consider a self-disclosure as a mitigating factor in an administrative enforcement action or as a factor in determining whether the person has adopted and implemented an effective compliance program.
- **Submission Requirements.** The newly proposed regulations also detail what must be contained in a Self-Disclosure Statement. This includes, among other things, an estimate of the amount of the overpayment, a “detailed” explanation of the reason the person received the overpayment, whether the person is requesting to pay through installment payments and/or is requesting a waiver of applicable interest, and the person’s “agreement to return the full amount of the overpayment and interest if applicable, as determined by OMIG.” If installment payments are requested, OMIG may require financial or other supporting records. The proposed rules specify that the Self-Disclosure Statement must be signed by the Compliance Officer, if the provider is required to have a compliance program under New York law (*i.e.*, is a “required provider”); otherwise, the Self-

Disclosure Statement may be signed by the CEO, COO, a senior manager or, if a sole practitioner, by the practitioner.

- **Time Periods.** The proposed rules also formalize specific time periods relating to the SDP, including as to:
 - **Receipt and Review.** Under the proposed rules, OMIG must acknowledge receipt, review the Self-Disclosure Statement and consider requests for a waiver of interest and/or repayment through installment payments, and complete its “preliminary review” within twenty (20) days of the submission. Once OMIG has completed its review of the Self-Disclosure Statement, it must notify the person whether the submission is accepted or if it is found to be incomplete.
 - **Tolling.** The deadline for reporting, returning and explaining an overpayment is tolled when OMIG acknowledges and accepts a Self-Disclosure Statement – and will remain tolled until: (i) a Self-Disclosure and Compliance Agreement is fully executed; (ii) the person withdraws from the SDP; (iii) the person repays the full amount of the overpayment along with any interest due, as determined by OMIG after its review; or (iv) OMIG terminates the person’s participation in the SDP. For Medicaid Managed Care Organization overpayments, the obligation to report, return and explain overpayments is satisfied if the deadline for doing so is met by reporting and returning the overpayment to the Medicaid Managed Care Organization.
 - **Requests for Additional Information.** OMIG may, at any time, request additional information or data, and a response must be received within fifteen (15) days of the date of OMIG’s notice, or a longer period of time if extended by OMIG for “good cause.”
- **Self-Disclosure and Compliance Agreement (“SDCA”).** The proposed rules create what OMIG refers to as a SDCA. Currently, OMIG either issues a “final letter” requiring repayment in connection with self-disclosures, or in certain cases, enters into what it refers to as a “Repayment Agreement” or “Stipulation of Settlement” with the provider. Under the proposed rules, a SDCA is defined as a “stipulation of settlement” that constitutes “a binding contract between the [disclosing] person and OMIG” and includes, at minimum: (i) an agreement to repay the overpayment and interest, if applicable, as determined by OMIG, (ii) an agreement to make all installment payments on time (if applicable), and (iii) identification of, and agreement to implement, any corrective actions to prevent recurrence of the issues that caused the overpayment. How a SDCA may differ from existing OMIG agreements resolving self-disclosure matters remains to be seen. The proposed rules also require that a SDCA be executed, returned and received by OMIG within fifteen (15) days of receipt, unless OMIG permits otherwise. If the timeline for executing and returning the SDCA is not met, participation in the SDP “shall be terminated.” Among other things, under the proposed rules, such termination ends the tolling of the deadline within which one must return the overpayment.
- **Enforcement.** The proposed rules also reiterate the SOS’s admonition that a failure to report, return and explain an overpayment by the deadline may result in significant monetary penalties pursuant under New York law – as well as other sanctions or penalties under applicable law.

A copy of the proposed regulations may be found here: <https://omig.ny.gov/information-resources/laws-and-regulations> (see proposed 18 NYCRR Subpart 521-3). **The comment period for the proposed regulations runs until September 12, 2022.**

Garfunkel Wild routinely advises its clients on self-disclosures to OMIG, to the U.S. Department of Health and Human Services, Office of Inspector General, to Medicare Administrative Contractors, and to managed care and other payers. Should you have any questions regarding self-disclosures or this Alert, please contact the [Garfunkel Wild attorney](#) with whom you regularly work, or contact us at info@garfunkelwild.com.

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