INFORMATION UPDATE ON PROPOSED UNIVERSAL SETTLEMENT

Introduction

The State and nursing home industry attorneys have agreed upon the terms of a proposed settlement whereby, in exchange for surrendering most of their rate appeals and lawsuits against the State, facilities would receive $850 million in the aggregate in five annual equal installments of $170 million each, most likely commencing in either fiscal year 2014-2015 (4/1/14 - 3/31/15) or state fiscal year 2015-2016 (4/1/15 – 3/31/16). A "term sheet" is attached that summarizes the proposed Agreement, which cannot be achieved, however, unless all[1] facilities agree to its terms. Also attached is a separate sheet that sets forth what the aggregate amount your individual facility would receive under this Agreement were the settlement to be implemented.

Very soon your facility will be asked to agree or not to agree to the settlement as outlined in the term sheet. In an effort to answer any questions, the following is a section-by-section analysis to help each facility make an informed decision.

Section 1. Claims, Appeals and Litigation Covered by the Settlement

This section details the types of rate appeals and lawsuits that would be given up in the event the Facility were to agree to accept the settlement. With the exception of certain designated appeals and lawsuits set forth in Sections 8 and 9 (to be discussed later), each settling facility must agree to give up all other existing or potential rate appeals and lawsuits affecting any rate periods prior to January 1, 2012 (the beginning of state-wide pricing [SWP]). In addition, they would surrender any rate appeals (except for computational errors) and lawsuits affecting rate periods after January 1, 2012 that relate to the Wage Equalization Factor, Medicare Part B offsets, Reserve Bed Days, Rebasing, Scaleback and The Medicaid Global Cap. In addition, facilities would not be able to bring any actions to force the State to act on rate appeals until after the last installment of $170 million is paid.

Section 2. Payments.

This section confirms that total payments of $850 million will be paid over five years in equal installments of $170 million / year. The $170 million to be paid out annually would come from three sources – (a) $50 million from money the Department of Health (DOH) typically sets aside to resolve litigation claims on an annual basis; (b) $50 million DOH typically sets aside to pay rate appeals on an annual basis; and (c) $70 million drawn from the .8% revenue assessment paid by all facilities in lieu of the 2% rate cut. Note that recent legislation repealed the 2% rate cut, but kept in effect the .8% revenue assessment. Payment will be made "off-line" in a lump sum separate and apart from whatever else facilities receive through the Medicaid reimbursement

[1] The Agreement actually contemplates "universal" industry acceptance, but the State, in its discretion, may agree to its terms even if there is less than 100% acceptance. Should the State agree to settle despite the absence of 100% acceptance, facilities that decline the offer obviously will not receive their share of the funds otherwise available, but will nevertheless preserve all their rights to continue their rate appeals and/or litigation on their own.

system. Thus, it is not a rate add-on and will not be included in benchmark rates for future reimbursement from managed care organizations.

Section 3. Future Appropriations.

The Governor is required to include each year's appropriation in his Executive Budget. There exists a possibility that future Legislatures may not appropriate the money necessary to fund this agreement for a given year, but the agreement requires the Governor to pledge his best efforts to do so (NYSHFA believes that it is highly unlikely that the Legislature will fail to appropriate such funds in future years, but this is nevertheless a potential risk).

Section 4. Recoupment.

The State will provide a list of all debts it believes are due and owing from facilities to the State. Any funds otherwise due facilities pursuant to this Agreement may be offset (recouped) by the amount of such debts, provided, however, that in fiscal year 2014-15 the State may offset no more than 70% of the funds due the provider in that year pursuant to this Agreement. The State agrees, however, to pursue recoupment against the facility's Medicaid rate before recouping against payments due under this Agreement. Facilities reserve the right to challenge the basis for any such recoupment and no such recoupment shall be made against a prior owner with respect to debts owned by a current owner of any facility.

Section 5. Cash Receipts Assessment.

Any payments attributable to a current owner are subject to the cash receipt assessment. But payments to prior operators shall not be subject to such assessment.

Section 6. Payment Schedule.

This section confirms the payout schedule of $170 million / year beginning with State Fiscal Year 2014/15, provided, however, that if such amount would pierce the global cap, payments may be deferred until the next fiscal year with the understanding that the full amount of $850 million will be paid out even if some payments have to be pushed into a sixth year.[2]

Section 7. Withdrawal of Equity.

All funds received by operators pursuant to this Agreement shall be subject to the same prohibitions against unauthorized withdrawals of equity as are set forth in Public Health Law § 2808(5) with respect to any other withdrawals.

Section 8. Excluded Rate Appeals.

This section contains a list of all rate appeals that facilities are not giving up, even if they enter into this Agreement, assuming a Facility identifies them in accordance with Paragraph 10 of this Agreement (to be discussed later herein). Also be aware that certain appeals, even if filed

[2] There exists the possibility that the State may make the first two installments of $170 million in the same Fiscal Year.

after the advent of statewide pricing (January 1, 2012) are nevertheless being surrendered as set forth in § 8.11. Those pertain to the Wage Equalization Factor, Medicare Part B offsets, Reserve Bed Days, Rebasings / Scaleback (unless they relate solely to computational issues). Note also that Specialty Facility rates are not subject to nor barred by this settlement.

Section 9. Excluded Litigation.

This section clarifies that the so-called base price settlement is NOT part of this Agreement and that facilities may receive additional funds pursuant to that Agreement over and above what they receive in this Agreement. Also, any lawsuits challenging rates effective after January 1, 2012 pursuant to the statewide pricing methodology are not being surrendered unless they relate to the Wage Equalization Factor, Medicare Part B Offsets, Reserve Bed Days, Rebasing / Scaleback, compelling DOH to act on a rate appeal during the settlement pay out period and The Global Cap. That would not, however, prevent mere computational errors from being challenged. Note also that Specialty Facility rate litigation is not barred nor subject to the settlement.

Section 10. Process for Excluding Rate Appeals and/or Lawsuits.

This is a **CRUCIAL** section that needs to be understood by all facilities, and especially those with rate appeals and/or lawsuits that they think are outside this Settlement Agreement and otherwise preserved in accordance with Sections 8 and 9 of this Agreement. Section 10, however, states that even if facilities have such rate appeals and/or lawsuits that would otherwise be preserved, they will nevertheless also be forfeited unless facilities specifically identify them to DOH before the effective date of this Settlement Agreement (the date when DOH signs off) in accordance with the procedures outlined in § 10. **THIS IS VERY IMPORTANT**.

Section 11. Office of the Medicaid Inspector General (OMIG).

OMIG is a party to this Agreement, and agrees to discontinue and/or not commence any new audits, investigations or reviews of rate appeals and lawsuits settled by this Agreement unless there is credible evidence of fraud and/or abuse. In the event of any such review, investigation or audit with respect to fraud or abuse, facilities have the right to challenge and file any rate appeals as otherwise authorized by State Medicaid reimbursement regulations which allow certain rate appeals to be filed at the time of any audit (*See*10 N.Y.C.R.R. § 86-2.13[a]).

Section 12. No Collection or Enforcement.

Anything settled pursuant to this Agreement shall not be subject to further enforcement or collection by OMIG or the State.

Section 13. Releases.

Facilities agree to sign the necessary releases to ensure that the State is relieved of any other obligations (except those in this Settlement Agreement) with respect to the rate appeals and lawsuits being settled.

Section 14. Indemnity.

Any current operators receiving money pursuant to this Agreement shall indemnify (hold harmless) the State against any claims made by former operators with respect to any rate appeals or lawsuits settled by this Agreement.

Section 15. CMS Approval.

This Agreement is subject to and contingent upon approval by the Federal Centers for Medicare and Medicaid Services (CMS) which must also agree to participate in the financial settlement in accordance with the formula for federal participation in State Medicaid reimbursement (*i.e.*, the Federal Match).

Section 16. Universal Participation.

All facilities must agree to the settlement (but see Section 18 to be discussed below).

Section 17. No New Rights.

This Settlement Agreement doesn't create any new rights or obligations other than those necessary to effectuate the terms of this Agreement.

Section 18. Reservation of the State's Rights.

The State can elect not to participate in this Agreement if any facilities fail to agree, but may decide to nevertheless settle, in its sole discretion, if in the State's opinion a sufficient number of facilities have agreed to settle.

Section 19. Failure to Settle.

If there is no settlement, nothing proposed in this Agreement shall be used as evidence against either party and none of its terms is enforceable.

Section 20. Proposed Legislation.

The Governor will propose legislation extending the current moratorium and $80 million cap on rate appeals, as it currently exists, until March 31, 2019 – which is a four year extension. $50 million of the $80 million will be used to fund part of the Settlement as set forth in Section 2.2(ii) of this Agreement.

Any questions relative to the terms of this Settlement may be addressed to NYSHFA's general counsel, Cornelius D. Murray, at (518) 462-5601, extension 3305, or via his e-mail address, cmurray@oalaw.com.