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EMAIL ALERT

- **New Requirements for ASC Private Placements in the Dodd-Frank Wall Street Reform and Consumer Protection Act**
- **New Professional Liability Insurance Requirements under the Colorado Health Care Availability Act**

New Requirements for ASC Private Placements in the Dodd-Frank Wall Street Reform and Consumer Protection Act

On July 21, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act, which passed the Senate by a vote of 69-30. Senators Mark Udall and Michael Bennett voted in support of the measure. Although the media has portrayed the Act as applicable to the financial services industry alone, the Act has a broader impact than most people realize.

For-profit healthcare provider entities often utilize Regulation D, Rules 505 or 506, of the Securities Act of 1933, which exempt certain types of private placement offerings from registration under the Securities Act. ASC limited liability companies often take advantage of this exemption, directing offerings of membership interests toward “accredited investors” – individuals with sufficiently high income or net-worth (*e.g.*, physicians) – to avoid registration of the membership interests as securities. Registration, of course, would add complexity and cost to the offering of investment interests.

Precisely, the definition of “accredited investor” includes individuals whose net worth (or joint net worth with a spouse) exceeds \$1 million. While the Act retains this existing net-worth threshold, prospective potential investors must exclude the value of their primary residence from the net-worth calculation. If using this net-worth exemption, the potential investor must now have a net-worth of more than \$1 million over and above his / her home equity. Although the value of primary residences may have been impacted by the recession, many Americans continue to rely on their primary residence as their main investment.

The new calculation requirement took effect on July 21, and will not impact any private placements already completed. But any pending private placements must reject investors that do not meet the new calculation requirement. This change will eliminate many investors, especially in states where home values are high, from meeting the “accredited investor” definition based solely on net worth. The alternative high income definition as applied to annual earnings (\$200,000 / \$300,000) has not changed, but

the SEC retains the ability to modify this definition through administrative rulemaking, and many analysts expect the SEC to increase these amounts in the future.

New Professional Liability Insurance Requirements under the Colorado Health Care Availability Act

As a condition of licensure by the Colorado Department of Public Health and Environment, Health Facilities Division (CDPHE), all licensed Colorado health care facilities, including ASCs, must comply with the financial responsibility requirements of the Health Care Availability Act (HCAA). The HCAA, which was enacted as part of the 1988 tort reform legislation, requires commercial professional liability insurance coverage with a minimum indemnity amount of \$500,000 per incident and \$3,000,000 annual aggregate per year or, in the alternative, the approval for an alternative plan of financial responsibility from the Commissioner of Insurance in the form of: (a) a surety bond; (b) deposit of cash or cash equivalents; or (c) other acceptable security, including an approved self-insurance plan.

The financial responsibility requirements of the HCAA were recently amended by House Bill 10-1227, which became effective upon the Governor's signature on April 15. These amendments codified the policy adopted by CDPHE for health care facility license applications or renewals received after January 1, 2010 and require the Division of Insurance (DOI) to review and approve all professional liability policies that include a deductible¹ or a self-insured retention² (SIR) to assure that such arrangement qualifies as an alternative financial arrangement under the HCAA. CDPHE's and DOI's interpretation of the amendment are not fully resolved. Insurance policy periods do not normally coincide with license renewal dates, so insurance coverage may have to be changed during the policy year to comply with the new changes.

Miles & Peters met with representatives of DOI to discuss the amendments to the HCAA and any interpretative policies that may

¹ A "deductible," is an agreement between the insured and the insurance carrier that the insured will pay a certain amount of any claim. It is usually distinguished from an SIR by virtue of the requirement that the carrier is fully liable to the claimant for the entire amount of the claim. The insurance carrier then seeks reimbursement from the insured for the amount of the deductible.

² An SIR means that insurance carrier does provide coverage until the SIR amount has been incurred and paid by the insured. In other words, the insured is responsible for any first dollar coverage for claims or costs associated with the insurance claim up to the amount of the SIR. The insurance carrier is then liable for payment of claims and costs incurred in excess of the SIR amount.

have been adopted by the DOI to review the insurance policies or alternative financial arrangements. DOI has advised that it will look at the professional liability policies differently depending upon whether they have a deductible or an SIR. For those policies with deductibles, DOI indicates it will require only clear language in the policy or an endorsement from the insurance company stating that the insurance company will pay all claims within the deductible amounts and seek reimbursement from the insured. However, for policies with an SIR (or presumably a non-qualifying deductible), DOI will require an alternative financial arrangement as described under DOI Regulation 2.1.1, Section 4, for the amount of the SIR, which requires review and approval of an alternative plan of financial responsibility.

CDPHE and DOI also have interpreted these changes to require each licensed health care facility to maintain these minimum indemnity requirements under separate insurance policies. This creates a problem for facilities licensed as both an ASC and a Convalescent Care Unit (CCU) that operate out of a single entity because separate insurance policies are not available from commercial insurance carriers for a single entity. A meeting with representatives of CASCA and CDPHE to address the separate insurance policy requirements for organizations operating as both an ASC and a CCU is being planned. Because the HCAA exempts “extended care facilities” having less than 16 licensed beds / rooms, CASCA has notified CDPHE that the CCU license should not be required to maintain a separate insurance policy. CDPHE has taken this issue under advisement and reports that it will respond shortly.

When planning for ASC license renewal or renewal of insurance coverage, the professional liability insurance policy must meet the following requirements:

1. For professional liability insurance coverage through a commercial insurance policy with a deductible, the ASC should carefully review the language in the policy and, if necessary, ask the insurance carrier about including an endorsement to the policy stating that the carrier will pay any and all claims covered the deductible and will seek reimbursement of the deductible amount directly from the insured.
2. For arrangements with a non-qualifying deductible or an SIR, the ASC should: (a) provide a surety bond to the Commissioner of Insurance; (b) deposit cash or cash equivalents with the Commissioner of Insurance; or (c) prepare the necessary documentation required under DOI Regulation 2.2.1, Section

4(F), for review by DOI at least 60 days prior to the license renewal date.

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