

June 2013

Fourteen Years Later: New OIG Guidance on Excluded Providers

In this Issue:

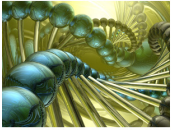
Exclusion from Federal Health Care Programs	1
The New Advisory Bulletin	2
What Providers Should Know	3
For More Information	4

The health care industry now has new guidance on individuals and entities excluded from participation in Federal health care programs. In a [Special Advisory Bulletin](#) issued on May 8, 2013 (“Bulletin”), the Department of Health and Human Services Office of Inspector General (“OIG”) provided updated guidance to providers on what types of relationships with excluded individuals or entities could subject providers to penalties, how best to determine whether an individual or entity is excluded from a Federal health care program and how to limit liability associated with employing or contracting with excluded individuals or entities. The last time the OIG provided a bulletin on the exclusion rule was in a Special Advisory Bulletin from September, 1999.

Exclusion from Federal Health Care Programs

Individuals or entities can be excluded from participation in Federal health care programs for a variety of misconduct, including: being convicted of a program-related crime; submitting false, fraudulent, or otherwise improper claims; or engaging in other types of fraud and abuse. Excluded individuals can be subject to civil and criminal liability, including monetary penalties under the Civil Monetary Penalties Law (“CMP”) and the False Claims Act (“FCA”).

Liability, however, is not limited to just an excluded individual or entity. Both prior



and new OIG guidance explain that a provider may be subject to CMP liability if an excluded individual participates in the furnishing of items or services that are payable by a Federal health care program. CMP liability applies to the furnishing of all categories of items or services that violate the exclusion rule, including direct patient care, indirect patient care, administrative and management services, and items or services furnished at the medical direction or on the prescription of an excluded individual when the provider furnishing the services either knows or should know of the exclusion. Any provider that knowingly employs or enters into contracts with an excluded individual to provide items or services payable by a Federal health care program could also be subject to FCA liability.

To avoid such liability, providers should determine whether an individual or entity is excluded before contracting with or employing such individual and also monitor the exclusion status of current employees and contractors. To aid in making this determination, the OIG maintains a List of Excluded Individuals or Entities ("LEIE"). Although the 1999 Bulletin alerted providers to the LEIE and their affirmative duty to perform exclusion screenings, the OIG did not provide detailed guidance on the screening process until issuing the new Bulletin.

The New Advisory Bulletin

The Bulletin offers information on avoiding situations where a provider would employ or contract with an excluded individual or entity. Relying on more than a decade of experience since the 1999 Bulletin, the OIG provided a number of examples where it claims the prohibition on payment extends beyond direct patient care where excluded individuals:

- Work for or under an arrangement with a hospital, nursing home, home health agency, or managed care entity and provide such services as preparation of surgical trays, or review of treatment plans, regardless of whether such services are separately billable or are included in a bundled payment;

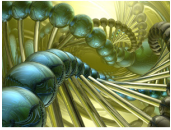
- Input prescription information for pharmacy billing or are involved in any way in filling prescriptions for drugs that are billed to a Federal health care program; or
- Provide transportation services that are paid by a Federal health care program.

The OIG also included examples in the Bulletin where it claims excluded individuals are prohibited from furnishing certain administrative and management services payable by Federal health care programs, even though they are not separately billable, including:

- Serving in an executive or leadership role (e.g., chief executive officer, chief financial officer, general counsel, director of health information management, director of human resources, physician practice office manager, etc.) at a provider that furnishes items or services payable by Federal health care programs; and
- Providing other types of administrative and management services, such as health information technology services and support, strategic planning, billing and accounting, staff training and human resources unless wholly unrelated to Federal health care programs.

While these examples may be consistent with prior OIG guidance and with industry practice, their inclusion





in the Bulletin is helpful to clarify those circumstances providers should be aware of to avoid CMP liability.

In contrast to prior guidance, the Bulletin also provides detailed information on how to determine whether an individual or entity is excluded from a Federal health care program. In particular, the Bulletin suggests and explains that:

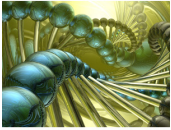
- While the OIG concedes that there are no statutory or regulatory requirements that providers check the LEIE, providers should check the exclusion status of current employees and contractors on a monthly basis.
- Providers should screen all individuals with whom they contract or employ that provide items and services which are in any way payable by a Federal health care program, directly or indirectly, in whole or in part. Particular attention should be given to those individuals that provide patient care, as the potential CMP liability is greatest for these individuals.
- If a provider relies on screening conducted by a contractor of the contractor's employees (who render services to a provider), the provider should confirm that the contractor is in fact conducting the screening for its employees. The Bulletin warns that, regardless of who performed the exclusion screening, providers are subject to overpayment and possibly CMP liability if the provider does not ensure such screening occurred.
- For the purposes of screening, providers should rely primarily on the LEIE and not other government exclusion and debarment lists, such as the General Services Administration's System for Award Management, or other sanction databases, such as the National Practitioner Data Bank and the Healthcare Integrity and Protection Databank. The OIG plans to include the National Provider Identifier in its LEIE database so that providers can verify the exclusion status of individuals without the need for a Social Security Number.

The Bulletin also asserts that providers may use the [OIG's Voluntary Self-Disclosure Protocol](#) to disclose situations where the provider has contracted with or employed an excluded individual. The Self-Disclosure Protocol was recently updated by the OIG to include a discussion of exclusion issues.

What Providers Should Know

- Because of the potential liability, providers should implement a reasonable process for screening employees and contractors against the LEIE; screening for exclusions is a core business function that providers cannot afford to overlook or get wrong.
- Providers should consider incorporating the OIG's new guidance and suggestions into their compliance programs to limit or prevent overpayment and CMP liability related to exclusions, including the OIG's guidance regarding the frequency of screening and determining which employees must be screened.
- While providers should consider screening employees or contractors against other databases for potential exclusions, debarment or sanctions, the LEIE is the primary and most important database to utilize in performing the screening function. ■





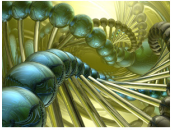
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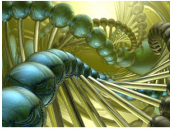
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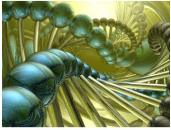
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* Inc. Magazine, September 2012

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