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OIG ISSUES UPDATED GUIDANCE FOR EXCLUSIONS

EXECUTIVE SUMMARY

On May 8, 2013, the Department of Health and Human Services Office of Inspector General ("OIG") issued an updated version of its Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs ("Updated Bulletin"). In September of 1999, the OIG published its original bulletin on this topic designed to provide guidance to individuals and entities that have been excluded from federal health care programs and to providers that employ or contract with an excluded individual or entity ("Original Bulletin"). The Original Bulletin addressed: (1) the scope of the prohibition on contracting with or employing an excluded individual or entity; (2) when a provider could be subject to Civil Monetary Penalties ("CMPs") for violating this prohibition; and (3) the process for screening an individual or entity against the OIG's List of Excluded Individuals and Entities ("LEIE"). The Updated Bulletin provides additional direction on the scope of the payment prohibition and potential CMP liability and provides guidance on best practices for screening individuals and entities against the LEIE. A copy of the Updated Bulletin is available here.

EXCLUSION BACKGROUND

Federal law provides the OIG with the authority to exclude individuals or entities from participating in any federally funded health care program, including Medicare and Medicaid. Any individual or entity that provides or is involved in the provision of, or billing for, services or items that are reimbursable by a federal health care program can be excluded from participation in these programs. The OIG may (and in some cases must) exclude individuals for certain reasons, including criminal convictions related to health care fraud or patient abuse, professional license revocation or suspension and defaulting on Health Education Assistance Loans.

When the OIG excludes an individual or entity, federal health care programs will not pay for any item or service that individual or entity furnished, ordered or prescribed. This prohibition is not limited to direct patient care. The payment ban applies to all methods of payment, including, but not limited to, itemized claims, cost reports, capitated payments and bundled payments. In addition, the Updated Bulletin clarifies the OIG's position that the payment prohibition applies even when the payment is made to a provider that is not excluded. According to the Updated Bulletin, for example, laboratories, imaging centers, durable medical equipment suppliers and pharmacies that furnish items and services on the basis of orders or prescriptions could be subject to CMP liability if such order or prescription was written by an excluded physician or practitioner. Entities that employ or enter into contracts with an excluded individual or entity for the provision of items or services to federal health care program beneficiaries are also subject to CMPs.

In the Updated Bulletin, the OIG provides the following examples demonstrating the items or services that may subject an employer or contractor to CMP liability if an excluded individual or entity provides such items or services:

- Services performed by an excluded nurse where such services are related to administrative duties, preparation of surgical trays or review of treatment plans, even if the nurse does not furnish direct care to the beneficiary;
- Services performed by excluded pharmacists or other excluded individuals who input prescription information for pharmacy billing or who are involved in any way in filling prescriptions for drugs;
- Transportation services, such as ambulance drivers or ambulance company dispatchers;
- Services performed by an excluded administrator, billing agent, accountant, claims processor or utilization reviewer;
- Administrative and management services - an excluded individual may not serve in an executive leadership role, such as chief executive officer, chief financial officer, general counsel, director of human resources or physician practice office manager; and
- Items or services furnished by an excluded individual who is a volunteer serving without pay from the provider.

BEST PRACTICES FOR SCREENING INDIVIDUALS AND ENTITIES AGAINST THE LEIE

The OIG, in the Updated Bulletin, reaffirms its position that providers have a duty to screen certain individuals and entities against the LEIE list before a provider employs or contracts with such an individual or entity. The Updated Bulletin refers providers to the OIG's website to

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screen individuals and entities against the LEIE. As in the past, providers may either download the LEIE or search the LEIE by name. If an individual or entity name matches a name on the LEIE, a provider must confirm the match by inputting the individual or entity Social Security Number ("SSN") or Employer Identification Number ("EIN"). The Updated Bulletin suggests that the OIG plans to update the LEIE in the near future to include excluded individual and entity National Provider Identifier numbers for all exclusions occurring after 2009. This should allow providers to confirm exclusion status even when the provider does not possess such individual SSNs or entity EINs.

The OIG further encourages, but does not require, that providers screen individuals and entities on a monthly basis. As the Updated Bulletin states in this regard: "screening employees and contractors each month best minimizes potential overpayment and CMP liability."

Finally, the Updated Bulletin offers further specific guidance as to the breadth of provider LEIE screens. The OIG recommends that providers screen every individual or entity who provides items or services that are directly or indirectly, in whole or in part, payable by a federal health care program. The Updated Bulletin suggests that providers should apply this same analysis to contractors to determine if a provider should screen a contractor and/or the contractor's employees against the LEIE. The Updated Bulletin acknowledges that while certain providers appear to rely on contractors to screen the contractor's own employees against the LEIE, the provider should be aware that it is ultimately responsible for any overpayment liability related to items or services provided by excluded contractor employees. Likewise, the Updated Bulletin indicates that the provider may be liable for CMPs if it did not ensure that its contractor was adequately screening its own employees against the LEIE.

CONCLUSION/PRACTICAL TAKEAWAYS

Providers should consider updating, as necessary, their policies and procedures that address the timely and accurate screening of employees and contractors against the LEIE to incorporate the OIG's best practices set forth in the Updated Bulletin. If a provider detects an excluded individual or entity in its midst, the provider should conduct a thorough investigation and determine what further steps, if any, may need to be taken to rectify the situation. The Updated Bulletin refers providers on this point to the OIG's updated Self-Disclosure Protocol to self-disclose and calculate damages regarding the employment of, or the contracting with, an excluded individual or entity in violation of the authorities set forth in the Updated Bulletin. (Please click here for Hall Render's recent article on the OIG's updated Self-Disclosure Protocol.) In summary, the Updated Bulletin provides some helpful additional insight as to the enforcement policy of the OIG regarding exclusion status and what providers can do to avoid becoming the subjects of this type of enforcement.

If you have any questions regarding the Updated Bulletin, please contact:

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