

Recent Developments in OIG Exclusion Enforcement for Long-Term Care Facilities

Two recently released guidance documents by the Department of Health and Human Services (HHS) Office of the Inspector General (OIG) suggest OIG may be refocusing its attention on enforcement actions involving the employment of individuals and entities excluded from participation in federal health care programs (collectively, Excluded Parties). While long-term care facilities traditionally faced lesser legal scrutiny in this area, the recent OIG filings make clear that long-term care facilities must re-evaluate (or create) policies to prevent the knowing (or unwitting) hiring of Excluded Parties, and mechanisms to respond through the OIG's Self-Disclosure Protocol (SDP) in the event of suspected or actual violations.

Clarified Exclusion and Reporting Guidance

OIG's Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs (Special Fraud Bulletin), issued May 8, 2013, set forth updated guidelines for the scope and frequency of screening employees and contractors to determine whether they are Excluded Parties. OIG issued the Special Fraud Bulletin largely in response to common questions from providers such as:

- What if the excluded person provided services not directly connected with patient/resident care?
- How far downstream must the provider check with respect to contractors and employees?
- What systems does OIG require the provider to check on penalty of civil monetary penalties (CMPs)?

We learned from the Special Fraud Bulletin that OIG views the provision of any item or service, directly or indirectly billable to federal health care programs, by an Excluded Party as potential violations of law punishable by CMPs among other potential remedies. In essence, in addition to the Excluded Party, the organization faces potential liability under federal law if it employs an Excluded Party in connection with any item or service traceable to federal health care

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programs—even if the item or service itself is never filed or otherwise billed in connection with any claim. The SDP, issued April 17, 2013, sets forth separate CMP guidelines for false billing and conduct involving Excluded Parties. Similarly, the SDP contemplates CMP damage calculations based upon an organization's overall payor mix when no specific billing or claim is the subject of the reported conduct.

The Special Fraud Bulletin makes clear that OIG's enforcement power is broad—OIG specifies no particular limiting principle on the extent of screening—but practically necessitates every organization devise a workable, effective exclusion policy for its own employees and at least certain key contractors. While such a policy is no guarantee against violations, it is at the very least a critical tool in any self disclosure.

Similarly, OIG indicated in the Special Fraud Bulletin that it limits the scale of its enforcement powers to screening against its own List of Excluded Individuals and Entities (LEIE). Previously, questions had been raised by providers regarding their responsibility for screening employees and contractors against other sources, including the General Service Administration's exclusion list and the National Practitioner Data Bank. The next question facing long-term care entities thus becomes how to effectively insulate the entity from CMP liability through effective screening practices.

Finding a Needle in a Haystack

Unfortunately, Excluded Parties typically do not advertise excluded status on a resume or bid proposal. Employees and contractors will sometimes go to great lengths to conceal their excluded status in the hopes that an unwitting employer (and OIG) simply will not catch on. With expanded OIG enforcement power, however, comes a greater organizational responsibility to screen—and screen well. Organizations may find the following a helpful, but not exhaustive, list of best practices.

- Search names as broadly as possible. For individuals, start with the broadest possible search on the LEIE; for instance, using last name only. This will help alleviate the problem of an Excluded Party who seeks to conceal that status by omitting a "Jr.", "III" or using a different first/middle name. If a name lends itself to easily transposed letters or hyphenation, try variations of these, as well. A Social Security Number (SSN) can often be used to identify a "match" but this is not a perfect system, as individuals will sometimes provide an intentionally

incorrect or misleading SSN. For contractors, be sure to check not only the entity's name, but also any aliases or related entities under which it does business.

- Check exclusion from state health care programs as well.
- Change your employment applications and contractor agreements. Include language requiring applicants to affirmatively state whether they are or have ever been excluded or subject to exclusion from any federal or state health care program.
- For contractors, determine your best approach and stick to it. Adherence to your exclusion policy is a major factor OIG will use in evaluating any self-disclosure, so be sure that you have carefully considered the extent to which you will screen contractors. For instance, will you check entities only? In some cases, will you check individual contractor agents? Or will you require the contractors to screen and report the results to your organization? Work with your legal counsel to determine the best approach, but make sure it is carefully followed.

I've Discovered an Excluded Party: What Now?

The first step is to immediately contact legal counsel regarding the implications of your relationship with any excluded party. The next step will involve a thorough investigation and potentially result in a self disclosure depending on the facts presented. However, the existence of a workable exclusion policy militates in favor of your organization in the SDP process; in some cases, where an entity made a good faith effort to discover an Excluded Party on the LEIE but billed for the services, a simple refund may be possible under limited circumstances. Nevertheless, however your individual situation unfolds, discovering one Excluded Party must be cause to exhaustively screen your entire workforce for others.

Action Items

- Determine the scope of your current exclusion policy. Be sure to update it to reflect the new OIG guidance.
- Consult legal counsel regarding the scope and applicability of that policy.



- Clearly demarcate responsibility for checking the LEIE for new and current employees and assign responsibility for ongoing, monthly screening of current employees.
- Consult legal counsel regarding best practices for contractor screening.
- Confer with legal counsel regarding Stark Act and Anti-Kickback Statute implications of exclusion.
- Act quickly to consult legal counsel if you suspect you may be employing an excluded individual.

If you have any questions regarding the above, please contact your Reinhart attorney, Rob Heath, Chris Kriva or any member of our Health Care team.

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