



# Compliance

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## Fighting fraud, waste, and abuse

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by Ari J. Markenson, JD, MPH and Kelly Skeat, Esq.

# Protecting your organization from exclusion sanctions

- » Check all new employees and vendors against federal and state exclusion lists.
- » Rerun these checks on current employees and vendors on a regular basis.
- » Terminate any excluded employees or vendors and disclose it immediately.
- » Make sure your vendor contracts protect you to the greatest extent possible.
- » Keep a record of all exclusion checks.

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The federal government has a wide array of sanctions it can levy against individuals and organizations that run afoul of the laws and regulations governing Medicare, Medicaid, and other federal healthcare programs. One of its most effective tools is the ability to exclude persons convicted of certain criminal or civil violations from further participation in federal healthcare programs.

On May 8, 2013 the Office of Inspector General within the Department of Health and Human Services (OIG) issued a special advisory bulletin on the effect of exclusion sanctions. This is the first updated guidance it has issued on the topic in nearly 15 years.<sup>1</sup> OIG has provided new details about the scope of exclusion and steps providers should take to protect themselves from sanctions for doing business with excluded persons. This article discusses what healthcare compliance professionals and their organizations should know about the elementary aspects of exclusions and the OIG's most recent guidance on the topic.

OIG is required to exclude persons who are convicted of certain crimes, such as patient

abuse, violations of the Anti-Kickback Statute or controlled substance laws, and certain other felony convictions. In addition to these so-called mandatory exclusions, OIG has wide discretion to levy exclusion sanctions against persons who violate other rules and regulations related to federal healthcare programs, including misdemeanor convictions related to healthcare fraud, license suspensions or revocations, and other civil and criminal violations of healthcare laws.<sup>2</sup>



Markenson



Skeat

## Scope and effect of exclusion

If a person is excluded from federal healthcare programs, this means that Medicare, Medicaid, and other federal healthcare programs will not reimburse a provider for items or services furnished, ordered, or prescribed (directly or indirectly) by the excluded person. Most healthcare providers are aware of this sanction; however, not everyone understands how broad its scope is. Exclusion does not apply only to direct healthcare providers. In all of the following situations, a provider could face sanctions for hiring or contracting with an excluded person:

- ▶ A hospital seeks Medicare reimbursement for services ordered by an excluded

physician. It does not matter if the physician is only on the medical staff and is not an employee of the hospital.

- ▶ A home health agency uses a nurse provided by a staffing agency and later finds out that the nurse was excluded. Even though it is the staffing agency that failed to perform the appropriate background checks, the home health agency is still prohibited from billing Medicare or Medicaid for the services the nurse provided.
- ▶ A physician's office hires an excluded individual to provide billing and other clerical services. Although the individual is not directly providing any healthcare services, the individual's salary is derived, in part, from Medicare and Medicaid reimbursement received by the physician's office. The physician's office cannot seek reimbursement from federal healthcare programs while the excluded person is on the office's payroll.
- ▶ A nursing home contracts with an excluded company that provides supplies that are reimbursed through its cost report. Even though the supplies are not separately reimbursed, the exclusion still applies to such services.

When a provider does business with an excluded person, the OIG does not recognize a defense that the services were medically necessary or performed to a high standard of care. OIG has broad power to levy sanctions against providers that do business with an excluded person. In addition to repaying any Medicare or other federal payer reimbursement received based on services ordered or furnished by the excluded person, the provider can also face

civil monetary penalty liability of up to \$10,000 per claim submitted to the federal government, if the provider knew or should have known that the person was excluded.

### Protecting your organization

If you are a Medicare or Medicaid provider, the first step you should take to protect yourself against these sanctions is to check *all* individuals and entities with which you do business to make sure they are not excluded. OIG maintains an easily accessible List of Excluded Individuals and Entities (the LEIE), which can be found at <http://exclusions.oig.hhs.gov>. This should be done at the time of hire for new employees and as part of the standard vendor enrollment process for all entities with which your organization does business.

Note, however, one check against the LEIE is not enough to protect your organization from sanctions and reduce the risk. The following are some best practices to ensure that you have implemented appropriate safeguards to reduce the risk of your organization doing business with or being exposed to an excluded person or organization:

- ▶ Check both current and former names and nicknames used by all individuals you are checking against the LEIE. If an individual changed his/her name following their exclusion, (e.g., following a marriage or divorce), an LEIE check using their current name might not turn up a positive result.
- ▶ For vendors, check both the entity itself and the individuals that perform services for them. Do not rely solely on the vendor to properly screen all individuals in its employ. The provider is ultimately the party that will face sanctions for doing business with excluded persons.

## OIG has broad power to levy sanctions against providers that do business with an excluded person.

- ▶ Rerun checks on a regular basis. An individual could be put on the exclusion list after they are hired. OIG recommends that these checks be done monthly.
- ▶ When you enter into vendor contracts, make sure they (1) require the vendor to check its employees against exclusion lists and (2) contain warranties that the vendor will not do business with excluded individuals. Require the vendor to provide proof of the checks it has conducted.
- ▶ Put indemnification provisions in vendor contracts requiring the vendor to indemnify you if you are subject to fines or other penalties because the vendor was excluded or used an excluded individual to provide services to you.
- ▶ Make sure that you can terminate all vendor and employee contracts immediately, without penalty, if you discover the vendor or employee is on the exclusion lists or using excluded individuals to provide services.
- ▶ Many states have separate exclusion databases that mirror the federal exclusion sanctions. These statewide exclusions are not found on the LEIE, because they only apply on a statewide basis. Run all persons against any statewide lists in states where they will be providing services, in addition to checking them against the LEIE. Don't assume the information from your state's Medicaid agency has been added to the LEIE on a real time basis. Do both checks, state and federal, to be sure.
- ▶ Maintain documentation of all exclusion searches performed. If your HR function performs the checks, make sure they provide evidence of the checks to the compliance professionals in your organization.

### Discovering violations

OIG actively enforces the exclusion sanctions and seeks penalties against those who do

business with excluded persons. If you discover you have done business with an excluded person, the first thing to do is to stop doing business with them immediately. Terminate their employment or cancel their contract. Next, discuss the issue with your in-house or outside counsel and determine the how, when, and where to report the issue through the OIG's self-disclosure program or a state-based disclosure program. These programs allow the provider to enter into settlement negotiations and potentially pay less than the maximum sanctions.

Actual sanctions will depend on many factors, including (among others), the role the excluded person played in the organization, how long they were employed by or contracted with the organization, and the amount of federal healthcare program reimbursement the provider received related to their services.

Don't let your organization be the subject of the next OIG press release. Identifying and pursuing enforcement action on excluded individual issues is essentially very low-hanging fruit for the OIG and state enforcement agencies. Protect your organization by taking the simple steps necessary to appropriately and periodically check you employees, agents, vendors, and business partners against the LEIE and related lists. With the new guidance and continued focus on enforcement by OIG, now is the time to review your current policies and make sure your organization is fully protecting itself from doing business with excluded persons. 📌

*The information contained in this article is designed to provide accurate and informative information on the subject matter covered. The information is not intended to be, nor should it be considered, legal advice or counsel. Readers should consult the expert assistance of an attorney to discuss any specific legal matter.*

1. The Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs is available at <http://1.usa.gov/16xodmK>
2. The full list of mandatory and permissive exclusions can be found at 42 U.S.C. §§ 1128 and 1156.