

# BE AWARE OF EXCLUDED INDIVIDUALS



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## **BE AWARE OF EXCLUDED INDIVIDUALS**

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I have seen the same story play out over and over. XYZ Pharmacy will employ John Smith. Smith may be a staff pharmacist...a marketing rep...you name it. XYZ runs the typical background check, has Smith take a drug test, etc. Smith “checks out” and XYZ hires him. 18 months later, by mere happenstance, XYZ discovers that four years earlier, the OIG had excluded Smith from directly or indirectly having anything to do with the Medicare program. XYZ comes to me in a panic and asks what it should do.

Certainly, XYZ cannot just bury its head in the sand, continue to employ Smith, and pretend that XYZ is not aware that its employee has been excluded. XYZ cannot just quietly terminate Smith and not inform the OIG that XYZ had employed an excluded individual. If XYZ voluntarily discloses to the OIG that XYZ had employed an excluded individual then the OIG will likely say (i) “Thank you for being honest” and (ii) “Repay to CMS all Medicare payments you received while Smith was your employee.” Based on financial inability, XYZ may be able to convince the OIG to accept less than the total Medicare payments received by XYZ, but the ultimate resolution will be painful.

In hiring a new employee, it is critical for XYZ to look for the employee’s name on the OIG exclusion list, which can be found at [www.oig.hhs.gov/exclusions](http://www.oig.hhs.gov/exclusions). Likewise, once a year XYZ needs to check all of its employees against the exclusion list.

The importance of taking these proactive steps is illustrated by the May 8, 2013 OIG “Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs.” The Bulletin points that the OIG originally published a Special Advisory Bulletin in September 1999 on “the effect of exclusion from participation in Federal health care programs.” The 1999 Bulletin provided guidance to excluded persons as to the scope and effect of their exclusions and the activities that might result in a violation of their exclusions. The 1999 Bulletin “also provided guidance to providers that might arrange with, contract with, or employ an excluded person regarding (1) what the scope of the prohibition on employment or contracting is, (2) when the provider might be subject to civil monetary penalties (“CMPs”) for violating this prohibition, and (3) how to determine whether a potential employee or contractor is excluded.”

The 2013 Updated Bulletin states that the “health care industry and OIG have now had more than a decade of experience with the questions that arise in determining the effect of an exclusion...” Since the 1999 Bulletin, the OIG has received a number of questions about exclusions. The purpose of the 2013 Updated Bulletin is to address these questions. The 2013 Updated Bulletin replaces the 1999 Bulletin.

Beginning in 1977, there have been a number of federal statutes and regulations that establish the government's authority to exclude individuals and entities, and that give the government broad authority to levy CMPs and other sanctions in the event that individuals and entities violate the exclusion rules. For example, the Balanced Budget Act (“BBA”) of 1997,

Public Law 105-33 authorized CMP authority “to be imposed against health care providers (e.g., HME companies) that employ or enter into contracts with an excluded person to provide items or services for which payment may be made under a Federal health care program.”

According to the 2013 Updated Bulletin, the “effect of an OIG exclusion is that no Federal health care program payment may be made for any items or services furnished (1) by an excluded person or (2) at the medical direction or on the prescription of an excluded person.” For example, “no payment may be made to a hospital for the items or services furnished by an excluded nurse to Federal health care program beneficiaries, even if the nurse’s services are not separately billed and are paid for as part of a Medicare diagnosis-related group payment received by the hospital.” According to the 2013 Updated Bulletin, the prohibition on Federal health care program payment for items or services furnished by an excluded individual includes items and services beyond direct patient care. For example, “the prohibition applies to services performed by excluded individuals who work for or under an arrangement with a hospital, nursing home, home health agency, or managed care entity when such services are related to, for example, preparation of surgical trays or review of treatment plans, regardless of whether such services are separately billable or are included in a bundled payment.”

Excluded persons “are prohibited from furnishing administrative and management services that are payable by the Federal health care programs. This prohibition applies even if the administrative and management services are not separately billable. For example, an excluded individual may not serve 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 service payable by Federal health care programs. Also, an excluded individual may not provide 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.”

According to the 2013 Updated Bulletin, many “providers that furnish items and services on the basis of orders or prescriptions, such as laboratories, imaging centers, durable medical equipment suppliers, and pharmacies, have asked whether they could be subject to liability if they furnish items or services to a Federal program beneficiary on the basis of an order or a prescription that was written by an excluded physician. Payment for such items or services is prohibited.”

The 2013 Updated Bulletin states that if “a health care provider arranges or contracts (by employment or otherwise) with a person that the provider knows or should know is excluded by OIG, the provider may be subject to CMP liability if the excluded person provides services payable, directly or indirectly, by a Federal health care program. OIG may impose CMPs of up to \$10,000 for each item or service furnished by the excluded person for which Federal program payment is sought, as well as an assessment of up to three times the amount claimed, and program exclusion.” CMP liability would “apply to the furnishing of all of the categories of items or services that are violations of an OIG exclusion, 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 person when the person furnishing the services either knows or should know of the exclusion.”

The 2013 Updated Bulletin then offers the following guidance regarding the circumstances under which an excluded person may be employed by, or contract with, a provider that receives payments from Federal health care programs: “First, if Federal health care programs do not pay, directly or indirectly, for the items or services being provided by the excluded individual, then a provider that participates in Federal health care programs may employ or contract with an excluded person to provide such items or services. Second, a provider that employs or contracts with an excluded person to furnish items or services solely to non-Federal health care program beneficiaries would not be subject to CMP liability. A provider need not maintain a separate account from which to pay the excluded person, as long as no claims are submitted to or payment is received from Federal health care programs for items or services that the excluded person provides and such items or services relate solely to non-Federal health care program patients.” Thus, “a provider that receives Federal health care program payments may employ or contract with an excluded person only in limited situations. Providers that identify potential CMP liability on the basis of the employment of, or contracting with, or arranging with an excluded person may use OIG’s Provider Self-Disclosure Protocol (SDP) to disclose and resolve the potential CMP liability.”

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