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## CMS Exclusions Guidance May Place Significant Burden on Providers

On January 20, 2009, the Centers for Medicare & Medicaid Services (“CMS”) released a State Medicaid Director Letter (“CMS Letter”) advising States of their obligation to direct providers to screen their own employees and contractors for persons excluded from participation in federal health care programs. Importantly, CMS advises the States that they should require providers to search the Department of Health and Human Services - Office of Inspector General’s (“OIG”) List of Excluded Individuals/Entities (“Exclusions List”) on a *monthly* basis to capture any exclusions or reinstatements that may have occurred since the last monthly update to the Exclusions List. The CMS Letter further suggests that providers are to immediately report to their State Medicaid programs any of their respective employees or contractors appearing on these monthly updates to the Exclusions List. Finally, CMS urges States to remind providers that those who employ or enter into contracts with excluded individuals or entities to provide services to Medicaid beneficiaries may be subject to civil monetary penalties.

CMS clarifies that the purpose of the CMS Letter is to strengthen the integrity of the Medicaid program and help States reduce improper payments to providers. We understand, though, that a Medicaid requirement to review the Exclusions List on a monthly basis may be particularly burdensome to providers such as hospitals, that employ and/or contract with large numbers of employees and/or contractors.

The CMS Letter follows a June 12, 2008 State Medicaid Director Letter directing the State Medicaid Directors to review the Exclusions List on a monthly basis for excluded providers. The CMS Letter presumably takes this requirement one step further by specifying that providers monthly check their own employees and contractors for exclusion status; presumably because the State Medicaid Directors do not have the data necessary to perform this function themselves.

You should also note that the CMS Letter may be inconsistent with previous pronouncements from the OIG regarding the expected frequency of verifying employee/contractor exclusion status. Specifically, the OIG’s 2005 *Supplemental Compliance Program Guidance for Hospitals* suggests that hospitals for this purpose check the Exclusions List on at least an annual, not a monthly, basis. It also is unclear from the CMS Letter whether there is a similar requirement to monthly verify exclusion status for the Medicare program.

According to CMS' website, State Medicaid Director Letters do not represent Medicaid policy, but, instead, are “used to provide States with guidance and clarification on current Medicaid policy and Medicaid data issues...to ensure consistency and to better serve the States.” We confirmed with CMS that the CMS Letter itself is not a statement of program policy and it is left to each State Medicaid program to issue specific instructions to state providers regarding how often to check the Exclusions List. Of course, in the end, the State Medicaid programs may feel compelled to follow CMS' guidance on this topic.

The CMS Letter is available at:

<http://www.cms.hhs.gov/SMDL/downloads/SMD011609.pdf>.

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