

OIG PROVIDES MORE EXCLUSION GUIDANCE THROUGH RECENT ADVISORY OPINION

OIG recently issued Advisory Opinion 15-02, which clarified OIG's position on when federal health care program payments to an excluded individual could be permissible. The proposed arrangement involved a physician who had an ownership interest in a group medical practice. The group practice billed federal health care programs for services the physician performed before his exclusion date, and the group practice's buyer received payment for these services after the physician's exclusion date. As such, OIG concluded that this arrangement would not violate the terms of the physician's exclusion, and therefore, would not subject the physician to administrative penalties. At the same time, OIG reiterated its concerns in the Advisory Opinion about excluded practitioners making referrals to other providers while such practitioners are excluded from federal health care program participation. A copy of the Advisory Opinion is available [here](#).

RELEVANT FACTS

Background. The requestor of the Advisory Opinion ("Requestor") is a physician who was excluded from participation in federal health care programs as part of a criminal plea agreement and civil False Claims Act settlement. The Requestor's exclusion was effective on October 25, 2013. As part of the Requestor's plea agreement and civil settlement with the government, the Requestor was required to sell all of the ownership interest in the Requestor's medical practice ("Practice"). On October 31, 2013, the Requestor finalized the sale of the Practice assets to a buyer ("Buyer").

The Proposed Arrangement. Prior to the effective date of the Requestor's exclusion, the Requestor performed medical services and billed these services to federal health care programs. The federal health care programs made payments to the Buyer for these services after the Requestor's exclusion date. The Requestor intended that the Buyer transfer these payments to the Requestor but sought guidance from OIG on whether such transfer would violate the Requestor's exclusion and subject the Requestor and/or Buyer to administrative sanctions.

OIG ANALYSIS

The effect of an exclusion is that no federal health care program may pay for any item or service provided by an individual or entity after the individual's or entity's exclusion date. Additionally, federal health care programs may not pay for items or services that are provided at the medical direction of an excluded individual or entity. An individual or entity that bills for services provided by, or at the medical direction of, an excluded individual or entity is subject to administrative penalties, including fines under the Civil Monetary Penalties Law.

In the Proposed Arrangement, the Requestor performed and billed all services to federal health care programs before the Requestor's exclusion date. However, payment for these services occurred after the Requestor's exclusion date. According to OIG, this arrangement would not be in violation of the Requestor's exclusion and would not subject the Requestor and/or Buyer to administrative penalties including fines under the Civil Monetary Penalties Law. OIG reasoned that the exclusion payment prohibition only applies to items and services that an excluded individual or entity provides, or that are provided at the medical direction of or based on a prescription from, an excluded individual or entity on or after the exclusion effective date.

PRACTICAL TAKEAWAYS

While only the Requestor may rely on this Advisory Opinion, this Advisory Opinion helps clarify the scope of an individual's exclusion and under what circumstances a health care provider could be paid for services or items performed by an individual or entity who later becomes excluded. Here, OIG clearly articulates that if an individual performed and billed for items or services before the individual's exclusion date, payment would be allowed after the exclusion date. This Advisory Opinion may also provide insight to other health care providers who bill services at the medical direction of an individual who later becomes excluded. For example, this Advisory Opinion suggests that a clinical laboratory or pharmacy could bill for services performed or items dispensed at the medical direction of an excluded practitioner so long as such services were ordered before the practitioner's exclusion effective date. On the other hand, any such services ordered at the medical direction of an excluded prescriber are not eligible for federal health care program payment.

Recent enforcement actions coupled with this Advisory Opinion highlight OIG's continued interest in excluded providers and ensuring that such providers are not participating in any way in federal health care programs. Providers should therefore closely monitor their own

employees and contractors, as well as practitioners who refer services, to make sure none of the parties are excluded.

Should you have any questions about exclusions and any associated penalties, please contact:

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