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Clarifying Sanction Screening: OIG LEIE and Entities versus GSA EPLS

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Do Organizations Need to Have the Same Diligence for Both Lists?

For over a decade, the Office of Inspector General (OIG) has been issuing "voluntary" compliance program guidance for the various health care sectors. In these documents, the OIG advises organizations to utilize sanction screening mechanisms to preclude employing or engaging in business relationships with individuals and entities convicted of criminal violations or those who have been the subject of sanctioning that could impact their compliance with applicable laws and regulations. The OIG notes that organizations are responsible for whom they hire, give discretionary authority, and do business.

Although its compliance guidance is not mandatory and does not appear in law or regulation, the OIG warns that employing or doing business with sanctioned individuals or entities may result in liability for an organization, and any claims emanating from a sanctioned individual or entity may be viewed as a false claim. For example, a Medicare Part A cost report that includes sanctioned individuals can be viewed as containing false claims for those portions attributable to sanctioned individuals. Therefore, the OIG advises organizations to conduct appropriate sanction screening to ensure they do not employ or do business with individuals or entities that are convicted of criminal violations or have been the subject of sanctioning, debarment, exclusion, or other adverse action that could impact their compliance with applicable laws and regulations.

OIG List of Excluded Individuals and Entities

The OIG maintains a list of all currently excluded parties on its list of excluded individuals and entities (LEIE). To avoid potential civil monetary penalty (CMP) liability,

health care providers and entities have been advised by the OIG to access this Web site prior to hiring or contracting with individuals or entities and thereafter periodically checking it for the status of current employees and contractors.

The OIG also suggests that sanction screening should extend to debarred individuals and organizations maintained by the General Services Administration (GSA) on its excluded parties list system (EPLS). Those on this list (www.oig.nsf.gov/debarment) are barred from participation in government contracts or receiving government benefits or financial assistance. This advice, however, does not carry the same weight and force as the call for screening against the LEIE, as will be discussed further below.

All the OIG guidance calls for employee applications for all new employees and physicians include questions pertaining to any pending charge or conviction for violation of criminal law and/or any sanction or disciplinary actions by any duly authorized regulatory or enforcement agency of government. It should be the responsibility of any hiring authority to verify the accuracy and honesty of the responses provided by applicants. Similarly, credentialing committees should ensure that anyone given staff privileges are not excluded from the Medicare and Medicaid programs. All health care organizations should take that position and include it in their compliance policies.

The reason why the OIG guidance regarding sanction screening against the LEIE is necessary lies in the fact that Medicare and Medicaid do not make payments for any services furnished by excluded individuals or entities. The OIG has elaborated on the sanction screening process in a special advisory bulletin issued in September 1999, entitled "The Effect of Exclusion From Participation in Federal Health Care Programs." In that bullet, the OIG stated:

> In accordance with the expanded sanction authority provided in HIPAA and BBA, and with limited exceptions, an exclusion from Federal health care programs effectively precludes an excluded individual or entity from being employed by, or under contract with, any practitioner, provider or supplier to provide any items and services reimbursed by a Federal health care program. This broad prohibition applies whether the Federal reimbursement is based on itemized claims, cost reports, fee schedules or PPS. Furthermore, it should be recognized that an exclusion remains in effect until the individual or entity has been reinstated to participate in Federal health care programs in accordance with the procedures set forth at 42 CFR 1001.3001 through 1001.3005. Reinstatement does not occur automatically at the end of a term of exclusion, but rather, an excluded party must apply for reinstatement.

The prohibition against federal program payment for items or services furnished by excluded individuals or entities also extends to payment for administrative and management services not directly related to patient care but that are a necessary component of providing items and services to federal program beneficiaries. This prohibition continues to apply to an individual even if he or she changes from one health care profession to another while excluded. In addition, no federal program payment may be made to cover an excluded individual's salary, expenses, or fringe benefits, regardless of whether they provide direct patient care.

An excluded party is in violation of its exclusion if it furnishes to federal program beneficiaries items or services for which federal health care program payment is sought. An excluded individual or entity that submits a claim for reimbursement to a federal health care program, or causes such a claim to be submitted, may be subject to a CMP of $10,000 for each item or service furnished during the period that the person

or entity was excluded (section 1128A(a)(1)(D) of the Act).

The individual or entity also may be subject to treble damages for the amount claimed for each item or service. In addition, since reinstatement into the programs is not automatic, the excluded individual may jeopardize future reinstatement into federal health care programs (42 C.F.R. §1001.3002).

If a health care provider arranges or contracts (by employment or otherwise) with an individual or entity who is excluded by the OIG from program participation for the provision of items or services reimbursable under such a federal program, the provider may be subject to CMP liability if it renders services reimbursed, directly or indirectly, by such a program. CMPs of up to $10,000 for each item or service furnished by the excluded individual or entity and listed on a claim submitted for federal program reimbursement as well as an assessment of up to three times the amount claimed and program exclusion may be imposed.

For liability to be imposed, the statute requires that the provider submitting the claims for health care items or services furnished by an excluded individual or entity "knows or should know" that the person was excluded from participation in the federal health care programs (section 1128A(a)(6) of the Act; 42 C.F.R. §1003.102(a)(2)). Providers and contracting entities have an affirmative duty to check the program exclusion status of individuals and entities prior to entering into employment or contractual relationships, or run the risk of CMP liability if they fail to do so.

To avoid potential CMP liability, the OIG urges health care providers and entities to conduct sanction screening against the OIG LEIE prior to hiring or contracting with individuals or entities. In addition, if they have not already done so, health care providers periodically should check the OIG Web site for determining the participation/exclusion status of current employees and contractors.

The Web site contains OIG program exclusion information and is updated in both online searchable and downloadable formats. This information is updated on a regular basis. The OIG Web site sorts the exclusion of individuals and entities by (1) the legal basis for the exclusion, (2) the types of individuals and entities that have been excluded, and (3) the state where the excluded individual resided at the time he or she was excluded or the state where the entity was doing business. In addition, the entire exclusion file may be downloaded for persons who wish to set up their own database. Monthly updates are posted to the downloadable information on the Web site.

Without question, the OIG has established its authority to seek action and penalties for providers who utilize the services of an excluded individual or entity. What is also significant in this advisory bulletin is the silence on the question of debarments by other agencies and the GSA EPLS, and there is no other that addresses or clarifies the use of the GSA EPLS.

The reason for this comes down to the fact that OIG authority outside of the Department of Health and Human Services (HHS) is very limited. Furthermore, departmental and CMS regulations are silent on the issue of GSA debarments and the effect on the health care financing programs of HHS. I am not aware of a single instance in which the OIG has taken action against a health care provider using an individual or entity on the GSA EPLS.

General Services Administration EPLS Sanction Screening

There are several difficulties associated with sanction screening against the GSA data. First of all, the fact is that the purpose of the EPLS is for use by government agencies, and there are no mandates that nongovernment entities use the EPLS or act upon those parties found to be on the list. Debarments prohibit debarred parties from contracting with the government. Health care providers may participate in government finance programs, in that they provide services and products and

engage in business activities that are paid for by government programs, such as Medicare or Medicaid, but that does not make them a government agency or a grantee of the federal government.

Put simply, those parties who contract with a health care provider are not contracting with the government. The only nexus that providers/suppliers have with the government is that there are services and products associated with business activities that are paid for by government programs. Taken together, it is questionable as to how a provider/supplier could act should they encounter a person or entity that has been suspended or debarred from bidding on government contracts. A provider/supplier certainly could follow the government's lead and not do business with them, but they might find the action of the government not relevant to their business decision.

Furthermore, the government debarment and suspension procedures are intended to prevent poor performance, waste, fraud, and abuse in federal procurement and nonprocurement actions. Debarment or suspension of an organization, business, or individual from doing business with the federal government is not meant to be a punishment but a procedure to ensure that federally funded business is conducted legally with responsible persons.

The GSA EPLS includes those who are debarred or suspended from doing business with the federal government. Guidance for agency suspension and debarment activities is provided by Executive Order 12549, "Debarment and Suspension," and Executive Order 12689, same title.

Section 4 of Executive Order 12549 directed the establishment of the Interagency Committee on Debarment and Suspension. Committee members and its chairman are appointed by the Office of Management and Budget (OMB); all members are federal employees. The committee monitors the implementation of the Government-wide Debarment and Suspension System and periodically reports to the OMB on federal implementation efforts. The committee coordinates lead agency's actions, provides support for individual agencies' efforts, and assists in developing unified federal policy.

Some statutes require or allow agency officials to exclude contractors that have engaged in conduct prohibited under the statute. Statutory debarments and suspensions are federal government-wide; they are often mandatory, or at least beyond agency heads' discretion; and they are punishments. Statutes prescribe the debarments' duration, and agency heads generally cannot waive statutory debarments.

Administrative debarments can result when contractors are convicted of, found civilly liable for, or found by agency officials to have committed certain offenses or when other causes affect contractor responsibility. Administrative suspensions similarly can result when contractors are suspected of, or indicted for, certain offenses or when other causes affect contractor responsibility. Debarred or suspended contractors are excluded from contracts with executive branch agencies. Administrative exclusions are discretionary and can be imposed only to protect government interests.

Debarment removes a contractor from eligibility for future contracts with the government for a fixed period of time while suspension temporarily debars a contractor for the duration of any agency investigation of the contractor or ensuing legal proceedings. Debarment and suspension are collectively known as exclusions. Contractors currently can be debarred or suspended under federal statutes or under the federal acquisition regulation (FAR), an administrative rule governing contracting by executive branch agencies.

Statutory debarments are often mandatory, leaving no discretion to contracting officers; are punishments; and last for a period prescribed by statute, with limited opportunities for agencies to waive them. Statutory suspensions otherwise resemble statutory debarments but last only until a designated agency official finds that the contractor has ceased the conduct violating the statute.

Administrative debarments, by contrast, are within the discretion of agency contracting officials; cannot be punitive; generally may last no longer than three years; and can be waived by agency heads. Administrative suspensions are temporary administrative debarments, lasting only as long as any agency investigation of contractor misconduct or ensuing legal proceedings.

It is important to note that among the agencies that can debar is the Department of Health and Human Services. If that were done, then it would be the responsibility of the OIG to include that action on its LEIE.

Routine sanction screening against the EPLS for all employees, vendors, contractors, and other affected parties may not be necessary or cost effective. There are a number of reasons to that noted above to support this, including the fact that sanction screening against the GSA EPLS is not as user friendly as the OIG Web site.

EPLS sanction screening produces many "false hits" and few that are on target. The effort necessary to weed out the false hits causes considerable work, complicated by the fact that the information provided by the EPLS often lacks solid identifiable information to permit easy verification that the party listed is the same as being considered for engagement by a health care entity. This is in stark contrast with the OIG LEIE sanction screening site where there are verification tools available to assist with possible hits.

Another problem for providers is there is no explanation as to where to draw the line in the sanction screening of contractors and vendors, especially in light of the fact that the EPLS has relatively few entities related to health care. Even smaller hospitals may have many thousands of contractors and vendors, in addition to physicians and employees.

The overwhelming majority of entities on the EPLS are not relevant to health care entities. It makes sense to screen health care-related contractors or vendors, but most hospitals have thousands of other types providing everything imaginable for running any business, such as printing paper, toilet paper, computer supplies, delivery services, grounds keeping services, trash hauling contractors, accounting and legal services, and so on. All one has to do is to look at the accounts payable and see that there is a never-ending list.

After all has been said about it, "hits" on screening the EPLS are very common, legitimate ones are very uncommon. Suppose, however, you have a legitimate hit; what do you do with it? It would be difficult to ignore, but the question becomes how one evaluates the significance of the underlying reason for his or her placement on the list. More significantly…would it necessitate ceasing having contracts with him or her? Even government agencies, under the debarment rules, are not required to discontinue a current contract because an entity is placed on the EPLS. Actual knowledge may create more of a problem than not knowing.

What all the foregoing suggests is that organizations must perform sanction screening against the LEIE but that they have considerable latitude in deciding if, when, how, or under what circumstances they would conduct sanction screening against the GSA EPLS. It may come down to a cost versus benefits of sanction screening against the EPLS. For example, an organization may reasonably conclude to limit debarment screening to those who are providers of health care services or products. It makes little sense to screen IBM, Staples, a courier service, computer repair services, et cetera. A case can be made, however, not to screen those gaining staff privileges or employees against the debarment List.

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