



DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



April 24, 2020

TO: All Medicaid Fraud Control Unit Directors

FROM: Suzanne Murrin
Deputy Inspector General
for Evaluation and Inspections

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SUBJECT: State Fraud Policy Transmittal No. 2020-1
Plea Negotiations and Reporting Convictions to the Office of Inspector General

This transmittal revises and supersedes State Fraud Policy Transmittal No. 2014-2 (October 23, 2014), “Plea Negotiations and the Definition of Convictions; Reporting Convictions for Exclusion Purposes.”

Revised and effective on May 21, 2019, Federal regulations direct Medicaid Fraud Control Units (MFCUs or Units) to provide pertinent information to the U.S. Department of Health and Human Services’ Office of Inspector General (OIG) for all convictions, both for MFCU and non-MFCU prosecutions, on a timely basis for all cases that MFCUs investigate. This guidance originally appeared in the October 2014 transmittal (No. 2014-2), which we are updating and replacing to reflect that it is now contained as a part of binding regulations. Also, as in the 2014 transmittal, we request that prosecutors in MFCU cases be mindful of criminal plea arrangements that may interfere with OIG’s ability to exclude the defendant from Federal and State health care programs. Finally, we request in this newest transmittal that State prosecutors coordinate fully with OIG when attempting to negotiate the length of the Federal exclusion, and that they inform OIG when State court judges attempt to conduct such negotiations.

Background

Section 1128 of the Social Security Act (Act), 42 U.S.C. 1320a-7, establishes the legal grounds by which OIG may exclude individuals and entities from participation in Medicare, Medicaid, and other Federal health care programs. Most significantly for the MFCUs, OIG will impose what are known as “mandatory” exclusions under section 1128(a)(1) through (4) when a MFCU or other prosecutor convicts an individual or entity of program-related crimes, patient abuse, or felony offenses relating to health care or to controlled substances. Under section 1128(b)(1) through (b)(16), OIG also has the authority to impose what are known as “permissive” exclusions for various other reasons, including a misdemeanor conviction relating to health care fraud

((b)(1)(A)); a conviction relating to fraud in a non-health-care government program ((b)(1)(B)); license revocation, suspension, or surrender ((b)(4)); a State-imposed exclusion or suspension ((b)(5)); and a failure to grant OIG or a MFCU immediate access to records necessary to the performance of their duties ((b)(12)).

Convictions of providers by MFCUs are a major source for the mandatory exclusions that OIG imposes each year. For this reason, it is important that OIG receive timely and complete information about MFCU-initiated convictions. MFCU Performance Standard 8.F requires that pertinent information be provided to OIG within 30 days of conviction.

Revised regulations at 42 CFR 1007.11(g)(1) through (3)—which became effective on May 21, 2019—expand on the performance standard. They require the following from MFCUs:

- (1) The Unit will transmit to OIG pertinent information on all convictions, including charging documents, plea agreements, and sentencing orders, for purposes of program exclusion under section 1128 of the Act.
- (2) Convictions include those obtained either by Unit prosecutors or non-Unit prosecutors in any case investigated by the Unit.
- (3) Such information will be transmitted to OIG within 30 days of sentencing, or as soon as practicable if the Unit encounters delays in receiving the necessary information from the court.

Plea Negotiations and the Definition of Conviction for Purposes of Federal Exclusion

As in past guidance, OIG continues to be concerned about the pretrial resolution of MFCU criminal cases when the intent of the plea arrangement is to limit, or interfere with, OIG's ability to exclude the defendant. Unit prosecutors or non-Unit prosecutors (in cases in which a Unit investigates but does not prosecute) should keep in mind legal mechanisms—such as “deferred prosecutions”—in which defendants, as part of plea negotiations, have the charges against them dropped before a plea has been accepted in court typically do not meet the definition of conviction under Section 1128 of the Act.

Deferred prosecutions are different than pretrial diversion programs—also known as “deferred adjudication” or “first offender” programs—in which the criminal charges are maintained, but the sentencing judge withholds a judgment of conviction. Section 1128(i) of the Act defines the term “convicted” as follows:

- (i) **Convicted Defined.** For purposes of subsections (a) and (b) of this section, an individual or entity is considered to have been “convicted” of a criminal offense-
 - (1) when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court, regardless of whether there is an appeal pending or whether the judgment of conviction or other record relating to criminal conduct has been expunged;

- (2) when there has been a finding of guilt against the individual or entity by a Federal, State, or local court;
- (3) when a plea of guilty or nolo contendere by the individual or entity has been accepted by a Federal, State, or local court; or
- (4) when the individual or entity has entered into participation in a first offender, deferred adjudication, or other arrangement or program where judgment of conviction has been withheld.

Although paragraph (i)(4) of the Federal exclusion statute specifically includes deferred adjudication and similar programs in the definition of a criminal conviction, other arrangements—such as deferred prosecution—may not satisfy the definition. While prosecutors should strive to achieve the best outcome given the facts of a particular case, accepting arrangements that are not covered by the statute’s definition of a conviction may limit OIG’s ability to protect Federal health care programs and beneficiaries from future incidents of Medicaid provider fraud and patient abuse or neglect. OIG instructions for the MFCU annual statistical report (ASR) reflect this guidance by excluding from the definition of a conviction those deferred prosecutions where charges are withdrawn before a plea is accepted by the court.

OIG is aware of some cases in which, after a MFCU has reported an initial conviction to OIG, the defendant is allowed to return to court and withdraw his or her plea or have the plea vacated, after which charges are dismissed and the individual may be considered as no longer convicted for purposes of State law. In these situations, if the court has initially accepted the defendant’s plea or there has been a finding of guilt, the State court’s action to remove the conviction from the individual’s record will be treated the same by OIG as an expungement—in other words, the individual will still be considered convicted for purposes of the Federal exclusion statute.

Please ensure that your ASR reports are accurate and do not count as convictions those plea arrangements that preclude OIG from imposing a Federal exclusion on the defendant.

Contacting the Office of Inspector General When Negotiating the Terms of the Federal Exclusion

An exclusion from the Federal health care programs can be imposed only by OIG. In addition, only OIG has the authority to negotiate a voluntary term of exclusion. Before negotiating any voluntary term of exclusion with a defendant, prosecutors should contact OIG’s Office of Counsel to the Inspector General at OCIGExclusions@oig.hhs.gov or (202) 619-2078. Similarly, prosecutors should contact the Office of Counsel to the Inspector General if a State court judge is contemplating the imposition of a term of Federal exclusion as a part of the judge’s resolution of the criminal case. Exclusions are a critical tool in protecting the Medicare and Medicaid programs from unscrupulous providers, and OIG wants to ensure that it is able to successfully defend such exclusions.

Reporting Convictions to the Office of Inspector General

As stated above, MFCU performance standards and Federal regulations require that MFCUs report to the OIG Exclusions Branch pertinent information on exclusions—including charging documents, plea agreements, and sentencing orders—within 30 days, or as soon as practical if there are delays in receiving the necessary information from the sentencing court. Since the time of the 2014 transmittal, OIG has developed a reliable, secure, and easy-to-use “exclusions portal” for Units to upload conviction information.

As we have emphasized in earlier versions of this guidance, Federal regulations require Units to report pertinent information to OIG on *all* convictions, and not only those that the Unit understands to be “excludable” convictions. OIG will make the determination of whether to exclude an individual or entity after considering all of the circumstances in a particular case. The decision on whether to exclude an individual or entity has significant consequences, and OIG has the responsibility to make that decision after weighing the legal and policy concerns in light of the evidence.

OIG recognizes that MFCUs may face difficulties in making timely reports of conviction information when non-MFCU prosecutors—particularly, local prosecutors—are responsible for the prosecution of MFCU-investigated cases. In such cases, MFCUs should make their best efforts to obtain court documents in a timely manner following sentencing.

This transmittal is effective on the date of issuance. If you have any questions, please contact Richard Stern, Director, Medicaid Fraud Policy and Oversight Division, at (202) 619-0480.

Attachment