DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL
WASHINGTON, DC 20201

October 28, 2020

TO: All State Medicaid Fraud Control Units

FROM: Suzanne Murrin
Deputy Inspector General
for Evaluation and Inspections

SUZANNE MURRIN
Digitally signed by SUZANNE MURRIN
Date: 2020.10.27 17:06:50 -04'00'

SUBJECT: State Fraud Policy Transmittal No. 2020-3
MFCU Authority to Receive Federal Funding to Investigate and Prosecute Diversion and Misuse of Pharmaceuticals

This transmittal revises and supersedes State Fraud Policy Transmittal No. 2018-1 (September 13, 2018), "MFCU Authority to Receive Federal Funding to Investigate and Prosecute Diversion and Misuse of Pharmaceuticals."

The purpose of this revised policy transmittal is to further clarify the authority of Medicaid Fraud Control Units (MFCUs or Units) to receive Federal financial participation (FFP) for investigations and prosecutions of potentially fraudulent conduct related to the diversion or misuse of pharmaceuticals. This guidance provides information on Federal funding authority for the MFCUs to the extent a Unit chooses to investigate or prosecute such a case. This guidance does not address whether a MFCU has the jurisdiction or authority under State law to pursue a case.

OIG has received questions from MFCUs as to whether a Unit may receive FFP when a provider is alleged to have committed fraudulent conduct, but there is no claim to the program associated with the conduct. This revised transmittal includes two additional scenarios, not included as part of the 2018 transmittal, that are intended to address these questions and revises the answers to two other scenarios that appeared in the 2018 transmittal. Scenario 5 illustrates a case that would be eligible for FFP because of the alleged fraudulent acts of a Medicaid provider. Scenario 8 illustrates a case that would require further facts to determine if the target qualifies as a Medicaid provider and thus whether the case would be eligible for FFP. Scenario 2 (also Scenario 2 in the earlier transmittal) is amended to address that the case may also be eligible for FFP if the employee qualifies as a provider. Scenario 6 (Scenario 5 in the earlier transmittal) is amended to address that the case may be eligible for FFP if the MFCU suspects fraud involving the provider.

Background

In October 2017, President Donald Trump declared the opioid crisis a national Public Health Emergency and the focus on the opioid crisis continues to the present time. MFCUs continue to be an important part of the law enforcement response to the opioid crisis, and the Office of Inspector General (OIG) encourages MFCUs to pursue appropriate cases of Medicaid provider fraud, as well as patient abuse or neglect, to protect program beneficiaries and other citizens from the fraudulent prescription and misuse of opioids and other pharmaceuticals.

General Principles

Fraud investigations concerning prescription drugs may involve participation by multiple actors such as: (1) a doctor or other prescriber; (2) a pharmacy or other dispenser; (3) an employee of a Medicaid provider whose customary duties include furnishing or arranging for the furnishing of items or services for which Medicaid payment is claimed; (4) a managed care organization or other entity under contract with the program (such as a pharmacy benefits manager); and/or (5) one or more beneficiaries.

Federal regulations provide that a MFCU may receive FFP for investigations and prosecutions of "violations of all applicable State laws . . . pertaining to . . . [f]raud in the administration of the Medicaid program, the provision of medical assistance, or the activities of [Medicaid] providers." [1] Fraud investigations[2] and prosecutions concerning the prescribing, dispensing, or use of pharmaceuticals may qualify for FFP if the allegations involve: (1) a potentially fraudulent claim to the Medicaid program, or (2) potentially fraudulent activities of a Medicaid provider related to the provider's professional duties.

First, FFP is available for a fraud investigation concerning the prescribing, dispensing, or use of pharmaceuticals involving a potentially fraudulent claim to the Medicaid program as one component of the investigation.[3] In other words, FFP is available for the investigation and prosecution of a case involving prescription drugs if there are credible allegations that the conduct of any of the actors – whether prescriber, dispenser, provider employee, managed care related intermediary, or beneficiary – was committed with the knowledge that it would cause the submission of a potentially fraudulent claim to the Medicaid program. Such claims could be submitted as part of a fee for service delivery system or through a managed care network.

Second, FFP is available for fraud investigations and prosecutions concerning "[f]raud in . . . the activities of [Medicaid] providers." FFP is available for investigating such fraudulent activities

[1] 42 CFR § 1007.11(a)(1).

[2] MFCUs, in the early stages of an investigation, are encouraged to pursue a case until and unless it becomes clear to the Unit that a potentially fraudulent Medicaid claim will not be established in a cost-effective timeframe. When the Unit determines that it lacks authority, or the case can no longer be pursued in a cost-effective manner, further investigation and prosecution should be appropriately referred to other law enforcement agencies.

[3] For "extended authority" cases involving Medicare or other Federal health care programs (see 42 CFR § 1007.11(a)(2)), a similar analysis would apply to the ability of a Unit to receive FFP for such cases.

involving pharmaceuticals if the alleged activity was related to the provider's professional duties as a Medicaid provider, even if no claim is submitted to the program.

In determining whether the subject of a potential investigation qualifies as a Medicaid provider, OIG regulations, amended in 2019, provide the following definition:

> Provider means:
>
> (1) An individual or entity that furnishes or arranges for the furnishing of items or services for which payment is claimed under Medicaid, including an individual or entity in a managed care network;
>
> (2) An individual or entity that is required to enroll in a State Medicaid program, such as an ordering, prescribing, or referring physician; or
>
> (3) Any individual or entity that may operate as a health care provider under applicable State law.[4]

We provide illustrations of how this definition may be applied in the scenarios below.

In addition to fraud investigations and prosecutions, FFP may be available for investigations and prosecutions of patient abuse or neglect involving the diversion of drugs when the drug diversion was performed by a health care provider, either in a board and care facility or in a Medicaid-funded health care facility, and the diversion resulted in patient or resident harm, such as through the failure to receive critical medication as ordered.

Scenarios

OIG provides some hypothetical scenarios below that illustrate cases that would be eligible for FFP, and others that would require further facts to determine if they are eligible for FFP. These scenarios are intended to be illustrative only and do not address other potential scenarios that a MFCU may encounter. We encourage Units to contact OIG if they have questions about other factual scenarios as they arise.

Scenarios that are eligible for FFP

Scenario 1

> A doctor bills the Medicaid program (directly or through a contract with a managed care entity) for an office visit with a Medicaid beneficiary and writes a prescription, but there is evidence that the doctor fabricated the diagnosis to permit the beneficiary to misuse the pharmaceutical or to divert it for financial gain.
>
> Case eligible for FFP. On a larger scale, this is the classic "pill mill" scenario where a doctor's office issues fraudulent prescriptions on a routine basis to defraud the program. The Unit may receive FFP to investigate and potentially

[4] 42 CFR § 1007.1.

charge the doctor for health care fraud or other criminal conduct. If the pharmacy or beneficiary were also a part of the scheme, they could potentially be investigated and charged as well.

Scenario 2

An employee of a facility steals drugs from the facility that are paid for by Medicaid and intended to be administered to a Medicaid beneficiary residing in the facility. The drugs are then diverted for financial gain or other illicit purposes.

Case eligible for FFP. The Unit may receive FFP for investigating and prosecuting the case if the investigation can establish that the stolen drugs were paid for by Medicaid or that the drugs were intended to be administered to a Medicaid beneficiary. To establish a nexus to the program and to be eligible for FFP, it is not sufficient that the facility, or some part of a facility, merely receive some amount of Medicaid funding, as is the case for most hospitals and nursing facilities in the United States.

In addition, the case may be eligible for FFP under a separate "[f]raud in the . . . activities of [Medicaid] providers" theory if the employee qualifies as a provider under 42 CFR § 1007.1. See Scenario 8 below for further detail.

Finally, regardless of the funding source for the drugs, if the theft or diversion resulted in harm to a particular patient – for example, because the patient did not receive critically important medications – the employee could also be investigated and charged for patient abuse or neglect.

Scenario 3

A Medicaid beneficiary visits one or more doctors in an effort to obtain a prescription that will be misused or diverted. There is evidence the beneficiary is healthy but feigns a medical condition, such as back pain, to obtain a prescription. The beneficiary finds a doctor to write a prescription, as well as a pharmacy to fill it, and the cost of the medical exam and the prescription are billed to the Medicaid program. There is no evidence that the doctor or the pharmacy is aware of the intended misuse of the prescription.

Case eligible for FFP. A MFCU may receive FFP to investigate the diversion of the prescribed drugs by the beneficiary. Although the drugs may have been prescribed by a doctor in good faith and/or dispensed by a pharmacy in good faith, the beneficiary caused the submission of false claims through the false representation of symptoms to the doctor. The beneficiary's false representation of symptoms led to the prescription being written, dispensed, and ultimately misused or diverted.

Scenario 4

A Medicaid provider is the victim of identity theft, in which the non-provider suspect uses the provider's information (e.g., NPI, DEA registration number, medical license number) to create forged or manufactured prescriptions. As one common scheme, the suspect passes the fraudulent prescriptions (for such Schedule II drugs as oxycodone and hydrocodone) to "runners," who in turn present the fraudulent prescriptions to pharmacies to fill. Suspects commonly pay cash to the runners, who may also use their own Medicaid benefits to cover the prescriptions. The prescriptions may also be later reimbursed by Medicaid when they are filled.

Case eligible for FFP. A MFCU may receive FFP to investigate identity theft cases in which a third-party non-provider forges or manufactures a prescription for which a Medicaid claim is paid.

Scenario 5

A hospital nurse, who is licensed or certified by the State, is discovered to be administering an unusually high number of PRN (as-needed) medications to patients as compared to his or her peers. There is reason to suspect that the drugs are then diverted for financial gain or other illicit purposes. The medications are not designated for specific Medicaid beneficiaries, and no claims are made to the Medicaid program for the medications.

Case eligible for FFP. Under Federal regulations, the Unit may receive FFP for investigations and prosecutions of "violations of all applicable State laws . . . pertaining to . . . [f]raud in the administration of the Medicaid program, the provision of medical assistance, or the activities of [Medicaid] providers."[5]

The allegations involving the nurse may involve suspected fraudulent activities of a Medicaid provider related to the provision of health care services. Although no claim is submitted to the Medicaid program for the medications, a MFCU may receive FFP to investigate and potentially charge the nurse for suspected illicit theft and/or use of the medication under a "[f]raud in the . . . activities of [Medicaid] providers" theory. The nurse qualifies as a provider under OIG's definition contained in 42 CFR § 1007.1, because a nurse both furnishes Medicaid services and is licensed or certified by the State, thus operating as a health care provider under State law.

[5] 42 CFR § 1007.11(a)(1).

Scenarios in which eligibility for FFP would be in question or require further information

Scenario 6

A doctor sees a Medicaid patient seeking a prescription for medically unnecessary painkillers and does not bill Medicaid for the clinical visit but charges the patient cash for the visit.

The case may be eligible for FFP if further investigation reveals: (1) another provider bills Medicaid for a service related to the claim; (2) the prescription is later filled by the patient and billed to the Medicaid program; or (3) the doctor is suspected of drug diversion or other fraudulent conduct.

A cash payment, especially for an individual who would have the ability to submit a claim to the program, may be an indicator of fraud or other criminal activity. Similar to scenario 5 above, the MFCU, even without a claim to the Medicaid program, may receive FFP for the investigation and prosecution of this case under a "[f]raud in the . . . activities of [Medicaid] providers" basis if the doctor or another provider is suspected of fraudulent activities.

If the above scenario was determined not to be within the authority of the MFCU, it should be timely referred to another law enforcement agency for investigation of potential criminal activity. Also, some States prohibit a provider from seeking payment by a beneficiary for the cost of services that are covered by Medicaid, which may be a relevant consideration in choosing whether to investigate a case.

Scenario 7

A doctor bills for an office visit with a Medicaid beneficiary and writes a prescription for a medication that is designed to be taken once a day for 30 days, but instead prescribes 90 pills for the 30-day period.

This type of "over-prescribing" case would be eligible for FFP if evidence reveals no legitimate medical purpose for the size of the prescription and an intent by either the doctor or patient to misuse or divert the prescription. However, the case could become ineligible if further investigation revealed legitimate, clinical reasons that the patient was prescribed a high amount of medication. On the other hand, even with a clinical basis for the prescription, the case could be eligible for FFP if the pharmacy fills the prescription and submits a claim to the Medicaid program as part of a larger fraud scheme, such as those involving kickbacks to the doctor or pharmacy.

Scenario 8

A medical assistant employed at a doctor's office creates phony prescriptions for controlled substances that he or she has filled at retail pharmacies. When filling

the prescriptions, the medical assistant pays cash to the pharmacy, and similar to Scenario 5, no claims are made to the Medicaid program.

Case may be eligible for FFP if the medical assistant qualifies as a Medicaid provider. In determining whether the medical assistant (or other allied health professional, such as a pharmacy or nurse tech) qualifies as a provider, the Unit should examine the definition of "provider" at 42 CFR § 1007.1, quoted in the "General Principles" section above.

Allied professionals, including medical assistants, are treated differently as a matter of professional status among the States. FFP would be available if the medical assistant or other allied professional is required to enroll under the Medicaid program, or operates as a health care provider under State law, such as through a license or certification. If the assistant is neither required to enroll, nor is licensed or certified under State law, the MFCU should alternatively determine whether the assistant furnishes items or services, or "arranges for the furnishing" of items or services, for which payment is claimed under Medicaid.

If a significant part of the medical assistant's customary duties includes the furnishing, or arranging for the furnishing, of items or services for which payment is claimed under Medicaid, the case would be eligible for FFP. For a medical assistant, examples of such activities include drawing blood or administering medication to patients. However, if the medical assistant's customary duties are administrative in nature, such as billing and bookkeeping, neither of which involve the furnishing or arranging for the furnishing of items or services for which payment is claimed under Medicaid, the case may not be eligible for FFP.

We encourage you to contact OIG to address situations about the availability of FFP that are not addressed by this policy transmittal. If you have questions about the transmittal, please contact Richard Stern, Director, Medicaid Fraud Policy and Oversight Division, at Richard.Stern@oig.hhs.gov.