



OIG proposed rule: No statute of limitations on certain exclusion actions and other significant changes to exclusion authority

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The Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS) recently issued a [proposed rule](#) that would significantly expand the OIG's authority to exclude individuals and entities from participation in federal health care programs. Using the proposed rule, the OIG intends to update its exclusion regulations to codify changes made by the Affordable Care Act and other statutory authorities.

Chief among the OIG's proposals is an unlimited time period for bringing an affirmative exclusion action under Section 1128(b)(7) of the Social Security Act (42 U.S.C. § 1320a-7(b)(7)). Specifically, the proposed language provides that an exclusion "is neither time barred nor subject to any statute of limitations period, even when the exclusion is based on violations of another statute that may have a specified limitations period." In the proposed rule, the OIG noted that it had proposed the same unlimited authority for affirmative exclusions in 2002, but did not finalize the rule at that time based on comments the OIG received that expressed concern that (1) an "individual or entity could be excluded for conduct that occurred years before and that does not bear on the person's current trustworthiness or integrity" and (2) "after the passage of significant time, evidence becomes difficult or impossible to gather."

Notwithstanding its prior decision not to finalize the unlimited limitations period, the OIG is again proposing that no statute of limitations apply to affirmative actions under its permissive authority to exclude any individual or entity that the Secretary of HHS determines has committed an act that violates Section 1128A (civil monetary penalties), 1128B (criminal penalties for acts involving federal health care programs), or 1129 (civil monetary penalties and assessments for Titles II, VIII, and XVI) of the Social Security Act.

In support of its proposal that it be permitted to consider exclusion based on conduct that is more than 6 years old, the OIG notes, "Many False Claims Act cases are resolved through settlement or litigation significantly later than 6 years after the underlying conduct. In most cases, the OIG determines whether to seek an exclusion only when the settlement terms are set or there is a judgment" Therefore, in most cases it makes sense for the OIG to decide whether to impose an exclusion based on the facts and circumstances at the time of the potential settlement.... If section 1128(b)(7) is subject to a six year statute of limitations, then the OIG will often be forced to file exclusion actions prematurely."

Other significant changes in the proposed rule include:

- Narrowing of the application of the OIG's mandatory exclusion authority under section 1128(a)(4) (felony conviction related to controlled substances) and section 1128(b)(3) (misdemeanor conviction related to controlled substances) so that only individuals who are currently employed in any capacity in the health care industry or who were so employed at the time of the offense are subject to mandatory exclusion for these types of offenses.
- Expansion of the permissive exclusion authority to allow exclusion based on false statements, omissions, or misrepresentations of material fact in any application, agreement, bid, or contract to participate or enroll as a provider of services or supplier under a federal health care program. The proposed rule also provides an opportunity to present oral arguments prior to the imposition of exclusion for making the false statement, omission, or misrepresentation.

- Early reinstatement procedures for some providers who were excluded pursuant to the loss of a health care license for reasons bearing on professional competence, professional performance, or financial integrity.
- Implementation of new authority to issue testimonial subpoenas in potential cases involving the exclusion statute.
- Modification and/or clarification of aggravating/mitigating factors considered in determining the length of an exclusion.
- Expansion of the scope of what is considered a Health Education Assistance Loan (HEAL Loan) to include default under loan repayment programs as a basis for exclusion.

The deadline to submit comments on the proposed rule is no later than July 8, 2014.

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