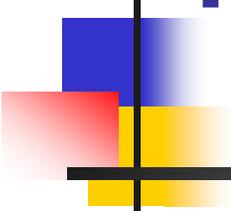


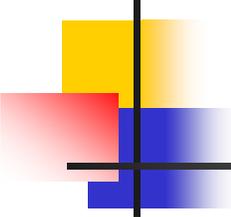
AHLA Medicare and Medicaid Payment Institute



Exclusions and Administrative Sanctions

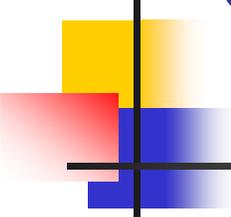
Howard Young – Partner, Morgan Lewis
Jaishiri Mehta – Senior Counsel, OCIG

March 20 & 21, 2013



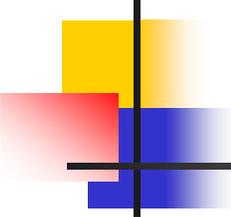
Overview of Exclusions and Related Administrative Sanctions

- Civil Monetary Penalties (CMP) Law
- Mandatory and Permissive Exclusion Authorities
- Billing and Excluded Persons



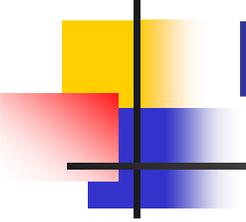
OIG CMPs: Key Points

- 42 USC § 1320a-7a
 - (a)(4) - claims for items/services furnished by excluded person; and
 - (a)(6) – employing or contracting with a person knew or should have known was excluded
- Burden: preponderance of the evidence
- Statute of limitations: 6 years
- Procedures: administrative rules apply
- Note FCA liability may also apply



CMP Scien~~ter~~

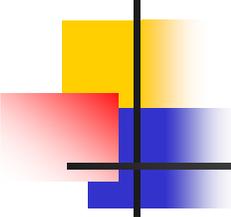
- Generally: “knows or should know”
- Similar to FCA: more than negligence
- “Should know” defined:
 - “Acts in deliberate ignorance of the truth or falsity of the information” *or*
 - “Acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required”



CMPs for Employment of Excluded Persons

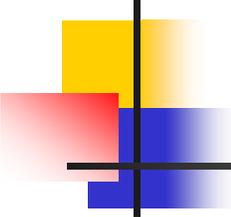
Total of 58 CMP cases in 2011 and 2012 for employing/contracting with excluded persons

- Hy-Vee, Inc. (CMP) \$831,871
- Cooperative Home Care (CMP) \$121,010
- Buchanan County Health Center (CMP) \$406,030
- Jennings Health Care Center (CMP) \$81,705



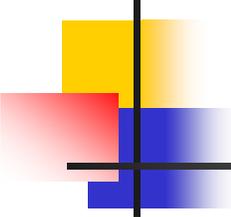
Mandatory Exclusions

- Typically based on criminal convictions (state, federal, misdemeanor, felony):
 - Medicare/Medicaid fraud
 - Patient abuse or neglect
 - Felony health care fraud
 - Felony controlled substance
- Imposed for at least 5 years



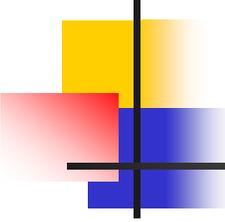
Permissive Exclusions

- OIG may impose exclusions for:
 - Certain convictions in connection with delivery of health care items/services
 - Professional license revocation or suspension
 - Fraud, kickbacks, and other prohibited activities
 - False statements
 - Obstruction of audit or investigation
 - Other statutory circumstances
- Term varies by authority and facts



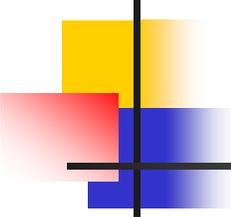
Top 6 Exclusions by Type

- license revocation or suspension-23,983
- program-related conviction-13,604
- patient abuse or neglect - 5,489
- felony health care fraud conviction - 2,665
- HEAL loan default - 2,304
- felony controlled substance conviction - 2,075



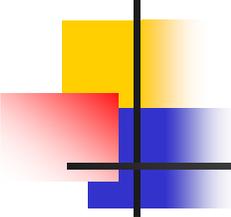
Scope and Effect of Exclusion

- Federal health care programs
 - Applies to items and services that are furnished, directed, or prescribed
 - Applies to all methods of Federal program reimbursement
 - OIG Special Advisory Bulletin
- Private payors usually follow suit
- Debarment by other agencies/CMS billing revocation
- Employment law implications



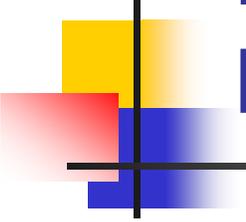
Reinstatement

- Not automatic, must apply to OIG
- Within discretion of OIG to grant/deny
- No judicial review of decision to deny
- Billing while excluded most common reason for denial
- OIG sanctions staff will refer to OCIG if excluded person reported employment by health care entity while excluded



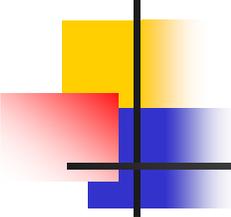
Excluded Persons: Self Disclosures

- With greater awareness of need for exclusion screening and more robust compliance, more entities are discovering excluded individuals in their employment
- May happen as part of corporate/ transactional due diligence
- Benefits of self-disclosure
- OIG Self-Disclosure Alternatives



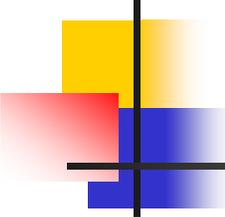
Recent Enforcement Actions for Employment of Excluded Persons

- Swan Point Care Center \$213,708 (SDP)
- East Boston Neighborhood Ctr. \$103,485 (SDP)
- Community General Hospital \$248,363 (SDP)
- Mercy Hospitals East Communities \$138,452 (SDP)
- Bruce Worrell (Exclusion Agreement)



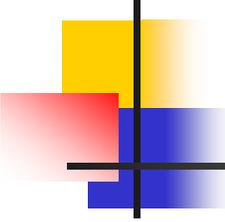
Screening for Excluded Persons

- Best practices (not legal requirements)
 - Screen at hiring with employee/contractor certification
 - Screen periodically (e.g., monthly, quarterly, annually) – inconsistency among state Medicaid directives
 - Require immediate disclosure by an employee or contractor who receives a notice of intent
- OIG List of Excluded Individuals and Entities (LEIE)
 - <http://exclusions.oig.hhs.gov>
- GSA System for Award Management (SAM) – f/k/a Excluded Parties List System (EPLS)
 - <https://www.sam.gov>
- Some states (at least 18) maintain their own exclusion lists



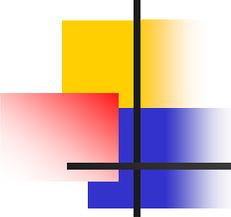
Recent Focus on Excluding Officers/Managing Employees

- OIG Guidance for Implementing Section 1128(b)(15) Permissive Exclusion
 - Non-binding factors
 - Owners – knowledge element
 - Officers/Managing employees – no knowledge requirement
 - Some controversy, though OIG success in Purdue executive exclusions - *Park* doctrine
- Proposed legislation failed to pass



Exclusion Litigation

- Administrative Decisions/case law stacked in OIG's favor
 - Strong body of deferential case law
 - ALJ authority limited by regulation to OIG legal authority and period of exclusion
- Few Federal Court decisions on exclusion
 - Almost all upheld exclusions
 - Excluding executives will generate more litigation
 - *Chevron* deference?

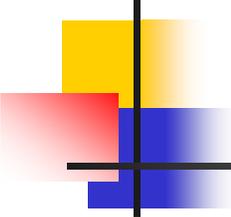


Questions

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