



Lisa A. Rickard
President

June 23, 2011

Daniel R. Levinson
Office of Inspector General
United States Department of Health and Human Services
330 Independence Ave., S.W.
Washington, D.C. 20201

Dear Inspector General Levinson:

On behalf of the U.S. Chamber of Commerce, and U.S. Chamber Institute for Legal Reform, I write to express our serious concerns regarding the U.S. Department of Health and Human Services Office of Inspector General's ("OIG's") exercise of its permissive exclusion authority to exclude officers and managing employees of "sanctioned" health care entities without a finding of either wrongdoing or knowledge of wrongdoing on the part of the officer or managing employee. OIG's current use of exclusionary authority in this manner is seriously troubling because it undermines fundamental fairness and due process. As such, we urge OIG immediately to begin to exercise its permissive exclusion authority against officers and managing employees of sanctioned entities based only on specific findings of such individuals' wrongdoing or knowledge of wrongdoing, and to make corresponding revisions in the OIG Guidance for Implementing Permissive Exclusion Authority Under Section 1128(b)(15) of the Social Security Act (the "OIG Guidance").

At the outset, we wholeheartedly support the government's efforts to curb health care fraud and abuse, but we believe that the OIG Guidance creates draconian and patently unfair penalties for health care industry professionals without corresponding deterrence or enforcement benefits to the government.

First, the OIG's proposal to exclude officers and managing employees of sanctioned entities without a finding of wrongdoing or knowledge of wrongdoing, and without the possibility of administrative or judicial review, is fundamentally unfair to the sanctioned individuals. Our judicial system imposes severe sanctions on individuals, such as exclusion from one's livelihood, only upon an independent finding by a neutral arbiter that the individual has acted in a manner that justifies the sanction imposed. It does not countenance draconian penalties for "guilt by association" – which is the approach effectively adopted in the OIG Guidance. Courts have repeatedly discredited this approach, holding that "[t]he concept of guilt by

association is repugnant to our notion of elemental justice and fair play,” *United States v. Swayne*, 700 F.2d 467, 469-70 (8th Cir. 1983); *see also, e.g., NAACP v. Overstreet*, 384 U.S. 118 (1966) (Warren, C.J., and Douglas, and Brennan JJ., dissenting from dismissal of certiorari) (stating that the concept of “guilt by association is a philosophy alien to the traditions of a free society”).

Second, the OIG’s approach may violate such individuals’ due process rights under the Fourteenth Amendment of the U.S. Constitution. Courts have consistently recognized that depriving an individual of his or her livelihood – especially when it impacts the individual’s ability to take advantage of other employment opportunities – triggers due process rights. *See, e.g., Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971). When the OIG excludes an individual from a federal health care program, that individual is effectively barred from working in the health care industry, as any health care entity that employs such an individual could be subject to penalties and potential exclusion.

Under the OIG’s stated approach to permissive exclusion, the government would essentially destroy a health care executive’s ability to obtain employment in the health care industry with no finding that the executive engaged in, or had knowledge of, any wrongdoing. Compounding the problem, the OIG Guidance asserts that the OIG’s exercise of discretion is “not subject to administrative or judicial review.” As the Supreme Court has held, “[w]here a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.” *Constantineau*, 400 U.S. at 437. The OIG offers no such meaningful notice or opportunity if it exercises its authority to exclude “based solely on [individuals’] position within the entity.”

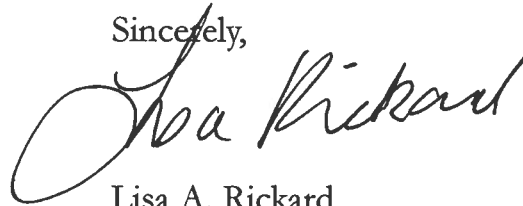
Third, the OIG’s proposed treatment of officers and managing employees does nothing to further the goals of exclusion – namely, protection of federal health care programs from individuals and entities who have in the past, and may in the future, seek to fraudulently obtain unlawful funds from such programs. In targeting for exclusion any officer or managing employee of a sanctioned entity, where there is no showing whatsoever of his or her participation in, or knowledge of, fraud or other wrongful conduct, the OIG would punish innocent individuals without any benefit to the federal fisc. Put simply, the OIG will not be protecting Medicare from waste, fraud, or abuse if it excludes individuals who have no knowledge of wrongdoing, let alone have actually participated in wrongdoing. Nor will exclusion of such individuals have the effect of deterring undesirable behavior in the future. Instead, it may deter

Daniel R. Levinson
June 23, 2011
Page 3

other qualified individuals from assuming positions of responsibility in the health care industry for fear of unjust and unjustified sanctions.

In sum, we urge the OIG to revise its Guidance on permissive exclusion to reflect a policy of using exclusion only after specific findings of such individuals' wrongdoing or knowledge of wrongdoing. We also call for the OIG to immediately begin to use its discretion and again exercise its permissive exclusion authority against officers and managing employees of sanctioned entities based only on specific findings of such individuals' wrongdoing or knowledge of wrongdoing.

Sincerely,

A handwritten signature in black ink, appearing to read "Lisa A. Rickard". The signature is written in a cursive, flowing style with a large initial "L".

Lisa A. Rickard

cc: The Honorable Kathleen Sebelius, Secretary of the Department of Health and Human Services
The Honorable William Corr, Deputy Secretary, Department of Health and Human Services
William B. Schultz, Acting General Counsel, Department of Health and Human Services