DEPARTMENT OF HEALTH AND HUMAN SERVICES

AI-15-1

AUG -6 1990

STATE FRAUD POLICY TRANSMITTAL NO. 90-1

Re: The Definition of Convictions and Plea Negotiations

We have received concerns from within the Office of Inspector General (OIG) and from the Office of General Counsel about recent trends in State practices with regard to plea negotiations with health providers. We are sending this notice to ensure that Medicaid Fraud Control Units avoid situations where they could be seen as cooperating with defense counsel in avoiding the reach of the Federal "exclusion" law, which suspends participation in the Medicare and Medicaid programs. This transmittal also responds to requests by Units that we clarify OIG policy about tabulating the number of convictions, as well as the policy as to when to report convictions.

As you are aware, section 1128 of the Social Security Act, 42 U.S.C. section 1320a-7, now authorizes the Department of Health and Human Services to exclude providers from participation in Medicare and State health care programs based upon certain judicial determinations and other situations. Moreover, section 1128(a) of the Act requires the Secretary to exclude an individual or entity based upon a conviction of a "criminal offense related to the delivery of an item or service under title XVIII [Medicare] or under any State health care program [including Medicaid]." Under section 1128(c)(3)(B), such a mandatory exclusion must usually be for a period of at least 5 years.

Because of the assortment of Federal, State and local court practices relating to plea agreements, the definition of a "conviction" is defined quite specifically by the exclusion statute. Section 1128(i) of the Act currently defines a conviction as follows:

(1) when a judgment of conviction has been entered. . .;

(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 . . . 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.

Our concerns relate particularly to subsection (4) of the definition, situations in which the "judgment of conviction has been withheld." We have received cases where defendants in State Medicaid fraud cases, as part of plea negotiations, have had the charges against them dropped before a plea has even been accepted in court. Such a practice has reportedly become known as a "deferred prosecution," apparently in order to distinguish it from a "deferred adjudication" or "pre-trial diversion," in which a judge would "defer" judgment after acceptance of a plea, based upon the mutual agreement of the parties. Some State codes authorize the use of such pre-trial diversions.

So called "deferred prosecutions," on the other hand, avoid the formality of acceptance of a plea, and may be a device created by the defense bar with the sole or primary purpose of avoiding for their clients the reach of the Federal exclusion law. While we believe that "deferred prosecutions" are similar to deferred adjudications as a reflection of culpability, its lack of recognition as an official "program," under the statute, may bring such situations outside the reach of the Federal law's definition of a conviction.

We are therefore requesting that you direct attorneys on your staff to avoid acceptance of so called deferred prosecutions as part of plea negotiations. Further more, in reviewing a Unit's annual report and other submissions, we will not treat a "deferred prosecution" as a conviction for statistical purposes since the defendant would not yet have entered a plea of guilty or nolo contendere. In other words, if the OIG cannot use the State's action as a basis for a mandatory exclusion, then the action will not be considered as a conviction.

In response to requests that we clarify the OIG's other existing policies concerning the reporting of convictions, we note that if a defendant is convicted of two counts by the same court in the same proceeding, this action should be reported as one conviction. The number of counts that a defendant is convicted of during any one proceeding cannot be counted as more than one conviction. Also, our policy is that convictions should be reported at the time of sentencing, rather than at the date of the finding of guilt. These policies are observed by the OIG when compling its own statistical accomplishments.

/s/ Paul F. Conroy

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