

NOTICE OF EMERGENCY RULEMAKING (RENEWAL)

TITLE 9. HEALTH SERVICES

CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM - ADMINISTRATION

ARTICLE 18. PROVIDER EXCLUSION RULES

PREAMBLE

<u>1. Article, Part, or Section Affected (as applicable)</u>	<u>Rulemaking Action</u>
ARTICLE 18	New Section
R9-22-1801	New
R9-22-1802	New
R9-22-1803	New
R9-22-1804	New
R9-22-1805	New
R9-22-1806	New

2. Citations to the agency’s statutory rulemaking authority to include the authorizing statute (general) and the implementing statute (specific):

Authorizing statute: A.R.S. § 41-1026(A)

Implementing statute: A.R.S. § 41-1026(A)

3. The effective date of the rule:

Immediately.

a. If the agency selected a date earlier than the 60 day effective date as specified in A.R.S. § 41-1032(A), include the earlier date and state the reason or reasons the agency selected the earlier effective date as provided in A.R.S. § 41-1032(A)(1) through (5):

AHCCCS selects the effective date of this rule to be immediate in order to protect the health and safety of its members by excluding AHCCCS providers for alleged criminal activity targeting Indigenous peoples and other vulnerable Arizonans.

b. If the agency selected a date later than the 60 day effective date as specified in A.R.S. § 41-1032(A), include the later date and state the reason or reasons the agency selected the later effective date as

provided in A.R.S. § 41-1032(B):

Not applicable.

4. Citations to all related emergency rulemaking notices published in the *Register* as specified in R1-1-409(A) that pertain to the record of this notice of emergency rulemaking:

Notice of Emergency Rulemaking: 29 A.A.R. 1577

Notice of Emergency Rulemaking Extension: [staff of the Secretary of State will fill in]

Notice of Rulemaking Docket Opening: [staff of the Secretary of State will fill in]

Notice of Proposed Rulemaking: [staff of the Secretary of State will fill in]

5. The agency's contact person who can answer questions about the rulemaking:

Name: Sladjana Kuzmanovic

Address: 801 E. Jefferson St., Phoenix, AZ 85003

Mail Code: 4100

Telephone: (602)-417-4232

E-mail: AHCCCSRules@azahcccs.gov

Web site: www.azahcccs.gov

6. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:

Pursuant to A.R.S. § 36-2930.05, AHCCCS is to adopt rules that prescribe procedures for determining the length of exclusion, appealing the exclusion determination and requesting reinstatement following an exclusion. In 2016, AHCCCS was sued to prevent enforcement of H.B. 2599, codified at A.R.S. § 36-2930.05, concerning the permission to exclude from participation in Arizona's Medicaid Program any individual or entity that failed to segregate taxpayer dollars from abortions, including the use of taxpayer dollars for any overhead expenses attributable to abortions. Under the Stipulation to Dismiss in Planned Parenthood Arizona, et al. v. Betlach, AHCCCS agreed to notify counsel of Planned Parenthood of Arizona and the ACLU when a rulemaking, promulgated to enforce H.B. 2599, is filed for public comment. AHCCCS also agreed not to request an immediate effective date for this rulemaking. This agreement was entered as a stipulation in the litigation; however, on May

18, 2023, the parties agreed to a Joint Stipulation of Non-Enforcement whereby the parties agree that this emergency rulemaking may proceed with an immediate effective date. On December 8, 2023, the parties entered into an updated stipulation to allow the regular rulemaking to proceed with clarity.

AHCCCS proposes to create a new Article 18 in Title 9, Chapter 22, which will constitute only provider exclusion rules. The proposed rules will set forth the basis for an exclusion, the period of an exclusion, the process to seek an appeal of an exclusion and the process to seek reinstatement following an exclusion. A.R.S. § 36-2930.05(C) allows the administration to adopt rules which set forth a basis for exclusion, in addition to those already specified by A.R.S. 36-2930.05, subsections A and B, and the proposed rules will do so in R9-22-1802. The proposed rules will set forth the method for determination of the period of exclusion at R9-22-1803. Proposed rule R9-22-1804 will provide that an exclusion may be appealed pursuant to the Uniform Administrative Appeals Procedures, A.R.S. § 41-1092, et seq. The process for reinstatement following exclusion will be set forth by R9-22-1805 and R9-22-1806, which will be patterned in part after 42 C.F.R. §§ 1001.3002 and 1001.3004.

The proposed rulemaking will enable AHCCCS to exclude individuals or entities from participation in the system who pose an undue risk of fraud, waste, and abuse. The proposed rules are narrowly drawn and limited to matters specifically required to be addressed by A.R.S. § 36-2930.05(D) and allowed to be addressed by A.R.S. § 36-2930.05(C). The proposed rules will preserve the due process rights of excluded individuals and entities and reduce legal uncertainty by setting forth the process by which an exclusion determination may be appealed as well as the process to be followed for reinstatement of participation. Technical and conforming changes will also be considered in the course of rulemaking.

7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

No study was relied upon for this rule.

8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:

Not applicable.

9. A summary of the economic, small business, and consumer impact:

The emergency rulemaking will enable AHCCCS to exclude individuals or entities from participation in the

system who pose an undue risk of fraud, waste, and abuse. These rules are necessary for the Administration to specifically delineate the basis of provider exemption beyond general federal regulation and state statute. The emergency rulemaking will also allow the AHCCCS Office of the Inspector General to further enforce exclusions which will result in increased program savings.

10. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules. When applicable, matters shall include but are not limited to:

There are no other matters prescribed by statute.

a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:

Not applicable.

b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:

The rule is not more stringent than 42 CFR § 1001.3002 and 42 CFR § 1001.3004.

c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:

There was no analysis submitted to the agency on the topic of this rulemaking.

11. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rule:

There is no material incorporated by reference in this rule.

12. An agency explanation about the situation justifying the rulemaking as an emergency rule:

The AHCCCS Office of Inspector General and the Arizona Attorney General's Office became aware of potential fraudulent billing practices, including significant increases in billing for outpatient behavioral health services. These circumstances triggered a multi-agency review and investigation of potential fraud, waste, and abuse. Ultimately, this led AHCCCS to connect the irregular billing of these services with alleged criminal activity targeting Indigenous peoples and other vulnerable Arizonans. These investigations led to the announcement that the AHCCCS Office of Inspector General (OIG) suspended payments to more than 100 registered providers of Medicaid services based on credible allegations of fraudulent billing activities on May 15, 2023. These provider payment suspensions are known as Credible Allegations of Fraud (CAF) suspensions.

The total number of suspensions has increased as the investigative process has evolved and more providers have been identified. In some instances, in prior payment suspension, individuals or entities affiliated with the suspended providers have reconstituted themselves in the form of different providers or provider entities and have then continued to perpetuate their fraudulent activities. To prevent this pattern from recurring, proposed rule R9-22-1801 provides definitions of the terms “Affiliation”, “Managing employee”, and “Person with an ownership or control interest.” Proposed rule R9-22-1802(A)(6) allows the Administration to exclude, “Any individual who is or was a managing employee or a person with an ownership or control interest who participated in, condoned, or was willfully ignorant of any action or failure to act of an entity which was or could have been the basis for exclusion of the entity” and proposed rule R9-22-1802(A)(7) allows the administration to exclude, “Any individual who was an organizer, leader, manager, or supervisor of any entity activity which was or could have been the basis for exclusion of the entity”.

13. The date the Attorney General approved the rule:

14. The full text of the rules follows:

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ARTICLE 18. PROVIDER EXCLUSION RULES

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ARTICLE 18 Provider Exclusion Rules

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ARTICLE 18. PROVIDER EXCLUSION RULES

R9-22-1801. Definitions

“Administration” has the meaning defined in A.R.S. § 36-2901.

“Affiliation” has the meaning defined in 42 C.F.R. § 424.502.

“Managing employee” has the meaning defined in 42 C.F.R. § 455.101.

“Member” has the meaning defined in A.R.S. § 36-2901.

“Person with an ownership or control interest” has the meaning defined in 42 C.F.R. § 455.101 and 42 C.F.R. § 455.102.

“System” has the meaning defined in A.R.S. § 36-2901.

R9-22-1802. Basis for Exclusion

A. In addition to such grounds for exclusion set for in Subsections A and B of A.R.S. § 36-2930.05,

the Administration, in its sole discretion, may exclude:

1. Any individual or entity which has failed to comply with any requirement, term, or condition set forth in any agreement with the Administration;
2. Any individual or entity which has failed to remit any indebtedness or overpayment as required by A.A.C. R9-22-713;
3. Any entity which has a managing employee or any entity with a person with an ownership or control interest that:
 - a. Has failed to remit any indebtedness or overpayment as required by A.A.C. R9-22-713;
 - b. Has an affiliation with an organization which has failed to remit any indebtedness or overpayment as required by A.A.C. R9-22-713;
4. Any individual or any entity with a managing employee or a person with an ownership or control interest that has been convicted of a criminal offense which the Administration, in its sole discretion, determines may represent an undue risk of fraud, waste, or abuse of the system or an undue risk of harm to members;
5. Any individual or entity who employs any person to furnish items or services who has been excluded from participation in the system pursuant to A.R.S. § 36-2930.05;

6. Any individual who is or was a managing employee or a person with an ownership or control interest who participated in, condoned, or was willfully ignorant of any action or failure to act of an entity which was or could have been the basis for exclusion of the entity;

7. Any individual who was an organizer, leader, manager, or supervisor of any entity activity which was or could have been the basis for exclusion of the entity; or

8. Any individual or entity in order to protect the health of members.

B. The delineation of grounds for exclusion herein does not exclude any other basis for exclusion pursuant to A.R.S. § 36-2930.05(C).

R9-22-1803. Period of Exclusion

A. Pursuant to A.R.S. § 36-2930.05 and 42 C.F.R. § 1002.210, any exclusion from participation in the system shall be for such period as determined in the discretion of the Administration, but in no event shall such period be less than 5 years.

B. In determining the period of exclusion, the Administration, in its sole discretion, may consider aggravating and mitigating factors set forth in any provision of Code of Federal Regulations Chapter 42 part 1001, Subpart C or part 1003.

R9-22-1804. Appeal of Exclusion

A. Any exclusion of an individual or entity pursuant to A.R.S. § 36-2930.05 is an appealable agency action subject to the Uniform Administrative Appeals Procedures, A.R.S. § 41-1092, et seq.

B. The Administration shall set forth in the notice of an appealable agency action required by A.R.S. § 41-1092.03 the period of exclusion and the earliest date on which AHCCCS will consider a request for reinstatement.

R9-22-1805. Reinstatement of Participation

A. If the period of exclusion has expired, an individual or entity may apply for reinstatement of participation in the system by submission of the following:

1. An application for participation as a provider.

2. Information to demonstrate reasonable assurances that the type of actions that formed the basis for the original exclusion have not recurred and will not recur.

3. Such other information as may be requested by the Administration.

B. In making the reinstatement determination, the Administration may consider:

1. Conduct of the individual or entity occurring prior to the date of the exclusion, if not known to the Administration at the time of the exclusion;

2. Conduct of the individual or entity after the date of the exclusion;

3. Whether all fines and all debts due and owing (including overpayments) to any Federal, State, or local government that relate to Medicare, Medicaid, and all other Federal health care programs have been paid;

4. Whether the individual or entity otherwise qualifies for participation in the system;

5. Whether reinstatement is in the best interest of the system.

6. Such other information as deemed relevant by the Administration.

R9-22-1806. Denial of Reinstatement

A. If an application for reinstatement is denied, the Administration shall give written notice to the requesting individual or entity.

B. Within 30 days of the date on the notice of denial of reinstatement, the excluded individual or entity may submit documentary evidence and written argument against the denial of reinstatement.

C. After evaluating any additional evidence submitted by the excluded individual or entity (or at the end of the 30-day period if none is submitted), the Administration will send written notice either confirming the denial and indicating that a subsequent request for reinstatement will not be considered until at least one year after the date of the denial or approving the request for reinstatement of participation.

D. Any notice confirming a denial of reinstatement is an appealable agency action subject to the Uniform Administrative Appeals Procedures, A.R.S. § 41-1092, et seq.