

NOTICE OF FINAL RULEMAKING

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 Section
R9-22-1802	New Section
R9-22-1803	New Section
R9-22-1804	New Section
R9-22-1805	New Section
R9-22-1806	New Section

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

Authorizing statute: A.R.S. § 36-2930.05(C)

Implementing statute: A.R.S. § 36-2930.05(C)

3. The effective date of the rule:

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 is requesting an effective date of June 26, 2024, per A.R.S. § 41-1032(A)(1), to preserve the public peace, health or safety. AHCCCS previously requested and was granted emergency rulemaking authority by the Attorney General’s office on July 3, 2023. AHCCCS was granted a one-time renewal of the emergency rules for 180 days, effective 12/30/2023. The emergency rulemaking renewal will expire on June 27, 2024. Therefore, AHCCCS is requesting that this rulemaking is effective the day before the emergency rules expire. This is important to prevent a lapse in the ability of the agency to exclude providers for fraud, waste and abuse, or health and safety reasons, as outlined in the rule text. AHCCCS uses the authority to exclude, granted in statute, to protect its members from individuals and providers who have already taken actions to harm the agency or its members. Therefore, a delay in

the effective date of the rule would harm the agency's authority to enact exclusions for the brief period until a regular 60 day delayed effective date.

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

Notice of Rulemaking Docket Opening: 29 A.A.R. 3875

Notice of Proposed Rulemaking: 29 A.A.R. 3833

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

Name: Nicole Fries

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

Mail Code: 4100

Telephone: (602)-417-4232

E-mail: AHCCCSRules@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:

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. Pursuant to A.R.S. § 36-2930.05, AHCCCS is required to adopt rules that prescribe procedures for determining the length of exclusion, appealing the exclusion determination and requesting reinstatement following an exclusion.

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 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. These rules are necessary for the Administration to specifically delineate the basis of provider exclusion beyond general federal regulation and state statute. Under existing authorities, AHCCCS Office of the Inspector General enforced exclusions have resulted in over 2.8 million in program savings from 2013-2021.

10. A description of any changes between the proposed rulemaking, to include supplemental notices, and the final rulemaking:

There were no changes between the proposed rulemaking and the final rulemaking.

11. An agency’s summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments:

AHCCCS received one comment from Arizona Alliance for Community Health Centers on January 29, 2024:

Stakeholder	Comment	AHCCCS reply to comment
Alliance for Community Health Centers	January 29, 2024	AHCCCS appreciates the insight the Alliance provided as to

	<p>Carmen Heredia AHCCCS Director 801 E. Jefferson Phoenix, AZ 85034</p> <p>RE: Comment on Proposed Rule Changes on Article 18 Provider Exclusion Rules</p> <p>Dear Carmen,</p> <p>Thank you for your efforts to stop the fraud and abuse uncovered in the Behavioral Health system. We recognize the critical role that AHCCCS plays in preventing fraud and abuse and value many of the changes being enacted.</p> <p>The proposed Article 18 Provider Exclusion Rules (R9-22-1801 to R9-22-1806) will expand the ability to protect the healthcare system from bad actors. However, we are concerned that R9-1802(A)(4) may have unintended consequences in preventing our volunteer Boards from being representative of the populations we serve.</p> <p>“R9-1802(A)(4) allows AHCCCS to exclude any individual or 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.”</p> <p>FQHCs have community based, volunteer Boards with a requirement that at least 51% of Board members be patients. The purpose is for the FQHCs to be representative of the population they are serving. Several of our FQHCs are involved in justice projects, such as the AHCCCS Targeted Investments program, where</p>	<p>uncompensated board members, however AHCCCS does not believe that they should be treated any differently than the board members of other provider types. The reasons upon which AHCCCS may exclude an individual are clearly outlined in the regulation and intended to protect AHCCCS members from those individuals who have already taken actions which cause a risk of fraud, waste, and abuse, or the health and safety of AHCCCS members. All individuals are able to appeal their exclusion, protecting the due process rights of those who may have concerns that AHCCCS would apply these exclusions too broadly. Since AHCCCS has concerns that individuals may not only attempt to take advantage of AHCCCS members for compensatory purposes, AHCCCS believes a blanket exemption would be inappropriate.</p>
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	<p>we are serving incarcerated individuals and those recently released from prison.</p> <p>The proposed provision may have the unintended consequence of preventing any of our FQHC volunteer, community Boards from having a member that is formerly incarcerated. As discussed below, this is an unnecessary precaution at FQHCs due to other safeguards which already prevent fraud and abuse. FQHCs are not “owned” in the traditional sense. Community Board members are volunteers, have no ownership interest, and are not compensated for their efforts, more than de minimis travel and meal expenses. Chief Executive Officers (CEOs) operate and manage the FQHC and affiliated sites. CEOs receive a salary but are also not “owners.” FQHCs do not have an “ownership” structure. In fact, the federal government often has a legal interest in assets of the FQHC. Unlike at some of the fraudulent sober living homes, FQHC Board members have no mechanism to benefit financially or fraudulently by serving on our Boards. In addition, FQHCs already perform required OIG and CMS exclusion checks on Board members annually to verify they have not been barred from OIG or CMS programs. This is an added check that protects against anyone taking part that has previously been involved in Medicare or Medicaid fraud or abuse. The proposed rule allows AHCCCS to go further and potentially prevent anyone with a former criminal offense from serving on the volunteer, non-ownership Board. While we recognize AHCCCS could allow someone on a case-by-case basis to serve, the potential of embarrassment and being</p>	
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	<p>prevented from serving will have a chilling effect on our willingness to invite someone with any felony conviction from serving. This will limit the ability of our Boards from being truly representative of our patients.</p> <p>Finally, FQHCs are subject to extensive federal regulation, which includes a wide range of financial, operational, and clinical requirements that they must meet. They are reviewed by the Health Resources and Services Administration through routine site visits to ensure they are complying with requirements, and all are subject to required data reporting as well as annual financial audits. The requirements to which FQHCs must demonstrate they adhere on an ongoing basis serve to prevent fraud and abuse.</p> <p>The Alliance’s request is that an exception to R9-22-1802(A)(4) be made for entity Board members that do not have a controlling or financial interest in the entity and which are in compliance with the OIG and CMS exclusion checks specific to Medicare and Medicaid fraud. (We are not requesting a specific exclusion for FQHC volunteer Boards, but that is another possibility.)</p> <p>FQHC Background The Arizona Alliance for Community Health Centers (Alliance) is the Primary Care Association (PCA) for Arizona, a mission-driven, nonprofit member organization that represents FQHCs. The Alliance’s network of 24 FQHCs comprises Arizona’s largest primary care network serving over 817,000 patients annually. Arizona’s health centers serve one in 9 Arizonans and one in 5 AHCCCS beneficiaries. Arizona FQHCs provide integrated</p>	
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	<p>physical and behavioral health services. These centers are vital in connecting people to quality care that gives everyone an equal opportunity to thrive.</p> <p>FQHCs have a long history, beginning in 1965, as part of the federal government's war on poverty. FQHCs are mission-driven safety-net health care providers uniquely focused on removing barriers to care and providing quality healthcare to everyone, regardless of their ability to pay. The process to become an FQHC is rigorous, time consuming, and requires substantial investment. Many organizations that apply to become FQHCs are not awarded this designation because of the myriad requirements that they must meet and to which they must continually adhere. In addition, FQHCs have ongoing regulation by the Health Resources and Services Administration, Bureau of Primary Health Care (BPHC) including regular site visits and required and publicly available annual reporting on their finances, operations, staffing, services, and quality outcomes. As a result, FQHCs are subject to a multi-layered, heavily regulated level of oversight that ensures accountability over the actions, finances, quality, and services provided by FQHCs. This extensive approval process and ongoing oversight prevent any fraud and abuse by unscrupulous providers and operators.</p> <p>The Alliance and Arizona's FQHCs are committed to collaborating with AHCCCS to create a safer system for all, preventing fraud and abuse, and simultaneously expanding our ability to meet the needs of Arizonans.</p> <p>Please reach out if you have any</p>	
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	<p>questions or wish to discuss the details of this comment.</p> <p>Thank you, Jessica Yanow President & CEO</p>	
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12. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

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.

13. 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.

14. Whether the rule was previously made, amended or repealed as an emergency rule. If so, cite the notice published in the Register as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:

The rules were previously made as an emergency rule. The initial emergency rule is found in 29 A.A.R. 1577. The emergency rulemaking renewal is found in 30 A.A.R. 69. No changes were made to the rule between the emergency rules and the final rulemaking package.

15. The full text of the rules follows:

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Sections

ARTICLE 18 Provider Exclusion Rules

R9-22-1801 Definitions

R9-22-1802 Basis for Exclusion

R9-22-1803 Period of Exclusion

R9-22-1804 Appeal of Exclusion

R9-22-1805 Reinstatement of Participation

R9-22-1806 Denial of Reinstatement

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 continued exclusion.

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.