the rate of pay in effect for Level V of the Executive Schedule under section 5316 of title 5.

Dated: January 14, 1993.

Cindy Daub,

Chairman.

[FR Doc. 93-1354 Filed 1-21-93; 8:45 am]

BILLING CODE 1410-09-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Inspector General

42 CFR Parts 1001 and 1005

RIN 0991-AA75

Health Care Programs; Fraud and Abuse; Amendments to OIG Exclusion and CMP Authorities Resulting From Public Law 100-93

AGENCY: Office of Inspector General (OIG), HHS.

ACTION: Final rule and clarification.

SUMMARY: This final rule clarifies the scope and purpose of the exclusion authority provisions originally set forth in final rulemaking published in the Federal Register on January 29, 1992 (57 FR 3298). That final rule implemented the OIG sanction and civil money penalty (CMP) provisions established through section 2 and other conforming amendments in the Medicare and Medicaid Patient and Program Protection Act of 1987, and other statutory authorities. This clarifying document modifies the final rule to give greater clarity to the original scope of the authorities contained in 42 CFR part 1001. In addition, this rule is providing further clarification to the discovery provision set forth in part 1005 of the regulations.

EFFECTIVE DATE: This regulation is effective on January 22, 1993.

FOR FURTHER INFORMATION CONTACT: Joel Schaer, Office of Inspector General, (202) 619-3270.

SUPPLEMENTARY INFORMATION:

I. Background

On January 29, 1992, we published in the Federal Register a final rule to implement a variety of OIG sanction and civil money penalty provisions established through section 2 and other conforming amendments in the Medicare and Medicaid Patient and Program Protection Act of 1987, along with certain additional provisions contained in the Consolidated Budget Reconciliation Act of 1985, the Omnibus Budget Reconciliation Act (OBRA) of 1987, the Medicare Catastrophic Coverage Act of 1988, OBRA 1989, and OBRA 1990 (57 FR 3298). Those final regulations were designed to protect program beneficiaries from unfit health care practitioners, and otherwise to improve the anti-fraud provisions of the Department's health care programs under titles V, XVIII, XIX and XX of the Social Security Act.

As a result of that final rule, 42 CFR part 1001 was amended to specifically set forth each type of exclusion, the basis or activity that would justify the exclusion, and the considerations that would be used in determining the period of exclusion. (In addition, through the revision and recodification of existing regulations, a new 42 CFR part 1005 was added to address various procedures that govern administrative hearings and subsequent appeals for all OIG sanction cases.)

Since publication of the final rule, we have become aware that an uncertainty exists with regard to the scope and applicability of the exclusion authorities set forth in part 1001 of the regulations. This final rule gives clarity to the original intent of the scope and applicability of existing exclusion authorities.

II. Revisions to 42 CFR 1001.1 and 1005.4

We are clarifying § 1001.1, Scope and purpose, to explicitly indicate that the exclusion provisions in 42 CFR part 1001 apply to and bind (1) the OIG in imposing and proposing program exclusions, and (2) the administrative law judges (ALJs), the Departmental Appeals Board (DAB) and federal courts in reviewing the imposition of exclusions by the OIG (or, where applicable, in imposing exclusions proposed by the OIG).

It has always been implicit that the circumstances for each program exclusion and the specified length for each exclusion (including the mitigating and aggravating circumstances) set forth in 42 CFR part 1001 would bind the OIG, ALJs and the DAB in all their decision making. Following the publication of the revised exclusion regulations on January 29, 1992, however, it has been brought to our attention that it could be possible to interpret part 1001 as applying only to the imposition of exclusions by the OIG, and not to the review of exclusions by ALJs, the DAB and federal courts. This is not the result intended by the Secretary or these regulations, and is inconsistent with the application of the prior regulations codified at 42 CFR part 1001 to program exclusions.

The regulatory provisions in 42 CFR part 1001 were promulgated in large part to add consistency and predictability to the overall process of imposing program exclusions. Were the Secretary to have so limited the applicability of these highly specific, substantive provisions set forth in part 1001, the effect of the regulations would be virtually nullified if interpreted as binding the OIG to their requirements while, at the same time, providing the ALJs with total discretion to disregard the regulatory requirements and review the OIG's imposition of exclusions as if there were no applicable regulatory standards.

In addition, we are also making a related change to the ALJs' authority in § 1005.4(c) to make clear that ALJs do not have the authority to find invalid or refuse to follow Federal statutes, regulations or Secretarial delegations of authority.

III. Technical Clarification to Section 1005.7

In addition, we are revising paragraph (e)(1) of § 1005.7, Discovery, to clarify that parties are not required to file a motion for a protective order as a condition precedent for withholding documents under a claim of privilege. The revised § 1005.7(e)(1) also specifically states that the parties are allowed to have the opportunity to file a motion for a protective order at any time during discovery.

As revised, § 1005.7(e)(1) deletes the unrealistic time frame for filing a motion for a protective order. The revised section gives the parties the option of filing a motion for a protective order at any time during the discovery process.

IV. Regulatory Impact Statement

Executive Order 12291 requires us to prepare and publish a final regulatory impact analysis for any regulation that meets one of the Executive Order criteria for a "major rule." In addition, we generally prepare a regulatory flexibility analysis that is consistent with the Regulatory Flexibility Act (5 U.S.C. 601-612), unless the Secretary certifies that a final regulation would not have a significant economic impact on a substantial number of small entities.

As we indicated in the original final rule published on January 29, 1992, consistent with the intent of the statute, the amendments to 42 CFR chapter V, and this subsequent clarification, are designed to clarify departmental policy with respect to the imposition of exclusions, CMPs and assessments upon individuals and entities who violate the

statute. We continue to believe that the great majority of providers and practitioners do not engage in such prohibited activities and practices, and that the aggregate economic impact of these provisions should be minimal, affecting only those who have engaged in prohibited behavior in violation of statutory intent.

For this reason, we have determined that a regulatory impact analysis is not required. Further, we have determined, and the Secretary certifies, that this rule will not have a significant economic impact on a number of small business entities, and we have, therefore, not prepared a regulatory flexibility analysis.

V. Effective Date and Waiver of Proposed Rulemaking

Since this rulemaking is designed to clarify departmental policy already set forth in final regulations with respect to the imposition of exclusions, CMPs and assessments, we are waiving the proposed notice and public comment period in accordance with the exceptions to the Administrative Procedure Act (APA) set forth in 5 U.S.C. 553(b)(A). Specifically, 5 U.S.C. 553(b)(A) excepts "interpretative rules, general statements of policy or rules of agency organization, procedure or practice" from the notice and comment requirements under the APA. This regulation meets all three exceptions set forth in this section. It is an interpretative rule in that it interprets the application and scope of 42 CFR part 1001; it is a statement of Departmental policy with respect to the application of 42 CFR part 1001; and it is a rule of agency procedure in that it directs the ALJs and the DAB to apply 42 CFR part 1001 to their reviews of OIG exclusion decisions. Therefore, we believe that proposed notice and public comment for this rulemaking is unnecessary.

In addition, this document does not promulgate any substantive changes to the scope of the January 29, 1992 final rule, but rather seeks only to clarify the text of that rulemaking to better achieve our original intent. Since it is not substantive, we are issuing this clarifying regulation as a final rule to be effective immediately, rather than the usual 30-day delay required for substantive rules under 5 U.S.C. 553(d). This clarifying rule will apply to all pending and future cases under this authority.

List of Subjects

42 CFR Part 1001

Administrative practice and procedure, Fraud, Health facilities, Health professions, Medicaid, Medicare.

42 CFR Part 1005

Administrative practice and procedure, Fraud, Penalties.

42 CFR chapter V is amended as set forth below:

A. 42 CFR part 1001 is amended as set forth below:

PART 1001—PROGRAM INTEGRITY—MEDICARE AND STATE HEALTH CARE PROGRAMS

1. The authority citation for part 1001 continues to read as follows:

Authority: 42 U.S.C. 1302, 1320a–7, 1320a–7b, 1395u(j), 1395u(k), 1395y(d), 1395y(e), 1395cc(b)(2) (D), (E) and (F), and 1395hh, and section 14 of Public Law 100–93 (101 Stat. 697).

2. Section 1001.1 is amended by designating the existing paragraph as paragraph (a), and by adding a new paragraph (b) to read as follows:

§ 1001.1 Scope and purpose.

* * * * *

(b) The regulations in this part are applicable to and binding on the Office of Inspector General (OIG) in imposing and proposing exclusions, as well as to Administrative Law Judges (ALJs), the Departmental Appeals Board (DAB), and federal courts in reviewing the imposition of exclusions by the OIG (and, where applicable, in imposing exclusions proposed by the OIG).

B. 42 CFR part 1005 is amended as set forth below:

PART 1005—APPEALS OF EXCLUSIONS, CIVIL MONEY PENALTIES AND ASSESSMENTS

1. The authority citation for part 1005 continues to read as follows:

Authority: 42 U.S.C. 405(a), 405(b), 1302, 1320a–7, 1320a–7a and 1320c–5.

2. Section 1005.4 is amended by revising paragraph (c)(1) and republishing paragraph (c) introductory text to read as follows:

§ 1005.4 Authority of the ALJ.

* * * * *

(c) The ALJ does not have the authority to—

(1) Find invalid or refuse to follow Federal statutes or regulations or secretarial delegations of authority;

* * * * *

3. Section 1005.7 is amended by revising paragraph (e)(1) to read as follows:

§ 1005.7 Discovery.

* * * * *

(e)(1) After a party has been served with a request for production of documents, that party may file a motion for a protective order.

* * * * *

Dated: November 23, 1992.

Bryan B. Mitchell,

Principal Deputy Inspector General.

Approved: December 18, 1992.

Louis W. Sullivan,

Secretary.

[FR Doc. 93–1376 Filed 1–21–93; 8:45 am]

BILLING CODE 4150–04–M

FEDERAL MARITIME COMMISSION

46 CFR Parts 514, 580, 581 and 583

[Docket No. 92–37]

Financial Responsibility for Non-Vessel-Operating Common Carriers

AGENCY: Federal Maritime Commission.

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission ("FMC" or "Commission") is amending its regulations governing the financial responsibility requirements of Non-Vessel-Operating Common Carriers ("NVOCCs") in response to the Non-Vessel-Operating Common Carrier Act of 1991 ("1991 Act"). The 1991 Act amended section 23 of the Shipping Act of 1984 ("1984 Act"), to permit the Commission to accept—in addition to bonds—insurance or other surety as proof of an NVOCC's financial responsibility. The 1991 Act also deleted the $50,000 minimum amount for a bond previously prescribed by section 23. The final rule: (1) Specifies the conditions for accepting insurance and guaranties as evidence of an NVOCC's financial responsibility; (2) provides forms and procedures for accepting insurance and guaranties as evidence of an NVOCC's financial responsibility; (3) specifies standards for the acceptability of insurance companies and guarantors; and (4) specifies the amount and method of coverage.

EFFECTIVE DATE: February 22, 1993.

FOR FURTHER INFORMATION CONTACT: Austin L. Schmitt, Director, Bureau of Trade Monitoring and Analysis, Federal Maritime Commission, 800 North Capitol Street NW., Washington, DC 20573–0001, (202) 523–5787.

SUPPLEMENTARY INFORMATION: The Commission initiated this proceeding by an Advance Notice of Proposed Rulemaking ("ANPR") published in the