

Original Date:	December 2011	<i>Approved VJ</i>
Revision Date:		
Effective Date:	December 2011	

I. PURPOSE / GENERAL PROCEDURAL STATEMENT

This policy shall be implemented to comply with the education and dissemination requirements of Section 6032 of the Deficit Reduction Act (DRA) and any implementing regulations which may be adopted by the U.S. Department of Health and Human Services related to Section 6032 of the DRA. The text of this Policy provides information with respect to both the role of Federal laws and the West Virginia Department of Health and Human Resources (DHHR), Bureau for Behavioral Health and Health Facilities (BBHFF), policies and procedures, in preventing and detecting fraud, waste and abuse in the Federal Health Care Programs.

All BBHFF facility or other affiliated entity employee handbooks shall include the following information (either directly or indirectly, as a supplement thereto and a part thereof, by delivery of this Policy and attachments along with any handbook).

II. APPLICABILITY

Employees, contractors and agents of all West Virginia state-owned Behavioral Health Facilities.

III. IMPLEMENTATION

This policy is effective upon date of release.

IV. CANCELLATION

This procedure is subject to revision and is not intended to supersede any existing policies or regulations. In the event of conflict, policies or regulations shall be observed in the order of precedence.

V. RESPONSIBILITY

It is the responsibility of all organizations or entities receiving or making payments of more than \$5 million annually in Medicaid reimbursement to establish policies and disseminate information to employees about the False Claims Act and anti-fraud compliance. As such, each qualifying facility shall provide detailed information to all employees (including officers and other management) and its healthcare contractors and agents (as the term "Healthcare Contractors and Agents" is defined below) about the role of the Federal false claims statutes in detecting fraud and abuse in all Federal Health Care Programs, so that the facilities will be in compliance with Section 6032 of the Federal Deficit Reduction Act of 2006, Codified at 42 U.S.C. 1396a(a)(68), entitled "Employee Education About False Claims Recovery".

VI. DEFINITIONS

CRA, as used herein, is defined to mean the Program Fraud Civil Remedies Act of 1986 (31 U.S.C., Chapter 38).

DRA, as used herein, is defined to mean the Federal Deficit Reduction Act of 2005, Pub. Law 109- 171 (2006).

Facilities, as used herein, is defined to mean state-owned hospitals operating under the administration of the West Virginia Department of Health and Human Resources, Bureau for Behavioral Health and Health Facilities.

False Claims Act or Federal False Claims Act , as used herein, shall each mean the Federal False Claims Act (31 U.S.C. Sections 3279-3733).

Federal Health Care Programs, as used herein, is defined to mean the Federal Medicare Program, any State Medicaid Program and any other Federal health care program where funds under the Program are paid with Federal funds to the Company or its affiliated entities.

Healthcare Contractors and Agents, as used herein, is defined to mean the Facilities' contractors, subcontractors or agents which or who (1) furnish or otherwise authorize the furnishing of Medicaid health care items or services; (2) perform billing or coding functions; (3) are involved in the monitoring of health care provided by the Company or (4) supply products used in the furnishing of Medicaid health care services; such individuals, businesses or organizations to include, without limitation, contract therapists, physicians (including, but not limited to, house staff, hospitalists and independent contractors and pharmacies); but excluding individuals, businesses or organizations that perform functions not associated with the provision of Medicaid health care items or services, such as copy or shredding services, grounds maintenance, or hospital cafeteria or gift shop services.

Health Reform Law, as used herein, is defined to mean The Patient Protection and Affordable Care Act, as amended by the Health Care and Education Reconciliation Act of 2010.

HHS, as used herein, is defined to me the United States Department of Health and Human Services.

VII. PROCEDURES

Any BBHFF entity that receives or makes annual payments under the state Medicaid plan of at least \$5,000,000, as a condition of receiving such payments, shall:

- (a) Establish written policies for all employees of the entity, and of any contractor or agent of the entity, that provide detailed information about:
 - 1) False Claims Act established under sections 3729 through 3733 of title 31, United States Code,
 - 2) Administrative remedies for false claims and statements established under chapter 38 of title 31, United States Code,

- 3) State laws pertaining to civil or criminal penalties for false claims and statements, and
 - 4) Whistleblower protections under such laws, with respect to the role of such laws in preventing and detecting fraud, waste, and abuse in Federal health care programs (as defined in section 1128B(f));
- (b) Include as part of such written policies, detailed provisions regarding the entity's policies and procedures for detecting and preventing fraud, waste, and abuse; and
- (c) Include in any employee handbook for the entity, a specific discussion of the laws described in subparagraph (a), the rights of employees to be protected as whistleblowers, and the entity's policies and procedures for detecting and preventing fraud, waste, and abuse.

1. The Federal False Claims Act.

The False Claims Act was enacted in 1863 in response to "rampant fraud" perpetrated on the Union Army during the Civil War. Multiple amendments in 1986 to the Act expanded the law beyond its modest military origins to encompass virtually any individual or entity that transacts business with the Federal government. The current version of the False Claims Act (31 U.S.C. Sections 3279-3733) prohibits a variety of inappropriate activities involving government funds including fraudulent activities to obtain funds from the Federal Health Care Programs.

The False Claims Act provision most commonly invoked against health care providers is 31 U.S.C. §3729(a)(1), which imposes liability when: (1) a defendant presents, or causes to be presented, a claim for payment or approval to a Federal Health Care Program (including, without limitation, the Federal Medicare Program and each State Medicaid program); (2) the claim is false or fraudulent; and (3) the defendant's acts are undertaken "knowingly." Liability also accrues to a health care provider when it knowingly or improperly retains an overpayment that it has an obligation to refund within 60 days of identifying the overpayment or by the date a corresponding cost report is due, whichever is earlier. Such "knowledge" includes both deliberate ignorance and reckless disregard of the truth or falsity of the claim. For purposes of the Act, a claim includes "any request or demand . . . for money or property" as long as the Federal government provides any portion thereof.

In addition to this basic false claims prohibition, several other provisions of the Act can be used against health care providers. The false records provision, § 3729(a)(2), applies to defendants who knowingly make or use false records or statements to obtain payment of claims. Section 3729(a)(3) prohibits conspiracies "to defraud the Government by getting a false or fraudulent claim allowed or paid." The 1986 Amendments also prohibited "reverse false claims," which involve the use of false records "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government"—a provision that takes on new significance in the context of Medicare Cost Reports.

The Fraud Enforcement and Recovery Act of 2009 expanded the scope of the False Claims Act by, among other things, creating liability for knowingly and improperly avoiding

repayment of an overpayment received from the government and broadening protections for whistleblowers. Under the Health Reform Law, the False Claims Act is implicated by the knowing failure to report and return an overpayment within 60 days of identifying the overpayment or by the date a corresponding cost report is due, whichever is later. Further, the Health Reform Law expands the scope of the False Claims Act to cover payments in connection with the new health insurance exchanges to be created by the Health Reform Law, if those payments include any federal funds.

Examples of the scope of the false claims that are subject to provisions of the False Claims Act:

- Billing for goods and services that were never delivered or rendered.
- Performing inappropriate or unnecessary medical procedures in order to increase Medicare or Medicaid reimbursement.
- Billing for medical procedures or tests not performed.
- Automatically running a lab test whenever the results of some other test fall within a certain range, even though the second test was not specifically requested.
- Unbundling - Using multiple billing codes instead of one billing code for a drug panel test in order to increase remuneration.
- Bundling -- Billing more for a panel of tests when a single test was asked for.
- Double billing - Charging more than once for the same goods or service.
- Upcoding procedures - Inflating bills by using diagnosis billing codes that suggest a more expensive illness or treatment.
- Billing for brand -- Billing for brand-named drugs when generic drugs are actually provided.
- Phantom employees and doctored time slips: Charging for employees that were not actually on the job, or billing for made-up hours in order to maximize reimbursements.
- Upcoding employee work: Billing at doctor rates for work that was actually conducted by a nurse or resident intern.
- Being over-paid by the government for sale of a good or service, and then not reporting that overpayment.
- Prescribing a medicine or recommending a type of treatment or diagnosis regimen in order to win kickbacks from hospitals, labs or pharmaceutical companies.
- Billing for unlicensed or unapproved drugs.
- Forging physician signatures when such signatures are required for reimbursement from Medicare or Medicaid.

The civil penalty for violating the False Claims Act is three times the dollar amount that the government is defrauded (i.e. treble damages) and civil penalties of \$5,500 to \$11,000 for each offense.

The Health Reform Act also provides that a submission of claims for services or items generated in violation of the federal Anti-Kickback Statute constitutes a false or fraudulent claim under the False Claims Act.

More detailed information about the Federal False Claims Act is set forth in Exhibit A hereto. Employees are urged to read this statute in its full text.

2. Federal Administrative Remedies for False Claims and Statements.

In addition to the statutory penalties under the False Claims Act mentioned above, the Federal government has available to it certain administrative remedies for false claims and statements under Chapter 38 of Title 31 of the United States Code, the Program Fraud Civil Remedies Act of 1986 the ("CRA"). These administrative remedies were implemented by HHS in 45 CFR Part 79 to impose civil penalties and assessments up to \$150,000 against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to governmental authorities or to their agents.

Under Section 79.3 of this Part and Section 3802 of the CRA, each and every false claim to any Federal Health Care Program is subject to a civil penalty of \$5,500 which may be imposed administratively by an official in the Office of Inspector General of the Department of Health and Human Services (the "OIG").

Under Section 79.4 of this Part and Section 3804 of the CRA, the investigating official in the OIG is given full subpoena power to investigate the false claim and statement and if such official deems that a violation of the CRA has occurred, such official is to send a report with such conclusions to a reviewing official who is the General Counsel of the Department of Health and Human Services or his designee.

Under Section 79.5 of this Part if such reviewing official deems that a civil penalty under Section 79.3 of this Part is warranted, then the reviewing officer is required to send a notice to the Attorney General of the United States that the reviewing officer will institute an administrative complaint under Section 79.7 of this Part before an Administrative Law Judge and such administrative complaint is subject to the approval of the Attorney General.

Civil penalties determined due in these administrative proceedings may be collected by administrative offset under Section 3716 of Title 31 of the US Code, except there shall be no administrative offset against a refund of an overpayment of Federal taxes then owing by the United States to such person. See Section 79.44 of Part 79 and Section 3807 of the CRA.

With respect to the role of the CRA in preventing and deterring fraud, waste and abuse in the Federal Health Care Programs, these provisions give the OIG an administrative, non-judiciary alternative to insure against and deter false claims and are an important additional weapon against fraud, waste and abuse.

More detailed information about the Federal False Claims Act is set forth in Exhibit B hereto. Employees are urged to read the statute in its full text.

3. State Law Pertaining to Civil or Criminal Penalties for False Claims and Statements.

Currently, West Virginia does not have a false claims act governing all governmental transactions. However, West Virginia does have a statute that regulates fraud and abuse in the Medicaid program, West Virginia Code § 9-7-1 et seq. Section 9-7-1 indicates that the purpose of West Virginia's fraud and abuse statute is to combat the substantial sums of money that have been lost by the state and federal government in operation of the state's Medicaid program.

West Virginia's fraud and abuse statute states that "[a] person shall not make or present or cause to be made or presented to the [Department of Health and Human Resources] a claim under the medical programs of the department of welfare knowing the claim to be false, fraudulent or fictitious." W. Va. Code § 9-7-5(b) (1981). The statute provides for both civil and criminal penalties. In addition, any person or entity that violates the statute is liable to the Department of Health and Human Resources for fines equal to three times the amount of any payments received from which that person or entity was not entitled. W. Va. Code § 9-7-6 (1981).

More detailed information about West Virginia Code § 9-7-1 is set forth in Exhibit C hereto. Employees are urged to read this statute in its full text.

4. Whistleblower Provisions Under Federal Law.

The False Claims Act contains qui tam, or whistleblower, provisions. Qui tam is a unique mechanism in the law that allows employees or any other private person (known as "qui tam relators" or, more commonly, "whistleblowers") with evidence of fraud against the Federal Health Care Programs (including, without limitation, any State Medicaid program) to sue in the Federal courts, on behalf of the government, in order to recover the stolen funds. A qui tam suit initially remains confidential under seal for at least 60 days (but usually much longer) while the Federal Department of Justice investigates and decide whether to join the action of the employee whistleblower.

If the Department of Justice joins the suit, it then has the primary responsibility for prosecuting the suit and, if effect, takes over prosecution of the matter. If the Department of Justice chooses not to intervene, the qui tam relator has the right to conduct the lawsuit by himself/herself. In compensation for the risk and effort of filing a qui tam case, where the Government joins the suit, the whistleblower or qui tam relator will usually be awarded a portion of the Federal damages and penalties recovered, generally in an amount of between 15 and 25 percent of such proceeds depending upon the extent to which the whistleblower substantially contributed to the prosecution of the suit. However, if the court finds that the suit was primarily based upon specific information (other than information provided by the whistleblower), then the court will award the whistleblower such sum as it deems appropriate, but not in excess of 10% of the Federal funds recovered.

Where the Government does not join the suit, the employee whistleblower will be awarded not less than 25% nor more than 30% of the Federal funds recovered, such exact amount to be determined by the court in its reasonable discretion. The whistleblower is also entitled under the Act to recover his/her reasonable expenses, plus reasonable attorneys' fees and costs. Because the Federal False Claims Act applies only to false claims against the Federal

Government, the qui tam relator is not entitled to a share of the State portion of any Medicaid recovery under the False Claims Act.

The False Claims Act also contains provisions that specifically address concerns an employee may have about his/her job security in the event that an employee reports fraud by his/her employer and becomes a qui tam relator. If an employee is "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against . . . by his or her employer because of lawful acts done by the employee . . . or others in furtherance of an action under [the whistleblower provisions of the False Claims Act], [the employee] shall be entitled to all relief necessary to make the employee whole." The relief provided for under the Act includes reinstatement (with seniority restored), double the amount of any lost back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

More detailed information about the Federal False Claims Act, including the whistleblower provisions thereof discussed in this, is set forth in Exhibit A hereto. Employees are urged to read the statute in its full text

5. Other Applicable Policies and Procedures.

In addition to the policies and regulations previously mentioned in this document, the state of West Virginia and Department of Health and Human Resources have developed other documents that may be pertinent to Preventing and Detecting Fraud, Waste and Abuse in Federal Health Care Programs. Those policies and procedures include, but are not limited to the following:

- West Virginia Code, Chapter 6C. Public Employees, Article 1. Whistle Blower law
- Division of Personnel, Interpretive Bulletin 2, (DOP-B2) Whistle-Blower Law
- Department of Health and Human Resources Policy Memorandum 2108
Employee Conduct

VIII. Policy Dissemination Requirements

This Policy shall be disseminated to all qualifying employees (including officers and other management) as well as to all of the Healthcare Contractors and Agents. Employees and Healthcare Contractors and Agents, must abide by this Policy as to the work that they perform.

This Policy may be disseminated on paper or in electronic form, but in each case must be readily available to all employees of the facility and its Contractors and Agents.

REFERENCES:

Federal False Claims Act (31 U.S.C. Sections 3279-3733)
West Virginia Code § 9-7-1
42 U.S.C. 1396a(a)(68)
45 CFR Part 79
Deficit Reduction Act of 2005, Pub. Law 109-171 (2006)

the Secretary withholds under this section, the Secretary shall pay the plaintiff the balance and interest of 6 percent for the time the money is withheld.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 977; Pub. L. 104-316, title II, § 202(p), Oct. 19, 1996, 110 Stat. 3844.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3728(a)	31:227(1st sentence words before semicolon).	Mar. 3, 1875, ch. 149, 18 Stat. 481; restated Mar. 3, 1933, ch. 212, § 13, 47 Stat. 1516.
3728(b)	31:227(1st sentence words after semicolon, 2d, 3d sentences).	
3728(c)	31:227(last sentence).	

In the section, the words “of the United States” are omitted as unnecessary.

In subsection (a), the words “final . . . recovered . . . duly allowed by legal authority”, “for payment”, and “in any manner, whether as principal or surety” are omitted as surplus.

In subsection (b)(1), the words “due from the plaintiff to the United States” are omitted as surplus.

In subsection (b)(2)(A), the words “of such judgment”, “be sufficient to”, and “charges and” are omitted as surplus. The words “of bringing a civil action” are substituted for “in prosecuting the debt” for consistency in the revised title and with other titles of the United States Code. The words “of the United States to final judgment” and “to the United States” are omitted as surplus.

Subsection (b)(2)(B) is substituted for 31:227(3d sentence) for consistency and to eliminate unnecessary words.

In subsection (c), the words “for debt and costs”, “thereon”, and “from the plaintiff” are omitted as surplus.

AMENDMENTS

1996—Subsec. (a). Pub. L. 104-316, § 202(p)(1), (2), substituted “Secretary of the Treasury” for “Comptroller General” before “shall withhold” and “Secretary” for “Comptroller General” after “presented to the”.

Subsecs. (b), (c). Pub. L. 104-316, § 202(p)(2), substituted “Secretary” for “Comptroller General” wherever appearing.

§ 3729. False claims

(a) **LIABILITY FOR CERTAIN ACTS.**—Any person who—

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be

used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that—

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation;

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) **KNOWING AND KNOWINGLY DEFINED.**—For purposes of this section, the terms “knowing” and “knowingly” mean that a person, with respect to information—

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

(c) **CLAIM DEFINED.**—For purposes of this section, “claim” includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) **EXEMPTION FROM DISCLOSURE.**—Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) EXCLUSION.—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

(Pub. L. 97-258, Sept. 13, 1982, 96 Stat. 978; Pub. L. 99-562, § 2, Oct. 27, 1986, 100 Stat. 3153; Pub. L. 103-272, § 4(f)(1)(O), July 5, 1994, 108 Stat. 1362.)

HISTORICAL AND REVISION NOTES

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
3729	31:231.	R.S. §3490.

In the section, before clause (1), the words “a member of an armed force of the United States” are substituted for “in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States” and “military or naval service” for consistency with title 10. The words “is liable” are substituted for “shall forfeit and pay” for consistency. The words “civil action” are substituted for “suit” for consistency in the revised title and with other titles of the United States Code. The words “and such forfeiture and damages shall be sued for in the same suit” are omitted as unnecessary because of rules 8 and 10 of the Federal Rules of Civil Procedure (28 App. U.S.C.). In clauses (1)–(3), the words “false or fraudulent” are substituted for “false, fictitious, or fraudulent” and “Fraudulent or fictitious” to eliminate unnecessary words and for consistency. In clause (1), the words “presents, or causes to be presented” are substituted for “shall make or cause to be made, or present or cause to be presented” for clarity and consistency and to eliminate unnecessary words. The words “officer or employee of the Government or a member of an armed force” are substituted for “officer in the civil, military, or naval service of the United States” for consistency in the revised title and with other titles of the Code. The words “upon or against the Government of the United States, or any department of the United States, or any department or officer thereof” are omitted as surplus. In clause (2), the word “knowingly” is substituted for “knowing the same to contain any fraudulent or fictitious statement or entry” to eliminate unnecessary words. The words “record or statement” are substituted for “bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition” for consistency in the revised title and with other titles of the Code. In clause (3), the words “conspires to” are substituted for “enters into any agreement, combination, or conspiracy” to eliminate unnecessary words. The words “of the United States, or any department or officer thereof” are omitted as surplus. In clause (4), the words “charge”, “or other”, and “to any other person having authority to receive the same” are omitted as surplus. In clause (5), the words “document certifying receipt” are substituted for “certificate, voucher, receipt, or other paper certifying the receipt” to eliminate unnecessary words. The words “arms, ammunition, provisions, clothing, or other”, “to any other person”, and “the truth of” are omitted as surplus. In clause (6), the words “arms, equipments, ammunition, clothes, military stores, or other” are omitted as surplus. The words “member of an armed force” are substituted for “soldier, officer, sailor, or other person called into or employed in the military or naval service” for consistency with title 10. The words “such soldier, sailor, officer, or other person” are omitted as surplus.

REFERENCES IN TEXT

The Internal Revenue Code of 1986, referred to in subsec. (e), is classified generally to Title 26, Internal Revenue Code.

AMENDMENTS

1994—Subsec. (e). Pub. L. 103-272 substituted “1986” for “1954”.

1986—Subsec. (a). Pub. L. 99-562, §2(1), designated existing provisions as subsec. (a), inserted subsec. heading, and substituted “Any person who” for “A person not a member of an armed force of the United States is liable to the United States Government for a civil penalty of \$2,000, an amount equal to 2 times the amount of damages the Government sustains because of the act of that person, and costs of the civil action, if the person” in introductory provisions.

Subsec. (a)(1). Pub. L. 99-562, §2(2), substituted “United States Government or a member of the Armed Forces of the United States” for “Government or a member of an armed force”.

Subsec. (a)(2). Pub. L. 99-562, §2(3), inserted “by the Government” after “approved”.

Subsec. (a)(4). Pub. L. 99-562, §2(4), substituted “control of property” for “control of public property” and “by the Government” for “in an armed force”.

Subsec. (a)(5). Pub. L. 99-562, §2(5), substituted “by the Government” for “in an armed force” and “true;” for “true; or”.

Subsec. (a)(6). Pub. L. 99-562, §2(6), substituted “an officer or employee of the Government, or a member of the Armed Forces,” for “a member of an armed force” and “property; or” for “property.”

Subsec. (a)(7). Pub. L. 99-562, §2(7), added par. (7).

Subsecs. (b) to (e). Pub. L. 99-562, §2(7), added subsecs. (b) to (e).

INCREASED PENALTIES FOR FALSE CLAIMS IN DEFENSE PROCUREMENT

Pub. L. 99-145, title IX, §931(b), Nov. 8, 1985, 99 Stat. 699, provided that: “Notwithstanding section 3729 of title 31, United States Code, the amount of the liability under that section in the case of a person who makes a false claim related to a contract with the Department of Defense shall be a civil penalty of \$2,000, an amount equal to three times the amount of the damages the Government sustains because of the act of the person, and costs of the civil action.”

[Section 931(c) of Pub. L. 99-145 provided that section 931(b) is applicable to claims made or presented on or after Nov. 8, 1985.]

§ 3730. Civil actions for false claims

(a) RESPONSIBILITIES OF THE ATTORNEY GENERAL.—The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under

DRA Exhibit B: 45 CFR Part 79

Title 45: Public Welfare

PART 79—PROGRAM FRAUD CIVIL REMEDIES

Authority: 31 U.S.C. 3801–3812.

Source: 53 FR 11659, Apr. 8, 1988, unless otherwise noted.

§ 79.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. 99–509, §§6101–6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801–3812, 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 79.2 Definitions.

ALJ means an Administrative Law Judge in the authority appointed pursuant to 5 U.S.C. 3105 or detailed to the authority pursuant to 5 U.S.C. 3344.

Authority means the Department of Health and Human Services.

Authority head means the Departmental Grant Appeals Board of the Department of Health and Human Services.

Benefit means, in the context of *statement*, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the authority or to a party to a contract with the authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand: or

(c) Made to the authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under §79.7.

Defendant means any person alleged in a complaint under §79.7 to be liable for a civil penalty or assessment under §79.3.

Department means the Department of Health and Human Services.

Government means the United States Government.

Individual means a natural person.

Initial decision means the written decision of the ALJ required by §§79.10 or 79.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the Department of Health and Human Services or an officer or employee of the Office of the Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Knows or has reason to know, means that a person, with respect to a claim or statement—

- (a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;
- (b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or
- (c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made*, shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association or private organization, and includes the plural of that term.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico.

Reviewing official means the General Counsel of the Department or his or her designee who is—

- (a) Not subject to supervision by, or required to report to, the investigating official;
- (b) Not employed in the organizational unit of the authority in which the investigating official is employed; and
- (c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

- (a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or
- (b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from, the authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit,

§ 79.3 Basis for civil penalties and assessments.

(a) *Claims* . (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes, or is supported by, any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes, or is supported by, any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,500¹ for each such claim.

¹ As adjusted in accordance with the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (Pub. L. 101–140), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–143).

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the authority, recipient, or party when such claim is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1). Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements* . (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, factitious, or fraudulent; or

(B) Is false, factitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains, or is accompanied by, an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than \$5,500² for each such statement.

² As adjusted in accordance with the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (Pub. L. 101–140), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. 104–143).

(2) Each representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the authority when such statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the authority.

(c) *Applications for certain benefits.* (1) In the case of any claim or statement made by any individual relating to any of the benefits listed in paragraph (c)(2) of this section received by such individual, such individual may be held liable for penalties and assessments under this section only if such claim or statement is made by such individual in making application for such benefits with respect to such individual's eligibility to receive such benefits.

(2) For purposes of paragraph (c) of this section, the term *benefits* means—

(i) Benefits under the supplemental security income program under title XVI of the Social Security Act;

(ii) Old age, survivors, and disability insurance benefits under title II of the Social Security Act;

(iii) Benefits under title XVIII of the Social Security Act;

(iv) Aid to families with dependent children under a State plan approved under section 402(a) of the Social Security Act;

(v) Medical assistance under a State plan approved under section 1902(a) of the Social Security Act;

(vi) Benefits under title XX of the Social Security Act;

(vii) Benefits under section 336 of the Older Americans Act; or,

(viii) Benefits under the Low-Income Home Energy Assistance Act of 1981, which are intended for the personal use of the individual who receives the benefits or for a member of the individual's family.

(d) No proof of specific intent to defraud is required to establish liability under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty.

(f) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

[53 FR 11659, Apr. 8, 1988, as amended at 61 FR 52301, Oct. 7, 1996]

§ 79.4 Investigation.

(a) If an investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

- (1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;
- (2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and
- (3) The person receiving such subpoena shall be required to tender to the investigating official, or the person designated to receive the documents, a certification that—
 - (i) The documents sought have been produced;
 - (ii) Such documents are not available and the reasons therefor; or
 - (iii) Such documents suitably identified, have been withheld based upon the assertion of an identified privilege.
- (b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.
- (c) Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.
- (d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 79.5 Review by the reviewing official.

- (a) If, based on the report of the investigating official under §79.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under §79.3, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's attention to issue a complaint under §79.7.
- (b) Such notice shall include—
 - (1) A statement of the reviewing official's reasons for issuing a complaint;
 - (2) A statement specifying the evidence that supports the allegations of liability;
 - (3) A description of the claims or statements upon which the allegations of liability are based;
 - (4) An estimate of the amount of money, or the value of property, services, or other benefits, requested or demanded in violation of §79.3 of this part;
 - (5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and
 - (6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 79.6 Prerequisites for issuing a complaint.

- (a) The reviewing official may issue a complaint under §79.7 only if—
 - (1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under §79.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in paragraph (b) of this section), the amount of money, or the value of property or services, demanded or requested in violation of §79.3(a) does not exceed \$150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 79.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in §79.8.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer as set forth in §79.9 will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in §79.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 79.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 79.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

- (1) Shall admit or deny each of the allegations of liability made in the complaint;
 - (2) Shall state any defense on which the defendant intends to rely;
 - (3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and
 - (4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.
- (c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant, before that time expires, may file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (b) of this section. As provided in §79.11, the reviewing official shall file promptly with the ALJ the complaint, the general answer denying liability, and the request for an extension of time. For good cause shown, the ALJ may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 79.10 Default upon failure to file an answer.

- (a) If the defendant does not file an answer within the time prescribed in §79.9(a), the reviewing official may refer the complaint to the ALJ.
- (b) Upon the referral of the complaint, the ALJ shall promptly serve on the defendant in the manner prescribed in §79.8, a notice that an initial decision will be issued under this section.
- (c) The ALJ shall assume the facts alleged in the complaint to be true and, if such facts establish liability under §79.3, the ALJ shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.
- (d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.
- (e) If, before such an initial decision becomes final, the defendant files a motion with the ALJ seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the ALJ's decision on the motion.
- (f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the ALJ shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.
- (g) A decision of the ALJ denying a defendant's motion under paragraph (e) of this section is not subject to reconsideration under §79.38.
- (h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the ALJ denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.
- (i) If the defendant files a timely notice of appeal with the authority head, the ALJ shall forward the record of the proceeding to the authority head.
- (j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the ALJ.

(k) If the authority head decides that extraordinary circumstances excuse the defendant's failure to file a timely answer, the authority head shall remand the case to the ALJ with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the ALJ, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 79.11 Referral of complaint and answer to the ALJ.

Upon receipt of an answer, the reviewing official shall file the complaint and answer with the ALJ.

§ 79.12 Notice of hearing.

(a) When the ALJ receives the complaint and answer, the ALJ shall promptly serve a notice of hearing upon the defendant in the manner prescribed by §79.8. At the same time, the ALJ shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The tentative time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the ALJ deems appropriate.

§ 79.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 79.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the authority who takes part in investigating, preparing, or presenting a particular case may not, in such case or a factually related case—

(1) Participate in the hearing as the ALJ;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) The ALJ shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 79.15 Ex parte contacts.

No party or person (except employees of the ALJ's office) shall communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

§ 79.16 Disqualification of reviewing official or ALJ.

(a) A reviewing official or ALJ in a particular case may disqualify himself or herself at any time.

(b) A party may file with the ALJ a motion for disqualification of a reviewing official or an ALJ. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the ALJ shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the ALJ determines that a reviewing official is disqualified, the ALJ shall dismiss the complaint without prejudice.

(2) If the ALJ disqualifies himself or herself, the case shall be reassigned promptly to another ALJ.

(3) If the ALJ denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 79.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the ALJ;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the ALJ; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 79.18 Authority of the ALJ.

(a) The ALJ shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

- (1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;
 - (2) Continue or recess the hearing in whole or in part for a reasonable period of time;
 - (3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
 - (4) Administer oaths and affirmations;
 - (5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;
 - (6) Rule on motions and other procedural matters;
 - (7) Regulate the scope and timing of discovery;
 - (8) Regulate the course of the hearing and the conduct of representatives and parties;
 - (9) Examine witnesses;
 - (10) Receive, rule on, exclude, or limit evidence;
 - (11) Upon motion of a party, take official notice of facts;
 - (12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;
 - (13) Conduct any conference, argument, or hearing on motions in person or by telephone; and
 - (14) Exercise such other authority as is necessary to carry out the responsibilities of the ALJ under this part.
- (c) The ALJ does not have the authority to find Federal statutes or regulations invalid.

§ 79.19 Prehearing conferences.

(a) The ALJ may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the ALJ shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The ALJ may use prehearing conferences to discuss the following:

- (1) Simplification of the issues;
- (2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

- (3) Stipulations and admissions of fact___, or as to the contents and authenticity of documents;
 - (4) Whether the parties can agree to submission of the case on a stipulated record;
 - (5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;
 - (6) Limitation of the number of witnesses;
 - (7) Scheduling dates for the exchange of witness lists and of proposed exhibits;
 - (8) Discovery;
 - (9) The time and place for the hearing; and
 - (10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.
- (d) The ALJ may issue an order containing all matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

§ 79.20 Disclosure of documents.

- (a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under §79.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.
- (b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.
- (c) The notice sent to the Attorney General from the reviewing official as described in §79.5 is not discoverable under any circumstances.
- (d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed with the ALJ following the filing of an answer pursuant to §79.9.

§ 79.21 Discovery.

- (a) The following types of discovery are authorized:
 - (1) Requests for production of documents for inspection and copying;
 - (2) Requests for admission of the contents or authenticity of any relevant document or of the truth of any relevant fact;
 - (3) Written interrogatories; and
 - (4) Depositions.
- (b) For the purpose of this section and §§79.22 and 79.23, the term *documents* includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the ALJ. The ALJ shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion with the ALJ. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in §79.24.

(3) The ALJ may grant a motion for discovery only if he or she finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The ALJ may grant discovery subject to a protective order under §79.24.

(e) *Depositions.* (1) If a motion for deposition is granted, the ALJ shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in §79.8.

(3) The deponent may file with the ALJ a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 79.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the ALJ, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with §79.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the ALJ, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the ALJ shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the ALJ finds good cause for the failure or that there is no prejudice to the objecting party.

(c) Unless another party objects within the time set by the ALJ, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 79.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the ALJ issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the ALJ for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in §79.8, except that a subpoena on a party or upon an individual under the control of a party may be served as prescribed in §79.26(b).

(f) A party or the individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 79.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the ALJ may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the ALJ;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the ALJ;

(8) That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the ALJ.

§ 79.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees

and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority, a check for witness fees and mileage need not accompany the subpoena.

§ 79.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the ALJ shall include an original and two copies.

(2) Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the ALJ, and a designation of the paper (e.g., motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the ALJ shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in §79.8 shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid, and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 79.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) Except as provided in paragraph (c) of this section, when the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional five calendar days will be added to the time permitted for any response.

§ 79.28 Motions.

(a) Any application to the ALJ for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 79.29 Sanctions.

(a) The ALJ may sanction a person, including any party or representative, for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the ALJ may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the ALJ may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The ALJ may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 79.30 The hearing and burden of proof.

(a) The ALJ shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under §79.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the ALJ for good cause shown.

§ 79.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the ALJ and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

- (1) The number of false, fictitious, or fraudulent claims or statements;
 - (2) The time period over which such claims or statements were made;
 - (3) The degree of the defendant's culpability with respect to the misconduct;
 - (4) The amount of money or the value of the property, services, or benefit falsely claimed;
 - (5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;
 - (6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;
 - (7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;
 - (8) Whether the defendant has engaged in a pattern of the same or similar misconduct;
 - (9) Whether the defendant attempted to conceal the misconduct;
 - (10) The degree to which the defendant has involved others in the misconduct or in concealing it;
 - (11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;
 - (12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;
 - (13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;
 - (14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;
 - (15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding, to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and
 - (16) The need to deter the defendant and others from engaging in the same or similar misconduct.
- (c) Nothing in this section shall be construed to limit the ALJ or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 79.32 Location of hearing.

- (a) The hearing may be held—
- (1) In any judicial district of the United States in which the defendant resides or transacts business;
 - (2) In any judicial district of the United States in which the claim or statement in issue was made; or
 - (3) In such other place as may be agreed upon by the defendant and the ALJ.
- (b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the ALJ.

§ 79.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in §79.22(a).

(c) The ALJ shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

(d) The ALJ shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 79.34 Evidence.

(a) The ALJ shall determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ shall not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, *e.g.*, to exclude unreliable evidence.

(c) The ALJ shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The ALJ shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to §79.24.

§ 79.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to §79.24.

§ 79.36 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ shall fix the time for filing such briefs, not to exceed 60 days from the date the party receives the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

§ 79.37 Initial decision.

(a) The ALJ shall issue an initial decision based only on the record, which shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate §79.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in §79.31.

(c) The ALJ shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The ALJ shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the ALJ or a notice of appeal with the authority head. If the ALJ fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the ALJ is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the ALJ.

§ 79.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the ALJ.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The ALJ may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

(f) If the ALJ denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the ALJ denies the motion, unless the initial decision is timely appealed to the authority head in accordance with §79.39.

(g) If the ALJ issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with §79.39.

§ 79.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the ALJ issues an initial decision. However, if another party files a motion for reconsideration under §79.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ denies the motion or issues a revised initial decision, whichever applies.

(3) If no motion for reconsideration is timely filed, a notice of appeal must be filed within 30 days after the ALJ issues the initial decision.

(4) The authority head may extend the initial 30-day period for an additional 30-days if the defendant files with the authority head a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal with the authority head, and the time for filing motions for reconsideration under §79.38 has expired, the ALJ shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the ALJ.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the ALJ unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the ALJ for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the ALJ in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under §79.3 is final and is not subject to judicial review.

§ 79.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 79.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 79.42 Judicial review.

Section 3805 of title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 79.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 79.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §79.42 or §79.43, or any amount agreed upon in a compromise or settlement under §79.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this subsection against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 79.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 79.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the ALJ issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the ALJ issues an initial decision, except during the pendency of any review under §79.42 or during the pendency of any action to collect penalties and assessments under §79.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under §79.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 79.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in §79.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under §79.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

DRA Exhibit C: West Virginia Code Chapter 7, Article 9

WEST VIRGINIA CODE

CHAPTER 9. HUMAN SERVICES.

ARTICLE 7. FRAUD AND ABUSE IN THE MEDICAID PROGRAM.

§9-7-1. Legislative purpose and findings; powers and duties of fraud control unit.

(a) It is the purpose of the Legislature to continue the Medicaid Fraud Control Unit previously established within the West Virginia Department of Health and Human Resources and to provide it with the responsibility and authority for investigating and controlling fraud and abuse of the medical programs of the state Department of Health and Human Resources which have been established pursuant to section two, article four of this chapter. It is the finding of the Legislature that substantial sums of money have been lost to the state and federal government in the operation of the medical programs of the state due to the overpayment of moneys to medical providers. Such overpayments have been the result of both the abuse of and fraud in the reimbursement process.

(b) The Medicaid Fraud Control Unit of the State Department of Health and Human Resources shall be continued and shall have the following powers and duties:

(1) The investigation and referral for prosecution of all violations of applicable state and federal laws pertaining to the provision of goods or services under the medical programs of the state including the Medicaid program.

(2) The investigation of abuse, neglect or financial exploitation of residents in board and care facilities and patients in health care facilities which receive payments under the medical programs of the state.

(3) To cooperate with the federal government in all programs designed to detect and deter fraud and abuse in the medical programs of the state.

(4) To employ and train personnel to achieve the purposes of this article and to employ legal counsel, investigators, Auditors and clerical support personnel and such other personnel as are deemed necessary from time to time to accomplish the purposes herein.

§9-7-2. Definitions.

For the purposes of this article:

(1) "Assistance" means money payments, medical care, transportation and other goods and services necessary for the health or welfare of individuals, including guidance, counseling and other welfare services and shall include all items of any nature contained within the definition of "welfare assistance" in section two, article one of this chapter.

(2) "Benefits" means money payments, goods, services, or any other thing of value.

(3) "Board and Care Facility" means a residential setting where two or more unrelated adults receive nursing services or personal care services.

(4) "Claim" means an application for payment for goods or services provided under the medical programs of the Department of Health and Human Resources.

(5) "Entity" means any corporation, association, partnership, limited liability company, or other legal entity.

(6) "Financial Exploitation" means the intentional misappropriation or misuse of funds or assets of

another.

(7) "Medicaid" means that assistance provided under a state plan implemented pursuant to the provisions of subchapter nineteen, chapter seven, Title 42, United States Code, as that chapter has been and may hereafter be amended.

(8) "Person" means any individual, corporation, association, partnership, proprietor, agent, assignee or entity.

(9) "Provider" means any individual or entity furnishing goods or services under the medical programs of the Department of Health and Human Resources.

(10) "Unit" means the Medicaid Fraud Control Unit established under section one of this article.

§9-7-3. Investigations; procedure.

(a) When the unit has credible information that indicates a person has engaged in an act or activity which is subject to prosecution under this article, the unit may make an investigation to determine if the act has been committed and, to the extent necessary for such purpose, the Secretary, or an employee of the unit designated by the Secretary, may administer oaths or affirmations and issue subpoenas for witnesses and documents relevant to the investigation, including information concerning the existence, description, nature, custody, condition and location of any book, record, documents or other tangible thing and the identity and location of persons having knowledge of relevant facts or any matter reasonably calculated to lead to the discovery of admissible evidence.

When the unit has probable cause to believe that a person has engaged in an act or activity which is subject to prosecution under this article, or section twenty nine, article two, chapter sixty one, either before, during, or after an investigation pursuant to this section, the Secretary, or an employee of the unit designated by the Secretary, may request search warrants and present and swear or affirm criminal complaints.

(b) If documents necessary to an investigation of the unit shall appear to be located outside the state, such documents shall be made available by the person or entity within the jurisdiction of the state having control over such documents either at a convenient location within the state or, upon payment of reasonable and necessary expenses to the unit for transportation and inspection, at the place outside the state where such documents are maintained.

(c) Upon failure of a person to comply with a subpoena or subpoena duces tecum or failure of a person to give testimony without lawful excuse and upon reasonable notice to all persons affected thereby, the unit may apply to the circuit court of the county in which compliance is sought for appropriate orders to compel obedience with the provisions of this section.

(d) The unit shall not make public the name or identity of a person whose acts or conduct is investigated pursuant to this section or the facts disclosed in such investigation except as the same may be used in any legal action or enforcement proceeding brought pursuant to this article or any other provision of this code.

§9-7-3a. Agency lawyers assisting prosecutors.

Attorneys employed and assigned to the Medicaid Fraud Control Unit created by the provisions of section one of this article may assist in the prosecution of criminal violations of this article.

§9-7-4. Applications for medical assistance; false statements or representations; criminal penalties.

(a) A person shall not knowingly make or cause to be made a false statement or false representation

of any material fact in an application for medical assistance under the medical programs of the Department of Health and Human Resources.

(b) A person shall not knowingly make or cause to be made a false statement or false representation of any material fact necessary to determine the rights of any other person to medical assistance under the medical programs of the Department of Health and Human Resources.

(c) A person shall not knowingly and intentionally conceal or fail to disclose any fact with the intent to obtain medical assistance under the medical programs of the Department of Health and Human Resources to which the person or any other person is not entitled.

(d) Any person found to be in violation of subsection (a), (b) or (c) of this section is guilty of a felony and, upon conviction, shall be imprisoned in a state correctional facility not less than one nor more than ten years, or shall be fined not to exceed \$10,000 or both fined and imprisoned.

§9-7-5. Bribery; false claims; conspiracy; criminal penalties.

(a) A person shall not solicit, offer, pay, or receive any unlawful remuneration, including any kickback, rebate or bribe, directly or indirectly, with the intent of causing an expenditure of moneys from the medical services fund established pursuant to section two, article four of this chapter, which is not authorized by applicable laws or rules and regulations.

(b) A person shall not make or present or cause to be made or presented to the Department of Health and Human Resources a claim under the medical programs of the Department of Health and Human Resources knowing the claim to be false, fraudulent or fictitious.

(c) A person shall not enter into an agreement, combination or conspiracy to obtain or aid another to obtain the payment or allowance of a false, fraudulent or fictitious claim under the medical programs of the Department of Health and Human Resources.

(d) Any person found to be in violation of subsection (a), (b) or (c) of this section is guilty of a felony and, upon conviction, shall be imprisoned in a state correctional facility not less than one nor more than ten years or shall be fined not to exceed \$10,000, or both fined and imprisoned.

§9-7-5a. Venue for criminal offenses.

In addition to other venues permitted by state law, a criminal prosecution under section five of this article may be commenced in the circuit court of Kanawha County or of any county in which:

(a) The defendant is conducting business; or

(b) Any of the conduct constituting a violation of any provision of this article has occurred.

§9-7-6. Civil remedies.

(a) Any person, firm, corporation or other entity which willfully, by means of a false statement or representation, or by concealment of any material fact, or by other fraudulent scheme, devise or artifice on behalf of himself, herself, itself, or others, obtains or attempts to obtain benefits or payments or allowances under the medical programs of the Department of Health and Human Resources to which he or she or it is not entitled, or, in a greater amount than that to which he or she or it is entitled, shall be liable to the Department of Health and Human Resources in an amount equal to three times the amount of such benefits, payments or allowances to which he or she or it is not entitled, and shall be liable for the payment of reasonable attorney fees and all other fees and costs of litigation.

(b) No criminal action or indictment need be brought against any person, firm, corporation or other

entity as a condition for establishing civil liability hereunder.

(c) A civil action under this section may be prosecuted and maintained on behalf of the Department of Health and Human Resources by the Attorney General and the Attorney General's assistants or a prosecuting attorney and the prosecuting attorney's assistants or by any attorney in contract with or employed by the Department of Health and Human Resources to provide such representation.

§9-7-6a. Liability of employees of the Department of Health and Human Resources.

There shall be no civil liability on the part of, and no cause of action shall arise against the Secretary or the Department of Health and Human Resources or its employees or agents for any action taken by them in good faith and in the lawful performance of their powers and duties under this article.

§9-7-7. Licensing of vehicles for use by the medicaid fraud control unit.

For purposes of the responsibilities assigned the unit pursuant to this article, personnel of the unit shall be permitted to operate vehicles owned or leased for the state displaying Class A registration plates.

§9-7-8. Remedies and penalties not exclusive.

The remedies and penalties provided in this article governing the operation of the medical programs of the Department of Health and Human Resources are in addition to those remedies and penalties provided elsewhere by law.

§9-7-9. Severability.

If any provision of this article be found by a court of competent jurisdiction to be unenforceable under the constitution of this state or the laws and constitution of the United States, the remaining provisions of this article shall be deemed severable and shall continue in full force and effect.