

<b>COMPLIANCE STANDARD:</b>	<b>Deficit Reduction Act of 2005 §6032 Employee Education About False Claims Recovery</b>
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## **BACKGROUND AND PURPOSE**

As stated in its Directive entitled "Compliance," the South Carolina Department of Mental Health (SCDMH) is committed to ensuring the promotion of full compliance and the prevention and detection of accidental and intentional noncompliance with all applicable legal and ethical responsibilities. To ensure compliance with such laws, SCDMH has a Compliance Plan and policies and procedures in place to detect and prevent fraud, waste, and abuse.

This policy is incorporated into the "Compliance Standards and Procedures" section of the SCDMH Compliance Plan and its purpose is to fulfill the terms of the Deficit Reduction Act which requires SCDMH to establish a policy which provides detailed information about the Federal Civil False Claims Act, the Federal Program Fraud Civil Remedies Act, state laws pertaining to false claims, and whistleblower protections under such laws.

### **1. FEDERAL CIVIL FALSE CLAIMS ACT**

The Civil False Claims Act (31 U.S.C. §3729 *et seq.*) is a statute that imposes civil liability on any person who:

- knowingly presents, or causes to be presented, a false or fraudulent claim, record or statement for payment or approval,
- conspires to defraud the government by getting a false or fraudulent claim allowed or paid,
- uses a false record or statement to avoid or decrease an obligation to pay the Government,
- and other fraudulent acts enumerated in the statute.

The term "**knowingly**" as defined in the Civil False Claims Act ("FCA") includes a person who has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud is required.

The term "**claim**" includes any request or demand for money or property if the United States Government provides any portion of the money requested or demanded.

**Potential civil liability** under the FCA currently includes penalties of between five thousand five hundred and eleven thousand per claim, treble damages, and the costs of any civil action brought to recovery such penalties or damages.

The **Attorney General of the United States** is required to diligently investigate violations of the FCA, and may bring a civil action against a person. Before filing suit the Attorney General may

issue an investigative demand requiring production of documents and written answers and oral testimony.

The FCA also provides for **Actions by Private Persons** (*qui tam* lawsuits) who can bring a civil action in the name of the government for a violation of the Act. Generally, the action may not be brought more than six years after the violation, but in no event more than ten. When the action is filed it remains under seal for at least sixty days. The United States Government may choose to intervene in the lawsuit and assume primary responsibility for prosecuting, dismissing or settling the action. If the Government chooses not to intervene, the private party who initiated the lawsuit has the right to conduct the action.

In the event the government proceeds with the lawsuit, the *qui tam* plaintiff may receive fifteen to twenty-five per cent of the proceeds of the action or settlement. If the *qui tam* plaintiff proceeds with the action without the government, the plaintiff may receive twenty-five to thirty per cent of the recovery. In either case, the plaintiff may also receive an amount for reasonable expenses plus reasonable attorneys' fees and costs.

If the civil action is frivolous, clearly vexatious or brought primarily for harassment, the plaintiff may have to pay the defendant its fees and costs. If the plaintiff planned or initiated the violation, the share of proceeds may be reduced and, if found guilty of a crime associated with the violation, no share will be awarded the plaintiff.

**Whistleblower Protection.** The Civil False Claims Act also provides for protection for employees from retaliation. An employee who is discharged, demoted, suspended, threatened, harassed, or discriminated against in terms and conditions of employment because of lawful acts conducted in furtherance of an action under the FCA may bring an action in Federal District Court seeking reinstatement, two times the amount of back pay plus interest, and other enumerated costs, damages, and fees.

## 2. FEDERAL PROGRAM FRAUD CIVIL REMEDIES ACT OF 1986

The Program Fraud Civil Remedies Act of 1986 ("Administrative Remedies for False Claims and Statements" at 38 U.S.C. §3801 *et seq.*) is a statute that establishes an administrative remedy against any person who presents or causes to be presented a claim or written statement that the person knows or has reason to know is false, fictitious, or fraudulent due to an assertion or omission to certain federal agencies (including the Department of Health and Human Services).

The term "**knows or has reason to know**" is defined in the Act as a person who has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information. No proof of specific intent to defraud is required.

The term "**claim**" includes any request or demand for property or money, e.g., grants, loans, insurance or benefits, when the United States Government provides or will reimburse any portion of the money.

The authority, i.e., federal department, may investigate and with the Attorney General's approval commence proceedings if the claim is less than one hundred and fifty thousand dollars. A hearing must begin within six years from the submission of the claim. The Act allows for **civil monetary sanctions** to be imposed in administrative hearings, including penalties of five thousand five hundred dollars per claim and an assessment, in lieu of damages, of not more than twice the amount of the original claim.

### 3. STATE CRIMINAL FALSE CLAIMS STATUE

The South Carolina "Presenting False Claims for Payment" statute (S.C. Code Ann. §38-55-170) provides that a person who knowingly causes, assists with, solicits, or conspires in the presentation of a false claim to an insurer, health maintenance organization, or to any person (including the State of South Carolina) providing benefits for health care in South Carolina is, depending upon the amount of the claim, guilty of anywhere from a misdemeanor for which the person can be fined and imprisoned to a felony whereby the person is subject to imprisonment for ten years and/or a fine of five thousand dollars.

### 4. STATE MEDICAID FALSE CLAIMS STATUTE

The South Carolina Medicaid False Claims Statute (S.C. Code Ann. §43-7-60) provides **criminal, civil, and administrative** penalties and sanctions related to health care providers who knowingly and willfully make a false statement in an application or request for a benefit, reimbursement or in a report or certificate submitted to the Medicaid program. The Statute also provides that it is unlawful for a provider to knowingly and willfully conceal or fail to disclose any material fact which affects the provider's initial or continued entitlement to reimbursement or the amount of payment under the Medicaid program. Each false claim or concealed fact constitutes a separate offense.

A person who violates the Medicaid False Claims Statute is guilty of a misdemeanor and subject to imprisonment for up to three years and a fine of not more that one thousand dollars per offense. In addition, the Attorney General may bring a civil action to recover treble damages and seek penalties of two thousand dollars per false claim. The state agency administering the Medicaid program may impose additional administrative sanctions on providers convicted under the Statute.

### 5. State Medicaid False Application Statute

The South Carolina Medicaid False Application Statute (S.C. Code Ann. §43-7-70) provides **criminal** penalties for any applicant, recipient or other person acting on their behalf to knowingly and willfully (1) make or cause to be made a false statement or representation of material fact on a Medicaid application for entitlements, or (2) conceal or fail to disclose any material fact affecting initial or continuing entitlement to receive assistance, goods or services under the state's Medicaid program.

A person who violates the provisions of this statute is guilty of medical assistance recipient fraud, a misdemeanor, and upon conviction must be imprisoned not more than three years or fined not more than one thousand dollars, or both.

### 6. STATE INSURANCE FRAUD AND REPORTING IMMUNITY ACT

The South Carolina Insurance Fraud and Reporting Immunity Act (S.C. Code Ann. §38-55-510 *et seq.*) provides for **criminal and civil** penalties related to insurance fraud and established an Insurance Fraud Division in the office of the Attorney General to prosecute violations.

The term "false statement and misrepresentation" is defined as one made with knowledge and the intent of obtaining an undeserved economic benefit or deny another a benefit in connection with an insurance transaction. Any person or insurer who makes a "false statement or misrepresentation" is, depending upon the amount received and number of offenses, guilty of

anywhere from a misdemeanor, thirty days imprisonment or fine to a felony, ten years imprisonment, and a fifty thousand dollar fine. In all cases the person must make full restitution to the victim of the fraud.

In addition to criminal liability, a person who violates the statute faces potential civil fines up to fifteen thousand dollars and may be ordered to pay court costs and attorneys' fees to the director of the Insurance Fraud Division which retains the fines for use in enforcing and administering the Act.

Any person, insurer, or agency (1) having reason to believe that another has made a false statement or misrepresentation, or (2) has knowledge of a suspected false statement or misrepresentation **shall notify** the Insurance Fraud Division. If the reporter acts without malice or in good faith, the reporter is immune from any liability arising out of the report.

## **7. State Computer Crime Act**

The South Carolina Computer Crime Act (S.C. Code Ann. §16-16-10, *et seq.*) provides **criminal** penalties related to causing direct or indirect access to a computer for, among other things, the purpose of devising or executing a fraud scheme or obtaining money, property or services by means of false or fraudulent pretenses, representations or promises.

Any person convicted of computer crime is, depending upon the amount of the victim's loss and number of offenses, guilty of anywhere from a misdemeanor, thirty days imprisonment or fine of not more than two hundred dollars to a felony, five years imprisonment, and/or a fifty thousand dollar fine.

## **8. STATE ADMINISTRATIVE SANCTIONS AGAINST MEDICAID PROVIDERS ACT**

Pursuant to the South Carolina Department of Health and Human Services ("DHHS") Regulations, "Administrative Sanctions Against Medicaid Providers" (S.C. Code of Regulations R. 126-400 *et seq.*), the Administrator of Medicaid may invoke administrative sanctions against a Medicaid provider who has been determined to have abused the Medicaid Program. "Abuse" is defined as provider practices that are inconsistent with sound fiscal, business, or medical practices and result in unnecessary cost to the Medicaid Program, reimbursement for medically unnecessary services, or services that fail to meet professionally recognized standards for health care.

Grounds for sanctioning providers under the DHHS regulations include presenting a false claim for services, submitting false information to obtain greater compensation than that to which the provider is entitled, overutilization, conviction for a criminal offense related to Medicaid or Medicare, failure to meet standards required by State or Federal law for participation in Medicaid, and other acts. Sanctions may include educational intervention, peer review, recoupment of overpayments, suspension, termination, postpayment or prepayment review of claims, and referral to licensing and certifying boards or agencies.

The factors considered in determining sanctions include, but are not be limited to: the seriousness of the offense; the extent of violation; history of prior violation(s); prior imposition of sanction; and, the providers failure to obey program rules and policies as specified in the appropriate Provider Manual or other official notices.

## **9. SCDHHS & SCDMH Contract; Medicaid Community Mental Health Services**

The South Carolina Departments of Health and Human Services (SCDHHS) and Mental Health (DMH) agreed pursuant to a contract for Community Mental Health Services that:

"If at any time during the term of this contract, DMH becomes aware of or has reason to believe by whatever means that, under this or any other program administered by SCDHHS, a recipient of or applicant for services, an employee of DMH or SCDHHS, and/or subcontractor or its employees, have **improperly or fraudulently** applied for or received benefits, monies, or services pursuant to this or any other contract, such information **shall be reported** in confidence by DMH to SCDHHS." (Emphasis added.)

(See: Article IX, Covenants and Conditions, Subsection G., Reporting of Fraudulent Activity.)

#### 10. State Employment Protection Act

State employees who report violations of state or federal law or regulation are provided protection against retaliation or disciplinary action related to the report pursuant to the "Employment Protection for Reports of Violations of State or Federal Law or Regulation" (S.C. Code Ann. §8-27-10 *et seq.*). The Act prohibits a public body from dismissing, suspending, demoting, or taking other adverse actions against an employee based on the employee's filing of a report of wrongdoing with an appropriate authority.

An "appropriate authority" is defined as the public body that employs the reporting individual or a federal, state, or local government body having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or wrongdoing.

If an employee suffers adverse actions related to employment within one year after having timely (within sixty days of first learning) reported alleged wrongdoing, the employee may institute a nonjury civil action against the public body after exhausting all available grievance or other administrative remedies. In the event the appropriate authority which received the report determines the employee's report is unfounded or a mere technical violation and is not made in good faith, the public body may take disciplinary action including termination and, notwithstanding the filing of a report, a public body may dismiss, suspend, demote, or decrease the compensation of an employee for causes independent of the filing of a protected report.

A public body may also impose disciplinary sanctions against any direct line supervisory employees who retaliate against another employee for having filed a good faith report.

Reviewed by Governing Council, Inpatient and CMHC Center Directors and COs

Approved:



SCDMH Director of Quality Mgmt/  
Compliance Officer

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