

# HILLSIDE MANOR REHABILITATION AND EXTENDED CARE CENTER

## Compliance & Ethics Program Policy and Procedure

### Appendix H

#### COMPLIANCE WITH APPLICABLE FEDERAL AND STATE FALSE CLAIMS LAWS: OVERVIEW OF THE LAWS REGARDING FALSE CLAIMS AND WHISTLEBLOWER PROTECTIONS

##### I. BACKGROUND/PURPOSE

Hillside Manor Rehabilitation and Extended Care Center (the “Facility”) is committed to complying with the requirements of Section 6032 of the Federal Deficit Reduction Act of 2005, and preventing and detecting any fraud, waste, or abuse. To this end, the Facility maintains a Compliance and Ethics Program and strives to educate its work force on fraud and abuse laws, including the importance of submitting accurate claims and reports to the Federal and State governments. The Facility has instituted various procedures, which are set forth in our Compliance Manual and various Compliance and Ethics Program policies, to ensure compliance with these laws and to assist us in preventing fraud, waste and abuse in Federal health care programs.<sup>1</sup> In furtherance of this policy and to comply with the Deficit Reduction Act, the Facility disseminates this Policy to all Personnel (including employees, management, and contractors and other agents)<sup>2</sup> to ensure that such persons are aware of certain relevant Federal and State false claims laws and regulations, and that submission of a false claim can result in significant administrative and civil penalties under the Federal False Claims Act and other New York State laws.

##### II. POLICY

To assist the Facility in meeting its legal and ethical obligations, any Personnel who reasonably suspects or is aware of the preparation or submission of a false claim or report or any other potential fraud, waste, or abuse related to a Federal health care program is required to report such information to his/her supervisor or the Compliance Officer. Personnel who report such information will have the right and opportunity to do so anonymously and will be protected against retaliation for coming forward with such information both under our internal compliance policies and procedures and Federal and State law. If any Personnel intentionally and maliciously make a false report or falsely accuses someone of filing a false claim, in violation of Federal law, State law, or Facility policy, the Facility retains the right to take appropriate action against that individual.

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<sup>1</sup> “Federal health care program” means any plan or program that provides health benefits whether directly, through insurance or otherwise, which is funded directly, in whole or in part, by the United States government and includes certain State health care programs. Medicare, Medicaid, Veterans’ programs and the State Children’s Health Insurance Program are some examples of Federal health care programs.

<sup>2</sup> “Personnel” means all persons who are affected by the Facility’s compliance risk areas, including employees, the Chief Executive Officer, senior administrators, managers, contractors, agents, subcontractors, independent contractors, the Governing Body and corporate officers.

The Facility commits itself to investigating any suspicions of fraud, waste, or abuse swiftly and thoroughly and requires all employees to assist in such investigations. If any Personnel believes that the Facility is not responding to their report within a reasonable period of time, the individual should bring these concerns about the perceived inaction to the Compliance Officer. Failure to report and disclose or assist in an investigation of fraud and abuse is a breach of the Personnel's obligations to the Facility and may result in disciplinary action, up to, and including termination of employment, contract or affiliation.

### III. RELEVANT FEDERAL LAWS

#### A. The Federal False Claims Act

The federal False Claims Act ("FCA") provides, in pertinent part, that:

(1) (a) In general. Subject to Paragraph (2), any person who –  
(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval; (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; (C) conspires to commit [the above violations] or (G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

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is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000,<sup>3</sup> plus 3 times the amount of damages which the Government sustains because of the act of that person.

For purposes of this section:

(1) the terms "knowing" and "knowingly" (A) mean that a person, with respect to information – (i) has actual knowledge of the information; (ii) acts in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information; and (B) require no proof of specific intent to defraud;

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<sup>3</sup> Although the statutory provisions of the FCA authorize a range of penalties between \$5,000 and \$10,000, as of the effective date of this policy, those amounts have been adjusted for inflation and increased by regulation to not less than \$13,508 and not more than \$27,018 for penalties assessed after January 30, 2023, whose associated violations occurred after November 15, 2015 28 *CFR* § 85.5.

(2) the term “claim” (A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that – (i) is presented to an officer, employee, or agent of the United States; or (ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government (I) provides or has provided any portion of the money or property requested or demanded; or (II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded;

(3) the term “obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment; and

(4) the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

*31 U.S.C. § 3729*

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(d) Exclusion.

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

*31 U.S.C. § 3729.*

While the FCA imposes liability only when the claimant acts “knowingly,” it does not require that the person submitting the claim have actual knowledge that the claim is false. A person who acts in reckless disregard or in deliberate ignorance of the truth or falsity of the information also can be found liable under the Act.

In sum, the FCA imposes liability on any person who submits a claim to the federal government or a contractor of the federal government that he or she knows (or should know) is false. An example may be a physician who submits a bill to Medicare for medical services she knows she has not provided. The FCA also imposes liability on an individual who may knowingly submit a false record in order to obtain payment from the government. An example of this may include a government contractor who submits records that he knows (or should know) are false and that indicate compliance with certain contractual or regulatory requirements. The third area of liability includes those instances in which someone may obtain money from the federal government to which he may not be entitled, and then uses false statements or records in order to retain the money. An example of this so-called “reverse false claim” may include a health care facility that obtains interim payments from Medicare or Medicaid throughout the year, and then knowingly files a false cost report at the end of the year in order to avoid making a refund to the Medicare or Medicaid program.

In addition to its substantive provisions, the FCA provides that private parties may bring an action on behalf of the United States. These private parties, known as “*qui tam* relators,” may share in a percentage of the proceeds from an FCA action or settlement.

Section 3730(d)(1) of the FCA provides, with some exceptions, that a *qui tam* relator, when the government has intervened in the lawsuit, shall receive at least 15 percent but not more than 25 percent of the proceeds of the FCA action depending upon the extent to which the relator substantially contributed to the prosecution of the action. When the government does not intervene, section 3730(d)(2) of the FCA provides that the relator shall receive an amount that the court decides is reasonable and shall be not less than 25 percent and not more than 30 percent.

### **B. The Program Fraud Civil Remedies Act (“PFCRA”)**

This statute allows for administrative recoveries by federal agencies. If a person submits a claim that the person knows is false or contains false information, or omits material information, then the agency receiving the claim may impose a penalty of up to \$5,000 for each claim.<sup>4</sup> The agency may also recover twice the amount of the claim.

Unlike the FCA, a violation of this law occurs when a false claim is submitted, not when it is paid. Also unlike the FCA, the determination of whether a claim is false, and the imposition of fines and penalties is made by the administrative agency, not by prosecution in the federal court system.

## **IV. RELEVANT NEW YORK STATE LAWS**

New York State False Claim laws fall into two categories: civil and administrative, and criminal. Some apply to recipient false claims and some apply to provider false claims. The majority of these statutes are specific to health care or Medicaid. Yet some of the “common law” crimes apply to areas of interaction with the government and so are applicable to health care fraud.

### **A. CIVIL AND ADMINISTRATIVE LAWS**

#### **i) NY False Claims Act (State Finance Law, §§187-194)**

The New York False Claims Act is similar to the federal FCA. It imposes penalties and fines on individuals and entities who knowingly file false or fraudulent claims for payment from any state or local government, including health care programs such as Medicaid. It also has a provision regarding “reverse false claims” similar to the federal FCA, such that a person or entity will be liable in those instances in which the person obtains money from a state or local government to which the person may not be entitled, and then uses false statements or records in order to retain the money.

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<sup>4</sup> Although the statutory provisions of the Program Fraud Civil Remedies Act authorizes a penalty up to \$5,000, that amount has been adjusted for inflation and increased by regulation to not more than \$13,508 for penalties assessed after January 30, 2023, whose associated violations occurred after November 2, 2015. *See* 28 C.F.R. §85.5.

The penalty for filing a false claim under the New York False Claims Act is equal to the amount that may be imposed under the Federal FCA (as may be adjusted for inflation). In addition, a person who violates this act is liable for costs, including attorneys' fees, of a civil action brought to recover any such penalty.

The New York False Claims Act allows private individuals to file lawsuits in state court, just as if they were state or local government parties. If the suit eventually concludes with payments back to the government, the person who started the case can recover 25%-30% of the proceeds if the government did not participate in the suit; or 15%-25% if the government did participate.

**ii) Social Services Law 145-b False Statements**

It is a violation to knowingly obtain or attempt to obtain payment for items or services furnished under any Social Services program, including Medicaid, by use of a false statement, deliberate concealment or other fraudulent scheme or device. The state or the local Social Services district may recover three times the amount incorrectly paid. In addition, the Department of Health may impose a civil penalty of up to \$10,000 per violation. If repeat violations occur within 5 years, a penalty up to \$30,000 per violation may be imposed if the repeat violations involve more serious violations of Medicaid rules, billing for services not rendered, or providing excessive services.

**iii) Social Services Law 145-c Sanctions**

If any person applies for or receives public assistance, including Medicaid, by intentionally making a false or misleading statement, or intending to do so, the needs of the individual or that of his family shall not be taken into account for six months if a first offense, for twelve months if a second offense (or if benefits wrongfully received are at least \$1,000 and no more than \$3,900), for eighteen months if a third offense (or if benefits wrongfully received are in excess of \$3,900), and five years for any subsequent occasion of any such offense.

**B. CRIMINAL LAWS**

**i) Social Services Law 145, Penalties**

Any person who submits false statements or deliberately conceals material information in order to receive public assistance, including Medicaid, is guilty of a misdemeanor.

**ii) Social Services Law 366-b, Penalties for Fraudulent Practices**

- a. Any person who obtains or attempts to obtain, for himself or others, medical assistance by means of a false statement, concealment of material facts, impersonation or other fraudulent means is guilty of a Class A misdemeanor.
- b. Any person who, with intent to defraud, presents for payment any false or fraudulent claim for furnishing services, knowingly submits false information to obtain greater Medicaid compensation, or knowingly submits false information in order to obtain authorization to provide items or services is guilty of a Class A misdemeanor.

**iii) Penal Law Article 155, Larceny**

The crime of larceny applies to a person who, with intent to deprive another of his property, obtains, takes or withholds the property by means of trick, embezzlement, false pretense, false promise, including a scheme to defraud, or other similar behavior. It has been applied to Medicaid fraud cases.

- a. Fourth degree grand larceny involves property valued over \$1,000. It is a Class E felony.
- b. Third degree grand larceny involves property valued over \$3,000. It is a Class D felony.
- c. Second degree grand larceny involves property valued over \$50,000. It is a Class C felony.
- d. First degree grand larceny involves property valued over \$1 million. It is a Class B felony.

**iv) Penal Law Article 175, False Written Statements**

Four crimes in this Article relate to filing false information or claims and have been applied in Medicaid fraud prosecutions:

- a. § 175.05, Falsifying business records involves entering false information, omitting material information or altering an enterprise's business records with the intent to defraud. It is a Class A misdemeanor.
- b. § 175.10, Falsifying business records in the first degree includes the elements of the § 175.05 offense and includes the intent to commit another crime or conceal its commission. It is a Class E felony.
- c. § 175.30, Offering a false instrument for filing in the second degree involves presenting a written instrument (including a claim for payment) to a public office knowing that it contains false information. It is a Class A misdemeanor.
- d. § 175.35, Offering a false instrument for filing in the first degree includes the elements of the second degree offense and must include an intent to defraud the state or a political subdivision. It is a Class E felony.

**v) Penal Law Article 176, Insurance Fraud**

This law applies to claims for insurance payments, including Medicaid or other health insurance and contains six crimes.

- a. Insurance Fraud in the 5th degree involves intentionally filing a health insurance claim knowing that it is false. It is a Class A misdemeanor.

- b. Insurance fraud in the 4th degree is filing a false insurance claim for over \$1,000. It is a Class E felony.
- c. Insurance fraud in the 3rd degree is filing a false insurance claim for over \$3,000. It is a Class D felony.
- d. Insurance fraud in the 2nd degree is filing a false insurance claim for over \$50,000. It is a Class C felony.
- e. Insurance fraud in the 1st degree is filing a false insurance claim for over \$1 million. It is a Class B felony.
- f. Aggravated insurance fraud is committing insurance fraud more than once. It is a Class D felony.

**vi) Penal Law Article 177, Health Care Fraud**

This statute primarily applies to claims for health insurance payments, including Medicaid, and contains five crimes:

- a. Health care fraud in the 5th degree is knowingly filing, with the intent to defraud, a claim for payment that intentionally has false information or omissions. It is a Class A misdemeanor.
- b. Health care fraud in the 4th degree is filing false claims and annually receiving over \$3,000 in aggregate. It is a Class E felony.
- c. Health care fraud in the 3rd degree is filing false claims and annually receiving over \$10,000 in aggregate. It is a Class D felony.
- d. Health care fraud in the 2nd degree – a person is guilty of this crime upon filing such false claims on more than one occasion and annually receiving over \$50,000. It is a Class C felony.
- e. Health care fraud in the 1st degree filing false claims and annually receiving over \$1 million. It is a class B felony.

**V. WHISTLEBLOWER PROTECTIONS**

**A. Federal False Claims Act (31 U.S.C. §3730[h])**

The federal FCA provides protection to any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the FCA. Remedies include reinstatement with comparable seniority as the *qui tam* relator would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

## **B. NY False Claim Act (State Finance Law §191)**

The New York State False Claims Act also provides protection to *qui tam* relators who are discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of their employment as a result of their furtherance of an action under the Act. Remedies include reinstatement with comparable seniority as the *qui tam* relator would have had but for the discrimination, two times the amount of any back pay, interest on any back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees.

## **C. New York Labor Law §740**

Section 740 prohibits employers from taking retaliatory action against an employee (including former employees and natural persons working as independent contractors), whether or not the employee is acting within the scope of his or her job duties, because the employee does any of the following:

- i) discloses or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer that the employee reasonably believes is in violation of law, rule, regulation or that the employee reasonably believes poses a substantial and specific danger to the public health or safety;
- ii) provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any such activity, policy or practice by such employer; or
- iii) objects to, or refuses to participate in, any such activity, policy or practice.

The employee's disclosure is protected only if the employee first brought up the matter with a supervisor and gave the employer a reasonable opportunity to correct the alleged violation. However, such employer notification is *not* required where:

- there is an imminent and serious danger to the public health or safety;
- the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy or practice;
- such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor;
- the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or
- the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct it.



#### **D. New York Labor Law §741**

Section 741 prohibits certain defined health care employers from taking retaliatory action against an employee because the employee does any of the following:

- i) discloses or threatens to disclose to a supervisor, to a public body, to a news media outlet, or to a social media forum available to the public at large, an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety; or
- ii) objects to, or refuses to participate in, any activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety.

Similar to Section 740, an employee may not be protected under Section 741 unless the employee has first brought the improper quality of patient care or improper workplace safety to the attention of a supervisor and has given the employer a reasonable opportunity to correct the activity, policy or practice. Also similar to Section 740, notice to the employer is not required where it presents an imminent threat to public health or safety or to the health of a specific patient or specific health care employee and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action.

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Under both Sections 740 and Section 741, an employee who has been the subject of retaliatory action may bring a civil action within two years after the alleged retaliatory action was taken. If the employee's action is successful, a court may order one or more of the following: an injunction to restrain continued violation of the law; the reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position or "front pay;" the reinstatement of full fringe benefits and seniority rights; the compensation for lost wages, benefits and other remuneration; the payment by the employer of reasonable costs, disbursements and attorneys' fees; a civil penalty not to exceed \$10,000; and/or the payment by the employer of punitive damages, if the violation was willful, malicious or wanton.

*Revised April 2023*

