



WISCONSIN LEGISLATIVE COUNCIL STAFF MEMORANDUM

Memo No. 2

TO: MEMBERS OF THE SPECIAL COMMITTEE ON PUBLIC ASSISTANCE PROGRAM
INTEGRITY

FROM: Pam Shannon, Senior Staff Attorney, and Anna Henning, Staff Attorney

RE: Program Integrity Provisions Relating to the Wisconsin Medical Assistance and FoodShare
Programs

DATE: September 1, 2010

This Memo describes program integrity provisions relating to the Medical Assistance (MA) program and the FoodShare program, both of which are administered by the Wisconsin Department of Health Services (DHS). The Memo is not an exhaustive discussion of the complex array of federal and state laws, rules, and regulations that may have some bearing on program integrity in MA and FoodShare. Rather, it provides brief background information and an overview of federal and state requirements relating to program integrity in the two programs. Its particular focus on state statutes, administrative rules, and policies is intended to assist the committee in its deliberations on possible legislative recommendations.

MEDICAL ASSISTANCE PROGRAM

Background

The Wisconsin MA program is the state's component of the federal Medicaid program and is administered by the Division of Health Care Access and Accountability in DHS. Under federal law, the state's MA program is required to provide certain health care services to individuals with limited financial resources. In addition, the state has, through a series of "waiver" agreements with the federal government, elected to expand coverage beyond the limits mandated by federal law. As currently structured, Wisconsin's MA program can be viewed as two broad, but distinct, programs. The first, referred to as "MA" or "EBD MA," provides coverage for elderly, blind, and disabled individuals through a series of subprograms such as EBD MA, Family Care, and the home- and community-based waiver programs. The second, BadgerCare Plus (including the BadgerCare Plus Core Plan), provides coverage to low-income children, their families, pregnant women, and low-income adults without

dependent children. In order to qualify for coverage, individuals must satisfy a number of financial and nonfinancial eligibility criteria, the specifics of which vary with the particular program.

Program enrollment* as of July 2010 is:

1. BadgerCare Plus: 771,784 (including 56,421 in the BadgerCare Plus Core Plan).
2. EBD MA: 189,084.
3. Other: 94,077.

In addition to the enrollment figures cited above, 89,239 individuals were enrolled in Senior Care (the state's prescription drug assistance program for low-income senior citizens) in July 2010.

At the federal level, Medicaid is administered by the Centers for Medicare and Medicaid Services (CMS), an agency within the U.S. Department of Health and Human Services (DHHS). Also within DHHS, the Office of the Inspector General (OIG) oversees program integrity in DHHS programs generally and, with respect to Medicaid, certifies state Medicaid fraud control units and reviews state false claims laws for compliance with federal requirements which, if met, make the state eligible for certain financial incentives.

Federal statutes and regulations set forth general requirements for the administration of Medicaid by the states. State statutes and administrative rules specify the authority and responsibilities of state and local agencies in administering the program. States are required to operate the program pursuant to a state MA plan that is submitted to CMS for approval, as are any amendments to the plan. The plan serves as the state's funding agreement with CMS and provides assurances that the state is operating the program in conformity with applicable federal laws and regulations. Wisconsin's MA Plan is available at: <http://www.dhs.wisconsin.gov/aboutdhs/DHCF/MAStatePlan/Index.htm>.

Federal Medicaid fraud-related statutes are generally found in 42 U.S.C. s. 1320a-7 *et seq.* Federal CMS and OIG regulations relating to Medicaid program integrity are in 42 C.F.R. Parts 455 and 1002, respectively. Wisconsin statutes specific to the MA program are in subch. IV of ch. 49, Stats. [ss. 49.43 to 49.498, Stats.] Other provisions of ch. 49, Stats., pertain to public assistance programs in general and, therefore, also apply to the MA program. Wisconsin's administrative rules governing the MA program are in chs. DHS 101-108, Wis. Adm. Code. Additional DHS rules, such as ch. DHS 2, relating to recoupment of benefit overpayments, also apply to the MA program.

As permitted under state law, DHS has delegated responsibility for administering MA at the local level to county social services and human services departments and tribes (collectively referred to as Income Maintenance (IM) agencies). [s. 49.45 (2) (a) 3., Stats.]

* Enrollment data from DHS website at:

<https://www.forwardhealth.wi.gov/WIPortal/portals/0/staticContent/Member/caseloads/481-caseload.htm>.

The DHS Income Maintenance Manual (IM Manual), dated March 16, 2010, sets forth the various responsibilities of local IM agencies in administering public assistance benefit programs, including MA. Chapters 11 to 13 of the Manual contain the Public Assistance Fraud provisions. The IM Manual is available at: <http://www.emhandbooks.wi.gov/imm/imm.htm>.

The MA program is jointly funded with federal and state funds. The federal share is called the “federal medical assistance percentage” or “FMAP.” Wisconsin’s FMAP is normally around 60%, but the federal American Recovery and Reinvestment Act (ARRA) temporarily increased it to 70.63% for the period October 1, 2008 through December 31, 2010. With a six-month extension to ARRA recently enacted in P.L. 111-22, Wisconsin’s FMAP is projected to be 66.86% for the period January 1, 2011 through June 30, 2011.

Most MA administrative costs are funded on a 50%-50% federal-state shared basis, although certain types of administrative expenses qualify for greater federal cost-sharing.

An evaluation of MA program integrity was completed by the Legislative Audit Bureau (LAB) in December 2008. Audit Report 08-15, *Medical Assistance Integrity*, evaluated efforts by DHS to ensure program integrity, including its certification of providers and audits of provider payments. The report also reviewed the role of the Department of Justice (DOJ) in prosecuting cases of MA fraud. The report is available at: <http://www.legis.state.wi.us/lab/reports/08-15full.pdf>.

State Public Assistance Fraud Program

Federal Medicaid regulations require state MA agencies to operate a Medicaid fraud detection and investigation program. The regulations specify the various required program components. [42 C.F.R. ss. 455.13 to 455.23.] Under state law, DHS operates the Public Assistance Fraud Program to prevent fraud and investigate fraudulent activity by recipients in various public assistance programs, including MA. Funding from several DHS appropriations (income maintenance administration, interagency assistance, and MA and FoodShare overpayment recoveries) may be used for this purpose. DHS activities may include any of the following:

- Comparisons of information provided to DHS by an applicant and information provided by the applicant to other federal, state, and local agencies.
- Development of an advisory welfare investigation prosecution standard.
- Provision of funds to county social services and human services agencies to encourage activities to detect fraud. [s. 49.845 (1), Stats.]

The IM Manual describes the program as consisting of fraud prevention, fraud investigation, and fraud overpayment collection activities. [s. 11.1.1., IM Manual.] The Manual notes that county and tribal IM agencies administering public assistance programs are responsible for operating early fraud detection and prevention programs and for initiating claims and collections of fraudulent overpayments. They also determine which cases are to be referred to the agency’s fraud investigation unit or the local district attorney for prosecution. [s. 11.1.1, IM Manual.]

In March 2010, DHS contracted with the Public Consulting Group to conduct an assessment of current fraud prevention efforts through site visits and a statewide survey. DHS anticipates that this process will culminate in a program implementation plan which was expected to be delivered in August 2010.

Fraud Prevention

The IM Manual notes that in operating fraud prevention programs, IM agencies provide varied levels of verification, as follows:

- Routine verification of eligibility determined for all applications;
- The selection of items for referral to fraud prevention activities under ch. 12, IM Manual; and
- The selection of cases for referral to fraud investigation under ch. 13, IM Manual.

DHS administrative rules governing the MA application process emphasize front-end verification as an important element of fraud prevention. The rules specify that:

- Applicants for and recipients of MA benefits are required to provide full, correct, and truthful information and report any changes in income, assets, or other items affecting eligibility within 10 days of the change. [s. DHS 102.01 (6), Wis. Adm. Code.]
- If an applicant is able to but fails to provide all required verifications, the applicant may be denied benefits in most circumstances. [s. DHS 102.02, Wis. Adm. Code.]
- If the applicant is unable to produce verification or needs help in doing so, the IM agency may not deny benefits but must proceed immediately to verify the data elements. [s. DHS 102.03 (1), Wis. Adm. Code.]
- The agency must verify those data elements deemed appropriate under the case history of an applicant who has been convicted of public assistance-related fraud, who is repaying aid pursuant to an agreement with a district attorney's office, or who is known to have provided erroneous information on a previous application which resulted in an incorrect payment of aid. [s. DHS 102.03 (2), Wis. Adm. Code.]
- A person's eligibility must be redetermined in several instances, including if the agency has a reasonable basis to believe the person is no longer eligible for MA. [s. DHS 102.04 (3) (e), Wis. Adm. Code.]

IM agencies give more intensive scrutiny to cases that exhibit characteristics of an "error prone profile," as set forth in s. 12.4, IM Manual. Error-prone criteria relate, for example, to residency, household composition, and unreported income. [s. 12.2, IM Manual.] When a case requires intensive scrutiny, it is referred to a specialist who performs a more in-depth verification than the routine verification for eligibility determination. The specialist provides results to the IM caseworker for use in verifying eligibility or referring a case for a fraud investigation where applicable.

Fraud Investigation

Investigation of Applicants and Recipients

As noted above, investigation of suspected fraudulent activity by public assistance recipients is a key component of DHS' fraud program. [s. 49.845 (1), Stats.] DHS is specifically authorized to audit and investigate violations of MA statutes and rules on the part of recipients, as well as providers, both of whom must cooperate in providing information and records to authorized personnel. [s. 49.45 (3) (g) 1., Stats.]

Under DHS rules, if an IM agency director or a designee has a reason to believe that fraud has been committed by an applicant or recipient, or that person's representative, the case must be referred to the district attorney. The rule does not specify whether such referrals must be made subsequent to an investigation by the agency, nor does it define "fraud" for this purpose. [s. DHS 102.05, Wis. Adm. Code.]

DHS Investigation of Providers

Under current law, in auditing or investigating MA providers, DHS may authorize personnel to verify the actual provision of services and the appropriateness and accuracy of claims for reimbursement submitted by providers. [s. 49.45 (3) (g) 1. and 2., Stats.] The failure or refusal of a provider to grant department auditors or investigators access to provider personnel, records, patient health care records, and other specified items constitutes grounds for decertification or suspension of the provider. [s. 49.45 (3) (h) 1m. and 1n., Stats., and s. DHS 106.02 (9) (e) 4., Wis. Adm. Code.]

Provider fraud is administered by the Bureau of Program Integrity in the Division of Health Care Access and Accountability, DHS. The IM Manual provides that if circumstances reveal a potentially fraudulent case involving a recipient and a provider, the IM worker should refer the case to DHS. [s. 13.4.3, IM Manual.] DHS may in turn refer the case for criminal investigation.

DOJ Investigation and Prosecution of Providers

Federal law requires that each state operate a Medicaid fraud control unit, separate from the state agency administering the MA program, with authority to prosecute providers for criminal violations relating to fraud. [42 U.S.C. ss. 1396a (a) (61) and 1396b (q) (4).] Wisconsin's Medicaid Fraud Control and Elder Abuse Unit is housed in the state DOJ. In conjunction with local law enforcement agencies, the unit investigates and prosecutes cases involving MA provider fraud and the abuse and neglect of, and misappropriation from, residents or patients residing in facilities that receive MA funds.

State law specifies that DOJ or a district attorney may institute, manage, control, and direct, in the proper county, any prosecution for violation of criminal laws affecting the MA program including, but not limited to, laws relating to MA in subch. IV of ch. 49, Stats., and laws affecting the health, safety, and welfare of recipients of MA. For this purpose, DOJ has all of the powers conferred upon district attorneys in such cases. DOJ or the district attorney must notify the Medical Examining Board, or an interested affiliated credentialing board, of the prosecution of a person holding a license granted by the board or affiliated board. [s. 49.495, Stats.] DHS is directed to cooperate with district attorneys regarding fraud prosecutions. [s. 49.845 (1), Stats.]

Error Reduction Activities

Under current law, DHS must conduct activities to reduce payment errors in the MA program and other public assistance programs. [s. 49.845 (2), Stats.]

Prohibited Conduct

Numerous provisions of state and federal law specify conduct that is prohibited with respect to the MA (or federal Medicaid) program, or to public assistance programs in general. They fall into the following general categories described below:

MA Offenses

State law specifies a number of so-called “MA offenses” which constitute prohibited conduct under the program. Some pertain to actions by applicants or recipients, while others pertain to providers. Some of the offenses carry criminal penalties, while others result in civil forfeitures. [s. 49.49, Stats.] Note that the first category of MA offenses is titled “fraud” but some subsequent provisions also pertain to fraudulent activity. Also note that these provisions are substantially paraphrased here because the statutory language is not written in modern drafting style, making the provisions difficult to understand.

- **Fraud.** No person, in connection with an MA program, may:
 - Knowingly and willfully make, or cause to be made, any false statement or representation of a material fact in any application for any benefit or payment.
 - Knowingly and willfully make, or cause to be made, any false statement or representation of a material fact for use in determining rights to a benefit or payment.
 - Conceal or fail to disclose an event, of which the person has knowledge, affecting the eligibility of an individual on whose behalf the person receives an MA benefit or payment, with intent to fraudulently obtain a greater MA benefit or larger payment than is due or a benefit or payment that is not authorized.
 - Knowingly and willfully convert MA benefits or payments the person has received to another use than that for which the benefit or payment was made.

Violators of the above provisions may be punished as follows:

- A person violating any of these provisions is guilty of a Class H felony, which is punishable by a fine of not more than \$10,000 or imprisonment of not more than six years, or both, except that the person may be fined not more than \$25,000, rather than the \$10,000 maximum normally associated with a Class H felony. This increased fine applies to all MA offenses that are designated Class H felonies.
- In the case of such a statement, representation, concealment, failure, or conversion by any other person, a person convicted of violating these provisions may be fined not more than \$10,000 or imprisoned for not more than one year in the county jail, or both.

If a person is convicted of any of the prohibited conduct described above, the state has a cause of action for relief against the person in an amount equal to three times the amount of actual damages sustained as a result of the excess payments made in connection with the offense for which the person was convicted. Proof of a conviction of an MA violation is conclusive proof in a civil action of the state's right to damages and the only issue in controversy may be the amount of the actual damages sustained. Actual damages consist of the total amount of excess payments, any part of which is paid with state funds. [s. 49. 49 (1) (c), Stats.]

- **Kickbacks, Bribes, and Rebates.** A person who solicits, receives, or pays a kickback bribe or rebate in connection with referrals to providers or purchasers of goods, services, and items in the MA program is guilty of a Class H felony, except that the person may be fined not more than \$25,000.

These provisions do not apply to any of the following:

- A discount or other reduction in price obtained by a provider of social services, children's services, health care services, or economic support services or other entity under chs. 46 to 51 and 58, Stats., if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity under MA.
- An amount paid by an employer to an employee who has a bona fide employment relationship with the employer for employment in the provision of covered items or services. [s. 49.49 (2), Stats.]

- **Fraudulent Certification of Facilities.** A person may not knowingly and willfully make a false statement or representation of a material fact with respect to the conditions or operation of any institution or facility, such that it could qualify as a hospital, skilled nursing facility, intermediate care facility, or home health agency. A person who violates this provision is guilty of a Class H felony, but with a maximum fine of not more than \$25,000. [s. 49.49 (3), Stats.]

- **Prohibited Provider Charges.** A provider may not knowingly impose upon an MA recipient charges in addition to payments received for services under MA or knowingly impose direct charges upon a recipient instead of obtaining payment under MA, except under the following conditions:

- Benefits or services are not provided under MA and the recipient is advised of this fact prior to receiving the service.
- An applicant is determined eligible retroactively and a provider bills the person directly for services and benefits rendered during the retroactive period.
- Benefits or services are provided that require recipient copayment, coinsurance, or a deductible.

A person who violates this provision is guilty of a Class H felony, except that the person may be fined not more than \$25,000. [s. 49. 49 (3m), Stats.]

- **Other Prohibited Provider Charges.** No provider may knowingly violate s. 609.91 (2), Stats., which prohibits an HMO from making specified recovery attempts against MA enrollees. [s. 49.49 (3p), Stats.]

- **Prohibited Facility Charges.** No person, in connection with MA, may knowingly and willfully charge, solicit, accept or receive any gift, money, donation, or other consideration, from an organization or person unrelated to a patient, as a precondition of admitting the patient to a hospital, skilled nursing facility, or intermediate care facility, or as a requirement for the patient's continued stay in such a facility. [s. 49.49 (4), Stats.]

- **Prohibited Conduct; Forfeitures.** No person, in connection with MA, may:
 - Knowingly make or cause to be made any false statement or representation of a material fact in any application for a benefit or payment.
 - Knowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a benefit or payment.
 - Knowingly conceal or fail to disclose any event of which the person has knowledge that affects his or her right to a benefit or payment or the right of any other person on whose behalf the person has applied for or is receiving a benefit or payment.

Note that these violations are similar to those described under the heading "Fraud," above, but do not include the element of "willfulness."

A person who violates these provisions may be required to forfeit not less than \$100 nor more than \$15,000 for each statement, representation, concealment, or failure. [s. 49.49 (4m), Stats.]

False Claims

Under current law, a person who knowingly presents or causes to be presented, a false claim for MA to any officer, employee, or agent of the state, must forfeit not less than \$5,000 nor more than \$10,000, plus three times the amount of the damages that were sustained by the state or would have been sustained by the state, whichever is greater, as a result of the false claim. The Attorney General may bring an action on behalf of the state to recover any forfeiture incurred under this provision. [s. 49.485, Stats.]

A separate provision of the statutes, known as the Wisconsin False Claims Act, also pertains to false claims for MA and actions by or on behalf of the state. It contains the same element and penalty as the above provision, but also prohibits several other types of conduct relating to claims or other transactions related to MA. [s. 20.931, Stats.]

The federal Deficit Reduction Act (DRA) of 2005 provides financial incentives to states to enact laws that establish liability to the state for individuals and entities that submit false or fraudulent claims to the state MA program. The Medicaid Fraud Control unit at DOJ submitted s. 20.931, Stats., to the OIG for review. The OIG determined that the Wisconsin law meets the requirements of the DRA, when considered together with s. 893.981, Stats., which establishes a 10-year statute of limitations for actions brought under the Act.

Abuse or Misuse of MA Card or Benefits

DHS administrative rules specify various types of “abuse or misuse” of a recipient’s MA card or MA benefits that can lead to limitation or termination of program benefits by DHS or the IM agency, as appropriate. Abuse and misuse includes, but is not limited to:

- Altering or duplicating an MA card in any manner.
- Permitting the use of an MA card by any unauthorized individual for the purpose of obtaining health care through MA.
- Using an MA card that belongs to another recipient.
- Using an MA card to obtain any covered service for another individual.
- Duplicating or altering prescriptions.
- Knowingly misrepresenting material facts as to medical symptoms for the purpose of obtaining any covered service.
- Knowingly furnishing incorrect eligibility status or other information to a provider.
- Knowingly furnishing false information to a provider in connection with health care previously rendered which the recipient has obtained and for which MA has been billed.
- Knowingly obtaining health care in excess of established program limitations, or knowingly obtaining health care which is clearly not medically necessary.
- Knowingly obtaining duplicate services from more than one provider for the same health care condition, excluding confirmation of diagnosis or a second opinion on surgery.
- Otherwise obtaining health care by false pretenses. [s. DHS 104.02 (5), Wis. Adm. Code.]

General Public Assistance Violations

In addition to offenses specific to the MA program, state law specifies general penalties for public assistance violations in s. 49.95, Stats. These provisions are described on pages 16-17 of Memo No. 1 to the Special Committee, dated July 28, 2010.

Criminal Code Violations

Provisions of the state Criminal Code, including the following, may in some circumstances be applicable to fraudulent actions relating to MA: s. 943.201, Stats. (unauthorized use of an individual’s personal identifying information or documents); s. 946.13, Stats. (private interest in a public contract prohibited); s. 946.32, Stats. (false swearing); and s. 946.41, Stats. (obstructing an officer by providing false information).

Federal Provisions

Federal health care statutes and regulations applicable to the Medicaid program and to state health care programs receiving federal funding contain numerous provisions addressing fraud and abuse. Examples of these provisions include:

- Criminal penalties for certain false statements and representations made knowingly and willfully, in applying for benefits or determining rights to benefits, and for concealment of events affecting the right to a benefit with fraudulent intent. [42 U.S.C. s. 1320a-76.]
- Civil penalties for knowingly presenting certain false or fraudulent claims to a federal or state official. [42 U.S.C. s. 1320a-7a.]
- Mandatory exclusion from federal health care programs for specified criminal offenses and permissive exclusions for specified offenses, many of which relate to fraud or financial misconduct. [42 U.S.C. s. 1320-7.]
- Anti-kickback statute. [42 U.S.C. s. 1320a-7b (b).]
- False claims statute. [31 U.S.C. ss. 3729-3733.]

An overview of federal provisions relating to health care fraud is available in a Congressional Research Service Report to Congress, *Health Care Fraud and Abuse Laws Covering Medicare and Medicaid*, October 24, 2007, available at: <http://aging.senate.gov/crs/medicare21/pdf>.

Recoupment of Overpayments

Recoupment of overpayments is addressed in several statutes and rules, some of which pertain specifically to MA and others to public assistance programs in general. They include:

1. Section 49.497, Stats.--recovery from MA recipients

This provision permits DHS to recover an MA overpayment resulting from any of the following:

- A misstatement or omission of fact by a person supplying information in an application for MA benefits.
- The failure of an MA recipient or any other person responsible for giving information on the recipient's behalf to report the receipt of income or assets in an amount that would have affected the recipient's eligibility.
- The failure of an MA recipient or any other person responsible for giving information on the recipient's behalf to report any change in the recipient's financial or nonfinancial situation or other characteristics that would have affected the recipient's eligibility for benefits or the recipient's cost-sharing requirements. [s. 49.497 (1) (a), Stats.]

The statute provides that an IM or tribal agency administering MA shall begin recovery actions on behalf of DHS in accordance with DHS rules. The extent of recovery is limited to the amount of the benefits incorrectly granted. The rules are set forth in s. DHS 108.03 (3), Wis. Adm. Code, described below. [s. 49.497 (1) (b), Stats.]

A county or tribe may retain 15% of the MA benefits recovered due to the efforts of an employee or officer of the county or tribe. Any amount that Milwaukee County would otherwise be entitled to retain under this provision is credited to a specified DHS appropriation. [s. 49.497 (2) (a) and (b), Stats.]

If a person receives notice that an incorrect payment was made and fails to repay the incorrect payment or enter into or comply with a repayment agreement, DHS may bring an action to enforce the liability or issue an order to compel payment. A person aggrieved by a DHS order may request a hearing within 30 days from the date of the order, at which the only issue is the department's determination that the person has not made the repayment or entered into, or complied with, a repayment agreement. If the liable person does not make the ordered repayment and the time for filing for a hearing has expired, DHS may present the order to a circuit court in any county for a judgment to be entered against the person. Also, DHS may recover an unpaid penalty assessment from an employer who was assessed a penalty for failing to provide information on an employee's health coverage to the department. These recovery procedures are in addition to any other procedure authorized by law. [s. 49.497 (1m) and (1r), Stats.]

DHS may appear for the state in all collection matters relating to repayments under this section and may commence suit in the name of the department to recover an incorrect payment or unpaid penalty assessment. DHS may make an agreement with a recipient or other liable person for repayment of an incorrect payment at a specified rate or amount. [s. 49.497 (4) and (5), Stats.]

2. Section DHS 108.03 (3), Wis. Adm. Code--recovery from MA recipients

DHS administrative rules specify requirements for recovery of incorrect MA payments. IM agencies are directed to begin recovery action on behalf of DHS against any MA recipient to whom or on whose behalf an incorrect payment was made that resulted from any of the following:

- Misstatement or omission of fact by the person supplying information during an application for MA benefits.
- Failure by the recipient or other responsible person to report income or assets in an amount which would affect the recipient's eligibility for benefits.

The amount of the recovery may not exceed the amount of the MA benefits incorrectly provided. If the effort to recover incorrect payments is unsuccessful, the agency must refer cases of possible recovery to the district attorney or corporation counsel for investigation. They may bring any appropriate action for prosecution for fraud or collection under civil liability statutes. An agency's decision concerning amounts owed may be appealed. [s. DHS 108.03 (3), Wis. Adm. Code.]

3. Section 49.45 (2) (a) 10., Stats.--recovery from MA providers

This provision directs DHS to recover money improperly or erroneously paid to a provider. DHS rules implementing this provision are in s. DHS 108.02 (9), Wis. Adm. Code, described next.

4. Section DHS 108.02 (9), Wis. Adm. Code--recovery from MA providers

DHS rules specify recoupment methods to be used if the department finds that a provider has received an overpayment, including, among others, erroneous, excess, duplicative, and improper payments, regardless of cause. The methods include:

- Offsetting or making an appropriate adjustment against other amounts owed the provider for covered services.
- Offsetting or crediting against amounts owed the provider for subsequent services provided if the amount owed the provider is insufficient to recover the entire amount of the overpayment and the provider is claiming and receiving MA reimbursement in amounts sufficient to reasonably ensure full recovery of the overpayment within a reasonable period of time.
- Requiring the provider to pay the amount of the overpayment directly to DHS.

The rules permit DHS to withhold payments to providers in cases involving fraud or willful misrepresentation. [s. DHS 108.02 (9) (a) and (d), Wis. Adm. Code.]

5. Section 49.847, Stats.--recovery from recipients of ch. 49 benefits generally

DHS, or a county IM or tribal agency acting on behalf of the department, may recover benefits incorrectly paid under any of the programs administered by DHS under ch. 49, including MA. DHS, or the county or tribe, may recover an overpayment from a family or individual who continues to receive benefits under any ch. 49 program by reducing the benefit amount. [s. 49.847, Stats.] DHS may by rule specify other methods for recovering incorrectly paid benefits. The county or tribe may “retain a portion” of the amount recovered and DHS must promulgate a rule establishing the portion to which the county or tribe is entitled. Pertinent DHS rule, described below, does not provide for the retention of funds by local agencies. However, the IM Manual provides that local IM agencies may retain 15%. [s. 13.8.1, IM Manual.]

6. Section DHS 2.04, Wis. Adm. Code

Chapter DHS 2, Wis. Adm. Code, sets forth rules for the recoupment of benefit overpayments to recipients of public assistance benefits under chs. 48 and 49, Stats. Section DHS 2.04, Wis. Adm. Code, permits DHS or a county or tribal IM agency to seek recovery from a recipient for an incorrectly paid benefit for a period of one year. “Incorrectly paid benefits” means benefits paid to an ineligible individual or paid in an amount in excess of the amount the recipient was eligible to receive. This rule provision does not specify the portion of an amount collected that the county or tribe may retain.

FOODSHARE PROGRAM

Background

FoodShare is Wisconsin's implementation of the Supplemental Nutrition Assistance Program (SNAP), a federal program designed to boost low-income families' access to nutrition by providing benefits for the purchase of approved types of food. The program is administered on the state level by the DHS and on the federal level by the Food and Nutrition Service (FNS), an agency within the U.S. Department of Agriculture. DHS also contracts with local IM agencies to administer FoodShare enrollment and manage caseloads.

Nearly all benefits provided to FoodShare participants are federally funded. The federal government also funds up to 50% of Wisconsin's program administration costs. Thus, although the state plays an important role, many aspects of FoodShare, including some elements related to program integrity, are federally controlled.

Household participation in the FoodShare program has increased relatively rapidly over the past few years. As of June 2010, DHS statistics show that 328,688 households, comprised of 737,022 individuals, participated in the program. Two years earlier, the FoodShare program served 192,114 households, with 447,727 individuals. The increase mirrors a national increase in participation in SNAP programs, caused in part by higher numbers of low-income households and in part by expanded eligibility standards put in place by the federal Food, Conservation and Energy Act of 2008, also known as the "2008 Farm Bill." [P.L. 110-246.]

Federal statutes related to SNAP programs are codified in 7 U.S.C. ss. 2011-2036, and accompanying federal regulations are primarily located in 7 C.F.R. ss. 271-279. State statutes most relevant to FoodShare administration are codified in ss. 46.215, 46.22, 49.79, 49.793, 49.795, and 49.797, Stats., with administrative rules related to the electronic distribution of benefits located in ch. DHS 252, Wis. Adm. Code.

State statutes have not yet been updated to reflect recent program changes made at the federal level. Thus, some obsolete language appears throughout the state statutes. For example, provisions refer to the "food stamp program," rather than SNAP, and to "food coupons," which have been replaced by electronic benefits transfer (EBT) cards, called "Quest cards" in Wisconsin.

Section 49.79, Stats., authorizes DHS to develop a "food stamp program" and sets guidelines regarding employment and other participation requirements. Sections 46.215 (1) (k) and 46.22 (1) (b) 2. d., Stats., authorize counties to certify eligibility for and issue food coupons in accordance with federal statutes. Other relevant state statutes are discussed below.

Although states have some flexibility with regard to determining what resources to exclude in determining households' income eligibility, federal regulations provide primary definitions for included income and set threshold eligibility requirements. However, federal law gives states an option to adopt broad-based "categorical eligibility" criteria for people who receive specified other forms of public assistance. [7 U.S.C. s. 2014 (a).] Wisconsin has exercised that option since 2003. It extends such categorical eligibility to households with gross incomes less than 200% of the federal poverty level

(currently \$3,676 for a family of four) who have been sent a notice regarding eligibility for participation in Wisconsin's "JobNet" service.

The authorization and disqualification of retail establishments participating in SNAP is administered on the federal level by FNS. To be authorized, a retailer must either: (1) sell at least three varieties of food in each of four "staple" food groups and offer perishable items in at least two of those groups; or (2) earn more than 50% of retail profits from sales of foods in the "staple" groups. FNS defines the four staple groups to include: (1) meat, poultry, or fish; (2) breads and grains; (3) fruits and vegetables; and (4) dairy products. [7 U.S.C. s. 2012 (p); 7 C.F.R. s. 278.1.] When reviewing retailers' applications, FNS checks whether retailers were previously sanctioned for engaging in benefits trafficking (i.e., exchanging benefits for cash) or other prohibited activities.

Federal Regulations Related to FoodShare Program Integrity

Federal regulations govern some aspects of states' administrative structures related to program integrity. For example, with limited exceptions, federal regulations require states to maintain separate units to perform the functions of eligibility certification, data management, and benefits issuance. [7 C.F.R. s. 274.4 (c).]

Some changes made to SNAP programs by the 2008 Farm Bill have potentially significant implications for program integrity. Perhaps most importantly, the Act eliminated paper food coupons and made EBTs the sole means of receiving benefits, thus potentially reducing some opportunities for trafficking and fraud. [P.L. 110-246, SEC. 4115; 7 U.S.C. s. 2016 (g) (3) (A).] New federal regulations also require states to submit monthly reports detailing benefits issuances that do not reconcile with master issuance files required to be maintained by a state's data management unit. [*Food Stamp Program: Eligibility and Certification Provisions of the Farm Security and Rural Investment Act of 2002; Final Rule*, Fed. Reg. 4912, January 29, 2010.] In addition, they require state SNAP programs to undergo an independent audit on an annual basis. [*Supplemental Nutrition Assistance Program, Regulation Restructuring: Issuance Regulation Update and Reorganization to Reflect the End of Coupon Issuance Systems*, 75 Fed. Reg. 18377, 18383.]

Under a federal regulation effective June 11, 2010, states are required to place an "immediate hold" on a participant's account as soon as notice is received that a replacement EBT (Quest) card or personal identification number (PIN) number is requested. [*Supplemental Nutrition Assistance Program, Regulation Restructuring: Issuance Regulation Update and Reorganization to Reflect the End of Coupon Issuance Systems*, 75 Fed. Reg. 18377, 18389, to be codified at 7 C.F.R. s. 274.6 (b) (2).] States may also establish programs enabling participants to "sign" their applications for food stamp benefits over the telephone. However, the state systems must record the verbal "signature" (i.e., assent) and safeguard against impersonation and identity theft.

Examples of other relevant changes include increased penalties for benefits trafficking and other violations and requirements for adequate testing of state computer systems. Despite such safeguards, the federal Government Accountability Office (GAO) has identified the following ongoing program integrity concerns for SNAP programs: (1) improper payments; (2) benefits trafficking; and (3) the potential for lax verification due to categorical eligibility rules. [GAO-10-956T, July 28, 2010.]

In some instances, federal regulations not specific to program integrity may limit options for legislative responses on that issue at the state level. For example, federal regulations under which SNAP program participants may not be treated differently than other customers at SNAP-authorized retailers [7 C.F.R. s. 278.2 (b)] may be interpreted as prohibiting states from requiring participants to present particular proof of identification at the time of purchase.

Fraud Prevention

In conjunction with its approval, in June 2010, of an allocation and expenditure request submitted by the Governor, the Joint Committee on Finance directed DHS to submit a report by February 1, 2011, regarding fraud in the FoodShare program. In the report, DHS is required to describe types of fraud committed by FoodShare recipients and discuss proposals for state law and departmental policy changes and available resources devoted to enforcement.

Federal regulations require states to establish fraud detection units. [7 C.F.R. s. 272 (4) (g).] As discussed in relation to the MA program, Wisconsin law likewise requires DHS to establish a program to prevent fraud in various state public assistance programs, including FoodShare. [s. 49.845 (1), Stats.] Through the resulting program, the Public Assistance Fraud Program, state and local officials identify “intentional program violations” in FoodShare. DHS guidelines governing the program, including the handling of both fraud prevention measures and the investigation of potential violations in FoodShare and other programs are set forth in chs. 11 through 13 of the department’s IM Manual, referenced above. [<http://www.emhandbooks.wi.gov/imm/home.htm>.]

As with MA, front-end verification of participant eligibility is a key focus of the Public Assistance Fraud Program’s approach to fraud prevention in FoodShare. As discussed above, the IM Manual outlines characteristics of an “error prone profile,” such as conflicting documentation or large increases in household composition, which prompt a special investigation by a “Front-End Verification Specialist.” [s. 12.4.1, IM Manual.]

As mentioned in the previous section, several changes recently instituted at the federal level are designed to prevent fraud in SNAP programs. Some changes went into effect since the IM Manual was last published but have likely affected practices at local IM agencies.

Prohibited Conduct

As with other public assistance programs, prohibited conduct related to FoodShare is addressed through a mix of administrative and criminal proceedings. Applicable criminal provisions provide specific definitions for prohibited conduct. In contrast, the IM Manual lists general examples of conduct that may give rise to an administrative finding that an intentional program violation occurred. The Manual specifically includes the “trafficking or fraudulent use of FoodShare benefits” as an intentional program violation, but more general activities listed may also be considered intentional violations. For instance, one example given is “[c]oncealing circumstances or a change in circumstances” impacting eligibility. [s. 13.1.3, IM Manual.] Though less precisely defined, administratively determined intentional program violations give rise to administrative penalties (e.g., disqualifications) only. More serious cases are referred for criminal investigation.

For FoodShare, the state's fraud investigation responsibility is limited to benefit recipients. As mentioned, authorizing, disqualifying, and penalizing retailers is handled at the federal level. [7 U.S.C. s. 2021.]

Incidences of Intentional Program Violations

Overall rates of intentional program violations appear to have remained fairly consistent over the past few years in the FoodShare program. DHS statistics show that a total of 144 FoodShare participants were sanctioned for intentional program violations in 2008, 155 participants were sanctioned in 2009, and 77 people have been sanctioned to date in 2010.

Application fraud and benefits trafficking are perhaps the two most common types of intentional program violations committed by FoodShare participants. Application fraud, including the failure to report changed circumstances affecting eligibility, is the type of intentional program violation most often handled at the state level. From 2008 through the present, 158 FoodShare participants have been found to have committed application fraud for the first time, eight participants were found to have committed application fraud a second time, and one participant was found to have committed application fraud for the third time.

Another type of intentional program violation is benefits trafficking, which occurs when SNAP benefits are exchanged for cash or something else of value. If trafficking occurs at the point of service, it may involve fraudulent actions of both the program participant and the retail establishment. Studies have suggested that incidences of benefits trafficking are higher among small retailers than among large retailers. [GAO-10-956T, July 28, 2010.] Federal statutes provide for civil penalties, including permanent disqualification in some instances, to be assessed upon a finding that a retailer has trafficked SNAP benefits. [7 U.S.C. s. 2021.] Section 49.795, Stats., discussed below, establishes state criminal penalties for trafficking FoodShare benefits. DHS directs local IM agencies to refer cases of suspected trafficking to DHS, which, in turn, works with FNS to ensure cooperation with any ongoing federal investigations. [s. 13.1.6, IM Manual.]

Fraud Investigation by DHS

The IM Manual establishes procedures for investigating suspected intentional program violations. It outlines the process by which suspected program violations may be investigated in an administrative hearing called an administrative disqualification hearing. In some circumstances, DHS (or a local IM agency) may determine that a criminal investigation is more appropriate and refer a case to the local district attorney's office. Such referrals may be made pursuant to memoranda of understanding between local agencies administering FoodShare and local district attorneys' offices. [See s. 13.5.1, IM Manual.]

Upon a finding in an administrative disqualification hearing that a participant committed an intentional program violation, a FoodShare participant may be disqualified from participation for 12 months after an initial violation, 24 months after a subsequent violation, and permanently after a third violation. Identical periods of disqualification are imposed in criminal proceedings upon a finding that a participant violated s. 49.795, Stats., discussed below. Federal law similarly mandates that SNAP program participants be disqualified for one year, two years, or permanently upon a first, second, or third finding of fraud in a state or federal proceeding. [7 U.S.C. s. 2015.]

Criminal Provisions

Several Wisconsin statutes provide potential bases of criminal liability for fraudulent actions related to FoodShare. Section 49.795, Stats., sets forth criminal penalties for seven fraudulent activities specific to FoodShare. The statute includes some outdated terminology. For example, it refers to food coupons, which are no longer issued, and to the “food stamp program,” now FoodShare (or SNAP at the federal level). Specifically, the statute prohibits knowingly doing any of the following:

- Misstating or concealing facts in a food stamp program application or report of income, assets, or household circumstances with intent to secure or continue to receive food stamp program benefits.
- Failing to report changes in income, assets, or other facts as required by federal law.
- Issuing food coupons to a person who is not an eligible person or knowingly issuing food coupons to an eligible person in excess of the amount for which the person’s household is eligible.
- Transferring food coupons except to purchase food from a supplier or knowingly obtaining or using food coupons for which the person’s household is not eligible.
- Obtaining food coupons except as payment for food or knowingly obtain food coupons from a person who is not an eligible person.
- Obtaining, possessing, transferring, or using food coupons, if not authorized to do.
- Altering food coupons. [s. 49.795, Stats.]

Criminal penalties for violating the statute include imprisonment and fines ranging from a maximum of \$1,000 and one year imprisonment if the value of affected FoodShare benefits does not exceed \$100 and the conviction is for a first offense, to a Class G felony (a maximum \$25,000 fine and 10 years imprisonment) if the value of affected benefits exceeds \$5,000. [s. 49.795 (8), Stats.] In addition, the statute requires a court to suspend an offender’s eligibility for participation in FoodShare for 12 months for a first offense, 24 months for a subsequent offense, and permanently upon conviction for a third offense--the same eligibility penalties as apply in administrative disqualification hearings. [s. 49.795 (8) (d), Stats.]

Several other state criminal statutes are not specific to FoodShare but may apply to violations in the FoodShare program. For example, s. 49.95, Stats., prohibits various activities interfering with public assistance programs. Provisions relevant to FoodShare include: willfully making false representations to secure public assistance; willfully interfering with the proper administration of public assistance programs; selling or exchanging goods supplied as assistance; the receipt or solicitation by an administrator or assistant of any commission or personal financial gain in exchange for public benefits; and continuing to receive benefits after failing to notify DHS of the receipt of new income or assets or of a relevant change in factual circumstances. Penalties vary according to the nature and degree of the fraud and may include forfeitures, fines, and imprisonment, ranging from a forfeiture, if the value of assistance secured is less than \$1,000, to a Class G felony if the value exceeds \$10,000. [s. 49.95 (1), Stats.]

A few state statutes codified in the chapters on crimes against property (ch. 943, Stats.) and crimes against the government and its administration (ch. 946, Stats.) may also apply in some circumstances. Section 943.41, Stats., prohibits various actions related to financial transaction cards, defined to include a device issued for the purpose of providing a cardholder access to an account. Prohibited actions include: false statements of identity; taking of a card without the cardholder's consent; forging a financial transaction card; fraudulently using a financial transaction card; and furnishing financial transaction records in specified circumstances. Also, s. 943.201, Stats., prohibits the unauthorized use of an individual's personal identifying information, including a PIN used, "alone or in conjunction with any access device, to obtain...goods...or any other thing of value or benefit." Both statutes appear to include FoodShare Quest cards and associated PIN numbers within their definitions. Finally, s. 946.32, Stats., proscribes making a false statement or two inconsistent statements "under oath or affirmation" when the oath or affirmation is "required by any public officer or governmental agency as a prerequisite to such officer or agency taking some official action." The crime is a Class A misdemeanor (punishable by a fine not to exceed \$10,000 or imprisonment not to exceed nine months, or both).

Several federal statutes provide an additional basis for criminal liability. Most relevant is 7 U.S.C. s. 2024, which provides a range of penalties for the knowing use, transfer, acquisition, alteration, or possession of SNAP benefits in a manner contrary to federal statutes and regulations.

Error Reduction

Errors in benefit payments are caused by both administrative and participant errors. The GAO has noted that complex eligibility rules for SNAP programs (e.g., complicated rules regarding which resources qualify as "income") may increase the likelihood for administrative errors. [GAO-10-956T, July 28, 2010.] FNS tracks the "payment error rate" nationally and for state SNAP programs. The rate accounts for both overpayments and underpayments made to program participants. The national rate has reduced significantly during the past decade due both to program modifications and increased efforts to achieve program integrity.

FNS has instituted multiple approaches designed to improve payment accuracy. Examples include conducting annual reviews of state programs and designing automated systems to prompt state administrators to obtain complete documentation. In 2005, FNS published a guide to best practices for ensuring payment accuracy:

FNS, *Keys to Payment Accuracy*, <http://www.Fns.usda.gov/snap/government/pdf/keys.pdf>.

One key federal approach is to provide monetary incentives, in the form of bonuses and sanctions, to encourage states to maintain low payment error rates. [7 U.S.C. s. 2025.] The incentives are determined by comparing a state's payment error rate to the national rate in a given federal fiscal year.

From the mid-1990s through the 2001-02 fiscal year, the FoodShare program was sanctioned for having relatively high error rates. Its error rates improved since that period, due in part to several key technology-based modernization efforts instituted in the state. For example, DHS established a statewide electronic case filing system, which provides ready access to electronic images of documents in participants' files. It also launched a new website, entitled ACCESS, which increased efficiency in

processing applications and other functions. In 2009, Wisconsin's error rate of 1.11% was more than 3% below the national average. As a result, in June 2010, the state received more than \$2.8 million in bonus funding for lowest payment error rate and most improved negative error rate. [<http://www.fns.usda.gov/cga/PressReleases/2010/0341.htm>.] DHS is in the process of determining how the funds will be allocated.

Recovery of Overpayments

Section 49.793, Stats., authorizes DHS, and counties and American Indian tribes acting on behalf of the department, to recover overpayments that arise from an overissuance of food coupons under the food stamp program. [See also s. 49.847, Stats. (authorizing recovery of overpayments in public assistance programs, generally).] Any such recovery must be made in accordance with federal law, which establishes various collection methods and limits the amount by which benefits may be reduced absent a showing of fraud. [7 U.S.C. s. 2022.]

Federal law governs the proportion of recovered overpayments that states may retain. [7 U.S.C. s. 2025.] States may retain 35% of funds recovered pursuant to specified findings of fraud, and 20% of all other overpayments recovered, except overpayments resulting from state administrative error. The state may retain 20% of an overpayment recovered as a result of a participant's error.

State law authorizes county and tribal governments to "retain a portion" of the funds that federal law would otherwise allow the state to retain and requires DHS to promulgate a rule establishing the portion to which a country is entitled. [s. 49.793 (2), Stats.] The pertinent DHS rule does not provide for the retention of funds by local agencies. [See, s. DHS 2.04, Wis. Adm. Code.] However, the IM Manual states that local IM agencies may retain 15% of the portion that the state is authorized to retain pursuant to federal law. [s. 13.8.1, IM Manual.]

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