



## **FEDERAL LABOR RELATIONS AUTHORITY**

### **5 CFR Part 2419**

#### **Implementation of the Administrative False Claims Act**

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Final rule.

**SUMMARY:** This final rule establishes procedural regulations for the Administrative False Claims Act (AFCA) at the Federal Labor Relations Authority (FLRA). The AFCA is at 31 U.S.C. 3801 through 3812. The AFCA requires the promulgation of rules and regulations necessary to implement the AFCA.

**DATES:** This rule is effective **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Thomas Tso, Solicitor and Federal Register Liaison, (771) 444-5779, SolMail@flra.gov.

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Congress originally enacted the Program Fraud Civil Remedies Act (PFCRA) in 1986. The purpose of the PFCRA was twofold: 1) to provide agencies that were the victims of false claims and statements an administrative remedy; and 2) to provide due process for all parties subject to that remedy. Pub. L. 99-509, sec. 6102 (October 21, 1986) (findings and purposes at 31 U.S.C. 3801 note).

On December 23, 2024, the Servicemember Quality of Life Improvement and National Defense Authorization Act for Fiscal Year 2025 amended the PFCRA. Among other things, the amendments changed the PFCRA's name to the Administrative False Claims Act (AFCA). Pub. L. 118-159, sec. 5203(a). In that legislation, Congress also mandated

that agencies promulgate regulations and procedures to carry out the AFCA within 180 days of enactment. Pub. L. 118-159, sec. 5203(j). This final rule includes the regulations required by that provision. The intent of this final rule is to cite the controlling statute when possible, repeating statutory provisions in the regulation only where necessary for the convenience of the regulated public.

*Initial Inflation Adjustment of Penalties.*

The Bipartisan Budget Act of 2015 included the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (the 2015 Inflation Adjustment Act). Pub. L. 114-74, sec. 701 (November 2, 2015). The 2015 Inflation Adjustment Act amended a previous statutory scheme in order to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect. Among other things, the 2015 Inflation Adjustment Act mandated an initial catch-up inflation adjustment for certain civil penalties by August 1, 2016, to be followed by annual inflation adjustments each year thereafter. 28 U.S.C. 2461 note. The statute capped the initial inflation increase at 150% of the original penalty.

The FLRA did not have regulations for the Program Fraud Civil Remedies Act, the previous name of the AFCA, in 2015. The FLRA, therefore, could not adjust penalties under the 2015 Inflation Adjustment Act contemporaneously with the first adjustment period. With the promulgation of this final rule, the FLRA can adjust any penalties imposed under the AFCA consistent with the 2015 Inflation Adjustment Act. That adjustment remains constrained by the initial inflation adjustment cap.

Accordingly, we are adjusting the penalty amount for the AFCA from the statutory \$5,000 to \$12,500. We arrived at this figure by determining the maximum increase permitted by the 2015 Inflation Adjustment Act – 150 percent of \$5,000, or \$7,500 – and adding that amount to the base \$5,000 penalty to yield a \$12,500 adjusted penalty amount. This adjustment resulted in a lower increase than a full Consumer Price Index

adjustment comparing October 1984 with February 2026 on the publicly available Bureau of Labor Statistics website at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last accessed March 12, 2026).

## **II. Overview of Comments Received**

On July 8, 2025, the FLRA published a proposed rule in the Federal Register that proposed a new part 2419 in 5 CFR chapter XIV containing the regulations required to implement the AFCA at the FLRA. The FLRA received three comment letters on the proposed rule.

One commenter expressed concern that the proposed rule could be used to sanction litigants in proceedings before the FLRA if the Government disputes the factual accuracy of litigants' submissions. To address their concern, the commenter proposed modifying the rule to state that the rule is inapplicable to the proceedings of litigants in litigation matters before the FLRA.

Another commenter similarly recommended clarification regarding the individuals and types of actions that could be subject to the rule, as well as how an investigation could be initiated. The commenter also recommended stating in the rule that an AFCA complaint is a "proceeding" for purposes of Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, to permit use of official time by Federal employee witnesses, representatives, and defendants. The commenter further recommended that the failure to answer a complaint not result in maximum penalties under proposed 5 CFR 2419.4(e), but rather the provisions at proposed 5 CFR 2419.5(b) should apply when there is a failure to answer a complaint. Finally, the commenter made several recommendations regarding the representation of a defendant, including clarification that the representative is not limited to an attorney and the representation is not in contravention of the conflict-of-interest statute at 18 U.S.C. 205.

The final commenter, in applying a recent U.S. Supreme Court decision to the proposed rule, expressed the view that the proposed rule is unconstitutional because it does not afford defendants a jury trial in an Article III court before a civil penalty may be imposed on defendants. The commenter recommended revising the rule to state that a defendant must consent to the agency proceedings and final decision, thereby waiving the right to a jury trial in an Article III court. The commenter also expressed concern that the proposed rule does not state who has the burden of proof.

### **III. Final Rule and Discussion of Comments**

The FLRA carefully considered all comments received and is finalizing the rule generally as proposed.

#### **A. Application to Certain Types of Actions**

The terms “claim”, “person”, and “statement” are defined by statute. 31 U.S.C. 3801. The FLRA does not read these definitions under the AFCA to encompass the representations and advocacy that may occur during proceedings before the FLRA under Title VII of the Civil Service Reform Act of 1978, Pub. L. 95-454, 5 U.S.C. 7101-7135. Therefore, the FLRA is not adding further definition to these terms or other related specification in the final rule.

#### **B. Receipt and Assessment of Information by the Inspector General**

The “investigating official” is defined as the Inspector General by statute. 31 U.S.C. 3801(4)(A)(i). Anyone may submit or refer a complaint or information to the Inspector General of the FLRA through the Inspector General’s public Hotline, which is maintained in accordance with the Inspector General Act, as amended. The FLRA Office of Inspector General (OIG) assesses complaints and information it receives in accordance with the professional standards established under the Inspector General Act. 5 U.S.C. 424(c)(2). Given the general standards of the OIG, the FLRA is not adding further criteria to the final rule.

### **C. Relationship to Title VII of the Civil Service Reform Act of 1978**

An administrative proceeding by the FLRA under the AFCA is distinct from a proceeding before the FLRA under Title VII of the Civil Service Reform Act of 1978.

The FLRA is not herein advising other agencies on managing their employees' time and attendance when participating in FLRA ACFA proceedings. Thus, the FLRA is not adding provisions regarding Federal employee official time to the final rule.

### **D. Representation**

The FLRA concurs with the comment that a party could elect to be represented by an individual who is not an attorney and the FLRA has clarified this point by adding a definition of "representative" to the final rule at 5 CFR 2419.2(e). The FLRA does not concur that a proceeding under the AFCA is a "personnel administration proceeding" under 18 U.S.C. 205(d)(1)(A) because the AFCA does not distinguish or otherwise reference Federal employee and non-Federal employee defendants. Therefore, the FLRA is not adding reference to the conflict-of-interest statute in the final rule.

### **E. Default Upon Failure to File an Answer**

The FLRA does not concur with the comment that the analysis under proposed 5 CFR 2419.5(b) can substitute for the default penalty at proposed 5 CFR 2419.4(e) because the detailed analysis at 5 CFR 2419.5(b) requires a record that would not exist if the defendant does not respond. Therefore, the FLRA is not removing the provisions regarding the default penalty.

### **F. Lawfulness Under Supreme Court Case**

As indicated in the preamble to the proposed rule, the FLRA considered the lawfulness of the proposed rule, including the proposed rule's relationship to the case discussed by a commenter, *SEC v. Jarkesy*, 603 U.S. 109 (2024). While the FLRA understands the commenter's extension of *Jarkesy* to the AFCA and the constitutional concerns raised, the FLRA cannot conclude at this time that either the AFCA or the proposed rule is

facially unlawful under *Jarkesy*. Congress debated whether the AFCA’s predecessor statute, the Program Fraud Civil Remedies Act of 1986 (PFCRA), violated the Seventh Amendment when it enacted the PFCRA. See 132 Cong. Rec. S13007-13 (daily ed. Sept. 19, 1986). When the PFCRA was amended in 2024 and renamed the AFCA, *Jarkesy* had been decided, and the FLRA assumes that Congress understood the constitutional question. AFCA regulations are required pursuant to a statutory mandate from Congress, and the determination of whether a statute is facially unconstitutional for structural challenges ordinarily rests with the courts, not with agencies. See, e.g., *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (“Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies”)). Therefore, the FLRA is not modifying the final rule in response to the comment.

#### **G. Burden of Proof**

The FLRA identifies the AFCA itself as establishing which party has the burden of proof at each stage of the process. 31 U.S.C. 3803. Therefore, the FLRA is not adding further provisions regarding burden of proof to the final rule.

#### **IV. Findings and Certifications.**

*Regulatory Planning and Review*: Executive Orders 12866, 13563, 14215, and 14192 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits. This final rule has not been designated a “significant regulatory action” under section 3(f) of Executive Order 12866. Accordingly, this final rule has not been reviewed by the Office of Management and Budget as a significant regulatory action.

This regulatory action determination is based on the limited scope of the final rule and the FLRA’s statutory mission. The regulations are required by the AFCA and would only

affect an entity suspected of making a false claim or statement related to the FLRA.

Furthermore, claims and statements subject to the AFCA are capped at \$1 million.

*Legality and National Interest:* Executive Order 14219 directs agencies to evaluate potential new regulations under factors related to legality and the national interest. The FLRA has determined the final rule is lawful and in the national interest as the final rule is narrowly tailored to comply with the AFCA and will provide a tool for the FLRA to recover misappropriated taxpayer funds and deter misconduct.

*Regulatory Flexibility Analysis:* Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the FLRA has determined that this final rule will not have a significant impact on a substantial number of small entities. The AFCA only affects entities suspected of making false claims or statements and, except in proceedings arising from such suspected false claims or statements, imposes no duties or obligations on small entities.

*Unfunded Mandates Reform Act of 1995:* This final rule change will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

*Small Business Regulatory Enforcement Fairness Act of 1996:* This action is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This final rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

*Paperwork Reduction Act:* The final rule contains no additional information collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, et seq.

*Federalism:* A rule has federalism implications under Executive Order 13132 if it has a substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. The FLRA has analyzed this final rule under that Order and determined that this rule does not have federalism implications.

*Civil Justice Reform (Plain Language):* This final rule meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988.

*Consultation and Coordination With Indian Tribal Governments:* This final rule does not have Tribal implications under Executive Order 13175 because it would not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.

## **List of Subjects in 5 CFR Part 2419**

Administrative practice and procedure.

For the reasons stated in the preamble, the FLRA amends 5 CFR chapter XIV by adding part 2419 to read as follows:

### **PART 2419—THE ADMINISTRATIVE FALSE CLAIMS ACT**

#### **Sec.**

2419.1 Background.

2419.2 Definitions.

2419.3 Pre-complaint Procedures.

2419.4 Complaint and Prehearing Procedures.

2419.5 Hearing Procedures.

2419.6 Post-hearing Procedures.

Authority: 31 U.S.C. 3803(g), 3809; Sec. 5203(j), Pub. L. 118-159, 138 Stat. 2440.

**§ 2419.1 Background.**

(a) *Legal authority.* This subpart implements the Administrative False Claims Act, codified at 31 U.S.C. 3801 through 3812. Section 3809 of that Act requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

Administrative False Claims Act liability is identified at 31 U.S.C. 3802. Liability for false claims can include an assessment of up to twice the amount of the false claim and a civil penalty. Liability for a false statement is a civil penalty. The civil penalty for a false claim or false statement actionable under that section is \$12,500.

(b) *Limitations.* A notice to a person alleged to be liable under the Administrative False Claims Act referenced in 31 U.S.C. 3803(d)(1) must be mailed or delivered by the timeframes noted in 31 U.S.C. 3808(a). Those timeframes are the later of: 6 years after the date on which the violation of 31 U.S.C. 3802 is committed; or 3 years after the date on which facts material to the action are known or reasonably should have been known by the authority head, but in no event more than 10 years after the date on which the violation is committed. A civil action to recover a penalty or assessment must be commenced within the 3-year timeframe noted in 31 U.S.C. 3808(b).

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

(1) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

(2) Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response.

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

(e) *Additional referrals.* Federal agencies that receive or discover any specific information regarding bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, must immediately report that information consistent with the requirements of 31 U.S.C. 3808(c) to the Attorney General and agency Inspector General as appropriate.

(f) *Board of contract appeals.* If a Federal agency uses a presiding officer who is a member of a board of contract appeals as permitted by 31 U.S.C. 3801(a)(7)(C) for a matter, the procedural rules implemented by that board of contract appeals will control the litigation of that matter to the extent there is an inconsistency between the board's procedural rules and the procedural rules of this part.

## **§ 2419.2 Definitions.**

(a) *Definitions from the statute.* The definitions of “authority,” “claim,” “investigating official,” “knows or has reason to know,” “person,” “presiding officer,” “reviewing official,” “statement,” “material,” and “obligation” are found in 31 U.S.C. 3801. The investigating official at the Federal Labor Relations Authority is identified as the Federal Labor Relations Authority’s Inspector General, and the Federal Labor Relations Authority’s Solicitor is designated to be the reviewing official by the authority head at the Federal Labor Relations Authority.

(b) *Complaint* means the administrative complaint served by the reviewing official on the defendant under § 2419.4(b).

(c) *Defendant* means any person alleged in a complaint under § 2419.4(a) to be liable for a civil penalty or assessment under § 2419.1.

(d) *Authority Head* means the Chairman of the Federal Labor Relations Authority.

(e) *Representative* means a party’s attorney or other duly qualified representative.

### **§ 2419.3 Pre-complaint Procedures.**

(a) *Investigating Official.* The investigating official may elect to investigate matters potentially resulting in an Administrative False Claims Act action using the subpoena authority at 31 U.S.C. 3804, or any other authority granted to the investigating official, such as the authority of the Inspector General Act at 5 United States Code, Chapter 4.

(1) If the investigating official concludes that an action under the Administrative False Claims Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(2) Nothing in this section shall preclude or limit the investigating official’s discretion to refer allegations directly to the Department of Justice for suit under the False Claims Act (31 U.S.C. 3729-3733) or other civil relief, or to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(3) Nothing in this section modifies any responsibility of the investigating official to report violations of criminal law to the Attorney General.

(b) *Reviewing Official.* The procedures for the reviewing official are as follows:

(1) *Determination.* If, based on the report of the investigating official under § 2419.3(a)(2), the reviewing official determines that there is adequate evidence to believe that a person is liable under the Administrative False Claims Act, and there is a reasonable prospect of collecting an appropriate amount of penalties and assessments, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to have a complaint issued under § 2419.4(a).

(2) *Written notice.* A written notice of the reviewing official's intention to have a complaint issued under § 2419.4(a) shall include:

- (i) A statement of the reviewing official's reasons for issuing a complaint;
- (ii) A statement specifying the evidence that supports the allegations of liability;
- (iii) A description of the claims or statements upon which the allegations of liability are based;
- (iv) An estimate of the amount of money, or the value of property, services, or other benefits, requested or demanded in violation of the Administrative False Claims Act;
- (v) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and
- (vi) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

(c) *Request for authorization from the Department of Justice.* The reviewing official may issue a complaint under § 2419.4(a) only if:

(1) The Department of Justice approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under 31 U.S.C. 3802(a)(1) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted, the amount of money, or the value of property or services, demanded or requested in violation of section 3802(a)(1) does not exceed \$1,000,000.

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

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

(d) *Written notifications.* The reviewing official shall make all appropriate written notifications required by section 3803(j)(2) of title 31 of the United States Code.

#### **§ 2419.4 Complaint and Pre-Hearing Procedures.**

(a) *Complaint.* The reviewing official will identify the allegations of liability in a complaint. The complaint must identify the following:

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

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

- (3) Instructions for filing an answer, including a specific statement of the defendant's right to request a hearing and to be represented by a representative;
- (4) Identification and contact information for the governmental employee representing the reviewing official in the matter if the reviewing official is not handling the matter personally; and
- (5) The fact that failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal, as provided in § 2419.4(d).
- (6) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations or identify a free online resource where the defendant can access these regulations.

(b) *Service of the complaint.* The Federal Labor Relations Authority must mail or deliver the complaint to the person alleged to be liable in accordance with 31 U.S.C. 3803(d)(1) within the time limitations identified at 31 U.S.C. 3808(a).

(c) *Answer.* The defendant may file an answer to the complaint within 30 days of service of the complaint by mail or facsimile to the reviewing official (current mailing address and facsimile numbers posted at <https://www.flra.gov/components-offices/offices/office-solicitor>).

(1) In the answer, the defendant:

- (i) Shall admit or deny each of the allegations of liability made in the complaint;
- (ii) Shall state any defense on which the defendant intends to rely;
- (iii) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and
- (iv) Shall state the name, postal address, electronic mail address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(2) *Hearing.* The defendant may request a hearing with the presiding officer within 30 days of service of the complaint. Upon receipt of an answer, the reviewing official shall file the complaint and answer with the presiding officer.

(3) *General answer.* If the defendant is unable to file an answer meeting the requirements of paragraph (c)(1) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of paragraph (c)(1) of this section. The reviewing official shall file promptly with the presiding officer the complaint, the general answer denying liability, and the request for an extension of time as provided in paragraph (d) of this section. For good cause shown, the presiding officer may grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (c)(1) of this section. The presiding officer shall decide expeditiously whether the defendant shall be granted the additional period of time to file such answer.

(d) *Default upon failure to file an answer.* If the defendant does not file an answer within the time prescribed in this section, the reviewing official must refer the complaint to the presiding officer within a reasonable time.

(1) Upon the referral of the complaint, the presiding officer shall promptly serve on the defendant in the manner prescribed in paragraph (b) of this section, a notice that an initial decision will be issued under this section.

(2) The presiding officer shall assume the facts alleged in the complaint to be true and, if such facts establish liability under 31 U.S.C. 3802, the presiding officer shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

- (3) Except as otherwise provided in this section, by failing to file a timely answer the defendant waives any right to further review of the penalties and assessments imposed under paragraph (d)(2) of this section and the initial decision shall become final and binding upon the parties 30 days after it is issued.
- (4) If, before such an initial decision becomes final, the defendant files a motion with the presiding officer seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the presiding officer's decision on the motion.
- (5) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failure to file a timely answer, the presiding officer shall withdraw the initial decision in paragraph (d)(2) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.
- (6) A decision of the presiding officer denying a defendant's motion under paragraph (d)(4) of this section is not subject to reconsideration under § 2419.6(d).
- (7) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the presiding officer denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.
- (8) If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head.
- (9) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the presiding officer.
- (10) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

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

(e) *Presiding officer disqualification and authorities.* A presiding officer may be removed from a case on the presiding officer's own initiative or on motion by the parties for disqualification of the presiding officer.

(1) *Motion and affidavit.* The motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

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

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

(iii) Upon the filing of such a motion and affidavit, the presiding officer shall proceed no further in the case until the presiding officer resolves the matter of disqualification in accordance with this section.

(2) *Authority of the presiding officer.* The presiding officer shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made. The presiding officer has the authority to:

(i) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(ii) Continue or recess the hearing in whole or in part for a reasonable period of time;

- (iii) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;
- (iv) Administer oaths and affirmations;
- (v) For the purpose of conducting a hearing, the presiding officer may issue subpoenas requiring the attendance and testimony of witnesses as well as the production of information as set forth in 31 U.S.C. 3804(b)(2);
- (vi) Rule on motions and other procedural matters;
- (vii) Regulate the requirements regarding motions including requiring any oral motion to be reduced to writing and establishing the time within which a response to any written motion will be due if the motion will not be due within 15 days after the written motion is served;
- (viii) Regulate the scope and timing of discovery;
- (ix) Regulate the course of the hearing and the conduct of representatives and parties to include imposing sanctions such as drawing adverse inferences, striking pleadings, deeming items admitted, restricting use of evidence, dismissing an action, or issuing an initial decision – that reasonably relate to the severity and nature of the failure or misconduct;
- (x) Examine witnesses;
- (xi) Receive, rule on, exclude, or limit evidence;
- (xii) Upon motion of a party, take official notice of facts;
- (xiii) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;
- (xiv) Conduct any conference, argument, or hearing on motions in person or by telephone, videoconference, or other virtual method; and
- (xv) Exercise such other authority as is necessary to carry out the responsibilities of the presiding officer under this part.

(xvi) Irrespective of any implications of the above, the presiding officer does not have the authority to find Federal statutes or regulations invalid.

(xvii) Additionally, the presiding officer shall not, except to the extent required for the disposition of ex parte matters as authorized by law:

(A) Consult a person or party on a fact in issue, unless on notice and opportunity for all parties to the hearing to participate; or

(B) Be responsible to or subject to the supervision or direction of the investigating official or the reviewing official.

(f) *Prehearing*. The prehearing procedures are as follows:

(1) *Entitlement to review and obtain information*. Defendants receiving notice of the hearing from the presiding officer under 31 U.S.C. 3803(d)(2)(B) are entitled to information identified in 31 U.S.C. 3803(e), including a copy of all relevant and material documents, transcripts, records, and other materials, which relate to the allegations and upon which the findings and conclusions of the investigating official are based.

Defendants should request any such information from the reviewing official's point of contact identified in the complaint. The reviewing official will provide all requested information expeditiously. Information subject to payment of a fee will be expeditiously provided upon payment of any applicable reasonable duplication fee.

(2) *Discovery*. Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer.

(i) The presiding officer may order the following types of discovery:

(A) Requests for production of documents for inspection and copying;

(B) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(C) Written interrogatories; and

(D) Depositions.

(ii) A party seeking discovery must file a motion with the presiding officer. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition. Within 10 days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 2419.4(f)(3). The presiding officer may grant a motion for discovery only if he or she finds that the discovery sought:

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

(B) Is not unduly costly or burdensome;

(C) Will not unduly delay the proceeding; and

(D) Does not seek privileged information.

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

(iv) The presiding officer shall regulate the timing of discovery.

(3) *Protective orders.* A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence. The presiding officer may issue any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(i) That the discovery not be had;

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

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

(iv) That certain matters not be the subject of inquiry, or that the scope of discovery be limited to certain matters;

(v) That discovery be conducted with no one present except persons designated by the presiding officer;

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

(vii) That a sealed deposition be opened only by order of the presiding officer;

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

(ix) That the parties simultaneously file specified documents.

(4) *Prehearing orders.* The presiding officer shall issue scheduling orders the presiding officer deems appropriate to ensure a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made. At a minimum, the presiding officer must issue an order that:

(i) Sets the hearing in a location permissible under 31 U.S.C. 3803(g)(4);

(ii) Provides the written notice required by 31 U.S.C. 3803(g)(2)(A);

(iii) Governs the exchange of witness lists, statements, and exhibits;

(iv) Ensures the defendant has an opportunity to present their case, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts; and

(v) Includes in any written notice of a hearing to a defendant a description of the procedures for the conduct of the hearing.

#### **§ 2419.5 Hearing.**

(a) *Determinations.* The presiding officer will conduct the hearing consistent with that officer's authority to make the determinations identified in 31 U.S.C. 3803(f) by a preponderance of the evidence.

(b) *Determining the amount of penalties and assessments.* In determining an appropriate amount of civil penalties and assessments, the presiding officer and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, double damages and a significant civil penalty ordinarily should be imposed. Although not exhaustive, the following factors are among those that may influence the presiding officer and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (i.e., the false, fictitious, or fraudulent claims or statements) charged in the complaint:

- (1) The number of false, fictitious or fraudulent claims or statements;
- (2) The time period over which such claims or statements were made;
- (3) The degree of the defendant's culpability with respect to the misconduct;
- (4) The amount of money or the value of the property, services, or benefit falsely claimed;
- (5) The cost of the United States Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;
- (6) The relationship of the amount imposed as civil penalties to the amount of the United States Government's loss;
- (7) The potential or actual impact of the misconduct upon public confidence in the management of United States Government programs and operations;
- (8) Whether the defendant has engaged in a pattern of the same or similar misconduct;
- (9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the United States Government or of a state, directly or indirectly;

(16) The need to deter the defendant and others from engaging in the same or similar misconduct; and

(17) The potential impact of the misconduct on the rights of others.

(c) *Other factors.* Nothing in this section shall be construed to limit the presiding officer or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(d) *The Record.* The hearing shall be recorded and transcribed.

(1) Transcripts shall be available following the hearing at a cost not to exceed the actual cost of duplication and any court reporter's reasonable fee.

(2) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all documents filed in the proceeding constitute the record for the decision by the presiding officer and the authority head.

(3) The record may be inspected and copied by anyone upon payment of a reasonable fee, unless otherwise ordered by the presiding officer.

**§ 2419.6 Post-Hearing Procedures.**

(a) *Post-hearing motions.* The presiding officer may decide any post-hearing motions.

(b) *Post-hearing briefs.* Any party may file a post-hearing brief. The presiding officer shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The presiding officer may permit the parties to file reply briefs.

(c) *Decision.* Except for good cause, the presiding officer shall issue a written decision required by 31 U.S.C. 3803(h) within 90 days after the time for submission of post-hearing briefs and reply briefs, if permitted, has expired.

(d) *Appeal to the authority head.* Parties may not appeal interlocutory rulings by the presiding officer to the authority head.

(1) Except in case of default, if the defendant is determined in the decision to be liable for a civil penalty or assessment, the defendant may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section. A notice of appeal shall be accompanied by a written brief specifying exceptions to the decision and reasons supporting the exceptions.

(i) A notice of appeal may be filed at any time within 30 days after the presiding officer issues the decision.

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

(2) The reviewing official's representative or other designated agency official may file a brief in opposition to the notice of appeal within 30 days of receiving the notice of appeal and accompanying brief.

(3) The authority head's review will occur within the limitations noted in 31 U.S.C. 3803(i)(2)(B) and (C). There is no right to appear personally before the authority head.

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

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

**Thomas Tso,**

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