Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Cases of:	)	
	)	
Martin Weissman,	)	DATE: February 14, 1991
Professional Care, Inc.,	)	
and Israel Cohen,	)	
	)	Docket Nos. C-199
Petitioners,	)	203
v.	)	205
	)	
The Inspector General.	)	Decision No. CR116
	)	

DECISION

Petitioners timely requested hearings before an Administrative Law Judge (ALJ) to contest notices of determination (Notices) issued by the Inspector General (I.G.) of the United States Department of Health and Human Services. The Notices, dated November 10, 1989, November 24, 1989 and December 4, 1989, informed Petitioner Martin Weissman (Weissman), Petitioner Professional Care, Inc. (PCI), and Petitioner Israel Cohen (Cohen), respectively, that they were excluded from participating in the Medicare and Medicaid programs for a period of 15 years, pursuant to section 1128 of the Social Security Act (Act).[1]

Separate administrative hearing dockets were initially created to hear these three cases individually. However, in the interest of judicial economy, I consolidated these three cases at the request of the parties. The parties waived their right to an in-person evidentiary hearing. This decision is based on the documentary evidence

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[1] The Medicaid program is one of three types of federally-financed State health care programs from which Petitioners are excluded. I use the term "Medicaid" to represent all three of these programs which are defined in section 1128(h) of the Act.

submitted, written arguments submitted, and oral arguments made by the parties.

Based on the entire record before me, and on applicable federal law and regulations, I conclude that Petitioners were convicted of crimes related to the delivery of an item or service under the New York State Medicaid Program and, accordingly, are subject to the federal minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act. I also conclude that the I.G. was required to exclude Petitioners for at least the minimum period of five years, and that after weighing all mitigating and aggravating factors, it is reasonable and appropriate to exclude Petitioners for 15 years.

APPLICABLE STATUTES AND REGULATIONS

I. The Federal Statute.

Section 1128 of the Social Security Act is codified at 42 U.S.C. 1320a-7 (West U.S.C.A., 1989 Supp.). Section 1128(a)(1) of the Social Security Act provides for the exclusion from Medicare and Medicaid of those individuals or entities "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs. Section 1128(c)(3)(B) provides for a five-year minimum period of exclusion for those excluded under section 1128(a)(1).

II. The Federal Regulations.

The governing federal regulations (Regulations) are codified in 42 C.F.R. Parts 498, 1001, and 1002 (1989). Part 498 governs the procedural aspects of this exclusion case; Parts 1001 and 1002 govern the substantive aspects.

Section 1001.123 requires the I.G. to issue an exclusion notice to an individual or entity whenever the I.G. has "conclusive information" that such individual or entity has been "convicted" of a criminal offense "related to the delivery of an item or service" under the Medicare or Medicaid programs; the exclusion begins 20 days from the date on the notice.[2]

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[2] The I.G.'s notice letters add five days to the 15 days prescribed in section 1001.123, to allow for receipt by mail.

PROCEDURAL BACKGROUND

The I.G. stated in his Notices that these exclusions are based on Petitioners' convictions, in the Albany County Supreme Court of the State of New York, of criminal offenses related to the delivery of an item or service under the New York State Medicaid program. The I.G. also stated that his determinations to exclude Petitioners for a period of 15 years was based upon aggravating factors such as: (1) the financial damage to the New York State Medicaid program by Petitioners' criminal activity was in excess of $1,000,000; and (2) the furnishing of untrained and unqualified personal care aides to render homemaker services was potentially harmful to program beneficiaries receiving these services.

By letters dated January 8, 1990, January 18, 1990, and January 29, 1990, Petitioner Weissman, Petitioner PCI, and Petitioner Cohen, respectively, filed timely requests for hearings to contest the I.G.'s determinations. The three cases were assigned separate administrative docket numbers, and all three cases were assigned to me for hearing and decision. Since the three cases involve common questions of fact and law, I determined that consolidation of the cases would best serve the interests of judicial economy.

On March 23, 1990 I conducted an in-person consolidated prehearing conference in New York, New York. At the prehearing conference, the parties requested that this case be decided based upon a written record and oral argument. I established a schedule for filing documentary evidence (exhibits), motions, and briefs. I also set a date for telephone oral arguments. On April 9, 1990, I issued a Prehearing Order in which I summarized the matters discussed at the March 23, 1990 prehearing conference.

By letter dated April 23, 1990, the I.G. requested that I modify my April 9, 1990 Prehearing Order to reflect his view that these Petitioners have the ultimate burden of proof to show that there is no legal basis for the exclusion and that the length of the exclusion imposed by the I.G. is unreasonable. In addition, the I.G. requested that I modify the April 9, 1990 Prehearing Order to reflect his view that the proposed regulations should provide guidance in this exclusion case. I did not modify my April 9, 1990 Prehearing Order, but I considered the arguments advanced by the I.G. in reaching this decision.

Thereafter, the I.G. filed a motion for summary disposition on all issues, a supporting brief, and exhibits. Petitioners responded with a cross motion for summary disposition, a supporting brief, and exhibits. The I.G. filed a reply brief accompanied by exhibits. Both parties submitted certifications authenticating their exhibits.

On September 12, 1990 I heard oral argument by telephone. During oral argument, the parties waived their right to an in-person evidentiary hearing. In addition, Petitioners requested that I leave the record open after the oral argument in order to provide them with the opportunity to submit some additional exhibits. I left the record open until October 31, 1990. During this period, Petitioners submitted additional exhibits and the I.G. submitted written comments about the exhibits. The parties also submitted written summaries of their September 12, 1990 oral arguments.

ADMISSIONS

As documented by my April 9, 1990 Prehearing Order, Petitioners admitted during the March 23, 1990 prehearing conference that they were "convicted" of criminal offenses within the meaning of section 1128(i) of the Act.

ISSUES

The remaining issues in this case are:

1. Whether Petitioners' convictions were for criminal offenses that are "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

2. Whether the exclusions imposed and directed against Petitioners for a period of 15 years are reasonable and appropriate under the facts of this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having considered the entire record, the arguments and submissions of the parties, and being fully advised herein, I make the following Findings of Fact and Conclusions of Law:

1. Petitioner PCI, at all times relevant to this case, is a corporation formed pursuant to the laws of the State of New York. I.G. Ex. 31/3.[3]

2. Petitioner PCI is an "entity" within the meaning of section 1128(a)(1) of the Act.

3. Petitioner PCI is engaged in the business of providing supplemental staff and private duty care in hospitals, nursing homes, clinical laboratories, and other health care institutions. Petitioner PCI also provides home health care services to chronically and acutely ill patients and to the elderly as an alternative to prolonged hospitalization and nursing home confinement. I.G. Ex. 31/3.

4. Petitioner PCI's home health care services include the provision of health aides (persons providing certain medical functions under the supervision of a registered nurse in addition to personal care services), personal care aides (persons providing assistance with personal hygiene, dressing and feeding in addition to homemaker services), and homemakers (persons providing household services such as meal preparation, light housecleaning, and shopping). I.G. Ex. 31/4-5.

5. In New York State, Petitioner PCI is organized to provide home health care services under the New York State plan for medical assistance known as the New York

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[3] The abbreviations to the parties' submissions cited in this Decision are as follows:

Petitioners' Brief	P. Brief (page)
Petitioners' Exhibits	P. Ex. (letter)/(page)
I.G.'s Brief	I.G. Br. (page)
I.G.'s Reply Brief	I.G. Rep. Br. (page)
I.G.'s Exhibits	I.G. Ex. (number)/(page)
I.G.'s Reply Exhibits	I.G. Rep. Ex. (number)/(page)
Findings of Fact and Conclusions of Law	FFCL (number)

State Medicaid Program. Petitioner PCI operates through formal contracts with county departments of social services throughout New York State, under the overall supervision of the New York State Department of Social Services. I.G. Ex. 29/3.

6. Regulations promulgated by the New York State Department of Social Services require providers of home health care services to meet certain health and training standards. N.Y. COMP. CODES R. & REGS. tit. 18, sections 505.14(d) and (e).

7. Petitioner Weissman has served as the President and a Director of PCI since its formation in 1975. As of December 21, 1989, Petitioner Weissman owned 6.8% of PCI's outstanding shares, and he was deemed to be a "control person" within the meaning of applicable federal securities regulations. I.G. Ex. 31/52 and 59-60.

8. Petitioner Cohen served as a Director of PCI beginning in 1975. He was Vice President and Treasurer of PCI from 1975 to 1981, and became PCI's Executive Vice President in 1981. As of December 21, 1989, Petitioner Cohen owned 6.8% of PCI's outstanding shares, and he was deemed to be a "control person" within the meaning of applicable federal securities regulations. I.G. Ex. 31/53 and 59-60.

9. Petitioners Weissman and Cohen are "individuals" within the meaning of section 1128(a)(1) of the Act.

10. An undated document entitled "Indictment No. 2-142, Index # 7963/86" was filed in the Supreme Court of the State of New York, County of Albany. The indictment names Petitioners PCI, Weissman, and Cohen as defendants. Also named as a defendant is Edna A. Lee, the manager of the Albany office of PCI at the time of the indictment. I.G. Ex. 1.

11. The indictment charged Petitioner PCI with one count of grand larceny and with 12 counts of falsifying business records. I.G. Ex. 1.

12. The indictment charged Petitioner Weissman with six counts of falsifying business records and with one count of conspiracy. I.G. Ex. 1.

13. The indictment charged Petitioner Cohen with one count of grand larceny, with 12 counts of falsifying business records, and with one count of conspiracy. I.G. Ex. 1.

14. With regard to the grand larceny count, the indictment alleged that between 1981 and 1985, Petitioner Cohen, acting in concert with Edna A. Lee, filed fraudulent claims with the New York State Medicaid program seeking payment for homemaker services rendered by untrained and unqualified personal care aides. The indictment further alleged that, as a result of this activity, the Medicaid program paid Petitioner PCI approximately $1,821,693 to which it was not entitled. I.G. Ex. 1.

15. With regard to the falsifying business records counts, the indictment alleged that the first six counts of falsifying business records occurred in 1983 and involved Petitioners Weissman and Cohen, acting in concert with Edna A. Lee. The indictment alleged that the last six counts of falsifying business records occurred in 1985 and involved Petitioner Cohen, acting in concert with Edna A. Lee. The indictment alleged that these PCI employees falsified personnel records of Petitioner PCI to conceal from government auditors that Petitioner PCI had unlawfully received payment for the services of unqualified and untrained personal care aides. I.G. Ex. 1.

16. With regard to the conspiracy count, the indictment alleged that from 1982 to 1985, Petitioners Weissman and Cohen, along with Edna A. Lee, unlawfully conspired in Albany County, and elsewhere within New York State, to falsify the personnel records of Petitioner PCI to conceal the corporation's failure to comply with Medicaid regulations and to prevent the discovery of the theft of funds from the Medicaid program. The acts underlying the criminal conspiracy in Albany County alone allegedly occurred from 1983 to 1985. I.G. Ex. 1.

17. On February 23, 1988, at the close of the State's case at the criminal trial, Petitioner PCI, through its authorized counsel, entered into a plea agreement in which it pled guilty to 10 counts of falsifying business records and to one count of grand larceny. At the plea allocution, Petitioner PCI admitted its liability through the actions of Edna A. Lee, a high managerial agent of the corporation. I.G. Ex. 3/4,10; I.G. Ex. 29/4.

18. The falsifying business records and grand larceny charges to which Petitioner PCI pled guilty are felony offenses under New York State law. I.G. Ex. 2.

19. Pursuant to the plea agreement, Petitioner PCI agreed to pay $1,000,000 restitution, solely with respect to its conduct in Albany County as set forth in the indictment, and to pay a fine of $250,000. At the plea allocution, Petitioner PCI did not admit that the amount of monies wrongfully obtained by the corporation was the sum of $1,000,000, but admitted only that the amount "obtained wrongfully by the corporation was in excess of $1,500", the minimum amount required under the statute for grand larceny in the second degree. Petitioner PCI agreed, however, not to contest restitution in the amount of $1,000,000 and waived a restitution hearing to determine the exact amount of its unlawful gain. I.G. Ex. 3/5,23-25; I.G. Ex. 29/4.

20. On February 23, 1988, Petitioner PCI was convicted of 10 counts of falsifying business records and one count of grand larceny. The court ordered Petitioner PCI to pay restitution in the amount of $1,000,000 and to pay a fine in the amount of $250,000. I.G. Ex. 2.

21. On February 23, 1988, at the close of the State's case at the criminal trial, Petitioners Weissman and Cohen entered into a plea agreement in which they each pled guilty to one count of conspiracy. I.G. Ex. 8/5; I.G. Ex. 13/5; and I.G. Ex. 29/4.

22. The conspiracy charge to which Petitioners Weissman and Cohen pled guilty is a misdemeanor, punishable up to one year of incarceration. I.G. Ex. 8/5; I.G. Ex. 13/5.

23. At their plea allocutions, Petitioners Weissman and Cohen read identical statements in which they admitted that they knew that the Albany office of Petitioner PCI had not complied with the Medicaid program's record-keeping regulations and that they agreed that the corporation should alter its personnel records "after the fact" to conceal its failure to comply with these Medicaid regulations. Petitioners Weissman and Cohen also admitted that the reason they agreed to conceal the corporation's record-keeping violations was that they did not want the corporation to be liable for an overpayment. I.G. Ex. 8/10-11; I.G. Ex. 13/10-11.

24. Pursuant to the plea agreement, Petitioner Weissman and Petitioner Cohen each agreed to pay a fine in the amount of $100,000. At Petitioners Weissman's and Cohen's plea allocutions, counsel representing the office of the Deputy Attorney General for Medicaid Fraud Control stated that the fines against Petitioner Weissman and Petitioner Cohen were "solely for the crimes committed within the County of Albany". I.G. Ex. 8/5,13; I.G. Ex. 13/6,13.

25. On February 23, 1988 Petitioners Weissman and Petitioner Cohen were each convicted of the offense of conspiracy and each were sentenced to pay a fine in the amount of $100,000. I.G. Ex. 7; I.G. Ex. 12.

26. Petitioners PCI, Weissman, and Cohen admit, and I conclude, that they were each "convicted" of a criminal offense within the meaning of section 1128 (i) of the Act. April 9, 1990 Prehearing Order.

27. Petitioners PCI, Weissman, and Cohen were each convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid Program, within the meaning of section 1128(a)(1) of the Act.

28. The minimum mandatory exclusion period is five years for an individual or an entity who has been excluded based on conviction of a criminal offense related to the delivery of an item or service under Medicaid. Act, sections 1128(a)(1) and 1128(c)(3)(B).

29. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (1983).

30. The I.G. excluded Petitioners PCI, Weissman, and Cohen from participation in Medicare, and directed that Petitioners be excluded from participation in Medicaid, for 15 years.

31. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs for a period of at least five years as required by the minimum mandatory exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

32. While the exclusion provisions of section 1128 of the Act establish a five year minimum mandatory exclusion period for an individual or an entity who has been excluded based on conviction of a criminal offense related to the delivery of an item or service under Medicaid within the meaning of section 1128(a)(1) of the Act, they do not establish a maximum length for exclusions based on section 1128(a)(1).

33. The remedial purposes of section 1128 of the Act include protecting the integrity of federally funded health care programs from persons who have demonstrated by their conduct that they cannot be trusted to deal with program funds. Act, section 1128.

34. The remedial purposes of section 1128 of the Act also include protecting program beneficiaries and recipients from persons who have demonstrated by their conduct that they cannot be trusted to treat beneficiaries and recipients. Act, section 1128.

35. An additional remedial purpose of section 1128 of the Act is to deter persons from engaging in conduct which jeopardizes the integrity of federally-funded health care programs or the safety and welfare of program beneficiaries and recipients. Act, section 1128.

36. Some indicia of trustworthiness used to determine the appropriate period of exclusion are: (1) the number and nature of offenses, (2) the nature and extent of any adverse impact the violations have had on beneficiaries, (3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs, (4) the existence of mitigating circumstances, (5) the length of the sentence imposed by the court, (6) any other facts bearing on the nature and seriousness of the violations, and (7) the previous sanction record of the excluded party. 42 C.F.R. 1001.125(b)(1)-(7).

37. Petitioner PCI was convicted of 11 felony offenses. Petitioner PCI's conviction involves several serious criminal violations, and this is an aggravating factor in determining the appropriate length of Petitioner PCI's exclusion. FFCL 18, 20; see 42 C.F.R. 1001.125(b)(1).

38. Petitioners Weissman and Cohen were each convicted of a single misdemeanor offense. The acts underlying Petitioners Weissman's and Cohen's conspiracy conviction show that Petitioners Weissman and Cohen were involved in and profited from the 11 felony counts which formed the

basis for Petitioner PCI's conviction. Petitioners Weissman and Cohen, by their own admission, had knowledge of the corporation's failure to comply with Medicaid regulations. In addition, they admitted that they agreed to conceal these violations from the Medicaid program by permitting corporate employees to alter the corporations's business records "after the fact" in order that the corporation would not have to return monies wrongfully obtained from the Medicaid program. Under the circumstances of this case, the nature of Petitioners Weissman's and Cohen's single misdemeanor convictions are serious, and they are aggravating factors in determining the appropriate length of Petitioners Weissman's and Cohen's exclusions. FFCL 22, 23, 25; see 42 C.F.R. 1001.125(b)(1).

39. As a result of their convictions, Petitioner PCI was sentenced to pay a fine of $250,000 and Petitioners Weissman and Cohen were each sentenced to pay fines of $100,000. These are all substantial fines, and are aggravating factors in determining the appropriate length of Petitioners' exclusions. FFCL 20, 25; see 42 C.F.R. 1001.125(b)(6).

40. The criminal acts which formed the basis of Petitioners PCI's, Weissman's, and Cohen's convictions were committed over a period of time in excess of one year. This is a lengthy period of time, and is an aggravating factor in determining the appropriate length of Petitioners' exclusions. FFCL 14, 15, 16, 24; see 42 C.F.R. 1001.125(b)(6).

41. The acts underlying Petitioner PCI's conviction resulted in a financial loss to the Medicaid program for which the court ordered PCI to pay restitution in the amount of $1,000,000. This is an aggravating factor in determining the appropriate length of Petitioner PCI's exclusion. FFCL 19-20; see 42 C.F.R. 1001.125(b)(3).

42. Petitioners Weissman and Cohen, by their own admissions, made decisions at the management level of the corporation to agree to the performance of illegal acts which resulted in a financial loss to the Medicaid program for which the court ordered restitution. Under these circumstances, the court's ordering the corporation to pay $1,000,000 in restitution is an aggravating factor in determining the appropriate length of Petitioners Weissman's and Cohen's exclusions, even though individually they were not ordered to pay restitution. FFCL 23; see 42 C.F.R. 1001.125(b)(3).

43. The actions of Petitioners PCI, Weissman, and Cohen compromised the integrity of the federally funded health care programs. This is an aggravating factor in determining the appropriate length of Petitioners' exclusions. FFCL 11-25; see 42 C.F.R. 1001.125(b)(3).

44. The actions of Petitioners PCI, Weissman, and Cohen endangered the health and safety of Medicaid recipients who received the services of personal care aides who did not possess properly documented qualifications required by Medicaid regulations. This is an aggravating factor in determining the appropriate length of Petitioners' exclusions. FFCL 11-25; see 42 C.F.R. 1001.125(b)(2).

45. The record contains substantial evidence showing that the criminal offenses to which Petitioners PCI, Weissman, and Cohen pled guilty and for which they were convicted did not occur in isolation. The preponderance of the evidence shows that the actions underlying Petitioners' convictions were part of a larger, widespread, pattern of similar misconduct which occurred at various locations throughout the State of New York over a lengthy period of time. I.G. Exs. 18-23.

46. The evidence showing that Petitioners' criminal misconduct was part of a larger, pervasive, scheme to falsify business documents to conceal non-compliance with Medicaid regulations confirms the conclusion that Petitioners are untrustworthy. This is an aggravating factor, and it provides additional justification for a lengthy exclusion for all three Petitioners. FFCL 45; see 42 C.F.R. 1001.125(b)(6).

47. The record shows that various branch offices of PCI located in New York State were sanctioned for violations of Medicaid regulations during the same period that Petitioners were engaging in the criminal misconduct which formed the basis for their convictions. I.G. Exs. 24-28.

48. Petitioner PCI's administrative sanction record is an aggravating factor in determining the appropriate length of PCI's exclusion. FFCL 47; see 42 C.F.R. 1001.125(b)(7).

49. Petitioners Weissman's and Cohen's willingness to make management decisions to conceal the corporation's non-compliance with Medicaid regulations from auditors during the same period of time that the corporation was being sanctioned for violations reflects poorly on their

trustworthiness. In view of this, PCI's administrative sanction record is an aggravating factor in determining the appropriate length of Petitioners Weissman's and Cohen's exclusions. FFCL 23, 47; see 42 C.F.R. 1001.125(b)(7).

50. Petitioners' actions demonstrate that they have repeatedly placed their financial interests above a respect for compliance with Medicaid regulations designed to protect the health and safety of Medicaid recipients. Petitioners, by their persistent misconduct in the face of administrative sanctions and their efforts to deceive government auditors, have demonstrated not only a high degree of culpability but contempt for the law and those who enforce it. These are serious aggravating factors in determining the length of Petitioners' exclusions. FFCL 11-25, 45-49; see 42 C.F.R. 1001.125(b)(6).

51. Petitioners' record of community service is not a mitigating factor in this case. The fact that Petitioners engaged in a business that served the community by providing home health care services does not derogate from the conclusion that, in light of their offenses, Petitioners cannot be trusted to participate in federally funded health care programs.

52. In light of the evidence presented in this case, a 15-year exclusion of Petitioners PCI, Weissman, and Cohen from participation in the Medicare and Medicaid programs is reasonable.

DISCUSSION

I. The Mandatory Exclusion Provisions Of Section 1128 Apply To This Case.

The Act mandates an exclusion of:

> Any individual or entity that has been convicted of a criminal offense related to the delivery of an item or service under . . . [Medicare] or under . . . [Medicaid].

Act, section 1128 (a)(1).

The Act further requires, at subsection 1128(c)(3)(B), that in the case of an exclusion imposed and directed pursuant to subsection 1128(a)(1), the minimum term of such exclusion shall be five years. The I.G. asserts

that Petitioners were convicted of offenses that "fall squarely within the language of [section 1128(a)(1)]" of the Act. The I.G. therefore asserts that Petitioners' exclusions were mandatory, and Petitioners must be excluded under section 1128(c)(3)(B) for at least five years. I.G. Br. 21-22.

In order for an individual or entity to be properly excluded from participation in the Medicare and Medicaid programs based upon the mandatory provisions of the Act, such individual or entity must be: (1) "convicted" of a criminal offense within the meaning of section 1128(a)(1) and (i) of the Act, and (2) the conviction must be "related to the delivery of an item or service" under the Medicare or Medicaid programs.

A. Petitioners PCI, Weissman, And Cohen Were "Convicted" Of Criminal Offenses Within The Meaning Of Section 1128(i) Of The Act.

The term "convicted" is defined in sections 1128(i)(1) and 1128(i)(3) of the Act to include "when a judgment of conviction has been entered against the individual or entity by a Federal, State, or local court" or "when a plea of guilty . . . by the individual or entity has been accepted by a Federal, State, or local court".

The record shows that on February 23, 1988, Petitioner PCI pled guilty to 10 counts of falsifying business records and to one count of grand larceny. On that date, a Judgement of Conviction was entered against Petitioner PCI by the New York State Supreme Court in the County of Albany. I.G. Exs. 2 and 3.

The individual Petitioners, Weissman and Cohen, each pled guilty to one count of conspiracy on February 23, 1988. On that date, Judgements of Conviction were entered against each of the individual Petitioners by the New York State Supreme Court in the County of Albany. I.G. Exs. 7, 8, 12, and 13.

Petitioners admitted during the March 23, 1990 prehearing conference that they were "convicted" of criminal offenses within the meaning of section 1128(i) of the Act, and I conclude that the record supports this admission.

B. Petitioner PCI's Criminal Offenses Underlying Its Conviction Are "Related To The Delivery Of An Item Or Service" Under The Medicaid Program.

Having concluded that Petitioners were "convicted" of criminal offenses, I must determine whether the convictions were "related to the delivery of an item or service" under the Medicaid program within the meaning of section 1128(a)(1) of the Act. In order to determine the existence of a relationship between the criminal offenses for which Petitioners PCI, Weissman, and Cohen were convicted, and the delivery of an item or service under the Medicaid program, it is necessary to examine the specific criminal offenses for which Petitioners were convicted and the actions of Petitioners which formed the basis for the convictions. I will first consider the relationship between Petitioner PCI's criminal offenses and the delivery of an item or service under the Medicaid program, and then I will consider this issue with regard to the two individual Petitioners.

Petitioner PCI entered into a plea agreement in which it pled guilty to, and was convicted of, 10 counts of falsifying business records and one count of grand larceny. Petitioner PCI asserts that these criminal offenses do not relate to "the delivery of an item or service" under the Medicaid program, and therefore the mandatory exclusion provisions do not apply to it. PCI Hearing Request; P. Br. 5.

In support of its argument that its criminal offenses do not relate to the delivery of an item or service, Petitioner PCI describes the facts which formed the basis of its conviction. The I.G.'s description of the underlying facts differs. However, I find that either version of the facts underlying Petitioner PCI's conviction is sufficient to establish that Petitioner PCI was convicted of a criminal offense "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act.

The I.G. points out that according to the description of the grand larceny count contained in the indictment, Petitioner PCI was charged with submitting fraudulent claims to the Medicaid Program for home health care services performed by personal care aides. According to the indictment, these claims were fraudulent because the aides who rendered these services lacked the training and other qualifications required by the Medicaid

regulations. The I.G. asserts that in pleading guilty to this grand larceny count contained in the indictment, Petitioner PCI admitted that it filed false claims for the services of qualified aides when, in fact, the aides who performed the services were not qualified. In addition, the I.G. asserts that based on the description of the falsifying business record counts contained in the indictment, Petitioner PCI pled guilty to falsifying personnel records to conceal from the Medicaid program that the personal care aides were unqualified. The I.G. argues that the falsification activities were part of a scheme to receive payment from Medicaid for services delivered by unqualified aides.

Petitioner PCI has a different version of the facts underlying its convictions. Although the indictment charged Petitioner PCI with submitting false claims for the services of unqualified aides, Petitioner PCI asserts that based on statements it made at its plea allocution, it admitted only that it altered its business documents to conceal violations of record-keeping requirements of the Medicaid programs. According to Petitioner, it

> never admitted . . . that the aides were not in compliance with the regulations or that references were not obtained for the aides. Indeed, in all probability the aides were in compliance with the regulations and references were obtained. The problem was that the record-keeping in the Albany office was in shambles and files and documents were lost or misplaced. To hide this fact, the Albany office manager, acting on her own, constructed files and records. She might well have been able to go back and obtain duplicates of valid documents and establish a valid file, but chose not to do so . . . It is clear in such case that PCI's records were falsified and that PCI was guilty of a criminal offense, but the criminal offense [is] in no way related to the services performed by such aides.
>
> PCI Hearing Request.

Petitioner PCI reasons that since it did not admit that services were performed by unqualified aides, it did not plead guilty to a larceny offense based on the submission of claims for services that were not provided as claimed. Instead, Petitioner PCI asserts that its guilty plea to the larceny offense was based on its falsification of business documents to conceal record-keeping violations.

Based upon the I.G.'s version of the facts underlying the conviction, Petitioner PCI billed the Medicaid program for services which were not provided as claimed. In Jack W. Greene, DAB App. 1078 (1989), the Departmental Appeals Board (DAB) held that convictions for criminal offenses involving false or fraudulent claims are "related to the delivery of items or services" within the meaning of section 1128(a)(1) because such claims "directly and necessarily follow under the health care program from the delivery of the item or service". The DAB stated in Greene that "false Medicaid billing and the delivery of drugs to a Medicaid recipient are inextricably intertwined and therefore 'related' under any reasonable reading of that term". The Greene decision was subsequently affirmed by the United States District Court. Greene v. Sullivan, 731 F.Supp. 835, 838 (E.D. Tenn. 1990). Applying this holding in Greene to the I.G.'s version of the facts underlying Petitioner PCI's conviction, any claims submitted by Petitioner PCI for services not provided as claimed would be related to the "delivery or an item or service" within the meaning of section 1128(a)(1). In addition, since the purpose of the document falsification activity was to prevent the discovery that the claims were false, the falsifying business records offenses were also related to the delivery of an item or service under the Medicaid program.

Petitioner PCI contends that its case is distinguishable from the Greene case in which section 1128(a)(1) was held to apply. In Greene, the petitioner was convicted of filing claims for filling prescriptions with brand name drugs when instead generic drugs had been dispensed. Petitioner PCI argues that since it did not plead guilty to filing false claims for services that were not provided as claimed, the Greene case does not apply to it.

It is true that the Greene case involved a criminal offense for filing false Medicaid claims. However, this is not to suggest that the only criminal offenses which fall into the ambit of section 1128(a)(1) are criminal offenses based on the filing of false claims. The language of section 1128(a)(1) plainly intends that a broader range of criminal offenses are to be covered by the mandatory exclusion provision. Even if I were to accept Petitioner PCI's assertion that it did not admit that its personal care aides were in fact unqualified and therefore it did not plead guilty to filing false Medicaid claims, I would still find that its admitted

failure to keep adequate records and its admitted falsification of documents to conceal these violations are "related to" the delivery of the service for which it sought reimbursement, within the meaning of section 1128(a)(1).

Medicaid regulations governing the provision of services by personal care aides require that these aides meet certain training, physical health, and other requirements. The purpose of these regulations is to ensure that Medicaid recipients receive competent care from these aides. Since the Medicaid program is responsible for processing numerous claims for the delivery of home health care services, the burden to certify that the providers of these services are qualified cannot be placed on the Medicaid program. Instead, the Medicaid program requires that agencies providing home health care services meet record-keeping requirements to document that its aides are trained, healthy, and otherwise qualified. The record-keeping requirements are an integral part of a regulatory scheme designed to ensure that Medicaid recipients receive competent home health care services. It is apparent from this regulatory scheme that the Medicaid program did not view its requirements to document the qualifications of personal care aides as being separable from its objective to provide competent home health care services to Medicaid recipients.

Petitioner PCI admitted that it falsified its business records with the intent to conceal its record-keeping violations. This compromised the integrity of the administration of the Medicaid program and breached the corporation's duty to provide adequate proof that its personal care aides were competent to provide home health care services to Medicaid recipients. The purpose of the record falsification activity was to prevent Petitioner PCI from being liable for any overpayments resulting from its failure to provide home health care services in compliance with Medicaid's regulations. I conclude from this that, even based on Petitioner PCI's version of the facts underlying its conviction, its criminal offenses were related to the delivery of a service under the Medicaid program.[4]

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[4] See Surabhan Ratanasen, M.D., DAB App. 1138 at 6 (1990) where the DAB found that if a physician filled in information on the charts of patients after being

(continued...)

The DAB has held that a criminal offense is related to the delivery of an item or service under Medicare or Medicaid where the intended victim of the crime is the Medicare or Medicaid program. Napoleon S. Maminta, DAB App. 1135 (1990). The criminal offense in Maminta consisted of the unlawful conversion of a Medicare reimbursement check, and the victim of the crime was the Medicare program.

In this case, the adverse impact of Petitioner PCI's criminal offenses on the Medicaid program is not tangential or ephemeral. Petitioner PCI admitted that it received payment for the delivery of home health care services by personal care aides who did not possess documented qualifications required by the program's regulations and it attempted to conceal this from the government by falsifying its business records. This activity damaged program integrity, resulted in a monetary loss to the program, and breached Petitioner PCI's duty to program recipients.

Petitioner PCI argues that even if its personal care aides in fact failed to meet the training, health and other qualifications, this would not have any adverse impact on the Medicaid program. To support this contention, Petitioner PCI refers to a decision of the New York State Supreme Court in Homemakers of Western New York, Inc. v. State of New York (N.Y. Sup. Ct. June 9, 1987) (attached to PCI Hearing Request). According to Petitioner PCI, this case stands for the proposition that non-compliance with technical regulations regarding the qualifications of home health care aides does not permit the government to recover money paid for services that were actually performed. Petitioner PCI argues that, under this case, the government would not have been able to recover any payments for services performed by health care aides, even if Petitioner PCI failed to comply with Medicaid's technical regulations. Petitioner PCI argues that its record-keeping violations and its document falsification activities cannot be program-related because they have no impact on the program or the expenditure of program funds under the Homemakers case.

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[4] (...continued)
notified that a Medicaid agency was going to audit its medical charts, the matter is related to the delivery of an item or service under the Medicaid program.

I find that the Homemakers case does not stand for the proposition stated by Petitioner PCI, and that it is not relevant to the issue of whether Petitioner PCI's criminal offenses are related to the delivery of items or services under the Medicaid program.

In Homemakers, a home health care agency sought a judgment overturning a determination by the New York State Department of Social Services that it had been overpaid for home care services performed by aides who did not meet regulatory qualifications pertaining to the physical health of the aides, the documentation of their health testing, and their training. The court in Homemakers found that under the circumstance of that case, the Department of Social Service's disallowance of payments was arbitrary, capricious, and an abuse of discretion. Homemakers does not stand for the general proposition that the Medicaid program is required to pay for the services of home health care aides even if those aides do not comply with Medicaid regulations concerning their qualifications. Instead, Homemakers is merely an example of a case where there are compelling reasons to make an exception to the general rule that the Medicaid program can recover payments it has made for home health care services provided by aides who do not comply with its regulations. Some of the factors considered by the court in reaching its decision in Homemakers were that the audit period (June 1, 1980 to December 31, 1981) was for the first 18 months that the petitioner in Homemakers was providing home health care services under the Medicaid program, that the regulatory scheme itself was relatively new and unclear, and that there was no finding of any fraud on the petitioner's part.

In this case, Petitioner PCI pled guilty to criminal offenses committed from 1981 to 1985. Petitioner PCI had already been in business since 1975 (I.G. Ex. 31), and it had been doing business with the Medicaid program at least since 1979. I.G. Ex. 20. At the time Petitioner PCI engaged in the misconduct underlying its criminal offenses, it was not new to either the home health care industry or to the Medicaid program. In addition, there is no evidence in the record that Petitioner PCI violated Medicaid regulations because it was confused about what they required. If anything, Petitioner PCI's document falsification activities suggest that it was all too aware of Medicaid's requirements.

Most importantly, there was no evidence of fraud in the Homemakers case. In this case, the central and uncontested fact is that Petitioner PCI pled guilty to, and was convicted of, criminal offenses involving fraud against the Medicaid program. Not only did Petitioner PCI fail to comply with Medicaid regulations, but it, unlike the petitioner in Homemakers, actively tried to conceal this from government auditors by falsifying its records. In pleading guilty to the larceny offense, Petitioner PCI admitted that it received money from the Medicaid program to which it was not entitled. Petitioner PCI's agreement to pay the Medicaid program restitution in the amount of $1,000,000 is tantamount to an admission that the monetary damage to the program resulting from its criminal offenses was at least this amount. In light of these facts, Petitioner PCI's reliance on the Homemakers case to support the argument that the crimes committed by it had no impact on the Medicaid program and were therefore unrelated to the Medicaid program is misplaced.

Petitioner PCI argues that its criminal offenses relate to "financial misconduct" and therefore fall within the ambit of section 1128(b)(1) of the Act. Section 1128(b)(1) permits the Secretary in his discretion to exclude persons who have been convicted of a criminal offense "relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct" in connection with the delivery of a health care item or service, or "with respect to any act or omission in a program operated by or financed in whole or in part by any Federal, State, or local government agency." Petitioner therefore argues that the Secretary (and his delegate, the I.G.) was not required by law to exclude it.

This argument is virtually the same argument which was made by petitioner in Greene and found by the United States District Court to be "manifestly incorrect". Greene, 731 F. Supp. at 838. If subsection 1128(b)(1) is read in isolation, its language would literally encompass the criminal offenses which formed the basis of Petitioner PCI's conviction. However, such a reading would ignore a legislative scheme in which Congress mandated exclusion of persons convicted of criminal offenses related to the delivery of items or services under Medicare and Medicaid, and permitted exclusion of persons convicted of criminal offenses related to the delivery of items or services under other health care programs. Since I find that Petitioner PCI was convicted

of criminal offenses "related to" the delivery of a service under the Medicaid program, I conclude that the I.G. properly classified Petitioner PCI's offenses as falling under the mandatory exclusion authority. It is not relevant here that the offenses in question might also fall within the scope of section 1128(b). Congress provided that if an offense falls within the scope of 1128(a), the I.G. has no choice but to exclude the provider for a minimum period of five years.

In view of the foregoing, I find that the mandatory exclusion provisions of the Act apply to the criminal offenses which formed the basis of Petitioner PCI's conviction, and the I.G. is required to exclude Petitioner PCI for a minimum of five years under sections 1128(a)(1) and 1128(c)(3)(B).

C. Petitioners Weissman's And Cohen's Criminal Offense Underlying Their Convictions Is "Related To The Delivery Of An Item Or Service" Under the Medicaid Program.

Turning now to the individual Petitioners in this case, Weissman and Cohen, I will consider whether the criminal offense which formed the basis of their convictions was "related to the delivery of an item or service" under the Medicaid program, within the meaning of section 1128(a)(1) of the Act. In considering this issue, I note that Petitioners Weissman and Cohen were convicted of the same crime, made the same statement at their plea allocutions, and made almost identical arguments in their submissions to this tribunal.

Petitioners Weissman and Cohen entered into plea agreements in which they pled guilty to, and were convicted of, engaging in a criminal conspiracy. At their plea allocutions, Petitioners Weissman and Cohen read identical statements, as follows:

> I agreed that the non-compliance of Professional Care's Albany office with the record keeping regulations of the Department of Social Services would not be divulged to the Department of Social Services or any county serviced by the Albany office. During 1983 services were performed out of the Albany office which were billed for and paid for in connection with a compliance review that the Department of Social Services was conducting. I learned that there were records of Professional Care's Albany office which were not in compliance and I agreed that the company should try after the

> fact to make its records comply without disclosure to the state or any county serviced by the Albany office. I knew that if the Department of Social Services or counties serviced by the Albany office were told that, they may have required the company to pay some or all of the money back, and that is why I agreed it shouldn't be disclosed.

I.G. Ex. 8/10-11; I.G. Ex. 13/10-11.

Based on this statement, Petitioners Weissman and Cohen admitted that they learned that the records of the Albany office of the corporation did not comply with the Medicaid program's record-keeping regulations, and that they agreed that the corporation should alter its business documents "after the fact" to conceal these deficiencies. Petitioners Weissman and Cohen also stated that the reason that they agreed that the corporation should engage in this cover-up activity was that they did not want the corporation to be liable for an overpayment.

Petitioners Weissman and Cohen argue that their conspiracy to conceal their record-keeping deficiencies is too far removed from the delivery of personal care services to be considered "related" under section 1128(a)(1) of the Act. Citing the DAB's language in the Greene decision that criminal offenses which concern acts that "directly and necessarily follow" from the delivery of an item or service are related to the delivery of the item or service, they point out that at the time of their conspiracy, the actual delivery of the services had already been accomplished and payment for services had already been received. While they concede that under Greene, the submission of false bills is related to the delivery of services, they argue that this is inapplicable to them because they did not plead guilty to submitting false bills.

Petitioners Weissman and Cohen appear to be arguing that an offense cannot be related to the delivery of an item or service under the Medicaid program if it is committed at a point in time after the actual delivery of the item or service and after payment has been received for it. This mechanistic approach to the issue of whether an offense is program-related ignores that Congress intended the mandatory exclusion sanction to be available when the Medicare and Medicaid programs are victims of the criminal offense. See Maminta, supra. Thus, the test to determine whether or not a criminal offense is related to the delivery of an item or service under the Medicaid

program is whether the offense had an adverse impact on the program.

Petitioners Weissman and Cohen admitted to participating in a scheme to defraud the Medicaid program by altering PCI's business documents to conceal the corporation's failure to comply with Medicaid's record-keeping requirements. As stated above, these record-keeping requirements are an integral part of a regulatory scheme designed to ensure that recipients receive competent home health care services. While Petitioners Weissman and Cohen may not have been directly responsible for the initial record-keeping violations, their participation in a plan to conceal them by altering business documents perpetuated these violations. This compromised the integrity of the administration of the Medicaid program and violated the corporation's duty to accurately document that its personal care aides were qualified to deliver services to Medicaid recipients. In addition, Petitioners Weissman and Cohen admitted that the reason they agreed to the cover-up activities was that they did not want the corporation to be liable for an overpayment. Implicit in this admission is the acknowledgement that their criminal conspiracy contributed to financial damage to the Medicaid program. I therefore conclude that Petitioners Weissman's and Cohen's criminal conspiracy injured the Medicaid program and it is program-related.

Petitioners Weissman and Cohen join Petitioner PCI in invoking the Homemakers case to argue that their criminal activities did not have any impact on the Medicaid program or the expenditure of Medicaid funds and therefore their criminal activities were not program-related. I reject this argument for the reasons contained in my discussion of this case above.

Petitioners Weissman and Cohen also point out that the crime of conspiracy does not require the successful completion of the agreement, and they argue that the "inchoate offense of conspiracy - without more - cannot possibly have had any effect on the Medicaid or Medicare programs and therefore cannot possibly be 'related to' the 'delivery of an item or service'". P. Br. 2.

I disagree. While Petitioners Weissman and Cohen did not admit to actually executing the plan to conceal the corporation's record-keeping violations by altering the corporation's business records, they admitted that they "agreed" to it. In so doing, they signalled to the lower levels of the corporation that this type of fraudulent

activity would be tolerated. This management decision was very damaging to the Medicaid program and it therefore was program-related.[5]

Petitioners Weissman and Cohen also join Petitioner PCI in arguing that this case falls within the permissive exclusion provision of 1128(b) of the Act rather than the mandatory exclusion provision of 1128(a). Since I find that Petitioners Weissman and Cohen were convicted of criminal offenses related to the delivery of a service under the Medicaid program, I conclude that the I.G. properly classified Petitioner Weissman's and Cohen's offenses as falling under the mandatory exclusion authority. As I stated above, Congress provided that if an offense falls within the scope of 1128(a), the I.G. has no choice but to exclude the provider for a minimum period of five years.

In view of the foregoing, I find that the mandatory exclusion provisions of the Act apply to the criminal conspiracy which formed the basis of Petitioners Weissman's and Cohen's convictions, and the I.G. is required to exclude Petitioners Weissman and Cohen for a minimum of five years under sections 1128(a)(1) and 1128(c)(3)(B) of the Act.

II. A 15 Year Exclusion Is Appropriate And Reasonable In This Case.

The I.G. excluded Petitioners PCI, Weissman, and Cohen from participating in the Medicare and Medicaid programs for 15 years. While the exclusion provisions of sections 1128(a)(1) and 1128(c)(3)(b) of the Act require that an individual or entity who has been convicted of criminal offense related to the delivery of an item or service under Medicaid be excluded for a minimum period of five years, there is no provision for a maximum exclusion period under these circumstances. The remaining issue in this case is whether the I.G. is justified in excluding

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[5] See Charles W. Wheeler, DAB Civ. Rem. C-61 at 4 (1989) which states that the distinction between a conviction for the offense of falsifying accounts and for the lesser offense of attempting to commit the offense of falsifying accounts is irrelevant for the purpose of determining whether the offense is program-related because "either an attempt to commit or an actual commission of the offense charged . . . are crimes which similarly concern the Medicaid program".

Petitioners PCI, Weissman, and Cohen for 10 years in addition to the minimum five year exclusion period required by law. Resolution of this issue depends on analysis of the evidence of record in light of the exclusion law's remedial purpose. See Frank J. Haney, DAB Civ. Rem. C-156 (1990).

A. The Purpose Of The Exclusion Law Should Be Considered In Determining An Appropriate Length Of Exclusion.

Congress enacted section 1128 of the Act to protect the Medicare and Medicaid programs from fraud and abuse and to protect the beneficiaries and recipients of those programs from incompetent practitioners and inappropriate or inadequate care. See, S.Rep. No. 109, 100th Cong., 1st Sess. 1; reprinted 1987 U.S. Code Cong. and Admin. News 682. The key term to keep in mind is "protection", the prevention of harm. See, Webster's II New Riverside University Dictionary 946 (1984).

As a means of protecting the Medicare and Medicaid programs and their beneficiaries and recipients, Congress chose to mandate, and in other instances to permit, the exclusion of untrustworthy providers. Through exclusion, individuals or entities who have caused harm, or demonstrated that they may cause harm, to the federally funded health care programs or its beneficiaries or recipients are no longer permitted to receive reimbursement for items or services which they provide to Medicare beneficiaries or Medicaid recipients. Thus, untrustworthy providers are removed from a position which provides a potential avenue for causing harm to the program or to its beneficiaries or recipients. Exclusions also advance the ancillary remedial purpose of section 1128 by deterring other providers of items or services from engaging in conduct which threatens the well-being and safety of beneficiaries and recipients, or the integrity of program funds. See Charles J. Burks, M.D., DAB Civ. Rem. C-111 (1989).

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the individual or entity against whom the exclusion is imposed. However, the law places the well-being and safety of beneficiaries and recipients and the integrity of program funds ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objective, even if the exclusion has a severe adverse financial impact on the individual or entity against whom it is imposed.

B. The Facts And Circumstances Of Each Case Should Be Considered In Determining An Appropriate Length Of Exclusion.

The determination of when a provider should be trusted and allowed to reapply for participation in Medicare and Medicaid programs is a difficult issue and is one which is subject to much discretion. Each case has countless unique facts which must be weighed, and there is no mechanical formula which can be applied to determine the appropriate length of an exclusion. The Regulations provide some guidance which may be followed in making this determination. The Regulations provide that the length of Petitioner's exclusion may be determined by reviewing: (1) the number and nature of the offenses, (2) the nature and extent of any adverse impact the violations have had on beneficiaries, (3) the amount of the damages incurred by the Medicare, Medicaid, and social services programs, (4) the existence of mitigating circumstances, (5) the length of sentence imposed by the court, (6) any other facts bearing on the nature and seriousness of the violations, and (7) the previous sanction record of the excluded party. 42 C.F.R. 1001.125(b).[6]

I note that the Regulations were adopted by the Secretary prior to the enactment of the 1987 amendments to the Act. Even though the Regulations were adopted by the Secretary to implement the law as it existed prior to the enactment of the 1987 amendments, they are entirely consistent with Congressional intent to exclude untrustworthy providers from participation in Medicare and Medicaid programs. Thus, to the extent that they have not been repealed or modified, the Regulations embody the Secretary's intent that they continue to apply as guidelines to the cases

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[6] There are proposed regulations which, if adopted by the Secretary, would supersede the regulations which presently govern exclusions. See 55 Fed. Reg. 12205 (April 2, 1990). The I.G. urged that I use these proposed regulations as guidelines to evaluate the reasonableness of the exclusions imposed and directed against Petitioners. However, these proposed regulations have not been finally adopted, and it would not be appropriate for me to assume that they will be adopted in their proposed form. Moreover, it is not clear that, assuming these proposed regulations are adopted, they would apply retroactively to exclusions imposed prior to the date of their adoption.

such as this one which have arisen after the enactment of the 1987 revisions.

The purpose of the hearing is not to determine how accurately the I.G. applied the law to the facts before him, but whether, based on all relevant evidence, the exclusion comports with the legislative purpose of protecting the Medicare and Medicaid programs and their beneficiaries and recipients from untrustworthy providers.

The hearing is, by law, de novo. Act, section 205(b). Accordingly, in deciding the appropriate length of an exclusion, I must make an independent assessment of the seven factors listed in section 1001.125 of the Regulations and consider all of the purposes designated by Congress for the enactment of the exclusion law. Evidence which is relevant to the reasonableness of an exclusion will be admitted in a hearing on an exclusion whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. Moreover, evidence which relates to a petitioner's trustworthiness or to the remedial objectives of the exclusion law is admissible at the hearing, even if that evidence is of conduct other than that which establishes statutory authority to exclude a petitioner.

In this case, I permitted both sides to offer evidence consisting of excerpts from the record of Petitioners' criminal trial. In addition, I received evidence which included investigative reports, documents pertaining to audits of Petitioner PCI, documents pertaining to proceedings related to Petitioners' criminal trial, an affidavit pertaining to the employment status of employees of Petitioner PCI, a legal opinion regarding the indemnification of the officers and directors of Petitioner PCI, and documents providing information about Petitioner PCI. My purpose in admitting such evidence was to create as full a record as possible of the gravity and effect of Petitioners' offenses as well as any mitigating factors that may exist.

The Regulations establish that the ultimate issue to be determined at a hearing pertaining to an exclusion imposed pursuant to section 1128 of the Act is whether the exclusion is reasonable. 42 C.F.R. 1001.128(a)(3). In adopting this regulation, the Secretary stated that: "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not

extreme or excessive". 48 Fed. Reg. 3744 (January 27, 1983).[7] An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent.

In this case, the I.G. has brought forward substantial evidence which establishes that there are sufficient aggravating factors to justify the imposition of lengthy exclusions against Petitioners PCI, Weissman, and Cohen. Petitioners have failed to establish the existence of mitigating factors which would justify a reduction in the length of the exclusions imposed against them.

C. Petitioners Were Convicted Of Serious Offenses.

1. Petitioner PCI Was Convicted Of A Number Of Serious Offenses. Petitioner PCI pled guilty to and was convicted of one count of grand larceny and 10 counts of falsifying business records. The 10 counts of falsifying business records and the one count of grand larceny to which Petitioner PCI pled guilty are all felonies under New York State law. This is a significant number of serious criminal offenses.

2. The Gravity Of Petitioners Weissman's And Cohen's Single Misdemeanor Offense Cannot Be Evaluated Independently Of Petitioner PCI's 11 Felony Offenses. The individual Petitioners in this case, Weissman and Cohen, pled guilty to, and were convicted of, one conspiracy count, which is a single misdemeanor under New York State law. Petitioners Weissman and Cohen assert that a 15 year exclusion is unreasonably lengthy in view of the fact that the criminal offense which formed the basis of their convictions was merely a single misdemeanor.

While a single misdemeanor would on its face appear to be less serious than the 11 felony counts which formed the basis of Petitioner PCI's conviction, a review of the

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[7] The I.G. argued that "petitioners bear the ultimate burden of proof that the exclusion is not supportable and that the period of exclusion is unreasonable". I.G. Br. 22-23. The I.G. supported this position by citing provisions in the proposed regulations. As I have stated in my previous footnote, these regulations have not been finally adopted, and I am not bound by them.

acts underlying Petitioners Weissman's and Cohen's conspiracy conviction shows that they had direct involvement in the 11 felony counts for which Petitioner PCI was convicted. At their plea allocutions, Petitioners Weissman and Cohen admitted that they knew Petitioner PCI's Albany office was not in compliance with Medicaid regulations, and that they made a decision at the management level that the corporation should alter its business records to conceal the company's noncompliance from the scrutiny of government officials. They admitted that they, in concert with lower level employees of Petitioner PCI, participated in a criminal scheme to cover up the corporation's failure to comply with Medicaid regulations in order that corporation would not have to return the money it had wrongfully received from the Medicaid program.

Petitioners Weissman's and Cohen's attempt to minimize their role in defrauding the Medicaid program by asserting that "there is no proof whatsoever that either Mr. Cohen or Mr. Weissman personally benefitted directly or indirectly from any of the alleged falsification." P. Br. 11. This assertion is without merit. Petitioners Weissman and Cohen have a strong financial interest in Petitioner PCI. In addition to receiving compensation for their duties as corporate officers and directors, they are large shareholders of the corporation. They would therefore benefit financially from any profits resulting from the crimes of Petitioner PCI.

In view of the foregoing, an evaluation of the nature of Petitioners Weissman's and Cohen's criminal offenses can not be made independently of an evaluation of the nature of the offenses which formed the basis of Petitioner PCI's conviction. Petitioners Weissman and Cohen were involved in and profited from the 11 felony counts underlying Petitioner PCI's conviction. Under these circumstances, Petitioners Weissman's and Cohen's attempt to minimize the gravity of their criminal misconduct on the grounds that they were convicted of only a single misdemeanor is unpersuasive.

3. Petitioners' Attempt To Minimize The Gravity Of Their Criminal Offenses By Shifting Responsibility To Low Level Employees Is Unpersuasive. All three Petitioners attempt to minimize the gravity of the criminal offenses which formed the basis for their convictions by shifting criminal responsibility to low level corporate employees.

Petitioners Weissman and Cohen assert that they "should be excused for what was at worst a first time failure to supervise low level renegade employees". P. Br. 10. Their own admissions at their plea allocutions, however, contradict this assertion. While lower level employees of PCI engaged in misconduct which resulted in the submission of claims to the Medicaid program that were not properly reimbursable, Petitioners Weissman and Cohen, by their own admissions, learned about this misconduct. While lower level employees performed the cover-up activities, Petitioners Weissman and Cohen, by their own admissions, made a decision at the management level to agree to this activity so that the corporation would not have to return any money overpaid to it by Medicaid. Petitioners Weissman's and Cohen's admissions at the plea allocution show that they were guilty of far more than a mere "failure to supervise". They admitted that they learned about and consented to illegal activities performed by lower level employees, and that they made a business decision to consent to this activity in order to preserve the financial health of the corporation.

Petitioner PCI also asserts that "[w]hile the company itself pled guilty to a number of counts . . . this plea resulted from the actions of lower level renegade corporate employees." P. Br. 8. Petitioner PCI points out that the lower level employees who engaged in the criminal activity are no longer employed by the corporation and argues that an exclusion against Petitioner PCI is therefore unwarranted.

As stated above, while lower level employees performed the felonious acts which resulted in Petitioner PCI's conviction, they did not act in isolation from the management of Petitioner PCI. Petitioner Weissman, the president and a director of the corporation, and Petitioner Cohen, the executive vice president and a director of the corporation, admitted that they participated in a criminal conspiracy to defraud the Medicaid program. Thus, removing the lower level employees who participated in the criminal misconduct from their positions at the corporation does not ensure that the corporate entity is trustworthy.

D. Petitioners Were Sentenced To Substantial Fines.

The seriousness of Petitioners' criminal offenses is in some measure reflected in the substantial fines which the court imposed. The court ordered Petitioner PCI to pay a

fine in the amount of $250,000. Petitioners Weissman and Cohen were each ordered to pay a fine in the amount of $100,000 out of their personal funds.

E. Petitioners Committed Their Criminal Offenses Over A Lengthy Period Of Time.

The criminal offenses which formed the basis for Petitioners' convictions were committed over a lengthy period of time in excess of one year. The criminal offenses underlying Petitioner PCI's conviction spanned from 1981 to 1985. Although Petitioners Weissman and Cohen assert that "there is no indication that the conspiracy to which the individual petitioners pled guilty covered a period of over one year", this statement is not supported by the record. P. Br. 12.

Petitioners Weissman and Cohen were indicted for a conspiracy offense occurring from 1982 to 1985 in Albany County and "elsewhere within the State of New York". I.G. Ex. 1. At their plea allocutions, counsel for the State of New York stated that Petitioners Weissman's and Cohen's fines were "solely for the crimes committed within the County of Albany". I.G. Exs. 8/13 and 13/13. I infer from this that New York State agreed, as part of the plea bargain, that the illegal acts which formed the basis of Petitioners Weissman's and Cohen's convictions would be limited to the criminal conspiracy occurring in Albany County only. Statements made in the indictment allege that the criminal conspiracy occurred in Albany County from 1983 to 1985.

In their statements made at their plea allocutions, Petitioners Weissman and Cohen state that "[d]uring 1983 services were performed out of the Albany office which were billed for and paid for in connection with a compliance review that the Department of Social Services was conducting". While this statement makes reference to the year 1983 as being the year that the homemaker services were performed, it does not explicitly limit Petitioners Weissman's and Cohen's criminal conspiracy to that year. In addition, there is no indication that the State agreed as part of the plea bargain that illegal acts underlying the conviction were limited to those which occurred in Albany County in 1983 only.

In view of the foregoing, I find that Petitioners Weissman's and Cohen's plea bargains contemplated that they pled guilty to a criminal conspiracy which took place in Albany County, and that this conspiracy occurred

from 1983 to 1985. This is a lengthy period of time, substantially in excess of one year.

F. The Criminal Offenses Underlying Petitioners PCI's, Weissman's, And Cohen's Criminal Convictions Resulted In Substantial Financial Damage To The Medicaid Program And Seriously Compromised The Integrity Of The Program.

Petitioners assert that "there has been no damage incurred by any program" because "the services were in fact performed". P. Br. 9. It is undisputed that Petitioner PCI actually performed services for which they received payment. In fact, these home care services may have been performed satisfactorily, as Petitioners assert, and may even have been beneficial to Medicaid recipients. The damage to the Medicaid program in this case is not because there were payments for services that were never performed at all, or for services that were performed in a less than satisfactory manner. Instead, the damage to the Medicaid program is because payments were made for services that were not properly reimbursable under Medicaid regulations. This resulted in a financial loss to Medicaid and compromised the integrity of the program.

In this case, the Medicaid program contracted to reimburse Petitioner PCI for home health care services performed by individuals who possessed properly documented qualifications in accordance with Medicaid regulations. The Medicaid program contemplated that compliance with Medicaid regulations was an important material element of the consideration for which it bargained. Petitioner PCI's guilty plea to the grand larceny count constitutes an admission that it received payment for home health care services even though it failed to comply with applicable Medicaid regulations designed to ensure that these services would be provided by individuals with the properly documented qualifications. The Medicaid program was therefore damaged because Petitioner PCI did not provide what its contract with Medicaid contemplated it would provide in exchange for the monetary payment it received from Medicaid.

Petitioners assert that under Homemakers, supra, the Medicaid program is required to pay for services that have actually been provided, even if the personal care aides providing the service are not in full compliance with Medicaid regulations. Petitioners reason that the Medicaid program was not damaged as the result of

Petitioners' misconduct because the government would not have been able to recover any funds even if the personal care aides did not meet all the Medicaid requirements.

The Homemakers case cited by Petitioners is not applicable to the facts of this case for the reasons I have discussed above. I therefore find that Petitioners' reliance on it is misplaced, and it does not support their assertion that the length of their exclusions is unreasonable because there was no damage to the Medicaid program as a result of their criminal offenses.

The demand for Medicaid's scarce resources is great. Payments by Medicaid for any claim which is not properly reimbursable under Medicaid regulations results in financial damage to the program. In this case, Petitioners illegally diverted a substantial amount of program funds and this resulted in a serious financial loss to the Medicaid program.

The I.G. asserts that the financial damage to Medicaid program resulting from the criminal activity underlying Petitioners' convictions in this case was over $1,000,000. It bases this assertion on the fact that Petitioner PCI agreed to pay $1,000,000 in restitution to the Medicaid program as part of its plea bargain in the criminal proceedings.

Petitioner PCI, however, argues that there "is no evidence in the record to indicate that the New York State Medicaid program suffered a loss of $1,000,000". Petitioner PCI denies that its agreement to pay $1,000,000 in restitution constituted an admission that the Medicaid program suffered a loss in that amount, but instead states that at the plea allocution it admitted only that the amount "obtained wrongfully by [Petitioner PCI] was in excess of $1500 . . .", the minimum amount required under the larceny statute. In addition, Petitioner PCI asserts that the "only evidence introduced by the State [in the criminal trial], if believed by the jury, apparently indicated that $160,785.33 was obtained by falsifying records". PCI Hearing Request.

In support of its argument that the $1,000,000 restitution it agreed to pay was unrelated to the value of its larceny, PCI cites a decision issued by the New York State Supreme Court in a related civil proceeding. Subsequent to the criminal convictions in this case, the State of New York sought summary judgment in its civil action against Petitioners and others for treble damages

based on the $1,000,000 restitution ordered by the court in the criminal case. The State contended that Petitioner PCI's agreement to pay $1,000,000 in restitution constituted an admission that the State suffered a loss in at least that amount. The New York State Supreme Court rejected this argument and denied the State's motion for summary judgment, finding that "the record does not disclose that PCI ever admitted that the value of PCI's unlawful receipts was $1,000,000, merely that the amount was in excess of $1500". Based on this finding, the New York State Supreme Court concluded that the judge in the criminal case had accepted voluntary payment of restitution in "an amount greater than that established at trial as the actual damage to the State". Kuriansky v. Professional Care, Inc., et al. slip op. at 5 (N. Y. Sup. Ct. October 20, 1988) (attached to PCI Hearing Request). Petitioner PCI therefore relies on this decision to support its assertion that $1,000,000 restitution payment bears no relationship to the amount of its unlawful gain from the Medicaid program. Instead, Petitioner PCI would have me believe that it voluntarily agreed to pay $1,000,000 in restitution plus the $250,000 fine because that seemed an appropriate penalty for its wrongful acts.

The I.G. pointed out that the Supreme Court decision cited by Petitioner PCI was subsequently overruled by the Appellate Division of the New York State Supreme Court. The Appellate Division found that "restitution is the return of all the fruits of a crime" and therefore Petitioner PCI's agreement to pay restitution in the amount of $1,000,000 is evidence that Petitioner PCI unlawfully gained at least that amount as a result of its criminal offenses. Kuriansky v. Professional Care, Inc., et al, No. 59621, slip op at 3 (N.Y. App. Div. February 22, 1990) (I.G. Ex. 30). The I.G. also noted that after the Appellate Division issued this ruling, the trial judge who presided over Petitioners' criminal trial and who subsequently presided over the civil liability action brought by the State, stated in an opinion:

> The undersigned presided over the lengthy criminal trial and is familiar with the extensive scope thereof; in no way does the amount of treble damages sought [by the State in its civil action against Petitioners] bear no rational relation to the goal of compensating the State for its loss, but is a classic example of such a rational relation.

Kuriansky v. Professional Care, Inc., et al. No. 7088 - 87, slip op. at 19 (N.Y. Sup. Ct. March 15, 1990) (I. G. Ex. 29).

I agree with the opinion of the Appellate Division of the New York State Supreme Court that in spite of its equivocation at its plea allocution, Petitioner PCI's voluntary agreement to pay $1,000,000 in restitution is in effect, an admission that its criminal offenses resulted in damage to the Medicaid program in at least that amount. By definition, restitution means "an act of repaying or compensating for loss, damage, or injury". See, Websters II New Riverside University Dictionary, 1002 (1984). In addition, I am persuaded by the opinion of the judge who presided over the criminal trial and who had first hand familiarity with the evidence in the criminal case that the amount of restitution Petitioner PCI paid bears a "rational relation" to the goal of compensating the Medicaid program for its loss. I find that Petitioner PCI caused a substantial amount of financial damage to the Medicaid program, as evidenced by the $1,000,000 restitution it paid.

Although Petitioners Weissman and Cohen were not ordered to pay any restitution out of their personal funds, they admitted to participating in the conspiracy to defraud the Medicaid program. Their criminal misconduct therefore contributed to the large monetary loss sustained by the Medicaid program.

The Medicaid program is vulnerable to unscrupulous providers. Since the Medicaid program is responsible for processing numerous claims, it is impossible for it to audit every claim as it is filed. It depends on the honesty and good faith of the providers of services who submit claims to uphold the integrity of the program. In addition to causing substantial monetary damage to the Medicaid program, the dishonest conduct which formed the basis of Petitioners' convictions in this case seriously compromised the integrity of the Medicaid program.

G. Petitioners' Criminal Offenses Endangered The Health And Safety Of Medicaid Recipients.

Petitioners contend that the evidence fails to establish that their offenses resulted in any actual harm to Medicaid recipients. In addition, Petitioners point out that the services at issue were not highly technical medical procedures, and they argue that "the noncompliance with regulations was apparently merely

technical". P. Br. 9. In an attempt to show that the Medicaid training regulations are "technical", Petitioners submitted the trial testimony of former aides employed by Petitioner PCI to show that they already had prior training as an aide or had prior experience taking care of elderly or infirm patients. P. Ex. B-G. Petitioners argue that the I.G.'s assertion that there was potential harm to Medicaid program recipients is "purely speculative and without merit". P. Br. 9.

While there is no evidence that Petitioners' violations resulted in actual harm to recipients, it is also true that their unlawful conduct placed the health and safety of Medicaid recipients in jeopardy. I do not accept Petitioners' attempt to belittle the Medicaid regulations at issue by characterizing them as being "merely technical". These regulations require aides to receive medical examinations in order to screen them for communicable diseases and to prevent Medicaid recipients from being exposed to these diseases. A review of the transcripts of the trial testimony of the six former aides submitted by Petitioners shows that three of them testified that they did not receive physical examinations, which means that they were not screened for serious contagious diseases and other relevant medical conditions. In addition, the training requirements are important because they provide some assurance that the aides will have the necessary skills to provide adequate care for Medicaid recipients. The requirements to document compliance with the training and health regulations are necessary to certify that the aides are qualified. Failure to maintain true and accurate personnel records threatens the well-being of Medicaid recipients because it makes it impossible to verify whether a personal care aide is in fact qualified to deliver home health care services.

The Medicaid program serves the most fragile segment of the population - the elderly and the ill. Individuals in this population group often suffer from impaired immune systems and are at risk for contracting contagious diseases that could be life threatening. In addition, individuals in this group often do not have the physical, mental, or financial resources to be effective advocates on their own behalf in the event that they receive incompetent or inadequate care. They therefore need the protection offered by the Medicaid regulations more than the population at large, and Petitioners' disregard for the Medicaid requirements is particularly egregious.

In view of the foregoing, I find that Petitioners' offenses threatened the health and welfare of Medicaid recipients. In addition, I find that the threat of harm was serious enough under the circumstances of this case to be an aggravating factor in determining the appropriate length of exclusion, even though there is no showing of actual harm.

H. While There Are Sufficient Aggravating Factors To Justify Lengthy Exclusions On The Basis Of Petitioners' Criminal Offenses, The Evidence Shows That These Criminal Offenses Were Part Of A Widespread Pattern Of Similar Misconduct.

Based on the foregoing, sufficient aggravating factors exist to justify a lengthy exclusion on the basis of the criminal offenses underlying Petitioners' convictions alone. These offenses were serious, and they were committed over an extended period of time. They damaged the integrity of the Medicaid program, and resulted in a financial loss of at least $1,000,000 to the Medicaid program in Albany County. These criminal violations also seriously threatened the health and safety of Medicaid recipients. The record, however, contains additional evidence which is damaging to Petitioners. There is substantial evidence showing that the criminal offenses to which Petitioners pled guilty and for which they were convicted in Albany County did not occur in isolation. Instead, these criminal offenses were but a small part of a larger, more pervasive, pattern of document falsification to conceal non-compliance with Medicaid regulations which occurred at various locations throughout New York State over a lengthy period of time.

1. The I.G. Has Brought Forward Substantial Evidence Showing A Widespread Pattern Of Misconduct. A Medicaid Fraud Control Unit investigative report dated March 26, 1986 contains evidence that business documents were falsified as early as 1979 in PCI's branch office at Hicksville, New York. According to this report, Barbara Goldstein, a part-time weekend coordinator at the Hicksville office in 1979 and later a director of the Hauppauge office, told a Medicaid Fraud Control Unit investigator that while she was working part time in 1979, she saw Harriet Weissman and Arline Cohen, the spouses of Petitioners Weissman and Cohen and co-directors of the Hicksville office, "fixing up the files". Ms. Goldstein told the investigator that Ms. Weissman and Ms. Cohen would check the personnel files to see if the requisite letters of reference, physical

forms, and in-service training certificates were there. If a document was missing, they would generate one for the file. I.G. Ex. 20/1-2.

Ms. Goldstein also admitted to the Medicaid Fraud Control Unit investigator that while she was the director of the Hauppauge office from 1983 to 1985, she created false in-service training certificates for those aides who did not attend training. Ms. Goldstein also stated that two employees, one of whom was Petitioner Cohen's niece, would help her create these false in-service training certificates. I.G. Ex. 20/2-3.

The record contains a transcript of the testimony given by Elyse Campo, former National Director of PCI (I.G. Ex.19/15), at the criminal trial. Ms. Campo testified that in 1981 an audit of home health aide files was performed in the New York City office, and that she informed Petitioners Weissman and Cohen that "the files were not in appropriate order at all to pass this audit". According to Ms. Campo's testimony, Petitioner Cohen told her that he would send Ms. Cohen and Ms. Weissman to New York City to help her and other PCI employees "correct these files, whether by properly documenting them or falsifying the records by ourselves making up the documents and placing them in the files". I.G. Ex. 19/24. Ms. Campo described to the court how the participants falsified the documents:

> We would take the files, and the majority of them had nothing in there that they should have had in there. We all sat and wrote in-service sheets, physicals, references, evaluations, W-4 forms. And we actively did this on the files.
> I.G. Ex. 19/25.

Ms. Campo also testified that in 1982, at the direction of Petitioner Cohen, she went to the White Plains office to falsify test scores of personal care aides when Petitioner Cohen learned that the passing grade for the test was 75 rather than 65. Ms. Cohen testified that she spent three nights going through all the files and changed "all the 65s to make them 75s so that they would all pass". In addition, Ms. Campo stated that Petitioner Cohen actually was present and participated in this falsification effort two of those nights. I.G. Ex. 19/19-23.

According to Ms. Campo's testimony, the Department of Social Services had performed an audit of the Spring Valley office in 1982, and had found the records in that office to be out of compliance. The Department of Social Services gave PCI a period of time to correct these files, and Petitioner Cohen asked her to go to the Spring Valley office and "whether properly or falsify the records, to make sure that the file folders were in compliance so when the Social Service Department came back they would pass their audit". I.G. Ex. 19/27.

In addition, Ms. Campo testified that sometime between October 1981 and 1983, Petitioner Weissman asked her to help his wife get the files in the Hicksville office in order in preparation for an audit. According to Ms. Campo, Mr. Weissman told her to "perform whatever duties we had to..., meaning falsifying the records, if necessary, to get them in order." I.G. Ex. 19/32.

According to Ms. Campo, in January of 1983, a massive effort to falsify personnel records was undertaken in New York City in preparation for an audit. This effort took several weeks, involving a group of PCI employees which included Ms. Weissman and Ms. Cohen. I.G. Ex. 19/32-40. Criminal trial testimony by Terry Freer, former National Director of Contracts, and a June 27, 1986 Medicaid Fraud Control Unit investigative report of an interview with Gilda Greenfield, former Director of Branch Development, contain corroborating statements describing this extensive falsification effort. I.G. Exs. 18 and 21. According to statements made by these former PCI employees, Petitioners Weissman and Cohen were fully aware of this falsification activity. I.G. Ex. 21/3. Progress reports were made to Petitioners Weissman and Cohen, and Petitioner Cohen arranged for additional employees to help with the falsification when it was necessary. I.G. Ex. 18/43-44. Elyse Campo testified that on at least one occasion, Petitioner Weissman gave his advice on the best way to falsify an in-service training log. I.G. Ex. 19/38-39.

Also contained in the record is a press release from the Office of the Special Prosecutor for Medicaid Fraud Control dated August 17, 1990. According to this document, a civil suit was filed against Petitioners and others on July 28, 1987 seeking approximately $11,600,000, plus treble damages, for fraudulent Medicaid overpayments made to Petitioner PCI statewide from 1981 to 1985. The State's claim included the $1,800,000 charged in the criminal indictment, $3,200,000 for PCI

overbillings in New York City, and $6,600,000 for overbillings elsewhere in New York State. PCI agreed to pay $3,750,000 to New York State in settlement of this civil suit. I.G. Rep. Ex. 2.

There is ample evidence in the record showing that countless numbers of documents were falsified in the Albany, New York City, Hicksville, Hauppauge, White Plains, and Spring Valley offices of Petitioner PCI. The evidence also shows that this documentation fabrication occurred as early as 1979, and that it continued for several years. In addition, the record is replete with instances where the documents were falsified with Petitioner Weissman's and Cohen's knowledge. There is also evidence that on various occasions, Petitioners Weissman and Cohen asked PCI employees to falsify business documents and even personally participated in these efforts themselves. Thus, while the criminal misconduct underlying Petitioners' convictions alone is serious enough to justify a lengthy period of exclusion for all three Petitioners, the evidence showing that their criminal misconduct was part of a larger, widespread scheme to falsify business documents to conceal non-compliance with Medicaid regulations confirms the conclusion Petitioners are untrustworthy. With regard to Petitioners Weissman and Cohen, in particular, the evidence showing that not only did they "agree" to these falsification efforts, but that they sometimes participated in the planning and execution of this activity, confirms the conclusion that they pose a serious threat to the integrity of the Medicaid and Medicare programs.

2. Petitioners' Collateral Attacks On The Sufficiency And Reliability Of The I.G.'s Evidence Are Not Persuasive. Petitioners respond to this damaging evidence primarily by collaterally attacking its sufficiency and reliability in an attempt to show that it is not probative on the issue of aggravating circumstances. Petitioners urge that I should not place "undue reliance" on the "immunized testimony of disgruntled former Professional Care employees who admitted falsifying documents". Petitioners contend that statements made by former employees as reported in the Medicaid Fraud Control Unit investigative reports are particularly unreliable because they "lack any cross-examination whatsoever". P. Br. 1, 5.

The individual Petitioners, Weissman and Cohen, argue that the criminal trial judge "was apparently not impressed" with the evidence against them showing that had any role in the planning or execution of the document falsification activity. They base this assertion on the fact that the trial judge dismissed all the felony charges against Petitioners Weissman and Cohen individually at the close of the State's case. Petitioners Weissman and Cohen therefore argue that I should not "give more weight and credence" to this testimony than did the trial judge "who had the opportunity to view the witnesses firsthand and assess their credibility". P. Br. 5-6.

I am not persuaded by these arguments. Petitioners Weissman's and Cohen's felony charges were dismissed as a result of a plea bargain struck by the parties and approved of by the court. I can not conclude from this alone that the criminal trial judge was "not impressed" with the evidence against Petitioners Weissman and Cohen. In addition, criminal trial courts use a considerably higher standard of persuasion than that employed in a civil administrative proceeding such as this. See Basem F. Kandah, R. Ph., DAB Civ. Rem. C-155 at 6 (1990). The criminal trial judge was therefore bound by evidentiary requirements that are not applicable to this administrative proceeding.

As I stated above, this is a de novo proceeding. In making a determination on the factual issue of the reasonableness of the length of the exclusion, I am not required to second guess or adopt the criminal trial judge's opinion on the reliability or legal sufficiency of a piece of evidence. Instead, I am required to make an independent evaluation of all the evidence in the record before me which is relevant to the issue of Petitioners' trustworthiness, and make an independent decision on the appropriate length of exclusion.

In evaluating the evidence before me, I recognize that the I.G. would have me rely heavily on statements made by former employees of Petitioner PCI who may be angry at Petitioners Weissman and Cohen for losing their jobs. I also recognize that these employees have been implicated in wrongdoing and they may be motivated to limit their own liability by making damaging statements against Petitioners Weissman and Cohen. Even taking these factors into consideration, I find that the record contains substantial reliable evidence which supports the conclusion that Petitioners Weissman and Cohen, in

concert with other employees of Petitioner PCI, engaged in the planning and execution of falsification activities that went well beyond the scope of the criminal offenses for which Petitioners were convicted.

The civil suit brought by New York State against Petitioners sought damages for fraudulent Medicaid overpayments at various locations throughout the state in addition to Albany County. This suit resulted in a settlement agreement in which Petitioner PCI agreed to pay $3,750,000 in damages to the Restitution Account of the Special Prosecutor for Medicaid Fraud Control. These facts provide evidence that misconduct occurred outside of Albany County, and that it involved millions of dollars of damage to the Medicaid program. The investigative report of the interview with Barbara Goldstein provides evidence that Petitioner PCI's fraudulent misconduct occurred as early as 1979.

The criminal trial testimony by Elyse Campo provides additional evidence that the fraudulent activities repeatedly occurred at various branch offices throughout New York State. This testimony is extremely damaging to Petitioners Weissman and Cohen in particular because it implicates them in the planning and execution of these activities. This was sworn testimony given under the penalty of perjury. In addition, it was subject to the rigors of cross-examination. Most importantly, I find this testimony reliable because, at least with respect to Petitioners Weissman's and Cohen's role in the massive falsification efforts which occurred in New York City, it is corroborated by the trial testimony of Terry Freer and the investigative report of the interview with Gilda Greenfield. While the damaging statements contained in the investigative reports were not sworn statements subject to cross-examination, I nevertheless find these reports valuable as corroborating evidence.

3, Petitioners Have Failed To Bring Forward Any Substantial Rebuttal Evidence. The only rebuttal evidence brought forward by Petitioners is criminal trial testimony by Lynn McGuire, an employee in Petitioner PCI's Albany office, in which she stated on cross-examination that she remembered Edna Lee, the office manager of the Albany office, say during a falsification session that if anyone at corporate headquarters found out about this they would be in "big trouble". P. Ex. A. This statement merely suggests that there may have been some falsification activity that was initiated in Albany County without Petitioners Weissman's and Cohen's

approval. However, even if this is true, Petitioners Weissman's and Cohen's guilty plea to the conspiracy charge shows that they agreed that the Albany office should engage in cover-up activities to conceal its failure to comply with Medicaid regulations. Lynn McGuire's statement does not rebut the other evidence of record showing that falsification activities were initiated outside of Albany County by Petitioners Weissman and Cohen.

Petitioners also submitted an opinion by "independent legal counsel", dated February 14, 1990, which concluded that "Martin Weissman and Israel Cohen meet the standards of conduct contained in Section 722 of the Business Corporation Law which will allow the Board, if they so choose, to grant them indemnification". In order to reach this conclusion, the author of the report found that, with regard to allegations involving document falsifications, "Messrs. Weissman and Cohen were acting in good faith, in the best interests of the Corporation and had no reasonable cause to believe that their conduct was unlawful". Petitioners' Post Oral Argument Submission.

I accord this report very little weight in determining the culpability of Petitioners Weissman and Cohen for the purpose of determining the appropriate length of their exclusions. It was prepared by a lawyer at the request of PCI's Board of Directors for the purpose of making a decision on whether Petitioners Weissman and Cohen could be indemnified for judgments incurred as a result of civil and criminal actions arising out of the falsification activity. An indemnification decision involves different legal standards than those in this case. In addition, a reading of this document shows that counsel reached his conclusions without considering the damaging testimony of Elyse Campo. As I have stated, I am required to make an independent evaluation of the evidence before me and I give little weight to the opinion of a lawyer involving different legal questions and which is based on a different record.

Petitioners argue that they are at a serious disadvantage in bringing forward rebuttal evidence because "there is no parallel transcript of defense witnesses presented in the criminal case that might be included on their behalf" since "the People's case abruptly ended after the last prosecution witness testified". P. Br. 6. Petitioners' claim that had they had the opportunity to present a defense case at the criminal trial, they would have

"submitted proof that the alleged misconduct by Professional Care, Inc. was conducted by renegade low level corporate employees on their own and not pursuant to any instruction by Mr. Cohen or Mr. Weissman". P. Br. 6.

This argument is disingenuous. While Petitioners did not present a defense case at the criminal trial, they certainly had every opportunity to submit any and all evidence in their favor in this proceeding. In addition, they had the opportunity to have a full and fair in-person hearing in which they could call witnesses to testify on their behalf, and they chose to waive this opportunity. I therefore rely on the documentary evidence provided by the parties, and I find that the preponderance of the evidence establishes that the criminal offenses which formed the basis of Petitioners' convictions were but a small part of a larger pattern of similar misconduct. In addition, I find that Petitioners Weissman and Cohen actively initiated and participated in this misconduct.[8]

I. Petitioner PCI Had A Previous Administrative Sanction Record.

An additional aggravating factor for all three Petitioners is Petitioner PCI's administrative sanction record. The I.G. submitted evidence which was uncontroverted by Petitioners showing that the New York State Department of Social Services sanctioned various branch offices of Petitioner PCI during the period from 1981 to 1986. In 1983 the branch office located in Buffalo was required to repay over $32,000 for services that were "ineligible for reimbursement" because Petitioner PCI's records failed to adequately document that aides had the requisite training, physical examinations, immunizations, and tests for tuberculosis. I.G. Ex. 24/1-2.

The Spring Valley office has been sanctioned repeatedly. In 1982 it was suspended for noncompliance with regulations. I.G. Ex. 21/2. In 1985 the Department of

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[8] See Richardson v. Perales, 402 U.S. 389 (1971), which holds that in an administrative proceeding written statements of persons in lieu of live testimony may be substantial evidence supportive of a finding adverse to a party when the party fails to exercise its right to subpoena the witness.

Social Services cited this office for significant noncompliance. I.G. Ex. 26. Due to the serious and persistent deficiencies, including that a majority of the aides had not been properly trained, the Department of Social Services recommended that Petitioner PCI's training plan approval be withdrawn. I.G. Ex. 26.

In addition, audits revealed deficiencies for which PCI was required to pay money to the Department of Social Services in Rochester County, Naussau County, Albany County, and Westchester County. I.G. Ex 27 and 28.

Petitioners Weissman and Cohen argue that sanctions were not imposed against them personally, and therefore the administrative sanctions against Petitioner PCI's branch offices should not be an aggravating factor in considering the lengths of their exclusions. While the administrative sanctions in the record were against the corporate entity and not against Petitioners Weissman and Cohen individually, they, by virtue of their high level management positions, must take some responsibility for the repeated deficiencies which resulted in these administrative sanctions. In addition, their willingness to make management decisions to engage in activity designed to conceal the corporation's non-compliance with regulations during the period of time the corporation was being sanctioned reflects poorly on their trustworthiness. Rather than being an incentive to correct the regulatory deficiencies of the corporation, the sanctions motivated Petitioners to engage in criminal activity to conceal these deficiencies.

J. Petitioners' Actions Demonstrate A Complete Indifference To Medicaid Regulations.

Petitioners' actions demonstrate that they have repeatedly placed their financial interests above a respect for Medicaid regulations designed to protect the health and welfare of Medicaid recipients. Petitioners, by their persistent misconduct in the face of administrative sanctions and their efforts to deceive government auditors, have repeatedly demonstrated not only a high degree of culpability but contempt for the law and those who enforce it. This is a serious aggravating factor.

K. Petitioners' Record Of Community Service Is Not A Mitigating Factor.

The Regulations allow for the consideration of mitigating circumstances in determining an appropriate length of exclusion. 42 C.F.R. 1001.125(b)(4). Petitioners assert that they have had "an exemplary record of community service", and that this should be considered a mitigating factor pursuant to subsection 1001.125(b)(4) of the Regulations. P. Br. 10.

The fact that Petitioners engaged in a business that served the community by providing home health care services and the fact that these services may have been beneficial to individuals receiving them has been considered but does not derogate from the conclusion that, in light of their offenses, Petitioners cannot be trusted to participate in federally funded health care programs. Petitioners' widespread pattern of misconduct shows that their record of community service is far from "exemplary", as they allege.

L. A 15 Year Exclusion Is Supported By The Record In This Proceeding.

In weighing all the factors discussed above, I conclude that the 15-year exclusion imposed against Petitioners PCI, Weissman, and Cohen is reasonable and is entirely consistent with the exclusion law's remedial purpose. I am mindful of the fact that the exclusions imposed against Petitioners are lengthy. In addition, I recognize that Petitioners have already suffered extensive financial losses as a result of the related civil and criminal proceedings, and that this exclusion may have a severe financial impact on Petitioners. However, the remedial considerations of the Act must take precedence over the financial consequences that an exclusion may have on Petitioners.

The record shows that Petitioners' offenses were serious, widespread, and occurred over a lengthy period of time. Petitioners' actions wrought substantial damage to the integrity of health care programs and resulted in enormous financial losses to Medicaid. In addition, Petitioners committed these offenses with complete disregard for the health and safety of Medicaid recipients. Instead, these offenses were motivated by considerations of financial gain. It is reasonable to infer, from the nature of these offenses, and from the circumstances under which they were committed, that

Petitioners are manifestly untrustworthy. Therefore, substantial protection must be created to guard against even the possibility that Petitioners could perpetuate their criminal offenses against Medicare or Medicaid, or the beneficiaries or recipients of these programs, in the future.

The exclusion imposed in this case may have the ancillary benefit of deterring other individuals from engaging in the conduct Petitioners engaged in. Home care is now the fastest growing segment of the Medicaid-funded health care system. It grew from a $400 million a year industry in 1986 to a $1.5 billion a year industry in 1990. I.G. Rep. Ex. 2/1. Because it is such a large and fast growing industry, it is easy prey for unscrupulous providers. The fiscal integrity of this segment of the federally-funded health care system and the quality of care provided to the homebound sick and elderly must be protected. A lengthy exclusion in this case should send the message that home health care providers who engage in this kind of behavior can expect to incur substantial exclusions from participation in Medicare and Medicaid.

CONCLUSION

Based on the evidence in this case and the law, I conclude the I.G. properly excluded Petitioners PCI, Weissman, and Cohen from the Medicare and Medicaid programs pursuant to section 1128(a)(1) of the Act, and that a minimum period of exclusion of five years is mandated by federal law. In addition, I conclude that the I.G.'s determinations to exclude Petitioners PCI, Weissman, and Cohen from participation in the Medicare and Medicaid programs for 15 years are reasonable. Therefore, I sustain the exclusions imposed against Petitioners PCI, Weissman, and Cohen, and I enter a decision in favor of the I.G.

/s/

Charles E. Stratton
Administrative Law Judge