

NOTICE OF PROPOSED RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM (AHCCCS)

ADMINISTRATION

PREAMBLE

<u>1. Sections Affected</u>	<u>Rulemaking Action</u>
R9-22-1101	Amend
R9-22-1102	Amend
R9-22-1103	Repeal
R9-22-1104	Amend
R9-22-1105	Amend
R9-22-1106	Amend
R9-22-1108	Amend
R9-22-1109	Amend
R9-22-1110	Amend
R9-22-1111	Amend

**2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):**

Authorizing statute: A.R.S. § 36-2903.01

Implementing statute: A.R.S. §§ 36-2903.01, 36-2905.04, 36-2912, 36-2918

**3. A list of all previous notices appearing in the Register addressing the proposed rule:**

Notice of Rulemaking Docket Opening: (to be filled in by editor)

**4. The name and address of agency personnel with whom persons may communicate regarding the rulemaking:**

Name: Mariaelena Ugarte  
Address: AHCCCS  
Office of Administrative Legal Services  
701 E. Jefferson, Mail Drop 6200  
Phoenix, AZ 85034  
Telephone: (602) 417-4693  
Fax: (602) 253-9115  
E-mail: AHCCCSRules@azahcccs.gov

**5. An explanation of the rule, including the agency's reasons for initiating the rule:**

The Administration has initiated the following rulemaking regarding Civil Monetary Penalties as result of a 5-year-rule-review approved by the Governor's Regulatory Review Council on December 2, 2008.

**6. A reference to any study relevant to the rule that the agency reviewed and either proposes to rely on in its evaluation of or justification for the rule or proposes not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

No study was relied upon when evaluating and updating the rules.

**7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**8. The preliminary summary of the economic, small business, and consumer impact:**

The Administration anticipates minimal economic impact as result of the rule changes.

**9. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business, and consumer impact statement:**

Name: Mariaelena Ugarte  
Address: AHCCCS  
Office of Administrative Legal Services  
701 E. Jefferson, Mail Drop 6200  
Phoenix, AZ 85034  
Telephone: (602) 417-4693  
Fax: (602) 253-9115  
E-mail: AHCCCSRules@azahcccs.gov

Proposed rule language will be available on the AHCCCS website [www.azahcccs.gov](http://www.azahcccs.gov) the week of July 5, 2011. Please send email or written comments to the above address by 5:00 p.m., August 29, 2011.

**10. The time, place, and nature of the proceedings for the making, amendment, or repeal of the rule, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:**

Date: August 29, 2011  
Time: 11:00 a.m.  
Location: AHCCCS  
701 East Jefferson  
Phoenix, AZ 85034  
Nature: Public Hearing

Date: August 29, 2011  
Time: 11:00 a.m.  
Location: ALTCS: Arizona Long-Term Care System  
1010 N. Finance Center Dr, Suite 201  
Tucson, AZ 85710  
Nature: Public Hearing

Date: August 29, 2011  
Time: 11:00 a.m.  
Location: ALTCS: Arizona Long-Term Care System  
2717 N. 4th St. STE 130  
Flagstaff, AZ 86004  
Nature: Public Hearing

**11. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:**

None

**12. Incorporations by reference and their location in the rules:**

None

**13. The full text of the rules follows:**

**TITLE 9. HEALTH SERVICES**

**CHAPTER 22. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM**

**ADMINISTRATION**

**ARTICLE 11. CIVIL MONETARY PENALTIES AND ASSESSMENTS**

Section

R9-22-1101. Basis for Civil Monetary Penalties and Assessments for Fraudulent Claims; Definitions

R9-22-1102. Determining the Amount of a Penalty and an Assessment

R9-22-1103. ~~Determining the Amount of an Assessment~~ Repealed

R9-22-1104. Mitigating Circumstances

R9-22-1105. Aggravating Circumstances

R9-22-1106. Notice of Intent

R9-22-1108. Request for a Compromise

R9-22-1109. Failure to Respond to the Notice of Intent

R9-22-1110. Request for State Fair Hearing

R9-22-1111. Issues and Burden of Proof

## ARTICLE 11. CIVIL MONETARY PENALTIES AND ASSESSMENTS

### **R9-22-1101. Basis for Civil Monetary Penalties and Assessments for Fraudulent Claims; Definitions**

- A. Scope. This Article applies to ~~a provider or non-contracting provider who meets the conditions under this Article and who submits a claim under Medicaid (Title XIX of the Social Security Act), KidsCare (Title XXI of the Social Security Act), or the Health Care Group (A.R.S. § 36-2912)~~ prohibited acts as described under A.R.S. § 36-2918(A), submissions of encounters to the Administration, and to any person who aids and abets a prohibited act affecting any of the AHCCCS programs or Health Care Group.
- B. Purpose. This Article describes the circumstances AHCCCS considers and the process that AHCCCS uses to determine the amount of a penalty, assessment, or penalty and assessment as required under A.R.S. § 36-2918. This Article includes the process and time-frames used by a ~~provider or non-contracting provider~~ person to request a State Fair Hearing.
- C. Definitions. The following definitions apply to this Article:
1. "Assessment" means a monetary amount that does not exceed twice the dollar amount claimed by the ~~provider or non-contracting provider~~ person for each service.
  2. "Claim" means a request for payment submitted by a ~~provider or non-contracted provider~~ person for payment for a service or line item of service, including a submission of an encounter.
  3. "Day" means calendar day unless otherwise specified.
  4. "File" means the date that AHCCCS receives a written acceptance, request for compromise, request for a counter proposal, or a request for a State Fair Hearing as established by a date stamp on the written document or other record of receipt.
  5. "Penalty" means a monetary amount, based on the number of items of service claimed or reported, that does not exceed two thousand dollars times the number of line items of service.
  6. "Person" means an individual who acts as one, such as a human being, partnership or corporation that is recognized by law as the subject of rights and duties.

~~6.7.~~ "Reason to know" or "had reason to know" means that a ~~provider or non-contracting provider~~ person, acts in deliberate ignorance of the truth or falsity of, or with reckless disregard of the truth or falsity of information. No proof of specific intent to defraud is required.

**R9-22-1102. Determining the Amount of a Penalty and an Assessment**

- A. AHCCCS shall determine the amount of a penalty and assessment according to A.R.S. § 36-2918(B) and (C), R9-22-1104, and R9-22-1105.
- B. AHCCCS shall include in the amount of the penalty ~~the cost~~ and assessment the cost incurred by AHCCCS for conducting the following;
1. An investigation,
  2. Audit, or
  3. Inquiry.

**R9-22-1103. ~~Determining the Amount of an Assessment~~ Repealed**

- ~~A. AHCCCS shall determine the amount of an assessment according to A.R.S. § 36-2918(B) and (C), R9-22-1104, and R9-22-1105.~~
- ~~B. AHCCCS shall include in the amount of the assessment the cost incurred by AHCCCS for conducting the following:~~
- ~~1. An investigation,~~
  - ~~2. Audit, or~~
  - ~~3. Inquiry.~~

**R9-22-1104. Mitigating Circumstances**

AHCCCS shall consider any of the following to be mitigating circumstances when determining the amount of a penalty, assessment, or penalty and assessment.

1. Nature and circumstances of a claim. The following are mitigating circumstances:
  - a. All the services are of the same type,
  - b. All the dates of services occurred within six months or less,
  - c. ~~The services listed in subsection (1)(b)~~ number of claims submitted total less than 25,
  - d. The nature and circumstances do not indicate a pattern of inappropriate claims for the services, and
  - e. The total amount claimed for the services is less than \$1,000.

2. Degree of culpability. The degree of culpability of a ~~provider or non-contracting provider~~ provider person who presents or causes to present a claim is a mitigating circumstance if:
  - a. Each service is the result of an unintentional and unrecognized error in the process that the ~~provider or non-contracting provider~~ provider person followed in presenting or in causing to present the service,
  - b. Corrective steps were taken promptly by the ~~provider or non-contracting provider~~ provider person after the error was discovered, and
  - c. The ~~provider or non-contracting provider~~ provider person had a fraud and abuse control plan that was operating effectively at the time each claim was presented or caused to be presented.
3. Financial condition. The financial condition of a ~~provider or non-contracting provider~~ provider person who presents or causes to present a claim is a mitigating circumstance if the imposition of a penalty, assessment, or penalty and assessment without reduction ~~jeopardizes the ability of the provider or non-contracting provider to continue as a health care provider~~ will render the provider incapable to continue providing services. AHCCCS shall consider the resources available to the ~~provider or non-contracting provider~~ provider person when determining the amount of the penalty, assessment, or penalty and assessment.
4. Other matters as justice may require. AHCCCS shall take into account other circumstances of a mitigating nature, if in the interest of justice, the circumstances require a reduction of the penalty, assessment, or penalty and assessment.

**R9-22-1105. Aggravating Circumstances**

AHCCCS shall consider any of the following to be aggravating circumstances when determining the amount of a penalty, assessment, or penalty and assessment.

1. Nature and circumstances of each claim. The nature and circumstances of each claim and the circumstances under which the claim is presented or caused to be presented are aggravating circumstances if:
  - a. A ~~provider or non-contracting provider~~ provider person has forged, altered, recreated, or destroyed records;
  - b. The ~~provider or non-contracting provider~~ provider person refuses to provide pertinent documentation to AHCCCS for a claim or refuses to cooperate with investigators ~~for other than constitutional reasons~~;
  - c. The services are of several types;
  - d. All the dates of services did not occur within six months or less;
  - e. The ~~services rendered in subsection (1)(d)~~ number of claims submitted are greater than 25;

- f. The nature and circumstances indicate a pattern of inappropriate claims for the services; and
  - g. The total amount claimed for the services is \$5,000 or greater.
2. Degree of culpability. The degree of culpability of a ~~provider or non-contracting provider~~ person who presents or causes to present each claim is an aggravating circumstance if:
- a. The ~~provider or non-contracting provider~~ person knows or had reason to know that each service was not provided as claimed,
  - b. The ~~provider or non-contracting provider~~ person knows or had reason to know that no payment could be made because the ~~provider or non-contracting provider~~ person had been excluded from reimbursement by AHCCCS, or
  - c. The ~~provider or non-contracting provider~~ person knows or had reason to know that the payment would violate the terms of an agreement between the ~~provider or non-contracting provider~~ person and AHCCCS system.
3. Prior offenses. The prior offenses of a ~~provider or non-contracting provider~~ person who presents or causes to present each claim are an aggravating circumstance if:
- a. At any time before the submittal of the claim the ~~provider or non-contracting provider~~ person was held criminally or civilly liable for any act; or
  - b. The ~~provider or non-contracting provider~~ person had received an administrative sanction in connection with:
    - i. A Medicaid program,
    - ii. A Medicare program, or
    - iii. Any other public or private program of reimbursement for medical services.
4. Effect on patient care. The adverse effect on patient care that resulted, or could have resulted, from the failure of a ~~provider or non-contracting provider~~ person who presents or causes to present a claim to provide medically necessary care.
5. Other matters as justice may require. AHCCCS shall take into account other circumstances of an aggravating nature, if in the interest of justice, the circumstances require an increase of the penalty, assessment, or penalty and assessment.

**R9-22-1106. Notice of Intent**

If AHCCCS imposes a penalty, assessment, or a penalty and assessment, AHCCCS shall hand deliver or send by certified mail return receipt requested or Federal Express to the ~~provider or non-contracting provider~~ person, a written Notice of Intent to impose a penalty, assessment, or a penalty and assessment. The Notice of Intent shall include:

1. The statutory basis for the penalty, assessment, or the penalty and assessment;
2. Identification of the state or federal regulation and state or federal law that AHCCCS alleges has been violated;
3. The factual basis for AHCCCS' determination that the penalty, assessment, or the penalty and assessment should be imposed;
4. The amount of the penalty, assessment, or penalty and assessment;
5. The process for the ~~provider or non-contracting provider~~ person to accept or request a compromise of the penalty, assessment, or penalty and assessment; and
6. The process for requesting a State Fair Hearing.

**R9-22-1108. Request for a Compromise**

- A. To request a compromise, the ~~provider or non-contracting provider~~ person shall file a written request with AHCCCS within 30 days from the date of receipt of the Notice of Intent. The written request for compromise shall contain the ~~provider or non-contracting provider's~~ person's reasons for the reduction or modification of the penalty, assessment, or penalty and assessment.
- B. Within 30 days from the date of receipt of the request for compromise from the ~~provider or non-contracting provider~~ person, AHCCCS shall send a Notice of Compromise Decision and accept, deny, or offer a counter proposal to the ~~provider or non-contracting provider's~~ person's request for compromise. If AHCCCS offers a counter proposal the amount of the counter proposal shall represent the penalty, assessment, or penalty and assessment.
  1. If AHCCCS does not withdraw the Notice of Intent under R9-22-1112 or denies the request for compromise the original penalty, assessment, or penalty and assessment is upheld.
  2. To dispute the Compromise Decision, the ~~provider or non-contracting provider~~ person shall file a request for a State Fair Hearing under R9-22-1110 within 30 days from the date of receipt of the Notice of Compromise Decision.

**R9-22-1109. Failure to Respond to the Notice of Intent**

If a ~~provider or non-contracting provider~~ person fails to respond timely to the Notice of Intent, AHCCCS shall uphold the original penalty, assessment, or penalty and assessment.

**R9-22-1110. Request for State Fair Hearing**

- A. To request a State Fair Hearing regarding a dispute concerning a penalty, assessment, or penalty and assessment, the ~~provider or non-contracting provider~~ person shall file a written request for a State Fair Hearing with AHCCCS within 60 days from the date of the receipt of the Notice of Intent under R9-22-1106 or within 30 days from the date of receipt of the Notice of Compromise Decision under R9-22-1108, if applicable.
- B. AHCCCS shall mail a Notice of Hearing under A.R.S. § 41-1092.05 if AHCCCS receives a timely request for a State Fair Hearing from the ~~provider or non-contracting provider~~ person.
- C. AHCCCS shall mail a Director's Decision to the ~~provider or non-contracting provider~~ person no later than 30 days after the date the Administrative Law Judge sends the decision of the Office of Administrative Hearings (OAH) to AHCCCS.
- D. AHCCCS shall accept a written request for withdrawal of a hearing request if the written request for withdrawal is received from the ~~provider or non-contracting provider~~ person before AHCCCS mails a Notice of Hearing under A.R.S. § 41-1092 et seq. If AHCCCS mailed a Notice of Hearing under A.R.S. § 41-1092 et seq., a ~~provider or non-contracting provider~~ person may withdraw the hearing request only by sending a written request for withdrawal to OAH.

**R9-22-1111. Issues and Burden of Proof**

- A. Preponderance of evidence. In any State Fair Hearing conducted under R9-22-1110, AHCCCS shall prove by a preponderance of the evidence that a ~~provider or non-contracting provider~~ person presented or caused to be presented each claim in violation of this Article and any aggravating circumstances under R9-22-1105. A ~~provider or non-contracting provider~~ person shall bear the burden of producing and proving by a preponderance of the evidence any circumstance that would justify reducing the amount of the penalty, assessment, or penalty and assessment.
- B. Statistical sampling.
  - 1. In meeting the burden of proof described in subsection (A), AHCCCS may introduce the results of a statistical sampling study as evidence of the number and amount of claims that were presented or caused to

be presented by the ~~provider or non-contracting provider~~ person. A statistical sampling study constitutes prima facie evidence of the number and amount of claims if ~~based upon an appropriate sampling and~~ computed by valid statistical methods.

2. The burden of proof shall shift to the ~~provider or non-contracting provider~~ person to produce evidence reasonably calculated to rebut the findings of the statistical sampling study once AHCCCS has made a prima facie case as described in subsection (B)(1). AHCCCS shall be given the opportunity to rebut this evidence.