

**§ 308.531**

the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the ALJ and the Board in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statement) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

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

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

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

**12 CFR Ch. III (1-1-05 Edition)**

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

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

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

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

(c) Nothing in this section will be construed to limit the ALJ or the Board from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

(d) Civil money penalties that are assessed pursuant to this subpart are subject to adjustment on a four-year basis to account for inflation as required by section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, as amended (codified at 28 U.S.C. 2461, note) (*see also* 12 CFR 308.132(c)(3)(xv)).

**§ 308.531 Location of hearing.**

(a) The hearing may be held:

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement at issue was made; or

(3) In such other place as may be agreed upon by the defendant and the ALJ.

(b) Each party will have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing will be held at the place and at the time ordered by the ALJ.

**§ 308.532 Witnesses.**

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony may be admitted in the form of

a written statement or deposition. The party offering a written statement must provide all other parties with a copy of the written statement along with the last known address of the witness. Sufficient time must be allowed for other parties to subpoena the witness for cross-examination at the hearing. Prior written statements and deposition transcripts of witnesses identified to testify at the hearing must be exchanged as provided in §308.521(a) of this subpart.

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the ALJ, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the ALJ, cross-examination on matters outside the scope of direct examination will be conducted in the manner of direct examination and may proceed by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the ALJ will order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of:

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated by the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Corporation engaged in assisting the representative for the Corporation.

#### § 308.533 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this subpart, the ALJ will not be bound by the Federal Rules of Evidence (28 U.S.C. App.). However, the ALJ may apply the Federal Rules of Evidence where appropriate, e.g., to exclude unreliable evidence.

(c) The ALJ will exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under federal law.

(f) Evidence concerning offers of compromise or settlement will be inadmissible to the extent provided in rule 408 of the Federal Rules of Evidence.

(g) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record must be open to examination by all parties, unless otherwise ordered by the ALJ pursuant to §308.523 of this subpart.

#### § 308.534 The record.

(a) The hearing will be recorded by audio or videotape and transcribed. Transcripts may be obtained following the hearing from the ALJ at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits, and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Board.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the ALJ pursuant to §308.523 of this subpart.

#### § 308.535 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing