



## Improving Fairness and Accuracy in Food Stamp Fraud Investigations: Advocating Reform Under Food Stamp Regulations

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**T**he fundamental goal of food stamp fraud investigations without burdening honest claimants should be to identify and punish people who have abused the program. Failure to punish fraud wastes public funds and diminishes public confidence in the program. However, intrusive investigations, harassment, disqualification, or prosecutions of innocent claimants undermine the program's goals by increasing stigma, discouraging eligible people from seeking aid, and reducing public confidence by creating the impression that fraud is more prevalent than it is.

Although the states' performance varies widely, some states appear to engage in campaigns that are so aggressive and poorly targeted that they harm many innocent food stamp claimants, who may sign agreements to be disqualified from benefits because they believe that their only alternative is criminal prosecution or termination of their entire household for noncooperation. This approach defeats the purpose of getting food assistance to families in need.

The Food and Nutrition Service's regulations offer the means to advocate reforming these efforts. Moreover, its recent policy guidance provides for valuable tools for advocating fairer procedures. In this article I propose four key principles that should guide states' antifraud efforts. Within each, I identify specific policies that advocates might urge their states to adopt and suggest legal and policy arguments in support of those policies.

### **I. Determine that All Elements of an Intentional Program Violation Have Occurred Before Taking Enforcement Action**

Three elements are necessary to establish most types of intentional program violations (IPVs). First, except in trafficking cases, some event must occur, such as a new job or new household member, which affects the household's eligibility or benefit level and which the food stamp office does not take into account. Second, there must

be a violation of the program's rules, typically a failure to report that event at or between certifications. Third, the violation must be intentional. Investigators who ignore any one of these elements are likely to accuse innocent households of IPVs. Federal regulations require states to have *documentary* evidence of an IPV before seeking to punish a claimant.<sup>1</sup> This requirement is a basis for criticizing state practices that fail to establish properly all elements of an IPV and for advocating policies ensuring that only appropriate cases are pursued for disqualification or criminal prosecution.

### A. Confirming the Underlying Facts

States receiving wage matches and other information indicating a discrepancy in circumstances affecting eligibility or benefit levels must independently verify that information before taking action unless the information comes from one of the few sources that are considered "verified upon receipt."<sup>2</sup> This rule applies in all cases, whether or not fraud is suspected. The state agency should send routine inquiries to employers in all cases of wage matches on which the agency decides to follow up for any reason.<sup>3</sup> These requests for information should not be identified as part of a fraud investigation since that would disclose confidential information and possibly lead to incorrect and stigmatizing inferences—in violation of federal confidentiality and verification regulations.<sup>4</sup>

Some states average income from a wage match over a quarter when an employer fails to respond; this could result in inaccurate assessments.<sup>5</sup> For example, all quarterly earnings may have taken place during a month before the household's application for benefits. Earnings from late in the quarter may not have been budgeted against the household because of the "10-10-10" principle (or because they were not sufficiently certain to be received in the future to be anticipated under the strict, recipient-friendly federal standards for income budgeting).<sup>6</sup> Households subject to quarterly reporting, simplified reporting, or some other systems may not be required to report the income. Thus there may be no overissuance at all. Alternatively, if the earnings were concentrated in one month, that month's benefits might have been inappropriate but the benefits for the other two months correct, resulting in a significantly smaller discrepancy than if the earnings were spread so that all three months' benefits were erroneous. Also, the earnings which could be from seasonal employment should be averaged over a longer period. States' management evaluation reviews should include assessments of the accuracy of policy application by fraud investigation units.

Offering the household an opportunity to respond to information received from other sources is another way to ensure that only appropriate cases are pursued as IPVs. With identity theft becoming

<sup>1</sup> 7 C.F.R. § 273.16(a)(1) (2004).

<sup>2</sup> *Id.* § 273.2(f)(9)(v).

<sup>3</sup> Note that the 1996 welfare law gives states complete discretion regarding use of the Income and Eligibility Verification System that gives much of the matching information available to states. 7 U.S.C. § 2020(e)(18) (2000). States sought the discretion to drop the system because many found that it too often contained erroneous or outdated matches. States electing to continue using the system may disregard any matches that they do not believe merit follow-up.

<sup>4</sup> 7 C.F.R. §§ 272.1(c), 273.2(f)(4)(ii) (2004).

<sup>5</sup> Michigan Family Independence Agency Program Policy Bulletin 2003-001, page 10, attributes this policy to Food and Nutrition Services advice.

<sup>6</sup> Under the "10-10-10" principle neither the state agency nor the household is liable for any overissuance of benefits based on unreported information if the issuance takes place less than thirty days from the date of the event that the household should have reported. This is because food stamp regulations give households ten days to make reports, the state agency ten days to act on those reports, and the household at least ten days to respond to a notice of adverse action before its benefits may be reduced. 7 C.F.R. § 273.10(a)(2), (c)(2)(i) (2004). Thus, for any issuance made within thirty days of a change, no one can be sure that the issuance would have been any different if the household and the state agency had fully complied with their obligations under the regulations. The state agency may not be charged with a quality control error, and the household may not be charged with a claim, much less an intentional program violation (IPV). As for receiving food stamps in the future, see *id.* § 273.10(c)(1).

more widespread, employers may be mistaken about workers' true names and social security numbers. Since federal rules require states to have sufficient evidence to believe that an IPV has been committed before taking action, state food stamp agencies should make clear to their staffs that sending confirming notices to households is an important part of verifying third-party information.<sup>7</sup> Indeed, federal rules require states to notify households when the states receive unclear or uncertain information.<sup>8</sup> These notices should clearly specify the dates of the alleged discrepant information, the identities of any household members in question, and the source and amount of any alleged unreported income or unjustified deductions.<sup>9</sup> The notices should inform the household that failure to respond would not be held against it. And, of course, notices should be written in plain, easy-to-read terms and translated into appropriate languages to comply with states' obligations under the due process clause and federal rules.<sup>10</sup>

## B. Determining Violations of Food Stamp Regulations

A household that experiences a change but reports it or is not required to report it under program rules commits no violation at all, much less an intentional violation. The food stamp agency therefore must determine that a household violated program rules before the agency implements the IPV process.<sup>11</sup> This involves several steps.

First, fraud investigators should be required to review the entire case file before determining that no report was made. Federal rules require a full review by someone other than the eligibility worker prior to the solicitation of a waiver of an administrative disqualification hearing.<sup>12</sup> By implication, the same principle should apply to cases scheduled for hearings and those referred for prosecution.<sup>13</sup> If the eligibility worker sends the fraud investigator only portions of a case file, this independent review cannot take place, and evidence that the household did report the change—a loose pay stub, a phone message, or a note scrawled on the case folder jacket itself—may be overlooked. This particularly applies to states with high turnover, where the eligibility worker referring a case may not have handled it at the crucial juncture.

Full review of a case file that has been purged is clearly impossible, as purged items might have contained formal or informal notations that the household did report the circumstances in question. Once a case file has been purged, the state agency cannot possibly fulfill its obligation to accused claimants to make all relevant evidence available.<sup>14</sup> Absent specific state policies to the contrary, local offices are free to purge documents from case files after three years.<sup>15</sup> States should not pursue a matter as an IPV or a household error claim if the case file has become subject to purging under the state's document retention policy. States also should protect files from future

<sup>7</sup>*Id.* § 273.16(a)(1).

<sup>8</sup>*Id.* § 273.12(c)(3); see also *id.* § 273.2(f)(9)(v).

<sup>9</sup>To facilitate meaningful responses, these notices should identify what would constitute relevant, and irrelevant, responses. E.g., the response would be relevant if the claimant did not work for the employer named, did work for the employer but not during the months specified, or tried to report that information to the eligibility worker; on the other hand, what would not be relevant is that the household could not afford to have its food stamps reduced.

<sup>10</sup>*Id.* § 272.4(b); see, e.g., *Santiago v. D'Elia*, 435 N.Y.S.2d 333 (App. Div. 1981) (disallowing recoupment of overpayment where there was "no indication whatsoever that the Spanish-speaking petitioner understood the English acknowledgment that she signed").

<sup>11</sup>7 C.F.R. § 273.16(a)(1) (2004).

<sup>12</sup>*Id.* § 273.16(f)(1).

<sup>13</sup>See *id.* § 273.16(a)(1), (f)(1).

<sup>14</sup>See *id.* §§ 273.16(e)(3)(iii)(C), (G), 273.15(p)(1).

<sup>15</sup>*Id.* § 272.1(f).

purging where a possible claim or IPV is being investigated.

Fraud investigators should consider whether the income or resources in question might be excluded or was not reasonably certain to be received (and hence could not have been anticipated) and whether a report of the income might not have been required (or, if it was, whether the report was due) under the reporting policy applicable to the household for the relevant month.<sup>16</sup> Neither should IPV be founded on unusual or even foolish uses of benefits or electronic benefit transfer cards (such as giving food to a friend, writing a personal identification number on a card, or giving a card to a friend to purchase food for the household) unless the program's regulations clearly prohibit those uses and the prohibitions are carefully explained to claimants. For example, federal rules permit the household to allow any non-household member to purchase food with the household's benefits; the household need not go through any particular procedure to do so.<sup>17</sup> Similarly, although federal rules require states to train households about electronic benefits transfer security procedures, they do not impose requirements upon households.<sup>18</sup> And, although those rules impose a general requirement on state agencies, issuers, and retailers to take steps to prevent improper use of food stamp benefits, they do not impose any specific requirements on recipients—who can hardly be expected to be security specialists—relating to the handling of these benefits.<sup>19</sup> Violations of security

procedures that state agency personnel believe—probably with good reason—to be advisable should not be equated with violations of specific program rules. Recipients who follow poor security practices may lose benefits (a not insignificant penalty for someone poor enough to qualify for food stamps), but, absent a clear rule that prohibits their specific conduct and has been clearly explained, recipients should not be disqualified for IPV. Moreover, even where food stamps have been trafficked, the Food and Nutrition Service emphasizes that “the head of household may not be held ‘automatically’ responsible for trafficking the household’s benefits if there is no direct evidence identifying him/her as the guilty party.”<sup>20</sup>

In cases of suspected trafficking, determining whether the program's rules have been violated is even more difficult. A quirky pattern of purchases could mean nothing more than that, even if the pattern takes place at a store that is later disqualified for trafficking. Typically, even at dishonest stores, most customers are honest and likely oblivious of what may be going on in the backroom.<sup>21</sup> Unusual purchases also could mean that the claimant's card and PIN (personal identification number) were stolen and abused by someone in or out of the food store. In negotiating arrangements with the Food and Nutrition Service under which the agency will follow up on possible trafficking that Alert, its automated system, identifies, states should ensure that “hits” have been screened carefully enough to limit fraud accusations to

<sup>16</sup>See *id.* §§ 273.8(e), 273.9(c) (excludable income or resources), 273.10(c)(1) (unanticipated income or resources), 273.12(a) (reporting policy).

<sup>17</sup>*Id.* § 273.2(n)(3).

<sup>18</sup>*Id.* § 274.12(g)(10)(iv).

<sup>19</sup>*Id.* § 271.5(c).

<sup>20</sup>LOU PASTURA, FOOD AND NUTRITION SERVICE, FSP—REVISITING POLICY REGARDING HEAD OF HOUSEHOLD AS INDIVIDUAL RESPONSIBLE FOR INTENTIONAL PROGRAM VIOLATIONS (IPV) (2001), available at [www.fns.gov/fsp/rules/Memo/04/fraud\\_ipv.htm](http://www.fns.gov/fsp/rules/Memo/04/fraud_ipv.htm). The Food and Nutrition Service does note, however, that the head of household may be charged if the state has sufficient evidence to prove, with regard to the IPV, that “he/she was aware of it, may have benefited from it, and took no actions to correct it.” *Id.*

<sup>21</sup>In guidance in 2004 the Food and Nutrition Service acknowledged that patterns of suspicious activity often fall short of actionable proof of IPV. BARBARA HALLMAN, U.S. DEPARTMENT OF AGRICULTURE, FRAUD POLICY: 7 CFR 273.16, at 1 (Feb. 4, 2004) [hereinafter FNS 2004 FRAUD MEMO], available at [www.fns.usda.gov/fsp/rules/Memo/04/fraud\\_policy.htm](http://www.fns.usda.gov/fsp/rules/Memo/04/fraud_policy.htm).

households that are very likely to have abused the program.<sup>22</sup> Data on the household alone rarely will be sufficient to show an IPV because relatively few transactions are involved and because unsophisticated households that are uncomfortable with electronic benefits transfer may adopt a variety of coping mechanisms that appear anomalous when viewed out of context.

Since trafficking is impossible without the collaboration of a corrupt retailer, limiting attention to households engaging in suspicious patterns of benefit usage at retailers that have been found to have trafficked can be a more reliable means of identifying fraud. Current agency practice focuses on households that shop at stores that are *suspected* of trafficking and that have not been adjudicated to be guilty of actual IPV. Whether the store owners have an innocent explanation of *their* suspicious conduct is impossible to know without a criminal or administrative adjudication. An adjudication also would allow determination of the period during which a store was trafficking. To accuse recipients of trafficking at a store makes no sense if the trafficking was the work of a single employee and if the recipients' patterns of usage were the same before, during, and after that employee's tenure. Similarly, if the guilty employee worked the day shift, recipients who shopped at night should not be accused of trafficking. States should pursue Alert referrals only where households shopped in suspicious patterns at stores that have been administratively or criminally found guilty of trafficking. States should apply as much information as possible about the patterns of trafficking at convicted stores to determine which subset of recipients with unusual shopping patterns at that store are likely to have trafficked.

Before accusing households of fraud, investigators should be required to check for indications that third parties have accessed the recipient's account inappropriately. For example, benefit utiliza-

tion through key entries when swiping an electronic benefits transfer card fails, or through manual vouchers, often indicates that someone was seeking to access an account with the correct numbers but without an authentic electronic benefits transfer card. Alert should have this information or be able to retrieve it from system records. The information should be relied upon to eliminate potential IPV cases unless other evidence strongly suggests the household's involvement in fraud.

### C. Determining Whether Any Violation Is Intentional

The most difficult and error-prone element of establishing an IPV is intent. A system that finds claimants guilty of IPV only when they make explicit, written confessions is vulnerable to abuse by unscrupulous claimants—and gives investigators strong incentives to coerce confessions from claimants who may not be guilty. At the other extreme, a system that presumes intent based solely on a claimant's signature on an application or other program document that includes boilerplate language about reporting amid a host of other cautions and advisories can ensnare numerous innocent claimants with limited literacy as well as those who failed to read the document carefully during a tense or hurried interview. A sensible middle ground is needed.

#### 1. Case File Reviews

Evidence of the claimant's intent (or lack thereof) can often be found in the case file.

**Claimant's Reporting History.** A claimant who was not given the change report form may be less likely to understand the need to submit a report. A claimant with a solid record of reporting changes is more likely to have forgotten or given up after unsuccessful efforts to reach the eligibility worker. A claimant who failed to respond to written notices in the past when doing so would have

<sup>22</sup>Alert is the Food and Nutrition Service's automated system for monitoring the millions of food stamp electronic benefits transfer transactions for suspicious patterns. The acronym is for Antifraud Locator using EBT (electronic benefits transfer) Retail Transactions. Many potentially innocent events—evening transactions at stores thought to be open only during the day, transactions in even numbers of dollars, large transactions at small stores, transactions at stores that are suspected of wrongdoing—can contribute to a case being flagged as suspicious.

been advantageous may have a literacy problems that prevented understanding instructions or declarations on the application form or in other program information. A claimant with a documented history of being subjected to domestic violence is more likely to have had her electronic benefits transfer card taken from her and used improperly by her abuser (and to have been coerced into supplying her identification number).

**Eligibility Worker's Documentation History.** The case file (or the experience of supervisors) also may disclose that the eligibility worker poorly documents contacts with the claimant. If the file includes no record of contacts that clearly took place (as evidenced by subsequent actions in the case), the absence of a record of a report of a change should not be relied upon as proof that none was made—much less that the claimant intentionally withheld information. Similarly, if an eligibility worker was found in prior cases to have told recipients not to bother reporting information until their next recertification, the state should not assume that the worker gave a claimant accurate information about disclosure obligations. Cases involving an eligibility worker who has been responsible for prior “failure to act” errors should be examined closely.

**Records of Phone Calls.** Many claimants lack home telephones and make their calls from pay phones, friends' houses, and borrowed cell phones that are difficult to trace. In some cases, however, the local telephone company can produce records of local calls made from a particular telephone. States alleging IPV should offer to request local phone company records to show attempts to report changes if a claimant asserts having tried unsuccessfully to reach the eligibility worker through an identifiable telephone account. States should offer to request telephone company records to support claimants' assertions that they attempted to report changes and should retain telephone message records in such a way that

the records can be checked when claimants assert attempts to reach their eligibility worker.<sup>23</sup> This should be done particularly in areas with high turnover and those where eligibility workers' case-loads routinely prevent them from returning or responding to all calls.

**Inculpatory Behavior.** Claimants who lied to avoid having certification interviews scheduled during the hours of a job that they failed to report demonstrate an intent to deceive. A claimant who misled the state agency about one issue is more likely to have deceived it about others. Doctored social security cards, third-party verification letters, or other documents that a claimant submitted in the past can support inference of a current intent to deceive even if those documents have no direct bearing on the current problem. States should target the strongest cases: those with documentary evidence of a pattern of dishonest acts.

**Evidence of Language Barriers or Mental Disabilities.** A few case files may raise such serious questions about intent that proceeding to treat the case as an IPV would be unreasonable. A claimant identified as having limited English proficiency should not be presumed to have understood declarations or instructions not given in the appropriate language. Even if the eligibility worker used as a translator a friend or relative of the claimant, or spoke to the claimant with the help of a telephone translator not familiar with food stamp rules, the eligibility worker may not have sufficient basis to be sure that the claimant understood exactly what the program's rules required. The Food and Nutrition Service notes that “some mentally disabled individuals may lack the ability to form the intent necessary for establishing an IPV.”<sup>24</sup> File notations that an individual receives social security, Supplemental Security Income, or other disability benefits should alert eligibility workers and fraud investigators to the need to determine whether the individual is capable of

<sup>23</sup>States should retain telephone messages and copies or logs of voicemail messages under the record retention policy of 7 C.F.R. § 272.1(f) and make that information available to accused claimants under 7 C.F.R. § 273.16(e)(3)(iii)(C).

<sup>24</sup>FNS 2004 FRAUD MEMO, *supra* note 21, at 3.

forming an intent to defraud the program. An approach that tends to presume an intentional act when a claimant with a mental disability fails to comply with administrative requirements can have, in violation of the Americans with Disabilities Act, the effect of discriminating against persons with disabilities. States should advise their fraud investigators that to charge claimants with IPVs where important information was delivered in an inappropriate language or where the claimant has a documented serious mental disability that may have caused the incident in question would be inconsistent with the Food Stamp Act's requirement of "accurate and fair service," the federal regulations' requirements of intent, and Title VI and the Americans with Disabilities Act.<sup>25</sup> Where a state is contemplating charging a disability benefit recipient with an IPV, the fraud investigator should seek to determine whether a mental impairment is part of the identified disability, whether the accused claimant has been exempted from food stamp work requirements on the basis of at least a partially mental incapacity, or whether the state's Medicaid records show that the claimant is receiving medications consistent with the presence of a mental impairment.

**Reliance on Overissuance as Evidence of Intent.** Officials in some states describe policies of automatically considering overissuances that exceed an arbitrary threshold to be IPVs. Federal regulations, however, permit state agencies to rely on such thresholds only when deciding which of the cases already determined to be IPVs to refer for prosecution.<sup>26</sup> These regulations do not authorize states to dispense altogether with determinations of intent in cases over a certain threshold amount.

## 2. Review of Electronic Benefit Transactions

Many Food and Nutrition Service rules for using electronic benefits transfer cards

may be counterintuitive to claimants. For example, a claimant may not see anything wrong with making a food purchase in which the stores provide the food late in one month, when the household is in distress, and accepts payment early the following month, after benefits are issued. The prohibition on credit transactions and other usage rules should be explained in electronic benefits transfer training. States often do not specifically require clear coverage of these matters in training sessions. Many states also now "train by mail," sending recipients brochures rather than actually training them in benefit usage. Some recipients may be unable to read or understand these prohibitions; others may fail to grasp their significance and forget them. States should not assume an intentional violation of the program's rules in electronic benefits transfer transactions that do not involve dishonesty unless the state has direct evidence that the prohibition in question was explained to the recipients. A recipient who has been warned once about credit transactions may be charged with any subsequent occurrence of prohibited conduct.

In some cases Alert may show a pattern of transactions sufficiently suspicious to convince fraud investigators that an IPV has taken place. Who engaged in the prohibited transactions may not be clear if the household has more than one member. Some states simply assume that the head of the household is responsible and should be disqualified. This presumption has no basis in the statute and regulations and may often be false. Indeed, the head of the household may feel more responsibility for the household's well-being, and less inclined to traffic than a young adult or extended family household member. The head of the household certainly is likely to be more concerned about preserving the household's future eligibility than a boyfriend, neighbor, or

<sup>25</sup> 7 U.S.C. § 2020(e)(2)(B) (2000) ("accurate and fair service"); 7 C.F.R. § 273.16(a)(1), (c), (e)(6), (f)(1)(i) (2004) (intent); 42 U.S.C. § 2000d (2000); see 7 C.F.R. pt. 15 (2004) (Title VI requirements for U.S. Department of Agriculture programs) and *id.* § 272.4(b) (Food Stamp Program requirements for serving people with limited English proficiency); 42 U.S.C. § 12132 (2000) (Americans with Disabilities Act). Regarding language access, see also Mary Ellen Natale & David A. Super, *Securing Access to the Food Stamp Program for the Non-English-Speaking Poor*, 23 CLEARINGHOUSE REVIEW 954 (Dec. 1989).

<sup>26</sup> 7 C.F.R. § 273.16(g)(1) (2004).

babysitter to whom a household member entrusts an electronic benefits transfer card and PIN when the household member is unable to go to the store.

Some food stamp recipients may be unaware that they have been made victims of trafficking by those to whom they entrusted their cards. Unlike credit cards, electronic benefit transfer cards generate no monthly statements that would allow claimants to see where their benefits were spent. Recipients juggling work, child care, and other responsibilities may be unable to find transaction receipts and to track the balances in their electronic benefits transfer accounts. Many, too, have arithmetic or reading skills so limited that they cannot understand and draw conclusions from any transaction receipts available.

Moreover, recipients realizing that they have been the victims of trafficking may not report the incidents for any of several reasons that have nothing to do with fraud. Some may simply see no point in reporting trafficking since the program will not replace the benefits. Indeed, for this reason some may prefer to confront the trafficker themselves to obtain some food to compensate them for their loss, not realizing that the Food and Nutrition Service considers the program, together with the household, to be a trafficking victim. Some may see no point in reporting trafficking after they resolve to prevent a recurrence by not entrusting their card to the offender again. Some may believe that reporting the trafficking will mean that they must take time off from work to wait in line at the food stamp office and that their household will be without benefits during a lengthy investigation. And some may try to contact the food stamp office but cannot get through to the appropriate caseworker. States should train their fraud investigators to recognize that some recipients who appear to be perpetrators of food stamp trafficking may be its victims.

## II. Keep Each Stage of the Process Separate

Criminal prosecution, administrative disqualification hearings, and waiver and consent forms all are integral parts of the system that punishes claimants for abusing the Food Stamp Program. Each has its own strengths and weaknesses, and each is appropriate only to certain types of situations. The regulations give states significant discretion to determine which approach is most appropriate in each case. Those regulations do, however, require states to choose among these tools; states may not combine the various techniques in a single case to overwhelm a claimant. Proper application of these regulations that distinguish the various enforcement devices can greatly enhance the fairness and accuracy of states' antifraud systems.

### A. The Decision to Refer a Case for Prosecution or Pursue It Administratively

Serious abuses in some states' IPV investigations result from threats of prosecution. Making such threats to win concessions in a civil dispute, even where a crime actually occurred, is unfair and may be extortionate. On a number of occasions, the U.S. Supreme Court found constitutional violations when the government tried to "whipsaw" accused individuals between threats of criminal prosecution and loss of public benefits or employment.<sup>27</sup> Ethical rules governing attorneys (including those in prosecutors' offices) prohibit threats of prosecution to gain advantage in civil disputes, as do many states' fair debt collection practices statutes. The risk of abuse is exacerbated where the accused has no viable opportunity to consult counsel since none is appointed before criminal charges are brought but civil legal services are not available. The Food and Nutrition Service notes that

suggesting to the client that his/her case may be referred for

<sup>27</sup>See, e.g., *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Spevak v. Klein*, 385 U.S. 511 (1967); *Garrity v. New Jersey*, 385 U.S. 493 (1967).

prosecution if he/she does not sign an [administrative disqualification hearing] waiver is confusing or misleading and again makes it difficult for the individual to make an informed decision. Additionally, the consequences of losing a judicial proceeding are potentially so severe when contrasted with “merely” losing one’s benefits for 12 months, that it is conceivable that innocent clients will sign [administrative disqualification hearing] waivers rather than risk the alternative.<sup>28</sup>

This doubtlessly leads to numerous erroneous disqualifications by coerced consent. Both federal regulations and recent U.S. Department of Agriculture guidance, however, direct that the decision whether to prosecute or proceed administratively be made at the beginning of a case.<sup>29</sup>

The State agency must not offer an [administrative disqualification hearing] waiver if it intends to refer the case for prosecution nor suggest prosecution if the waiver is not signed. If an [administrative disqualification hearing] waiver is offered, it should be because the State agency has already determined that an administrative hearing is appropriate in this case.... [T]hese provisions require the State agency to make a determination as to which procedure, administrative or judicial, it believes appropriate for a given case and to pursue that procedure to its conclusion. Thus, whenever State agencies have sufficient evidence to hold a

hearing and have offered an [administrative disqualification hearing] waiver to the individual, an [administrative disqualification hearing] and not a referral for prosecution is the appropriate course of action.<sup>30</sup>

Indeed, obtaining a waiver through threats of prosecution may deny the accused due process of law. A waiver cannot be knowing or intelligent unless the individual is informed that an IPV hearing is one consequence of not signing. To this end, federal rules require that states describe the administrative disqualification hearing process and the penalty that can result when soliciting waivers.<sup>31</sup> However, “[o]ffering an [administrative disqualification hearing] waiver accompanied by the required notices appropriate to the administrative proceeding does *not* properly inform the individual of the consequences of not signing the waiver if he or she is to be referred for prosecution.”<sup>32</sup>

States should recognize that federal regulations do not permit threats of criminal prosecution to be employed in the administrative process or concurrent with requests for administrative waivers. States should remind their staffs that federal financial participation is available for work on cases being referred for prosecution only for activities necessary to the prosecution, such as organizing evidence, briefing the prosecutor, and testifying at a trial, and not for activities inconsistent with the decision to prosecute, such as requesting waivers.

## B. Delaying Waiver Requests Until the Investigation Is Complete

Some states combine the notice of the apparent discrepancy with a request that the household sign a waiver or acknowl-

<sup>28</sup>FNS 2004 FRAUD Memo, *supra* note 21, at 2.

<sup>29</sup>7 C.F.R. § 273.16(a)(1) (2004); FNS 2004 FRAUD Memo, *supra* note 21, at 1–2.

<sup>30</sup>FNS 2004 FRAUD Memo, *supra* note 21, at 2; see 7 C.F.R. § 273.16(f)(1) (2004).

<sup>31</sup>7 C.F.R. § 273.16(f)(1) (2004); FNS 2004 FRAUD MEMO, *supra* note 21, at 2.

<sup>32</sup>FNS 21004 FRAUD MEMO, *supra* note 21, at 2 (emphasis supplied). The Food and Nutrition Service goes on to note that confusion about the consequences of each course of action could make a decision different from what they would be if fully informed.

edgment of an IPV. Inherently intimidating, the combined letters are unlikely to elicit informative responses to the notice of the discrepancy even if the state's information is demonstrably erroneous. A claimant who infers that the state already has determined guilt of fraud—as the request for a waiver implies—may feel that any explanation is too late to be taken seriously. Alternatively the claimant may fail to appreciate the consequences of a waiver and believe that signing it is merely responsive to the request for information. Also, as a practical matter, once fraud investigators send a letter accusing a claimant of an IPV and demanding that the claimant sign a waiver, the investigators' position has likely hardened to the point that the investigators are no longer open to any but the most overwhelming defenses.

This practice violates federal rules because, by soliciting more information from the claimant, the state implicitly acknowledges that it is still gathering data and has not definitely decided that the case warrants scheduling an administrative disqualification hearing.<sup>33</sup> This practice, because it is so likely to mislead or confuse innocent claimants into signing away their right to receive food stamps, also violates the Food Stamp Act's "accurate and fair service" requirement.<sup>34</sup> In 2004 the Food and Nutrition Service advised states that "[w]aivers should not be offered when there is a suspicion of guilt but the evidence is not convincing."<sup>35</sup>

### C. Delaying Waiver Requests Until the Case Is Ready for a Hearing

Some states reportedly have one threshold for cases for which they will schedule

administrative disqualification hearings and another, lower, standard for claimants whom the states will ask to sign hearing waivers. Thus, for example, a state might schedule hearings only for overissuances exceeding \$1,000 but send letters demanding hearing waivers in all cases of overissuances that exceed \$500. Alternatively a state might schedule a hearing only where it has proof of the claimant's intent to violate program rules but solicit waivers in all cases of overissuances over a certain amount. Presumably, in cases that do not meet the threshold for scheduling a hearing, the state drops the case as an IPV and merely processes it as an inadvertent household error or agency error claim if the claimant does not sign the waiver. Because sending standardized letters asking claimants to sign waivers is so much easier than proving a case at a hearing, this practice is likely to lead to meritless allegations against innocent claimants, some of whom nonetheless will sign waivers out of fear or confusion. Federal rules and Food and Nutrition Service guidance prohibit states from soliciting waivers unless they have first obtained an independent determination that the case is strong enough to merit scheduling a hearing.<sup>36</sup> The agency instructs states that they should invite an individual to sign a waiver only when they will schedule a hearing if the individual does not sign.<sup>37</sup>

### D. Delaying Requests for "Consents to Disqualification" Until a Criminal Case Is Resolved

Although similar in effect, "consents to disqualifications" and "waivers of administrative disqualification hearings" are under separate sections of the federal regulations and authorized under very different cir-

<sup>33</sup>See *id.* § 273.16(f)(1)(i).

<sup>34</sup>7 U.S.C. § 2020(e)(2)(B)(i) (2000).

<sup>35</sup>FNS 2004 FRAUD Memo, *supra* note 21, at 1, illustrates this point forcefully: E.g., an investigator having reviewed an individual's EBT transactions in a store previously disqualified for trafficking, might believe, based on these transactions, that the individual has committed an IPV. However, unless the investigator is willing to take this evidence before a hearing official, an administrative disqualification hearing waiver should not be offered.

<sup>36</sup>*Id.*; 7 C.F.R. § 273.16(f)(1)(i) (2004).

<sup>37</sup>FNS 2004 FRAUD Memo, *supra* note 21, at 1.

cumstances.<sup>38</sup> Federal regulations allow states to request consents to disqualification only *after* a case is resolved through “deferred adjudication.” Only at this point have the prosecutor, the defense counsel, and the judge had the opportunity to consider the merits of the case: the prosecutor having determined that the case was worth prosecuting and the defense counsel having had the opportunity to demand that the case be dismissed as frivolous. Because both will have already been involved by the time a case reaches deferred adjudication, the rules on consent to disqualification (unlike those on administrative disqualification hearing waivers) do not require prior independent review of the merits and a notice explaining the charges and the claimant’s right to defend.<sup>39</sup> If states can threaten criminal prosecution to obtain consent to disqualification before the accused claimant has had the opportunity to have a criminal defense lawyer appointed, all of the safeguards of the regulations on waivers of administrative disqualification hearings are rendered meaningless.<sup>40</sup> Innocent claimants can be pressed to agree to disqualification for events which are not properly ascribed to them and for which they may have compelling explanations. States should clarify that federal regulations permit fraud investigators to seek consents to disqualification only when a case is brought to court and the court enters a judgment of deferred adjudication.

### III. Avoid Coerced Concessions

Waivers or confessions signed under coercion are not reliable indications of guilt. To the extent that innocent claimants are disqualified in this manner, the program’s goals of fighting food insecurity are undermined, its statutory

principle of “accurate and fair service” is disregarded, and its messages about the importance of honest dealing with state agencies become blurred. Consistent with the Food Stamp Act’s guarantee of “accurate and fair service” as well as federal regulations, states choosing to solicit waivers of administrative disqualification hearings should do so only through the mail, not in meetings with fraud investigators or eligibility workers.

#### A. Preventing Unauthorized Demands on Claimants

Federal regulations strictly limit when households may be required to appear for interviews, and responding to a fraud investigator’s questions is not one of these instances. A letter from the food stamp office asking a recipient to appear for a meeting implicitly threatens to terminate benefits if the recipient does not comply—particularly in a program (such as food stamps) requiring frequent face-to-face interviews to continue benefits. This is effectively an unauthorized additional condition of eligibility in violation of the Food Stamp Act and its implementing regulations.<sup>41</sup> The U.S. Department of Agriculture confirmed this interpretation in a 2003 memo.<sup>42</sup>

In practice, these interviews often prove highly coercive. Consider a claimant who lacks a complete knowledge of the program’s rules and is questioned about their violation by investigators who know the rules. The claimant may feel the need to satisfy the investigators to avoid termination of benefits for the entire household or a criminal charge. Food stamp offices cultivate a culture in which claimants believe they must sign any form placed in front of them in order to

<sup>38</sup>Compare 7 C.F.R. § 273.16(f) (providing for waivers of administrative disqualification hearings by persons whom the state agency is trying to disqualify through an administrative hearing) with *id.* § 273.16(h) (authorizing state to seek consents to disqualification from persons against whom prosecutors brought charges but whose criminal cases ended with a court order of “deferred adjudication”).

<sup>39</sup>*Id.* § 273.16(h)(1).

<sup>40</sup>*Id.* § 273.16(f)(1).

<sup>41</sup>7 U.S.C. §§ 2014(b), 2020(e)(5) (2000); 7 C.F.R. § 273.2(a)(1) (2004).

<sup>42</sup>Arthur T. Foley & Lou Pastura, Food Stamp Program Cooperation with Fraud Investigators (April 24, 2003), available at [www.fns.usda.gov/fsp/rules/Memo/03/fraud.htm](http://www.fns.usda.gov/fsp/rules/Memo/03/fraud.htm).

receive essential benefits, despite uncertainty about the consequences. In other contexts, failure to sign a paper presented by the food stamp agency means that the entire household is denied food stamps until the claimant relents and signs. Many papers that food stamp offices ask claimants to sign are mere acknowledgments of decisions already taken by the state agency or ordained by the program's rules.<sup>43</sup>

With few cues that different rules apply in fraud investigations, an accused claimant may believe that disqualification has already been decided upon and that failure to sign would leave other household members without food stamps. Some fraud investigators reportedly tell claimants that signing the waiver will allow their children to continue receiving food stamps—misleadingly implying that refusal to sign will cause the children to be cut off.

Some state agencies may demand that claimants appear for meetings with fraud investigators in the hope of getting admissions of guilt. Important as it is to determine claimants' intent in these cases, meetings with fraud investigators are unlikely to be much help in doing so. Indeed, claimants so unsophisticated as to capitulate in the face of investigators' pressure may be less likely to have the guile to defraud the program than those who defiantly stand their ground. The Food and Nutrition Service reports with approval that some state agencies recognize this problem and either instruct their fraud investigators to accept waivers only by mail rather than at interviews or allow accused individuals to withdraw waivers signed at meetings with investigators.<sup>44</sup>

### **B. Ensuring that Claimants Fully Understand the Consequences of Signing a Waiver**

Waivers of administrative disqualification

hearings can save both state agencies and claimants time and effort where the claimant committed an IPV. In these cases, waivers serve the program's interests. Waivers that innocent claimants sign out of confusion or fear, however, undermine the program's effectiveness in fighting food insecurity. They also undermine the credibility of the program's antifraud message, which should seek to draw a sharp line between the treatment of those who have committed fraud and those who have not. If the disqualification and claim appear to spring from being misled by the state's efforts to solicit the waiver rather than from an act of fraud, the message to other claimants will be to distrust the state (which may even lead to more IPV's) rather than to be more candid. A state that seeks to discourage tricky behavior in claimants should not be engaging in tricky behavior itself. The Food and Nutrition Service recognizes this problem: "For individuals to make an informed decision with respect to waiving the right to a hearing, they must be fully informed of due process rights, hearing procedures, and consequences they face if determined guilty of an IPV at the hearing."<sup>45</sup>

Some states' letters soliciting waivers of administrative disqualification hearings are written so cryptically that accused claimants may not have any clear idea of what they are signing. Particularly problematic are letters that make the waiver seem like routine paperwork that needs to be signed and returned for the claimant to continue receiving food stamps. The Food and Nutrition Service recognizes the potential for confusion and suggests

includ[ing] a statement on the [administrative disqualification hearing] waiver form that would allow the individual to assert that they do not wish to waive their right to an administrative hearing. For example, such a state-

<sup>43</sup>E.g., although the claimant is required to acknowledge by signing the application form that information that the claimant supplies is subject to third-party verification, 7 C.F.R. § 273.2(b)(1)(i) (2004), the verification that actually takes place is not the result of the claimant's acknowledgment but rather the federal regulations. *Id.* § 273.2(f).

<sup>44</sup>FNS 2004 FRAUD MEMO, *supra* note 21, at 3.

<sup>45</sup>*Id.* at 2.

ment might read, “I have read this notice and wish to exercise my right to have an administrative hearing.” Current regulations at 7 CFR 273.16(f)(1)(ii)(D) require that the individual be permitted to indicate on the waiver form whether they agree or disagree with the facts of the case as presented. Some clients may wrongly conclude that they should sign the waiver to disagree with the facts as presented and exercise their right to have a hearing. We believe the inclusion of this additional statement will allow the individual to sign the waiver form while affirmatively asserting his or her desire to have a hearing.<sup>46</sup>

Some claimants may think they are acknowledging that an overissuance occurred but not realize they are accepting an individual disqualification. Others may believe that they are agreeing not to receive food stamps for a year but not understand that a large claim will be collected from other household members’ benefits or recouped from one or more household members’ earned income tax credits or other tax refunds. Often the relevant information appears somewhere in the documents presented to the claimant, but many food stamp claimants have limited literacy skills. Even those who read well may not work through the fine print of the waiver if they are misled by the reassuring language in the solicitation letter or frightened by overt or implied threats of what might happen if they do not sign.

The Food and Nutrition Service reports that its “reviews showed that important information was sometimes omitted or

was presented in such a way as to be confusing to the client. Omission of due process rights and other information from the waiver form not only fails to provide the individual information to make a decision about signing the waiver; it may also jeopardize the State agency’s case.”<sup>47</sup> The Food and Nutrition Service also notes that

clients unfamiliar with administrative hearings may confuse the [administrative disqualification hearing] with a court proceeding and may wrongly believe that the consequence of a hearing is essentially the same as that of a conviction in court. Thus, individuals may believe the waiver is a way of avoiding a more serious penalty they might be subject to were they to go ahead with the hearing. Adding a statement to the waiver form indicating that the penalty remains the same whether the individual chooses to have a hearing and is determined guilty, or whether the individual waives the hearing, might permit a more objective consideration of the merits of agreeing to the waiver versus having an administrative hearing.<sup>48</sup>

Several different federal regulations contain requirements for information that must be on waiver forms.<sup>49</sup> Notices that do not plainly and openly disclose their purpose, and the consequence of signing waivers, fall short of providing the “fair service” that the Food Stamp Act requires.<sup>50</sup> States should have their waiver and waiver solicitation forms reviewed by literacy experts to ensure the forms’ accessibility to as large a propor-

<sup>46</sup>*Id.*

<sup>47</sup>*Id.* at 2.

<sup>48</sup>*Id.* at 3.

<sup>49</sup>The main regulation on waivers, 7 C.F.R. § 273.16(f)(1) (2004), contains several requirements of its own and cross-references *id.* § 273.16(e)(3), which adds more requirements and, in turn, requires a description of all of the rights set out at *id.* § 273.15(p). The Food and Nutrition Service sent states a list of these requirements. FNS 2004 FRAUD MEMO, *supra* note 21 (appendix).

<sup>50</sup>7 U.S.C. § 2020(e)(2)(B)(i) (2000).

tion of the food stamp caseload as possible. States also should translate these documents into the appropriate languages for households not proficient in English.

An accused claimant who understands the consequences of signing the waiver still may not understand the consequences of *not* signing. The claimant may feel compelled to sign because the consequence of not signing would be disqualification of the entire household for non-cooperation. These claimants may reason that having some food stamps continue for other household members is better than having the entire household cut off—especially if the claimants believe that they will have to sign the waiver eventually for any benefits to be reinstated. States should further instruct their staffs not to solicit waivers of administrative disqualification hearings without making clear that the only consequence of failing to sign will be the scheduling of an administrative disqualification hearing at which the state will have to prove its case and in which the most severe consequence would be identical to the consequence of signing the waiver.

Some claimants may be unable to comprehend a letter soliciting a waiver, or the waiver itself, because of language difficulties or a mental disability. The Food and Nutrition Service warns that “all forms used by the State agency to advise individuals about the investigation due process rights and hearing procedures should be simply stated and in a manner that is clear and understandable to clients.”<sup>51</sup> It specifically notes that “some mentally disabled individuals ... may not fully understand the consequences of signing an [administrative disqualification hearing] waiver” and urges states to schedule hearings for these individuals without seeking “questionable” waivers.<sup>52</sup> Disqualifying

claimants on the basis of waivers they do not understand probably violates the due process clause.<sup>53</sup> In violation of Title VI, the Americans with Disabilities Act, and the Food Stamp Act’s requirement of “accurate and fair service,” it also has the effect of denying benefits to otherwise eligible claimants because of their disabilities. States should determine whether a mental impairment is part of the basis for any disability for which a claimant receives cash or health care benefits, forms the basis for exempting a claimant from work requirements, or may be indicated by prescriptions filled through the state’s Medicaid program; unless the state can rule out any mental impairment in these cases, it should not solicit waivers.

### C. Not Relying on the Availability of Legal Services for Accused Claimants

Our society tolerates intense and sometimes coercive police questioning in criminal matters because suspects have the right to request and receive free counsel. Because the right to free legal representation does not apply at all in civil cases, or in criminal cases until an arrest is made, a similar safeguard is not available in food stamp IPV cases. Many, if not most, legal aid programs do not take food stamp IPV cases at all, and many of the rest take only a small fraction of those that occur. Abusive and coercive interviews are likely to produce incorrect confessions and disqualifications and thus violate the Food Stamp Act’s requirement of “accurate and fair service,” but they cannot meaningfully be controlled by telling people of a right to counsel that is likely to be largely illusory.

The Legal Services Corporation (LSC) Act prohibits LSC-funded programs from becoming involved in criminal matters.<sup>54</sup> When states send claimants notices on prosecutors’ letterhead or

<sup>51</sup>FNS 2004 FRAUD MEMO, *supra* note 24, at 2.

<sup>52</sup>*Id.* at 3.

<sup>53</sup>See, e.g., *Canales v. Sullivan*, 936 F.2d 755 (2d Cir. 1991) (failure to meet deadline may not be held against claimant with severe mental disability); *Young v. Bowen*, 858 F.2d 951 (4th Cir. 1988) (same); *Elchediak v. Heckler*, 750 F.2d 892 (11th Cir. 1985) (same); *Parker v. Califano*, 644 F.2d 1199, 1203 (6th Cir. 1981) (same); *Torres v. Secretary*, 475 F.2d 466 (1st Cir. 1973) (same).

<sup>54</sup>See 45 C.F.R. § 1613.3 (2004) (enforcing prohibition).

other notices threatening criminal prosecution, these programs may feel that they may not take the case (or that taking it would be futile since it apparently is on the brink of becoming criminal). As noted above, legal representation will never be available to the vast majority of claimants investigated for IPVs. Nonetheless, when a state makes its administrative pursuit of an IPV appear to be the prelude to a “criminal” proceeding, the state effectively prevents the claimant from obtaining counsel even where it might otherwise be available. This is inconsistent with the state’s obligation to inform accused claimants of their right to legal counsel and is one more reason for states to follow carefully the regulations’ requirement to determine early in the process whether a case will be referred for prosecution or pursued administratively.<sup>55</sup> States should advise their staffs that using letterhead from criminal justice agencies or threatening criminal action while seeking information or waivers in an administrative matter is inconsistent with federal regulations.<sup>56</sup>

#### IV. Correct Questionable State Fiscal Practices

The ferocity of some states’ antifraud efforts puzzles some advocates because states do not pay any of the costs of food stamp benefits.<sup>57</sup> Moreover, states receive no credit against their quality control error rates when the recipient of an overissuance is prosecuted or disqualified.<sup>58</sup> Part of the explanation, of course, is that food stamp fraud is illegal and hence inherently offensive. Another part is a combination of history and finances. For more than a decade before 1993, states received a 75 percent federal match for money spent on antifraud activities. This encouraged some to build large antifraud units, many of which have proven effective at lobbying for contin-

ued funding even after the federal match rate was reduced to the same 50 percent that other activities receive.<sup>59</sup> States retain 35 percent of overissuances collected from households where someone was disqualified for an IPV, but only 10 percent for inadvertent household errors.<sup>60</sup> Some antifraud units depend on these claim retentions to support their budgets. During the 1980s and 1990s, most states incurred large quality-control penalties that Food and Nutrition Service allowed the states to “reinvest” in activities designed to improve program integrity. Reinvestment moneys ordinarily cannot pay the salaries of regular state employees, but antifraud units have proven effective at getting these funds spent to support their activities.

Although the need for strong, effective antifraud enforcement is unassailable, advocates may and should question inappropriate spending in the name of fraud prevention and detection.

##### A. Questioning Wasteful, Stigmatizing Practices

Some states (notably Ohio) have spent significant amounts of program or reinvestment funds on bus signs, movie theater ads, and other widely disseminated advertising calling attention to food stamp fraud and encouraging people to report suspected instances. These materials certainly give the public the impression that food stamp fraud is widespread. Whether they accomplish anything meaningful in identifying actual cases of fraud is far less clear, however. Most members of the general public are in no position to report food stamp fraud because they do not know what a household may have told its eligibility worker or what the program’s eligibility rules are. Many people probably believe that receiving food stamps while one is

<sup>55</sup>This right exists directly under 7 C.F.R. § 273.16(e)(3)(iii)(I) and by cross-reference under *id.* § 273.16(f)(1)(iii).

<sup>56</sup>*Id.* §§ 273.16(a)(1), (e)(3)(iii)(I), (f)(1)(iii).

<sup>57</sup>U.S.C. §§ 2019, 2024(d) (2000).

<sup>58</sup>*Id.* § 2025(c).

<sup>59</sup>*Id.* § 2025(a).

<sup>60</sup>*Id.*

employed is fraudulent—even though 38 percent of food stamp recipients live in a household with at least one earner.

The effectiveness of these broad-scale campaigns is speculative at best. Absent evidence that these are effective and efficient means of program administration, their costs may not be eligible for federal financial participation and may not be included in reinvestment plans.<sup>61</sup>

### **B. Prohibiting Improper Personal Incentives for Individuals Pursuing Fraud Cases**

Georgia's food stamp agency has had contractual arrangements with many county prosecutors to provide bounties of a certain amount for each claimant whom prosecutors disqualify from the Food Stamp Program. This funding may be critical to preserving the jobs of some junior prosecutors, who are precisely the people responsible for pressuring claimants into accepting disqualification through waivers, consents to disqualifications, or fee bargains. Other states reportedly tie the funding of their antifraud units, and hence the jobs of the investigators working there, to the state-retained share of collections of IPV claims. In times of state and local financial crises and a generally weak employment market, these incentives are likely to be particularly powerful. Naturally any individual whose personal financial security depends upon the number of people disqualified

for IPV has a conflict of interest that is likely to make the individual less responsive to the explanations that innocent claimants may offer. These payments reward investigators for doing only one part of their job—winning disqualifications—and ignore another, equally important aspect—exonerating innocent claimants. As such, these arrangements violate the Food Stamp Act's "fair service" requirements.<sup>62</sup> They also violate the Act's command that "[t]he officials responsible for making determinations of ineligibility under this Act shall not receive or benefit from revenues retained by the State under the provisions of this subsection."<sup>63</sup> Moreover, paying fixed bounties for disqualifications rather than reimbursing actual costs violates the Food Stamp Act's general limitations on activities eligible for federal financial participation.<sup>64</sup> Although some may find bounties appealing in this particular case, providing a federal match for the payments opens the program to widespread financial abuse. States should not tie funding for any person involved with fraud investigations, prosecutions, or disqualifications to the number of claimants disqualified or the amounts of the resulting claims.

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<sup>61</sup>See 7 C.F.R. § 276.1(a)(4) (2004) (describing reinvestment as alternative to payment of sanctions).

<sup>62</sup>7 U.S.C. § 2020(e)(2)(B)(i) (2000).

<sup>63</sup>*Id.* § 2025(a).

<sup>64</sup>*Id.* § 2025(a).