



March 21, 2011

The Honorable Paula T. Dow
Office of the Attorney General
State of New Jersey
P.O. Box 080
Trenton, NJ 08625-0080

Dear Madam Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) has received your request to review the New Jersey False Claims Act, N.J. Stat. Ann. §§ 2A:32C-1 through 2A:32C-18, under the requirements of section 1909 of the Social Security Act (the Act). Section 1909 of the Act provides a financial incentive for States to enact laws that establish liability to the State for individuals and entities that submit false or fraudulent claims to the State Medicaid program. For a State to qualify for this incentive, the State law must meet certain requirements enumerated under section 1909(b) of the Act, as determined by the Inspector General of HHS in consultation with the U.S. Department of Justice (DOJ). After reviewing the law and consulting with DOJ, we have determined that the New Jersey False Claims Act does not meet the requirements of section 1909(b) of the Act.

On May 20, 2009, the Fraud Enforcement and Recovery Act of 2009 (FERA) made numerous amendments to the Federal False Claims Act, 31 U.S.C. §§ 3729-33. On March 23, 2010, the Patient Protection and Affordable Care Act (ACA) amended the Federal False Claims Act. Also, on July 21, 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act) further amended the Federal False Claims Act. These three acts, among other things, amended bases for liability in the Federal False Claims Act and expanded certain rights of *qui tam* relators.

Section 1909(b)(1) of the Act requires the State law to establish liability for false or fraudulent claims described in the Federal False Claims Act with respect to any expenditure described in section 1903(a) of the Act. The Federal False Claims Act, as amended by the FERA, establishes liability for, among other things:

- knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval (removing the requirement that the claim be presented to an officer or employee of the Government);
- knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;

- conspiring to commit a violation of the Federal False Claims Act; and
- knowingly making, using, or causing to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Government.

See 31 U.S.C. § 3729(a). Relevant to the above-described bases for liability, the Federal False Claims Act, as amended by the FERA, includes an expanded definition of the term “claim” and defines the terms “obligation” and “material.” See 31 U.S.C. § 3729(b). In contrast, the New Jersey False Claims Act does not establish liability for the same breadth of conduct as the Federal False Claims Act, as amended.

Section 1909(b)(2) of the Act requires the State law to contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false and fraudulent claims as those described in sections 3730 through 3732 of the Federal False Claims Act. The Federal False Claims Act, as amended by the FERA and the Dodd-Frank Act, provides certain relief to any employee, contractor, or agent who is retaliated against because of lawful acts done in furtherance of a Federal False Claims Act action or efforts to stop violations of the Federal False Claims Act. See 31 U.S.C. § 3730(h). The New Jersey False Claims Act does not provide these persons with as much protection from retaliatory action. Therefore, the New Jersey False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act, as amended by the FERA, provides that for statute of limitations purposes, any Government complaint in intervention, whether filed separately or as an amendment to the relator’s complaint, shall relate back to the filing date of the relator’s complaint, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the relator’s complaint. See 31 U.S.C. § 3731(c). In contrast, the New Jersey False Claims Act does not contain a similar provision. Therefore, the New Jersey False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act, as amended by the ACA, provides that the court shall dismiss an action or claim under the Federal False Claims Act, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (2) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (3) by the news media, unless the action is brought by the Attorney General or a person who is an original source of the information. See 31 U.S.C. § 3730(e)(4)(A). In contrast, the New Jersey False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give New Jersey

the opportunity to oppose the dismissal. Therefore, the New Jersey False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Further, the Federal False Claims Act, as amended by the ACA, defines “original source” as an individual who either: (1) prior to a public disclosure, voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based or (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations or transactions, and who has voluntarily provided the information to the Government before filing an action. See 31 U.S.C. § 3730(e)(4)(B). In contrast, the New Jersey False Claims Act has a more restrictive definition of “original source.” Therefore, the New Jersey False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the New Jersey False Claims Act provides that no *qui tam* action may be brought by a present or former employee or agent of the State or any political subdivision of the State when the action is based upon information discovered in any civil, criminal, or administrative investigation or audit within the scope of the employee’s or agent’s duties or job description. See N.J. Stat. Ann. § 2A:32C-9(d). The Federal False Claims Act contains no such limitation. Therefore, the New Jersey False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

If the New Jersey False Claims Act is amended to address the issues noted above, please notify OIG for further consideration of the New Jersey False Claims Act. If you have any questions regarding this review, please contact me or have your staff contact Katie Arnholt, Senior Counsel, at 202-205-3203 or Tony Maida, Deputy Chief, Administrative and Civil Remedies Branch, at 202-205-9323.

Sincerely,

/Daniel R. Levinson/

Daniel R. Levinson
Inspector General