



JUL 24 2008

Washington, D.C. 20201

Wallace T. Hart  
Director  
Michigan Medicaid Fraud Control Unit  
Department of Attorney General  
P.O. Box 30218  
Lansing, Michigan 48909

Dear Mr. Hart:

This letter supplements the December 21, 2006 letter from the Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS) regarding OIG's review of the Michigan Medicaid False Claim Act, Mich. Comp. Laws §§ 400.601 through 400.613, under the requirements of section 6031(b) of the Deficit Reduction Act (DRA). Section 6031 of the DRA 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 6031(b) of the DRA, as determined by the Inspector General of HHS in consultation with the Department of Justice (DOJ). Based on our review of the law and consultation with DOJ, we have determined that the Michigan Medicaid False Claim Act does not meet the requirements of section 6031(b) of the DRA.

Section 6031(b)(1) of the DRA requires the state law to establish liability to the state for false or fraudulent claims described in section 3729 of the Federal False Claims Act. The Federal False Claims Act defines "knowing" and "knowingly" to mean that a person has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information. See 31 U.S.C. § 3730(d)(3). In contrast, the Michigan Medicaid False Claim Act defines "knowing" and "knowingly" to mean that "a person is in possession of facts under which he or she is aware or should be aware of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of a medicaid benefit" and provides that "[k]nowing or knowingly does not include conduct which is an error or mistake unless the person's course of conduct indicates a systematic or persistent tendency to cause inaccuracies to be present." Mich. Comp. Laws § 400.602(f). Because the Michigan Medicaid False Claim Act does not define knowing or knowingly to include deliberate ignorance or reckless disregard, it does not establish liability for false or fraudulent claims as described in section 3729 of the Federal False Claims Act.

Section 6031(b)(2) of the DRA 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 provides that the court may reduce the share awarded to the relator if the court finds

that the relator planned and initiated the violation upon which the action was brought. See 31 U.S.C. § 3730(d)(3). In contrast, the Michigan Medicaid False Claim Act provides that the court may reduce or eliminate the share awarded to the relator if the court finds that the relator “planned, initiated, or participated in” the conduct upon which the action is brought. See Mich. Comp. Laws § 400.610a(11). Based on this provision, the Michigan Medicaid False Claim Act is not at least as effective in rewarding or facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Federal False Claims Act provides that a relator may not bring a *qui tam* action that is based upon allegations or transactions that are the subject of a civil suit or an administrative civil money penalty proceeding in which the government is already a party. See 31 U.S.C. § 3730(e)(3). In contrast, the Michigan Medicaid False Claim Act provides that “[a] person other than the attorney general shall not bring an action under this section that is based on allegations or transactions that are already the subject of a civil suit, a criminal investigation or prosecution, or an administrative investigation or proceeding to which this state or the federal government is already a party” and that “[t]he court shall dismiss an action brought in violation of this section.” See Mich. Comp. Laws § 400.610a(12). Because this provision prohibits *qui tam* actions when there is already a criminal or administrative investigation, it 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 provides that an action may not be brought after the later of: (1) six years after the date on which the violation is committed; or (2) three years after the date when the facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than ten years after the date on which the violation is committed. See 31 U.S.C. § 3731(b). In contrast, the Michigan Medicaid False Claim Act does not include a statute of limitations. The Michigan statute that governs statutes of limitations in civil cases generally provides for a six-year statute of limitations. See Mich. Comp. Laws § 600.5813. Because a shorter statute of limitations applies to actions brought under the Michigan Medicaid False Claim Act, it 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 provides that the government is required to prove all essential elements, including damages, by a preponderance of the evidence. See 31 U.S.C. § 3732(c). The Michigan Medicaid False Claim Act does not include a burden of proof. However, Michigan Model Civil Jury Instruction 8.01 states that the burden of proof in civil cases is clear and convincing evidence. Because the Michigan Medicaid False Claim Act doesn’t include a burden of proof and a more stringent standard of proof applies to actions brought under the Michigan Medicaid False Claim Act, it is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Lastly, the Federal False Claims Act provides relief to employees who are discharged, demoted, suspended, threatened, harassed, or in any manner discriminated against in the terms or conditions of employment by his or her employer because of lawful acts done in furtherance of an action under the Federal False Claims Act. See 31 U.S.C. § 3730(h). The Michigan Medicaid False Claim Act includes similar relief to employees, but exempts from protection employees

who merely participated in the conduct upon which the action was brought. See Mich. Comp. Laws § 400.610c. Based on this provision, the Michigan Medicaid False Claim Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

If the Michigan Medicaid False Claim Act is amended to address the issues noted above, please notify OIG for further consideration of the Michigan Medicaid False Claim Act. If you have any questions regarding this review, please contact me, or your staff may contact Susan Elter Gillin at 202-205-9426 or [susan.gillin@oig.hhs.gov](mailto:susan.gillin@oig.hhs.gov) or Katie Arnholt at (202) 205-3203 or [katie.arnholt@oig.hhs.gov](mailto:katie.arnholt@oig.hhs.gov).

Sincerely,

A handwritten signature in cursive script that reads "Daniel R. Levinson".

Daniel R. Levinson  
Inspector General

cc: Aaron Blight, CMS