



AUG 31 2011

The Honorable Kenneth T. Cuccinelli II  
Office of the Attorney General  
Commonwealth of Virginia  
900 East Main Street  
Richmond, VA 23219

Dear Mr. Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS) has received your request to review the Virginia Fraud Against Taxpayers Act, Va. Code Ann. §§ 8.01-216.1 through 8.01-216.19, under the requirements of section 1909 of the Social Security Act (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 Department of Justice. OIG previously reviewed the Virginia Fraud Against Taxpayers Act and, on March 21, 2011, determined that it did not satisfy the requirements of section 1909 of the Act. On May 26, 2011, you requested that OIG review the amended Virginia Fraud Against Taxpayers Act. This letter supplements the March 21, 2011, letter and responds to your May 26, 2011, request.

The Federal False Claims Act, as amended by the Patient Protection and Affordable Care Act, provides that “[t]he court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed ... in a congressional, Government Accountability Office, or other *Federal* report, hearing, audit, or investigation ....” See 31 U.S.C. § 3730(e)(4)(A) (emphasis added). In contrast, the Virginia Fraud Against Taxpayers Act provides “[t]he court shall dismiss an action or claim under § 8.01-216.5 unless opposed by the Commonwealth if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed ... in a legislative, administrative, or Auditor of Public Accountants’ report, hearing, audit, or investigation ....” See Va. Code Ann. § 8.01-216.8. Because the Virginia Fraud Against Taxpayers Act does not limit such public disclosures to disclosures in *Virginia* reports, hearings, audits, or investigations, 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, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act), provides that “[a]ny employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened,

harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of *an action under this section or other efforts* to stop 1 or more violations ....” See 31 U.S.C. § 3730(h)(1) (emphasis added). In contrast, the Virginia Fraud Against Taxpayers Act provides that such relief shall be accorded if the employee, contractor, or agent is discriminated against because of “lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of others’ efforts to stop 1 or more violations ....” See Va. Code Ann. § 8.01-216.8. The Virginia Fraud Against Taxpayers Act is more restrictive than the Federal False Claims Act because it protects only efforts to “stop” a violation set forth in the statute, and does not protect lawful acts done “in furtherance of an action” under the Virginia statute. Moreover, the Virginia Fraud Against Taxpayers Act protects only lawful acts done in furtherance of “others” efforts and does not protect acts done by the employee, contractor, or agent in furtherance of their own efforts. Therefore, the Virginia Fraud Against Taxpayers 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 Dodd-Frank Act, provides a 3-year statute of limitations for retaliation actions. See 31 U.S.C. § 3730(h)(3). The Virginia Fraud Against Taxpayers Act does not provide at least a 3-year statute of limitations for retaliation actions. Therefore, the Virginia Fraud Against Taxpayers Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In your May 26, 2011, letter, you requested that OIG explain its position regarding section 8.01-216.8 of the Virginia Fraud Against Taxpayers Act, which OIG determined causes the Virginia Fraud Against Taxpayers Act not to be at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act. This section, in part, limits the court’s jurisdiction in cases based on “information discovered by a present or former employee of the Commonwealth during the course of his employment ....” See Va. Code Ann. § 8.01-216.8. As your May 26, 2011, letter notes, the Virginia Fraud Against Taxpayers Act does not prohibit Virginia employees from being relators, but instead imposes statutory requirements before they can pursue a case, and requires the court to dismiss Commonwealth employee relators if those requirements have not been met. See id. Specifically, the Virginia Fraud Against Taxpayers Act requires that the employee first exhaust internal procedures for reporting and seeking recovery of the falsely claimed sums and that Virginia fail to act within a reasonable period of time. See id. The Federal False Claims Act does not expressly include those or similar requirements. See United States ex rel. Holmes v. Consumer Insurance Group et al., 318 F.3d 1199 (10th Cir. 2003); United States ex rel. Williams v. NEC Corp. et al., 931 F.2d 1493 (11th Cir. 1991). Therefore, the Virginia Fraud Against Taxpayers Act is not as effective at facilitating and rewarding *qui tam* actions as the Federal False Claims Act.

OIG acknowledges that this position is a change from OIG’s position in its 2007 review of the Virginia Fraud Against Taxpayers Act. The change was the result of further analysis of the issues and the requirements of section 1909 of the Act, pursuant to OIG’s statutory mandate. In addition, since the 2007 review, Congress has twice considered establishing similar requirements for Federal employee relators under the Federal False Claims Act, but has not done so.

Because the 3-year statute of limitations issue was not raised in the March 21, 2011, letter, OIG will extend Virginia's grace period to August 31, 2013. Accordingly, until August 31, 2013, Virginia will continue to qualify for the incentive under section 1909 of the Act. Resubmission to OIG of an amended act will toll the expiration of the grace period until OIG issues a letter deeming the act either compliant or not compliant with section 1909 of the Act. To continue to qualify for the incentive after August 31, 2013, or after the expiration of any tolling period, if applicable, Virginia must amend the Virginia Fraud Against Taxpayers Act to address the issues identified in this letter and the March 21, 2011, letter; submit it for review; and receive approval by OIG. If any provision of the Federal False Claims Act that is relevant to section 1909 of the Act is amended further, Virginia will again be granted a 2-year grace period from the date of enactment of any such amendments in which to amend its act to conform with the amended Federal False Claims Act and resubmit it to OIG for approval.

If you have any questions, please contact me or have your staff contact Katie Arnholt, Senior Counsel, at 202-205-3203 or Susan Gillin, Deputy Chief, Administrative and Civil Remedies Branch, at 202-205-9426.

Sincerely,

/Daniel R. Levinson/

Daniel R. Levinson  
Inspector General