



DEPARTMENT OF HEALTH AND HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



NOV 20 2012

The Honorable Robert E. Cooper, Jr.
Attorney General and Reporter
State of Tennessee Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202

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 amended Tennessee Medicaid False Claims Act (Tennessee FCA), TENN. CODE ANN. §§ 71-5-181 through 71-5-185, under the requirements of section 1909 of the Social Security Act (the Act). Section 1909 of the Act provides a financial incentive for a State to enact a law that establishes 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). We have determined, after consulting with DOJ, that the amended Tennessee FCA does not meet the requirements of section 1909(b) of the Act.

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 (Federal FCA), 31 U.S.C. §§ 3729-33, with respect to any expenditure described in section 1903(a) of the Act. The Federal FCA, as amended by the Fraud Enforcement and Recovery Act of 2009 (FERA), establishes liability for a person who: “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” See 31 U.S.C. § 3729(a)(1)(B). The amended Tennessee FCA more narrowly establishes liability for a person that “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim *to get a false or fraudulent claim under the [M]edicaid program paid for or approved.*” TENN. CODE ANN. § 71-5-182(a)(1)(B)(emphasis added). Therefore, the amended Tennessee FCA does not establish liability for the same breadth of conduct as the Federal FCA.

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 FCA. The Federal FCA, as amended by FERA and the Dodd-Frank Wall Street Reform and Consumer Protection Act, provides certain

legal protections for employees, contractors, or agents who are 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 of this subchapter.” See 31 U.S.C. § 3730(h)(1). In contrast, the amended Tennessee FCA only provides protection from retaliation for “lawful acts done by the employee, contractor, or agent on behalf of the employee or associated others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section.” See TENN. CODE ANN. § 71-5-183(g). Because the amended Tennessee FCA does not protect the same breadth of conduct as the Federal FCA, it is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal FCA.

As explained in OIG’s August 31, 2011, letter, Tennessee was granted a grace period, ending August 31, 2013, to amend the Tennessee FCA and resubmit it to OIG for approval. OIG’s present review of the amended Tennessee FCA will not affect that grace period. Accordingly, Tennessee will continue to qualify for the incentive under section 1909 of the Act during the grace period. 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, Tennessee must amend the Tennessee FCA to meet the requirements of section 1909 of the Act.

If the Tennessee FCA is amended to address the issues noted above, please notify OIG for further consideration of Tennessee’s law. If you have any questions regarding this review, please contact me or your staff may contact Tamara Forsys at 202-205-2997 or Katie Arnholt at 202-205-3203.

Sincerely,

/Daniel R. Levinson/
Daniel R. Levinson
Inspector General