DEPARTMENT OF HEALTH & HUMAN SERVICES **Office of Inspector General**

Washington, D.C. 20201

March 21, 2011

The Honorable Kamala D. Harris
Office of Attorney General
1300 I Street, Suite 1740
Sacramento, CA 95814

Attn: Mark Geiger, Director, Bureau of Medi-Cal Fraud and Elder Abuse

Dear Madam Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) has received your office's request to review the amended California False Claims Act, Cal. Gov't Code §§ 12650 through 12656, under the requirements of section 1909 of the Social Security Act (the Act). OIG previously reviewed the California False Claims Act and determined that it satisfied the requirements of section 1909 of 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). As explained below, we have determined, after consulting with DOJ, that the California False Claims Act no longer meets the requirements of section 1909 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. As a result of the FERA, the ACA, and the Dodd-Frank Act, the California False Claims Act is no longer in compliance with section 1909 of the Act. OIG also identified additional provisions in the California False Claims Act that do not satisfy the requirements of section 1909 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 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 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, defines the term "obligation." See 31 U.S.C. § 3729(b). In contrast, the California 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 California False Claims Act does not provide these persons with as much protection from retaliatory action. Therefore, the California 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 California False Claims Act does not contain a similar provision. Therefore, the California 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 California False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give California the opportunity to oppose the dismissal. Therefore, the California 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 California False Claims Act has a more restrictive definition of "original source." Therefore, the California 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 California False Claims Act allows relators to pursue only cases in which funds that are the subject of a claim presented to an officer, employee, or agent of the State or a political subdivision or in which the State or political subdivision provides, has provided, or will reimburse any portion of the money, property, or service requested or demanded are involved. See Cal. Gov't Code §§ 12650(b)(6), (7), 12652. The Federal False Claims Act contains no such limitation. Therefore, the California 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 provides that "[w]hether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action . . . ." See 31 U.S.C. § 3730(d)(3). In contrast, the California False Claims Act provides that "[i]f the action is one that the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee is not entitled to any minimum guaranteed recovery from the proceeds." See Cal. Gov't Code § 12652(g)(5). Therefore, the California 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 provides that "[i]f the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." See 31 U.S.C. § 3730(d)(4). In contrast, the California False Claims Act provides "[i]f the state, a political subdivision, or the

qui tam plaintiff proceeds with the action, the court may award to the defendant its reasonable attorney's fees and expenses against the party that proceeded with the action if the defendant prevails in the action and the court finds that the claim was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment." See Cal. Gov't Code § 12652(g)(9). Therefore, the California 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 provides that "[a] civil action . . . may not be brought (1) more than 6 years after the date on which the violation . . . is committed, or (2) more than 3 years after the date when 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 10 years after the date on which the violation is committed, whichever occurs last." See 31 U.S.C. § 3731(b). In contrast, the California False Claims Act provides that "[a] civil action . . . may not be filed more than three years after the date of discovery by the Attorney General or prosecuting authority with jurisdiction to act under this article or, in any event, not more than 10 years after the date on which the violation . . . was committed." See Cal. Gov't Code § 12654(a). Therefore, the California 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 California False Claims Act contains a ban on *qui tam* suits that are "based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment unless that employee first, in good faith, exhausted existing internal procedures for reporting and seeking recovery of the falsely claimed sums through official channels and unless the state or political subdivision failed to act on the information provided within a reasonable period of time." See Cal. Gov't Code § 12652(d)(4). The Federal False Claims Act contains no such limitation. Therefore, the California False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Section 1909(b)(4) of the Act requires the State law to contain a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of the Federal False Claims Act. As amended by the FERA, the Federal False Claims Act now expressly provides that its civil penalty shall be adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990. See 31 U.S.C. § 3729(a). Pursuant to the Federal Civil Penalties Inflation Adjustment Act, a civil penalty under the Federal False Claims Act is not less than $5,500 and not more than $11,000. In contrast, the California False Claims Act provides for a penalty of not less than $5,000 and not more than $10,000. See Cal. Gov't Code § 12651(a).

California will be granted a grace period, ending March 31, 2013, to amend the California False Claims Act and resubmit it to OIG for approval. Until March 31, 2013, California 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 March 31, 2013, or after the expiration of any tolling period, if applicable, California must amend the California False Claims Act to meet the requirements of section 1909 of the Act with reference to the Federal False Claims Act in effect on the date of this 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, California 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 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