



March 21, 2011

Ms. Joan Henneberry
Executive Director
Colorado Department of
Health Care Policy and Financing
1570 Grant Street
Denver, CO 80203-1818

Dear Ms. Henneberry:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) has received your request to review the Colorado Medicaid False Claims Act, Colo. Rev. Stat. §§ 25.5-4-303.5 through 25.5-4-310, 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 Colorado Medicaid 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. See 31 U.S.C. § 3729(a)(1)(A). In contrast, the Colorado Medicaid False Claims Act more narrowly establishes liability for knowingly presenting, or causing to be presented, “to an officer or employee of the state” a false or fraudulent claim for payment or approval. See Colo. Rev. Stat. § 25.5-4-305(1)(a).

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 Colorado Medicaid False Claims Act does not provide these persons with as much protection from retaliatory action. Therefore, the Colorado Medicaid 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 Colorado Medicaid False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give Colorado the opportunity to oppose the dismissal. Therefore, the Colorado Medicaid 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 Colorado Medicaid False Claims Act has a more restrictive definition of “original source.” Therefore, the Colorado Medicaid 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 bars *qui tam* actions that are 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. § 3130(e)(3). In contrast, the Colorado Medicaid False Claims Act more broadly bars *qui tam* actions that are based upon allegations or transactions that are the subject of “a civil suit in a court of this state or an administrative civil money penalty proceeding in which the state is already a party.” See Colo. Rev. Stat. § 25.5-4-306(5)(b). Therefore, the Colorado Medicaid 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 when a relator brings a *qui tam* action under the Federal False Claims Act, no person other than the Government may intervene or bring

a related action based on the facts underlying that *qui tam* action. See 31 U.S.C. § 3730(b)(5). In contrast, the Colorado Medicaid False Claims Act provides that when a relator brings a *qui tam* action under the Colorado Medicaid False Claims Act, the Federal False Claims Act, or any similar provision of the laws of any other State, then no person other than the State may intervene or bring a related action based on the facts underlying the pending action. See Colo. Rev. Stat. § 25.5-4-306(2)(e). Therefore, the Colorado Medicaid 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 no court shall have jurisdiction over an action brought against “a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.” See 31 U.S.C. § 3730(e)(2)(A). In contrast, the Colorado Medicaid False Claims Act more broadly provides that no court shall have jurisdiction over an action against “a member of the general assembly, a member of the state judiciary, or an elected official in the executive branch of the state of Colorado.” See Colo. Rev. Stat. § 25.5-4-306(5)(a). Therefore, the Colorado Medicaid 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 Colorado Medicaid False Claims Act provides for a penalty of not less than \$5,000 and not more than \$10,000. See Colo. Rev. Stat. § 25.5-4-305(1).

If the Colorado Medicaid False Claims Act is amended to address the issues noted above, please notify OIG for further consideration of the Colorado Medicaid 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