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

Washington, D.C. 20201

March 21, 2011

Mr. Allen K. Pope
Director, Medicaid Fraud Control Unit
State of Indiana
8005 Castleway Drive
Indianapolis, IN 46250-1946

Dear Mr. Pope:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) previously received your office's request to review the Indiana False Claims and Whistleblower Protection Act, Ind. Code §§ 5-11-5.5-1 through 5-11-5.5-18, under the requirements of section 1909 of the Social Security Act (the Act) and determined that the Indiana False Claims and Whistleblower Protection Act met those requirements. 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 Indiana False Claims and Whistleblower Protection 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 Indiana False Claims and Whistleblower Protection Act is no longer in compliance with section 1909 of the Act. OIG also identified additional provisions in the Indiana False Claims and Whistleblower Protection 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 of 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, includes an expanded definition of the term "claim" and defines the terms "obligation" and "material." See 31 U.S.C. § 3729(b). In contrast, the Indiana False Claims and Whistleblower Protection 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 Indiana False Claims and Whistleblower Protection Act does not provide these persons with as much protection from retaliatory action. Therefore, the Indiana False Claims and Whistleblower Protection 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 Indiana False Claims and Whistleblower Protection Act does not contain a similar provision. Therefore, the Indiana False Claims and Whistleblower Protection 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 Indiana False Claims and Whistleblower Protection Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give Indiana the opportunity to oppose the dismissal. Therefore, the Indiana False Claims and Whistleblower Protection 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 Indiana False Claims and Whistleblower Protection Act has a more restrictive definition of "original source." Therefore, the Indiana False Claims and Whistleblower Protection 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 the court may award the relator not more than 10 percent of the proceeds of the action or settlement if it finds the action was based primarily on "disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media." See 31 U.S.C. § 3730(d)(1). The Indiana False Claims and Whistleblower Protection Act includes a similar provision; however, the Indiana False Claims and Whistleblower Protection Act does not include an exception for information provided by the person bringing the *qui tam* action. See Ind. Code § 5-11-5.5-6(a)(2). Therefore, the Indiana False Claims and Whistleblower Protection Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

In addition, the Indiana False Claims and Whistleblower Protection Act provides that a court does not have jurisdiction over a *qui tam* action that is based on information discovered by a present or former State employee in the course of the employee's employment unless the employee exhausted internal procedures for reporting and recovering the amount owed to the State and the State failed to act in a reasonable amount of time. See Ind. Code § 5-11-5.5-7(b). The Federal False Claims Act contains no such limitation. Therefore, the Indiana False Claims and Whistleblower Protection 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 Indiana False Claims and Whistleblower Protection Act provides for a penalty of at least $5,000. See Ind. Code § 5-11-5.5-2(b).

Indiana will be granted a grace period, ending March 31, 2013, to amend the Indiana False Claims and Whistleblower Protection Act and resubmit it to OIG for approval. Until March 31, 2013, Indiana 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, Indiana must amend the Indiana False Claims and Whistleblower Protection 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, Indiana 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