



March 21, 2011

The Honorable Steve Bullock
Montana Department of Justice
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

Dear Mr. Attorney General:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) has received your request to review the Montana False Claims Act, Mont. Code Ann. §§ 17-8-401 through 17-8-413, 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 Montana 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 (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 Montana 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, including two times back pay, 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 Montana False Claims Act does not provide these persons with as much protection from retaliatory action. Therefore, the Montana 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 Montana False Claims Act does not contain a similar provision. Therefore, the Montana 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 Montana False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure and does not give Montana the

opportunity to oppose the dismissal. Therefore, the Montana 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 Montana False Claims Act has a more restrictive definition of “original source.” Therefore, the Montana 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 the court may reduce the relator’s share if it finds that the relator “planned and initiated” the violation upon which the action was brought. See 31 U.S.C. § 3730(d)(3). In contrast, the Montana False Claims Act provides that the court may reduce or eliminate the relator’s share if it finds that the relator “planned, initiated, or knowingly participated in” the violation. See Mont. Code Ann. § 17-8-410(5). Therefore, the Montana 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 if 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. See 31 U.S.C. § 3170(d)(4). In contrast, the Montana False Claims Act provides that any award to the defendant of attorneys’ fees and costs “must be equitably apportioned against the person who brought the action and the governmental entity if a person and a governmental entity were coplaintiffs.” See Mont. Code Ann. § 17-8-411. Therefore, the Montana 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 Montana False Claims Act provides that no *qui tam* action may be filed based upon information discovered by a present or former employee of a Montana governmental entity during the course of his or her employment unless the employee first, in good faith, exhausted internal procedures for reporting and seeking recovery of the falsely claimed sums and the governmental entity failed to act within a reasonable period of time. See Mont. Code Ann. § 17-8-403(5)(d). The Federal False Claims Act contains no such limitation. Therefore, the Montana 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

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penalty under the Federal False Claims Act is not less than \$5,500 and not more than \$11,000. In contrast, the Montana False Claims Act provides for a penalty of not less than \$5,000 and not more than \$10,000. See Mont. Code Ann. § 17-8-403(2)(a).

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