



March 21, 2011

Ms. Monica J. Hickey-Martin
Office of the Attorney General, State of New York
Medicaid Fraud Control Unit
120 Broadway, 13th Floor
New York, NY 10271-0007

Dear Ms. Hickey-Martin:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) has received your request to review the amended New York False Claims Act, N.Y. Fin. Law §§ 187 through 194, under the requirements of section 1909 of the Social Security Act (the Act). OIG previously reviewed the New York 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 New York 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 New York False Claims Act is no longer in compliance with section 1909 of the Act. OIG also identified additional provisions in the New York 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 mak[ing], us[ing], or caus[ing] 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 conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government.” See 31 U.S.C. § 3729(a). In contrast, the New York False Claims Act does not establish liability for knowingly

concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the State. See N.Y. Fin. Law § 189(1)(g).

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, 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 New York False Claims Act does not contain a similar provision in the event that the State moves to intervene in the action. See N.Y. Fin. Law § 190(2)(e). Therefore, the New York 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 in addition to a percentage “of the proceeds of the action or settlement of the claim,” the relator shall receive an amount for reasonable expenses, plus reasonable attorneys' fees and costs, to be awarded against the defendant. See 31 U.S.C. § 3730(d)(1). In contrast, the New York False Claims Act more narrowly provides “[a]ll such expenses, fees and costs . . . shall only be awarded if the state or a local government or the *qui tam* civil action plaintiff prevails in the action.” See N.Y. Fin. Law § 190(7). Therefore, the New York 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]hen a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.” See 31 U.S.C. § 3730(b)(5). In contrast, the New York False Claims Act provides that “[w]hen a person brings a *qui tam* action under this section, no person other than the attorney general . . . may intervene or bring a related civil action based upon the facts underlying the pending action, unless such other person has first obtained the permission of the attorney general to intervene or bring such related action.” See N.Y. Fin. Law § 190(4). Therefore, the New York False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

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

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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, New York 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