UPDATED

OIG Guidelines for Evaluating State False Claims Acts

Note: These guidelines are effective March 15, 2013, and replace the guidelines effective on August 21, 2006, found at 71 FR 48552.

U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES
OFFICE OF INSPECTOR GENERAL

UPDATED OIG GUIDELINES FOR EVALUATING STATE FALSE CLAIMS ACTS

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Purpose of Updating Guidance

On August 21, 2006, the Office of Inspector General (OIG) issued guidelines on how the Inspector General would determine whether a State law meets the requirements of section 1909(b) of the Social Security Act (Act). See 71 FR 48552, Aug. 21, 2006. These guidelines replace those 2006 guidelines to reflect the amendments to the Federal False Claims Act (FCA) that have gone into effect since the effective date of section 1909 of the Act. These new guidelines provide more specificity regarding OIG's reviews when evaluating a State law and are based on OIG's experience in reviewing over 28 different State laws. The guidelines in this notice are based on the FCA in effect on the date of the publication of this notice. Future amendments to the FCA could further affect OIG's evaluation of State laws.

OIG Procedures for Reviewing State False Claims Acts

OIG will accept requests for review of State laws that have been enacted and that are in effect to determine whether they meet the requirements of section 1909 of the Act. To request OIG review of a State law, the State Attorney General's office should submit a complete copy of the State law and any other relevant information to the following address: Assistant Inspector General for Legal Affairs, Office of Inspector General, Office of Counsel to the Inspector General, Cohen Building, Mail Stop 5527, 330 Independence Avenue, SW, Washington, DC 20201. Submissions by telecopier, facsimile, or other electronic media will not be accepted. OIG will review the State law under these guidelines and in consultation with the U.S. Department of Justice (DOJ) and will inform the State Attorney General's office in writing whether the State law meets the requirements of section 1909 of the Act. OIG will also accept submissions of draft legislation for informal review and discussion.

For Further Information Contact: **Katie A. Arnholt** or **Susan E. Gillin**, Office of Counsel to the Inspector General, (202) 619-2078.

Background

Section 1909 of the Act, added by section 6031 of the Deficit Reduction Act of 2005 (Pub. L. 109-171), creates a financial incentive for States to enact legislation that establishes liability to the State for false or fraudulent claims to the State Medicaid program. This incentive takes the form of a decrease in the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under a qualifying law. For a State to qualify for this incentive, the State law must meet certain requirements listed in section 1909 of the Act, as determined by the Inspector General of the Department of Health and Human Services in consultation with the U.S. Attorney General.

Medicaid, authorized under Title XIX of the Act, 42 U.S.C. 1396-1396w-5, is a joint Federal and State program that pays for medical and related benefits provided to certain low-income families and individuals. States that participate in Medicaid administer their own programs within broad Federal guidelines and receive matching funds from the Federal Government, called the Federal medical assistance percentage. The Federal medical assistance percentage for a State generally varies between 50 and 83 percent, depending on the State's per capita income for a particular year.

Individuals or entities that submit false or fraudulent claims under State Medicaid programs may be civilly liable under the FCA, 31 U.S.C. 3729-3733. Under the FCA, any person who knowingly submits, or causes to be submitted, a false or fraudulent claim for payment or approval under the State Medicaid program is liable to the Federal Government for three times the amount of the Federal Government's damages plus penalties of $5,500 to $11,000 for each false or fraudulent claim. Under the qui tam provisions of the FCA, private persons, known as relators, may file lawsuits in Federal court against individuals and entities that defraud the Federal Government by submitting false or fraudulent claims under State Medicaid programs. DOJ is required to investigate the relator's allegations and may

intervene and take over the prosecution of the action. If DOJ chooses not to intervene, the relator has the right to conduct the action. With respect to recoveries in cases in which DOJ has intervened, the relator is generally entitled to between 15 and 25 percent of the proceeds of the action or settlement of the claim depending on the extent to which the relator substantially contributed to the case. In cases in which DOJ has declined to intervene, the relator is generally entitled to between 25 and 30 percent of the proceeds of the action or settlement of the claim.

Many States have enacted their own false claims acts that establish civil liability to the States for individuals and entities that submit false or fraudulent claims under the State Medicaid programs. Generally, these laws include qui tam provisions that reward relators with a share of the recovery in cases of Medicaid fraud. If a State obtains a recovery as a result of a State action relating to false or fraudulent claims under the State Medicaid program, it must share the recovery with the Federal Government in the same proportion as the Federal medical assistance percentage. For example, if the Federal medical assistance percentage for a State is 60 percent, then the State would retain 40 percent of the recovery and the Federal Government would be entitled to the remaining 60 percent of the recovery.

Section 1909 of the Social Security Act

To encourage States to pursue civil Medicaid fraud, Congress added section 1909 to the Act, effective on January 1, 2007. Under this section, if a State has in effect a State false claims act that meets certain enumerated requirements, as determined by the Inspector General in consultation with the Attorney General, [redacted]

Under section 1909(a) of the Act, if a State has a qualifying law, the State's share of any recovery in an action under such a law will be increased by 10 percentage points. For example, if the State's Medicaid share is 50 percent, the State would be entitled to 60 percent of the amount of the recovery, while the Federal Government would be entitled to 40 percent.

Section 1909(b) of the Act sets forth the requirements that a State law must meet to qualify for the incentive. Under this section, the Inspector General must determine, in consultation with the U.S. Attorney General, whether a State has in effect a false claims act that meets the following requirements:

1. The law must establish liability to the State for false or fraudulent claims described in 31 U.S.C. 3729 with respect to any expenditure described in section 1903(a) of the Act.

2. The law must contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in 31 U.S.C. 3730-3732.

3. The law must contain a requirement for filing an action under seal for 60 days with review by the State Attorney General.

4. The law must contain a civil penalty that is not less than the amount of the civil penalty authorized under 31 U.S.C. 3729.

Section 1909(c) of the Act provides that a State that has a law in effect that meets the requirements of section 1909(b) of the Act will be considered in compliance with such requirements so long as the law continues to meet such requirements. A State will not qualify for the 10-percentage-point increase in its share of recoveries until after the Inspector General, in consultation with the U.S. Attorney General, has determined that the State's law satisfies the requirements of section 1909(b) of the Act.

Section 1909 of the Act does not require a State to have in effect a false claims act or to enact a false claims act. A State may choose not to enact a false claims act or may choose to enact a false claims act that does not meet the enumerated requirements. However, a State that does not have a qualifying law in effect will not be eligible for the 10-percentage-point increase in its share of Medicaid fraud recoveries.

Amendments to the FCA

Congress has amended the FCA three times since the enactment of section 1909 of the Act: on May 20, 2009, in the Fraud Enforcement and Recovery Act of 2009; on March 23, 2010, in the Patient Protection and Affordable Care Act; and on July 21,

2010, in the Dodd-Frank Wall Street Reform and Consumer Protection Act. These three acts, among other things, amended the bases for liability in the FCA, expanded the rights of *qui tam* relators, and added an express requirement that civil penalties include adjustments under the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Pub. L. 104-410).

For purposes of OIG's review of State false claims acts, OIG will interpret the references in section 1909 of the Act with reference to the FCA to incorporate the amendments in the Fraud Enforcement and Recovery Act, the Patient Protection and Affordable Care Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, as well as any future amendments to the FCA. Therefore, to qualify for the incentive, a State false claims act must fulfill the requirements of section 1909 of the Act with reference to the FCA as amended at the time of OIG's review.

For States with false claims acts approved by OIG before the amendments to the FCA in the Fraud Enforcement and Recovery Act, the Patient Protection and Affordable Care Act, and the Dodd-Frank Wall Street Reform and Consumer Protection Act, OIG provided a 2-year grace period during which the approved States would continue to be deemed compliant with the requirements of section 1909 of the Act and the States would continue to qualify for the incentive. The date of the expiration of the 2-year grace period was set forth in individual letters to each affected State. After the expiration of its 2-year grace period, a State will no longer qualify for the incentive unless its law: (1) is amended and resubmitted to OIG for review and (2) either is approved by OIG or is pending review by OIG.

OIG anticipates that if any provision of the FCA relevant to OIG's reviews under section 1909 of the Act is amended in the future, it will grant similar 2-year grace periods to any States with laws approved by OIG at the time of such amendment. In such event, OIG would review each OIG-approved State law and then notify in writing any State that, as a result of the amendment to the FCA, no longer satisfies the requirements of section 1909 of the Act. The specific dates for the grace period would be in the written notice.

OIG Guidelines for Evaluating State False Claims Acts

Section 1909 of the Act sets forth four requirements a State law must meet to qualify for the 10-percentage-point decrease in the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under the State law. After consulting with DOJ, OIG has developed guidelines to use in determining whether a State law meets the enumerated requirements. The guidelines are intended to highlight the FCA provisions relevant to OIG's determination of whether a State law meets the requirements of section 1909 of the Act. OIG will closely review any variation from these provisions of the FCA in the State law.

A. Liability for False or Fraudulent Claims

Under section 1909(b)(1) of the Act, the State law must establish liability to the State for false or fraudulent claims described in 31 U.S.C. 3729, with respect to expenditures related to State Medicaid plans. When evaluating a State law to determine whether it meets the requirements of section 1909(b)(1) of the Act, OIG will consider whether the law provides for the following:

1. Liability to the State for false or fraudulent claims with respect to Medicaid program expenditures, including:

    - knowingly presenting, or causing to be presented, a false or fraudulent claim for payment or approval;

    - knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;

    - 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 State or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the State; and conspiring to commit any of the violations described above.

2. Definitions for the terms "knowing" and "knowingly" meaning that a person, with respect to information: (a) has actual knowledge of the information, (b) acts in deliberate ignorance of the truth or falsity of the information, or (c) acts in reckless disregard of the truth or falsity of the information. In addition, no specific intent to defraud should be required.

3. A definition for the term "claim" meaning, with respect to any Medicaid program expenditure, any request or demand, whether under contract or otherwise, for money or property and whether or not the State has title to the money or property, that (a) is presented to an officer, employee, or agent of the State, or (b) is made to a contractor, grantee, or other recipient if the money or property is to be spent or used on the State's behalf or to advance a State program or interest and if the State (i) provides or has provided any portion of the money or property requested or demanded or (ii) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

4. A definition of the term "obligation" meaning an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship; from a fee-based or similar relationship; from statute or regulation; or from the retention of any overpayment.

5. A definition of the term "material" meaning to have a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

If a State law includes provisions that limit the application of the above-described liability provisions and definitions, OIG will consider whether, because of those limitations, the State law fails to fully establish liability to the State for the false or fraudulent claims described in 31 U.S.C. 3729.

B. Rewarding and Facilitating Qui Tam Actions

Under section 1909(b)(2) of the Act, a State law must contain provisions that are at least as effective in rewarding and facilitating *qui tam* actions for false or fraudulent claims as those described in 31 U.S.C. 3730-3732. When evaluating a State law to determine whether it meets these requirements, OIG will consider whether the law provides for the following:

1. A relator may bring a civil action for a violation of the State law for the relator and for the State, which shall be brought in the name of the State.

2. When a relator brings an action under the State law, no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

3. If the State proceeds with the action, the relator shall have the right to continue as a party to the action.

4. If the State elects not to proceed with the action, the relator shall have the right to conduct the action. When the relator proceeds with the action, the court, without limiting the status and rights of the relator, may permit the State to intervene at a later date.

5. If the State is authorized to elect to pursue its claim through an alternative remedy available to the State, the relator shall have the same rights in such alternative proceeding as the relator would have had if the action had continued under the State false claims act.

6. If the State proceeds with the action, the relator shall receive at least 15 to 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the relator substantially contributed to the prosecution of the action. Such payment shall be made from the proceeds of the action or settlement of the claim.

7. If the State does not proceed with the action, the relator bringing the action or settling the claim shall receive an amount that the court decides is reasonable for collecting the civil penalty and damages, which shall be least 25 to 30 percent of the proceeds of the action or settlement of the claim. Such payment shall be made from the proceeds of the action or settlement of the claim.

8. A relator who receives a percentage of the proceeds of the action or settlement of the claim shall also receive an amount for reasonable expenses that the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

9. If the State law limits *qui tam* actions as a result of public disclosures, such limitation must not be broader than the following: The court shall dismiss an action or a claim under the State law, unless opposed by the State, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed (a) in a State criminal, civil, or administrative hearing in which the State or its agent is a party; (b) in a State legislative or other State report, hearing, audit, or investigation; or (c) from the news media; unless the action is brought by the State Attorney General or the relator is an original source of the information.

10. If the State law limits *qui tam* actions as a result of public disclosures, it must provide a definition of "original source" that is not narrower than the following: an individual who either (a) prior to a public disclosure, has voluntarily disclosed to the State the information on which allegations or transactions in a claim are based, or (b) 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 State before filing an action.

11. Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under the State law or other efforts to stop one or more violations of the State law. Relief shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination; two times the amount of back pay; interest on the back pay; and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. The relator must be allowed to initiate a civil action for such retaliation for at least 3 years after the date when the retaliation occurred.

12. A statute of limitations not shorter than the following, whichever is later: (a) 6 years after the date on which the violation of the State law was committed or (b) 3 years after the date when facts material to the right of action are known, or reasonably should have been known, by the office of the State charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation occurred.

13. If the State elects to intervene and proceed with an action brought by a relator, the State may file its own complaint or amend the complaint of the relator to clarify or add detail to the claims in which the State is intervening and add any claims with respect to which the State contends it is entitled to relief. For statute of limitations purposes, any such State pleading shall relate back to the filing date of the complaint of the relator, to the extent that the claim of the State arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that relator.

14. In any action brought under the State law, the State shall be required to prove all essential elements of the cause of action, including damages, by a [redacted]

The State law may include additional restrictions on the relator's procedural rights, limitations on or reductions in the relator's award, jurisdictional bars, and other *qui tam* provisions that do not conflict with the requirements of section 1909(b)(2) of the Act. If such provisions are more restrictive than the provisions of the FCA, OIG may determine that a State law is not as effective in rewarding and facilitating *qui tam* actions as the FCA. OIG will make such determinations on a case-by-case

basis and in consultation with DOJ. Examples of such provisions OIG may consider include:

- any limitation on the rights of the relator that is broader than the limitations on the rights of the relator in the FCA,
- any limitation on or reduction in the relator's share of the proceeds of the action or settlement that is broader than the limitations on or greater than the reductions in the relator's share under the FCA,
- any requirements placed on the relator that are more onerous than the requirements placed on the relator under the FCA,
- any requirement that the relator pay defendant's attorneys' fees and expenses that is broader than the requirement under the FCA, and
- any jurisdictional bar that is broader than the jurisdictional bars under the FCA.

C. Seal Provisions

Under section 1909(b)(3) of the Act, a State law must contain a requirement for filing an action under seal for 60 days with review by the State Attorney General. When evaluating whether a State law meets the requirements of section 1909(b)(3) of the Act, OIG will consider whether the law requires the complaint to be filed in camera and to remain under seal for at least 60 days.

D. Civil Penalty Provisions

Under section 1909(b)(4) of the Act, the State law must contain a civil penalty that is not less than the amount of the civil penalty authorized under 31 U.S.C. 3729. When determining whether a State law meets the requirements of section 1909(b)(4) of the Act, OIG will consider whether the law establishes liability for (1) at least treble damages and (2) civil penalties of at least $5,000 to $10,000 as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Pub. L. 104-410). As of the date of this Notice, the civil penalties under the FCA, as adjusted by the Federal Civil Penalties Inflation Adjustment Act, are $5,500 to $11,000. Therefore, a State law must provide for civil penalties of at

least $5,500 to $11,000. If the civil penalties under the FCA are further adjusted by the Federal Civil Penalties Inflation Adjustment Act at a future date, then a State law must provide for civil penalties of at least those adjusted amounts to satisfy the requirements of section 1909(b)(4) of the Act.

Kraly, Stacie L (LAW)

From: Brodie Anderson <Brodie.Anderson@akleg.gov>
Sent: Monday, March 21, 2016 5:54 PM
To: Pierson, Jane (LAA); Shadduck, Heather R (LAA); Phillips, Helen (LAA); Newman, Anthony (HSS); Kraly, Stacie L (LAW)
Subject: SB 74 Medicaid Reform schedule and presenters
Attachments: SB 74 Medicaid Schedule.docx

Date/Time	*Topic*	*Presenter*	*Organization*
Monday, Mar 21	Introduction	Heather Shadduck	Sponsor's Office
		Stacie Kraly	Dept. of Law
Tuesday, Mar 22	Fraud, False Claims, Penalties	Andrew Peterson	Medicaid Fraud Control Unit
		Doug Jones	Health Care Services
		Stacie Kraly	Dept. of Law
		Lynne Keilman-Cruz	DHSS (SDS)
Wednesday, Mar 23	Super-utilizers, Emergency Room Management	Anne Zink, M.D.	MatSu ER doc; President, American College of Emergency Physicians Alaska Chapter
		Becky Hultberg	Alaska State Hospital & Nursing Home Assoc.
		Carl Heine, MD	Juneau ER Doc; Past President, American College of Emergency Physicians Alaska Chapter
		Margaret Brodie	DHSS (Update re current Super Utilizers Program)
Thursday, Mar 24	Managed Care, Accountable Care and Organizations	LeAnn Behrens	President, Medical Health Plan, Texas, Amerigroup
		Sabrina Gibson	Chief Medical Actuary, Well Care Health Plans, Inc.
		Jocelyn Pemberton, MBA, CMPE	E.D. Alaska Hospitalist Group, LLC
		Nancy Merriman	Alaska Primary Care Associates
		Rich Davis	Central Peninsula Hospital

		Thea Agnew Bemben	Agnew Beck
Monday, Mar 28	Behavioral Health	Charlie Curie	CEO, The Curie Group (AMHTA expert)
		Jeff Jessee	AMHT
		Karen Forrest	DHSS
		Randall Burns	DHSS
		Thea Agnew Bemben	Agnew::Beck
		Kate Burkhardt	ED, Advisory Board on Alcoholism & Drug Abuse
		~~Tom Chard~~	~~ED, Alaska Behavioral Health Associates~~
Monday, Mar 28	Federal Overview, Waivers, and Options	Jerry Moses	Contact Alaska Native Tribal Health Consortium
		Shane Spotts	Health Management Associates (contractor for 1915 i/k)
		Valerie Davidson	DHSS
		Jon Sherwood	DHSS
		Duane Mayes	DHSS - 1915 i/k
Tuesday, Mar 29	Fiscal Notes	Jon Sherwood	
	Public Testimony	5:00 PM- 7:00 PM	
Wednesday, Mar 30	Telemedicine	Stewart Ferguson	Chief Technology Officer, ANTHC
		Rebecca Madison	Board Member of Northwest Telehealth/ Alaska eHealth Network
		Henry DePhillips	Medical Director, Teledoc
		Wallace Adamson	Strategic Partnership
	Prescription Drug Database	Jay Butler	Chief Medical Officer
		Dr. Erin Narus	State Medical Pharmacist
		Janey Hovington	Boards & Commission
		Carl Heine, MD	Juneau ER Doc; Past President, American College of Emergency Physicians Alaska Chapter
		Brian Howes	Senior Investigator, AK CCED Div of Corp Business