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STATE OF ALASKA

STEVE COWPER, GOVERNOR

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL

P.O. BOX K—STATE CAPITOL
JUNEAU, ALASKA 99811-0300
PHONE: (907) 465-3600

February 14, 1990

The Honorable Rick Halford
Alaska State Senate
P.O. Box V
Juneau, Alaska 99811

Re: Department of Law's comments
on SB 324 -- Establishing a
medicaid fraud and patient
abuse investigation program

Dear Senator Halford:

You have requested the Department of Law's comments on SB 324, which establishes a medicaid provider fraud and patient abuse investigation program. We understand that the bill has been drafted to gain the 90 percent federal match available for allowable services through the federal Office of the Inspector General.

Presently the Department of Health and Social Services (DHSS) conducts a provider abuse and surveillance program and utilizes a new medicaid claim processing computer system to identify cases. DHSS's program is eligible for 50 percent federal match. The Department of Law currently does not have the resources to pursue fraud referrals from DHSS on a priority basis.

The Department of Law agrees with the bill's overall goal that medicaid fraud and patient abuse should be investigated and appropriate legal actions taken. While the Department of Law is always interested in ways to increase its capacity to timely prosecute fraud cases, the department believes that new legislation is not needed to operate a successful medicaid fraud prosecution program in this state.

Existing criminal laws and civil remedies provide ample opportunities to address these issues. Also, new legislation is not necessary for the Department of Law to qualify for federal monies available for such programs at the 90 percent match level. These monies could be utilized by simply including them through the budget process in the Department of Law's FY 91 budget.

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If the state were to accept the new federal monies at the 90 percent match level, the federal government would place additional restrictions on the design of a fraud program for Alaska. In our research regarding this bill, we found several concerns regarding the desirability of acceptance of those 90 percent federal match monies that we wanted to bring to your attention in your deliberations on this bill. They are as follows:

A. Nonparticipation of Some Western States - Even though the federal government allows 90 percent federal funding for the first three years of operation of approved programs, not all states have opted to participate in the program. Four western states (Idaho, Montana, North Dakota, and Wyoming) with similar populations to Alaska do not presently participate. 1/ Montana had a program which it later dropped when the program was found to be not cost effective. Idaho also had a program but discontinued it approximately three years ago for similar reasons. North Dakota did an administrative study and found that it did not have a sufficient fraud caseload to justify even the minimum federal staffing requirement of three full-time professional people. Even though 38 or 39 states do have a program, we have similar concerns whether a program that meets the requirements for 90 percent federal match funding can be operated on a cost-effective basis in Alaska. Likewise, Oregon, a state with a population several times Alaska's, can only presently justify the minimum staff of three full-time professionals.

B. Stringent Federal Requirements - Federal regulations require a minimum staffing of three full-time upper range positions (attorney, auditor, senior investigator) regardless of caseload. See 42 C.F.R. § 1002.313. Also, we understand that the federal government is currently debating raising the minimum staffing requirements to seven or eight positions. 2/ We have been informed that using part-time positions or assigning unit staff to other duties will not meet the federal requirements for a full-time staff for the unit and

1/ Several of the nonparticipating states do offer state designed provider fraud and patient abuse investigation programs through 50 percent federal match dollars provided through the medicaid state agency.

2/ Discussions have included the possibility of "grandfathering" in programs at their existing staffing level.

would not be eligible for reimbursement, even though there may be insufficient caseload to keep the staff busy on a full-time basis. See 42 C.F.R. § 1002.319(e)(4). Contracting for these services on an as-needed basis will not meet federal requirements either.

C. Functions That Make Sense for Alaska are Specifically Denied the 90 percent Match - Ninety percent federal match monies are specifically limited to address medicaid provider fraud and patient abuse in health facilities. The 90 percent match monies are not available to assist in investigation or prosecution of claims based on provider abuse or misuse of the system, where fraudulent intent cannot be shown. Any expenditure is subject to audit and could be disallowed "if these cases do not involve substantial allegations or other indications of fraud." See 42 C.F.R. § 1002.319(e)(1). Thus, the state could be in the situation of expending monies on an investigation assuming that 90 percent match would be available, only to be later disallowed, if the "substantial allegations or other indications of fraud" were not shown to the federal government's satisfaction.

Although there are debates about the amount of undiscovered cases of medicaid provider fraud in Alaska, most professionals agree that the potential for undiscovered cases of medicaid provider abuse and misuse of the system, as opposed to actual fraud, is substantially greater, because fraudulent intent need not be shown. Yet, these new federal 90 percent match monies cannot be used to add to the state's prosecution or collection efforts, even though they appear to be a more likely area to yield recoveries for the dollars spent.

Also, due to federal restrictions, key services to the unit's success, such as coordination and utilization of the services of the Alaska State Troopers in the Department of Public Safety, could not be reimbursed by the new 90 percent federal fraud unit monies.

D. Duplication of Efforts - 42 C.F.R. § 1002.311(b) requires the unit to screen and investigate medicaid patient abuse complaints in health care facilities and refer them to appropriate investigative or prosecutive authority. If the claim has no substantial potential for criminal prosecution, the unit would be required to refer the complaint to the DHSS. This practice duplicates efforts now mandated to be done by DHSS to investigate and to screen medicaid patient abuse complaints in health care facilities in Alaska. DHSS makes appropriate referrals for criminal investigation. The 90 percent federal match monies would not be available to review allegations of

patient abuse in non-health facility settings, such as in a doctor's office or in a patient's home care program which DHSS has also identified as a potential problem. In any case, the responsibility for patient abuse investigations could divert the unit resources from reviewing for suspected "white collar" type crimes of providers.

Also, with the unit providing the screening and investigation, as well as prosecuting patient complaints, the Department of Law would be assuming new duties which have been traditionally reserved for state agencies with investigatory personnel or law enforcement responsibilities. Under current practice, the Department of Law has relied on the expertise of these agencies to investigate claims and to refer claims with merit for appropriate action. The federal model for the 90 percent monies requires the Department of Law to handle these claims or complaints differently than it handles other referrals. Also, the requirement would mandate costly attorney involvement at earlier stages, even before a prosecutable case was shown.

E. Federal Funding Participation (FFP) is Limited - For the first three years of an eligible program, the state could receive 90 percent for covered expenditures for a quarter not to exceed the greater of \$125,000 or "one quarter of one percent" of the sums expended in the previous quarter in carrying out the medicaid program. 42 C.F.R. § 1002.319(c). At current funding levels, this would amount to a cap of \$500,000 per year. The 90 percent federal match automatically drops to 75 percent federal match after three years of operation of the program. Thus, the state's long-term cost for the program may be greater than seen on first analysis. Also, federal funding must be earned by time actually spent on services eligible for the enhanced 90 percent federal funding. As discussed above, the state could be subject to a disallowance if the federal government determined after the expenditure was made that the state did not meet the requirements of the program, while the Department of Law must maintain the same minimum staff to have a potentially qualifying program.

As you can see, the Department of Law has serious reservations about recommending that the legislature pass SB 324 into law. However, if you decide to pursue this legislation, we would like to discuss with you a number of concerns we have about the prosecution aspects of the bill. For example, we believe that the investigative powers given to the department are too narrowly drawn and that the relationship between the procedures set up for administrative hearings and criminal prosecutions needs to be more clearly defined. In addition, the Commissioner of Public Safety currently has the general power to issue special police commissions. As a result, we do not believe it is

necessary for the statute to specifically provide for the designation of Department of Law investigators as peace officers.

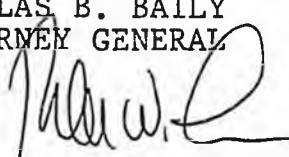
Moreover, as we pointed out above, if a policy decision were to be made to undertake a medicaid provider fraud program and pursue available federal funding at the 90 percent match level, we believe all that is necessary is to incorporate funding for that purpose in the Department of Law's operating budget. In this regard, since the federal government's program is focused on criminal prosecutions of "white collar" crime, it would seem most appropriate to place funds in the Office of Special Prosecutions and Appeals in the Criminal Division's budget.

Alternatively, the legislature may wish to consider that if an expanded medicaid provider fraud program is desired, a state program could be designed to meet many of the problems addressed above and still receive 50 percent federal matching monies through DHSS. An additional benefit of a state designed program could be to investigate patient abuse claims in non-health facility settings, which cannot be included at the 90 percent match level. Such a program could be created without a bill. The Department of Law would be supportive of increased capacity in this area, given that the state medicaid budget is estimated to be over \$214.5 million in federal and state monies in FY 91.

If you have additional questions or concerns about our comments, please let us know.

Sincerely yours,

DOUGLAS B. BAILY
ATTORNEY GENERAL

By: 
Ronald W. Lorensen
Deputy Attorney General

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The Honorable Rick Halford
Alaska State Senate

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cc: Hon. Jan Faiks, Chair
Senate Judiciary

Bob Evans
Deputy Chief of Staff/Legislative Liaison
Office of the Governor

Hon. Myra Munson
Commissioner
Department of Health and Social Services

Jeffrey W. Bush
Assistant Attorney General