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OIG Advises Florida Attorney General of Changes Needed in Florida False Claims Act

As enacted by the Deficit Reduction Act of 2005, section 1909 of the Social Security Act (Act) provides a financial incentive for States to enact false claims acts that establish liability to the State for the submission of false or fraudulent claims to the State's Medicaid program. If a State false claims act is determined to meet certain enumerated requirements, the State is entitled to an increase of 10 percentage points in its share of any amounts recovered under a State action brought under such a law.

The OIG's guidelines for reviewing State false claims acts were published in the Federal Register on August 21, 2006, and invited States to request the OIG's review of their State laws to determine if the laws meet the new requirements of section 1909(b) of the Act. Last fall, the State of Florida requested the OIG's review of the Florida False Claims Act (FFCA) codified at Florida Statutes §68.081-68.092, and the OIG issued its findings to the Office of the Florida Attorney General by letter dated December 21, 2006. The Florida False Claims Act was found by the OIG to be deficient in two of the four requirements needed to qualify the State of Florida to receive the additional 10% share of any Medicaid False claims action recoveries resulting from actions brought under the statute.

Due to the significant financial incentives to the State which would accompany expansion of the Florida False Claims Act, we have anticipated that the 2007 Florida Legislature will pass amendments to the current Florida Statute, which would clearly result in an expansion of opportunities for the state and any would-be qui tam relators to initiate Medicaid false claims recovery actions in the State of Florida in the future. Dean Mead will continue to watch for and monitor legislative developments relevant to the FFCA.

To learn more about this subject, you may view the entire article written by Tracy Mabry, a member of our Healthcare and Life Science Team, below. And, as always, please do not hesitate to contact us if you have any questions.



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**OIG ADVISES FLORIDA ATTORNEY GENERAL OF
CHANGES NEEDED IN FLORIDA FALSE CLAIMS ACT**

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As enacted by the Deficit Reduction Act of 2005, section 1909 of the Social Security Act (Act) provides a financial incentive for States to enact false claims acts that establish liability to the State for the submission of false or fraudulent claims to the State's Medicaid program. If a State false claims act is determined to meet certain enumerated requirements, the State is entitled to an increase of 10 percentage points in its share of any amounts recovered under a State action brought under such a law. Under section 1909(b) of the Act, the Department of Health and Human Services Office of Inspector General (OIG) is required to determine, in consultation with the Attorney General of the United States, whether a State has in effect a law relating to false or fraudulent claims submitted to a State Medicaid program that meets the requirements enumerated in the provisions enacted by the Deficit Reduction Act. The effective date of the relevant Social Security Act amendment was January 1, 2007.

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First, to qualify for the incentives, federal law now requires a state law to establish liability to the state for those "false or fraudulent claims" described in the Federal False Claims Act, 31 U.S.C. §3729. Among other things, the Federal False Claims Act creates liability for knowingly presenting, or causing to be presented, to an officer or employee

of the United States Government a false or fraudulent claim for payment or approval. In contrast, the Florida False Claims Act provides that only persons who "[k]nowingly present or cause to be presented to an officer or employee of an agency a false claim"...(omitting reference to "fraudulent" claims)... "for payment or approval" are liable to the State. See Florida Statutes §68.082(2)(a). Where the current Florida False Claims Act does not specifically prohibit the presentation of a fraudulent claim for payment or approval, the OIG determined that the FFCA language does not meet all of the requirements necessary in order for the State's Medicaid program to be eligible for the additional 10% share of any false claims recovery. We note that although the current Florida Statute also prohibits one from knowingly making, using, or causing to be made or used a false record or statement "to get a false or fraudulent claim paid or approved by an agency", the OIG's opinion was that the FFCA fell short of establishing liability for all the "false or fraudulent" claims prohibited under the Federal False Claims Act.

Second, and perhaps more significant to Florida providers, the new Deficit Reduction Act language also requires that the State false claims law contain provisions that are at least as effective in rewarding and facilitating qui tam actions as those described in the Federal False Claims Act, 31 U.S.C. §§3730-3732. "Qui tam" actions are those claims initiated by private whistleblowers. Among other things, the Federal False Claims Act permits an action to be filed no more than six (6) years after the date the violation is committed, or three (3) years after the date when facts material to the right of action are known or reasonably should have been known by the state official charged with the responsibility to act in the circumstances, whichever occurs last, but in no event more than ten (10) years after the date on which the violation is committed. See 31 U.S.C. §3731(b). In contrast, the Florida False Claims Act provides that a cause of action may be brought no more than five (5) years after the date of the violation, and no more than two (2) years after the date when facts material to the right of action are known or reasonably should have been known by the responsible state official; but in no event more than seven (7) years after the date on which the violation was committed, whichever occurs last. See Florida Statutes §68.089. Because the Florida act's statute of limitations, "discovery rule", and statute of ultimate repose each contain shorter periods than apply under the Federal False Claims Act, the Florida False Claims Act has been deemed not as effective in facilitating qui tam actions as the provisions of the Federal False Claims Act.

In his December 21, 2006 letter to L. Clayton Roberts, former Deputy Attorney General of the State of Florida, DHHS Inspector General Daniel Levinson stated: "If the FFCA is amended to address those issues, please notify the OIG for further consideration of a revised FFCA." Due to the significant financial incentives to the State which would accompany expansion of the Florida False Claims Act, we have anticipated that the 2007 Florida Legislature will pass amendments to the current Florida Statute, which would clearly result in an expansion of opportunities for the state and any would-be qui tam relators to initiate Medicaid false claims recovery actions in the State of Florida in the future. To date, however, no bills to amend the Florida False Claims Act have been filed in the 2007 Regular Session of the Florida Legislature. The deadline for introducing new legislation for the regular 2007 session is March 2nd. Dean Mead will continue to watch for and monitor legislative developments relevant to the FFCA.



e-newsletter

from the **healthcare** and **life sciences** team

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