

# United States Senate

WASHINGTON, DC 20510

April 28, 2010

The Honorable Daniel R. Levinson  
Inspector General  
Department of Health and Human Services  
330 Independence Ave, SW  
Washington, D.C. 20201

The Honorable Eric H. Holder, Jr.  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, D.C. 20535

Dear Inspector General Levinson and Attorney General Holder:

On February 8, 2006, President Bush signed the Deficit Reduction Act of 2005 (DRA) into law. (Pub. L. No. 109-171). Section 6031 of the DRA, codified at 42 U.S.C. § 1396(h), provides a financial incentive for States to enact state False Claims Acts (FCAs) that “contain provisions that are at least as effective in rewarding and facilitating qui tam actions for false claims as those described in the federal False Claims Act.” The DRA requires that the Office of the Inspector General at the Department of Health and Human Services (HHS/OIG) work in consultation with the Department of Justice (DOJ) to determine if a state FCA meets the qualifications outlined in section 6031. I write today regarding your responsibilities under section 6031 and the need to update compliance guidance to States to reflect recent changes to the federal False Claims Act (31 U.S.C. § 3729 et seq.) that were included in the Fraud Enforcement Recovery Act (Pub. L. No. 111-21) and the Patient Protection and Affordable Care Act (Pub. L. No. 111-148).

Section 6031 specifically outlines four requirements for determining if a state FCA is eligible for the incentive, specifically:

- (1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31 with respect to any expenditure described in [the Medicaid Program];
- (2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31;
- (3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General;
- (4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31.

To implement this section, the OIG published guidelines for evaluating state FCAs in the Federal Register on August 21, 2006. Those guidelines outline the basic requirements a state FCA must contain in order to be deemed compliant with the requirements of section 6031. The guidelines expressly state that the OIG will consider whether the state FCA liability provisions include language mirroring section 3729 of the federal False Claims Act. Further, the guidelines also describe the procedural requirements and whistleblower protections that a state FCA must have in order to be compliant. To date, the OIG has

deemed fourteen state FCAs compliant with section 6031 and eligible for the incentive. However, the OIG has determined that six other state FCAs fail to meet the requirements outlined in section 6031 and are not eligible for the incentive. While the requirements of section 6031 and the guidance issued in the Federal Register are clear, some States have continued to seek qualification for the incentive, despite their failure to pass robust legislation modeled after the federal FCA.

On May 20, 2009, President Obama signed into law the Fraud Enforcement Recovery Act (FERA) which included, among other things, substantive changes to the federal FCA's liability provisions located at 31 U.S.C. § 3729. Further, on March 23, 2010, President Obama signed into law the Patient Protection and Affordable Care Act (Pub. L. No. 111-148), which included substantive changes to the federal FCA by modifying the public disclosure bar and original source exceptions codified at 31 U.S.C. § 3730. Taken together, these changes represent the most substantial modifications to the federal FCA since I authored the 1986 amendments to revive the FCA.

These changes to the federal FCA removed liability loopholes and statutory confusion that were used to undermine the original intent of the federal FCA. As a result, in order to ensure that state FCA's that are currently qualified under section 6031, your offices should: (1) conduct a thorough review of state FCA's to determine if they remain in compliance with the requirements of section 6031 including the requirement to be "as effective as" the federal FCA as revised; (2) review the August 21, 2006, guidance to States that was published in the Federal Register to determine if the changes to the federal FCA impact your advice to States; (3) examine whether proposed state laws that include a "first-to-file" bar that would preclude *qui tam* relators from filing suit under a state FCA if a similar suit is filed under another state FCA, would be considered "at least as effective in rewarding and facilitating *qui tam* actions" under section 6031.

I am particularly interested in the examination of the "first to file" bar provisions in state FCAs. These provisions will severely limit *qui tam* actions brought by relators in States where the language is adopted. Such a provision is included in the Oklahoma Medicaid False Claims Act codified at Okla. Stat. tit. 63 § 5053.2(B)(5) (2010). While HHS/OIG ultimately concluded the Oklahoma statute was not as effective as the federal FCA in a letter dated July 24, 2008, the "first to file" bar was not addressed as part of HHS/OIG's analysis of Oklahoma's statute. Similar language is currently being debated as other States consider enacting state FCAs; thus, guidance from HHS/OIG and the Attorney General on this provision would help clarify if the inclusion of this provision would deem a statute ineligible for the incentive under section 6031.

I request that you conduct this review expeditiously and provide my office with a briefing to discuss the results of the review upon completion. Should you or your staff have any questions regarding this request please contact Nick Podsiadly of my Judiciary Committee staff at 202-224-9032.

Sincerely,

A handwritten signature in blue ink that reads "Chuck Grassley". The signature is fluid and cursive, with the first name "Chuck" and last name "Grassley" clearly distinguishable.

Charles E. Grassley  
United States Senator

Attachment



**SEC. 6031. ENCOURAGING THE ENACTMENT OF STATE FALSE CLAIMS ACTS.**

(a) IN GENERAL.—Title XIX of the Social Security Act (42 U.S.C. 1396 et seq.) is amended by inserting after section 1908A the following:

“STATE FALSE CLAIMS ACT REQUIREMENTS FOR INCREASED STATE SHARE OF RECOVERIES

“SEC. 1909. (a) IN GENERAL.—Notwithstanding section 1905(b), if a State has in effect a law relating to false or fraudulent claims that meets the requirements of subsection (b), the Federal medical assistance percentage with respect to any amounts recovered under a State action brought under such law, shall be decreased by 10 percentage points.

“(b) REQUIREMENTS.—For purposes of subsection (a), the requirements of this subsection are that the Inspector General of the Department of Health and Human Services, in consultation with the Attorney General, determines that the State has in effect a law that meets the following requirements:

“(1) The law establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to any expenditure described in section 1903(a).

“(2) The law contains provisions that are at least as effective in rewarding and facilitating qui tam actions for false or fraudulent claims as those described in sections 3730 through 3732 of title 31, United States Code.

“(3) The law contains a requirement for filing an action under seal for 60 days with review by the State Attorney General.

“(4) The law contains a civil penalty that is not less than the amount of the civil penalty authorized under section 3729 of title 31, United States Code.

“(c) DEEMED COMPLIANCE.—A State that, as of January 1, 2007, has a law in effect that meets the requirements of subsection (b) shall be deemed to be in compliance with such requirements for so long as the law continues to meet such requirements.

“(d) NO PRECLUSION OF BROADER LAWS.—Nothing in this section shall be construed as prohibiting a State that has in effect a law that establishes liability to the State for false or fraudulent claims described in section 3729 of title 31, United States Code, with respect to programs in addition to the State program under this title, or with respect to expenditures in addition to expenditures described in section 1903(a), from being considered to be in compliance with the requirements of subsection (a) so long as the law meets such requirements.”.

(b) EFFECTIVE DATE.—Except as provided in section 6035(e), the amendments made by this section take effect on January 1, 2007.