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STATE OF MINNESOTA

OFFICE OF THE ATTORNEY GENERAL

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ATTORNEY GENERAL

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January 13, 2012

Honorable Morrie Lanning
Chair, State Government Finance Committee
379 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1298

Honorable Mike Parry
Chair, State Government Innovation and
Veterans Committee
309 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1606

Honorable Phyllis Kahn
Minnesota House of Representatives
353 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1298

Honorable Richard Cohen
Minnesota State Senate
109 State Office Building
100 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155-1298

Re: Report Required Under Minn. Stat. § 15C.16 (2010)

Dear Chairs and Ranking Members:

As you know, the Minnesota False Claims Act ("MFCA") became effective July 1, 2010. Minn. Stat. § 15C.16 (2010) requires this Office to report to the chairs and ranking minority members of the Senate and House of Representative Committees with jurisdiction over state government finance by January 15 of each year on activities carried out under Chapter 15C during the prior calendar year. Pursuant to this requirement, I am providing the following information:

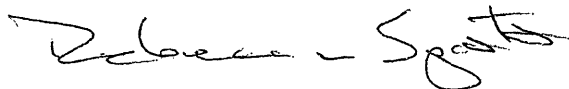
- 1) *The number of complaints received by the Attorney General's Office under Minn. Stat. § 15C.05 (2010):* Sixty one complaints were received in 2011, where a claim was made that included, in part, Minn. Stat. § 15C.05. Only one of these complaints was filed exclusively under § 15C.05, and the rest were filed primarily under the Federal False Claims Act ("FCA").
- 2) *The number of times in 2011 the Attorney General's Office intervened and declined to intervene after receiving a complaint filed pursuant to Minn. Stat. § 15C.05:* The Office declined participation in five cases, and four cases were dismissed by the relators in 2011. The Office intervened in four cases in 2011. The Office is participating in eighty four cases under the federal FCA that were filed in 2010 and 2011.

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Honorable Mike Parry
Honorable Phyllis Kahn
Honorable Richard Cohen
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- 3) *An estimate of the amount of time spent by attorneys in the Attorney General's Office and an estimate of the amount of time spent by other staff in the Attorney General's Office on activities carried out in 2011 under Chapter 15C: 1653.4 attorney hours and 47.5 non-attorney hours were spent on the cases listed in paragraphs 1 and 2.*
- 4) *Net proceeds received by the State in 2011 for each action under this Chapter: One case was settled with \$303,286.70 being disbursed to the Minnesota Department of Human Services pursuant to federal Medicaid fraud provisions.*

Please be advised that this Office continues to be a member of the National Association of Medicaid Fraud Control Units ("NAMFCU") and through this participation works in conjunction with other states and with the United States Department of Justice to pursue recoveries under the Federal False Claims Act. The Medicaid Fraud Control Unit of this Office has been advised in a letter, hereto attached, dated August 31, 2011 by Daniel Levinson, Inspector General of the Department of Health and Human Services, that the Minnesota False Claims Act provisions do not meet the requirements for the enhanced financial incentive provided by section 1909 of the Federal Deficit Reduction Act ("DRA"). Due to a variety of recent changes to federal law, it is our understanding that all previously approved states fell out of compliance with the requirements of section 1909 of the DRA. The Office of the Inspector General has stated that states previously recognized to be DRA compliant will continue to be considered compliant until March 31, 2013, after which time they must be re-approved. To date, only Connecticut and Iowa have been re-approved by the Inspector General.

Sincerely yours,



REBECCA SPARTZ
Director of Administration

(651) 757-1111

Enclosure: August 31, 2011 Correspondence from Daniel Levinson, Inspector General of the Department of Health and Human Services



AUG 31 2011

Ms. Deborah R. Peterson
Director, Medicaid Fraud Control Unit
Office of the Attorney General
445 Minnesota Street, Suite 1200
St. Paul, MN 55101-2130

Dear Ms. Peterson:

The Office of Inspector General (OIG) of the U.S. Department of Health & Human Services (HHS) has received your request to review the Minnesota False Claims Act, Minn. Stat. §§ 15C.01 through 15C.16, under the requirements of section 1909 of the Social Security Act (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). We have determined, after consulting with DOJ, that the Minnesota False Claims Act does not meet 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.

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 presenting, or causing to be presented, a false or fraudulent claim for payment or approval (removing the requirement that the claim be presented to an officer or employee of the Government);
- knowingly making, using, or causing to be made or used, a false record or statement material to a false or fraudulent claim;

- conspiring to commit a violation of the Federal False Claims Act; and
- 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 Government, or knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or property to the Government.

See 31 U.S.C. § 3729(a). Relevant to the above-described bases for liability, the Federal False Claims Act, as amended by the FERA, includes an expanded definition of the term “claim” and defines the terms “obligation” and “material.” See 31 U.S.C. § 3729(b). In contrast, the Minnesota False Claims Act does not establish liability for the same breadth of conduct as the Federal False Claims Act, as amended. See Minn. Stat. §§ 15C.01, 15C.02. Therefore, the Minnesota False Claims Act does not establish liability for the false or fraudulent claims described in the Federal False Claims Act.

In addition, the Minnesota False Claims Act provides that “an employer is not liable for an act committed by a nonmanagerial employee that violates this section, unless the employer had knowledge of the act, ratified the act, or was reckless in the hiring or supervision of the employee.” See Minn. Stat. § 15C.02(e). The Federal False Claims Act contains no similar limitation on liability. Therefore, the Minnesota False Claims Act does not establish liability for the false or fraudulent claims described in the Federal False Claims Act.

In addition, the Minnesota False Claims Act provides that “[e]xcept in cases where proof of specific intent to defraud the state or a political subdivision is found, a person is not liable under this section if ... the person repays the amount of actual damages to the state or the political subdivision within 45 days after being so informed.” See Minn. Stat. § 15C.02(f)(2). The Federal False Claims Act contains no similar limitation on liability. Therefore, the Minnesota False Claims Act does not establish liability for the false or fraudulent claims described in the Federal False Claims Act.

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 and the Dodd-Frank Act, provides certain relief to any employee, contractor, or agent who is retaliated against because of lawful acts done in furtherance of a Federal False Claims Act action or efforts to stop violations of the Federal False Claims Act. See 31 U.S.C. § 3730(h). The Minnesota False Claims Act does not provide these persons with as much protection from retaliatory action. See Minn. Stat. § 15C.14. Therefore, the Minnesota 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, as amended by the Dodd-Frank Act, establishes a 3-year statute of limitations for retaliation actions. See 31 U.S.C. § 3730(h)(3). The Minnesota False Claims Act does not provide at least a 3-year statute of limitations for retaliation actions. Therefore, the Minnesota 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, 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 Minnesota False Claims Act does not contain a similar provision. Therefore, the Minnesota 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, as amended by the ACA, provides that the court shall dismiss an action or claim under the Federal False Claims Act, unless opposed by the Government, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a Federal criminal, civil, or administrative hearing in which the Government or its agent is a party; (2) in a congressional, Government Accountability Office, or other Federal report, hearing, audit, or investigation; or (3) by the news media, unless the action is brought by the Attorney General or a person who is an original source of the information. See 31 U.S.C. § 3730(e)(4)(A). In contrast, the Minnesota False Claims Act requires a court to dismiss a broader category of cases based on a public disclosure. See Minn. Stat. § 15C.05(c)(3). In addition, the Minnesota False Claims Act does not give the State the opportunity to oppose the dismissal when the State has not intervened in the action. See *id.* Therefore, the Minnesota False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

Further, the Federal False Claims Act, as amended by the ACA, defines "original source" as an individual who either: (1) prior to a public disclosure, voluntarily disclosed to the Government the information on which the allegations or transactions in a claim are based or (2) 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 Government before filing an action. See 31 U.S.C. § 3730(e)(4)(B). In contrast, the Minnesota False Claims Act has a more restrictive definition of "original source." See Minn. Stat. § 15C.01 (subd. 4). Therefore, the Minnesota 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 Minnesota False Claims Act limits actions brought by relators by requiring "money, property, or services provided by the state" or "political subdivision" to be involved. See Minn. Stat. § 15C.05(a). The Federal False Claims Act, as amended by the FERA, contains

no similar limitation. Therefore, the Minnesota 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 “no court shall have jurisdiction over an action brought [by a relator] against a Member of Congress, a member of the judiciary, or a senior executive branch official *if the action is based on evidence or information known to the government when the action was brought.*” See 31 U.S.C. § 3730(e)(2)(A) (emphasis added). The Minnesota False Claims Act contains a similar limitation; however, it is not restricted to actions based on evidence or information known to the State when the action was brought. See Minn Stat. § 15C.05(c)(1). Therefore, the Minnesota 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 if the Government initially elects not to proceed with the action, “the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.” See 31 U.S.C. § 3730(c)(3). In contrast, the Minnesota False Claims Act more stringently provides that “[i]f the prosecuting attorney elects not to intervene at the outset of the action, the prosecuting attorney may intervene subsequently, *upon timely application* and good cause shown.” See Minn Stat. § 15C.08(b) (emphasis added). Further, for cases in which the prosecuting attorney “intervene[s] subsequently,” the Minnesota False Claims Act does not provide that the relator remains a party *without limitation to his or her status or rights.* See id. Therefore, the Minnesota 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 a relator “*shall ... receive an amount for reasonable expenses ... plus reasonable attorneys’ fees and costs.*” See 31 U.S.C. § 3730(d)(1) (emphasis added). In contrast, the Minnesota False Claims Act provides that “the court *may authorize* the prosecuting attorney or [relator] to recover reasonable costs, reasonable attorney fees, and the reasonable fees of expert consultants and expert witnesses.” See Minn. Stat. § 15C.12 (emphasis added). Therefore, the Minnesota 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 “[i]f the Government proceeds with an action brought by a [relator], such person shall ... receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, *depending on the extent to which the person substantially contributed to the prosecution of the action.*” See 31 U.S.C. § 3730(d)(1) (emphasis added). In contrast, for cases in which the prosecuting attorney “subsequently intervenes,” the Minnesota False Claims Act more narrowly bases the relator’s share on the relator’s “participation in the action *before* the prosecuting attorney intervened.” See Minn. Stat. § 15C.13 (emphasis added). Therefore, the Minnesota False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

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In addition, the Federal False Claims Act provides that the relator shall receive a certain percentage “of the proceeds of the action or settlement.” See 31 U.S.C. §§ 3730(d)(1) and (2). In contrast, the Minnesota False Claims Act provides that if the prosecuting attorney intervenes at the “outset” or “subsequently,” the relator is entitled to receive a portion of “any recovery.” See Minn Stat. § 15C.13. If, however, the prosecuting attorney does not intervene in the action, the relator is entitled to receive a portion of “any recovery of the civil penalty and damages, or settlement.” See id. Because “any recovery” appears not to include the proceeds of a settlement, the Minnesota False Claims Act is not at least as effective in rewarding and facilitating *qui tam* actions as the Federal False Claims Act.

If the Minnesota False Claims Act is amended to address the issues noted above, please notify OIG for further consideration of the Minnesota False Claims Act. If you have any questions, please contact me or have your staff contact Katie Arnholt, Senior Counsel, at 202-205-3203 or Lisa Veigel, Senior Counsel, at 202-205-4489.

Sincerely,

A handwritten signature in cursive script that reads "Daniel R. Levinson".

Daniel R. Levinson
Inspector General