



DEC 21 2006

Mr. Patrick O'Connell
Assistant Attorney General
Chief, Civil Medicaid Fraud Section
Elder Law and Public Health Division
Office of the Attorney General, State of Texas
P.O. Box 12548
Austin, Texas 78711

Dear Mr. O'Connell:

The Office of Inspector General (OIG) of the U.S. Department of Health and Human Services (HHS) has received your request to review the Texas Medicaid Fraud Prevention Act, Tex. Hum. Res. Code Ann. §§ 36.001 – 36.132, under the requirements of Section 6031(b) of the Deficit Reduction Act (DRA). Section 6031 of the DRA 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 6031(b) of the DRA, as determined by the Inspector General of HHS in consultation with the Department of Justice (DOJ). Based on our review of the law and consultation with DOJ, we have determined that the Texas Medicaid Fraud Prevention Act does not meet the requirements of section 6031(b) of the DRA.

First, section 6031(b)(2) of the DRA requires that 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 the Federal False Claims Act, 31 U.S.C. §§ 3730-3732. Among other things, the Federal False Claims Act permits relators to bring civil actions under the law on behalf of the United States and to conduct the action if DOJ declines to intervene in the action. See 31 U.S.C. § 3730(c)(3). In contrast, the Texas Medicaid Fraud Prevention Act does not permit a *qui tam* relator to conduct the action if the Texas Attorney General's Office declines to intervene in the action. See Tex. Hum. Res. Code Ann. § 36.104. Therefore, this provision in the Texas law does not appear to be as effective in facilitating *qui tam* actions for false or fraudulent claims as the Federal False Claims Act provisions.

The Federal False Claims Act also permits a relator to recover at least 15 percent of the proceeds of the action or settlement of the claim if the Government has intervened in the action. See 31 U.S.C. § 3730(d). In contrast, the Texas Medicaid Fraud Prevention Act permits the relator to recover at least 10 percent of the proceeds of the action. See Tex. Hum. Res. Code Ann. § 36.110. Therefore, the Texas law does not appear to be as effective in rewarding *qui tam* actions as the Federal law.

Next, section 6031(b)(4) of the DRA requires a state law to contain a civil penalty that is not less than the civil penalty amounts authorized under the Federal False Claims Act, 31 U.S.C. § 3729. This provision permits the United States to recover three times the amount of damages in addition to penalties of at least \$5,000 and up to \$10,000 per false claim. The Texas Medicaid Fraud Prevention Act, in contrast, permits the state to recover not less than \$1,000 but no more than \$10,000 for each unlawful act in the absence of injury to an elderly person, disabled person, or a person younger than 18 years of age. See Tex. Hum. Res. Code Ann. § 36.052. Because the minimum civil penalties under the Texas law are less than the amount permitted under the Federal False Claims Act, the Texas law does not meet this requirement under the DRA.

In addition, we note that the Federal False Claims Act requires the United States to prove each of the elements of the cause of action, including damages, by a preponderance of the evidence. See 31 U.S.C. § 3731(c). Because the Texas Medicaid Fraud Prevention Act does not have an explicit burden of proof, we presume the burden of proof for the Texas law would follow the common law preponderance of the evidence standard. To the extent that any Texas statute establishes a higher burden of proof for any element of the cause of action, including damages, such a provision may not be as effective in facilitating or rewarding *qui tam* actions as the Federal False Claims Act.

If the Texas Medicaid Fraud Prevention Act is amended to address the issues noted above, please notify OIG for further consideration of the Texas Medicaid Fraud Prevention Act. If you have any questions regarding this review, please contact me, or have your staff contact Roderick Chen at 202-401-4134 or roderick.chen@oig.hhs.gov.

Sincerely,

Handwritten signature of Daniel R. Levinson in black ink.

Daniel R. Levinson
Inspector General

cc: Aaron Blight, CMS