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FISCAL IMPACT REPORT

ORIGINAL DATE 02/03/12
LAST UPDATED 02/09/12 **HB** 80

SPONSOR Cervantes

SHORT TITLE Medicaid False Claims Act Actions **SB** _____

ANALYST Daly

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY12	FY13	FY14		
Indeterminate*	Indeterminate*	Indeterminate*	Recurring	General Fund et al.

(Parenthesis () Indicate Revenue Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY12	FY13	FY14	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total	Minimal*	Minimal*	Minimal*	Minimal*	Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

*See Fiscal Implications

Relates to HB 66 and SB 234

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General’s Office (AGO)
 Public Regulation Commission (PRC)
 General Services Department (GSD)
 Educational Retirement Board (ERB)
 Human Services Department (HSD)

SUMMARY

Synopsis of Bill

House Bill 80 clarifies the Medicaid False Claims Act that any person—instead of any “affected person”—may bring a private civil action to recover State Medicaid funds that were lost due to fraud. This change makes the Medicaid False Claims Act consistent with the Fraud Against Taxpayers Act as well as with analogous federal law. (Section 1)

Additionally, HB 80 makes a series of technical changes to the Fraud Against Taxpayers Act (“FATA”). It:

- Adds language that characterizes the damages available under FATA as civil, remedial and curative. (Section 3)
- Gives the Attorney General discretion in the extent to which the Attorney General investigates potential FATA claims. (Section 4)
- Sets forth a maximum time period of 180 days during which the Attorney General can unilaterally extend the seal imposed on private civil actions under FATA and evaluate the case before allowing it to go forward. Any further extensions require the consent of the qui tam plaintiff. HB 80 also allows the qui tam plaintiff to elect to proceed with the case if the AGO has not made a determination about whether or not to intervene within 180 days. (Section 5)
- Clarifies that in cases in which the State intervenes and asserts other non-FATA legal claims, the qui tam plaintiff has the same rights—including a potential share in the recovery—as to such claims if they are based on the allegations or information provided by the qui tam plaintiff. This clarifies the scope of the incentive for relators to assist the State in pursuing other claims for recovery for the State. House Bill 80 also provides that the State can recover its attorneys’ fees and costs if it succeeds in pursuing non-FATA claims. (Section 6)
- Specifically directs certain of the funds recovered through successful FATA actions: attorney fees and costs recovered from defendants for costs and time incurred by the AGO shall be paid to that office, and residual recoveries from FATA claims are to be used by the AGO to provide staffing to pursue additional FATA claims. (Section 7)
- Eliminates the AGO’s ability to dismiss a FATA claim based on publicly disclosed information if the qui tam plaintiff is the original source of the information. (Section 8)
- Enacts a new section of the Act to authorize the AGO to issue civil investigative demands (or “CIDs”)—akin to subpoenas—to obtain documentary materials in furtherance of an investigation of a FATA claim. (Section 9)

HB 80 contains an emergency clause.

FISCAL IMPLICATIONS

As to the amendment in HB 80 clarifying that any person can bring a private civil action for violation of the Medicaid False Claims Act, the HSD predicts no material fiscal impact to that department beyond additional IT staff and equipment to support any new investigations and to ensure appropriate data is available from the Medicaid management information system. Any increase in investigations is unknown at this time, but based on HSD’s analysis, the impact on HSD’s operating budget is estimated to be minimal, as set out in the table above.

The GSD notes that under HB 80's amendments to FATA, the Risk Management Division will continue to incur costs and attorney fees associated with providing a defense to public employees in civil suits brought under FATA, as well as any settlement amounts or penalties and judgments awarded if the public employee is found to have violated FATA. These expenses are paid from the Public Liability Fund and the GSD reports that these expenses depend on how many suits are filed, how complicated the allegations are and whether or not the public employee is found to have violated FATA.

On the other hand, the AGO anticipates that the amendments to FATA contained in this bill will result in no additional costs or fiscal burdens to the State, and believes they increase the likelihood of potential significant recoveries of money to the State through civil actions for fraud. Because no specific estimates can be made at this time as to those savings, the table above reflects the increase as indeterminate.

SIGNIFICANT ISSUES

The AGO asserts that the technical changes in HB 80 strengthen the FATA in ways that would facilitate the State's recovery of funds lost due to fraud and misconduct. For example, the AGO points out that under existing law, the AGO has the duty to investigate potential FATA claims, but has no formal means for doing so. The authority granted in HB 80 to issue Civil Investigative Demands would substantially aid the AGO in investigating FATA claims. Almost every other jurisdiction with a law comparable to FATA provides this authority.

The AGO does, however, raise a concern as to the new 180 day time limit in FATA for action by that office:

The 180-day deadline for action by the AGO may not be enough time in some cases. If, for example, HB 80 is enacted and the AGO has CID authority to investigate a proposed qui tam case, it may take substantial time to evaluate the case, develop and issue CIDs, enforce the CIDs in court if necessary, and review and evaluate the documents obtained through a CID.

This problem is mitigated somewhat by the fact that the qui tam plaintiff's ability to proceed unilaterally with the case after 180 days is discretionary. In most cases, qui tam plaintiffs are very eager to secure the AGO's intervention. Therefore, in most cases in which the AGO needs more time, the qui tam plaintiff would likely consent to further extensions of the seal. There may be rare cases, however, in which the AGO needs more than 180 days to investigate the case, but the qui tam plaintiff is unwilling to consent to additional extensions. In such cases, the AGO retains the ability to intervene in the case at a later date, but must show good cause for doing so.

The HSD points to the provision in existing law that allows the AGO to delegate to a state agency the authority to investigate or bring a civil action for any false claim made to that agency (section 44-9-4), at which point the state agency has every power given to the AGO under the FATA. In light of the new section granting the AGO the authority to issue CIDs, the HSD questions whether that authority would also transfer to an agency that has been delegated power to investigate and sue for a false claim, noting that state agencies currently do not have subpoena power once a civil action has commenced. Given that limitation, HSB believes it would not be consistent to grant an agency power to issue CIDs.

The ERB comments that the bill protects the right of a legitimate *qui tam* plaintiff to not have that plaintiff's claim dismissed if the plaintiff is the source of the information that is at the heart of the FATA claim. However, as drafted, the ERB points out HB 80 continues to leave open a possibility that a *qui tam* plaintiff could use information that that plaintiff did not originate, or that does not even affect that plaintiff in any significant manner, that was obtained from public information that came from a source not specifically listed in Section 8(D).

RELATIONSHIP

HB 80 relates to HB 66, Medicaid Fraud Prevention and Detection and SB 234, Fraud Against Taxpayers Act Public Liability.

TECHNICAL ISSUES

The new language contained in Section 44-9-5(C) (on page 9, lines 5-7) allows a *qui tam* plaintiff to consent to extensions of time beyond the 180 day time limit, yet new subsection E (on page 9, lines 18-23) allows that plaintiff to proceed with the action after 180 days. To avoid any confusion, the legislature may want to consider adding a phrase like “ Except when the *qui tam* plaintiff has consented to an extension under Subsection C” at the beginning of Subsection E.

To avoid confusion, the AGO suggests that, in light of the general term “person” that would now appear in the Medicaid False Claims Act, (see page 2, line 5), the legislature may want to amend the definitions in that Act (section 27-14-3) to include the same definition of “person” as is contained in FATA (section 44-9-2(D)).

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AGO advises that the failure to enact HB 80 could mean that the State, in some cases, would either forego or have a substantially more difficult time pursuing fraud and related claims, which claims often carry the possibility of significant recoveries for the state. As to the amendment to the Medicaid False Claims Act, the HSD points out that currently, only those directly affected by a violation of that act are able to bring a claim. The HSD also comments that it would continue to work closely with the AGO in the pursuit of Medicaid fraud.

MD/lj:svb