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FISCAL IMPACT REPORT

ORIGINAL DATE 02/13/13

SPONSOR SPAC LAST UPDATED _____ HB _____

SHORT TITLE Medicaid False Claims Changes SB 133/SPACS

ANALYST Geisler/Courtney/
Griego

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY13	FY14	FY15		
\$0.0	\$0.1 Indeterminate		Recurring	Other state funds

(Parenthesis () Indicate Revenue Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Attorney General (AGO)
Human Services Department (HSD)
Administrative Office of the Courts (AOC)

SUMMARY

Synopsis of Bill

The Senate Public Affairs Committee (SPAC) substitute for Senate Bill 133 (SPAC/SB133) would transfer enforcement of the Medicaid False Claims Act from the Human Services Department (HSD) to the Office of the Attorney General (AGO). The AGO is given both investigatory and enforcement authority over the act. The bill would increase liability and certain penalties, and make extensive changes to actions for damages brought by individuals. The bill further expands whistleblower protections to also include “agents or contractors” as well as employees protected under current law, including those not directly affected by any Medicaid false claim.

FISCAL IMPLICATIONS

The original NM-MFCA enacted in 2004 and Fraud Against Taxpayers Act (FATA) enacted in 2007 have not been amended to reflect provisions of the Federal False Claims Act (FCA) and the Patient Protection and Affordable Care Act (ACA). Assuming the amended New Mexico

Medicaid False Claims Act (NM-MFCA) complies with the federal requirements and passes the federal review. The state would be entitled to receive a 10-percentage point increase in its share of any amounts recovered under the False Claims Act. Total Medicaid recoupment from all sources including HSD and the AGO was approximately \$6 million in FY10; assuming the NM-MFCA is found compliant after enactment of SPAC/SB133 it should provide a positive fiscal impact to the state.

SIGNIFICANT ISSUES

Need to Amend Current Statute

The Legislative Finance Committee (LFC) examined Medicaid, fraud, waste, and abuse controls in a July 2011 program evaluation. The LFC evaluation recommended that the Legislature revise state statute to bring the state False Claims Act into compliance with the United States Department of Health and Human Services (DHHS) Office of Inspector General (OIG) requirements to qualify for a 10 percent increase in state share of any recoveries awarded under the False Claims Act. SPAC/SB133 follows this LFC recommendation.

LFC staff review of SPAC/SB133 compared content of the bill with guidance provided by the U.S. DHHS OIG. SPAC/SB133 likely fulfills requirements provided by the U.S. DHHS OIG qualifying the state of New Mexico for an increase in state share of any recoveries awarded. SPAC/SB133 reflects the requirements of section 1909 of the Social Security Act. However, the legislation is still subject to review and final approval by the U.S. DHHS OIG.

The Attorney General and Human Services department both support the need to update the statute. The AG noted that the sooner the NM-MFCA is amended the better because FATA, a NM *qui tam* statute has been held to not be retroactive to activities occurring prior to enactment. Therefore, any sums due to NM in a successful FFCA and/or NM-MFCA case may still not be recoverable, depending upon the facts of a particular case, unless the activity occurred after the proposed NM-MFCA amendments are enacted. Consequently the State needs these amendments passed in this session, so that an enacted NM-MFCA can be submitted to HHS OIG for review and comment as soon as possible.

HSD noted that the amendments in this bill and legislative enactment are responsive to the federal Department of Health and Human Services letter to the New Mexico Medicaid Fraud Control Unit (MFCU), dated July 2008, which found that our state False Claims Act did not meet the Centers for Medicare and Medicaid Services (CMS) requirements for Medicaid federal matching dollars. Absent a finding of compliance with federal requirement, the state is prevented from recovering an additional 10 percent share of any Medicaid-related recoveries. The modifications in SPAC/SB 133 in a number of sections are primarily to mirror the federal False Claims Act.

State Agency Jurisdiction Concerns

Humans Services Department (HSD):

HSD notes that despite the fact that HSD manages the state's Medicaid program, SPAC/SB133 would limit civil actions to recover payments for health care services pursuant to the Medicaid program that are made by the state or through its contractors to the discretion of the attorney

general. The committee substitute partially reinstated HSD into MFCA, but left out HSD's ability to initiate civil fraud actions where, e.g., the attorney general files a criminal action but foregoes claims against an alleged fraudulent provider.

As the state agency with the responsibility for the Medicaid program and for repaying the federal government for its share of any overpayments made to under the program, HSD is uniquely situated to determine when enforcement is both appropriate and necessary. Unlike the Fraud Against Taxpayers Act, which includes a mechanism for the state agency to proceed with a civil fraud action in cases in which the attorney general declines to proceed. SPAC/SB133 would remove that same ability for HSD in cases of Medicaid fraud. See suggested amendments below.

The AGO provided the following input regarding the HSD concerns with SPAC/SB133:

In response to HSD's legal concerns that HSD is being replaced by the AGO, any action by the AGO would be for the benefit of HSD and all state agencies as well as the state treasury. HHS OIG's reviews of other states' *qui tam* acts require that state actions be brought by the attorney general on behalf of the state in the same manner FFCA actions are brought by the attorney general on behalf of the federal government.

It does not appear that HHS OIG would approve any amended MFCA which limited the authority and jurisdiction to sue in a state *qui tam* to only HSD. To address HSD's concerns, amendments could change NM-MFCA references where applicable from "attorney general" to "state," but would require a new provision that allows the "attorney general" and/or "HSD" to act under the definition of "state," similar to the Medicaid Fraud Act § 30-44-3.

OTHER SUBSTANTIVE ISSUES

The Administrative Office of the Courts provided the following summary of key changes in SPAC/SB133:

The SPAC/SB133 provides that if the AGO proceeds with the action, the state shall have the primary responsibility for prosecuting the action. The person bringing the action has the right to continue as a party to the action subject to the law's limitations. The bill permits a court to stay actions of discovery by the person bringing the action, for as many as 60 days, upon a showing by the AGO that the actions would interfere with the AGO's investigation or prosecution of a criminal or civil matter arising out of the same facts. The stay may be extended upon a further showing in camera. Under the SPAC/SB133, upon a showing by the AGO that unrestricted participation by the person initiating the action would interfere with or unduly delay the state's prosecution of the case. or would be repetitious, irrelevant or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation. Participation may also be limited upon a showing by the defense that unrestricted participation during the course of the litigation would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense. The SPAC/SB133 permits the AGO or the state to pursue an action through any available alternate remedy, including an administrative proceeding to determine a civil money penalty. The bill provides that if an alternative remedy is pursued in another proceeding, the person initiating the action shall have the same rights in the proceeding as the person would have had if the action had continued under the Medicaid False Claims Act. The substitute provides that, for purposes of pursuing an available alternate method, a finding of fact

or conclusion of law that has become final shall be conclusive on all parties to an action under this section. The bill provides that a finding or conclusion is final if it has been finally determined on appeal to the appropriate court, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

The SPAC/SB133 increases penalties for specified violations of the Act as a person shall be liable to the state for a civil penalty of from \$5,000 to \$10,000, plus 3 times the amount of damage that the state sustains as a result of the violation. The bill now requires a person to “knowingly” make, use or cause to be made or used a false record or statement material to an obligation to pay or transmit money to the state or to knowingly conceal or improperly avoid or decrease an obligation, for there to be a violation of the Act. Specified violations now also include having possession, custody or control of property or money used, or to be used, by the state or federal government under the Medicaid program and knowingly delivering, or causing to be delivered, less than all of that money or property, or conspiring to commit a violation of the Act.

The SPAC/SB133 defines “knowing” or “knowingly” to mean that a person, with respect to information and regardless of whether that person has a specific intent to defraud, has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the same. The bill defines “obligation” to mean an established duty, arising from an express or implied contractual, grantor-grantee or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation or from the retention of any overpayment. The bill defines “claim” to mean a request or demand, under contract or otherwise, for money or property, regardless of whether the federal or state government has title to the money or property, that meets specific requirements.

The SPAC/SB133 denies necessary jurisdiction by a court over an action pursuant to the Act substantially based upon the public disclosure of allegations or actions in a criminal, civil or administrative hearing in which the state is a party or from the news media, unless the action is brought by the AG or the person bringing the action is an original source of the information.

The SPAC/SB133 amends Section 27-14-12 NMSA 1978 to extend whistleblower protection under the Act to an agent or contractor, in addition to an employee. The substitute provides that a civil action brought by a whistleblower must be brought within 3 years from the date on which the retaliation occurred.

The SPAC/SB133 provides that a civil action for false claims against the state may not be brought more than 6 years after the date on which the violation is committed, or more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the AGO, but in no more than 10 years after the date on which the violation is committed, whichever occurs last. The bill further provides that if the state elects to intervene and proceed with an action brought by a *qui tam* plaintiff, the state may file its own complaint or amend the complaint of a *qui tam* plaintiff to clarify or add detail to the claims with respect to which the state contends it is entitled to relief. For statute of limitations purposes, a state pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state arises out of the conduct, transactions or occurrences set forth, or attempted to be set forth, in the prior complaint of that person. Finally, The SPAC/SB133 provides that when a final judgment is rendered in favor of the state in any

criminal proceeding charging fraud or false statements, upon a plea of nolo contendere, in addition to a verdict after trial or upon a plea of guilty, the defendant shall be stopped from denying the essential elements of the offense in any action that involves the same transaction as in the criminal proceeding and that is brought pursuant to the Medicaid False Claims Act.

AMENDMENTS

The Human Services Department recommends the following amendments to the SPAC Substitute for SB133 to restore HSD's ability to initiate civil fraud actions.

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1. Pg. 7 line 9: undelete "department" and insert "or the attorney general" immediately thereafter; delete "state"
2. Pg. 7 line 22: undelete "department" and insert "and the" immediately thereafter
3. Pg. 8 line 13: delete "attorney general" and insert "state" in its place
4. Pg. 9 line 25: undelete "department" and insert "or the" immediately thereafter
5. Pg. 10 line 8: delete "attorney general" and insert "state" in its place
6. Pg. 10 line 15: delete "attorney general" and insert "state" in its place
7. Pg. 10 line 25: undelete "department" and insert "or the" immediately thereafter
8. Pg. 11 lines 3-4: delete "attorney general's" and insert "state's" in its place
9. Pg. 11 line 9: delete "attorney general" and insert "state" in its place
10. Pg. 11 line 11: delete "attorney general" and insert "state" in its place
11. Pg. 11 line 13: delete "attorney general's" and insert "state's" in its place
12. Pg. 11 line 18: delete "attorney general" and insert "state" in its place
13. Pg. 11 line 23: delete "attorney general" and insert "state" in its place
14. Pg. 12 line 20: delete "state" and insert "department" in its place
15. Pg. 13 line 14: delete "attorney general" and insert "state" in its place
16. Pg. 14 line 18: delete "attorney general" and insert "state" in its place
17. Pg. 15 line 11: delete "attorney general" and insert "state" in its place
18. Pg. 16 line 1: undelete "department" and insert "or the" immediately thereafter
19. Pg. 16 line 2: delete "attorney general" and insert "state" in its place
20. Pg. 17 line 9: delete "attorney general" and insert "state" in its place
21. Pg. 17 line 18: delete "attorney general" and insert "state" in its place
22. Pg. 18 lines 9-10: delete "attorney general" and insert "state" in its place
23. Pg. 19 line 10: delete "attorney general" and insert "state" in its place

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

The AGO notes that the State will not be able to recover the additional 10 percent from the federal share. On a hypothetical NM \$1,000,000 *qui tam* recovery, the loss to the state would be \$100,000.

GG:JC:MG/blm