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FISCAL IMPACT REPORT

ORIGINAL DATE 01/31/13

SPONSOR Cervantes LAST UPDATED _____ HB _____

SHORT TITLE Clarify Fraud Against Taxpayers Act SB 153

ANALYST Daly

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY13	FY14	FY15	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
Total		NFI	NFI			

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the Courts (AOC)

Attorney General’s Office (AGO)

Human Services Department (HSD)

SUMMARY

Synopsis of Bill

Senate Bill 153, endorsed by the Courts, Corrections and Justice Committee, amends the Fraud Against Taxpayers Act (FATA). Significant substantive changes to the FATA:

- Grant the AG discretion in the extent to which the AG investigates potential FATA claims (Section 3);
- Limit extensions of the time for AG intervention to 120 days after the initial 60 day time limit when a FATA complaint has been filed by a private party on behalf of that party and the state (a “qui tam plaintiff”) and has been placed under seal (Section 4);
- Provide that once 180 days have elapsed after the AG has received a copy of the FATA complaint, the qui tam plaintiff may litigate the case as if the State had declined to intervene (Section 4);
- Clarify that in cases where the AG intervenes and asserts other non-FATA claims: 1) the qui tam plaintiff has the same rights—including a potential share in the recovery—as to those additional claims if they are based on allegations or information provided by the qui tam plaintiff; and 2) the state is entitled to attorney fees and costs based on the additional claims raised by the AG (Section 5);

- Require that when funds are recovered by the State for violations of FATA: 1) attorney fees and costs for costs and time incurred by the AGO shall be reimbursed to that office; and 2) one-half of any remaining funds shall be deposited into a fund for use by the AGO to provide staffing for FATA cases (the remaining one-half is deposited in the General Fund under existing law)(Section 6);
- Bar the AG from seeking dismissal of a FATA claim based on public disclosed information if the qui tam plaintiff is the original source of the information (Section 7); and
- Grant the AG authority to issue civil investigative demands (CIDs)—which are like subpoenas—to obtain documentary materials during an investigation of a FATA claim, subject to certain limitations and conditions, and provide procedures to enforce CIDs. (Section 8).

The effective date of this bill is July 1, 2013.

FISCAL IMPLICATIONS

The AGO does not anticipate any fiscal impact on the State and believes SB 153 may increase the likelihood of potentially significant recoveries of money to the State. There also is a potential for an increase in the State's share of Medicaid fund recoveries if the Section 7 amendment is enacted. See discussion under Significant Issues.

SIGNIFICANT ISSUES

The AGO believes SB 153 will significantly strengthen the State's ability to recover damages for fraud against the State under FATA. The AGO cites in particular the provision granting it authority to issue CIDs and reports that the AGO very much needs this tool to effectively investigate FATA claims, and advises almost every other state with a law comparable to FATA provides this investigative mechanism.

Similarly, as to the amendment regarding a qui tam plaintiff's share of a recovery contained in Section 5, the AGO comments that this change will make clear the strong incentive FATA provides to these persons to encourage them to assist the State in pursuing other claims for recovery by the State.

However, the AGO posits that the provisions in Section 4 that tighten the timelines for AGO action on a newly filed case may pose unintended problems and are, on balance, unnecessary. The AGO has a single attorney to review, investigate and litigate the dozens of qui tam FATA cases that are filed. These cases are often extremely complex. Under the analogous law at the federal level, it is not unusual for the U.S. Department of Justice to extend the sealed period for investigation of a complex case for several years. Such is the nature of these cases.

Further, the AGO believes SB 153 may needlessly be trying to rush the review process. Qui tam plaintiffs often desperately want the Attorney General's Office to intervene in order to bolster their case. They also want the Attorney General's Office to thoroughly review and investigate the case. This entire process takes considerable time. Indeed, if SB 153 is enacted and CID authority is granted, it will take months simply to develop, issue, receive and review responses from CIDs, particularly if the respondent seeks protective orders or is otherwise uncooperative. Because qui tam plaintiffs almost always want the Attorney General's Office's intervention, they

will typically support lengthy extensions of the sealed investigatory period, which SB 153 continues to allow with the plaintiff's consent. In some cases, however, the AGO asserts it might be hamstrung under SB 153 if, with an ongoing investigation at the six-month mark, the qui tam plaintiff insists on proceeding with the case.

Lastly, the AGO advises that, as to recoveries involving Medicaid monies, Section 7's bar prohibiting the AGO from seeking dismissal of a FATA claim based on publicly disclosed information if the qui tam plaintiff is the original source of the information might qualify New Mexico for enhanced recovery of Medicaid funds from the U.S. Department of Health and Human Services (HSSD). The AGO reports that currently, the federal government takes 75 cents of every dollar of Medicaid money recovered by the State, but HSSD has in the past suggested that it may take a lesser share if an amendment like this was enacted.

TECHNICAL ISSUES

HSD recommends the deletion of the word 'or' from NMSA Section 44-9-11(B) of FATA, as follows:

B. An employer shall not discharge, demote, suspend, threaten, harass, deny promotion to or in any other manner discriminate against an employee in the terms and conditions of employment because of the lawful acts of the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency ~~or~~ in furthering a fraud against taxpayers action, including investigating, initiating, testifying or assisting in an action filed or to be filed pursuant to the Fraud Against Taxpayers Act [44-9-1 NMSA 1978].

OTHER SUBSTANTIVE ISSUES

In light of the new section of FATA added in Section 8 of SB 153 which grants the AGO the power to issue CIDs, the HSD first calls attention to the existing language of Section 44-9-4(B) of FATA that authorizes the AG to delegate to a state agency to which a false claim was made the authority to investigate or bring a civil action as to that claim, and then comments:

If it is the bill's intent that the state agency then has the power to execute and serve the civil investigative demands that are provided for in new section 8 of FATA, it should be noted that state agencies do not currently have subpoena power once a civil action has commenced. It would thus be incongruous for those agencies to have the power to issue civil investigative demands *prior* to the commencement of such an action.

MD/svb