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FISCAL IMPACT REPORT

ORIGINAL DATE 2/12/18

SPONSOR Ortiz y Pino **LAST UPDATED** _____ **HB** _____

SHORT TITLE Medicaid & Taxpayer Fraud Acts Changes **SB** 75

ANALYST Esquibel

REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY18	FY19	FY20		
	Indeterminate, up to \$600.0		Recurring	General Fund

(Parenthesis () Indicate Revenue Decreases)

Relates to Senate Bill 2, Medicaid Changes.

SOURCES OF INFORMATION

LFC Files

Responses Received From

New Mexico Attorney General (NMAG)

Responses Not Received From

Human Services Department (HSD)

SUMMARY

Synopsis of Bill

Senate Bill 75 (SB 75) amends the New Mexico Medicaid False Claims Act, NMSA 1978, §§ 30-44-1 to -8 (1989, as amended through 2004) (MFCA) to mirror the federal False Claims Act, 31 U.S.C.A. § 3729 (2011) (FCA), allowing the state to retain an additional percentage of the total recovery made in a case brought under the MFCA.

Section 1909 of the Social Security Act creates a financial incentive for states to enact legislation that establishes liability to the state for false or fraudulent claims to the Medicaid program. Presently, when a recovery is made as a result of an action relating to false or fraudulent claims under the Medicaid program, New Mexico must share the recovery with the federal government in the same proportion that the federal government contributes to the New Mexico Medicaid program. This percentage, called the federal medical assistance percentage (FMAP) varies, but is approximately 25 to 30 percent. As incentive for enacting legislation that mirrors the federal

FCA, the states in compliance may retain an additional 10 percent of the FMAP for all amounts recovered under the compliant Act. The current MFCA does not pass federal review. Therefore, New Mexico is currently not qualified to retain the additional funds.

In order to qualify for this incentive, the state law must meet certain requirements, as determined by the Department of Health and Human Services—Office of the Inspector General (HHS-OIG), in consultation with the United States Attorney General. HHS-OIG provides specific guidelines for drafting qualifying false claims legislation. False claims actions may be initiated by the State or a relator (a whistleblower in a qui tam lawsuit filed on behalf of the State). In reviewing state laws for compliance, HHS-OIG closely reviews any variation from the FCA. In order to qualify, a state false claims act must establish liability to the state for false or fraudulent claims, as described in the FCA with respect to Medicaid spending. It 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 FCA; contain a requirement for filing an action under seal for 60 days with review by the State Attorney General; and contain a civil penalty that is not less than the amount of the civil penalty authorized under the FCA. The State law must mirror the language within the FCA, including the definitions contained therein, with little variation.

SB 75 authorizes the New Mexico Attorney General to investigate and pursue violations of the MFCA. Currently, the MFCA only authorizes the Human Services Department (HSD) to investigate and pursue MFCA claims. The amendments do not remove the authority of HSD.

SB 75 incorporates language to mirror the FCA, including definitions of commonly used terms, and the mirroring of language throughout. The amendments also make the New Mexico Act more relator-friendly by removing the current language which provides for the automatic unsealing of the complaint at the expiration of the seal.

Section 11 adds a provision to allow the Attorney General to obtain attorney fees and costs. This provision is mirrored in Section 18, which would enable the Attorney General to recover attorney fees and costs under the New Mexico's Fraud Against Taxpayers Act, NMSA §§ 44-9-1, *et seq.* (“FATA”).

Section 12 adds a civil investigative demand provision, which would enable the Attorney General to obtain documents, answers to interrogatories, and require oral testimony during the investigative process. This provision is mirrored in Section 22, which would enable the Attorney General to issue civil investigative demands in false claims actions brought under FATA.

FISCAL IMPLICATIONS

The bill does not include an appropriation.

The Attorney General’s Office indicates SB 75 would bring the MFCA into compliance with the FCA, enabling New Mexico to retain an additional 10 percent of recoveries made under the Act. Based on past recoveries, the additional funds could be significant. For example the State could have retained an additional \$600,479 in FFY 2016, if New Mexico’s law had passed federal review.

SIGNIFICANT ISSUES

The Attorney General's Office notes the current version of SB 75 has passed informal federal review, and any amendments may take it out of compliance with the federal requirements.

RAE/al