ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

Mr. Daniel R. Levinson
Inspector General
Office of Inspector General
Department of Health and Human Services
Room 5541 Cohen Building
330 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Texas False Claims Act – Request for Approval Under the Deficit Reduction Act of 2005

Dear Mr. Levinson:

On March 21, 2011, your office notified the State of Texas that, because of recent amendments to the Federal False Claims Act (the FCA), the "Texas False Claims Act" (the Texas Medicaid Fraud Prevention Act, or the TMFPA), no longer meets the requirements of section 1909 of the Social Security Act (the Act). On August 31, 2011, your office supplemented your March 21 correspondence with a letter that raised additional purported issues. Specifically, your office wrote that the TMFPA did not establish a 3-year statute of limitations for retaliation actions, and thus did not establish a limitations period at least as long as the 3-year period established under the Act. However, since your office notified the state about these issues in 2011, the Texas legislature amended the TMFPA. In light of those statutory changes and the further considerations set forth below, we believe that the TMFPA is in compliance with the Act, and we hereby resubmit it to the Office of the Inspector General for approval:

The TMFPA as Amended Establishes Liability for a Broader Swath of Conduct than the FCA

Your March 21, 2011 letter noted that the TMFPA did not include either the expanded definition of "claim" or the addition of definitions for the terms "obligation" and "material." To address these concerns, the TMFPA has been amended to define the term "material" as "having a natural tendency to influence or to be capable of influencing." TEX. HUM. RES. CODE § 36.001(5-a) (amendments effective September 1, 2011). This definition is broader than that provided in the current version of the FCA (which defines "material" as "having a natural tendency to influence, or be capable of influencing, *the payment or receipt of money or property*"[1]). The TMFPA also has been amended to define the term "obligation" with language virtually identical to that found in the FCA as "a duty, whether or not fixed, that arises from: (A) an express or implied contractual, grantor-grantee, or licensor-licensee relationship; (B) a fee-based or similar relationship; (C) a statute or regulation; or (D) the retention of any overpayment." TEX. HUM. RES. CODE § 36.001(7-a) (amendments effective September 1, 2011).

With regard to the term "claim," unlike the FCA, liability under the TMFPA is not tied specifically to the making of, or presentation of a false claim as defined in the FCA (although, of course, such conduct is covered by the unlawful acts enumerated under the statute). The TMFPA thus provides for a broader

[1] Because the TMFPA does not require the payment or receipt of money to establish a violation, the remainder of the federal definition was not applicable to the Texas statute and was not added.

scope of potential liability than the FCA, and the federal definition of "claim" would not expand the breadth of conduct currently covered by the TMFPA. Inclusion of the federal definition of "claim" could have the unintended effect of limiting the breadth of the statute by giving the appearance of adding an additional element to incur liability. Therefore, the federal definition of "claim" was not added to the TMFPA.

The TMFPA Now Provides Persons with Protection from Retaliatory Action that is the Same or Broader than that Provided by the FCA

Your March 21, 2011 letter noted that the TMFPA did not provide individuals with as much protection from retaliatory action as the FCA. The relevant portion of the TMFPA has since been amended to address this concern as follows:

> Sec. 36.115. RETALIATION [~~BY EMPLOYER~~] AGAINST PERSON [~~BRINGING SUIT~~] PROHIBITED.
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> (a) A person, including an employee, contractor, or agent, who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment [~~by the person's employer~~] because of a lawful act taken by the person in furtherance of an action under this subchapter, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this subchapter, or other efforts taken by the person to stop one or more violations of Section 36.002 is entitled to:
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> (1) reinstatement with the same seniority status the person would have had but for the discrimination; and
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> (2) not less than two times the amount of back pay, interest on back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees.

TEX. HUM. RES. CODE § 36.115(a) (amendments effective September 1, 2011). We believe these changes, which closely track the language of the corresponding provisions of the FCA, provide materially the same protection from retaliatory action as that provided by the FCA.

In your August 31, 2011 letter, you also noted that the TMFPA "does not provide at least a 3-year statute of limitations for retaliation actions. Therefore, the [TMFPA] is not at least as effective in rewarding and facilitating *qui tam* actions as the [FCA]." In actuality, the TMFPA does not provide any limitations periods, either for *qui tam* or retaliation actions. In the case of retaliation actions,[2] Texas law dictates a four year statute of limitations period for statutory causes of action with no express limitations period. (Texas Civil Practice and Remedies Code §16.051.) Because Texas law currently provides a longer period of limitations than the FCA, the TMFPA is at least as effective as the FCA in this regard. Therefore, no statute of limitations for retaliation actions was added to the TMFPA.

[2] *Qui tam* actions are discussed further below.

The TMFPA is at Least as Effective in Rewarding and Facilitating *Qui Tams* as the FCA

Your March 21, 2011 letter noted that the TMFPA "requires a court to dismiss a broader category of cases [than the FCA] based on a public disclosure and does not give Texas the opportunity to oppose dismissal. Therefore, the [TMFPA] is not at least as effective in rewarding and facilitating *qui tam* actions as the [FCA]." The March 21 letter went on to note that the TMFPA "has a more restrictive definition of 'original source'" than the FCA. To address these concerns, subsections (b) and (c) of Section 36.113 of the TMFPA were amended to narrow the category of cases a court is required to dismiss based on public disclosure; to give Texas the opportunity to oppose dismissal; and to provide a broader definition of "original source" as follows:

> (b) A person may not bring an action under this subchapter that is based on the public disclosure of allegations or transactions in a criminal or civil hearing in which the state or an agent or an agent of the state is a party, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, unless the person bringing the action is an original source of the information. In this subsection, "original source" means an individual who:
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> (1) has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the state before filing an action under this subchapter that is based on the information; or
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> (2) has knowledge that is independent of and materially adds to the publicly disclosed allegations and who has voluntarily provided the information to the state before filing an action under this subchapter that is based on the information.
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> (c) Before dismissing an action as barred under this section, the court shall give the attorney general an opportunity to oppose dismissal.

TEX. HUM. RES. CODE § 36.113 (b) and (c) (amendments effective September 1, 2011).

Additionally, your March 21, 2011 letter indicated that the TMFPA's provision for Relator's reasonable expenses and attorneys' fees is narrower than that found in the FCA. Subsection (c) of Section 36.110 of the TMFPA was amended to track the FCA provision for Relator's fees and expenses as follows:

> (c) A payment to a person under this section shall be made from the proceeds of the action. A person receiving payment under this section is also entitled to receive from defendant an amount for reasonable expenses, reasonable attorney's fees, and costs that the court finds to have been necessarily incurred. The court's determination of expenses, fees, and costs to be awarded under this subsection shall be made only after the defendant has been found liable in the action or the state settles an action with a defendant that the court determined, after a hearing, was fair, adequate, and reasonable in accordance with Section 36.107(c).

TEX. HUM. RES. CODE § 36.110(c) (amendments effective September 1, 2011).

The March 21, 2011 letter further explained that the FCA has been amended to increase the amount of civil penalties available pursuant to the Federal Civil Penalties Inflation Adjustment Act. Subsection (a)

(3) of Section 36.052 of the TMFPA has since been amended as follows to provide for civil penalties in the same amounts as those provided for under the FCA:

> (3) a civil penalty of:
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> (A) not less than $5,500 or the minimum amount as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $5,500, and not [~~$5,000 or~~] more than $15,000 or the maximum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $15,000, for each unlawful act committed by the person that results in an injury to an elderly person, as defined by Section 48.002(a)(1), a disabled person, as defined by Section 48.002(a)(8)(A), or a person younger than 18 years of age; or
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> (B) not less than $5,500 or the minimum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $5,500, and not [~~$5,000 or~~] more than $11,000 or the maximum amount imposed as provided by 31 U.S.C. Section 3729(a), if that amount exceeds $11,000, [~~$10,000~~] for each unlawful act committed by the person that does not result in injury to a person described by Paragraph (A) . . . .

TEX. HUM. RES. CODE § 36.052(a) (3) (amendments effective September 1, 2011).

We believe that with these changes the TMFPA is now at least as effective as the amended FCA in rewarding and facilitating *qui tam* actions in these areas.

Neither the State Nor Any Party Making Claims on Behalf of the State are Subject to Statutes of Limitations for *Qui Tam* Actions under the TMFPA

You note in your August 31, 2011 letter that Texas does not provide "for as long a statute of limitations [as the FCA] . . . . Therefore, the [TMFPA] is not at least as effective in rewarding and facilitating *qui tam* actions as the [FCA]."[3] As discussed above, however, the TMFPA simply does not impose a shorter period of limitations for Qui Tam actions. In fact, Texas law is far more generous than Federal law because the TMFPA imposes no statute of limitations at all. Indeed, under Texas law, the state is not subject to any limitations period for *qui tam* actions under the TMFPA. *See State v. Durham*, 860 S.W.2d 63, 67 (Tex. 1993); TEX. CIV. PRACTICE & REM. CODE §16.061.

Additionally, it is the State's position that parties making claims on behalf of the state also are not subject to any limitations period for *qui tam* actions under the TMFPA.[4] As such, adding statute of limitations

[3] Specifically, your August 31, 2011 letter notes that "the [FCA] provides that '[a] civil action ... may not be brought (1) more than 6 years after the date on which the violation ... is committed, or (2) 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 official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.'"

[4] Your August 31, 2011 letter cites *United States ex rel. Foster v. Bristol-Myers Squibb Co.* (a case in which the State of Texas declined to intervene, and in which the State did not participate in terms of strategy or briefing) in support of the view that the TMFPA provides a shorter limitations period for *qui tam* actions than that provided under the FCA. 587 F. Supp. 2d 805 (E.D. Tex. 2008). The district court's interpretation of Texas law in that case is not consistent with the State's position on the statute of limitations for *qui tam* actions under the

language to the TMFPA would not broaden the protection for *qui tam* actions but rather would restrict the State's ability to pursue these claims. If a statute of limitations period were to be created where one does not currently exist, that would limit the State's ability to pursue fraud that occurred beyond a certain period.

As of the date of this letter, Texas has recovered in excess of $1 billion from over one hundred settlements with drug manufacturers and others using the TMFPA as our authority. Moreover, Texas has successfully taken two TMFPA cases to trial -- which both resulted in a positive result for Texas and United States taxpayers.[5] Consequently, we believe that the TMFPA is at least as effective as the FCA and materially meets, and in parts exceeds, the requirements of the Deficit Reduction Act of 2005 (the "DRA"). By reviewing the TMFPA as amended in 2011 and determining that Texas law complies with the TMFPA, your office can help ensure that the State will continue to successfully recover millions of dollars that have been lost.

With all of the aforementioned in mind, the State of Texas respectfully requests that the Office of Inspector General conduct an additional review of the current or the 2011 changes to the law and determining that the TMFPA complies with DRA. Thank you for your careful consideration of this request. If you have any questions, please do not hesitate to contact either me or Raymond Winter, Chief of the Civil Medicaid Fraud Division, at (512) 936-1709.

Sincerely,

John B. Scott
Deputy Attorney General
for Civil Litigation

TMFPA, and is not determinative on the issue. Importantly, that case was decided based on the pre-2007 version of the statute which did not allow a relator to proceed with an action unless the state intervened. The 2007 amendments to the TMFPA changed the relator's position and placed the relator more definitively in the "shoes of the state" for these matters. TEX. HUM. RES. CODE §§ 36.104(b) and 36.110(a-1) (amendments effective May 4, 2007).

[5] In January of 2011, the State of Texas tried a case against Actavis alleging that the pharmaceutical company had committed fraud under the TMFPA by misrepresenting its drug prices. After a three-week trial, the jury returned a verdict for the State and ordered Actavis to return over $170 million dollars to taxpayers. (This matter was later settled for $84 million dollars during the appeals process, and after the defendants' solvency issues were brought to light.) One year later, in January of 2012, Texas again went to trial, this time alleging that Johnson & Johnson and its subsidiary, Janssen had violated the TMFPA by misrepresenting the value, safety and appropriate use of their antipsychotic drug to Texas Medicaid. After seven days of trial, the parties settled that case for $158 million dollars.

cc: Raymond C. Winter, Chief, Civil Medicaid Fraud Division