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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/16/11  
**LAST UPDATED** 03/18/11    **HB** 314/aSJC

**SPONSOR** Cervantes

**SHORT TITLE** Fraud against Taxpayer Act Revisions    **SB** \_\_\_\_\_

**ANALYST** Aubel/Daly

### REVENUE (dollars in thousands)

Estimated Revenue			Recurring or Non-Rec	Fund Affected
FY11	FY12	FY13		
	See Fiscal Impact		Nonrecurring	Medicaid Fraud/School Fund/General Fund

(Parenthesis ( ) Indicate Revenue Decreases)

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY11	FY12	FY13	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
<b>Savings</b>		See Fiscal Impact			Recurring	General Fund/Consumer Settlement Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to Senate Bill 73

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Office of the Attorney General (OAG)  
 General Services Department/Risk Management Division (RMD)  
 Administrative Office of the Courts (AOC)  
 Educational Retirement Board (ERB)  
 Human Services Department (HSD)

### SUMMARY

#### Synopsis of SJC Amendment

The Senate Judiciary amendment to House Bill 314 makes these changes:

- 1) Amends section 44-9-3 of the Fraud Against Taxpayers Act (FATA) to clarify that a person violating the false claims section of FATA shall be liable for the civil, remedial and curative damages set out in that section;

- 2) Removes language in the original bill that barred a qui tam plaintiff from asserting any claim on behalf of the State other than ones brought under FATA;
- 3) Sets a deadline of 180 days in which the State must intervene in a FATA action, and limits court extensions of time for such intervention consistent with that deadline unless the qui tam plaintiff concurs in a later extension;
- 4) Removes language in the original bill that would allow the State in qui tam cases in which it does not intervene to later bring other statutory or common law claims based on the same conduct;
- 5) Removes the definition of “original source” from the provision of the original bill that eliminates the Attorney General’s ability to dismiss a FATA claim based on publicly disclosed information if the qui tam plaintiff is the original source of the information; and
- 6) Adds an emergency clause.

#### Synopsis of Original Bill

House Bill 314 amends the Medicaid False Claims Act to clarify any person can bring a civil action for a violation of the Medicaid False Claims Act, not just a person affected by the violation. Thus, the bill broadens the base of potential claimants or “whistle blowers” related to Medicaid fraud or other violation of that Act. The OGA notes that this change makes the law consistent with the Fraud Against Taxpayers Act as well with analogous federal law.

The bill also amends several sections of the Fraud Against Taxpayers Act (FATA), as detailed by RMD:

- 1) Section 44-9-4 A is amended to allow the Attorney General’s Office to determine whether or not to investigation suspected violations of FATA.
- 2) Section 44-9-5 A is amended to prohibit the claims allowed in a civil actions initiated by a private individual known as a “qui tam” plaintiff on behalf of the State to only those of a false claim as defined in Section 44-9-3.
- 3) Section 44-9-6 is amended to add a new subsection B allowing the State to assert other statutory or common law claims that are based on allegations or information provided by the “qui tam” plaintiff, and those claims are successful, that the “qui tam” plaintiff is entitled to the same monetary award percentage as provided in Section 44-9-7 of FATA, which ranges from 10% to 25% depending on how much of the information comes from the “qui tam” plaintiff and/or how much the “qui tam” plaintiff contributed to the prosecution of the action.
- 4) Section 44-9-6 is further amended to add a new subsection I allowing the State to seek additional recovery based on other statutory or common law claims for the same conduct that was the subject of the “qui tam” plaintiff’s action.
- 5) Section 44-9-7 E(1) & E(3)(a) are amended to allow proceeds of a FATA action collected by the State, but not paid to the “qui tam” plaintiff, to be paid back to the Attorney General’s Office for the fees and costs expended in pursuing such an action; and into a fund for the use of the Attorney General’s Office to provided staffing for FATA cases.
- 6) Section 44-9-9 D is amended allowing for the dismissal of a FATA action (by a court on motion by the Attorney General) if the elements of the alleged false or fraudulent claim by the defendant have been publicly disclosed in a federal or state, criminal, civil or public administrative proceeding (as well as the news media or publicly disseminated governmental report) at the time the complaint is filed, *unless* the person bringing the action is an original source of the information on which the FATA action is brought. This section is further amended to define “original source” as an individual who has direct and independent knowledge of the information on which the FATA action is brought.

- 7) A new Section 8 of FATA is provided to allow the Attorney General to issue a civil investigative demand on a person reasonably believed to have in his or her possession, custody or control of any tangible document or recording that is believed to be relevant to an investigation of a probable violation of FATA. Such a demand would be issued prior to the beginning of a civil proceeding; would not be a matter of public record; and would not be published by the Attorney General except by court order. This new section also outlines what a civil investigative demand would and would not contain; how it should be served; who can receive copies of the documents produced pursuant to a civil investigative demand; whether the civil investigative demand can be modified or set aside; and provides court enforcement via contempt charges for failure to personally appear and produce the requested documents.

### **FISCAL IMPLICATIONS**

The OAG foresees that the bill, if enacted, will not impose any additional costs or fiscal burdens on state agencies while increasing the likelihood of significant recoveries of money to the state through civil actions for fraud. The OAG also suggests that the bill would likely qualify New Mexico for enhanced recovery of Medicaid funds from the U.S. Department of Health and Human Services. Currently, the federal government takes 75 cents of every dollar of Medicaid money recovered by the State, but has previously indicated that it would take a lesser share if a statute was amended as proposed under the bill. The amount of increased revenue through higher recoveries and lower federal distribution of Medicaid recoveries is indeterminate.

It appears that the discretion given to the OAG to the extent to which he or she investigates FATA claims would represent operational savings to the office. In addition, dealing with improper claims filed under FATA wastes judicial and state resources that would be reduced under House Bill 314. Finally, HB 314 allows the AG to intervene and assert other non-FATA legal claims and also provides the state recover its attorney fees and costs if it succeeds in pursuing those claims. These potential cost savings to operations are indeterminate but presumably recurring, based on the idea that reducing the occurrence of frivolous, improper, or extended investigations without cause would be an ongoing fiscal benefit of the bill for the OAG.

### **SIGNIFICANT ISSUES**

The OAG suggests that widening the pool of potential claimants to file under the Medicaid False Claims Act would enhance New Mexico's ability to recover for Medicaid fraud. The OAG also addresses how the bill will impact other areas of the Medicaid Fraud and qui tam acts, as follows:

House Bill 314 amends the Fraud Against Taxpayers Act ("FATA") to clarify that qui tam plaintiffs CANNOT bring any claim other than a FATA claim under the Act. Courts applying similar laws at the state and federal level around the country have nearly universally held that qui tam plaintiffs do not have standing to bring, for example, common law claims on the government's behalf. Even in the short lifespan of FATA, a New Mexico court has reached that same conclusion. Nonetheless, some qui tam plaintiffs in New Mexico persist in bringing wide-ranging claims on the State's behalf under FATA. Dealing with these improper claims wastes judicial and State resources. This amendment will dissuade those lawyers from bringing such claims.

House Bill 314 amends FATA to make clear that in cases in which the State intervenes and asserts other non-FATA legal claims, the relator 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 relator. This makes clear the strong incentive for relators to assist the State in pursuing other claims for recovery for the State.

House Bill 314 amends FATA to make clear that in qui tam cases in which the State does not intervene—and in which the qui tam plaintiff fails—the State’s ability to later bring claims based on the same conduct is not precluded.

House Bill 314 amends FATA to more specifically direct certain of the funds recovered through successful FATA actions:

- Attorney fees and costs recovered from defendants for costs and time incurred by the Attorney General’s Office shall be paid to the Attorney General’s Office;
- HB 314 adds more specific direction for the Attorney General’s Office to use residual recoveries from FATA claims to provide staffing to pursue additional FATA claims.

House Bill 314 amends FATA to eliminate the Attorney General’s or a defendant’s ability to dismiss a FATA claim based on publicly disclosed information if the qui tam relator is the original source of the information. This amendment would make FATA conform to federal law and would likely qualify New Mexico for enhanced recovery of Medicaid funds from the U.S. Department of Health and Human Services. Currently, the federal government takes 75 cents of every dollar of Medicaid money recovered by the State, but has previously indicated that it would take a lesser share if an amendment such as this were to be made.

House Bill 314 amends FATA to give the Attorney General authority to issue civil investigative demands (or “CIDs”)—which are akin to subpoenas—to obtain documentary materials in furtherance of an investigation of a FATA claim. Almost every other jurisdiction with a law comparable to FATA provides this authority. The Attorney General’s Office very much needs this tool to effectively investigate FATA claims.

## **PERFORMANCE IMPLICATIONS**

The bill would appear to improve the OGA’s ability to uncover Medicaid Fraud and make the qui tam act work more efficiently.

## **ADMINISTRATIVE IMPLICATIONS**

ERB points out two administrative issues, as follows:

There is no express provision in section eight (8) - civil investigative demands, regarding payment for copies. Some guidance is available in subsection C which states that a civil investigative demand shall not contain any requirements that would be unreasonable...if contained in a subpoena duces tecum issued by a court of this state. Rule 1-045 (C) (2) NMRA which addresses subpoenas duces tecum, states that a person commanded to produce and permit inspection of materials...(iv) may condition the preparation of any copies upon payment in advance of the reasonable cost of inspection and copying. Under HB 314, a strong possibility exists that what constitutes reasonable cost may be subject to varied interpretations between the attorney general and the person or entity required to produce. It might be beneficial to consider including additional guidance addressing the matter of cost.

In addition, details regarding the parameters of electronic discovery were fleshed out in a recent substitute to SB 52 – Electronic Copies of Public Records, to make clear that governmental entities subject to Inspection of Public Records Act (“IPRA”) requests were not required, pursuant to an IPRA request, to convert any existing electronic records into a different file format for the purpose of making the file readable to the requestor. With respect to the civil investigative demand in HB 314, there may be instances where issues of electronic production and conversion costs remain uncertain. It might be beneficial to include language briefly addressing matters of electronic production.

### **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

House Bill 314 relates to Senate Bill 73, which prohibits the State from providing for or paying for the defense of a claim under the qui tam act.

### **TECHNICAL ISSUES**

RMD points out a possible technical issue:

There appears to be some ambiguity between the amendments proposed in Section 44-9-5 A and the new 44-9-6 subsection B. It seems that the bill is attempting to delineate as to what claims can be brought by a person (as a “qui tam” plaintiff) and those that can be brought by the State, which by assumption would be the Attorney General. It may clarify things to simply state that the Attorney General can bring additional statutory and common law claims so as to clarify that the Attorney General is bringing a civil action as the State whereas the person (or “qui tam” plaintiff) is bringing only a FATA claim on behalf of the State.

### **OTHER SUBSTANTIVE ISSUES**

ERB provides more detail on how proceeds are to be distributed for successful actions:

In successful actions, the Act authorizes the state to deposit proceeds which are not part of the qui tam plaintiff’s recovery, in the fund or funds from which payment of the false claim was derived. HB 314 adds a provision requiring state proceeds to also be used to pay attorney fees and costs incurred by the attorney general’s office in the action...

The bill does not otherwise change the distribution schedule as currently specified but does clarify that the one-half of residual proceeds going to the OAG is to provide staffing for cases arising pursuant to FATA. The statute already provides the other half going into the general fund.

### **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

Only those directly affected by a violation of the Medicaid False Claims Act will be able to bring a claim. The potential for higher retention of Medicaid recoveries through enhanced status with the federal HSD would be forgone. Certain inefficiencies arising from the current application of FATA would continue.