

Department of Legislative Services
Maryland General Assembly
2016 Session

FISCAL AND POLICY NOTE
Third Reader

House Bill 1220

(Chair, Health and Government Operations Committee,
et al.) (By Request - Departmental - Health and Mental
Hygiene)

Health and Government Operations

Finance

**Department of Health and Mental Hygiene - Health Program Integrity and
Recovery Activities**

This departmental bill authorizes the Inspector General (or a designated Assistant Inspector General) to subpoena any person or evidence, administer oaths, and take depositions and other testimony as part of an investigation of fraud, waste, or abuse of departmental funds. A court of competent jurisdiction may compel compliance. The Inspector General (or a contractor or agent) may use “extrapolation” during an audit to recover an overpayment from a provider. The Inspector General may impose a civil money remedy against a provider for a violation of State or federal law governing the conditions of payment for any service or item for which the provider submitted a claim and received payment. The Inspector General must adopt regulations to implement civil money remedies.

Fiscal Summary

State Effect: General fund revenues increase to the extent civil money remedies are assessed and to the extent the Department of Health and Mental Hygiene (DHMH) is able to enhance recovery of overpayment from providers. DHMH expenditures (including Medicaid expenditures at a 60% federal matching rate) decline due to reduced audit and litigation costs. Federal matching fund revenues decline accordingly.

Local Effect: The bill is not expected to materially affect local government operations or finances.

Small Business Effect: DHMH has determined that this bill has minimal or no impact on small business (attached). The Department of Legislative Services concurs with this assessment.

Analysis

Bill Summary: “Extrapolation” means the process of estimating an unknown value by projecting, with a calculated precision or margin of error, the results of the review of a sample to the universe from which the sample was drawn using a statistically valid sampling methodology. “Overpayment” means a payment that (1) is made by DHMH to a provider for services or goods for which the provider submitted a claim to DHMH; (2) is found to be incorrect; and (3) results in a payment greater than that to which the provider is entitled. “Program” includes Medicaid, the Cigarette Restitution Fund, the Developmental Disabilities Administration, the Prevention and Health Promotion Administration, or any other unit of DHMH that pays a provider for a service rendered or claimed to have been rendered.

Extrapolation: The Inspector General (or a contractor or agent) may use extrapolation if (1) the federal government has also conducted an audit of the program for overpayment and (2) the monetary recovery amount determined to be due by the program to the federal government is based on the federal government’s use of extrapolation. An audit using extrapolation must be limited to the scope of the federal audit, including claims for the same audit time period and same type of claims.

On a finding of an overpayment to a provider, the Inspector General may not use extrapolation unless there is a determination of a sustained or high level of payment error. When using extrapolation to determine an overpayment, the sample may not include specified claims. An audit using extrapolation must be performed or conducted in accordance with specified standards. If the medical necessity of the claim is in question, the audit team must include certain licensed health occupations professionals.

The Inspector General must give a provider written notice of an audit, including specified information, no less than 15 calendar days prior to the start of the audit and, except under certain circumstances, conduct an exit conference with the provider during which specified information must be presented to the provider. A provider may challenge the draft findings and conclusions of an audit within 30 days after the exit conference, except under specified circumstances. Failure to challenge the draft findings and conclusions does not preclude a provider from appealing the final report and recovery letter.

The Inspector General must review any additional documentation submitted by the provider and, when appropriate, recalculate the error rate used in extrapolation, and issue its final report and recovery letter. The final report and recovery letter must state that the provider has 30 days to appeal the findings under the Administrative Procedure Act (APA).

On appeal, the provider may present evidence of a second audit using the same sampling methodology but based on a different sample of claims identified and produced by the Inspector General. The Inspector General must produce a new sample of claims within 30 days of a request. The provider must have 60 days after receipt of the new sample to conduct the audit and provide the results to the Inspector General. The recovery must be stayed until completion of the administrative appeal process. DHMH may adopt the findings of the federal government if the federal government conducts an audit with specified findings and methodologies.

Civil Money Remedies: A civil money remedy imposed under the bill (1) may not exceed the amount of the reimbursement for the paid claim; (2) is *in lieu of* full payment or adjustment of the paid claim; (3) may not be less than the federal financial participation share; (4) may not be imposed if the claim was included under an extrapolation calculation; and (5) is only available if the provider has not been subjected to other specified penalties for the same claim.

In determining whether to impose a civil money remedy, specified factors must be considered. If a civil money remedy is imposed, the Inspector General must issue an order stating (1) the total amount of the remedy; (2) the basis on which the order is made; (3) each regulation or law violated; (4) the amount of each remedy imposed for each violation; (5) the number of claims and total value of the claims identified with errors; and (6) the manner in which the amount of the remedy was calculated.

DHMH must provide written notice to a provider of a civil money remedy in a specified manner. A provider may appeal a civil money remedy order under APA. An order imposing a civil money remedy is final when a provider has exhausted all opportunities to contest the remedy under APA. A provider must pay a civil money remedy within 10 days of receiving a final order.

Current Law: The DHMH Inspector General is authorized to investigate fraud, waste, and abuse of departmental funds. The Inspector General must cooperate, and coordinate investigative efforts, with the Medicaid Fraud Control Unit, departmental programs, and other State and federal agencies to ensure a provider is not subject to duplicative audits. The Inspector General may take necessary steps to recover any mistaken claims paid; payments obtained in error; fraudulent claims paid to or obtained by a provider; or the cost of benefits mistakenly paid, obtained in error, or fraudulently paid to or obtained by a recipient.

The Secretary (or the Secretary's designee) may subpoena any person or evidence, administer oaths, and take depositions and other testimony. If a person fails to comply, on petition of the Secretary or designee, a court of competent jurisdiction may compel obedience to the order or subpoena or compel testimony or the production of evidence.

Background: The bill increases the ability of DHMH to audit providers that receive funding from the department and to recover overpayments made to these providers.

Subpoena Power: Subpoenas are often necessary to obtain documentation needed to investigate a provider. Although the Secretary has subpoena power, it is unclear whether the authority is limited to protecting the health and welfare of the citizens of Maryland. According to DHMH, by providing the Inspector General with subpoena power, there is no question as to whether the documents were obtained legally.

Extrapolation: Statistical sampling and extrapolation are standard audit practices that reduce the cost of auditing in exchange for accepting a small amount of risk in the audits. Health care audits can include hundreds or thousands of potentially fraudulent claims, which are time consuming and expensive to investigate and litigate. The federal government uses extrapolation to calculate the error rate when performing Medicaid provider audits and seeks recovery of funds from the State. The State does not, however, have the authority to use extrapolation to seek reimbursement from providers who actually received the overpayment. Thus, the State's ability to recoup funds is severely limited. Use of extrapolation under the bill is limited to when the federal government conducts a review of a provider using extrapolation. According to DHMH, extrapolation based on a statistically sound sample permits DHMH to identify and recoup larger recoveries for fraud, waste, and abuse.

Civil Money Remedies: If a provider submits a claim for payment, the provider is attesting compliance with all laws and regulations. If the provider is in violation of these laws or regulations, DHMH can recoup the entire cost of the claim. However, if a service or good was actually provided and the violation is a technicality or first offense, it may not be fair to recoup all of the funds. According to DHMH, civil money remedies provide an alternative remedy to total recoupment of the claim and may provide an incentive to the provider to become compliant with laws and regulations.

State Fiscal Effect: General fund revenues increase to the extent DHMH imposes civil money remedies on providers in cases in which the claim would not otherwise have been recouped by the department. General fund revenues also increase to the extent DHMH increases recoveries for overpayments to providers. According to DHMH, the authority to use extrapolation in auditing enhances operational efficiencies and reduces the cost of auditing claims and defending audits in court.

The Office of the Inspector General identified \$31 million in recoveries in fiscal 2015 and \$10 million in fiscal 2016. Since fiscal 2007, the office has identified over \$100 million in recoveries.

Additional Comments: House Bill 1101 of 2015, a similar departmental bill, was heard by the House Health and Government Operations Committee, but no further action was taken on the bill. During the 2015 interim, DHMH established a workgroup, led by the Acting Inspector General but comprised primarily of health care providers, to resolve differences and develop legislation for the 2016 session. The workgroup achieved general consensus on legislation that would authorize (1) the Inspector General or a designated Assistant Inspector General to issue a subpoena in connection with an investigation; (2) DHMH or the Inspector General to use extrapolation during an audit to recover an overpayment, but only when the federal government has initiated an audit for overpayment and the monetary recovery amount identified for recovery by the federal government is based on the federal government's use of extrapolation; and (3) DHMH or the Inspector General to impose a civil money remedy against a health care provider, in lieu of full repayment of a claim.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Office of the Attorney General, Judiciary (Administrative Office of the Courts), Department of Health and Mental Hygiene, Maryland Insurance Administration, Department of Legislative Services

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min/ljm

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ANALYSIS OF ECONOMIC IMPACT ON SMALL BUSINESSES
Department of Health and Mental Hygiene
Session 2016

TITLE OF PROPOSAL: Department of Health and Mental Hygiene - Health Program Integrity and Recovery Activities

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PART A. ECONOMIC IMPACT RATING

This agency estimates that the proposed bill:

WILL HAVE MINIMAL OR NO ECONOMIC IMPACT ON MARYLAND SMALL BUSINESS

OR

WILL HAVE MEANINGFUL ECONOMIC IMPACT ON MARYLAND SMALL BUSINESSES

PART B. ECONOMIC IMPACT ANALYSIS

Civil money remedies would be implemented in lieu of retracting an entire claim for what may be considered minor violations of statutes and regulations. Thus, implementation of civil money remedy may actually be a savings for the provider community. Extrapolation could have a more substantial impact on the provider community. However, it should be noted that extrapolation is merely being used to identify funds the provider received in error. The Department is not seeking interest or other penalties.