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March 2, 2023

TO: The Honorable Luke Clippinger
Chair, Judiciary Committee

FROM: Shelly Marie Martin
Director, False Claims Unit, Office of the Attorney General

William Z. Shirley, Director, Medicaid Fraud Control Unit, Office of the Attorney General

RE: HB 773 - Maryland False Claims Act and
Maryland False Health Claims Act – Revisions (Support)

The Maryland False Claims Act (Gen. Prov. §§ 8-101 through 8-111) and its companion statute the Maryland False Health Claims Act (Health Gen. §§ 2-601 through 2-611) prohibit contractors, grantees, and others who directly or indirectly receive government funds from making false or fraudulent claims for payment.

Cases may be brought by the government directly when it is aware of fraudulent conduct. This conduct, by its very nature, is often hidden from the government, limiting its ability to protect the public against unscrupulous conduct. To encourage the reporting of fraud, the false claims statutes allow whistleblowers to file suit on the government's behalf and to receive a portion of any funds recovered.

Declined Whistleblower Actions

Under the current versions of the Acts, a whistleblower alerts the government to allegations of fraud by filing a lawsuit, on behalf of the government, against the person or entity alleged to have committed the fraud. The government investigates those allegations and either intervenes in the case and pursues the litigation or declines to intervene, which results in dismissal of the case. The federal False Claims Act and those of the other states that have analogous laws do not require dismissal when the government declines to intervene. They allow the whistleblower to continue to litigate the case in the name of the government.

This bill letter is a statement of the Office of Attorney General's policy position on the referenced pending legislation. For a legal or constitutional analysis of the bill, Members of the House and Senate should consult with the Counsel to the General Assembly, Sandy Brantley. She can be reached at 410-946-5600 or sbrantley@oag.state.md.us

House Bill 773 would amend the Maryland statutes to allow a whistleblower to proceed with a fraud case, even if the government declines to intervene and take over that litigation. The amount the government can recover is limited by the resources available to conduct investigations and pursue litigation. Currently, if the government does not have the resources to pursue a whistleblower case, the case comes to an end, regardless of its merits. The OAG's current lack of resources negatively impacts the ability to pursue cases. The proposed amendments would allow those cases to continue, subject to government supervision, relieving some of the burden on government staff and allowing more cases to be pursued.¹

Investigating cases through subpoenas

Both versions of the false claims act allow the government to investigate the case either prior to filing its own lawsuit or before deciding whether to intervene in a whistleblower suit. The process used for these investigations is that the government has "the same rights of discovery as a civil litigant in the circuit court" House Bill 773 changes the vehicle used for the government's investigation to a subpoena.

This change will harmonize the false claims Acts with other State statutes. Some other statutes that govern the disclosure of records, in particular certain opioid prescribing and substance abuse treatment records, allow those records to be disclosed only in response to a "subpoena," hampering the government's ability to investigate some cases because the false claims Acts authorize issuance of "discovery" that is not a "subpoena." This change is a technical amendment that does not change the substance of the government's investigatory authority under the Acts.

Establishing a minimum penalty

The Acts currently state that a court may award the government an amount of up to \$10,000 per violation and up to treble the amount of damages incurred by the government. No penalty is mandatory. The minimum amount a court must award is the damages sustained by the government.

The Acts are intended to deter future fraud. Without a minimum penalty, the prospect of repaying the damages, even if trebled, may not be sufficient to act as a deterrent in cases in which the damages are relatively small. Some contracts are vulnerable to a pattern in which contractors submit dozens, or even hundreds, of frivolous claims for additional compensation for

¹ The OAG's Medicaid Fraud Control Unit is currently authorized to have 40 positions. In addition to cases under the Maryland False Health Claims Act, it is responsible for cases of criminal Medicaid Fraud, identity theft, and related crimes and criminal cases of abuse and neglect of vulnerable adults in long-term care facilities. Many other states with similarly sized Medicaid programs have larger MFCU's to handle this responsibility. Virginia, for example, which has a slightly smaller Medicaid program, staffs its MFCU with 90 people. The OAG's False Claims Unit, which is responsible for the investigation and litigation of fraud cases involving all State programs except Medicaid, has only one person. Cities and counties can also recover under the False Claims Act, but none have dedicated anti-fraud units. Some do not even have full-time attorneys on staff.

work allegedly outside of the scope of their contract, hoping that overwhelmed procurement staff will have no choice but to offer some type of settlement of the claims. When procurement staff deny the claims, the government incurs no “damages,” but nonetheless expends substantial time and effort in addressing these claims. Without a minimum penalty amount, the government cannot feel confident that pursuing these false claims under the Acts will result in penalties commensurate with the effort required to obtain them.

The \$5,000 minimum penalty is still significantly less than required under the federal act or analogous laws in other states. The federal act requires mandatory treble damages in addition to the mandatory \$5,000 penalty, which is adjusted for inflation and is currently more than \$11,000 per violation.

Making these changes to the Maryland False Claims Act/False Health Claims Act will enable the government to manage its limited resources more effectively and rely on whistleblowers’ counsel to pursue recoveries in appropriate cases, harmonize the form of investigative process with other statutes, and assure that those who commit fraud are subject to a minimum penalty for their actions. All of these changes will assist with the important mission of protecting the public fisc and deterring future misconduct. The Office of the Attorney General urges the Committee to vote favorably on House Bill 773.