

FISCAL NOTE
Requested by Legislative Council
01/21/2019

Amendment to: SB 2347

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$1,000,000	\$0
Expenditures	\$0	\$0	\$181,733	\$1,635,593	\$310,601	\$1,464,264
Appropriations	\$0	\$0	\$181,733	\$1,635,593	\$310,601	\$1,464,264

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
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- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill provides for a false claims act needed prior to the state having a Medicaid Fraud Control Unit. It also provides for a Medicaid Fraud Control Unit in the Office of Attorney General.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

On December 19, 2017, the Department of Human Services received a letter from the US Department of Health & Human Services Centers for Medicare and Medicaid Services indicating the state's request for a continued waiver from having a state MFCU was denied. North Dakota is the only state without a MFCU.

Section 4 requires the Medicaid Fraud Control Unit (MFCU) in the Office of Attorney General to investigate alleged false medical assistance claims and to possibly file a civil action, a criminal action, or both against any person that violated or is violating this Act.

Section 14 establishes the MFCU in the Office of Attorney General.

The person bringing the Medicaid Fraud claim to the attention of the state is eligible for a percentage of the Medicaid proceeds recovered and may also recover reasonable expenses necessarily incurred plus reasonable attorney's fees and costs.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

It is unclear at this time the amount of recoveries under this Act. South Dakota has averaged \$2.6 million in recoveries during the last eight years. Other neighboring states have seen recoveries ranging between \$9-23 million over a six year period. North Dakota may see Medicaid recoveries of at least the lower part of the range although this is speculative. It is likely the recoveries will be realized in the 2021-23 biennium given the startup time needed for investigations and adjudications. Estimated general fund revenues may be \$1 million in the 2021-23 biennium.

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As reported to the interim Human Services committee, 7 staff members are needed to carry out the requirements of a Medicaid Fraud Control Unit. These staff members would be 2 attorneys, 2 criminal investigators, 2 auditors, and 1 administrative assistant. The 2019-21 biennium estimated expenses include \$1,333,716 for salaries, \$398,809 for operating expenses and \$84,800 for needed equipment. The 2021-23 biennium estimated expenses include \$1,412,965 in salaries and \$361,900 in operating expenses.

For the first three years the federal government will pay 90% of the expenses. After three years the federal government will pay 75% of expenses.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

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Name: Kathy Roll

Agency: Office of Attorney General

Telephone: 701-328-3622

Date Prepared: 01/23/2019

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Bill/Resolution No.: SB 2347

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2019 SENATE HUMAN SERVICES

SB 2347

2019 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Red River Room, State Capitol

SB 2347
1/28/2019
Job # 31536

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature: Justin Velez

Explanation or reason for introduction of bill/resolution:

To provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

Attachment #1

Madam Chair Lee: Opens the hearing on SB 2347

Senator K. Roers: Introduces SB 2347 and gives a brief description.

(01:27-21:11) Maggie Anderson, Director of Medical Services Division of the Department of Human Services. Testifying in favor of SB 2347. Please see **Attachment #1** for testimony.

(04:44) Madam Chair Lee: When it says that the unit will not receive funds made. Does that mean that you aren't going to get it back in the department of human services? Where does the money go that is recaptured?

Maggie Anderson: The funds that would be recaptured certainly the federal portion of those would need to be returned to the federal government and then if there were repayments as a result of an overpayment to a provider, those all need to be accounted for back to the general fund. Whether they would flow back to the department and we would deposit them or the attorney general's office would deposit them but, there is also supposed to be this relationship where it's not to fund the agency because you don't want to set it up like a contingent type of agency where it would actually fund the operations. Eventually the state funds would get back to the general fund whether they would come back to the department of the general fund.

Madam Chair Lee: The second part of that question was the provider that is not necessarily a guilty party in this, are they going to have to pay back funds that they in good faith were paid to provide a service?

Maggie Anderson: If our program integrity unit or the Medicaid fraud control unit find overpayments and those would actually be a situation where the provider shouldn't have

billed us and that could have been intentional or unintentional, the provider would be expected to repay those.

Madam Chair Lee: So if the provider was a part of the fraud, I'm not trying to nitpick but I think there may be times when it isn't necessarily open therapy services who initiated this problem it might be that he is doing the work because someone else has told him to do that. Are the details figured out to make sure that they are innocent?

Maggie Anderson: the investigation would need to fair out all of those details. In terms of whether that provider was a known party to a larger conspiracy event, the Medicaid fraud control unit focuses on provider fraud and not recipient fraud. There are exceptions where recipients can come into that. My faith would be in the investigation whether the company was fraudulently billing and aware or not.

(8:12) Maggie Anderson continues testimony.

(11:05) Senator Hogan: I think the misuse with personal funds is a very detailed complex investigation and to have higher skilled investigators might be good rather than protective service investigators because of the detail and complexity. Is that some of the thinking behind it?

Maggie Anderson: Certainly, the Medicaid fraud control unit would have trained investigators.

Madam Chair Lee: I'm just concerned about the overlap that might come from this and the exhilaration into something that might not have needed to go to a level that could be discussed at a different level and make sure everything gets squared away.

Maggie Anderson: That's where the MOU's (memorandum of understanding) would play out.

(12:36) Maggie Anderson continues testimony.

Senator K. Roers: In the interim when you were doing studies, what is the frequencies of incidents that could have been elevated to this unit and what are you doing now with those cases?

Maggie Anderson: We looked at the other states staffing, cost of units, and the number of investigations they have completed. You can always look at the numbers that are spent on the unit but we did prepare information that compares to similar size states. If we find suspicion of credible fraud, we refer that to the attorney general. Some of those are going to hit the radar and some of them are just not going to be a large enough case or situation for them to take.

Senator Anderson: The federal law says that your unit within your department may refer instances of credible fraud, how do you see that as how you are operating now?

Maggie Anderson: I would see our unit functioning as they do now but would refer the cases to the fraud unit instead of the attorney general's office.

Senator Anderson: Right now you're referring to the office of inspector general, is that going to go away then and it will just go to the ND fraud unit who would then involve the inspector general if they thought it was important? How does that relationship work?

Maggie Anderson: A lot of those things will need to be addressed in the MOU's that would occur as to whether there would be any instances that we would then still have that direct referral to the office of inspector general or whether in all cases we would make the referral to the fraud unit and they would further investigate and interact with the OIG (office of inspector general) if necessary.

Senator Anderson: What main difference might be that your now no longer going to be dependent on the prosecuting attorney in the county but depending on the attorney general's office.

Maggie Anderson: That is correct

Senator K. Roers: Can you tell me what's the penalty if we don't do this?

Maggie Anderson: It's impossible to answer that but after we received the letter from CMS I was expecting it to be more direct and they just ended with saying they denied our waiver and to come up with an implementation plan. So I had a follow up phone call with them and asked if we don't have one, does that affect our Medicaid funding. Their comment to me was, coming out of this next session, absent having a Medicaid fraud control unit they would move forward with corrective action that corrective action can be anything up to and including withholding Medicaid funding. They cannot speak for the CMS administrator, nor will the CMS administrator just say that is the automatic action. They would work with the state through a corrective action plan to determine what that action would be but, that action could be up to and including withholding Medicaid funding.

(27:38-29:26) Troy Siebel, Chief Deputy Attorney General. Offering neutral testimony for SB 2347. Testimony is as follows.

Troy Siebel: I am here to answer any questions that you might have but I would like to start out by saying that as the AG (attorney general) has stated on several occasions over the course of the last several sessions; the office is officially neutral in terms of whether or not North Dakota has a Medicaid fraud control unit. The AG has indicated that it seems to make sense. North Dakota is the only state in the country that does not have a Medicaid fraud control unit and in the event that this body decides to adopt and implement the Medicaid fraud control unit, the AG is happy to take on that responsibility and we will do it and do it well, he would just ask that this body also provide the resources that we need to actually implement the unit. Having said that we think that it makes sense. We have been instrumental with our office working with Maggie Anderson and the folks at human services in drafting the false claims act which is before you as well as some of the other language that is required to implement. This version that is front of you, there might be a few tweaks that we would like to see but that is something that we can definitely work with the sponsor and going forward.

Senator Anderson: You have done some work with states of similar size to see what resources they apply and what issues they come up with. What happens if we approve this the way it is and the FTE's are sitting around with nothing to do.

Troy Siebel: We have been in close contact with South Dakota and they are very busy and the number of FTE's reflects their suggestions. I don't think we would be in that position from what we are hearing from South Dakota.

Senator Anderson: This is more of a statement; just from reading the news I would anticipate we won't be as busy as South Dakota because they have a lot of things going on down there that I wouldn't expect to happen in North Dakota.

Senator O. Larsen: Is it just changing the workload so the bill is asking to implement more workers but the work is already being done is that correct?

Troy Siebel: I think it's fair to say that what is happening now is the cases are being referred to the feds and they don't take on all of these cases so they aren't being investigated or prosecuted at this time.

Senator Hogan: Do you see working with the OIG on some of these cases particularly across state jurisdiction?

Troy Siebel: A lot of those details would be ironed out in the MOU.

Senator Hogan: Do you see any role for the local states attorney?

Troy Siebel: I would see it being at the state level. We would expect the states attorney would be happy to take on the unit.

Senator Hogan: Is it fair to say that's part of the reason they don't prosecute because its so technical?

Troy Siebel: Partly, but I think partly too there isn't a state law that makes it a crime, and that's what this bill does it is giving the prosecutors the proper tools.

Senator Anderson: The last thing you said was that this bill makes it a crime where it wasn't a crime before. Can you explain that a little and why is it necessary to pursue fraud allegations if it's already inappropriate on the federal level.

Troy Siebel: It's not a crime at the state level. So there may be federal statutes that make it a federal crime but when you take our office and prosecutors they don't have a state statute to charge it out under and so they are relying on the federal government to prosecute. Our state doesn't have that authority.

Madam Chair Lee: closes the hearing on SB 2347.

2019 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Red River Room, State Capitol

SB 2347
1/28/2019
Job # 31543

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature: Justin Velez

Explanation or reason for introduction of bill/resolution:

To provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

No Attachments

Senator Anderson: The Attorney General's Office did mention there were some tweaks, so we need to see specifically what those are.

Senator K. Roers: He (Troy Siebel) said there were multiple drafts floating around and there were a couple of things that he will work with me to suggest some tweaks.

Madam Chair Lee: So for the discussion on SB 2347, section 2 talks about the liability and civil penalties, not less than \$157 and not more than \$21,956 for each act specified in this section, three times the amount of damages the state sustains because of the persons act and the costs of the investigation and litigation fees.

Senator Anderson: One of the concerns that I had was, it's one thing to recover the money from a provider and of course if the provider has to pay the money then they don't like that. When you get to charging them with a crime related to that same incident, that means that I am going to get my attorney and spend a lot more time and energy on it then we are if they just said you owe us \$13,000 and we will take it out of your next payment. That is one of my concerns here and I'm not sure that we can change that because the feds have insisted on it. We have had cases where the individual's attorney related to a Medicaid fraud, they were willing to pay the money but they would not let the individual talk at all because that meant Medicare fraud and of course they would have prosecuted for a crime related to Medicare. They were happy to pay back the money that the state said they owed and of course they lost their Medicaid credentials but I'm a little concerned that we are going to be going backwards here.

Senator K. Roers: I think one of the challenges that I have in my head when I listen to that argument being that I don't have any history with this, coming into this fresh is the difference between the inadvertent overcharge and was not intentional fraud versus when you have people who are committing intentional fraud especially on a grander scale. I don't know what

the frequency of the intentional versus unintentional is, but I feel that sometimes there should be criminal charges imposed when people are doing that.

Madam Chair Lee: I wish we had some options but I don't think that we really do. So, right away that section that which continues on page 4 talks about what the damages might be and how the courts will decide what the assessments will be. Section 3, a limitation of actions, civil action filed under this act must be brought by the later of six years after the date of which the violation was committed or three years after the date. We are not going to change any of the legalese obviously. Section 5, complaint by a person, a person may bring a civil action for a violation of this act on behalf of the person and person of course could be defined as corporation as well and the state. The action must be brought in by the name of the state. The action may be dismissed only if the court and the AG (Attorney General) give written consent of the dismissal and provide the reasons for consenting.

Senator Anderson: On page 5 Line 2 it talks about a complaint must be filed under seal and must remain under seal for 60 days, the complaint may not be served upon the defendant until the court orders that it can be served. I wonder if there is a particular reason for that because typically law enforcement would the AG's office would file a complaint and then once that complaint is filed it becomes public. So maybe there are some nuances there that im not seeing about protecting the business from a complaint.

Maggie Anderson, Director of Medicaid Services with the Department of Human Services: That section which is section 5 and it's a complaint by a person so I believe that is a situation where as a citizen, I would make a complaint and it would be then protected during that time until it is released by the courts. It is not a complaint by the BCI, it's a complaint by a person. We did send this version of the bill back to centers for Medicare and Medicaid services and the OIG (office of inspector general) to make sure that they were okay with it and that it met the minimum criteria to establish a MFCU (Medicaid Fraud Control Unit) and they were very comfortable with that. They have a formal process where they review the false claims act pieces and they're doing that and know that we are trying to get those answers as soon as possible. I don't know what changes the AG's office has, they did indicate that they had a few changes but the feds said that this bill met their requirements at this time, and we will continue to share with them if there are amendments just to make sure because we don't want to implement something then we can't qualify for the federal funding.

(08:30- end of recording) Madam Chair Lee continues to read over SB 2347.

2019 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Red River Room, State Capitol

SB 2347
1/30/2019
Job # 31803

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature: Justin Velez

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Senator K. Roers: I have some amendments that was provided to us by Troy Siebel from the AG's office. He mentioned that he would have some amendments and so this is the follow up to that comment. I'll be honest I haven't a chance to look and see what they are.

(00:35-06:25) Senator K. Roers gives an overview of the proposed amendments for SB 2347 proposed by the Attorney General's office. Please see Attachment #1 for proposed amendments.

Senator O. Larsen: Do you remember why they put that section three in there?

Senator K. Roers: Honestly, I have no idea. In the e-mail that I received Troy Siebel sent to me says; I have attached some suggestions amendments from our office, these are included in the version of this bill that made its way around last session but didn't make it. In summary it changes the unit's investigatory responsibilities, and gives us some flexibility on when it investigates a case, changes when a defendant in a civil action is entitled to recover fees and expenses, provides for immunity for the state. This is done in many other states, it provides that any information the unit receives during an investigation remains confidential and provides for an enforcement mechanism for the unit to enforce subpoenas and civil investigative demands.

(07:54) Chris Jones, Executive Director for the Department of Human Services: All of this also needs to be approved by the feds and CMS and these amendments that Troy have suggested have not been blessed by the feds yet, so Maggie Anderson has sent them to the feds and they would like to provide feedback on both the false claims act as well as the establishment of the Medicaid Fraud Control Unit and they can't meet until the week of February 11th.

Madam Chair Lee: Would you like to explain to us about the amendment which is mentioned on page 15 line 30 which includes subsection 3.

(09:36) Maggie Anderson, Department of Human Services: These amendments were prepared by the AG's office and we didn't know about them until you knew about them. We have sent these amendments and the entire bill to the feds. Yesterday when Troy Siebel shared these amendments with the committee I then also sent them to the federal government and heard back from them this morning, we have a meeting scheduled for the 11th of February, which is the earliest time to let us know if any of these amendments conflict with either the false claims acts requirements or the requirements of the Medicaid Fraud Control Unit statute. I know you have to act on it before then and they are aware of that, so all you can do is move it forward and we can catch it in the house. We have kept them informed but unfortunately the timing just isn't going to work out but hopefully because they have been drafted by Mr. Grossman and the AG's office they are consistent with the requirements but I am not sure.

Madam Chair Lee: Could you come back this afternoon just to explain a little bit more and response to Senator O. Larsen's question about the subsection 3.

Maggie Anderson: Could I try and get Parrell Grossman on the phone.

Madam Chair Lee: Of course, maybe he would be able to come down this afternoon.

Maggie Anderson: I will see if he is available after floor session, and if him then Troy Siebel.

Senator Hogan: Do you think it would be better for us not to amend these into the base bill because we already know the feds have approved it and wait until the house.

Maggie Anderson: Actually, the feds have told us that the Medicaid Fraud Control Unit; This bill actually does three things it establishes the unit, creates the criminal code, and then has the false claims act. They have told us that the Medicaid Fraud Control Unit pieces are in harmony with the federal piece, the criminal statute is a ND piece not a federal issue. The February 11th call will also be the feedback on the false claims act provisions, so they have not confirmed that with us. They actually have a formal review process to look at something from a false claims act provision, that is also what they will share with us.

Senator Hogan: So, we could just pass it without the amendment and if on February 11th they say you will take it to the house or we can amend it here and have the house take it out if it doesn't sit well with the feds.

Madam Chair Lee: Any other questions for Mrs. Anderson?

Madam Chair Lee moves on from SB 2347 to SB 2124.

2019 SENATE STANDING COMMITTEE MINUTES

Human Services Committee
Red River Room, State Capitol

SB 2347
1/30/2019
Job # 31824

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature: Justin Velez

Explanation or reason for introduction of bill/resolution:

To provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

Attachments #1-2

Parrell Grossman, Director of the Attorney General's Consumer Protection and Antitrust Division: I'm here to try and answer any questions for the committee, we certainly think this is a good bill but it is entirely a policy decision for this committee and legislature and both chambers. We do have some proposed amendments and I would be happy to try and explain that.

(04:24-16:20) Parrell Grossman give an overview to the committee of the proposed amendments of SB 2347. Please **Attachment #1** for proposed amendments, and **Attachment #2** for Christmas tree bill with the proposed amendments.

(11:16) Senator K. Roers: I think one of the questions that were asked was if you could explain that number 3 in that section at the bottom of 15 and top of page 16 just to make sure we understand the intent on that part.

Parrell Grossman: The first change on line 25 is just tweaking language to say "concerned subject matter of the investigation", and the next change on line 27 is just "civil investigator demand or subpoena" they are two different devices. Civil investigator demands are a lot like written interrogatories that tell us to answer all these questions and produce these documents, subpoenas are to show up and testify under oath, so it is just adding that subpoena and then down below which is the now the subsection 3, "if I a person objects to or otherwise fails to comply with a civil investigator demand or subpoena served upon that person under subsection 1, the attorney general may file in the district court a petition for an order to enforce the demand or subpoena". If the court agrees that the AG (Attorney General) or the Medicaid Fraud Control Unit is entitled to that information and the court has the ability under the statute to enforce that order the investigative target to produce that information and then it would provide that the court shall award to the AG reasonable attorney's fees, costs, and expenses incurred in bringing the action. This is something we have used in our consumer fraud and Antitrust investigations for many years in this state.

Senator Hogan: I have been thinking about Maggie Anderson's question about the February 11th date and because it appears that these are kind of common sense routine language issue I think we may be able to adopt the amendments and pray that the feds approve them.

Madam Chair Lee: That was my thought. Mrs. Anderson do you have any questions on this after going over these amendments with Mr. Grossman?

Maggie Anderson: No.

Senator Hogan: I move to **ADOPT AMENDMENTS.**
Seconded by Senator K. Roers.

ROLL CALL VOTE TAKEN
5 YEA, 0 NAY, 1 ABSENT
MOTION CARRIES TO ADOPT AMENDMENT

Senator Hogan: I move a **DO PASS, AS AMENDED.**
Seconded by Senator K. Roers.

Madam Chair Lee: Any further discussion on SB 2347?

Senator O. Larsen: Im going to continue to resist on it, I don't think we need to do it. I heard that the feds may hold the funding but they are not going to do that and we passed it last time and they stopped the funding on it and here we are again. I think we are already doing it with the department and I think they are doing a good job with.

Madam Chair Lee: I don't like it either but, I think this time they are saying but we really mean it.

ROLL CALL VOTE TAKEN
4 YEA, 1 NAY, 1 ABSENT
MOTION CARRIES DO PASS, AS AMENDED.
Senator K. Roers will carry SB 2347 to the floor.

Madam Chair Lee end the discussion on SB 2347.

January 30, 2019

PROPOSED AMENDMENTS TO SENATE BILL NO. 2347

Page 5, line 14, after "shall" insert "enforce this Act and may"

Page 5, line 15, remove "may"

Page 10, line 20, replace "A defendant in a civil action brought pursuant to this Act which prevails in an action" with "If the attorney general does not intervene in a civil action and the person bringing the civil action conducts the action and the defendant prevails in the action"

Page 10, line 22, after "purposes" insert ", the defendant"

Page 10, line 22, remove ", which must be equitably"

Page 10, remove line 23

Page 10, line 24, remove "were co-plaintiffs"

Page 10, line 24, after the underscored period insert "The state is not liable for costs, attorney's fees, or other expenses incurred by a person in bringing or defending an action under this Act."

Page 15, line 16, after "**demands**" insert "**and subpoenas - Failure to comply - Confidentiality**"

Page 15, line 21, after "demand" insert "or subpoena"

Page 15, line 21, after the second "to" insert ", under oath"

Page 15, line 25, after "the" insert "subject matter of the investigation, including any"

Page 15, line 27, after the first "demand" insert "or subpoena"

Page 15, line 30, after the underscored period insert:

- "3. If a person objects to or otherwise fails to comply with a civil investigative demand or subpoena served upon that person under subsection 1, the attorney general may file in the district court a petition for an order to enforce the demand or subpoena. If the court finds the demand or subpoena is proper, the court shall order the person to comply with the demand or subpoena and may grant such injunctive or other relief as may be required until the person complies with the demand or subpoena. Notice of hearing on the petition and a copy of the petition must be served upon the person that may appear in opposition to the petition. If the attorney general prevails in an action brought under this subsection, the court shall award to the attorney general reasonable attorney's fees, costs, and expenses incurred in bringing the action.
4. Any testimony taken or material produced under this section must be kept confidential by the attorney general before bringing an action against a person under this chapter for the violation under investigation, unless confidentiality is waived by the person being investigated and the person

that testified, answered interrogatories, or produced material, or disclosure is authorized by the court.

282

5."

Page 16, line 2, after "Act" insert "and the person agrees to comply with the confidentiality provisions provided in subsection 4, and unless otherwise provided by state or federal law"

Renumber accordingly

Date: 1/30/19
Roll Call Vote #: 1

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2347**

Senate Human Services Committee

☐ Subcommittee

Amendment LC# or Description: 19. 8166. 01001

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐

Motion Made By Sen. Hogan Seconded By Sen. K. Roers

Senators	Yes	No	Senators	Yes	No
Chair Lee	<input checked="" type="checkbox"/>		Senator Hogan	<input checked="" type="checkbox"/>	
Vice Chair Larsen	<input checked="" type="checkbox"/>				
Senator Anderson					
Senator Clemens	<input checked="" type="checkbox"/>				
Senator Roers	<input checked="" type="checkbox"/>				

Total (Yes) 5 No 0

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 4/30/19
Roll Call Vote #: 2

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2347**

Senate Human Services Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☒ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Sen. Hogan Seconded By Sen. K. Roers

Senators	Yes	No	Senators	Yes	No
Chair Lee	<u>X</u>		Senator Hogan	<u>X</u>	
Vice Chair Larsen		<u>X</u>			
Senator Anderson					
Senator Clemens	<u>X</u>				
Senator Roers	<u>X</u>				

Total (Yes) 4 No 1

Absent 1

Floor Assignment Sen. K. Roers

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2347: Human Services Committee (Sen. J. Lee, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (4 YEAS, 1 NAYS, 1 ABSENT AND NOT VOTING). SB 2347 was placed on the Sixth order on the calendar.

Page 5, line 14, after "shall" insert "enforce this Act and may"

Page 5, line 15, remove "may"

Page 10, line 20, replace "A defendant in a civil action brought pursuant to this Act which prevails in an action" with "If the attorney general does not intervene in a civil action and the person bringing the civil action conducts the action and the defendant prevails in the action"

Page 10, line 22, after "purposes" insert ", the defendant"

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Page 15, line 27, after the first "demand" insert "or subpoena"

Page 15, line 30, after the underscored period insert:

"3. If a person objects to or otherwise fails to comply with a civil investigative demand or subpoena served upon that person under subsection 1, the attorney general may file in the district court a petition for an order to enforce the demand or subpoena. If the court finds the demand or subpoena is proper, the court shall order the person to comply with the demand or subpoena and may grant such injunctive or other relief as may be required until the person complies with the demand or subpoena. Notice of hearing on the petition and a copy of the petition must be served upon the person that may appear in opposition to the petition. If the attorney general prevails in an action brought under this subsection, the court shall award to the attorney general reasonable attorney's fees, costs, and expenses incurred in bringing the action.

4. Any testimony taken or material produced under this section must be kept confidential by the attorney general before bringing an action against a person under this chapter for the violation under investigation, unless confidentiality is waived by the person being investigated and the person that testified, answered interrogatories, or produced material, or disclosure is authorized by the court.

5."

Page 16, line 2, after "Act" insert "and the person agrees to comply with the confidentiality provisions provided in subsection 4, and unless otherwise provided by state or federal law"

Renumber accordingly

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 46 YEAS, 0 NAYS, 0 EXCUSED, 1 ABSENT AND NOT VOTING.

YEAS: Anderson; Bakke; Bekkedahl; Burckhard; Clemens; Cook; Davison; Dever; Dotzenrod; Dwyer; Elkin; Erbele; Fors; Grabinger; Heckaman; Hogan; Hogue; Holmberg; Kannianen; Klein; Krebsbach; Kreun; Larsen, O.; Larson, D.; Lee, G.; Lee, J.; Luick; Marcellais; Mathern; Meyer; Myrdal; Oban; Oehlke; Osland; Patten; Piepkorn; Poolman; Roers, J.; Roers, K.; Rust; Schaible; Sorvaag; Unruh; Vedaa; Wanzek; Wardner

ABSENT AND NOT VOTING: Robinson

SB 2218 passed.

SECOND READING OF SENATE BILL

SB 2338: A BILL for an Act to create and enact sections 57-39.2-02.3 and 57-40.2-02.4 of the North Dakota Century Code, relating to collection of sales and use tax by marketplace facilitators; to amend and reenact subsection 22 of section 57-39.2-01, and subsections 6 and 7 of section 57-40.2-01 of the North Dakota Century Code, relating to the definition of retailer and retail sale; and to provide an effective date.

ROLL CALL

The question being on the final passage of the bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 44 YEAS, 2 NAYS, 0 EXCUSED, 1 ABSENT AND NOT VOTING.

YEAS: Anderson; Bakke; Bekkedahl; Burckhard; Clemens; Cook; Davison; Dever; Dotzenrod; Dwyer; Elkin; Erbele; Fors; Grabinger; Heckaman; Hogan; Hogue; Holmberg; Kannianen; Klein; Krebsbach; Kreun; Larson, D.; Lee, G.; Lee, J.; Luick; Mathern; Meyer; Myrdal; Oban; Oehlke; Osland; Patten; Piepkorn; Poolman; Roers, J.; Roers, K.; Rust; Schaible; Sorvaag; Unruh; Vedaa; Wanzek; Wardner

NAYS: Larsen, O.; Marcellais

ABSENT AND NOT VOTING: Robinson

SB 2338 passed.

MOTION

SEN. KLEIN MOVED that SB 2347 be rereferred to the **Appropriations Committee**, which motion prevailed. Pursuant to Sen. Klein's motion, SB 2347 was rereferred.

SECOND READING OF SENATE BILL

SB 2170: A BILL for an Act to amend and reenact section 43-48-03 of the North Dakota Century Code, relating to clinical laboratory personnel exemptions.

ROLL CALL

The question being on the final passage of the amended bill, which has been read, and has committee recommendation of DO PASS, the roll was called and there were 46 YEAS, 0 NAYS, 0 EXCUSED, 1 ABSENT AND NOT VOTING.

YEAS: Anderson; Bakke; Bekkedahl; Burckhard; Clemens; Cook; Davison; Dever; Dotzenrod; Dwyer; Elkin; Erbele; Fors; Grabinger; Heckaman; Hogan; Hogue; Holmberg; Kannianen; Klein; Krebsbach; Kreun; Larsen, O.; Larson, D.; Lee, G.; Lee, J.; Luick; Marcellais; Mathern; Meyer; Myrdal; Oban; Oehlke; Osland; Patten; Piepkorn; Poolman; Roers, J.; Roers, K.; Rust; Schaible; Sorvaag; Unruh; Vedaa; Wanzek; Wardner

ABSENT AND NOT VOTING: Robinson

2019 SENATE APPROPRIATIONS

SB 2347

2019 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee Harvest Room, State Capitol

SB 2347
2/5/2019
JOB # 32203

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Alice Delzer / Florence Mayer

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

1. DHS MFCU pamphlet
2. Letters: Maggie Anderson; Jonathan D. Morse, J.D.; Governor Burgum.

Chairman Holmberg: Called the Committee to order on SB 2347. All committee members were present. Brady Larson, Legislative Council and Becky Deichert, OMB were also present. It is an issue on the subcommittee on the Attorney General's office. This is a bill that talks about the policy. This committee is interested in the dollar amounts; we don't need the full load. We have several people that will need to leave. We will start with the prime sponsor.

Senator Kristen Roers, District 27, South Central Fargo, ND: Introduced SB 2347, a policy bill that corresponds to the funding in the Governor's budget for the Medicaid Fraud Unit.

Wayne Stenehjem, ND Attorney General: We are appearing on behalf of this bill. We now have to have a Medicaid Fraud Unit now; you also need a false claims act. That is what SB 2347 is. We have a lot of people from my office and DHS that will walk through the bill itself. We have worked on this for at least 2 sessions, now we need to do something.

Senator Sorvaag: I forgot to say something in our subcommittee, happy birthday!

Maggie Anderson, Director of Medical Services: Testifying in favor of SB 2347. Provided Attachment #1, DHS Medicaid Fraud Control Unit (MFCU) Overview, Background and History. Also provided Attachment #2 which is a collection of letters concerning communications about the Medicaid Fraud Unit.

(14:02) Senator Dever: I see the Federal Government pays 90% for 3 years, and then 75%. So in the next biennium we need to consider a larger appropriation?

Maggie Anderson: That is correct and that should be reflected in the fiscal note.

Chairman Holmberg: Anyone else that has to give us information?

Senator Sorvaag: What we are looking at in this bill, is 7 FTE's. The fiscal note is \$181,000 which is the 10%. Last session we were doing the exact same thing and the bill had 6FTEs. The Governor's request was 5 FTEs for this same function. That puts the range anywhere from \$128,000 to \$181,000. Just so you know, if the committee wants to go forward with this, we have to decide whether it is 5,6, or 7 FTEs. Should we have someone speak on the number of FTEs?

Chairman Holmberg: What this bill is essentially saying, is do we as an appropriation committee feel we need to go forward with this program. Then the Attorney General's budget is where the money would be. They will be coming back. Any additional questions?

Senator Hogue: I am acquainted with other actions, where if the Attorney General of the U.S. Attorney does not except and prosecute the case, the private citizen can. Is that the same proposal as last session? Does that impact the same number of FTEs? Could you give us the reasons why it would be good policy why it should be turned over to someone else to prosecute?

(17:36) Wayne Stenehjem: The draft of the bill in front of us was worked on over the interim. Parrell Grossman spent a lot of time on it. I will defer to him.

Parrell Grossman, Consumer Protection Director, Attorney General's Office: I don't think we view this legislation as something that will typically involve the private citizens. It is intended to provide the opportunity to do that. Typically, the Federal Government wants that to be a possibility. I don't think you'll see the majority of the work done on behalf of the citizens of this state. think this legislation makes it clear that the Attorney General always remains in control of the enforcement of this statute and can intervene at any time. Once the Attorney General does, the actions of the private person are very limited. They would share in some percentage of the recovery. I don't think we foresee this as something private citizens will frequently bring some action.

Chairman Holmberg: We will close the hearing on 2347. We are meeting at 8:00 am tomorrow.

Senator Mathern: I am wondering if the committee should act on this bill? That then gives us direction as whether or not to fund it in the Attorney General's budget.

Chairman Holmberg: This can be one of the issues we look at tomorrow, when the full committee meets.

2019 SENATE STANDING COMMITTEE MINUTES

Appropriations Committee
Harvest Room, State Capitol

SB 2347
2/6/2019
JOB # 32241 (Did not record)

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Alice Delzer

Explanation or reason for introduction of bill/resolution:

A BILL for False medical assistance claims. DO PASS

Minutes:

No testimony submitted

Chairman Holmberg: called the Committee to order on SB 2347. All committee members were present. Adam Mathiak, Legislative Council and Stephanie Gullickson, OMB were also present.

Senator Robinson: Moved a Do Pass. 2nd by Senator Sorvaag

Chairman Holmberg: Call the roll on a DO PASS on SB 2347.

A Roll Call vote was taken. Yea: 13; Nay: 1; Absent: 0.

Chairman Holmberg: This will go back to Human Services. Senator K. Roers will carry the bill.

The hearing was closed on SB 2347.

Date: 2-6-2019
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2349

Senate Appropriations Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Robinson Seconded By Sorvaag

Senators	Yes	No	Senators	Yes	No
Senator Holmberg	<input checked="" type="checkbox"/>		Senator Mathern	<input checked="" type="checkbox"/>	
Senator Krebsbach	<input checked="" type="checkbox"/>		Senator Grabinger	<input checked="" type="checkbox"/>	
Senator Wanzek	<input checked="" type="checkbox"/>		Senator Robinson	<input checked="" type="checkbox"/>	
Senator Erbele	<input checked="" type="checkbox"/>				
Senator Poolman	<input checked="" type="checkbox"/>				
Senator Bekkedahl	<input checked="" type="checkbox"/>				
Senator G. Lee	<input checked="" type="checkbox"/>				
Senator Dever	<input checked="" type="checkbox"/>				
Senator Sorvaag	<input checked="" type="checkbox"/>				
Senator Oehlke	<input checked="" type="checkbox"/>				
Senator Hogue		<input checked="" type="checkbox"/>			

Total (Yes) 13 No 1

Absent 0

Floor Assignment K. Loew

If the vote is on an amendment, briefly indicate intent:

go back
Human Services

REPORT OF STANDING COMMITTEE

SB 2347, as engrossed: Appropriations Committee (Sen. Kannianen, Chairman)
recommends **DO PASS** (13 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed SB 2347 was placed on the Eleventh order on the calendar.

2019 HOUSE HUMAN SERVICES

SB 2347

2019 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Union Room, State Capitol

SB 2347
2/27/2019
32953

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Nicole Klamann

Explanation or reason for introduction of bill/resolution:

To provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

1-2

Senator K. Roers: Introduced bill No written testimony provided

Maggie Anderson, Director of Medicaid: In support, written provided See attachment 1. This is primarily for provider fraud.
(0:15:30)

Chairman Weisz: Will there be any gain for the department if we establish this?

Maggie Anderson: I'm unclear what the question is.

Chairman Weisz: Would we save resources?

Maggie Anderson: No, we have responsibilities specific to Medicaid Program integrity. If a credible allegation of fraud is made, we work with the office of Inspector General and States Attorney. This would give us an entity with investigation and prosecution authorities in it.
(0:17:03)

Chairman Weisz: Does the Attorney General's office do preliminary investigation?

Maggie Anderson: Very possible because they can receive referrals from anyone.
(0:18:35)

Representative Todd Porter: Is this in the minimum form acceptable by the federal government? Is there a component where there is more than required?

Maggie Anderson: When SB 2347 introduced, this bill is going to meet the federal requirements, nothing more.

Rep. Porter: I started looking at definitions, Section 1 sub 1 definition of abuse. I get concerned when the standard practice of the Medicaid agency bumps up against what abuse could be.

Maggie Anderson: The department wasn't involved in the drafting of the legislation.

Rep. Porter: I will save my questions because it's about definitions.

Representative Kathy Skroch: Do you know if within 2023 was any additional monies requested?

Maggie Anderson: Yes there are FTE and dollars, defer to The attorney general

Parrell D. Grossman, Director Consumer Protection & Antitrust Division of Attorney General:
Neutral testimony, see **attachment 2**.
(0:36:18)

Rep. Porter: What is the penalty to the state if we do nothing?

Parrell Grossman: Uncertain what that is in dollar amount but I'm sure it's some level of funding taken away.

Rep. Porter: Definitions are important. There are two that are concerning; abuse and benefits. If the definitions are geared towards current law, how do we implement them to the new law?

Parrell Grossman: I don't understand why it doesn't fit.

Rep. Porter: Definition of "knowingly" you don't have anything required or no specific proof that the person intended to commit fraud. Anything can be called fraud or abuse based on that. Whether or not I intended to steal or it was just a mistake, I'm subject to the rest of this act.

Parrell Grossman: Even though it doesn't require specific proof, you still have to know what the requirements are and that you are in violation.

Parrell Grossman: It states it doesn't inquire intent.

Rep. Porter: If I have the actual knowledge, I am compliant and I make a mistake. Even though I didn't intend on making that mistake, I still knowingly committed the act. The definition is what follows this act, not what I think the word "knowingly" means.

Parrell Grossman: I think it takes more than you might have or could have been acting in reckless disregard.

Rep. Porter: I would feel much better on the criminal side of the world but this is on the civil side, where the levels are a lot less. Inside of Section 2, you propose a language change on the liability for certain acts. The way the language is in this bill, here is an example of

what would come up. If I miscode a trip ticket, knowingly or with specific intent to defraud, and my coding software is set up incorrectly. Now we have 300 claims times the fine. Inside of that, if I miscoded 3 different codes, the fine keeps growing. I have a big concern about Section 2 becoming an investigate and settle situation.

(0:49:22)

Parrell Grossman: I can only speak to ND situations and how we handle things. I don't know it's fair to say that if in another state something happened, to say it's going to happen here but I do understand your concern.

(0:51:46)

Rep. Porter: Page 4 line 17, they are putting minimum sentencing guidelines in for the courts. We have actually gotten rid of those on the criminal side, so why are we putting them back in on this side?

Parrell Grossman: I would have to defer to the Feds as this statute follows what their requirements are.

Rep. Porter: We don't really know the bare minimum required then?

Parrell Grossman: I don't know that it's the same as every other state. We are being told these are the requirements and we are trying to meet them without going to them and asking what are the bare minimum requirements.

Chairman Weisz: Page 2 "knowingly". That language appears to be in conflict because in on area is states no intent necessary. Where did this language come from, straight out of the Feds model?

Parrell Grossman: I don't interpret that the same way. If you had knowledge of or acted out of deliberate knowledge of.

Chairman Weisz: Deliberate and intent mean the same thing. If someone does something knowingly, doesn't that provide intent?

In other words, a code can be billed with the same reimbursement as the proper code deciding it wouldn't be a big deal because of the reimbursement rate.

Parrell Grossman: Yes.

Representative Karen Rohr: Are we the only state without a fraud unit?

Parrell Grossman: Yes

Rep. Rohr: Based on current data does it appear that we do need this?

Parrell Grossman: I don't have that data but we can track 2.6 million cases of fraud during the past 8 years. Other states 9-23 million cases of fraud over 3 years. It's hard to imagine ND being the only state not having these problems.

Rep. Rohr: Would this be retroactive?

Parrell Grossman: No, it would take effect once the legislature says it takes effect.

Opposition: None.

Kathy Roll, Finance Administration of the North Dakota Attorney General's office: Not in opposition just responding to a question regarding funding. There is a fiscal note of 1.8 million 90% would become above the feds 10% to the state.

Chairman Weisz: Closes hearing

2019 HOUSE STANDING COMMITTEE MINUTES

Human Services Committee
Fort Union Room, State Capitol

SB 2347
3/20/2019
34060 and 34063

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Nicole Klamann typed by Mary Brucker

Explanation or reason for introduction of bill/resolution:

To provide for liability for false medical assistance claims and to provide for Medicaid fraud control unit and to provide a penalty.

Minutes:

Attachment 1

Proposed amendments were distributed prior to the meeting from Parrell Grossman, Director of Consumer Protection and Antitrust Division with the Office of Attorney General. See attachment 1.

Chairman Weisz: Opened meeting. This is regarding the Medicaid fraud unit. There were concerns having to do with the false claims area. These amendments eliminate the False Claim Act. These came from the AG's office. CMS has said this bill would meet their qualifications as a Medicaid Fraud Unit. This eliminates the whole false claims section in the bill.

Rep. Schneider: How does that impact the other set of amendments we've had if at all?

Chairman Weisz: I believe these would pre-empt the other amendments. We wouldn't need to adopt the other amendments. These are complete. Maybe we'll take a break.

Rep. Rohr: I would like to take some time to read this document we received.

BREAK IN COMMITTEE

NEW RECORDING (34063)

Chairman Weisz: These amendments aren't necessarily suggested by the Attorney General. Some of the committee members asked for this to get rid of the False Claims Act. Ellen, does this remove the false claim portion of the bill?

Ellen Alm, Attorney General's office: It removes the whistle blower false claims portion of the statute. We were asked to prepare amendments for a less stringent bill for the Medicaid Fraud Unit. We took out all the claims where private citizens can bring actions for violations

of the Medicaid fraud. The amendments are taking out some definitions that are no longer necessary. The abuse definition was not really necessary for the statute. Some of the other definitions that were taken out are only relating to the qui tam portions so they are not needed anymore. We changed the definition of “knowingly” because there were some concerns regarding the definition in the original proposed bill. We felt that it was probably better to go back to the normal definition of “knowingly” that applies in the criminal code. In the mock up version on page four, we changed the civil penalties to be limited. It used to be based on the federal law and is now limited to \$1,000 to \$10,000 per violation with a cap of 15% if the total claims are less than \$100,000. By changing the civil penalties and changing the qui tam the difference in the law now is that it wouldn’t comply with the Debt Reduction Act which means the state would be entitled to 10% less recovery in any national settlements. If you have a statute that complies to the Debt Reduction Act you get an extra 10% of that recovery, we don’t have to send back to the feds; we can keep 60% instead of 50% and so forth. There is still a civil cause of action for Medicaid Fraud Unit.

Rep Rohr: Did I hear you say that the private citizen would not be able to introduce a fraudulent case?

Ellen Alm: Correct, we’ve taken out the qui tam which is the private citizens’ right to bring an action.

Rep. Schneider: Can you give an estimate based on the past of what it would cost us to remove the whistle blower provision in a reduction of shares of lawsuits and federal funds? Can you tell us how much we’re losing by taking that provision out and not complying with the Debt Reduction Act?

Ellen Alm: I do not have those numbers. Maggie may have those numbers.

Rep. Schneider: I’d like the committee to have them because that’s a pretty high price just for the paranoia of taking out the whistle blower provisions.

Rep. Devlin: That is a different number then on top of page two, because there it points to \$200,000 each year. Are you looking for a different figure?

Rep. Schneider: I’m looking for an estimation of what it would cost us to get 10% less off some of those big settlements. Some of those settlements can be millions of dollars.

Ellen Alm: I believe Parrell Grossman’s number in there is an example.

Chairman Weisz: If the eventual average of North Dakota is recovery to \$2 million each but only half of that would be federal so if it was 10% of that it would only be \$100,000 each year instead of \$200,000. Where does the \$2 million figure come from?

Maggie Anderson, Director Human Services: I’m not sure where Parrell got that figure from. We did a chart during the 2017 session and we haven’t updated it. In 2016, South Dakota under their global civil monetary settlements received about \$2 million so that could be where the money figure came from. Those are the global drug settlements. In 2017 Montana they had \$824,000 of recovery, South Dakota had about \$437,000, and Wyoming

had about \$467,000. In 2016 MFCU recovered \$679,000, South Dakota recovered \$438,000 and Wyoming recovered \$493,000. In addition, they had the global civil monetary amounts; Montana was \$178,000, North Dakota was \$204,000, South Dakota was \$173,000, and Wyoming was \$503,000. The previous year those numbers were much bigger. That is totally dependent on those drugs and how they were distributed amongst their Medicaid population. If we had a False Claims Act in North Dakota today in 2017, with the \$204,000 that was recovered, we would have been able to retain an additional 10% of that.

Chairman Weisz: This 10% applies to the global settlement?

Maggie Anderson: In 2007 the department brought forward a False Claims Act because the Deficit Reduction Act passed in 2006 and had the legislature adopted that at the time we would have been receiving the additional 10% on these all of these years even without a MFCU. False Claims Act don't have to have a MFCU.

Rep. Schneider: Are there additional costs to the state for removing the qui tam because we don't have a qui tam? We might not get information from a whistle blower that would show a pattern of fraud that would also bring money back as a revenue addition.

Maggie Anderson: I hesitate speaking to how qui tam and whistle blowers' provisions work because that's more on the legal side. It doesn't stop people from making referrals to our office or the MFCU.

Rep. Schneider: Do we have any information on what other states recover from their qui tam actions?

Maggie Anderson: I would have to look at the National Medicaid Fraud Unit's annual report.

Rep. Schneider: Just so we have an overall understanding of what we are all losing by these amendments and the overall picture.

Chairman Weisz: Are there any further questions? We have suggested amendments in front of us.

Rep. Porter: Made an amendment to adopt the amendments.

Rep. Ruby: Seconded the motion.

Chairman Weisz: Discussion on the amendment?

Rep. Schneider: I think there's a reason other states have picked up the qui tam actions. I'd hate to have a general paranoia of this which could cost our state millions of dollars putting these things together with the reduction in our recoveries that changes every year. If we want to prevent fraud, I don't see the fear in preventing fraud. The idea is to have people come forward so we can improve our system and make it honest while maximizing dollars to the state. I think we are undercutting the power of that by implementing these amendments.

Chairman Weisz: Further discussion?

Voice Vote: Motion carried.

Chairman Weisz: We have an amended bill in front of us, what are your wishes?

Rep. Porter: Made a motion for a DO PASS AS AMENDED AND REREFER TO APPROPRIATIONS.

Rep. Ruby: Seconded motion.

Roll call vote: 11 Yes 2 No 1 Absent

Motion carried.

Rep. Porter will be the bill carrier.

March 20, 2019

DE 3/20/19
1 of 3

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2347

Page 1, line 7, remove ""Abuse" means conduct by a provider or other person involving disregard of and an"

Page 1, remove lines 8 through 11

Page 1, line 12, remove "2."

Page 1, line 14, replace "3." with "2."

Page 1, line 14, replace "any" with ":

a. Any"

Page 1, line 17, replace "a." with "(1)"

Page 1, line 18, replace "b." with "(2)"

Page 1, line 21, replace "(1)" with "(a)"

Page 1, line 23, replace "(2)" with "(b)"

Page 1, line 24, replace ": and does" with ":

b. A claim does"

Page 2, line 4, replace "4." with "3."

Page 2, line 5, replace "5." with "4."

Page 2, line 7, replace "6." with "5."

Page 2, line 10, replace "7." with "6."

Page 2, line 10, remove "or "knowing" requires no proof of specific intent to defraud and means a"

Page 2, remove lines 11 and 12

Page 2, line 13, replace "the information" with "means "knowingly" as defined in section 12.1-02-02"

Page 2, line 14, replace "8." with "7."

Page 2, line 16, replace "9." with "8."

Page 2, line 20, replace "10." with "9."

Page 2, line 25, replace "11." with "10."

Page 2, remove lines 29 through 31

Page 3, remove lines 1 and 2

Page 3, line 3, replace "13." with "11."

Page 3, line 8, replace "14." with "12."

DA 3/20/19
2 of 3

Page 3, remove lines 14 and 15

Page 3, line 16, replace "16." with "13."

Page 3, line 18, replace "17." with "14."

Page 3, line 26, replace "subsection" with "subsections"

Page 3, line 26, after "2" insert "and 3"

Page 3, line 27, replace "ten" with "one"

Page 3, line 27, remove "nine hundred fifty-seven"

Page 3, line 28, replace "twenty-one" with "ten"

Page 3, line 28, remove "nine hundred fifty-six"

Page 4, line 30, remove "Annually, the attorney general shall review the civil penalty rates and by administrative"

Page 4, remove line 31

Page 5, remove line 1

Page 5, line 2, replace "890; 28 U.S.C. 2461]" with "If the total claim made or presented by a person under subsection 1 is less than one hundred thousand dollars, the civil penalty for which the person is liable may not be more than fifteen percent of the total claim submitted"

Page 5, line 14, remove "enforce this Act and may"

Page 5, line 15, after "and" insert "may"

Page 5, remove lines 17 through 31

Page 6, remove lines 1 through 31

Page 7, remove lines 1 through 27

Page 8, remove lines 1 through 18

Page 8, remove lines 23 through 31

Page 9, remove lines 1 through 29

Page 10, remove lines 1 through 6

Page 10, line 19, remove "A plaintiff is"

Page 10, remove lines 20 and 21

Page 10, line 22, remove "or the state prevails in the action."

Page 10, line 23, remove "If the attorney general does not intervene in a civil action and the person bringing"

Page 10, remove lines 24 and 25

Page 10, line 26, remove "defendant is entitled to reasonable costs and attorney's fees."

Page 11, remove lines 17 through 23

Renumber accordingly

DA 3/20/16
303

Date: 3-20-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL 2347

House Human Services Committee

☐ Subcommittee

Amendment LC# or Description: eliminate False Claim Act see attach. #1

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Porter Seconded By Rubio

Representatives	Yes	No	Representatives	Yes	No
Robin Weisz - Chairman			Gretchen Dobervich		
Karen M. Rohr - Vice Chairman			Mary Schneider		
Dick Anderson					
Chuck Damschen					
Bill Devlin					
Clayton Fegley					
Dwight Kiefert					
Todd Porter					
Matthew Ruby					
Bill Tveit					
Greg Westlind					
Kathy Skroch					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Motion Carries

Date: 3/20/19
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILLS 82347

House Human Services Committee

☐ Subcommittee

Amendment LC# or Description: 19.8166.02001

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☒ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐

Motion Made By Rep. Porter Seconded By Rep. M. Ruby

Representatives	Yes	No	Representatives	Yes	No
Robin Weisz - Chairman	<input checked="" type="checkbox"/>		Gretchen Dobervich		<input checked="" type="checkbox"/>
Karen M. Rohr - Vice Chairman	<input checked="" type="checkbox"/>		Mary Schneider		<input checked="" type="checkbox"/>
Dick Anderson	<input checked="" type="checkbox"/>				
Chuck Damschen	<input checked="" type="checkbox"/>				
Bill Devlin	<input checked="" type="checkbox"/>				
Clayton Fegley	<input checked="" type="checkbox"/>				
Dwight Kiefert	<input checked="" type="checkbox"/>				
Todd Porter	<input checked="" type="checkbox"/>				
Matthew Ruby	<input checked="" type="checkbox"/>				
Bill Tveit	<input checked="" type="checkbox"/>				
Greg Westlind	<input checked="" type="checkbox"/>				
Kathy Skroch	<input checked="" type="checkbox"/>				

Total (Yes) 11 No 2

Absent 1

Floor Assignment Rep. Porter

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

SB 2347, as engrossed: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (11 YEAS, 2 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2347 was placed on the Sixth order on the calendar.

Page 1, line 7, remove ""Abuse" means conduct by a provider or other person involving disregard of and an"

Page 1, remove lines 8 through 11

Page 1, line 12, remove "2."

Page 1, line 14, replace "3." with "2."

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Page 10, line 26, remove "defendant is entitled to reasonable costs and attorney's fees."

Page 11, remove lines 17 through 23

Renumber accordingly

2019 HOUSE APPROPRIATIONS

SB 2347

2019 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee Roughrider Room, State Capitol

SB 2347
3/27/2019
34274

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk: Risa Bergquist

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

--

Chairman Delzer: Calls the meeting to order for SB 2347

Representative Weisz: SB 2347 is the bill for the Medicaid Fraud Unit. What you have in front of you is what the committee feels is the minimum requirement to meet the feds requirement that we have a Medicaid Fraud Unit. We amended out the false claims act that was in the bill when it came over from the senate. Appropriations already reduced the FTEs numbers in the AG's budget for the fraud unit. We never addressed the cost of the FTEs in the bill. This does establish the fraud until, the waiver went away so this is the fraud unit.

Chairman Delzer: We have had that discussion many times, what would happen if we didn't do this?

Representative Weisz: Worst case scenario we could lose Medicaid funding until we get something into place. When we took out the false claims act, any state that has a false claims act is eligible for an additional 10% of the federal share of reimbursement on any recovery.

Chairman Delzer: On any recovery or the cost of the unit?

Representative Weisz: On the recovery, it's 50/50 so if there's 2 million in recovery we'd get a million and then if we have the false claim act in place we would get an additional 10% of the feds share.

Chairman Delzer: That would have to go through the court system to prove that wouldn't you?

Representative Weisz: If the law is in place we automatically get that additional if there is a settlement. That's in place separate of the fraud unit.

Chairman Delzer: Would there be a cost to the false claims act?

Representative Vigessaa: Our indication was the minimum FTEs was 4 to qualify the unit to be in place.

Chairman Delzer: What would that do to the fiscal note?

Representative Vigessaa: With the feds paying 90% for the first three years it would be minimal effect.

Representative J. Nelson: I was reading about the potential Medicaid fraud in North Dakota and one of the wire that might trip an investigation is our commercial rates structure in the Medicaid expansion population. Did your committee have any testimony in that regard?

Chairman Delzer: Would that go against the any of the entities using that? Or would that go against the state for having a commercial rate in there?

Representative J. Nelson: We don't get those kind of answers in appropriation because we only deal with the money part of it and not the policy.

Representative Weisz: No didn't have any discussion on whether there would be more fraud under the commercial rates versus the traditional Medicaid rates.

Chairman Delzer: Is our commercial rate enough to be considered a fraud?

Representative J. Nelson: That's the potential conclusion of the group that reported in the piece that I was reading.

Representative Weisz: Because that rate isn't consistent across the providers.

Chairman Delzer: So then it's about who it falls on, are there penalties?

Representative Weisz: You could argue that if there's a recovery it would come back to the state. That's part of why we removed the false claims act, the penalties were severe.

Chairman Delzer: We had a Medicaid fraud until, it never paid for itself, I think it's a shame that the feds are making us do this.

Representative Weisz: We rejected in committee and we have fight this for a long time, I think the cost and work to recover doesn't make it worth it.

Chairman Delzer: There's nothing in the bill that says how many FTEs or the cost?

Representative Weisz: This just establishes the parameters and what they can do. The Attorney General's office is responsible the fraud unit but that doesn't take anything away from what they are currently doing in the department.

Chairman Delzer: Did you have the discussion on how many the department is finding right now?

Representative Weisz: I am drawing a blank on the dollars and it's hard to determine the exact dollars.

Chairman Delzer: Any further discussion? Seeing none we will close this hearing.

2019 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee Roughrider Room, State Capitol

SB 2347
3/27/2019
34293

- ☐ Subcommittee
☐ Conference Committee

Committee Clerk: Risa Bergquist

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to provide for liability for false medical assistance claims and to provide for a Medicaid fraud control unit; and to provide a penalty.

Minutes:

Chairman Delzer: Called the meeting to order for SB 2347. This is a bill for the Medicaid fraud unit. Representative Vigesaa stated that in the Attorney General bill they are looking at having 4 FTEs, the cost is 90-10 for the first couple of years, then it goes to 75-25 for those salaries. Do we have good enough reporting requirements, I am guessing at the next biennium we will have that. Human services will still be doing everything that they have always done. What are your wishes?

Representative J. Nelson: Do pass

Representative Schmidt Second

Representative Schatz: Where do the other funds come from?

Chairman Delzer: Other funds are federal funds; the federal government pays 90% for the first 3 years, after 3 years the federal government will pay 75.

Representative Vigesaa: They asked for 2 investigators, 2 attorneys 2 auditors and 1 administrative assistant, but we plan on giving them 2 investigators, 1 attorney and 1 auditor and they will find administrators within.

Representative Beadle: The executive recommendation was they put in 5 FTEs for the unit and then the senate bumped it up to 7.

Representative Kreidt: We start this up and then we are hung with the bill after that?

Chairman Delzer: We will be responsible for 25% after that. I don't know how we can take a chance of going against the on the Medicaid side. On the 7 would have 181 thousand next biennia 310 but with only doing 4 it will reduce that.

Representative Kreidt: Aren't there some other bills will fraud unit money in there?

Representative J. Nelson: We do have SB 2012 and there is 2 fraud unit position in the vocational rehab, we didn't object to those.

Chairman Delzer: Is that on Medicaid fraud?

Representative J. Nelson: That's dealt with Medicaid fraud as well, it's in the determination area of that field. When they do the application for eligibility.

Chairman Delzer: Would this fall in to the same thing? Could this cover that?

Representative J. Nelson: I didn't know this was out there but we will have that conversation and see if this would cover that. I thought it was 2 FTEs but I guess it's only 1.

Chairman Delzer: Further discussion? Seeing none we will call the roll.

A Roll Call vote was taken. Yea: 17 Nay: 1 Absent: 3

Motion Carries, Representative Porter will carry the bill.

Chairman Delzer: We will close this meeting.

Date: 3/27/2019
Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2347**

House Appropriations Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Representative J. Nelson Seconded By Representative Schmidt

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer		X			
Representative Kempenich	A				
Representative Anderson	X		Representative Schobinger	A	
Representative Beadle	X		Representative Vigesaa	X	
Representative Bellew	A				
Representative Brandenburg	X				
Representative Howe	X		Representative Boe	X	
Representative Kreidt	X		Representative Holman	X	
Representative Martinson	X		Representative Mock	X	
Representative Meier	X				
Representative Monson	X				
Representative Nathe	X				
Representative J. Nelson	X				
Representative Sanford	X				
Representative Schatz	X				
Representative Schmidt	X				

Total (Yes) 17 No 1

Absent 3

Floor Assignment Representative Porter

Motion Carries

REPORT OF STANDING COMMITTEE

SB 2347, as engrossed and amended: Appropriations Committee (Rep. Delzer, Chairman) recommends **DO PASS** (17 YEAS, 1 NAYS, 3 ABSENT AND NOT VOTING). Engrossed SB 2347, as amended, was placed on the Fourteenth order on the calendar.

2019 TESTIMONY

SB 2347

SB 2347
1/28/19
#1 pg.1

019



SB 2347 Department of Human Services

Medicaid Fraud Control
Unit (MFCU)

Overview, Background
and History

Code of Federal Regulations

42 CFR §1007.5 Basic requirement

A State Medicaid fraud control unit must be a single identifiable entity of the State government certified by the Secretary as meeting the requirements of §§ 1007.7 through 1007.13 of this part.

Code of Federal Regulations

42 CFR §1007.7 Organization and location requirements

Any of the following three alternatives is acceptable:

- (a) The unit is located in the office of the State Attorney General or another department of State government which has Statewide authority to prosecute individuals for violations of criminal laws with respect to fraud in the provision or administration of medical assistance under a State plan implementing title XIX of the Act;
- (b) If there is no State agency with Statewide authority and capability for criminal fraud prosecutions, the unit has established formal procedures that assure that the unit refers suspected cases of criminal fraud in the State Medicaid program to the appropriate State prosecuting authority or authorities, and provides assistance and coordination to such authority or authorities in the prosecution of such cases; or
- (c) The unit has a formal working relationship with the office of the State Attorney General and has formal procedures for referring to the Attorney General suspected criminal violations occurring in the State Medicaid program and for effective coordination of the activities of both entities relating to the detection, investigation and prosecution of those violations. Under this requirement, the office of the State Attorney General must agree to assume responsibility for prosecuting alleged criminal violations referred to it by the unit. However, if the Attorney General finds that another prosecuting authority has the demonstrated capacity, experience and willingness to prosecute an alleged violation, he or she may refer a case to that prosecuting authority, as long as the Attorney General's Office maintains oversight responsibility for the prosecution and for coordination between the unit and the prosecuting authority.

Code of Federal Regulations

42 CFR §1007.9 Relationship to, and agreement with, the Medicaid agency

- **(a)** The unit must be separate and distinct from the Medicaid agency.
- **(b)** No official of the Medicaid agency will have authority to review the activities of the unit or to review or overrule the referral of a suspected criminal violation to an appropriate prosecuting authority.
- **(c)** The unit will not receive funds paid under this part either from or through the Medicaid agency.
- **(d)** The unit will enter into an agreement with the Medicaid agency under which the Medicaid agency will agree to comply with all requirements of §455.21 (a)(2) of this title.
- **(e)**
 - (1) The unit may refer any provider with respect to which there is pending an investigation of a credible allegation of fraud under the Medicaid program to the State Medicaid agency for payment suspension in whole or part under §455.23 of this title.
 - (2) Referrals may be brief, but must be in writing and include sufficient information to allow the State Medicaid agency to identify the provider and to explain the credible allegations forming the grounds for the payment suspension.
- **(f)** Any request by the unit to the State Medicaid agency to delay notification to the provider of a payment suspension under §455.23 of this title must be in writing.
- **(g)** When the unit accepts or declines a case referred by the State Medicaid agency, the unit notifies the State Medicaid agency in writing of the acceptance or declination of the case.

Code of Federal Regulations

42 CFR §1007.11 Duties and responsibilities of the unit.

- (a) The unit will conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan.
- (b)
 - (1) The unit will also review complaints alleging abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan and may review complaints of the misappropriation of patient's private funds in such facilities.
 - (2) If the initial review indicates substantial potential for criminal prosecution, the unit will investigate the complaint or refer it to an appropriate criminal investigative or prosecutive authority.
 - (3) If the initial review does not indicate a substantial potential for criminal prosecution, the unit will refer the complaint to an appropriate State agency.
- (c) If the unit, in carrying out its duties and responsibilities under paragraphs (a) and (b) of this section, discovers that overpayments have been made to a health care facility or other provider of medical assistance under the State Medicaid plan, the unit will either attempt to collect such overpayment or refer the matter to an appropriate State agency for collection.
- (d) Where a prosecuting authority other than the unit is to assume responsibility for the prosecution of a case investigated by the unit, the unit will insure that those responsible for the prosecutive decision and the preparation of the case for trial have the fullest possible opportunity to participate in the investigation from its inception and will provide all necessary assistance to the prosecuting authority throughout all resulting prosecutions.
- (e) The unit will make available to Federal investigators or prosecutors all information in its possession concerning fraud in the provision or administration of medical assistance under the State plan and will cooperate with such officials in coordinating any Federal and State investigations or prosecutions involving the same suspects or allegations.
- (f) The unit will safeguard the privacy rights of all individuals and will provide safeguards to prevent the misuse of information under the unit's control.

Scope of MFCU

- Primary Function and Scope is Medicaid Provider Fraud.
- Neglect and abuse complaints, including misuse/theft of resident personal funds, of individuals in health care facilities and board and care facilities; and
- Does not include investigating beneficiary fraud unless there is an allegation of a conspiracy between the beneficiary and a Medicaid provider (patient/provider collusion).

DHS - Medicaid Program Integrity Unit (PIU)

- If ND implements a MFCU, all of the preliminary provider fraud investigations that the PIU conducts, where a credible allegation of fraud exists, would be referred to the MFCU for further investigation and potential prosecution.
- The PIU would also assist with explaining Medicaid program policies and procedures.
- Collaboration would be expected to discuss fraud trends, areas of concerns, and continued clarification of intersects of activity.

ND MFCU Waiver

- In August 1994 the Office of Inspector General at HHS approved the request from ND for a waiver from the requirement to establish a Medicaid Fraud Control Unit.
- The waiver did not have an end date.
- DHS has had multiple findings from the State Auditor's office for not having a MFCU in ND.

Other Background

- 2007 Legislative Assembly did not adopt a DHS bill requesting establishment of a False Claims Act.
- 2009 Legislative Assembly did not adopt legislation introduced to establish a MFCU.

Other Background

- May 2016 Letter from CMS Acting Administrator to Governor Dalrymple requesting notification of intent to establish a MFCU or the submission of a new waiver request.
- September 2016 Letter from Governor Dalrymple to CMS Acting Administrator requesting a new waiver.

Other Background

- January 2017 – Letter from CMS to Governor requesting North Dakota submit an implementation plan for establishing a MFCU.
- January 2017 Letter from Governor Burgum to CMS outlining the 2017 legislation that was under consideration.

2017 Legislation

- HB 1174 – False Claims Act (Not Adopted)
- HB 1226 Medicaid False Claims Act
(Amended and Adopted)
- HB 1227 Medicaid Fraud Statute (Not Adopted)

2017 HB 1226 States:

- During the 2017- 18 interim, the department of human services, with the cooperation of the governor and the attorney general, shall study the feasibility and desirability of establishing a medicaid fraud control unit. Before August 1, 2018, the department of human services shall report to the legislative management the outcome of this study, together with any legislation required to implement the recommendations.

Activity Since 2017 Session

- Multiple Workgroup meetings
 - Joint meeting with SD MFCU and Adult Protective Services
- October 2017 DHS Letter to Seema Verma (CMS Administrator)
- December 2017 Letter from CMS to DHS
- April 2018 Workgroup (DHS and AG) presentation to interim committee
 - Review of draft bill prepared by Office of Attorney General
- August 2018 Letter from Governor Burgum to CMS with MFCU Implementation Plan
- December 2018 – funding for MFCU included in Governor's Executive Budget Request

2019 Legislative Session

- SB 2347 has been introduced to implement a Medicaid Fraud Control Unit.
- Funding for the Unit is included in SB 2003 (Appropriation for the Office of the Attorney General)



SB 2347

1/26/19

#1 pg. 16

Medical Services

(701) 328-7068

Toll Free 1-800-755-2604

Fax (701) 328-1544

Relay ND TTY 1-800-366-6888

Provider Relations (701) 328-7098

Doug Burgum, Governor
Christopher Jones, Executive Director

October 10, 2017

Seema Verma, Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

RE: North Dakota Medicaid Fraud Control Unit (MFCU)

Dear Ms. Verma

As you are likely aware, since 1994, North Dakota has had a waiver from operating a Medicaid Fraud Control Unit (MFCU). During my fourteen year tenure with the North Dakota Medicaid program and Department of Human Services, there have been various discussions about the status and continuation of the waiver. In addition to the discussion about the MFCU waiver, past Legislative Assemblies have rejected proposals to implement a Medicaid False Claims Act (2007 Senate Bill 2126) and a Medicaid Fraud Control Unit (2009 House Bill 1511).

In May 2016, CMS Acting Administrator Andrew Slavitt wrote to then-Governor Dalrymple requesting that North Dakota either submit a request for a new waiver or submit a timeline for creating a North Dakota MFCU. In September 2016, Governor Dalrymple submitted a request for a new waiver. In January 2017, just shortly before the end of President Obama's administration, Mr. Slavitt sent a letter to North Dakota indicating the request for a new waiver would not be considered and North Dakota should move to establish a MFCU.

Governor Doug Burgum assumed office in December 2016 and provided a response to Acting CMS Administrator Tim Hill in January 2017 (copy enclosed). As noted in the response from Governor Burgum, the biennial legislative session was underway, and there were three pieces of legislation that were active within the North Dakota Legislative session.

Throughout the 2017 North Dakota legislative Assembly, I kept CMS staff updated on the status of each of the three pieces of related legislation. The two pieces of legislation (false claims act and Medicaid fraud statute) were defeated. The third piece of legislation (House Bill 1226), creation of a MFCU, was amended, passed both chambers and was signed by Governor Burgum. As enacted, House Bill 1226 requires the Department of Human Services, in collaboration with the North Dakota Offices of the Governor and Attorney General, to study the desirability and feasibility of establishing a MFCU (copy enclosed).

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Page 2
Seema Verma
October 10, 2017

As Medicaid Director, I am coordinating the study as required by House Bill 1226. Since the letter denying North Dakota's request for a new MFCU waiver was received in the final days of the previous administration and signed by the former CMS Acting Administrator, I am writing to inquire if the position of Mr. Slavitt is consistent with your position as the current CMS Administrator. The group that is collaborating on the MFCU study recognizes that your position on North Dakota establishing a MCFU is essential to complete the study.

Thank you for consideration and response. I am available to provide any information that you or your staff may need. I can be contacted at 701-328-1603 or manderson@nd.gov

Sincerely,


Maggie D. Anderson
Medicaid Director

Enclosures

cc: Christopher Jones, Executive Director, Department of Human Services
Robbie Lauf, Policy Advisor, Office of Governor Burgum
Richard Allen, Associate Regional Administrator, CMS, Denver

DEPARTMENT OF HEALTH & HUMAN SERVICES
CENTERS for MEDICARE & MEDICAID SERVICES
7500 Security Boulevard, Mail Stop AR-18-50
Baltimore, Maryland 21244-1850



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Center for Program Integrity

DEC 19 2017

Dear Ms. Anderson,

This is in response to your October 10, 2017 letter inquiring whether Administrator Verma's position on the establishment of a Medicaid Fraud Control Unit (MFCU) in North Dakota is consistent with Administrator Slavitt's. Administrator Verma has asked me to reply on her behalf.

Per section 1902 (a)(61) of the Social Security Act (the Act), Medicaid programs are required to operate a MFCU as a condition of receiving Federal Financial Participation (FFP). The law does allow for a waiver of the requirement if a State can demonstrate that it would not be cost-effective because minimal fraud exists in connection with the provision of covered services to eligible individuals under the State plan, and that beneficiaries under the plan will be protected from abuse and neglect in connection with the provision of medical assistance under the plan without the existence of such a unit. As your letter indicates, North Dakota submitted a waiver request to CMS that was denied; this decision remains valid.

If you feel that the availability of new information supports a waiver as outlined in section 1902 (a)(61) of the Act, I would encourage you to submit a new request. Currently, North Dakota fails to comply with the MFCU state plan requirement. To allow for further planning, please submit your implementation plan no later than September 1, 2018. The plan should be submitted to the CMS Administrator, with a copy to the Health and Human Services Inspector General on your submission

Should you or your staff have any questions about this letter, please contact Jonathan Morse, Acting Director, Center for Program Integrity at 410-786-1892, or Jonathan.Morse@cms.hhs.gov.

If you have questions about requirements of the MFCU program or the application for a MFCU please contact Richard Stern, Director, OIG Medicaid Fraud Policy and Oversight Division, at 202-205-0572 or Richard.Stern@oig.hhs.gov.

Sincerely,

Jonathan D. Morse, J.D.
Deputy Center Director
Center for Program Integrity

CC: Richard Stern, HHS OIG
Richard Allen, Associate Regional Administrator, CMS, Denver

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— State of —
North Dakota
Office of the Governor

Doug Burgum
Governor

August 31, 2018

Seema Verma, Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

RE: North Dakota Medicaid Fraud Control Unit (MFCU)

Dear Ms. Verma,

As you are likely aware, since 1994, North Dakota has had a waiver from operating a Medicaid Fraud Control Unit (MFCU). In May 2016, CMS Acting Administrator Andrew Slavitt wrote to then-Governor Jack Dalrymple requesting that North Dakota either submit a request for a new waiver or submit a timeline for creating a North Dakota MFCU. In September 2016, Governor Dalrymple submitted a request for a new waiver. In January 2017, Mr. Slavitt sent a letter to North Dakota indicating the request for a new waiver would not be considered and North Dakota should move to establish an MFCU.

I assumed office in December 2016 and provided a response to Acting CMS Administrator Tim Hill in January 2017 (copy enclosed). As noted in my January 2017 response, the biennial legislative session was underway, and there were three pieces of legislation that were active within the North Dakota legislative session. Throughout the 2017 North Dakota Legislative Assembly, North Dakota Medicaid Director Maggie Anderson kept CMS staff updated on the status of each of the three pieces of related legislation. Two pieces of legislation (false claims act and Medicaid fraud statute) were defeated. The third piece of legislation, House Bill 1226, creation of an MFCU, was amended, passed both chambers, and I signed the amended bill. As enacted, House Bill 1226 required the Department of Human Services, in collaboration with the North Dakota Offices of the Governor and Attorney General, to study the desirability and feasibility of establishing an MFCU (copy enclosed).

As part of the study required under 2017 House Bill 1226, Ms. Anderson sent a letter to you in October 2017 requesting confirmation that your position was the same as that of Mr. Slavitt. In December 2017, Mr. Jonathan Morse with the Center for Program Integrity responded to Ms.


Anderson requesting an MFCU implementation plan be submitted by Sept. 1, 2018. This letter fulfills the requirement for an implementation plan.

As part of the executive budget request for the 2019-2021 biennium, I will request the staffing and funding necessary to implement an MFCU in North Dakota. The executive budget request will be presented during the Legislature's organizational session, scheduled for Dec. 3-5, 2018. As budget discussions continue between now and the organizational session, I will collaborate with Attorney General Wayne Stenehjem to determine the number of staff positions requested and if North Dakota will pursue *qui tam* as part of the MFCU implementation. Mr. Stenehjem's office has also drafted the North Dakota Century Code (NDCC) changes that would be needed to authorize the implementation and grant the appropriate authorities to the MFCU. If legislation is not introduced by an interim legislative committee or individual legislator, my office will ensure legislation is introduced to correspond to the executive budget request.

During the 2019 Legislative Assembly, my office will advocate for the NDCC changes and appropriation needed to establish an MFCU in North Dakota, and my staff will keep Mr. Morse updated on the status of the legislation and appropriation.

Should you have questions or need additional information, please contact my office.

Sincerely,



Doug Burgum
Governor

Enclosures

cc: Wayne Stenehjem, North Dakota Attorney General
Richard Stern, HHS Office of Inspector General
Richard Allen, Associate Regional Administrator, CMS, Denver
Christopher Jones, Executive Director, Department of Human Services
Maggie Anderson, Director, Medical Services Division, Department of Human Services

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2347
HUMAN SERVICES COMMITTEE
JUDY LEE, CHAIRMAN
JANUARY 28, 2019

PRESENTED BY
PARRELL D. GROSSMAN, DIRECTOR
CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL

Page 5, line 14, replace "shall" with "may"

Page 10, line 20, after the period replace "A defendant in a civil action brought pursuant to this Act which prevails in an action" with "If the attorney general does not intervene in a civil action and the person bringing the civil action conducts the action and the defendant prevails in the action"

Page 10, line 22, after "purposes" insert ", the defendant"

Page 10, line 22, replace ", which must be equitably apportioned against the person that brought the action and the state if a person and the state were co – plaintiffs" with ". The state is not liable for costs, attorney fees, or other expenses incurred by a person in bringing or defending an action under this chapter."

Page 15, line 16, after "**Civil investigative demands**" insert "**and Subpoenas – Failure to Comply - Confidentiality**"

Page 15, line 21, after "civil investigative demand" insert "or subpoena"

Page 15, line 21, after the second "to" insert "under oath"

Page 15, line 21, after "the" insert "subject matter of the investigation, including any"

Page 15, line 27, after "civil investigative demand" insert "or subpoena"

Page 15, line 30, after period insert:

"3. If a person objects to or otherwise fails to comply with a civil investigative demand or subpoena served upon that person under subsection 1, the attorney general may file in the district court a petition for an order to enforce the demand or subpoena, and if the court finds that the demand or subpoena is proper, the Court shall order the person to comply with the demand or subpoena and may grant such injunctive or other relief as may be required until the person complies with the demand or subpoena. Notice of hearing the petition and a copy of the petition must be served upon the person, who may appear in opposition to the petition. If the attorney general prevails in an action brought under this subsection, the Court shall award to the attorney general reasonable attorney's fees, costs and expenses incurred in bringing the action.

4. Any testimony taken or material produced under this section must be kept confidential by the attorney general before bringing an action against a person under this chapter for the violation under investigation, unless confidentiality is waived by the person being

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investigated and the person who has testified, answered interrogatories, or produced material, or disclosure is authorized by the court.

5.

Page 16, line 2, after "Act" insert "and the person agrees to comply with the confidentiality provisions provided in subsection 4, and unless otherwise provided by state or federal law."

Renumber accordingly

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2347
HUMAN SERVICES COMMITTEE
JUDY LEE, CHAIRMAN
JANUARY 30, 2019

PRESENTED BY
PARRELL D. GROSSMAN, DIRECTOR
CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL

Page 5, line 14, after "shall" insert "enforce this chapter and may"

Page 5, line 15, remove "may"

Page 10, line 20, after the period replace "A defendant in a civil action brought pursuant to this Act which prevails in an action" with "If the attorney general does not intervene in a civil action and the person bringing the civil action conducts the action and the defendant prevails in the action"

Page 10, line 22, after "purposes" insert ", the defendant"

Page 10, line 22, replace ", which must be equitably apportioned against the person that brought the action and the state if a person and the state were co – plaintiffs" with "The state is not liable for costs, attorney fees, or other expenses incurred by a person in bringing or defending an action under this chapter."

Page 15, line 16, after "Civil investigative demands" insert "and Subpoenas – Failure to Comply - Confidentiality"

Page 15, line 21, after "civil investigative demand" insert "or subpoena"

Page 15, line 21, after the second "to" insert "under oath"

Page 15, line 25, after "the" insert "subject matter of the investigation, including any"

Page 15, line 27, after "civil investigative demand" insert "or subpoena"

Page 15, line 30, after period insert:

"3. If a person objects to or otherwise fails to comply with a civil investigative demand or subpoena served upon that person under subsection 1, the attorney general may file in the district court a petition for an order to enforce the demand or subpoena, and if the court finds that the demand or subpoena is proper, the Court shall order the person to comply with the demand or subpoena and may grant such injunctive or other relief as may be required until the person complies with the demand or subpoena. Notice of hearing the petition and a copy of the petition must be served upon the person, who may appear in opposition to the petition. If the attorney general prevails in an action brought under this subsection, the Court shall award to the attorney general reasonable attorney's fees, costs and expenses incurred in bringing the action.

4. Any testimony taken or material produced under this section must be kept confidential by the attorney general before bringing an action against a person under this chapter for the violation under investigation, unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories, or produced material, or disclosure is authorized by the court.

5.

Page 16, line 2, after "Act" insert "and the person agrees to comply with the confidentiality provisions provided in subsection 4, and unless otherwise provided by state or federal law"

Renumber accordingly

19.8166.01000

Sixty-sixth
Legislative Assembly
of North Dakota

SENATE BILL NO. 2347

Introduced by

Senators K. Roers, Hogan, J. Lee

Representatives Boschee, Rohr, Schneider

- 1 A BILL for an Act to provide for liability for false medical assistance claims and to provide for a
- 2 Medicaid fraud control unit; and to provide a penalty.

3 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

4 SECTION 1.

5 Definitions.

6 As used in this Act, unless the context otherwise requires:

- 7 1. "Abuse" means conduct by a provider or other person involving disregard of and an
- 8 unreasonable failure to conform with the laws and rules governing the Medicaid
- 9 program if the disregard or failure results or may result in payment by a Medicaid
- 10 agency of medical assistance payments or benefits to which the provider knows the
- 11 provider is not entitled.
- 12 2. "Benefit" means the provision of anything of pecuniary value under the Medicaid
- 13 program.
- 14 3. "Claim" means any request or demand, whether under a contract or otherwise, for
- 15 money or property under the Medicaid program regardless of whether the state has
- 16 title to the money or property which is:
- 17 a. Presented to an officer, employee, or agent of the state; or
- 18 b. Made to a contractor, grantee, or other recipient, if the money or property is to be
- 19 spent or used on the state's behalf or to advance a state program or interest, and
- 20 if the state:
- 21 (1) Provides or has provided any portion of the money or property requested or
- 22 demand; or
- 23 (2) Will reimburse such contractor, grantee, or other recipient for any portion of
- 24 the money or property that is requested or demanded; and does not include

1 requests or demands for money or property the state has paid to an
2 individual as compensation for state employment or as an income subsidy
3 with no restrictions on that individual's use of the money or property.

4 4. "Department" means the department of human services.

5 5. "Document" means an application, claim, form, report, record, writing, or
6 correspondence, whether in written, electronic, magnetic, or other form.

7 6. "Fraud" means any conduct or activity prohibited by law or rule involving knowing
8 conduct or omission to perform a duty that results in or may result in payments to
9 which the person is not entitled.

10 7. "Knowingly" or "knowing" requires no proof of specific intent to defraud and means a
11 person has actual knowledge of the information, acts in deliberate ignorance of the
12 truth or falsity of the information, or acts in reckless disregard of the truth or falsity of
13 the information.

14 8. "Material" means having a natural tendency to influence, or be capable of influencing,
15 the payment or receipt of money or property.

16 9. "Medicaid agency" means an agency or entity of state, county, or local government
17 which administers any part of the Medicaid program, whether under direct statutory
18 authority or under contract with an authorized agency of the state or federal
19 government.

20 10. "Misappropriation of patient property" means exploitation, deliberate misplacement, or
21 wrongful use or taking of a patient's property, whether temporary or permanent,
22 without authorization by the patient or the patient's designated representative. The
23 term includes conduct with respect to a patient's property, which would constitute a
24 criminal offense under chapter 12.1-23.

25 11. "Obligation" means an established duty, whether fixed, arising from an express or
26 implied contractual, grantor-grantee, or licensor-licensee relationship, from a
27 fee-based or similar relationship, from statute or regulation, or from the retention of
28 any overpayment.

29 12. "Original source" means an individual who before a public disclosure has voluntarily
30 disclosed to the state the information on which allegations or transactions in a claim
31 are based or who has knowledge that is independent of and materially adds to the

publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state before filing an action under this Act.

13. "Patient abuse" means the willful infliction of physical or mental injury of a patient or unreasonable confinement, intimidation, or punishment that results in pain, physical or mental harm, or mental anguish of a patient. The term includes conduct with respect to a patient which would constitute a criminal offense under chapter 12.1-16, 12.1-17, 12.1-18, 12.1-20, or 12.1-22.

14. "Patient neglect" means a failure, through inattentiveness, carelessness, or other omission, to provide to a patient goods and services necessary to avoid physical harm, mental anguish, or mental illness if an omission is not caused by factors beyond the person's control or by good-faith errors in judgment. The term includes conduct with respect to a patient which would constitute a criminal offense under section 12.1-17-03.

15. "Proceeds" means civil penalties and damages and excludes attorney's fees and costs.

16. "Provider" means a person that furnishes items or services for which payment is claimed under the Medicaid program.

17. "Record" means medical, professional, business, or financial information and documents, whether in written, electronic, magnetic, microfilm, or other form:

- a. Pertaining to the provision of treatment, care, services, or items to a recipient;
- b. Pertaining to the income and expenses of the provider; or
- c. Otherwise relating to or pertaining to a determination of entitlement to payment or reimbursement under the Medicaid program.

SECTION 2.

Liability for certain acts - Civil penalty.

1. Except as provided in subsection 2, a person is liable to the state for a civil penalty of not less than ten thousand nine hundred fifty-seven dollars and not more than twenty-one thousand nine hundred fifty-six dollars for each act specified in this section, three times the amount of damages the state sustains because of the person's act, and costs of the investigation and litigation fees, if the person:

- 1 a. Knowingly presents or causes to be presented a false or fraudulent claim for
- 2 payment or approval;
- 3 b. Knowingly makes, uses, or causes to be made or used, a false record or
- 4 statement material to a false or fraudulent claim;
- 5 c. Conspires to commit a violation of this section;
- 6 d. Has possession, custody, or control of public property or money used or to be
- 7 used by the state and knowingly delivers or causes to be delivered less than all
- 8 of that money or property;
- 9 e. Is authorized to make or deliver a document certifying receipt of property used or
- 10 to be used by the state and, with the intent to defraud the state, makes or
- 11 delivers a receipt without completely knowing the information on the receipt is
- 12 true; or
- 13 f. Knowingly makes, uses, or causes to be made or used a false record or
- 14 statement material to an obligation to pay or transmit money or property to the
- 15 state or knowingly conceals or knowingly and improperly avoids or decreases an
- 16 obligation to pay or transmit money or property to the state.
- 17 2. The court may assess not less than two times the amount of damages the state
- 18 sustains because of the act of the person and the person is liable to the state for the
- 19 costs of the civil action brought to recover any such penalty or damages if the court
- 20 finds:
- 21 a. The person committing the act furnished the attorney general with all information
- 22 known to that person about the act within thirty days after the date on which the
- 23 person first obtained the information;
- 24 b. The person fully cooperated with any investigation of the act by the attorney
- 25 general; and
- 26 c. At the time the person furnished the attorney general with information about the
- 27 act, a criminal prosecution, civil action, or administrative action had not been
- 28 commenced with respect to the act and the person did not have actual
- 29 knowledge of the existence of an investigation into the violation.
- 30 3. Annually, the attorney general shall review the civil penalty rates and by administrative
- 31 rule shall amend these civil penalty rates to comport with the penalty amounts under

the federal Civil Penalties Inflation Adjustment Act of 1990 [Pub. L. 101-410; 104 Stat. 890; 28 U.S.C. 2461].

SECTION 3.

Limitation of actions.

1. A civil action filed under this Act must be brought by the later of:
 - a. Six years after the date on which the violation was committed; or
 - b. Three years after the date facts material to the right of action are known or reasonably should have been known by the official of the state charged with responsibility to act in the circumstances.
2. An action may not be brought pursuant to subdivision b of subsection 1 more than ten years after the date on which the violation was committed.

SECTION 4.

Investigation and action by attorney general.

The attorney general's Medicaid fraud control unit ~~shall~~ *shall enforce this chapter and* may investigate an alleged violation of this Act and ~~may~~ *may* file a civil action, a criminal action, or both against any person that violated or is violating this Act.

SECTION 5.

Complaint by person - Civil action.

1. A person may bring a civil action for a violation of this Act on behalf of the person and the state. The action must be brought in the name of the state. The action may be dismissed only if the court and the attorney general give written consent to the dismissal and provide the reasons for consenting to the dismissal.
2. A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses must be served on the attorney general pursuant to the North Dakota Rules of Civil Procedure. The complaint must be filed under seal and must remain under seal for at least sixty days. The complaint may not be served upon the defendant until the court orders that it be served.
3. Within sixty days after receiving the complaint and the material evidence and information, the attorney general may elect to intervene and proceed with the action or to notify the court the attorney general declines to take over the action. If the attorney general declines to intervene or take over the action, the person bringing the action

- 1 may conduct the action. For good cause shown, the attorney general may move the
2 court for extensions of the time during which the complaint remains under seal.
- 3 4. The defendant may not be required to respond to any complaint until twenty days after
4 the complaint is unsealed and served upon the defendant pursuant to rule 5 of the
5 North Dakota Rules of Civil Procedure.
- 6 5. If a person brings an action under this section, no person other than the attorney
7 general may intervene or bring a related action based on the facts underlying the
8 pending action.
- 9 6. If the attorney general proceeds with the action, the attorney general has the primary
10 responsibility for prosecuting the action and is not bound by an act of the person
11 bringing the action. The person bringing the action has the right to continue as a party
12 to the action subject to the limitations set forth in this Act.
- 13 7. If the attorney general elects not to proceed with the action and the person that
14 initiated the action conducts the action:
- 15 a. Upon the attorney general's request, the person that initiated the action shall
16 serve the attorney general with copies of all pleadings filed in the action and shall
17 supply the attorney general with copies of all deposition transcripts at the
18 attorney general's expense; or
- 19 b. The court, without limiting the status and rights of the person initiating the action,
20 may permit the attorney general to intervene at a later date upon a showing of
21 good cause.
- 22 8. If a person files a civil action under this section, no person other than the attorney
23 general may intervene or bring a related action based on the facts underlying the
24 pending action.
- 25 9. Upon a showing by the attorney general unrestricted participation during the course of
26 the litigation by the person initiating the action would interfere with or unduly delay the
27 attorney general's prosecution of the case or would be repetitious, irrelevant, or for
28 purposes of harassment, the court may impose limitations on the person's
29 participation, including:
- 30 a. Limiting the number of witnesses the person may call;
31 b. Limiting the length of testimony of witnesses called by the person;

1 c. Limiting the person's cross-examination of witnesses; or

2 d. Otherwise limiting the participation of the person in the litigation.

3 10. Whether the attorney general proceeds with the action, upon an in camera showing by
4 the attorney general that actions of discovery by the person initiating the action would
5 interfere with the attorney general's investigation or prosecution of a criminal or civil
6 matter arising out of the same facts, the court may stay such discovery for a period of
7 not more than sixty days. The court may extend the sixty-day period upon a further in
8 camera showing the attorney general has pursued the criminal, civil investigation, or
9 proceedings with reasonable diligence and any proposed discovery in the civil action
10 will interfere with the ongoing investigation or proceedings.

11 11. The attorney general may elect to pursue the claim through any alternate remedy
12 available, including administrative proceedings to determine a civil penalty. If an
13 alternate remedy is pursued, the person initiating the action has the same rights in the
14 proceeding as the person would have in proceeding under this section. Any finding of
15 fact or conclusion of law made in another proceeding that has become final is
16 conclusive on all parties to an action under this section. A finding or conclusion is final
17 if determined on appeal to the appropriate court, time for filing the appeal has expired,
18 or the finding or conclusion is not subject to judicial review.

19 12. If the attorney general elects to intervene and proceed with an action, the attorney
20 general may file a complaint or amend the complaint of a person that has brought an
21 action to clarify or add detail to the claims in which the attorney general is intervening
22 and to add additional claims with which the attorney general contends the attorney
23 general is entitled to relief. For statute of limitations purposes, a pleading relates back
24 to the filing date of the complaint of the person that originally brought the action to the
25 extent the attorney general's claim arises out of the conduct, transactions, or
26 occurrences set forth, or attempted to be set forth, in the prior complaint of that
27 person.

28 **SECTION 6.**

Filing prohibited.

1. A person may not bring an action under this Act based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state is already a party.
2. The court shall dismiss an action or claim brought under this Act, unless opposed by the state, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed; in a criminal, civil, or administrative hearing in which the state or its agent is a party; in a legislative, state auditor, or other state report, hearing, audit, or investigation; or from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

SECTION 7.

Dismissal of civil action.

On motion of the attorney general, the court may dismiss a civil action notwithstanding the objection of the person that initiated the action if the attorney general notified the person of the filing of the motion to dismiss and the court has given the person an opportunity to oppose the motion and present evidence at a hearing.

SECTION 8.

Burden of proof.

The standard of proof in a civil action brought under this Act is the preponderance of the evidence.

SECTION 9.

Distribution of damages and civil penalty.

1. Except as provided in subsection 2, if the attorney general proceeds with an action brought by a person pursuant to section 5 of this Act, the person is entitled to receive at least fifteen percent, but not more than twenty-five percent, of the proceeds recovered and collected in the action or in settlement of the claim, depending on the extent to which the person substantially contributed to the prosecution of the action.
2. The court may award an amount the court considers appropriate, but in no case more than ten percent of the proceeds in an action the court finds to be based primarily on disclosures of specific information, other than information provided by the person

1 bringing the action, relating to allegations or transactions disclosed through a criminal,
2 civil, or administrative hearing; a legislative, administrative, auditor report, hearing,
3 audit, or investigation; or the news media. In determining the award, the court shall
4 take into account the significance of the information and the role of the person bringing
5 the action in advancing the case to litigation.

6 3. A payment to a person bringing an action pursuant to this section may be made only
7 from the proceeds recovered and collected in the action or in settlement of the claim.
8 In addition, the person is entitled to receive an amount for reasonable expenses the
9 court finds to have been necessarily incurred, and reasonable attorney's fees and
10 costs. The expenses, fees, and costs must be awarded against the defendant.

11 4. If the attorney general does not proceed with an action pursuant to section 5 of this
12 Act, the person bringing the action or settling the claim is entitled to receive an amount
13 the court decides is reasonable for collecting the civil penalty and damages on behalf
14 of the attorney general. The amount may not be less than twenty-five percent nor
15 more than thirty percent of the proceeds recovered and collected in the action or
16 settlement of the claim and must be paid out of the proceeds. In addition, the person is
17 entitled to receive an amount for reasonable expenses the court finds were
18 necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees,
19 and costs must be awarded against the defendant.

20 5. Whether the attorney general proceeds with the action, if the court finds the action was
21 brought by a person that planned or initiated the violation of this Act, the court may
22 reduce or eliminate the share of the proceeds the person would otherwise receive
23 pursuant to subsections 1 through 4, taking into account the role of the person in
24 advancing the case to litigation and any relevant circumstances pertaining to the
25 violation. If the person bringing the action is convicted of criminal conduct arising from
26 the person's role in the violation of this section, the person must be dismissed from the
27 civil action and may not receive any share of the proceeds of the action. The dismissal
28 does not prejudice the right of the attorney general to continue the action.

29 6. The attorney general is entitled to any damages and civil penalties not awarded to the
30 person bringing the action, and the damages and civil penalties must be deposited in
31 the general fund.

7. Unless otherwise provided, the remedies or penalties provided by this Act are cumulative to each other and to the remedies or penalties available under all other laws of the state.

SECTION 10.

Effect of criminal conviction.

A defendant convicted in any criminal proceeding under this Act is precluded from subsequently denying the essential elements of the criminal offense of which the defendant was convicted in any civil proceeding. For purposes of this section, a conviction may result from a verdict or plea of guilty.

SECTION 11.

Costs and attorney's fees.

If the state favorably settles or prevails in a civil action in which the state intervened or filed, the state is entitled to be awarded reasonable expenses, consultant and expert witness fees, costs, and attorney's fees. In an action in which outside counsel is engaged by the attorney general, the costs and attorney's fees awarded to that counsel must equal the outside counsel's charges reasonably incurred for costs and attorney's fees in prosecuting the action. A plaintiff is entitled to an amount for reasonable expenses the court finds to have been necessarily incurred, plus reasonable costs and attorney's fees, if the action is settled favorably for the state or the state prevails in the action. The expenses, fees, and costs must be awarded against the defendant. A defendant in a civil action brought pursuant to this Act which prevails in an action
If the attorney general does not intervene in a civil action and the person bringing the civil action conducts the action and the defendant prevails in the action that is not settled and the court finds was clearly frivolous or brought solely for harassment

Purposes, the defendant is entitled to reasonable costs and attorney's fees, which must be equitably

apportioned against the person that brought the action and the state if a person and the state were co-plaintiffs. The state is not liable for costs, attorney fees, or other expenses incurred by a person in bringing or defending an action under this chapter.

SECTION 12.

Relief from retaliatory actions.

1. An employee, contractor, or agent is entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful

1 acts done by the employee, contractor, agent, or associated others in furtherance of
2 an action under this Act or other efforts to stop one or more violations of this Act.

3 2. Relief under subsection 1 includes reinstatement with the same seniority status that
4 employee, contractor, or agent would have had but for the discrimination, two times
5 the amount of back pay, interest on the back pay, and compensation for any special
6 damages sustained as a result of the discrimination, including litigation costs and
7 reasonable attorney's fees. An action under this section may be brought in the
8 appropriate district court for the relief provided in this subsection.

9 3. A civil action under this section may not be brought more than three years after the
10 date the retaliation occurred.

11 **SECTION 13.**

12 **Settlement by attorney general.**

13 The attorney general may settle the case with a defendant notwithstanding the objections of
14 any person that initiated the action if the court determines, after a hearing, the settlement is fair,
15 adequate, and reasonable under the circumstances. Upon a showing of good cause, the
16 hearing may be held in camera. A hearing is not otherwise required for the court to approve any
17 settlement.

18 **SECTION 14.**

19 **Medicaid fraud control unit.**

20 The Medicaid fraud control unit is established as a division of the attorney general's office.
21 The Medicaid fraud control unit, which is under the supervision and control of the attorney
22 general, consists of the agents and employees the attorney general considers necessary and
23 appropriate. The Medicaid fraud control unit is a criminal justice agency within the meaning of
24 section 12-60-16.1. Agents designated by the attorney general have peace officer status and
25 authority, including the authority of search, seizure, and arrest. All recovered money will be
26 forwarded to the designated state Medicaid agency for appropriate allocation between the
27 federal government and the general fund. The portion of state match appropriations for the
28 Medicaid fraud control unit will be appropriated from the general fund.

29 **SECTION 15.**

30 **Powers and duties of Medicaid fraud control unit.**

31 1. The Medicaid fraud control unit shall:

- 1 a. Investigate and prosecute under applicable criminal or civil laws fraud and patient
- 2 abuse or neglect by providers or any other person, including cases referred by
- 3 the department;
- 4 b. Review complaints of patient abuse, patient neglect, and misappropriation of
- 5 patient property and, if appropriate, investigate and initiate criminal or civil
- 6 proceedings or refer the complaint to another federal, state, or local agency for
- 7 action;
- 8 c. Refer to the department for collection and, if appropriate, imposition of
- 9 appropriate provider administrative actions involving provider overpayments and
- 10 abuse;
- 11 d. Communicate and cooperate with and, subject to applicable confidentiality laws,
- 12 provide information to other federal, state, and local agencies involved in the
- 13 investigation and prosecution of health care fraud, patient abuse, and other
- 14 improper activities related to the Medicaid program;
- 15 e. Transmit to other state and federal agencies, in accordance with law, reports of
- 16 convictions, copies of judgments and sentences imposed and other information
- 17 and documents for purposes of program exclusions or other sanctions or
- 18 penalties under Medicaid, Medicare, or other state or federal benefit or
- 19 assistance programs;
- 20 f. Recommend to state agencies appropriate or necessary adoption or revision of
- 21 laws, rules, policies, and procedures to prevent fraud, abuse, and other improper
- 22 activities under the Medicaid program and to aid in the investigation and
- 23 prosecution of fraud, abuse, and other improper activities under the Medicaid
- 24 program; and
- 25 g. Enter an agreement with the Medicaid agency regarding referrals, information
- 26 sharing, and improper payment recoveries as provided in title 42, Code of
- 27 Federal Regulations, part 455, section 23.
- 28 2. The Medicaid fraud control unit may:
- 29 a. Initiate criminal prosecutions and civil actions pursuant to subsection 1 in any
- 30 court of competent jurisdiction in the state;

- b. Upon request, obtain information and records from applicants, recipients, and providers;
- c. Subject to applicable federal confidentiality laws and rules and for purposes related to any investigation or prosecution under subsection 1, obtain from the department, local offices of public assistance, and other local, county, or state government departments or agencies records and other information, including applications, provider enrollment forms, claims and reports, individual or entity tax returns, or other information provided to or in the possession of the tax commissioner or the state auditor;
- d. Refer appropriate cases to federal, other state, or local agencies for investigation, prosecution, or imposition of penalties, restrictions, or sanctions;
- e. Work cooperatively with federal agencies; and
- f. Enter agreements with the department and other federal, state, and local agencies in furtherance of the unit's mission.

SECTION 16.

Medicaid fraud - Criminal penalty.

1. A person commits a criminal offense under this section if the person knowingly:
 - a. Presents for allowance, for payment, or for the purpose of concealing, avoiding, or decreasing an obligation to pay a false or fraudulent medical assistance claim, bill, account, voucher, or writing to a public agency, public servant, or contractor authorized to allow or pay medical assistance claims;
 - b. Solicits, accepts, offers, or provides any remuneration, including a kickback, bribe, or rebate in exchange for purchasing, leasing, ordering, arranging for, or recommending the purchasing, leasing, or ordering of any services or items from a provider for which payment may be made under the Medicaid program;
 - c. Solicits, accepts, offers, or provides any remuneration, including a kickback, bribe, or rebate in exchange for a fee for referring a recipient to another provider or arranging for the furnishing of services or items for which payment may be made under the Medicaid program;
 - d. Fails or refuses to provide covered medically necessary services to eligible recipients as required with respect to a managed care contract, health

1 maintenance organization contract, or similar contract or subcontract under the
2 Medicaid program; or

3 e. Conspires with another person to commit a violation of this section.

4 2. Conduct or activity that does not violate or which is protected under the provisions of,
5 or federal regulations adopted under 42 U.S.C. 1395nn and 42 U.S.C. 1320a-7b(b), is
6 not considered an offense under subdivision b of subsection 1, and the conduct or
7 activity must be accorded the same protections allowed under federal laws and
8 regulations.

9 3. A person convicted of this offense involving payments, benefits, kickbacks, bribes,
10 rebates, remuneration, services, or claims not exceeding one thousand dollars in
11 value is guilty of a class A misdemeanor.

12 4. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
13 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
14 common scheme and exceed one thousand dollars in value, a violation of this Act is a
15 class C felony.

16 5. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
17 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
18 common scheme and exceed ten thousand dollars in value but do not exceed fifty
19 thousand dollars, a violation of this Act is a class B felony.

20 6. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
21 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
22 common scheme and exceed fifty thousand dollars in value, a violation of this Act is a
23 class A felony.

24 a. For purposes of imposing sentence for a conviction under this Act, the value of
25 payments, benefits, kickbacks, bribes, rebates, remuneration, services, or claims
26 involved is the greater of the value of Medicaid payments or benefits received as
27 a result of the illegal conduct or activity or the value of the payments, benefits,
28 kickbacks, bribes, rebates, remuneration, services, or claim involved.

29 b. Amounts involved in Medicaid fraud committed pursuant to a common scheme or
30 the same transaction may be aggregated in determining the value involved.

c. A person convicted of the offense of Medicaid fraud must be suspended from participation in the Medicaid program:

(1) For any period of time not less than one year for a first offense or the person may be permanently terminated from participation in the medical assistance program;

(2) For any period of time not less than three years for a second offense, or the person may be permanently terminated from participation in the medical assistance program; or

(3) Permanently for a third offense.

7. In addition to any other penalty provided by law, a person convicted of Medicaid fraud is not entitled to bill or collect from the recipient, the Medicaid program, or any other third-party payer for the services or items involved and shall repay to the Medicaid program any payments or benefits obtained by any person for the services or items involved.

SECTION 17.

Civil investigative demands and Subpoenas – Failure to Comply - Confidentiality.

1. If the attorney general, or a designee, has reason to believe a person may be in possession, custody, or control of documentary material or information relevant to an investigation under this Act, the attorney general, or a designee, may, before commencing a civil proceeding under section 5 of this Act, issue in writing and cause to be served upon the person, a civil investigative demand or subpoena requiring the person to under oath:

a. Produce the documentary material for inspection and copying;

b. Answer in writing written interrogatories with respect to the documentary material or information;

c. Give oral testimony concerning the subject matter of the investigation, including any documentary material or information; or

d. Furnish any combination of the material, answers, or testimony.

2. If a civil investigative demand or subpoena is an express demand for product of discovery, the

attorney general or a designee shall cause to be served, a copy of such demand upon the person from which the discovery was obtained and shall notify the person to which such demand is issued of the date on which the copy was served.

3. If a person objects to or otherwise fails to comply with a civil investigative demand or subpoena served upon that person under subsection 1, the attorney general may file in the

district court a petition for an order to enforce the demand or subpoena, and if the court finds that the demand or subpoena is proper, the Court shall order the person to comply with the demand or subpoena and may grant such injunctive or other relief as may be required until the person complies with the demand or subpoena. Notice of hearing the petition and a copy of the petition must be served upon the person, who may appear in opposition to the petition. If the attorney general prevails in an action brought under this subsection, the Court shall award to the attorney general reasonable attorney's fees, costs and expenses incurred in bringing the action.

4. Any testimony taken or material produced under this section must be kept confidential by the attorney general before bringing an action against a person under this chapter for the violation under investigation, unless confidentiality is waived by the person being investigated and the person who has testified, answered interrogatories, or produced material, or disclosure is authorized by the court.

5.

30 Information
31 obtained by the attorney general or designee may be shared with a person that
1 initiated the action if the attorney general or designee determine it is necessary as part
2 of any investigation under this Act and the person agrees to comply with the
 confidentiality provisions provided in subsection 4, and unless otherwise provided by
 state or federal law.

3 **SECTION 18.**

4 **Cooperation of governmental agencies with Medicaid fraud control unit.**

5 All local, county, and state departments and agencies shall cooperate with the Medicaid
6 fraud control unit and the unit's agents and employees to effectuate the purposes of the unit.

7 **SECTION 19.**

8 **Authorization to adopt rules.**

9 The attorney general may adopt rules, pursuant to chapter 28-32, to implement this Act.

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SB 2347 Department of Human Services

Medicaid Fraud Control
Unit (MFCU)

Overview, Background
and History

Code of Federal Regulations

42 CFR §1007.5 Basic requirement

A State Medicaid fraud control unit must be a single identifiable entity of the State government certified by the Secretary as meeting the requirements of §§1007.7 through 1007.13 of this part.

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Code of Federal Regulations

42 CFR §1007.7 Organization and location requirements

Any of the following three alternatives is acceptable:

- (a) The unit is located in the office of the State Attorney General or another department of State government which has Statewide authority to prosecute individuals for violations of criminal laws with respect to fraud in the provision or administration of medical assistance under a State plan implementing title XIX of the Act;
- (b) If there is no State agency with Statewide authority and capability for criminal fraud prosecutions, the unit has established formal procedures that assure that the unit refers suspected cases of criminal fraud in the State Medicaid program to the appropriate State prosecuting authority or authorities, and provides assistance and coordination to such authority or authorities in the prosecution of such cases; or
- (c) The unit has a formal working relationship with the office of the State Attorney General and has formal procedures for referring to the Attorney General suspected criminal violations occurring in the State Medicaid program and for effective coordination of the activities of both entities relating to the detection, investigation and prosecution of those violations. Under this requirement, the office of the State Attorney General must agree to assume responsibility for prosecuting alleged criminal violations referred to it by the unit. However, if the Attorney General finds that another prosecuting authority has the demonstrated capacity, experience and willingness to prosecute an alleged violation, he or she may refer a case to that prosecuting authority, as long as the Attorney General's Office maintains oversight responsibility for the prosecution and for coordination between the unit and the prosecuting authority.

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Code of Federal Regulations

42 CFR §1007.9 Relationship to, and agreement with, the Medicaid agency

- (a) The unit must be separate and distinct from the Medicaid agency.
- (b) No official of the Medicaid agency will have authority to review the activities of the unit or to review or overrule the referral of a suspected criminal violation to an appropriate prosecuting authority.
- (c) The unit will not receive funds paid under this part either from or through the Medicaid agency.
- (d) The unit will enter into an agreement with the Medicaid agency under which the Medicaid agency will agree to comply with all requirements of §455.21(a)(2) of this title.
- (e)
 - (1) The unit may refer any provider with respect to which there is pending an investigation of a credible allegation of fraud under the Medicaid program to the State Medicaid agency for payment suspension in whole or part under §455.23 of this title.
 - (2) Referrals may be brief, but must be in writing and include sufficient information to allow the State Medicaid agency to identify the provider and to explain the credible allegations forming the grounds for the payment suspension.
- (f) Any request by the unit to the State Medicaid agency to delay notification to the provider of a payment suspension under §455.23 of this title must be in writing.
- (g) When the unit accepts or declines a case referred by the State Medicaid agency, the unit notifies the State Medicaid agency in writing of the acceptance or declination of the case.

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Code of Federal Regulations

42 CFR §1007.11 Duties and responsibilities of the unit.

- (a) The unit will conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan.
- (b)
 - (1) The unit will also review complaints alleging abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan and may review complaints of the misappropriation of patient's private funds in such facilities.
 - (2) If the initial review indicates substantial potential for criminal prosecution, the unit will investigate the complaint or refer it to an appropriate criminal investigative or prosecutive authority.
 - (3) If the initial review does not indicate a substantial potential for criminal prosecution, the unit will refer the complaint to an appropriate State agency.
- (c) If the unit, in carrying out its duties and responsibilities under paragraphs (a) and (b) of this section, discovers that overpayments have been made to a health care facility or other provider of medical assistance under the State Medicaid plan, the unit will either attempt to collect such overpayment or refer the matter to an appropriate State agency for collection.
- (d) Where a prosecuting authority other than the unit is to assume responsibility for the prosecution of a case investigated by the unit, the unit will insure that those responsible for the prosecutive decision and the preparation of the case for trial have the fullest possible opportunity to participate in the investigation from its inception and will provide all necessary assistance to the prosecuting authority throughout all resulting prosecutions.
- (e) The unit will make available to Federal investigators or prosecutors all information in its possession concerning fraud in the provision or administration of medical assistance under the State plan and will cooperate with such officials in coordinating any Federal and State investigations or prosecutions involving the same suspects or allegations.
- (f) The unit will safeguard the privacy rights of all individuals and will provide safeguards to prevent the misuse of information under the unit's control.

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Scope of MFCU

- Primary Function and Scope is Medicaid Provider Fraud.
- Neglect and abuse complaints, including misuse/theft of resident personal funds, of individuals in health care facilities and board and care facilities; and
- Does not include investigating beneficiary fraud unless there is an allegation of a conspiracy between the beneficiary and a Medicaid provider (patient/provider collusion).

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DHS - Medicaid Program Integrity Unit (PIU)

- If ND implements a MFCU, all of the preliminary provider fraud investigations that the PIU conducts, where a credible allegation of fraud exists, would be referred to the MFCU for further investigation and potential prosecution.
- The PIU would also assist with explaining Medicaid program policies and procedures.
- Collaboration would be expected to discuss fraud trends, areas of concerns, and continued clarification of intersects of activity.

ND MFCU Waiver

- In August 1994 the Office of Inspector General at HHS approved the request from ND for a waiver from the requirement to establish a Medicaid Fraud Control Unit.
- The waiver did not have an end date.
- DHS has had multiple findings from the State Auditor's office for not having a MFCU in ND.

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Other Background

- 2007 Legislative Assembly did not adopt a DHS bill requesting establishment of a False Claims Act.
- 2009 Legislative Assembly did not adopt legislation introduced to establish a MFCU.

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Other Background

- May 2016 Letter from CMS Acting Administrator to Governor Dalrymple requesting notification of intent to establish a MFCU or the submission of a new waiver request.
- September 2016 Letter from Governor Dalrymple to CMS Acting Administrator requesting a new waiver.

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Other Background

- January 2017 – Letter from CMS to Governor requesting North Dakota submit an implementation plan for establishing a MFCU.
- January 2017 Letter from Governor Burgum to CMS outlining the 2017 legislation that was under consideration.

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2017 Legislation

- HB 1174 – False Claims Act (Not Adopted)
- HB 1226 Medicaid False Claims Act
(Amended and Adopted)
- HB 1227 Medicaid Fraud Statute (Not Adopted)

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2017 HB 1226 States:

- During the 2017- 18 interim, the department of human services, with the cooperation of the governor and the attorney general, shall study the feasibility and desirability of establishing a medicaid fraud control unit. Before August 1, 2018, the department of human services shall report to the legislative management the outcome of this study, together with any legislation required to implement the recommendations.

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Activity Since 2017 Session

- Multiple Workgroup meetings
 - Joint meeting with SD MFCU and Adult Protective Services
- October 2017 DHS Letter to Seema Verma (CMS Administrator)
- December 2017 Letter from CMS to DHS
- April 2018 Workgroup (DHS and AG) presentation to interim committee
 - Review of draft bill prepared by Office of Attorney General
- August 2018 Letter from Governor Burgum to CMS with MFCU Implementation Plan
- December 2018 – funding for MFCU included in Governor's Executive Budget Request

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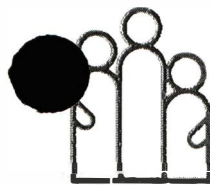
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2019 Legislative Session

- SB 2347 has been introduced to implement a Medicaid Fraud Control Unit.
- Funding for the Unit is included in SB 2003 (Appropriation for the Office of the Attorney General)

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north dakota
department of
human services

Medical Services

(701) 328-7068
Toll Free 1-800-755-2604
Fax (701) 328-1544
Relay ND TTY 1-800-366-6888
Provider Relations (701) 328-7098

Doug Burgum, Governor
Christopher Jones, Executive Director

October 10, 2017

Seema Verma, Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

RE: North Dakota Medicaid Fraud Control Unit (MFCU)

Dear Ms. Verma

As you are likely aware, since 1994, North Dakota has had a waiver from operating a Medicaid Fraud Control Unit (MFCU). During my fourteen year tenure with the North Dakota Medicaid program and Department of Human Services, there have been various discussions about the status and continuation of the waiver. In addition to the discussion about the MFCU waiver, past Legislative Assemblies have rejected proposals to implement a Medicaid False Claims Act (2007 Senate Bill 1226) and a Medicaid Fraud Control Unit (2009 House Bill 1511).

In May 2016, CMS Acting Administrator Andrew Slavitt wrote to then-Governor Dalrymple requesting that North Dakota either submit a request for a new waiver or submit a timeline for creating a North Dakota MFCU. In September 2016, Governor Dalrymple submitted a request for a new waiver. In January 2017, just shortly before the end of President Obama's administration, Mr. Slavitt sent a letter to North Dakota indicating the request for a new waiver would not be considered and North Dakota should move to establish a MFCU.

Governor Doug Burgum assumed office in December 2016 and provided a response to Acting CMS Administrator Tim Hill in January 2017 (copy enclosed). As noted in the response from Governor Burgum, the biennial legislative session was underway, and there were three pieces of legislation that were active within the North Dakota Legislative session.

Throughout the 2017 North Dakota legislative Assembly, I kept CMS staff updated on the status of each of the three pieces of related legislation. The two pieces of legislation (false claims act and Medicaid fraud statute) were defeated. The third piece of legislation (House Bill 1226), creation of a MFCU, was amended, passed both chambers and was signed by Governor Burgum. As enacted, House Bill 1226 requires the Department of Human Services, in collaboration with the North Dakota Offices of the Governor and Attorney General, to study the desirability and feasibility of establishing a MFCU (copy enclosed).

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Page 2
Seema Verma
October 10, 2017

As Medicaid Director, I am coordinating the study as required by House Bill 1226. Since the letter denying North Dakota's request for a new MFCU waiver was received in the final days of the previous administration and signed by the former CMS Acting Administrator, I am writing to inquire if the position of Mr. Slavitt is consistent with your position as the current CMS Administrator. The group that is collaborating on the MFCU study recognizes that your position on North Dakota establishing a MCFU is essential to complete the study.

Thank you for consideration and response. I am available to provide any information that you or your staff may need. I can be contacted at 701-328-1603 or manderson@nd.gov

Sincerely,


Maggie D. Anderson
Medicaid Director

Enclosures

cc: Christopher Jones, Executive Director, Department of Human Services
Robbie Lauf, Policy Advisor, Office of Governor Burgum
Richard Allen, Associate Regional Administrator, CMS, Denver

DEPARTMENT OF HEALTH & HUMAN SERVICES
CENTERS for MEDICARE & MEDICAID SERVICES
7500 Security Boulevard, Mail Stop AR-18-50
Baltimore, Maryland 21244-1850



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Center for Program Integrity

DEC 19 2017

Dear Ms. Anderson,

This is in response to your October 10, 2017 letter inquiring whether Administrator Verma's position on the establishment of a Medicaid Fraud Control Unit (MFCU) in North Dakota is consistent with Administrator Slavitt's. Administrator Verma has asked me to reply on her behalf.

Per section 1902 (a)(61) of the Social Security Act (the Act), Medicaid programs are required to operate a MFCU as a condition of receiving Federal Financial Participation (FFP). The law does allow for a waiver of the requirement if a State can demonstrate that it would not be cost-effective because minimal fraud exists in connection with the provision of covered services to eligible individuals under the State plan, and that beneficiaries under the plan will be protected from abuse and neglect in connection with the provision of medical assistance under the plan without the existence of such a unit. As your letter indicates, North Dakota submitted a waiver request to CMS that was denied; this decision remains valid.

If you feel that the availability of new information supports a waiver as outlined in section 1902 (a)(61) of the Act, I would encourage you to submit a new request. Currently, North Dakota fails to comply with the MFCU state plan requirement. To allow for further planning, please submit your implementation plan no later than September 1, 2018. The plan should be submitted to the CMS Administrator, with a copy to the Health and Human Services Inspector General on your submission

Should you or your staff have any questions about this letter, please contact Jonathan Morse, Acting Director, Center for Program Integrity at 410-786-1892, or Jonathan.Morse@cms.hhs.gov.

If you have questions about requirements of the MFCU program or the application for a MFCU please contact Richard Stern, Director, OIG Medicaid Fraud Policy and Oversight Division, at 202-205-0572 or Richard.Stern@oig.hhs.gov.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan D. Morse', is written over a horizontal line.

Jonathan D. Morse, J.D.
Deputy Center Director
Center for Program Integrity

CC: Richard Stern, HHS OIG
Richard Allen, Associate Regional Administrator, CMS, Denver

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— State of —
North Dakota
Office of the Governor

Doug Burgum
Governor

August 31, 2018

Seema Verma, Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

RE: North Dakota Medicaid Fraud Control Unit (MFCU)

Dear Ms. Verma,

As you are likely aware, since 1994, North Dakota has had a waiver from operating a Medicaid Fraud Control Unit (MFCU). In May 2016, CMS Acting Administrator Andrew Slavitt wrote to then-Governor Jack Dalrymple requesting that North Dakota either submit a request for a new waiver or submit a timeline for creating a North Dakota MFCU. In September 2016, Governor Dalrymple submitted a request for a new waiver. In January 2017, Mr. Slavitt sent a letter to North Dakota indicating the request for a new waiver would not be considered and North Dakota should move to establish an MFCU.

I assumed office in December 2016 and provided a response to Acting CMS Administrator Tim Hill in January 2017 (copy enclosed). As noted in my January 2017 response, the biennial legislative session was underway, and there were three pieces of legislation that were active within the North Dakota legislative session. Throughout the 2017 North Dakota Legislative Assembly, North Dakota Medicaid Director Maggie Anderson kept CMS staff updated on the status of each of the three pieces of related legislation. Two pieces of legislation (false claims act and Medicaid fraud statute) were defeated. The third piece of legislation, House Bill 1226, creation of an MFCU, was amended, passed both chambers, and I signed the amended bill. As enacted, House Bill 1226 required the Department of Human Services, in collaboration with the North Dakota Offices of the Governor and Attorney General, to study the desirability and feasibility of establishing an MFCU (copy enclosed).

As part of the study required under 2017 House Bill 1226, Ms. Anderson sent a letter to you in October 2017 requesting confirmation that your position was the same as that of Mr. Slavitt. In December 2017, Mr. Jonathan Morse with the Center for Program Integrity responded to Ms.

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Anderson requesting an MFCU implementation plan be submitted by Sept. 1, 2018. This letter fulfills the requirement for an implementation plan.

As part of the executive budget request for the 2019-2021 biennium, I will request the staffing and funding necessary to implement an MFCU in North Dakota. The executive budget request will be presented during the Legislature's organizational session, scheduled for Dec. 3-5, 2018. As budget discussions continue between now and the organizational session, I will collaborate with Attorney General Wayne Stenehjem to determine the number of staff positions requested and if North Dakota will pursue *qui tam* as part of the MFCU implementation. Mr. Stenehjem's office has also drafted the North Dakota Century Code (NDCC) changes that would be needed to authorize the implementation and grant the appropriate authorities to the MFCU. If legislation is not introduced by an interim legislative committee or individual legislator, my office will ensure legislation is introduced to correspond to the executive budget request.

During the 2019 Legislative Assembly, my office will advocate for the NDCC changes and appropriation needed to establish an MFCU in North Dakota, and my staff will keep Mr. Morse updated on the status of the legislation and appropriation.

Should you have questions or need additional information, please contact my office.

Sincerely,



Doug Burgum
Governor

Enclosures

cc: Wayne Stenehjem, North Dakota Attorney General
Richard Stern, HHS Office of Inspector General
Richard Allen, Associate Regional Administrator, CMS, Denver
Christopher Jones, Executive Director, Department of Human Services
Maggie Anderson, Director, Medical Services Division, Department of Human Services



SB 2347 Department of Human Services

Medicaid Fraud Control
Unit (MFCU)
Overview, Background
and History

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Code of Federal Regulations

42 CFR §1007.5 Basic requirement

A State Medicaid fraud control unit must be a single identifiable entity of the State government certified by the Secretary as meeting the requirements of §§ 1007.7 through 1007.13 of this part.

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Code of Federal Regulations

42 CFR §1007.7 Organization and location requirements

Any of the following three alternatives is acceptable:

- (a) The unit is located in the office of the State Attorney General or another department of State government which has Statewide authority to prosecute individuals for violations of criminal laws with respect to fraud in the provision or administration of medical assistance under a State plan implementing title XIX of the Act;
- (b) If there is no State agency with Statewide authority and capability for criminal fraud prosecutions, the unit has established formal procedures that assure that the unit refers suspected cases of criminal fraud in the State Medicaid program to the appropriate State prosecuting authority or authorities, and provides assistance and coordination to such authority or authorities in the prosecution of such cases; or
- (c) The unit has a formal working relationship with the office of the State Attorney General and has formal procedures for referring to the Attorney General suspected criminal violations occurring in the State Medicaid program and for effective coordination of the activities of both entities relating to the detection, investigation and prosecution of those violations. Under this requirement, the office of the State Attorney General must agree to assume responsibility for prosecuting alleged criminal violations referred to it by the unit. However, if the Attorney General finds that another prosecuting authority has the demonstrated capacity, experience and willingness to prosecute an alleged violation, he or she may refer a case to that prosecuting authority, as long as the Attorney General's Office maintains oversight responsibility for the prosecution and for coordination between the unit and the prosecuting authority.

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Code of Federal Regulations

42 CFR §1007.9 Relationship to, and agreement with, the Medicaid agency

- (a) The unit must be separate and distinct from the Medicaid agency.
- (b) No official of the Medicaid agency will have authority to review the activities of the unit or to review or overrule the referral of a suspected criminal violation to an appropriate prosecuting authority.
- (c) The unit will not receive funds paid under this part either from or through the Medicaid agency.
- (d) The unit will enter into an agreement with the Medicaid agency under which the Medicaid agency will agree to comply with all requirements of §455.21(a)(2) of this title.
- (e)
 - (1) The unit may refer any provider with respect to which there is pending an investigation of a credible allegation of fraud under the Medicaid program to the State Medicaid agency for payment suspension in whole or part under §455.23 of this title.
 - (2) Referrals may be brief, but must be in writing and include sufficient information to allow the State Medicaid agency to identify the provider and to explain the credible allegations forming the grounds for the payment suspension.
- (f) Any request by the unit to the State Medicaid agency to delay notification to the provider of a payment suspension under §455.23 of this title must be in writing.
- (g) When the unit accepts or declines a case referred by the State Medicaid agency, the unit notifies the State Medicaid agency in writing of the acceptance or declination of the case.

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Code of Federal Regulations

42 CFR §1007.11 Duties and responsibilities of the unit.

- (a) The unit will conduct a Statewide program for investigating and prosecuting (or referring for prosecution) violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program, the provision of medical assistance, or the activities of providers of medical assistance under the State Medicaid plan.
- (b)
 - (1) The unit will also review complaints alleging abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan and may review complaints of the misappropriation of patient's private funds in such facilities.
 - (2) If the initial review indicates substantial potential for criminal prosecution, the unit will investigate the complaint or refer it to an appropriate criminal investigative or prosecutive authority.
 - (3) If the initial review does not indicate a substantial potential for criminal prosecution, the unit will refer the complaint to an appropriate State agency.
- (c) If the unit, in carrying out its duties and responsibilities under paragraphs (a) and (b) of this section, discovers that overpayments have been made to a health care facility or other provider of medical assistance under the State Medicaid plan, the unit will either attempt to collect such overpayment or refer the matter to an appropriate State agency for collection.
- (d) Where a prosecuting authority other than the unit is to assume responsibility for the prosecution of a case investigated by the unit, the unit will insure that those responsible for the prosecutive decision and the preparation of the case for trial have the fullest possible opportunity to participate in the investigation from its inception and will provide all necessary assistance to the prosecuting authority throughout all resulting prosecutions.
- (e) The unit will make available to Federal investigators or prosecutors all information in its possession concerning fraud in the provision or administration of medical assistance under the State plan and will cooperate with such officials in coordinating any Federal and State investigations or prosecutions involving the same suspects or allegations.
- (f) The unit will safeguard the privacy rights of all individuals and will provide safeguards to prevent the misuse of information under the unit's control.

Scope of MFCU

- Primary Function and Scope is Medicaid Provider Fraud.
- Neglect and abuse complaints, including misuse/theft of resident personal funds, of individuals in health care facilities and board and care facilities; and
- Does not include investigating beneficiary fraud unless there is an allegation of a conspiracy between the beneficiary and a Medicaid provider (patient/provider collusion).

DHS - Medicaid Program Integrity Unit (PIU)

- If ND implements a MFCU, all of the preliminary provider fraud investigations that the PIU conducts, where a credible allegation of fraud exists, would be referred to the MFCU for further investigation and potential prosecution.
- The PIU would also assist with explaining Medicaid program policies and procedures.
- Collaboration would be expected to discuss fraud trends, areas of concerns, and continued clarification of intersects of activity.

History and Background

ND MFCU Waiver

- In August 1994 the Office of Inspector General at HHS approved the request from ND for a waiver from the requirement to establish a Medicaid Fraud Control Unit.
- The waiver did not have an end date.
- DHS has had multiple findings from the State Auditor's office for not having a MFCU in ND.

Other Background

- 2007 Legislative Assembly did not adopt a DHS bill requesting establishment of a False Claims Act (Senate Bill 2326)
- 2009 Legislative Assembly did not adopt legislation introduced to establish a MFCU (House Bill 1511)

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Other Background

- May 2016 Letter from CMS Acting Administrator to Governor Dalrymple requesting notification of intent to establish a MFCU or the submission of a new waiver request.
- September 2016 Letter from Governor Dalrymple to CMS Acting Administrator requesting a new waiver.

Other Background

- January 2017 – Letter from CMS to Governor requesting North Dakota submit an implementation plan for establishing a MFCU.
- January 2017 Letter from Governor Burgum to CMS outlining the 2017 legislation that was under consideration.

2017 Legislation

- HB 1174 – False Claims Act (Not Adopted)
- HB 1226 Medicaid Fraud Control Unit (Amended and Adopted)
- HB 1227 Medicaid Fraud Statute (Not Adopted)

2017 House Bill 1226

- During the 2017- 18 interim, the department of human services, with the cooperation of the governor and the attorney general, shall study the feasibility and desirability of establishing a medicaid fraud control unit. Before August 1, 2018, the department of human services shall report to the legislative management the outcome of this study, together with any legislation required to implement the recommendations.

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Activity Since 2017 Session

- Multiple Workgroup meetings
 - Joint meeting with SD MFCU and Adult Protective Services
- October 2017 DHS Letter to Seema Verma (CMS Administrator)
- December 2017 Letter from CMS to DHS
- April 2018 Workgroup (DHS and AG) presentation to interim committee
 - Review of draft bill prepared by Office of Attorney General
- August 2018 Letter from Governor Burgum to CMS with MFCU Implementation Plan
- December 2018 – funding for MFCU included in Governor's Executive Budget Request

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2019 Legislative Session

- SB 2347 was introduced to implement a Medicaid Fraud Control Unit.
 - Passed Senate (44-3)
- Funding for the Unit is included in SB 2003 (Appropriation for the Office of the Attorney General)

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Doug Burgum, Governor
Christopher Jones, Executive Director

October 10, 2017

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Medical Services pg 17
(701) 328-7068
Toll Free 1-800-755-2604
Fax (701) 328-1544
Relay ND TTY 1-800-366-6888
Provider Relations (701) 328-7098

Seema Verma, Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

RE: North Dakota Medicaid Fraud Control Unit (MFCU)

Dear Ms. Verma

As you are likely aware, since 1994, North Dakota has had a waiver from operating a Medicaid Fraud Control Unit (MFCU). During my fourteen year tenure with the North Dakota Medicaid program and Department of Human Services, there have been various discussions about the status and continuation of the waiver. In addition to the discussion about the MFCU waiver, past Legislative Assemblies have rejected proposals to implement a Medicaid False Claims Act (2007 Senate Bill 2126) and a Medicaid Fraud Control Unit (2009 House Bill 1511).

In May 2016, CMS Acting Administrator Andrew Slavitt wrote to then-Governor Dalrymple requesting that North Dakota either submit a request for a new waiver or submit a timeline for creating a North Dakota MFCU. In September 2016, Governor Dalrymple submitted a request for a new waiver. In January 2017, just shortly before the end of President Obama's administration, Mr. Slavitt sent a letter to North Dakota indicating the request for a new waiver would not be considered and North Dakota should move to establish a MFCU.

Governor Doug Burgum assumed office in December 2016 and provided a response to Acting CMS Administrator Tim Hill in January 2017 (copy enclosed). As noted in the response from Governor Burgum, the biennial legislative session was underway, and there were three pieces of legislation that were active within the North Dakota Legislative session.

Throughout the 2017 North Dakota legislative Assembly, I kept CMS staff updated on the status of each of the three pieces of related legislation. The two pieces of legislation (false claims act and Medicaid fraud statute) were defeated. The third piece of legislation (House Bill 1226), creation of a MFCU, was amended, passed both chambers and was signed by Governor Burgum. As enacted, House Bill 1226 requires the Department of Human Services, in collaboration with the North Dakota Offices of the Governor and Attorney General, to study the desirability and feasibility of establishing a MFCU (copy enclosed).

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Page 2
Seema Verma
October 10, 2017

As Medicaid Director, I am coordinating the study as required by House Bill 1226. Since the letter denying North Dakota's request for a new MFCU waiver was received in the final days of the previous administration and signed by the former CMS Acting Administrator, I am writing to inquire if the position of Mr. Slavitt is consistent with your position as the current CMS Administrator. The group that is collaborating on the MFCU study recognizes that your position on North Dakota establishing a MCFU is essential to complete the study.

Thank you for consideration and response. I am available to provide any information that you or your staff may need. I can be contacted at 701-328-1603 or manderson@nd.gov

Sincerely,


Maggie D. Anderson
Medicaid Director

Enclosures

cc: Christopher Jones, Executive Director, Department of Human Services
Robbie Lauf, Policy Advisor, Office of Governor Burgum
Richard Allen, Associate Regional Administrator, CMS, Denver

DEPARTMENT OF HEALTH & HUMAN SERVICES
CENTERS for MEDICARE & MEDICAID SERVICES
7500 Security Boulevard, Mail Stop AR-18-50
Baltimore, Maryland 21244-1850



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Center for Program Integrity

DEC 19 2017

Dear Ms. Anderson,

This is in response to your October 10, 2017 letter inquiring whether Administrator Verma's position on the establishment of a Medicaid Fraud Control Unit (MFCU) in North Dakota is consistent with Administrator Slavitt's. Administrator Verma has asked me to reply on her behalf.

Per section 1902 (a)(61) of the Social Security Act (the Act), Medicaid programs are required to operate a MFCU as a condition of receiving Federal Financial Participation (FFP). The law does allow for a waiver of the requirement if a State can demonstrate that it would not be cost-effective because minimal fraud exists in connection with the provision of covered services to eligible individuals under the State plan, and that beneficiaries under the plan will be protected from abuse and neglect in connection with the provision of medical assistance under the plan without the existence of such a unit. As your letter indicates, North Dakota submitted a waiver request to CMS that was denied; this decision remains valid.

If you feel that the availability of new information supports a waiver as outlined in section 1902 (a)(61) of the Act, I would encourage you to submit a new request. Currently, North Dakota fails to comply with the MFCU state plan requirement. To allow for further planning, please submit your implementation plan no later than September 1, 2018. The plan should be submitted to the CMS Administrator, with a copy to the Health and Human Services Inspector General on your submission

Should you or your staff have any questions about this letter, please contact Jonathan Morse, Acting Director, Center for Program Integrity at 410-786-1892, or Jonathan.Morse@cms.hhs.gov.

If you have questions about requirements of the MFCU program or the application for a MFCU please contact Richard Stern, Director, OIG Medicaid Fraud Policy and Oversight Division, at 202-205-0572 or Richard.Stern@oig.hhs.gov.

Sincerely,

Jonathan D. Morse, J.D.
Deputy Center Director
Center for Program Integrity

CC: Richard Stern, HHS OIG
Richard Allen, Associate Regional Administrator, CMS, Denver



— State of —
North Dakota
Office of the Governor

Doug Burgum
Governor

August 31, 2018

Seema Verma, Administrator
Department of Health and Human Services
Centers for Medicare & Medicaid Services
7500 Security Boulevard, Mail Stop S2-26-12
Baltimore, Maryland 21244-1850

RE: North Dakota Medicaid Fraud Control Unit (MFCU)

Dear Ms. Verma,

As you are likely aware, since 1994, North Dakota has had a waiver from operating a Medicaid Fraud Control Unit (MFCU). In May 2016, CMS Acting Administrator Andrew Slavitt wrote to then-Governor Jack Dalrymple requesting that North Dakota either submit a request for a new waiver or submit a timeline for creating a North Dakota MFCU. In September 2016, Governor Dalrymple submitted a request for a new waiver. In January 2017, Mr. Slavitt sent a letter to North Dakota indicating the request for a new waiver would not be considered and North Dakota should move to establish an MFCU.

I assumed office in December 2016 and provided a response to Acting CMS Administrator Tim Hill in January 2017 (copy enclosed). As noted in my January 2017 response, the biennial legislative session was underway, and there were three pieces of legislation that were active within the North Dakota legislative session. Throughout the 2017 North Dakota Legislative Assembly, North Dakota Medicaid Director Maggie Anderson kept CMS staff updated on the status of each of the three pieces of related legislation. Two pieces of legislation (false claims act and Medicaid fraud statute) were defeated. The third piece of legislation, House Bill 1226, creation of an MFCU, was amended, passed both chambers, and I signed the amended bill. As enacted, House Bill 1226 required the Department of Human Services, in collaboration with the North Dakota Offices of the Governor and Attorney General, to study the desirability and feasibility of establishing an MFCU (copy enclosed).

As part of the study required under 2017 House Bill 1226, Ms. Anderson sent a letter to you in October 2017 requesting confirmation that your position was the same as that of Mr. Slavitt. In December 2017, Mr. Jonathan Morse with the Center for Program Integrity responded to Ms.

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Anderson requesting an MFCU implementation plan be submitted by Sept. 1, 2018. This letter fulfills the requirement for an implementation plan.

As part of the executive budget request for the 2019-2021 biennium, I will request the staffing and funding necessary to implement an MFCU in North Dakota. The executive budget request will be presented during the Legislature's organizational session, scheduled for Dec. 3-5, 2018. As budget discussions continue between now and the organizational session, I will collaborate with Attorney General Wayne Stenehjem to determine the number of staff positions requested and if North Dakota will pursue *qui tam* as part of the MFCU implementation. Mr. Stenehjem's office has also drafted the North Dakota Century Code (NDCC) changes that would be needed to authorize the implementation and grant the appropriate authorities to the MFCU. If legislation is not introduced by an interim legislative committee or individual legislator, my office will ensure legislation is introduced to correspond to the executive budget request.

During the 2019 Legislative Assembly, my office will advocate for the NDCC changes and appropriation needed to establish an MFCU in North Dakota, and my staff will keep Mr. Morse updated on the status of the legislation and appropriation.

Should you have questions or need additional information, please contact my office.

Sincerely,



Doug Burgum
Governor

Enclosures

cc: Wayne Stenehjem, North Dakota Attorney General
Richard Stern, HHS Office of Inspector General
Richard Allen, Associate Regional Administrator, CMS, Denver
Christopher Jones, Executive Director, Department of Human Services
Maggie Anderson, Director, Medical Services Division, Department of Human Services

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2347
HUMAN SERVICES COMMITTEE
ROBIN WEISZ, CHAIRMAN
FEBRUARY 27, 2019

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PRESENTED BY
PARRELL D. GROSSMAN, DIRECTOR
CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL

Page 1, line 14, after "Claim" insert an underscored colon.

Page 1, line 14, replace "means" with "a. Means"

Page 1, line 17, replace "a." with "(1)"

Page 1, line 18, replace "b." with "(2)"

Page 1, line 21, replace "(1)" with "(a)"

Page 1, line 23, replace "(2)" with "(b)"

Page 1, line 24, replace ": and does not include" with an underscored period

Page 2, line 1, insert "b. Does not include"

Page 3, line 27, replace "ten thousand nine hundred fifty - seven dollars and not more than twenty - one thousand nine hundred fifty - six dollars" with "and not more than the civil penalty allowed under the federal False Claims Act [31 U.S.C. § 3729 et seq.], as may be adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990 [Pub. L. 101-410; 104 Stat. 890; 28 U.S.C. 2461], which on the date of the enactment of this chapter is no less than eleven thousand one hundred and eighty-one dollars and no more than twenty-two thousand three hundred and sixty-three dollars."

Page 4, remove lines 30 through 31.

Page 5, remove lines 1 though 2

Page 5, line 14, remove "enforce this Act and may"

Page 5, line 15, after "and" insert "may"

Page 6, line 22, after "8." remove "If a person files a civil action under this section, no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action."

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9."

Page 7, line 3, replace "10" with "9"

Page 7, line 11, replace "11" with "10"

Page 7, line 19, replace "12" with "11"

Renumber accordingly

MOCK-UP OF ENGROSSED SB2347 WITH
ATTORNEY GENERAL'S PROPOSED AMENDMENTS 2-27-2019

19.8166.02000

FIRST ENGROSSMENT

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2347

Introduced by

Senators K. Roers, Hogan, J. Lee

Representatives Boschee, Rohr, Schneider

- 1 A BILL for an Act to provide for liability for false medical assistance claims and to provide for a
2 Medicaid fraud control unit; and to provide a penalty.

3 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

4 SECTION 1.

5 Definitions.

6 As used in this Act, unless the context otherwise requires:

- 7 1. "Abuse" means conduct by a provider or other person involving disregard of and an
8 unreasonable failure to conform with the laws and rules governing the Medicaid
9 program if the disregard or failure results or may result in payment by a Medicaid
10 agency of medical assistance payments or benefits to which the provider knows the
11 provider is not entitled.
- 12 2. "Benefit" means the provision of anything of pecuniary value under the Medicaid
13 program.
- 14 3. "Claim": ~~means a.~~ Means any request or demand, whether under a contract or
15 money or property under the Medicaid program regardless of whether the state has
16 title to the money or property which is:
17 ~~a(1):~~ Presented to an officer, employee, or agent of the state; or
18 ~~b(2):~~ Made to a contractor, grantee, or other recipient, if the money or property is to be
19 spent or used on the state's behalf or to advance a state program or interest, and
20 if the state:
21 ~~(a1)~~ Provides or has provided any portion of the money or property requested or
22 demanded; or
23 ~~(b2)~~ Will reimburse such contractor, grantee, or other recipient for any portion of
24 the money or property that is requested or demanded; ~~and does not include.~~

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Legislative Assembly

b. Does not include requests or demands for money or property the state has paid to an

individual as compensation for state employment or as an income subsidy

with no restrictions on that individual's use of the money or property.

4. "Department" means the department of human services.

5. "Document" means an application, claim, form, report, record, writing, or correspondence, whether in written, electronic, magnetic, or other form.

6. "Fraud" means any conduct or activity prohibited by law or rule involving knowing conduct or omission to perform a duty that results in or may result in payments to which the person is not entitled.

7. "Knowingly" or "knowing" requires no proof of specific intent to defraud and means a person has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information.

8. "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

9. "Medicaid agency" means an agency or entity of state, county, or local government which administers any part of the Medicaid program, whether under direct statutory authority or under contract with an authorized agency of the state or federal government.

10. "Misappropriation of patient property" means exploitation, deliberate misplacement, or wrongful use or taking of a patient's property, whether temporary or permanent, without authorization by the patient or the patient's designated representative. The term includes conduct with respect to a patient's property, which would constitute a criminal offense under chapter 12.1-23.

11. "Obligation" means an established duty, whether fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

12. "Original source" means an individual who before a public disclosure has voluntarily disclosed to the state the information on which allegations or transactions in a claim are based or who has knowledge that is independent of and materially adds to the

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publicly disclosed allegations or transactions, and who has voluntarily provided the information to the state before filing an action under this Act.

13. "Patient abuse" means the willful infliction of physical or mental injury of a patient or unreasonable confinement, intimidation, or punishment that results in pain, physical or mental harm, or mental anguish of a patient. The term includes conduct with respect to a patient which would constitute a criminal offense under chapter 12.1-16, 12.1-17, 12.1-18, 12.1-20, or 12.1-22.

14. "Patient neglect" means a failure, through inattentiveness, carelessness, or other omission, to provide to a patient goods and services necessary to avoid physical harm, mental anguish, or mental illness if an omission is not caused by factors beyond the person's control or by good-faith errors in judgment. The term includes conduct with respect to a patient which would constitute a criminal offense under section 12.1-17-03.

15. "Proceeds" means civil penalties and damages and excludes attorney's fees and costs.

16. "Provider" means a person that furnishes items or services for which payment is claimed under the Medicaid program.

17. "Record" means medical, professional, business, or financial information and documents, whether in written, electronic, magnetic, microfilm, or other form:

- a. Pertaining to the provision of treatment, care, services, or items to a recipient;
- b. Pertaining to the income and expenses of the provider; or
- c. Otherwise relating to or pertaining to a determination of entitlement to payment or reimbursement under the Medicaid program.

SECTION 2.

Liability for certain acts - Civil penalty.

1. Except as provided in subsection 2, a person is liable to the state for a civil penalty of not less than ~~ten thousand nine hundred fifty seven dollars and not more than~~

~~twenty one thousand nine hundred fifty six dollars and not more than the civil penalty allowed under the federal False Claims Act [31 U.S.C. § 3729 et seq.], as may be adjusted in accordance with the inflation adjustment procedures prescribed in the Federal Civil Penalties Inflation Adjustment Act of 1990 [Pub. L. 101-410; 104 Stat. 890; 23 U.S.C. 2461], which on the date of the enactment of this chapter is no less than eleven thousand one hundred eighty-one dollars and no more than twenty-two thousand three hundred sixty-three dollars, for each act specified in this~~

section, three times the amount of damages the state sustains because of the

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3029 _____ person's act, and costs of the investigation and litigation fees, if the person:

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- 1 a. Knowingly presents or causes to be presented a false or fraudulent claim for
2 payment or approval;
- 3 b. Knowingly makes, uses, or causes to be made or used, a false record or
4 statement material to a false or fraudulent claim;
- 5 c. Conspires to commit a violation of this section;
- 6 d. Has possession, custody, or control of public property or money used or to be
7 used by the state and knowingly delivers or causes to be delivered less than all
8 of that money or property;
- 9 e. Is authorized to make or deliver a document certifying receipt of property used or
10 to be used by the state and, with the intent to defraud the state, makes or
11 delivers a receipt without completely knowing the information on the receipt is
12 true; or
- 13 f. Knowingly makes, uses, or causes to be made or used a false record or
14 statement material to an obligation to pay or transmit money or property to the
15 state or knowingly conceals or knowingly and improperly avoids or decreases an
16 obligation to pay or transmit money or property to the state.
- 17 2. The court may assess not less than two times the amount of damages the state
18 sustains because of the act of the person and the person is liable to the state for the
19 costs of the civil action brought to recover any such penalty or damages if the court
20 finds:
 - 21 a. The person committing the act furnished the attorney general with all information
22 known to that person about the act within thirty days after the date on which the
23 person first obtained the information;
 - 24 b. The person fully cooperated with any investigation of the act by the attorney
25 general; and
 - 26 c. At the time the person furnished the attorney general with information about the
27 act, a criminal prosecution, civil action, or administrative action had not been
28 commenced with respect to the act and the person did not have actual
29 knowledge of the existence of an investigation into the violation.
- 30 3. ~~Annually, the attorney general shall review the civil penalty rates and by administrative~~
31 ~~rule shall amend these civil penalty rates to comport with the penalty amounts under~~

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~~the federal Civil Penalties Inflation Adjustment Act of 1990 [Pub. L. 101-410; 104 Stat.
890; 28 U.S.C. 2461].~~

SECTION 3.

Limitation of actions.

1. A civil action filed under this Act must be brought by the later of:

a. Six years after the date on which the violation was committed; or

b. Three years after the date facts material to the right of action are known or
reasonably should have been known by the official of the state charged with
responsibility to act in the circumstances.

2. An action may not be brought pursuant to subdivision b of subsection 1 more than ten
years after the date on which the violation was committed.

SECTION 4.

Investigation and action by attorney general.

The attorney general's Medicaid fraud control unit shall ~~enforce this Act and may~~ investigate
an alleged violation of this Act and ~~may~~ file a civil action, a criminal action, or both against any
person that violated or is violating this Act.

SECTION 5.

Complaint by person - Civil action.

1. A person may bring a civil action for a violation of this Act on behalf of the person and
the state. The action must be brought in the name of the state. The action may be
dismissed only if the court and the attorney general give written consent to the
dismissal and provide the reasons for consenting to the dismissal.

2. A copy of the complaint and written disclosure of substantially all material evidence
and information the person possesses must be served on the attorney general
pursuant to the North Dakota Rules of Civil Procedure. The complaint must be filed
under seal and must remain under seal for at least sixty days. The complaint may not
be served upon the defendant until the court orders that it be served.

3. Within sixty days after receiving the complaint and the material evidence and
information, the attorney general may elect to intervene and proceed with the action or
to notify the court the attorney general declines to take over the action. If the attorney
general declines to intervene or take over the action, the person bringing the action

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- 1 may conduct the action. For good cause shown, the attorney general may move the
2 court for extensions of the time during which the complaint remains under seal.
3 4. The defendant may not be required to respond to any complaint until twenty days after
4 the complaint is unsealed and served upon the defendant pursuant to rule 5 of the
5 North Dakota Rules of Civil Procedure.
6 5. If a person brings an action under this section, no person other than the attorney
7 general may intervene or bring a related action based on the facts underlying the
8 pending action.
9 6. If the attorney general proceeds with the action, the attorney general has the primary
10 responsibility for prosecuting the action and is not bound by an act of the person
11 bringing the action. The person bringing the action has the right to continue as a party
12 to the action subject to the limitations set forth in this Act.
13 7. If the attorney general elects not to proceed with the action and the person that
14 initiated the action conducts the action:
15 a. Upon the attorney general's request, the person that initiated the action shall
16 serve the attorney general with copies of all pleadings filed in the action and shall
17 supply the attorney general with copies of all deposition transcripts at the
18 attorney general's expense; or
19 b. The court, without limiting the status and rights of the person initiating the action,
20 may permit the attorney general to intervene at a later date upon a showing of
21 good cause.
22 ~~8. If a person files a civil action under this section, no person other than the attorney~~
23 ~~general may intervene or bring a related action based on the facts underlying the~~
2422 ~~pending action.~~
2523 9. Upon a showing by the attorney general unrestricted participation during the course of
2624 the litigation by the person initiating the action would interfere with or unduly delay the
2725 attorney general's prosecution of the case or would be repetitious, irrelevant, or for
2826 purposes of harassment, the court may impose limitations on the person's
2927 participation, including:
3028 a. Limiting the number of witnesses the person may call;
3429 b. Limiting the length of testimony of witnesses called by the person;

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1 c. Limiting the person's cross-examination of witnesses; or

2 d. Otherwise limiting the participation of the person in the litigation.

3 ~~10-9.~~ Whether the attorney general proceeds with the action, upon an in camera showing by
4 the attorney general that actions of discovery by the person initiating the action would
5 interfere with the attorney general's investigation or prosecution of a criminal or civil
6 matter arising out of the same facts, the court may stay such discovery for a period of
7 not more than sixty days. The court may extend the sixty-day period upon a further in
8 camera showing the attorney general has pursued the criminal, civil investigation, or
9 proceedings with reasonable diligence and any proposed discovery in the civil action
10 will interfere with the ongoing investigation or proceedings.

11 ~~110.~~ The attorney general may elect to pursue the claim through any alternate remedy
12 available, including administrative proceedings to determine a civil penalty. If an
13 alternate remedy is pursued, the person initiating the action has the same rights in the
14 proceeding as the person would have in proceeding under this section. Any finding of
15 fact or conclusion of law made in another proceeding that has become final is
16 conclusive on all parties to an action under this section. A finding or conclusion is final
17 if determined on appeal to the appropriate court, time for filing the appeal has expired,
18 or the finding or conclusion is not subject to judicial review.

19 ~~1211.~~ If the attorney general elects to intervene and proceed with an action, the attorney
20 general may file a complaint or amend the complaint of a person that has brought an
21 action to clarify or add detail to the claims in which the attorney general is intervening
22 and to add additional claims with which the attorney general contends the attorney
23 general is entitled to relief. For statute of limitations purposes, a pleading relates back
24 to the filing date of the complaint of the person that originally brought the action to the
25 extent the attorney general's claim arises out of the conduct, transactions, or
26 occurrences set forth, or attempted to be set forth, in the prior complaint of that
27 person.

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SECTION 6.

Filing prohibited.

1. A person may not bring an action under this Act based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state is already a party.
2. The court shall dismiss an action or claim brought under this Act, unless opposed by the state, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed; in a criminal, civil, or administrative hearing in which the state or its agent is a party; in a legislative, state auditor, or other state report, hearing, audit, or investigation; or from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

SECTION 7.

Dismissal of civil action.

On motion of the attorney general, the court may dismiss a civil action notwithstanding the objection of the person that initiated the action if the attorney general notified the person of the filing of the motion to dismiss and the court has given the person an opportunity to oppose the motion and present evidence at a hearing.

SECTION 8.

Burden of proof.

The standard of proof in a civil action brought under this Act is the preponderance of the evidence.

SECTION 9.

Distribution of damages and civil penalty.

1. Except as provided in subsection 2, if the attorney general proceeds with an action brought by a person pursuant to section 5 of this Act, the person is entitled to receive at least fifteen percent, but not more than twenty-five percent, of the proceeds recovered and collected in the action or in settlement of the claim, depending on the extent to which the person substantially contributed to the prosecution of the action.
2. The court may award an amount the court considers appropriate, but in no case more than ten percent of the proceeds in an action the court finds to be based primarily on

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1 disclosures of specific information, other than information provided by the person
2 bringing the action, relating to allegations or transactions disclosed through a criminal,
3 civil, or administrative hearing; a legislative, administrative, auditor report, hearing,
4 audit, or investigation; or the news media. In determining the award, the court shall
5 take into account the significance of the information and the role of the person bringing
6 the action in advancing the case to litigation.

7 3. A payment to a person bringing an action pursuant to this section may be made only
8 from the proceeds recovered and collected in the action or in settlement of the claim.
9 In addition, the person is entitled to receive an amount for reasonable expenses the
10 court finds to have been necessarily incurred, and reasonable attorney's fees and
11 costs. The expenses, fees, and costs must be awarded against the defendant.

12 4. If the attorney general does not proceed with an action pursuant to section 5 of this
13 Act, the person bringing the action or settling the claim is entitled to receive an amount
14 the court decides is reasonable for collecting the civil penalty and damages on behalf
15 of the attorney general. The amount may not be less than twenty-five percent nor
16 more than thirty percent of the proceeds recovered and collected in the action or
17 settlement of the claim and must be paid out of the proceeds. In addition, the person is
18 entitled to receive an amount for reasonable expenses the court finds were
19 necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees,
20 and costs must be awarded against the defendant.

21 5. Whether the attorney general proceeds with the action, if the court finds the action was
22 brought by a person that planned or initiated the violation of this Act, the court may
23 reduce or eliminate the share of the proceeds the person would otherwise receive
24 pursuant to subsections 1 through 4, taking into account the role of the person in
25 advancing the case to litigation and any relevant circumstances pertaining to the
26 violation. If the person bringing the action is convicted of criminal conduct arising from
27 the person's role in the violation of this section, the person must be dismissed from the
28 civil action and may not receive any share of the proceeds of the action. The dismissal
29 does not prejudice the right of the attorney general to continue the action.

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1 6. The attorney general is entitled to any damages and civil penalties not awarded to the
2 person bringing the action, and the damages and civil penalties must be deposited in
3 the general fund.

4 7. Unless otherwise provided, the remedies or penalties provided by this Act are
5 cumulative to each other and to the remedies or penalties available under all other
6 laws of the state.

7 **SECTION 10.**

8 **Effect of criminal conviction.**

9 A defendant convicted in any criminal proceeding under this Act is precluded from
10 subsequently denying the essential elements of the criminal offense of which the defendant was
11 convicted in any civil proceeding. For purposes of this section, a conviction may result from a
12 verdict or plea of guilty.

13 **SECTION 11.**

14 **Costs and attorney's fees.**

15 If the state favorably settles or prevails in a civil action in which the state intervened or filed,
16 the state is entitled to be awarded reasonable expenses, consultant and expert witness fees,
17 costs, and attorney's fees. In an action in which outside counsel is engaged by the attorney
18 general, the costs and attorney's fees awarded to that counsel must equal the outside counsel's
19 charges reasonably incurred for costs and attorney's fees in prosecuting the action. A plaintiff is
20 entitled to an amount for reasonable expenses the court finds to have been necessarily
21 incurred, plus reasonable costs and attorney's fees, if the action is settled favorably for the state
22 or the state prevails in the action. The expenses, fees, and costs must be awarded against the
23 defendant. If the attorney general does not intervene in a civil action and the person bringing
24 the civil action conducts the action and the defendant prevails in the action that is not settled
25 and the court finds was clearly frivolous or brought solely for harassment purposes, the
26 defendant is entitled to reasonable costs and attorney's fees. The state is not liable for costs,
27 attorney's fees, or other expenses incurred by a person in bringing or defending an action under
28 this Act.

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SECTION 12.

Relief from retaliatory actions.

1. An employee, contractor, or agent is entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this Act or other efforts to stop one or more violations of this Act.
2. Relief under subsection 1 includes reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorney's fees. An action under this section may be brought in the appropriate district court for the relief provided in this subsection.
3. A civil action under this section may not be brought more than three years after the date the retaliation occurred.

SECTION 13.

Settlement by attorney general.

The attorney general may settle the case with a defendant notwithstanding the objections of any person that initiated the action if the court determines, after a hearing, the settlement is fair, adequate, and reasonable under the circumstances. Upon a showing of good cause, the hearing may be held in camera. A hearing is not otherwise required for the court to approve any settlement.

SECTION 14.

Medicaid fraud control unit.

The Medicaid fraud control unit is established as a division of the attorney general's office. The Medicaid fraud control unit, which is under the supervision and control of the attorney general, consists of the agents and employees the attorney general considers necessary and appropriate. The Medicaid fraud control unit is a criminal justice agency within the meaning of section 12-60-16.1. Agents designated by the attorney general have peace officer status and authority, including the authority of search, seizure, and arrest. All recovered money will be

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1 forwarded to the designated state Medicaid agency for appropriate allocation between the
2 federal government and the general fund. The portion of state match appropriations for the
3 Medicaid fraud control unit will be appropriated from the general fund.

4 **SECTION 15.**

5 **Powers and duties of Medicaid fraud control unit.**

6 1. The Medicaid fraud control unit shall:

- 7 a. Investigate and prosecute under applicable criminal or civil laws fraud and patient
8 abuse or neglect by providers or any other person, including cases referred by
9 the department;
10 b. Review complaints of patient abuse, patient neglect, and misappropriation of
11 patient property and, if appropriate, investigate and initiate criminal or civil
12 proceedings or refer the complaint to another federal, state, or local agency for
13 action;
14 c. Refer to the department for collection and, if appropriate, imposition of
15 appropriate provider administrative actions involving provider overpayments and
16 abuse;
17 d. Communicate and cooperate with and, subject to applicable confidentiality laws,
18 provide information to other federal, state, and local agencies involved in the
19 investigation and prosecution of health care fraud, patient abuse, and other
20 improper activities related to the Medicaid program;
21 e. Transmit to other state and federal agencies, in accordance with law, reports of
22 convictions, copies of judgments and sentences imposed and other information
23 and documents for purposes of program exclusions or other sanctions or
24 penalties under Medicaid, Medicare, or other state or federal benefit or
25 assistance programs;
26 f. Recommend to state agencies appropriate or necessary adoption or revision of
27 laws, rules, policies, and procedures to prevent fraud, abuse, and other improper
28 activities under the Medicaid program and to aid in the investigation and
29 prosecution of fraud, abuse, and other improper activities under the Medicaid
30 program; and

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- 1 g. Enter an agreement with the Medicaid agency regarding referrals, information
- 2 sharing, and improper payment recoveries as provided in title 42, Code of
- 3 Federal Regulations, part 455, section 23.
- 4 2. The Medicaid fraud control unit may:
- 5 a. Initiate criminal prosecutions and civil actions pursuant to subsection 1 in any
- 6 court of competent jurisdiction in the state;
- 7 b. Upon request, obtain information and records from applicants, recipients, and
- 8 providers;
- 9 c. Subject to applicable federal confidentiality laws and rules and for purposes
- 10 related to any investigation or prosecution under subsection 1, obtain from the
- 11 department, local offices of public assistance, and other local, county, or state
- 12 government departments or agencies records and other information, including
- 13 applications, provider enrollment forms, claims and reports, individual or entity
- 14 tax returns, or other information provided to or in the possession of the tax
- 15 commissioner or the state auditor;
- 16 d. Refer appropriate cases to federal, other state, or local agencies for investigation,
- 17 prosecution, or imposition of penalties, restrictions, or sanctions;
- 18 e. Work cooperatively with federal agencies; and
- 19 f. Enter agreements with the department and other federal, state, and local
- 20 agencies in furtherance of the unit's mission.

21 **SECTION 16.**

22 **Medicaid fraud - Criminal penalty.**

- 23 1. A person commits a criminal offense under this section if the person knowingly:
- 24 a. Presents for allowance, for payment, or for the purpose of concealing, avoiding,
- 25 or decreasing an obligation to pay a false or fraudulent medical assistance claim,
- 26 bill, account, voucher, or writing to a public agency, public servant, or contractor
- 27 authorized to allow or pay medical assistance claims;
- 28 b. Solicits, accepts, offers, or provides any remuneration, including a kickback,
- 29 bribe, or rebate in exchange for purchasing, leasing, ordering, arranging for, or
- 30 recommending the purchasing, leasing, or ordering of any services or items from
- 31 a provider for which payment may be made under the Medicaid program;

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1 c. Solicits, accepts, offers, or provides any remuneration, including a kickback,
2 bribe, or rebate in exchange for a fee for referring a recipient to another provider
3 or arranging for the furnishing of services or items for which payment may be
4 made under the Medicaid program;

5 d. Fails or refuses to provide covered medically necessary services to eligible
6 recipients as required with respect to a managed care contract, health
7 maintenance organization contract, or similar contract or subcontract under the
8 Medicaid program; or

9 e. Conspires with another person to commit a violation of this section.

10 2. Conduct or activity that does not violate or which is protected under the provisions of,
11 or federal regulations adopted under 42 U.S.C. 1395nn and 42 U.S.C. 1320a-7b(b), is
12 not considered an offense under subdivision b of subsection 1, and the conduct or
13 activity must be accorded the same protections allowed under federal laws and
14 regulations.

15 3. A person convicted of this offense involving payments, benefits, kickbacks, bribes,
16 rebates, remuneration, services, or claims not exceeding one thousand dollars in
17 value is guilty of a class A misdemeanor.

18 4. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
19 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
20 common scheme and exceed one thousand dollars in value, a violation of this Act is a
21 class C felony.

22 5. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
23 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
24 common scheme and exceed ten thousand dollars in value but do not exceed fifty
25 thousand dollars, a violation of this Act is a class B felony.

26 6. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
27 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
28 common scheme and exceed fifty thousand dollars in value, a violation of this Act is a
29 class A felony.

30 a. For purposes of imposing sentence for a conviction under this Act, the value of
31 payments, benefits, kickbacks, bribes, rebates, remuneration, services, or claims

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involved is the greater of the value of Medicaid payments or benefits received as a result of the illegal conduct or activity or the value of the payments, benefits, kickbacks, bribes, rebates, remuneration, services, or claim involved.

b. Amounts involved in Medicaid fraud committed pursuant to a common scheme or the same transaction may be aggregated in determining the value involved.

c. A person convicted of the offense of Medicaid fraud must be suspended from participation in the Medicaid program:

(1) For any period of time not less than one year for a first offense or the person may be permanently terminated from participation in the medical assistance program;

(2) For any period of time not less than three years for a second offense, or the person may be permanently terminated from participation in the medical assistance program; or

(3) Permanently for a third offense.

7. In addition to any other penalty provided by law, a person convicted of Medicaid fraud is not entitled to bill or collect from the recipient, the Medicaid program, or any other third-party payer for the services or items involved and shall repay to the Medicaid program any payments or benefits obtained by any person for the services or items involved.

SECTION 17.

Civil investigative demands and subpoenas - Failure to comply - Confidentiality.

1. If the attorney general, or a designee, has reason to believe a person may be in possession, custody, or control of documentary material or information relevant to an investigation under this Act, the attorney general, or a designee, may, before commencing a civil proceeding under section 5 of this Act, issue in writing and cause to be served upon the person, a civil investigative demand or subpoena requiring the person to, under oath:

a. Produce the documentary material for inspection and copying;

b. Answer in writing written interrogatories with respect to the documentary material or information;

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- 1 c. Give oral testimony concerning the subject matter of the investigation, including
2 any documentary material or information; or
3 d. Furnish any combination of the material, answers, or testimony.
4 2. If a civil investigative demand or subpoena is an express demand for product of
5 discovery, the attorney general or a designee shall cause to be served, a copy of such
6 demand upon the person from which the discovery was obtained and shall notify the
7 person to which such demand is issued of the date on which the copy was served.
8 3. If a person objects to or otherwise fails to comply with a civil investigative demand or
9 subpoena served upon that person under subsection 1, the attorney general may file
10 in the district court a petition for an order to enforce the demand or subpoena. If the
11 court finds the demand or subpoena is proper, the court shall order the person to
12 comply with the demand or subpoena and may grant such injunctive or other relief as
13 may be required until the person complies with the demand or subpoena. Notice of
14 hearing on the petition and a copy of the petition must be served upon the person that
15 may appear in opposition to the petition. If the attorney general prevails in an action
16 brought under this subsection, the court shall award to the attorney general
17 reasonable attorney's fees, costs, and expenses incurred in bringing the action.
18 4. Any testimony taken or material produced under this section must be kept confidential
19 by the attorney general before bringing an action against a person under this chapter
20 for the violation under investigation, unless confidentiality is waived by the person
21 being investigated and the person that testified, answered interrogatories, or produced
22 material, or disclosure is authorized by the court.
23 5. Information obtained by the attorney general or designee may be shared with a person
24 that initiated the action if the attorney general or designee determine it is necessary as
25 part of any investigation under this Act and the person agrees to comply with the
26 confidentiality provisions provided in subsection 4, and unless otherwise provided by
27 state or federal law.

28 **SECTION 18.**

29 **Cooperation of governmental agencies with Medicaid fraud control unit.**

30 All local, county, and state departments and agencies shall cooperate with the Medicaid
31 fraud control unit and the unit's agents and employees to effectuate the purposes of the unit.

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- 1 **SECTION 19.**
- 2 **Authorization to adopt rules.**
- 3 The attorney general may adopt rules, pursuant to chapter 28-32, to implement this Act.

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SECOND PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2347
HUMAN SERVICES COMMITTEE
ROBIN WEISZ, CHAIRMAN
MARCH 14, 2019

PRESENTED BY
PARRELL D. GROSSMAN, DIRECTOR
CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL

Chairman Weisz and Members of the House Human Services Committee:

Subsequent to my testimony on February 27, in which I provided some proposed amendments to Engrossed SB2347, I met with Representative Porter on February 28 to discuss this legislation, particularly regarding concerns whether the Attorney General can offer legislation that will be less stringent than Engrossed SB2347.

Representative Porter, subsequent to the hearing, requested that I review the statutes from the surrounding states of South Dakota, Wyoming, Montana, and Minnesota, to compare for purposes of a more minimal Act. I did so, prior to meeting with Representative Porter. The Montana and Minnesota statutes include the federal False Claims Act with the *qui tam* whistle blower provisions that allow a private individual who assists a prosecution can receive all or part of any penalty imposed. This original language and these provisions are almost identical to the substantive provisions Engrossed SB2347, with the amendments proposed on February 27 to the House Human Services Committee. These *qui tam* provisions are a critical component of laws meeting the requirements of the federal government in order to provide those states with an additional 10% in recoveries by the states' Medicaid Fraud Control Units, in line with the original goal of North Dakota's proposed legislation.

South Dakota and Wyoming's statutes, however, do not have similar provisions and are less stringent. Those laws do not include the specific federal the false claims act language contained in the North Dakota legislation being considered. Without the requirement to meet the "10%" guidelines, those statutes are able to include less penalties than the federally mandated provisions of the Minnesota, Montana, and proposed North Dakota legislation. In addition, as above explained, they do not include the federal False Claims Act *qui tam* provisions allowing private citizens to bring claims.

When you inquired about less stringent statutes, I was not aware that these less stringent statutes were possible at this time, or that they would be approved by the Department of Health and Human Services for the purpose of approving a MFCU. Upon further research and review, we learned that a less stringent statute, without the federal false claims act language, is permissible to meet the requirements of a MFCU. The consequences for the State of North Dakota would be that, because the North Dakota law is not as good as the federal False Claims Act, it would not comply with the Debt Reduction Act and, therefore, the State would be ineligible for an additional 10%

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share in recoveries that otherwise would go to the U.S. Department of Health and Human Services. The difference will mean less total recoveries for this state. For instance, assuming an eventual average in North Dakota, similar to South Dakota's recoveries of \$2M each year over the past eight years, those reduced recoveries would be \$200,000 each year, or \$1.6M over eight years. That is just a policy decision purely for the legislature.

In consultation and agreement with the NDDHS, we want to ensure that, if the House does not favor Engrossed SB2347 as offered with the February 27 proposed amendments, we have presented other alternatives for a statute that will meet the minimum requirements for a MFCU and, therefore, avoid loss of funding sanctions by the federal government.

Therefore, the Attorney General has drafted amendments for a less stringent statute. In addition to the proposed amendments, I have attached a mock-up of what the legislation would look like if the House Human Services approves these latest proposed amendments.

The current definition of "abuse" seemed to cause some concern. Although that definition has no application without an actual violation of the chapter, meaning a false claim, it is not necessary in this different version of the legislation. Therefore, we have removed that definition.

We also have removed the current definition of "knowingly or knowing" per the Committee's concerns and any misunderstanding about that definition and what appeared to be confusion or concerns with the current language, "requires no proof of specific intent."

Instead, the Attorney General is recommending simply referring to the long-standing definition in section 12.1-02-02 in the criminal code.

That definition states as follows: "Knowingly" if and when he engages in the conduct, he knows or has a firm belief, unaccompanied by substantial doubt, that he is doing so, whether or not it is his purpose to do so."

With this amendment, the legislation would then read as follows: "Knowingly" means as defined in section 12.1-02-02."

We believe this would be an appropriate definition of "knowingly." With this change, "knowingly" would simply mean the provider submitted the false claim knowing it was false or not allowed. We are not aware of any states that use a different standard other than "knowingly."

As to penalties, we have incorporated Representative Porter's suggestion to limit the penalties to no more than 15% for total claims under \$100,000, regardless of how many individual claims or acts violated the chapter. For claims of \$100,000 or more, we have

inserted Wyoming's penalty range of \$1,000 to \$10,000 for each violation. Representative Porter did not have any objection to those penalties for violation above the \$100,000 threshold.

The initially proposed penalties, per the federal requirements, were between approximately \$11,000 and \$22,000 per violation, as currently provided in the Montana and Minnesota laws with their false claims acts (including possibly as many as 30 states total). South Dakota's penalties are \$2,000 per violation. The Wyoming penalties seem like a good compromise. In a settlement of alleged false claims, the parties would have to agree on the appropriate penalties and the amount could, and likely always would, be an amount less than the amount permitted with a court finding. Furthermore, as a further "checks and balances" with penalty amounts, imposition of penalties is up to the complete discretion of the court if it finds violations in an investigation.

Treble damages appear to be the standard across the country. Minnesota, South Dakota, Wyoming and Montana all provide for treble damages. Unlike the North Dakota legislation, South Dakota does not even provide for a reduction to double damages, when the provider cooperates and assists with the investigation. We would respectfully suggest that limiting damages to merely having to pay back the false claims with only interest, in addition to being significantly different from the other states' statutes, is not a deterrent to or disincentive for submitting false or fraudulent claims.

If the Committee decides to deviate and provide for less than treble damages, you should further amend this legislation to remove lines 17 through 29 on page 4, which provide an incentive for cooperation in an investigation and a reduction to two times the damages the state sustains with a false claim. If the damages already are less than treble damages, there is no benefit for an offender to cooperate and no necessity for a further reduction due to cooperation.

If the legislature feels at any time in the future that any MFCU recoveries, including damages, penalties, etc., are not fairly imposed by the MFCU or agreed upon between the parties, or as ordered by any court, or that such sums are not otherwise fair and consistent with good public policy, the legislature may change the damages or penalties.

Please look closely at the types of violations specified in Section 2. These violations relate to false claims. The MFCU will be pursuing false Medicaid claims that the providers knew were false. It will not be pursuing mistakes or "coding errors."

Removing the more onerous false claims and *qui tam* provisions that would allow lawsuits by private individuals is a huge change and should substantially lessen provider concerns in North Dakota.

The Attorney General and NDDHS are not necessarily recommending these amendments over Engrossed SB2347 presented on February 27 with proposed amendments. Instead, per your request, we want to present you a less stringent statute

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as another alternative. We are not suggesting that the 10% additional funding should be a deciding factor and, instead, are only informing you of the options and potential results.

It appears likely that the State of North Dakota will lose its waiver and that a Medicaid Fraud Control Unit is now a mandate in North Dakota to ensure the continued and appropriate level of federal funding for the NDDHS. The Attorney General believes that either version of this legislation will comply. It is a policy decision for your committee and the legislature to determine what statute, if any, is necessary and appropriate or acceptable.

Thank you for the opportunity to share some further proposed amendments and comments with you.

I would be pleased to appear at your convenience to explain any amendments and try to answer any questions.

REVISED PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2347
HUMAN SERVICES COMMITTEE
ROBIN WEISZ, CHAIRMAN
MARCH 14, 2019

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PRESENTED BY
PARRELL D. GROSSMAN, DIRECTOR
CONSUMER PROTECTION & ANTITRUST DIVISION
OFFICE OF ATTORNEY GENERAL

Page 1, line 7, remove “Abuse” means conduct by a provider or other person involving disregard of and an

Page 2, remove lines 8 through 11

Page 1, line 12 remove “2.”

Page 1, line 14, replace “3” with “2”

Page 1, line 14, after “Claim” insert an underscored colon.

Page 1, line 14, replace “means” with “a. Means”

Page 1, line 17, replace “a.” with “(1)”

Page 1, line 18, replace “b.” with “(2)”

Page 1, line 21, replace “(1)” with “(a)”

Page 1, line 23, replace “(2)” with “(b)”

Page 1, line 24, replace “; and does not include” with an underscored period

Page 2, line 1, insert “b. Does not include”

Page 2, line 4, replace “4” with “3”

Page 2, line 5, replace “5” with “4”

Page 2, line 7, replace “6” with “5”

Page 2, line 10, replace “7” with “6”

Page 2, line 10, replace “or “knowing” requires no proof of specific intent to defraud and means a” with “means as defined in section 12.1-02-02.”

Page 2, remove lines 11 through 13

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Page 2, line 14, replace "8" with "7"

Page 2, line 16, replace "9" with "8"

Page 2, line 20, replace "10" with "9"

Page 2, line 25, replace "11" with "10"

Page 2, remove lines 29 through 31

Page 3, remove lines 1 through 2

Page 3, line 3, replace "13" with "11"

Page 3, line 8, replace "14" with "12"

Page 3, remove lines 14 through 15

Page 3, line 16, replace "16" with "13"

Page 3, line 18, replace "17" with "14"

Page 3, line 26, replace "subsection" with "subsections"

Page 3, line 26, after "2" insert "and 3"

Page 3, line 27, replace "ten" with "one"

Page 3, line 27, remove "nine hundred fifty-seven dollars"

Page 3, line 28, replace "twenty - one" with "ten"

Page 3, line 28, remove "nine hundred fifty-six"

Page 4, line 30, replace "Annually, the attorney general shall review the civil penalty rates and by administrative rule shall amend these civil penalty rates to comport with the penalty amounts under" with "If the total claim made or presented by a person under subsection 1 is less than one hundred thousand dollars, the civil penalty for which the person is liable may be not more than 15% of the total claim submitted."

Page 5, remove lines 1 through 2

Page 5, line 14, remove "enforce this Act and may"

Page 5, line 15, after "and" insert "may"

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Page 5, remove lines 17 through 31

Page 6, remove lines 1 through 31

Page 7, remove lines 1 through 27

Page 8, remove lines 1 through 18

Page 8, remove lines 23 through 31

Page 9, remove lines 1 through 29

Page 10, remove lines 1 through 6

Page 10, line 19, remove "A plaintiff is"

Page 10, remove lines 20 through 21

Page 10, line 22, remove "or the state prevails in the action."

Page 10, line 23, remove "If the attorney general does not intervene in a civil action and the person bringing"

Page 10, remove lines 24 and 25

Page 10, line 26, remove "defendant is entitled to reasonable costs and attorney's fees."

Page 11, remove lines 17 through 23

Renumber accordingly

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FIRST ENGROSSMENT

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2347

Introduced by

Senators K. Roers, Hogan, J. Lee

Representatives Boschee, Rohr, Schneider

- 1 A BILL for an Act to provide for liability for false medical assistance claims and to provide for a
2 Medicaid fraud control unit; and to provide a penalty.

3 BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

4 SECTION 1.

5 Definitions.

6 As used in this Act, unless the context otherwise requires:

- 7 1. ~~"Abuse" means conduct by a provider or other person involving disregard of and an~~
8 ~~unreasonable failure to conform with the laws and rules governing the Medicaid~~
9 ~~program if the disregard or failure results or may result in payment by a Medicaid~~
10 ~~agency of medical assistance payments or benefits to which the provider knows the~~
11 ~~provider is not entitled.~~

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- 12 2. "Benefit" means the provision of anything of pecuniary value under the Medicaid
13 program.

- 14 23. "Claim": ~~means a.~~ Means any request or demand, whether under a contract or
otherwise, for

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15 money or property under the Medicaid program regardless of whether the state has
16 title to the money or property which is:

17 a(1): Presented to an officer, employee, or agent of the state; or

18 b(2): Made to a contractor, grantee, or other recipient, if the money or property is to be
19 spent or used on the state's behalf or to advance a state program or interest, and
20 if the state:

21 (a1) Provides or has provided any portion of the money or property requested or
22 demanded; or

23 (b2) Will reimburse such contractor, grantee, or other recipient for any portion of
24 the money or property that is requested or demanded ~~and does not include.~~

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b. Does not include requests or demands for money or property the state has paid to an

individual as compensation for state employment or as an income subsidy with no restrictions on that individual's use of the money or property.

34. "Department" means the department of human services.

45. "Document" means an application, claim, form, report, record, writing, or correspondence, whether in written, electronic, magnetic, or other form.

56. "Fraud" means any conduct or activity prohibited by law or rule involving knowing conduct or omission to perform a duty that results in or may result in payments to which the person is not entitled.

67. "Knowingly" ~~or "knowing" requires no proof of specific intent to defraud and means a person has actual knowledge of the information, acts in deliberate ignorance of the truth or falsity of the information, or acts in reckless disregard of the truth or falsity of the information.~~ means as defined in section 12.1-02-02.

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78. "Material" means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

89. "Medicaid agency" means an agency or entity of state, county, or local government which administers any part of the Medicaid program, whether under direct statutory authority or under contract with an authorized agency of the state or federal government.

940. "Misappropriation of patient property" means exploitation, deliberate misplacement, or wrongful use or taking of a patient's property, whether temporary or permanent, without authorization by the patient or the patient's designated representative. The term includes conduct with respect to a patient's property, which would constitute a criminal offense under chapter 12.1-23.

1044. "Obligation" means an established duty, whether fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.

12. ~~"Original source" means an individual who before a public disclosure has voluntarily disclosed to the state the information on which allegations or transactions in a claim are based or who has knowledge that is independent of and materially adds to the~~

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~~publicly disclosed allegations or transactions, and who has voluntarily provided the
information to the state before filing an action under this Act.~~

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1143. "Patient abuse" means the willful infliction of physical or mental injury of a patient or
unreasonable confinement, intimidation, or punishment that results in pain, physical or
mental harm, or mental anguish of a patient. The term includes conduct with respect to
a patient which would constitute a criminal offense under chapter 12.1-16, 12.1-17,
12.1-18, 12.1-20, or 12.1-22.

1244. "Patient neglect" means a failure, through inattentiveness, carelessness, or other
omission, to provide to a patient goods and services necessary to avoid physical
harm, mental anguish, or mental illness if an omission is not caused by factors beyond
the person's control or by good-faith errors in judgment. The term includes conduct
with respect to a patient which would constitute a criminal offense under section
12.1-17-03.

~~15. "Proceeds" means civil penalties and damages and excludes attorney's fees and
costs.~~

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1346. "Provider" means a person that furnishes items or services for which payment is
claimed under the Medicaid program.

1417. "Record" means medical, professional, business, or financial information and
documents, whether in written, electronic, magnetic, microfilm, or other form:
a. Pertaining to the provision of treatment, care, services, or items to a recipient;
b. Pertaining to the income and expenses of the provider; or
c. Otherwise relating to or pertaining to a determination of entitlement to payment or
reimbursement under the Medicaid program.

SECTION 2.

Liability for certain acts - Civil penalty.

1. Except as provided in ~~subsection subsections 2 and 3~~, a person is liable to the state for
a civil penalty of

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not less than ~~ten-one~~ thousand ~~nine hundred fifty seven~~ dollars and not more than
~~twenty-one~~ ten thousand ~~nine hundred fifty six~~ dollars for each act specified in this
section, three times the amount of damages the state sustains because of the
person's act, and costs of the investigation and litigation fees, if the person:

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- 1 a. Knowingly presents or causes to be presented a false or fraudulent claim for
2 payment or approval;
3 b. Knowingly makes, uses, or causes to be made or used, a false record or
4 statement material to a false or fraudulent claim;
5 c. Conspires to commit a violation of this section;
6 d. Has possession, custody, or control of public property or money used or to be
7 used by the state and knowingly delivers or causes to be delivered less than all
8 of that money or property;
9 e. Is authorized to make or deliver a document certifying receipt of property used or
10 to be used by the state and, with the intent to defraud the state, makes or
11 delivers a receipt without completely knowing the information on the receipt is
12 true; or
13 f. Knowingly makes, uses, or causes to be made or used a false record or
14 statement material to an obligation to pay or transmit money or property to the
15 state or knowingly conceals or knowingly and improperly avoids or decreases an
16 obligation to pay or transmit money or property to the state.
17 2. The court may assess not less than two times the amount of damages the state
18 sustains because of the act of the person and the person is liable to the state for the
19 costs of the civil action brought to recover any such penalty or damages if the court
20 finds:
21 a. The person committing the act furnished the attorney general with all information
22 known to that person about the act within thirty days after the date on which the
23 person first obtained the information;
24 b. The person fully cooperated with any investigation of the act by the attorney
25 general; and
26 c. At the time the person furnished the attorney general with information about the
27 act, a criminal prosecution, civil action, or administrative action had not been
28 commenced with respect to the act and the person did not have actual
29 knowledge of the existence of an investigation into the violation.
3 3. Annually, the attorney general shall review the civil penalty rates and by administrative
4 rule shall amend these civil penalty rates to comport with the penalty amounts under
If the total claim made or presented by a person under subsection 1 is less than one hundred
thousand dollars, the civil penalty for which the person is liable may be not more than 15% of the

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total claim submitted.

1 the federal Civil Penalties Inflation Adjustment Act of 1990 (Pub. L. 101-410; 104 Stat.
2 890; 28 U.S.C. 2461).

83 SECTION 3.

94 Limitation of actions.

- 105 1. A civil action filed under this Act must be brought by the later of:
- 116 a. Six years after the date on which the violation was committed; or
- 127 b. Three years after the date facts material to the right of action are known or
- 138 reasonably should have been known by the official of the state charged with
- 149 responsibility to act in the circumstances.
- 1510 2. An action may not be brought pursuant to subdivision b of subsection 1 more than ten
- 1611 years after the date on which the violation was committed.

1712 SECTION 4.

1813 Investigation and action by attorney general.

1914 The attorney general's Medicaid fraud control unit shall enforce this Act and may investigate

2015 an alleged violation of this Act and may file a civil action, a criminal action, or both against any

2116 person that violated or is violating this Act.

2217 SECTION 5.

2318 Complaint by person ~~Civil action.~~

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- 2419 1. ~~A person may bring a civil action for a violation of this Act on behalf of the person and~~
- 2520 ~~the state. The action must be brought in the name of the state. The action may be~~
- 2621 ~~dismissed only if the court and the attorney general give written consent to the~~
- 2722 ~~dismissal and provide the reasons for consenting to the dismissal.~~
- 2823 2. ~~A copy of the complaint and written disclosure of substantially all material evidence~~
- 2924 ~~and information the person possesses must be served on the attorney general~~
- 3025 ~~pursuant to the North Dakota Rules of Civil Procedure. The complaint must be filed~~
- 3126 ~~under seal and must remain under seal for at least sixty days. The complaint may not~~
- 3227 ~~be served upon the defendant until the court orders that it be served.~~
- 3328 3. ~~Within sixty days after receiving the complaint and the material evidence and~~
- 3429 ~~information, the attorney general may elect to intervene and proceed with the action or~~
- 3530 ~~to notify the court the attorney general declines to take over the action. If the attorney~~
- 3631 ~~general declines to intervene or take over the action, the person bringing the action~~

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- 1 ~~may conduct the action. For good cause shown, the attorney general may move the~~
2 ~~court for extensions of the time during which the complaint remains under seal.~~
3 ~~4. The defendant may not be required to respond to any complaint until twenty days after~~
4 ~~the complaint is unsealed and served upon the defendant pursuant to rule 5 of the~~
5 ~~North Dakota Rules of Civil Procedure.~~
6 ~~5. If a person brings an action under this section, no person other than the attorney~~
7 ~~general may intervene or bring a related action based on the facts underlying the~~
8 ~~pending action.~~
9 ~~6. If the attorney general proceeds with the action, the attorney general has the primary~~
10 ~~responsibility for prosecuting the action and is not bound by an act of the person~~
11 ~~bringing the action. The person bringing the action has the right to continue as a party~~
12 ~~to the action subject to the limitations set forth in this Act.~~
13 ~~7. If the attorney general elects not to proceed with the action and the person that~~
14 ~~initiated the action conducts the action:~~
15 ~~a. Upon the attorney general's request, the person that initiated the action shall~~
16 ~~serve the attorney general with copies of all pleadings filed in the action and shall~~
17 ~~supply the attorney general with copies of all deposition transcripts at the~~
18 ~~attorney general's expense; or~~
19 ~~b. The court, without limiting the status and rights of the person initiating the action,~~
20 ~~may permit the attorney general to intervene at a later date upon a showing of~~
21 ~~good cause.~~
22 ~~8. If a person files a civil action under this section, no person other than the attorney~~
23 ~~general may intervene or bring a related action based on the facts underlying the~~
24 ~~pending action.~~
25 ~~9. Upon a showing by the attorney general unrestricted participation during the course of~~
26 ~~the litigation by the person initiating the action would interfere with or unduly delay the~~
27 ~~attorney general's prosecution of the case or would be repetitious, irrelevant, or for~~
28 ~~purposes of harassment, the court may impose limitations on the person's~~
29 ~~participation, including:~~
30 ~~a. Limiting the number of witnesses the person may call;~~
31 ~~b. Limiting the length of testimony of witnesses called by the person;~~

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~~c. Limiting the person's cross examination of witnesses; or~~

~~d. Otherwise limiting the participation of the person in the litigation.~~

~~10.9. Whether the attorney general proceeds with the action, upon an in camera showing by the attorney general that actions of discovery by the person initiating the action would interfere with the attorney general's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than sixty days. The court may extend the sixty day period upon a further in camera showing the attorney general has pursued the criminal, civil investigation, or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing investigation or proceedings.~~

~~1110. The attorney general may elect to pursue the claim through any alternate remedy available, including administrative proceedings to determine a civil penalty. If an alternate remedy is pursued, the person initiating the action has the same rights in the proceeding as the person would have in proceeding under this section. Any finding of fact or conclusion of law made in another proceeding that has become final is conclusive on all parties to an action under this section. A finding or conclusion is final if determined on appeal to the appropriate court, time for filing the appeal has expired, or the finding or conclusion is not subject to judicial review.~~

~~1211. If the attorney general elects to intervene and proceed with an action, the attorney general may file a complaint or amend the complaint of a person that has brought an action to clarify or add detail to the claims in which the attorney general is intervening and to add additional claims with which the attorney general contends the attorney general is entitled to relief. For statute of limitations purposes, a pleading relates back to the filing date of the complaint of the person that originally brought the action to the extent the attorney general's claim arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.~~

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1 ~~SECTION 6.~~

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2 ~~Filing prohibited.~~

3 1. ~~A person may not bring an action under this Act based upon allegations or~~
4 ~~transactions which are the subject of a civil suit or an administrative civil money~~
5 ~~penalty proceeding in which the state is already a party.~~

6 2. ~~The court shall dismiss an action or claim brought under this Act, unless opposed by~~
7 ~~the state, if substantially the same allegations or transactions as alleged in the action~~
8 ~~or claim were publicly disclosed; in a criminal, civil, or administrative hearing in which~~
9 ~~the state or its agent is a party; in a legislative, state auditor, or other state report,~~
10 ~~hearing, audit, or investigation; or from the news media, unless the action is brought~~
11 ~~by the attorney general or the person bringing the action is an original source of the~~
12 ~~information.~~

13 ~~SECTION 7.~~

14 ~~Dismissal of civil action.~~

15 ~~On motion of the attorney general, the court may dismiss a civil action notwithstanding the~~
16 ~~objection of the person that initiated the action if the attorney general notified the person of the~~
17 ~~filing of the motion to dismiss and the court has given the person an opportunity to oppose the~~
18 ~~motion and present evidence at a hearing.~~

19 ~~SECTION 8.~~

20 ~~Burden of proof.~~

21 ~~The standard of proof in a civil action brought under this Act is the preponderance of the~~
22 ~~evidence.~~

23 ~~SECTION 9.~~

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24 ~~Distribution of damages and civil penalty.~~

25 1. ~~Except as provided in subsection 2, if the attorney general proceeds with an action~~
26 ~~brought by a person pursuant to section 5 of this Act, the person is entitled to receive~~
27 ~~at least fifteen percent, but not more than twenty five percent, of the proceeds~~
28 ~~recovered and collected in the action or in settlement of the claim, depending on the~~
29 ~~extent to which the person substantially contributed to the prosecution of the action.~~
30 2. ~~The court may award an amount the court considers appropriate, but in no case more~~
31 ~~than ten percent of the proceeds in an action the court finds to be based primarily on~~

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1 ~~disclosures of specific information, other than information provided by the person~~
2 ~~bringing the action, relating to allegations or transactions disclosed through a criminal,~~
3 ~~civil, or administrative hearing; a legislative, administrative, auditor report, hearing,~~
4 ~~audit, or investigation; or the news media. In determining the award, the court shall~~
5 ~~take into account the significance of the information and the role of the person bringing~~
6 ~~the action in advancing the case to litigation.~~
7 3. ~~A payment to a person bringing an action pursuant to this section may be made only~~
8 ~~from the proceeds recovered and collected in the action or in settlement of the claim.~~
9 ~~In addition, the person is entitled to receive an amount for reasonable expenses the~~
10 ~~court finds to have been necessarily incurred, and reasonable attorney's fees and~~
11 ~~costs. The expenses, fees, and costs must be awarded against the defendant.~~
12 4. ~~If the attorney general does not proceed with an action pursuant to section 5 of this~~
13 ~~Act, the person bringing the action or settling the claim is entitled to receive an amount~~
14 ~~the court decides is reasonable for collecting the civil penalty and damages on behalf~~
15 ~~of the attorney general. The amount may not be less than twenty five percent nor~~
16 ~~more than thirty percent of the proceeds recovered and collected in the action or~~
17 ~~settlement of the claim and must be paid out of the proceeds. In addition, the person is~~
18 ~~entitled to receive an amount for reasonable expenses the court finds were~~
19 ~~necessarily incurred, plus reasonable attorney's fees and costs. All expenses, fees,~~
20 ~~and costs must be awarded against the defendant.~~
21 5. ~~Whether the attorney general proceeds with the action, if the court finds the action was~~
22 ~~brought by a person that planned or initiated the violation of this Act, the court may~~
23 ~~reduce or eliminate the share of the proceeds the person would otherwise receive~~
24 ~~pursuant to subsections 1 through 4, taking into account the role of the person in~~
25 ~~advancing the case to litigation and any relevant circumstances pertaining to the~~
26 ~~violation. If the person bringing the action is convicted of criminal conduct arising from~~
27 ~~the person's role in the violation of this section, the person must be dismissed from the~~
28 ~~civil action and may not receive any share of the proceeds of the action. The dismissal~~
29 ~~does not prejudice the right of the attorney general to continue the action.~~

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1 ~~6. The attorney general is entitled to any damages and civil penalties not awarded to the~~
2 ~~person bringing the action, and the damages and civil penalties must be deposited in~~
3 ~~the general fund.~~

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4 ~~7. Unless otherwise provided, the remedies or penalties provided by this Act are~~
5 ~~cumulative to each other and to the remedies or penalties available under all other~~
6 ~~laws of the state.~~

7 **SECTION 10.**

8 **Effect of criminal conviction.**

9 A defendant convicted in any criminal proceeding under this Act is precluded from
10 subsequently denying the essential elements of the criminal offense of which the defendant was
11 convicted in any civil proceeding. For purposes of this section, a conviction may result from a
12 verdict or plea of guilty.

13 **SECTION 11.**

14 **Costs and attorney's fees.**

15 If the state favorably settles or prevails in a civil action in which the state intervened or filed,
16 the state is entitled to be awarded reasonable expenses, consultant and expert witness fees,
17 costs, and attorney's fees. In an action in which outside counsel is engaged by the attorney
18 general, the costs and attorney's fees awarded to that counsel must equal the outside counsel's
19 charges reasonably incurred for costs and attorney's fees in prosecuting the action. ~~A plaintiff is~~
20 ~~entitled to an amount for reasonable expenses the court finds to have been necessarily~~
21 ~~incurred, plus reasonable costs and attorney's fees, if the action is settled favorably for the state~~
22 ~~or the state prevails in the action. The expenses, fees, and costs must be awarded against the~~
23 ~~defendant. If the attorney general does not intervene in a civil action and the person bringing~~
24 ~~the civil action conducts the action and the defendant prevails in the action that is not settled~~
25 ~~and the court finds was clearly frivolous or brought solely for harassment purposes, the~~
26 ~~defendant is entitled to reasonable costs and attorney's fees. The state is not liable for costs,~~
27 ~~attorney's fees, or other expenses incurred by a person in bringing or defending an action under~~
28 ~~this Act.~~

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1 **SECTION 12.**

2 **Relief from retaliatory actions.**

- 3 1. An employee, contractor, or agent is entitled to all relief necessary to make that
4 employee, contractor, or agent whole, if that employee, contractor, or agent is
5 discharged, demoted, suspended, threatened, harassed, or in any other manner
6 discriminated against in the terms and conditions of employment because of lawful
7 acts done by the employee, contractor, agent, or associated others in furtherance of
8 an action under this Act or other efforts to stop one or more violations of this Act.
9 2. Relief under subsection 1 includes reinstatement with the same seniority status that
10 employee, contractor, or agent would have had but for the discrimination, two times
11 the amount of back pay, interest on the back pay, and compensation for any special
12 damages sustained as a result of the discrimination, including litigation costs and
13 reasonable attorney's fees. An action under this section may be brought in the
14 appropriate district court for the relief provided in this subsection.
15 3. A civil action under this section may not be brought more than three years after the
16 date the retaliation occurred.

17 ~~**SECTION 13.**~~

18 ~~**Settlement by attorney general.**~~

19 ~~The attorney general may settle the case with a defendant notwithstanding the objections of~~
20 ~~any person that initiated the action if the court determines, after a hearing, the settlement is fair,~~
21 ~~adequate, and reasonable under the circumstances. Upon a showing of good cause, the~~
22 ~~hearing may be held in camera. A hearing is not otherwise required for the court to approve any~~
23 ~~settlement.~~

24 **SECTION 14.**

25 **Medicaid fraud control unit.**

26 The Medicaid fraud control unit is established as a division of the attorney general's office.
27 The Medicaid fraud control unit, which is under the supervision and control of the attorney
28 general, consists of the agents and employees the attorney general considers necessary and
29 appropriate. The Medicaid fraud control unit is a criminal justice agency within the meaning of
30 section 12-60-16.1. Agents designated by the attorney general have peace officer status and
31 authority, including the authority of search, seizure, and arrest. All recovered money will be

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1 forwarded to the designated state Medicaid agency for appropriate allocation between the
2 federal government and the general fund. The portion of state match appropriations for the
3 Medicaid fraud control unit will be appropriated from the general fund.

4 **SECTION 15.**

5 **Powers and duties of Medicaid fraud control unit.**

6 1. The Medicaid fraud control unit shall:

- 7 a. Investigate and prosecute under applicable criminal or civil laws fraud and patient
8 abuse or neglect by providers or any other person, including cases referred by
9 the department;
- 10 b. Review complaints of patient abuse, patient neglect, and misappropriation of
11 patient property and, if appropriate, investigate and initiate criminal or civil
12 proceedings or refer the complaint to another federal, state, or local agency for
13 action;
- 14 c. Refer to the department for collection and, if appropriate, imposition of
15 appropriate provider administrative actions involving provider overpayments and
16 abuse;
- 17 d. Communicate and cooperate with and, subject to applicable confidentiality laws,
18 provide information to other federal, state, and local agencies involved in the
19 investigation and prosecution of health care fraud, patient abuse, and other
20 improper activities related to the Medicaid program;
- 21 e. Transmit to other state and federal agencies, in accordance with law, reports of
22 convictions, copies of judgments and sentences imposed and other information
23 and documents for purposes of program exclusions or other sanctions or
24 penalties under Medicaid, Medicare, or other state or federal benefit or
25 assistance programs;
- 26 f. Recommend to state agencies appropriate or necessary adoption or revision of
27 laws, rules, policies, and procedures to prevent fraud, abuse, and other improper
28 activities under the Medicaid program and to aid in the investigation and
29 prosecution of fraud, abuse, and other improper activities under the Medicaid
30 program; and

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- 1 g. Enter an agreement with the Medicaid agency regarding referrals, information
- 2 sharing, and improper payment recoveries as provided in title 42, Code of
- 3 Federal Regulations, part 455, section 23.
- 4 2. The Medicaid fraud control unit may:
- 5 a. Initiate criminal prosecutions and civil actions pursuant to subsection 1 in any
- 6 court of competent jurisdiction in the state;
- 7 b. Upon request, obtain information and records from applicants, recipients, and
- 8 providers;
- 9 c. Subject to applicable federal confidentiality laws and rules and for purposes
- 10 related to any investigation or prosecution under subsection 1, obtain from the
- 11 department, local offices of public assistance, and other local, county, or state
- 12 government departments or agencies records and other information, including
- 13 applications, provider enrollment forms, claims and reports, individual or entity
- 14 tax returns, or other information provided to or in the possession of the tax
- 15 commissioner or the state auditor;
- 16 d. Refer appropriate cases to federal, other state, or local agencies for investigation,
- 17 prosecution, or imposition of penalties, restrictions, or sanctions;
- 18 e. Work cooperatively with federal agencies; and
- 19 f. Enter agreements with the department and other federal, state, and local
- 20 agencies in furtherance of the unit's mission.

21 **SECTION 16.**

22 **Medicaid fraud - Criminal penalty.**

- 23 1. A person commits a criminal offense under this section if the person knowingly:
- 24 a. Presents for allowance, for payment, or for the purpose of concealing, avoiding,
- 25 or decreasing an obligation to pay a false or fraudulent medical assistance claim,
- 26 bill, account, voucher, or writing to a public agency, public servant, or contractor
- 27 authorized to allow or pay medical assistance claims;
- 28 b. Solicits, accepts, offers, or provides any remuneration, including a kickback,
- 29 bribe, or rebate in exchange for purchasing, leasing, ordering, arranging for, or
- 30 recommending the purchasing, leasing, or ordering of any services or items from
- 31 a provider for which payment may be made under the Medicaid program;

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- 1 c. Solicits, accepts, offers, or provides any remuneration, including a kickback,
2 bribe, or rebate in exchange for a fee for referring a recipient to another provider
3 or arranging for the furnishing of services or items for which payment may be
4 made under the Medicaid program;
5 d. Fails or refuses to provide covered medically necessary services to eligible
6 recipients as required with respect to a managed care contract, health
7 maintenance organization contract, or similar contract or subcontract under the
8 Medicaid program; or
9 e. Conspires with another person to commit a violation of this section.
10 2. Conduct or activity that does not violate or which is protected under the provisions of,
11 or federal regulations adopted under 42 U.S.C. 1395nn and 42 U.S.C. 1320a-7b(b), is
12 not considered an offense under subdivision b of subsection 1, and the conduct or
13 activity must be accorded the same protections allowed under federal laws and
14 regulations.
15 3. A person convicted of this offense involving payments, benefits, kickbacks, bribes,
16 rebates, remuneration, services, or claims not exceeding one thousand dollars in
17 value is guilty of a class A misdemeanor.
18 4. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
19 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
20 common scheme and exceed one thousand dollars in value, a violation of this Act is a
21 class C felony.
22 5. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
23 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
24 common scheme and exceed ten thousand dollars in value but do not exceed fifty
25 thousand dollars, a violation of this Act is a class B felony.
26 6. Notwithstanding subsection 3, if the value of the payments, benefits, kickbacks, bribes,
27 rebates, remuneration, services, or claims of the Medicaid fraud were part of a
28 common scheme and exceed fifty thousand dollars in value, a violation of this Act is a
29 class A felony.
30 a. For purposes of imposing sentence for a conviction under this Act, the value of
31 payments, benefits, kickbacks, bribes, rebates, remuneration, services, or claims

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1 involved is the greater of the value of Medicaid payments or benefits received as
2 a result of the illegal conduct or activity or the value of the payments, benefits,
3 kickbacks, bribes, rebates, remuneration, services, or claim involved.

4 b. Amounts involved in Medicaid fraud committed pursuant to a common scheme or
5 the same transaction may be aggregated in determining the value involved.

6 c. A person convicted of the offense of Medicaid fraud must be suspended from
7 participation in the Medicaid program:

8 (1) For any period of time not less than one year for a first offense or the person
9 may be permanently terminated from participation in the medical assistance
10 program;

11 (2) For any period of time not less than three years for a second offense, or the
12 person may be permanently terminated from participation in the medical
13 assistance program; or

14 (3) Permanently for a third offense.

15 7. In addition to any other penalty provided by law, a person convicted of Medicaid fraud
16 is not entitled to bill or collect from the recipient, the Medicaid program, or any other
17 third-party payer for the services or items involved and shall repay to the Medicaid
18 program any payments or benefits obtained by any person for the services or items
19 involved.

20 **SECTION 17.**

21 **Civil investigative demands and subpoenas - Failure to comply - Confidentiality.**

22 1. If the attorney general, or a designee, has reason to believe a person may be in
23 possession, custody, or control of documentary material or information relevant to an
24 investigation under this Act, the attorney general, or a designee, may, before
25 commencing a civil proceeding under section 5 of this Act, issue in writing and cause
26 to be served upon the person, a civil investigative demand or subpoena requiring the
27 person to, under oath:

28 a. Produce the documentary material for inspection and copying;

29 b. Answer in writing written interrogatories with respect to the documentary material
30 or information;

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1 c. Give oral testimony concerning the subject matter of the investigation, including
2 any documentary material or information; or

3 d. Furnish any combination of the material, answers, or testimony.

4 2. If a civil investigative demand or subpoena is an express demand for product of
5 discovery, the attorney general or a designee shall cause to be served, a copy of such
6 demand upon the person from which the discovery was obtained and shall notify the
7 person to which such demand is issued of the date on which the copy was served.

8 3. If a person objects to or otherwise fails to comply with a civil investigative demand or
9 subpoena served upon that person under subsection 1, the attorney general may file
10 in the district court a petition for an order to enforce the demand or subpoena. If the
11 court finds the demand or subpoena is proper, the court shall order the person to
12 comply with the demand or subpoena and may grant such injunctive or other relief as
13 may be required until the person complies with the demand or subpoena. Notice of
14 hearing on the petition and a copy of the petition must be served upon the person that
15 may appear in opposition to the petition. If the attorney general prevails in an action
16 brought under this subsection, the court shall award to the attorney general
17 reasonable attorney's fees, costs, and expenses incurred in bringing the action.

18 4. Any testimony taken or material produced under this section must be kept confidential
19 by the attorney general before bringing an action against a person under this chapter
20 for the violation under investigation, unless confidentiality is waived by the person
21 being investigated and the person that testified, answered interrogatories, or produced
22 material, or disclosure is authorized by the court.

23 5. Information obtained by the attorney general or designee may be shared with a person
24 that initiated the action if the attorney general or designee determine it is necessary as
25 part of any investigation under this Act and the person agrees to comply with the
26 confidentiality provisions provided in subsection 4, and unless otherwise provided by
27 state or federal law.

28 **SECTION 18.**

29 **Cooperation of governmental agencies with Medicaid fraud control unit.**

30 All local, county, and state departments and agencies shall cooperate with the Medicaid
31 fraud control unit and the unit's agents and employees to effectuate the purposes of the unit.

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- 1 **SECTION 19.**
- 2 **Authorization to adopt rules.**
- 3 The attorney general may adopt rules, pursuant to chapter 28-32, to implement this Act.