

Regulatory Impact Statement

1. Statutory authority: Section 194 of the State Finance Law empowers the Attorney General to adopt such rules and regulations as is necessary to effectuate the purposes of New York False Claims Act. See State Fin. Law, Art. XIII, §§ 187-194 (hereinafter “the Act”).

2. Regulatory objectives: These rules and regulations (hereinafter referred to as “the rule”) are in accordance with public policy objectives the Legislature sought to advance by passing the Act, including the recovery of funds or property fraudulently obtained or retained from the state and local governments, and the prevention and deterrence of fraud against the state and local governments. The rule seeks to reduce the risk of unnecessary litigation for qui tam plaintiffs, the state, local governments, and defendants. The rule clarifies the parameters and scope of the Act in regards to: pro se litigation, the damages multiplier, obligations, and costs and attorneys’ fees for the state. Critically, the rule also ensures that the state will maintain compliance with section 1909 of Social Security Act, 42 U.S.C. § 1396h (the “Deficit Reduction Act of 2005”). Compliance with the Deficit Reduction Act of 2005 allows the state to retain an additional twenty percent of all Medicaid fraud recoveries obtained from actions brought under the Act that would otherwise be given to the federal government. This is a difference worth tens of millions of dollars annually.

3. Needs and benefits: The rule is needed to realize the full potential of the Act’s enforcement and recovery powers; clarify terms for the state, local governments, and potential and actual qui tam plaintiffs and defendants; and ensure that the state is allowed to retain an additional twenty percent of Medicaid fraud recoveries obtained from actions brought under the Act that would otherwise be given to the federal government. Specifically, the benefits derived from the rule are as follows:

(A) Subdivision d of Section 400.4 prohibits plaintiffs from pursuing qui tam actions on a pro se basis after the state or a local government declines to intervene or supersede in the action, unless the

pro se plaintiff is eligible to represent a party before the court in which the case is proceeding. This new subdivision ensures that qui tam cases in which the state or a local government does not intervene or supersede are litigated by qualified attorneys who can adequately represent the interests of the state or a local government in a court proceeding. The rule also protects defendants from unmeritorious cases that, having been rejected by the state and local governments, and private counsel, might otherwise be pursued by pro se plaintiffs. The rule is consistent with federal case law that would similarly prevent pro se qui tam plaintiffs from pursuing qui tam actions after the government declined to intervene or supersede in the action. See, e.g., *United States ex rel. Mergent Services v. Flaherty*, 540 F.3d 89, 93 (2d Cir. 2008). This case law is very likely to be applied by New York courts as well, and the rule accordingly puts potential qui tam plaintiffs on notice of this limitation on pro se litigation.

(B) Section 400.5 addresses section 190(9)(b) of the Act, the so-called “public disclosure bar”. This rule is consistent with the public disclosure bar of the United States False Claims Act, see 31 U.S.C. § 3730(e)(4)(A), and, as applied to Medicaid cases, is required to comply with the Deficit Reduction Act of 2005 so that the state continues to retain an additional twenty percent of all Medicaid fraud recoveries obtained from actions brought under the Act that would otherwise be given to the federal government. The additional amount retained as a result of complying with the Deficit Reduction Act of 2005 is tens of millions of dollars annually. Section 400.5(a) codifies the policy of the state that a qui tam complaint with several causes of action will not be dismissed in its entirety if only some, but not all, of the causes of action are dismissed because of publicly disclosed information. This subsection will encourage the filing of valid qui tam complaints. Section 400.5(b) encourages meritorious qui tam actions to be filed involving undisclosed federal reports that have not resulted in state or local government enforcement actions. Both subsections will facilitate the

recovery of funds or property fraudulently obtained or retained from the state and local governments, and prevent and deter fraud against the state and local governments.

(C) Section 400.6 clarifies that the damage multiplier in section 189 of the Act results in “gross trebling” or “gross doubling” and not “net trebling” or “net doubling”. The rule holds that the damage multiplier applies to the full damages resulting from the fraud, before any subtractions are made for compensatory payments received by the government from any source, including the defendant, or that are otherwise made because of any offset or credit received by the government from any source, including the defendant. With regard to the damage multiplier, federal courts have inconsistently interpreted identical language in the United States False Claims Act with regard to whether it requires the gross or net amount to be multiplied. While some courts have interpreted this language to require the multiplying of the net amount, see, e.g., *United States v. Anchor Mortg. Corp.*, 711 F.3d 745, 748-51 (7th Cir. 2013), other courts have interpreted the language to require the gross amount to be multiplied, see, e.g., *United States v. Eghbal*, 548 F.3d 1281, 1285 (9th Cir. 2008). This rule adopts the gross multiplier rule in order to better facilitate the recovery of funds or property fraudulently obtained or retained against the state and local governments, and to better prevent and deter fraud against the state and local governments. For example, without this rule, a defendant that has already been investigated and sued by the state or a local government could escape the statutory damage multiplier by simply paying the government an offset or a credit before the judgment of multiplied damages is entered. By increasing the government’s recovery, the rule also encourages potential qui tam plaintiffs to file valid qui tam complaints and cautions government contractors and large taxpayers against defrauding the government. The rule also resolves the confusion created by inconsistent federal case law, and thus puts the state, local governments, qui tam plaintiffs, and potential defendants on notice of the proper scope of the damage multiplier.

(D) Section 400.7 confirms that an “obligation” under sections 189(1)(g) and 189(1)(h) of the Act can be an “obligation” of any person, including but not limited to the obligation of the defendant. The rule will better facilitate the recovery of funds or property fraudulently obtained or retained, and better prevent and deter fraud against the state and local governments.

(E) Section 400.8 clarifies that any costs and attorneys’ fees awarded to the state are awarded and paid in the same manner as costs and fees that are awarded to local governments or qui tam plaintiffs.

4. Costs: There are no costs of implementing or complying with the rule. The rule might result in a small increase in the number of qui tam actions being filed, which will have to be reviewed by the Attorney General’s office.

5. Local government mandates: This rule imposes no responsibilities or duties on local governments.

6. Paperwork: This rule imposes no additional reporting requirements or paperwork requirements.

7. Duplication: The rule does not duplicate any existing state or federal law.

8. Alternatives: The Attorney General considered applying section 400.5 of the rule only to qui tam complaints involving the Medicaid program. Doing so would comply with the Deficit Reduction Act of 2005, while allowing the state to make case-by-case determinations as to whether to oppose the dismissal of non-Medicaid complaints described in that section pursuant to the public disclosure bar. The Attorney General ultimately rejected this approach to encourage the filing of all meritorious qui tam complaints, to facilitate the recovery of funds or property fraudulently obtained or retained from the state and local governments, and to better prevent and deter fraud against the state and local governments.

9. Federal standards: The rule does not exceed any minimum standards of the federal government for the same or similar subject areas.

10. Compliance schedule: Compliance with this rule could be achieved immediately upon effect of the adoption of this rule.