

# FCA Amendments in S. 386, Fraud Enforcement Recovery Act of 2009

S.386

FERA (Engrossed Amendment as Agreed to by House)

## SEC. 4. CLARIFICATIONS TO THE FALSE CLAIMS ACT TO REFLECT THE ORIGINAL INTENT OF THE LAW.

(a) Clarification of the False Claims Act- Section 3729 of title 31, United States Code, is amended--

(1) by striking subsection (a) and inserting the following:

^ (a) Liability for Certain Acts-

^ (1) IN GENERAL- Subject to paragraph (2), any person who--

^ (A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;

^ (B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;

^ (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);

^ (D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;

^ (E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

^ (F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the

Armed Forces, who lawfully may not sell or pledge property; or

`(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.

`(2) REDUCED DAMAGES- If the court finds that--

`(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

`(B) such person fully cooperated with any Government investigation of such violation; and

`(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into such violation,

the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of that person.

`(3) COSTS OF CIVIL ACTIONS- A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.';

(2) by striking subsections (b) and (c) and inserting the following:

`(b) Definitions- For purposes of this section--

`(1) the terms `knowing' and `knowingly'--

`(A) mean that a person, with respect to information--

`(i) has actual knowledge of the information;

`(ii) acts in deliberate ignorance of the truth or falsity of the information; or

`(iii) acts in reckless disregard of the truth or falsity of the information; and

`(B) require no proof of specific intent to defraud;

`(2) the term `claim'--

`(A) means any request or demand, whether under a contract or otherwise, for money or property and whether or not the United States has title to the money or property, that--

`(i) is presented to an officer, employee, or agent of the United States; or

`(ii) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government's behalf or to advance a Government program or interest, and if the United States Government--

`(I) provides or has provided any portion of the money or property requested or demanded; or

`(II) will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded; and

`(B) does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as an income subsidy with no restrictions on that individual's use of the money or property;

`(3) the term `obligation' means an established duty, whether or not 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; and

`(4) the term `material' means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.';

(3) by redesignating subsections (d) and (e) as subsections (c) and (d), respectively; and

(4) in subsection (c), as redesignated, by striking `subparagraphs (A) through (C) of subsection (a)' and inserting `subsection (a)(2)'.

(b) Intervention by the Government- Section 3731(b) of title 31, United States Code, is amended--

(1) by redesignating subsection (c) as subsection (d);

(2) by redesignating subsection (d) as subsection (e); and

(3) by inserting the new subsection (c):

`(c) If the Government elects to intervene and proceed with an action brought under 3730(b), the Government may file its own complaint or amend the complaint of a person who has brought an action under section 3730(b) to clarify or add detail to the claims in which the Government is intervening and to add any additional claims with respect to which the Government contends it is entitled to relief. For statute of limitations purposes, any such Government pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the Government arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.'.

(c) Civil Investigative Demands- Section 3733 of title 31, United States Code, is amended--

(1) in subsection (a)--

(A) in paragraph (1)--

(i) in the matter preceding subparagraph (A)--

(I) by inserting `, or a designee (for purposes of this section),' after `Whenever the Attorney General'; and

(II) by striking `the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law,' and inserting `the Attorney General, or a designee, may, before commencing a civil proceeding under section 3730(a) or other false claims law, or making an election under section 3730(b),'; and

(ii) in the matter following subparagraph (D)--

(I) by striking `may not delegate' and inserting `may delegate'; and

(II) by adding at the end the following: `Any information obtained by the Attorney General or a designee of the Attorney General under this section may be shared with any qui tam relator if the Attorney General or designee determine it is necessary as part of any false claims act investigation.'; and

(B) in paragraph (2)(G), by striking the second sentence;

(2) in subsection (i)(2)--

(A) in subparagraph (B), by striking `, who is authorized for such use under regulations which the Attorney General shall issue'; and

(B) in subparagraph (C), by striking `Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.'; and

(3) in subsection (1)--

(A) in paragraph (6), by striking `and' after the semicolon;

(B) in paragraph (7), by striking the period and inserting `; and'; and

(C) by adding at the end the following:

`(8) the term `official use' means any use that is consistent with the law, and the regulations and policies of the Department of Justice, including use in connection with internal Department of Justice memoranda and reports; communications between the Department of Justice and a Federal, State, or local government agency, or a contractor of a Federal, State, or local government agency, undertaken in furtherance of a Department of Justice investigation or prosecution of a case; interviews of any qui tam relator or other witness; oral examinations; depositions; preparation for and response to civil discovery requests; introduction into the record of a case or proceeding; applications, motions, memoranda and briefs submitted to a court or other tribunal; and communications with Government investigators, auditors, consultants and experts, the counsel of other parties, arbitrators and mediators, concerning an investigation, case or proceeding.'

(d) Relief From Retaliatory Actions- Section 3730(h) of title 31, United States Code, is amended to read as follows:

`(h) Relief From Retaliatory Actions-

`(1) IN GENERAL- Any employee, contractor, or agent shall be 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, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.

`(2) RELIEF- Relief under paragraph (1) shall include reinstatement with the same seniority status that employee, contractor, or agent would have had but for the discrimination, 2 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 attorneys' fees. An action under this subsection may be brought in the appropriate district court of the United States for the relief provided in this subsection.'

(e) False Claims Jurisdiction- Section 3732 of title 31, United States Code, is amended by adding at the end the following new subsection:

`(c) Service on State or Local Authorities- With respect to any State or local government that is named as a co-plaintiff with the United States in an action brought under subsection (b), a seal on the action ordered by the court under section 3730(b) shall not preclude the Government or the person bringing the action from serving the complaint, any other pleadings, or the written disclosure of substantially all material evidence and information possessed by the person bringing the action on the law enforcement authorities that are authorized under the law of that State or local government to investigate and prosecute such actions on behalf of such governments, except that such seal applies to the law enforcement authorities so served to the same extent as the seal applies to other parties in the action.'

(f) Effective Date and Application- The amendments made by this section shall take effect on the date of enactment of this Act and shall apply to conduct on or after the date of enactment, except that--

(1) subparagraph (B) of section 3729(a)(1) of title 31, United States Code, as added by subsection (a)(1), shall take effect as if enacted on June 7, 2008, and apply to all claims under the False Claims Act (31 U.S.C. 3729 et seq.) that are pending on or after that date; and

(2) section 3731(b) of title 31, as amended by subsection (b); section 3733, of title 31, as amended by subsection (c); and section 3732 of title 31, as amended by subsection (e); shall apply to cases pending on the date of enactment.

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