

Model State FCA

Sections

- 1 Definitions.
- 2 Acts subjecting person to treble damages, costs and civil penalties; exceptions.
- 3 Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as *qui tam* plaintiffs and as private citizens; jurisdiction of courts.
- 4 Limitation of actions; activities antedating this article; burden of proof.
- 5 Remedies under other laws; severability of provisions; liberality of legislative construction; adoption of legislative history.
- 6 Applicable rules of civil procedure

§ 1 Definitions

For purposes of this Act:

- (A) “Claim” includes any request or demand, whether under a contract or otherwise, for money or property, whether or not the State has title to the money or property that:
- (1) Is presented to an officer, employee, or agent of the State; or
 - (2) Is made to a contractor, grantee, or other recipient of the money or property, if the money or property is to be spent or used on the State’s behalf or to advance a State program or interest, and if the State:
 - (a) Provides or has provided any portion of the money or property requested or demanded; or
 - (b) Will reimburse the contractor, grantee, or other recipient for any portion of the money or property that is requested or demanded.
 - (3) “Claim” does not include a request or demand for money or property that 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.

(B) “Employer” includes any natural person, corporation, firm, association, organization, partnership, business, trust, or State-affiliated entity involved in proprietary function, including State universities and State hospitals.

- (C) “Knowingly” or “knowing” mean that a person, with respect to information:
- (1) Has actual knowledge of the information;
 - (2) Acts in deliberate ignorance of the truth or falsity of the information; or
 - (3) Acts in reckless disregard of the truth or falsity of the information.
 - (4) “Knowingly” and “knowing” require no specific intent to defraud.

(D) “Material” or “materially” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

(E) “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 rule, or from the retention of any overpayment.

(F) “Person” means any natural person, partnership, corporation, organization, association, business, trust or other legal entity, other than the State.

§ 2 Acts subjecting person to treble damages, costs and civil penalties; exceptions

(A) Any person who commits any of the following acts shall be liable to the State for three times the amount of damages which the State sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the State for the costs, including attorneys’ fees, of a civil action brought to recover any of those penalties or damages, and may be liable to the State for a civil penalty of not less than \$5,500 and not more than \$11,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), for each violation:

- (1) Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;
- (2) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
- (3) Has possession, custody, or control of money or property used or to be used by the State and knowingly delivers or causes to be delivered less than all of that money or property;
- (4) Is authorized to make or deliver a document certifying receipt of property used, or to be used, by the State and, intending to defraud the State, makes or delivers the receipt without completely knowing that the information on the receipt is true;
- (5) Knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer, employee, or agent of the State who is not lawfully authorized to sell or pledge the property;
- (6) 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 State;
- (7) Knowingly conceals, or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the State;
- (8) Conspires to violate any paragraph (A)(1) to (7) of this section.

(B) This section does not apply to claims, records, or statements made under the State [Tax laws].

(C) **Damages Limitation.** Notwithstanding section 2(A), a person who violates any of the provisions of subsection (A)(1) through (8) is liable to the State for not less than two

times the amount of damages that the State sustains because of the violation and the costs of a civil action brought to recover the damages, but no civil penalties, if the court finds all of the following:

(a) The person committing the violation provided officials of the State who are responsible for investigating false claims violations with all information known to that person about the violation within thirty days after the date on which the person first obtained the information;

(b) The person fully cooperated with any State investigation of the violation; and

(c) At the time the person provided the State with information about the violation, no criminal prosecution, civil action, or administrative proceeding had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

§ 3 Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as *qui tam* plaintiff and as private citizens; jurisdiction of courts

(A) **Responsibilities of the Attorney General.** The Attorney General diligently shall investigate a violation under section 2(A). If the Attorney General finds that a person has violated or is violating section 2(A), the Attorney General may bring a civil action under this section against that person.

(B) Actions by private persons.

(1) A person may bring a civil action for a violation of this Act for the person and for the State in the name of the State. No action may be filed pursuant to this subsection against the federal government, the State, or any officer or employee thereof acting in his or her official capacity. The person bringing the action shall be referred to as the *qui tam* plaintiff. Once filed, the action may be dismissed only with the written consent of the court and the Attorney General, taking into account the best interest of the parties involved and the public purposes behind this act.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the State Attorney General. The complaint shall also be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The State may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and the information. Any information or documents furnished by the relator to the attorney general in connection with the initiation of a *qui tam* action or investigation under subsection (B)(2) is not a public record and is exempt from disclosure under [applicable State FOIA law].

(3) The State may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subsection (B)(2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until after the complaint is unsealed and served upon the defendant pursuant to State Rules of Civil Procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the State shall—

(a) proceed with the action, in which case the Attorney General shall intervene and conduct the action on behalf of the State; or

(b) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings a valid action under this subsection, no person other than the State may intervene or bring a related action based on the facts underlying the pending action.

(C) Rights of the parties to *qui tam* actions.

(1) If the State proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2) (a) The State may seek to dismiss the action for good cause notwithstanding the objections of the *qui tam* plaintiff if the *qui tam* plaintiff has been notified by the State of the filing of the motion and the court has provided the *qui tam* plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(b) The State may settle the action with the defendant notwithstanding the objections of the *qui tam* plaintiff if the court determines, after a hearing providing the *qui tam* plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(c) Upon a showing by the State that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the State's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as—

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(d) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the State elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the State so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the State's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the State to intervene at a later date upon a showing of good cause.

(4) Whether or not the State proceeds with the action, upon a showing by the State that certain actions of discovery by the person initiating the action would interfere with the State'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 60 days. Such

a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the State has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection 3(B), the State may elect to pursue its claim through any alternate remedy available to the State, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the State, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(D) Award to *qui tam* plaintiff.

(1) If the State proceeds with an action brought by a person under subsection 3(B), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions specifically in a criminal, civil, or administrative hearing, in a legislative or administrative report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the State does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the State proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 2 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the

role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 2, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the State to continue the action.

(4) If the State does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(E) Certain actions barred.

(1) No court shall have jurisdiction over an action brought under subsection 3(B) against a member of the State legislative branch, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the State when the action was brought.

(2) In no event may a person bring an action under subsection 3(B) which is 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.

- (3) (A) The court shall dismiss an action or claim under this section, unless opposed by the State, if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed-
- (i) in a State criminal, civil, or administrative hearing in which the State or its agent is a party;
 - (ii) in a federal or State congressional or other report, hearing, audit, or investigation; or
 - (iii) 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.

(B) For purposes of this paragraph, "original source" means an individual who either (i) prior to a public disclosure under subsection (e)(3)(A), has voluntarily disclosed to the State the information on which allegations or transactions in a claim are based, or (2) 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 section.

(F) State not liable for certain expenses. The State is not liable for expenses which a person incurs in bringing an action under this section.

(G) Private Action for Retaliatory Actions. Any employee, contractor, or agent who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by the employer of the employee, contractor, or agent because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action brought or to be brought under section 3, or other efforts to stop 1 or more violations of this Act, including investigation

for, initiation of, testimony for, or assistance in the action, shall be entitled to all relief necessary to make the employee, contractor, or agent whole. The relief shall include reinstatement with the same seniority status the 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 employee, contractor, or agent may bring an action in the appropriate court for the relief provided under this section. The action may not be brought under this section more than three years after the last act of the employer that is alleged to violate this section.

§ 4 Limitation of actions; activities antedating this article; burden of proof

(A) A civil action under Section 3 may not be brought –

(1) more than 6 years after the date on which the violation of section 2 is committed, or

(2) more than 3 years after the date when 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, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(B) Retroactivity. A civil action under Section 3 may be brought for activity prior to the effective date of this Act if the limitations period set in section 4(A) has not lapsed.

(C) If the State elects to intervene and proceed with an action brought under section 3(B), the State may file its own complaint or amend the complaint of a person who has brought an action under section 3(B) to clarify or add detail to the claims in which the State is intervening and to add any additional claims with respect to which the State contends it is entitled to relief. For statute of limitations purposes, any such State 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 State arises out of the conduct, transactions, or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

(D) Estoppel. Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or *nolo contendere*, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (A) or (B) of Section 3.

(E) An action under subsection 3(A) or 3(B) of this section may be brought in [list court(s)] in any county in which the defendant or any one of multiple defendants can be found, resides, or transacts business, or in any county in which any act prohibited by section 2(A) occurred. The attorney general or the person who brought the action shall prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

§ 5 Remedies under other laws; severability of provisions; liberality of legislative construction; adoption of legislative history

(A) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(B) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(C) This Act shall be liberally construed and applied to promote the public interest. This Act also adopts the congressional intent behind the Federal False Claims Act, 31 U.S.C. §§ 3729-3733, including the legislative history underlying the 1986, 2009, and 2010 Amendments to the Federal False Claims Act.

§ 6 Applicable Rules of Civil Procedure

[NOTE: TAF Education Fund recommends that the States adopt provisions that address issues of venue and discovery, including provisions empowering the State to utilize subpoena powers similar to the civil investigative demands authorized under section 3733 of the federal False Claims Act. *See* 31 U.S.C. § 3733. Because these issues of civil procedure vary from state to state, TAF Education Fund has chosen not to include such provisions in this Model State False Claims Act.]