

S 458 IS

111th CONGRESS

1st Session

S. 458

To amend the False Claims Act.

IN THE SENATE OF THE UNITED STATES

February 24, 2009

Mr. GRASSLEY (for himself, Mr. DURBIN, Mr. LEAHY, Mr. SPECTER, and Mr. WHITEHOUSE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the False Claims Act.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the `False Claims Act Clarification Act of 2009'.

SEC. 2. FALSE CLAIMS GENERALLY.

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 to get a false or fraudulent claim paid or approved;

` (C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G) or otherwise to get a false or fraudulent claim paid or approved;



FEEDBACK

` (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 the property; or

` (G) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, or knowingly conceals, 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' mean that a person, with respect to information--

` (A) has actual knowledge of the information;

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

` (C) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required;

` (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 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; and

` (3) the term `obligation' means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, fee-based, or similar relationship, and the retention of any overpayment.';

(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)'.

SEC. 3. GOVERNMENT RIGHT TO DISMISS CERTAIN ACTIONS.

Section 3730(b) of title 31, United States Code, is amended--

(1) in paragraph (2), by striking ` Rule 4(d)(4)' and inserting ` rule 4'; and

(2) by adding at the end the following:

` (6)(A) Not later than 120 days after the date of service under paragraph (2), the Government may move to dismiss from the action a qui tam relator that is an employee of the Federal Government, or that is an immediate family member of an employee of the Federal Government, if--

` (i) the necessary and specific material allegations contained in such action were derived from a filed criminal indictment or information or an open and active criminal, civil, or administrative investigation or audit by the Government into substantially the same fraud alleged in the action;

` (ii) the duties of the employee's position specifically include uncovering and reporting the particular type of fraud that is alleged in the action, and the employee, as part of the duties of that employee's position, is participating in or has knowledge of an open and active criminal, civil, or administrative investigation or audit by the Government of the alleged fraud;

` (iii) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States, and either--

` (I) in a case in which the employing agency has an inspector general, such person, before bringing the action has not--

` (aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed to such inspector general; and

` (bb) notified in writing the person's supervisor and the Attorney General of the disclosure under division (aa); or

` (II) in a case in which the employing agency does not have an inspector general, such person, before bringing the action has not--

` (aa) disclosed in writing substantially all material evidence and information that relates to the alleged violation that the person possessed, to the Attorney General; and

` (bb) notified in writing the person's supervisor of the disclosure under division (aa); or

` (iv) the person bringing the action learned of the information that underlies the alleged violation of section 3729 that is the basis of the action in the course of the person's employment by the United States, made the required disclosures and notifications under clause (iii), and--

` (I) less than 18 months (and any period of extension as provided for under subparagraph (B)) have elapsed since the disclosures of information and notification under clause (iii) were made; or

` (II) within 18 months (and any period of extension as provided for under subparagraph (B)) after the disclosures of information and notification under clause (iii) were made, the Attorney General has filed an action based on such information.

` (B) Prior to the expiration of the 18-month period described under subparagraph (A)(iv)(II) and upon notice to the person who has disclosed information and provided notice under subparagraph (A)(iii), the Attorney General may extend such 18-month period by 1 additional 12-month period.

` (C) For purposes of subparagraph (A), a person's supervisor is the officer or employee who--

` (i) is in a position of the next highest classification to the position of such person;

` (ii) has supervisory authority over such person; and

` (iii) such person believes is not culpable of the violation upon which the action under this subsection is brought by such person.

` (D) A motion to dismiss under this paragraph shall set forth documentation of the allegations, evidence, and information in support of the motion.

` (E) Any person against whom the Government has filed a motion to dismiss under subparagraph (A) shall be provided an opportunity to contest a motion to dismiss under this paragraph. The court may restrict access to the evidentiary materials filed in support of the motion to dismiss, as the interests of justice require. A motion to dismiss and evidentiary material filed in support or opposition of such motion shall not be--

` (i) made public without the prior written consent of the person bringing the civil action; and

` (ii) subject to discovery by the defendant.

` (F) Upon granting a motion filed under subparagraph (A), the court shall dismiss the qui tam relator from the action.

` (G) If the motion to dismiss under this paragraph is granted, the matter shall remain under seal.

` (H) Not later than 12 months after the date of the enactment of this paragraph, and every 12 months thereafter, the Department of Justice shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives relating to--

` (i) the cases in which the Department of Justice has filed a motion to dismiss under this paragraph;

` (ii) the outcome of such motions; and

` (iii) the status of false claims civil actions in which such motions were filed.

` (I) Nothing in this paragraph shall be construed to limit the authority of the Government to dismiss an action or claim, or a person who brings an action or claim, under this subsection for any reason other than the grant of a motion filed under subparagraph (A).'

SEC. 4. BARRED ACTIONS.

(a) Provisions Relating to Actions Barred- Section 3730(b)(1) of title 31, United States Code, is amended by adding at the end the following: ` No claim for a violation of section 3729 may be waived or released by any action of any person who brings an action under this subsection, except insofar as such action is part of a court approved settlement of a false claim civil action brought under this section. Nothing in this paragraph shall be construed to limit the ability of the United States to decline to pursue any claim brought under this subsection, or to require court approval of a settlement by the Government with a defendant of an action brought under subsection (a), or under this subsection, unless the person bringing the action objects to the settlement under subsection (c)(2)(B).'

(b) Dismissal- Section 3730(e)(4) of title 31, United States Code, is amended to read as follows:

` (4) A court shall dismiss an action or claim or the person bringing the action or claim under subsection (b), upon a motion by the Government filed on or before service of a complaint on the defendant under subsection (b), or thereafter for good cause shown if--

` (A) on the date the action or claim was filed, substantially the same matters, involving the same wrongdoer, as alleged in the action or claim were contained in, or the subject of--

` (i) a filed criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit; or

` (ii) a news media report, or public congressional hearing, report, or investigation, if within 90 days after the issuance or completion of such news media report or congressional hearing, report, or investigation, the Department of Justice or an Office of Inspector General opened a fraud investigation or audit of the facts contained in such news media report or congressional hearing, report, or investigation as a result of learning about the public report, hearing, or investigation;

` (B) any new information provided by the person does not add substantial grounds for additional recovery beyond those encompassed within the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit; and

` (C) the Government's existing criminal indictment or information, or an open and active criminal, civil, or administrative investigation or audit, or the news media report, or congressional hearing, report, or investigation was not initiated or published after the Government's receipt of information about substantially the same matters voluntarily brought by the person to the Government.'.

(c) Qui Tam Awards- Section 3730(d) of title 31, United States Code, is amended--

(1) in paragraph (1), by striking the second sentence and inserting ` If the person bringing the action is not dismissed under subsection (e)(4) because the person provided new information that adds substantial grounds for additional recovery beyond those encompassed within the Government's existing indictment, information, investigation, or audit, then such person shall be entitled to receive a share only of proceeds of the action or settlement that are attributable to the new basis for recovery that is stated in the action brought by that person.'; and

(2) by striking paragraph (3) and inserting the following:

` (3)(A) Whether or not the Government proceeds with the action, the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which a 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 court finds that person--

` (i) planned and initiated the violation of section 3729 upon which the action was brought; or

` (ii) derived the knowledge of the claims in the action primarily from specific information relating to allegations or transactions (other than information provided by the person bringing the action) that the Government publicly disclosed, as that term is defined in subsection (e)(4)(A), or that the Government disclosed privately to the person bringing the action in the course of its investigation into potential violations of this subchapter.

` (B) If the person bringing the action is convicted of criminal conduct arising from the role of that person in the violation of section 3729, 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 United States to continue the action, represented by the Department of Justice.'.

SEC. 5. 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, government contractor, or agent shall be entitled to all relief necessary to make that employee, government contractor, or agent whole, if that employee, government 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, government contractor, or agent on behalf of the employee, government 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, government 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.'

SEC. 6. STATUTE OF LIMITATIONS.

Section 3731(b) of title 31, United States Code, is amended to read as follows:

` (b)(1) A civil action under section 3730 may not be brought more than 10 years after the date on which the violation of section 3729 or 3730 is committed.

` (2) Upon intervention, the Government may file its own complaint in intervention 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.'

SEC. 7. 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 electing 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 (l)--

(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.'

SEC. 8. FALSE CLAIMS SETTLEMENTS.

(a) Reports by Attorney General- Not later than November 1 of each year, the Attorney General shall submit a report to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives that describes each settlement or compromise of any claim, suit, or other action entered into with the Department of Justice that--

(1) relates to an alleged violation of section 1031 of title 18, United States Code, or section 3729 of title 31, United States Code (including all settlements of alternative remedies); and

(2) results from a claim of damages in excess of \$100,000.

(b) Contents of Reports- The descriptions of each settlement or compromise required to be included in the annual report under subsection (a) shall include--

(1) the overall amount of the settlement or compromise and the portions of the settlement attributed to various statutory authorities;

(2) the amount of actual damages, or in the event no actual amount is available a good faith estimate of the damages, estimated to have been sustained and the minimum and maximum potential civil penalties incurred as a consequence of the defendants that is the subject of the settlement or compromise;

(3) the basis for the estimate of damages sustained and the potential civil penalties incurred;

- (4) the amount of the settlement that represent damages and the multiplier or percentage of the actual damages applied in the actual settlement or compromise;
- (5) the amount of the settlement that represents civil penalties and the percentage of the potential penalty liability captured by the settlement or compromise;
- (6) the amount of the settlement that represents criminal fines and a statement of the basis for such fines;
- (7) the length of time involved from the filing of the complaint until the finalization of the settlement or compromise, including--
 - (A) the date of the original filing of the complaint;
 - (B) the time the case remained under seal;
 - (C) the date upon which the Department of Justice determined whether or not to intervene in the case; and
 - (D) the date of settlement or compromise;
- (8) whether any of the defendants, or any divisions, subsidiaries, affiliates, or related entities, had previously entered into 1 or more settlements or compromises relating to section 1031 of title 18, United States Code, or section 3730(b) of title 31, United States Code, and if so, the dates and monetary size of such settlements or compromises;
- (9) whether the defendant or any of its divisions, subsidiaries, affiliates, or related entities--
 - (A) entered into a corporate integrity agreement relating to the settlement or compromise;
 - (B) entered into a deferred prosecution agreement relating to the settlement or compromise; and
 - (C) had previously entered into 1 or more corporate integrity agreements relating to section 3730 (b) of title 31, United States Code, or a deferred prosecution agreement relating to section 1031 of title 18, United States Code, and if so, whether the previous corporate integrity agreements covered the conduct that is the subject of the settlement or compromise being reported on or similar conduct;
- (10) in the case of settlements involving Medicaid, the amounts paid to the Federal Government and to each of the States participating in the settlement or compromise;
- (11) whether civil investigative demands were issued in process of investigating the case;
- (12) in qui tam actions, the percentage of the settlement amount awarded to the relator, and whether or not the relator requested a fairness hearing pertaining to the percentage received by the relator or the overall amount of the settlement;
- (13) the extent to which officers of the department or agency that was the victim of the loss resolved by the settlement or compromise participated in the settlement negotiations; and
- (14) the extent to which relators and their counsel participated in the settlement negotiations.

SEC. 9. SEVERABILITY.

If any provision or application of this Act is held invalid, the invalidity shall not affect other provisions or applications of this Act which can be given effect without regard to the invalid provision or application, and to this end the provisions or applications of this Act are severable.

SEC. 10. EFFECTIVE DATE AND APPLICATION.

(a) In General- Except as provided under subsections (b) and (c), the amendments made by this Act shall take effect on the date of enactment of this Act and shall apply to all civil actions filed before, on, or after that date.

(b) False Claims- The amendments made by section 2 shall take effect on the date of enactment of this Act and shall apply to conduct occurring after that date of enactment.

(c) Statute of Limitation- The amendment made to section 3731(b)(1) of title 31, United States Code, by section 6 of this Act shall take effect on the date of enactment of this Act and shall apply to civil actions filed after that date of enactment.

END