

Department of Legislative Services
 Maryland General Assembly
 2015 Session

FISCAL AND POLICY NOTE
Revised

Senate Bill 374 (The President, *et al.*) (By Request - Office of the Attorney General)

Judicial Proceedings

Judiciary

Maryland False Claims Act

This bill (1) prohibits a person from knowingly making a false or fraudulent claim for payment or approval by a governmental entity; (2) authorizes a governmental entity to file a civil action against a person who makes a false claim; (3) establishes civil penalties for making a false claim; (4) permits a private citizen to file a civil action on behalf of a governmental entity against a person who has made a false claim; (5) requires the court to award a certain percentage of the proceeds of the action to the private citizen initiating the action; and (6) prohibits retaliatory actions by a person against an employee, contractor, or grantee for disclosing a false claim or engaging in other specified false claims-related activities.

The bill takes effect June 1, 2015, and applies prospectively to claims made on or after June 1, 2015.

Fiscal Summary

State Effect: Potential significant increase in general fund revenues beginning in FY 2018 from civil penalties and damages awarded in cases involving the cause of action created by the bill. Increase in general fund expenditures of \$501,800 beginning FY 2018 for the Office of the Attorney General (OAG) to hire additional personnel to handle cases filed under the bill’s provisions. Future year expenditures reflect annualization and inflation.

(in dollars)	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
GF Revenue	\$0	\$0	-	-	-
GF Expenditure	\$0	\$0	\$501,800	\$502,300	\$525,300
Net Effect	\$0	\$0	(\$501,800)	(\$502,300)	(\$525,300)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate effect

Local Effect: Potential increase in local revenues from civil penalties and damages awarded to local governments under the bill. Potential increase in expenditures for legal departments and circuit courts in local jurisdictions if the increase in workloads requires additional personnel.

Small Business Effect: None.

Analysis

Bill Summary:

Definitions

A “governmental entity” is the State or a county. A “claim” means a request or demand, under contract or otherwise, for money or property, regardless of whether the governmental entity has title to the money or property, that is (1) presented to an officer, employee, or agent of a governmental entity or (2) made to a contractor, grantee, or other recipient, if the money or other property is to be spent or used on the governmental entity’s behalf or to advance an interest of the governmental entity and the governmental entity provides or reimburses any portion of the money or property. “Knowing” or “knowingly” means, with respect to information and without requiring proof of specific intent to defraud, that a person (1) has actual knowledge that the information is false; (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. “Knowing” or “knowingly” does not mean, with respect to information, that a person acts in a manner that constitutes a mistake or negligence.

Prohibited Activities

The bill prohibits a person from (1) knowingly presenting or causing to be presented a false or fraudulent claim for payment or approval; (2) knowingly making, using, or causing to be made or used a false record or statement material to a false or fraudulent claim; (3) conspiring to commit a violation of the false claims statute; (4) having possession, custody, or control of money or other property used or to be used by or on behalf of a governmental entity and knowingly delivering or causing to be delivered to the governmental entity less than all of the money or property; (5) being authorized to make or deliver a receipt of money or property used or to be used by a governmental entity and, intending to defraud the governmental entity, making or delivering a receipt knowing that the information contained in it is not true; (6) knowingly buying or receiving as a pledge of an obligation or a debt publicly owned property from an officer, employee, or agent of a governmental entity who may not lawfully sell or pledge the property; (7) knowingly making, using, or causing to be made or used a false record or statement material to an

obligation to pay or transmit money or other property to a governmental entity; (8) knowingly concealing or knowingly and improperly avoiding or decreasing an obligation to pay or transmit money or other property to a governmental entity, including misrepresentation of the time at which a trade was made to make the transaction appear less favorable; or (9) knowingly making any other false or fraudulent claim against a governmental entity.

These prohibitions do not apply to claims, records, or statements related to State or local taxes.

Awards/Damages

A person who violates the bill's prohibitions is liable to a governmental entity for a civil penalty of up to \$10,000 for each violation and up to triple the governmental entity's damages resulting from the violation. However, the total amount of a violator's liability to the governmental entity may not be less than the amount of the actual damages the governmental entity incurred as a result of the false claims violation. These penalties are in addition to any criminal, civil, or administrative penalties provided under any other State or federal law. The governmental entity may file a civil action against an alleged violator seeking civil penalties. Any remedy provided under the bill is in addition to any other appropriate legal or equitable relief provided under any other applicable statute or regulation. A governmental entity may not maintain an action under the bill if the governmental entity has filed a civil action based on the same underlying act under the Maryland False Health Claims Act (MFHCA) or sought enforcement by the Attorney General under specified procurement statutes pertaining to collusion or falsification or concealment of material facts. Any civil penalties or damages collected by the State are deposited into the State's general fund.

When determining the appropriate amount of civil penalties and damages awarded for a false claims violation, a court must consider the following factors: (1) the number, nature, and severity of the person's current and past false claims violations; (2) the degree of loss suffered by the governmental entity as a result of the false claims; (3) the person's history of billing compliance and whether the person has a compliance program in place; (4) the extent to which the person has taken steps to address and correct the false claims violation since becoming aware of it; (5) funds previously returned to the governmental entity in compliance with federal overpayment requirements, to the extent the funds represented losses to the governmental entity caused by the violation; (6) whether the person self-reported the violation, the timeliness of the self-reporting, the person's cooperation with the investigation of the violation, and the extent to which the person had prior knowledge of the investigation or other action relating to the violation; and (7) any other factor as justice requires.

The awarding of court costs and attorney's fees in a false claims case is discretionary. When determining the amount of court costs and/or attorney's fees to be awarded, the court must consider the amount of any penalties and damages recovered in the action and any other factor as justice may require.

Causes of Action by Private Parties on Behalf of a Governmental Entity ("Qui Tam" Actions)

The bill authorizes a private party to bring an action on behalf of a governmental entity (often referred to as a "*qui tam*" action), in which the private party may seek the civil penalties and damages previously mentioned, as well as court costs and attorney's fees. If the governmental entity intervenes and proceeds with an action and prevails, the court must award the private party not less than 15% and not more than 25% of the proceeds, and in certain circumstances not more than 10% of the proceeds, proportional to the amount of time and effort that the party contributed to the final resolution of the action.

The court may reduce any share of the proceeds on a finding that the party who brought the civil action deliberately participated in the violation on which the action was based. If a person who initiated a civil action is convicted of criminal conduct arising from a violation of this bill prior to a final determination of the action, the person must be dismissed from the action and may not receive any share of the proceeds. If a person who was awarded proceeds is later convicted of criminal conduct arising from a violation of the bill's provisions, the person must be ordered to repay the proceeds previously awarded.

Procedural Requirements

If a civil action is initiated by a person on behalf of a governmental entity, the person must serve on the governmental entity a copy of the complaint and a written disclosure of substantially all material and information that the person possesses in accordance with the Maryland Rules for serving process on the State or a local entity. A complaint is to be filed *in camera* and must remain under seal for at least 60 days or until the court orders the complaint to be served on the defendant. The governmental entity may request that the court grant an extension of the 60-day period during which the complaint is sealed for good cause shown. During the period in which the complaint is under seal, the governmental entity must notify the defendant as soon as practicable of an ongoing alleged violation, unless notification would compromise the investigation.

The governmental entity may intervene in and proceed with the civil action that has been initiated on its behalf by another person. The governmental entity must proceed with the civil action or notify the court that it will not proceed within 60 days after being served with the complaint or before any applicable extension period expires. If the governmental entity decides to intervene, the governmental entity may elect to withdraw from the case at

any time. The court must dismiss the case if the governmental entity declines to intervene or decides to withdraw from the case after intervening.

If the governmental entity elects to proceed with a civil action, it has the primary responsibility for proceeding with the action and is not bound by any act of the person who initiated the action. However, the person who initiated the action may continue as a party to the action. If the court determines after a hearing that a proposed settlement is fair, adequate, and reasonable, the governmental entity may settle a civil action, regardless of the objections of the person who initiated the action.

A court may impose limitations on the participation of the person who initiated the civil action if the governmental entity can show that unrestricted participation would (1) interfere with or unduly delay the governmental entity in its pursuit of the civil action or (2) be repetitious, irrelevant, or harassing to the person allegedly in violation of the bill's provisions. Such limitations can include restricting the number of witnesses the person may call to testify, limiting the person's cross-examination of witnesses, or limiting the person's participation in the litigation. A court may impose these limitations on the motion of the governmental entity or the defendant or on the court's own motion.

If the governmental entity can show that certain actions of discovery by the private party who initiated the civil action may interfere with the governmental entity's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay the discovery for no more than 60 days. The bill provides for an extension of this period if the governmental entity can show that it has pursued the investigation or proceeding with reasonable diligence.

Retaliatory Actions

The bill prohibits retaliatory actions by a person against an employee, contractor, or grantee for (1) acting lawfully in furtherance of a false claim action; (2) disclosing or threatening to disclose the person's false claim; (3) providing information or testifying regarding a false claim; or (4) objecting or refusing to participate in a practice the employee, contractor, or grantor reasonably believes to be a false claim.

In general, an employee, contractor, or grantee who has experienced retaliation may file a civil action against the retaliator and may seek any relief necessary to make the employee whole, including reinstatement, two times the amount of back pay, interest on back pay, and compensation for other damages, including litigation costs, reasonable attorney's fees, and punitive damages. Remedies provided under the bill are in addition to any other remedy available under State or federal law or any collective bargaining agreement or employee contract.

Coordination with Federal Investigations

A governmental entity is required to make all reasonable efforts to coordinate any investigation of an alleged violation with any federal investigation involving the same violation. The governmental entity's objective must be to avoid duplication of effort on the part of the alleged violator and minimize the burden of the investigation on the alleged violator.

Statute of Limitations

The statute of limitations for any action brought under the bill is the later of (1) six years from the date of the violation or (2) three years after the date when material facts were known or reasonably should have been known by the person initiating the action or the official of the governmental entity charged with responsibility for acting under the circumstances. However, in no event may a civil action be brought under the bill if more than 10 years have passed since the date on which the underlying violation occurred. In any action, the governmental entity or the initiating complainant must prove all essential elements of the case by a preponderance of the evidence.

Reporting Requirements

Beginning October 1, 2016, OAG and the attorney for each county must report annually to the General Assembly on (1) the number of false claims civil actions filed; (2) the number of false claims civil actions in which a judgment was entered; and (3) the number of claims made by the governmental entity for alleged false claims violations that are settled without the filing of a civil action.

Current Law: In general, the federal False Claims Act (FCA), 31 U.S.C. §§ 3729-3733, authorizes the federal government to recover damages from and seek civil penalties against individuals who knowingly submit false or fraudulent claims to the federal government. Another key feature of the FCA is that it allows a private citizen (relator) to bring an action on behalf of the federal government against individuals who knowingly submit false or fraudulent claims against the federal government, seeking remedies for those claims. The act of filing such an action (often referred to as a "*qui tam*" action) is informally called "whistleblowing." If successful, the relator is entitled to a share of the recovery of federal damages and penalties, depending on the extent to which the relator substantially contributed to the case.

The bill's language reflects several changes to FCA included in the Fraud Enforcement and Recovery Act of 2009 (FERA). FERA contains the most significant changes to FCA since 1986. The most significant amendments to FCA are listed below.

- *Intent* – Prior to FERA, FCA liability attached whenever a person “knowingly ma[de], use[d], or cause[d] to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government.” Under FERA, a person is liable under FCA if he/she “knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim.” The amendment is a response to the U.S. Supreme Court’s ruling in *Allison Engine v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008). In *Allison Engine*, two former employees of a subcontractor to a navy contractor filed a *qui tam* action alleging that their former employer submitted false certificates of conformance in order to secure payment. The court held that it was insufficient for the plaintiffs to establish that the defendant’s false statement resulted in payment of the claim or that the primary contractor used government money to pay the subcontractor. Instead, a plaintiff must prove that the false statement was made with the intent that it would result in the government paying the claim.
- *Presentment* – FERA defines a “claim” under FCA to include requests or demands “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.” This language expands the scope of FCA by allowing claims made by subcontractors to private entities using government funds or advancing government interests to qualify as false claims. The FERA amendments reverse rulings by some federal courts requiring a false claim to have been presented to the government in order for the claim to qualify under FCA. See *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004).
- *Reverse False Claims* – Prior to FERA, a person who knowingly made a fraudulent statement for the purpose of avoiding or decreasing an obligation to pay money to the government was liable to the government. FERA expanded this “reverse false claim” provision by making a person liable for “knowingly conceal[ing] or knowingly and improperly avoid[ing] or decreas[ing] an obligation to pay or transmit money or property to the Government.” Under FERA, “obligation” includes “retention of an overpayment.” Thus, knowingly retaining an overpayment by the government may result in a violation of FCA.

Background: The \$3.8 billion in false claims recoveries by the U.S. Department of Justice in fiscal 2013 represent the fourth year in a row that the department recovered more than \$3.0 billion and are surpassed only by the approximately \$5.0 billion the department recovered during fiscal 2012. As in previous years, the largest recoveries in fiscal 2013 related to health care fraud (\$2.6 billion). According to the department, the majority of false claims actions under FCA are filed under the Act’s *qui tam* provisions. Recoveries in *qui tam* cases during fiscal 2013 totaled \$2.9 billion.

Federal Incentives: The federal Deficit Reduction Act of 2005 (DRA) established incentives for states to enact certain antifraud legislation modeled after the federal FCA. States that enact qualifying legislation are eligible to receive an increase of 10% in the share of recovered funds in Medicaid fraud cases. The 10% increase in the state share of the recovery corresponds to a 10% reduction in the federal share.

To qualify, a state false claims act must (1) establish liability to the state for false or fraudulent claims, as described in FCA, with respect to Medicaid spending; (2) contain provisions that are at least as effective in rewarding or facilitating *qui tam* actions for false or fraudulent claims as those provided by the federal FCA; (3) require *qui tam* actions to be filed under seal for 60 days with review by the state Attorney General; and (4) impose a civil penalty not less than in the amount of the civil penalty authorized under the federal FCA. At least 27 states and the District of Columbia have enacted state false claims acts with *qui tam* provisions. Several of these laws are limited to health care fraud, while others encompass additional types of fraud. According to the Office of the Inspector General of the U.S. Department of Health and Human Services, 18 states have qualified for the federal incentive as of October 2014.

Maryland False Health Claims Act: Chapter 4 of 2010, also known as MFHCA, is substantially similar to the provisions of this bill, except that it is limited to false claims made against the State under a State health care plan or program. MFHCA authorizes individuals to file *qui tam* actions for false health claims made against the State. However, the State is the only entity authorized to intervene in these cases. Because MFHCA does not permit an action to continue once the State declines to intervene and does not provide a minimum civil penalty equivalent to the minimum penalty under the federal FCA, MFHCA did not qualify for the monetary incentives under DRA.

In addition to authorizing *qui tam* actions for false claims made against a State health plan or program, the enactment of MFHCA allowed Maryland to be named as a plaintiff in *qui tam* actions filed in federal court. Prior to MFHCA, Maryland could only participate in settlements of these lawsuits through the National Association of Medicaid Fraud Control Units' (NAMFCU) collaboration with the U.S. Department of Justice in settling Medicaid fraud cases and the State's waiver of its right to sue in these cases under common law fraud. The Medicaid Fraud Control Unit (MFCU) in OAG is a member of NAMFCU.

According to OAG, the State collected approximately \$22.6 million in false health claims settlements from fiscal 2012 through March 26, 2015. A portion of this amount may be owed to the federal government. Of the \$22.6 million collected, \$652,462 would have been unrecoverable absent MFHCA. For approximately \$6.1 million of this amount, the State would have recovered a smaller amount absent MFHCA.

Other States: At least 27 states and the District of Columbia have enacted state false claims acts with *qui tam* provisions. Several of these laws are limited to health care fraud, while others encompass additional types of fraud.

State Revenues: General fund revenues may increase significantly beginning in fiscal 2018 from civil penalties and damages collected by the State in cases involving the cause of action created by the bill.

State Expenditures: General fund expenditures for OAG increase by \$501,773 in fiscal 2018. This estimate reflects the cost of hiring two attorneys, one paralegal, one investigator, and one administrative assistant to assist with cases generated by the bill beginning on July 1, 2017. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses.

Positions	5
Salaries and Fringe Benefits	\$466,143
Equipment/Operating Expenses	<u>35,630</u>
Total FY 2018 OAG Expenditures	\$501,773

Future year expenditures reflect annual increases and employee turnover as well as annual increases in ongoing operating expenses.

Depending on the additional workload created by the bill, additional personnel may be needed in future years, but the extent of this need cannot be determined without actual experience under the bill. OAG was given nine positions following enactment of MFHCA, but anticipated needing additional personnel in the future.

OAG advises that unlike its experience with MFHCA, the office does not anticipate that it will participate in a noticeable volume of cases immediately or even within the first two years after the bill takes effect. With MFHCA, companion federal legislation had been in effect for several years before the State legislation took effect, and the office was able to join ongoing federal/multistate cases soon after MFHCA took effect. OAG advises that this is not likely to occur with the Maryland False Claims Act, and that the office will probably spend the first two years after the bill takes effect educating stakeholders and the community about the legislation and reviewing initial claims for merit.

During this two-year transition, OAG anticipates that it will place a current attorney in MFCU to learn and understand how false claims cases are handled. OAG also anticipates that its existing civil litigation unit can prioritize false claims cases during the first two years and that agency attorneys general will be authorized to handle applicable cases as needed. According to OAG, between 10% and 20% of the complaints received by MFCU are pursued.

The Judiciary advises that depending on the number of cases filed, the bill may result in a significant increase in personnel expenditures, particularly in Baltimore City and Annapolis. Given the extensive amount of time needed to investigate and bring a *qui tam* lawsuit, it is unlikely that there will be an immediately noticeable increase in caseloads. However, to the extent that the bill appreciably increases the caseloads of the courts, general fund expenditures for additional personnel may increase. Any such increase cannot be reliably estimated without actual experience under the bill and is not expected to occur in the next few years.

The Department of General Services (DGS) advises that it needs an internal auditor and an Assistant Attorney General to review contractor invoices to ensure compliance with Maryland laws, regulations, and contract payment terms and represent the department in applicable false claims cases. However, the Department of Legislative Services advises that it is unlikely that DGS has an immediate need for such personnel, which is determined by the frequency with which the department encounters relevant fraudulent activity and cannot be reliably estimated without actual experience under the bill. Furthermore, it is likely that existing auditing and legal personnel can develop internal procedures and protocols to ensure compliance in the future or that the personnel within OAG assisting with false claims cases can communicate protocols and guidelines to State agencies.

Local Revenues: Local revenues increase from civil penalties and damages collected by local entities in cases involving the cause of action created by the bill. The bill requires the Comptroller to deposit civil penalties and damages collected by the *State* into the State's general fund. Thus, this estimate assumes that civil penalties and damages collected by local entities remain with local jurisdictions.

Local Expenditures: Under the bill, a governmental entity that wishes to intervene and proceed with a *qui tam* lawsuit may, through OAG or the local governmental entity, file a civil action against an alleged violator seeking civil penalties. As a result, county attorneys and attorneys for Baltimore City will litigate cases involving false or fraudulent claims involving their jurisdictions. To the extent that the bill appreciably increases the workloads of these legal departments, local expenditures for additional personnel may increase.

Additional Information

Prior Introductions: HB 867 of 2014 passed the House with amendments and passed second reading in the Senate with amendments. No further action was taken on the bill. HB 509 of 2013 was withdrawn after receiving a hearing in the House Judiciary Committee.

Cross File: HB 405 (The Speaker, *et al.*) (By Request - Office of the Attorney General) - Judiciary.

Information Source(s): Baltimore, Carroll, Montgomery, Queen Anne's, and St. Mary's counties; Department of Budget and Management; Judiciary (Administrative Office of the Courts); Department of Health and Mental Hygiene; Department of General Services; Maryland Department of Transportation; State's Attorneys' Association; Office of the Attorney General; U.S. Department of Justice; *Maryland Daily Record*; *State False Claims Laws and Compliance with the DRA: What is Required after FERA and PPACA?*, Ropes and Gray LLP; U.S. Department of Health and Human Services; *False Claims Act Client Alert*, Kutak Rock LLP; National Conference of State Legislatures; Washington State Legislature; Statehealthfacts.org; *Amendments to the False Claims Act Significantly Increase Exposure for Government Contractors and Service Providers*, Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates; *Supreme Court's Allison Engine Decision Narrows the Scope of False Claims Act Cases That Can Be Brought Against Subcontractors*, Foley & Lardner LLP; *Congress Quickly Passes Significant FCA Amendments as Part of a Bill Funding Federal Law Enforcement*, Foley & Lardner LLP; *FERA Amendments To The False Claims Act May Have Serious Implications for Health Care Providers*, Jackson Walker LLP (martindale.com); *Newstand: Fraud Enforcement and Recovery Act of 2009 ("FERA")*, K&L Gates; California Mental Health Directors Association; *Baltimore Business Journal*; Department of Legislative Services

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