

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.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “False Claims Act Clari-
5 fication Act of 2009”.

6 **SEC. 2. FALSE CLAIMS GENERALLY.**

7 Section 3729 of title 31, United States Code, is
8 amended—

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

11 “(a) LIABILITY FOR CERTAIN ACTS.—

1 “(1) IN GENERAL.—Subject to paragraph (2),
2 any person who—

3 “(A) knowingly presents, or causes to be
4 presented, a false or fraudulent claim for pay-
5 ment or approval;

6 “(B) knowingly makes, uses, or causes to
7 be made or used, a false record or statement to
8 get a false or fraudulent claim paid or ap-
9 proved;

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

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

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

1 “(F) knowingly buys, or receives as a
2 pledge of an obligation or debt, public property
3 from an officer or employee of the Government,
4 or a member of the Armed Forces, who lawfully
5 may not sell or pledge the property; or

6 “(G) knowingly makes, uses, or causes to
7 be made or used, a false record or statement to
8 conceal, avoid, or decrease an obligation to pay
9 or transmit money or property to the Govern-
10 ment, or knowingly conceals, avoids, or de-
11 creases an obligation to pay or transmit money
12 or property to the Government,

13 is liable to the United States Government for a civil
14 penalty of not less than \$5,000 and not more than
15 \$10,000, as adjusted by the Federal Civil Penalties
16 Inflation Adjustment Act of 1990 (28 U.S.C. 2461
17 note; Public Law 104–410), plus 3 times the
18 amount of damages which the Government sustains
19 because of the act of that person.

20 “(2) REDUCED DAMAGES.—If the court finds
21 that—

22 “(A) the person committing the violation
23 of this subsection furnished officials of the
24 United States responsible for investigating false
25 claims violations with all information known to

1 such person about the violation within 30 days
 2 after the date on which the defendant first ob-
 3 tained the information;

4 “(B) such person fully cooperated with any
 5 Government investigation of such violation; and

6 “(C) at the time such person furnished the
 7 United States with the information about the
 8 violation, no criminal prosecution, civil action,
 9 or administrative action had commenced under
 10 this title with respect to such violation, and the
 11 person did not have actual knowledge of the ex-
 12 istence of an investigation into such violation,
 13 the court may assess not less than 2 times the
 14 amount of damages which the Government sustains
 15 because of the act of that person.

16 “(3) COSTS OF CIVIL ACTIONS.—A person vio-
 17 lating this subsection shall also be liable to the
 18 United States Government for the costs of a civil ac-
 19 tion brought to recover any such penalty or dam-
 20 ages.”;

21 (2) by striking subsections (b) and (c) and in-
 22 serting the following:

23 “(b) DEFINITIONS.—For purposes of this section—

24 “(1) the terms ‘knowing’ and ‘knowingly’ mean
 25 that a person, with respect to information—

1 “(A) has actual knowledge of the informa-
2 tion;

3 “(B) acts in deliberate ignorance of the
4 truth or falsity of the information; or

5 “(C) acts in reckless disregard of the truth
6 or falsity of the information,

7 and no proof of specific intent to defraud is re-
8 quired;

9 “(2) the term ‘claim’—

10 “(A) means any request or demand, wheth-
11 er under a contract or otherwise, for money or
12 property and whether or not the United States
13 has title to the money or property, that—

14 “(i) is presented to an officer, em-
15 ployee, or agent of the United States; or

16 “(ii) is made to a contractor, grantee,
17 or other recipient if the United States Gov-
18 ernment—

19 “(I) provides or has provided any
20 portion of the money or property re-
21 quested or demanded; or

22 “(II) will reimburse such con-
23 tractor, grantee, or other recipient for
24 any portion of the money or property
25 which is requested or demanded; and

1 “(B) does not include requests or demands
 2 for money or property that the Government has
 3 paid to an individual as compensation for Fed-
 4 eral employment or as an income subsidy with
 5 no restrictions on that individual’s use of the
 6 money or property; and

7 “(3) the term ‘obligation’ means a fixed duty,
 8 or a contingent duty arising from an express or im-
 9 plied contractual, quasi-contractual, grantor-grantee,
 10 licensor-licensee, fee-based, or similar relationship,
 11 and the retention of any overpayment.”;

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

14 (4) in subsection (c), as redesignated, by strik-
 15 ing “subparagraphs (A) through (C) of subsection
 16 (a)” and inserting “subsection (a)(2)”.

17 **SEC. 3. GOVERNMENT RIGHT TO DISMISS CERTAIN AC-**
 18 **TIONS.**

19 Section 3730(b) of title 31, United States Code, is
 20 amended—

21 (1) in paragraph (2), by striking “Rule
 22 4(d)(4)” and inserting “rule 4”; and

23 (2) by adding at the end the following:

24 “(6)(A) Not later than 120 days after the date
 25 of service under paragraph (2), the Government may

1 move to dismiss from the action a qui tam relator
2 that is an employee of the Federal Government, or
3 that is an immediate family member of an employee
4 of the Federal Government, if—

5 “(i) the necessary and specific material al-
6 legations contained in such action were derived
7 from a filed criminal indictment or information
8 or an open and active criminal, civil, or admin-
9 istrative investigation or audit by the Govern-
10 ment into substantially the same fraud alleged
11 in the action;

12 “(ii) the duties of the employee’s position
13 specifically include uncovering and reporting the
14 particular type of fraud that is alleged in the
15 action, and the employee, as part of the duties
16 of that employee’s position, is participating in
17 or has knowledge of an open and active crimi-
18 nal, civil, or administrative investigation or
19 audit by the Government of the alleged fraud;

20 “(iii) the person bringing the action
21 learned of the information that underlies the al-
22 leged violation of section 3729 that is the basis
23 of the action in the course of the person’s em-
24 ployment by the United States, and either—

1 “(I) in a case in which the employing
2 agency has an inspector general, such per-
3 son, before bringing the action has not—

4 “(aa) disclosed in writing sub-
5 stantially all material evidence and in-
6 formation that relates to the alleged
7 violation that the person possessed to
8 such inspector general; and

9 “(bb) notified in writing the per-
10 son’s supervisor and the Attorney
11 General of the disclosure under divi-
12 sion (aa); or

13 “(II) in a case in which the employing
14 agency does not have an inspector general,
15 such person, before bringing the action has
16 not—

17 “(aa) disclosed in writing sub-
18 stantially all material evidence and in-
19 formation that relates to the alleged
20 violation that the person possessed, to
21 the Attorney General; and

22 “(bb) notified in writing the per-
23 son’s supervisor of the disclosure
24 under division (aa); or

1 “(iv) the person bringing the action
2 learned of the information that underlies the al-
3 leged violation of section 3729 that is the basis
4 of the action in the course of the person’s em-
5 ployment by the United States, made the re-
6 quired disclosures and notifications under
7 clause (iii), and—

8 “(I) less than 18 months (and any pe-
9 riod of extension as provided for under
10 subparagraph (B)) have elapsed since the
11 disclosures of information and notification
12 under clause (iii) were made; or

13 “(II) within 18 months (and any pe-
14 riod of extension as provided for under
15 subparagraph (B)) after the disclosures of
16 information and notification under clause
17 (iii) were made, the Attorney General has
18 filed an action based on such information.

19 “(B) Prior to the expiration of the 18-month
20 period described under subparagraph (A)(iv)(II) and
21 upon notice to the person who has disclosed informa-
22 tion and provided notice under subparagraph
23 (A)(iii), the Attorney General may extend such 18-
24 month period by 1 additional 12-month period.

1 “(C) For purposes of subparagraph (A), a per-
2 son’s supervisor is the officer or employee who—

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

5 “(ii) has supervisory authority over such
6 person; and

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

10 “(D) A motion to dismiss under this paragraph
11 shall set forth documentation of the allegations, evi-
12 dence, and information in support of the motion.

13 “(E) Any person against whom the Government
14 has filed a motion to dismiss under subparagraph
15 (A) shall be provided an opportunity to contest a
16 motion to dismiss under this paragraph. The court
17 may restrict access to the evidentiary materials filed
18 in support of the motion to dismiss, as the interests
19 of justice require. A motion to dismiss and evi-
20 dentiary material filed in support or opposition of
21 such motion shall not be—

22 “(i) made public without the prior written
23 consent of the person bringing the civil action;
24 and

25 “(ii) subject to discovery by the defendant.

1 “(F) Upon granting a motion filed under sub-
2 paragraph (A), the court shall dismiss the qui tam
3 relator from the action.

4 “(G) If the motion to dismiss under this para-
5 graph is granted, the matter shall remain under
6 seal.

7 “(H) Not later than 12 months after the date
8 of the enactment of this paragraph, and every 12
9 months thereafter, the Department of Justice shall
10 submit a report to the Committee on the Judiciary
11 of the Senate and the Committee on the Judiciary
12 of the House of Representatives relating to—

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

16 “(ii) the outcome of such motions; and

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

19 “(I) Nothing in this paragraph shall be con-
20 strued to limit the authority of the Government to
21 dismiss an action or claim, or a person who brings
22 an action or claim, under this subsection for any
23 reason other than the grant of a motion filed under
24 subparagraph (A).”.

1 **SEC. 4. BARRED ACTIONS.**

2 (a) PROVISIONS RELATING TO ACTIONS BARRED.—

3 Section 3730(b)(1) of title 31, United States Code, is
4 amended by adding at the end the following: “No claim
5 for a violation of section 3729 may be waived or released
6 by any action of any person who brings an action under
7 this subsection, except insofar as such action is part of
8 a court approved settlement of a false claim civil action
9 brought under this section. Nothing in this paragraph
10 shall be construed to limit the ability of the United States
11 to decline to pursue any claim brought under this sub-
12 section, or to require court approval of a settlement by
13 the Government with a defendant of an action brought
14 under subsection (a), or under this subsection, unless the
15 person bringing the action objects to the settlement under
16 subsection (c)(2)(B).”.

17 (b) DISMISSAL.—Section 3730(e)(4) of title 31,
18 United States Code, is amended to read as follows:

19 “(4) A court shall dismiss an action or claim or
20 the person bringing the action or claim under sub-
21 section (b), upon a motion by the Government filed
22 on or before service of a complaint on the defendant
23 under subsection (b), or thereafter for good cause
24 shown if—

25 “(A) on the date the action or claim was
26 filed, substantially the same matters, involving

1 the same wrongdoer, as alleged in the action or
2 claim were contained in, or the subject of—

3 “(i) a filed criminal indictment or in-
4 formation, or an open and active criminal,
5 civil, or administrative investigation or
6 audit; or

7 “(ii) a news media report, or public
8 congressional hearing, report, or investiga-
9 tion, if within 90 days after the issuance
10 or completion of such news media report or
11 congressional hearing, report, or investiga-
12 tion, the Department of Justice or an Of-
13 fice of Inspector General opened a fraud
14 investigation or audit of the facts con-
15 tained in such news media report or con-
16 gressional hearing, report, or investigation
17 as a result of learning about the public re-
18 port, hearing, or investigation;

19 “(B) any new information provided by the
20 person does not add substantial grounds for ad-
21 ditional recovery beyond those encompassed
22 within the Government’s existing criminal in-
23 dictment or information, or an open and active
24 criminal, civil, or administrative investigation or
25 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:

1 “(3)(A) Whether or not the Government proceeds
2 with the action, the court may, to the extent the court
3 considers appropriate, reduce the share of the proceeds of
4 the action which a person would otherwise receive under
5 paragraph (1) or (2) of this subsection (taking into ac-
6 count the role of that person in advancing the case to liti-
7 gation and any relevant circumstances pertaining to the
8 violation), if the court finds that person—

9 “(i) planned and initiated the violation of sec-
10 tion 3729 upon which the action was brought; or

11 “(ii) derived the knowledge of the claims in the
12 action primarily from specific information relating to
13 allegations or transactions (other than information
14 provided by the person bringing the action) that the
15 Government publicly disclosed, as that term is de-
16 fined in subsection (e)(4)(A), or that the Govern-
17 ment disclosed privately to the person bringing the
18 action in the course of its investigation into potential
19 violations of this subchapter.

20 “(B) If the person bringing the action is convicted
21 of criminal conduct arising from the role of that person
22 in the violation of section 3729, that person shall be dis-
23 missed from the civil action and shall not receive any share
24 of the proceeds of the action. Such dismissal shall not

1 prejudice the right of the United States to continue the
2 action, represented by the Department of Justice.”.

3 **SEC. 5. RELIEF FROM RETALIATORY ACTIONS.**

4 Section 3730(h) of title 31, United States Code, is
5 amended to read as follows:

6 “(h) RELIEF FROM RETALIATORY ACTIONS.—

7 “(1) IN GENERAL.—Any employee, government
8 contractor, or agent shall be entitled to all relief nec-
9 essary to make that employee, government con-
10 tractor, or agent whole, if that employee, govern-
11 ment contractor, or agent is discharged, demoted,
12 suspended, threatened, harassed, or in any other
13 manner discriminated against in the terms and con-
14 ditions of employment because of lawful acts done by
15 the employee, government contractor, or agent on
16 behalf of the employee, government contractor, or
17 agent or associated others in furtherance of other ef-
18 forts to stop 1 or more violations of this subchapter.

19 “(2) RELIEF.—Relief under paragraph (1) shall
20 include reinstatement with the same seniority status
21 that employee, government contractor, or agent
22 would have had but for the discrimination, 2 times
23 the amount of back pay, interest on the back pay,
24 and compensation for any special damages sustained
25 as a result of the discrimination, including litigation

1 costs and reasonable attorneys' fees. An action
2 under this subsection may be brought in the appro-
3 priate district court of the United States for the re-
4 lief provided in this subsection.”.

5 **SEC. 6. STATUTE OF LIMITATIONS.**

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

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

11 “(2) Upon intervention, the Government may file its
12 own complaint in intervention or amend the complaint of
13 a person who has brought an action under section 3730(b)
14 to clarify or add detail to the claims in which the Govern-
15 ment is intervening and to add any additional claims with
16 respect to which the Government contends it is entitled
17 to relief. For statute of limitations purposes, any such
18 Government pleading shall relate back to the filing date
19 of the complaint of the person who originally brought the
20 action, to the extent that the claim of the Government
21 arises out of the conduct, transactions, or occurrences set
22 forth, or attempted to be set forth, in the prior complaint
23 of that person.”.

1 **SEC. 7. CIVIL INVESTIGATIVE DEMANDS.**

2 Section 3733 of title 31, United States Code, is
3 amended—

4 (1) in subsection (a)—

5 (A) in paragraph (1)—

6 (i) in the matter preceding subpara-
7 graph (A)—

8 (I) by inserting “, or a designee
9 (for purposes of this section),” after
10 “Whenever the Attorney General”;
11 and

12 (II) by striking “the Attorney
13 General may, before commencing a
14 civil proceeding under section 3730 or
15 other false claims law,” and inserting
16 “the Attorney General, or a designee,
17 may, before commencing a civil pro-
18 ceeding under section 3730(a) or
19 other false claims law, or electing
20 under section 3730(b),”; and

21 (ii) in the matter following subpara-
22 graph (D)—

23 (I) by striking “may not dele-
24 gate” and inserting “may delegate”;
25 and

1 (II) by adding at the end the fol-
2 lowing: “Any information obtained by
3 the Attorney General or a designee of
4 the Attorney General under this sec-
5 tion may be shared with any qui tam
6 relator if the Attorney General or des-
7 ignee determine it is necessary as part
8 of any false claims act investigation.”;
9 and

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

12 (2) in subsection(i)(2)—

13 (A) in subparagraph (B), by striking
14 “, who is authorized for such use under regula-
15 tions which the Attorney General shall issue”;
16 and

17 (B) in subparagraph (C), by striking “Dis-
18 closure of information to any such other agency
19 shall be allowed only upon application, made by
20 the Attorney General to a United States district
21 court, showing substantial need for the use of
22 the information by such agency in furtherance
23 of its statutory responsibilities.”; and

24 (3) in subsection (l)—

1 (A) in paragraph (6), by striking “and”
2 after the semicolon;

3 (B) in paragraph (7), by striking the pe-
4 riod and inserting “; and”; and

5 (C) by adding at the end the following:

6 “(8) the term ‘official use’ means any use that
7 is consistent with the law, and the regulations and
8 policies of the Department of Justice, including use
9 in connection with internal Department of Justice
10 memoranda and reports; communications between
11 the Department of Justice and a Federal, State, or
12 local government agency, or a contractor of a Fed-
13 eral, State, or local government agency, undertaken
14 in furtherance of a Department of Justice investiga-
15 tion or prosecution of a case; interviews of any qui
16 tam relator or other witness; oral examinations;
17 depositions; preparation for and response to civil dis-
18 covery requests; introduction into the record of a
19 case or proceeding; applications, motions, memo-
20 randa and briefs submitted to a court or other tri-
21 bunal; and communications with Government inves-
22 tigators, auditors, consultants and experts, the coun-
23 sel of other parties, arbitrators and mediators, con-
24 cerning an investigation, case or proceeding.”.

1 **SEC. 8. FALSE CLAIMS SETTLEMENTS.**

2 (a) **REPORTS BY ATTORNEY GENERAL.**—Not later
3 than November 1 of each year, the Attorney General shall
4 submit a report to the Committee on the Judiciary of the
5 Senate and the Committee on the Judiciary of the House
6 of Representatives that describes each settlement or com-
7 promise of any claim, suit, or other action entered into
8 with the Department of Justice that—

9 (1) relates to an alleged violation of section
10 1031 of title 18, United States Code, or section
11 3729 of title 31, United States Code (including all
12 settlements of alternative remedies); and

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

15 (b) **CONTENTS OF REPORTS.**—The descriptions of
16 each settlement or compromise required to be included in
17 the annual report under subsection (a) shall include—

18 (1) the overall amount of the settlement or
19 compromise and the portions of the settlement at-
20 tributed to various statutory authorities;

21 (2) the amount of actual damages, or in the
22 event no actual amount is available a good faith esti-
23 mate of the damages, estimated to have been sus-
24 tained and the minimum and maximum potential
25 civil penalties incurred as a consequence of the de-

1 fendants that is the subject of the settlement or
2 compromise;

3 (3) the basis for the estimate of damages sus-
4 tained and the potential civil penalties incurred;

5 (4) the amount of the settlement that represent
6 damages and the multiplier or percentage of the ac-
7 tual damages applied in the actual settlement or
8 compromise;

9 (5) the amount of the settlement that rep-
10 resents civil penalties and the percentage of the po-
11 tential penalty liability captured by the settlement or
12 compromise;

13 (6) the amount of the settlement that rep-
14 resents criminal fines and a statement of the basis
15 for such fines;

16 (7) the length of time involved from the filing
17 of the complaint until the finalization of the settle-
18 ment or compromise, including—

19 (A) the date of the original filing of the
20 complaint;

21 (B) the time the case remained under seal;

22 (C) the date upon which the Department
23 of Justice determined whether or not to inter-
24 vene in the case; and

25 (D) the date of settlement or compromise;

1 (8) whether any of the defendants, or any divi-
2 sions, subsidiaries, affiliates, or related entities, had
3 previously entered into 1 or more settlements or
4 compromises relating to section 1031 of title 18,
5 United States Code, or section 3730(b) of title 31,
6 United States Code, and if so, the dates and mone-
7 tary size of such settlements or compromises;

8 (9) whether the defendant or any of its divi-
9 sions, subsidiaries, affiliates, or related entities—

10 (A) entered into a corporate integrity
11 agreement relating to the settlement or com-
12 promise;

13 (B) entered into a deferred prosecution
14 agreement relating to the settlement or com-
15 promise; and

16 (C) had previously entered into 1 or more
17 corporate integrity agreements relating to sec-
18 tion 3730(b) of title 31, United States Code, or
19 a deferred prosecution agreement relating to
20 section 1031 of title 18, United States Code,
21 and if so, whether the previous corporate integ-
22 rity agreements covered the conduct that is the
23 subject of the settlement or compromise being
24 reported on or similar conduct;

1 (10) in the case of settlements involving Med-
2 icaid, the amounts paid to the Federal Government
3 and to each of the States participating in the settle-
4 ment or compromise;

5 (11) whether civil investigative demands were
6 issued in process of investigating the case;

7 (12) in qui tam actions, the percentage of the
8 settlement amount awarded to the relator, and
9 whether or not the relator requested a fairness hear-
10 ing pertaining to the percentage received by the rela-
11 tor or the overall amount of the settlement;

12 (13) the extent to which officers of the depart-
13 ment or agency that was the victim of the loss re-
14 solved by the settlement or compromise participated
15 in the settlement negotiations; and

16 (14) the extent to which relators and their
17 counsel participated in the settlement negotiations.

18 **SEC. 9. SEVERABILITY.**

19 If any provision or application of this Act is held in-
20 valid, the invalidity shall not affect other provisions or ap-
21 plications of this Act which can be given effect without
22 regard to the invalid provision or application, and to this
23 end the provisions or applications of this Act are severable.

1 **SEC. 10. EFFECTIVE DATE AND APPLICATION.**

2 (a) IN GENERAL.—Except as provided under sub-
3 sections (b) and (c), the amendments made by this Act
4 shall take effect on the date of enactment of this Act and
5 shall apply to all civil actions filed before, on, or after that
6 date.

7 (b) FALSE CLAIMS.—The amendments made by sec-
8 tion 2 shall take effect on the date of enactment of this
9 Act and shall apply to conduct occurring after that date
10 of enactment.

11 (c) STATUTE OF LIMITATION.—The amendment
12 made to section 3731(b)(1) of title 31, United States
13 Code, by section 6 of this Act shall take effect on the date
14 of enactment of this Act and shall apply to civil actions
15 filed after that date of enactment.

○