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## FISCAL IMPACT REPORT

SPONSOR Park DATE TYPED 1/31/05 HB 355

SHORT TITLE False Claims Act SB \_\_\_\_\_

ANALYST Wilson

### APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring or Non-Rec	Fund Affected
FY05	FY06	FY05	FY06		
			See Narrative		

### REVENUE

Estimated Revenue		Subsequent Years Impact	Recurring or Non-Rec	Fund Affected
FY05	FY06			
		See Narrative		

(Parenthesis () Indicate Expenditure Decreases)

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

Attorney General's Office (AGO)

Corrections Department (CD)

### SUMMARY

#### Synopsis of Bill

House Bill 355 enacts the "False Claims Act" and creates the False Claims Act Fund. The act defines what is to be considered a "claim" – a request or demand for money, property or services made to an employee, officer or agent of the state or a political subdivision of the state or to a contractor, grantee or other recipient, whether under contract or not, if any portion of the money, property or services requested or demanded issued or would issue from or was provided by the state or any political subdivision of the state – and provides that a person committing any of the acts constituting a false claim shall be liable to the state or to a political subdivision of the state for three times the amount of damages sustained because of the act.

The bill also provides a person shall also be liable to the state or to a political subdivision of the state for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or the political subdivision of the state for a civil penalty of up to \$10 thousand for each false claim. The act provides conditions, the occurrence of which will restrict a court's assessment of a civil penalty.

The act sets out the following provisions governing actions related to false claims:

- Proof of specific intent to defraud is not required for liability for damages;
- Liability shall be joint and several for any act committed by two or more persons;
- The act does not apply to any controversy involving an amount of less than \$5 hundred in value;
- The act does not apply to claims, records or statements made pursuant to the Workers' Compensation Act; and
- The act does not apply to claims, records or statements made under Chapter 7 NMSA 1978 (relating to taxation)

The act sets out requirements and procedures to be followed in investigations and civil actions, including the role of the attorney general and a prosecuting authority (defined in Section 2.F). The Act provides that a person may bring a civil action for a violation of the Act on the person's behalf and either the state of New Mexico or a political subdivision of the state. The action is to be commenced by a complaint filed in New Mexico district court in camera, and once filed, the action may be dismissed only with the written consent of the court after taking into account the best interests of the parties involved and the public purposes behind the Act. The complaint may remain under seal for up to 60 days, and no service shall be made on the defendant until after the complaint is unsealed.

The act sets out time periods for the attorney general, prosecuting authority and defendant to follow. The act provides that when a person brings a civil action for a violation of the act, no other person may bring a related action based on the facts underlying the pending action. The act sets out circumstances under which a court is denied jurisdiction over an action, and the additional circumstances that will subsequently trigger a court's jurisdiction. The act specifically addresses actions initiated by or based on information from a present or former employee of the state or a political subdivision of the state.

The act prohibits employers from taking specified actions against an employee involved in a false claims action, or from preventing an employee from disclosing information to a government or law enforcement agency or from acting in furtherance of a false claims action.

### Significant Issues

The AGO note in concept, this bill is modeled on the federal False Claims Act, 31 USCA sec. 3729, which creates a right for individuals to sue in the name of the government known as *qui tam*. New Mexico has no such legislation except in the Medicaid False Claims Act, sec. 27-14-1 NMSA 1978 et seq. The definition of false claim tracks the federal definition and expands upon it.

The AGO believes this bill is too complex when compared with the federal and Medicaid models. While the AGO is required to investigate violations involving state funds, if the funds are those of a political subdivision the duty to investigate is with local officials. Section 4 of the bill

contains complex formulas for bringing and maintaining actions. As a practical matter, local authorities lack the ability to investigate and prosecute financial crimes. District Attorney offices can barely keep up with investigation and prosecution of crimes. Most have little experience or resources to investigate and prosecute complex financial crimes, let alone civil actions. The AGO has traditionally assisted local authorities in such matters and believes it has more experience in complex civil litigation.

The AGO suggests amending the bill to provide primary jurisdiction exclusively to the AGO to investigate and prosecute false claims against both the state and political subdivisions. Only if the AGO declines to bring an action should a local prosecutor or an individual be authorized to do so. Such a change would not only streamline the bill, but would reflect reality.

The bill provides that a qui tam plaintiff has the right to continue as a full party to the action under Section 4.BB. or control the action under Section 4.GG. While those rights can be limited by the court under Section 4.SS., once the AGO or equivalent governmental authority is prosecuting the case, the private citizen should be a nominal party as is provided in the Medicaid Act, section 27-14-8. The victim here is the government and its rights to prosecute should prevail.

### **FISCAL IMPLICATIONS**

This bill creates the “False Claims Act Fund,” the monies in which shall be used to support the ongoing investigation and prosecution of false claims in furtherance of the False Claims Act.

This bill creates a new fund, but does not provide any appropriations. Presumably the agency suing will provide any monies it receives under this act to the False Claims Act Fund. The LFC is concerned about including continuing appropriation language in the statutory provisions for newly created funds. Earmarking reduces the ability of the legislature to establish spending priorities.

There will be a minimal administrative cost for statewide update, distribution, and documentation of statutory changes. Any additional fiscal impact on the judiciary would be proportional to the enforcement of this law and commenced prosecutions. New laws, amendments to existing laws, and new hearings have the potential to increase caseloads in the courts, thus requiring additional resources to handle the increase.

### **ADMINISTRATIVE IMPLICATIONS**

Under this bill, civil actions are to be filed in district court, the handling of which will require an allocation of additional resources. Both the courts and the AGO will require additional personnel.

### **TECHNICAL ISSUES**

The AOC notes Section 6.C. refers to “an employer who violates Subsections D through F of this section...” but the section does not contain subsections E or F. To what is this language referring?

Similarly, Section 6.D refers to Subsection G through W of this section, but the section does not contain Subsections G through W.

The AGO provided the following:

1. Section 3.B authorizes a court to assess between two and three times actual damages. The section then refers to a “civil penalty”. It is unclear whether the penalty is the amount in excess of actual damages or the entire award. It is also unclear whether the multiplied amount is in addition to actual damages. See also Section 4.TT. which adds to the lack of clarity. It appears that the intent of the bill is to allow the award of actual damages plus a civil penalty of double to treble that amount.
2. Sections 3. E and F read together could exempt any situation where a person has submitted a claim for less than \$5 hundred although that person also submitted multiple claims in excess of \$5 hundred. It would be clearer if these sections were deleted.
3. Section 4.W. refers to a person bringing an action pursuant to Subsections G through V of this section. However, most of the included subsections do not authorize the bringing of an action. It would be preferable to refer to a person bringing an action pursuant to Subsection G. This problem is found in many other subsections as well. It should also be made clear that the term “person” does not include a prosecuting authority or the Attorney General.
4. Section 7.B. would give retroactive effect to the bill. This would be problematic and would undoubtedly be the subject of court challenge.

DW/lg:yr