

1 BILL

2 **51ST LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2013**

3 INTRODUCED BY

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6 DISCUSSION DRAFT

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9 AN ACT

10 RELATING TO CIVIL ACTIONS; CLARIFYING PROVISIONS OF THE FRAUD
11 AGAINST TAXPAYERS ACT; PROVIDING THAT THE STATE IS ENTITLED TO
12 ATTORNEY FEES AND COSTS FOR ADDITIONAL CLAIMS ASSERTED AGAINST
13 A DEFENDANT; PROVIDING A DEADLINE FOR THE STATE TO INTERVENE;
14 PROVIDING FOR CIVIL INVESTIGATIVE DEMANDS.

15
16 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

17 SECTION 1. Section 44-9-1 NMSA 1978 (being Laws 2007,
18 Chapter 40, Section 1) is amended to read:

19 "44-9-1. SHORT TITLE.--~~[This act]~~ Chapter 44, Article 9
20 NMSA 1978 may be cited as the "Fraud Against Taxpayers Act"."

21 SECTION 2. Section 44-9-3 NMSA 1978 (being Laws 2007,
22 Chapter 40, Section 3) is amended to read:

23 "44-9-3. FALSE CLAIMS--LIABILITY--PENALTIES--EXCEPTION.--

24 A. A person shall not:

25 (1) knowingly present, or cause to be

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1 presented, to an employee, officer or agent of the state or to
2 a contractor, grantee or other recipient of state funds a false
3 or fraudulent claim for payment or approval;

4 (2) knowingly make or use, or cause to be made
5 or used, a false, misleading or fraudulent record or statement
6 to obtain or support the approval of or the payment on a false
7 or fraudulent claim;

8 (3) conspire to defraud the state by obtaining
9 approval or payment on a false or fraudulent claim;

10 (4) conspire to make, use or cause to be made
11 or used, a false, misleading or fraudulent record or statement
12 to conceal, avoid or decrease an obligation to pay or transmit
13 money or property to the state;

14 (5) when in possession, custody or control of
15 property or money used or to be used by the state, knowingly
16 deliver or cause to be delivered less property or money than
17 the amount indicated on a certificate or receipt;

18 (6) when authorized to make or deliver a
19 document certifying receipt of property used or to be used by
20 the state, knowingly make or deliver a receipt that falsely
21 represents a material characteristic of the property;

22 (7) knowingly buy, or receive as a pledge of
23 an obligation or debt, public property from any person that may
24 not lawfully sell or pledge the property;

25 (8) knowingly make or use, or cause to be made

1 or used, a false, misleading or fraudulent record or statement
2 to conceal, avoid or decrease an obligation to pay or transmit
3 money or property to the state; or

4 (9) as a beneficiary of an inadvertent
5 submission of a false claim and having subsequently discovered
6 the falsity of the claim, fail to disclose the false claim to
7 the state within a reasonable time after discovery.

8 B. Proof of specific intent to defraud is not
9 required for a violation of Subsection A of this section.

10 C. A person who violates Subsection A of this
11 section shall be liable for civil, remedial and curative
12 damages as follows:

13 (1) three times the amount of damages
14 sustained by the state because of the violation;

15 (2) a civil penalty of not less than five
16 thousand dollars (\$5,000) and not more than ten thousand
17 dollars (\$10,000) for each violation;

18 (3) the costs of a civil action brought to
19 recover damages or penalties; and

20 (4) reasonable attorney fees, including the
21 fees of the attorney general or state agency counsel.

22 D. A court may assess not less than two times the
23 amount of damages sustained by the state if the court finds all
24 of the following:

25 (1) the person committing the violation

1 furnished the attorney general with all information known to
2 that person about the violation within thirty days after the
3 date on which the person first obtained the information;

4 (2) at the time that the person furnished the
5 attorney general with information about the violation, a
6 criminal prosecution, civil action or administrative action had
7 not been commenced with respect to the violation, and the
8 person did not have actual knowledge of the existence of an
9 investigation into the violation; and

10 (3) the person fully cooperated with any
11 investigation by the attorney general.

12 E. This section does not apply to claims, records
13 or statements made pursuant to the provisions of Chapter 7 NMSA
14 1978."

15 SECTION 3. Section 44-9-4 NMSA 1978 (being Laws 2007,
16 Chapter 40, Section 4) is amended to read:

17 "44-9-4. INVESTIGATION BY THE ATTORNEY GENERAL--
18 DELEGATION--CIVIL ACTION.--

19 A. To the extent the attorney general deems
20 appropriate, the attorney general shall diligently investigate
21 suspected violations of Section [~~3 of the Fraud Against~~
22 ~~Taxpayers Act]~~ 44-9-3 NMSA 1978, and if the attorney general
23 finds that a person has violated or is violating that section,
24 the attorney general may bring a civil action against that
25 person pursuant to the Fraud Against Taxpayers Act.

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1 B. The attorney general may in appropriate cases
2 delegate the authority to investigate or to bring a civil
3 action to the state agency to which a false claim was made, and
4 when this occurs, the state agency shall have every power
5 conferred upon the attorney general pursuant to the Fraud
6 Against Taxpayers Act."

7 SECTION 4. Section 44-9-5 NMSA 1978 (being Laws 2007,
8 Chapter 40, Section 5) is amended to read:

9 "44-9-5. CIVIL ACTION BY QUI TAM PLAINTIFF--STATE MAY
10 INTERVENE.--

11 A. A person may bring a civil action for a
12 violation of Section [~~3 of the Fraud Against Taxpayers Act~~]
13 44-9-3 NMSA 1978 on behalf of the person and the state. The
14 action shall be brought in the name of the state. The person
15 bringing the action shall be referred to as the qui tam
16 plaintiff. Once filed, the action may be dismissed only with
17 the written consent of the court, taking into account the best
18 interest of the parties involved and the public purposes behind
19 the Fraud Against Taxpayers Act.

20 B. A complaint filed by a qui tam plaintiff shall
21 be filed in camera in district court and shall remain under
22 seal for at least sixty days. No service shall be made on a
23 defendant, and no response is required from a defendant until
24 the seal has been lifted and the complaint served pursuant to
25 the rules of civil procedure.

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1 C. On the same day as the complaint is filed, the
2 qui tam plaintiff shall serve the attorney general with a copy
3 of the complaint and written disclosure of substantially all
4 material evidence and information the qui tam plaintiff
5 possesses. The attorney general on behalf of the state may
6 intervene and proceed with the action within sixty days after
7 receiving the complaint and the material evidence and
8 information. Upon a showing of good cause and reasonable
9 diligence in the state's investigation, the state may move the
10 court for an extension of time during which the complaint shall
11 remain under seal; provided that extensions of time shall not
12 exceed an additional one hundred twenty days without the
13 consent of the qui tam plaintiff.

14 D. Before the expiration of the sixty-day period or
15 any extensions of time granted by the court, the attorney
16 general shall notify the court that the state:

17 (1) intends to intervene and proceed with the
18 action; in which case, the seal shall be lifted and the action
19 shall be conducted by the attorney general on behalf of the
20 state; or

21 (2) declines to take over the action; in which
22 case, the seal shall be lifted and the qui tam plaintiff may
23 proceed with the action.

24 E. If the state has not intervened and proceeded
25 with the action within one hundred eighty days after receiving

1 the complaint, the qui tam plaintiff may deem the state's
2 inaction to be a declination to act and elect to proceed with
3 the action as provided in Paragraph (2) of Subsection D of this
4 section.

5 ~~[E.]~~ F. When a person brings an action pursuant to
6 this section, no person other than the attorney general on
7 behalf of the state may intervene or bring a related action
8 based on the facts underlying the pending action."

9 SECTION 5. Section 44-9-6 NMSA 1978 (being Laws 2007,
10 Chapter 40, Section 6) is amended to read:

11 "44-9-6. RIGHTS OF THE QUI TAM PLAINTIFF AND THE STATE.--

12 A. If the state proceeds with the action, it shall
13 have the primary responsibility of prosecuting the action and
14 shall not be bound by an act of the qui tam plaintiff. The qui
15 tam plaintiff shall have the right to continue as a party to
16 the action, subject to the limitations of this section.

17 B. If the state proceeds with the action and
18 asserts other statutory or common law claims against the
19 defendant and the additional claims are based on allegations or
20 information provided by the qui tam plaintiff, the qui tam
21 plaintiff's award shall be as provided in Section 44-9-7 NMSA
22 1978 for any recovery based on the additional claims. The
23 state shall be entitled to an award of attorney fees and costs
24 as provided in Section 44-9-7 NMSA 1978 in any successful
25 action based on the additional statutory or common law claims.

1 [~~B-~~] C. The state may seek to dismiss the action
2 for good cause notwithstanding the objections of the qui tam
3 plaintiff if the qui tam plaintiff has been notified of the
4 filing of the motion and the court has provided the qui tam
5 plaintiff with an opportunity to oppose the motion and to
6 present evidence at a hearing.

7 [~~C-~~] D. The state may settle the action with the
8 defendant notwithstanding any objection by the qui tam
9 plaintiff if the court determines, after a hearing providing
10 the qui tam plaintiff an opportunity to present evidence, that
11 the proposed settlement is fair, adequate and reasonable under
12 all of the circumstances.

13 [~~D-~~] E. Upon a showing by the state that
14 unrestricted participation during the course of the litigation
15 by the qui tam plaintiff would interfere with or unduly delay
16 the state's prosecution of the case, or would be repetitious,
17 irrelevant or for the purpose of harassment, the court may, in
18 its discretion, impose limitations on the qui tam plaintiff's
19 participation, such as:

20 (1) limiting the number of witnesses the qui
21 tam plaintiff may call;

22 (2) limiting the length of testimony of such
23 witnesses;

24 (3) limiting the qui tam plaintiff's cross
25 examination of witnesses; or

1 (4) otherwise limiting the qui tam plaintiff's
2 participation in the litigation.

3 ~~[E-]~~ F. Upon a showing by a defendant that
4 unrestricted participation during the course of litigation by
5 the qui tam plaintiff would be for purposes of harassment or
6 would cause the defendant undue burden or unnecessary expense,
7 the court may limit the participation by the qui tam plaintiff
8 in the litigation.

9 ~~[F-]~~ G. If the state elects not to proceed with the
10 action, the qui tam plaintiff shall have the right to conduct
11 the action. If the attorney general so requests, the qui tam
12 plaintiff shall serve the attorney general with copies of all
13 pleadings filed in the action and all deposition transcripts in
14 the case, at the state's expense. When the qui tam plaintiff
15 proceeds with the action, the court, without limiting the
16 status and rights of the qui tam plaintiff, may permit the
17 attorney general to intervene at a later date upon a showing of
18 good cause.

19 ~~[G-]~~ H. Whether or not the state proceeds with the
20 action, upon a showing by the attorney general on behalf of the
21 state that certain actions of discovery by the qui tam
22 plaintiff would interfere with the state's investigation or
23 prosecution of a criminal or civil matter arising out of the
24 same facts, the court may stay such discovery for a period of
25 not more than sixty days. The showing by the state shall be

1 conducted in camera. The court may extend the sixty-day period
2 upon a further showing in camera that the state has pursued the
3 criminal or civil investigation or proceeding with reasonable
4 diligence and any proposed discovery in the civil action will
5 interfere with the ongoing criminal or civil investigation or
6 proceeding.

7 [H.] I. Notwithstanding the provisions of Section
8 [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978, the
9 attorney general may elect to pursue the state's claim through
10 any alternate remedy available to the state, including an
11 administrative proceeding to determine a civil money penalty.
12 If an alternate remedy is pursued, the qui tam plaintiff shall
13 have the same rights in such a proceeding as the qui tam
14 plaintiff would have had if the action had continued pursuant
15 to this section. A finding of fact or conclusion of law made
16 in the other proceeding that has become final shall be
17 conclusive on all parties to an action under the Fraud Against
18 Taxpayers Act. For purposes of this subsection, a finding or
19 conclusion is final if it has been finally determined on appeal
20 to the appropriate court, if all time for filing an appeal with
21 respect to the finding or conclusion has expired or if the
22 finding or conclusion is not subject to judicial review."

23 **SECTION 6.** Section 44-9-7 NMSA 1978 (being Laws 2007,
24 Chapter 40, Section 7) is amended to read:

25 "44-9-7. AWARDS TO QUI TAM PLAINTIFF AND THE STATE.--

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1 A. Except as otherwise provided in this section, if
2 the state proceeds with an action brought by a qui tam
3 plaintiff and the state prevails in the action, the qui tam
4 plaintiff shall receive:

5 (1) at least fifteen percent but not more than
6 twenty-five percent of the proceeds of the action or
7 settlement, depending upon the extent to which the qui tam
8 plaintiff substantially contributed to the prosecution of the
9 action; or

10 (2) no more than ten percent of the proceeds
11 of the action or settlement if the court finds that the action
12 was based primarily on disclosures of specific information, not
13 provided by the qui tam plaintiff, relating to allegations or
14 transactions in a criminal, civil, administrative or
15 legislative hearing, proceeding, report, audit or investigation
16 or from the news media, taking into account the significance of
17 the information and the role of the qui tam plaintiff in
18 advancing the case to litigation. However, if the attorney
19 general determines and certifies in writing that the qui tam
20 plaintiff provided a significant contribution in advancing the
21 case, then the qui tam plaintiff shall receive the share of
22 proceeds set forth in Paragraph (1) of this subsection.

23 B. If the state does not proceed with an action
24 brought by a qui tam plaintiff and the state prevails in the
25 action, the qui tam plaintiff shall receive an amount that is

1 not less than twenty-five percent or more than thirty percent
2 of the proceeds of the action or settlement, as the court deems
3 reasonable for collecting the civil penalty and damages.

4 C. Whether or not the state proceeds with an action
5 brought by a qui tam plaintiff:

6 (1) if the court finds that the action was
7 brought by a person that planned or initiated the violation of
8 Section [~~3 of the Fraud Against Taxpayers Act~~] 44-9-3 NMSA 1978
9 upon which the action was based, the court may reduce the share
10 of the proceeds that the person would otherwise receive under
11 Subsection A or B of this section, taking into account the role
12 of the person as the qui tam plaintiff in advancing the case to
13 litigation and any relevant circumstances pertaining to the
14 violation; or

15 (2) if the person bringing the action is
16 convicted of criminal conduct arising from that person's role
17 in the violation of Section [~~3 of the Fraud Against Taxpayers~~
18 ~~Act~~] 44-9-3 NMSA 1978 upon which the action was based, that
19 person shall be dismissed from the civil action and shall not
20 receive a share of the proceeds. The dismissal shall not
21 prejudice the right of the state to continue the action.

22 D. Any award to a qui tam plaintiff shall be paid
23 out of the proceeds of the action or settlement, if any. The
24 qui tam plaintiff shall also receive an amount for reasonable
25 expenses incurred in the action plus reasonable attorney fees

1 that shall be paid by the defendant.

2 E. The state is entitled to all proceeds collected
3 in an action or settlement not awarded to a qui tam plaintiff.
4 The state is also entitled to reasonable expenses incurred in
5 the action plus reasonable attorney fees, including the fees of
6 the attorney general or state agency counsel that shall be paid
7 by the defendant. Proceeds and penalties collected by the
8 state shall be deposited as follows:

9 (1) proceeds in the amount of the false claim
10 paid and attorney fees and costs shall be returned to the fund
11 or funds from which the money, property or services came and
12 attorney fees and costs provided by the office of the attorney
13 general shall be paid to the office of the attorney general;

14 (2) civil penalties shall be deposited in the
15 current school fund pursuant to Article 12, Section 4 of the
16 constitution of New Mexico; and

17 (3) all remaining proceeds shall be deposited
18 as follows:

19 (a) one-half into a fund for the use of
20 the office of the attorney general to provide staffing for
21 cases arising pursuant to the Fraud Against Taxpayers Act in
22 furtherance of the obligations imposed upon that office by [~~the~~
23 ~~Fraud Against Taxpayers~~] that act; and

24 (b) one-half into the general fund."

25 SECTION 7. Section 44-9-9 NMSA 1978 (being Laws 2007,

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Chapter 40, Section 9) is amended to read:

"44-9-9. CERTAIN ACTIONS BARRED--INFORMATION SOURCE.--

A. No court shall have jurisdiction over an action brought pursuant to Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978 by a present or former employee of the state unless the employee, during employment with the state and in good faith, exhausted existing internal procedures for reporting false claims and the state failed to act on the information provided within a reasonable period of time.

B. No court shall have jurisdiction over an action brought pursuant to Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978 against an elected or appointed state official, a member of the state legislature or a member of the judiciary if the action is based on evidence or information known to the state agency to which the false claim was made or to the attorney general when the action was filed.

C. Unless the attorney general determines and certifies in writing that the action is in the interest of the state, no court shall have jurisdiction over an action brought pursuant to Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978 when that action is based on allegations or transactions that are the subject of a criminal, civil or administrative proceeding in which the state is a party.

D. Upon motion of the attorney general, a court may, in its discretion, dismiss an action brought pursuant to

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1 Section [~~5 of the Fraud Against Taxpayers Act~~] 44-9-5 NMSA 1978
2 if the elements of the alleged false or fraudulent claim by the
3 defendant have been publicly disclosed in a federal or state
4 criminal, civil or public administrative proceeding, in the
5 news media or in a publicly disseminated governmental report at
6 the time the complaint is filed, unless the person bringing the
7 action is an original source of the information on which the
8 action brought pursuant to Section 44-9-5 NMSA 1978 is based."

9 SECTION 8. A new section of the Fraud Against Taxpayers
10 Act is enacted to read:

11 "[NEW MATERIAL] CIVIL INVESTIGATIVE DEMAND.--

12 A. Whenever the attorney general has reason to
13 believe that any person may be in possession, custody or
14 control of an original or copy of any book, record, report,
15 memorandum, paper, communication, tabulation, map, chart,
16 photograph, mechanical transcription or other tangible document
17 or recording that the attorney general believes to be relevant
18 to the subject matter of an investigation of a probable
19 violation of the Fraud Against Taxpayers Act, the attorney
20 general may, prior to the institution of a civil proceeding,
21 execute in writing and cause to be served upon the person a
22 civil investigative demand requiring that person to produce
23 documentary material and permit the inspection and copying of
24 the material. The demand of the attorney general shall not be
25 a matter of public record and shall not be published by the

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1 attorney general except by court order.

2 B. A civil investigative demand shall:

3 (1) state the general subject matter of the
4 investigation;

5 (2) describe with reasonable certainty the
6 classes of documentary material to be produced;

7 (3) prescribe the return date within which the
8 documentary material is to be produced, which in no case shall
9 be less than ten days after the date of service; and

10 (4) identify the members of the attorney
11 general's staff to whom such documentary material is to be made
12 available for inspection and copying.

13 C. A civil investigative demand shall not:

14 (1) contain any requirement that would be
15 unreasonable or improper if contained in a subpoena duces tecum
16 issued by a court of this state;

17 (2) require the disclosure of any documentary
18 material that would be privileged or for any other reason would
19 not be required by a subpoena duces tecum issued by a court of
20 this state; or

21 (3) require the removal of any documentary
22 material from the custody of the person upon whom the demand is
23 served except in accordance with the provisions of Subsection E
24 of this section.

25 D. Service of a civil investigative demand may be

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1 made by:

2 (1) delivering a duly executed copy of the
3 demand to the person to be served, or if the person is not a
4 natural person, to the statutory agent for the person or an
5 officer of the person to be served;

6 (2) delivering a duly executed copy of the
7 demand to the principal place of business in this state of the
8 person to be served; or

9 (3) mailing by registered or certified mail a
10 duly executed copy of the demand addressed to the person to be
11 served at the person's principal place of business in this
12 state or, if the person has no place of business in this state,
13 to the person's principal office or place of business.

14 E. Documentary material demanded pursuant to this
15 section shall be produced for inspection and copying during
16 normal business hours at the principal office or place of
17 business of the person served or may be inspected and copied at
18 such other times and places as may be agreed upon by the person
19 served and the attorney general.

20 F. Except as provided in Subsection G of this
21 section, no documentary material produced pursuant to a civil
22 investigative demand, or copies of that material, shall be
23 produced for inspection or copying by anyone other than an
24 authorized employee of the attorney general, nor shall the
25 contents thereof be disclosed to anyone other than an

1 authorized employee of the attorney general.

2 G. Documentary material produced pursuant to a
3 civil investigative demand, or copies of that material, may be
4 produced for inspection or copying to:

5 (1) other state attorneys general for the
6 purposes of investigation into the particular action in which
7 the civil investigation demand was served;

8 (2) federal, state and other law enforcement
9 agencies; or

10 (3) the qui tam plaintiff.

11 H. At any time before the return date of a civil
12 investigative demand, a petition to set aside or modify the
13 demand or extend the return date set forth in the demand may be
14 filed in the district court in the county in which the person
15 resides or has a principal place of business, and the court
16 upon a showing of good cause, may set aside or modify the
17 demand or extend the return date of the demand.

18 I. After service of the civil investigative demand
19 upon a person, if that person neglects or refuses to comply
20 with the demand, the attorney general may invoke the aid of the
21 court in the enforcement of the demand. In appropriate cases,
22 the court shall issue its order requiring the person to appear
23 and produce the documentary material required in the demand and
24 may, upon failure of the person to comply with the order,
25 punish the person for contempt."

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SECTION 9. EFFECTIVE DATE.-The effective date of the provisions of this act is July 1, 2013.

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