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HOUSE OF REPRESENTATIVES

140th GENERAL ASSEMBLY

HOUSE BILL NO. 543

AN ACT TO AMEND TITLE 6 OF THE DELAWARE CODE RELATING TO FRAUDULENT CLAIMS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE:

Section 1. Amend Subtitle II, Title 6 of the Delaware Code, by adding the following new chapter:

“Chapter 12. Delaware False Claims and Reporting Act.

§ 1201 Liability for certain acts.

(a) Any person who:

(1) knowingly presents, or causes to be presented, directly or indirectly, to an officer or employee of the Government a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, directly or indirectly, a false record or statement to get a false or fraudulent claim paid or approved;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) 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;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government who the person knows may not lawfully sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, increase or decrease an obligation to pay or transmit money or property to or from the Government, shall be liable to the Government for a civil penalty of not less than \$5,500 and not more than \$11,000 for each act constituting a violation of this section, plus three times the amount of actual damages which the Government sustains because of the act of that person.

(b) Notwithstanding the foregoing, the court may assess not less than two times the amount of damages which the Government sustains because of the act of the person, if:

- (i) the person committing the violation of this subsection furnished officials of the Government 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;
- (ii) such person fully cooperated with any Government investigation of such violations; and
- (iii) at the time such person furnished the Government with the information about the violation, no criminal prosecution, civil action, investigation 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 violations.

A person violating this subsection shall also be liable for the costs of a civil action brought to recover any such penalty or damages, including payment of reasonable attorneys fees and costs.

(c) The Superior Court shall have jurisdiction of all offenses under this chapter.

§ 1202 Definitions.

As used in this chapter:

(1) '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) 'Claim' includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient where the Government provides, directly or indirectly, any portion of the money or property which is requested or demanded, or where the Government will, directly or

indirectly, reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(3) 'Government' includes all departments, boards or commissions of the executive branch of the State of Delaware, all political subdivisions of the State, the Delaware Department of Transportation and all State and municipal authorities, all organizations created by or pursuant to a statute which declares in substance that such organization performs or has for its purpose the performance of an essential governmental function, and all organizations, entities or persons receiving funds of the State where the act complained of pursuant to this act relates to the use of such funds of the State.

§ 1203. Civil Actions for False Claims.

(a) Responsibilities of the Attorney General. - The Attorney General shall diligently investigate suspected violations under this chapter. If the Attorney General finds that a person has violated or is violating the provisions of this chapter, the Attorney General may bring a civil action under this section against the person.

(b) Private Actions. - (1) A private civil action may be brought by any person, entity or organization (hereinafter 'private party' or 'party') for a violation of this chapter on behalf of the party bringing suit and for the Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the private party possesses shall be served on the Attorney General pursuant to Rules 4 and 5 of the Superior Court Civil Rules. The complaint shall be filed in camera, shall remain under seal for at least 60 days. The complaint shall not be served on the defendant until the expiration of sixty (60) days or any extension approved under subsection (3) hereof. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motion may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to Rule 4 of the Superior Court Civil Rules. The complaint shall be deemed unsealed at the expiration of the sixty (60) day period in the absence of a court approved extension of the time frame.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall -

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the private party bringing the action shall have the right to conduct the action.

(5) When a party brings an action under this subsection, no party other than Government may intervene or bring a related action based on the facts underlying the pending action.

§ 1204. Rights of the parties to Qui Tam actions.

(a) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the party bringing the action. Such party shall have the right to continue as a party to the action, subject to the limitations set forth in subsection (d).

(b) The Government may dismiss the action notwithstanding the objections of the party initiating the action if the party has been notified by the Government of the filing of the motion and the court has provided the party with an opportunity for a hearing on the motion.

(c) The Government may settle the action with the defendant notwithstanding the objections of the party initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(d) Upon a showing by the Government that unrestricted participation during the course of the litigation by the party initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the party's participation, such as -

- (i) limiting the number of witnesses the party may call;
- (ii) limiting the length of the testimony of such witnesses;
- (iii) limiting the party's cross-examination of witnesses; or
- (iv) otherwise limiting the participation by the party in the litigation.

- (e) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the party initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the party in the litigation.
- (f) If the Government elects not to proceed with the action, the party who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of the pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a party proceeds with the action, the court, without limiting the status and rights of the party initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.
- (g) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the party initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. The court may extend the 60 day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

§ 1205. Award to Qui Tam plaintiff.

- (a) If the Government proceeds with an action brought by a party under § 1203(b), such party shall, subject to the second sentence of this subsection, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the party substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the party bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the party bringing the action in advancing the case to litigation. Any payment to a party under the first or second sentence of this paragraph shall be made from the proceeds. Any such party shall also receive an amount for reasonable expenses which the court finds

to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees and costs shall be awarded against the defendant.

(b) If the Government does not proceed with an action under this chapter, the party bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such party shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(c) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a party who planned and initiated the violation upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the party would otherwise receive under subsection (a) or (b) hereof, taking into account the role of that party in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the party bringing the action is convicted of criminal conduct arising from his or her or its role in the violation of this chapter, that party 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 State of Delaware to continue the action, represented by the Attorney General's Office.

(d) If the Government does not proceed with the action and the party bringing the action conducts the action, the court may award to the defendant its reasonable attorneys fees and expenses if the defendant prevails in the action and the court finds that the claim of the party bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purpose of harassment.

§ 1206. Certain actions barred.

(a) No court shall have jurisdiction of an action brought pursuant to this chapter against a State Government official if the action is substantially based on evidence or information known to the Government when the action was brought.

(b) In no event may a party bring an action under this chapter which is substantially based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the Government is already a party.

(c) No court shall have jurisdiction over an action under this chapter substantially based upon the public disclosure of allegations or actions in a criminal civil or administrative hearing, or from the news media, unless the action is brought by the Attorney General or the party bringing the action is an original source of this information.

For purposes of this subsection, 'original source' means the party bringing suit who has independent knowledge, including knowledge based on its own investigation of the defendant's conduct, of the information on which the allegations are based and has voluntarily provided or verified the information on which the allegations are based or has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

§ 1207. Government not liable for certain expenses.

No Government shall be liable for expenses which a party incurs in bringing an action under this chapter.

§ 1208. Employee Protection.

Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this chapter, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this chapter, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, two 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 employee may bring an action in the appropriate court of the State of Delaware for the relief provided in this subsection.

§ 1209. False Claims and Reporting Procedure.

(a) A civil action under this Act may not be brought -

(1) more than 6 years after the date on which the violation is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or

reasonably should have been known by the official of the Government charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

188 (b) In any action brought under this chapter, the Government or the private party shall be required to
189 prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

190 (c) Notwithstanding any other provision of law, the Delaware Rules of Criminal_Procedure, or the
191 Delaware Rules of Civil Procedure, a final judgment rendered in favor of the Government in any criminal
192 proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty, shall estop
193 the defendant from denying the essential elements of the offense in any action which involves the same transaction
194 as in the criminal proceeding and which is brought under this chapter.”

SYNOPSIS

This Bill would protect the State taxpayers from people who submit false claims to try to defraud them. It also protects people who come forward with information about the fraud, and encourages them to report the wrongdoing.

It will protect property (specifically including funds) of the Government from fraudulent claims, regardless of the particular form or function of the Government instrumentality upon which such claims were made. At the same time, the ‘original source’ provision of the Act prevents suits by latecomers seeking gain who had nothing to add to the fraud exposure.

Another purpose is to provide restitution of money taken from Government by fraud. The double damages provision in addition to the specified sum is intended to ensure that Government is made completely whole.

This bill reflects the historical reality that one of the least expensive and most effective means of preventing frauds on the State's Treasury is to make the perpetrators of them liable to actions by private parties.

It applies to situations where an individual falsely convinces Delaware to pay out funds, or to pay out too much funds, and to situations where an individual fraudulently pays too little to the Government. The Bill covers not only acts that create loss to government, but also acts which cause government to pay out sums of money to claimants it did not intend to benefit.

It contains qui tam provisions, which are meant to encourage those with knowledge of government fraud to come forward. These provisions provide private parties who would otherwise have no judicially cognizable interest with interest sufficient to give him or her or it standing to sue to enforce the law.

It contains a whistle blower protection provision, which allows employees to feel more secure in reporting fraud to the Government.

A "claim" refers to a demand for money or for some transfer of public property or disbursement of public funds. Each individual false payment demand under a Government contract which calls for numerous payments constitutes a "false claim" under this Act.