

## VERMONT FALSE CLAIMS ACT

### § 4301. DEFINITIONS

As used in this chapter:

- (1) “Claim” means any request or demand, whether under a contract or otherwise, for money or property, and whether or not the state has title to the money or property, that:
  - (A) is presented to an officer, employee, or agent of the state; or
  - (B) is made to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the state’s behalf or to advance a state program or interest, and if the state:
    - (i) provides or has provided any portion of the money or property that is requested or demanded, or
    - (ii) will reimburse directly or indirectly such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

A claim shall not include a request or demand for money or property that the state has paid to an individual as compensation for state employment or as an income subsidy with no restrictions on that individual’s use of the money or property.
- (2) “Knowing” and “knowingly”:
  - (A) mean that a person, with respect to information,
    - (i) has actual knowledge of the information,
    - (ii) acts in deliberate ignorance of the truth or falsity of the information, or
    - (iii) acts in reckless disregard of the truth or falsity of the information; and
  - (B) require no proof of specific intent to defraud.
- (3) “Material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.
- (4) “Obligation” means an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment after the deadline for reporting and returning the overpayment under subsection 4302(a)(10) of this chapter.
- (5) “Original source” means an individual who:

(A) prior to a public disclosure under subsection 4307(c) of this chapter, has voluntarily disclosed to the state the information on which allegations or transactions in a claim are based; or

(B) has knowledge that is independent of and materially adds to the publicly-disclosed allegations or transactions, and who has voluntarily provided the information to the state before filing a false claims action.

- (6) “Overpayment” means any state or federal funds that a person receives or retains to which the person, after applicable reconciliation, is not entitled.
- (7) “Relator” or “qui tam plaintiff” means an individual who brings an action under subsection 4303(b) of this chapter.
- (8) “State” means the state of Vermont, a county, a municipality or other subdivision thereof and commission, board, department or agency thereof or any other governmental entity authorized or created by state law, including public corporations and authorities.

#### § 4302. PROHIBITION; PENALTIES

(a) No person shall:

- (1) Knowingly present, or cause to be presented, a false or fraudulent claim for payment or approval;
- (2) Knowingly make, use, or cause to be made or used, a false record or statement material to a false or fraudulent claim;
- (3) Knowingly present, or cause to be presented, a claim that includes items or services resulting from a violation of Chapter 21 of Title 13 of the Vermont Statutes Annotated or section 1128B of the Social Security Act, 42 U.S.C. 1320a-7b;
- (4) Knowingly present, or cause to be presented, a claim that includes items or services for which the State could not receive payment from the federal government due to the operation of 42 U.S.C. § 1396b(s) because the claim includes a designated health service(s) (as defined in subsection (h)(6) of 42 U.S.C. § 1395nn) furnished to an individual on the basis of a referral that would result in the denial of payment under Title 42, Chapter 7, subchapter XVIII (the “Medicare program”), due to a violation of 42 U.S.C. § 1395nn.
- (5) Having possession, custody, or control of property or money used, or to be used, by the state, knowingly deliver, or cause to be delivered to the state or its agent, less than all of that property or money for which the person receives a certificate or receipt;
- (6) Being authorized to make or deliver a document certifying receipt of property used, or to be used, by the state or its agent and, intending to defraud the state, make or deliver the receipt without completely knowing that the information on the receipt is true;

- (7) Knowingly buy, or receive as a pledge of an obligation or debt, public property from an officer or employee of the state, who lawfully may not sell or pledge the property;
  - (8) Enter into a ~~written~~ agreement, ~~or~~ contract ~~or understanding~~ with an official of the state or its agent knowing the information contained therein is false;
  - (9) Knowingly make, use or cause to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state;
  - (10) Knowingly conceal or knowingly and improperly avoid or decrease an obligation to pay or transmit money or property to the state;
  - (11) As a beneficiary of an inadvertent submission of a false claim to the state, or as a beneficiary of an overpayment from the state, and who subsequently discovers the falsity of the claim or the receipt of overpayment, fail to disclose the false claim or receipt of overpayment to the state by the later of: (A) a date which is 60 days after the date on which the false claim or receipt of overpayment was identified, or (B) the date any corresponding cost report is due, if applicable; or
  - (12) Conspire to commit a violation of this subsection.
- (b) Any person who violates a provision of subsection (a) shall be liable to the state for:
- (1) a civil penalty of not less than \$5,500.00 and not more than \$11,000.00 for each act constituting a violation of subsection (a) of this chapter, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461);
  - (2) three times the amount of damages that the state sustains because of the act of that person; and,
  - (3) the costs of the investigation and prosecution of such violation.
- (c) ~~Liability shall be joint and several for any violation of subsection (a) committed by two or more persons.~~
- (d) Notwithstanding subsections ~~s. (b)(1) and~~ (b)(2), the court may enter judgment for assess no civil penalties and not less than two times the amount of damages that the state sustains because of the act of that person and assessing no civil penalties, if the court finds that:
- (1) The person committing the violation of subsection (a) furnished officials of the state responsible for investigating false claims violations with all information known to that person about the violation within thirty days after the date on which the person first obtained the information;
  - (2) The person fully cooperated with any investigation by the state of such violation; and
  - (3) At the time the person furnished the state with the information about the violation, no criminal prosecution, civil action or administrative action had commenced under the false

**Comment [JT1]:** Federal courts appear to have applied joint and several liability under the FCA.

claims law with respect to such violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

- (e) This chapter shall not apply to claims, records, or statements made or presented to establish, limit, reduce, or evade liability for the payment of tax to the state or other governmental authority.

§ 4303. CIVIL ACTIONS FOR FALSE CLAIMS

- (a) The attorney general shall investigate violations of section 4302(a). If the attorney general finds that a person has violated or is violating section 4302(a), the attorney general may bring a civil action in the civil division of the superior court under this section against the person. The action may be brought in Washington County or in any county where an act prohibited by section 4302 occurred.

- (b) (1) A relator may bring a civil action in the civil division of the superior court in Washington County or in any county where an act prohibited by section 4302 occurred for a violation of this chapter on behalf of the relator and the state. The action shall be brought in the name of the state. The relator must file the complaint in camera. The complaint must remain under seal for at least 60 days after being served on the attorney general and must not be served on the defendant until the court so orders.

(2) Once filed, the action may be dismissed only if the attorney general gives written reasons for consenting to the dismissal and the court approves the dismissal. Notwithstanding any law to the contrary, it shall not be a cause for dismissal or a basis for a defense that the relator could have brought another action based on the same or similar facts under any other law.

(3) A relator filing an action under this chapter must serve a copy of the complaint and written disclosure of substantially all material evidence and information the relator possesses on the attorney general in an electronic format determined by the attorney general. The attorney general may elect to intervene and proceed with the action within 60 days after the later of the date the attorney general is served with

(A) the complaint and

(B) the material evidence and information.

(4) The attorney general may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under subsection (b)(1) of this section. Any such motions may be supported by affidavits or other submissions in camera.

(5) Before the expiration of the 60-day period or any extensions obtained under subdivision (4) of this subsection, the state shall (A) proceed with the action, in which case the action shall be conducted by the attorney general, or (B) notify the court that it declines to take over the action, in which case the relator shall have the right to conduct the action.

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(6) When a relator brings an action under this subsection no person other than the attorney general may intervene or bring a related action based on the facts underlying the pending action.

#### § 4304. RIGHTS OF THE PARTIES TO QUI TAM ACTIONS

- (a) If the state proceeds with the action, the attorney general shall have the primary responsibility for prosecuting the action, and shall not be bound by any act of the relator. The relator shall have the right to continue as a party to the action, subject to the limitations in subsection (b).
- (b) (1) The attorney general may move to dismiss the action if the relator has been notified by the attorney general of the filing of the motion and the court has provided the relator with an opportunity for a hearing on the motion.
- (2) Notwithstanding any objection of a relator, the attorney general may settle the action with the defendant if after a hearing the court determines that the proposed settlement is fair, adequate, and reasonable under all the circumstances.
- (3) Upon a showing by the attorney general that unrestricted participation during the course of the litigation by the relator would interfere with or unduly delay the prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the relator's participation, such as:
- (A) limiting the number of witnesses the relator may call;
  - (B) limiting the length of the testimony of such witnesses;
  - (C) limiting the relator's cross-examination of witnesses; or
  - (D) otherwise limiting the participation by the relator in the litigation.
- (4) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the relator would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the relator in the litigation.
- (c) If the attorney general elects not to proceed with the action, the relator who initiated the action shall have the right to conduct the action. If the attorney general so requests, it shall be served with copies of all pleadings filed in the action in an electronic format determined by the attorney general and shall be supplied with copies of all deposition transcripts at the state's expense. When a relator proceeds with the action, the court, without limiting the status and rights of the relator, may nevertheless permit the attorney general to intervene at a later date upon a showing of good cause.
- (d) Whether or not the attorney general proceeds with the action, upon a showing by the attorney general that discovery by the relator would interfere with the state's investigation

or prosecution of a criminal or civil matter arising out of the same or similar facts, the court may stay such discovery for a period of not more than 60 days. The court may extend the 60-day period upon a further showing that the attorney general has pursued the criminal or civil investigation or proceedings with reasonable diligence and may stay any proposed discovery in the civil action that will interfere with the ongoing criminal or civil investigation or proceedings.

§ 4305. ALTERNATE REMEDIES AVAILABLE TO DETERMINE CIVIL PENALTY

(a) Notwithstanding sections 4303 and 4304, the attorney general may elect to pursue its claim through any alternate remedy available to the state under any other law or regulation, including any administrative proceeding to determine a civil monetary penalty. If any such alternate remedy is pursued in another proceeding, a relator shall have the same rights in such proceeding as said relator would have had if the action had continued under this section.

**Comment [JT2]:** We think this is required for DRA compliance. See OIG Guidelines p. 8, condition B(5). It is also substantially similar to the federal FCA. See 31 U.S.C. § 3730(c)(5).

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§ 4306. PAYMENTS TO RELATORS; LIMITATIONS

- (a) If the attorney general proceeds with an action brought by a relator under subsection (b) of this section, the relator shall, subject to subsection (b) of this section, receive at least 15 percent but not more than 25 percent of the proceeds recovered and collected in the action or in settlement of the claim, depending upon the extent to which the relator substantially contributed to the prosecution of the action.
- (b) Where the action is one which the court finds to be based primarily on disclosures of specific information, other than information provided by the relator, relating to allegations or transactions in a criminal, civil, or administrative hearing; in a legislative, administrative, or state auditor hearing, audit, investigation, or report; 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 relator in advancing the case to litigation.
- (c) Any payment to a relator under the subsections (a) or (b) of this section shall be made only from the proceeds recovered and collected in the action or in settlement of the claims. Any such relator shall also receive an amount for reasonable expenses which the appropriate 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, and paid directly by the defendant to the relator.
- (d) If the attorney general does not proceed with an action under this chapter, the relator bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the state. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds recovered and collected in the action or in settlement of the claim, and shall be paid out of such proceeds. In such circumstances, the relator shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, including

reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant, and paid directly by the defendant to the relator.

- (e) Whether or not the attorney general proceeds with the action, if the court finds that the action was brought by a relator who planned and initiated the violation of section 2 of this chapter upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce or eliminate the share of the proceeds of the action which the relator would otherwise receive pursuant to this section, taking into account the role of the relator in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the relator bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 2 of this chapter, that relator 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 to continue the action.

#### § 4307. CERTAIN ACTIONS BARRED

- (a) An individual may not bring an action under subsection 3(b) of this chapter against a member of the state legislative branch, the attorney general, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state when the action was brought.
- (b) An individual may not bring an action under subsection 3(b) of this chapter which is based upon allegations or transactions which are the subject of a civil suit or an administrative proceeding in which the state is already a party.
- (c) Unless opposed by the attorney general, the court shall dismiss an action or claim under subsection 3(b) of this chapter if substantially the same allegations or transactions as alleged in the action or claim were publicly disclosed: (1) in a criminal, civil, or administrative hearing in which the state or its agent is a party; (2) in a state legislative, administrative, or state auditor's report, hearing, audit, or investigation; or (3) from the news media, unless the action is brought by the attorney general or the person bringing the action is an original source of the information.

#### § 4308. AWARDS OF COSTS AND ATTORNEY FEES AGAINST RELATORS; LIABILITY

- (a) If the attorney general does not proceed with the action and the person 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 person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment. ~~If the attorney general does not proceed with the action pursuant to this chapter and the defendant is the prevailing party, the court may award the defendant reasonable attorneys' fees and expenses against the relator upon a written finding that such action was pursued in bad faith or was wholly insubstantial, clearly frivolous, and advanced for the purpose of causing the defendant undue burden, unnecessary expense or harassment.~~

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- (b) No liability shall be incurred by the state for any expenses, attorney's fees or other costs incurred by any person bringing or defending an action under this chapter.

§ 4309. RELIEF FROM RETALIATORY ACTIONS

- (a) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or a person associated with the employee, contractor, or agent in furtherance of an action under section 3 of this chapter, or other efforts to stop one or more violations of this chapter.
- (b) Notwithstanding any law to the contrary, relief under subsection (a) shall include reinstatement with the same seniority status that employee, contractor, or agent 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, contractor or agent may bring an action in the civil division of the superior court or any other appropriate court for the relief provided in this section.
- (c) No employer shall make, adopt or enforce any rule, regulation or policy preventing an employee, contractor or agent from disclosing information to a government or law enforcement agency or from acting to further efforts to stop one or more violations of this chapter. No employer shall require as a condition of employment, during the term of employment or at the termination of employment that any employee, contractor or agent agree to, accept or sign an agreement that limits or denies the rights of such employee, contractor or agent to bring an action or provide information to a government or law enforcement agency pursuant to this chapter. Any such agreement shall be void.
- (d) A civil action under this section may not be brought more than three years after the date when the retaliation occurred and became known to the employee, contractor, or agent.

§ 4310. LIMITATION OF ACTIONS; FINAL JUDGMENTS IN CRIMINAL PROCEEDINGS

- (a) A civil action under section 3 of this chapter for a violation of section 2(a) may not be brought:
  - (1) More than six years after the date on which the violation was committed; or
  - (2) More than three years after the date when facts material to the right of action are known or reasonably should have been known by the official within the attorney general's office 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.



- (b) If the state elects to intervene and proceed with an action brought under subsection 3(b) of this chapter, the state may file its own complaint or amend the complaint of a person who has brought an action pursuant to subsection 3(b). For statute of limitations purposes, any such pleading shall relate back to the filing date of the complaint of the person who originally brought the action, to the extent that the claim of the state arises out of the conduct, transactions or occurrences set forth, or attempted to be set forth, in the prior complaint of that person.

§ 4311. PREPONDERANCE OF THE EVIDENCE STANDARD

In any action brought under section 3, the party bringing the action shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

§ 4312. REMEDIES UNDER OTHER LAWS; LIBERALITY OF LEGISLATIVE CONSTRUCTION

- (a) The provisions of this chapter are not exclusive, and the remedies provided for in this chapter shall be in addition to any other remedies provided for in any other law or available under common law.
- (b) ~~This chapter shall be liberally construed and applied to promote the public interest. Furthermore, it~~ is the intent of the legislature that in construing this chapter, the courts of this state will be guided by the construction of similar terms contained in the Federal False Claims Act, 31 U.S.C. §§ 3729-3733, as from time to time amended by the United States Congress and the courts of the United States.

§ 4313. CIVIL INVESTIGATIVE DEMANDS

(a)(1) The attorney general whenever he or she has reason to believe any person to be or to have been in violation of this chapter may examine or cause to be examined by any agent or representative designated by him or her for that purpose, any books, records, papers, memoranda, and physical objects of whatever nature bearing upon each alleged violation, and may demand written responses under oath from any person to questions bearing upon each alleged violation.

(2)The attorney general may require the attendance of such person or of any other person having knowledge in the premises in the county where the person resides or has a place of business or in Washington County if the person is a nonresident or has no place of business within the State, and may take testimony and require proof material for his or her information, and may administer oaths or take acknowledgment in respect of any book, record, paper, or memorandum.

(3) The Attorney General shall serve notice of the time, place, and cause of the examination or attendance, or notice of the cause of the demand for written responses, at least ten days prior to the date of the examination, personally or by certified mail, upon

**Comment [JT3]:** WE can substitute language from the federal CID statute – 31 U.S.C. § 3733.

the person at his or her principal place of business, or, if the place is not known, to his or her last known address.

(4) Any book, record, paper, memorandum, or other information produced by any person pursuant to this section shall not, unless otherwise ordered by a court of appropriate jurisdiction for good cause shown, be disclosed to any person other than the authorized agent or representative of the Attorney General, other state agency personnel, agents, or employees, relators, or law enforcement officers engaged in legitimate law enforcement activities, unless with the consent of the person producing the same.

(5) This subsection shall not be applicable to any criminal investigation or prosecution brought under the laws of this or any state.

(b)(1) A person upon whom a notice is served pursuant to the provisions of this section shall comply with the terms thereof unless otherwise provided by the order of a court of this State.

(2) Any person who, with intent to avoid, evade, or prevent compliance, in whole or in part, with any civil investigation under this section, removes from any place, conceals, withholds, or destroys, mutilates, alters, or by any other means falsifies any documentary material in the possession, custody, or control of any person subject to any such notice, or mistakes or conceals any information, shall be subject to a civil penalty of not more than \$5,000.00 for each such act and to recovery by the Attorney General's office the reasonable value of its services and expenses in enforcing compliance with this section.

(c)(1) Whenever any person fails to comply with any notice served upon him or her under this section or whenever satisfactory copying or reproduction of material pursuant to this section cannot be done and the person refuses to surrender the material, the Attorney General may file, in the civil division of the Superior Court in which the person resides or has his or her principal place of business, or in Washington County if the person is a nonresident or has no principal place of business in this State, and serve upon the person, a petition for an order of the court for the enforcement of this section.

(2) Whenever a petition is filed under this section, the court shall have jurisdiction to hear and determine the matter presented, and to enter one or more orders as may be required to carry into effect the provisions of this section.

(3) A person who violates an order entered under this section by a court shall be punished for contempt of court and shall be subject to a civil penalty of not more than \$5,000.00 for each act or instance of non-compliance and to recovery by the Attorney General's office of the reasonable value of its services and expenses in enforcing compliance with this section.