

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Rules

**BILL:** CS/CS/SB 1494

**INTRODUCER:** Rules Committee; Judiciary Committee; and Senator Thrasher

**SUBJECT:** Florida False Claims Act

**DATE:** April 19, 2013

**REVISED:** \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Munroe	Cibula	JU	<b>Fav/CS</b>
2.	Munroe	Phelps	RC	<b>Fav/CS</b>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input type="checkbox"/>            | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

CS/CS/SB 1494 conforms the Florida False Claims Act (FFCA)<sup>1</sup> to the Federal False Claims Act.<sup>2</sup> Specifically, the bill:

- Expands the authority of the Department of Legal Affairs to issue subpoenas to investigate false claims against the state. However, this authority is contingent upon a public records exemption in Senate Bill 1496 or similar legislation becoming law.
- Removes the statement of purpose for the FFCA.
- Revises the definitions under the FFCA to conform to the Federal False Claims Act, revises the violations under the FFCA,
- Revises procedures for the Department of Legal Affairs to intervene in a case under the FFCA.

<sup>1</sup> Section 68.081, F.S., states that ss. 68.081 - 68.09, F.S., may be cited as the “Florida False Claims Act.”

<sup>2</sup> See Federal False Claims Act currently codified at 31 U.S.C. ss. 3729-3733 (Supp IV. 2010).

- Expands the authority of the Attorney General’s Office to prosecute false claims allegedly made by certain governmental officials which are not acted upon by other state officials having authority to act.
- Revises provisions for the burden of proof, to provide that if a defendant in a state or federal proceeding is found guilty, pleads guilty, or pleads *nolo contendere* in a criminal action with underlying facts that would support a *qui tam* action, the defendant may not deny any of the matters in the criminal proceeding, as if the department had been a party.

This bill creates section 68.0831, Florida Statutes.

This bill substantially amends the following sections of the Florida Statutes: 68.081, 68.082, 68.083, 68.084, 68.085, 68.086, 68.087, 68.089, and 68.09.

## II. Present Situation:

The Florida False Claims Act (FFCA)<sup>3</sup> authorizes civil actions by individuals and the state against persons who file false claims for payment or approval by a state agency. The Florida Legislature enacted the FFCA in 1994 and the FFCA is modeled after the Federal Civil False Claims Act.<sup>4</sup> The Federal Civil False Claims Act was enacted during the Civil War in response to widespread fraud among defense contractors.<sup>5</sup> The Federal Civil False Claims Act provides that the United States Attorney General and the Department of Justice may enforce the provisions of the federal act.<sup>6</sup> The “*qui tam*” provisions of the Federal Civil False Claims Act, however, also authorize private individuals to enforce its provisions on behalf of the United States.<sup>7</sup> “*Qui tam* action” means “[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive.”<sup>8</sup>

In 1986, the Federal False Claims Act was substantially amended and the amendments revitalized the *qui tam* provisions of the federal act by allowing persons to bring an action regardless of the government’s prior knowledge of the allegations.<sup>9</sup> As a result of the financial success that the Federal False Claims Act brought for federal government, a number of states in addition to Florida have adopted false claims act with *qui tam* provisions.<sup>10</sup>

In Florida, the FFCA has often been used to combat health care, nursing home, and Medicaid fraud.<sup>11</sup> An action under the FFCA can be brought either by the state itself, or by a private

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<sup>3</sup> Section 68.081, F.S., *supra* note 1

<sup>4</sup> See House Staff Analysis and Economic Impact Statement for SB 1185 (1994 Reg. Sess.) by the House Committee on Judiciary (Mar. 15, 1994) and *see also*, Federal False Claims Act, *supra* note 2.

<sup>5</sup> See *Rainwater v. United States*, 356 U.S. 590, 592 (1958) (“The Act was originally passed in 1863 after disclosure of widespread fraud against the Government during the War Between the States.”).

<sup>6</sup> See 31 U.S.C. s. 3729.

<sup>7</sup> See 31 U.S.C. s. 3730(a) and (b)(1).

<sup>8</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>9</sup> House Staff Analysis and Economic Impact Statement for SB 1185 (1994 Reg. Sess.) *supra* note 5.

<sup>10</sup> House Staff Analysis and Economic Impact Statement for SB 1185 (1994 Reg. Sess.) *supra* note 5 and *also see* The False Claims Act Legal Center, Taxpayers Against Fraud Education Fund, State False Claims Acts, <http://www.taf.org/states-false-claims-acts> (last visited March 12, 2013).

<sup>11</sup> Florida Department of Legal Affairs.

individual on behalf of the state. The Department of Legal Affairs and the Department of Financial Services are responsible for investigating and litigating actions brought under the FFCA. Qui tam actions may be brought by private entities on behalf of the State of Florida.<sup>12</sup>

When a private person files a *qui tam* action, a copy of the complaint and disclosure of all material evidence must be served on the Attorney General, as head of the Department of Legal Affairs, and the Chief Financial Officer, as head of the Department of Financial Services.<sup>13</sup> The FFCA does not explicitly provide that a complaint is to be sealed automatically upon filing. However, certain provisions in s. 68.083, F.S., arguably only have meaning if they are construed to mean that a complaint is automatically sealed. Section 68.083(2), F.S., provides that “[p]rior to the court unsealing the complaint under subsection (3), the action may be voluntarily dismissed . . . .” Section 68.083(5), F.S., allows the Department of Legal Affairs to request an extension of the time during which the complaint remains sealed under subs. 68.035(2), F.S. Furthermore, the Leon County Clerk of Courts office indicated that the office’s current practice in order to comply with s. 68.083, F.S., is to automatically seal such complaints for 90 days. The complaint is unsealed on the 91st day unless a party successfully moves the court to keep it under seal.

Section 68.083(3), F.S., also provides that when a private individual brings a potential claim to the attention of the Department of Legal Affairs or the Department of Financial Services, these departments have 60 days to decide whether they are going to intervene and take over litigating the FFCA action from the private individual.

Actions that violate the FFCA include:

- Submitting a false claim for payment or approval;<sup>14</sup>
- Making or using a false record to get a false or fraudulent claim paid or approved;<sup>15</sup>
- Conspiring to make a false claim or to deceive an agency to get a false or fraudulent claim allowed or paid;<sup>16</sup> or
- Making or using a false record to conceal, avoid, or decrease payments owed to the state government.<sup>17</sup>

The penalty for violating the FFCA is \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state government.<sup>18</sup> For example, if a person is found guilty of making a false claim where he or she defrauded \$100,000 from the state, that person is liable to pay the state \$300,000 plus the \$5,500 to \$11,000 penalty per claim.

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<sup>12</sup> See s. 68.083(2), F.S. *Qui tam* cases usually arise from an employee of an institution such as a health care provider who discovers that violations of the FFCA are occurring. This is a type of whistleblower action. In a *qui tam* action under the FFCA, the employee will sue on behalf of the state to collect money that was illegally defrauded from the state. A private entity that brings a successful FFCA action on behalf of the state will receive an amount that the court decides is reasonable for collecting the civil penalty and damages. See ss. 68.085 and 68.086, F.S. The amount must not be less than 25 percent and not more than 30 percent of the proceeds recovered under a judgment. Section 68.085(3), F.S.

<sup>13</sup> Section 68.083(3), F.S.

<sup>14</sup> Section 68.082(2)(a), F.S.

<sup>15</sup> Section 68.082(2)(b), F.S.

<sup>16</sup> Section 68.082(2)(c), F.S.

<sup>17</sup> Section 68.082(2)(g), F.S.

<sup>18</sup> Section 68.082(2), F.S.

Section 68.089, F.S., provides a statute of limitation where a civil action under the FFCA cannot be brought:

- More than 6 years after the date on which the false claim against the state is committed; or
- More than 3 years after the date when the facts are known or reasonably should have been known by the state; but in no event more than 10 years after the date on which the violation is committed.

### III. Effect of Proposed Changes:

#### The Florida False Claims Act – Section 68.081, F.S.

The current statute includes a statement of purpose that the FFCA is:

to deter persons from knowingly causing or assisting in causing state government to pay claims that are false or fraudulent, and to provide remedies for obtaining treble damages and civil penalties for state government when money is obtained from state government by reason of a false or fraudulent claim.

The bill removes the statement of purpose. The bill clarifies that the Florida False Claims Act includes ss. 68.091 and 68.092, F.S. Section 68.091, F.S., states that the “act shall be liberally construed to effectuate its remedial and deterrent purposes” and also contains a severability clause. Section 68.092, F.S., states that all moneys recovered by the Chief Financial Officer as head of the Department of Financial Services in any civil action for violation of the FFCA based on an action brought under the FFCA must be deposited in the Administrative Trust Fund of the Department of Financial Services.

#### Definitions – Section 68.082, F.S.

The current statute defines “agency” as an official or other subset of the executive branch of the state government.

The bill removes this definition, and consistently changes the term “agency” throughout the balance of the FFCA to “state.” The term “state” is defined in the bill so as to include state agencies, authorities, and instrumentalities. The net effect of these changes is to expand the applicability of the FFCA to state subdivisions and instrumentalities where prior law limited it to executive branch agencies.<sup>19</sup>

The bill also adds definitions for “material” and “obligation”<sup>20</sup> which conforms with definitions found in the Federal False Claims Act. “Material” includes the ability to influence the payment of money, and “obligation” now includes an established duty.

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<sup>19</sup> Cf. Fla. AGO 2011-10, which excludes municipalities from the act because of the definitions of “agency,” and “instrumentality.” 2011 WL 2429107.

<sup>20</sup> Under the Federal False Claims Act, “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property. 31 U.S.C. 3729(b)(3). Under the Federal False Claims Act, “obligation” means

**Violations under Section 68.082(2), F.S.**

The bill substantially expands the jurisdiction of the Department of Legal Affairs to investigate and prosecute violations of the FFCA. Currently, the jurisdiction of the Department of Legal Affairs under the FFCA is limited to pursuing perpetrators of fraudulent claims against executive branch entities. The bill authorizes the Attorney General's Office to investigate or prosecute perpetrators of false claims against any instrumentality of the state, which would include the Legislative and Judicial Branches.

Currently, an agency or the department may take action against perpetrators of false claims. Because the bill consistently removes "agency" and replaces it with "department," the bill makes the Department of Legal Affairs the sole entity in the state to pursue the FFCA, except for those initiated by or intervened in by the Department of Financial Services pursuant to s. 68.083, F.S.

Under the bill, a person is liable under the FFCA who:

- Knowingly presents or causes to be presented a false or fraudulent claim for payment or approval;
- Knowingly makes, uses, or causes to be made or used a false record or statement material to a false or fraudulent claim;
- Conspires to commit a violation the violations statute;
- Has possession, custody, or control of property or money used or to be used by the state and knowingly delivers or causes to be delivered less than all or that money or property;
- Is authorized to make or deliver a document certifying receipt of property used or to be used by the state and, intending to defraud the state, makes or delivers the receipt without knowing that the information on the receipt is true;
- Knowingly buys or received, as a pledge of an obligation or a debt, public property from an officer or employee of the state who may not sell or pledge the property; or
- Knowingly makes, uses, or causes to be made or used a false record or statement material to an obligation to pay or transmit money or property to the state, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state.

The conduct prohibited by the FFCA as revised by the bill is only subtly different than the conduct prohibited under existing law. The civil penalties for violating the FFCA of \$5,500 to \$11,000 per claim, plus three times the amount of damages to the state government are unchanged.

**Civil Actions for False Claims – Section 68.083, F.S.**

Section 68.083(7), F.S., provides that when a private individual brings a potential claim to the attention of the Department of Legal Affairs or the Department of Financial Services, as

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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. 31 U.S.C. 3729 (b)(4).

appropriate, have 60 days to decide whether to intervene and take over litigating the FFCA action from the private individual. The bill removes the reference to “on behalf of the state,” which appears to preclude other government entities other than the Department of Legal Affairs or the Department of Financial Services from intervening or bringing a related action.

### **Subpoenas – Section 68.0831, F.S.**

Under current law, the Department of Legal Affairs may investigate claims but is not authorized to issue subpoenas to facilitate the investigation of claims. The department reports that the lack of subpoena authority can make it difficult for the department to determine if it is appropriate to intervene in a FFCA case.

The bill creates s. 68.0831, F.S., to grant the Department of Legal Affairs discovery capabilities prior to the institution of a civil proceeding, if it has reason to believe that any person has testimony or evidence relevant to an investigation. The bill provides that the department may issue subpoenas requiring the recipient to:

- Produce documents;
- Answer interrogatories under oath; and
- Give sworn testimony.

The bill provides:

- A subpoena will be served as other process;
- A subpoena must detail the materials requested and the nature of the conduct to which the materials relate;
- The recipient of a subpoena may petition the Circuit Court of Leon County for relief from the subpoena;
- The recipient of a subpoena has 30 days to respond at the time and place specified, or risk being subject to contempt;
- Transcribed testimony may be reviewed by the deponent;
- The department may stipulate to protective orders; and
- The department may request that a person who refuses to comply on Fifth Amendment grounds may be compelled to comply by the court.

The bill provides that the discovery provisions do not impair the ability of the department to:

- Institute a civil proceeding; or
- Invoke the power of the court to compel production of evidence before a grand jury.

The bill provides for a civil penalty up to \$100,000 for a natural person and \$1 million for any other entity, plus reasonable attorney fees and costs if the person or entity knowingly creates or destroys evidence while a subpoena is pending.

The new authority of the Department of Legal Affairs to issue subpoenas in connection with an investigation of a false claim contingent upon a public records exemption in Senate Bill 1496, or similar legislation, becoming law.

### **Rights of Parties in Civil Actions – Section 68.084, F.S.**

Currently, the department may dismiss a cause voluntarily over the objections of the person who initiated the action. The bill authorizes the department to dismiss an action “at any point” over the objections of said person.

Currently, the application of one civil remedy under the Act does not preclude another. The bill authorizes the state to elect to pursue a false claim through an administrative remedy to determine a civil monetary penalty, and if the state does so, the person bringing the action has the same rights as the person will have in an action brought through the courts.

The bill also specifies when a finding or conclusion is final once the time for appeal has expired.

### **Awards to Plaintiffs Bringing Actions – Section 68.085, F.S.**

Currently, the private party bringing the action is entitled to recover a portion of the proceeds awarded by the court in the event that the department prevails in a false claims action.

The bill adds that the person bringing the claim will also be entitled to expenses incurred in pursuit of the claim, including reasonable attorney fees and costs. Moreover, those fees and costs will be assessed against the defendant and are payable only from the proceeds of the action.

### **Expenses and Attorney Fees – Section 68.086, F.S.**

Currently, the provisions for the fees and costs of the person bringing the action and the department are contained in the same section of the FFCA. Because the provisions for the payment of private parties has been moved to s. 68.085, F.S., that provision was removed from s. 68.087, F.S., leaving provision for payment of attorney fees to the department intact.

### **Exemptions to Civil Actions – Section 68.087, F.S.**

#### *Government Officials*

Section 68.087, F.S., closely resembles the federal false claims statute.<sup>21</sup> Currently, the statute provides that no court shall have jurisdiction over an action under the statute against any member of the Legislature, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the state government.

The bill departs from the federal model, which continues to provide that a court has no jurisdiction over a false claims action for acts known to “the [g]overnment.” The bill changes

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<sup>21</sup> 31 U.S.C. 3730(e)(2)(A) provides “[n]o court shall have jurisdiction over an action brought under [the Federal False Claims Act] against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.”

this limitation to information known to the Department of Legal Affairs or Department of Financial Services. This distinction has the effect of expanding potential false claims actions to now include previously excluded government officials where information is not previously known to the Department of Legal Affairs or the Department of Financial Services.

### ***Publicly Disclosed Evidence***

Currently if a false claim is brought based upon evidence which was disclosed in a pending investigation, the court does not have jurisdiction to entertain the action. Disclosure of the evidence through the media also causes the court to lose jurisdiction, unless the person bringing the action was the original source of the information.<sup>22</sup>

The bill provides that the court may dismiss an action brought upon publicly disclosed facts, and gives the department the opportunity to object to such dismissal of the action.

### **Local Governments**

Currently, the statute<sup>23</sup> provides that the court has no jurisdiction over a case brought against local governments, which is defined as a county or municipality.

The bill removes the reference to local governments and continues to provide that the court cannot have jurisdiction over an action brought under the act against a county or municipality.

### **Limitations and Interventions by the Department – Section 68.089, F.S.**

#### ***Limitation of Actions***

Currently, no action may be brought for false claims more than 6 years after the violation, or more than 3 years after the material facts were known to the public official charged with responsibility of the matter, but in no event more than 10 years after the date on which the violation was committed.

Under the bill expands the limitation on actions so that an action may not be brought more than three years after the date when the material facts were known or reasonably should have been known by Department of Legal Affairs or the Department of Financial Services, as appropriate, rather than the state official charged with responsibility of the matter. The distinction of this effect will allow the department to sit in the shoes of the government official who has responsibility for the matter. Therefore, no action may be brought more than 3 years after material facts were known to the department.

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<sup>22</sup> The current provision which deprives the court of jurisdiction subjects a suit in these circumstances to dismissal pursuant to Fla. R. Civ. Pro. 1.140 on the basis of a lack of subject matter jurisdiction. Further, a court order entered without jurisdiction is void. *Blewitt v. Nicholson*, 2 Fla. 200 (1848).

<sup>23</sup> Section 68.088(6), F.S.



### **Intervention by the Department**

The bill adds a new provision which allows the Department of Legal Affairs or the Department of Financial Services, as appropriate, to amend the pleadings if it intervenes in an existing action. It may also file a completely new complaint. For statute of limitations purposes, the bill provides that such changes relate back to the original date the action was brought. The bill authorizes the department to intervene and make such changes in pending actions.

### **Burden of Proof – Section 68.09, F.S.**

Currently the statute provides that the State of Florida must prove the essential elements of a false claim action by a preponderance of the evidence. The bill changes the “State of Florida” to the “department.”

The bill adds that if a defendant in a state or federal proceeding is found guilty, pleads guilty, or pleads *nolo contendere* in a criminal action with underlying facts that would support a *qui tam* action, the defendant is estopped (may not deny) any of the matters in the criminal proceeding, as if the department had been a party.

### **Effective date**

The bill takes effect July 1, 2013, except as otherwise provided in the bill.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

### **B. Public Records/Open Meetings Issues:**

None.

### **C. Trust Funds Restrictions:**

None.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

### **B. Private Sector Impact:**

None.

C. Government Sector Impact:

None.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. Committee Substitute – Statement of Substantial Changes:  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Rules on April 17, 2013:**

The committee substitute defines the word “department” as used in s. 68.0831, F.S., to mean the Department of Legal Affairs. Additionally, the bill authorizes the Department of Legal Affairs to issue subpoenas in connection with an investigation of a false claim. The committee substitute makes this authority contingent upon a public records exemption in Senate Bill 1496 or similar legislation becoming law.

**CS by Judiciary on March 18, 2013:**

The committee substitute corrects a scrivener’s error, replacing the word “department” with “state government.”

- B. Amendments:

None.