



Alaska Policy Forum Report  
**PROTECTING  
THE ALASKA  
PUBLIC TREASURY**

by

**Stephen Merrill**

*Introduction by Chris Beheim and David Boyle*

February 8, 2016

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through fraud, waste and abuse.**



**In these tight budgetary times, it is vital that the state not  
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- We believe that individual freedom and private property are inextricably linked.
- We believe that government should be limited, transparent and accountable.
- We believe in responsible, sustainable development.
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# PROTECTING THE ALASKA PUBLIC TREASURY

## INTRODUCTION

**By Chris Beheim and David Boyle**

*Chris Beheim has almost three decades of experience as a State of Alaska employee and manager. He retired in 2007 as director of the Alaska Scientific Crime Detection Laboratory. He was the first forensic chemist hired by the State and worked as a supervisor in the crime lab for 28 years.*

*David Boyle is one of the founders of the Alaska Policy Forum and is now its executive director. With two decades in government service, he retired from the U.S. Air Force as a major and has been a resident of Alaska since 1996. He has been a candidate twice for the Anchorage School Board. Education and government transparency are two of his public policy focus areas.*

Every year millions of dollars are squandered in Alaska through fraud, waste and abuse. The State of Alaska Department of Law has stated that if national trends hold true for Alaska, then the **State's Medicaid program alone will lose millions of dollars annually**. Alaska needs to enhance and upgrade its fraud prevention program to help prevent, detect, and eliminate fraud, waste, and abuse.

Many governmental entities around the country have instituted fraud, waste, and abuse hot lines to facilitate the reporting such activities. To increase effectiveness, some programs have even incorporated **cash incentives**. Several federal agencies have established programs that pay cash rewards for reporting wasteful activities, and numerous states and municipalities have also established similar programs. Baltimore approved a policy that includes cash incentives for city employees, contractors, vendors and city residents for reporting activity or conduct that costs the city money or resources. Their incentive amounts to **10 percent of all monies recovered with no cap**.



While the State of Alaska currently operates multiple hot lines for reporting different types of fraud, a single highly publicized and easy to remember phone number (e.g. 1-800-FraudAK) should be established to make reporting as easy as possible. Such a FWA reporting hot line combined with cash incentives for reporting would be far more effective in combating fraud, waste and abuse in Alaska.

Back in 2005, Representatives Kevin Meyer and Beth Kertulla introduced legislation to establish a fraud, waste and abuse hot line for Alaska. This bill should be reintroduced and modified to **allow anyone to call the hot line, not just state employees**. Incorporating **cash incentives** for reporting fraud should also be included to ensure that the program really works. This legislation should also mandate that all government entities, including school districts, implement FWA programs that include monetary incentives.

Alaska should also adopt a False Claims Act. The federal False Claims Act is perhaps the single most important tool U.S. taxpayers have to recover money stolen through fraud by U.S. government contractors every year. This law allows citizens with evidence of fraud against government contracts and programs to sue, on behalf of the government, in order to recover the stolen funds. In compensation for their efforts, a citizen whistle blower may be awarded a portion of the funds recovered, typically between 15 and 25 per cent. **Under this Act, the U.S. Government has recovered \$26.4 billion since January 2009.**

In 2005, the Congress passed **financial incentives for states to pass false claims acts** that are modeled after the federal False Claims Act. Twenty-nine states and the District of Columbia have enacted their own False Claims Acts. Under the Deficit Reduction Act, states that enact a False Claims Act closely modeled on the federal version of the law receive a larger state share of FCA Medicaid awards from the Federal Government. Alaska does not have a False Claims Act. According to the non-profit organization Taxpayers Against Fraud, Alaska would have recovered an additional **\$167,000 from just five Medicaid fraud cases** if the State had a qualifying False Claims Act at the time they were settled. Taxpayers Against Fraud has produced a model state False Claims Act statute.

Currently in Alaska there is a Workers' Compensation Fraud Hot line, an Insurance Fraud Hot line, and a Permanent Fund Dividend Fraud Hot line. The Department of Law also has a hot line to report Medicaid Fraud. The Department of Health & Social Services has an email address for reporting instances of fraud by individuals applying for or receiving the Alaska Temporary Assistance, Food Stamps, Medicaid, and Adult Public Assistance.

It is time for Alaska to consolidate all these FWA hot lines into a single hot line and provide monetary incentives to ensure its success and reward state employees and watchful Alaskans. In these tight budgetary times, it is vital that the state not waste a single dollar. **The state owes it to all Alaskans that their monies are not wasted. We cannot afford to waste money nor waste time. So let's do this now.**

# PROTECTING THE ALASKA PUBLIC TREASURY

By Stephen Merrill

*Stephen Merrill is a trial attorney in Anchorage, Alaska and a Research Associate for the Alaska Policy Forum in legal and justice matters. After graduating from the University of Nebraska Law School, Stephen accepted a Navy officer's commission in the Judge Advocate General's Corps. During four years of Navy active-duty, Lieutenant Merrill tried over 300 court-martials and accompanied aircraft carriers on foreign cruises. In Alaska he has filed a federal False Claims Act suit to recover waste diverted from a federal grant to a municipality.*

Every year tens of millions of taxpayer dollars are lost in Alaska due to fraud, waste and abuse<sup>1</sup>. The State Department of Law has acknowledged, given national trends, Alaska's Medicaid program alone loses as much as \$70,000,000 to fraud annually, about half of it state money.

Alaska should enhance its fraud prevention to help sharply reduce these huge losses.

The federal False Claims Act (FCA) has been astonishingly successful in combating fraud of all forms against the federal taxpayers. The US Department of Justice has recovered \$26.4 billion from FCA cases since 2009<sup>2</sup>. By far most of the effort and time spent detecting and proving this fraud was done by private actors. Little of this money would have ever been recovered by the usual investigatory processes of the DOJ and other federal agencies.

There are a variety of legislative approaches already in place under state whistleblower laws across the nation. These laws include a 1) false claims act similar to the federal model; or 2) whistleblower protection for revealing proof of serious wrongdoing; or 3) whistleblower hotlines, some confidential, sometimes operated by an entity independent of the other agencies of government.

Alaska law in the area of whistleblowing is not fully developed at the present time.

## History of the Law of Whistleblowing

It was the time of English medieval courts when a quite unusual legal statute first came into being. It was a law when, once fully developed in more modern times, the average citizen was empowered to institute and prove at trial a suit on behalf of, and in the name of, the king himself, all on their own initiative.

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<sup>1</sup> The U.S. Department of Defense, Inspector General: Fraud, Waste, and Abuse Defined.  
[www.dodig.mil/resources/fraud/fraud\\_defined.html](http://www.dodig.mil/resources/fraud/fraud_defined.html)

<sup>2</sup> Justice Department Recovers Over \$3.5 Billion From False Claims Act Cases in Fiscal Year 2015  
[www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015](http://www.justice.gov/opa/pr/justice-department-recovers-over-35-billion-false-claims-act-cases-fiscal-year-2015)

Such a suit was “qui tam sequitur” in Latin: “[he] who sues in this matter for the king as [well as] for himself.” The legal doctrine’s use goes back as far as 695 A.D. when first used to reward serfs who turned in fellow serfs for cheating the king.

At one time, the unruliness in Britain of so many informers for fraud on the King endangered their lives to such a point Queen Elizabeth I, in 1566, issued a proclamation to all British subjects not to engage in mob violence against the cursed informers.

Outside such “qui tam” suits, there is no parallel in the law of England or any other nation where just any private citizen can bring a lawsuit on behalf of a government and handle the suit largely on their own. “Qui tam” laws are typically called “false claims acts” in modern parlance.

The practice first came to American law during Colonial times as legislatures passed qui tam laws of their own. The first federal qui tam law came in the midst of the War Between the States, enacted in 1863 at the urging of President Abraham Lincoln to help combat war profiteering and culpable incompetence in the performance of federal contracts. It is often called “Lincoln’s Law”.

Similar to some of the English laws from centuries earlier, whistleblowers who were able to prove false claims committed against the central government could directly sue the alleged wrongdoer, the person or company who bilked the federal government, with the suit brought in the name of the federal government as the plaintiff. The whistleblower is given a share personally in the recovery determined by their degree of help in obtaining the recovery, generally 15% to 30% of the net recovery.

The incentive to root out federal contracting fraud was enhanced under Lincoln’s Law by mandating the award of treble damages for any proven count of fraud, also a fine for each count of fraud proven, along with the award of the attorney’s fees as well. The policy reason for the stiff penalties was people who commit civil fraud should pay further consequences than just returning the money wrongly taken.

In one form or another, the Federal False Claims Act has been in effect since its first passage. The law is a frequent subject of amendment, including important changes enacted under the Federal Affordable Care Act in 2010.

As of now, twenty-eight states have enacted false claims acts of their own, where citizens are invited to investigate and directly help punish fraud against the state taxpayers. Typically, these state laws track the framework of the federal act, including the award of treble recovery and a share of the recovery for the “relator” who made the case.

The major present development in “qui tam” law is the 2006 federal deficit reduction law that encourages states to enact their own false claims acts. See the Center for Medicare & Medicaid Services<sup>3</sup>.

The law increases the state share of recovery in Medicaid FCA cases by ten percentage points if the state has a statute compliant with federal guidelines reviewed by the Office of Inspector General. Ten percent of the settlement is often more than a state recovers in FCA Medicaid suits as a matter of practice. This policy goal helps close a frequent loophole for Medicaid fraud defendants in often avoiding or reducing the state share of Medicaid payments as part of their liability under the FCA.

Of the states with FCA Medicaid laws on the subject, sixteen state laws have been approved by the Office of the Inspector General<sup>4</sup> as compliant with the federal guidelines with the exceptions being Louisiana, Florida, New Hampshire, New Jersey, New Mexico and Oklahoma. The usual question is whether the state law is “at least as effective in rewarding and facilitating qui tam actions” as are the provisions in the federal FCA. Florida’s law, for instance, was held non-compliant by OIG because it subjected relators to a full award of the defendant’s attorney’s fees if the relator tried the case and lost.

The Taxpayers Against Fraud Education Fund has an Interactive US Map with links to state FCA statutes: [www.taf.org/states-false-claims-acts](http://www.taf.org/states-false-claims-acts). Apria Healthcare has a list of all state whistleblower laws with a short description<sup>5</sup>.

### **Whistleblowing in Alaska**

Alaska has not enacted a false claims act of its own. Nor has the state enacted other forms of whistleblower protection laws with three narrow exceptions.

One is for whistleblowing state employees involved in any civil controversy with the state, even as a witness or advocate. AS 39.90.100 State employees may not be retaliated against for their investigatory or rhetorical activities.

A second statute protects nurses who immediately report to the state board the improper delegation of professional duties and win their claim with the board. AS 08.68.279 is to help nurses being asked by employers to provide patient treatment only a physician should provide.

Whistleblowers in the medical field exposing harmful medical care have no statutory protection in Alaska at all.

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<sup>3</sup> [www.cms.gov/Regulations-and-Guidance/Legislation/DeficitReductionAct/downloads/Checklist1.pdf](http://www.cms.gov/Regulations-and-Guidance/Legislation/DeficitReductionAct/downloads/Checklist1.pdf)

<sup>4</sup> State False Claims Act Reviews, Office of Inspector General, U.S. Department of Health and Human Services <http://oig.hhs.gov/fraud/state-false-claims-act-reviews/index.asp>

<sup>5</sup> Information about State False Claims Acts or Similar Laws, Attachment 1 [www.apria.com/wp-content/uploads/2014/09/EC006-A1-Information-About-State-False-Claims-Acts-or-Similar-Laws.pdf](http://www.apria.com/wp-content/uploads/2014/09/EC006-A1-Information-About-State-False-Claims-Acts-or-Similar-Laws.pdf)

A third Alaska law protects citizens who report violations of law to the Legislature, including legislative employees. Informers of this sort may not be threatened or discriminated against, presumably by legislators. AS 24.60.035

The Alaska courts have also upheld a common law protection for whistleblowers from retaliation, in the same case where the award of punitive damages was prohibited under both the statute and the common law. *Alaska Housing Finance Corp. v. Salvucci*, 950 P.2d 1116 (Alaska 1997). Since that decision, the statute has been amended to allow for the award of punitive damages in a proper case.

With the exception of state employees battling the state where punitive damages and full attorney's fees can be awarded for employment retaliation, Alaska whistleblowers cannot even hope to be made completely whole once they are harmed by unlawful retaliation. Indeed, if their exposure of criminal activity involves documents or other confidences deemed private by a wrongdoing employer, the whistleblower can lawfully be fired for the act of blowing the whistle with no recourse available. Most employment contracts prohibit employees from disclosing company papers to anyone.

Presently, a state employee who cannot get fraud investigated in their workplace has nowhere else to go in safety, no direction provided. When the boss you report to is the wrongdoer in question, the state employee can feel to be in quite a fix except in an extreme case.

- There is no special incentive in Alaska law to reward effective whistleblowing in any way.

### **A False Claims Act for Alaska**

The policy aims in creating a false claims act for Alaska are obvious. Not only is fraud against the taxpayers detected and compensated much more often, the general deterrent effect on the commission of fraud is tremendous. Anyone with proof can turn wrongdoers in and even be paid for the favor. A state contractor's employees become potential arms of law-enforcement when it comes to protecting the public treasury from fraud.

The Cardozo Law Review has published an excellent summary of the strengths and weaknesses of qui tam laws, especially those for states<sup>6</sup>.

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<sup>6</sup> STATES, STATUTES, AND FRAUD: A STUDY OF EMERGING STATE EFFORTS TO COMBAT WHITE COLLAR CRIME by Pamela Bucy, Jonathan Diesenhaus, Marc S. Raspanti, Holly Chestnut, Katherine Merrell, Chad Vacarella, (2010). CARDOZO LAW REVIEW, Vol 31:5, Page 1523. <http://cardozolawreview.com/Joomla1.5/content/31-5/BUCY.31-5.pdf>

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The apparent unforeseen consequences of enacting a false claims act must also be taken into account.

Whistleblower laws can be used to force investigations and court hearings that have little merit under the act. Mean-spirited or attention-seeking whistleblowers may be given a stage.

These concerns have more to do with usual people problems than anything else. People of explosive character are going to behave in destructive ways whatever the present rules may be. Redundancy in examining alleged fraud is actually a good thing. It is easy to file lawsuits, with or without a false claims act in place.

If a relator brings a frivolous suit, the state can dismiss the case over the relator's objections. It is the state's claim to reimbursement, after all.

*"I don't care how you do it, but get the damn business."*

When his supervisor gave these instructions to Dean Steinke, a sales manager for the pharmaceutical giant Merck & Company, Steinke told himself, "You know what? They're not going to get away with it."

"It" was giving payments to physicians and hospitals to prescribe the medicines Vioxx, Zocor, and Pepcid instead of cheaper generic alternatives. "It" was also giving hospitals up to 92% discounts on these drugs and not offering Medicaid the same discount, as required by law. In 2000 and 2005, Steinke filed qui tam actions under federal and Nevada False Claims Acts. In 2008, these cases settled, with Merck agreeing to pay \$400 million to the United States, forty-nine states, and the District of Columbia. Like many cases brought under the federal False Claims Act (FCA) and an increasing number of state False Claims Acts, a private citizen, not a prosecutor, initiated the Merck case.

-- *From: STATES, STATUTES, AND FRAUD*, Bucy et al, (2010)

There is also the prospect of a sanction under Alaska Civil Rule 11 awarding full attorney's fees against the relator personally as an ultimate safeguard against the filing of a frivolous suit.<sup>7</sup>

Since the new statute only affects clear wrongdoing, there is little general chilling effect to the business environment among honest Alaskans working with or for the state.

Bill Falsey, now Anchorage Municipal Attorney, has asked whether Alaska should have a qui tam, False Claims Act<sup>8</sup>.

<sup>7</sup> The usual, mandatory award of partial attorney's fees under Alaska's loser pays law would likely present no problem in the review by the OIG since it is generic in character and equally applicable to the litigants. Alaska Rule of Civil Procedure 82 Such costs when awarded are for the relator to pay should they prosecute the case alone.

<sup>8</sup> Should there be a law? Qui tam statutes by Bill Falsey, (June 2014), Alaska Bar Rag. [www.kreig.net/ProBono/AkWaste/AkBarRag\\_1404\\_WhoTamStatutes.pdf](http://www.kreig.net/ProBono/AkWaste/AkBarRag_1404_WhoTamStatutes.pdf)

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The draft Alaska False Claims Act the Alaska Policy Forum offers for consideration by the Legislature is drawn from a variety of such laws across the nation. It is drawn using the same procedure and remedies contained in Lincoln's Law, something now all but required by federal law for HHS FCA cases. The state's share of Medicaid fraud recoveries will likely more than double with the passage of this proposed act.

Importantly, the proposed act bars Alaska employers from limiting the whistleblower activities of its employees. This effectively shields whistleblowers from job retaliation, even those whistleblowers who are reporting on confidential matters, private or public.

A second tremendous advantage arises from adopting the same language as that contained in the Federal False Claims Act.

That advantage is the availability of federal legal precedent to assist Alaska judges and lawyers in interpreting the new state law. Using much of the exact language of Lincoln's Law should greatly reduce uncertainty in the new law's scope and application and therefore hopefully reduce the volume of contested litigation in the courts.

Most importantly, the draft law establishes for the first time in Alaska an effective legislative program to combat all forms of fraud, one using the resources of private citizens as well as public offices. (Draft Alaska False Claims Act, Appendix A) .

### **Fraud Hotlines: Bringing Greater Transparency to Every State Office and Every State Contractor**

Many states and localities have enacted whistleblower protection in the form of a "hotline" number where citizens, specifically including state employees, may report the squandering of public dollars and hopefully help bring it to an end.

#### **FEDERAL FALSE CLAIMS ACT SUIT RECOVERS \$1.5 MILLION IN ALASKA**

Alaska DigiTel owner agrees to pay \$1.56 million to settle suit - **SUBSIDY: Whistleblower said telephone service sold to unqualified subscribers**

One of Alaska's telecom giants has paid \$1.56 million to federal authorities to settle a case alleging rampant abuse of a federal phone-bill subsidy for low-income households in the Anchorage area... a local office manager filed a whistleblower suit in federal District Court accusing her employer ... Alaska DigiTel of defrauding the phone subsidy program. The woman, Natalia Napoleon, [is] originally from the Western Alaska village of Akiachak...federal prosecutors decided to use their right to take over Napoleon's case... As the whistleblower, Napoleon is entitled to about \$260,000 of the settlement.

-- From: ELIZABETH BLUEMINK - Anchorage Daily News, 2/23/11, United States ex rel. Napoleon v. Alaska DigiTel et al. No. 3:08CV66-JWS (D. Ak.), [www.adn.com/article/20110222/alaska-digitel-owner-agrees-pay-156-million-settle-suit](http://www.adn.com/article/20110222/alaska-digitel-owner-agrees-pay-156-million-settle-suit)

Callers to official hotlines are typically protected from harm connected to their whistleblowing, at least in making the hotline call, and are sometimes rewarded for the information they provide. Some laws provide for confidentiality to the caller, but many do not.

In Alaska there is a variety of such hotlines, public and private, including one for reporting fraud under the Worker's Compensation Act, another for the Permanent Fund Dividend, one for child abuse reporting, and another for abuse of frail or disabled adults that is oddly combined with Medicaid fraud reporting.

All the Alaska hotlines identified above are run by the relevant state agency for enforcement. The hotline calls are a sideline activity for the state offices that operate the lines.

Alaska does not have an office akin to an inspector general. Inspectors general, in any event, have not proven especially effective in combating contractor fraud or state insider fraud<sup>9</sup>.

There is no Alaska hotline intended to report waste, fraud and abuse of taxpayer funds that comes in all forms, including, for instance, state contractor fraud. Contractor fraud is by far the largest source of federal FCA recoveries.

The present Alaska laws do not offer special protection for callers to the fraud hotline and provide no tangible incentive to make the call, other than a "reward" *may* be given in certain cases.

In 2005, Representatives Kevin Meyer and Beth Kertulla introduced legislation<sup>10</sup> to establish a fraud, waste and abuse hot line for Alaska. This bill should be reintroduced and modified to allow anyone to call the hot line, not just state employees. Incorporating cash incentives for reporting fraud should also be included to ensure that the program really works. This legislation should also mandate that all government entities, including school districts, implement FWA programs that include monetary incentives.

The Alaska Policy Forum makes a unique proposal on the question of FWA reporting and FCA enforcement policy. We propose the state hotline be awarded to a qualified private-bidder who is given the power of subpoena to investigate hotline claims made and to help bring recoveries to fruition, working with relators and with state law enforcement offices.

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<sup>9</sup> The Alaska Office of the Ombudsman has an independent character. That office though is sharply restrained in its authority, limited to issuing reports at its discretion well after a confidential investigation has been completed. The Office of Ombudsman as of now is seldom involved in the investigation of false claims committed against the state. Such an assignment would transform the office of the Ombudsman and its character.

<sup>10</sup> House Bill 86 - "An Act establishing in the office of the ombudsman a state executive branch employee fraud, waste, and abuse report hotline program."  
[www.legis.state.ak.us/basis/get\\_bill.asp?session=24&bill=HB86](http://www.legis.state.ak.us/basis/get_bill.asp?session=24&bill=HB86)

It is simply better public policy for the body being reported to with hotline calls to be *wholly independent of government agencies*, at first anyway.

A private organization performing collections is more focused on productivity and cost-savings than busy state offices. Hotline callers may be more comfortable talking with fellow private citizens compared to state law enforcement people. Callers may have more confidence in the assurances they are being given if they know the sole goal is reimbursement, not criminal prosecution. Callers would also know their names are not going into some state database.

The taxpayers would be freed of the burden of additional state bureaucracy through bidding out a large share of the FCA enforcement duties.

The hotline number is likely to become a new, substantial source of state revenue on a permanent basis, a punitive tax on cheaters that are discovered. Indeed, it all seems too good to be true.

The Alaska Policy Forum's proposed Alaska statute in this area establishes a hotline number for the reporting of waste, fraud and abuse, including for state employees, operated by a private entity, presumably a group of attorneys.

Under the proposed law, the act of making the call would be immune from civil liability and held confidential unless the caller specifically authorizes the use of their name. Callers would also be advised of the availability to all citizens of the Alaska False Claims Act to root out fraud against the state (should such an act be passed by the Legislature). If no such act is applicable, the hotline callers would be rewarded with the payment of 10% of any net recovery made against a wrongdoer that was directly linked to the hotline caller's information, a well-publicized fact. (Draft Alaska Whistleblower Protection Act, Attachment 2)

All funds recovered by the efforts of the Alaska Fraud Line would earn the contractor of the hotline a share for operating expenses, say 20% or even much lower. What would be a sufficient incentive to attract a qualified bidder is unknown. The percentage can always be higher or lower depending on what private bids for the work are submitted.

A "costs only first-paid" formula could also be privately bid, also contingent on office recoveries.

## **Conclusion**

It is past time for Alaska to take the same action so many other states are taking when it comes to protecting the public treasury from fraud in all of its forms. In these difficult fiscal times it is imperative that Alaska watch every dollar. There are many successful laws in this area across the nation, including Lincoln's Law itself.

## **Because:**

**“Thieves Operate in the Dark, Yet are Visible in  
Ways Many Can See.”**

***-- Scottish Proverb***

Appendix A – Proposed Alaska False Claims Act

Appendix B – Proposed Alaska Whistleblower Protection Act

## Appendix A – Proposed **ALASKA FALSE CLAIMS ACT**

### ARTICLES:

1. Acts subjecting person to treble damages, costs and civil penalties; exceptions.
2. Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as relator plaintiff; judicial procedure.
3. Employer interference with employee disclosures, etc.; liability of employer; remedies of employee.
4. Limitation of actions; activities antedating this article; burden of proof, evidence.
5. Remedies under other laws; severability of provisions; liberality of article construction.
6. Distribution, State Training

### Definitions

For purposes of this chapter:

(a) "Claim" includes any request or demand for money, property, or services made to any employee, officer, or agent of the state or of any political subdivision, or to any contractor, grantee, or other recipient, whether under contract or not, if any portion of the money, property, or services requested or demanded issued from, or was provided by, the state (hereinafter "state funds") or by any political subdivision thereof (hereinafter "political subdivision funds").

(b) "Knowing" and "knowingly" mean that a person, with respect to information, does any of the following:

- (1) Has actual knowledge of the information.
- (2) Acts in deliberate ignorance of the truth or falsity of the information.
- (3) Acts in reckless disregard of the truth or falsity of the information.

Proof of specific intent to defraud is not required.

(c) "Political subdivision" includes any city, borough, municipality, tax or assessment district, or other legally authorized local governmental entity with jurisdictional boundaries.

(d) "Prosecuting authority" refers to the city, borough or municipal attorney, counsel, or other local government official charged with investigating, filing, and conducting civil legal proceedings on behalf of, or in the name of, a particular political subdivision.

(e) "Person" includes any natural person, corporation, firm, association, organization, partnership, business, or trust or political subdivision of the state.

**Article 1** Acts subjecting person to treble damages, costs and civil penalties; exceptions

(a) Any person who commits any of the following acts shall be liable to the state or to the political subdivision for three times the amount of damages which the state or the political subdivision sustains because of the act of that person. A person who commits any of the following acts shall also be liable to the state or to the political subdivision for the costs of a civil action brought to recover any of those penalties or damages, and may be liable to the state or political subdivision for a civil penalty of no less than \$2,500 and up to eleven thousand dollars (\$11,000) for each false claim.

Prohibited Acts

(1) Knowingly presents or causes to be presented to an officer or employee of the state or of any political subdivision thereof, a false claim for payment or approval.

(2) Knowingly makes, uses, or causes to be made or used a false record or statement to get a false claim paid or approved by the state or by any political subdivision.

(3) Conspires to defraud the state or any political subdivision by getting a false claim allowed or paid by the state or by any political subdivision.

(4) Has possession, custody, or control of public property or money used or to be used by the state or by any political subdivision and knowingly 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 state or by any political subdivision and knowingly makes or delivers a receipt that falsely represents the property used or to be used.

(6) Knowingly buys, or receives as a pledge of an obligation or debt, public property from any person who lawfully may not sell or pledge the property.

(7) Knowingly makes, uses, or causes to be made or used a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the state or to any political subdivision.

(8) Is a beneficiary of an inadvertent submission of a false claim to the state or a political subdivision, subsequently discovers the falsity of the claim, and fails to disclose the false claim to the state or the political subdivision within a reasonable time after discovery of the false claim.

(b) Notwithstanding the mandatory trebling of a damage award under this section, the court may impose on a defendant only the loss incurred by the state along with fine(s), interest and attorney's fees, if the court finds all of the following:

(i) The person committing the violation furnished officials of the state or of the political subdivision responsible for investigating false claims violations with all information known to that person about the violation within 30 days after the date on which the person first was informed of the false claim allegation.

(ii) The person fully cooperated with any investigation by the state or a political subdivision of the violation and supplied information to authorities that materially added to their investigation.

(iii) At the time the person furnished the state or the political subdivision with information about the violation, no criminal prosecution, civil action, or administrative action had commenced with respect to the violation, and the person did not have actual knowledge of the existence of an investigation into the violation.

(c) Liability under this section shall be joint and several for any act committed by two or more persons.

(d) This section does not apply to any controversy involving an amount of less than one thousand and five hundred dollars (\$1500) in value. For purposes of this article, "controversy" means any one or more false claims submitted by the same person in violation of this article.

**Article 2** Attorney general investigations and prosecutions; powers of prosecuting authority; civil actions by individuals as qui tam plaintiff; judicial procedure

(1) The Office of Attorney General shall diligently investigate apparent violations involving state funds brought to its attention by a relator plaintiff. If the Attorney General finds that a person has likely committed a false claim, the Attorney General may bring a civil action under this section against that person or decline to do so, whether relying on the relator plaintiff to do so or not.

(2) If the Attorney General brings a civil action under this subdivision on a claim involving political subdivision funds as well as state funds, the Attorney General shall, on the same date that the complaint is filed in this action, serve by mail with "return receipt request[ed]" a copy of the complaint on the appropriate prosecuting authority.

(3) The prosecuting authority shall have the right to intervene in an action brought by the Attorney General under this subdivision within 60 days after receipt of the complaint pursuant to paragraph (2). The court may permit intervention thereafter upon a showing that all of the requirements of Section 387 of the Code of Civil Procedure have been met.

(4) The prosecuting authority of a political subdivision shall diligently investigate false claims involving political subdivision funds. If the prosecuting authority finds that a person likely committed a false claim, the prosecuting authority may bring a civil action under this section against that person or decline to do so, whether relying on the relator plaintiff to do so or not.

(5) If the prosecuting authority brings a civil action under this section on a claim involving state funds as well as political subdivision funds, the prosecuting authority shall, on the same date that the complaint is filed in this action, serve a copy of the complaint on the Attorney General.

(6) Within 60 days after receiving the complaint pursuant to paragraph (2), the Attorney General shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the Attorney General shall assume primary responsibility for conducting the action and the prosecuting authority shall have the right to continue as a party.

(ii) Notify the court that it declines to take over the action, in which case the prosecuting authority shall have the right to conduct the action.

(7) A person may bring a civil action for a violation of this article for the person and either for the State of Alaska in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the relator plaintiff. Once filed, the action may be dismissed only with the written consent of the court, taking into account the best interest of the parties involved and the public purposes behind this act.

(8) A complaint filed by a private person relator under this subdivision shall be filed in superior court under seal and may remain under seal without extension for 90 days. No service shall be made on the defendant(s) until after the complaint is unsealed.

(9) On the same day as the complaint is filed pursuant to paragraph (2), the relator plaintiff shall serve by mail with "return receipt requested" the Attorney General with a copy of the complaint and a written disclosure of substantially all material evidence and information the person possesses.

(10) Within 90 days after receiving a complaint alleging violations which involve state funds but not political subdivision funds, the Attorney General shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action, in which case the seal shall be lifted and the relator plaintiff shall have the right to conduct the action.

(11) Within 15 days after receiving a complaint alleging violations which exclusively involve political subdivision funds, the Attorney General shall forward the complaint and written disclosure to the appropriate prosecuting authority for disposition and shall notify the relator plaintiff of the transfer.

(12) Within 45 days after the Attorney General forwards the complaint and written disclosure, the prosecuting authority shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action, in which case the seal shall be lifted and the relator plaintiff shall have the right to conduct the action.

(13) Within 15 days after receiving a complaint alleging violations which involve both state and political subdivision funds, the Attorney General shall forward copies of the complaint and written disclosure to the appropriate prosecuting authority, and shall coordinate its review and investigation with those of the prosecuting authority.

(14) Within 60 days after receiving a complaint alleging violations which involve both state and political subdivision funds, the Attorney General shall do either of the following:

(i) Notify the court that it intends to proceed with the action, in which case the seal shall be lifted.

(ii) Notify the court that it declines to take over the action but that the prosecuting authority of the political subdivision involved intends to proceed with the action, in which case the seal shall be lifted and the action shall be conducted by the prosecuting authority.

(iii) Notify the court that both it and the prosecuting authority decline to take over the action, in which case the seal shall be lifted and the relator plaintiff shall have the right to conduct the action.

(15) If the Attorney General proceeds with the action, the political subdivision shall be permitted to intervene in the action within 60 days after the Attorney General notifies the court of its intentions. The court may authorize intervention thereafter upon a showing that all the requirements of the Code of Civil Procedure have been met.

(16) Upon a showing of good cause and reasonable diligence in its investigation, the Attorney General or the prosecuting authority of a political subdivision may move the court for extensions of the time during which the complaint remains under seal, but in no event may the complaint remain under seal for longer than 90 days.

(17) When a person brings an action under this subdivision, no other person may bring a related action based on the facts underlying the pending action.

(18) No court shall have jurisdiction over an action brought against a member of the State Legislature, a member of the state judiciary, an elected official in the executive branch of the state, or a member of the governing body of any political subdivision if the action is based on evidence or information known to the state or political subdivision when the action was brought.

(19) In no event may a person bring an action which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the state or political subdivision is already a party.

(20) The courts shall dismiss false claim allegations under this chapter that are based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in an investigation, report, hearing, or audit conducted by or at the request of the Legislature, an auditor, or governing body of a political subdivision, or information coming from the news media, unless the action is brought by the Attorney General or the prosecuting authority of a political subdivision, or the person bringing the action is an original source of the information or the Attorney General objects to the dismissal of the claims after timely notice of a preliminary decision to dismiss.

(21) The phrase "original source" means a person who voluntarily disclosed the information to the government prior to the public disclosures or, alternatively, has information that is independent of and materially adds to the publically disclosed allegations and whose efforts provided the basis or catalyst for the investigation of wrongdoing.

(22) No court shall have jurisdiction over an action brought based upon information discovered by a present or former employee of the state or a political subdivision during the course of his or her employment, unless that employee first in good faith exhausted existing internal procedures for reporting and seeking recovery of falsely claimed sums through official channels, and unless the state or political subdivision declined to act or failed to act on the information provided by the state employee within a reasonable period of time, such period to be no longer than six months.

(23) If the state or political subdivision proceeds with the action, it shall have the primary responsibility for prosecuting the action. The relator plaintiff shall have the right to continue as a full party to the action or may decline to do so.

(24) The state or political subdivision may seek to dismiss the action for good cause notwithstanding the objections of the relator plaintiff if the relator plaintiff has been notified by the state or political subdivision of the filing of the motion and the court has provided the relator plaintiff with an opportunity to oppose the motion and present evidence at a hearing.

(25) The state or political subdivision may settle the action with the defendant notwithstanding the objections of the relator plaintiff if the court determines, after a hearing providing the relator plaintiff an opportunity to present evidence, that the proposed settlement is fair, adequate, and reasonable under all of the circumstances.

(26) If the state or political subdivision elects not to proceed, the relator plaintiff shall have the same right to conduct the action as the Attorney General or prosecuting authority would have had if it had chosen to proceed. If the state or political subdivision so requests, and at its expense, the state or political subdivision shall be served with copies of all pleadings filed in the action and supplied with copies of all deposition transcripts.

(27) Upon timely application, the court shall permit the state or political subdivision to intervene in an action with which it had initially declined to proceed if the interest of the state or political subdivision in recovery of the property or funds involved is not being adequately represented by the relator plaintiff.

(28) If the state or political subdivision is allowed to intervene, the relator plaintiff shall retain principal responsibility for the action and the recovery of the parties shall be determined as if the state or political subdivision had elected not to proceed.

(29) If the Attorney General initiates an action or assumes control of an action initiated by a prosecuting authority or a relator plaintiff, the fees of the office of the Attorney General shall be a fixed 33 1/3 percent of the gross proceeds of the action.

(30) If a prosecuting authority initiates an action or assumes control of an action initiated by a relator plaintiff, the fees of the office of the prosecuting authority shall be a fixed 33 1/3 percent of the gross proceeds of the action.

(31) If a prosecuting authority intervenes in an action initiated by the Attorney General or remains a party to an action assumed by the Attorney General, the court may award the office of the prosecuting authority a portion of the Attorney General's fixed 33 1/3 percent of the recovery, taking into account the prosecuting authority's role in investigating and conducting the action.

(32) If the state or political subdivision proceeds with an action brought by a relator plaintiff, the relator plaintiff shall receive at least 15 percent but not more than 33 1/3 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the relator plaintiff contributed to the prosecution of the action.

(33) If the state or political subdivision does not proceed with an action, the relator plaintiff shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages on behalf of the Government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of such proceeds.

(34) An exception to this payment formula is a present or former employee of the state or political subdivision. Such person shall not be entitled to any minimum guaranteed recovery from the proceeds. The court, however, may award such a relator plaintiff those sums from the proceeds as it considers appropriate, but in no case more than 10 percent of the proceeds if the state or political subdivision goes forth with the action or 25 percent if the state or political subdivision declines to go forth, taking into account the significance of the information, the role of the relator plaintiff in advancing the case to litigation, and the scope of, and response to, the employee's earlier reports to the state through official channels.

(35) Where the action is one which the court finds to be based primarily on information from a present or former employee who actively participated in the fraudulent activity, the employee shall not be entitled to any recovery from the proceeds unless the misconduct was first exposed by the employee. The court may award such a relator plaintiff such sums from the proceeds as it considers appropriate, but in no case more than 20 percent of the proceeds.

(36) Net recoveries under this Chapter shall revert to the state general fund if the underlying false claims involved state funds exclusively and to the political subdivision if the underlying false claims involved political subdivision funds

exclusively. If the violation involved both state and political subdivision funds, the court shall make an apportionment between the state and political subdivision based on their relative share of the funds falsely claimed.

(37) For purposes of this section, "proceeds" include civil penalties as well as double or treble damages, punitive damages and attorney's fees awarded for the state.

(38) If the state, political subdivision, or the relator plaintiff prevails in or settles any action, the relator plaintiff shall receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable costs and attorneys' fees. All expenses, costs, and fees shall be awarded against the defendant and under no circumstances shall they be the responsibility of the state or political subdivision. The state or political subdivision is not liable for any award of attorney's fees or costs for the defendant in a case brought by a plaintiff relator.

(39) The court may stay an act of discovery of the person initiating the action for a period of not more than 60 days if the Attorney General or local prosecuting authority show that the act of discovery would interfere with an investigation or a prosecution of a criminal or civil matter arising out of the same facts, regardless of whether the Attorney General or local prosecuting authority proceeds with the action. Such a showing shall be conducted in camera. The court may extend the 60-day period upon a further showing in camera that the Attorney General or local prosecuting authority 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.

(40) Upon a showing by the Attorney General or local prosecuting authority that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Attorney General's or local prosecuting authority'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 person's participation, including the following:

- (i) Limiting the number of witnesses the person may call.
- (ii) Limiting the length of the testimony of such witnesses.
- (iii) Limiting the person's cross-examination of witnesses.
- (iv) Otherwise limiting the participation by the person in the litigation.

**Article 3** Employer interference with employee disclosures, etc.; liability of employer, remedies of employee

(1) No employer may enforce an employment contract provision, a workplace rule or policy in any form preventing an employee from disclosing information, including company papers, to a government law enforcement agency in furtherance of a false claims action, including investigating, initiating, testifying, or assisting in an action under this chapter.

(2) No employer shall discharge, demote, suspend, threaten, harass, deny promotion to, or in any other manner discriminate against, an employee in the terms and conditions of employment because of lawful acts done by the employee on behalf of the employee or others in disclosing information to a government or law enforcement agency or in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed.

(3) An employer who commits a violation shall be liable for all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay, interest on the back pay, compensation for any special damage sustained as a result of the discrimination, and, where appropriate, the award of punitive damages. In addition, the defendant shall be required to pay the full litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate superior court of the state for the relief provided in this provision.

(4) An employee who is discharged, demoted, suspended, harassed, denied promotion, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of active participation in the conduct which directly or indirectly resulted in a false claim being submitted to the state or a political subdivision shall be entitled to the recourse remedies if, and only if, both of the following occur:

(i) The employee voluntarily disclosed information to a government or law enforcement agency or acted in furtherance of a false claims action, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed.

(ii) The employee had been harassed, threatened with termination or demotion, or otherwise coerced by the employer or its management into engaging in the fraudulent activity in the first place.

**Article 4** Limitation of actions; activities antedating this article; burden of proof, evidence

(1) A civil action under Section 12652 may not be filed more than three years after the date of discovery by the official of the state or political subdivision charged with responsibility to act in the circumstances or, in any event, no more than six years after the date on which the violation is committed.

(2) A civil action may be brought for activity prior to the effective date of this article if the limitations period set in subdivision (a) has not lapsed.

(3) In any action under this chapter, the state, the political subdivision, or the relator plaintiff shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(4) Notwithstanding any other provision of law, a guilty verdict rendered in a criminal proceeding charging false statements or fraud, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the

essential elements of the offense in any action which involves the same transaction as in the criminal proceeding.

**Article 5** Remedies under other laws; severability of provisions; liberality of article construction

(1) The provisions of this article are not exclusive, and the remedies provided for in this article shall be in addition to any other remedies provided for in any other law or available under common law.

(2) If any provision of this article or the application thereof to any person or circumstance is held to be unconstitutional, the remainder of the article and the application of the provision to other persons or circumstances shall not be affected thereby.

(3) In cases filed under this Chapter, counterclaims filed against the plaintiff relator by the defendant are barred. Such suits may be brought in a separate action.

(4) The award of attorney's against a plaintiff under any rule of procedure shall be paid solely by the state when it prosecutes the suit and by the relator solely when the relator prosecutes the suit.

(4) This chapter shall be liberally construed and applied to promote the public interest.

**Article 6** Distribution, State Training

(1) Every public employee and every employee of state contractors shall be provided a memorandum by the Department of Commerce publicizing the policies and provisions of this Chapter, including needed contact information for making a false claim allegation. Each such person shall certify in writing they have read and understood the content of the memorandum.

(2) The Department of Commerce shall provide or delegate to state agencies job-training for state employees and state contractors on the content of this Chapter that includes an exam, to be incorporated into existing training modalities, where possible.

(3) The Department of Commerce shall organize the publication of the basic content of this Chapter generally into all private-sector bids and state contracting materials involving the expenditure of state funds.

(4) Every state office involved in procurement of any form shall display a poster outlining the content of this Chapter and contact information for submitted alleged false claims. Such posters must also be utilized by state contractors in their workplace if the contractor is expected to receive more than fifty thousand dollars of state funds in a calendar year.

## **Appendix B – Proposed ALASKA WHISTLEBLOWER PROTECTION ACT**

**Policy** – Alaska encourages the prompt, unencumbered sharing of information that might prove public dollars are being stolen in some way. This article seeks to facilitate an effective pathway to use for whistleblowers revealing the squandering of state funds.

**The Alaska Fraud Hotline** – The Alaska Fraud Hotline is hereby created authorizing the Department of Commerce to administer the program with existing staff and procedures employing private-bidding for answering the Hotline and following through on the allegations made, when credible. The operation of the Hotline is maintained in the private sector by the use of Department biennial bid awards for the operation of the hotline. The person or organization awarded the hotline operation duties shall be known as the “Fraud Hotline Operator”.

**Duties, Powers and Compensation of the Fraud Hotline Operator** – The following requirements apply:

1. The Fraud Hotline Operator shall be a business entity independent of other organizations. All investors and managers in an entity bidding to become the Fraud Hotline Operator shall be disclosed prior to the bid and publically disclosed if, and when, the bid is awarded to an entity. The Hotline shall be operated in an office visibly independent of any other business entity with signage and contact information of all forms dedicated solely to the Hotline. No independent commercial lease is required for the Hotline operation though a lease or sublease of some form, including paid rent, is required.
2. Have personnel available to answer the Hotline during normal business hours and always be prepared then to initiate an investigation or inquiry where called for. Outside business hours a recorded message to Hotline callers may be used which message must provide a further immediate contact number in cases where advice is critically needed by the caller. All Hotline callers, in person or by recorded message, will be informed of the availability of the Alaska False Claims Act to combat fraud against the public, including reference to a web page maintained by the Fraud Hotline Operator.

Contacts to the Hotline will also be available by electronic mail and regular mail in addition to contacts by telephone.

3. All viable instances of fraud against the public presented by Hotline callers shall be further investigated in one of three ways:

(i) The Fraud Hotline Operator may initiate a false claims investigation or inquiry of its own working with the Hotline caller as a possible relator under the Alaska False Claims Act.

(ii) The matter may be reported to the Office of the Attorney General by the Fraud Hotline Operator in sufficient detail to allow for a further decision by that office with no further action taken by the Fraud Hotline Operator.

(iii) The Hotline caller decides to pursue the matter without further assistance under the Alaska False Claims Act and does so in a reasonable time thereafter.

4. The Fraud Hotline Operator shall, while under contract, enjoy the power of subpoena in connection with documents and tangible objects as presently possessed by state criminal prosecutors applying the same standards and procedures for use of the power. This subpoena power granted here is limited to inquiries and investigations prompted by a Hotline caller or cases referred to the Fraud Hotline Operator by a state agency.

5. In instances that do not involve a potential conflict-of-interest with a Hotline caller, the Fraud Hotline Operator may in its private business operations work on Alaska False Claims Act litigation that is unconnected to Hotline calls, including acting as a relator in an appropriate instance or as counsel for a relator.

6. The records of the Alaska Fraud Hotline, though public records in the end, shall be held with the same privacy protections as those held in the private-sector, except for the narrow purposes of routine auditing by the state as a private contractor for the state. At the end of a contracting period as the Fraud Hotline Operator, all Hotline records shall be transferred to the next bid awardee of the state contract.

7. The Alaska Fraud Hotline Operator contract shall be awarded by private bidding administered by the Department of Commerce employing either a percentage of fund recovery formula or a "costs only, paid-first from proceeds" formula. The Department is not authorized to award state funds directly for the operation of the Fraud Hotline.

8. The Department is authorized to compile guidelines for the private bid offer, including the duties and powers of the post and office capacities and expertise needed to be met.

9. No civil liability will attach to the Fraud Hotline Operator for the exercise of its discretion in acting upon claims submitted to its office by Hotline callers. Hotline callers are always free to contact other state offices concerning their information and its import.

#### **Hotline Caller Protections and Limitations.**

1. Any Hotline caller has the option of remaining anonymous, partially or completely, whether represented by counsel or not, including to the Fraud Hotline Operator and the state. Hotline callers must specifically authorize the use of their name in connection with the content of their call or as part of a later inquiry or investigation. Hotline callers may not place any limitation on the use of the information they provide to the Hotline. Hotline callers who remain anonymous may have less certainty applied to their claims of wrongdoing.

2. No civil liability of any form shall be imposed for the act of calling the Alaska Fraud Hotline and providing information on an alleged false claim committed against the state.

3. Any person may be a Hotline caller, including state employees and non-Alaskans.

4. In cases where there is a recovery under the Alaska False Claims Act for wrongful acts that were first directly brought to the attention of the state with supporting evidence by a Hotline caller, so long as that caller is not a relator for the claim recovery, the Hotline caller shall be awarded ten percent of the net recovery received at the time of payment by the defendant(s). The previous acts of the Hotline caller as a state worker in the scope of their employment shall not be disqualifying as a first notice to the state for purposes of the award.

5. State employees must first exhaust the remedies provided in their workplace for investigating fraud against the state before qualifying for the award based on the Hotline call, except in the instance of wrongdoing committed by the state employee's work supervisor(s).