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### FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

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Mr. LEAHY, from the Committee on the Judiciary,  
submitted the following

### R E P O R T

[To accompany S. 386]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 386), to improve enforcement of mortgage fraud, securities fraud, financial institution fraud, and other frauds related to federal assistance and relief programs, for the recovery of funds lost to these frauds, and for other purposes, having considered the same, reports favorably thereon, with an amendment, and recommends that the bill, as amended, do pass.

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#### I. BACKGROUND AND PURPOSE OF THE FRAUD ENFORCEMENT AND RECOVERY ACT OF 2009

On February 5, 2009, Chairman Leahy and Senators Grassley and Kaufman introduced the Fraud Enforcement and Recovery Act of 2009 (FERA). Senators Klobuchar and Schumer have joined as cosponsors. This legislation will increase accountability for the corporate and mortgage frauds that have contributed to the recent economic collapse and will help protect Americans from future

frauds that exploit the economic assistance programs intended to restore and rebuild our economy.

This legislation provides substantial funding for the Justice Department and other agencies to hire prosecutors, agents, and analysts in order to restore their capacity to pursue mortgage, corporate, and other financial fraud during this economic downturn. The bill also provides important clarifications to current criminal and civil fraud statutes to ensure that law enforcement has the tools it needs to prevent and punish these frauds, as well as to recover taxpayer money lost to these frauds.

#### A. BACKGROUND

Our Nation is in the midst of its most serious economic crisis since the Great Depression. With each passing week, tens of thousands more Americans lose their jobs to layoffs, and many thousands more are losing their homes to foreclosure. As we learn more and more each day about the causes of this debacle, it is clear that unscrupulous mortgage brokers and Wall Street financiers were among the contributors to this economic collapse. With the new tools and resources in this bill, it will be easier to ensure that all of those responsible for these financial crimes are held accountable.

While the full scope of the fraud that helped trigger the economic crisis is still unknown, we do know a great deal about what went wrong. As banks and private mortgage companies relaxed their standards for loans, approving ever riskier mortgages with less and less due diligence, they created an environment that invited fraud. Private mortgage brokers and lending businesses came to dominate the home housing market, and these companies were not subject to the kind of banking oversight and internal regulations that had traditionally helped to prevent fraud. We are now seeing the results of this lax supervision and accountability.

In the last six years, suspicious activity reports alleging mortgage fraud that have been filed with the Treasury Department have increased nearly tenfold to more than 62,000 in 2008. In the last three years, the number of criminal mortgage fraud investigations opened by the Federal Bureau of Investigation (FBI) has more than doubled, and the FBI anticipates a new wave of cases that could double that number yet again in coming years. Despite these increases, the FBI currently has fewer than 250 Special Agents nationwide assigned to these financial fraud cases. At current levels, they cannot individually review, much less thoroughly investigate, the more than 5,000 fraud allegations received by the Treasury Department each month.

Of course, the problem is not limited to mortgage frauds. As is so common in today's financial markets, home mortgages were packaged together and turned into securities that were bought and sold in largely unregulated markets on Wall Street. Here again, the environment invited fraud. As the value of the mortgages started to decline with falling housing prices, Wall Street financiers began to see these mortgage-backed securities unravel. Unfortunately, some were not honest about these securities, leading to even more fraud and victimizing investors nationwide.

All of this fraud has contributed to an unprecedented collapse in the mortgage-backed securities market. In the past year, banks and financial institutions in the United States alone have suffered more

than \$500 billion in losses associated with the subprime mortgage industry. Some of our Nation's largest and most venerable financial institutions collapsed as a result. The list of publicly traded companies that declared bankruptcy or have been taken over by the Federal Government because of the mortgage-backed securities market collapse includes Fannie Mae, Freddie Mac, Bear Stearns, IndyMac, and Lehman Brothers.

To make sure this kind of collapse cannot happen again, we must reinvigorate our anti-fraud measures and give law enforcement agencies the tools and resources they need to root out fraud so that it can never again place our financial system at risk. Taxpayers, who bear the burden of this financial downturn, deserve to know that the Government is doing all it can to hold responsible those who committed fraud in the run-up to this collapse.

#### B. PURPOSE OF THE LEGISLATION

This bipartisan legislation will reinvigorate our Nation's capacity to investigate and prosecute the kinds of financial frauds that have so severely undermined our financial markets and hurt so many hard working people in these difficult economic times. This legislation provides the resources and new tools needed for law enforcement to uncover and prosecute these frauds and to aggressively work to detect and prevent fraud related to the Government's ongoing efforts to bail out banks and stimulate the economy.

The bill authorizes \$165 million a year for hiring fraud prosecutors and investigators at the Justice Department in fiscal years 2010 and 2011. This includes \$75 million in 2010 and \$65 million in 2011 for the FBI to hire 190 additional special agents and more than 200 professional staff and forensic analysts to nearly double the size of its mortgage and financial fraud program. With this funding, the FBI can expand the number of its mortgage fraud task forces nationwide—from 26 to more than 50—that target fraud in the hardest hit areas in our Nation. This authorization also includes \$50 million a year for U.S. Attorneys' Offices to staff those strike forces and \$40 million for the Criminal, Civil, and Tax Divisions at the Justice Department to provide special litigation and investigative support in those efforts. In addition, the bill authorizes \$80 million a year for fiscal years 2010 and 2011 for investigators and analysts at the U.S. Postal Inspection Service, the U.S. Secret Service, and the Office of Inspector General for the Department of Housing and Urban Development to combat fraud in Federal assistance programs and financial institutions.

This legislation also makes a number of important improvements to fraud and money laundering statutes to strengthen prosecutors' ability to combat this growing wave of fraud. Specifically, the bill amends the definition of "financial institution" in the criminal code (18 U.S.C. § 20) in order to extend Federal fraud laws to mortgage lending businesses that are not directly regulated or insured by the Federal Government. These companies were responsible for nearly half the residential mortgage market before the economic collapse, yet they remain largely unregulated and outside the scope of traditional Federal fraud statutes. This change would apply the Federal fraud laws to private mortgage businesses, just as they apply to federally insured and regulated banks.

The legislation would also amend the false statements in mortgage applications statute (18 U.S.C. § 1014) to make it a crime to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. Currently, this false statements offense only applies to Federal agencies, banks, and credit associations and does not necessarily extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages. Similar to expanding the definition of “financial institution”, this provision would ensure that private mortgage brokers and companies are held fully accountable under this Federal fraud provision. This is a particularly important as false appraisal fraud has been a particularly problematic type of fraud during the recent financial crisis.

The bill would amend the major fraud statute (18 U.S.C. § 1031) to protect funds expended under the Troubled Asset Relief Program and the economic stimulus package, including any Government purchases of preferred stock in financial institutions. The U.S. Government has provided extraordinary economic support to our banking system, and we need to make sure that none of those funds are subject to fraud or abuse. This change will give Federal prosecutors and investigators the explicit authority they need to protect taxpayer funds.

The legislation would amend the Federal securities statute (18 U.S.C. § 1348) to cover fraud schemes involving commodities futures and options, including derivatives involving the mortgage-backed securities that caused such damage to our banking system.

This bill would amend the Federal money laundering statutes (18 U.S.C. §§ 1956, 1957) to correct an erroneous Supreme Court decision in 2008 that significantly weakened these statutes. In *United States v. Santos*, the Supreme Court misinterpreted the money laundering statutes, limiting their scope to only the “profits” of crimes, rather than the “proceeds” of the offenses. 128 S. Ct. 2020 (2008). The Court’s decision was contrary to Congressional intent and will lead to criminals escaping culpability simply by claiming their illegal scams did not make any profit. Indeed, proceeds of “Ponzi schemes” like the Bernard Madoff case, which by their very nature do not include any profit, would be out of the reach of the money laundering statutes under this decision. This flawed decision needs to be corrected immediately, as dozens of significant money laundering cases have already been dismissed.

Lastly, FERA improves one of the most potent civil tools for rooting out waste and fraud in Government—the False Claims Act (18 U.S.C. § 3729 *et seq.*). The effectiveness of the False Claims Act has recently been undermined by court decisions which limit the scope of the law and, in some cases, allow subcontractors paid with Government money to escape responsibility for proven frauds. The False Claims Act must be corrected and clarified in order to protect from fraud the Federal assistance and relief funds expended in response to our current economic crisis.

## II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

### A. INTRODUCTION OF THE BILL

On February 5, 2009, Chairman Leahy introduced the bill, S. 386, with Senators Grassley and Kaufman. Senators Klobuchar and Schumer have joined as cosponsors.

### B. COMMITTEE CONSIDERATION

#### 1. Committee hearing

On February 11, 2009, the Committee held a hearing entitled “*The Need for Increased Fraud Enforcement in the Wake of the Economic Downturn*” to, among other things, consider this legislation. At the hearing, three witnesses testified: FBI Deputy Director John S. Pistole; Special Inspector General for the Troubled Asset Relief Program (“TARP”) Neil M. Barofsky; and the Acting Assistant Attorney General for the Criminal Division of the Justice Department Rita M. Glavin. All three witnesses testified favorably concerning the need for this legislation.

Deputy Director Pistole testified that the number of mortgage fraud cases opened by the FBI had more than doubled in the past three years, with 721 cases open in 2005 and more than 1,800 at the end of 2008. Transcript of Hearing at 13. In his oral and written testimony, Pistole analogized the current situation to the Savings and Loan crisis of the late 1980s and early 1990s, when the Federal Government needed to improve financial fraud enforcement and did so by passing the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) of 1989 and the Crime Control Act of 1990. *Id.* at 27–28; Statement of John S. Pistole, FBI Deputy Director at 1–2. Pistole warned, however, that the losses in this economic crisis dwarf those of the Savings and Loan debacle, and the need for more enforcement is even greater now than it was then. Transcript of Hearing at 28; Statement of John S. Pistole, FBI Deputy Director at 1–2.

Special Inspector General Barofsky described how law enforcement resources had understandably been diverted from traditional “white collar” crime to terrorism following the attacks on September 11, 2001. Transcript of Hearing at 19. This trend left the Justice Department’s capacity to respond to financial and securities fraud significantly weakened, and with the recent trends shifting even more resources to mortgage frauds, other white collar efforts were even further “underfunded and underprosecuted.” *Id.* Barofsky warned that with trillions of dollars being spent under TARP and other associated programs, “it is essential that the appropriate resources be dedicated to meet the challenges of both deterring and prosecuting fraud.” *Id.* at 20.<sup>1</sup>

Acting Assistant Attorney General Glavin emphasized the need for this legislation amidst the current economic crisis. *Id.* at 22. Glavin testified that S. 386 would provide the Justice Department

<sup>1</sup>Barofsky specifically commented on S. 386 as follows: “I applaud the efforts of this Committee to introduce bipartisan legislation, such as the Chairman and Senator Kaufman’s Fraud Enforcement [and] Recovery Act and Senator Schumer and Senator Shelby’s Safe Markets Act. These will ensure that law enforcement has the necessary resources to meet the daunting challenges that [lie] ahead. Such measures will greatly assist us and our partners as we engage in this historic effort to deter and prosecute those who would seek to criminally profit from a national crisis.” Transcript of Hearing at 20.

with needed tools “to aggressively fight fraud in the current economic climate” and “provide key statutory enhancements that will assist in ensuring that those who have committed fraud are held accountable.” *Id.* at 23. Glavin also stated that the resources in the bill were needed for the Justice Department to respond to fraud in the midst of this crisis, and S. 386 was “an important and timely step in the process and we applaud the initiative of this Committee in proposing this Act.” *Id.* at 26.

The Committee also received written testimony supporting S. 386 from the Kenneth M. Donohue, the Inspector General for the Department of Housing and Urban Development, and from William R. Gilligan, Jr., Acting Chief Postal Inspector.

## *2. Committee executive business meetings*

On February 26, 2009, the Committee held an executive committee business meeting to consider S. 386, and other measures, and the bill was held over for further consideration at the request of the ranking member.

On March 5, 2009, the Committee adopted by unanimous consent a complete substitute to the bill offered by the Chairman and Senators Grassley, Schumer, Kaufman, and Klobuchar. The complete substitute made several technical corrections and clarifications to the bill requested by the Justice Department in the appendix to Acting Assistant Attorney General Glavin’s written testimony and in a Justice Department views letter about Section 4 of the bill. The substitute also increased the authorized funding for the FBI by \$10 million in fiscal year 2010 and added \$20 million in fiscal year 2010 and 2011 for the U.S. Secret Service to combat financial fraud. Senator Schumer also offered an amendment to add funding for the Securities and Exchange Commission to the bill, but withdrew the amendment after Senator Grassley opposed it.

The Committee then voted to report the Fraud Enforcement and Recovery Act of 2009, as amended, favorably to the Senate by voice vote.

## III. SECTION-BY-SECTION SUMMARY OF THE BILL

### *Sec. 1. Short title*

This section provides that the legislation may be cited as the Fraud Enforcement and Recovery Act of 2009 (FERA).

### *Sec. 2(a) and 2(b). Definition of financial institution expanded to include mortgage lending businesses and mortgage brokers*

At the height of the subprime lending era, independent mortgage companies—those that are not depository institutions or their subsidiaries or holding company affiliates—made nearly half of the higher-priced, first-lien mortgages in America. The loans originated by these private mortgage companies were not generally covered by current Federal fraud statutes, such as the bank fraud and bank bribery statutes. As a result, these Federal fraud statutes need to be updated by expanding the definition of “financial institution” to include mortgage lending businesses.

The recent financial crisis has further demonstrated how fraudulent mortgages can affect the health of the banking system and the overall economy. Those who engage in frauds on mortgage lending

businesses should be held to the same standards that apply to traditional financial institutions, given the impact of these businesses on federally-insured and federally-regulated institutions.

This section amends the definition of a “financial institution” in Title 18 of the United States Code to include a “mortgage lending business,” which is defined as “an organization \* \* \* which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries” whose activities affect interstate or foreign commerce. The definition also includes “any person or entity that makes in whole or in part a federally-regulated mortgage loan as defined in 12 U.S.C. § 2602(1).”

These new definitions for “financial institution” and “mortgage lending business” (18 U.S.C. §§ 20, 27) will ensure that private mortgage brokers and companies are held fully accountable under Federal fraud laws, particularly where they are dealing in federally-regulated or federally-insured mortgages. For example, the bank fraud statute, 18 U.S.C. § 1344, prohibits defrauding “a financial institution,” and the amendment to this definition would extend the bank fraud statute beyond traditional banks and financial institutions to private mortgage companies. This definition of “financial institution” would also apply to the following criminal provisions: 18 U.S.C. § 215 (financial institution bribery); 18 U.S.C. § 225 (continuing financial crimes enterprise); 18 U.S.C. § 1005 (false statement/entry/record for financial institution); and 18 U.S.C. § 1344 (bank/financial institution fraud). The new definition would also provide for enhanced penalties for mail and wire fraud affecting a financial institution, including a mortgage lending business, pursuant to 18 U.S.C. §§ 1341 and 1343.

Expanding the term “financial institution” to include mortgage lending businesses would also strengthen penalties for mortgage frauds and the civil forfeiture in mortgage fraud cases. It would extend the statute of limitations in investigations of mortgage fraud cases to be consistent with bank fraud investigations.

This definition of “financial institution” would not apply to the Suspicious Activity Reports (SARs) that banks and other financial institutions are required to file, as “financial institution” is defined separately under the Bank Secrecy Act, 31 U.S.C. § 5312(a)(2).

*Sec. 2(c). False statements and appraisals by mortgage brokers and agents in loan applications*

This section would amend the false statements in mortgage applications statute (18 U.S.C. § 1014) to make it a crime to make a materially false statement or to willfully overvalue a property in order to influence any action by a mortgage lending business. The current offense only applies to Federal agencies, banks, and credit associations and does not extend to private mortgage lending businesses, even if they are handling federally-regulated or federally-insured mortgages. Similar to expanding the definition of “financial institution” in Sections 2(a) and 2(b), this provision would ensure that private mortgage brokers and companies are held fully accountable under this Federal fraud provision. This is a particularly important offense as it specifically relates to false appraisal fraud, which has been a particularly problematic type of mortgage fraud during the recent financial crisis.

*Sec. 2(d). Major fraud against the government amended to include economic relief and Troubled Asset Relief Program funds*

This section would amend the Federal major fraud statute (18 U.S.C. § 1031) to include “any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, including through the Troubled Assets Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government’s purchase of any preferred stock in a company.” This amendment will make sure that Federal prosecutors have jurisdiction to use one of their most potent fraud statutes to protect the Government assistance provided during the current economic crisis, including money from the TARP and circumstances where the Government purchased preferred stock in companies to provide economic relief. These amendments, however, only apply to major frauds against the Government, where the value of the contract or services is more than \$1,000,000.

*Sec. 2(e). Amending securities fraud statute to include commodities fraud*

This section would amend the Federal securities fraud statute (18 U.S.C. § 1348) to include commodities fraud, in addition to securities fraud. Currently, the securities fraud statute does not reach frauds involving options or futures, which include some of the derivatives and other financial products that contributed substantially to the current financial collapse.

*Sec. 2(f). Amending the money laundering statute to include the proceeds for specified unlawful activity*

This section would amend the criminal money laundering statutes (18 U.S.C. §§ 1956, 1957) to make clear that the proceeds of specified unlawful activity include the gross receipts of the illegal activity, not just the profits from the illegal activity. The money laundering statutes make it an offense to conduct financial transactions involving the “proceeds” of a crime (referred to as “specified unlawful activity” in the statutes). These statutes, however, do not define the term “proceeds,” and the term has been left to definition by the courts. For 22 years, since the money laundering statutes were enacted in 1986, most courts have construed “proceeds” to mean “gross receipts” and not “net profits” of illegal activity, which was consistent with the original intent of Congress. In *United States v. Santos*, 128 S.Ct. 2020 (2008), however, the Supreme Court in a four-justice plurality suggested that the term “proceeds” was “ambiguous” and as a result, under the rule of lenity the Court gave the term a narrower meaning. In this decision, the Court mistakenly limited the term “proceeds” to the “profits” of a crime, not its receipts.

As a result, the Supreme Court’s decision has limited the money laundering statutes to only profitable crimes, and permits criminal defendants to reduce their culpability for money laundering by deducting the costs of their criminal conduct. For example, if a fraudulent mortgage broker intentionally overvalued the fair market value of a home for purposes of a mortgage, that broker could only be charged for money laundering related to any fees or potential profit made in the fraudulent transaction, not based on the full value of the house. Furthermore, an executive who committed secu-



rities fraud could not be charged with money laundering, if the fraud did not result in a profit, even though there was a fully completed financial transaction using money stolen by fraud. This decision is contrary to the intent of Congress in passing the money laundering statutes and weakens one of Federal Government primary tools used to recover the proceeds of illegal activity, including mortgage, securities, and other financial frauds.

*Sec. 2(g). Making the international money laundering statute apply to tax evasion*

This section would amend the international money laundering provision in the Federal money laundering statute (18 U.S.C. §1956(a)(2)) to make it a crime for individuals to transport or transfer money in and out of the United States to evade taxes.

*Sec. 3. Funding for investigators and prosecutors for mortgage fraud, securities fraud, and cases involving federal economic assistance*

The economic crisis has revealed an epidemic of fraud related to the mortgage crisis and the resulting corporate collapses. The FBI and other Federal agencies will soon be overwhelmed with new cases. In the past year, the Treasury Department has received more than 62,000 Suspicious Activity Reports (SARs) from banks alleging mortgage fraud. The number of mortgage fraud SARs has gone up nearly tenfold in the last six years, and doubled even in the last three years. Currently, however, the FBI has fewer than 250 agents assigned to investigate these mortgage fraud allegations, even though the number of FBI investigations has doubled in the past three years, with the expectation that it will grow further in the coming months and years. Investigators and agents at the Inspector General's Office for Housing and Urban Development (HUD), the U.S. Secret Service, and the U.S. Postal Inspector Service have seen a similar rise in their investigations of mortgage and other corporate frauds. In addition, the U.S. Postal Inspection Service, traditionally one of the Nation's bulwarks against white collar fraud, has consistently lost funding and support over the years and needs substantial support in these times of economic crisis. The resources included in this bill will help the Justice Department, the FBI, and other investigative agencies responsible for enforcing mortgage and securities fraud hold accountable those responsible for contributing to this economic crisis, as well as protecting the resources being spent to stabilize the banking system and rebuild our economy.

This section authorizes appropriations of \$165 million a year to the Attorney General for fiscal years 2010 and 2011 to be allocated to the FBI (\$75 million in 2010 and \$65 million in 2011), U.S. Attorney's offices (\$50 million), and Criminal, Civil, and Tax Divisions of the Justice Department (\$40 million). This section also authorizes additional appropriations for the Postal Inspection Service (\$30 million), the Inspector General for HUD (\$30 million), and the U.S. Secret Service (\$20 million). This section provides that the money authorized may only be used for fighting mortgage, securities, and other financial institution frauds, and frauds against Federal assistance and relief programs, as well as for recovering funds lost to those frauds, and the Justice Department, in consultation

with the other agencies and departments, would have to certify that these funds were used for those purposes, after expended.

*Sec. 4. Clarifications to the False Claims Act to reflect the original intent of the law*

In response to the economic crisis, the Federal Government has obligated and expended more than \$1 trillion in an effort to stabilize our banking system and rebuild our economy. These funds are often dispensed through contracts with non-governmental entities, going to general contractors and subcontractors working for the Government. Protecting these funds from fraud and abuse must be among our highest priorities as we move forward with these necessary actions.

One of the most successful tools for combating waste and abuse in Government spending has been the False Claims Act (FCA), which is an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse. The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect the Federal assistance and relief funds expended in response to our current economic crisis.

This section amends the FCA to clarify and correct erroneous interpretations of the law that were decided in *Allison Engine Co. v. United States ex rel. Sanders*, 128 S. Ct. 2123 (2008), and *United States ex. rel. Totten v. Bombardier Corp*, 380 F.3d 488 (D.C. Cir. 2004).<sup>2</sup> In *Allison Engine*, the Supreme Court held that Section 3729(a)(2) of the FCA requires the Government to prove that “a defendant must intend that the Government itself pay the claim,” for there to be a violation. 128 S. Ct. at 2128. As a result, even when a subcontractor in a large Government contract knowingly submits a false claim to general contractor and gets paid with Government funds, there can be no liability unless the subcontractor intended to defraud the Federal Government, not just their general contractor. This is contrary to Congress’s original intent in passing the law and creates a new element in a FCA claim and a new defense for any subcontractor that are inconsistent with the purpose and language of the statute. Similarly, in *Totten*, the Court of Appeals for the District of Columbia Circuit held that liability under the FCA can only attach if the claim is “presented to an officer or employee of the Government before liability can attach.” 380 F. 3d at 490. Known as the “presentation clause,” the D.C. Circuit interpreted this clause to limit recovery for frauds committed by a Government contractor when the funds are expended by a Government grantee, such as Amtrak. The *Totten* decision, like the *Allison Engine* decision, runs contrary to the clear language and congressional intent of the FCA by exempting subcontractors who know-

<sup>2</sup>The provisions in Section 4 were drawn, in significant part, from the Committee’s previous work on S. 2041, the False Claims Act Corrections Act of 2008, in the 110th Congress. S. 2041 was favorably reported from Committee and a detailed Committee report was filed on S. 2041 outlining the conflicting interpretations and providing significant background on why the Committee chose to make the amendments contained in the bill. The Committee feels that the report to S. 2041, S. Rpt. 110–507, should be read as a complement to this report due to a number of similar changes contained in S. 386.

ingly submit false claims to general contractors and are paid with Government funds.

As the bill makes a number of changes to the liability provisions compared to the current statute, this report will outline the new clarifications to the law by topic.

#### A. *Fraud against government contractors and grantees*

Following the decision in *Totten* a number of courts have held that the FCA does not reach false claims that are (1) presented to Government grantees and contractors, and (2) paid with Government grant or contract funds.<sup>3</sup> These cases are representative of the types of frauds the FCA was intended to reach when it was amended in 1986. This section of the bill clarifies that liability under section 3729(a) attaches whenever a person knowingly makes a false claim to obtain money or property, any part of which is provided by the Government without regard to whether the wrongdoer deals directly with the Federal Government; with an agent acting on the Government's behalf; or with a third party contractor, grantee, or other recipient of such money or property. The bill explicitly excludes from liability requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or has received as an income subsidy, such as Social Security benefits.

As some defendants have argued that *Totten* and *Atkins* restrict FCA liability from attaching to Medicaid claims, the bill clarifies the position taken by the Committee in 1986 that the FCA reaches all false claims submitted to State administered Medicaid programs. By removing the offending language from section 3729(a)(1), which requires a false claim be presented to "an officer or employee of the Government, or to a member of the Armed Forces," the bill clarifies that direct presentment is not required for liability to attach. This is consistent with the intent of Congress in amending the definition of "claim" in the 1986 amendments to include "any request or demand \* \* \* for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded." 31 U.S.C. § 3729(c) (2000).<sup>4</sup>

This section differs also addresses the Supreme Court's decision in *Allison Engine*, 128 S. Ct. 2123 (2008). In *Allison Engine*, the Court held that the FCA contained an intent requirement in sections 3729(a)(2) and (a)(3) that had not previously been required to prove for FCA liability to attach. The *Allison Engine* decision created a significant question about the scope and applicability of the FCA to certain false claims, effectively limiting FCA coverage for some Government programs and funds. As a result, defendants

<sup>3</sup> 380 F.3d 488 (D.C. Cir. 2005); see, e.g. *United States, ex rel., Atkins v. McInteer*, 345 F. Supp. 2d 1302 (N.D. Ala. 2004), aff'd on other grounds, 470 F.3d 1350 (11th Cir. 2006); *United States, ex rel., Rafizadeh v. Continental Common, Inc.*, 2006 WL 980676 (E.D. La. April 10, 2006); *United States v. City of Houston*, 2006 WL 2382327 (S.D. Tex. Aug. 16, 2006); *United States, ex rel., Rutz v. Village of River Forest*, 2007 WL 3251439 (N.D. Ill. Oct. 25, 2007); *United States, ex rel., Arnold v. CMC Engineering*, 2007 WL 442237 (W.D. Pa. Feb. 7, 2007).

<sup>4</sup> See also S. Rpt. No. 99-345, at 5282-5301 (providing section-by-section analysis explaining that a false claim includes claims submitted to grantees and contractors if the payment ultimately results in a loss to the Government).

across the country have cited *Allison Engine* in seeking dismissal of certain FCA cases claiming that the FCA no longer applies to Government programs traditionally covered. Further, one court has even gone as far as dismissing a case *sua sponte*.<sup>5</sup>

To correct the *Allison Engine* decision, S. 386 contains three specific changes to existing section 3729(a)(2) and (a)(3). In section 3729(a)(2) the words “to get” were removed striking the language the Supreme Court found created an intent requirement for false claims liability under that section. In place of this language, the Committee inserted the words “material to” a false or fraudulent claim. Further, the language “paid or approved by the Government” was removed to address both the decision in *Allison Engine*, and to prevent a new “presentment” requirement from being read into the section. Finally, the new term “material” is defined later in the section to mean “having a natural tendency to influence, or being capable of influencing, the payment or receipt of money or property.” This definition is consistent with the Supreme Court definition, as well as other courts interpreting the term as applied to the FCA.<sup>6</sup>

The other change responding to *Allison Engine* is in current section 3729(a)(3). While this section includes further modifications discussed below, the words “defraud the Government by getting a false or fraudulent claim allowed or paid” were removed to specifically address the intent requirement read into the section by the Court in *Allison Engine*. As a result, the provision now just extends FCA liability to those who conspire to commit a violation of any substantive section of 3729(a).

#### *B. Fraud against funds administered by the United States*

The Committee included provisions in the bill to address a recent decision involving funds administered by the U.S. Government during the reconstruction of Iraq. In *United States ex rel. DRC, Inc. v. Custer Battles, LLC*, a district court set aside a jury award finding that Iraqi funds administered by the U.S. Government on behalf of the Iraqi people were not U.S. Government funds within the scope of the FCA. 376 F. Supp. 2d 617 (E.D. Va. 2006). The Committee believes this result is inconsistent with the spirit and intent of the FCA.

When the U.S. Government elects to invest its resources in administering funds belonging to another entity, or providing property to another entity, it does so because use of such investments for their designated purposes will further the interest of the United States.<sup>7</sup> False claims made against Government-administered funds harm the ultimate goals and U.S. interests and reflect negatively on the United States. The FCA should extend to these administered funds to ensure that the bad acts of contractors do not

<sup>5</sup> See *United States v. Russell T. Hawley, et al.*, No. C06-4087-MWB (N.D. Iowa).

<sup>6</sup> See *Neder v. United States*, 527 U.S. 1, 16 (1999); *United States v. Bourseau*, 531 F.3d 1159, 1171 (9th Cir. 2008); *United States v. Rogan*, 517 F.3d 449, 452 (7th Cir. 2008); *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1204 (10th Cir. 2006); *United States ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 446 (6th Cir. 2005); *United States ex rel. Harrison v. Westinghouse Savannah River Co.*, 352 F.3d 908, 913, 916-917 (4th Cir. 2003); *United States ex rel. Cantekin v. University of Pittsburgh*, 192 F.3d 402, 415-416 (3d Cir. 1999).

<sup>7</sup> See, e.g., *United States ex rel. Haynes v. CMC Electronics, Inc.*, 297 F.Supp.2d 734 (D.N.J. 2003) (discussing sales of equipment to foreign governments under the Arms Export Control Act).

harm the foreign policy goals or other objectives of the Government. Accordingly, this bill includes a clarification to the definition of the term “claim” in new Section 3729(b)(2)(A) and attaches FCA liability to knowingly false requests or demands for money and property from the U.S. Government, without regard to whether the United States holds title to the funds under its administration.

### *C. Conspiracy*

As noted above, the current FCA contains a provision that subjects those who knowingly conspire to defraud the Government by getting a false or fraudulent claim allowed or paid. Some courts have interpreted this provision narrowly.<sup>8</sup> The current FCA conspiracy provision does not explicitly impose liability on those who conspire to violate other provisions of the FCA, such as delivery of less Government property than that promised or making false statements to conceal an obligation to pay money to the Government. *See* 31 U.S.C. §§ 3729(a)(4–6) (2000). Because of the confusion and uncertainty surrounding the application of the conspiracy provision, the bill amends current section 3729(a)(3) to clarify that conspiracy liability can arise whenever a person conspires to violate any of the provisions in Section 3729 imposing FCA liability.

### *D. Wrongful possession, custody or control of government property*

Section 3729(a)(4) of the FCA has remained unchanged since enactment of the FCA in 1863. This provision establishes FCA liability upon an individual that has “possession, custody, or control of property or money used, or to be used, by the Government, and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate of receipt.” 31 U.S.C. § 3729(a)(4)(2000). This section allows the Government to recover losses that are incurred because of conversion of Government assets. However, because this section has remained unchanged from the original act that was drafted in 1863, the archaic language has made recoveries under a conversion theory contingent upon the individual receiving an actual receipt for the property. The new section, renumbered as Section 3729(a)(1)(D) in the bill, updates this provision by retaining the core conversion principle while redrafting it in a more straightforward manner and removing the receipt requirement. Where knowing conversion of Government property occurs, it should make no difference whether the person receives a valid receipt from the Government.

### *E. “Reverse” false claims*

Section 3729(a)(7) of the FCA currently imposes liability on any person who “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 Government.” 31 U.S.C. § 3729(a)(7)(2000). This provision is commonly referred to as creating “reverse” false claims liability because it is designed to cover Government money or property that is knowingly retained by

<sup>8</sup>See, e.g., *United States ex rel. Huangyan Import & Export Corp. v. Nature’s Farm Products, Inc.*, 370 F. Supp. 2d 993 (N.D. Cal. 2005) (holding that section 3729(a)(3) does not extend to conspiracies to violate section 3729(a)(7)).

a person even though they have no right to it. This provision is similar to the liability established under 3729(a)(2) for making “false records or statements to get false or fraudulent claims paid or approved.” 31 U.S.C. § 3729(a)(2)(2000). However, the provision does not capture conduct described in 3729(a)(1), which imposes liability for actions to conceal, avoid, or decrease an obligation directly to the Government. This legislation closes this loophole and incorporates an analogous provision to 3729(a)(1) for “reverse” false claims liability.

Further, this legislation addresses current confusion among courts that have developed conflicting definitions of the term “obligation” in Section 3729(a)(7).<sup>9</sup> The term “obligation” is now defined under new Section 3729(b)(3) and includes fixed and contingent duties owed to the Government—including fixed liquidated obligations such as judgments, and fixed, unliquidated obligations such as tariffs on imported goods.<sup>10</sup> It is also noteworthy to restate that while the new definition of “obligation” expressly includes contingent, non-fixed obligations, the Committee supports the position of the Department of Justice that current section 3729(a)(7) “speaks of an ‘obligation,’ not a ‘fixed obligation.’”<sup>11</sup> By including contingent obligations such as, “implied contractual, quasi-contractual, grant-or-grantee, licensor-licensee, fee-based, or similar relationship,” this new section reflects the Committee’s view, held since the passage of the 1986 Amendments,<sup>12</sup> that an “obligation” arises across the spectrum of possibilities from the fixed amount debt obligation where all particulars are defined<sup>13</sup> to the instance where there is a relationship between the Government and a person that “results in a duty to pay the Government money, whether or not the amount owed is yet fixed.”<sup>14</sup>

The Committee also notes that the reverse false claims provision and amendments to that provision do not include any new language that would incorporate or should otherwise be construed to include a presentment requirement. This is consistent with various court decisions that have held that the current reverse false claims provision does not contain a presentment requirement.<sup>15</sup>

<sup>9</sup>See, e.g., *United States ex rel. Praver & Co. v. Verrill & Dana*, 946 F. Supp. 87, 93–95 (D. Me. 1996) (discussing the definition of “obligation” at length); *Am. Textile Mfr’s Inst., Inc. v. The Limited, Inc.*, 190 F.3d 729, 736 (6th Cir. 1999) (discussing definition of “obligation”).

<sup>10</sup>The new definition of the term “obligation” in S. 386 does not include specific reference to “customs duties for mismarking country of origin,” which was a singular type of obligation referred to in S. 2041. The Committee originally included this language in S. 2041 in response to the decision in *American Textile Manufacturers Institute, Inc. v. The Limited, Inc.* where the Sixth Circuit Court of Appeals narrowly defined the term “obligation” to apply reverse false claims to only fixed obligations and dismissing a claim for false statements made by importers to avoid paying customs duties. See 190 F.3d 729 (6th Cir. 1999). After subsequent discussion with the Department of Justice, the Committee decided to remove the “customs duties” language in S. 386, as the Committee believes that customs duties clearly fall within the new definition of the term “obligation” absent an express reference and any such specific language would be unnecessary.

<sup>11</sup>Brief for United States at 23, *United States v. Bourseau* No. 06–56741, 06–56743 (9th Cir. July 14, 2008).

<sup>12</sup>See S. Rpt. No. 99–345 at 5283.

<sup>13</sup>See, e.g., *Am. Textile Mfrs. Inst. v. The Limited, Inc.*, 190 F.3d 729 (6th Cir. 1999); *United States v. Q Int’l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997).

<sup>14</sup>Brief for United States at 24, *United States v. Bourseau* No. 06–56741, 06–56743 (9th Cir. July 14, 2008) (citing *United States ex rel. Bahrani v. Conagra, Inc.*, 465 F.3d 1189, 1201 (10th Cir. 2006), mot. for reh’g pending, (10th Cir. 2007)); *United States v. Pemco Aeroplex, Inc.*, 195 F.3d 1234, 1237–38 (11th Cir. 1999) (en banc).

<sup>15</sup>See, e.g., *United States ex rel. Bahrani*, 465 F.3d 1189, 1208 (10th Cir. 2006); *United States ex rel. Koch v. Koch Indus.*, 57 F.Supp.2d 1122, 1144 (N.D. Okla. 1999).

The new definition of “obligation” includes an express statement that an obligation under the FCA includes “the retention of an overpayment.” The Department of Justice supported the inclusion of this provision and provided technical advice that the proper place to include overpayments was in the definition of obligation.<sup>16</sup> This new definition will be useful to prevent Government contractors and others who receive money from the Government incrementally based upon cost estimates from retaining any Government money that is overpaid during the estimate process. Thus, the violation of the FCA for receiving an overpayment may occur once an overpayment is knowingly and improperly retained, without notice to the Government about the overpayment. The Committee also recognizes that there are various statutory and regulatory schemes in Federal contracting that allow for the reconciliation of cost reports that may permit an unknowing, unintentional retention of an overpayment. The Committee does not intend this language to create liability for a simple retention of an overpayment that is permitted by a statutory or regulatory process for reconciliation, provided the receipt of the overpayment is not based upon any willful act of a recipient to increase the payments from the Government when the recipient is not entitled to such Government money or property. Moreover, any action or scheme created to intentionally defraud the Government by receiving overpayments, even if within the statutory or regulatory window for reconciliation, is not intended to be protected by this provision. Accordingly, any knowing and improper retention of an overpayment beyond or following the final submission of payment as required by statute or regulation—including relevant statutory or regulatory periods designated to reconcile cost reports, but excluding administrative and judicial appeals—would be actionable under this provision.

S. 386 also includes the term “statutory” to the definition of “obligation”. This term was included to ensure that duties created by a statutory authority that may not be an express or implied contract or other relation are included as these statutory relationships confer a duty upon the recipient of Government funds regardless of the existence of a contract.

#### IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 386, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

MARCH 18, 2009.

Hon. PATRICK J. LEAHY,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 386, the Fraud Enforcement and Recovery Act of 2009.

<sup>16</sup> Letter from Brian Benczkowski, Principal Deputy Assistant Attorney General, United States Department of Justice, to Senator Patrick Leahy, Chairman, Senate Committee on the Judiciary Appendix 3 (Feb. 21, 2008).

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Mark Grabowicz.

Sincerely,

DOUGLAS W. ELMENDORF.

Enclosure.

*S. 386—Fraud Enforcement and Recovery Act of 2009*

Summary: S. 386 would broaden the coverage of current laws against financial crimes, including fraud affecting mortgages, securities, and federal assistance and relief programs. The bill would authorize the appropriation of \$245 million for each of fiscal years 2010 and 2011 for the Department of Justice (DOJ), the Postal Inspection Service, and other federal agencies to investigate and prosecute violators of the bill’s provisions. S. 386 also would amend certain provisions of the False Claims Act (FCA), which allows private individuals with knowledge of past or present fraud committed against the government to file claims against federal contractors.

CBO estimates that implementing S. 386 would cost \$490 million over the 2010–2014 period, assuming appropriation of the authorized amounts. S. 386 could affect direct spending and revenues; CBO has no basis for estimating the timing or magnitude of any such effects, but we estimate that they would have no net costs over both the 2010–2014 and 2010–2019 periods.

S. 386 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of S. 386 is shown in the following table. The costs of this legislation fall within budget functions 370 (commerce and housing credit), 450 (community and regional development), and 750 (administration of justice).

	By fiscal year, in millions of dollars—					2010–2014
	2010	2011	2012	2013	2014	
CHANGES IN SPENDING SUBJECT TO APPROPRIATION						
Authorization Level .....	245	245	0	0	0	490
Estimated Outlays .....	211	240	32	5	2	490

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted during fiscal year 2009, that the authorized amounts will be appropriated each year, and that spending will follow historical patterns for the authorized activities.

*Spending subject to appropriation*

S. 386 would authorize the appropriation of \$245 million for each of fiscal years 2010 and 2011 for investigations and prosecutions relating to financial crimes. For each of those years the bill would authorize:

- \$75 million for the Federal Bureau of Investigation;
- \$90 million for offices of the United States Attorneys and the DOJ criminal, civil, and tax divisions;
- \$30 million for the Postal Inspection Service;
- \$30 million for the Inspector General for the Department of Housing and Urban Development; and



- \$20 million for the United States Secret Service.

*Revenues and direct spending*

CBO estimates that the provisions relating to the FCA would, on net, increase civil fines and recoveries collected by the federal government because it would likely lead to the initiation of additional claims under FCA. S. 386 also could increase collections of civil and criminal fines for violations of the bill's other provisions.

Recoveries from FCA cases would be recorded as offsetting receipts (a credit against direct spending). Civil fines are recorded as revenues and deposited in the U.S. Treasury. Criminal fines are recorded as revenues, deposited in the Crime Victims Fund, and subsequently spent without further appropriation.

CBO has no basis for estimating the magnitude of any additional recoveries and collections of civil and criminal fines. However, we estimate that any such effects would have no net costs over both the 2010–2014 and 2010–2019 periods.

Intergovernmental and private-sector impact: S. 386 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Mark Grabowicz and Leigh Angres; Impact on State, Local, and Tribal Governments: Melissa Merrell; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 386.

## VI. CONCLUSION

The Federal Government has obligated and spent more than \$1 trillion to stabilize our banking system and to rebuild our economy. But to date, we have paid far too little attention to investigating and prosecuting the mortgage and corporate frauds that have so dramatically contributed to this economic collapse and to deterring those who would seek to take advantage of the economic assistance provided to correct it. This legislation, S. 386, will address these serious and immediate problems by providing the resources and new tools necessary for the Justice Department and other investigative agencies to restore our Nation's capacity to combat and prosecute mortgage and other financial frauds. The Committee believes that Congress, as it did during the Savings and Loan crisis more than two decades ago, should take action to rebuild and strengthen our fraud enforcement efforts by passing S. 386 without delay.

## VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 386, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**UNITED STATES CODE**

**TITLE 18—CRIMES AND CRIMINAL  
PROCEDURE**

**PART I—CRIMES**

\* \* \* \* \*

**CHAPTER 1—GENERAL PROVISIONS**

Sec.

\* \* \* \* \*

- 24. Definitions related to Federal health care offense.
- 25. Use of minors in crimes of violence.
- 26. Definition of seaport.
- 27. *Mortgage lending business defined.*

\* \* \* \* \*

**§ 20. Financial institution defined.**

As used in this title, the term “financial institution” means—

\* \* \* \* \*

(8) an organization operating under section 25 or section 25(a) of the Federal Reserve Act; **[or]**

(9) a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978)**[.1]**; or

(10) a mortgage lending business (as defined in section 27 of this title) or any person or entity that makes in whole or in part a federally-related mortgage loan as defined in 12 U.S.C. §2602(1).

\* \* \* \* \*

**§ 27. Mortgage lending business defined**

As used in this title, the term “mortgage lending business” means an organization which finances or refinances any debt secured by an interest in real estate, including private mortgage companies and any subsidiaries of such organizations, and whose activities affect interstate or foreign commerce.

\* \* \* \* \*

**CHAPTER 47—FRAUD AND FALSE STATEMENTS**

\* \* \* \* \*

**§ 1014. Loan and credit applications generally; renewals and discounts; crop insurance**

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Federal Housing Administration, the Farm Credit Administration, Federal Crop Insurance Corporation or a company the Corporation reinsures, the Secretary of Agriculture acting through the Farmers Home Administration or

successor agency, the Rural Development Administration or successor agency, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662), or the Small Business Administration in connection with any provision of that Act, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), **[or]** an organization operating under section 25 or section 25(a) of the Federal Reserve Act, *or a mortgage lending business whose activities affect interstate or foreign commerce, or any person or entity that makes in whole or in part a federally-related mortgage loan as defined in 12 U.S.C. §2602(1)* upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, loan, or insurance agreement or application for insurance or a guarantee, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both. The term “State-chartered credit union” includes a credit union chartered under the laws of a State of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States.

\* \* \* \* \*

### **§ 1031. Major fraud against the United States**

(a) Whoever knowingly executes, or attempts to execute, any scheme or artifice with the intent—

(1) to defraud the United States; or

(2) to obtain money or property by means of false or fraudulent pretenses, representations, or promises, in *any grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, including through the Troubled Assets Relief Program, an economic stimulus, recovery or rescue plan provided by the Government, or the Government’s purchase of any preferred stock in a company, or in any procurement of property or services as a prime contractor with the United States or as a subcontractor or supplier on a contract in which there is a prime contract with the United States, if the value of [the contract, subcontract] such grant, contract, subcontract, subsidy, loan, guarantee, insurance or other form of Federal assistance, or any constituent part thereof, for such property or services is \$1,000,000 or more shall, subject to the applicability of subsection (c) of this section, be fined not more*

than \$1,000,000, or imprisoned not more than 10 years, or both.

\* \* \* \* \*

**CHAPTER 63—MAIL FRAUD AND OTHER FRAUD OFFENSES**

Sec.

\* \* \* \* \*

- 1346. Definition of “scheme or artifice to defraud”
- 1347. Health care fraud
- 1348. Securities *and commodities* fraud
- 1349. Attempt and conspiracy
- 1350. Failure of corporate officers to certify financial reports.

\* \* \* \* \*

**§ 1348. Securities and commodities fraud**

Whoever knowingly executes, or attempts to execute, a scheme or artifice—

(1) to defraud any person in connection with *any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)); or*

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of *any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d));*

shall be fined under this title, or imprisoned not more than 25 years, or both.

\* \* \* \* \*

**CHAPTER 95—RACKETEERING**

\* \* \* \* \*

**§ 1956. Laundering of monetary instruments**

\* \* \* \* \*

(a)(2)(A) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A)(i) with the intent to promote the carrying on of specified unlawful activity; or

(ii) with the intent to engage in conduct constituting a violation of section 7201 or 7206 of the Internal Revenue Code of 1986; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer represent the proceeds of some form of unlawful activity and knowing that such transportation, transmission, or transfer is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer, whichever is greater, or imprisonment for not more than twenty years, or both. For the purpose of the offense described in subparagraph (B), the defendant’s knowledge may be established by proof that a law enforcement officer represented the matter specified in subparagraph (B) as true, and the defendant’s subsequent statements or actions indicate that the defendant believed such representations to be true.

\* \* \* \* \*

(c) As used in this section—

\* \* \* \* \*

(8) the term “State” includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States[.]; and

(9) the term “proceeds” means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

\* \* \* \* \*

**§ 1957. Engaging in monetary transactions in property derived from specified unlawful activity**

\* \* \* \* \*

(f) As used in this section—

\* \* \* \* \*

(3) the terms “specified unlawful activity” and “proceeds” shall have [has] the meaning given those [that] terms in section 1956 of this title.

\* \* \* \* \*

**TITLE 31—MONEY AND FINANCE**

**CHAPTER 37—CLAIMS**

**Subchapter III—Claims Against the United States Government**

\* \* \* \* \*

**§ 3729. False claims**

(a) LIABILITY FOR CERTAIN ACTS.[—Any person who]—

(1) IN GENERAL.—Subject to paragraph (2), any person who—

(A) knowingly presents, or causes to be presented, [to an officer or employee of the United States Government or a member of the Armed Forces of the United States] a false or fraudulent claim for payment or approval;

[(2)](B) knowingly makes, uses, or causes to be made or used, a false record or statement *material* to [get] a false or fraudulent claim [paid or approved by the Government];

[(3)](C) conspires to [defraud the Government by getting a false or fraudulent claim allowed or paid] *commit a violation of subparagraph (A), (B), (D), (E), (F), or (G)*;

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

[(5)](E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

[(6)](F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

[(7)](G) knowingly makes, uses, or causes to be made or used, a false record or statement *material* to [conceal, avoid, or decrease] an obligation to pay or transmit money or property to the Government, *or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government*,

is liable to the United States Government for a civil penalty of not less than \$5,000 and not more than \$10,000, *as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410)*, plus 3 times the amount of damages which the Government sustains because of the act of that person. [except that if the court finds that]

[(A)](2) *REDUCED DAMAGES*.—*If the court finds that—*

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the existence

of an investigation into such violation[;], the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of [the] *that* person.

(3) *COSTS OF CIVIL ACTIONS*.—A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) [KNOWING AND KNOWINGLY DEFINED]. *DEFINITIONS*.—For purposes of this section[,]—

(1) the terms “knowing” and “knowingly”—

(A) mean that a person, with respect to information—

[(1)](i) has actual knowledge of the information;

[(2)](ii) acts in deliberate ignorance of the truth or falsity of the information; or

[(3)](iii) acts in reckless disregard of the truth or falsity of the information; and

(B) require no proof of specific intent to defraud [is required].

[(c)](2) [CLAIM DEFINED.—For purposes of this section,] *the term “claim”*—

(A) means [includes] any request or demand, whether under a contract or otherwise, for money or property *and whether or not the United States has title to the money or property, that—*

(i) *is presented to an officer, employee, or agent of the United States; or*

(ii) [which] is made to a contractor, grantee, or other recipient if the *money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest, and if the United States Government—*

(I) *provides or has provided any portion of the money or property [which is] requested or demanded, or*

(II) [if the Government] will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded, *and*

(B) *does not include requests or demands for money or property that the Government has paid to an individual as compensation for Federal employment or as income subsidy with no restrictions on that individual’s use of the money or property; and*

(3) *the term “obligation” means a fixed duty, or a contingent duty arising from an express or implied contractual, quasi-contractual, grantor-grantee, licensor-licensee, statutory, fee-based, or similar relationship, and the retention of overpayment; and*

(4) *the term “material” means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.*

[(d)] (c) *EXEMPTION FROM DISCLOSURE*.—Any information furnished pursuant to [subparagraphs (A) through (C) of subsection (a)] subsection (a)(2) shall be exempt from disclosure under section 552 of title 5.

**[(e)]** (d) *EXCLUSION.*—This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

