

S.8815 (Krueger) / A.9975 (Weinstein)

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BILL S.8815 (Krueger) / A.9975 (Weinstein)
SUBJECT False Claims Act Applicability to Tax Law
DATE May 03, 2022
OPPOSE

We oppose this legislation that is modeled on False Claims Act (FCA) legislation vetoed by Governor Hochul in 2021 (see S.4730, Veto memo #83).

This new bill would extend the FCA to apply to “obligations” under the Tax Law, and would apply existing §189.1(h) to Tax Law claims (i.e., cases where an entity “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same . . .”), from which Tax Law issues are currently excluded.

It would also make these new provisions retroactive, applying them “to all false claims, records, statements and obligations concealed, avoided or decreased on, prior to, or after such effective date,” allowing such claims to go back up to ten years from the enactment date.

The Business Council strongly opposes this legislation for a number of reasons:

- First, we oppose this legislation based on our longstanding concerns about the application of the False Claims Act to any tax controversy. This was initial done in New York in the last days of the 2010 session, when S.8378/A.11568 (later approved as Chapter 379) was introduced and pass in three days with virtually no public review or input. Neither the federal government nor the majority of states apply their false claims acts to their tax laws, meaning that New York is already an outlier in its application of its false claims act to tax issues. As such, this legislation would further usurp the Department of Taxation and Finance’s ability to administer, interpret and enforce the state’s tax laws. Further, New York’s existing FCA gives private parties significant financial interest to pursue claim, including up to thirty percent of any recovery or settlement and payment of their legal expenses, even in cases where the Department of Taxation and Finance has not found a reason to take action.
- Second, we have significant concerns regarding the provisions of this bill, and its potential for unforeseen adverse outcomes. The bill would expand the

application of State Finance Law §189 to “obligations” under the Tax Law, in instances where the net income or sales of the taxpayer equal or exceeds \$1 million and where “damages” sought exceed \$350,000. Article 13 defines “obligations” as “. . . an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from a fee-based or similar relationship, from statute or regulation, or from the retention of any overpayment.” However, the term “obligation” is not defined in the Tax Law, nor is its meaning here explained, so it is far from certain it would apply only to an “obligation” to file a return.

- Third, the bill would also extend the False Claims Act’s tax law provision to circumstances defined in §189.1.h, which applies the Act to instances in which a taxpayer “. . . knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the state or a local government, or conspires to do the same. . .” The provisions of paragraph (h) were never intended to apply to Tax Law cases. Paragraph (h) was created by 2013 legislation as part of a package addressing Medicaid fraud. That legislation (Chapter 56, Laws of 2013) also added State Finance Law § 189.4(iii) which basically excluded application of paragraph (h) to tax law cases. That exclusion was adopted based on arguments made at the time that the language in paragraph (h) would be inappropriately applied to issues that are properly addressed in Tax Department reviews, where the Department is charged with determining if correct taxes are paid and/or if any additional taxes are owed. New York has a well-funded Tax Department, staffed with issue experts, where tax controversies are ultimately reviewed by an independent Tax Appeals Tribunal. It makes little public policy sense to undermine that process with third party actions.

We believe that existing state law provides New York with effective mechanisms to enforce its Tax Laws. Expanding the application of the False Claims Act to additional categories of tax compliance issues as proposed in this legislation undermines the Tax Department’s primary role in administering and enforcing the Tax Law and will result in uncertain and inconsistent of state Tax Law.

For these reasons, we oppose adoption of S.8815 (Krueger) / A.9975 (Weinstein).