
S.9813 (Krueger)/A.10514 (Rules/Weinstein) at the Request of the Attorney General

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BILL S.9813 (Krueger)/A.10514 (Rules/Weinstein) at the Request of the Attorney General
SUBJECT Amendments to the False Claims Act
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OPPOSE

The Business Council has always had reservations about application of the “false claims act” or FCA (State Finance Law Article 13) to the Tax Law. When the FCA was first adopted in 2007, it specifically excluded the Tax Law from its new, broad “enforcement” authority. However, the FCA was expanded to apply to the Tax Law in limited circumstance, when in the last days of the 2010 session, legislation was introduced and passed in three days with virtually no public review or input. Importantly, 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.

Importantly, we believe that the FCA, and any further expansion of the FCA to the Tax Law, will further usurp the Department of Taxation and Finance’s ability to administer, interpret and enforce the state’s tax laws – by the Attorney General or by individuals through qui tam actions. New York’s existing FCA gives private parties significant financial interest to pursue claims, 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 reviewed tax returns and not found a reason to take enforcement action.

For these reasons, we are especially concerned that we are again facing legislation to further amend the FCA with regard to the Tax Law, with little time for review and comment by affected interests, with the bill only being introduced on May 31, 2024 and already passing the Assembly just four days later with no discussion or debate.

We have several significant questions and concerns about this proposed legislation, all related to understanding how these amendments will affect individual and business taxpayers, to what extent the bar will be lowered for

application of the False Claims Act, and the extent to which these amendments will reduce the Tax Department's key role in administering state Tax Law.

We believe our concerns could be addressed through negotiations on amendments. However, if this legislation is adopted as is in expectation of chapter amendments, its "immediate" effective date could subject taxpayers to additional enforcement actions before any such amendments are adopted.

For these reasons, we strongly recommend against approval of S.9813/A.10514 as is.

– **Definition of "Material"** – The bill memo states that the proposed amendment to this definition "clarifies that the materiality of a false statement depends on its potential, not actual, effect." This is a key definition, as actions have to be "material" to be subject to FCA action. For example, current law applies liability to persons that "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim," and that "knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the state or a local government."

We believe this amended definition will further limit defenses under the FCA, by negating guidance from affected agencies to taxpayers. With the additions, the purportedly false claim is judged "at the time it is presented, made, or used . . ." regardless of whether such claim actually influences payment. The issue of materiality has been highly litigated for years at both the state and federal level and it has gotten increasingly difficult for defendants to successfully challenge materiality, which this will exacerbate. Attorneys have also suggested that this amendment will also tend to diminish the effect of agency actions and guidance, and their post-action reviews, if they are deemed not material at the time the initial action took place.

– **Thresholds** – Under present law, the FCA applies to Tax Law cases only if the net income or sales of the person against whom the claims is brought is more than \$1 million. Under this legislation, claims could be brought against multiple persons if any such person has income over \$1 million or assets over \$5 million.

We see some merit in this amendment, e.g., to maintain FCA applicability to high wealth taxpayers engaged in fraudulent activity in years when they had relatively low income.

However, we have concerns with the legislation's impact on individuals below both the income and asset threshold. The intent of this amendment may be to capture under the FCA "co-conspirators" to a fraud who would now fall under the

FCA's thresholds. However, we are concerned that this expansion could lead to a qui tam claim or Attorney General action against a significant number of low income and/or low asset individuals, who are below the FCA's current thresholds, including those with no actual connection to the alleged fraud but who would be subject to significant response and defense costs before getting to the issue of scienter.

This outcome would be contrary to the notion that the FCA is an extraordinary response to significant frauds and fraudsters. In fact, the legislative sponsors of this bill have previously argued that the FCA is designed to apply to "wealthy individual [and] large corporations." (see memo in support of S.8815/A.9975, which passed the legislature in 2022 but was subsequently vetoed.)

– **Access to Tax Data** – The bill would also amend the Tax Law to allow (but not mandate) the Tax Commissioner to share tax data with the Attorney General, and to authorize the Attorney General to use that information to investigate and prosecute potential FCA violations. This language seems very open ended, with no requirement for the Attorney General to provide any basis for suspected Tax Law violations to access otherwise non-disclosable tax data. Again, this broadening of the Attorney General's authority would further erode the Tax Department's primary role in auditing and enforcing the Tax Law.

In summary, we oppose adoption of the current version of S.9813/A.10514. We urge the legislature to more carefully consider this proposal, and consult with taxpayer representatives, professional associations and other key stakeholders to evaluate these concerns and explore amendments that avoid unintended consequences.