COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE OF THE WHOLE
COMMITTEE REPORT
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO: All Councilmembers

FROM: Chairman Phil Mendelson
Committee of the Whole

DATE: November 17, 2020

SUBJECT: Report on Bill 23-35, "False Claims Amendment Act of 2020"

The Committee of the Whole, to which Bill 23-35, the "False Claims Amendment Act of 2020" was referred, reports favorably thereon with amendments, and recommends approval by the Council.

CONTENTS

I. BACKGROUND AND NEED

On January 8, 2019, Bill 23-35, the "False Claims Amendment Act of 2019" was introduced by Councilmember Mary Cheh. Bill 23-35 would expand false claims liability to matters concerning taxation when District taxable income, District sales tax, or District revenue equals or exceeds $1 million and the damages pleaded in the action total $350,000 or more. The bill also amends D.C. Official Code § 47.4111 to increase from 10% to 30% (of proceeds collected) the maximum reward the OCFO may give to someone supplying information regarding tax violations.

Currently, seven states permit what this bill would do. Yet, critics of the legislation fear that it will "create a cottage industry of bounty hunters,"[1] "make D.C. a less attractive place for businesses,"[2] and make D.C. "an island by itself in allowing access to taxpayer information by

[1] Letter from Stephen Kranz, December 20, 2018 (pg. 1).
[2] Testimony of Patrick Reynolds, Council on State Taxation, December 20, 2018 (pg. 2).

third parties."[3] These concerns are unfounded, as this report will explain. Experience undermines critics' claims. Moreover, Bill 23-35 is modeled after a 2010 change in New York State law— a change that has won 18 settlements valued at $467.4 million in nine years. In support of this law, the New York State Attorney General recently wrote to the Attorney General of California:

> *"… the Tax FCA [False Claims Act] Provisions have contributed enormously to the recovery of unpaid taxes in cases where, without the help of whistleblowers, it is doubtful any recovery would have been obtained, or that the misconduct would have even come to light. It is our judgment that, in the current climate more than ever, enforcement tools enabling the State to ensure that all taxpayers follow the law and pay their taxes are of the utmost value, and that the Tax FCA Provisions have performed extremely successfully in this role."*[4]

There will be numerous safeguards to protect honest businesses once Bill 23-35 becomes law. First, a taxpayer must have "knowingly" presented a false claim (i.e., with *deliberate* ignorance or *reckless* disregard of the truth or falsity of the information). Second, a taxpayer who relied on official guidance or reasonable tax advice will not get caught up, as such instances do not constitute "knowingly" false, "deliberate ignorance," or "reckless disregard." Third, before a claim can proceed in court, the District's Attorney General must see the case and may take it over or move to dismiss it. Fourth, the high threshold for claims ($1 million or more in District taxable income, $350,000 or more in damages, etc.) protects the little guy.

At the public hearing, both the Office of Chief Financial Officer (OCFO) and Attorney General (OAG) argued that the bill is legally insufficient as it violates (they claimed) the Home Rule Act. The Committee disagrees. The Council's General Counsel disagrees. And last week, the OAG issued a revised opinion finding that Bill 23-35 "is validly within the Council's legislative power."[5]

Eliminating the tax fraud loophole in the District's False Claims Act creates a new tool for enforcement— better enabling the District to crack down on tax fraudsters, generate revenue, and increase enforcement resources in a revenue-neutral manner.[6]

The District's Current False Claims Law

The District's False Claims Act is an effective tool to combat fraud against the government. Modeled after the federal False Claims Act, false claims acts have been adopted across the country. These acts permit individuals who are aware of fraud to go to court to obtain recompense for the government. While most of the funds are restored to the public treasury, these acts encourage private enforcement— whistleblowers— by awarding them a portion of the damages. However, to be liable (guilty), a defendant has to have *knowingly* defrauded the Government. The District's false claims law defines "knowingly" as actual knowledge of the information and either deliberate

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[3] Letter from the D.C. Chamber of Commerce, et al., December 20, 2018 (pg. 1).
[4] Letter from New York State Attorney General Letitia James to California State Attorney General Xavier Becerra, April 27, 2020, pg. 3.
[5] Brian K. Flowers, Memorandum - Legal Advice on the False Claims Amendment Act of 2019 (AL-20-265), November 13, 2020, pg. 10.
[6] Testimony of Michael Ronickher, December 20, 2018, pg. 1.

ignorance or reckless disregard of the truth or falsity of the information.[7] This includes knowingly presenting a false claim for payment or approval, knowingly delivering less money to the District than it is owed, knowingly buying government property from an unauthorized government officer,[8] or, with the adoption of Bill 23-35, knowingly cheated the government out of taxes.

Under the False Claims Act, the plaintiff bringing the claim is known as a *qui tam* plaintiff. Pursuant to D.C. Official Code § 2-381.03, a *qui tam* plaintiff may file an action in Superior Court on behalf of the government, although cases cannot be brought for actions that occurred more than six years after the date of the violation or more than three years after the date when material facts for the right of action are known or reasonably should have been known.[9] Further, a *qui tam* plaintiff may not base a false claims case on information that was publicly disclosed in a report, hearing, or audit by District agencies, in a civil, criminal, or administrative hearing to which the District is a party, or by the news media.[10]

Qui tam complaints filed pursuant to D.C. Official Code § 2-381.03 remain under seal for up to 180 days. On the same day that the plaintiff files the complaint with the court, the plaintiff must serve a copy, and all material information, on the Office of the Attorney General (OAG). Within the 180 days, the OAG must either notify the court that the OAG intends to proceed with the action or that it declines to take the case. If the OAG proceeds with the action, they take primary responsibility for prosecuting the case. If they decline, the plaintiff has the right to conduct the action. Importantly, the OAG may recognize a qui tam case as unwarranted and support a motion to dismiss the case— thereby protecting the plaintiff from abuse of the process.[11]

If a defendant is found guilty of a false claims law violation, they are liable to the District for three times the amount of damages the District incurred as a result of their action, as well as a civil penalty of not less than $5,500 and not more than $11,000 for each false claim.[12] *Qui tam* plaintiffs may receive anywhere from 15% to 25% of the proceeds of an action or settlement where the government has brought the action or 25% to 30% in cases where the District did not proceed with the action. The amount awarded to the plaintiff depends on the extent to which they contributed to the prosecution of an action.[13] The remaining damages are paid to the District treasury.[14] Data on the number and scope of false claims law cases filed on behalf of the District is not readily available, but a review of publicly accessible settlements suggests that at least $21 million has been recovered through false claims actions since 2014.[15]

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[7] D.C. Official Code § 2-381.01(7).
[8] D.C. Official Code § 2-381.02.
[9] D.C. Official Code § 2-381.05(a)(1) and § 2-381.05(a)(2).
[10] D.C. Official Code § 2-381.03(c-1)(1).
[11] D.C. Official Code § 2-381.03(b)(1).
[12] D.C. Official Code § 2-381.02(a).
[13] D.C. Official Code § 2-381.03(f)(1)(A) and § 2-381.03(f)(2)(A).
[14] D.C. Official Code § 2-381.03(f)(3).
[15] Committee analysis of settlements and media releases on the Office of Attorney General for the District of Columbia's website.

The Tax Bar

While many claims and circumstances fall under the purview of the current false claims law, false claims involving taxes are expressly prohibited in the District.[16] This provision, known as the "tax bar," is included in the District's code because our law is mirrored off of the federal False Claims Act, where a tax bar provision was added in 1986.[17] Currently, seven states have no tax bar or a modified tax bar. In Delaware, Florida, and Nevada, there is no explicit limitation on false claims cases involving taxes, whereas in Illinois, Indiana, and Rhode Island, the tax bar only explicitly applies to income tax. The Committee could not find data on any *qui tam* tax cases in Delaware, Florida, Nevada, Indiana, or Rhode Island, although a thorough search of court cases through Lexis Nexus revealed that there have only been three false claims cases involving taxes in these jurisdictions: one in Florida, one in Nevada, and one in Rhode Island.[18] All three cases were dismissed.

In 2010, Former New York State Senator Eric Schneiderman introduced the Fraud, Enforcement and Recovery Act (S. 8378) to allow "whistleblowers to go after millionaire tax cheats that defraud the state of over $350,000."[19] The law amended the state's false claims law to remove the tax bar for cases where the defendant has net income or sales of $1 million or more, and damages, as plead, are greater than $350,000.[20] The impetus for introducing and passing the law was the fact that the State of New York loses billions of dollars a year in taxes due to persons and companies failing to file tax returns, underpaying taxes, or underreporting income, or improperly claiming deductions. An analysis conducted by the New York State Department of Taxation and Finance found that the income tax gap, or the difference between taxes paid and taxes owed, was $2.838 billion in 2002 alone.[21] It was estimated that the Department's audit activities would recover $500 million in 2002, leaving an estimated $2.338 billion in taxes unassessed.[22]

As a result of removing the tax bar, the State of New York has received more than $460 million from false claims settlements involving taxes.[23] The largest of these settlements involved Sprint Corporation, a telecommunications company that knowingly failed to collect and remit more than $100 million in state and local taxes for nearly a decade. Sprint Corporation agreed to pay $330 million to New York State as a result of the settlement.[24] The investigation into Sprint

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[16] D.C. Official Code § 2-381.02(d).
[17] False Claims Amendments Act of 1986, Pub.L. No. 99-562, § 2, 100 Stat. 3153, 3153-54.
[18] *Stevens v. State*, 127 So. 3d 668; *Intl Game Tech., Inc. v. Second Judicial District*. Court, 122 Nev. 132; *State ex rel. Harmeyer v. Shaw's Supermarkets, Inc.,* 2017 R.I. Super.
[19] New York State Senate Newsroom, "Senator Eric. T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislature," July 1, 2010 (https://www.nysenate.gov/newsroom/press-releases/eric-t-schneiderman/senator-eric-t-schneiderman-shepherds-historic-anti).
[20] NY State Finance Law, Art 13. §189(4)(a).
[21] New York State Department of Taxation and Finance, "New York State Personal Income Tax Compliance Baseline Study Tax Year 2002," March 2005.
[22] *Id.,* pg. 11.
[23] Committee analysis of settlements and media releases on the Office of Attorney General for the State of New York's website.
[24] Sarah Krouse, "Sprint to Pay $330 Million to Settle N.Y. Tax Probe," The Wall Street Journal, Dec. 21, 2018 (https://www.wsj.com/articles/sprint-to-pay-330-million-to-settle-n-y-tax-probe-11545414196).

by the New York's Attorney General and the New York Tax Department came about as a result of a whistleblower claim filed in March 2011.[25]

Addressing Arguments Against Removing the Tax Bar

The Committee investigated the legislative history of the False Claims Amendment Act of 1986, but the only mention of the tax bar is in a committee report that states, "… it is now apparent that the False Claims Act does not apply to tax cases, and the Committee does not intend that it should be used so."[26] It may be that Congress intended nothing more than to codify the case law that existed at the time.[27]

Several witnesses at the Committee's hearing on Bill 23-35 suggested that removing the tax bar would result in a flood of frivolous lawsuits. These witnesses pointed to Illinois as a window into the District's future should the Committee move forward with this Bill. In Illinois, a prolific *qui tam* plaintiff, Stephen Diamond, has filed over 900 tax cases in Cook County Circuit Court.

The Committee investigated the situation in Illinois and does not believe it applies to the District for several reasons. First, the law in Illinois does not set an income, sales, revenue, or damages threshold for false claims cases. This has allowed Diamond to pursue low dollar nuisance cases, such as a complaint against an out-of-state wine seller for alleged failure to collect appropriate taxes for an online order of less than $250.[28] Such a low-dollar case would not be possible here under Bill 23-35. Second, Diamond exploited a regulatory gap resulting from inaction by the Illinois Department of Revenue (DOR). In 2009, the Illinois Supreme Court ruled that certain delivery charges were taxable.[29] Rather than provide regulatory guidance, the DOR did nothing. For seven years, this left retailers vulnerable to Diamond.[30] Only if defendants could show they were following official guidance or were otherwise told they complied with the law via DOR audits, courts dismissed these cases.[31] Third, despite pleas from many defendants, the Attorney General of Illinois often did not intervene to have Diamond's cases dismissed.[32] When the Illinois Attorney General has intervened, cases have been dismissed en masse.[33]

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[25] *Ibid.*
[26] S. Rep. No. 99-345, at 18 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5283.
[27] *United States ex rel. Lissack v. Sakura Global Capital Mkts*., No. 95civ1363(BSJ), 2003 U.S. Dist., at *18 (S.D.N.Y. Aug. 21, 2003) ("Congress codified existing case law that had held that the FCA did not support actions based on alleged violations of federal tax law.")
[28] *State of Illinois ex rel. Stephen P. Diamond, P.C. v. Winetasting Network*, 89 N.E. 3D 764 (2017).
[29] *Kean v. Wal-Mart Stores, Inc.* (919 N.E.2d 926).
[30] Michael Bologna, "Settlement Data Reveals Lawyer's False Claims Freight Train," October 19, 2016, Bloomberg Big Business Law (https://biglawbusiness.com/settlement-data-reveals-lawyers-false-claims-freight-train/).
[31] See for instance *State ex rel. Schad, Diamond & Shedden, P.C. v. National Business Furniture, LLC*, 2016 IL App (1st) 150526.
[32] *Id., supra* note 23.
[33] See for instance, John Edwards and John Hinman, "Better Late than Never – Judge in Illinois Dismissed 201 Sales Tax Cases Against Retailers," Hinman & Carmichael, June 2, 2016 (https://www.beveragelaw.com/booze-rules/2016/6/2/better-late-than-never-judge-in-illinois-dismisses-201-sales-tax-cases-against-retailers).

The Committee could not find evidence of frivolous false claims act cases in New York State after the passage of Senate Bill 8378. According to an empirical study of false claims cases involving taxes in New York State, there have been 18 tax settlements since the passage of the law, 11 of which originated from *qui tam* plaintiffs.[34] Courts have only dismissed five cases involving *qui tam* plaintiffs.[35] The dismissed cases were not against small businesses, but companies like Starbucks, Wells Fargo, Credit Suisse, and Vanguard.[36]

Some opponents of Bill 23-35 have cited a case involving B&H Foto and Electronics in the New York State Supreme Court as an example of a *qui tam* complaint that is frivolous or otherwise problematic (*People v. B&H Foto & Electronics Corp*., 452106/2019). This case alleges that B&H Foto underpaid sales tax on millions of dollars in receipts from electronics sales by applying reimbursable vendor discounts to purchases and knowingly not paying taxes on those reimbursements. The New York State Attorney General conducted an investigation into the claims of the *qui tam* relator. Based on that investigation, the case was converted to a civil enforcement action by the Attorney General.[37] The case is still pending, so it is too soon to know how the court will rule, but it is noteworthy that the Attorney General decided to supersede the relator's complaint. At the very least, it suggests that characterizing the case as frivolous is inaccurate.

The District's false claims law also has mechanisms to prevent or mitigate the impact of frivolous lawsuits. All *qui tam* complaints must be served on the Attorney General on the same day that the plaintiff files the complaint.[38] The Attorney General then has up to 180 days to decide, *inter alia*, whether to request that the court dismiss the case.[39] The Attorney General can intervene after the 180-day window as well.[40] Defendants can also request that the court limit or restrict the participation of the plaintiff upon showing that unrestricted participation would be repetitious, irrelevant, or constitutes harassment.[41] Finally, where a *qui tam* plaintiff proceeds and the court finds that the claim is frivolous, the statute provides that the court may award the defendant attorney's fees and expenses incurred.[42]

Witnesses at the hearing expressed concern that removing the tax bar would lead to the potential exposure of private tax return information to the public. While tax returns are generally confidential, federal and District law already provides that tax return information can be obtained for judicial proceedings.[43] The District's false claims laws, and Superior Court procedures, also contain provisions that mitigate the risk of public exposure of this information. Pursuant to D.C. Official Code § 2-381.03, *qui tam* complaints are filed in camera and remain under seal for up to 180 days. In cases where the Attorney General proceeds with the action and requests a civil investigative demand, the law imposes significant restrictions on who may examine documentary

[34] Gregory Krakower, "New York False Claims Act Tax Qui Tam: Evidence and Evaluation."
[35] *Ibid.*
[36] See, for instance, *State of New York v. Credit Suisse Sec.* 2015 NY Slip Op 32031(U).
[37] Superseding Complaint in *People v. B&H Foto & Electronics Corp.*, November 14, 2019.
[38] D.C. Official Code § 2-381.03(b)(3).
[39] D.C. Official Code § 2-381.03(b)(4).
[40] D.C. Official Code § 2-381.03(e)(2).
[41] D.C. Official Code § 2-381.03(d)(2)(C).
[42] D.C. Official Code § 2-381.03(f)(5).
[43] Federal law for disclosure of tax return information in judicial and administrative proceedings can be found at 26 U.S. Code § 6103(h). The District statutes are D.C. Official § 47–1805.04 and § 47–4406.

evidence in the custody of the investigator.[44] For cases where the *qui tam* plaintiff proceeds with the action, courts have the discretion to craft protective orders and require in camera review or redaction of materials to prevent public exposure of tax return information.[45]

Several witnesses cited reports and resolutions from the American Bar Association (ABA) and the National Conference of State Legislatures (NCSL), suggesting that these organizations oppose efforts to include taxes within a false claims act law. Neither organization has weighed in on on this, however. The ABA's report and model legislation specifically seek to balance the competing interests of companies, consumers, and state and local governments in the context of overpayment of transaction taxes, or taxes to state and local governments that a seller is required to collect from a consumer on taxable sales.[46] The resolution from NCSL opposes the use of contingent fee audit arrangements by state and local jurisdictions, where tax agencies contract with third-party tax auditors to augment revenues. It does not speak to false claims act legislation or cases at any point.[47]

Witnesses also suggested that removing the tax bar would result in potentially duplicative enforcement actions, such as where a *qui tam* complaint is filed against a company that is already being audited by the OTR. However, the OAG is free to consult with OTR at any time during a case to ensure it is not interfering with or duplicating an OTR audit or investigation. Moreover, it is not clear that a *qui tam* plaintiff and OTR would be flagging the same issues, as an audit may not uncover the specific allegations of the *qui tam* plaintiff. A recently settled *qui tam* case in New York highlights this dynamic. The *qui tam* plaintiff was a former employee of Moody's Corporation (MCO), the credit rating agency. The case alleged that the company was knowingly funneling money through a parent company, Moody's Assurance Company (MAC), to avoid corporate taxes. Moody's was subject to several audits by the New York State Department of Taxation and Finance, but those audits failed to capture or address this activity.[48]

Finally, the CFO has argued that Bill 23-35 would force its employees to violate section 6103 of the Internal Revenue Code (IRC).[49] The legislation does not require the CFO to produce tax information to anyone, however. In a *qui tam* case, the plaintiff may already have access to relevant tax information, or if they do not already have such information, they may seek it from the defendant once litigation has commenced. Additionally, the Committee Print pertains only to District taxes. While the CFO notes that District and federal tax data is combined within its computer systems and is not disaggregated, this logistical concern does not implicate the legal sufficiency of the Bill. Should the CFO receive a discovery request in a false claims case involving taxes, there is no reason it could not redact federal information or seek relief from the court to limit the scope of information that is produced. Finally, IRC section 6103 already contemplates disclosure of tax information in court when it states that "a return or return information may be

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[44] D.C. Official Code § 2-381.07(j)(1)-(j)(5)(B).
[45] See, for instance, D.C. Superior Court Civil Rule 5.2 Privacy Protection for Filings Made with the Court.
[46] American Bar Association Transaction Tax Overpayment Model Act Report, February 2011.
[47] National Conference of State Legislatures, Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals, September 30, 2011.
[48] Anonymous v. Anonymous, N.Y.S. 3d (2018) (For the full opinion, see here).
[49] 26 U.S.C. § 6103.

disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration" when the taxpayer is a party to the case.[50]

The District's Tax Fraud Hotline As an Alternative

Currently, the only avenue District residents have to report tax fraud or abuse is via the OTR's Tax Fraud Hotline. However, this option is rarely used. Under this option, an informant can submit a report of tax fraud or abuse via a Tax Fraud Information D-3949A form.[51] Once the allegation has been filed, OTR investigates. If they find that tax fraud or abuse has occurred, the informant may receive up to 10% of the proceeds collected pursuant to D.C. Official Code § 47-4111. Data suggests this is rare: from 2003 to the end of 2018, only five cases have been brought to OTR, totaling $7.23 million in taxes.[52]

During the Committee hearing, several witnesses suggested that the Committee tweak our tax fraud whistleblower statute to mirror federal law instead of moving forward with Bill 23-35. The federal law was amended in 2006 to allow tax fraud whistleblowers to receive an award of up to 30% of the proceeds collected.[53] While there is evidence that the federal law has incentivized more people to come forward, the Committee is not convinced that a change to our tax fraud whistleblower statute should preclude Bill 23-35 from being adopted.[54] Having only one mechanism for whistleblowers to pursue tax fraud cases is problematic. For instance, OTR may choose not to pursue a whistleblower case that has merit, or OTR may pursue an administrative action instead of the whistleblower case, leaving the whistleblower unrewarded. For instance, in one case, two whistleblowers filed a tip with the Whistleblower Office, alleging that their former employer engaged in bogus refund schemes that totaled $150 million. The IRS rejected the claim but then used the information to initiate an administrative action against the company. The whistleblowers appealed the IRS's determination to the Tax Court but lost because the IRS stated that administrative action was not based on the information the whistleblowers provided.[55] The IRS later admitted that the whistleblower information was used to initiate the administrative action, but by then the whistleblowers lacked recourse to challenge the determination.[56]

With this in mind, the Committee believes that the District's tax fraud whistleblower statute should be updated in addition to amending the False Claims Act. The Committee Print includes language to amend Section 47-4111 of the District of Columbia Official Code to increase the potential reward for informants who report tax fraud through the tax fraud hotline from "shall not exceed 10%" to "shall not exceed 30%" of the proceeds.

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[50] 26 U.S.C. § 6103(h)(4)(A).
[51] Examples of tax fraud or abuse that can be reported include claiming false exemptions or deductions, failing to report taxable income, or failing to file a return or pay taxes.
[52] Cases involving the application of D.C. Code § 47-4111, as of December 27, 2018. Source: OTR.
[53] 26 U.S. Code § 7623(b)(1).
[54] See, for instance, Treasury Inspector General for Tax Administration, "The Whistleblower Program Helps Identify Tax Noncompliance; However, Improvements Are Needed to Ensure That Claims Are Processed Appropriately and Expeditiously," August 30, 2016 (2016-30-059).
[55] Stock, M. R. (2014). Tax Whistleblower Statute: Obtaining Meaningful Appeals Through the Appropriate Scope of Review. *Fla. St. UL Rev.*, 42, 819.
[56] *Ibid.*

Legal Sufficiency

Testimony from OAG on a similar measure that was introduced during Council Period 22, Bill 22-166, stated that the Bill would violate the Home Rule Act if it did not include language requiring that the Office of Chief Financial Officer (OCFO) authorize any false-claims action relating to taxation. However, the Council's General Counsel issued a written opinion disagreeing with the OAG's analysis. In response to General Counsel's opinion,[57] the CFO advanced several counter-arguments in a letter to Chairman Mendelson dated February 3, 2020.[58] These, in turn, resulted in a second opinion by the Council's General Counsel. All of these opinions are attached.[59]

General Counsel's opinion was recently joined by a revised opinion from the D.C. Attorney General. Brian Flowers, Deputy Attorney General of the Legal Counsel Division, issued a legal memorandum on November 13, 2020 reversing the agency's prior position that the Bill may not be legally sufficient unless it included language that required tax-related false claims to be authorized by the CFO.[60] To come to this conclusion, the OAG reviewed the D.C. Court of Appeals ruling in *Apartment & Office Bldg. Ass'n of Metro. Washington v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772 (D.C. 2019), decided by the court subsequent to the OAG's 2018 testimony on Bill 22-166. The OAG's revised analysis concludes that the Bill does not "fundamentally alter the CFO's role under the Charter" since the Bill does not affect or shift any of the CFO's powers. The OAG memorandum also notes that while conflicts between the CFO, the Attorney General, and a *qui tam* relator may arise, provisions of the False Claims Act provide adequate means to resolve those conflicts in court.

Conclusion

Bill 23-35 provides a new tool to catch tax cheats and increase compliance with our tax laws. The Committee is convinced that there are multiple and adequate safeguards to protect honest and innocent taxpayers. Every concern against this bill has been refuted except one: fear. Fear that somehow this new tool will backfire. But the evidence is not there. Rather, this bill furthers the public interest in tax compliance. The Committee recommends the adoption of the Committee Print for Bill 23-35.

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[57] General Counsel memorandum, "Whether Expanding the False Claims Act to Permit Certain Tax Fraud Claims Impermissibly Infringes on the Chief Financial Officer's Charter-Based Responsibility for the "Levying and Collection" of Taxes and Other Revenue," January 19, 2020. See attachments.
[58] Jeff DeWitt, Re: Bill 23-35, "False Claims Amendment Act of 2020." February 3, 2020. See attachments.
[59] General Counsel memorandum, "Response to the Chief Financial Officer's February 3, 2020, Memorandum Regarding Bill 23-35, "False Claims Amendment Act of 2020,'" February 14, 2020. See attachments.
[60] Brian K. Flowers, Memorandum - Legal Advice on the False Claims Amendment Act of 2019 (AL-20-265), November 13, 2020.

II. LEGISLATIVE CHRONOLOGY

March 7, 2017	Bill 22-166, the "False Claims Amendment Act of 2017" is introduced by Councilmember Mary Cheh, with Councilmembers Jack Evans and Anita Bonds as co-sponsors.[61]
December 20, 2018	The Committee of the Whole holds a public hearing on Bill 22-166.
January 8, 2019	Bill 23-35, the "False Claims Amendment Act of 2019" is introduced by Councilmember Mary Cheh, with Councilmember David Grosso as a co-sponsor.
January 18, 2020	Notice of Intent to Act on Bill 23-35 is published in the *District of Columbia Register*.
November 17, 2020	The Committee of the Whole marks-up Bill 23-35.[62]

III. POSITION OF THE EXECUTIVE

Alan Levin, Chief Counsel for the Office of Tax and Revenue, testified at the Committee's public hearing on December 20, 2018. He stated that expanding false claims to include taxation infringes on the Chief Financial Officer's authority to levy and collect all taxes. Additionally, he said that including taxation in false claims actions could result in parallel enforcement actions. Finally, he suggested that other jurisdictions that have implemented similar legislation have experienced an increase in questionable or frivolous lawsuits.

IV. COMMENTS OF ADVISORY NEIGHBORHOOD COMMISSIONS

The Committee did not receive comments from any Advisory Neighborhood Commissions (ANC) regarding this Bill.

V. SUMMARY OF TESTIMONY

The Committee of the Whole held a public hearing on several bills, including Bill 23-35, on Thursday, December 20, 2018. The testimony summarized below pertains to Bill 23-35. Copies of written testimony are attached to this report.

Michael Ronicker, with Constantine Cannon LLP, testified in support of the Bill.

Erika Wadlington, D.C. Chamber of Commerce, testified in opposition to the Bill.

Stephen P. Kranz, McDermott Will & Emery LLP, testified in opposition to the Bill.

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[61] In previous Council Periods, similar bills (Bill 20-112 and Bill 21-649) had been introduced.

[62] Pursuant to Council Rule 501(a)(2), a hearing is not required when a hearing on a similar bill was held in the immediately preceding Council Period.

Patrick J. Reynolds, Council on State Taxation, testified in opposition to the Bill.

Alan Levine, Chief Counsel for the Office of Tax and Revenue, testified on behalf of the Executive in opposition to the Bill. His testimony is summarized in Section III.

Jimmy Rock, the Assistant Deputy Attorney General for the Public Advocacy Division of the Office of Attorney General for the District of Columbia, submitted written testimony suggesting that the Bill is not legally sufficient and recommending that the Bill be amended to require authorization from the Chief Financial Officer before the OAG can proceed with a false claims action involving taxes.[63]

VI. IMPACT ON EXISTING LAW

Bill 23-35 amends D.C. Official Code § 2-381.02 to expand false claims liability to taxation where the annual District income, District sales, or District revenue of the person against whom the action is being brought equals or exceeds $1 million, and the damages pleaded total $350,000 or more, then they may be held liable for false claims. The bill also amends D.C. Official Code § 47-4111(b) to increase the potential whistleblower award from 10% to 30%.

VII. FISCAL IMPACT

The attached fiscal impact statement from the District's Chief Financial Officer states that funds are sufficient in the FY 2019 through FY 2022 budget and financial plan to implement the Bill.

VIII. SECTION-BY-SECTION ANALYSIS

Section 1	Short title.
Section 2	Section 814(d) of the District of Columbia Procurement Practices Act of 1985 is amended to expand false claims liability to taxation.
Section 3	Section 47-4111 of the District of Columbia Official Code is amended to increase the potential award from up to 10% to up to 30%.
Section 4	Fiscal impact statement.
Section 5	Effective date.

[63] A November 13, 2020 opinion by the OAG Legal Counsel Division reverses this position and finds Bill 23-35 legally sufficient.

IX. COMMITTEE ACTION

On November 17, 2020, the Committee met to consider Bill 23-35, the "False Claims Amendment Act of 2020." The meeting was called to order at 12:23 p.m., and Bill 23-35 was item V-A on the agenda. Chairman Mendelson moved the print with leave for staff to make technical and conforming changes. Councilmembers Pinto, R. White, Cheh, McDuffie, T. White, Silverman, Bonds, and Grosso debated the motion. Councilmember Pinto then moved to postpone the vote to December 1, 2020. Councilmember Pinto's motion failed 4-9 (Councilmembers Grosso, McDuffie Pinto, and R. White voting aye; Chairman Mendelson and Councilmembers Allen, Bonds, Cheh, Gray, Nadeau, Silverman, Todd, and T. White voting no). The vote on the print was 8-5 (Chairman Mendelson and Councilmembers Allen, Bonds, Cheh, Gray, Nadeau, Silverman, and Todd voting aye; Councilmembers Grosso, McDuffie, Pinto, R. White, and T. White voting no). Then Chairman Mendelson moved the committee report for Bill 23-35 with leave for staff to make technical, conforming, and editorial changes. Approval of the report was unanimous (Chairman Mendelson and Councilmembers Allen, Bonds, Cheh, Gray, Grosso, McDuffie, Nadeau, Pinto, Silverman, Todd, and R. White, and T. White voting aye). The meeting was adjourned at 3:21 p.m.

X. ATTACHMENTS

1. Bill 23-35 as introduced.
2. Written Testimony (includes legal opinions referenced in this report).
3. Fiscal Impact Statement for Bill 23-35.
4. Legal Sufficiency Determination for Bill 23-35.
5. Comparative Print for Bill 23-35
6. Committee Print for Bill 23-35.

COUNCIL OF THE DISTRICT OF COLUMBIA
1350 Pennsylvania Avenue, N.W.
Washington D.C. 20004

Memorandum

To : Members of the Council

From : Nyasha Smith, Secretary to the Council

Date : January 09, 2019

Subject : Referral of Proposed Legislation

Notice is given that the attached proposed legislation was introduced in the Legislative Meeting on Tuesday, January 8, 2019. Copies are available in Room 10, the Legislative Services Division.

TITLE: "False Claims Amendment Act of 2019", B23-0035

INTRODUCED BY: Councilmember Cheh

CO-SPONSORED BY: Councilmember Grosso

The Chairman is referring this legislation to the Committee of the Whole.

Attachment

cc: General Counsel
Budget Director
Legislative Services

Councilmember Mary M. Cheh

A BILL

____

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

____

To amend the District of Columbia Procurement Practices Act of 1985 to expand false claim liability to certain false claims made pursuant to those portions of Title 47 of the District of Columbia Code that refer or relate to taxation.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "False Claims Amendment Act of 2019".

Sec. 2. Section 814(d) of the District of Columbia Procurement Practices Act of 1985, effective May 8, 1998 (D.C. Law 12-104, D.C. Official Code § 2-381.02(d)), is amended by striking the phrase "taxation." and inserting the phrase "taxation, unless the person making any such claim, record, or statement reported net income, sales, or revenue totaling $1 million or more in a tax filing to which that claim, record, or statement pertained, and the damages pleaded in the action total $350,000 or more." in its place.

Sec. 3. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (12 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 4. Effective date.

This act shall take effect following approval by the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.

Written Testimony of Michael Ronickher
Of Counsel at Constantine Cannon LLP

In Support of Bill 22-0166, the False Claims Amendment Act of 2017

December 20, 2018

Thank you for the opportunity to submit this testimony on behalf of myself, as a District resident and taxpayer, and Constantine Cannon LLP, a law firm with a specialty in representing whistleblowers under state and federal False Claims Acts, including the whistleblower reward program of the Internal Revenue Service. Based on our collective decades of experience with *qui tam* actions such as those permitted by the District's False Claims Act, we urge the Committee and the Council to eliminate the tax-fraud loophole.

The tax gap – the difference between the taxes owed and those actually paid – is a difficult problem for every jurisdiction. Eliminating the tax-fraud loophole in the District's successful False Claims Act would help reduce it, by enabling the District to crack down on tax fraudsters, generate revenue, and increase enforcement resources in a revenue-neutral manner. Below, we explain why. We also suggest some minor modifications to the Bill to help maximize its effectiveness.

I. Challenges of Tax Enforcement

While the District's Office of Tax and Revenue can and does investigate and prosecute tax cheats, it faces the same problems as every other taxing authority. Two particularly difficult problems are squarely addressed by the Bill.

First, budgetary realities mean that the District has finite enforcement resources. As a result, OTR cannot pursue every audit that it might like. Moreover, those same budgetary constraints may limit OTR's ability to identify potential non-compliance with the tax laws in the first place, further reducing the likelihood that it will successfully find and audit all non-compliant taxpayers. Compounding the problem, would-be tax cheats are aware of these limitations, and they will often choose to play the "audit lottery" rather than comply with the law.

Second, like all enforcement agencies, OTR is at an informational disadvantage compared to taxpayers. In my near-decade of experience representing the Internal Revenue Service at the U.S. Department of Justice, I learned first-hand how little information even federal tax authorities have compared to the taxpayers. Because federal and District tax law are based on self-reporting, tax authorities are frequently simply unaware of non-compliance prior to an audit. Some frauds are completely invisible to the outside, particularly those that are highly complex or perpetrated by non-filers or entities outside the jurisdiction who nonetheless have a legal duty to pay District taxes.

II. Eliminating the Tax-Fraud Loophole in the False Claims Act Would Address These Difficulties

Adopting the Bill would permit the District to address these two key problems in tax enforcement, in a revenue-neutral manner and with limited downside. *Qui tam* suits are among the most successful of government enforcement mechanisms, and the District should join the growing number of states employing them to combat tax fraud.

A. The Benefits of Enforcement Through False Claims Acts

As the Council is well aware, the District False Claims Act (D.C. Code § 2-381.01 – .10) already imposes strict civil penalties and liability for damages on those who defraud the District government of public funds, and it permits whistleblowers to bring civil actions on behalf of the government to stop fraud. Most of the funds are restored to the public treasury, but the Act encourages whistleblowers by awarding them a certain portion of damages collected from the defendant. The District has recovered millions of dollars in wrongfully obtained public funds in cases brought under the Act. Similarly, the federal False Claims Act has netted the U.S. Treasury over $40 billion in whistleblower-originated fraud recoveries since its enactment in 1986.

As a result, false claims acts are considered the most effective tool to combat fraud against the government. But in the District, as in many states, the tax-fraud exemption bars the Attorney General and whistleblowers from bringing cases against entities that defraud the government by failing to pay taxes.

By lifting that restriction, the Bill would bring the many benefits of *qui tam* provisions to tax enforcement. *Qui tam* provisions extend the government's reach by using whistleblowers to level a playing field characterized by asymmetric information and tax cheats' active concealment. Whistleblower "insiders" can point regulators to tax avoidance that would otherwise fly under the radar, and they can provide critical information that permits regulators to see behind the façade to the fraud that would otherwise escape view. This makes whistleblowers a vital resource to expose tax frauds that would otherwise go undetected.

Encouraging whistleblowers to report tax fraud will also multiply the limited resources available for enforcing tax laws. *Qui tam* suits, particularly with the proposed statutory minimum amount at issue, would also increase the efficiency of enforcement by focusing on large-scale frauds. If the District closes the tax-fraud loophole, whistleblowers would build a case for the government, provide a submission that explains the tax fraud in detail, and allow the District tax authorities to efficiently determine whether to join the suit and reap the rewards of the whistleblower's work.

As a side benefit, closing the tax-fraud loophole in the District also would strengthen federal-tax enforcement efforts, with resulting benefits for District enforcement. Since District tax law often mirrors federal law, it is common for the IRS and OTR to take action against the same violations. Because insufficient resources and endless delays so hamper IRS enforcement, whistleblowers would embrace the option to file parallel cases with District authorities.

B. New York's Successful Tax *Qui Tam* Experience

Numerous states have already realized that tax *qui tams* can help them address some of their issues with tax enforcement. False-claims statutes in Delaware, Florida, Illinois, Indiana, Nevada, New Hampshire, New York, Rhode Island, and Washington allow actions targeting some or all types of tax fraud.

New York's statute, which follows similar lines to what the Bill proposes for the District, has been extremely successful, demonstrating the enormous positive impact reliance on whistleblowers can have on enforcement. New York amended its false-claims statute in August 2010 to expressly allow *qui tam* suits for tax fraud. Like the District's proposal, New York's law sensibly requires whistleblowers to bring only actions that allege large-scale tax fraud; it does so by limiting the law's application to situations in which a defendant's net income or sales exceed $1,000,000 for the tax year, and the alleged underreporting deprives the government of $350,000 or more.

Complex tax fraud cases take many years to resolve. Yet the tax-fraud provisions of the New York False Claims Act, in effect for only eight years, have already shown considerable success. For example:

- In related settlements, in October 2018, an investment manager agreed to pay $30 million, and in April 2017, a hedge fund sponsor and its top executives agreed to pay $40 million, all to resolve allegations that originated with a whistleblower that they had failed to pay millions in New York State income tax on performance-fee income.
- In October 2017, Yankee Clipper Food Services I Corporation was convicted of a multi-year scheme to avoid paying New York taxes, after an investigation that was kicked off by a whistleblower. Together with other entities involved in the scheme, it paid $13 million to the state.
- In August 2016, a Minnesota pillow company paid $1.1 million to resolve a whistleblower suit alleging it knowingly failed to collect state and local sales taxes on website and telephone sales to New York residents.
- In August 2014, Topline Appliance Center agreed to pay $1.56 million to settle a false-claims lawsuit that accused the company and its owner of failing to collect and pay New York sales taxes and corporate franchise taxes for nearly 10 years.
- In March 2013, Mohanbhai Ramchandani, owner of a celebrity custom clothing business, paid $5.5 million to settle a whistleblower's claims that he failed to pay state and local sales taxes that his business charged to customers.

- In April 2012, the New York Attorney General intervened in a whistleblower action alleging Sprint fraudulently failed to collect and pay more than $100 million in New York sales taxes for wireless services since July 2005.

Because complex tax cases require such lengthy investigations, it is certain that, in addition to the few that have been publicly reported, dozens or even hundreds of other cases in New York remain under investigation.

C. The IRS's Whistleblower Program

The IRS's Whistleblower Program also provides an instructive lesson. Like the District's current act, the federal False Claims Act excludes tax claims. In 2006, however, Congress created the Whistleblower Program—a standalone whistleblower law that mandates rewards for whistleblowers who provide information to the IRS that results in the collection of unpaid federal taxes—to close that loophole. *See* 26 U.S.C. § 7623(b).

The IRS whistleblower program has been a huge boon for the federal treasury, leading to the recovery of $3.6 billion in unpaid taxes and penalties since 2010. In one notable case, a whistleblower revealed that UBS helped American clients hide income from the IRS in offshore accounts. As the *New York Times* reported, not only did UBS pay the IRS $780 million to settle its case, but the whistleblower's information "led to an investigation that … allowed the Treasury to recover billions in unpaid taxes." *See* David Kocieniewski, *Whistle-Blower Awarded $104 Million by I.R.S.*, N.Y. TIMES, Sept. 11, 2012, at A1. This case is but one of many examples.

While the IRS Whistleblower Program enables whistleblowers to provide the IRS with information about tax fraud, it could be even more effective. Critically, the IRS whistleblower program has no *qui tam* provision, which allows a whistleblower to file suit on the government's behalf to recover public funds, further leveraging private resources to the government's benefit. Several other problems—including delays in processing whistleblower claims, a lack of communication, a practice of rejecting claims without explanation, and a subjective process for determining whether to grant whistleblower awards—further hamper the program's effectiveness.

Apart from the IRS Whistleblower Program's own shortcomings, federal resources to police tax cheats have been—and will continue to be—greatly cut back. The IRS has long been the target of lawmakers in Washington, who since 2010 have slashed the IRS's enforcement budget by 20 percent, leading the agency to lose nearly a quarter of its workforce. *See* Brandon Debot, Emily Horton & Chuck Marr, *Trump Budget Continues Multi-Year Assault on IRS Funding Despite Mnuchin's Call for More Resources*, Center on Budget and Policy Priorities, March 16, 2017. The current administration has proposed even deeper cuts to the IRS that would further hobble its ability to pursue tax cheats. The IRS's resulting ineffectiveness will embolden tax cheats to violate the law at all levels of taxation, including the District.

By closing the tax-fraud loophole, the District can fight this tide. *Qui tam* plaintiffs leverage private resources, avoiding the budgetary constraints facing the tax authorities and boosting their ability to target frauds. Moreover, strong enforcement at the District level will help combat slackening enforcement elsewhere and ensure that the District receives the taxes it is owed.

III. Suggested Changes to the Proposed Statutory Language

We would also urge the Committee to make a minor change to the Bill's language. As written, the Bill would add the following language to the District False Claims Act:

> "…taxation, unless the person making any such claim, record, or statement reported net income, sales, or revenue totaling $1 million or more in a tax filing to which that claim, record, or statement pertained, and the damages pleaded in the action total $350,000 or more."

Unfortunately, the wording as proposed would leave two unintended loopholes. Ironically, the first would benefit those most successful at defrauding the District of its rightful tax revenue. Specifically, if the individual or entity dodging taxes did not "report[] net income, sales, or revenue totaling $1 million or more in a tax filing," no False Claims Act liability would attach, *even if* the alleged tax fraudster *actually had* net income, sales, or revenue totaling $1 million that it should have reported. A simple change to the wording would resolve the problem, putting the emphasis back on the reality of the taxpayer's situation, as opposed to what it reported.

Second, the language as proposed in the Bill is ambiguous in a way that runs the risk of being underinclusive for taxpayers committing fraud over multiple years. Imagine a taxpayer with net revenues of $1.8 million in 2017, but only $900,000 in 2016 and 2018. As writing, the Bill might permit an action against that tax cheat only for 2017, but not 2016 or 2018, even if the fraud covered all of those years. Again, a simple wording change would make clear that this unintended narrowing is not the case, without undercutting the goal of preventing minor claims.

As a result, we propose the following change to the statutory amendment, which would fix both unintended problems:

> "…taxation, unless the person making any such claim, record, or statement ~~reported~~ **had** net income, sales, or revenue totaling $1 million or more in ~~a tax filing to which that claim, record, or statement pertained~~ **any tax year subject to such an action**, and the damages pleaded in the action total $350,000 or more."

IV. Conclusion

We urge the Committee to support the Bill, with the modifications proposed above, to help the District take enormous steps forward for tax enforcement. Doing so would crack down on tax fraudsters, raise revenues, and increase the government's tax-enforcement resources, all without costing taxpayers additional money.

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Supplemental Written Testimony of Michael Ronickher
Of Counsel at Constantine Cannon LLP

In Support of Bill 22-0166, the False Claims Amendment Act of 2017

December 28, 2018

This submission supplements my oral and written testimony of December 20, 2018, submitted on behalf of myself, as a District resident and taxpayer, and Constantine Cannon LLP, a law firm with a specialty in representing whistleblowers.

In the hearing on December 20, 2018, the Committee heard numerous opponents of the Bill muster to the defense of those who try to avoid their obligation to pay District taxes. Yet they said nothing that counters the basic reality of the Bill: it would simply expand a tried-and-true method of supplementing the government's enforcement apparatus into a new area that direly needs its help. The District, like every jurisdiction, suffers from a stubborn tax gap, estimated in 2015 at tens of millions of dollars per year.[1] This Bill would help close that gap.

The potential immense benefits of the Bill were underscored just the day after the hearing, when New York announced a dramatic success.[2] Because of a whistleblower suit filed under the tax provisions of its False Claims Act, the state was able to secure a settlement of $330 million from Sprint for allegedly failing to collect and pay state and local sales tax on flat-rate wireless plans. The settlement, the largest single state-level false claims act settlement ever, demonstrates the incredible possibilities for using the *qui tam* mechanism to bolster tax enforcement.

In the press release announcing the settlement, both the state Attorney General and the Acting Commissioner of Taxation and Finance came out in praise of New York's law. Notably, the latter is the top official of exactly the agency that the testifying representative from DC OTR claimed disapproved of the law. Yet the Acting Commissioner took the opposite stance and specifically praised the unique features of the tax False Claims Act regime: "We applaud the whistleblower who brought this injustice to light, and our colleagues at the Attorney General's Office who worked closely with us on the investigation that led to this record-setting settlement of $330 million."[3]

Below, I discuss some of the specific arguments raised at the hearing and explain why they are unpersuasive in the face of the plain logic of the Bill's proposed approach. Given the enormous potential for success, the District should take the opportunity to increase its tax enforcement and expand its False Claims Act (FCA) to permit tax cases.

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[1] Office of Tax and Revenue, Collection Information, *available at* https://otr.cfo.dc.gov/page/collection-info-2015.
[2] New York Attorney General, Press Release, *available at* https://ag.ny.gov/press-release/ag-underwood-and-acting-tax-commissioner-manion-announce-record-330-million-settlement.
[3] *Id.*

I. The Statute of Limitations Will Not Be Increased

The Bill would not increase the statute of limitations for the tax fraud it targets, contrary to the statements of some of its opponents. District law already suspends the statute of limitations for a "(A) false or fraudulent return with the intent to evade tax, (B) willful attempt in any manner to defeat or evade tax imposed by this title, (C) failure to file a return…" DC Code § 47–4301(d)(1). These are exactly the kinds of tax fraud the Bill is designed to counter. Thus, its six-year statute of limitations would not increase the enforcement window. Indeed, even absent fraud, the District can pursue any gross understatement of tax for six years. § 47–4301(d)(2) & (3). The statute of limitations is simply not an issue.

II. Government Oversight Prevents a "Commandeering of Enforcement"

Opponents of the Bill, arrayed against tax enforcement, displayed an unusual concern for the District government by repeatedly citing worries about the "commandeering of enforcement" by private litigants, but such concerns are blunted by the decades of experience with the District's False Claims Act and other state and federal FCAs. The FCA regime creates a public-private partnership; it does not give private litigants free rein. Instead, government is heavily involved in every stage of an FCA action. When a whistleblower files a case, the government reviews it and leads the investigation, permitting the whistleblower to assist as the government deems helpful. Such assistance is often critical, but the whistleblower does not direct the investigation. Indeed, the government has the right to seek to dismiss claims it deems meritless.

Moreover, the intent requirements in the statute meant that only cases involving willful tax avoidance will succeed. That acts as a check on the potential overriding of administrative enforcement policies, because only cases against willful tax cheats will go forward, and those are always a priority.

Healthcare enforcement provides a useful example of the critical role of whistleblowers even in a highly technical and regulated area. Contrary to some of the testimony at the Hearing, the regulation and oversight of Medicare and Medicaid is in fact very similar to tax administration. There is a government enforcement agency (the Department of Health and Human Services Office of the Inspector General, as well as its equivalents outside the federal government) tasked with regulating the program and with enforcing compliance. Like OTR, it even conducts audit to determine whether participants are following the law. Yet, as in the tax realm, the enforcement agency cannot identify or investigate every single fraud on the program.

As a result, the federal and state FCAs have proven to be critical tools for rooting out healthcare fraud. In 2018 alone, the federal government recovered over $2.5 billion in healthcare fraud cases.[4] Almost $2 billion of that total was attributable to *qui tam* suits brought by

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[4] U.S. Dep't of Justice, Press Release, *available at https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.*

whistleblowers.[5] The healthcare arena provides clear proof that, even in an area with its own dedicated enforcement agency, whistleblowers provide critical assistance.

III. The Bill Would Increase Enforcement and Reduce "Inequitable Treatment"

Relatedly, although opponents of the Bill claim to be concerned that it might lead to uncertainty or inequitable treatment, it would simply increase enforcement. Currently, many individuals and entities that owe tax play the so-called audit lottery, hoping their non-compliance will go unnoticed by an overburdened enforcement agency. Whenever someone succeeds at that lottery, there is inequitable treatment.

Involving whistleblowers will help catch some of those who might otherwise escape the eye of the authorities, increasing compliance with the law. As a result, the Bill will reduce, not increase, inequity.

IV. The Bill Does Not Raise New Privacy Concerns

Opponents of closing the tax loophole in the FCA also cite a supposed concern with taxpayer privacy, but this issue is not unique to the tax world, and the examples outside of tax show that it is of limited concern here.

All *qui tam* actions are sealed during the investigative phase, so no taxpayer information would be revealed. Moreover, many non-tax whistleblower actions involve extremely sensitive or even classified information. In those cases, the government is very careful about what information it reveals to the whistleblower, let alone the public. The rules preventing disclosure are not waived by a *qui tam*, just as taxpayer privacy rules would not be waived. Thus, the courts' normal tools, like protective orders and sealed proceedings, are more than up to the task of preserving privacy.

V. A Flood of Claims Is Unlikely and Not Inherently Negative

Opponents also cite a potential flood of claims if the Bill is passed, but that concern misses a few key points. First, *qui tams* are expensive to bring, and attorneys have strong interests in vetting potential cases and only bringing those that are very sound. A flood of claims is unlikely.

Second, even if such a flood occurs, it is also almost entirely a positive. If the claims have merit, then it is an unambiguous success that will help close the District's tax gap. If there are numerous unmeritorious claims brought by the uninformed or unscrupulous, then the government and the courts will weed them out. The single lawyer bringing a huge number of claims in Illinois should not deter the District from doing the smart thing for enforcement here

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[5] U.S. Dep't of Justice, Fraud Statistics, *available at* *https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.*

(and it is worth remembering that any case of that lawyer's that succeeds is returning funds to the state treasury).

VI. The FCA's Existing Intent Requirement Is Sufficient

The FCA's intent requirement can be applied without change to the area of tax enforcement. Although one of the opponents of the Bill made the baseless suggestion that its language would encompass anyone who had signed their tax return, that is insufficient to meet the intent requirement under the District's FCA. The law requires a "knowing" false claim, defined as actual knowledge, willful ignorance, or reckless disregard of its falsity. DC Code § 2-381.01(7). That is hardly satisfied simply by signing the tax return constituting the claim, unless the signatory has or should have a reason to believe it is false. In short, the law narrowly targets those who deliberately or recklessly underreport their tax liability, and the Council should embrace the chance to increase enforcement against such tax avoiders.

VII. The District's Existing Tax Informant Program Is Not a Solution

The Bill will offer a comprehensive new enhancement of the District's tax enforcement that even an improvement to the existing informant reward provision could not offer.

The existing provision is an anemic, discretionary program that simply permits the Mayor, or her delegate, to pay up to 10% of collected proceeds if she deems it necessary to detect and pursue tax underpayments. The representative of OTR could cite only one example of the program's having been used at all and, while there may be others, this lack of utilization is hardly surprising. A discretionary program does very little to incentivize whistleblowers, who take on enormous risks to come forward with their information.

More critically, even if the award were made mandatory and the percentage increase, it would still be less desirable for the District than expanding the FCA. An informant reward program does not leverage private resources to improve enforcement, and it is not revenue neutral. Instead, it relies on existing, already strained enforcement resources to investigate tips from whistleblowers, further taxing the enforcement agency. When it does lead to collection, the government must pay a reward out of the collected proceeds, but unlike in an FCA, there are no provisions for enhanced penalties via damage multipliers, so the government recovers less than it otherwise would.

The lesson of the IRS informant-reward program is one the Council should heed. I and other practitioners at my firm have represented clients in numerous submissions to that program, and we are well acquainted with its shortcomings. Because it relies on the existing resources of the agency, claims languish for years and many are simply not pursued due to lack of resources. In an FCA regime, by contrast, private resources are brought to bear to assist the government in its investigation, permitting it to take on more actions than it otherwise would be able.

Accordingly, the Bill should move forward with the closing of the tax loophole to the FCA; attempting to boost the failed and ignored informant reward program will not meet the same goals of increasing enforcement and collections in a revenue-neutral manner.

VIII. Conclusion

We urge the Committee to support the Bill, with the minor tweaks to its language suggested in my initial written testimony, to help the District take enormous steps forward for tax enforcement. No challenge raised to it by its opponents raises any serious concerns, and the Bill remains smart policy to help the District crack down on tax fraudsters, raise revenues, and increase the government's tax-enforcement resources, all without costing taxpayers additional money.

Respectfully submitted,

s/*Michael J. Ronickher*

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December 20, 2018

Mr. Phil Mendelson, Chairman

Council of the District of Columbia

1350 Pennsylvania Avenue NW, Suite 504

Washington, DC 20004

Dear Chairman Mendelson:

On behalf of the business stakeholders we represent, we thank you for the opportunity to provide comments on Bill 22-166, the False Claims Amendment Act of 2017 ("Act"). Like you, we strive to make the District of Columbia a better place for all residents and the job creators that are investing in our local economy.

With that said, we strongly urge the DC Council not to move forward with the false claims expansion nor any future iteration of this policy suggestion. As you know, when the District considered this Act and whistleblower laws many years ago, its applicability to tax claims were removed. We encourage the DC Council to maintain the policy of tax claims being exempt from the Act. Maintaining this policy would keep the District of Columbia in harmony with neighboring Maryland, Virginia, and the federal government.

The proposed amendment is problematic for the following reasons:

1. **The proposal raises privacy concerns**. The District, along with the 50th states and the federal government, have always considered taxpayer information to be private and confidential. Should the proposed bill move forward the District of Columbia will be on an island by itself in allowing access to taxpayer information by third-parties or individual litigants.

2. **The proposal is unnecessary and would usurp the administrative authority of the DC Chief Financial Officer**. At both the federal and local level, tax compliance and enforcement mechanisms are effectively handled. The Internal Revenue Service (IRS) has a whistle blower program for tax fraud and the DC Office of the Chief Financial Officer uses its auditing and regulatory powers to address any perceived or actual cases of tax evasion. Moreover, expanding the Act in the way B22-166 proposes would not only displace the CFO's authority and transfer it to the courts through individual claimants, but

also increase frivolous claims and burgeoning caseloads that would also overburden the court system. We are extremely concerned that the proposal does not protect against unsubstantiated claims or fishing expeditions. The unintended consequences of this proposal could lead to a manipulation of the court system to harass District taxpayers.

3. **The proposal makes the District of Columbia's statute and tax practices an outlier**. Currently, the District of Columbia is aligned with the majority of states and the IRS which prohibit tax claims coming under the purview of the Act. Moving forward with extending the Act to tax claims would deviate from best practices and raises serious policy and fairness concerns. Applying the Act to tax matters may lead to complications and unpredictability for the individual or corporate taxpayer. If an individual brought a tax claim to the OCFO and/or the DC Attorney General which was declined for action, the individual could try to have a second bite at the apple with a *qui tam* suit. Further, pursuing these claims causes additional distress, inconsistencies and uncertainties to an issue that is already complicated.

As always, we look forward to working with you to find optimal solutions to the challenges facing our city. However, Bill 22-166 raises many concerns and we encourage the Council to maintain the law as is. Because of these concerns and others, we cannot support Bill 22-166.

We thank you in advance for taking the time to consider and examine the concerns and impact of all affected stakeholders. Should you have any questions, please feel free to contact Erika Wadlington at (202) 624-0613 or by email at ewadlington@dcchamber.org

Signed,

DC Chamber of Commerce

US Chamber of Commerce, Institute for Legal Reform

AT&T Inc.

Verizon

Access Green

Cc: Members of the Committee of the Whole, and Chief Financial Officer, Jeff DeWitt.

McDermott
Will Emery

Boston Brussels Chicago Dallas Dusseldorf Frankfurt Houston London Los Angeles Miami
Milan Munich New York Orange County Paris San Francisco Seoul Silicon Valley Washington DC

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December 20, 2018

VIA HAND DELIVERY

Chairman Phil Mendelson
Council of the District of Columbia
Committee of the Whole
1350 Pennsylvania Avenue NW, Suite 504
Washington, DC 20004

Re: Bill 22-166, False Claims Amendment Act of 2017

Dear Chairman Mendelson:

I am writing to express concerns regarding Bill 22-166. As introduced, the bill would amend the existing false claims statute in the District of Columbia (the "DC FCA") to expressly authorize certain tax-related false claims actions. By allowing private, profit motivated parties to bring tax enforcement lawsuits. Bill 22-166 would seriously harm the District's reputation for fair tax administration, while failing to do anything to support the voluntary compliance upon which our tax system is based. As a former General Counsel to DC's Office of Tax and Revenue ("OTR") and resident of the District, I am concerned on a professional and personal level about the proposed legislation.

Now, in private practice, I can attest to the fact that opening the door to tax-related false claims can lead to significant headaches for taxpayers as well as frustration of the agency responsible for tax administration, here OTR. The proposed bill would permit private parties ("relators") to bring cases on behalf of the government in exchange for 15-30 percent of any recovery to the District. These types of cases, which are known as *qui tam* cases, are the bulk of the cases filed under state false claims act statutes. Indeed, only a handful of cases have ever been brought under state false claims act statutes by internal whistleblowers. Instead, the vast majority of cases are brought by bounty hunters seeking big rewards. Bill 22-166 would create a cottage industry of bounty hunters in the District, similar to what we have seen occur in Illinois and New York, and provide business to the law firms that defend against them, doing so at the expense of the District's reputation and OTR.

For example, a Chicago-based law firm has filed over a thousand *qui tam* tax actions under the Illinois False Claims Act. Those cases are illustrative of the problems that can ensue when tax-related false claims actions are permitted. As is typical in tax-related false claims actions, many of the defendants accused of improperly administering provisions of Illinois' sales and use tax code proactively sought guidance from and were audited by the respective tax authority regarding the complex issues at hand. Despite these efforts to get it right and comply with the law, companies in Illinois and New York are regularly sued by bounty hunters nearly a decade later—long after the statute of limitations for audit and assessment has run and after records and correspondence that would permit them to defend themselves have been destroyed. In many cases, the employee or service provider that assisted with the matter is no longer associated with the company. The bill before your committee targets ambiguity in the law and allows a few litigious individuals to profit from uncertainty in a way that does not respect the efforts of taxpayers to comply with the law or the ability of the taxing authority to enforce it.

The cost to retailers and to the government of the aggressive use of the Illinois False Claims Act case is significant. Retailers have paid untold millions in legal fees to defend against the practices of bounty hunters that have flocked to the opportunity. Other retailers have abandoned making sales to the state entirely or been deterred from offering innovative business models that inherently involve a grey area. In a hearing before the Illinois House Revenue and Finance Committee, Former Illinois Revenue Director Brian Hamer described the Illinois cases as being brought by a financially motivated third party adept at manipulating the *qui tam* process to victimize businesses that at most made an inadvertent mistake. At that hearing, several witnesses described being forced into settlements for amounts far exceeding any tax owed because the costs of litigation are so high.

Moreover, the financial incentive for private bounty hunters encourages them to develop theories of liability that are not necessarily established or approved by the agency responsible for tax administration. Allowing private parties to intervene in the administration, interpretation or enforcement of the tax law commandeers the authority of the tax agency, creates uncertainty and can result in inequitable tax treatment. The Illinois Department of Revenue has repeatedly publicly criticized the relator's conduct in the Illinois cases, accusing it of undermining tax enforcement, unfairly penalizing taxpayers for good faith errors in applying complex tax laws and costing the state significant revenue. Mark Dyckman, the current General Counsel for the Illinois Department of Revenue, has said that "the cases have clearly interfered with the administration and enforcement of tax law and may have even ultimately cost the state money, though it's impossible to quantify how much." Allowing private parties to determine, through a false claims act case, what the law is, removes responsibility and authority from OTR to do just that. Furthermore, if encouraging whistleblowers to disclose known underpayments of tax is the end goal there is no need for further action. Specifically, a provision enacted by the Council in 2001 permits up to a 10% reward for providing information necessary to detect underpayments of tax. *See* D.C. Code § 47-4111. While to my knowledge this provision is not regularly invoked, a completely plausible explanation is that there is simply not a plethora of bad actors willfully avoiding tax obligations owed to the District. In the event there are a few isolated bad actors, § 47-4111 is available to financially encourage those that wish to inform OTR of known noncompliance.

Finally, the National Conference of State Legislatures ("NCSL") has recognized the inherent problems with involving third parties in sensitive tax matters. In fact, the NCSL Executive Committee Task Force on State and Local Taxation of Communications and Electronic Commence unanimously adopted a resolution opposing the use of contingency fee arrangements for the conduct of taxpayer audits and encouraging governments to end such contingency fee practices where they exist. A copy of the resolution is enclosed for your reference.

Please contact me at (202)-756-8180 or skranz@mwe.com if you would like to meet to discuss this issue further.

Sincerely,

Stephen Kranz

Enclosure NCSL Executive Committee Task Force on State and Local Taxation of Communications and Electronic Commence – Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals

NATIONAL CONFERENCE *of* STATE LEGISLATURES

The Forum for America's Ideas

RESOLUTION CONCERNING THE USE OF CONTINGENT FEE ARRANGEMENTS IN TAX AUDITS AND APPEALS

NCSL EXECUTIVE COMMITTEE TASK FORCE ON STATE & LOCAL TAXATION OF COMMUNICATIONS AND ELECTRONIC COMMERCE

WHEREAS, taxes are one of the most sensitive points of contact between citizens and their government, and there is a delicate balance between efforts to effectuate revenue collection and freedom from government harassment; and

WHEREAS, although compliance with state tax statutes and regulations is subject to audit scrutiny, the percentage of taxpayers actually audited is small, and as a result, our federal and state tax systems are premised, to a great degree, on voluntary compliance; and

WHEREAS, the implementation of tax statutes must be transparent in order to improve voluntary compliance, reduce the costs to states of administration of those taxes, and improve the relationship between taxpayers and their government representatives; and

WHEREAS, it is incumbent upon governments to ensure that the rights, privacy and property of our taxpayers are adequately protected during the process of the assessment and collection of taxes; and

WHEREAS, the purpose of any audit of a taxpayer or proceeding between government and a taxpayer is the determination of the taxpayer's correct amount of tax liability, and correspondingly, whether the return as filed was accurate; and

WHEREAS, a properly conducted audit should serve three purposes: to determine the accuracy of a particular tax return, to create an incentive for all taxpayers to comply with the tax law, and to educate taxpayers about their future tax compliance obligations; and

WHEREAS, to conduct an audit that accomplishes these goals, the audit should be based on an actual review of the taxpayer's books and records, designed to determine whether the taxpayer has over or under paid, or has reported the correct amount of tax.

WHEREAS, by contracting with third parties to conduct taxpayer audits on a contingent fee basis, governments may provide an incentive to the third-party auditor to arbitrarily inflate a taxpayer's liability because a larger audit assessment results in a larger payment to the auditor; and

WHEREAS, contingent fee arrangements may encourage auditors to be overly aggressive, to interpret tax statutes to their own monetary advantage rather than in a fair and just manner, to "cherry pick" taxpayers as audit targets and to ignore taxpayer errors that would result in lower assessments; and

WHEREAS, government use of contingent fee arrangements in tax audits and appeals denies the transparency that taxpayers are owed and demand, creates a perception of unfairness that undermines taxpayers' relationships with tax administrators and fosters an atmosphere of mistrust that hinders voluntary compliance.

THEREFORE, LET IT BE RESOLVED, that the National Conference of State Legislatures opposes the use of contingency fee arrangements for the conduct of taxpayer audits as well as arrangements with firms or organizations that rely on economic assumptions rather than on an actual or statistical review of a taxpayer's books and records, in tax audits and appeals and encourages governments to end such contingency fee practices where they exist.

Adopted Unanimously by the NCSL Executive Committee Task Force on State and Local Taxation of Communications and Electronic Commerce, September 30, 2011

COST
Council On State Taxation

Testimony to the Council of the District of Columbia Committee of the Whole

In Opposition to B22-166 False Claims Amendment Act of 2017

Patrick J. Reynolds
Senior Tax Counsel
December 20, 2018

Chairman Mendelson and Members of the Committee, thank you for the opportunity to provide testimony today on behalf of the Council On State Taxation (COST) in opposition to B22-166, which would remove a prohibition and inappropriately expand the District's False Claims Act (FCA) to allow third parties to attempt to enforce DC's taxes against taxpayers, instead of that sole responsibility resting with the Office of Tax and Revenue (OTR). While COST recognizes that allowing third parties to serve as a check to the government making payments, such as medical service providers, it is not needed when the government already has an agency, the OTR in this case, that is dedicated to administering and enforcing DC's tax laws.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of approximately 550 major corporations engaged in interstate and international business. COST's objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities.

COST's Policy Statement on False Claims Act Application to Taxes

The COST Board of Directors have a policy statement on False Claims Acts applying to taxes. That statement, in part, provides that:

> Tax agencies should be the sole entities that administer and enforce state and local tax laws. It is inappropriate for persons or governmental entities outside the tax agency to initiate civil suits claiming undercollection or underpayment of a tax (false claims act suits).[1]

[1] COST Policy Statement on "False Claims Acts Should Exclude State & Local Taxes" is available at: https://www.cost.org/globalassets/cost/state-tax-resources-pdf-pages/cost-policy-positions/cost-fca-policy-statement-final.pdf.

122 C Street, N.W., Suite 330 ● Washington, DC 20001-2109 ● Tel: 202/484-5222 ● Fax: 202/484-5229 ● www.cost.org

This legislative proposal removes a prohibition to the District's False Claims Act applying to all taxes and allows such actions if a net income, sales, or revenue filing totals more than $1 million or more in a tax filing and the pleaded damages in the action are $350,000 or more. The District should stay the course, along with the vast majority of other states, and not allow such actions.

COST's Major Concerns with False Claims Acts for Tax Disputes

There are four primary reasons private individuals, via a False Claims Action, should <u>not</u> be expanded to apply to taxes administered by the OTR:

- First, tax issues can be complex and the OTR already has an expert staff capable of dealing with all tax issues. (The threshold for an action applying to taxes almost guarantees the tax issue at hand will be complex.) OTR should control the overall administration of the District's taxes, not third parties with their own financial interest on how the District's tax law should be interpreted.

- Second, FCA actions applying to tax makes it difficult, if not impossible, for the OTR, as the District's designated tax administrator, to directly address tax issues, including developing cases for litigation and for settling tax disputes. For example, what constitutes a substantial presence after the U.S. Supreme Court's decision in *South Dakota v. Wayfair* decided June 21 of this year, which was recently addressed by this Council, should be administered by the OTR, not third-party litigators that may have limited tax expertise and/or inappropriate financial interests.

- Third, expanding FCA actions to apply to taxes could inappropriately allow private parties access to confidential tax information. This directly conflicts with DC's taxpayer confidentiality provisions (§47-2018 and §47-1805.04). Private parties could also gain access to a business's confidential customer information (products purchased, credit reports, etc.), which creates risks for the potential improper disclosure of private "trade secret" information.

- Finally, expanding FCA actions to apply to taxes will make DC a less attractive place for businesses to conduct their operations. Allowing private parties to enforce their interpretation of DC's tax law will create havoc, confusion, and increase stress for both taxpayers and the OTR. DC should not stray from Virginia and Maryland which have specifically excluded taxes in their FCA laws.

Conclusion

COST respectfully urges this Committee to retain the exclusion in DC's FCA for taxation by not enacting this legislation.

cc: COST Board of Directors

False Claims Amendment Act of 2017,

Bill 22-166

Before the

Committee of the Whole
Council of the District of Columbia
The Honorable Phil Mendelson, Chair

December 20, 2018, 9:30 A.M.
John A. Wilson Building, Room 412

Testimony of Alan C. Levine
Chief Counsel
Office of Tax and Revenue

Jeffrey S. DeWitt
Chief Financial Officer
Government of the District of Columbia

Good morning, Chairman Mendelson, and members of the Committee of the Whole. I am Alan C. Levine, Chief Counsel for the Office of Tax and Revenue ("OTR"). I am pleased to present testimony today on Bill 22-166, the "False Claims Amendment Act of 2017" (the "Bill").

The District's False Claims Act ("FCA") allows court actions to be taken against those making false claims to the District Government for the purpose of improperly obtaining or retaining government funds. The District's FCA, enacted in 1986, is "based on a similar California statute which in turn was derived in large part from the federal false claims and qui tam statutes." *Report on Bill 11-705, The Procurement Reform Amendment Act of 1996,* at page 8 (September 24, 1996). Tax matters are expressly exempted in the Federal False Claims Act. *See* 31 U.S.C. Section 3729(d). The legislative history of the Federal False Claims Act clearly indicates that Congress did not think it appropriate to include taxation within the reach of the *Federal False Claims Act. Senate Report* (Judiciary Committee) 99–345, at 5283 (1986).

The Bill amends the FCA to make it applicable to taxation matters above certain thresholds. False claims actions would be allowed only where the taxpayer has net income, sales, or revenue of $1 million or more and the damages alleged are $350,000 or more. OTR anticipates administrative and legal issues to implement the Bill as written. A number of these issues have been addressed in the tax press and in various law review articles over the years, several of which are attached to my testimony.

First, expanding the FCA to include "taxation" infringes on the Chief Financial Officer's exclusive authority for "levying and collection of all taxes," granted under Section 424(d)(10) of the Home Rule Act. As the Chief Financial Officer's authority to collect taxes arises from the Home Rule Act, it may require Congressional legislation to amend this authority.

Second, including taxation in the FCA could create parallel enforcement actions for tax cases. For example, when the Office of the Attorney General ("OAG") accepts an FCA matter there could be both an audit and an FCA case. OTR's Audit Division, with industry specific-ability to efficiently process large and complex tax matters, may be able to resolve the audit and settle with a taxpayer with minimal time and effort, or, alternatively, issue a proposed notice of assessment. However, OAG may not be as familiar with auditing the complex tax matters at issue, delaying the resolution of the case, which could be expensive and burdensome to both the District and the taxpayer. As pointed out in one of the articles attached to my testimony:

> Tax Department audits of large corporations are usually conducted by teams of auditors who know the industry and who may have audited the particular

> taxpayer in previous audit cycles. The tax auditors are experienced and know the law, the regulations, and the other authorities. They are familiar with the issues that are likely to be presented by a corporation's tax returns. The [New York Attorney General's Office ("AGO")], in contrast, typically will not be familiar with those issues and, as a result, its investigations is likely to be inefficient and time-consuming…. [resulting in] a separate administrative structure for enforcing the tax law that is expensive and burdensome and that is wholly unnecessary.
>
> *Extending State False Claims Acts to Tax Matters Is a Bad Idea,* Bloomberg Daily Tax Report: State, April 26, 2017.

The Multistate Tax Commission ("MTC") and the American Bar Association ("ABA") both oppose including tax matters in false claims actions since they result in non-tax agencies conducting tax administration. The MTC and the ABA have expressed the view that false claims statutes encourage under-collection by vendors in order to avoid a false claim action against them. As the ABA noted:

> Sellers collecting state and local transaction taxes face two main liability risks: First, if sellers fail to collect sufficient tax, they face liability risks attributable to audit assessments. Second, if sellers over-collect or collect for the wrong jurisdiction, they face potential actions and lawsuits filed on

> behalf of purchasers or pursuant to consumer protection statutes….
> Exposure to lawsuits will increase the cost of collection and will discourage some retailers from voluntarily collecting state and local transaction taxes.
>
> *American Bar Association Transaction Tax Overpayment Model Act Report* at page 6 (February 2011).

Third, allowing tax matters to be subject to false claims actions has led to numerous questionable lawsuits in other jurisdictions. For example, in Illinois, "[a] single Chicago-based law firm brought approximately 62 actions claiming each defendant taxpayer violated the Illinois Whistleblower Act[.]" *A Recipe For Bad Tax Policy: False Claims Acts And State Taxation,* Journal of Multistate Taxation 14, January 2013. Tax officials in Illinois have stated that number has expanded to approximately 1,000 lawsuits of questionable validity. *Court Tosses Fees for 'King of Qui Tam,' Business Model Done?*, Bloomberg Daily Tax Report: State, June 16, 2017. New York tax officials have indicated that many suits have been brought by "relators"[1] or "whistleblowers" with questionable motives.

Fourth, the Bill may be unnecessary since the District already offers a reward of up to 10 percent of the proceeds collected for supplying information regarding tax violations. *See* D.C. Official Code Section 47-4111. This approach is

[1] The term or definition of "relator" as used in the qui tam provision of the False Claims Act means one who relates to the government the fraud being committed against the government.

similar, in some respects, to the method used at the federal level. The Internal Revenue Service ("IRS") administers a "whistleblower awards program" which provides rewards to individuals that report to the IRS detailed information about tax violations. The reward for this information is between 15 and 30 percent of the amount collected. *See* IRC Section 7623(b)(1). This approach places the review of tax information under the purview of the IRS and it decides which whistleblower cases to pursue. Thus, this program acknowledges that the taxing authority has unique expertise in tax matters and is the most appropriate agency to handle these cases. The IRS statute permits a whistleblower the right to contest the award in U.S. Tax Court.

Thank you, Chairman Mendelson for the opportunity to comment on the Bill. I am happy to answer any questions at this time.

Statement of Jimmy Rock
Assistant Deputy Attorney General for the Public Advocacy Division
Office of the Attorney General for the District of Columbia

Before

The Committee of Whole
The Honorable Phil Mendelson, Chair

Public Hearing

On

Bill 22-166, the "False Claims Amendment Act of 2017"

December 20, 2018
9:30 am
Room 412
John A. Wilson Building
1350 Pennsylvania Avenue, NW
Washington, District of Columbia 20004

Introduction

Greetings Chairman Mendelson, Councilmembers, staff, and residents. My name is Jimmy Rock, and I serve as the Assistant Deputy Attorney General for the Public Advocacy Division of the Office of the Attorney General for the District of Columbia (OAG). I am pleased to submit testimony to the Committee of the Whole (Committee) on behalf of Attorney General Karl A. Racine to support the goal of strengthening the District's false claims enforcement, an objective of Bill 22-166, the "False Claims Amendment Act of 2017."

OAG can bring court actions against those who violate the False Claims Act (FCA) by making false claims to the District Government for the purpose of improperly obtaining or retaining government funds. Examples of False Claims Act violators include contractors and grantees who seek to have the District pay for work that was not fully or properly performed. Many of the District's False Claims Act recoveries are for Medicaid fraud. OAG may recover treble damages, civil penalties, and attorney's fees for violations of the District's False Claims Act, DC Code §§ 2-381.01 to 2-381.09.

Discussion of Bill 22-166

On March 7, 2017, Councilmember Mary Cheh introduced Bill 22-166 (Bill) to expand the FCA to include claims relating to tax fraud where the "reported net income, sales, or revenue total[s] $1 million or more . . . and the damages pleaded in the action total $350,000 or more." As currently drafted, the Bill is not legally sufficient because it would limit the powers of the Chief Financial Officer (CFO) under the District Charter without going through the Charter amendment process.

The District Charter grants the CFO the sole authority to levy and collect taxes. The Charter states that the CFO has the duty to "supervis[e] and assum[e] responsibility for the assessment of all property subject to assessment and special assessment . . . [to] provid[e] such notice of taxes and special assessments," and to "supervis[e] and assum[e] responsibility for the levying and collection of all taxes [and] special assessments." While the Congress initially transferred these duties from the Mayor to the CFO only during "control periods," in 2006, the Congress permanently granted the CFO these duties and designated the CFO as an independent executive officer.

As the officer "responsibl[e] for the levying and collection of all taxes," the CFO may "take such steps as are necessary to perform these duties." For example, the CFO's levying authority allows the CFO to "seize and sell property" to collect the taxes owed. In addition, the CFO may "compromise the tax" if he or she believes "there is a reasonable doubt as to the liability of the taxpayer or the collectibility of the tax."

The Attorney General (AG) has the exclusive authority to control all FCA actions. The AG is the only government entity that may investigate and bring FCA claims to recover District funds. Although a member of the public may bring a civil action for a violation of the FCA as a qui tam plaintiff, the qui tam plaintiff must serve the AG "a copy of the complaint and . . . substantially all material evidence and information the person possesses" so the AG can decide whether to proceed with the action. "If the [AG] proceeds with the action, [he] shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the qui tam plaintiff." If the AG elects not to proceed, the court "may nevertheless permit the [AG] to intervene at a later date upon a showing of good cause." In either circumstance, the AG may dismiss the action and settle with the defendant, even against the qui tam plaintiff's objections, so long as the qui tam plaintiff has an opportunity to be heard, and in the event of a settlement, upon the court's determination that "the proposed settlement is fair, adequate, and reasonable under all the circumstances." Currently, the AG has the authority to settle FCA claims by an amount that does not reduce the claim's value by $500,000.

For the Bill to become legally sufficient, it must first be amended to give the CFO the option of authorizing OAG to bring these tax claims. For example, if line 23 of the introduced version of the legislation were amended to read, "taxation, unless, ***with authorization from the Chief Financial Officer***, the person making any…" this will make this bill legally sufficient. However, from our discussions with the office of the Chief Financial Officer, there are a litany of policy considerations we must fully explore prior to enacting this legislation.

Conclusion

I greatly appreciate the opportunity to submit this testimony for the record. OAG stands ready to work with the Committee, Councilmember Cheh, and the CFO in the upcoming Council Period to work towards the best path forward for the District.

OFFICE OF THE GENERAL COUNSEL
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: **Chairman Phil Mendelson**

FROM: **Nicole Streeter, General Counsel**

DATE: **January 19, 2020**

RE: **Whether Expanding the False Claims Act to Permit Certain Tax Fraud Claims Impermissibly Infringes on the Chief Financial Officer's Charter-Based Responsibility for the "Levying and Collection" of Taxes and Other Revenue**

This memorandum responds to your request for an opinion with respect to whether Bill 23-35, the "False Claims Amendment Act of 2019," which would expand the District's False Claim Act to permit certain claims predicated on the fraudulent avoidance of tax liability without expressly requiring that the Chief Financial Officer ("CFO") authorize such claims, impermissibly infringes on the authority of the CFO to "[s]upervis[e] and assum[e] responsibility for the levying and collection of all taxes, special assessments, licensing fees, and other revenues of the District of Columbia (as may be required by law)," set forth at section 424(d)(10) of the District Charter.[1] As detailed below, the bill does not violate section 424(d)(10) and it is therefore legally sufficient for Council consideration.

In general terms, the District's False Claims Act[2] ("FCA") permits either the Office of the Attorney General ("OAG") or a *qui tam* plaintiff, acting with the approval of OAG, to initiate a civil action against a person who submits a false claim to the District for the purpose of obtaining or retaining District funds. The FCA has been described as "quasi-criminal" because persons found liable generally are subject to punitive treble damages, "a civil penalty of not less than $5,500, and not more than $11,000, for each false or fraudulent claim," and reimbursement of the costs of the civil action.[3] Presently, the FCA expressly precludes claims based on "those portions of Title 47 of the District of Columbia Official Code that refer or

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[1] D.C. Official Code § 1-204.24d(10).
[2] D.C. Official Code § 2-381.01 *et seq.*
[3] D.C. Official Code § 2-381.02; *Phone Recovery Servs., LLC v. Verizon Washington, DC, Inc.*, 191 A.3d 309, 322 (D.C. 2018).

relate to taxation."[4] Bill 23-35 would amend the FCA to permit an FCA action predicated on the fraudulent avoidance of a tax obligation when "net income, sales, or revenue . . . equals or exceeds $1 million for any taxable year . . . and damages pleaded in the action total $350,000 or more."

During the prior Council period, the Committee of the Whole held a public hearing on a substantially similar bill, the False Claims Amendment Act of 2017,[5] which also would have permitted an action under the FCA based on the fraudulent avoidance of certain tax obligations. At that hearing, the CFO's Chief Counsel for the Office of Tax and Revenue and OAG's Assistant Deputy Attorney General for the Public Advocacy Division each testified and articulated his belief that the bill infringed on the CFO's "exclusive" authority to levy and collect taxes provided by section 424(d)(10) of the District Charter. The Assistant Deputy Attorney General further opined that, "[f]or the bill to be legally sufficient, it must be amended to give the CFO the option of authorizing OAG to bring these tax claims."[6] In a subsequent conference call between members of this office, the Assistant Deputy Attorney General, the leadership of OAG's Legal Counsel Division, and OAG's Director of Legislative Affairs, held on January 15, 2020, OAG's representatives reaffirmed their position that Bill 23-35, as written, violates section 424(d)(10) of the District Charter.

Notwithstanding OAG's contrary position, amending the FCA to allow actions relating to certain tax fraud claims without expressly providing that the CFO must approve such actions does not impermissibly infringe on the CFO's Charter-based authority for the "levying and collection" of taxes and other revenue. First, section 424(d)(10) of the District Charter does not confer on the CFO exclusive authority with respect to tax-related matters generally or the authorization of tax litigation specifically. Second, amending the False Claims Act to permit an action based on the fraudulent avoidance of tax liability, without expressly requiring that the CFO authorize such an action, would not impermissibly burden or unduly interfere with the CFO's authority to levy and collect taxes. Each of these points is addressed in turn below.

First, the plain language of section 424(d)(10), which refers specifically to the "levying and collection" of taxes and other revenues, cannot be read to confer on the CFO exclusive authority for all tax-related matters in the

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[4] D.C. Official Code § 2-381.02(d).
[5] Bill 22-166.
[6] Specifically, he proposed that the legislation be amended to read: ". . . taxation, unless, *with authorization from the Chief Financial Officer*, the person making any . . . ."

District.[7] The United States Court of Appeals for the District of Columbia Circuit previously rejected the argument, put forward by the Internal Revenue Service, that a similar statutory phrase, "assessment and collection,"[8] should be read broadly to include all matters that "ultimately affect the money Treasury retains."[9] And in the tax context, the Supreme Court has defined the terms "assessment" and "collection" narrowly to mean the "trigger for levy and collection efforts," [10] and the "act of obtaining taxes due,"[11] respectively.[12] Had Congress intended for the CFO to have the exclusive authority over all tax-related matters, the Charter presumably would have used more categorical language.[13] The District of Columbia Court of Appeals disfavors reading into the District Charter implicit grants of exclusive authority;[14] moreover, any potential "limitations on the Council's legislative authority" contained in the Charter are to be "construed narrowly."[15] Accordingly, there is no support in the text of section 424(d)(10) for the notion that the CFO has exclusive authority with respect to tax litigation or that the Council therefore must expressly legislate a requirement that the CFO approve any tax-related action under the FCA.[16]

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[7] *See Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 753 (D.C. 1983) (*en banc*) ("We must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning.") (internal quotation and citation omitted).

[8] The primary legal definition of the term "levy" is "[t]o impose or assess (a fine or a tax) by legal authority." Black's Law Dictionary (7th ed.).

[9] *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011).

[10] *Hibbs v. Winn*, 542 U.S. 88, 102 (2004).

[11] *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 10 (2015).

[12] The inclusion of the parenthetical phrase "as may be required by law" in section 424(d)(10) also tends to suggest that the CFO's discharge of its responsibilities pursuant to this paragraph is essentially ministerial in character.

[13] *Compare Tenley & Cleveland Park Emergency Comm v. District of Columbia Bd. of Zoning Adjustment*, 550 A.2d 331, 335-36 (D.C. 1988) (observing that the Zoning Commission is the "exclusive agency vested with power to enact zoning regulations" for the District based on statutory language providing that the Commission "shall exercise *all* the powers and perform *all* the duties with respect to zoning in the District as provided by law") (emphasis in original) *with Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (rejecting the plaintiff's argument that the Home Rule Act implicitly gave the court the "exclusive authority to take any action which would restrict in any way the conduct of attorneys in the practice of law" when no such express language existed in the Act).

[14] *Bergman*, 986 A.2d at 1226.

[15] *Washington, D.C. Ass'n of Realtors, Inc. v. District of Columbia*, 44 A.3d 299, 303 (D.C. 2012); *Bergman*, 986 A.2d at 1226; *see also Hessey v. Burden*, 584 A.2d 1, 3 (D.C. 1990) (stating that the Home Rule Act's limitations must be "expressed in the law" or "clearly and compellingly implied") (brackets omitted).

[16] Indeed, the arena of the FCA is uniquely inhospitable to the argument that the reference to "levying and collection" in section 424(d)(10) confers on the CFO exclusive authority with respect to tax-related claims brought under that statute.

This more natural and restrained reading of section 424(d)(10) finds further support in its surrounding statutory language.[17] Section 424(d) generally enumerates the various duties of the CFO, including supervising and assuming responsibility for financial transactions, maintaining systems of accounting, submitting financial statements, maintaining custody of all public funds and investments, and performing internal audits. Those listed duties are well-defined and, consistent with the role of the CFO, tied to managing the District's finances and ensuring its fiscal health. Granting the CFO a broader remit to control all tax-related matters, including a superior right vis-à-vis OAG to control the initiation of tax litigation, would not be consistent with the nature of the CFO's other enumerated duties. Moreover, such an interpretation would undermine the core of the authority of the Attorney General, who "shall have charge and conduct of all law business of the said District and all suits instituted by and against the government thereof,"[18] and "shall have the power to control litigation and appeals, as well as the power to intervene in legal proceedings on behalf of the public interest."[19]

Unsurprisingly, the District's current statutes do not presuppose that the CFO possesses such authority, as evidenced by the manner in which they demarcate the respective roles of the CFO and OAG in the tax context.

The mere filing of a complaint alleging a false claim is not equivalent to the assessment (or levying) of a tax that would trigger the CFO's collection authority since such unadjudicated allegations are not themselves enforceable, in contrast to tax assessments. *See Brohl*, 575 U.S. at 9 ("Assessment" is "an official action taken <u>based on information already reported to the taxing authority</u>") (emphasis added). And the CFO's authority to "collect" a tax is not implicated when there has been no assessment to set the collection process "in motion." *Id.* at 10. The levying and collection of taxes is therefore clearly distinguishable from a false claims action, the purpose of which is to uncover fraud and recover monies that the District was previously unaware it was owed.

[17] Statutory language should not be read "in isolation" and "the language of surrounding and related paragraphs may be instrumental to understanding them," including the language's "placement and purpose in the statutory scheme." *Office of the People's Counsel v. Public Serv. Comm'n*, 163 A.3d 735, 740 (D.C. 2017).

[18] D.C. Official Code § 1-301.81(a)(1).

[19] *Id.* The fact that the FCA also permits a *qui tam* plaintiff to pursue an action does not alter the analysis. As the Assistant Deputy Attorney General's testimony makes clear, the Attorney General retains "the exclusive authority to control all FCA actions." Therefore, although a *qui tam* plaintiff may bring a civil action under the FCA, the Attorney General must be notified of the complaint and thereafter may decide whether to proceed with the action directly, to intervene at a later date, or to dismiss or settle the action over the *qui tam* plaintiff's objections. *See* D.C. Official Code § 2-381.03.

Pursuant to Title 47 of the D.C. Official Code, the CFO is entrusted with the general administration of the District's tax laws. However, consistent with OAG's "power to control litigation and appeals,"[20] OAG is statutorily authorized to prosecute Title 47's criminal provisions and may bring civil suits to recover unpaid taxes (i.e., taxes subject to collection).[21] In executing these statutory responsibilities, OAG has brought suits to recover unpaid back sales taxes, unincorporated business franchise taxes, and sales and use taxes.[22] Similarly, OAG is also entitled to enter into plea negotiations and settlements and impose penalties in tax-related matters.[23] Yet nowhere in the pertinent statutory provisions does it expressly state that the CFO's permission is required before OAG may engage in any of the aforementioned activities. OAG's statutory authority to litigate "quasi-criminal" false claims actions premised on alleged tax fraud should be treated no differently.

It also should be noted that section 424(d)(10) does not limit the CFO's "levying and collection" responsibility to taxes; instead, that responsibility extends to "all . . . revenues of the District of Columbia . . . ." Interpreting "levying and collection" to extend to the authorization of litigation in the manner contemplated by OAG would require OAG to seek the CFO's permission to commence any action that would have the goal of recovering revenue owed to the District – essentially subordinating OAG to the CFO for a wide swath of suits involving the recovery of District funds. Further, it would be inconsistent with the FCA as currently written, which permits actions based on "reverse" false claims, without the express authorization of the CFO, whenever a person "[k]nowingly makes, uses, or causes to be made or used, a false record or payment material to an obligation to pay or transmit money or property to the District, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the District."[24] In light of all the foregoing, it is clear that the CFO does not have exclusive authority with respect to the litigation of tax claims, or any other claim related to the recovery of revenue, maintained by the District.

Having established that the CFO does not have exclusive authority with respect to all tax-related matters, including tax litigation, the question

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[20] D.C. Official Code § 1-301.81(a)(1).
[21] *See* D.C. Official Code § 47-4101 *et seq.*
[22] *See Expedia, Inc. v. District of Columbia*, 120 A.3d 623, 628 (D.C. 2015); *District of Columbia v. Young*, 39 A.3d 36, 38 (D.C. 2012).
[23] *See Stedman v. District of Columbia*, 12 A.3d 1156, 1157 (D.C. 2011); *Young*, 39 A.3d at 38; *see also* D.C. Official Code 47-4211 *et seq.*
[24] D.C. Official Code § 2-381.02(a)(6).

remains whether legislation authorizing certain FCA actions based on the fraudulent avoidance of tax liability, without expressly requiring the CFO's approval of such actions, impermissibly impinges on the CFO's specific responsibility for the "levying and collection" of taxes and other revenues. In determining whether there has been an infringement upon the powers and duties allocated by the District Charter to a particular component of District government, the District of Columbia Court of Appeals inquires whether a challenged action "'impermissibly burdens' or 'unduly interferes with'" some core aspect of those responsibilities.[25] Here, amending the FCA to permit certain tax fraud claims without expressly mandating that the CFO approve of such claims does not materially burden or interfere with the CFO's ability to "levy" or "collect" taxes. First, initiating an FCA action based on avoidance of a tax obligation would not interfere with then-existing tax-collection efforts by the CFO given that the FCA precludes claims for which the allegations are already "the subject of a civil suit or an administrative civil money penalty proceeding in which the District is already a party."[26] Moreover, the initiation of an FCA action based on a tax obligation also would not preclude the CFO from initiating separate collection efforts coextensive with the FCA action.[27]

Likewise, OAG's authority to dismiss or settle an FCA action,[28] does not infringe on the CFO's ability to "levy" or "collect" taxes. As explained previously, OAG already enters into tax settlements during the course of litigation, so expanding OAG's ability to prosecute tax fraud under the FCA provides OAG with no additional authority or powers. Moreover, given that an FCA suit is a "quasi-criminal" and punitive action intended not only to make the District whole but also to punish defendants who knowingly defraud the government,[29] the fact that OAG may dismiss an FCA action with prejudice does not mean, for estoppel purposes, that the CFO cannot independently assess and collect taxes that the CFO believes are owed; it merely means that OAG cannot file a new FCA action against the defendant

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[25] *Hessey*, 584 A.2d at 6. *See also Bergman*, 986 A.2d at 1230 ("In our view, the Council's passage of the Act, in the exercise of its power to enact legislation of general applicability, <u>does not impermissibly burden or unduly interfere with this court's authority to exercise its core functions</u> relating to Bar admission and the discipline of attorneys.") (emphasis added).
[26] D.C. Official Code § 2-381.03(c)(2).
[27] *See* D.C. Official Code § 2-381.06 ("The provisions of this chapter are not exclusive, and the remedies provided for shall be in addition to any other remedies provided for in any other law or available pursuant to common law.").
[28] *See* D.C. Official Code § 2-381.03(d)(2)(A) & (d)(2)(B).
[29] *Phone Recovery Servs., LLC*, 191 A.3d at 322.

based on the same allegations.[30] OAG's ability to settle FCA actions also does not infringe on the CFO's "compromise" authority, which states that, "[i]f the [CFO] believes there is a reasonable doubt as to the liability of the taxpayer or the collectability of the tax <u>imposed under this title</u>, the [CFO] may compromise the tax."[31] Based on a plain reading of the emphasized text, it is again clear that the CFO's compromise authority stems from an official tax assessment. Here, any settlement would not be made pursuant to an assessment of taxes made by the CFO pursuant to Title 47, but rather would be made pursuant to the FCA and D.C. Official Code § 2-402(a), which provides that the Mayor "is empowered to settle, in his discretion, claims and suits, either at law or in equity, against the District of Columbia . . . ." In any event, the CFO's "compromise" authority is not exclusive in the litigation context for the same reasons explained previously.[32]

Of course, as a practical matter, OAG may seek cooperation and referrals from, and work closely with, the CFO to litigate tax-related matters. Indeed, there are numerous good reasons for doing so given the CFO's administration of the District's tax laws and its specialized expertise and knowledge. OAG may even decline to pursue or move to dismiss specific cases based on the advice of the CFO; nothing within the FCA or Bill 23-35 would prevent it from doing so. However, the fact that OAG historically has included the CFO in its decision-making process and otherwise enlisted its aid with respect to tax matters does not translate into a requirement, imposed by the District Charter, that OAG obtain the CFO's approval to commence litigation related to taxation.

For all the foregoing reasons, amending the FCA to permit certain claims predicated on the avoidance of tax liability, without including an

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[30] *See Johnson v. District of Columbia*, 853 A.2d 207, 211 (D.C. 2004) ("Collateral estoppel means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties.").
[31] D.C. Official Code § 47-4404 (emphasis added).
[32] As the plain language of D.C. Official Code § 47-4404 makes clear, the Council already has constrained the CFO's compromise authority, limiting its exercise to cases in which "there is a reasonable doubt as to the liability of the taxpayer or the collectability of the tax . . . ." Moreover, even if OAG settles an FCA action for less than an outstanding assessment, it is not evident that the settlement would prevent the CFO from seeking to collect any outstanding balance. *See, e.g.*, *United States v. Rubenstein*, 228 F. Supp. 3d 223, 234 (E.D.N.Y. 2019) (concluding that the plea agreement still permitted civil and administrative actions such as the IRS's assessment and collection efforts, and that the only agencies the agreement binds are the Environmental Crimes Section and the Tax Division, not the IRS, which is "an agency wholly distinct" from the Department of Justice).

express requirement that the CFO authorize such claims, does not impermissibly infringe on the CFO's Charter-based authority to "levy" and "collect" taxes, and Bill 23-35 is therefore legally sufficient for Council consideration. I am available should you have any questions.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF THE CHIEF FINANCIAL OFFICER

Jeffrey S. DeWitt
Chief Financial Officer

February 3, 2020

The Honorable Phil Mendelson
Chairman
Council of the District of Columbia
John A. Wilson Building
1350 Pennsylvania Avenue, NW, Suite 504
Washington, DC 20004

Re: Bill 23-35, "False Claims Amendment Act of 2020"

Dear Chairman Mendelson:

This letter provides the views of the Office of the Chief Financial Officer (OCFO) regarding Bill 23-35, the "False Claims Amendment Act of 2020" (Bill). As a matter of policy and practice, the OCFO does not generally comment on the merits of legislation, however, because the Bill affects core OCFO duties, I am writing to reiterate the concerns expressed in the OCFO testimony presented to the Committee of the Whole (Committee) on December 20, 2018 and remain opposed to the Bill for the reasons discussed below.

The Bill, as considered by the Committee on January 21, 2020, allows private parties to initiate litigation under the False Claims Act[1] (FCA) based on fraudulent avoidance of tax obligations in conjunction with the Office of the Attorney General (OAG) or private parties alone if OAG declines to pursue a whistleblower cause of action. The Bill would allow these claims to proceed independently of the Chief Financial Officer (CFO). As indicated in our previous testimony, the Home Rule Act (HRA)[2] confers exclusive authority to the CFO for the levy and collection of District taxes[3], and as such, the CFO has the exclusive authority to bring tax actions on behalf of the District. The Bill impermissibly infringes on this authority.[4] The OCFO continues to hold this position and is supported on this point by the OAG.[5]

[1] D.C. Official Code § 2-381.01 *et seq.* Currently, the FCA does not apply to claims based on the District's tax law, codified in Title 47 of the District of Columbia Official Code. D.C. Official Code § 2-381.02(d). This is sometimes referred to as the "tax bar" of the FCA.
[2] D.C. Official Code § 1-201.01 *et seq.*
[3] D.C. Official Code § 1-204.24d(10).
[4] Testimony of Alan C. Levine, Chief Counsel, Office of Tax and Revenue, Bill 22-166, False Claims Amendment Act of 2017 (December 20, 2018) (stating that "expanding the FCA to include 'taxation' infringes on the Chief Financial Officer's exclusive authority for 'levying and collection' of all taxes granted under Section 424(d)(10) of the Home Rule Act.").

Additionally, the Bill would place District (OCFO) employees in the position of violating IRS confidentiality statutes and subject them to civil and criminal penalties.

We disagree with assertions that the Bill is legally sufficient and the HRA does not vest the CFO with exclusive authority over tax administration.[6] This unduly narrow and technical view of the relevant statutory language ignores the structure and purpose of HRA provisions governing the CFO's responsibilities.

The HRA established the CFO as an independent officer within the executive branch of the District government and transferred to the CFO those District agencies dealing with budgeting, finance and taxation, including the Office of Tax and Revenue (OTR),[7] which is generally responsible for the administration of the District's tax laws. The HRA enumerates the duties of the CFO with respect to taxation as follows:

> Notwithstanding any provisions of this Act which grant authority to other entities of the District government, the Chief Financial Officer shall have the following duties and shall take such steps as are necessary to perform these duties:
> . . .
> (9) Supervising and assuming responsibility for the assessment of all property subject to assessment and special assessments within the corporate limits of the District of Columbia for taxation, preparing tax maps, and providing such notice of taxes and special assessments (as may be required by law).
>
> (10) Supervising and assuming responsibility for the levying and collection of all taxes, special assessments, licensing fees, and other revenues of the District of Columbia (as may be required by law), and receiving all amounts paid to the District of Columbia from any source (including the [District of Columbia Financial Responsibility and Management Assistance] Authority).[8]

While the Bill's Committee Report and ensuing Committee discussion[9] suggest that the language of HRA section 424(d)(10) does not vest exclusive authority over taxation in the CFO, the HRA introductory clause quoted above expressly states that responsibility for taxation is vested in the CFO "[n]otwithstanding any provisions of the [HRA] which grant authority to other" District government entities. It is well established that the phrase "notwithstanding any other provision of law" means that the provision is intended to apply regardless of the language of other laws and that, to the extent a conflict exists between the law containing "notwithstanding any other provision of law" and other legislation, the provisions of the "notwithstanding" legislation

[5] Statement of Jimmy Rock, Assistant Deputy Attorney General, Bill 22-166, False Claims Amendment Act of 2017 (December 20, 2018) (stating that "The District Charter grants the CFO the sole authority to levy and collect taxes.").
[6] Report on Bill 23-35 (Jan. 21, 2020) at 3.
[7] D.C. Official Code § 1-204.24a(3).
[8] D.C. Official Code § 1-204.24d(9), (10).
[9] Regular Meeting of the Committee of the Whole, Council of the District of Columbia (Jan. 21, 2020), available at http://dc.granicus.com/MediaPlayer.php?view_id=2&clip_id=5312.

control.[10] As the United States Court of Appeals for the D.C. Circuit has commented, when the phrase "notwithstanding any other provision of law" is used, "[a] clearer statement is difficult to imagine."[11] Thus, the duty and responsibility over "levying and collection of all taxes" is vested in the CFO to the exclusion of other entities of the District government.

Since the HRA creates the structure of the District government, and is not simply a tax administration statute, excessive reliance should not be placed on the technical definitions of the terms "levying" and "collection" to determine the scope of the CFO's duties and responsibilities in tax matters. Rather, the terms should be understood in the context of the congressional delegation to the CFO for overall responsibility for the District's finances and construed in a manner that carries out that intent.[12] Furthermore, by placing the District's tax agency, OTR, under the CFO, Congress intended that the delegation of authority to the CFO included all of OTR's tax administration activities, which extend far beyond mere assessment, levying, and collection of taxes.

Moreover, although OAG litigates on behalf of the District,[13] including the CFO, its role in tax administration is limited. OAG generally litigates tax cases that have been developed by OTR, whether through an assessment of a real property tax, an audit and assessment of deficiency in a reportable tax on a return, such as the income or sales tax, a denial of a refund claim, or investigation of a criminal matter. In these cases, OAG represents the CFO as its client, and the litigation is conducted in a cooperative and coordinated undertaking between the two agencies. OTR provides technical tax expertise and audit examination to support the OAG in litigating before the courts. One tax case initiated by OAG, District of Columbia v. Expedia, Inc.,[14] was conducted with substantial input and assistance from OTR and its jurisdiction based on a Code section in Title 47. This case does not establish that OAG has tax administration authority

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[10] See Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993) ("the use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section.") (emphasis in original) and Burton v. Office of Employee Appeals, 30 A.3d 789, 795-96 (D.C. 2011) (noting that use of the phrase "notwithstanding . . . any other law or *regulation*" supersedes any conflicting regulations that were in place at the time the statute was enacted, and stating "it is well-established that 'the use of such a "notwithstanding" clause *clearly* signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of *any other section.*'") (emphasis in original); see also Leonard v. District of Columbia, 794 A.2d 618, 626 (D.C. 2002) ("Section 152 begins with the language, '[n]otwithstanding any other provision of law.' Such language customarily evidences an intention of the legislature that the enactment control in spite of any earlier law to the contrary addressing the subject."); Adirondack Medical Center v. Sebelius, 891 F. Supp. 2d 36, 48 (D.D.C. 2012), aff'd 740 F.3d 692 (D.C. Cir. 2014) (noting that the "notwithstanding any other provision of law" clause in § 7(b) of the Transitional Medical Assistance, Abstinence Education, and QI Programs Extension Act of 2007 indicates that "to the extent that other provisions conflict with § 7(b), § 7(b) controls.").

[11] Crowley Caribbean Transport, Inc. v. United States, 865 F.2d 1281, 1283 (D.C. Cir. 1989) ("As we noted recently in interpreting the phrase '[n]otwithstanding any other provision of law' in another statute, '[a] clearer statement is difficult to imagine.'").

[12] Reichelderfer v. Johnson, 72 F.2d 552 (App. D.C. 1934) (declining to ascribe a technical and narrow meaning to a term where doing so would be contrary to the purpose of the statute).

[13] D.C. Official Code § 1-301.81(a)(1)

[14] 120 A.3d 623 (D.C. 2015). This case was commenced relying on a rarely used provision allowing suits for collection of tax without assessment. D.C. Official Code § 47-4301(d)(1).

independent of the CFO or that OAG independently pursues tax litigation without coordination with the CFO.

Accordingly, the Bill would not, as the Committee Report suggests, simply add to OAG's existing portfolio of tax-related activities. Rather, the Bill creates a new type of authorization that is beyond OAG's existing responsibilities and involves OAG in tax administration activities that are reserved to the CFO under the HRA.

Congress further recognized the paramount importance of the OCFO when it enacted the tax confidentiality statutes of the Internal Revenue Code (IRC), specifically, IRC section 6103, which provides, in pertinent part, that:

> [r]eturns and return information with respect to taxes...shall be open to inspection by, or disclosure to, any State [including the District of Columbia][15] agency, body, or commission, or its legal representative, which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws.[16]

Thus, federal tax information (FTI) may be provided only to OTR and certain other enumerated offices within the OCFO as memorialized in agreements between the OCFO and the Internal Revenue Service (IRS).[17] The use of FTI by the District of Columbia, states, and other local jurisdictions is governed by procedures detailed in IRS Publication 1075, and, as a result, all systems and practices of OTR and affiliated offices relating to the use of FTI, are subject to annual reviews by the Office of IRS Safeguards. Because some aspects of FTI were, in past computer systems, combined with District tax data and that information is still in the current system, District tax data is treated like FTI data and is not disaggregated.

FTI may be shared only with OAG for <u>tax administration purposes</u>, as discussed above, in court on any matters arising out of the administration of the District's tax laws. A whistleblower action is not a part of tax administration.[18] It is a separate cause of action brought by a *qui tam* plaintiff with or without the participation of OAG (if OAG declines) in the D.C. Superior Court.[19] Moreover, a review of the confidentiality statute of the IRC reveals no permissible use of FTI for whistleblower purposes.[20]

Because a *qui tam* action is a separate cause of action unrelated to tax administration, the OCFO and OTR are prohibited from providing FTI to OAG except as narrowly defined above or to a

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[15] IRC sec. 6103(b)(5)(A)(i) defines the term "state" to include the District for purposes of sec. 6103.
[16] IRC § 6103(d)(1).
[17] Agreement on Coordination of Tax Administration (2005) and Memorandum of Implementation for the Agreement on Coordination of Tax Administration between the District of Columbia Office of the Chief Financial Officer and the Internal Revenue Service (2007).
[18] IRC § 6103(b)(4).
[19] D.C. Official Code § 2-381.01-03(e)(1) ("If the District elects not to proceed and the qui tam action was proper...the qui tam plaintiff shall have the same right to conduct the action as the Attorney General for the District of Columbia would have had....").
[20] *See* IRC § 6103 and IRC § 6103(l).

qui tam plaintiff who separately pursues a *qui tam* action if OAG does not join. To this end, the IRC permits the use of FTI in a state or administrative action but only if it involves "tax administration." The nondisclosure provisions of the D.C. Official Code,[21], must be read in this context.

Because the Bill conflicts with Home Rule Act authority related to the collection and levy of taxes and IRS statutes prohibit the sharing of federal tax information for purposes outside of tax administration, neither OAG nor the whistleblower (whether working in conjunction with OAG or independently) may seek District tax information or FTI in a whistleblower action. Accordingly, the OCFO could not comply with this Bill as doing so would violate federal laws and provisions, jeopardize the District's access to critical IRS tax data, and subject employees to civil and criminal penalties.[22] As such, the OCFO is opposed to Bill 23-35 and urges the Council to retain the District's FCA statute as currently written.

If you have any questions regarding our position on this matter, I can be reached at (202) 727-2476.

Sincerely,

Jeffrey S. DeWitt

Jeffrey S. DeWitt

cc: All Members of the Council of the District of Columbia
Karl A. Racine, Attorney General

[21] D.C. Official Code §§ 47-1804.05, 47-2018 47-4406 *et al.*
[22] IRC § 6103(a).

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MEMORANDUM

TO: **Chairman Phil Mendelson**

FROM: **Nicole L. Streeter, General Counsel**

DATE: **February 14, 2020**

RE: **Response to the Chief Financial Officer's February 3, 2020, Memorandum Regarding Bill 23-35, "False Claims Amendment Act of 2020"**

This supplemental memorandum is provided in response to your inquiry regarding the Chief Financial Officer's ("CFO") February 3, 2020, letter to you contesting the legal sufficiency of Bill 23-35, the "False Claims Amendment Act of 2020" (the "CFO Letter"). Bill 23-35 would amend the District's False Claims Act ("FCA")[1] to permit a civil action predicated on the defendant's fraudulent avoidance of District tax liability without specifically requiring that the CFO authorize that civil action. For the reasons explained below, the CFO's arguments in continuing to oppose the bill are unpersuasive and lack adequate legal justification. My opinion therefore remains that Bill 23-35 is legally sufficient for Council consideration.

Briefly, the CFO asserts that Bill 23-35 is deficient because: (A) its expansion of the FCA to include certain tax claims infringes on the CFO's "exclusive" authority for tax matters, which the CFO maintains is conferred by the District Charter; and (B) it would require CFO employees to disclose federal tax information in violation of federal law, thereby subjecting those employees to possible civil and criminal penalties. I address the CFO's claims in turn below.

A.

As explained in my initial memorandum to you regarding Bill 23-35, dated January 19, 2020, the Charter does not vest the CFO with "exclusive" authority over all tax-related matters, and the CFO presents no persuasive new arguments or authority that would call this conclusion into question. At the outset, it is important to note that the CFO's blanket assertion that "the

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[1] D.C. Official Code § 2-381.01 *et seq.*

CFO has the exclusive authority to bring tax actions on behalf of the District,"[2] is demonstrably incorrect and has no basis in District law. Chapter 41 of Title 47 authorizes the Office of the Attorney General ("OAG"), not the CFO, to prosecute tax crimes.[3] Further, OAG litigates civil suits to recover unpaid taxes.[4] Nowhere does the Charter (or any other part of the D.C. Code) state that OAG's authority to engage in tax litigation is subject to the CFO's approval or that the CFO otherwise has "exclusive authority" to bring tax actions on behalf of the District.[5]

The CFO nevertheless attempts to ground its assertion of exclusive authority over tax-related litigation in section 424(d)(10) of the Charter,[6] which, according to the CFO, "confers exclusive authority to the CFO for the levy and collection of District taxes."[7] As I indicated in my prior memorandum to you, the terms "levying" and "collection," which appear in paragraph (10), have established definitions that describe the ministerial acts necessary to secure the payment of declared revenue in the ordinary course, namely "[t]o impose or assess (a fine or a tax) by legal authority"[8] and "the act of obtaining taxes due,"[9] respectively. For its part, the CFO asserts that "excessive reliance should not be placed on the technical definitions of the terms 'levying' and 'collection' to determine the scope of the CFO's duties and responsibilities in tax matters,"[10] and argues instead that "the terms should

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[2] CFO Letter at 1.
[3] D.C. Official Code § 47-4101 *et seq.*
[4] *See generally, Expedia, Inc. v. District of Columbia*, 120 A.3d 623, 628 (D.C. 2015).
[5] The existence of a *qui tam* plaintiff does not change the calculus since OAG will control the litigation at all stages of the proceeding. As the Assistant Deputy Attorney General conceded in his written comments on the prior version of Bill 23-35, although the FCA recognizes *qui tam* plaintiffs, it is the Attorney General who retains "the exclusive authority to control all FCA actions" given that the Attorney General must be notified of the *qui tam* plaintiff's complaint and can decide whether to proceed with the action, to intervene at a later date, or to dismiss or settle the action over the *qui tam* plaintiff's objections. D.C. Official Code § 2-381.03; *see also Scachitti v. UBS Financial Servs.*, 831 N.E.2d 544, 560 (Ill. 2005) (holding that Illinois's false claims statute does not usurp the Illinois Attorney General's constitutional authority by allowing *qui tam* plaintiffs to file suit because the Attorney General retains authority to control the litigation at every stage of the proceedings). In practice, this may mean that a *qui tam* plaintiff's right to pursue a tax fraud claim under the FCA is more circumscribed than a *qui tam* plaintiff's right to pursue other FCA claims given that OAG may seek the CFO's input before pursuing or allowing a *qui tam* plaintiff to pursue such claims, but in any event it does not make Bill 23-35 legally insufficient.
[6] D.C. Official Code § 1-204.24d(10).
[7] CFO Letter at 1.
[8] "Levy," Black's Law Dictionary (7th ed.).
[9] *Direct Marketing Ass'n v. Brohl*, 575 U.S. 1, 10 (2015).
[10] CFO Letter at 3.

be understood in the context of the congressional delegation to the CFO for overall responsibility for the District's finances and construed in a manner that carries out that intent."[11] For the reasons set forth below, however, the CFO is wrong to urge that Congress intended to vest the CFO with exclusive authority for all tax matters, and the plain and established meaning of the terms "levying" and "collection" in section 424(d)(10) should not be subordinated to that alleged intent.

In arguing for a broad Charter-based conferral of "exclusive" authority over "taxation" and "tax administration" generally,[12] the CFO primarily relies upon the lead-in language of section 424(d), which states that the CFO shall have certain enumerated duties and take steps necessary to perform those duties "[n]otwithstanding any provisions of this Act which grant authority to other entities of the District government . . . ."[13] According to the CFO, that quoted phrase, taken together with the ensuing paragraphs (9) and (10) of section 424(d), which assign responsibility for "[s]upervising and assuming responsibility for the assessment of all property subject to assessment and special assessments within the corporate limits of the District of Columbia for taxation, preparing tax maps, and providing such notice of taxes and special assessments (as may be required by law),"[14] and "[s]upervising and assuming responsibility for the levying and collection of all taxes, special assessments, licensing fees, and other revenues of the District of Columbia (as may be required by law), and receiving all amounts paid to the District of Columbia from any source (including the [District of Columbia Financial Responsibility and Management Assistance] Authority,"[15] to the CFO, evidence Congress's intent to confer broad authority over all tax matters to the CFO. The CFO also cites to Congress's placement of the Office of Tax and Revenue ("OTR") under the CFO in section 424(a)[16] as indicative of this broad legislative intent.[17] I disagree with the CFO's conclusion for the following reasons.

First, it is important to note that when Congress added the phrase "[n]otwithstanding any provisions of this Act which grant authority to other entities of the District government," to the lead-in language of section 424(d), it kept intact section 424(d)'s existing list of specific enumerated duties, which included paragraphs (9) and (10).[18] Had Congress's intent been to

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[11] *Id.*
[12] *Id.* at 2.
[13] D.C. Official Code § 1-204.24d.
[14] D.C. Official Code § 1-204.24d(9).
[15] D.C. Official Code § 1-204.24d(10).
[16] D.C. Official Code § 1-204.24a
[17] CFO Letter at 3.
[18] *See* 2005 District of Columbia Omnibus Authorization Act, approved October 16, 2006 (120 Stat. 2019; Pub. L. 109-356) at § 201(a).

confer upon the CFO both general and exclusive authority over all taxation matters, it stands to reason that Congress would not then set forth only certain specific taxation-related duties in paragraphs (9) and (10), including them among no fewer than 26 other discretely numbered paragraphs (some with subparagraphs) that articulate in detail each of the specific duties and responsibilities of the CFO.[19] The most logical reading of the phrase "[n]otwithstanding any provisions of this Act which grant authority to other entities of the District government" is that it establishes the CFO's primacy with respect only to the list of specific enumerated functions and not exclusive authority over some broader set of additional matters related to taxation generally. The very fact that the CFO's enumerated functions are identified and described in such detail suggests that they in fact form an exhaustive and exclusive list.[20] Moreover, to the extent the Charter confers on the CFO responsibility for those functions "to the exclusion of other entities of District government,"[21] it further reinforces that they should be construed narrowly.[22]

Second, the CFO fails to acknowledge that both paragraphs (9) and (10), which Congress left unamended when it added the "[n]otwithstanding" language quoted above, by their own terms cabin the scope of the authority they confer on the CFO. Specifically, both paragraphs (9) and (10) expressly state that the CFO's duties under those sections are to be effectuated "as may be required by law."[23] The Charter itself therefore makes clear that the CFO's powers in these areas are not untrammeled and necessarily may be

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[19] Nor is it clear why two discrete tax-related functions would continue to be described in two separate paragraphs.
[20] *See McCray v. McGee*, 504 A.2d 1128 1130 (D.C. 1986) ("[W]hen a legislature makes express mention of one thing, the exclusion of others is implied, because 'there is an inference that all omissions should be understood as exclusions.'") (quoting 2A Sutherland, Statutes and Statutory Construction § 47.23 (4th ed. 1984)).
[21] CFO Letter at 3.
[22] Established case law holds that limitations to the Council's legislative power under the Home Rule Act are to be construed narrowly, "so as not to thwart the paramount purpose of the Home Rule Act, namely, to grant the inhabitants of the District of Columbia powers of local self-government." *Woodroof v. Cunningham*, 147 A.3d 777, 784 (D.C. 2016) (internal quotations and citations omitted).
[23] *See* D.C. Official Code § 1-204.24d(9) ("Supervising and assuming responsibility for the assessment of all property subject to assessment and special assessments within the corporate limits of the District of Columbia for taxation, preparing tax maps, and providing such notice of taxes and special assessments (as may be required by law).") (emphasis added); D.C. Official Code § 1-204.24d(10) ("Supervising and assuming responsibility for the levying and collection of all taxes, special assessments, licensing fees, and other revenues of the District of Columbia (as may be required by law), and receiving all amounts paid to the District of Columbia from any source (including the Authority).") (emphasis added).

circumscribed by the Council through the enactment of specific legislation. Notably, the phrase "as may be required by law" does not appear in any of the other 26 numbered paragraphs that set forth the CFO's specific duties in section 424(d). The CFO's broad interpretation of the authority that paragraphs (9) and (10) confer would render the phrase "as may be required by law" found in both paragraphs superfluous.[24]

Third, the fact that Congress has made OTR subordinate to the CFO does not in any way demonstrate an intent to vest the CFO with exclusive authority over all matters that relate to taxation. The subordination of OTR to the CFO occurs in section 424(a) of the Charter, which does not contain the "notwithstanding" language of section 424(d).[25] Thus, to the extent section 424(a) assigns the CFO additional functions beyond those enumerated in 424(d), those functions are not vested in the CFO "[n]otwithstanding any provisions of this Act which grant authority to other entities of the District government," and thus are subject to the Council's Charter-conferred authority to legislate. Furthermore, as noted above, it is OAG, and not OTR, that pursues tax litigation on behalf of the District government.[26] Thus, OTR itself does not have exclusive responsibility for all tax-related matters and the subordination of OTR to the CFO by Congress therefore should not be read to confer on the CFO any greater exclusive authority with respect to taxation than that which the Charter otherwise provides for in section 424(d).

In short, the CFO cites no evidence that Congress ever formulated an intent to confer <u>exclusive</u> authority for all tax-related matters on the CFO, such that the plain language of section 424(d) and the established definitions of the terms "levying" and "collection" should be disregarded. Bill 23-35 therefore does not violate the Charter by impermissibly infringing on the responsibilities of the CFO, as the CFO alleges.

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[24] *See Providence Hosp. v. District of Columbia Dep't of Emp't Servs.*, 855 A.2d 1108, 1114 (D.C. 2004) ("Each provision of the statute should be given effect, so as not to read any language out of a statute whenever a reasonable interpretation is available that can give meaning to each word in the statute." (citations and internal quotation marks omitted)).

[25] D.C. Official Code § 1-204.24a

[26] *See* CFO Letter at 3 ("Moreover, although OAG litigates on behalf of the District, including the CFO, its role in tax administration is limited."). The CFO asserts that historically the OAG does not pursue tax litigation without coordinating with the CFO; in doing so, however, the CFO concedes that such coordination is not required, expressly stating that OAG "generally" litigates tax cases that have been developed by OTR. In any event, even assuming that OAG in most instances litigates cases developed by OTR, that litigation is conducted in cooperation and coordination between the two agencies, and that OTR provides technical tax expertise and audit examination to support OAG's litigation efforts, none of those facts are relevant to whether Bill 23-35 violates the Charter or is otherwise legally insufficient.

B.

The CFO also raises for the first time the argument that Bill 23-35 would force its employees to violate section 6103 of the Internal Revenue Code,[27] which governs the confidentiality and disclosure of tax returns and return information. This argument also is without merit.

First and foremost, Bill 23-35 does not reference the CFO or OTR and certainly does not require the CFO to produce any tax information to anyone. It is therefore unclear (and the CFO does not state) how or why Bill 23-35 would require its employees to violate section 6103. In many cases a *qui tam* plaintiff already may have access to relevant tax information; indeed, such information may form the basis for bringing an FCA tax action. Alternatively, a *qui tam* plaintiff (or OAG) may seek relevant tax information directly from an FCA defendant once litigation has commenced. The CFO does not explain the basis for its apparent presumption that an FCA action based on fraudulent tax avoidance would require it to disclose tax information subject to section 6103. Indeed, the fact that other states, such as Illinois[28] and New York,[29] allow tax-related false claims actions without causing state employees to violate section 6103 confirms that the CFO's concerns are fundamentally misplaced.

Second, Bill 23-35 pertains solely to District tax fraud and does not therefore on its face implicate federal taxes or federal tax information of the sort governed by section 6103. Although the CFO claims that some District tax data is combined with federal tax information in its computer systems and is not "disaggregated,"[30] such logistical considerations do not implicate the legal sufficiency of Bill 23-35. Should the CFO receive a discovery request in an FCA action, there is no reason it could not redact any "aggregated" federal tax information governed by section 6103, or otherwise seek relief from a court to limit the scope of the information to be produced.

Third, section 6103 itself expressly contemplates that "[a] return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration" when "the taxpayer is a party to the proceeding."[31] The CFO appears to take the position, without any cited support, that an FCA action based on tax

[27] 26 U.S.C. § 6103.
[28] 740 Ill. Comp. Stat. 175/3.
[29] N.Y. State Fin. Law § 189.
[30] CFO Letter at 4.
[31] 26 U.S.C. § 6103(h)(4)(A).

avoidance is not a judicial proceeding "pertaining to tax administration."[32] However, "[t]he courts that have considered whether certain activities qualify as 'tax administration' uniformly have defined the term broadly."[33] Moreover, a judicial proceeding need only "pertain[] to" tax administration to permit the disclosure of federal tax return information, and such a proceeding therefore may include an action brought under a statute wholly collateral to the underlying process of levying and collecting taxes.[34] Because the defendant in an FCA action is the taxpayer, and therefore a party to the proceeding, disclosure of taxpayer information under section 6103 would appear to be permitted, thus vitiating the CFO's concerns.

For all the foregoing reasons, I maintain that Bill 23-35 is legally sufficient for Council consideration. I am available should you have any questions.

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[32] The CFO's position that an FCA action does not relate to "tax administration" would appear to contradict his first argument that OAG (or a *qui tam* plaintiff) cannot litigate FCA tax claims absent CFO approval specifically *because* these claims fall within the realm of tax administration.
[33] *Hobbs v. United States*, 209 F.3d 408, 410 (5th Cir. 2000) (citations omitted).
[34] *See id.* (holding that action for termination of employee based on discrimination under Title VII of Civil Rights Act of 1964 was "judicial . . . proceeding pertaining to tax administration" within the meaning of section 6103).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

ATTORNEY GENERAL
KARL A. RACINE

PRIVILEGED AND CONFIDENTIAL
ATTORNEY-CLIENT COMMUNICATION

Legal Counsel Division

MEMORANDUM

TO: **Hon. Phil Mendelson**
Chairman
Council of the District of Columbia

FROM: **Brian K. Flowers**
Deputy Attorney General
Legal Counsel Division

DATE: **November 13, 2020**

SUBJECT: **Legal Advice on the False Claims Amendment Act of 2019 (AL-20-265)**

This memorandum responds to a request from the immediate office of the Office of the Attorney General ("OAG") to evaluate the legality of the False Claims Amendment Act of 2019[1] ("Bill"). The Bill amends what is commonly known as the False Claims Act[2] ("FCA") to include tax claims involving revenue of $1 million or more, and pleaded damages of $350,000 or more. At issue is whether the Bill impermissibly interferes with the duties of the Chief Financial Officer ("CFO") provided in the District Charter of the Home Rule Act[3] of "supervising and assuming responsibility for the levying and collection of all taxes." D.C. Official Code § 1-204.24d(10). The Bill does not fundamentally alter the structure of the CFO's duties in the Charter, and is within the power of the Council to enact without a Charter amendment. While the CFO maintains primary authority over tax administration matters, that authority is not entirely exclusive of other District agencies or laws.

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[1] As introduced on January 8, 2019 (Bill 23-35).

[2] District of Columbia Procurement Practices Act of 1985, effective May 8, 1998 (D.C. Law 12-104; D.C. Official Code § 2-381.01 *et seq.*).

[3] Section 424(d) of the Home Rule Act, effective October 16, 2006 (120 Stat. 2034; D.C. Official Code § 1-204.24d).

Background

The FCA, modeled substantively after the federal false claims act,[4] creates civil and criminal penalties for presenting a fraudulent claim to or otherwise deceiving the District regarding money or property, including treble damages as a civil penalty. D.C. Official Code §§ 2-381.02, 2-381.09. It provides for enforcement by both the Attorney General and by individuals as "*qui tam*" plaintiffs. First, the FCA provides that "the Attorney General for the District of Columbia shall investigate, with such assistance from other District agencies as may be required, violations pursuant to § 2-381.02 involving District funds." *Id.* § 2-381.03(a). For *qui tam* plaintiffs, it provides that:

> A person may bring a civil action for a violation of § 2-381.02 for the person and for the District. The action shall be brought in the name of the District. The person bringing the action shall be referred to as the qui tam plaintiff. The action may be dismissed only if the court and the Attorney General for the District of Columbia give written consent to the dismissal and their reasons for consenting.

Id. § 2-381.03(b)(1). The FCA thus provides concurrent authority for the Attorney General to investigate false claims, and for private *qui tam* plaintiffs to bring suits in the name of the District.

The FCA further gives the Attorney General the options to either proceed with the action, dismiss or settle the action notwithstanding the objections of the *qui tam* plaintiff after a hearing. *Id.* § 2-381.03(d). If the Attorney General elects not to proceed and the action is otherwise proper, the *qui tam* plaintiff may proceed with the action with the same rights as the Attorney General. *Id.* § 2-381.03(e)(1). The *qui tam* plaintiff may recover anywhere from between 0-30% of the proceeds of the action depending on the *qui tam* plaintiff's contribution and nature of the information provided. *Id.* § 2-381.03(f).

However, following the federal false claims act, 37 U.S.C. § 3729(d), which exempts taxation claims, the District FCA provides that it "shall not apply to claims, records, or statements made pursuant to those portions of Title 47 of the District of Columbia Official Code that refer or relate to taxation." *Id.* § 2-381.02(d). The Bill would amend that provision to add at the end that "unless the person making any such claim, record, or statement reported net income, sales, or revenue totaling $1 million or more in a tax filing to which that claim, record, or statement pertained, and the damages pleaded in the action total $350,000 or more." Bill § 2. The Bill would thus extend the reach of the False Claims Act to tax filings of $1 million or more where the alleged deception is greater than $350,000 or more.

[4] An Act To revise, codify, and enact without substantive change certain general and permanent laws, related to money and finance, as title 31, United States Code, Money and Finance," approved September 13, 1982 (96 Stat. 978; 31 U.S.C. § 3729).

The Bill is substantively identical to several bills that have been introduced before which have not proceeded.[5] In the most recent previous iteration, the False Claims Amendment Act of 2017, Jimmy Rock, Assistant Deputy Attorney General for the Public Advocacy Division, testified before the Committee of the Whole that the bill was legally insufficient, on the grounds that "it would limit the powers of the Chief Financial Officer . . . under the District Charter without going through the Charter amendment process."[6] Mr. Rock stated that "for the Bill to become legally sufficient, it must first be amended to give the CFO the option of authorizing OAG to bring these tax claims. For example, if line 23 of the introduced version of the legislation were amended to read, 'taxation, unless, ***with authorization from the Chief Financial Officer*** . . .' this will make this bill legally sufficient."[7] Mr. Rock relied at least in part on a memorandum from the Legal Counsel division advising that:

> Amending the FCA to include tax-related claims would allow the AG to interfere with the CFO's exclusive authority under the Charter to "supervis[e] and assum[e] responsibility for the levying and collection of all taxes," including the CFO's discretion to "compromise the tax." Therefore, the Council does not have the authority to include tax claims into the purview of FCA liability using the ordinary legislative process without maintaining the CFO's exclusive authority to collect or compromise such claims.[8]

OAG thus advised that the previous iteration of the bill impermissibly infringed on the CFO's exclusive authority over the levying and collection of taxes.

The CFO's authority over tax claims is provided in the District Charter, D.C. Official Code § 1-204.24d, which states that "notwithstanding any provisions of this chapter which grant authority to other entities of the District government, the Chief Financial Officer shall have the following duties and shall take such steps as are necessary to perform these duties . . . (10) Supervising and assuming responsibility for the levying and collection of all taxes."[9]

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[5] False Claims Amendment Act of 2017, introduced March 7, 2017 (Bill 22-166); False Claims Amendment Act of 2016, introduced March 1, 2016 (Bill 21-649); False Claims Amendment Act of 2013, introduced February 5, 2013 (Bill 20-112).

[6] False Claims Amendment Act of 2017, Hearing on Bill 22-166 Before the Committee of the Whole, 22nd Council Period 1 (D.C. Dec. 20, 2018) (Statement of Jimmy Rock, Assistant Deputy Att'y Gen. for the Pub. Advocacy Div., Office of the Att'y Gen. for D.C.).

[7] *Id.* at 3.

[8] Memorandum from Janet M. Robins, Deputy Att'y Gen., Legal Counsel Div., Office of the Att'y Gen. for D.C., to James Pittman, Deputy Att'y Gen., Legislative, Intergovernmental and Community Engagement, Office of the Att'y Gen. for D.C. 3 (Apr. 18, 2018) (AD-17-635).

[9] D.C. Official Code § 1-204.24d was most recently amended by an act of Congress in 2006, the 2005 District of Columbia Omnibus Authorization Act, approved October 16, 2006 (120 Stat. 2034; D.C. Official Code § 1-204.24d). Prior to the Omnibus Act, the Mayor had substantively identical authority under the Home Rule Act, which provides that the Mayor shall "supervise and be responsible for the levying and collection of all taxes." D.C. Official Code § 1-204.48(a)(6). However, the Omnibus Act amended the lead-in language to that section to add "except to the extent provided under section 424(d)." (120 Stat. 2036; D.C. Official Code § 1-204.48.) Although both the CFO and the Mayor have statutory authority under the text of the Charter to supervise and be responsible for the levying and collection of all taxes in D.C. Official Code §§ 1-204.24d(10) and 1-204.48(a)(6), we read the Omnibus Act's inclusion of "except to the extent provided under section 424(d)" to remove such authority from the Mayor and give it to the CFO to the extent there is any conflict. *See generally* Memorandum from Janet M. Robins,

In response to the current Bill, the Council's General Counsel argued that it was legally sufficient, and that the CFO's concerns expressed over the prior bill are unfounded.[10] The Council argued that:

> First, section 424(d)(10) of the District Charter does not confer on the CFO exclusive authority with respect to tax-related matters generally or the authorization of tax litigation specifically. Second, amending the False Claims Act to permit an action based on the fraudulent avoidance of tax liability, without expressly requiring that the CFO authorize such an action, would not impermissibly burden or unduly interfere with the CFO's authority to levy and collect taxes.[11]

The CFO responded to that memorandum in a letter,[12] arguing that "the Bill creates a new type of authorization that is beyond [the Attorney General's] existing responsibilities and involves [the Attorney General] in tax administration activities that are reserved to the CFO under the [Home Rule Act]."[13] It further argued that "IRS statutes prohibit the sharing of federal tax information for purposes outside of tax administration."[14] The Council's General Counsel responded by arguing that "the CFO cites no evidence that Congress ever formulated an intent to confer <u>exclusive</u> authority for all tax-related matters on the CFO," and that the bill "does not violate the Charter by impermissibly infringing upon the responsibilities of the CFO."[15] She further argued that the bill "does not require the CFO to produce any tax information to anyone," and that it was unclear how the bill would require anyone to violate IRS confidentiality requirements.[16]

The Legal Counsel division has been asked to independently review and assess whether it maintains its previous position that the Bill is legally insufficient for the reasons stated in light of this office's prior position and the arguments of the Council and the CFO. This turns on the interpretation of D.C. Official Code § 1-201.24d in the District Charter and the essential powers of the CFO, and whether the Bill constitutes an amendment to the Charter. If the Bill constitutes a charter amendment, it must comply with the procedures for charter amendment under the Home Rule Act in D.C. Official Code § 1-203.03. At issue is whether the Council may amend the FCA in the Bill without requiring a Charter amendment.

Deputy Att'y Gen., Legal Counsel Div., Office of the Att'y Gen. for D.C., to Irvin B. Nathan, Att'y Gen. for D.C. (Jan. 28, 2014) (AL-14-050, advising that the CFO and not the Mayor had the authority to cancel tax liens and sales absent further Council legislation).

[10] Memorandum from Nicole Streeter, General Counsel, Council of D.C., to Phil Mendelson, Chairman, Council of D.C. (Jan. 19, 2020).

[11] *Id.* at 2.

[12] Letter from Jeffrey S. DeWitt, Chief Fin. Officer, Office of the Chief Fin. Officer for D.C., to Phil Mendelson, Chairman, Council of D.C. (Feb. 3, 2020).

[13] *Id.* at 4.

[14] *Id.* at 5.

[15] Memorandum from Nicole L. Streeter, General Counsel, Council of D.C., to Phil Mendelson, Chairman, Council of D.C. 5 (Feb. 14, 2020).

[16] *Id.* at 6.

Analysis

1. Standard for Charter Amendments

The Council has the legislative authority of the District under the Charter. D.C. Official Code § 1-204.04(a). The Charter further provides that "the Council shall have no authority to pass any act contrary to the provisions of this chapter except as specifically provided in this chapter." *Id.* § 1-206.02(a). However, "the Council's powers of ordinary legislation are broad; they are limited only by specified exceptions and by the general requirement that legislation be consistent with the U.S. Constitution and the Home Rule Act." *Convention Ctr. Referendum Comm. v. D.C. Bd. of Elections & Ethics*, 441 A.2d 889, 903 (D.C. 1981). "Restrictions on the legislative authority of the Council . . . must be narrowly construed, so as not to thwart the paramount purpose the [Home Rule Act], namely, to 'grant to the inhabitants of the District of Columbia powers of local self-government.'" *Bergman v. District of Columbia*, 986 A.2d 1208, 1226 (D.C. 2010) (citations omitted). The legislative power of the Council is to be broadly construed, although it cannot pass any act contrary to the provisions of the Charter except as provided in the Charter.

Acts of the Council only count as Charter amendments if they change the text of the Charter itself or fundamentally change the structure of government in the Charter. In *Potomac Elec. Power Co. v. D.C. Gov't*, 651 F. Supp. 907, 910 (D.D.C. 1986), the court considered the Utility Regulatory Assessment and Clarification Act of 1984,[17] which gave the Office of the People's Counsel authority to investigate public utilities, compel them to produce information and documents, and assess public utilities for its expenses. 651 F. Supp. at 909. Plaintiffs alleged that this "amounted to an amendment of the District of Columbia charter and thus that the Act could not be enacted without passing through certain statutorily mandated charter amendment procedures." *Id.* at 908. The court found that the act was not a charter amendment:

> *First*, the Act does not directly change the charter at all. *Second*, whatever indirect effect the Act may have on the PSC certainly does not rise to the level of a charter amendment. The District of Columbia Charter contains those portions of the Home Rule Act which deal with the structure of government—the establishment of a legislative, executive, and judicial branch of government, etc. Charter amendments therefore refer to actions which, like state constitutional amendments, fundamentally change the nature of the system of government.

Id. at 910. The *Potomac* court held that an act is not a Charter amendment if it 1) does not amend the text of the Charter, and 2) does not fundamentally change the nature of the system of government in the Charter.

In *Apartment & Office Bldg. Ass'n of Metro. Washington v. Pub. Serv. Comm'n of D.C.*, 203 A.3d 772 (D.C. 2019), the court expressly considered and utilized the *Potomac* analysis to determine whether an act constitutes a Charter amendment. At issue was the Electric Company Infrastructure Improvement Financing Act of 2014[18] ("ECIIFA"), D.C. Official Code § 34-

[17] Effective March 14, 1985 (D.C. Law 5-153; D.C. Official Code § 34-804).
[18] Effective May 3, 2014 (D.C. Law 20-102; D.C. Official Code § 34-1311.01 *et seq.*).

1311.01 *et seq.*, which provided a framework for moving overhead power lines underground, including cost allocation provisions. 203 A.2d at 775. The plaintiffs challenged several orders of the Public Service Commission approving cost allocations under the ECIIFA between commercial and residential customers, *id.*, including arguing that the act violated the Home Rule Act, i*d.* at 778, as the Public Service Commission was preserved in section 493 of the Home Rule Act. *Id.* at 779-80 (citing D.C. Official Code § 1-204.93). The court directly quoted and applied the analysis in *Potomac. Apartment*, 203 A.3d at 781. The court noted that "the modest effect of the ECIIFA amendments is to streamline procedure by precluding constant relitigation of allocation issues," and that the "ECIIFA did not change a single word in Section 493. Nor . . . does it usurp the function of the Commission." *Id.* It therefore concluded that "the cost allocation provisions of ECIIFA do not violate the Home Rule Act." *Id.* The *Apartment* court effectively ratified the two-step process in *Potomac* for determining whether something is a Charter amendment.

Applying the framework from *Potomac* and *Apartment*, the Bill does not amend any text in the Charter; it only amends the FCA in D.C. Official Code § 2-381.02. Accordingly, the second step is whether the bill fundamentally changes the nature of the system of government in the Charter, i.e. whether it fundamentally alters the authority of the CFO.

2. Whether the Bill Fundamentally Changes the CFO's Role in the Charter

D.C. Official Code § 1-204.24d provides that "notwithstanding any provisions of this chapter which grant authority to other entities of the District government, the Chief Financial Officer shall have the following duties and shall take such steps as are necessary to perform these duties: . . . (10) Supervising and assuming responsibility for the levying and collection of all taxes." The CFO makes several arguments that the Bill impermissibly infringes on its Charter authority under D.C. Official Code § 1-204.24d: 1) the use of the phrase "notwithstanding" indicates that the levying and collection of taxes is exclusively vested in the CFO; 2) the terms "levying and collection" should be construed to carry out Congress' intent to give the CFO authority over all tax administration activities, as evidenced by the inclusion of the Office of Tax and Revenue ("OTR") in under the CFO; 3) in litigation, the Attorney General represents CFO as a client, and does not independently pursue tax litigation; and 4) a *qui tam* action does not constitute tax administration purposes, and would violate federal tax confidentiality requirements. While the CFO raises some legitimate issues, none of these arguments are fully persuasive.

To begin, there is no express language committing the levying and collection of taxes exclusively to the CFO in D.C. Official Code § 1-204.24d or elsewhere, creating a presumption that Congress did not so intend. *See generally Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 381 (2012) ("Congress knew full well how to grant exclusive jurisdiction with mandatory language."). The CFO nonetheless argues that this exclusivity must be presumed from the structure and intent of the Charter.

First, the CFO argues that "the phrase 'notwithstanding any other provision of law' means that . . . to the extent a conflict exists . . ., the provisions of the 'notwithstanding' legislation control."[19] However, D.C. Official Code § 1-204.24d does not say "notwithstanding any other provision of

[19] DeWitt, *supra* note 12, at 2.

law," it says only "notwithstanding any other provisions of this chapter," referring to the Home Rule Act.[20] It does not expressly forbid modification or insertion of additional duties by operation of other law; it only gives the CFO taxing authority to the exclusion of any other entity in the Charter.[21] As such, the CFO's duties may be amended or modified by law to the extent that they do not fundamentally alter the structure of the Charter.

Second, the CFO contends that the terms "levying and collection" should be read broadly to effectuate Congress' intent, as evidence by placing OTR under the CFO in the Charter in D.C. Official Code § 1-204.24a(b)(2). The CFO argues that "by placing the District's tax agency, OTR, under the CFO, Congress intended that the delegation of authority to the CFO included all of OTR's tax administration activities, which extend far beyond mere assessment, levying, and collection of taxes."[22] The CFO is correct that OTR was placed under its authority, and that the levying and collection of taxes generally extends broadly to activities necessary to enforce the levying and collection of taxes. *See generally Gardner v. United States*, 213 F.3d 735, 738 (D.C. Cir. 2000) ("The Internal Revenue Code defines 'tax administration' fairly broadly, to include 'the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws or related statutes . . . ,' as well as enforcement and litigation under the tax laws." (quoting 26 U.S.C. § 6104(b)(4)(A)(i) and (B)).

However, while "levying and collection of taxes" is broad, it is not so broad as to be exclusive over the entire field. As the Council argued, the language of D.C. Official Code § 1-204.24d "cannot be read to confer on the CFO exclusive authority for all tax-related matters in the District." The Council cited as authority *Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011), in which the court rejected the claim that the phrase "assessment and collection" extended to all matters that affect the money treasury retains.[23] The Council is correct that while "levying and collection" of taxes extends broadly to most tax administration matters, it is not exclusive of all other tax matters.

Third, the CFO argues that although OAG engages in tax litigation on behalf of the District, "OAG generally litigates tax cases that have been developed by OTR . . . . as its client . . . . The Bill creates a new type of authorization that is beyond OAG's existing responsibilities and involves OAG in tax administration activities that are reserved to the CFO."[24] The CFO is correct that OAG generally litigates tax cases on behalf of OTR as a client, as D.C. Official Code

[20] Home Rule Act § 424(d).
[21] *See generally* note 9 *supra*.
[22] DeWitt, *supra* note 12, at 3.
[23] Streeter, *supra* note 15, at 2. *See Cohen v. United States*, 650 F.3d 717, 726 (D.C. Cir. 2011) ("The IRS envisions a world in which no challenge to its actions is ever outside the closed loop of its taxing authority. It argues assessment and collection are part of a 'single mechanism' that ultimately determines the amount of revenue the Treasury retains. Because this suit will ultimately affect the money Treasury retains, the IRS argues, it involves 'assessment and collection.' But the Supreme Court rejected this 'single mechanism' theory of assessment and collection in *Hibbs*, choosing instead to define 'assessment and collection' as is done in the Internal Revenue Code. '[A]ssessment' is not 'synonymous with the entire plan of taxation,' but rather with 'the trigger for levy and collection efforts,' and 'collection' is the actual imposition of a tax against a plaintiff, and does not concern third-parties trying to contest the validity of a tax or to stop its collection." (citations omitted)).
[24] DeWitt, *supra* note 12, at 3-4.

§ 1-301.81(a)(1)[25] provides that "the Attorney General . . . shall have charge and conduct of all law business of the said District and all suits instituted by and against the government thereof." In the absence of statutory authority to the contrary, these general grants of litigation authority to attorneys general include the authority to litigate in suits involving taxation. *See generally People v. Birch Sec. Co.,* 196 P.2d 143, 146 (Cal. Dist. Ct. App. 1948) ("The Attorney General, as the chief law enforcement officer of the state, has the authority and power, in the absence of a statute to the contrary to institute, conduct and maintain all civil actions involving the rights and interests of the state, such as the collection of unpaid franchise taxes."). However, the CFO is correct that it is not established that "OAG has tax administration authority independent of the CFO or that OAG independently pursues tax litigation without coordination with the CFO,"[26] as the Charter gives the CFO the authority of "supervising and assuming responsibility" for taxation; this relationship is discussed in more detail below.

Fourth, the CFO argues that federal tax law permit the use of federal tax information "only if it involves 'tax administration," and "because a *qui tam* action is a separate cause of action unrelated to tax administration, the [CFO] and OTR are prohibited from providing [federal tax information] . . . except as narrowly defined."[27] The federal tax code provides that "returns and return information shall be confidential, and except as authorized by this title, no person "shall disclose any return or return information." 26 U.S.C. § 6103(a). It contains an exception for state tax administration, under which "returns and return information with respect to taxes . . . shall be open to inspection by, or disclosure to, any State agency . . . which is charged under the laws of such State with responsibility for the administration of State tax laws for the purpose of, and only to the extent necessary in, the administration of such laws." *Id.* § 6103(d)(1).

However, the CFO's argument that "a *qui tam* action is a separate cause of action unrelated to tax administration" is undermined by the CFO's own argument above that "the delegation of authority to the CFO included all of OTR's tax administration activities."[28] If "tax administration" does not include *qui tam* actions for tax fraud, then the Bill does not impinge upon the CFO's and OTR's tax administration duties. As argued by the Council, the Bill "does not reference the CFO or OTR and certainly does not require the CFO to produce tax information to anyone."[29] Further, 26 U.S.C. § 6103(h)(4)(A) provides that a "return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration" when "the taxpayer is a party to the proceeding."[30] The taxpayer in an FCA *qui tam* action would necessarily have to be the defendant, and thus a necessary party to the proceeding.[31]

More generally, at least seven other states either expressly allow certain taxation claims in their false claims actions, or do not contain the tax exemption as the federal false claims act does, and

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[25] Section 101(a)(1) of the Attorney General for the District of Columbia Clarification and Elected Term Amendment Act of 2010, effective May 27, 2010 (D.C. Law 18-160; D.C. Official Code § 1-301.81(a)(1)).
[26] DeWitt, *supra* note 12, at 3-4.
[27] *Id.* at 4-5.
[28] *Id.* at 3.
[29] *Streeter, supra* note 15, at 6.
[30] *Id.* (quoting 26 U.S.C. § 6103(h)(4)(A)).
[31] *Streeter, supra* note 15, at 7.

so explicitly or effectively allow false claims actions for taxation.[32] We have been unable to find any evidence that federal tax confidentiality laws are considered to be violated in these states.

In summary, while the CFO is correct that the "levying and collection of taxes" is generally considered to include activities incident to tax administration, the CFO's arguments that such authority is exclusive are not persuasive. The Bill does not fundamentally change the structure of the CFO under the Charter; it merely creates rights of action in court for the Attorney General and private plaintiffs for taxation matters. It is likely best considered not as an alteration in the powers of a Charter executive branch agency, as none of the CFO's powers under the Charter are directly affected or shifted; rather, it should be thought of primarily as creating a right of action in court.

3. Potential Conflicts Between the CFO's Taxing Authority and the Bill

However, the Charter still vests the CFO with "supervising and assuming responsibility for the levying and collection of all taxes." Although there is not sufficient reason to think that the CFO's taxation authority is exclusive, it remains in some sense primary or ultimate, and there is and would remain the possibility of conflicts between the CFO, the Attorney General, and a *qui tam* relator. Although for the reasons argued above, the Bill does not on its face fundamentally alter the CFO's authority under the Charter, it would create the potential for conflicts in individual cases if the interests of the CFO, the Attorney General, or the private plaintiffs diverge. To analogize from constitutional law, while the Bill does not facially change the Charter, there could be conflicts with the Bill as applied in particular instances.[33] To the extent that the CFO disagrees with the positions taken by the Attorney General or a *qui tam* relator, most likely if the CFO wants to settle a case and one of the other litigants wants to continue or vice versa, then since the CFO is ultimately responsible for all tax matters, it would seem that the Attorney General should generally yield to the CFO's position to the extent that there is any conflict.

These concerns may be mitigated by the role of court supervision in the FCA. Under D.C. Official Code § 2-381.03(d)(2)(A) provides that "the District may settle the action with the defendant, notwithstanding the objections of the qui tam plaintiff, if the court determines, after a hearing providing the qui tam plaintiff an opportunity to be heard, that the proposed settlement is fair, adequate, and reasonable under all the circumstances." In cases where the CFO and the

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[32] Franziska Hertel, *Qui tam for Tax?: Lessons from the States*, 113 Colum. L. Rev. 1897, 1911-16 (2013); *see also State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Centers, Inc.,* 878 N.E.2d 1152, 1167-68 (Ill. App. Ct. 2007) ("The Illinois FCA . . . expressly states that 'this section does not apply to claims, records, or statements made under the Illinois Income Tax Act.' Accordingly, . . . we conclude that use tax claims may be brought under the Act." (citation omitted)); *Int'l Game Tech., Inc. v. Second Judicial Dist. Court,* 127 P.3d 1088, 1104 (Nev. 2006) ("The inclusion of 'obligations' within the FCA's scope, coupled with the omission of an express tax bar, conclusively demonstrates the Legislature's intent to include tax liability matters within the realm of possible false claims.").

[33] *See Dubose v. United States,* 213 A.3d 599, 604 (D.C. 2019) ("A facial challenge 'amounts to an argument that no application of the . . . statute could be constitutional.' 'An 'as-applied' challenge requires that the application of the statute, by its own terms, infringe constitutional freedoms in the circumstances of the particular case.'" (citations omitted)).

Attorney General disagree over how to proceed with the claim, the Attorney General should yield to the CFO, especially given the Attorney General's historical role of representing the CFO as its client. If the CFO or the Attorney General disagree with the *qui tam* relator's position, the FCA provides the court adequate means to resolve those issues in its discretion. While the Bill may create conflicts of interest, the FCA has adequate means to resolve them in court, especially if the Attorney General defers to the CFO's ultimate responsibility over taxation matters.

We note that this memorandum differs from our previous memorandum and testimony before the Council on the previous iteration of the bill, in which we advised that the previous bill would violate the CFO's exclusive authority. However, the subsequent decision in *Apartment* has concretized the standard for when something is a Charter amendment, and we are now bound to apply that analysis. This current analysis recognizes and shares the underlying concerns in our previous memorandum and testimony, in that we still recognize that the CFO maintains primary authority in the area of taxation, and that the Attorney General should largely defer in the event of a conflict. Our prior testimony before the Council sought to make that deference explicit in the text of the bill by requiring "authorization from the Chief Financial Officer" before any action. But after *Apartment*, we no longer believe that the failure to include that language is fatal, as the Bill does not fundamentally change the role of the CFO under the Charter. Rather, although there may be potential conflicts between the primary taxation authority of the CFO and the Attorney General or *qui tam* relator, those conflicts may be resolved between the parties or by the court.

Summary

The False Claims Amendment Act of 2019 does not constitute a Charter amendment to the role of the CFO, as it does not fundamentally alter the CFO's role under the Charter. It merely creates a right of action in court for certain taxation matters. As such, it is validly within the Council's legislative power. The CFO retains primary responsibility for tax administration matters, although that authority does not preclude other statutorily designated entities from engaging in tax matters where authorized. To the extent there are any conflicts between the CFO and the Attorney General in taxation matters, the Attorney General should defer to the CFO's primary authority. The FCA contains adequate procedures to resolve any disputes in *qui tam* actions.

If you have any questions about this memorandum, please contact Matt James, Assistant Attorney General, Legal Counsel Division, at 724-5558, or me at 724-5565.

BKF/mdj

STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

Letitia James
Attorney General

April 27, 2020

Xavier Becerra, Esq.
Attorney General
State of California Department of Justice
Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814-2919

Dear Mr. Becerra,

I understand that California is considering amending the California False Claims Act to include tax provisions modeled on the provisions applying the New York False Claims Act to claims under the tax law (the "Tax FCA Provisions" or the "Statute"). At the request of your Office, I write to offer some information concerning this Office's experience in administering what has proven an extremely effective and beneficial law.

Enacted in 2010, the Tax FCA Provisions have now been in effect for ten years. In that time, the Tax FCA Provisions have enabled New York State to enforce the tax laws in numerous cases of fraud and recklessness that would have passed unnoticed by the authorities in the absence of these provisions. Moreover, the Tax FCA Provisions have resulted in settlements for more than $470 million in unpaid taxes and associated damages.

These results were accomplished while avoiding any of the dire predictions made by the law's opponents, that these provisions would thwart fair tax administration or open the floodgates to nuisance litigation. Indeed, the Tax FCA Provisions include several safeguards that prevent such outcomes and the last ten years have proven those safeguards to be effective.

Most significantly, as a fraud statute, the New York False Claims Act requires a "knowing" violation, which is defined as the possession of actual knowledge of falsity, deliberate ignorance of that falsity, or reckless disregard of the truth or falsity of the information at issue in any given case. The NYFCA further provides that mere negligence is not actionable. Therefore, where the facts of a given case do not indicate recklessness, deliberate ignorance or actual knowledge on a taxpayer's part, no violation of the NYFCA has occurred.

As a consequence, the Tax FCA Provisions complement the existing tax regulatory regime, which allows taxpayers to raise legitimate disputes with the tax authority about whether a tax is due. In contrast, cases settled or litigated by my Office in the ten years of the Statute's existence demonstrate that the Statute is aimed at situations where a good-faith tax position is absent, or where a meritless justification is fabricated by a taxpayer either contemporaneously or after (sometimes long after) the tax is evaded.

A further safeguard lies in the role played by the New York State tax authorities in tax FCA cases. The Statute requires my Office to consult with the tax commissioner before either commencing, or intervening in, a tax FCA action. My Office takes this requirement extremely seriously, closely coordinating with the Department of Taxation and Finance throughout both Office investigations and all *qui tam* actions brought under the Statute. This ensures that my Office is aware of any prior proceedings with the tax authorities and that our interpretations of the tax law are in alignment. As a result, our enforcement work under the Tax FCA Provisions complement and amplify the work of the tax authority and operates in a manner that avoids duplication or inconsistency.

The Statute also has several protections that prevent the whistleblower (or "*qui tam*") provisions of the Statute from being used as a tool for harassment. First, the Tax FCA Provisions include minimum thresholds below which actions may not be brought: the taxpayer must have net income or sales of a million dollars or more in any taxable year complained of, and damages pled must exceed $350,000. This has meant that only allegations of large-scale tax fraud are subject to scrutiny. It has also meant that this Office has not seen the occurrence of a "mill" type approach to tax *qui tam* actions: filing a large number of low-value cases to attain aggregate high returns.

Second, the New York False Claims Act allows the State to seek dismissal of *qui tam* actions. This power allows for prevention of meritless, frivolous or abusive cases. It also affords the State the ability to persuade relators of the futility of proceeding with meritless cases. It should be noted that my Office has not yet needed to exercise its power to dismiss a tax FCA action.

As a practical matter, those tax FCA cases that have been pursued by relators after the State has declined have not resulted in abuse of the Statute. This Office has declined to participate in roughly 90, or about half of the *qui tam* cases filed by relators under the Tax FCA Provisions. A summary review of this Office's docket shows that over ten years, relators have continued in only approximately 30 tax FCA cases after this Office's election to decline. This number refutes the idea that the Statute's *qui tam* provisions might lead to harassment, and it also demonstrates the strength of the declination provision in managing the *qui tam* docket.[1]

In addition, the whistleblower provisions of the New York False Claims Act have proven one of the most important guarantees of quality in tax FCA cases, bringing to light good information about misconduct previously hidden from the regulatory authorities. A summary review of this Office's docket supports this conclusion: since the Statute's enactment, the Office has overseen a total of approximately 204 matters brought or investigated under the Tax FCA Provisions. Of these, roughly 85% have been *qui tam* actions filed by relators. This Office's settlements of the cases filed by relators have resulted in settlements for more than $446 million, or just under 95% of the approximately $470 million of total settlements under the Statute. Relators, therefore, are responsible for an outsized proportion of the recoveries obtained by the State under the Statute: a fact suggesting that relators enhance, rather than compromise, the quality of tax FCA matters.

* * *

[1] Nor has it been this Office's experience that the cases pursued by relators after the State's election to decline have resulted in harassment of the tax authorities. To the contrary, we cannot recall a single request by a relator continuing an action after the state's election to decline—in ten years—for production from the tax authorities.

In conclusion, the Tax FCA Provisions have contributed enormously to the recovery of unpaid taxes in cases where, without the help of whistleblowers, it is doubtful any recovery would have been obtained, or that the misconduct would have even come to light. It is our judgment that, in the current climate more than ever, enforcement tools enabling the State to ensure that all taxpayers follow the law and pay their taxes are of the utmost value, and that the Tax FCA Provisions have performed extremely successfully in this role.

Sincerely,

Letitia James

Letitia James

Government of the District of Columbia
Office of the Chief Financial Officer

Jeffrey S. DeWitt
Chief Financial Officer

MEMORANDUM

TO:	**The Honorable Phil Mendelson** **Chairman, Council of the District of Columbia**
FROM:	**Jeffrey S. DeWitt** **Chief Financial Officer**
DATE:	**January 21, 2020**
SUBJECT:	**Fiscal Impact Statement – False Claims Amendment Act of 2020**
REFERENCE:	**Bill 23-35, Committee print provided to the Office of Revenue Analysis on January 15, 2019**

Conclusion

Funds are sufficient in the fiscal year 2020 through fiscal year 2023 budget and financial plan to implement the bill.

Background

Under the District's false claims laws[1] a person with knowledge of an action defrauding the District may file a civil action on behalf of the District. This person is known as a qui tam plaintiff. An action by a qui tam plaintiff may be dismissed with the written consent of the Attorney General and the Court. If the action proceeds, the District is responsible for prosecuting the action or settling with the defendant, subject to objections of the qui tam plaintiff. The defrauding person or entity may be liable for treble damages and civil penalties between $5,500 and $11,000 for each claim. The qui tam plaintiff is entitled to a reward of between 15 percent and 25 percent[2] of the proceeds received as a result of the action or settlement, depending on the significance of the information and role of the qui tam plaintiff.

Cases involving tax fraud, however, may not be brought forth under the District's false claims laws. Tax fraud actions are managed under separate statutory authority of the Office of the Chief Financial Officer, and informants are entitled to receive up to 10 percent[3] of the collections resulting from the case.

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[1] D.C. Official Code § 2-381.01, *et seq*.
[2] D.C. Official Code § 2-381.03(f)(1)(A).
[3] D.C. Official Code § 47-4111(b).

The bill makes two changes to this existing system. First, it increases the reward amount informants may receive under the existing OCFO authority from 10 percent of collections received by the action to 30 percent. Second, the bill allows tax fraud actions to be brought under the false claims laws, provided the damages total $350,000 or more and the defrauding entity or person has annual revenues, net income, sales, or earnings over $1 million.

Financial Plan Impact

Funds are sufficient in the fiscal year 2020 through fiscal year 2023 budget and financial plan to implement the bill.

Increase in reward for informants will reduce the total amount of revenue recovery the District may receive in future proceedings. However, receipts from informant driven proceedings are sporadic. From 2003 to 2018 there were five informant driven tax fraud cases totaling $7.4 million in tax recoveries with approximately $50,000 per year (on average) going toward informant rewards. There were no recoveries in fiscal year 2019. The effect on the current budget and financial plan of the increased reward is *de minimus*.

While it is possible a larger reward to informants will incentivize reporting of fraud in certain cases, there is insufficient information to predict revenue increases as a result of this change. We do not know what types of tax fraud settlements or judgements may occur in future years or whether those cases will come to light through audit processes or informants. Nor do we have a quantitative basis to predict how recovery amounts might increase as a result of a larger reward.

Allowing tax fraud cases to proceed under false claims laws provides an additional avenue for tax fraud proceedings to occur and may potentially increase recoveries. However, there is insufficient information to determine the amount of additional recovery (if any), and whether these recoveries might have happened regardless, under existing audit and compliance procedures.

OFFICE OF THE GENERAL COUNSEL
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 4
Washington, DC 20004
(202) 724-8026

MEMORANDUM

TO: **Chairman Phil Mendelson**

FROM: **Nicole L. Streeter, General Counsel**

DATE: **January 20, 2020**

RE: **Legal sufficiency determination for Bill 23-35, the False Claims Amendment Act of 2020**

The measure is legally and technically sufficient for Council consideration.

The proposed bill would amend section 814(d) of the District of Columbia Procurement Practices Act of 1985, effective May 8, 1988 (D.C. Law 12-104; D.C. Official Code § 2-381.02(d)), to provide section 814, which governs false-claims actions, applies to claims, records, or statements made pursuant to those portions of Title 47 of the District of Columbia Official Code that refer or relate to taxation when the net income, sales, or revenue of the person against whom the action is brought equals or exceeds $1 million for any taxable year subject to the action, and the damages pleaded in the action total $350,000 or more. It also would amend D.C. Official Code § 47-4111(b) to increase the maximum amount payable in connection with detecting underpayments of tax and detecting and bringing to trial and punishment persons guilty of violating or attempting to violate the revenue provisions of Titles 42 and 47 from 10% to 30% of the proceeds thereby obtained.

I am available if you have any questions.

COMMITTEE OF THE WHOLE
COMPARATIVE PRINT
BILL 23-35

D.C. OFFICIAL CODE § 2–381.02. FALSE CLAIMS LIABILITY, TREBLE DAMAGES, COSTS, AND CIVIL PENALTIES; EXCEPTIONS.

(d) This section shall not apply to claims, records, or statements made pursuant to those portions of Title 47 of the District of Columbia Official Code that refer or relate to taxation, **unless the District taxable income, or District sales, or District revenue of the person against whom the action is being brought equals or exceeds $1 million for any taxable year subject to any action brought pursuant to this subtitle, and the damages pleaded in the action total $350,000 or more.**

* * *

D.C. OFFICIAL CODE § 47-4111. REWARDS FOR INFORMANTS.

(b) The amount payable under this section shall not exceed ~~**10%**~~ **30%** of the proceeds, other than interest and penalties, collected by reason of the information obtained as a result of the payments. The proceeds collected shall be available for the payments.

COMMITTEE PRINT
Committee of the Whole
November 17, 2020

A BILL

23-35

IN THE COUNCIL OF THE DISTRICT OF COLUMBIA

To amend the District of Columbia Procurement Practices Act of 1985 to expand false claim liability to certain false claims made pursuant to those portions of Title 47 of the District of Columbia Code that refer or relate to taxation, and to increase the reward for informants who report tax fraud pursuant to 47-4111 of the District of Columbia Official Code.

BE IT ENACTED BY THE COUNCIL OF THE DISTRICT OF COLUMBIA, That this act may be cited as the "False Claims Amendment Act of 2020".

Sec. 2. Section 814(d) of the District of Columbia Procurement Practices Act of 1985, effective May 8, 1998 (D.C. Law 12-104, D.C. Official Code § 2-381.02(d)), is amended by striking the phrase "taxation" and inserting the phrase "taxation, unless the District taxable income, District sales, or District revenue of the person against whom the action is being brought equals or exceeds $1 million for any taxable year subject to any action brought pursuant to this subtitle, and the damages pleaded in the action totals $350,000 or more" in its place.

Sec. 3. Subsection 47-4111(b) of the District of Columbia Official Code is amended by striking the phrase "10%" and inserting the phrase "30%" in its place.

Sec. 4. Fiscal impact statement.

The Council adopts the fiscal impact statement in the committee report as the fiscal impact statement required by section 4a of the General Legislative Procedures Act of 1975, approved October 16, 2006 (12 Stat. 2038; D.C. Official Code § 1-301.47a).

Sec. 5. Effective date.

This act shall take effect following approval of the Mayor (or in the event of veto by the Mayor, action by the Council to override the veto), a 30-day period of Congressional review as provided in section 602(c)(1) of the District of Columbia Home Rule Act, approved December 24, 1973 (87 Stat. 813; D.C. Official Code § 1-206.02(c)(1)), and publication in the District of Columbia Register.