

District of Columbia False Claims Act Expanded to Tax Claims

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On January 13, 2021, District of Columbia Mayor Muriel Bowser signed the False Claims Amendment Act of 2020 (the “Amendment”),¹ which expanded liability under the D.C. False Claims Act (“D.C. FCA”) to include tax-related claims. Such tax-related claims include false tax returns that understate tax liability or seek a tax refund.² The Amendment is subject to the Congressional 30-day review period, currently underway, and is expected to go in effect in March 2021.³ The Amendment aims to increase revenue for the District of Columbia by enabling the D.C. attorney general to bring a new category of D.C. FCA cases, clearly signaling the District of Columbia’s intent to avail itself of the Amendment, particularly in the wake of the harsh financial impacts of COVID-19 on the district.

False Claims Act Background

The federal government and many states have False Claims Acts (FCAs) under which private parties can file actions on behalf of the government against entities or individuals who have allegedly defrauded the government by submitting a false claim for payment. The D.C. FCA allows both the D.C. attorney general and private whistleblowers—so-called *qui tam* plaintiffs—to file suit to enforce the statute’s provisions. Like the federal FCA, the D.C. FCA allows individual *qui tam* plaintiffs to recover anywhere between 15% and 30% of the proceeds of the District of Columbia’s recovery if successful, a benefit to incentivize whistleblowers to file FCA lawsuits. A review of publicly accessible settlements suggests that at least \$21 million has been recovered through D.C. false claims actions since 2014.⁴

The federal FCA prohibits *qui tam* actions from being brought for alleged violations of the Internal Revenue Code, and most states follow the federal government in excluding tax cases from their FCAs. The D.C. Amendment would lift that tax exclusion, however, and the District of Columbia would join states like New York⁵ and Illinois that allow private parties to take on a tax enforcement function typically restricted to government.

¹ B23-0035, Council of the District of Columbia, <https://ims.dccouncil.us/Legislation/B23-0035>.

² Some examples are false exemptions or deductions, unreported income, failure to pay tax, failure to withhold, or a false or altered document.

³ The D.C. Council’s website currently projects that the effective date for this legislation will be March 15, 2021.

⁴ Committee of the Whole Report on Bill 23-35, “False Claims Amendment Act of 2020,” Council of the District of Columbia, Nov. 17, 2020, https://ims.dccouncil.us/downloads/LIMS/41625/Committee_Report/B23-0035-Committee_Report1.pdf.

⁵ Notably, in 2018, the State of New York settled the largest state sales-tax case in history. The case, brought by a whistleblower, alleged that Sprint Nextel knowingly failed to collect and remit over \$100 million in state and local sales taxes owed on its flat-rate wireless calling plans sold to New Yorkers. Sprint settled with New York for \$330 million. The whistleblower received over \$62 million. New York Office of the Attorney General Press Release, *A.G. Underwood And Acting Tax Commissioner Manion Announce Record \$330 Million Settlement With Sprint In Groundbreaking False Claims Act Litigation Involving Unpaid Sales Tax*, Dec. 21, 2018, <https://ag.ny.gov/press-release/2018/ag-underwood-and-acting-tax-commissioner-manion-announce-record-330-million>.

D.C. False Claims Act Amendment and Penalties

The Amendment allows the D.C. attorney general or whistleblowers to file a claim of tax fraud against persons or entities: (1) that have more than \$1 million in district taxable income, district sales or district revenue for any taxable year brought into question by the action; and (2) where the claim asserted alleges damages to the district of at least \$350,000.

For cases that meet these statutory thresholds, the Amendment authorizes the D.C. attorney general to file suit on the District of Columbia's behalf. The Amendment also prescribes a 10-year statute of limitations for bringing a D.C. FCA tax fraud claim, expanding the time in which the D.C. attorney general or a whistleblower can bring a tax fraud claim by seven years more than the current three-year limitation period that applies to D.C. tax claims.⁶

Courts may impose treble damages—i.e., an amount three times the loss to the government—for violations of the D.C. FCA, in addition to civil penalties of between \$5,500 and \$11,000 for each violation.⁷ If the case is initiated by a whistleblower and D.C. recovers any funds, the business will also likely be responsible for paying the plaintiff's attorney's fees, costs and expenses.

Considerations and Best Practices

While the D.C. government must file any claims against a taxpayer within three years of the tax return at issue, the Amendment imposes a statute of limitations of 10 years from the date of the alleged violation. Since the D.C. FCA applies retroactively and enables the D.C. attorney general and whistleblowers to examine tax filings further back in time, it is recommended that entities that meet the \$1 million statutory taxable income threshold retain tax returns and related documentation for a minimum of 10 years.

Businesses may face increased scrutiny by both the D.C. attorney general and private citizens who have knowledge of their tax information. Therefore, it is recommended that businesses maintain detailed documentation of all tax-related decisions, including recordkeeping of advisory communications from outside financial, legal and tax professionals.

Businesses should also develop compliance programs for employees and consider training that addresses how to handle a D.C. FCA investigation for higher-level employees and management. For example, the D.C. FCA has an anti-retaliation clause for whistleblower or *qui tam* litigants so entities subject to an investigation should exercise caution with treatment of such employees.

If you have any questions regarding the topics discussed in this article, please contact **Kelly E. Buroker** at +1 (202) 312 3339, **Anand V. Ramana** at +1 (202) 312 3325, **Aleksandra Rybicki** at +1(202) 312 3336 or any Vedder Price attorney with whom you have worked.

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⁶ D.C. tax laws allow tax claims to be filed within three years of the tax return at issue.

⁷ D.C. CODE ANN. § 2-381.02(a).