



**REPORT ON LEGISLATION BY THE  
STATE AND LOCAL TAX COMMITTEE**

**A.2543  
S.4730**

**M. of A. Weinstein  
Sen. Krueger**

AN ACT to amend the state finance law, in relation to the liability of a person who presents false claims for money or property to the state or local government

**A.2506  
S.5319**

**M. of A. Weinstein  
Sen. Hoylman**

AN ACT to amend the state finance law, in relation to the liability of a person who makes or uses a false record or statement material to an obligation to pay money to the state or a local government under the tax law, or who conceals or improperly avoids or decreases an obligation to pay money to the state or a local government under the tax law

**THESE BILLS ARE OPPOSED**

The State and Local Tax Committee of the New York City Bar Association writes to express opposition to the pending bills, which would further expand the False Claims Act (“FCA”), found at N.Y.S. Finance Law §§ 187 to 194, into matters of tax administration which are more properly vested by the state’s Department of Taxation and Finance (“Department”) under its existing authority.<sup>1</sup>

The State’s FCA did not originally apply to tax claims. In 2010, as part of amendments that sought to create a “false claims act on steroids”<sup>2</sup> and with the Department recommending approval, the FCA was expanded to include state tax claims. L. 2010, c. 379. That legislation included treble damages and mandatory civil penalties for tax fraud and created the “first-in-the-nation program to allow whistle-blowers to go after millionaire tax cheats that defraud the state of

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<sup>1</sup> The Report represents the views of the Committee members and not those of their firms, companies or clients. Certain members of the Committee, David Bunning, Jahlionais (Elisha) Gaston, Malinda Sederquist and Kathryn Pickel recused themselves from the preparation of this report.

<sup>2</sup> Senator Eric T. Schneiderman Shepherds Historic Anti-Fraud Taxpayer Protection Measure Through Legislation (Jan. 1, 2010), <https://www.nysenate.gov/newsroom/press-releases/eric-t-schneiderman/senator-eric-t-schneiderman-shepherds-historic-anti>. (All links last visited Mar. 16, 2021.)

**About the Association**

*The mission of the New York City Bar Association, which was founded in 1870 and has 25,000 members, is to equip and mobilize a diverse legal profession to practice with excellence, promote reform of the law, and uphold the rule of law and access to justice in support of a fair society and the public interest in our community, our nation, and throughout the world.*

over \$350,000.”<sup>3</sup> Supporters of the legislation touted it as a fraud deterrence and revenue raising measure. However, detractors of the FCA tax expansion provisions pointed to its potential misuse, its long statute of limitations period (10 years), which substantially exceeds the statute of limitations periods provided under the State’s tax laws (generally three years and extended to six years if there has been a substantial tax understatement). There is no statute of limitations in instances of fraud. Another criticism of using the FCA in tax matters is that such application may directly conflict with considered positions taken by the Department on audit, undermining the Department’s ability to resolve disputed issues with finality.<sup>4</sup> The proposed bills would expand the FCA’s reach even further.

A.2506/S.5319 would remove the statutory requirement that the individual or business make the false claim “knowingly.” Removing the “knowingly” prerequisite could potentially extend to every situation where a tax deficiency may be asserted, creating a serious overbreadth concern. Tax law is not black and white but is often gray. It is not unusual for positions taken by the Department to be overturned by the State’s Tax Appeals Tribunal or the courts. Although the proposed legislation would limit the damages to the amount of tax, plus consequential damages, including interest, rather than the treble damages and statutory civil penalties otherwise imposed by the FCA, the legal costs and resources needed to defend against an FCA action, and award of attorneys’ fees and costs to a successful relator provided by the FCA can be daunting. Further, since the bills provide that they would apply to false claims, records, statements and obligations avoided or decreased on prior to the effective date, such retroactive application creates significant due process concerns.<sup>5</sup> For these reasons, the Committee recommends that this proposed legislation be rejected.

A.2543/S.4730 would extend the FCA to instances where a taxpayer knowingly fails to file a return, which the sponsor’s memo states is a “loophole” in the current FCA because the statute imposes a liability where a person made or used false statements or records that were material to an obligation to pay money to the government, such that nonfilers may be viewed as falling outside the FCA’s scope. However, the Attorney General’s office has long taken the position that nonfilers are within the scope of the FCA, settlements have been obtained on such basis, and the position has already been upheld by the courts.<sup>6</sup> Further, many nonfiler situations involve nexus (tax

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<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Anonymous v. Anonymous (Moody’s Corp.)*, 165 A.D.3d19 (1<sup>st</sup> Dep’t 2018) (rejecting argument that the FCA action was precluded since both the State and City had audited and settled the issue challenged under the FCA and had entered into closing agreements and consents and waivers); cf. *People ex rel. James v. Starbucks Corp.*, 60 Misc.3d 204 (N.Y. Sup. Ct. N.Y. Cnty. 2018) (in dismissing the complaint, court appeared swayed by the fact that the Department regularly audited the taxpayer and the issues involved in the relator’s claim were reviewed during the audits and resulted in no additional sales tax being assessed).

<sup>5</sup> See *United States v. Carlton*, 512 U.S. 26 (1994).

<sup>6</sup> See, e.g., Press Release, A.G. Schneiderman Announces \$6.2 Million Settlement with Lantheus Medical Imaging and Bristol-Myers Squibb for Failing to Pay New York Corporate Income Taxes (Mar. 14, 2014) available at <https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-62-million-settlement-with-lantheus-medical-imaging>; Press Release, A.G. Schneiderman Announces \$1.56 Million Settlement With New Jersey Appliance Retailer for Failing to Pay New York Taxes; available at <https://ag.ny.gov/press-release/2014/ag-schneiderman-announces-156-million-settlement-new-jersey-appliance-retailer>. See, e.g., *State of N.Y., City of N.Y., ex rel. Campagna v. Post Integrations, Inc.*, 162 A.D.3d 592 (1<sup>st</sup> Dep’t 2018) (rejecting taxpayer’s argument that FCA

jurisdiction) situations, determinations of domicile, and applications of Public Law § 86-272,<sup>7</sup> which often require subjective fact-specific determinations and the application of developing law. One need only review tax decisions on nexus, domicile and P.L. 86-272 to conclude that the delineation between taxable and nontaxable is often unclear and such determinations are best addressed by the Department as part of the normal tax administration function, rather than through the FCA. The Committee recommends that this proposed legislation be rejected.

State and Local Tax Committee  
Amy F. Nogid, Chair

April 2021

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claims “could be brought only against those who filed a tax-related document with New York State, and not against non-filers who otherwise made claims, records, or statements under the tax law.”)

<sup>7</sup> Public Law § 86-272 (15 U.S.C. § 381, *et seq.*), is a federal law that preempts states from imposing a net income tax on persons that otherwise would have nexus if the person’s activities meet certain restrictions. The activities must be limited to: (i) the solicitation of orders of tangible personal property; (ii) which orders are sent outside the state for approval or rejection; and (iii) if approved, are filled by shipment or delivery from a point outside the state.