

**Baker
McKenzie.**

False Claims Act and State Tax

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False Claims Act Overview

False Claims Act Overview

- Qui tam lawsuits
 - Are brought by third parties, under a statute that establishes a penalty for the commission or omission of a certain act
 - Provide that such penalties may be recovered in a civil action
 - Often 15% to 30% of the recovery goes to the relator

False Claims Act Overview

- Approximately 30 states and some localities (e.g., NYC, Chicago) have False Claims Acts
 - Some states restrict their FCA provisions to Medicaid and/or contractor-type “frauds”
 - A number of state FCA statutes contain explicit “tax bars”
 - Some states impose a tax bar only with respect to income tax matters
 - A number of states have no restrictions to a particular subject matter
 - In 2010, New York became the first state to explicitly authorize the application of its FCA to tax claims

False Claims Act Overview

- Frequently seen in the sales/use tax context
 - Nexus lawsuits against remote or internet sellers
 - Shipping & handling charges
 - Taxability of transactions
 - Potential for increased activity post-*Wayfair*

False Claims Act Overview

- Not limited to sales/use tax in all states
 - Example: Bristol-Myers Squibb settlement in New York
 - Corporate income tax case - \$6.2 million settlement
- Unclaimed Property
 - Failing to remit unused amounts on prepaid calling cards

False Claims Act Overview

- Potential for high damages
 - Long look back
 - Common to have treble damages
 - Attorney's fees
 - Statutory penalties per “false claim”

False Claims Act Overview

- VDAs may not resolve FCA liability
- Settling does not prevent risk of a class action lawsuit and may not prevent the tax department from challenging
- Conservative approach may result in class action lawsuit

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California Legislation

California Legislation

California A.B. 2570 – Summary

- Introduced on February 20, 2020; amended May 4, 2020.
- Expands California’s existing False Claims Act to “knowingly” false/fraudulent claims made under the Revenue and Taxation Code on or after January 1, 2021 (if enacted).
- Lookback period can extend up to ten years.
- Applies to all tax types under the California tax code (not just sales tax).

California Legislation

California A.B. 2570 – Summary (con't)

- The taxpayer accused of fraud must have personal income, gross receipts, or sales in excess of \$500,000 for the taxable year in which the alleged fraud occurred.
- Damages to the government from alleged fraud must exceed \$200,000.
- The State's Attorney General must consult with the Franchise Tax Board (or other taxing authority) to whom the underlying claim relates before intervening in any action.

California Legislation

California A.B. 2570 – Potential Liability

- A taxpayer found to have committed fraud owes:
 - Three times the amount of the cost of the fraud to the State.
 - Civil penalties between \$5,500 and \$11,000 per violation.
 - Attorney's fees.
 - If the State's Attorney General intervenes, the qui tam plaintiff shall receive at least 15% but not more than 33% of the proceeds of the action or settlement.
 - If the State's Attorney General does not intervene, the qui tam plaintiff shall receive not less than 25% and not more than 50% of the proceeds of the action or settlement.

California Legislation

California A.B. 2570 – Current Status

- Similar legislation died in the Senate Appropriations Committee in August 2019.
- California's Assembly Judiciary Committee approved the bill on May 11th by a 7-3 vote; referred to the Assembly Appropriations Committee on May 12th.
- Sponsored by the California Attorney General's Office.

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DC Legislation

DC Legislation

D.C. Bill 23-35 – Summary

- Introduced on January 8, 2019.
- Expands D.C.’s existing False Claims Act to “knowingly” false/fraudulent tax claims made under Title 47 of the District of Columbia Code. Becomes effective upon enactment.
- Lookback period can extend up to ten years.
- Applies to all tax types under Title 47 (not just sales tax).

DC Legislation

D.C. Bill 23-35 – Summary (con't)

- False/fraudulent tax claim may proceed to the extent “the net income, sales, or revenue of the person against whom the action is being brought exceeds \$1 million for any taxable year.”
- Damages pleaded must equal or exceed \$350,000.
- Separate provision increases reward for informants who report tax fraud from 10% to 30% of proceeds.

DC Legislation

D.C. Bill 23-35 – Potential Liability

- A taxpayer found to have committed fraud owes:
 - Three times the amount of the damages.
 - Civil penalties between \$5,500 and \$11,000 per violation.
 - If the District's Attorney General intervenes, the qui tam plaintiff shall receive at least 15% but not more than 25% of the proceeds of the action or settlement.
 - If the District's Attorney General does not intervene, the qui tam plaintiff shall receive not less than 25% and not more than 30% of the proceeds of the action or settlement.

DC Legislation

D.C. Bill 23-35 – Current Status

- Opposed by Chief Counsel of the Office of Tax and Revenue in December 2018.
- Similar legislation has failed to advance over the years.
- Recommended for approval by D.C. Council Committee of the Whole on January 21, 2020.

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Questions?

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