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.
plaintiff not affiliated with the government may file an action in Superior Court on behalf of the government in these circumstances, 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. A *qui tam* plaintiff may not base a false claims case on information that was publicly disclosed in a civil, criminal or administrative hearing to which the District is a party, in a report, hearing or audit by District agencies, or by the news media will be automatically dismissed by the Court.

*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, they must serve a copy of the complaint and all material information to the Office of the Attorney General (OAG) of the District of Columbia by mail. Within 180 days after receiving the complaint, the OAG must either notify the court that they intend to proceed with the action or notify the court that they decline to take over the action. If the OAG proceeds with the action, they take primary responsibility for prosecuting the case. If they decline to proceed with the action, the seal is lifted, and the plaintiff has the right to conduct the action. False claim cases may also be dismissed if the court and the OAG give written consent for the dismissal and their reasons for consenting.

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. *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. Any damages left after distributing proceeds to the plaintiff is paid to the District treasury. 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 claim actions since 2014.

**The Tax Bar in the District**

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. 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. The Committee investigated the legislative history of the False Claims Amendment Act of 1986, but the only mention of the tax

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3 D.C. Official Code § 2-381.05(a)(1) and § 2-381.05(a)(2).
4 D.C. Official Code § 2-381.03(c-1)(1).
5 D.C. Official Code § 2-381.03(b)(1).
6 D.C. Official Code § 2-381.02(a).
7 D.C. Official Code § 2-381.03(f)(1)(A) and § 2-381.03(f)(2)(A).
8 D.C. Official Code § 2-381.03(f)(3).
9 Committee analysis of settlements and media releases on the Office of Attorney General for the District of Columbia’s website.
10 D.C. Official Code § 2-381.02(d).
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.”12 Courts that have considered the tax bar have determined that it was merely a codification of common law that existed at the time.13

Testimony from OAG on a similar measure that was introduced during Council Period 22, Bill 22-166, stated that the bill would not be legally sufficient if it did not include language requiring that the Office of Chief Financial Officer (OCFO) authorize any false-claims action relating to taxation. In support of its position, OAG cited section 424(d)(10) of the District Charter (D.C. Official Code § 1-204.24d(10)), which provides that, among the Chief Financial Officer’s duties, is “[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) . . . .” The Council’s Office of the General Counsel disagrees that the institution of a false-claims action relating to taxation constitutes the “levying and collection” of taxes and that section 424(d)(10) therefore requires that OCFO authorize any such action. The existing false-claims statute permits the initiation of an action 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.”14 Yet OCFO’s authorization of such an action is not statutorily required, notwithstanding its responsibility under section 424(d)(10) for the “collection of all . . . revenues of the District of Columbia . . . .” As the District of Columbia Court of Appeals has recognized, “limitations on the Council’s legislative authority will be construed narrowly.”15 Nothing in the plain language or legislative history of section 424(d)(10) would appear to confer on OCFO the exclusive authority to determine whether one of a particular class of false-claims actions, i.e. those relating to taxation, may go forward. Moreover, as a practical matter, OAG may consult with OCFO as it discharges its responsibilities pursuant to the false-claims statute as amended by this bill.

The Tax Bar in Other Jurisdictions

Currently, only 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.16 All three cases were dismissed.

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13 *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.”)
14 D.C. Official Code § 2-381.02(a)(6).
New York State’s law expressly authorizes false claims cases involving taxes. In 2010, Former New York State Senator Eric Schneiderman introduced the Fraud, Enforcement and Recovery Act to allow “whistleblowers to go after millionaire tax cheats that defraud the state of over $350,000.” 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. 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. It was estimated that the Department’s audit activities would recover $500 million in 2002, leaving an estimated $2.338 billion in taxes unassessed.

As a result of removing the tax bar, the State of New York has received more than $450 million from false claims settlements involving taxes. 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. The investigation into Sprint 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.

**Addressing Arguments Against Removing the Tax Bar**

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, Diamond exploited a regulatory gap that was the result of inaction by the Illinois Department of Revenue (DOR). In 2009, the Illinois Supreme Court held in *Kean v. Wal-Mart Stores, Inc.* that delivery charges for products purchased via the internet and shipped to Illinois must be taxed when there is an “inseparable link” between sale and delivery of the product. It took DOR nearly seven years to update regulations providing guidance on collecting these taxes and allowing safe harbor for retailers acting in good faith during

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21 Committee analysis of settlements and media releases on the Office of Attorney General for the State of New York’s website.
23 Ibid.
the time between *Kean* and the updated regulations. Where defendants could show they were following official guidance or were otherwise told they complied with the law via DOR audits, courts dismissed these cases. Second, despite pleas from many defendants, the Attorney General of Illinois often did not intervene to have Diamond’s cases dismissed. When the Illinois Attorney General has intervened, cases have been dismissed en masse.

The District’s false claims law also has mechanisms to prevent frivolous lawsuits. All *qui tam* complaints must be served to the Attorney General on the same day that the plaintiff files the complaint. The Attorney General then has up to 180 days after receiving the complaint to decide whether the government should take over the case, allow the plaintiff to proceed, or request that the court dismiss the case. The Attorney General can intervene after the 180-day window as well. Defendants can request that the court limit or restrict the participation of the plaintiff upon showing that unrestricted participation would be repetitious, irrelevant, or constitutes harassment. 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.

Witnesses at the hearing expressed concern that removing the 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 provide that tax return information can be obtained for judicial proceedings. 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 evidence in the custody of the investigator. 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.

Finally, witnesses 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. In this scenario, it is not a given that OTR would flag the

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26 Ibid.
28 D.C. Official Code § 2-381.03(b)(3).
29 D.C. Official Code § 2-381.03(b)(4).
30 D.C. Official Code § 2-381.03(c)(2).
31 D.C. Official Code § 2-381.03(d)(2)(C).
32 D.C. Official Code § 2-381.03(f)(5).
33 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.
35 See, for instance, D.C. Superior Court Civil Rule 5.2 Privacy Protection for Filings Made with the Court.
transactions or claims that are the subject of the complaint. Additionally, the OAG could consult with OTR at any time during the case to ensure it is not interfering with or duplicating an OTR audit or investigation.

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. Per information from OTR, an informant can submit a report of tax fraud or abuse via a Tax Fraud Information D-3949A form. 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 provided by the OTR suggests that this is rare: From 2003 to the end of 2018, only five cases have been brought to OTR, totaling $7.23 million in taxes.

During the Committee hearing, several witnesses suggested that the Committee reconfigure our current tax fraud whistleblower statute to mirror the federal law, which was amended in 2006 to allow tax fraud whistleblowers to receive an award of up 30% of the proceeds collected, instead of moving forward with Bill 23-35. A 2016 report from the Treasury Inspector General for Tax Administration (TIGTA) show that the IRS’s whistleblower collected over $2 billion from fiscal year 2011 to fiscal year 2016. The same report found that the program suffered from issues such as a lack of timeliness for claim processing and rejection and denial decisions that were not always properly supported. Prior reports from the TIGTA found similar issues. This suggests that an agency administered whistleblower program, while a valuable tool, will not be able to capture or process all meritorious claims no matter the award amount offered to informants.

Conclusion

As introduced, Bill 23-35 would not cover circumstances in which an individual or entity knowingly failed to file tax returns. The Committee Print strikes this language and inserts wording that would allow cases to be pursued based on failure to file tax returns. Additionally, the Committee Print includes language that would 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 as up to 10% to up to 30%. The Committee reports favorably thereon with amendments and recommends approval by the Council.

36 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.
37 Cases involving the application of D.C. Code § 47-4111, as of December 27, 2018.
38 26 U.S. Code § 7623(b)(1).
40 Ibid.
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.

March 7, 2017  Bill 22-166 is “read” at a legislative meeting; on this date the referral of the bill to the Committee of the Whole is official.

March 10, 2017  Notice of Intent to Act on Bill 22-166 is published District of Columbia Register.

November 23, 2018  Notice of a Public Hearing on Bill 22-166 is published in the District of Columbia Register.

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, 2019  Notice of Intent to Act on Bill 23-35 is published in the District of Columbia Register.

January 21, 2020  The Committee of the Whole marks-up Bill 23-35.42

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.

42 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.
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.

*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.

VI. IMPACT ON EXISTING LAW

Bill 23-35 amends Section 814(d) of the District of Columbia Procurement Practices Act of 1985 to expand false claims liability related to taxation. If the net income, sales, or 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 subsection, and the damages pleaded in the action total $350,000 or more, then they may be held liable for false claims.

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 related 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.

IX.  COMMITTEE ACTION

X.  ATTACHMENTS

1.  Bill 23-35 as introduced.
2.  Written Testimony.
4.  Legal Sufficiency Determination for Bill 23-35.
5.  Committee Print for Bill 23-35.
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
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.


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.
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.
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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\(^3\) *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

whistleblowers. 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

(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
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.
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 Commerce 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 Commerce – Resolution Concerning the Use of Contingent Fee Arrangements in Tax Audits and Appeals
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
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

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 not 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*
declared 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.

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**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.


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.


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

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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.
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 of the District of Procurement Practices Act of 1985, effective May 8, 1998 (D.C. Law 12-104, D.C. Official Code § 2-381.02), is amended as follows:

(a) Subsection (d) is amended by striking the phrase “taxation” and inserting the phrase “taxation, unless the net income, sales, or 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 subsection, and the damages pleaded in the action total $350,000 or more.” in its place.

Sec. 3. Section 47-4111 of the District of Columbia Official Code is amended as follows:

(a) Subsection (b) is amended by striking the phrase “10%” and inserting the phrase “30%” in its place.

Sec. 4. Fiscal impact statement.

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.