Articles + Publications | February 3, 2021

Amending DC's False Claims Act: Expansion of the DC AG's Power Through Removal of the Tax Bar

WRITTEN BY

Amy Pritchard Williams | Ryan J. Strasser | Miranda Hooker | Rachel Miklaszewski

On January 13, District of Columbia Mayor Muriel Bowser signed the False Claims Amendment Act of 2020 (the Amendment), which expanded liability under the D.C. False Claims Act (D.C. FCA) to encompass tax-related claims. The Amendment is effective unless Congress jointly disapproves it during a 30-day review period. The Amendment endeavors to increase tax revenue for the District of Columbia by enabling the D.C. attorney general to bring a new category of D.C. FCA cases and to incentivize private citizen whistleblowers to file more *qui tam* complaints. D.C. now joins New York and Illinois in taking the novel step of expanding its FCA to apply to tax fraud — an expansion that, if successful, could become a wave of the future and create heightened exposure for tax liability for many businesses and individuals.[1]

This change to the existing D.C. FCA arises out of the context of the District of Columbia's large revenue losses — $721 million in 2020 and an additional projected $774 million in 2021 — due primarily to COVID-19's depletion of revenue streams, such as a decreases in sales tax intake. The depletion shortfalls impacted federal, state, and local governments, including the District of Columbia, and were exacerbated over the past year as a result of civil unrest that caused damage to public property. As previous articles predicted, states and local governments will likely look to an uptick in certain enforcement actions to recover funds from the private sector to augment state and local budgets. Against this backdrop, the District of Columbia added a tool to its arsenal with the Amendment, which drew upon a parallel New York state statute. The New York 2010 Fraud Enforcement and Recovery Act (S. 8378) resulted in the state generating more than $460 million in tax-related false claims act settlements. Indeed, New York's largest False Claims Act settlement of $330 million originated from a whistleblower's tax fraud claim made possible by the 2010 amendment to the New York False Claims Act.

Overview of the DC False Claims Act

The D.C. FCA, modeled after the federal False Claims Act, creates civil and criminal penalties for an individual who knowingly presents a false claim.[2] Knowingly, in this context, means deliberate ignorance or reckless disregard. The D.C. FCA allows both the D.C. attorney general and private citizens to file suit to enforce the statute's provisions.[3] Moreover, like the federal False Claims Act, in order to incentivize whistleblowers to file *qui tam* suits, the D.C. FCA allows individual *qui tam* plaintiffs to recover anywhere between 15% and 30% of the proceeds of the District of Columbia's recovery if successful.

The D.C. FCA, like the federal False Claims Act, did not apply to tax fraud cases. The Amendment removes that bar, allowing whistleblowers to file claims of tax fraud against persons or entities filing taxes in D.C. that report at least $1 million in income and understate tax liability (*i.e.,* damages) by at least $350,000. For cases that meet these jurisdictional thresholds, the Amendment authorizes the D.C. attorney general to file suit on the District of Columbia's behalf.[4] Moreover, while D.C. tax laws only allow tax claims to be filed within three years of the tax return at issue, the statute of limitations under the Amendment is 10 years, effectively expanding the time in which the D.C. attorney general or a whistleblower can bring a tax fraud claim by an additional seven years.

The DC FCA Amendment and Its Legislative Intent

Plainly, the purpose of the Amendment is to replenish the D.C. coffers. The D.C. Council Committee Report specifically stated that the goal of the Amendment is to generate revenue through an increase of tax fraud enforcement and by "crack[ing] down on tax fraudsters." As such, the Amendment seeks to accomplish these goals as follows:

- *Allows enforcement of tax fraud by private citizens through qui tam lawsuits.* Private citizens may now file *qui tam* complaints against taxpayers alleging tax fraud.
- *Financially incentivizes whistleblowers.* Successful *qui tam* can recover between 15% and 25% of any monetary reward or penalty if the D.C. attorney general intervenes and between 25% and 30% if the D.C. attorney general does not intervene. This additional incentive will likely result in plaintiffs' attorneys bringing more cases than before, given the additional expected payout.
- *Increases damages to deter potential tax fraudsters.* Courts may impose treble damages for violations of the D.C. FCA, in addition to civil penalties of between $5,500 and $11,000 for each D.C. FCA violation. D.C. Code Ann. § 2-381.02(a).

Supporters of the Amendment estimated that D.C. has recovered at least $21 million through enforcement of the D.C. FCA since 2014. Thus, the expansion of the D.C. FCA to encompass tax fraud provided a significant step in closing the district's revenue shortfall.

But not everyone supported the Amendment's enactment; rather, the bill had many detractors. In fact, in passing the Amendment, the D.C. Council received and considered arguments from those opposing the bill that predicted its enactment (1) would cause a deluge of frivolous lawsuits, (2) implicate private citizens' privacy concerns, and (3) duplicate government enforcement actions.

Many, including Mayor Bowser, expressed concerns about a proliferation of spurious whistleblower lawsuits based on the results seen following a similar expansion of Illinois's False Claims Act. The D.C. Council nonetheless decided that the Amendment differed from the similarly expanded Illinois law in four material ways. First, the Amendment sets an income threshold for tax fraud suits under the D.C. FCA, unlike the Illinois law. Second, the Amendment allows defendants to request that the court "limit or restrict the participation of a plaintiff upon showing that unrestricted participation would be repetitious, irrelevant, or constitut[ing] harassment." Third, the Amendment allows the court to award the defendant attorney's fees and expenses if the court finds the lawsuit frivolous. Fourth, and finally, the D.C. FCA requires *qui tam* plaintiffs to serve the D.C. attorney general when the plaintiff files, which theoretically should spur the D.C. attorney general to intervene and dismiss frivolous cases; a corresponding service requirement did not exist in the Illinois expansion. Moreover, the D.C. Council found the New York statute to be instructive because it has not witnessed a "flood" of frivolous claims flowing out of its narrowing of the tax bar.

Next, the D.C. Council dismissed the concerns surrounding privacy. It noted that the D.C. FCA already included several protections for personal tax information. For example, *qui tam* complaints are filed *in camera* and remain under seal for up to 180 days. Additionally, the D.C. FCA contains restrictions on who may examine evidence and allows for additional privacy protections, including the ability of the court to issue a protective order and/or allow for *in camera* review of certain materials.

Then, the D.C. Council rejected the concern of risks of duplicative action, pointing to language in the Amendment that bars lawsuits based on allegations that are already the subject of an existing investigation, audit, or enforcement activity of the D.C.'s chief financial officer (CFO).[5] In addition, the Amendment requires the D.C. attorney general to consult with D.C.'s CFO once it receives a *qui tam* complaint.[6] This process, the D.C. Council observed, could elucidate additional and new sources of information that government regulators did not possess; accordingly, actions brought on by separate and independent sets of information would necessarily not be duplicative. For example, after New York lifted the tax bar in its False Claim Act, a former employee whistleblower sounded the alarm on a subsidiary funneling money to a parent company with information that had evaded governmental audits for years.[7] Perhaps most importantly, the D.C. Council concluded that two avenues are better than one when it comes to fighting tax fraud.

The Intersection of the DC Attorney General's Office and the DC CFO

A final substantial obstacle to the Amendment's enactment related to whether the Amendment violated the D.C. Home Rule Act. Although Congress broadly granted self-government to D.C. residents with this act in 1973, Congress also limited the power of the D.C. Council by establishing the District of Columbia's Charter (Charter).[8] Although the D.C. Council's legislative power is to be broadly construed, it cannot pass any act contrary to the provisions of the Charter by changing the text itself or fundamentally changing the structure of government laid out in the Charter.[9]

The D.C. attorney general's office (AGO) and the D.C. CFO initially expressed concerns to the D.C. Council that the Amendment would improperly infringe on the CFO's exclusive authority to levy and collect taxes. The D.C. AGO changed its position after the D.C. Court of Appeals' ruling in *Apartment & Office Building Association of Metropolitan Washington v. Public Service Commission of D.C.*, 203 A.3d 772 (D.C. 2019). In *Apartment & Office*, the petitioner argued that a D.C. statute deprived the Public Service Commission (Commission), a commission created by the D.C. Charter, of its ratemaking authority because the D.C. Council instructed the Commission via statute how to allocate costs and set rates, thus violating the Home Rule Act.[10] The D.C. Court of Appeals, however, rejected this reasoning, finding that the statute did not change the text of the Home Rule Act.[11] Then, the court examined the reasoning in *Potomac Electric Power Co. v. D.C. Government*, 651 F. Supp. 907, 910 (D.D.C. 1986), to see if there had been a "constructive" amendment to the Home Rule Act or changes that "alter the structure or manner in which the [charter entity] operates."[12] Following that reasoning, the D.C. Court of Appeals found that the statute did not fundamentally change the Commission's authority because the statute did not intend to undermine the Commission's ratemaking authority.[13]

After the *Apartment & Office* decision, the D.C. AGO concluded that the Amendment did not "fundamentally alter the CFO's role under the Charter" but instead "merely creates rights of action in court for the attorney general and private plaintiffs for taxation matters."[14] Additionally, the D.C. AGO noted that "none of the CFO's powers under the Charter are directly affected or shifted."[15]

The D.C. AGO's second letter to the D.C. Council acknowledged that there may be some "as-applied" conflicts between the *qui tam* plaintiffs, the attorney general, and the CFO. According to the D.C. FCA pre-amendment, if the attorney general wants to settle, the court may allow it despite the objections of *qui tam* plaintiffs.[16] In tax-related cases, the D.C. AGO noted in its memo that although the attorney general has power to litigate lawsuits in taxation, the D.C. AGO should “generally yield” to the CFO for tax claims brought under the D.C. FCA because the CFO is “ultimately responsible for all tax matters.”[17] Despite the deferential position of the D.C. attorney general, however, the Amendment will certainly expand the D.C. attorney general’s power by creating statutory authorization for the D.C. AGO to file and prosecute tax-related enforcement actions.[18]

Conclusion

When faced with financial challenges, budgetary shortfalls, and a continued public health crisis, states and localities will look for creative ways to increase revenue, including additional investigations and enforcement actions. Adding a state analog to the federal False Claims Act or expanding liability under an existing false claims act affords states and localities tools to meet some of their current extreme budgetary challenges.

Businesses and individuals must be alert to these developments and take steps to reduce liability and defend against both public and private enforcement actions. In particular, companies and individuals in D.C. now have heightened enforcement potential, as well as heightened liability for tax-related false claims. There are several general steps for companies to protect against enforcement actions:

- *Recognize how the* Amendment *reshapes your liability.* Most notably, the Amendment permits enforcement by private plaintiffs and the D.C. attorney general, raises the recovery for whistleblowers, and potentially extends the statute of limitations for tax-related actions.
- *Seek outside advice.* Find someone with expertise in this area of the law when confronting novel or thorny issues.
- *Monitor trends across states.* Watching federal, state, and local action will provide visibility into ongoing regulatory and enforcement trends. It is likely that other states will consider, if not approve, amendments similar in nature to the Amendment.[19]

---

[1] Although the mayor signed the legislation, the bill is not yet law. Per D.C. law, all legislation must be hand delivered separately to the U.S. Senate and U.S. House of Representatives in paper form for their approval before taking effect. If Congress takes no action for 30 days on the new proposed law (or 60 days for changes to the D.C. Criminal Code), then the law takes effect automatically. But if Congress passes a joint resolution against any new D.C. law and the president signs it, the new law is overridden.

This process recently has been impeded by the erection of a large fence erected around the Capitol following the violent protests there on January 6, 2021, which has barred the D.C. Council access to Congress to effectuate the requisite hand-delivery. Accordingly, the 30-day review period could not begin to run for any recently enacted D.C. legislation, including for the Amendment. The D.C. Council finally succeeded in circumventing that barrier on February 1, 2021, when it hand-delivered paper copies of all new laws, including the Amendment, to a member of the House of Representatives on an offsite location. Thus, the 30-day review period has commenced. The D.C. Council’s website currently projects that the effective date for this legislation will be March 19, 2021.

[2] D.C. Code Ann. § 2-381.02 (2020).

[3] § 2-381.03.

[4] False Claims Act of 2020, 68 D.C. Reg. 1019 § 2(a) (amending § 2-381.02(d)).

[5] 68 D.C. Reg. 1019 § 2(b)(2).

[6] *Id*.

[7] *See Council Committee Report on the False Claims Amendment Act of 2020*, B. 23-35 (Office of the Attorney General for the District of Columbia Mem., Nov. 13, 2020) [hereinafter, "Nov. 13, 2020 Report"].

[8] D.C. Code § 1-203.03(a).

[9] *Potomac Elec. Power Co. v. D.C. Gov't*, 651 F. Supp. 907, 910 (D.D.C. 1986).

[10] *See id.* at 775-76.

[11] *See id.* at 780.

[12] *See Apartment & Office*, 203 A.3d at 781 (quoting *Potomac*, 651 F. Supp. at 910-11).

[13] *See id.* at 782.

[14] *See* Nov. 13, 2020 Report.

[15] *See id.*

[16] § 2-381.03(d)(2)(A).

[17] *See* Nov. 13, 2020 Report.

[18] § 2-381.03(a).

[19] For example, California considered lifting the tax bar in its False Claims Act in 2020. The bill was put up for debate and almost passed its state's legislature. Michigan also attempted to pass similar amendments broadening the scope of its respective FCA to include state tax law issues.

RELATED INDUSTRIES + PRACTICES

- State Attorneys General