

March 4, 2021

## Amendment to D.C. False Claims Act Will Allow Tax Actions, Enhancing Tax Enforcement in the District

In mid-March, [amendments to the D.C. False Claims Act](#) (the “D.C. Act”)<sup>1</sup> providing for tax fraud enforcement under the Act will become effective unless Congress vetoes the reforms before that time. Among other changes, the amended D.C. Act will allow private citizen whistleblowers to bring lawsuits, on behalf of the District,<sup>2</sup> against taxpayers who have defrauded the government by underpaying taxes. It also requires the D.C. attorney general to investigate tax fraud violations<sup>3</sup> and enables the attorney general, upon a finding of a violation, to bring civil actions against violators.

When the D.C. Act becomes effective, D.C. will join seven states—Delaware, Florida, Illinois, Indiana, Nevada, New York, and Rhode Island—in which false claims suits based on tax claims may be brought. While the federal False Claims Act (“FCA”) and most states’ FCAs allow private citizens to bring fraud claims on behalf of the government, most FCAs—including the federal FCA—do not allow suits based on tax-related claims. FCAs typically provide for a portion of the collected funds to go to the individuals who bring the claims, incentivizing private actions that have resulted in billions of dollars in recoveries for federal and state coffers.

The D.C. Act creates civil and criminal liability for making false claims to the District.<sup>4</sup> Offenders must knowingly make false claims—they must have actual knowledge of the violations, act in deliberate ignorance of the truth, or act in reckless disregard of the truth.<sup>5</sup> Like the federal FCA, the D.C. standard does not require plaintiffs to demonstrate that a violator specifically intended to violate the law.<sup>6</sup> Whether the alleged false claim at issue is a vendor overcharging a government agency, a business falsifying records as part of a transaction with an agency, or—after the amendment becomes effective—a taxpayer underpaying taxes, the D.C. Act allows private individuals, as well as the D.C. attorney general, to file civil suits under the D.C. Act.<sup>7</sup>

The new law changes the prior D.C. FCA in four ways:

1. Tax fraud claims are no longer barred, as long as the taxpayer being sued has District taxable sales, income, or revenue of at least \$1 million and the damages pleaded in the action total at least \$350,000.
2. The ceiling on incentive payments to informants providing information about tax underpayments is raised to 30% from 10%.<sup>8</sup>
3. The D.C. Act opens tax claims to a potentially broader statute of limitations than currently applies to tax actions. Rather than being subject to the D.C. tax law’s general three-year statute of limitations for tax enforcement actions brought by the D.C. Chief Financial Officer,<sup>9</sup> tax claims under the D.C. Act can be brought according to the later of a six-year statute of limitation and a three-year discovery provision, but no later than ten years after the date the violation was committed.<sup>10</sup>
4. Taxpayers targeted by false claims act lawsuits under the D.C. Act will also face FCA liabilities of up to three times the amount of damages sustained by the District<sup>11</sup> under the Act’s treble damages provision and additional per-violation civil penalties.

The D.C. Act was enacted to improve tax enforcement and to counteract D.C.’s revenue shortfalls as a result of the COVID-19 pandemic.<sup>12</sup> Other states may follow the District’s removal of its FCA tax bar as jurisdictions face revenue shortfalls and seek additional tools to protect revenue. Further, raising revenue through increased enforcement—rather than increased tax rates or new taxes—may be politically attractive to state legislators.

## Practical Implications and Considerations

The D.C. Act affects taxpayers with taxable sales, income, or revenue of at least \$1 million in the District. Beyond the increased likelihood of enforcement actions by the D.C. government and private whistleblowers, taxpayers are now potentially subject to a ten year statute of limitations for D.C. FCA claims. Years that were closed prior to the D.C. Act's passage may now remain open for FCA claims. Affected taxpayers should consider taking the following practical steps in light of the increased focus on tax enforcement:

- Conduct internal reviews of tax positions taken in D.C. to assess potential risks. Because information-sharing agreements allow tax authorities to exchange information across jurisdictions, the perspectives of federal and state taxing authorities should also be considered in internal reviews.
- Update compliance programs and trainings for tax personnel regarding best practices in documenting tax positions and advice.
- Retain tax returns and related documentation for a minimum of 10 years as a result of the 10-year statute of limitations.
- Be aware of the anti-retaliation provision in D.C.'s FCA; handle any FCA claims carefully.
- Monitor developments in other states with respect to their FCAs' tax bars.

1. D.C. Act 23-564.
2. *Id.*
3. D.C. Code § 2-381.03.
4. D.C. Code § 2-381.01.
5. *Id.*
6. *Id.*
7. *Id.*
8. D.C. Act 23-564, Sec. 3; D.C. Code § 47-4111.
9. D.C. Code § 47-4301(a). Note: Cases implicating tax fraud or tax evasion are not subject to a statute of limitations. See D.C. Code § 47-4301(d).
10. D.C. Code § 2-381.05.
11. D.C. Code § 2-381.02
12. Council of the District of Columbia, Committee of the Whole Report on Bill 23-35, "False Claims Amendment Act of 2020" (November 27, 2020), [https://lims.dccouncil.us/downloads/LIMS/41625/Committee\\_Report/B23-0035-Committee\\_Report1.pdf](https://lims.dccouncil.us/downloads/LIMS/41625/Committee_Report/B23-0035-Committee_Report1.pdf).