Supplemental Written Testimony of Michael Ronickher
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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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[1] Office of Tax and Revenue, Collection Information, *available at* https://otr.cfo.dc.gov/page/collection-info-2015.
[2] New York Attorney General, Press Release, *available at* https://ag.ny.gov/press-release/ag-underwood-and-acting-tax-commissioner-manion-announce-record-330-million-settlement.
[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

[4] U.S. Dep't of Justice, Press Release, *available at https://www.justice.gov/opa/pr/justice-department-recovers-over-28-billion-false-claims-act-cases-fiscal-year-2018.*

whistleblowers.[5] 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

[5] U.S. Dep't of Justice, Fraud Statistics, *available at https://www.justice.gov/civil/page/file/1080696/download?utm_medium=email&utm_source=govdelivery.*

(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,

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