

Memorandum Urging Approval S.4730/A.2543

COMMERCIAL AND FEDERAL LITIGATION SECTION

SUMMARY

Senate Bill 4730/Assembly Bill 2543 (“S.4730/A.2543” or “bill”), amends provisions in the New York False Claims Act, N.Y. State Fin. L. §§ 187-194 (“NYFCA” or “Act”), to impose liability for certain individuals and businesses that intentionally and illegally fail to file tax returns. The Commercial and Federal Litigation Section of the New York State Bar Association (“Section”) strongly recommends that the bill be signed into law, as further explained below.

COMMENT

I. OVERVIEW

The Section is comprised of a wide cross-section of practitioners, including members in the private and public sectors, solo practitioners, and members of small, mid-size, and large law firms, who actively litigate in state and federal courts in New York and adjacent states, and in national and international forums. Thus, in offering the following comments, the Section is drawing on a broad range of experience.

II. THE BILL

As explained in the State Senate Introducer’s Memorandum In Support, the bill would “amend[] section 189 of the State Finance Law by repealing subsection 4(a)(iii) to make individuals and corporations with a net income or sales of over \$1 million liable under the False Claims Act for knowingly and illegally failing to file tax returns that cost the state or local government at least three hundred fifty thousand dollars in lost revenue.”²

III. CONCLUSION

The Section strongly recommends that the bill be signed into law. The bill would strengthen the NYFCA’s purpose of combating fraud against the State by closing a loophole that permits wealthy businesses and individuals to evade the Act’s reach by knowingly failing to file tax returns. In doing so, the bill would promote greater tax fairness for individuals and businesses who file honest and correct New York tax returns, increase available resources for New York to address tax violations, and assist New York in its recovery of unpaid taxes.

¹ Opinions expressed in this memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

² Senator Liz Krueger, Bill Number S.4730, New York State Senate Introducer’s Memorandum In Support (Feb. 11, 2021).

The NYFCA allows the State of New York, a New York local government, or whistleblowers supervised by the State or local government, to file a civil action against individuals or corporations that defraud the State. In 2010, the NYFCA was amended so that individuals and corporations that filed false tax returns or other false records and statements were liable under the NYFCA if they met certain monetary thresholds. In 2013, the NYFCA was again amended to expand liability to individuals and corporations that knowingly concealed or knowingly and improperly avoided obligations to pay money to the State or a local government. However, a loophole was included in the 2013 amendment, which stated that this provision did not extend to tax frauds. As a result, individuals and businesses that file false tax returns are liable under the NYFCA, whereas *individuals and businesses that fail to file any tax returns at all are able to escape liability.*

This loophole serves no legitimate purpose and weakens the NYFCA. It puts honest, tax-paying, New York businesses at a competitive disadvantage insofar as it fails to impose liability on out-of-state corporations that hide New York-source income and then knowingly and illegally fail to file New York tax returns. In addition, it discourages whistleblowers from coming forward with evidence of wealthy individuals or corporations that violate the law by failing to file New York tax returns.

The New York State Bar Association's Commercial and Federal Litigation Section has a long history of support for legislation to enact and strengthen the NYFCA. It has also recognized that whistleblower enforcement is an important part of the NYFCA's statutory framework. In 2006, the Section adopted a Resolution reiterating the Bar Association's longstanding endorsement of enacting the NYFCA and emphasized the importance of including whistleblower provisions in the law. In 2010, the Bar Association expressed its support for the 2010 amendment in a letter to the Governor, noting that the amendment would strengthen the NYFCA, enhance the State's ability to recover financial losses due to fraud against the government, and further protect the interest of the people of the State of New York. If enacted, S.4730/A.2543 would further these same goals.

For these reasons, the Section **strongly recommends that the bill be signed into law.**

Respectfully submitted,

New York State Bar Association Commercial and Federal Litigation Section 12/7/21
Daniel K. Wiig, Section Chair

Approved by the Commercial & Federal Litigation Section Executive Committee, 12/7/21

Civil Prosecution Committee
Neil V. Getnick, Co-Chair*
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