



Memorandum in Support

COMMERCIAL AND FEDERAL LITIGATION SECTION

May 13, 2022

S. 8815
A. 9975

By: Senator Kreuger
By: M. of A. Weinstein
Senate Committee: Finance
Assembly Committee: 3rd Reading
Effective Date: Immediately

AN ACT amend the state finance law, in relation to the liability of a person who presents false claims for money or property to the state or a local government.

LAW AND SECTIONS REFERRED TO: New York False Claims Act, N.Y. Fin. Law §§ 187-194.

THE COMMERCIAL AND FEDERAL LITIGATION SECTION SUPPORTS THIS LEGISLATION

The Senate Bill 8815/Assembly Bill 9975 (“S.8815/A.9975” or “bill”), amends provisions in the New York False Claims Act, N.Y. Fin. Law §§ 187-194 (“NYFCA” or “Act”), to impose liability for certain individuals and businesses that knowingly and illegally fail to file tax returns. In 2021, a previous version of the bill (S.4730/A.2543) passed both Houses but was vetoed. The current bill makes clear that the amendment will close an illogical loophole in the NYFCA, while maintaining the Act’s existing safeguards. 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.

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.

S.8815/A.9975 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.”¹

¹ Senator Liz Krueger, Bill Number S.8815, New York State Senate Introducer’s Memorandum In Support (2022), <https://www.nysenate.gov/legislation/bills/2021/S8815>.

The bill further clarifies that: (1) it does not extend liability to actions otherwise barred under the Act; (2) individuals and businesses cannot be held liable for acts occurring by mistake or mere negligence; and (3) defendants are entitled to attorneys' fees and expenses for frivolous lawsuits.

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. At the same time, the bill is limited in scope and maintains NYFCA's existing safeguards.

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 businesses that defraud the State. In 2010, the NYFCA was amended so that individuals and businesses 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 businesses 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. The 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 entities 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 businesses that violate the law by failing to file New York tax returns. Without whistleblowers' inside knowledge, New York authorities are hard pressed to detect non-filers' invisible fraud. The NYFCA is therefore uniquely able to combat tax fraud committed by non-filers and return the associated tax dollars to New York.

S.8815/A.9975 is narrowly tailored to close this loophole. The NYFCA already covers individuals and businesses that file false tax returns, so the bill does not implicate tax filing controversies beyond those involving non-filers. Moreover, the bill only implicates significant wrongdoing: individuals and businesses cannot be held liable for mistakes or negligence, and there are high monetary thresholds for triggering the Act. Finally, the bill makes clear that frivolous lawsuits will be penalized: defendants subject to such suits are entitled to attorneys' fees and expenses.

In 2010, the New York State 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 interests of the people of the State of New York. If enacted, S.8815/A.9975 would further these same goals.

For these reasons, the Section **strongly supports this legislation be passed and signed into law.**