

June 23, 2021

Governor Andrew M. Cuomo  
Executive Chamber  
New York State Capitol  
Albany, New York 12224

To the Honorable Andrew M. Cuomo,

The New York State Society of Certified Public Accountants (NYSSCPA), an organization representing more than 24,000 certified public accountants in public practice, business, government, and education, writes to urge a veto of S.4730, an act to 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 local government, or, in the alternative, urge chapter amendments to achieve the legislation's stated goals in a more narrowly tailored manner.

New York's False Claims Act (FCA) is a statute that prohibits individuals and businesses from presenting fraudulent claims for money and property to state and local governments. In the tax context, New York's FCA applies where the alleged fraud involves the submission of tangible "claims, records, or statements" to state and local governments. New York's FCA statute has long been viewed as a national model. Similar to New York, several jurisdictions have recently considered adding tax claims to their false claims act. In essence, states are looking to catch up to New York.

As we understand the intent of S.4730, the legislation is aimed at filling a loophole in the New York FCA to ensure that individuals and businesses who knowingly fail to file tax returns are liable under the law. Filling this loophole is a noble purpose, but it cannot come at the expense of reasonable limitations and fundamental fairness. We are afraid, however, that S.4730 does precisely that – it expands New York's FCA beyond reasonable limits and the broad, vague, and retroactive application of its provisions violate the principle of fundamental fairness.

To illustrate these issues, the NYSSCPAs would like to draw attention to the term "obligation" in the legislation and the retroactive nature of the legislation's effective date provision.

First, the term "obligation" in the legislation is broad and vague, and the bill text provides no explanation as to what it means in the context of the N.Y. Tax Law. Traditionally, claims under the New York FCA require a specific, written representation that can be evaluated and tested. This allows the parties, and the courts, to assess the objective truth or falsity of the underlying "claim, record, or statement." Courts are familiar with this standard, which holds parties accountable for specifically identified false representations, and enables parties to

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use the truth of a given claim in defense. By adding the generic and undefined term “obligation,” however, the legislation introduces a subjective standard to the existing New York FCA calculus. This term must be rejected.

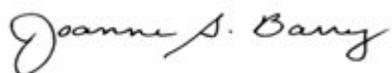
There certainly are other means through which the New York FCA could be amended to achieve the stated objectives without imposing liability on the basis of something as broad as indeterminate “obligations.” For instance, a chapter amendment could be advanced specifically stating that New York’s FCA applies to “claims, records, or statements made, ***or knowingly and improperly withheld***, under the tax law.” This modification would ensure that individuals and businesses are as liable for knowingly not filing tax returns as they are for knowingly filing false tax returns and statements.

Our second significant concern relates to the retroactive nature of the legislation – “[t]his act shall take effect immediately and shall apply to all false claims, records, statements and obligations concealed, avoided or decreased on, prior to, or after such effective date.” Retroactive legislation is largely disfavored by New York Courts, making S.4730 highly susceptible to a legal challenge on due process grounds. This makes all the sense in the world as fundamental fairness dictates that individuals and businesses should have an opportunity to know what the law is and to conform their conduct accordingly. If, however, this legislation is to stand, it must only have a prospective application.

For these reasons, the NYSSCPAs urges a veto of S.4730 or, in the alternative, chapter amendments to the legislation to ensure it truly achieves the sponsors’ objectives in a narrowly tailored way.

Please contact Joanne S. Barry at [jbarry@nysscpa.org](mailto:jbarry@nysscpa.org), with any questions and/or if you need any additional information.

Sincerely,



Joanne S. Barry, CAE  
Executive Director/CEO