LOST OPPORTUNITIES: THE UNDERUSE OF TAX WHISTLEBLOWERS

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Legal literature on whistleblower programs often assumes an agency's ability to effectively use a whistleblower tip. This Article challenges that assumption in the context of tax enforcement by exposing the Internal Revenue Service's (IRS's or the Service's) performance. This Article uses Fourth Amendment jurisprudence and taxpayer privacy law, as well as whistleblower and tax enforcement literature to propose a new approach to using information from tax whistleblowers.

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INTRODUCTION

Last year IRS received more than 9,000 tips from whistleblowers.[1] The Service's current backlog of whistleblower tips is more than 22,000.[2] In the last five years under the formalized IRS Whistleblower Program (the Program), the Service has paid approximately 100 awards per year.[3] With so much information pouring into the Service, why has the Service capitalized on so few tips? This Article argues that the answer lies in the Service's approach to whistleblowers and the administrative burdens that weigh down the Program. Together these issues produce an environment where a whistleblower tip is often not a short cut to successful enforcement

1. *See* IRS WHISTLEBLOWER OFFICE, FISCAL YEAR 2013 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623 14 tbl.1, *available at* http://www.irs.gov/pub/whistleblower/Whistleblower_Annual_report_FY_13_3_7_14_52549.pdf (reporting that 9,268 total claims were received for Fiscal Year (FY) 2013).

2. *See id.* (finding 22,330 claims open at the end of FY 2013).

3. *See id.* at 21 tbl.6 (stating that 110 awards were paid in FY 2009, 97 awards were paid in FY 2010, 97 awards were paid in FY 2011, 128 awards were paid in FY 2012, and 122 awards were paid in FY 2013).

but a meandering path to nowhere.

A close analysis of the Program shows its deficiencies to be internal to the Service. The primary deficiency is the underutilization of whistleblowers. Simply put, the Service does not seek all available information and assistance from whistleblowers. The Service's policies for interviewing whistleblowers, often referred to as debriefing, are a lens with which to view the underutilization. In the past eight years, the Service has taken a variety of approaches to interviewing whistleblowers. Initially, the Service had no formal policy on meeting with whistleblowers, then it adopted a policy of meeting with whistleblowers only a single time,[4] and then it moved to a policy of meeting with whistleblowers only on a case-by-case basis.[5] Most recently, in August 2014, the Service adopted a policy of debriefing some whistleblowers.[6] None of these policies have allowed the Service to efficiently leverage the tips and nimbly integrate whistleblower information into the enforcement process.

The ineffective prior policies are a result of (1) an overreaction to mild legal obstacles, (2) a Service culture that is resistant to incorporating whistleblower information, and (3) an overly burdensome administrative process for utilizing whistleblower tips. In 2012 and 2014, Service executives published memos encouraging the debriefing of whistleblowers.[7] While these pronouncements were steps in the right direction, the policy pronouncements were largely aspirational, failed to provide appropriate procedures for debriefing, and consequently left Service personnel with insufficient guidance.[8]

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4. *See* INTERNAL REVENUE SERV., OFFICE OF CHIEF COUNSEL, NOTICE CC-2008-011, LIMITATIONS ON INFORMANT CONTACTS: CURRENT EMPLOYEES AND TAXPAYER REPRESENTATIVES 1–2 (2008), *available at* http://www.tax-whistleblower.com/resources/Ferraro_Whistleblower_Notice_2008-011.pdf [hereinafter 2008 Notice].

5. *See* INTERNAL REVENUE SERV., OFFICE OF CHIEF COUNSEL, NOTICE CC-2010-004, CLARIFICATION OF CC NOTICE 2008-011 – LIMITATIONS ON INFORMANT CONTACTS: CURRENT EMPLOYEES AND TAXPAYER REPRESENTATIVES 2 (2010), *available at* http://www.taf.org/Conference/bootcamp/IRS%20Office%20of%20Chief%20Counsel%20Notice%202010%20004.pdf [hereinafter 2010 Notice].

6. *See* Memorandum from John Dalrymple, Deputy Comm'r for Servs. & Enforcement to Comm'r, Large Bus. & Int'l et al. 1–2 (Aug. 20, 2014) [hereinafter Dalrymple Memo].

7. *See* Memorandum from Steven Miller, Deputy Comm'r for Servs. & Enforcement to Comm'r, Large Bus. & Int'l et al. 2 (June 20, 2012), *available at* http://www.irs.gov/pub/whistleblower/field_directive_dated_june_20_2012.pdf [hereinafter Miller Memo].

8. *Compare id.* ("My expectation is that debriefings will be the rule not the exception."), *with* Dalrymple Memo, *supra* note 6, at 2 ("All whistleblower submissions referred for subject matter expert (SME) review . . . will include debriefing of the whistleblower, or a specific justification for a decision not to conduct a debriefing.").

Legal literature on whistleblower programs often assumes an agency's ability to effectively utilize a whistleblower tip. This Article challenges that assumption and uses Fourth Amendment jurisprudence, taxpayer privacy law, and whistleblower and tax enforcement literature to suggest policy improvements. This Article uses a critical eye to examine legal constraints for debriefing tax whistleblowers and, in light of the findings, proposes a new approach. In Part I, this Article makes the case for the importance of whistleblowers, particularly for tax enforcement. Given the assistance that tax whistleblowers could bring to the Service's enforcement mission, Part II then discusses the evolution of Service's policies for receiving information from whistleblowers. These prior policies appear to be an overreaction to the mild legal obstacles, which are discussed in Part III. Finally, Part IV presents new approaches to debriefing. In particular, Part IV suggests expanding the parameters of debriefing beyond its current confined usage. It also explains that debriefing is useful beyond the gathering of substantive information and could introduce efficiencies in whistleblower tip processing.

I. WHY USE TAX WHISTLEBLOWERS?

The Service is under pressure to raise more revenue and administer new tax credits with fewer resources. Given this pressure, the Service cannot afford to waste any available resources. This Part makes the case for the Service's general need for enforcement assistance and specific need for whistleblower assistance.

A. The Service is Struggling with Tax Compliance

At last official measurement in 2006, the U.S. Treasury failed to receive $385 billion in taxes annually.[9] The current estimate of missing tax revenue has risen to $450 billion.[10] While a variety of factors contribute to the shockingly large tax gap,[11] the vast majority of the tax gap is

9. *See IRS Releases New Tax Gap Estimates; Compliance Rates Remain Statistically Unchanged from Previous Study*, IRS.GOV (Jan. 6, 2012), http://www.irs.gov/uac/IRS-Releases-New-Tax-Gap-Estimates;-Compliance-Rates-Remain-Statistically-Unchanged-From-Previous-Study.

10. *See Review of the President's Fiscal Year 2015 Funding Request for the Department of the Treasury and the Internal Revenue Service: Hearing Before the Subcomm. on Fin. Servs. & Gen. Gov't of the S. Comm. on Appropriations*, 113th Cong. 23 (2014) [hereinafter George Senate Testimony] (statement of J. Russell George, Treasury Inspector General for Tax Administration).

11. The tax gap is the difference between projected revenue and the amount collected. *See generally* U.S. DEP'T OF TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 3 (2009); JAMES M. BICKLEY, CONG. RESEARCH SERV., RL41582, TAX GAP, TAX ENFORCEMENT, AND TAX COMPLIANCE PROPOSALS IN THE 112TH CONGRESS (2011).

attributable to underreported taxes.[12] The income linked to these unreported taxes never appears on any tax return.

Identifying underreported taxes is the duty of the Service's enforcement programs and staff. The Service's recent enforcement efforts have been increasingly less effective in collecting missing tax revenues. The Service exhibits a multi-year trend of declining revenue from its enforcement activities.[13] The declining enforcement revenue correlates with a drop in the number of returns audited as well as fewer enforcement staff.[14]

Due to budget pressure, the Service has recently reduced its staff by more than six percent.[15] The Service's shrinking staff comes at an inopportune time because the Service's budget has not kept pace with its expanding task list.[16] For example, the Service has recently begun collecting information from 77,000 foreign financial institutions under the Foreign Account Tax Compliance Act (FATCA) in an attempt to monitor offshore assets.[17] Additionally, the Service's mission has expanded far

12. *See* George Senate Testimony, *supra* note 10, at 23 (stating the tax gap is primarily based on taxpayers' underreporting of taxes, comprising $376 billion or approximately 84% of the total tax gap).

13. *See State of the IRS: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 113th Cong. 6 (2014) [hereinafter Koskinen House Testimony] (statement of John A. Koskinen, Comm'r, Internal Revenue Service (IRS or the Service)) ("[T]he total is still down by more than $4.2 billion from four years ago, and we are concerned about the steady decline since the high point of $59.2 billion in FY 2007. The reason for this decline is primarily due to a decline in revenue from audits, which dropped nearly $400 million in FY 2013 to $9.83 billion, the lowest level in a decade. This decline in audit revenue is attributable to a decline in the number of returns audited. The IRS audited the returns of approximately 1.4 million individuals in FY 2013, down 5 percent from FY 2012 and the lowest level since 1.39 million audits in FY 2008. The audit coverage rate—the number of audits divided by the number of tax returns—fell below 1 percent to 0.96 percent in FY 2013, the lowest level since FY 2006. Audits of high-income individuals—defined as those with $1 million or more in income—fell 3.7 percent as well last year. The IRS examined approximately 61,000 business returns in FY 2013, down 13 percent from FY 2012.").

14. *See id.* (noting there were 1,300 fewer Service employees in examinations, collections, and investigations in FY 2013, resulting in a 6.4% workforce reduction that coincided with a decrease in the total number of audits performed).

15. *See* Anna Bernasek, *At the IRS, Trying to Collect More with Less*, N.Y. TIMES, Feb. 7, 2014, http://www.nytimes.com/2014/02/09/business/yourtaxes/at-the-irs-trying-to-collect-more-with-less.html?_r=0; NAT'L TAXPAYER ADVOCATE, 1 2012 ANNUAL REPORT TO CONGRESS 34 (2012) (highlighting continued IRS budget cuts as a one of the greatest risks to long-term tax administration).

16. *See* Bernasek, *supra* note 15; *see also* Howard Gleckman, *IRS Gets Hammered in the 2014 Budget Agreement*, FORBES, Jan. 14, 2014, http://www.forbes.com/sites/beltway/2014/01/14/irs-gets-hammered-in-the-2014-budget-agreement/.

17. *See* CHUCK MARR & JOEL FRIEDMAN, CTR. ON BUDGET & POL'Y PRIORITIES, CUTS IN IRS BUDGET HAVE COMPROMISED TAXPAYER SERVICE AND WEAKENED ENFORCEMENT 8 (2014), *available at* http://www.cbpp.org/files/6-25-14tax.pdf (noting the increasing

beyond that of revenue collector to include benefits administrator.[18] The Service is now responsible for implementing significant portions of the Affordable Care Act.[19] Furthermore, the Service must monitor increasingly sophisticated and international business transactions as commerce becomes more global in nature.[20]

The recent budgetary and mission pressures compound the structural disadvantage with which the Service contends. Enforcement is inherently challenging because of the perpetual informational asymmetry of tax administration.[21] Because the Service has less information than a taxpayer about a taxpayer's transactions, and the Service nearly always receives a taxpayer's information in summary form, the Service must play a game of informational catch up to police revenue collection.[22]

The Service has attempted to use technology to both educate taxpayers and identify fraudulent returns;[23] however, current technology is not yet an adequate substitute for enforcement personnel and information leverage. With the enormous stress on Service resources, the Service can ill afford to ignore available enforcement tools.[24] This is why whistleblowers are such a critical tool for the Service.

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responsibilities related to the Foreign Account Tax Compliance Act (FATCA)).

18. *See* NAT'L TAXPAYER ADVOCATE, 1 2011 ANNUAL REPORT TO CONGRESS 3 & n.3 (2011) (citing the First-Time Homebuyer Credit, American Opportunity Tax Credit, and Patient Protection and Affordable Care Act of 2010) ("In addition, we note that the role of the IRS has expanded recently from one focused on tax collection to one that also involves distributing benefits to a variety of individuals and businesses."); *see also* Bernasek, *supra* note 15 ("Last year alone, staff positions in enforcement dropped 6.4 percent, to the lowest total in a decade: 19,531.").

19. *See ACA—Information Technology Readiness and Data Security: Hearing Before the Subcomm. on Energy Policy, Health Care and Entitlements of the H. Comm. on Oversight and Gov't Reform and Before the Subcomm. on Cybersecurity, Infrastructure Prot., and Sec. Techs. of the H. Comm. on Homeland Sec.*, 112th Cong. 2–3 (2013) (statement of Alan R. Duncan, Assistant Inspector General for Audit).

20. *See* Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self–Regulation*, 159 U. PA. L. REV. 411, 416, 456–58 (2011).

21. *See* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1735 (2010) (observing that a key problem within tax enforcement is "asymmetric information" whereby the taxpayer has facts regarding his or her transactions throughout the year, and the Service must obtain such information "from the taxpayer or from third parties").

22. *See, e.g.*, INTERNAL REVENUE SERV., FORM 1120, U.S. CORPORATION INCOME TAX RETURN (2014) (requiring total sales as a single line-item on the return).

23. *See* Koskinen House Testimony, *supra* note 13, at 11.

24. *See* NAT'L TAXPAYER ADVOCATE, *supra* note 18, at 3 (noting that the Service is seeing an increasing workload with decreasing resources resulting in several negative outcomes, including failure to adequately detect tax noncompliance and an inability to "maximize revenue collection").

B. From Informant to Whistleblower

An informant has the potential to substitute for enforcement personnel by identifying wrongdoing and by providing a roadmap for prosecution. Law enforcement personnel on federal, state, and local levels make extensive use of informants to aid in enforcement.[25] The use of informants in local law enforcement, illegal narcotics, and terrorism is virtually ubiquitous.[26] In many areas, informant usage has replaced many other law enforcement techniques.[27] Informant usage is common because of structural limits to investigative methods and limited agency resources.[28] Even those who call for diminished use of informants generally have not suggested diminished use for white-collar offenders because these offenders would likely go undetected and unpunished.[29]

Society has come to accept and appreciate whistleblowing as an important part of enforcement.[30] The term whistleblower is more frequently used than informant, particularly in business and white-collar wrongdoing.[31] Indeed, the Service previously used the term informant but

25. *See* Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 655 n.40 (2004) (citing Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 3 (2003); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 563–64 (1999)) ("It is undisputed that informant use is on the rise."); *see also* David R. Lurie, Note, *Sixth Amendment Implications of Informant Participation in Defense Meetings*, 58 FORDHAM L. REV. 795, 795 (1990) (citing William J. Genego, *The New Adversary*, 54 BROOK. L. REV. 781, 807 (1988)) (noting that 39% of surveyed attorneys had previously encountered confidential informants during client representation).

26. *See* Natapoff, *supra* note 25, at 650, 654–55 (noting the wide informant usage via anecdotal evidence but limited public data available on informant usage).

27. *See* Andrew E. Taslitz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1077 (2011) (reviewing ALEXANDRA NATAPOFF, SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE (2009)).

28. *See* Michael L. Rich, *Brass Rings and Red-Headed Stepchildren: Protecting Active Criminal Informants*, 61 AM. U. L. REV. 1433, 1435 (2012) (observing that informants play a critical role as a law enforcement tool, especially informants who have continued connections to the criminal underworld).

29. *See* Taslitz, *supra* note 27, at 1078.

30. *See* Richard Haigh & Peter Bowal, *Whistleblowing and Freedom of Conscience: Towards a New Legal Analysis*, 35 DALHOUSIE L.J. 89, 90 (2012) (discussing the changing perceptions of whistleblowing).

31. *See* Peter B. Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, 21 J. BUS. ETHICS 77, 77 (1999) (noting the rise of the term); *see also* Geneva Campbell, Comment, *Snitch or Savior? How the Modern Cultural Acceptance of the Pharmaceutical Company Employee External Whistleblowing is Reflected in Dodd-Frank and the Affordable Care Act*, 15 U. PA. J. BUS. L. 565, 573–76 (2013) (contrasting the former view of whistleblowers as those seeking personal gain with the present view of them as superheroes); Amanda C. Leiter, *Soft Whistleblowing*, 48 GA. L. REV. 425, 435 (2014) (comparing Professor Terry Morehead Dworkin's definition of whistleblowing with statutory definitions of whistleblowing).

has since updated its terminology to whistleblower.[32] Society's etymological change is due to greater acceptance of the act of whistleblowing, which is associated with diminishing trust in the corporation as an institution.[33] For much of last century, trust in corporations and the high value placed on loyalty and fidelity created societal distaste for whistleblowing.[34] The 1960s and 1970s were marked by changing attitudes regarding corporations and their conduct.[35] As one commentator has suggested, "[t]he cultural shift from reverence to distrust of large companies led to an attitudinal change toward external whistleblowing."[36] Since then, academics have conceived of whistleblowing as a control instrument[37] and a private monitoring tool supplementing governmental regulation and civil litigation.

For a potential whistleblower to be an effective private monitoring tool, the whistleblower must have access to relevant information and sufficient incentive to disclose that information.[38] Early social science research[39]

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32. The IRS Informants' Rewards Program was renamed as the IRS Whistleblowers Program (the Program) following the 2006 Internal Revenue Code (I.R.C.) § 7623 amendments. *See* IRM 25.2.2.1(3), *Overview: Authority and Policy* (as amended June 18, 2010) ("The IRS has generally referred to persons who submit information under section 7623 as "informants" and referred to the program as the "Informant Claims Program." The IRS has also referred to such persons as "claimants" in published guidance, and the law now refers to the "Whistleblower Office" and "whistleblower program." Accordingly, the terms "claimant" and "whistleblower" will be used in this IRM [Internal Revenue Manual] except where the term "informant" appears in an office title or published document. However, no legal significance should be inferred based solely on the use of these terms in this IRM.").

33. *See* Campbell, *supra* note 31, at 571–73 (citing ALAN F. WESTIN, WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION 4–6 (1981)).

34. *See id.*

35. *See id.* (citing WESTIN, *supra* note 33, at 4, 6; BERNARD RUBIN, BIG BUSINESS AND THE MASS MEDIA xiii (1977)).

36. *Id.* at 574.

37. *See* Jubb, *supra* note 31, at 77–78 (illustrating that promoting whistleblowing led to it being recognized as a control mechanism).

38. *See* Alexander Dyck et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2214–17 (2010) (describing how access to inside information may increase the fraud detection); *see also* John A. Martin & James G. Combs, *Does it Take A Village to Raise a Whistleblower?*, ACAD. MGMT. PERSP., May 2011, at 83, 84.

39. *See generally* Janet P. Near & Marcia P. Miceli, *Whistle-Blowing: Myth and Reality*, 22 J. MGMT. 507 (1996) [hereinafter Near & Miceli, *Myth and Reality*] (including a literature review of pre-1996 research on whistleblower attributes, including personality variables); Jessica R. Mesmer-Magnus & Chockalingam Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions, and Retaliation*, 62 J. BUS. ETHICS 277, 277 (2005) (including a meta-analysis of whistleblower personality variables for pre-2005 research); Marcia P. Miceli & Janet P. Near, *When Do Observers of Organizational Wrongdoing Step Up?: Recent US Research on the Factors Associated with Whistleblowing*, *in* A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE 81–84 (David B. Lewis ed., 2010) [hereinafter Miceli & Near, A GLOBAL APPROACH] (summarizing whistleblower attributed research

indicated that higher professional status, long service, a more positive attitude toward one's job, and a likelihood of having won a performance award in the previous two years were predictors of whistleblowing.[40] A more recent meta-analysis of whistleblower research suggests that some of these antecedents may be more related to a whistleblower's access to information about wrongdoing as opposed to attributes of whistleblowing.[41] Under either analysis, the result is a subset of well-placed employees with access to relevant information.

The second prerequisite to a whistleblower functioning as a private monitor is a sufficient incentive to act. Research indicates that whistleblowers likely have mixed motives.[42] Some are motivated to help themselves individually, and some are motivated to assist other people, be it colleagues, related parties, or society generally.[43] It is difficult to determine actual whistleblower motivation because what potential whistleblowers say about what motivates them to blow the whistle may differ from what actually motivates them.[44] Research has shown, however, what is likely to inhibit people from blowing the whistle. A study of more than 3,000 respondents indicated that the most common reasons for failing to blow the whistle are the perceptions that nothing could or would be done about the wrongdoing.[45] When wrongdoing is reported, many whistleblowers must blow the whistle more than once because the first attempt is often

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through 2010).

40. *See* Terry Morehead Dworkin & Janet P. Near, *A Better Statutory Approach to Whistle-blowing*, 7 BUS. ETHICS Q. 1, 6–7 (1997).

41. *See* Marcia P. Miceli et al., *Predicting Employee Reactions to Perceived Organizational Wrongdoing: Demoralization, Justice, Proactive Personality, and Whistle-blowing*, 65 HUM. REL. 923, 945 (2012) (discussing how certain attributes may influence the ability to observe wrongdoing rather than influencing whether one acts on that wrongdoing).

42. *See* Janet P. Near et al., *Does Type of Wrongdoing Affect the Whistle-Blowing Process?*, 14 BUS. ETHICS Q. 219, 220 (2004) [hereinafter Near et al., *Wrongdoing*] (citing Janelle Brinker Dozier & Marcia P. Miceli, *Potential Predictors of Whistle-Blowing: A Prosocial Behavior Perspective*, 10 ACAD. MGMT. REV. 823 (1985)); MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL & LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 28–29 (1992)); Dana Bash & Terry Frieden, *FBI Agent Blows Whistle on Moussaoui Probe*, CNN (May 23, 2002), http://edition.cnn.com/2002/US/05/23/fbi.minnesota.memo/index.html?related; *see also* Siddhartha Dasgupta & Ankit Kesharwani, *Whistleblowing: A Survey of Literature*, IUP J. CORP. GOVERNANCE, Oct. 2010, at 57, 62 (summarizing the literature on the motivations of whistleblowers).

43. *See* Miceli & Near, *supra* note 39, at 77; *see also* Mary L. Schapiro, Chairman, Secs. Exch. Comm'n, Opening Statement at Securities Exchange Commission Open Meeting: Item 2—Whistleblower Program (May 25, 2011), *available at* http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm (stating that whistleblowers come forward to right a wrong).

44. *See* Miceli & Near, *supra* note 39, at 80.

45. *See* Near et al., *supra* note 42, at 237–38.

ineffective.[46] Indeed, external whistleblowers usually attempt to blow the whistle internally first.[47]

C. Tax Whistleblowers

As with whistleblowers generally, tax whistleblowers appear to be well-placed.[48] They may be motivated by the Service's monetary awards for tips that generate revenue, potential grants of immunity for their own culpable conduct, their own morals, other considerations, or some combination thereof. Based on prior research on whistleblowers generally, tax whistleblowers will not be motivated if they perceive that the Service is unlikely or unwilling to act upon their information.[49] As such, positive public perception of the Service's willingness to act and effectiveness are critical to a functional program.

The effectiveness of tax whistleblower tips is not easy to ascertain but shows empirical promise. The only information available on the effectiveness of tax whistleblowers is from a prior program,[50] but even this limited information demonstrates that examinations involving whistleblowers raised nearly twice as much revenue per hour as examinations flagged through traditional methods.[51] Whistleblower involvement in an examination also lowered the percentage of examinations resulting in no additional revenue assessed.[52] Simply put, a

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46. *See* Eileen Z. Taylor & Mary B. Curtis, *An Examination of the Layers of Workplace Influences in Ethical Judgments: Whistleblowing Likelihood and Perseverance in Public Accounting*, 93 J. BUS. ETHICS 21, 22 (2010) (noting that the perseverance of a whistleblower is necessary to withstand fatigue).

47. *See* Miceli & Near, *supra* note 39, at 84 ("Most whistleblowers use internal channels to report wrongdoing; the majority of those who use external channels *have first used* internal channels.").

48. Unfortunately, the extreme secrecy of the Service's Program means that the only current data publicly available on whistleblower claims is that in the Service's Whistleblower Office annual report to Congress. *See* IRS WHISTLEBLOWER OFFICE, *supra* note 1. The report gives no information on tax whistleblower identities, attributes, or motivations. As such, we must rely on the available social science data about whistleblowers generally to opine about tax whistleblowers. The authors know of no reason to believe that tax whistleblowers differ in any material way from other whistleblowers.

49. *See supra* Part I.B.

50. *See generally* TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE INFORMANTS' REWARD PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT (2006), [hereinafter TIGTA 2006 Report], *available at* http://www.treasury.gov/tigta/auditreports/2006reports/200630092fr.pdf.

51. *See id.* at 4–5; *see also* Edward A. Morse, *Whistleblowers and Tax Enforcement: Using Inside Information to Close the "Tax Gap,"* 24 AKRON TAX J. 1, 11–13 (2009) (interpreting the 2006 Treasury Inspector General for Tax Administration (TIGTA) report data).

52. *See* Morse, *supra* note 51, at 11–13 (suggesting that both the government and

successful examination involving a whistleblower tip raised, on average, more revenue than one without a whistleblower tip. This data suggests that whistleblowers can be a cost-effective tool to counteract the inherent information asymmetry the Service faces; however, the direct applicability of this data is limited because it involves a small, predecessor whistleblower program with significantly different processes, available bounties, and public awareness. What we can take from this data is that when a good whistleblower tip is actually used in an examination, it increases the efficiency and productivity of an examination.

The ultimate objective of any tax whistleblower program should be to improve tax enforcement and collection through more efficient examinations. To that end, the Service needs policies that assist in fulfilling the theoretical and practical promise of whistleblower assistance. The next Part discusses how the Service interacts with whistleblowers and concludes with a discussion of troubling policies that underuse whistleblowers.

II. WHISTLEBLOWER TIP PROCESSING AND DEBRIEFING

This Part identifies the Service's policies for interacting with whistleblowers. After briefly noting the origins of the modern tax whistleblower program,[53] this Part describes how the Service receives information from whistleblowers and the breakdowns in the processing of tax whistleblower tips.[54]

A. Program History and Statutory Basis

Prior to the Tax Relief and Health Care Act of 2006,[55] the Service paid whistleblower awards under a discretionary system.[56] The still-codified

taxpayers benefitted from the increased dollar amount returned).

53. *See infra* Part II.A.

54. For the purposes of this Article, the authors define tax whistleblower claims as those eligible for awards under I.R.C. § 7623. Other individuals are, of course, permitted to provide anonymous tips to the Service regarding delinquent taxpayers. *See* INTERNAL REVENUE SERV., FORM 3949-A, INFORMATION REFERRAL (allowing for the provision of non-award tips to the Service). The focus of this Article, however, lies with the Service's collection of tips from employee whistleblowers and subject to § 7623.

55. *See* Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2911, 2958–60 (2006) (amending I.R.C. § 7623).

56. *See* Michelle M. Kwon, *Whistling Dixie about the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 451–52 n.15 (2010) (noting that courts had historically given the Service discretion regarding the payment and amount of whistleblower awards); *see also* Dennis J. Ventry, Jr., *Whistleblowers and* Qui Tam *for Tax*, 61 TAX LAW. 357, 362 (2008) (discussing the prior law to determine awards based on the discretion of the District Director); Karie Davis-Nozemack & Sarah Webber, *Paying the IRS Whistleblower: A Critical Analysis of Collected Proceeds*, 32 VA. TAX REV. 77, 83 (2012) (explaining

provision gave the Service complete discretion over all whistleblower awards, including discretion over the decisions of whether to pay and the amount of any whistleblower award.[57] The Service's complete discretion over payment resulted in uncertainty for whistleblowers until the 2006 overhaul of the Program.[58]

The 2006 statutory changes created an additional provision that authorizes a fifteen to thirty percent award from the collected proceeds if the tip alleges business tax delinquencies of $2 million or more.[59] Congress also removed the prior $10 million award cap in an attempt to encourage whistleblowers to report large tax evasion and fraud.[60] Congress combined a high threshold for tax whistleblower claims with much needed award certainty to focus the Program on high dollar tax abuse cases.[61] Congress intended the result to be a Program that seeks maximum revenues with minimal program expenses.[62]

The certainty provided to whistleblowers under the 2006 statutory changes only exists on the surface, however. In execution, the Program offers little certainty to whistleblowers.

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that the codification of I.R.C. § 7623 authorized a discretionary payout system).

57. Currently, the Service's discretion is limited to small whistleblower awards that fall below the minimum dollar thresholds. *See* I.R.C. § 7623(a) (2012) ("The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for—(1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, in cases where such expenses are not otherwise provided for by law.");
see also Internal Revenue Code IRC 7623(a), IRS (last updated Feb. 21, 2014), http://www.irs.gov/uac/Internal-Revenue-Code-IRC-7623(a) ("The award is at the discretion of the Service, there is no requirement that an award be issued. The discretionary award is based on additions to tax, penalties, and other amounts collected as a result of administrative or judicial action resulting from the information provided. No minimum statutory award percentage. No appeal provisions.").

58. *See* Davis-Nozemack & Webber, *supra* note 56, at 87 (stating that the 2006 changes to the Program provide some certainty for award valuations that was not present under the prior discretionary system that still exists in § 7623(a)).

59. *See* I.R.C. § 7623(b)(1) (allowing for "an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action").

60. *See* Blake Ellis, *Rat Out a Tax Cheat, Collect a Reward*, CNNMONEY (Mar. 3, 2010), http://money.cnn.com/2010/03/02/pf/taxes/rat_out_tax_cheat/# (quoting Stephen Whitlock as stating that "many claims are for substantially more than the $2 million threshold and involve businesses or very wealthy individuals").

61. *See* Tom Herman, *Tipster Rewards Require Patience; Law Boosts Payouts for IRS Informants in Large Tax Cases*, WALL ST. J., Dec. 26, 2007, at D3 (observing that Congress intended for the promise of larger rewards to attract better quality tips and to help reduce the tax gap).

62. *See* Davis-Nozemack & Webber, *supra* note 56, at 85.

B. Life Cycle of a Whistleblower Tip

The Service has created a process for managing whistleblower tips and the resultant taxpayer examinations or investigations. In theory, this approach involves a detailed plan for handling the whistleblower tips with set processing time guidelines. Unfortunately, the Service's implementation of this plan has been heavily criticized for underperformance.

1. Whistleblower Tips in Theory

The Service's process for administering whistleblower claims is outlined in detail in the Internal Revenue Manual (IRM).[63] Exhaustive detail is not needed for the purposes of this Article. What is important, however, is an understanding of the basic processing of a tax whistleblower tip.

Whistleblowers must submit tips in writing to the Service's Whistleblower Office.[64] Once the Whistleblower Office completes an administrative and cursory substantive review of the tip, it is then sent to the Service's relevant operating division for a comprehensive substantive evaluation.[65] The operating division has complete discretion over the process.[66] The division may or may not debrief a whistleblower,[67] and it may or may not act on the tip by beginning (or continuing) an examination of the taxpayer's return(s).[68] Only after tax proceeds have been collected

63. *See* IRM 25.2.2, *Whistleblower Awards* (as amended June 18, 2010).

64. *See id.* at 25.2.2.3, *Submission of Information for Award under Sections 7623(a) or (b)* (as amended June 18, 2010).

65. *See id.* at 25.2.2.4, *Initial Review of the Form 211 by the Whistleblower Office* (as amended June 18, 2010).

66. Upon initial review, the whistleblower analyst may forward the submission to the criminal investigation division. *See id.* at 25.2.2.7(2)–(3), *Processing of the Form 211 7623(b) Claim for Award* (as amended June 18, 2010). If the tip is not used for a criminal investigation, the operating division applicable to the taxpayer reviews it for use. For example, a tip involving a small employer would be referred to the Small Business/Self-Employed (SBSE) division, whereas a tip involving a larger employer or a multi-national corporation would be referred to Large Business and International (LB&I) division. *See id.* at 25.2.2.6(4), (6), *Processing of the Form 211 7623(a) Claim for Award* (as amended June 18, 2010); *id.* at 25.2.2.7(2), (5), *Processing of the Form 211 7623(b) Claim for Award* (as amended June 18, 2010).

67. *See id.* at 25.2.2.6(10)–(11), *Processing of the Form 211 7623(a) Claim for Award* (as amended June 18, 2010); *id.* at 25.2.2.7(7), (10), *Processing of the Form 211 7623(b) Claim for Award* (as amended June 18, 2010) (noting that a debriefing will take place "[u]nless the SME determines that a debriefing is unlikely to result in information that would be material to the evaluation of the submission, the SME will debrief the whistleblower"); *see also* Dalrymple Memo, *supra* note 6, at 2 (requiring only that LB&I, Tax Exempt and Government Entities (TEGE), and SBSE provide a reason for failing to debrief).

68. *See* IRM 25.2.2.6(13)–(15), *Processing of the Form 211 7623(a) Claim for Award* (as amended June 18, 2010).

and the two-year refund statute of limitations has run[69] will the Whistleblower Office evaluate the whistleblower's contribution and pay an award.[70] For many reasons, not the least of which is that a tax whistleblower may only be compensated from proceeds that the Service actually collects from the delinquent taxpayer,[71] the process may take the better part of a decade for a whistleblower.[72]

2. Whistleblower Tips in Practice—Cultural Resistance and Processing Burdens

Whistleblower attorneys have complained about the lengthy process and specifically about processing delays.[73] Recently, at least one tip was under examination for more than six years.[74] Lengthy processing times could be due to the complexity of some cases, but they are exacerbated by the Service's current incentive structure and cultural bias against aggressively pursuing whistleblower cases.[75] As mentioned above, the Service's operating divisions have total discretion to act upon any whistleblower tip;[76] consequently, a division can choose to ignore a tip. Even if a tip is accepted, the Service does not give whistleblower cases any higher priority. Agents have no greater incentive to act upon whistleblower cases than other cases.[77] Whistleblower cases are not a policy priority and may encounter

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69. The taxpayer may waive the right to a refund or settle, eliminating the need for the two-year window. *See id.* at 25.2.2.1(6), *Overview: Authority and Policy* (as amended June 18, 2010).

70. *See id.* at 25.2.2.6(14)–(20), *Processing of the Form 211 7623(a) Claim for Award* (as amended June 18, 2010); *id.* at 25.2.2.7(16)–(18), *Processing of the Form 211 7623(b) Claim for Award* (as amended June 18, 2010); *id.* at 25.2.2.8, *Whistleblower Award Administrative Proceeding* (as amended June 18, 2010); *id.* at 25.2.2.9, *Award Computation* (as amended June 18, 2010); *id.* at 25.2.2.12, *Funding Awards* (as amended June 18, 2010).

71. *See* I.R.C. § 7623(b)(1) (2012) ("[S]uch individual shall . . . receive as an award at least 15 percent but not more than 30 percent of the collected proceeds . . . .").

72. *See* Morse, *supra* note 51, at 17; *see also* Jesse Drucker & Peter S. Green, *IRS Resists Whistle-Blowers Despite Wide U.S. Tax Gap*, BLOOMBERG, June 19, 2012, http://www.bloomberg.com/news/2012-06-19/irs-resists-whistleblowers-despite-wide-u-s-tax-gap.html.

73. *See infra* notes 82–91 and accompanying text.

74. *See* IRS WHISTLEBLOWER OFFICE, *supra* note 1, at 20 tbl.5.

75. *See* Jeremiah Coder, *IRS Whistleblower Office Making Improvements*, 134 TAX NOTES 1096 (Feb. 27, 2012) ("Whitlock said the audit process for high-dollar cases takes longer, given their complexities and the opportunities for taxpayers to appeal.").

76. *See* Jeremiah Coder, *The Whistleblower Whipsaw Process*, 138 TAX NOTES 1168 (Mar. 11, 2013) (noting that the Service determines whether it will act on a tip from a whistleblower, and whistleblowers do not have a path to appeal if their information is ignored).

77. Andrew Velarde, *'Miller Memo' Seen as Improving IRS Whistleblower Process*, 141 TAX NOTES 35 (Oct. 7, 2013) (quoting J. Richard Harvey) ("There needs to be a lot of thinking

cultural resistance within the Service.[78] While recent Service executives have expressed support for the Program,[79] previous Service executives have publicly expressed disdain for it.[80] The Service has long limited involvement from non-Service individuals.[81] The presence of a whistleblower changes this cultural dynamic by adding an "outsider" into

about how you provide incentives to the field agents to take the whistleblower information, "maybe in a situation where they already know about a particular issue, but they don't have the proverbial smoking gun," he said. "There may be some institutional bias at the lower levels of the IRS.").

78. *See* Erika Kelton, *IRS Cheats Taxpayers by Ignoring Whistleblowers*, FORBES, Apr. 8, 2014, http://www.forbes.com/sites/erikakelton/2014/04/08/irs-cheats-taxpayers-by-ignoring-whistleblowers/ ("The root of the problem is the anti-whistleblower attitude ingrained in the IRS culture—a status quo that no IRS commissioner has attempted to change . . . ."); Erika Kelton, *IRS Whistleblowers See Little Reward*, FORBES, Mar. 2, 2012, http://www.forbes.com/sites/erikakelton/2012/03/02/irs-whistleblowers-see-little-reward [hereinafter Kelton, *Little Reward*] ("[T]he IRS Whistleblower Office does its best but faces stiff headwinds from the IRS Office of Chief Counsel (OCC), which has stymied the whistleblower program by interpreting the 2006 law in ways that discourage whistleblowers and undermine the program's potential for success."); Jeremiah Coder, *GAO Faults IRS Whistleblower Program for Award Delays*, 132 TAX NOTES 1229 (Sept. 19, 2011) [hereinafter Coer, *GAO Faults IRS*] (quoting Scott A. Knott, Dean Zerbe, Sen. Charles Grassley, and Bryan C. Skarlatos remarking on cultural resistance to working with whistleblowers).

79. *See* Douglas Shulman, Remarks of Commissioner Douglas Shulman before the 21st Annual George Washington University International Tax Conference (Dec. 8, 2008), *available at* http://www.irs.gov/uac/Remarks-of-Commissioner-Douglas-Shulman-before-the-21st-Annual-George-Washington-University-International-Tax-Conference ("Using informants is another part of our toolkit. . . . Some of these have become big money cases."); *see also* Paul Bonner, *Tax from the Top: Q&A With IRS Commissioner Doug Shulman*, J. ACCT., Apr. 2010, http://www.journalofaccountancy.com/issues/2010/apr/20102509.htm (quoting Shulman as stating "It's still relatively new but an important tool for tax administration. . . . But I'm a big fan of the program. It can help us identify fraud or tax noncompliance we would have never known about."); Gretchen Morgensen, *Sounding the Tax Alarm, to Little Applause*, N.Y. TIMES, Feb. 8, 2014, http://www.nytimes.com/2014/02/09/business/sounding-the-tax-alarm-to-little-applause.html?_r=0 (stating Commissioner Koskinen was a "fan" of the Program and stressing the importance of a tax system where everyone is paying their share).

80. *See* Jeremiah Coder, *Conversations: Donald Korb*, 126 TAX NOTES 310 (Jan. 18, 2010) (quoting Donald Korb) ("The new whistle-blower provisions Congress enacted a couple of years ago have the potential to be a real disaster for the tax system. I believe that it is unseemly in this country to encourage people to turn in their neighbors and employers to the IRS as contemplated by this particular program. The IRS didn't ask for these rules; they were forced on it by the Congress.").

81. *See Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws: Public Hearing on Proposed Regulation 26 C.F.R. Part 1* (Apr. 10, 2013) [hereinafter *Public Hearing on Proposed Regulations*] (statement of Erica L. Brady) (noting that the Service has been plagued by criticism that it does not welcome whistleblowers); *id.* (statement of Thomas C. Pliske) (acknowledging that the Service is constrained by privacy limitations and therefore does not disclose taxpayer information).

an examination. Though society has embraced whistleblowers, the Service has not yet caught up.

The Program has recently received significantly more tips but has struggled to process them.[82] The whistleblower process itself has additional steps in comparison to non-whistleblower examinations,[83] and consequently, examinations involving whistleblowers may experience delays that non-whistleblower cases do not. For example, whistleblower cases must spend time in the Whistleblower Office for screening and referral and with a subject matter expert; they also may undergo a review by the Chief Counsel's Office for the presence of privileged documents or other issues.[84]

During the last year, the Whistleblower Office and some areas of the Service have improved the processing time for tips, but tips still spend an inordinate amount of time in process overall.[85] Many whistleblower attorneys complain that delay is often caused during a tip's time with subject matter experts and the Chief Counsel's Office.[86] Tips are with a subject matter expert for evaluation for more than six months (on average), and one currently open tip has spent over three years with a subject matter expert.[87] A whistleblower attorney has reported that delays of more than a

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82. *See* Davis-Nozemack & Webber, *supra* note 56, at 88–93 (noting the TIGTA and Government Accountability Office (GAO) reports regarding IRS Whistleblower Office struggles).

83. *See* Coder, *GAO Faults IRS*, *supra* note 78 (acknowledging that "the numerous demands on subject matter experts' time, review of information for applicable privilege, and arranging debriefings with whistleblowers all add to how long a claim may be in process").

84. *See id.*

85. *See* Press Release, Sen. Charles Grassley, Grassley Presses Treasury Department and IRS to Effectively Implement Whistleblower Program (June 21, 2012) [hereinafter Grassley 2012 Press Release], *available at* http://www.grassley.senate.gov/news/news-releases/grassley-presses-treasury-department-and-irs-effectively-implement-whistleblower (discussing the Service's acknowledgment of lengthy processing of whistleblower claims). *Compare* IRS WHISTLEBLOWER OFFICE, *supra* note 1, at 20 tbl.5 (documenting the longest time period that a claim stayed with an operating division as 2,407 days), *with* IRS WHISTLEBLOWER OFFICE, FISCAL YEAR 2012 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623, at 10 tbl.3 [hereinafter IRS 2012 REPORT TO THE CONGRESS] (1,506 days).

86. *See* Jeremiah Coder, *Strong IRS Headwind Blows Whistleblowers Off Course*, 135 TAX NOTES 938, 938 (May 21, 2012) (internal quotation marks omitted) ("There are nice people running the IRS Whistleblower Office, but no one seems to want to make hard decisions and ruffle feathers of those in chief counsel or other parts of the IRS opposed to the program . . . ."); Coder, *GAO Faults IRS*, *supra* note 78 ("The IRS's use of subject matter experts has been inefficient in evaluating whistleblower claims.").

87. *See* IRS WHISTLEBLOWER OFFICE, *supra* note 1, at 20 tbl.5. The text accompanying table 5 notes that the "data collection . . . did not consider the possibility that a claim may not move through the process linearly. For example, the claim reported as 'longest' in operating division subject matter expert status was transferred for consideration of a field examination after completion of a criminal investigation." *Id.* Nonetheless, the report

year are common for tips undergoing subject matter expert evaluation.[88]

It is unclear whether additional time for these functions results in a more efficient examination, but it is clear that the administrative procedures overburden the Program. Delays, with which the Program appears to be peppered, create the danger of statute of limitations expiration.[89] If whistleblowers perceive that tip processing is prolonged, they may not step forward to submit tips. There have been a number of calls for revisions to the Program,[90] and the Service has publicly acknowledged that the Program "isn't where we would like it yet."[91]

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includes no information about the tip that spent the longest "linear" time in the process.

88. *See* Coder, *supra* note 86, at 939 (quoting Gregory S. Lynam) ("When I asked a subject matter expert why it took so long to get the debrief meeting set up, his response was 'This has only been on my desk for a year,'" Lynam said, adding that the answer "boggles the mind." It shouldn't take multiple years to determine whether a submission has merit, he said.").

89. *Id.* at 940 (commenting that whistleblower advocates and their clients are unhappy with the lack of set deadlines for Service response times in the whistleblower statutes); Coder, *GAO Faults IRS*, *supra* note 78 (quoting Gregory S. Lynam) ("No one needs three years to determine if a case could be valid. In point of fact, waiting three years pretty much ensures that it won't be because the statute of limitations would have expired," Lynam said. "If a revenue agent lets the statute of limitations run on an exam, there would be significant consequences, including potential job termination. But if the subject matter expert or chief counsel employee lets the statute of limitations run, it is just another day at the office.").

90. *See, e.g.*, *Grassley Lauds GAO Tax Whistleblower Report*, 2011 TAX NOTES TODAY 176–60 (Sept. 9, 2011) [hereinafter Grassley 2011 Press Release] (advocating for suggestions recommended by a GAO report on the Program); Letter from Sen. Charles Grassley, U.S. Senate, to Douglas Shulman, Comm'r, Internal Revenue Serv. 2 (Sept. 13, 2011) [hereinafter Grassley Letter to Shulman], *available at* http://www.rewardtax.com/files/grassleylettertoshulman9_13_11.pdf (arguing that funds received from whistleblower tips can more than pay for improvements necessary for the Program to grow in its success); Letter from Sen. Charles Grassley, U.S. Senate, to Douglas Shulman, Comm'r, Internal Revenue Serv., & Timothy Geithner, Sec'y, Dep't of Treasury (Apr. 30, 2012) [hereinafter Grassley Letter to Shulman and Geithner] (reiterating his concerns that the Service is not implementing recommendations from the GAO although the Service has access to funds to do so); Grassley 2012 Press Release, *supra* note 85 (requesting an accounting from the Commissioner of the IRS and Treasury Secretary regarding the flawed implementation of the Program); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-683, TAX WHISTLEBLOWERS: INCOMPLETE DATA HINDERS IRS'S ABILITY TO MANAGE CLAIM PROCESSING TIME AND ENHANCE EXTERNAL COMMUNICATION 26 (2011) (listing recommendations for executive action to improve the processing of whistleblower claims); Erika Kelton, *IRS Whistleblowers Should See New Tone at the Top*, FORBES, Oct. 11, 2012, http://www.forbes.com/sites/erikakelton/2012/10/11/irs-whistleblowers-should-see-new-tone-at-the-top/ (discussing the lack of attention the Program was receiving from the former head of the Service and how a change in leadership at the Service could improve the Program).

91. *See* Tom Schoenberg & David Voreacos, *UBS Whistle-Blower Secures $104 Million Award from IRS*, BLOOMBERG, Sept. 11, 2012, http://www.bloomberg.com/news/2012-09-

C. The Service's Approach to Debriefing

One of the places ripe for revision is in whistleblower information intake. Currently, the Service accepts only written tips.[92] Without interviewing a whistleblower, the Service has only written statements and submitted documents with which to work. Relying solely on written submissions unnecessarily limits the Service's access to information about the taxpayer and the whistleblower. Debriefing, otherwise known as interviewing, can allow the Service to better ascertain the veracity of the whistleblower's information and any motivations for tip submission. In addition, debriefing allows the Service to explicitly explore the relationship between the whistleblower and the taxpayer to flesh out any potential legal issues related to tip receipt. Specifically, privilege, the Fourth Amendment, and the Sixth Amendment pose potential issues but are not likely to be identified by the written submission. Debriefing also serves as a way for the whistleblower to provide expert-like guidance to the Service as it examines sophisticated business transactions.

For the past six years, the Service's policy for interviewing whistleblowers has been in flux. Prior to 2008, the Service did not have any policy expressly governing interviews with whistleblowers.[93] In 2008, the Service's policy, as announced by the Chief Counsel Notice (the 2008 Notice),[94] articulated a "one bite" rule.[95] The "one bite" rule limited staff to a single

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11/ubs-whistle-blower-birkenfeld-secures-irs-award-lawyers-say.html (citing 2012 interview with IRS Deputy Commissioner for Services and Enforcement Steven T. Miller).

92. *See* INTERNAL REVENUE SERV., FORM 211, APPLICATION FOR AWARD FOR ORIGINAL INFORMATION (2014), *available at* http://www.irs.gov/pub/irs-pdf/f211.pdf; *see also* INTERNAL REVENUE SERV., FORM 3949-A, INFORMATION REFERRAL (2014), *available at* http://www.irs.gov/pub/irs-pdf/f3949a.pdf.

93. The authors could find no published Service policy relating to whistleblower interviews issued before 2008.

94. *See* 2008 Notice, *supra* note 4, at 1–2.

95. Although the Chief Counsel's Office expressed the "one bite" rule, the 2008 IRM contained a broader policy. It contemplated that the Service "will debrief the whistleblower" in § 7623(b) claims "[u]nless the SME determines that a debriefing is unlikely to result in information that would be material to the evaluation of the submission." *See* IRM 25.2.2.6(5) *Processing Form 211 7623(b) Claim for Award* (as amended Dec. 30, 2008). Although the Service circulated two different policies during this time period, it appears, based on whistleblower attorneys' statements during this time, that the Service was using the "one bite" policy. *See* Janet Novack & William P. Barrett, *Tax Informants Are on the Loose*, FORBES, Nov. 24, 2009, http://www.forbes.com/forbes/2009/1214/investment-guide-10-ubs-irs-spondello-tax-informants-on-loose.html ("One big issue in this case is the so-called one-bite rule, an IRS directive that says the agency can be a one-time passive recipient of documents an informant brings from a target but can't have him go back and take more documents."); *see also* Michael Hudson, *Red Tape, Old Guard Slow Whistleblowing on Corporate Tax Cheats*, TUSCON SENTINEL, June 22, 2011, http://www.tucsonsentinel.

interview and document collection from an employee whistleblower.[96] The 2008 Notice reasoned that, if the government was a "passive recipient of the information and did not encourage or acquiesce" in a whistleblower's conduct, then the government would be able to use a whistleblower's information and any of the fruits of that information without tainting it.[97]

Two years later, the Service amended the 2008 Notice for civil tax matters.[98] Arguably, the Service continued its 2008 "one bite" rule with respect to criminal matters.[99] In the revised 2010 Chief Counsel Notice (the 2010 Notice), the Service continued to suggest that it remain a passive recipient of information;[100] however, the Service added a very brief analysis of applicable Fourth Amendment jurisprudence.[101] The Service included a two-factor test[102] for determining whether a private party's search would be imputed to the government and subsequently barred by the exclusion rule.[103] While the added legal analysis undoubtedly helps Service personnel understand the issues and stakes of whistleblower interviews, the most important change in the 2010 Notice was a slight loosening of the "one bite" rule for employee whistleblowers.[104] Instead of a nearly wholesale prohibition on subsequent whistleblower contact, the Service expressly allowed an employee whistleblower to submit supplemental information if it was for the "sole purpose of clarifying previously submitted information" and "reasonably relate[d] to the previously submitted information."[105] The Service would consider any new information from an employee

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com/nationworld/report/062211_irs_whistleblowers/red-tape-old-guard-slow-whistleblowing-corporate-tax-cheats/ (quoting Erika Kelton) ("One stalled case . . . involves hundreds of millions of dollars in tax cheating by a Wall Street bank . . . . The case is 'stuck in some review process, and it's been like that for two years' even though the whistleblower has offered further help, . . . 'He could help them break through some of the issues in a 45-minute meeting.' But the IRS has refused to meet with him").

96. *See* 2008 Notice, *supra* note 4, at 2.

97. *Id.* at 1. While the Chief Counsel Notice (the 2008 Notice) permitted one time only contact with employee whistleblowers, it completely barred the receipt of any information from whistleblowers that represented the taxpayer before the Service or in litigation in which the Service had an interest. *See id.* at 2.

98. *See* OFFICE OF CHIEF COUNSEL, NOTICE CC-2010-004, *supra* note 5, at 2.

99. *See id.* at 1 (addressing policy with respect to civil matters only).

100. *See id.* at 2.

101. *See id.* at 1–2.

102. *See id.* at 1 (citing United States v. Walther, 652 F.2d 788 (9th Cir. 1981)) ("Generally, courts focus on two factors: (1) the government's knowledge of, and acquiescence in, the search and seizure, and (2) the intent of the party conducting the search and seizure.").

103. *See id.* at 1–2.

104. *See id.* at 2.

105. *Id.*

whistleblower that related to a new issue as a new whistleblower claim.[106] Despite the permissive language for whistleblower contact within the 2010 Notice, its tone still dissuaded communication with whistleblowers and warned Service employees about contact with whistleblowers. While the 2010 Notice appears, on its face, to slightly liberalize whistleblower contact policy, greater whistleblower communication does not appear to have happened in practice.[107]

The 2010 IRM[108] added a "Debriefing Checksheet,"[109] (the Checksheet), but it fails to live up to its title. The Checksheet seeks to ensure the veracity and voluntary provision of the whistleblower's information.[110] It also warns the whistleblower that (1) the Service may not use the information; (2) if it does use the information, the issue may take years to resolve; and (3) any award is taxable.[111] Finally, the Checksheet promises confidentiality for the whistleblower.[112] This Checksheet essentially serves the purpose of legal protection for the Program. The Checksheet provides nothing other than legal coverage to the Service in the event of a dispute with the whistleblower on any of the above-mentioned issues. It provides very little investigative assistance.

During the following two years, Senator Charles Grassley criticized the Program in his correspondence with the Service.[113] His negative comments centered on the Service's policies and procedures for consuming whistleblowers tips.[114] Perhaps due to this criticism, the Deputy

106. *See id.* at 3. The Service's prohibition against accepting tips from taxpayer representatives remained the same. *See id.*

107. *See* Drucker & Green, *supra* note 72 (stating that IRS is reluctant to talk directly to whistleblowers); *see also* Kelton, *Little Reward*, *supra* note 78 (acknowledging the frustration of whistleblowers caused by the Service not utilizing the whistleblowers' expertise and allowing the whistleblowers to assist only in a limited role in the investigation).

108. Chief Counsel amended its whistleblower debriefing policy in 2010, and another version of the IRM whistleblower provisions was also adopted. Similar to the 2008 version, the 2010 IRM contemplated debriefing whistleblowers, stating "[u]nless the examiner/team determines that a debriefing is unlikely to result in information that would be material to the evaluation of the submission, the examiner/team will debrief the whistleblower." IRM 25.2.2.6(10) *Processing of the Form 211 7623(b) Claim for Award* (as amended June 18, 2010).

109. *See id.* at Exhibit 25.2.2-4 *Debriefing Checksheet* (as amended June 18, 2010).

110. *See id.*

111. *See id.*

112. *See id.* ("The informant was advised that the IRS will protect against the disclosure of his/her identity, and even the fact that a whistleblower has provided information, to the maximum extent that the law allows.").

113. *See* Grassley Letter to Shulman, *supra* note 90; Grassley Letter to Shulman and Geithner, *supra* note 90; Grassley 2011 Press Release, *supra* note 90; Grassley 2012 Press Release, *supra* note 85.

114. *See supra* note 113.

Commissioner for Services and Enforcement distributed a memo (the Miller Memo) encouraging Service personnel to accept and use whistleblower tips.[115] In the Miller Memo, the Deputy Commissioner expressed an "expectation [ ] that debriefings will be the rule not the exception."[116] He reasoned that "[d]ebriefing [a whistleblower] . . . is an important component of the evaluation of whistleblower information prior to a decision on whether the information should be referred to the field for audit or investigation."[117] The Miller Memo appears to have marked a policy shift for the Service's interaction with whistleblowers. Unlike previous Chief Counsel Notices, the Miller Memo made no distinctions between non-employee whistleblowers, employee whistleblowers, or taxpayer representatives. Indeed, the Miller Memo lacked any specificity whatsoever. It appeared to be a blanket statement of intention.[118]

In August 2014, a new Deputy Commissioner issued a strong statement in favor of debriefing (the Dalrymple Memo), but it too lacked specificity on the use of debriefing.[119] The recent Dalrymple Memo uses mandatory language, stating that "[a]ll whistleblower submissions referred for subject matter expert (SME) review . . . will include debriefing of the whistleblower";[120] however, there is only a nominal enforcement mechanism. The failure to debrief merely requires documentation of the reasoning for declining a debriefing.[121]

While the 2012 and 2014 memos are steps toward more debriefing, the Service has left its personnel without any guidance for implementing the memos' good intentions. Without specificity and guidance, the Service risks falling back into cultural reluctance to debriefing whistleblowers. A general reluctance to engage with third parties may be well-suited for typical examinations and helpful for protecting taxpayer privacy, but whistleblower involvement necessitates another approach. In particular,

115. *See* Miller Memo, *supra* note 7.

116. *Id.* at 2.

117. *Id.*

118. Nonetheless, the Deputy Commissioner's statement appears to temporally correlate with a change in Service action. *Compare id.* at 1–2 (issued on June 20, 2012), *with Public Hearing on Proposed Regulations*, *supra* note 81 (statement of Scott Oswald in 2013) ("And so in the interviews that we've had with IRS examiners, when it's gone into enforcement, it's really this one-way type of conversation, and these have occurred, I think, with some regularity since July."). A whistleblower attorney's testimony indicates that the Service has been debriefing more whistleblowers recently; the testimony also implied that debriefing increased after the Miller Memo. *See Public Hearing on Proposed Regulations*, *supra* note 81.

119. *See* Dalrymple Memo, *supra* note 6, at 2.

120. *Id.*

121. *See id.* (allowing alternatively for "a specific justification for a decision not to conduct a debriefing").

the Service should be more willing to take a critical look at its debriefing policies.

III. PERCEIVED OBSTACLES TO WHISTLEBLOWER DEBRIEFING

When the Service receives a whistleblower tip, the Service cannot simply open a dialogue amongst all of the parties. The Service is required by statute to protect a taxpayer's privacy,[122] and the Service also recognizes that it should protect a whistleblower's anonymity.[123] The Service must also respect a taxpayer's Fourth Amendment right against unreasonable search and seizure. These requirements may appear to constrain the Service; however, a closer examination reveals the circumstances of their invocation to be a rare occurrence in civil tax matters. The reality is that these issues are navigable for the Service.

A. Fourth Amendment Implications in Whistleblower Debriefing

The following analyzes the legal framework, consequences, and likelihood of violating a taxpayer's Fourth Amendment rights.

1. The Fourth Amendment Applies Only to Governmental Searches

As a federal agency, the Service must respect a taxpayer's constitutional rights, including a taxpayer's Fourth Amendment rights against unreasonable search and seizure.[124] The Fourth Amendment states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[125]

While the Fourth Amendment provides protection for the expectation of privacy that society has established for both individuals and businesses,[126] it

122. *See* I.R.C. § 6103(a) (2012) (providing generally that "[r]eturns and return information shall be confidential).

123. *See* IRM 25.2.2.11(1), *Confidentiality of the Whistleblower* (as amended June 18, 2010) ("The IRS will protect the identity of the whistleblower to the fullest extent permitted by the law."); *see also* Weimerskirch v. Comm'r, 67 T.C. 672, 676 (1977), *rev'd on other grounds*, 596 F.2d 358 (9th Cir. 1979) (stating that the informer privilege permits the government to withhold the identity of "persons who furnish information of violations of law to officers charged with enforcement of that law" to encourage the flow of information to the government).

124. *See* Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978) (citing See v. City of Seattle, 387 U.S. 541, 543 (1967)) (noting that businesses, like individuals, have Fourth Amendment rights); *see also* United States v. Blocker, 104 F.3d 720, 726 (5th Cir. 1997).

125. U.S. CONST. amend. IV.

126. *See* United States v. Jacobsen, 466 U.S. 109, 113 n.4 (1984) (citing Illinois v. Andreas, 463 U.S. 765, 771 (1983); United States v. Knotts, 460 U.S. 276, 280–81 (1983);

has limited applicability to whistleblowers' actions. It only protects taxpayers from unreasonable searches and seizures conducted by the government.[127] Fourth Amendment protection of a person's privacy does not extend to protection against search and seizure by private individuals.[128] Other laws protect against privacy violations such as trespass, burglary, and eavesdropping by private individuals.

Generally, a whistleblower may give someone else's information or property to the government without implicating the Fourth Amendment. Many individuals do not appreciate the possibility that a confidant may disclose his or her secrets or give his or her property to the government. When confiding in another, a person "assumes the risk that his confidant will reveal that information to the authorities . . . ."[129] Such a breach of confidence is not protected by the Fourth Amendment.[130] This is true even if the information was shared only for limited purposes and with the assumption that the information would remain confidential.[131]

2. *An Exception for Governmental Instruments*

As a private party, the whistleblower may violate the Fourth

Smith v. Maryland, 442 U.S. 735, 739–41 (1979); Terry v. Ohio, 392 U.S. 1, 9 (1968)) (noting the expectation of privacy); *see also Barlow's, Inc.*, 436 U.S. at 313.

127. *See* Katz v. United States, 389 U.S. 347, 350 (1967) ("That Amendment protects individual privacy against certain kinds of governmental intrusion . . . ."). As the Supreme Court made clear in 1921, the Fourth Amendment does not limit search and seizure by anyone other than the government.

> The Fourth Amendment gives protection against unlawful searches and seizures, and as shown in the previous cases, its protection applies to governmental action. Its origin and history clearly show that it was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other than governmental agencies; as against such authority it was the purpose of the Fourth Amendment to secure the citizen in the right of unmolested occupation of his dwelling and the possession of his property, subject to the right of seizure by process duly issued.

Burdeau v. McDowell, 256 U.S. 465, 475 (1921).

128. *See Katz*, 389 U.S. at 350.

129. *Jacobsen*, 466 U.S. at 117; *see also* Matthew D. Lawless, *The Third Party Doctrine Redux: Internet Search Records and the Case for a "Crazy Quilt" of Fourth Amendment Protection*, UCLA J.L. & TECH., Spring 2007, at 1, 5–6 (citing Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 527 (2006); Philip H. Marcus, Comment, *A Fourth Amendment Gag Order—Upholding Third Party Searches at the Expense of First Amendment Freedom of Association Guarantees*, 47 U. PITT. L. REV. 257, 276 (1985)).

130. *See Jacobsen*, 466 U.S. at 117; *see also* Coolidge v. New Hampshire, 403 U.S. 443, 488 (1971) (stating that the Fourth Amendment does not "discourage citizens from aiding to the utmost of their ability in the apprehension of criminals").

131. *See Jacobsen*, 466 U.S. at 117; *see also* Lawless, *supra* note 129, at 6 (citing United States v. Miller, 425 U.S. 435, 442 (1976)); Marcus, *supra* note 129, at 276.

Amendment if the whistleblower is regarded as having acted as an "'instrument' or agent of the state."[132] When an individual is an instrument of the government, the individual's actions are imputed to the government. Under this exception, an unreasonable search by a private individual, which would ordinarily not implicate the Fourth Amendment, becomes an unreasonable search by the government.

a. The Two-Factor Test

The Supreme Court has stated that "[w]hether a private party should be deemed an agent or instrument of the Government for Fourth Amendment purposes necessarily turns on the degree of the Government's participation in the private party's activities."[133] The Supreme Court resolves the question of governmental agency or instrumentality in light of all the circumstances,[134] and it has offered no bright line test.[135] Because the issue is so fact specific, Courts' of Appeals analyses offer more instruction for determining a cohesive view. All but the Second, Third, and Federal Circuits have utilized a two-factor test to determine whether a whistleblower is a government instrument.[136] The first factor is whether the government knew of or acquiesced in the private search. The second factor is whether the searching party intended to be a government instrument.

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132. *Coolidge*, 403 U.S. at 487.

133. Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 614 (1989) (citing Lustig v. United States, 338 U.S. 74, 78–79 (1949); Byars v. United States, 273 U.S. 28, 32–33 (1927)).

134. *See Ry. Labor Execs.' Ass'n*, 489 U.S. at 614–15 (citing *Coolidge*, 403 U.S. at 487).

135. *See Miller*, 688 F.2d at 656–57.

136. *See, e.g.*, United States v. Jarrett, 338 F.3d 339, 344–45 (4th Cir. 2003) (internal quotation marks omitted) ("[T]he Courts of Appeals have identified two primary factors . . . . These are: (1) whether the Government knew of and acquiesced in the private search; and (2) whether the private individual intended to assist law enforcement or had some other independent motivation. . . . [W]e too have embraced this two-factor approach, which we have compressed into "one highly pertinent consideration."); United States v. Paige, 136 F.3d 1012, 1017–18 (5th Cir. 1998) (citing United States v. Blocker, 104 F.3d 720, 725 (5th Cir. 1997) (noting that it utilizes the test in *Miller*, 688 F.2d at 652); United States v. Pervaz, 118 F.3d 1, 5 (1st Cir. 1997) (same); United States v. Smythe, 84 F.3d 1240, 1242–43 (10th Cir. 1996) (same); United States v. McAllister, 18 F.3d 1412, 1417 (7th Cir. 1994) (same); United States v. Malbrough, 922 F.2d 458, 462 (8th Cir. 1990) (same); United States v. Lambert, 771 F.2d 83, 89 (6th Cir. 1985) (same); *Miller*, 688 F.2d at 657 ("[W]e discerned that two critical factors in the 'instrument or agent' analysis are: (1) whether the government knew of and acquiesced in the intrusive conduct, and (2) whether the party performing the search intended to assist law enforcement efforts or to further his own ends.").

i. The First Factor

In most circuits, the first factor examines the government's acquiescence or knowledge of the search.[137] These circuits examine whether law enforcement has "instigated, encouraged or participated in the search"[138] to determine "'if the government coerce[d], dominate[d] or direct[ed] the actions of a private person' conducting the search or seizure."[139] In looking at government participation under the first factor, courts have allowed the presence[140] and limited involvement[141] of law enforcement, particularly when government involvement came after the initial private discovery.[142] Courts have even allowed small degrees of law enforcement assistance in the search.[143] Courts have been skeptical, however, of ongoing contact or relationships between whistleblowers and the government.[144] Despite

137. *See supra* note 136 and accompanying text. The First and Sixth Circuits use a slight variation on this first factor. *See Pervaz*, 118 F.3d at 5; *Lambert*, 771 F.2d at 89.

138. *Pervaz*, 118 F.3d at 5; *Lambert*, 771 F.2d at 89.

139. *Smythe*, 84 F.3d at 1242. The Fourth Circuit alone couches its analysis in terms of agency creation. Specifically, the Fourth Circuit seeks to "determin[e] whether the requisite agency relationship exists" through a "'fact-intensive inquiry that is guided by common law agency principles.'" *Jarrett*, 338 F.3d at 344 (internal citations omitted); *see also* United States v. Day, 591 F.3d 679, 683 (4th Cir. 2010).

140. *See, e.g.*, *Smythe*, 84 F.3d at 1242 (discussing a bus station manager receiving a suspicious package for shipment and summoning a policeman, who is present during manager's opening of package); *Miller*, 688 F.2d at 655 (detailing how a Federal Bureau of Investigation (FBI) agent watched as a witness conducted a search of the property).

141. *See, e.g.*, United States v. Smith, 383 F.3d 700 (8th Cir. 2004) (telling how the police removed a suspicious package from a Federal Express conveyor belt and gave it to the manager who then opened it); United States v. Hall, 142 F.3d 988 (7th Cir. 1998) (discussing how after an initial search by a computer technician, a trooper requested the technician to copy found, illegal images that were never viewed by the police or used as a basis of a warrant issued later).

142. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109 (1984) (relaying how Federal Express discovered white powder when examining a damaged package and summoned a Drug Enforcement Administration (DEA) agent, who reopened the package and conducted a field test without a warrant).

143. *See* United States v. Souza, 223 F.3d 1197 (10th Cir. 2000) (telling how DEA agents identified a suspicious package at a United Parcel Service (UPS) facility, encouraged an employee to open it, and assisted with the actual opening).

144. *See* United States v. Barth, 26 F. Supp. 2d 929 (W.D. Tex. 1998) (detailing how an FBI confidential informant found illegal images and then conducted additional searches after talking with law enforcement); *see also Jarrett*, 338 F.3d at 343 (discussing how an agent told a whistleblower/hacker that she could not ask him "to search out cases such as the ones you have sent to us. That would make you an agent of the Federal Government and make how you obtain your information illegal and we could not use it . . . . But if you should happen across such [information] . . . and wish us to look into the matter, please feel free to send [it] to us." Despite characterizing the statements as a "wink and a nod," the *Jarrett* court permitted the use of the information because the hacker's actions did not rise to the

expressing skepticism, though, courts have allowed governmental involvement with only a thin veneer of a "wink and a nod."[145] In most published cases, courts permit the government wide latitude in dealing with whistleblowers,[146] and even in cases with judicial admonishments, courts often find a way to admit the contested evidence.[147]

While courts are skeptical of ongoing or lengthy relationships between whistleblowers and the government, the timing of the relationship can mitigate courts' skepticism.[148] Even though courts prefer that private searches occur before contact with the government, it is not fatal if a search did not occur before the whistleblower's contact with the government.[149] Courts have given significant latitude to the government during a search, even going so far as to find a way to allow Drug Enforcement Administration (DEA) agents to physically assist a private searcher in opening contraband.[150]

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level of a government agent.).

145. *See Jarrett*, 338 F.3d at 343.

146. *See* United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987) (stating that when an employee gave records to the Service over a series of months and the agents arrived at one meeting with a "microfilm copier," presumably ready to copy documents that they anticipated from the whistleblower, the Court of Appeals cautioned that the "IRS agents' conduct came close to being improper.").

147. *See id.*

148. *See Jarrett*, 338 F.3d. at 346. In *Jarrett,* the hacker's evidence was permitted only because the hacker who discovered illegal images on the defendant's computer had conducted the illegal search prior to his lengthy email exchanges with an FBI agent. The Court focused on the timing of the relationship between the hacker and the FBI as a basis for deeming the search permissible; however, the Court ignored that the hacker had a prior relationship with the FBI that predated the case. The hacker had been the primary informant in another case involving nearly the same conduct by both the hacker and the defendant, and the hacker had FBI contact during the prior case. In an older Seventh Circuit case, an employee kept copies of her employer's records and later gave them to the Service, but the court focused on the fact that the employee's search occurred prior to any contact with the Service's agents. *See* United States v. Harper, 458 F.2d 891, 894 (7th Cir. 1971) ("Indeed, the records were acquired eight months prior to her first contact with the agents. In such a situation, the Fourth Amendment does not require that the evidence be excluded."); *see also* United States v. Ziperstein, 601 F.2d 281, 289 (7th Cir. 1979) (finding that an employee had "gained possession of the documents before his contact with the FBI").

149. *See* United States v. Black, 767 F.2d 1334, 1339 (9th Cir. 1985) (noting that the government initiated contact prior to the whistleblower's disclosure of the documents).

150. *See* United States v. Souza, 223 F.3d 1197, 1205–06 (10th Cir. 2000). In the published government instrument cases, courts have given latitude to the FBI and DEA. By and large, the published Fourth Amendment cases involving government instruments were narcotics cases or child pornography cases. The accused's conduct in these cases is arguably far more nefarious than that of a garden-variety tax shelter case. It is possible that the Service may not enjoy such latitude because of the subject matter of its tips. Because courts may not consider the illegal shelter of income as being as egregious as the violation of

ii. The Second Factor

In the two-factor test to determine whether a whistleblower is a government instrument, the second factor examines the intent of the searching party. Specifically, the test seeks to ascertain the intent of the party to become a governmental agent. The Seventh Circuit has explicitly stated that "a party is subject to the [F]ourth [A]mendment only when he or she has formed the necessary intent to assist in the government's investigative or administrative functions; in other words, when he or she intends to engage in a search or seizure."[151]

In whistleblower cases, the government instrument determination typically turns on the first factor because many tax whistleblowers gather evidence to turn over to the Service in an effort to bring a taxpayer to justice.[152] Other possible scenarios exist. Some whistleblowers collect evidence to protect themselves and to use as bargaining chips to secure their own immunity.[153] Here, as with the first factor, an ongoing relationship between a whistleblower and the government is also important albeit for a different reason. Because the second factor examines a whistleblower's motivations, a relationship with the government where the whistleblower is rewarded financially or with leniency may have bearing.[154] For example, in *United States v. Walther*, the ongoing financial relationship between the government and the informant seemed persuasive to the court, and the court deemed the information obtained through the *Walther*

narcotics or child pornography laws, courts may not be as likely to give the Service the latitude it grants the FBI and DEA. Nonetheless, it is unlikely that courts would not grant any latitude in tax cases. There is no logic to support granting latitude to the government in child pornography and narcotics cases but not in tax cases. Accordingly, it follows that the government will receive at least some latitude when receiving evidence from tax whistleblowers.

151. United States v. McAllister, 18 F.3d 1412, 1418 (7th Cir. 1994).

152. *See, e.g.*, *Jarrett*, 338 F.3d at 345.

153. *See* United States v. Feffer, 831 F.2d 734, 739 (7th Cir. 1987); *see also Harper*, 458 F.2d at 892.

154. *Compare* United States v. Malbrough, 922 F.2d 458 (8th Cir. 1990), *with* United States v. Walther, 652 F.2d 788 (9th Cir. 1981). In the Eighth Circuit's *Malbrough* case, the informant Kelley had previously agreed to participate in three narcotics purchases. In exchange for Kelley's participation, the police agreed to refrain from filing burglary charges against Kelley. Without informing the police, Kelley invaded the defendant's property of his own accord and brought back information of a marijuana greenhouse to the police. Although Kelley already had a preexisting relationship as an agent of the government, the court did not consider his search to be a governmental search in this case because the police never asked Kelley to seek out marijuana growers and had no knowledge of his actions until afterwards. The court distinguished Kelley's action from those of the informant in *Walther*. Specifically, the court noted that the government had routinely paid the *Walther* informant and that the government had knowingly acquiesced in the *Walther* informant's searches.

informant's searches subject to the exclusionary rule.[155] It is unclear, however, whether it was the ongoing relationship itself or the financial motivation that was dispositive to the court. Three circuits have considered the presence of a governmental reward as motivation for a search.[156] While these circuits have noted the reward factor in governmental instrumentality analysis,[157] none have decided a case in which the presence of an award was dispositive.

3. Consequences and the Fourth Amendment

If a whistleblower's search is deemed an improper governmental search, a taxpayer may attempt to use the exclusionary rule to enforce the Fourth Amendment's protections.[158] A taxpayer is unlikely to be successful, however, because the rule is not typically applied to civil tax matters.

The exclusionary rule "exclud[es] from admission into evidence in federal and state criminal prosecutions that which is obtained in violation [of the Fourth Amendment] by unlawful governmental action."[159] The exclusionary rule also applies to evidence that is "the indirect product or 'fruit' of unlawful police conduct."[160] The exclusionary rule is not a constitutional guarantee for taxpayers;[161] rather, it is a judicial doctrine designed to deter Fourth Amendment abuses by disallowing unlawfully obtained evidence.[162]

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155. *Walther*, 652 F.2d at 793.

156. *See McAllister*, 18 F.3d at 1417–18; *Malbrough*, 922 F.2d at 462 (citing United States v. Koenig, 856 F.2d 843, 847 (7th Cir. 1988)); *see also* United States v. Ginglen, 467 F.3d 1071, 1074 (7th Cir. 2006) (quoting United States v. Shahid, 117 F.3d 322, 325 (7th Cir. 1997)) ("'Other useful criteria are whether the private actor acted at the request of the government and whether the government offered the private actor a reward.'"); Valdez v. New Mexico, 109 F. App'x 257, 260 (10th Cir. 2004) (also considering whether the government requested a search and offered a reward). It is not clear why the *Malbrough* court considered assistance in exchange for a dismissed charge (that could have resulted in incarceration) as a permissible motivation for assisting the government, while presumably cash payments are not.

157. *See supra* note 156.

158. *See* David H. Taylor, *Should it Take a Thief?: Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 REV. LITIG. 625, 626–27 (2003).

159. *Id.* at 626.

160. United States v. Runyan, 275 F.3d 449, 466 (5th Cir. 2001) (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

161. *See* Stone v. Powell, 428 U.S. 465, 482 (1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment.").

162. *See id.* at 484 (citing Elkins v. United States, 364 U.S. 206, 217 (1960)) ("The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.").

If invoked, the exclusionary rule could thwart an ongoing examination. Even in the event that excluded evidence does not derail an examination, it could create a more expensive, labor-intensive examination to bring to completion. The Service may also fear losing not only a single examination or case, but also the ability to examine that taxpayer in the future. Depending upon the type or scope of evidence excluded, it may affect more than one tax year or a multitude of items in future years. In addition to thwarted examinations and extra costs, the Service may also be concerned about publicity of both its losses to taxpayers and its overreaches. Publicity of unfruitful examinations could tempt other taxpayers toward noncompliance.[163] In addition, the Service's past overreaches have invited both congressional and public scrutiny.[164]

Despite the potential risks of invocation of the exclusionary rule, the rule is very rarely applied outside the criminal context.[165] When it is applied

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163. *See* Joshua D. Blank, *In Defense of Individual Tax Privacy*, 61 EMORY L.J. 265, 265 (2011) ("[T]ax privacy enables the government to influence individuals' perceptions of its tax-enforcement capabilities by publicizing specific examples of its tax-enforcement strengths without exposing specific examples of its tax-enforcement weaknesses. Because salient examples may implicate well-known cognitive biases, this strategic-publicity function of tax privacy can cause individuals to develop an inflated perception of the government's ability to detect tax offenses, punish their perpetrators, and compel all but a few outliers to comply. Without the curtain of tax privacy, by contrast, individuals could see specific examples of the government's tax-enforcement weaknesses that would contradict this perception.").

164. *See* Chris Stirewalt, *Credibility Gap Worsens IRS Scandal*, FOX NEWS (July 23, 2014), http://www.foxnews.com/politics/2014/07/23/credibility-gap-worsens-irs-scandal (commenting on the decreased credibility of IRS Commissioner John Koskinen following claims that the Service targeted Obama's political foes); Peggy Noonan, *This is No Ordinary Scandal*, WALL ST. J., May 17, 2013, http://www.wsj.com/articles/SB10001424127887323582904578487460479247792 (discussing the Service's scandal targeting conservative groups as harming the public's ability to trust); Stop IRS Overreach Act, S. 2043, 113th Cong. (2014) (intending to prohibit the Service from asking taxpayers questions on religious, political, or social beliefs).

165. *Compare* Pa. Bd. of Prob. & Parole v. Scott, 524 U.S. 357, 363 (1998) (citing United States v. Leon, 468 U.S. 897, 909 (1984); United States v. Janis, 428 U.S. 433, 447 (1976)) ("Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials."), *and* Erin Murphy, *The Politics of Privacy in the Criminal Justice System: Information Disclosure, the Fourth Amendment, and Statutory Law Enforcement Exemptions*, 111 MICH. L. REV. 485, 523–24 (2013) (citations omitted) ("Finally, many statutes are altogether silent on the question of additional remedies, including [Health Insurance Portability and Accountability Act] HIPAA, [Family Education Rights and Privacy Act] FERPA, [Children's Online Privacy Protection Act] COPPA, DNA [Act], [Driver's Privacy Protection Act] DPPA, [Fair Credit Reporting Act] FCRA, and the IRS Code. Naturally, litigants have argued that this silence allows for application of the exclusionary rule. For example, defendants have cited HIPAA regulations' explicit reference to the Fourth Amendment, along with the intimate nature of the covered material, as support for

outside of criminal cases, it is rarely applied in civil tax cases. The Supreme Court employs a balancing test[166] to determine whether to apply the exclusionary rule "beyond its core [criminal] application."[167] The Court balances the cost of frustrated law enforcement against the "additional marginal deterrence" achieved by excluding evidence.[168] Some courts have allowed improperly obtained evidence from criminal investigation to be given to another agency or sovereign for use in a subsequent civil proceeding.[169] Most courts are more skeptical, however, when the same agency attempts to subsequently use the evidence in a civil proceeding,[170] but some courts have even allowed the Service to use improperly obtained evidence in subsequent civil tax proceedings.[171] Accordingly, while the list of risks may seem daunting, the chances that the rule will be applied against the Service in a civil tax matter are very remote.

While the Service must acknowledge, however small the risk, that whistleblower interactions could violate the Fourth Amendment, the Service can mitigate any risk through properly tailored whistleblower policies, which are discussed in Part IV. By disseminating clear guidance to personnel on the parameters of Fourth Amendment protections and by systematically collecting information designed to flag potential issues before they arise, the Service can create an effective policy to avoid Fourth Amendment violations. After all, law enforcement and other federal agencies often successfully work with informants and whistleblowers while avoiding the exclusionary rule. Debriefing a whistleblower is entirely possible without the fear of tainted evidence.

B. Taxpayer Privacy Implications in Whistleblower Debriefing

Some have claimed that taxpayer privacy inhibits whistleblower debriefing, but this position misunderstands taxpayer privacy law.

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exclusion of evidence as a remedy for privacy violations by law enforcement. However, most courts have rejected that contention. The same kinds of arguments have also been raised and rejected with regard to claims made under FERPA, the DNA Act, FCRA, the Privacy Act, and the IRS Code."), *with Janis*, 428 U.S. at 455 (citations omitted) ("Respondent argues, however, that the application of the exclusionary rule to civil proceedings long has been recognized in the federal courts. He cites a number of cases.").

166. *See Janis*, 428 U.S. at 447–60.

167. *See* United States v. Speck, 1997 U.S. Dist. LEXIS 8795, at *9 (N.D. Ca. 1997).

168. *See Janis*, 428 U.S. at 448, 453–54; *see also Speck*, 1997 U.S. Dist. LEXIS 8705, at *10.

169. *See, e.g.*, Grimes v. Comm'r, 82 F.3d 286 (9th Cir. 1996); *Janis*, 428 U.S. at 448.

170. *See, e.g.*, Tirado v. Comm'r, 689 F.2d 307, 312 (2d Cir. 1982); Pizzarello v. United States, 408 F.2d 579, 586 (2d Cir. 1969).

171. *See, e.g.*, Weiss v. Comm'r, 919 F.2d 115 (9th Cir. 1990); Houser v. Comm'r, 96 T.C. 184 (1991).

Taxpayer privacy is an overarching concern for the Service,[172] and this concern carries into the whistleblower arena.[173] The following discusses the alternatives available to the Service to facilitate disclosing taxpayer information to a whistleblower during debriefing.

Taxpayer privacy is generally governed by § 6103 of the Internal Revenue Code (the Code), which forbids any federal employee from disclosing any tax return[174] or return information.[175] Section 6103's broad protection of federal tax information has more than a dozen categorical exceptions.[176] The Service could use three of these exceptions to disclose a taxpayer's information to a whistleblower.[177] These include exceptions under § 6103(n) for tax administration contracts, under § 6103(k)(6) for investigative purpose, and under § 6103(h)(4) for administrative and judicial proceedings.

1. Tax Administration Contract Exception

Section 6103(n) allows the Service to disclose return information "to any person . . . for [the] purposes of tax administration."[178] The Service has interpreted "for the purposes of tax administration" to permit contracts with whistleblowers and has adopted a regulation governing whistleblower contracts.[179] A close reading of that regulation, however, describes less of a

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172. The Service has been statutorily required to protect taxpayer information since 1976. *See* Kwon, *supra* note 56, at 470–71 n.143.

173. *See* Michael A. Sullivan, *Best Practices in Pursuing IRS Whistleblower Claims: An Interview with IRS Whistleblower Office Director Stephen A. Whitlock*, 52 FALSE CLAIMS ACT & QUI TAM Q. REV. 79, 90 (2009) (quoting Stephen A. Whitlock) ("[Y]ou have to begin by understanding that the IRS puts a premium on protecting confidentiality. We have [a] statutory requirement to protect the confidentiality of taxpayer returns and return information is broadly defined. It includes information about the whistleblower, so that's taxpayer information within the scope of the statutory protection. And there's a culture in the IRS about protecting taxpayer information, so we start from there.").

174. I.R.C. § 6103(b)(1) (2012) (defining a tax return as "any tax or information return, declaration of estimated tax, or claim for refund . . . .").

175. I.R.C. § 6103(b)(2)(A) (defining return information primarily as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation . . . ."); *see also* Blank, *supra* note 163, at 267 & n.7 (citing I.R.C. § 6103(a), (b)(2), (c)).

176. *See* I.R.C. § 6103(c)–(o).

177. *See* I.R.C. § 6103(h)(4), (k)(6), (n).

178. I.R.C. § 6103(n).

179. *See* 26 C.F.R. § 301.6103(n)-2 (2014) (describing the Service's discretion to enter into § 6013(n) contracts by allowing the Service "to disclose return information to a whistleblower . . . in connection with a written contract among the [IRS], [and] the

contract and more of a confidentiality agreement that gives the Service permission to waive its privacy obligations to a taxpayer and requires a whistleblower to keep the disclosed information confidential.[180] The regulation does not describe a quid pro quo exchange; rather, it focuses on providing an exception to the Service's taxpayer privacy requirement.

Together, § 6103(n) and Treasury Regulation § 301.6103(n)-2 provide the Service an exception to taxpayer privacy that would permit whistleblower debriefing. The Service, however, has chosen not to utilize this exception.[181] Whistleblower experts have publicly stated that they are unaware of the Service's use of a tax administration contract with any whistleblower,[182] and some have questioned if the Service's reluctance to enter into contracts with whistleblowers is hindering its effective pursuit of whistleblower tips and hampering communication with whistleblowers.[183] While the Dalrymple Memo reminds Service personnel of the availability of § 6103(n) contracts, it remains to be seen if such contracts will be used in the whistleblower debriefing process.[184]

From the Service's perspective, § 6103(n) whistleblower contracts offer

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whistleblower . . . .").

180. *See id.* § 301.6103(n)-2(c) (enforcing whistleblower confidentiality with civil and criminal penalty provisions); *see also* I.R.C. §§ 7431, 7213, and 7213A (delineating penalty provisions).

181. *See* Jeremiah Coder, *Clash for Cash: The Conflict Over Tax Whistleblower Contracts*, 59 VILL. L. REV. 409, 414 (2014) (noting that the Service has not yet used a § 6103(n) contract).

182. Criticism of the Service's avoidance of § 6013(n) contracts has come primarily from whistleblower attorneys who desire a closer, more productive relationship with the Service in the hopes of making award payments more likely for their clients. It follows that whistleblower attorneys would seek a formalized relationship between their clients and the Service to create a legal obligation for award payment. *See Public Hearing on Proposed Regulations*, *supra* note 81 (statement of Scott Oswald) (commenting that contracts with whistleblowers have never been entered into though other areas of whistleblower practice utilize contractual arrangements with the whistleblower, and the Service has failed to utilize contractual relationships although they are authorized to enter into contracts in I.R.C. § 6103(n)); Letter from Sen. Charles Grassley, U.S. Senate, to Steven Miller, Acting Comm'r, Internal Revenue Serv., Hon. Neal S. Wolin, Acting Sec'y, Dept. of Treasury, and Hon. Mark Mazur, Assist. Sec'y for Tax Policy, Dept. of Treasury (Jan. 28, 2013) [hereinafter Grassley Letter to Miller, Wolin, and Mazur] (acknowledging that the Service has permission to enter into contracts with whistleblowers although he was unaware of any instances where a contract between the Service and a whistleblower was used); *id.* (stating that in the final regulations, the Service seemed to contemplate the use of a contract with a whistleblower, but it has not yet used the agreement).

183. *See, e.g.*, Grassley Letter to Miller, Wolin, and Mazur, *supra* note 182 (commenting on the lack of communication and the lack of contracts as a failure to use whistleblowers and their advisors, resulting in a crippling of the administration of the Program).

184. *See* Dalrymple Memo, *supra* note 6 (stating that § 6103(n) contracts may be used with appropriate controls).

additional benefits but can also cause certain undesirable consequences. Currently, the Service receives more than 9,000 whistleblower tips annually, suggesting that the Service is not faced with a lack of tips or incoming flow of information.[185] While streamlining and sifting or sorting the informational flow may be an obstacle for the Service, the Whistleblower Office and the Service business units likely see little upside to using a contract to gain additional information given the numerous tips received. It is possible that a contract disclosing return information to a whistleblower could uncover more substantial tax evasion than the whistleblower already disclosed or could clarify a whistleblower's previously made disclosures; however, such additional benefit is speculative. The outcome would not be known until after the contract had been executed and the disclosure made, which compounds the uncertainty surrounding a contract.

In contrast, use of a § 6103 contract has certain consequences for the Service.[186] Using a whistleblower contract shifts the balance of power in the relationship between the Service and the whistleblower. Currently, the Service has greater power in the relationship. Tax whistleblowers self-identify by submitting a compensable tip.[187] There is no other legal market for the tax tips. A whistleblower could seek compensation for the information illegally via blackmail, but no legally permissible market participant will pay for the whistleblower's information other than the Service.[188] As the only legal consumer of compensable tips, the balance of power is in the Service's favor. The Service's position is further strengthened because it has complete discretion on whether to act on the tip.[189] It is only after the Service has chosen to pursue the tip and has successfully collected proceeds (or denied the claim entirely) that a whistleblower gains rights, and the balance of power begins to move away from the Service.[190] One might argue that a whistleblower is powerful

185. *See* IRS WHISTLEBLOWER OFFICE, *supra* note 1, at 14 tbl.1.

186. If the Service enters into a contract with a whistleblower, the contractual formalization of the relationship itself implies a more equal power relationship. Even the bargaining itself grants a whistleblower more power than he would have otherwise had.

187. *See* IRM 25.2.2.3(1), *Submission of Information for Award under Sections 7623(a) or (b)* (as amended June 18, 2010) ("Individuals submitting information under section 7623(a) or (b) must complete IRS Form 211, *Application for Award for Original Information*").

188. Other federal whistleblower programs provide compensation for tips; however, no other federal whistleblower program is tasked with compensating tips for reporting tax violations.

189. *See* IRM 25.2.2.5(1)(F), *Grounds for Not Processing Claims for Award* (as amended June 18, 2010) (stating that claims "that upon initial review have no merit or that lack sufficient specific and credible information" will not be processed).

190. *See* Awards for Information Relating to Detecting Underpayments of Tax or

because he may be the sole source of information necessary for a tax prosecution; however, absent a whistleblower's self-identification as a whistleblower (via tip submission), the Service would usually be unaware such information exists.

A whistleblower contract could also open a Pandora's Box of contractual obligations. A contract would require the Service to provide the whistleblower consideration,[191] and that consideration cannot be rights that the whistleblower already possesses.[192] The Service may argue that it provides consideration by giving a whistleblower access to a taxpayer's return information. However, Treasury Regulation § 301.6103(n)-2 gives the Service the discretion over whether it performs the disclosure,[193] which may also be insufficient consideration.[194] If the contract is, as the

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Violations of the Internal Revenue Laws, 77 Fed. Reg. 74,798, 74,808 (proposed Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062) ("If the claimant believes that the Whistleblower Office erred in evaluating the information provided, the claimant has 30 days from the date the Whistleblower Office sends the preliminary award recommendation to submit comments to the Whistleblower Office. The Whistleblower Office will review all comments submitted timely by the claimant (or the claimant's legal representative, if any) and pay an award, pursuant to paragraph (b)(2) of this section."); *see also id.* at 74,809 (the whistleblower "will have 30 days . . . from the date of the preliminary award recommendation letter to respond to the preliminary award recommendation . . . .").

191. *See* 2 JOSEPH N. PERILLO & HELEN HADJIYANNAKIS BENDER, CORBIN ON CONTRACTS § 5.8, at 34 (1995) (citations omitted) ("The definition of consideration given in *Currie v. Misa*, is often used by American courts . . . : "A valuable consideration . . . may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.").

192. A contract requires a bargained-for exchange. *See id.* § 5.1, at 2–3, 6 ("The term 'consideration' has been used . . . to denote one reason deemed sufficient for enforcement of promises: the bargained-for exchange. . . . [T]o have consideration there must be, at a minimum, a bargained-for exchange."). If, in the contract, the Service only grants the whistleblower rights that he already has, then the Service will not have provided adequate consideration. This is not adequate consideration because the grant of rights would be a pre-existing duty, which is an impermissible category of consideration. *See id.* § 7.1, at 342 ("The very frequently stated rule is that neither the performance of duty nor the promise to render a performance already required by duty is a consideration for a return promise. This rule is known as the 'pre-existing duty rule.'").

193. *See* 26 C.F.R. § 301.6103(n)-2(b)(1) (2014) (stating that the "[d]isclosure of return information in connection with a written contract for services . . . shall be made only to the extent the IRS deems it necessary in connection with the reasonable or proper performance of the contract.").

194. If a party can choose whether to perform its promise, then the consideration is an illusory promise, which is another category of impermissible consideration. *See* PERILLO & BENDER, CORBIN ON CONTACTS, *supra* note 191, § 5.28, at 146 ("If the promisor bargains for some sort of real promise, and receives only an illusion, there is no contract for the reason that the offer has not been accepted as well as for the reason that there is no consideration for the offeror's promise."); *see also* 1 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.17 (1993) (citations omitted) ("As this term itself implies, an illusory promise is not a promise at

regulation states, "a written contract for services,"[195] then the Service's consideration is most likely payment for those services. Such a contract would be at odds with the most basic requirements of the § 7623(b) Program, namely compensation based on collected proceeds.[196]

The contract could also implicate agency duties to cooperate with and compensate a whistleblower,[197] which the Service is not incentivized to undertake.[198] The Service may also be reluctant to create an agency relationship with a whistleblower because it wants to avoid deputizing a whistleblower. The covenant of good faith and fair dealing could also

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all as that term has been herein defined. If the expression appears to have the form of a promise, this appearance is an illusion. Suppose, for example, that X guarantees payment of P's note in return for C's written promise to forbear from suing P as long as C wishes to forbear. In this case C's words may create the illusion of a promise, but, in fact, C has made no promise. The fundamental element of promise is a promisor's expression of intention that the promisor's future conduct shall be in accord with the present expression, irrespective of what the promisor's will may be when the time for performance arrives. In the supposed case, the words used by C are not such as may reasonably be relied upon by P. The clear meaning of the expression is that C's future conduct will be in accord with his or her own future will, just as it would have been had nothing at all been said.").

195. 26 C.F.R. § 301.6103(n)-2.

196. *See* I.R.C. § 7623(b) (2012). Even if the contract specified that payment could not be made until proceeds were collected (as per the statute and regulations), the Service has such control over the processes of whether the tip is pursued, how the examination is conducted, whether to compromise a tax deficiency, and how and when collection is obtained, that compensation under such a contract could be considered an illusory promise.

197. Even assuming that the Service provided legally sufficient consideration and entered into a "contract for services" with a whistleblower, such a contract implicates agency questions. An agreement where one party acts on behalf of another is an agency. *See* 1 RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."). If an agency is created by a § 6103(n) contract, then the Service becomes the principal, and a principal has duties to its agent. *See* RESTATEMENT (THIRD) OF AGENCY § 8.13 (2006) ("A principal has a duty to act in accordance with the express and implied terms of any contract between the principal and the agent."); *id.* § 8.13, cmt. d ("Unless an agreement between a principal and an agent indicates otherwise, a principal has a duty to pay compensation to an agent for services that the agent provides."). A principal also has a duty to cooperate with its agent. *See id.* § 8.13 cmt. b ("A principal's implied contractual duty of good faith and fair dealing obliges the principal to refrain from unreasonable interference with the agent's completion of work. The principal is subject to this duty when the principal has agreed to furnish an agent with an opportunity for work, in addition to agreeing to compensate the agent.").

198. The Service is currently attracting whistleblower tips and cooperation without obligating itself to provide any mandatory compensation or cooperation. Any duty of the Service to compensate and/or cooperate with a whistleblower is restrained by various limits in the statute, the regulations, and the IRM. Presumably, the Service created the regulatory and IRM restrictions to allow for discretion in the use of whistleblowers.

obligate the Service in a whistleblower contract.[199] Finally, the language used within § 301.6103(n)-(2)(b)(3) could obligate the Service to respond to whistleblower inquiries about the status of the claim.[200]

While the Code and Treasury Regulation § 301.6103(n)-2 permit a contractual arrangement between the whistleblower and the Service in § 6103(n), a whistleblower contract exposes the Service to potential hazards. The Service may ultimately perceive a contract as too risky and too costly when compared to its potential benefits.

2. The Administrative/Judicial Proceeding Exception

Another exception for disclosing taxpayer information to whistleblowers is found in § 6103(h)(4), and it relates to administrative and judicial proceedings.[201] Subparagraph (h)(4) allows the Service to disclose return information in an administrative or judicial proceeding if "the proceeding arose out of, or *in connection with, determining the taxpayer's civil or criminal liability*."[202] This exception contemplates the use of a taxpayer's return information in a proceeding where the information is at issue or is related to the proceeding. Therefore this exception could apply to a whistleblower

199. Additional contractual concerns arise when the Service and a whistleblower enter into a § 6103(n) agreement. When the Service enters into a contract with a private citizen, the contractual requirement of good faith and fair dealing still governs the transaction. *See* Frederick W. Claybrook, Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555 (1997) (citing United States v. Winstar Corp., 518 U.S. 839, 870–71 (1996) (plurality opinion); United States v. Bostwick, 94 U.S. 53, 66 (1876)). Good faith prevents a party from denying the benefit of the contract to the other party. *See* 6 PETER LINZER, CORBIN ON CONTRACTS § 26.1 (Joseph M. Perillo ed., 2010) (quoting Kirke La Shelle Co. v. Paul Armstrong Co., 188 N.E. 163, 167 (1933)) ("[I]n every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there is an implied obligation of good faith and fair dealing."). Is the Service fulfilling good faith when its actions prevent collected proceeds from being fully realized? A whistleblower may be misled into thinking his or her cooperation is guaranteeing an eventual award payment. The existing statutory, regulatory, and administrative processes prevent the Service from making award guarantees.

200. Under § 301.6103(n)-(2)(b)(3), a whistleblower may inquire about the status of the submitted claim. *See* 26 C.F.R. § 301.6103(n)-2(b)(3) (2014). The Service's obligation to answer the inquiry is not clear. The regulation does not use mandatory language to describe the Service's response, so on its face, it does not obligate the Service to answer the whistleblower's inquiry. Rather, the regulation uses permissive language that the Service "may inform" the whistleblower of the claim's status. The regulation further limits disclosure when it impedes or impairs the investigation. *See* 26 C.F.R. § 301.6103(n)-2(b)(3). Nonetheless, this murky inquiry privilege may be yet another source of the Service's caution in entering into a tax administration contract under § 6103(n).

201. *See* I.R.C. § 6103(h)(4) (2012).

202. I.R.C. § 6103(h)(4)(A) (emphasis added).

award claim if the whistleblower tip is sufficiently connected with determining the taxpayer's tax liability, and the whistleblower's claim is a proceeding.

For the first factor, sufficient nexus to satisfy § 6103(h)(4) may be found within the language of § 7623, the Treasury regulations, and the IRM. The Service has taken the position that, under § 7623, whistleblower awards may only be paid from proceeds collected from a taxpayer "by reason of the information provided."[203] Collected proceeds are produced only from the assessment and collection of tax liability, interest, or penalties from a taxpayer.[204] Assessment and collection of proceeds could be considered to be "in connection with, determining the taxpayer's civil . . . liability, or the collection of such civil liability."[205]

As for the second factor, the Service has repeatedly taken the position that a whistleblower claim can result in an administrative proceeding.[206] However, the Service's most recent identification of the commencement of a whistleblower administrative proceeding eliminates the Service's ability to use this § 6013 exception for whistleblower debriefing. Previously, the Service identified the filing of the initial whistleblower claim as the beginning of a whistleblower administrative proceeding.[207] If the filing of a whistleblower claim or tip marks the beginning of an administrative proceeding, then subsequent actions in the proceeding, including the claim investigation, appear to fall within the exception. However, more recently proposed regulations identify much later events as the trigger for an administrative proceeding.[208] For § 7623(b) claims,[209] the proposed

203. 26 C.F.R. § 301.7623-1(a)(2).

204. *See* I.R.C. § 7623(b)(1); *see also supra* note 48 and accompanying text.

205. I.R.C. § 6103(h)(4)(A).

206. *See* IRM 25.2.2.8(1), *Whistleblower Award Administrative Proceeding* (as amended June 18, 2010) ("The whistleblower award review and determination process is an administrative proceeding that begins on the date the claim for award is received by the Whistleblower Office."); Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 77. Fed. Reg. 74,798, 74,808 (proposed Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062) ("The whistleblower administrative proceeding described in paragraphs (b)(1)–(2), (c)(1) through (6) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter.").

207. *See* IRM 25.2.2.8(1), *Whistleblower Award Administrative Proceeding* (as amended June 18, 2010).

208. The proposed regulations make a distinction between the claims filed under § 7623(a) and § 7623(b). *See* Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 77 Fed. Reg. at 74,808.

209. For § 7623(a) claims, for which the Service maintains discretion over award payment, the proposed regulations identify the start of the administrative proceeding as when the Service issues a preliminary award recommendation. Because the Service has discretion to pay a § 7623(a) award, the proposed regulations provide that an award denial

regulations state that an administrative proceeding commences when the Service issues a preliminary award recommendation or an award denial letter.[210]

The Service has not explained its reasons for proposing a later date, but one consequence of a later date is lower administrative costs through reduced exposure to Tax Court litigation from whistleblowers. If the beginning of an administrative proceeding occurred at the filing of a whistleblower's claim, the Service would grant whistleblowers an earlier ability to challenge an award determination in Tax Court.[211] By postponing the start of administrative proceedings, the Service may have limited its Tax Court burden. A side effect of that decision is that the Service limited its ability to use the administrative proceeding exception to taxpayer privacy.[212] If the Service had interpreted the start of a whistleblower administrative proceeding differently, this exception could have permitted disclosure of a taxpayer's return information during whistleblower debriefing.

3. The Investigative Purpose Exception

Both the tax administration contract and administrative proceeding exceptions to taxpayer privacy had the potential to permit whistleblower

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under § 7623(a) is not an administrative proceeding. Only the recommendation of an award amount qualifies as an administrative proceeding under the proposed regulations. *See id.*

210. *See id.*

211. Section 7623(b)(4) gives whistleblowers the right to appeal to Tax Court "[a]ny determination regarding an award." I.R.C. § 7623(b)(4) (2012). A determination can be an award, a denial of an award, and even a refusal to issue an award or denial. *See* I.R.C. § 7623(b)(4); Cooper v. Comm'r, 135 T.C. 70, 75 (2010) ("The statute expressly permits an individual to seek judicial review in this Court of the amount or denial of an award determination."); Order in Insinga v. Comm'r, No. 4609-12W (T.C. Mar. 13, 2013) ("[W]e have jurisdiction if there has been "[a]ny determination regarding an award." If the IRS has in fact finished its consideration of an award claim and has not made an award, then evidently it has "determined" to conclude the matter administratively without granting an award. In order for us to decide whether (as petitioner contends) the IRS has made such a *de facto* determination, we may need to learn: whether the IRS has completed its consideration of petitioner's claim; what, if anything, the IRS is still doing with regard to petitioner's claim; and whether the IRS expects to do anything in the future with regard to petitioner's claim. If there has been a cessation of administrative action, then a reviewable determination may have been effectively made thereby."). Once the Service establishes that an administrative proceeding has begun in the whistleblower process, it follows that a "determination" must result from the administrative proceeding.

212. Given the large number of pending whistleblower claims, perhaps the Service is attempting to avoid the potential administrative burden of litigating a large number of whistleblower award determinations. *See* IRS 2012 REPORT TO THE CONGRESS, *supra* note 85, at 6, 16.

debriefing; however, the Service's current choices with respect to contracts and whistleblower claims have limited the utility of the aforementioned exceptions. Consequently, the investigative purpose exception offers the sole exception to taxpayer privacy that permits whistleblower debriefing. Fortunately, this exception provides the Service with nearly boundless authority to disclose taxpayer information to whistleblowers.

Section 6103(k)(6) allows disclosure of tax return information if the disclosure is "necessary" to obtain information not otherwise available for "audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws."[213] The corresponding regulation adds the requirement that the Service employee must "reasonably believe[], under the facts and circumstances, at the time of a disclosure, the information is not otherwise reasonably available, or if the activity connected with the official duties cannot occur properly without the disclosure."[214] The investigative purpose exception provides the Service with expansive authority to disclose return information. This exception does not limit who may be a recipient of the disclosure, so long as the disclosure itself is "necessary." Similarly, the purposes for which disclosure may be made are also limited only by a list covering most Service functions.[215] The requirements of "necessary" for the investigation and not otherwise "reasonably available" are very low bars for disclosing taxpayer information to a whistleblower during debriefing. The Service's current whistleblower debriefing policy, as articulated in the Miller Memo, presumably relied on the § 6103(k)(6) investigative purpose exception when it encouraged whistleblower debriefing.[216]

4. Consequences and Taxpayer Privacy

Similar to the Fourth Amendment analysis previously discussed,[217] violations of taxpayer privacy are unlikely to result in a thwarted

213. *See* I.R.C. § 6103(k)(6) ("An internal revenue officer or employee and an officer or employee of the Office of Treasury Inspector General for Tax Administration may, in connection with his official duties relating to any audit, collection activity, or civil or criminal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.").

214. 26 C.F.R. § 301.6103(k)(6)-1(a)(2) (2014).

215. *Id.* § 301.6103(k)(6)-1(a).

216. *See* Miller Memo, *supra* note 7.

217. *See supra* Part III.A.

examination.[218] The Service appears to be reluctant to disclose taxpayer information to whistleblowers despite the availability of a broad investigative purpose exception. This is highly ironic, considering that in 2012, the Service reported that *8.3 billion* disclosures were made pursuant to § 6103 exceptions.[219] The Service's reluctance to disclose to whistleblowers is likely related to the inability to control any subsequent disclosure by a whistleblower and to the fear of personal ramifications.

The Service may be reluctant to use the investigative purpose exception because, once it discloses taxpayer return information to a whistleblower under this exception, the Service has limited control over any subsequent disclosures by the whistleblower. Unlike the administrative contract exception, there is no requirement for the recipient of the information to keep it confidential. As Whistleblower Office Director Stephen Whitlock has stated publicly, "[p]ublicity is a two-edged sword."[220] Publicity may help or harm any particular Service investigation, but disclosure of return information generally runs contrary to the Service's culture.[221]

The consequences for violating taxpayer privacy may be more painful to the Service's personnel than the sting of a lost evidentiary battle under the exclusionary rule.[222] A violation of taxpayer privacy rights may lead to criminal or civil penalties, as well as dismissal from employment.[223]

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218. *See* United States v. Orlando, 281 F.3d 586, 596 (6th Cir. 2002) (noting that Congress has created statutory criminal and civil penalties for violations of taxpayer privacy, but neither provision requires the exclusion of the underlying evidence obtained); Nowicki v. Comm'r, 262 F.3d 1162, 1163 (11th Cir. 2001) (finding the imposition of the exclusionary rule is not required for disclosure of return information that violates taxpayer privacy rights); United States v. Stein, 2008 U.S. Dist. LEXIS 74030, at *7–8 (S.D.N.Y. Sept. 10, 2008) (stating that courts have declined to create additional remedies for taxpayer privacy violations because Congress has already provided civil and criminal remedies).

219. *See* Joint Committee on Taxation, *Disclosure Report for Public Inspection Pursuant to Internal Revenue Code Section 6103(p)(3)(C) for Calendar Year 2012* (JCX-8-13) (2013), https://www.jct.gov/publications.html?func=startdown&id=4514; *see also* Coder, *supra* note 181, at 411 (noting authorized disclosures under § 6103).

220. *See* Sullivan, *supra* note 173, at 91.

221. *See id.* at 90 (quoting Whitlock as stating "the IRS puts a premium on protecting confidentiality").

222. Courts have also upheld the Service's zero tolerance policy for breaches of taxpayer privacy as well as employment dismissals. *See* Powers v. Dep't of the Treasury, 63 F. App'x 480, 480 (Fed. Cir. 2003) (discussing how a Service employee was fired for repeatedly accessing confidential taxpayer information without authorization); *see also* Albritton v. Dep't of the Treasury, 287 F. App'x 852, 853 (Fed. Cir. 2008) (acknowledging that the Service has a legitimate interest in maintaining such a high standard, explaining that "'each instance of unauthorized access to and/or disclosure of taxpayer information could erode the public's confidence in the IRS and our ability to fairly administer the tax laws while safeguarding a taxpayers [sic] rights'").

223. *See* I.R.C. §§ 7213, 7431 (2012).

Aggrieved taxpayers may also file suit against the Service for civil damages when their returns or return information are improperly disclosed.[224] Perhaps creating an even greater incentive within the Service to protect taxpayer privacy, § 7213(a)(1) of the Code authorizes criminal penalties for a Service employee's willful disclosure of return information.[225] All of these consequences, as frightful as they are, are for improper disclosures. The investigative purpose exception requires only that a disclosure be "necessary" for the investigation and not otherwise "reasonably available" to be lawful. A whistleblower debriefing that is undertaken for lawful purposes as part of an examination is necessary for the purposes of verifying allegations or investigating the extent of wrongdoing.

Even if rarely invoked, the very existence of the criminal statute coupled with the zero tolerance policy likely creates a culture of hyper-privacy protection within the Service. While the Service faces a challenge in changing its culture and its employees' mindsets in creating a more engaging whistleblower debriefing policy, taxpayer privacy exceptions cannot be viewed as a barrier to whistleblower debriefing.

IV. NEW APPROACHES TO DEBRIEFING

The three previous Parts have explained how a Service culture resistant to whistleblowers, an overly burdensome administrative process, and some mild legal obstacles have resulted in Service policies that fail to collect available information from whistleblowers. These obstacles are not insurmountable, nor should they be permitted to relegate the Program to delays and inefficiencies. The Service should reconsider what it means to debrief a whistleblower, how debriefing occurs, and how debriefing might bring efficiencies to the Program. This Part suggests specific improvements to the Service's debriefing policies for more efficient tax enforcement.

A. The Service's Definition of Debriefing

The Service's policy pronouncements, in combination with other evidence, reveal that whistleblower debriefing occurs pre-examination, if at all, and involves a narrow set of topics. Indeed, Whistleblower Office

224. *See id.* § 7431(a)(1) (stating that if a Service employee "knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States").

225. *See id.* § 7213(a)(1) (holding it unlawful for a Service employee to "willfully . . . disclose to any person . . . any return or return information." A violation will be a felony punishable "by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both . . . .").

Director Whitlock has publicly articulated the Service's limited time period for debriefing. In 2012, he was quoted as stating that "[t]he IRS does not involve whistleblowers in case analysis or audits. A whistleblower may be debriefed while the claim is being evaluated, before the audit has begun. . . . After the audit has begun, it's hands off."[226] This is particularly troublesome because, as the Service moves along in an examination, it is in a better position to ask relevant questions of a whistleblower. For sophisticated, multi-step, multi-entity, or international transactions, this is likely the situation.

Given the preliminary stage at which the Service undertakes debriefing, unsurprisingly, the subjects covered appear to lack significant substance. What is surprising, however, is just how preliminary they are. For the Service, debriefing is an administrative procedure ensuring the legality of the whistleblower's information and apprising the whistleblower of the Service's policies.[227] The Checksheet seeks only preliminary information; it primarily serves to ensure that a whistleblower is giving truthful, voluntary information and to advise the whistleblower that the Service will endeavor to protect the whistleblower's identity throughout the lengthy process.[228] Nothing on the Checksheet asks for substantive information. The Checksheet even fails to request basic information about the whistleblower, his or her relationship with the taxpayer, or other facts about the underlying tip. While it is possible that other, non-public policies exist detailing substantive matters on which to question whistleblowers, making such a policy public would equip whistleblower attorneys with the information necessary to allow them to serve as gatekeepers to proactively identify and funnel relevant information to the Service.

B. A Better Definition of Debriefing

The debriefing process should be utilized as another tool in the Service's arsenal to provide key information during the entire investigation process. Debriefing can be useful to the Service as it seeks to remedy systemic information asymmetry. The utility of debriefing may appear only after the Service staff has performed its due diligence on the transactions. Prior to the investment of time, Service staff may not grasp the relevant questions. The Service's reluctance to utilize the whistleblower after initiation of an examination is an inefficient use of time and financial resources.

The Service should view whistleblower information as a potential

226. *See* Lee A. Sheppard, *Whistleblower Officials Talk to Tax Haven Professionals*, 135 TAX NOTES 811 (May 14, 2012) (quoting Stephen Whitlock).

227. *See* IRM Exhibit 25.2.2-4, *Debriefing Checksheet* (as amended June 18, 2010).

228. *See id.*

remedy against the inherent structural information asymmetry and debriefing as a tool that promotes communication with the whistleblower. To improve the debriefing process, the initial debriefing should expand far beyond the Checksheet to allow for detailed observational and substantive information that is not available from the written submission. Debriefing should seek to collect information for procedural, substantive, and programmatic purposes.

Debriefing should collect information about the taxpayer, the whistleblower, and their relationship. Successful debriefing should shed light on the motivation and reliability of the whistleblower, which may be useful as the Service investigates the claim. In addition, expanding the initial debriefing would also allow the Service to foresee potential Fourth Amendment limitations for subsequent searches.

Fourth Amendment governmental instrument law, while not crystal clear or totally uniform, is not an impassable morass. Several principles can be gleaned from the Fourth Amendment discussion in Part III.[229] First, to avoid deputizing IRS whistleblowers, the key inquiry will be whether the government knew of or acquiesced in a subsequent private search. In the first contact that an employee whistleblower has with the Service, any documents that an employee whistleblower passes to the Service will be safely outside the scope of the first factor. In other words, the private search would have occurred before the Service even knew about it. There is no genuine Fourth Amendment concern with a prior search of which the Service has no contemporaneous knowledge.

The issue then is, subsequent to a first meeting, can the Service avoid knowing about or acquiescing in any further searches? The Service has previously avoided this issue by refusing subsequent whistleblower interviews, but this is not necessary. Here, a simple solution may be a scripted disclaimer by the Service that the whistleblower acknowledges in writing. The disclaimer would not be a "'wink and a nod'" as courts have discouraged.[230] Instead, it would be a clear and thorough statement of law and policy that allows the Service to disclaim knowledge or acquiescence in any subsequent whistleblower search.[231]

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229. *See supra* Part III.A.

230. *See* United States v. Jarrett, 338 F.3d 339, 343 (4th Cir. 2003).

231. The Service also has to grapple with the scope of its subsequent examination of documents from the prior private searches. The Service should gather information about how far its examination may extend by asking questions about the extent to which a whistleblower has probed any documents given to the Service. If whistleblower's answers are documented, then the Service will know the bounds that may not be crossed in expansion of a prior private search. This is certainly an item that should be added to the Checksheet.

The Checksheet's current admonishment that a whistleblower should not misinterpret a debriefing question as a request for the whistleblower to acquire more information is a nod toward avoiding tainted subsequent searches. However, it does not explain the issue, and it does not firmly state that whistleblowers should not undertake any subsequent searches. The current Checksheet statement is too subtle. Both the Checksheet and Service staff should be more definitive during first interviews so that the Service is protected against the possibility of tainted evidence but is not foreclosed from further information collection.

Debriefing should also seek to collect substantive information. It should expand upon the information included in a whistleblower's written submission. While debriefing can occur pre-examination and assist in preparing for and guiding an exam, it should not be confined exclusively to pre-examination. As explained above, neither taxpayer privacy nor search law requires such a limitation. The Service can allow a whistleblower to serve as a monitor who prompts enforcement, as well as a quasi-expert who provides guidance on sophisticated transactions during an examination.

In addition, the Service should view debriefing as a device for opening communication with the whistleblower. A debriefing meeting offers the Service the opportunity to evaluate both a whistleblower and his contribution while instilling in the whistleblower the impression that the Service will attempt to act upon his information. Whistleblowers who participate in debriefing throughout the investigation should feel more engaged in the process, and this feeling of contributing to an important process may help offset the discontent of a long wait for an award. Fulfilling these whistleblower needs may have a positive effect on the future stream of tips.

Finally, the Service should use the debriefing process to collect information on whistleblower demographics, attributes, antecedents, tip attributes, and timing. This information would allow the Service to analyze its current stream of tips and measure the Program's efficacy. In addition to collecting information on examinations in which a whistleblower is debriefed, the Service should collect information on whistleblower-identified examination in which a whistleblower is debriefed. The Service needs to learn when and how to debrief a whistleblower to ensure that debriefing is used efficiently. Collecting and analyzing this information is the key to future policy and Program refinement. Without this kind of data, the Service's future policy refinements will be little more than blind guesses.

C. How Does Better Debriefing Fit into Whistleblower Policy?

The Service should use subsequent debriefings with a whistleblower to gain insight into and explanation of the underlying tax transactions and taxpayer workpapers. Expanding debriefing in this fashion will improve the efficiency of the Program, but debriefing can also improve efficiency in other areas, especially in the determination of which tips to pursue. Efficient sorting and screening of tips is an essential component of a successful whistleblower program. Given that whistleblower motivations can be vengeful, ethical, monetary, or some combination thereof, it follows that potential whistleblower tips are of a variety of kinds and quality. When the tips arrive, the Service must efficiently sort out the least meritorious, least revenue-generating, and most resource-intensive. Currently, the Service solely uses internal screening mechanisms, which are labor-intensive and a direct cost. The Service could improve the process if debriefing moved beyond the Checksheet and served as a screening mechanism to quickly sort tips that are inefficient to pursue and prioritize the remaining tips. Debriefing should not only be a forum in which to collect information, but it should also be used as a tool to promote efficiency. The Service should reap process efficiencies in addition to informational benefits.

The addition of the whistleblower should promote a more productive examination. The Service can measure an examination's productivity by revenue generated, examination time, or a combination thereof. To ensure that whistleblower involvement does not burden the process, the Service must measure revenue, timing, and efficiency. More importantly, once baselines are established, the Service must set standards and add accountability to enforce the standards. The Miller Memo sets timeframes for reviewing whistleblower claims;[232] specifically, it suggests that the Service should take no more than ninety days for each of the following steps: (1) conduct an initial evaluation;[233] (2) complete a subject matter expert evaluation of the claim;[234] and (3) notify a whistleblower regarding final award determination.[235] Currently, the ninety-day timeframes are not being met. The current averages for each step are 131 days, 299 days, and 285 days, respectively.[236] Because the Service never established baselines and has not published recent revenue, timing, or efficiency comparators, it

232. *See* Miller Memo, *supra* note 7.

233. *See id.*

234. *See id.*

235. *See id.*

236. *See* Jeremiah Coder, *IRS Whistleblower Office Report Cites Fewer Submissions, Awards*, 135 TAX NOTES 1581, 1582 (June 25, 2012).

is difficult to determine whether ninety-day benchmarks are appropriate for these activities. Moreover, the Miller Memo's timeframes present aspirational goals, but there is no accountability to ensure these timeframes are met.[237]

The Service should envision debriefing as a tool with which to streamline the administrative burden. For example, over-involvement of counsel during an examination can lead to delays. To limit counsel involvement, the Service should rewrite its whistleblower policies so that staff may more easily apply them without resorting to the time-consuming involvement of counsel. Staff should be provided with clear guidance on the Fourth Amendment limitations and explanations of law and policies. This would avoid applying case-by-case analysis to all whistleblowers cases. Guidance should also be given in a tone that promotes rather than dissuades whistleblower usage.

The tone of the whistleblower policy can also be used beyond debriefing. The Service has, at its disposal, a potentially powerful enforcement mechanism in the form of whistleblowers. Reaping the potential efficiencies and assistance will require prioritizing promising cases involving whistleblowers and incentivizing staff to undertake these cases. If the Service's staff perceives that whistleblower involvement slows or burdens cases, then the Service should endeavor to eliminate the burdens and tip the scales in favor of these cases. Policy revisions that unburden whistleblower cases will likely have a greater effect on cultural resistance within the Service than any aspiration policy could ever hope to have.

CONCLUSION

While the Service's current whistleblower debriefing policy is a welcome change from prior policies, it does not gather all available whistleblower information and ultimately fails to utilize whistleblowers throughout examinations. Debriefing serves mainly as a review of a whistleblower's legal rights and a preliminary interview. Despite calls for widespread whistleblower debriefing, the Service's policies limit whistleblower debriefing and forbid whistleblower involvement during an ongoing examination.

While there are limitations to using employee whistleblowers resulting from Fourth Amendment restrictions and taxpayer privacy law, a review of applicable law shows significant latitude for government-whistleblower interactions during an investigation. The restrictions are navigable with policy changes and well-trained Service personnel, so the Service should

237. *See* Coder, *supra* note 181, at 416 (noting the permissive tone of the Miller Memo, albeit for whistleblower contracts).

not resign itself to either under-utilizing or over-utilizing employee whistleblowers. To date, the Service has been overly cautious in its policies for maximizing the full potential of employee whistleblowers. By expanding the Service's conception of what it means to debrief, the Service can use whistleblower interviews to collect procedural, substantive, and programmatic information. The Service should also expand the time period during which it debriefs whistleblowers to include examinations. This would enable whistleblowers to serve the dual functions of monitors who prompt enforcement and quasi-experts who provide guidance.

Above all, the Service should reimagine debriefing as more than a tool for information collection. It can also be a tool for Program and process improvement. Debriefing can be used to screen, sort, and prioritize whistleblower tips. Efficiencies can only be gained, however, if the Service gathers information on whistleblowers and their tips as well as measures the revenue, timing, and efficiency of the processes. The Service must ensure that measurement is accompanied by appropriate and attainable standards that are enforced with accountability.

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