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Lost Opportunities: The Underuse of Tax Whistleblowers


Sarah J. Webber

University of Dayton, swebber1@udayton.edu

Karie Davis-Nozemack

Georgia Institute of Technology

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LOST OPPORTUNITIES: THE UNDERUSE OF TAX WHISTLEBLOWERS

Karie Davis-Nozemack* and Sarah J. Webber†

ABSTRACT

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 dismal performance. The article uses Fourth Amendment jurisprudence, taxpayer privacy law, as well as whistleblower and tax enforcement literature to propose a new approach to using information from tax whistleblowers.

TABLE OF CONTENTS

INTRODUCTION	3
I. WHY USE TAX WHISTLEBLOWERS?	4
A. THE SERVICE IS STRUGGLING WITH TAX COMPLIANCE	4
B. FROM INFORMANT TO WHISTLEBLOWER.....	6
C. TAX WHISTLEBLOWERS.....	9
II. WHISTLEBLOWER TIP PROCESSING AND DEBRIEFING.....	10
A. PROGRAM HISTORY AND STATUTORY BASIS.....	10
B. LIFECYCLE OF A WHISTLEBLOWER TIP.....	11
1. <i>Whistleblower Tips in Theory</i>	11
2. <i>Whistleblower Tips In Practice – Cultural Resistance and Processing Burdens</i>	12
C. SERVICE'S APPROACH TO DEBRIEFING.....	15
III. PERCEIVED OBSTACLES TO WHISTLEBLOWER DEBRIEFING	18
A. FOURTH AMENDMENT IMPLICATIONS IN WHISTLEBLOWER DEBRIEFING	19
1. <i>The Fourth Amendment Applies Only to Governmental Searches</i>	19
2. <i>An Exception for Governmental Instruments</i>	20
3. <i>Consequences and the Fourth Amendment</i>	24
B. TAXPAYER PRIVACY IMPLICATIONS IN WHISTLEBLOWER DEBRIEFING.....	26
1. <i>Tax Administration Contract Exception</i>	26
2. <i>The Administrative/Judicial Proceeding Exception</i>	30
3. <i>The Investigative Purpose Exception</i>	32
4. <i>Consequences and Taxpayer Privacy</i>	33
IV. NEW APPROACHES TO DEBRIEFING.....	34
A. THE SERVICE'S DEFINITION OF DEBRIEFING	35
B. A BETTER DEFINITION OF DEBRIEFING.....	35
C. HOW DOES BETTER DEBRIEFING FIT INTO WHISTLEBLOWER POLICY?.....	37
CONCLUSION	39

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† Assistant Professor of Accounting, University of Dayton.

INTRODUCTION

Last year the Internal Revenue Service (“Service”) received more than 9,000 tips from whistleblowers.³ The Service’s current backlog of whistleblower tips is more than 22,000.⁴ In the last five years under the formalized IRS Whistleblower Program, the program has made approximately 100 awards per year.⁵ With so much information pouring into the Service, why has the Service capitalized on so few tips? This paper argues that 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 but a meandering path to nowhere.

A close analysis of the program shows the program’s deficiencies to be internal to the agency. 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 six years, the Service has taken a variety of approaches to interviewing whistleblowers. Initially, the Service had no formal policy on meeting with whistleblowers, then adopted a policy of meeting with whistleblowers only a single time,⁶ and then moved to a policy of meeting with whistleblowers only on a case-by-case basis.⁷ Most recently, in August 2014, the Service adopted a policy of debriefing some whistleblowers.⁸ 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) overreaction to mild legal obstacles, (2) 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.⁹ While these pronouncements were steps in the right direction, the policy pronouncements were largely aspirational, fail to provide appropriate procedures for debriefing, and consequently leave Service personnel with insufficient guidance.

Legal literature on whistleblower programs often assumes an agency’s ability to

³ See IRS WHISTLEBLOWER OFFICE, FISCAL YEAR 2013 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623, at tbl 1 (9,268 total claims received for Fiscal Year 2013).

⁴ See *id.* at tbl 1 (22,330 Claims Open ending Fiscal Year 2013).

⁵ See *id.* at tbl 6 (110 awards paid in FY 2009, 97 awards paid in FY 2010, 97 awards paid in FY 2011, 128 awards paid in FY 2012, and 122 awards paid in FY 2013).

⁶ See Office of Chief Counsel Notice, CC-2008-011, *Limitations on Informant Contacts: Current Employees and Taxpayer Representatives*, (Feb. 27, 2008) at 1-2.

⁷ See Office of Chief Counsel Notice, CC-2010-004, *Clarification of CC Notice 2008-011 - Limitations on Informant Contacts: Current Employees and Taxpayer Representatives*, (Feb. 17, 2010) at 2.

⁸ See Memo from John Dalrymple, Deputy Commissioner for Enforcement to Commissioner, Large Business and International *et al.*, at 1-2 (Aug. 20, 2014) [hereinafter Dalrymple Memo].

⁹ See Memo from Steven Miller, Deputy Commissioner for Enforcement to Commissioner, Large Business and International *et al.*, at 2 (Jun. 20, 2012), http://www.irs.gov/pub/irs-utl/field_directive_dated_june_20_2012.pdf [hereinafter Miller Memo].

effectively utilize a whistleblower tip. This article challenges that assumption and uses Fourth Amendment jurisprudence, taxpayer privacy law, as well as 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, the 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 of the article 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 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 waste any available resources. The following 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.¹⁰ The current estimate of missing tax revenue has risen to \$450 billion.¹¹ While a variety of factors contribute to the shockingly large tax gap,¹² the vast majority of the tax gap is attributable to underreported taxes.¹³ 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.¹⁴ The declining enforcement revenue correlates

¹⁰ See INTERNAL REVENUE SERV., IRS RELEASES NEW TAX GAP ESTIMATES; COMPLIANCE RATES REMAIN STATISTICALLY UNCHANGED FROM PREVIOUS STUDY, <http://www.irs.gov/uac/IRS-Releases-New-Tax-Gap-Estimates;-Compliance-Rates-Remain-Statistically-Unchanged-From-Previous-Study>.

¹¹ See *Hearing on Review of the President's Fiscal Year 2015 Funding Request for the Department of the Treasury and the Internal Revenue Service Before Subcomm. on Financial Services and General Government of S. Comm. on Appropriations 23* (Apr. 30, 2014) [hereinafter George Senate Testimony] (statement of J. Russell George, Treasury Inspector General for Tax Administration)

¹² 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 (2009); JAMES M. BICKLEY, CONG. RESEARCH SERV., RL41582, TAX GAP, TAX ENFORCEMENT, AND TAX COMPLIANCE PROPOSALS IN THE 112TH CONGRESS (2011).

¹³ See George Senate Testimony, *supra* note __ (stating the tax gap is primarily based on taxpayers' underreporting of taxes, comprising \$376 billion or approximately 84% of the total tax gap).

¹⁴ See *Hearing on the State of the IRS, Before the Subcomm. on Oversight of H. Comm. on Ways and Means*, at 6 (Feb. 5, 2014) [hereinafter Koskinen House Testimony] (statement of John A. Koskinen,

with a drop in the number of returns audited as well as fewer enforcement staff.¹⁵

Due to budget pressure, the Service has recently shrunk its staff by more than 6 percent.¹⁶ The Service's shrinking staff comes at an inopportune time because the Service's budget has not kept pace with its expanding task list.¹⁷ For example, the Service has recently begun collecting information from 77,000 foreign financial institutions under the Foreign Account Tax Compliance Act (FACTA) in an attempt to monitor offshore assets.¹⁸ Additionally, the Service's mission has expanded far beyond that of revenue collector to include benefits administrator.¹⁹ The Service is now responsible for implementing significant portions of the Affordable Care Act.²⁰ Furthermore, the agency must monitor increasingly sophisticated and international business transactions as commerce becomes more global in nature.²¹

The recent budgetary and mission pressures compound the structural disadvantage

Com'r Internal Revenue Service)

http://waysandmeans.house.gov/uploadedfiles/irs_2014_testimony_wm20514_final_version_020414.pdf

("... the 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.”).

¹⁵ See Koskinen House Testimony, *supra* note __ (noting there were 1,300 fewer Service employees in examinations, collections, and investigations in FY 2013, resulting in a 6.4 percent workforce reduction that coincided with a decrease in the total number of audits performed).

¹⁶ See NATIONAL TAXPAYER ADVOCATE, FISCAL YEAR 2012 REPORT TO THE CONGRESS at 34 (2013) (highlighting continued IRS budget cuts as a one of the greatest risks to long-term tax administration).

¹⁷ 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. 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/>

¹⁸ See Chuck Marr and Joel Friedman, *Cuts in IRS Budget Have Compromised Taxpayer Service and Weakened Enforcement*, CTR. ON BUDGET & POL'Y PRIORITIES, 8, (Jun. 25, 2014), <http://www.cbpp.org/files/6-25-14tax.pdf> (noting the increasing responsibilities related to FACTA).

¹⁹ See NATIONAL TAXPAYER ADVOCATE, FISCAL YEAR 2011 REPORT TO THE CONGRESS at 3 (2012) (“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.” (citing the First-Time Homebuyer Credit, American Opportunity Tax Credit, and Patient Protection and Affordable Care Act of 2010)). See also Bernasek, *supra* note __ (“Last year alone, staff positions in enforcement dropped 6.4 percent, to the lowest total in a decade: 19,531.”).

²⁰ See *Hearing on ACA – Information Technology Readiness And Data Security Before the Subcomm. on Energy Policy, Health Care And Entitlements of H. Comm. on Oversight And Government Reform and Before the Subcomm. on Cybersecurity, Infrastructure Protection, And Security Technologies of H. Comm. On Homeland Security* (Jul. 17, 2013) (statement of Alan R. Duncan, Assistant Inspector General for Audit) http://www.treasury.gov/tigta/congress/congress_07172013.pdf

²¹ See Saule Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411 (2011).

with which the Service contends. Enforcement is inherently challenging because of the perpetual informational asymmetry of tax administration.²² 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.²³

The Service has attempted to use technology to both educate taxpayers and identify fraudulent returns;²⁴ 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.²⁵ This is why whistleblowers are such a critical tool for the Service.

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.²⁶ The use of informants in local law enforcement, illegal narcotics, and terrorism is virtually ubiquitous.²⁷ In many areas, informant usage has replaced many other law enforcement techniques.²⁸ Informant usage is common because of structural limits to investigative methods and limited agency resources.²⁹ Even those who call for

²² 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).

²³ See e.g., INTERNAL REVENUE SERV., FORM 1220 (requiring total sales as a single line-item on the return).

²⁴ See Koskinen House Testimony, *supra* note ____.

²⁵ See NATIONAL TAXPAYER ADVOCATE, FISCAL YEAR 2011 REPORT TO THE CONGRESS at 3 (2012) (noting the Service is seeing an increase workload with decreasing resources resulting in several negative outcomes including failure to adequately detect tax noncompliance and an inability to maximize revenue collection).

²⁶ See Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 U. CIN. L. REV. 645, 655 (2004) (“It is undisputed that informant use is on the rise.” (citing Michael A. Simons, *Retribution for Rats: Cooperation, Punishment, and Atonement*, 56 VAND. L. REV. 1, 3 (2003) (“Cooperation has never been more prevalent than it is today.”); Ian Weinstein, *Regulating the Market for Snitches*, 47 BUFF. L. REV. 563, 563-4 (1999) (describing “significant increase in cooperation”)). See also David R. Luri, *Sixth Amendment Implication of Information Participation in Defense Meetings*, 58 FORDHAM L. REV. 795, 795 (1990) (noting that 39 percent of surveyed attorneys had previously encountered confidential informants during client representation (citing Genego, *The New Adversary*, 54 BROOKLYN L. REV. 781, 807 (1988))).

²⁷ See Natapoff, *The Institutional and Communal Consequences*, *supra* note __ at 650 (noting the wide informant usage via anecdotal evidence but limited public data available on informant usage).

²⁸ See Andrew Tasliz, *Prosecuting the Informant Culture*, 109 MICH. L. REV. 1077, 1077 (2011) (reviewing ALEXANDRA NATAPOFF, *SNITCHING: CRIMINAL INFORMANTS AND THE EROSION OF AMERICAN JUSTICE* (2009)).

²⁹ See Michael Rich, *War, Terror, and the Federal Courts, Ten Years after 9/11: Article: 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).

diminished use of informants generally have not suggested diminished use for white-collar offenders because these offenders would likely go undetected and unpunished.³⁰

Society has come to accept and appreciate whistleblowing as an important part of enforcement.³¹ The term whistleblower is more frequently used than informant, particularly involving business and white-collar wrongdoing.³² Indeed, the Service previously used the term informant but has since updated its terminology to whistleblower.³³ Society's etymological change is due to greater acceptance of the act of whistleblowing, which is associated with diminishing trust in corporations as an institution.³⁴ For most of last century, trust in corporations and the high value placed on loyalty and fidelity created societal distaste for whistleblowing.³⁵ The 1960s and 1970s marked changing attitudes regarding corporations and their conduct.³⁶ As one commentator has suggested, "the cultural shift from reverence to distrust of large corporations led to an attitudinal change toward external whistleblowing."³⁷ Since then, academics have conceived of whistleblowing as a control instrument³⁸ 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.³⁹ Early social science research⁴⁰ indicated that higher

³⁰ See Tasliz, *supra* note __ at 1078.

³¹ See Richard Haigh and Peter Bowal, *Whistleblowing and the Freedom of Conscience: Towards a New Legal Analysis*, 35 DALHOUSIE L. J. 89, 90 (2012) (discussing the changing perceptions of whistleblowing).

³² See Peter Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, 21 J. OF BUS. ETHICS 77 (1999) (noting the rise of term). See also Genenva Campbell, *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*, 15.2 U. PA. J. BUS. L. 565, 573-576 (2013). See also 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).

³³ The IRS Informants' Rewards Program was renamed as the IRS Whistleblowers Program following the 2006 I.R.C. § 7623 amendments. See I.R.M. 25.2.2.1(3), *Overview: Authority and Policy* (as amended Jun. 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 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.")

³⁴ See Campbell, *supra* note __ at 571-573 (2013) (citing ALAN F. WESTIN, *WHISTLE BLOWING! LOYALTY AND DISSENT IN THE CORPORATION* 1-4 (1981)).

³⁵ See *id.*

³⁶ See *id.* (citing WESTIN, *supra* note __ at 4-6 (1981) and BERNARD RUBIN ET AL, *BIG BUSINESS AND THE MASS MEDIA* 169 (1977)).

³⁷ See *id.* at 574.

³⁸ See Peter Jubb, *Whistleblowing: A Restrictive Definition and Interpretation*, 21 J. OF BUS. ETHICS 77 (1999).

³⁹ See Alexander Dyck, Adair Morse, Luigi Zingales, *Who Blows the Whistle in Corporate Fraud*, 65.6 J. OF FIN. 2213, 2214-7 (2010). See also John A. Martin and James G. Combs, *Does it Take A Village to Raise a Whistleblower*, *ACAD. MGMT. PERSP.* 83, 84 (May 2011).

⁴⁰ See Janet P. Near and Marcia P. Miceli, *Whistleblowing: Myth and Reality*, 22.3 J. MGMT. 507-526 (1996) (including a literature review of pre-1996 research on whistleblower attributes, including personality

professional status, long service, a more positive attitude toward their jobs, and a likelihood of having won a performance award in the previous two years were predictors of whistleblowing.⁴¹ 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.⁴² 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.⁴³ Some are motivated to help themselves individually, and some are motivated to assist other people, be it colleagues, related parties, or society generally.⁴⁴ 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.⁴⁵ 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.⁴⁶ When wrongdoing is reported, many whistleblowers must blow the whistle more than once because the first attempt is often ineffective.⁴⁷ Indeed,

variables); Jessica R. Mesmer-Mangus and Chockalingam Viswesvaran, *Whistleblowing in Organizations: An Examination of Correlates of Whistleblowing Intentions, Actions and Retaliations*, 62 J. BUS. ETHICS 277-297 (2005) (including a meta analysis of whistleblower personality variables for pre-2005 research); Marcia P. Miceli and Janet P. Near, *When Do Observers of Organization Wrongdoing Step Up?: Recent US Research on the Factors Associated with Whistleblowing*, at 81-84 in DAVID B. LEWIS, A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE (2010) (summarizing whistleblower attribute research through 2010).

⁴¹ See Terry Morehead Dworkin and Janet P. Near, *A Better Statutory Approach to Whistleblowing*, 7.1 BUS. ETHICS Q. 1, 67-7 (1997)

⁴² See Marcia P. Miceli, Janet P. Near, Michael T. Rehg, James R. Van Scotter, *Predicting Employee Reactions to Perceived Organizational Wrongdoing: Demoralization, Justice, Proactive Personality, and Whistleblowing*, 65.8 HUM. REL. 923, 945 (2012).

⁴³ See Janet P. Near, Michael T. Rehg, James R. Van Scotter, and Marcia P. Miceli, *Does Type of Wrongdoing Affect the Whistleblowing Process*, 14.2 BUS. ETHICS Q. 219, 220 (2004) (citing J.B. Dozier and Marcia P. Miceli, *Potential Predictors of Whistleblowing: A Prosocial Behavior Perspective*, 10 ACAD. MGMT. REV. 823-36 (1985); MARCIA P. MICELI AND JANET P. NEAR, *BLOWING THE WHISTLE: THE ORGANIZATIONAL AND LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES* (1992); D. Bash and T. Friedlen, *FBI Agent Blows Whistle on Moussaoui Probe: "I Had to Do What I Believed Was Right*, CNN.COM (2002)). See also Siddharta Dasgupta and Ankit Kesharwani, *Whistleblowing: A Survey of Literature*, 9.4 IUP J. CORP. GOVERNANCE 1, 6 (2010) (summarizing the literature on the motivations of whistleblowers).

⁴⁴ See Miceli and Near, *When Do Observers of Organization Wrongdoing Step Up?*, *supra* note __ at 77. See also Mary L. Schapiro, Chairman, Securities Exchange Commission, Opening Statement at Securities Exchange Commission Open Meeting, Item 2 Whistleblower Program (May 25, 2011), <http://www.sec.gov/news/speech/2011/spch052511mls-item2.htm> (stating that whistleblowers come forward to right a wrong).

⁴⁵ See Miceli and Near, *When Do Observers of Organization Wrongdoing Step Up?*, *supra* note __ at 80.

⁴⁶ See Near, Rehg, Van Scotter, and Miceli, *supra* note __ at 237-8.

⁴⁷ See Eileen Z. Taylor and Mary B. Curtis, *An Examination of the Layers of Workplace Influences in Ethical Judgments: Whistleblowing Likelihood and Perseverance in Public Accounting*, 93 J. OF BUS. ETHICS 21, 22 (2010).

external whistleblowers usually attempt to blow the whistle internally first.⁴⁸

C. Tax Whistleblowers

As with whistleblowers generally, tax whistleblowers appear well-placed.⁴⁹ 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 of whistleblowers generally, tax whistleblowers will not be motivated if they perceive that the Service is unlikely or unwilling to act upon their information.⁵⁰ 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 that had drawn only a dozen tips involving more than \$2 million.⁵¹ Under these limited circumstances, examinations involving whistleblowers raised nearly twice as much revenue per hour as examinations flagged through traditional methods.⁵² Whistleblower involvement in an examination also lowered the percentage of examinations resulting in no additional revenue.⁵³ Simply put, a 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

⁴⁸ See Miceli and Near, *When Do Observers of Organization Wrongdoing Step Up*, *supra* note ___ at 84 (“Most whistleblowers use internal channels to report wrongdoing; the majority of those who use external channels have first used internal channels.”).

⁴⁹ Unfortunately, the extreme secrecy of the Service's whistleblower 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 WHISTLEBLOWER OFFICE, FY 2013 REPORT. The report gives no information on tax whistleblower identities, attributes or motivations. As such, we must rely on the available social science data about whistleblower generally to opine about tax whistleblowers. The authors know of no reason, however, to believe that tax whistleblowers differ in any material way from other whistleblowers.

⁵⁰ See *supra* Part I.B.

⁵¹ See TIGTA 2006 Report, *supra* note ___.

⁵² See TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE INFORMANTS' REWARD PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT (2006), [hereinafter TIGTA 2006 Report] <http://www.treasury.gov/tigta/auditreports/2006reports/200630092fr.pdf>. See also Edward Morse, *Whistleblowers and Tax Enforcement: Using Inside Information to Close the “Tax Gap,”* 24 AKRON TAX J. 1, 11-13 (2009) (interpreting the 2006 TIGTA report data).

⁵³ See Morse, *supra* note ___.

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

The following Part identifies the Service's policies for interacting with whistleblowers. After briefly noting the origins of the modern tax whistleblower program,⁵⁴ Part II describes how the Service receives information from whistleblowers and the breakdowns in the processing of tax whistleblower tips.⁵⁵

A. Program History and Statutory Basis

Prior to the Tax Relief and Health Care Act of 2006,⁵⁶ the Service paid whistleblower awards under a discretionary system.⁵⁷ The still-codified provision gave the Service complete discretion over all whistleblower awards, including discretion over the decision whether to pay and the amount of any whistleblower award.⁵⁸ The Service's complete discretion over payment resulted in uncertainty for whistleblowers until the 2006 overhaul to the Whistleblower Program.⁵⁹

The 2006 statutory changes created an additional provision that authorizes a 15 to 30 percent award from the collected proceeds if the tip alleges business tax delinquencies of

⁵⁴ See *infra* Part I.A.

⁵⁵ 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 3949A (form on which to provide 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.

⁵⁶ See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2958 (2006) (amending I.R.C. § 7623).

⁵⁷ See Kwon, *supra* note __ at n.15 (noting that courts had historically given the Service discretion whether or not to pay a whistleblower award and how much such award should be). See also Dennis J. Ventry, *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); Davis-Nozemack and Webber, *supra* note __ at 83 (explaining that the codification of I.R.C. § 7623 authorized a discretionary payout system).

⁵⁸ Currently, the Service's discretion is limited to small whistleblower awards that fall below the minimum dollar thresholds. See I.R.C. § 7623(a) ("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 REV. SERV., *Internal Revenue Code IRC 7623(a)*, [http://www.irs.gov/uac/Internal-Revenue-Code-IRC-7623\(a\)](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.")

⁵⁹ See Davis-Nozemack and Webber, *supra* note __ at 87 (commenting on the 2006 changes to the Whistleblower Program as providing some certainty for award valuations that was not present under the prior discretionary system that still exists in section 7623(a)).

\$2,000,000 or more.⁶⁰ Congress also removed the prior \$10 million award cap in an attempt to attract whistleblowers to report large tax evasion and fraud.⁶¹ Congress combined a high threshold for tax whistleblower claims with much needed award certainty to focus the Program on high dollar tax abuse cases.⁶² Congress intended the result to be a Whistleblower Program that seeks maximum revenues with minimal program expenses.⁶³

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

B. Lifecycle of a Whistleblower Tip

The Service has created a process for managing whistleblower tips and resulting taxpayer examinations or investigations. In theory, this approach involves a detailed plan for processing 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).⁶⁴ 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.⁶⁵ Once the Whistleblower Office completes an administrative and cursory substantive review of the tip, the tip is sent to the Service's relevant operating division for a comprehensive substantive evaluation.⁶⁶ The operating division has complete discretion over the process.⁶⁷ The division may or may not debrief a whistleblower,⁶⁸ and it may or

⁶⁰ See I.R.C. § 7623(b)(1) ("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").

⁶¹ See Blake Ellis, *Rat Out a Tax Cheat, Collect a Reward*, CNNMONEY.COM (Mar. 3, 2010) (quoting Stephen Whitlock as stating that "many claims are for substantially more than the \$2 million threshold and involve businesses or very wealthy individuals.").

⁶² See Tom Herman, *Tipster Rewards Require Patience*, WALL ST. J., Dec. 26, 2007, at D3 (observing that Congress intended the promise of larger rewards would attract better quality tips and help reduce the tax gap).

⁶³ See Davis-Nozemack and Webber, *supra* note __ at 87.

⁶⁴ See I.R.M. 25.2.2.1 *et seq.*

⁶⁵ See I.R.M. 25.2.2.3, *Submission of Information for Award under Sections 7623(a) or (b)* (as amended Jun. 18, 2010).

⁶⁶ See I.R.M. 25.2.2.4, *Initial Review of the Form 211 by the Whistleblower Office* (as amended Jun. 18, 2010).

⁶⁷ Upon initial review, the whistleblower analyst may forward the submission to the criminal investigation division. See I.R.M. 25.2.2.7(2) and (3), *Processing of the Form 211 7623(b) Claim for*

may not act on the tip by beginning (or continuing) an examination of the taxpayer's return(s).⁶⁹ Only after tax proceeds have been collected and the two-year refund statute of limitations has run⁷⁰ will the Whistleblower Office evaluate the whistleblower's contribution and pay an award.⁷¹ 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 taxpayer,⁷² the process may take the better part of a decade for a whistleblower.⁷³

2. Whistleblower Tips In Practice – Cultural Resistance and Processing Burdens

Whistleblower attorneys have complained about the lengthy process and specifically about processing delays.⁷⁴ At least one current tip has spent over six years under examination.⁷⁵ 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.⁷⁶ The Service's operating divisions have total discretion to act to upon any whistleblower tip.⁷⁷ In other words, the division

Award (as amended Jun. 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 division, whereas a tip involving a larger employer or a multi-national corporation would be referred to Large Business and International division. *See* I.R.M. 25.2.2.6(4) and (6), *Processing of the Form 211 7623(a) Claim for Award* (as amended Jun. 18, 2010); I.R.M. 25.2.2.7(2) and (5), *Processing of the Form 211 7623(b) Claim for Award* (as amended Jun. 18, 2010).

⁶⁸ *See* I.R.M. 25.2.2.6(10) and (11), *Processing of the Form 211 7623(a) Claim for Award* (as amended Jun. 18, 2010); I.R.M. 25.2.2.7(7) and (10), *Processing of the Form 211 7623(b) Claim for Award* (as amended Jun. 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 ___ (requiring only that LB&I, TEGE, and SBSE provide a reason for failing to debrief).

⁶⁹ *See* I.R.M. 25.2.2.6(13) – (15), *Processing of the Form 211 7623(a) Claim for Award* (as amended Jun. 18, 2010).

⁷⁰ The payor of the tax proceeds may waive the right to a refund or settle, eliminating the need for the two-year window. *See* I.R.M. 25.2.2.1(6), *Overview: Authority and Policy* (as amended Jun. 18, 2010).

⁷¹ *See* I.R.M. 25.2.2.6(14) through (20), *Processing of the Form 211 7623(a) Claim for Award* (as amended Jun. 18, 2010); I.R.M. 25.2.2.7(16) through (18), *Processing of the Form 211 7623(b) Claim for Award* (as amended Jun. 18, 2010); I.R.M. 25.2.2.8, *Whistleblower Award Administrative Proceeding* (as amended Jun. 18, 2010); I.R.M. 25.2.2.9, *Award Computation* (as amended Jun. 18, 2010); I.R.M. 25.2.2.12, *Funding Awards* (as amended Jun. 18, 2010).

⁷² *See* I.R.C. § 7623(b)(1) (“such individual shall...receive as an award at least 15 percent but not more than 30 percent of the collected proceeds”).

⁷³ *See* Morse, *supra* note ___ at 11-13. *See also* Jesse Drucker and Peter S. Green, *IRS Resists Whistleblowers Despite Wide U.S. Tax Gap*, BLOOMBERG (Jun. 19, 2012), available at <http://www.bloomberg.com/news/2012-06-19/irs-resists-whistleblowers-despite-wide-u-s-tax-gap.html>.

⁷⁴ *See infra* n. _ - _.

⁷⁵ *See* WHISTLEBLOWER OFFICE, FY 2013 REPORT, *supra* note ___ at tbl 5.

⁷⁶ *See* Jeremiah Coder, *IRS Whistleblower Office Making Improvements*, TAX NOTES (Feb. 27, 2012) (quoting Whitlock as stating “the audit process for high-dollar cases takes longer, given their complexities and the opportunities for taxpayers to appeal.”).

⁷⁷ *See* Jeremiah Coder, *The Whistleblower Whipsaw Process*, TAX NOTES (Mar. 11, 2013) (noting that the Service determines whether or not it will act on a tip from a whistleblower and whistleblowers do not have a path to appeal if their information is ignored).

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.⁷⁸ Whistleblower cases are not a policy priority and may encounter cultural resistance within the Service.⁷⁹ While recent Service executives have expressed support for the whistleblower program,⁸⁰ previous Service executives have publicly expressed disdain for the program.⁸¹ The Service has a long-standing closed-door policy with respect to its examinations and has limited involvement from non-Service individuals.⁸² The presence of a whistleblower changes this cultural dynamic by adding an “outsider” into an examination. As society has embraced whistleblowers, the Service has not yet caught up culturally.

The Program has recently received significantly more tips but has struggled to process them.⁸³ The whistleblower process itself has additional steps in comparison to

⁷⁸ Andrew Velarde, *Miller Memo’ Seen as Improving IRS Whistleblower Process*, TAX NOTES (Oct. 7, 2013) (quoting Harvey as saying “There needs to be a lot of thinking 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.’”).

⁷⁹ See Erika Kelton, *IRS Cheats Taxpayers By Ignoring Whistleblowers*, FORBES (Apr. 4, 2014) (noting that “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) (noting that “...the 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*, TAX NOTES (Sept. 19, 2011) (quoting Knott, Zerbe, Grassley, and Skarlatos remarking on cultural resistance to working whistleblowers).

⁸⁰ See Douglas Shulman, *Remarks Before 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) (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.”), <http://www.journalofaccountancy.com/issues/2010/apr/20102509.htm>. See also Gretchen Morgensen, *Sounding the Tax Alarm, to Little Applause* N.Y. TIMES (Feb. 8, 2014) (stating Commissioner Koskinen was a “fan” of the whistleblower program and stressing the importance of a tax system where everyone is paying their share).

⁸¹ See Jeremiah Coder, *Conversations: Donald Korb*, TAX NOTES (Jan. 19, 2010) (quoting Korb as stating “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.”).

⁸² 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 301* (Apr. 10, 2013) [hereinafter 2013 Public Hearing on Proposed Regulations] (testimony of Erica Brady, noting the Service has been plagued by criticism that the Service does not welcome whistleblowers, and testimony of Tom Pliske, acknowledging the Service is constrained by privacy limitations and therefore does not disclose taxpayer information).

⁸³ See Davis-Nozemack and Webber, *supra* note ___ at 89-93 (noting the TIGTA and GAO reports regarding IRS Whistleblower Office struggles).

non-whistleblower examinations,⁸⁴ 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, then with a subject matter expert, and also may undergo a review by chief counsel's office for privileged documents or other issues.⁸⁵

During the last year, the whistleblower office and some areas of the Service have improved the processing time for tips; however, tips still spend an inordinate amount of time in process overall.⁸⁶ Many whistleblower attorneys complain that delay is often caused during a tip's time with subject matter experts and chief counsel's office.⁸⁷ 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.⁸⁸ A whistleblower attorney has reported that delays of more than a year are common for tips undergoing subject matter expert evaluation.⁸⁹

It is unclear whether additional time for these functions results in a more efficient examination. It is clear that the administrative procedures overburden the Whistleblower Program. Delays, with which the program appears peppered, create the danger of statute of limitations expiration.⁹⁰ If whistleblowers perceive tip processing is prolonged, there is

⁸⁴ See Jeremiah Coder, *GAO Faults IRS Whistleblower Program for Award Delays*, TAX NOTES (Sept. 19, 2011) (acknowledging that “the 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”).

⁸⁵ See *id.*

⁸⁶ Compare WHISTLEBLOWER OFFICE, FY 2013 REPORT, at tbl 5, with WHISTLEBLOWER OFFICE, FY 2012 REPORT at tbl 3. See also Press Release from Senator Charles Grassley (Jun. 21, 2012) [hereinafter Grassley 2012 Press Release] (discussing the Service’s acknowledgment of lengthy processing of whistleblower claims).

⁸⁷ See Jeremiah Coder, *Strong IRS Headwind Blows Whistleblowers Off Course*, TAX NOTES (May 21, 2012) (quoting one practitioner as stating “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.”); Jeremiah Coder, *GAO Faults IRS*, *supra* note __ (quoting Lynam as stating “the IRS’s use of subject matter experts has been inefficient in evaluating whistleblower claims.”).

⁸⁸ See WHISTLEBLOWER OFFICE, FY 2013 REPORT at 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.” Nonetheless, the report includes no information about the tip that spent the longest “linear” time in the process.)

⁸⁹ See Jeremiah Coder, *Strong IRS Headwind Blows*, *supra* note __ (quoting Lynam as stating “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.”).

⁹⁰ Jeremiah Coder, *Strong IRS Headwind Blows*, *supra* note __ (commenting that whistleblower advocates and their clients are unhappy with the lack of set deadlines for Service response times in the whistleblower statutes); Jeremiah Coder, *GAO Faults IRS*, *supra* note __ (quoting Lynam as stating “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.’”).

a risk that whistleblowers will not step forward and submit tips. There have been a number of calls for revisions to the IRS Whistleblower Program,⁹¹ and the Service has publicly acknowledged the Program “isn’t where we would like it yet.”⁹²

C. Service’s Approach to Debriefing

One of the places ripe for revision is in whistleblower information intake. Currently, the Service accepts only written tips.⁹³ 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 and any motivations for tip submission. In addition, debriefing allows the Service to explicitly explore the relationship between the whistleblower and taxpayer to flesh out any potential legal issues related to tip receipt. Specifically, privilege, Fourth and 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

⁹¹ See e.g., Press Release from Senator Charles Grassley (Sept. 9, 2011) 2011 Tax Notes Today 176-60 [hereinafter Grassley 2011 Press Release] (advocating for suggestions recommended by a GAO report on the Whistleblower Program); Letter from Senator Charles Grassley, U.S. Senate, to Douglas Shulman, Commissioner, Internal Revenue Serv. (Sept. 13, 2011), available at http://www.rewardtax.com/files/grassleylettertoshulman9_13_11.pdf [hereinafter Grassley Letter to Shulman] (arguing that funds received from whistleblower tips can more than pay for improvements necessary for the Program to grow in its success); Letter from Senator Charles Grassley, U.S. Senate, to Douglas Shulman, Commissioner, Internal Revenue Serv., & Timothy Geithner, Secretary, Dep’t of Treasury, (Apr. 30, 2012), available at http://www.grassley.senate.gov/about/upload/Document_.pdf [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, (requesting an accounting from the Commissioner of the IRS regarding flawed implementation of the IRS Whistleblower Program) available at <http://www.grassley.senate.gov/news/>; 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 (Aug. 2011) at 26 [hereinafter 2011 GAO Report] (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 Whistleblower Program was receiving from the former head of the Service and a change in leadership at the Service could improve the Service’s Whistleblower Program).

⁹² See Tom Schoenberg & David Voreacos, *UBS Whistle-Blower Secures \$104 Million Award from IRS*, BLOOMBERG (Sept. 11, 2012), <http://www.bloomberg.com/news/2012-09-11/ubs-whistle-blower-birkenfeld-secures-irs-award-lawyers-say.html> (citing 2012 interview with IRS Deputy Commissioner for Services and Enforcement Steven Miller).

⁹³ See INTERNAL REVENUE SERV., FORM 211, APPLICATION FOR AWARD FOR ORIGINAL INFORMATION (2014), <http://www.irs.gov/pub/irs-pdf/f211.pdf>. See also INTERNAL REVENUE SERV., FORM 3949-A, INFORMATION REFERRAL (2014), <http://www.irs.gov/pub/irs-pdf/f3949a.pdf>.

interviews with whistleblowers.⁹⁴ In 2008, the Service’s policy, as announced by Chief Counsel Notice,⁹⁵ articulated a “one bite rule.”⁹⁶ The policy limited staff to a single interview and document collection from an employee whistleblower.⁹⁷ The Notice reasoned that, if the government was a “passive recipient of 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.⁹⁸

Two years later, the Service amended its 2008 Notice for civil tax matters.⁹⁹ Arguably, the Service continued its 2008 “one bite rule” with respect to criminal matters.¹⁰⁰ In the revised 2010 Notice, the Service continued to suggest that it remain a passive recipient of information;¹⁰¹ however, the Service added a very brief analysis of applicable Fourth Amendment jurisprudence.¹⁰² The Service included a two-factor test¹⁰³ for determining whether a private party’s search would be imputed to the government, and subsequently barred by the exclusion rule.¹⁰⁴ While the added legal analysis

⁹⁴ The authors could find no published Service policy relating to whistleblower interviews issued before 2008.

⁹⁵ See Office of Chief Counsel Notice, CC-2008-011, *Limitations on Informant Contacts: Current Employees and Taxpayer Representatives*, (Feb. 27, 2008) at 1-2.

⁹⁶ Although the Chief Counsel’s Office expressed the one bite rule policy, the 2008 Internal Revenue Manual (IRM) contained a broader policy. It contemplated that the Service “will debrief a whistleblower” in § 7623(b) claims “unless the [Subject Matter Expert] determines that a debriefing is unlikely to result in information that would be material to the evaluation of the submission.” See I.R.M. 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 and William P. Barnett, *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 (Jun. 22, 2011) http://www.tucsonsentinel.com/nationworld/report/062211_irs_whistleblowers/red-tape-old-guard-slow-whistleblowing-corporate-tax-cheats/ (quoting Erika Kelton as stating “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.”).

⁹⁷ See *id.*

⁹⁸ *Id.* While the Notice permitted one time only contact with employee whistleblowers, the Notice completely barred the receipt of any information from whistleblowers who represented the taxpayer before the Service or in litigation in which the Service has an interest. See *id.* at 2.

⁹⁹ See Office of Chief Counsel Notice, CC-2010-004, *Clarification of CC Notice 2008-011 - Limitations on Informant Contacts: Current Employees and Taxpayer Representatives*, (Feb. 17, 2010) at 2.

¹⁰⁰ See *id.* at 1 (addressing policy with respect to civil matters only).

¹⁰¹ See *id.* at 2.

¹⁰² See *id.* at 1-2.

¹⁰³ See *id.* (“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. (citing *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981)).

¹⁰⁴ See *id.*

undoubtedly helps Service personnel in understanding the issues and stakes of whistleblower interviews, the most important change of the Notice was a slight loosening of the “one bite rule” for employee whistleblowers.¹⁰⁵ Instead of 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[s] to the previously submitted information.”¹⁰⁶ The Service would consider any new information from an employee whistleblower that related to a new issue as a new whistleblower claim.¹⁰⁷ Despite the permissive language for whistleblower contact within the 2010 Notice, the Notice’s 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.¹⁰⁸

The 2010 Internal Revenue Manual (“IRM”)¹⁰⁹ added a “Debriefing Checksheet,”¹¹⁰ but it fails to live up to its title. The Checksheet seeks to ensure that the veracity and voluntary provision of the whistleblower’s information.¹¹¹ It also warns the whistleblower that the Service may not use the information, but if it does, the issue may take years to resolve, and that any award is taxable.¹¹² Finally, the Checksheet promises confidentiality for the whistleblower’s identity. This Checksheet essentially serves the purpose of legal protection for the Whistleblower Program. The Debriefing Checksheet provides nothing other than a 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, the Service received correspondence critical of the Whistleblower Program from Senator Charles Grassley.¹¹³ His criticism centered on the Service’s policies and procedures for consuming whistleblowers tips.¹¹⁴ Perhaps due to

¹⁰⁵ *See id.* at 2.

¹⁰⁶ *Id.*

¹⁰⁷ *See id.* at 3. The Service’s prohibition against accepting tips from taxpayer representatives remained the same. *See id.*

¹⁰⁸ *See* Druker and Green, *supra* note ___ (stating that the IRS is reluctant to talk directly to whistleblowers.). *See also* 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/> (acknowledging the frustration of whistleblowers that the Service has not utilized the whistleblowers’ expertise and allowed the whistleblowers to assist in a limited role in the investigation).

¹⁰⁹ Chief Counsel amended its whistleblower debriefing policy in 2010, and another version of the IRM whistleblower provisions were 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.” I.R.M. 25.2.2.6(10) *Processing of the Form 211 7623(b) Claim for Award*, (as amended Jun. 18, 2010).

¹¹⁰ *See* I.R.M. Exhibit 25.2.2-4 *Debriefing Checksheet* (as amended Jun. 18, 2010).

¹¹¹ *See id.*

¹¹² *See id.*

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

¹¹⁴ *See id.*

this criticism, the Deputy Commissioner for Services and Enforcement distributed a memo encouraging Service personnel to accept and use whistleblower tips.¹¹⁵ In a June 2012 memo, the Deputy Commissioner expressed an “expectation that debriefing will be the rule not the exception.”¹¹⁶ He reasoned that “debriefing [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 This memo appears to mark a policy shift for the Service’s interaction with whistleblowers. Unlike previous Chief Counsel Notices, the memo made no distinctions between non-employee whistleblowers, employee whistleblowers, or taxpayer representatives. Indeed, the memo lacked any specificity whatsoever. It appears to be a blanket statement of intention.¹¹⁸

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

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; however, whistleblower involvement necessitates another approach. In particular, 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 taxpayer’s privacy,¹²¹ and the Service also recognizes that it should protect a whistleblower’s anonymity.¹²² The Service must also respect a taxpayer’s Fourth

¹¹⁵ See Miller Memo *supra* note __.

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ Nonetheless, the Deputy Commissioner’s statement appears to temporally correlate with a change in Service action. Compare *id.* (issued on June 20, 2012), with 2013 Public Hearing on Proposed Regulations (statement of Scott Oswald) (“And so in the interviews we’ve had with IRS examiners, when its gone into enforcement, its 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 2012 Memo. See 2013 Public Hearing on Proposed Regulations, *supra* note __.

¹¹⁹ See Dalrymple Memo, *supra* note __.

¹²⁰ See *id.* (“or a specific justification for a decision not to conduct a debriefing.”)

¹²¹ I.R.C. §6103

¹²² See I.R.M. 25.2.2.11(1), *Confidentiality of the Whistleblower* (as amended Jun. 18, 2010) (“The IRS will protect the identity of the whistleblower to the fullest extent permitted by the law.”); See also

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.¹²³ 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”¹²⁴

While the Fourth Amendment provides protection for the expectation of privacy that society has established for both individuals and businesses,¹²⁵ the Fourth Amendment has limited applicability to whistleblowers. It only prohibits taxpayers from unreasonable search and seizure by the government.¹²⁶ Fourth Amendment protection of a person's privacy does not extend protection against search and seizure by private individuals.¹²⁷ Other laws protect against privacy violations such as trespass, burglary, and eavesdropping by private individuals.

Kwon, *supra* note 21 at n.312 (2010) (citing I.R.S. Notice 2008-4, 2008-2 I.R.B. 253, § 3.06; *Roviaro v. United States*, 353 U.S. 53, 59 (1957); *Weimerskirch v. Commissioner*, 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 violation of law to officers charged with enforcement of that law’ to encourage the flow of information to the government)).

¹²³ See *Marshall v. Barlow's Inc.*, 436 U.S. 307 (1978) (noting that businesses, like individuals, have Fourth Amendment rights (citing *See v. Seattle*, 387 U.S. 541, 543 (1967))). See also *United States v. Blocker*, 104 F.3d 720, 726 (5th Cir. 1997).

¹²⁴ U.S. CONST., amend. IV.

¹²⁵ See *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (noting the expectation of privacy (citing *Illinois v. Andreas*, 463 U.S. 765, 771 (1983); *U.S. v. Knotts*, 460 U.S. 276, 280-1 (1983); *Smith v. Maryland*, 442 U.S. 735 739-41 (1979); *Terry v. Ohio*, 392 U.S. 1, 9 (1968))). See also *See Marshall*, 436 U.S. at 307 (noting that businesses, like individuals, have Fourth Amendment rights (citing *See v. Seattle*, 387 U.S. 541, 543 (1967))).

¹²⁶ See *Katz v. United States*, 389 U.S. 347, 350 (1967) (“The 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. See *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921) (stating “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.”).

¹²⁷ See *Katz*, 389 U.S. at 350.

Generally, a whistleblower may give another'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 . . ." ¹²⁸ Breach of confidence is not protected by the Fourth Amendment. ¹²⁹ This is true even if the information was shared only for limited purposes and with the assumption that the information would remain confidential. ¹³⁰

2. An Exception for Governmental Instruments

As a private party, the whistleblower may violate the Fourth Amendment if the whistleblower is regarded as having acted as an 'instrument' or agent of the state . . ." ¹³¹ When an individual is an instrument of the government, the individual's actions are credited to the government. With 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 "whether 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." ¹³² The Supreme Court resolves the question of governmental agency or instrumentality in light of all the circumstances, ¹³³ and it has offered no bright line test. ¹³⁴ Because the issue is so fact determinative, Courts' of Appeals analysis offers 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. ¹³⁵ The first factor

¹²⁸ See *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*, 2007 U.C.L.A. J. L. & TECH. 2, 9 (2007) (citing Daniel J. Solove, *A Taxonomy of Privacy*, 154 U. PA. L. REV. 477, 528 (2006), Phillip H. Marcus, *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)).

¹²⁹ See *Jacobsen*, 466 U.S. at 117. See also *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) (the Fourth Amendment does not "discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.") .

¹³⁰ See *Jacobsen*, 466 U.S. at 117. See also Lawless, *supra* note __ at 9 (citing *United States v. Miller*, 425 U.S. 435, 442 (1976)); Marcus, *supra* note __ at 276.

¹³¹ *Id.*

¹³² *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989) (comparing *Lustig v. United States*, 338 U.S. 74, 78-79 (1949), *Byars v. United States*, 273 U.S. 28, 32-33 (1927)).

¹³³ See *id.* at 614-15 (citing *Coolidge*, 403 U.S. at 487).

¹³⁴ See *United States v. Miller*, 688 F.2d 652, 656-7 (9th Cir. 1982).

¹³⁵ See *United States v. Pervaz*, 118 F.3d 1, 5 (1st Cir. 1997) (internal citations omitted) (" . . . two facts must be shown. First, the police must have instigated, encouraged or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts."). *United States v. Jarrett*, 338 F.3d 339, 344-5 (4th Cir. 2003) ("the Courts of Appeals have identified two primary factors . . . are (1) whether the government knew of or acquiesced in the private

is whether the government knew or acquiesced in the private search. The second factor is whether the searching party intended to be a government instrument.

i. The First Factor

In most circuits, the first factor examines the government's acquiescence or knowledge of the search.¹³⁶ These circuits examine whether law enforcement has "instigated, encouraged, or participated in the search"¹³⁷ to determine "if the government coerces, dominates, or directs the actions of a private person' conducting the search . . ."¹³⁸ In looking at government participation under the first factor, courts have allowed the presence¹³⁹ and limited involvement¹⁴⁰ of law enforcement, particularly when government involvement came after the initial private discovery.¹⁴¹ Courts have even

search, and (2) whether the private individual intended to assist law enforcement efforts or to had some other independent motivation. . . . We too have embraced this two-factor approach, which we have compressed into 'one highly pertinent consideration.'"). *United States v. Paige*, 136 F.3d 1012, 1017-8 (5th Cir. 1998) ("There is no indication from the record (1) that the government knew of or acquiesced in the intrusive conduct of Willard and Windell, and (2) that Willard and Windell intended to assist law enforcement efforts in conducting their search." (citing *U.S. v. Blocker*, 104 F.3d 720, 725 (5th Cir. 1997) and noting it is utilized the test in *Miller*)). *United States v. Lambert*, 771 F.2d 83, 89 (6th Cir. 1985) (" . . . two factors must be shown. First, the police must have instigated, encouraged or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investigative efforts."). *United States v. McAllister*, 18 F.3d 1412, 1417 (7th Cir. 1994) ("Initially, we determine 'whether the government knew of or acquiesced in the intrusive conduct,' and secondly 'whether the private party's purpose . . . was to assist law enforcement efforts or to further his own ends.'"). *United States v. Malbrough*, 922 F.2d 458, 462 (8th Cir. 1990) (citing *United States v. Miller*, 688 F.2d 652 (9th Cir. 1982)) ("two critical factors are 'whether the government knew of or acquiesced in the intrusive conduct,' and 'whether the party performing the search intended to assist law enforcement efforts or to further [the informant's] own ends.'"). *Miller*, 688 F.2d at 657 (" . . . we discerned that two critical factors in the 'instrument or agent analysis are (1) whether the government knew of or 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.'"). *United States v. Smythe*, 84 F.3d 1240, 1242-3 (10th Cir. 1996) (quoting *Pleasant v. Lovell*, 876 F.2d 787, 796 (10th Cir. 1989) (citing *Miller*, 688 F.2d at 657 ("two important inquiries to aid in the determination . . . are whether 'the government knew of or acquiesced in the intrusive conduct, and . . . [whether] the party performing the search intended to assist law enforcement efforts or to further his own ends.'"))).

¹³⁶ *Id.* The First and Sixth circuits use a slight variation of the first factor. *See Pervaz*, 118 F.3d at 5; *Lambert*, 771 F.2d at 89.

¹³⁷ *Id.*

¹³⁸ *Smythe*, 84 F.3d at 1242. The Fourth circuit alone couches its analysis in terms of agency creation. Specifically, the circuit seeks to "determine 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. *See also United States v. Day*, 591 F.3d 679, 683 (4th Cir. 2010) (citing *Jarrett*, 338 F.3d at 344).

¹³⁹ *See e.g., Smythe*, 84 F.3d at 1242 (bus station manager receives suspicious package for shipment and summons policeman, who is present during manager's opening of package); *Miller*, 688 F.2d at 652-4 (FBI agent watched as witness conducted search of property).

¹⁴⁰ *See e.g., United States v. Smith*, 383 F.3d 700 (8th Cir. 2004) (police remove suspicious package from Federal Express conveyor belt and gives it to manager who then opens it); *United States v. Hall*, 142 F.3d 988 (7th Cir. 1998) (after initial search by computer technician, trooper requests technician to copy found, illegal images but copy is never viewed by police or used as basis of later issued warrant);

¹⁴¹ *See e.g., United States v. Jacobsen*, 466 U.S. 109 (1984) (Federal Express discover white powder when examining a damaged package and summon DEA agent, who reopens the package and makes a field test without a warrant).

allowed small degrees of law enforcement assistance in the search.¹⁴² Courts have been skeptical, however, of ongoing contact or relationships between whistleblowers and the government.¹⁴³ Despite expressing skepticism, courts have allowed governmental involvement with only a thin veneer of a “wink and a nod.”¹⁴⁴ In most published cases, courts permit the government very wide latitude in dealing with whistleblowers.¹⁴⁵ Even in cases with judicial admonishments, courts often find a way to admit the contested evidence.¹⁴⁶

While courts are skeptical of ongoing or lengthy relationships between whistleblowers and the government, the timing of the relationship can mitigate courts’ skepticism.¹⁴⁷ Even though courts prefer that private searches occur before contact with the government, it is not fatal that a prior search did not occur before the whistleblower’s contact with the government.¹⁴⁸ Courts have given significant latitude to the government during a search, even going so far as to find a way to allow DEA agents to physically assist a private searcher in opening contraband.¹⁴⁹

¹⁴² See *United States v. Souza*, 223 F.3d 1197 (10th Cir. 2000) (DEA agents identified suspicious package at UPS facility, then encouraged employee to open it, and assisted with actual opening).

¹⁴³ See *United States v. Barth*, 26 F. Supp.2d 929 (W.D. Tex. 1998) (FBI confidential informant finds illegal images and then conducts additional searched after talking with law enforcement). See also *United States v. Jarrett*, 338 F.3d 339, 343 (4th Cir. 2003) (The agent told the whistleblower/hacker that she could not ask him “to search out cases such as the ones you have sent 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 them to us.” Despite characterizing the statements as a “wink and a nod,” the Court permitted the use of the information because the hacker’s actions did not rise to the level of a government agent.).

¹⁴⁴ *Id.*

¹⁴⁵ See *United States v. Feffer*, 831 F.2d 734, 739 (1987) (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.”).

¹⁴⁶ See *id.*

¹⁴⁷ See *Jarrett*, 338 F.3d. at 346 (citing *United States v. Steiger*, 318 F.3d 1039 (11th Cir. 2003)). 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 (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 (1979) (finding that employee had “gained possession of the documents before his contact with the FBI”).

¹⁴⁸ 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).

¹⁴⁹ See *United States v. Souza*, 223 F.3d 1197 (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 or child pornography cases. The accused 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

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. More specifically, the test seeks to ascertain the intent of the party to become a governmental agent. The Sixth 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, he or she intends to engage in a search or seizure.”¹⁵⁰

In employee whistleblower cases, the government instrument determination would typically turn 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.¹⁵¹ Other possible scenarios exist. Some whistleblowers collect evidence to protect themselves and use as bargaining chips to secure their own immunity.¹⁵² 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 motivation, a relationship with the government where the whistleblower is rewarded financially or with leniency may have bearing.¹⁵³ For example, in *Walther*, the ongoing financial relationship between the government and the informant seemed persuasive to the court, and the court deemed the information obtained through *Walther* informant’s searches subject to the exclusionary rule. It is unclear, however, whether it is the ongoing relationship itself or financial motivation that was dispositive to the court. Three circuits consider the presence of a governmental reward as motivation for a search.¹⁵⁴ While these

consider the illegal shelter of income as egregious as the violation of 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.

¹⁵⁰ *United States v. McAllister*, 18 F.3d 1412, 1418 (7th Cir. 1994).

¹⁵¹ See e.g., *United States v. Jarrett*, 338 F.3d 339, 345 (4th Cir. 2003).

¹⁵² See *United States v. Feffer*, 831 F.2d 734, 739 (1987). See also *Harper*, 458 F.2d at 892.

¹⁵³ 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, 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 on 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.

¹⁵⁴ See *Malbrough*, 922 F.2d at 462 (citing *U.S. v. Koenig*, 856 F.2d 843, 847 (7th Cir. 1988)); *United States v. McAllister*, 18 F.3d 1412, 1417-8 (7th Cir. 1994) (citing *Malbrough*, 922 F.2d at 462). See also *U.S. v. Gingles*, 467 F.3d 1071 (7th Cir. 2006) (“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.” (internal citation omitted)); *U.S. v. Shahid*, 117 F.3d 322 (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 Fed. Appx. 257 (10th Cir. 2004) (“Other considerations are whether

circuits have noted the reward factor in governmental instrumentality analysis,¹⁵⁵ 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.¹⁵⁶ A taxpayer is unlikely to be successful, however, because the rule is not typically applied to civil tax matters.

The exclusionary rule "excludes from admission into evidence in federal and state criminal prosecutions that which is obtained in violation [of the Fourth Amendment] by unlawful governmental action."¹⁵⁷ The exclusionary rule also applies to evidence that is "the indirect product or 'fruit' "of improperly obtained evidence."¹⁵⁸ The exclusionary rule is not a constitutional guarantee for taxpayers;¹⁵⁹ rather, it is a judicial doctrine designed to deter Fourth Amendment abuses by disallowing evidence.¹⁶⁰

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 of harming 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.¹⁶¹ In addition, the Service's past

the informant performed the search at the request of the government and whether the government 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.

¹⁵⁵ *See id.*

¹⁵⁶ *See* David H. Taylor, *Should it Take a Thief? Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 REV. LITIG. 625, 626-7 (2003).

¹⁵⁷ *See* David H. Taylor, *Should it Take a Thief? Rethinking the Admission of Illegally Obtained Evidence in Civil Cases*, 22 REV. LITIG. 625, 626-7 (2003).

¹⁵⁸ *United States v. Runyan*, 275 F.3d 449, 466 (5th Cir. 2001) (citing *Wong Sun v. U.S.*, 371 U.S. 471 (1963)).

¹⁵⁹ *See Stone v. Powell*, 428 U.S. 465, 482 (U.S. 1976) ("The exclusionary rule was a judicially created means of effectuating the rights secured by the Fourth Amendment.")

¹⁶⁰ *See id.* ("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.") (citing *Elkins v. United States*, 364 U.S. 206, 217 (U.S. 1960)).

¹⁶¹ *See* Joshua Blank, *In Defense of Individual Taxpayer Privacy*, 61 EMORY L. J. 265 (2011) ("that tax 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. The government publicizes specific examples whenever it reveals the details of any named individual's tax controversy. 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

overreaches have invited both Congressional and public scrutiny.¹⁶²

Despite the potential risks of invocation of the exclusionary rule, the rule is very rarely applied outside the criminal context.¹⁶³ When it is applied outside of criminal cases, it is even more rarely applied in civil tax cases. The Court employs a balancing test¹⁶⁴ to determine whether to apply the exclusionary rule “beyond its core [criminal] application.”¹⁶⁵ The Supreme Court balances the cost of frustrated law enforcement with “additional marginal deterrence” achieved by excluding evidence.¹⁶⁶ Some cases have allowed improperly obtained evidence in criminal investigation to be given to another agency or sovereign for use in a subsequent civil proceeding.¹⁶⁷ Courts are more skeptical, however, when the same agency attempts subsequent use in a civil proceeding,¹⁶⁸ but some courts have even allowed the Service to use improperly obtained evidence in subsequent civil tax proceedings.¹⁶⁹ Accordingly, while the list of risks may seem daunting, the chances that the rule is 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 Fourth Amendment protections, the Service can mitigate any risk through properly tailored whistleblower policies, which are discussed in Part IV. By

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.”)

¹⁶² See Chris Stirewalt, *Credibility Gap Worsens IRS Scandal*, FOX NEWS FIRST, (July 23, 2014) (commenting on the decreased credibility of IRS Commissioner John Koskinen following claims the Service targeted Obama's political foes) available at <http://www.foxnews.com/politics/2014/07/23/credibility-gap-worsens-irs-scandal>; Peggy Noonan, *This is No Ordinary Scandal*, WALL ST. J. (May 17, 2013) (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) (introduced to prohibit the Service from asking taxpayers questions on religious, political or social beliefs).

¹⁶³ Compare *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363-364 (U.S. 1998) (“Recognizing these costs, we have repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials.” (citing *United States v. Leon*, 468 U.S. 897, 909 (U.S. 1984), *United States v. Janis*, 428 U.S. 433, 447 (U.S. 1976))) 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, 523-524 (2013) (“Finally, many statutes are altogether silent on the question of additional remedies, including HIPAA, FERPA, COPPA, DNA, DPPA, 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 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.” (internal citation omitted)), with *United States v. Janis*, 428 U.S. 433, 455 (U.S. 1976) (“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.” (internal citations omitted)).

¹⁶⁴ See *United States v. Janis*, 428 U.S. 433, 447-60 (U.S. 1976).

¹⁶⁵ See *United States v. Speck*, 1997 U.S. Dist. LEXIS 8795 *9 (N.D. Ca. 1997).

¹⁶⁶ See *Janis*, at 448, 453. See also *Speck*, at *10.

¹⁶⁷ See e.g., *Grimes v. C.I.R.*, 82 F.3d 286 (9th Cir. 1996), *Janis*, at 448.

¹⁶⁸ See e.g., *Tirado v. C.I.R.*, 689 F.2d 307, 312 (2d Cir. 1982) and *Pizzarello v. U.S.*, 408 F.2d 579, 586 (2d Cir. 1969).

¹⁶⁹ See e.g., *Weiss v. Commissioner*, 919 F.2d 115 (9th Cir. 1990); *Houser v. Commissioner*, 96 T.C. 184 (T.C. 1991)

disseminating clear guidance to personnel on the parameters and the systematic collection of information designed to flag potential issues before they arise, the Service can create an effective policy. After all, law enforcement and other federal agencies 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. Taxpayer privacy is an overarching concern for the Service,¹⁷⁰ and this concern carries into the whistleblower area.¹⁷¹ 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, which forbids any federal employee from disclosing any tax return¹⁷² or return information.¹⁷³ Section 6103's broad protection of federal tax information has more than a dozen categorical exceptions.¹⁷⁴ Three of these exceptions could be used by the Service to disclose a taxpayer's information to a whistleblower.¹⁷⁵ These include exceptions under § 6103(n) for tax administration contracts, § 6103(k)(6) for an investigative purpose, and § 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 . . .

¹⁷⁰ The Service has been statutorily required to protect taxpayer information since 1976. *See* Kwon, *supra* note __ at n.143 (2010) (citing PRIVACY PROT. STUDY COMM'N, FEDERAL TAX RETURN CONFIDENTIALITY, 13-14 (Jun. 1976); OFFICE OF TAX POLICY DEP'T OF TREASURY, REPORT TO CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS, VOL. 1: STUDY OF GENERAL PROVISIONS, 21 (2000); JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, H.R. 10612, 94th Cong., 313, 314-15 (1976), *reprinted in* 1976-3 C.B. (vol. 2) 1, 335).

¹⁷¹ *See* Michael 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. 81, 90 (2009) (quoting Whitlock as stating “you have to begin by understanding that the IRS puts a premium on protecting confidentiality. We have 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.”) available at http://www.who-tam-litigation.com/files/steve_whitlock_interview_with_michael_sullivan_2009.pdf.

¹⁷² I.R.C. §6103(b)(1) (defining a tax return as “any tax or information return, declaration of estimated tax, or claim for refund . . .”).

¹⁷³ I.R.C. § 6103(b)(2) (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 __ at 267 (2011) (citing I.R.C. § 6103 (a), (b)(2), (c)).

¹⁷⁴ *See* I.R.C. § 6103(c) – (o).

¹⁷⁵ *See* I.R.C. § 6103(h)(4), (k)(6), (n).

for the purposes of tax administration.”¹⁷⁶ The Service has interpreted “for the purposes of tax administration” to permit contracts with whistleblowers and has adopted a regulation governing whistleblower contracts.¹⁷⁷ A close reading of that regulation, however, describes less of a 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.¹⁷⁸ 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. Whistleblower experts have publicly stated that they are unaware of the Service’s use of a tax administration contract with any whistleblower,¹⁷⁹ and some have questioned if the Service’s reluctance to enter into contracts with whistleblowers is hindering the Service’s effective pursuit of whistleblower tips and hampering communication with whistleblowers.¹⁸⁰

From the Service’s perspective, § 6103(n) whistleblower contracts offer additional benefits but certain undesirable consequences. Currently, the Service receives more than 7,500 whistleblower tips annually, suggesting that the Service is not faced with a lack of tips or incoming flow of information.¹⁸¹ While streamlining and sifting/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

¹⁷⁶ See I.R.C. § 6103(n).

¹⁷⁷ See 26 C.F.R. § 301.6103(n)-2 (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], the whistleblower . . .”).

¹⁷⁸ See 26 C.F.R. § 301.6103(n)-2 (c) (enforcing whistleblower’s confidentiality with civil and criminal penalty provisions). See also I.R.C. §§ 7431, 7213, and 7213A (penalty provisions).

¹⁷⁹ 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 hopes of more likely award payment 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 2013 Public Hearing on Proposed Regulations, (statement of Scott Oswald) (commenting that contracts with whistleblowers have never been entered into and stating that 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 Commissioner, Internal Revenue Serv., Hon. Neal S. Wolin, Acting Secretary, Dept. of Treasury, and Hon. Mark Mazur, Assist. Sec. for Tax Policy, Dept. of Treasury, (Jan. 28, 2013) [hereinafter Grassley Letter to Miller, Wolin and Mazur] (acknowledging the Service has permission to enter into contracts with whistleblowers yet he was unaware of any instances where a contract between the Service and a whistleblower was used); Coder, _____, *supra* note __ (stating 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).

¹⁸⁰ See Grassley Letter to Miller, Wolin and Mazur, *supra* note __ (commenting on the lack of communication and lack of contracts as a failure to use whistleblowers and their advisors resulting in a crippling of the administration of the program).

¹⁸¹ See WHISTLEBLOWER OFFICE FY 2012 REPORT, *supra* notes 4-5 and accompanying text.

whistleblower already disclosed or 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 involving a contract.

In contrast, use of a § 6103 contract has certain consequences for the Service.¹⁸² Using a whistleblower contract shifts the relationship balance of power between the Service and whistleblower. Currently, the Service has greater power in the relationship. Tax whistleblowers self-identify by submitting a compensable tip.¹⁸³ There is no other legal market for the tax tips. A whistleblower could seek compensation for the information illegally via blackmail, but no other legally permissible market participant will pay for the whistleblower's information other than the Service.¹⁸⁴ 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.¹⁸⁵ It is only after the Service has chosen to pursue the tip and 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.¹⁸⁶ One might argue that a whistleblower is powerful because he or she 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.¹⁸⁷ The Service's consideration cannot be rights that the whistleblower already possesses.¹⁸⁸ The

¹⁸² 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/she would have otherwise had.

¹⁸³ See I.R.M. 25.2.2.3(1), *Submission of Information for Award under Sections 7623(a) or (b)*, (as amended Jun. 18, 2010) ("Individuals submitting information under section 7623(a) or (b) must complete IRS Form 211, *Application for Award for Original Information*").

¹⁸⁴ Other federal whistleblower programs provide compensation for tips; however, no other federal whistleblower program is tasked with compensating tips for reporting tax violations.

¹⁸⁵ See I.R.M. 25.2.2.5(1)(F), *Grounds for Not Processing Claims for Award*, (as amended Jun. 18, 2010) (Claims will not be processed "that upon initial review have no merit or that lack sufficient specific and credible information.").

¹⁸⁶ See Prop. Reg. § 301.7623-3(b)(1), 77. Fed. Reg. 74798 (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 Prop. Reg. § 301.7623-3(c)(3), 77. Fed. Reg. 74798 (Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062) (the whistleblower "will have 30 days...from the date of the preliminary award recommendation letter to respond to the preliminary award recommendation...").

¹⁸⁷ See 2-5 Corbin on Contracts § 5.8 (2013) ("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.'" (citing Law. Rep. 10 Ex. 153 (1875))).

¹⁸⁸ A contract requires bargained-for exchange. See 2-5 Corbin on Contracts § 5.1 (2013) ("The term

Service may argue that it provides consideration by giving a whistleblower access to a taxpayer's return information. However, Regulation § 301.6103(n)-2 gives the Service the discretion over whether it performs the disclosure,¹⁸⁹ which may also be insufficient consideration.¹⁹⁰ If the contract is, as the regulation states, "a written contract for services," then the Service's consideration is most likely payment for those services.¹⁹¹ Such a contract would be at odds with the most basic requirements of the § 7623(b) whistleblower program, namely compensation based on collected proceeds.¹⁹²

The contract could also implicate agency duties to cooperate and compensate a whistleblower,¹⁹³ which the Service is not incentivized to undertake.¹⁹⁴ The Service may

'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/she 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* 2-7 Corbin on Contracts § 7.1 (2013) ("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.").

¹⁸⁹ *See* 26 C.F.R. § 301.6103(n)-2 (b)(1) ("[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.").

¹⁹⁰ 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* 2-5 Corbin on Contracts § 5.28 (2013) ("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* 1-1 Corbin on Contracts § 1.17 (2013) ("As this term itself implies, an illusory promise is not a promise at 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.").

¹⁹¹ 26 C.F.R. § 301.6103(n)-2.

¹⁹² *See* I.R.C. § 7623(b). 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/when collection is obtained, that compensation under such a contract could be considered an illusory promise.

¹⁹³ 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* Restatement of Law, Third, 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 of Law, Third, 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. In particular, a principal has a duty of compensation to its agent. *See* Restatement of Law, Third, Agency § 8.13, comment d (2006) ("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

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 obligate the Service in a whistleblower contract.¹⁹⁵ 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.¹⁹⁶

While the code and regulation permit contractual arrangement between the whistleblower and the Service in section § 6103(n), a whistleblower contract exposes the Service to potential hazards. It follows that the Service may perceive a contract as too risky and too costly when compared its potential benefits.

2. The Administrative/Judicial Proceeding Exception

Another exception for disclosing taxpayer information to whistleblowers is found in § 6103(h)(4) and relates to administrative and judicial proceedings.¹⁹⁷ 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*

with its agent. *See* Restatement of Law, Third, Agency § 8.13, comment b (2006) (“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.”).

¹⁹⁴ The Service is currently attracting tips and cooperation of whistleblowers 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, regulations and IRM. Presumably, the Service created the regulatory and IRM restrictions to allow for discretion in the use of whistleblowers.

¹⁹⁵ 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* Fredrick W. Claybrook Jr., *Good Faith in the Termination and Formation of Federal Contracts*, 56 MD. L. REV. 555 (1997) (citing *United States v. Bostwick*, 94 U.S. 5, 66 (1876), *United States v. Winstar Corp.*, 116, S. Ct. 2432, 2464-65 (1996) (plurality opinion)). Good faith requires prevents a party from denying the benefit of the contract to the other party. *See* 6-26 Corbin on Contracts § 26.1 (2013) (“[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.” (citing *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933))). 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 eventual award payment. The existing statutory, regulatory and administrative process prevent the Service from making award guarantees.

¹⁹⁶ 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). The Service’s obligation to answer the inquiry is not clear. The regulation does not use mandatory language to describe the Service’s response. Rather, the regulation uses permissive language that the Service “may inform” the whistleblower of the claim’s status. On its face, the regulation does not obligate the Service to answer the whistleblower’s inquiry. 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).

¹⁹⁷ *See* 26 U.S.C. § 6103(h)(4).

taxpayer's civil or criminal liability."¹⁹⁸ 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. This exception could apply to a whistleblower award claim if (1) the whistleblower tip is sufficiently connected with determining the taxpayer's tax liability, and (2) the whistleblower's claim is a proceeding.

For the first factor, sufficient nexus to satisfy (h)(4) may be found within the language within § 7623, its regulations, and the Internal Revenue Manual. The Service has taken the position that, under § 7623, whistleblower awards may only be paid from proceeds collected from a taxpayer "by reason of information provided."¹⁹⁹ Collected proceeds are produced only from the assessment and collection of tax liability, interest or penalties from a taxpayer.²⁰⁰ 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."

As for the second factor, the Service has repeatedly taken the position that a whistleblower claim can result in an administrative proceeding.²⁰¹ 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.²⁰² If the filing a whistleblower claim or tip marks the beginning of an administrative proceeding, then subsequent actions in the proceeding, including the claim investigation, appears to fall within the exception. More recently proposed regulations identify much later events as the trigger for an administrative proceeding.²⁰³ For § 7623(b) claims,²⁰⁴ the Proposed

¹⁹⁸ See 26 U.S.C. § 6103(h)(4) (emphasis added).

¹⁹⁹ 26 C.F.R. § 301.7623-1(a)(2).

²⁰⁰ See I.R.C. § 7623(b)(1). See also *supra* note 48 and accompanying text.

²⁰¹ See I.R.M. 25.2.2.8 *Whistleblower Award Administrative Proceeding* (as amended Jun. 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."); Prop. Reg. § 301.7623-3(b)(1), 77. Fed. Reg. 74798 (Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062) ("The whistleblower administrative proceeding described in paragraphs (b)(1) and (2) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter."); Prop. Reg. § 301.7623-3(c), 77. Fed. Reg. 74798 (Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062) ("The whistleblower administrative proceeding described in paragraphs (c)(1) through (6) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter.").

²⁰² See I.R.M. 25.2.2.8 *Whistleblower Award Administrative Proceeding* (as amended Jun. 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.").

²⁰³ The proposed regulations make a distinction between the claims filed under § 7623(a) and § 7623(b). See Prop. Reg. § 301.7623-3, 77. Fed. Reg. 74798 (Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062).

²⁰⁴ 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 under § 7623(a) is not an administrative proceeding. Only the recommendation of an award amount rises to the level, under the Proposed Regulations. See Prop. Reg. § 301.7623-3(b)(1), 77. Fed. Reg. 74798 (Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062).

Regulations state that an administrative proceeding commences when the Service issues a preliminary award recommendation or an award denial letter.²⁰⁵

The Service has not explained its reasons for proposing a later date, but a 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 earlier availability to challenge an award determination in Tax Court.²⁰⁶ By postponing the administrative proceeding start, 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.²⁰⁷ If the Service had interpreted the start of a whistleblower administrative proceeding differently, this exception could have permitted disclosure of 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 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

²⁰⁵ See Prop. Reg. § 301.7623-3(c), 77 Fed. Reg. 74798 (Dec. 18, 2012) (corrected on Feb. 5, 2013 at 78 Fed. Reg. 8062).

²⁰⁶ Section 7623(b)(4) gives whistleblowers the right to appeal to Tax Court "any determination regarding an award." I.R.C. § 7623(b)(4). A determination can be an award, denial of an award, and even a refusal to issue an award or denial. See I.R.C. § 7623(b)(4) ("any determination regarding an award"); *Cooper v. Commissioner*, 135 T.C. 70 (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 *Insigna v. Commissioner* (T.C. Mar. 13, 2013) (No. 4609-12W) ("[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 defacto 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.

²⁰⁷ 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 WHISTLEBLOWER OFFICE FY 2012 REPORT, *supra* note __ and accompanying text.

laws.”²⁰⁸ 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.”²⁰⁹ 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.²¹⁰ 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 2012 Deputy Commissioner’s Memo, presumably relies on the § 6103(k)(6) investigative purpose exception when it encouraged whistleblower debriefing.²¹¹

4. Consequences and Taxpayer Privacy

Similar to the Fourth Amendment analysis previously discussed, violations of taxpayer privacy are unlikely to result in a thwarted examination.²¹² 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.²¹³ The Service’s reluctance to disclose to whistleblowers is likely related to the inability to control any subsequent disclosure by a whistleblower and 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

²⁰⁸ 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.”).

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

²¹⁰ 26 C.F.R. § 301.6103(k)(6)-1(a).

²¹¹ See Miller Memo, *supra* note ____.

²¹² See *United States v. Orlando*, 281 F.3d 586, 596 (6th Cir. Tenn. 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, 7-8 (S.D.N.Y. Sept. 10, 2008) (stating that courts have created additional remedies for taxpayer privacy violations because Congress has already provided civil and criminal remedies).

²¹³ 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), Apr. 15, 2013, <https://www.jct.gov/publications.html?func=startdown&id=4514>.

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, “publicity is a two-edged sword.”²¹⁴ Publicity may help or harm any particular Service investigation; however, disclosure of return information generally runs contrary to the Service’s culture.²¹⁵

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.²¹⁶ Violation of taxpayer privacy rights may lead to criminal or civil penalties as well as dismissal from employment.²¹⁷ Aggrieved taxpayers may also file suit against the Service for civil damages when their returns or return information is improperly disclosed.²¹⁸ Perhaps creating an even greater incentive within the Service to protect taxpayer privacy, § 7213(a)(1) authorizes criminal penalties for a Service employee’s willful disclosure of return information.²¹⁹ 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 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 mild legal obstacles

²¹⁴ See Sullivan, *supra* note __ at 91.

²¹⁵ See *id.* at 90 (quoting Whitlock as stating “the IRS puts a premium on protecting confidentiality”).

²¹⁶ Courts have also upheld Service’s zero tolerance policy for breaches of taxpayer privacy as well as employment dismissals. See *Powers v. Department of the Treasury*, 63 Fed. Appx. 480,48 (U.S. App. 2003)(Service employee was fired for repeatedly accessing confidential taxpayer information without authorization.) See also *Albritton v. Department of the Treasury*, 287 Fed. Appx. 852, 853-854 (U.S. App. 2008) (Albritton was a former Service employee fired for accessing taxpayer information to locate her bipolar son and the ex-husband of her niece. The court acknowledged 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 taxpayer’s rights.”).

²¹⁷ See I.R.C. § 7213 and § 7431.

²¹⁸ See I.R.C. § 7431 (a)(1) (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.”).

²¹⁹ See I.R.C. § 7213(a)(1) (It is 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...”).

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 tax whistleblower 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. The following Part suggests specific improvements to the Service's debriefing policies for more efficient tax enforcement.

A. The Service's Definition of Debriefing

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, 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."²²⁰ 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,²²¹ debriefing is an administrative procedure ensuring legality of the whistleblower's information and apprising the whistleblower of the Service's policies.²²² 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.²²³ 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 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 tremendously useful to the Service as it seeks to remedy systemic information

²²⁰ See Lee A. Shepard, *Whistleblower Officials Talk to Tax Haven Professionals*, 135 TAX NOTES 811 (May 14, 2012) (quoting Stephen Whitlock).

²²¹ This statement is based upon the 2010 Debriefing Checksheet.

²²² See I.R.M. Exhibit 25.2.2-4 *Debriefing Checksheet* (as amended Jun. 18, 2010).

²²³ See *id.*

asymmetry. The utility of debriefing may appear only after the Service staff has performed its due diligence of 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 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 veracity of the whistleblower, which may be useful as the Service's 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. 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. 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. It would rather be a clear and thorough statement of law and policy that allows the Service to disclaim knowledge or acquiescence in any subsequent whistleblower search.²²⁴

The Debriefing Checksheet's current admonishment that a whistleblower should not

²²⁴ 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.

misinterpret a debriefing question as a request for the whistleblower to acquire more information is a nod towards avoiding tainted subsequent searches but 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 validate a whistleblower, his/her contribution, and instill in the whistleblower the impression that the Service will attempt to act upon the whistleblower's 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. Social science research suggests that 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, tips attributes, and timing. This information would allow the Service to analyze its current stream of tip 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 to 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 an employee whistleblower to gain insight and explanation of an employer's tax transactions and develop an understanding the complexities of underlying tax transactions and taxpayer workpapers. Expanding debriefing in this fashion will improve the efficiency of the Whistleblower 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 imperative 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 resource-intensive tips. 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 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 2012 Miller Memo set timeframes for reviewing whistleblower claims.²²⁵ Specifically, the Memo set 90-day processing times during specific steps in the review of a whistleblower claim. The Memo suggests that the Service should take not more than 90 days for each of the following steps: (1) conduct an initial evaluation,²²⁶ (2) subject matter expert evaluation of the claim,²²⁷ and (3) notify a whistleblower regarding final award determination.²²⁸ Currently, the 90-day timeframes are not being met. The current averages are 131 days, 299 days, and 285 days, respectively.²²⁹ Because the Service never established baselines and has not published recent revenue, timing or efficiency comparators, it is difficult to determine whether 90-day benchmarks are appropriate for these activities. Moreover, the 2012 Memo's timeframes present aspirational goals, but there is no accountability to ensure these timeframes are met.

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 whistleblower policy can also be used beyond debriefing. The Service has, at its disposal, a potentially powerful enforcement mechanism in the form of

²²⁵ See Miller Memo *supra* note ____.

²²⁶ See *id.*

²²⁷ See *id.*

²²⁸ See *id.*

²²⁹ See Jeremiah Coder, *IRS Sets Timelines for Action on Whistleblower Claims*, TAX NOTES (Jun. 25, 2012) (citing WHISTLEBLOWER OFFICE FY 2011 REPORT).

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 perceive 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 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. The Service should 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 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, timings 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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