

# A RESPONSE: SOMETIMES LOST OPPORTUNITIES STRENGTHEN THE TAX SYSTEM

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## INTRODUCTION

The subject of tax whistleblowers has recently received more attention from academic writers as the result of legislative tinkering that has expanded both the financial incentives for individuals to file tips with the IRS and the legal rights provided in such situations.<sup>1</sup> This expansion has created new opportunities for informants to pursue claims, while conversely creating risks for taxpayers. Many of the articles on this subject have been written by professors or practitioners steeped in tax law, with a focus either on the pros and cons of the statutory revisions or on the procedural requirements under the new IRS Whistleblower Program (Program).<sup>2</sup> The article *Lost Opportunities: The Underuse of Tax Whistleblowers*, by Professors Karie Davis-Nozemack and Sarah J. Webber, however, uses a somewhat different approach to ponder the new tax whistleblower framework by

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1. See, e.g., Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447 (2010); Dennis J. Ventry Jr., *Stitches for Snitches: Lawyers as Whistleblowers*, 50 U.C. DAVIS L. REV. (forthcoming Apr. 2017).

2. See, e.g., Jeremiah Coder, *The Whistleblower Whipsaw Process*, 2013 TAX NOTES TODAY 5201, Mar. 6, 2013, <http://www.taxnotes.com/tax-notes-today/practice-and-procedure/news-analysis-whistleblower-whipsaw-process/2013/03/06/9781>; George Clarke & Kathryn Morrison Sneade, *Whistleblowers: Latest Danger to Privilege, Work Product in Tax Department*, BLOOMBERG BNA: DAILY REPORT FOR EXECUTIVES (Oct. 20, 2011), [http://dailyreport.bna.com/drpt/7010/split\\_display.adp?fedfid=23146450&vname=dernotallissues&wsn=928676000&searchid=28805911&doctypeid=1&type=date&mode=doc&split=0&scm=7010&pg=0](http://dailyreport.bna.com/drpt/7010/split_display.adp?fedfid=23146450&vname=dernotallissues&wsn=928676000&searchid=28805911&doctypeid=1&type=date&mode=doc&split=0&scm=7010&pg=0); Brian H. Mahany, *The IRS Whistleblower Program: What CPAs Should Know*, J. OF ACCOUNTANCY, Aug. 1, 2009, <http://www.journalofaccountancy.com/issues/2009/aug/20091526.html>.

employing concepts more often found in the social sciences, delving into the psyche of these whistleblowers and addressing operational efficiencies.<sup>3</sup> The authors' articulated desire for certain changes to the Program offers an interesting perspective into the ongoing debate over the extent to which the IRS should utilize informants in administering the statutory tax whistleblower program. The authors' claim that the current IRS stance on numerous issues regarding the Program is causing the agency to lose out on opportunities to fully take advantage of tax whistleblowers.<sup>4</sup> But glossed over is the fact that adopting these opportunities into policy may put at risk the strong legislative policy for taxpayer privacy that undergirds our tax system. Is a more robust whistleblower program really worth that risk?

The tax practitioner casually reading the scholarly article by Professors Davis-Nozemack and Webber because of interest in the topic might expect a number of fireworks based on a tagline that promises to "expose" the IRS's performance in the whistleblower arena.<sup>5</sup> Instead, readers will find a thoughtful discussion of human behavior that ultimately might determine the extent of Congress's success with whistleblower reforms. After all, the potential for high-dollar financial rewards may be a strong initial incentive to draw individuals to the whistleblower program outlined in Internal Revenue Code (IRC) § 7623, but mishandling by the IRS or an onset of difficult obstacles (procedural or otherwise) could overwhelm the long-term stability of the program by turning potential (or even current) informants away.<sup>6</sup> The authors' focus on these issues is understandably important, but may leave many tax practitioners with serious practical concerns that are not adequately discussed.

### 1. THE AUTHORS' MAIN CONTENTIONS

The authors correctly characterize the mood of many whistleblowers, and the specialized tax practitioners who represent them, when they describe the Program as a "meandering path to nowhere."<sup>7</sup> However, that descriptive statement implies a normative judgment that the Program should result in more rewards by the IRS than is currently happening. Many practitioners who represent business taxpayers will likely object to the authors' perceived bias in wanting to see more payments to whistleblowers under the award program set forth in IRC § 7623(b).<sup>8</sup> They

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3. Karie Davis-Nozemack & Sarah J. Webber, *Lost Opportunities: The Underuse of Tax Whistleblowers*, 67 ADMIN. L. REV. 321 (2015).

4. *Id.* at 323.

5. *Id.* at 321.

6. See Internal Revenue Code, 26 U.S.C. § 7623 (2012).

7. Davis-Nozemack & Webber, *supra* note 3, at 323.

8. 26 U.S.C. § 7623(b); Davis-Nozemack & Webber, *supra* note 3, at 330–31.

will have concerns that the administrative tax examination process must properly verify an informant's submission; the nuances of the applicable tax rules to a particular taxpayer—both technical and procedural—demand that great care be taken in determining whether a claim has merit and is the proper source for any future tax collection by the IRS.

There are many policy aspects to the Program that the authors leave untouched.<sup>9</sup> While Congress may want to shrink the tax gap by encouraging those with better knowledge than the IRS to blow the whistle on non-compliant taxpayers, the risk to the tax system is a shifting of taxpayer mentality from the current bedrock principle of voluntary compliance to one of paranoia. If business taxpayers and high-net-worth individuals begin to believe that their advisers, employees, and friends all have a chance to personally profit by making claims that more tax is due than was reported, there is a risk that reliance on and use of tax professionals will diminish. Cutting such professional advisers out of the planning and preparation process will only diminish tax compliance overall. Such a result would be an unfortunate and perhaps unintended consequence of Congress's tinkering, but perhaps not an unlikely outcome when large financial incentives are in play.

The authors' identification of deficiencies in the Program as primarily the result of IRS procedures substantially oversimplifies the reality.<sup>10</sup> Although outside observers may blame the IRS for a number of procedural impediments put into place in dealing with whistleblower claims, the overall issue of tax whistleblowers reveals friction between fundamental elements of our tax system that are much broader than simply discussing disputed IRS procedures. For example, our nation's tax system puts a high value on taxpayer privacy.<sup>11</sup> In contrast to the tax systems of other countries (and early proposals to make tax returns public),<sup>12</sup> Congress has

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9. See WHISTLEBLOWER—INFORMANT AWARD, IRS (last updated Sept. 1, 2016) (explaining that “the IRS Whistleblower Office pays money to people who blow the whistle on persons who fail to pay the tax that they owe” and denoting the program rules), <https://www.irs.gov/uac/whistleblower-informant-award>.

10. Davis-Nozemack & Webber, *supra* note 3, at 323.

11. See, e.g., TAXPAYER BILL OF RIGHTS: #8, THE RIGHT TO CONFIDENTIALITY, IRS (last modified Mar. 22, 2016), [https://www.irs.gov/taxpayer-bill-of-rights/taxpayer-bill-of-rights-the-right-to-confidentiality?\\_ga=1.224758490.1908537845.1476449121](https://www.irs.gov/taxpayer-bill-of-rights/taxpayer-bill-of-rights-the-right-to-confidentiality?_ga=1.224758490.1908537845.1476449121) (“Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer return information.”).

12. See David Lenter, Joel Slemrod & Douglas Shackelford, *Public Disclosure of Corporate Tax Return Information: Accounting, Economics, and Legal Perspectives*, 56 NAT'L TAXJ. 803, 807–10 (2003) (outlining the history of the publicity of tax returns).

enacted statutes that significantly limit the IRS's ability to disclose a taxpayer's tax return data.<sup>13</sup> While the general restrictions in IRC § 6103 do provide for a number of exceptions,<sup>14</sup> mostly related to enforcement, taxpayers generally expect that any information given to the IRS will be kept confidential from other individuals. Whistleblowers, though, sometimes have goals that erode respect for tax return privacy. When the motivation for making a whistleblower claim is revenge, humiliation, or simply antagonism, disclosure of the target taxpayer's information may become an issue. In spite of clear rules governing taxpayer confidentiality as applied to the IRS, whistleblowers may file documents with federal and state courts that are un-redacted or make public allegations and disclose financial information regarding the taxpayer. These events are outside the control of the IRS but have a significant impact on tax administration and taxpayer attitudes toward the tax system.

The authors strongly favor increased IRS reliance on tax whistleblowers as a means to increase tax compliance at a time when the IRS is receiving lower budget appropriations and experiencing significant decreases in personnel.<sup>15</sup> They focus much of the article's attention on their claim that the IRS underutilizes whistleblowers in analyzing and pursuing claims of unpaid taxes, especially with regard to the available debriefing procedures.<sup>16</sup> They charge that the IRS's perceived inept response toward debriefing has hindered the agency's efficient leverage of tips and integration of informant information into the enforcement process.<sup>17</sup> Specifically, the authors believe that deeply entrenched critical attitudes among IRS personnel toward the whistleblower program, as well as a burdensome administrative process and concern about legal obstacles, are greatly limiting the Program's success.<sup>18</sup>

Calling tax whistleblowers a "critical tool" of the IRS enforcement process probably overstates the congressional intent in enacting IRC § 7623.<sup>19</sup> Certainly, some whistleblowers will have good information on tax noncompliance by a taxpayer, and review by IRS personnel and follow-up to collect proper taxes is good for tax system administration. Enforcing a

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13. See, e.g., 26 U.S.C. §§ 6103, 6110 (2012).

14. 26 U.S.C. § 6103(d)–(n).

15. See Davis-Nozemack & Webber, *supra* note 3, at 324; see also John A. Koskinen, Comm'r, IRS, Remarks before the New York State Bar Association Section of Taxation (Feb. 24, 2015), <https://www.irs.gov/PUP/newsroom/Commissioner%20Koskinen%20Remarks%20at%20the%20NYSBA%20on%20Feb%2023%202015.pdf>.

16. See Davis-Nozemack & Webber, *supra* note 3, at 338, 361–66.

17. *Id.*

18. *Id.* at 366.

19. See *Id.* at 326; see also 26 U.S.C. § 7623 (2012).

taxpayer's responsibility under the tax code supports the public fisc, and public awareness of tax enforcement measures encourage other taxpayers to continue their voluntary compliance.<sup>20</sup> Unfortunately, model examples of the Program working can break down in practice. Sometimes the problem might be an informant's improper motive for a whistleblower claim, whether it be intended for embarrassment, harassment, revenge, or something else. At worst, a target taxpayer will be subject to an unfounded claim that involves the IRS spending precious resources investigating a submission, and the taxpayer paying to defend against it, with an ultimate determination that nothing improper occurred. Simple misunderstandings of a taxpayer's situation are also likely to occur; what may look like tax noncompliance to an outsider may turn out to in fact be legitimate tax reporting positions because of circumstances unknown to an informant, or favorable application of the tax law that is appropriate in the particular situation.

## II. WHISTLEBLOWERS ARE NOT SUBSTITUTE AGENTS

What the academic perspective regarding tax whistleblowers may overlook is the practical motivations at work. It is easy to look upon tax informants as potential substitutes for enforcement personnel (i.e., IRS agents) who can cheaply identify tax cheating and "provid[e] a roadmap for prosecution."<sup>21</sup> But should individuals really take on the role of tax system vigilantes in order to boost tax enforcement because the IRS is facing budget constraints? Analogizing the role of tax informants to informants in the criminal context (e.g., drugs, terrorism, etc.), as the authors do, is probably inappropriate because our tax system is built on voluntary compliance, not a penal structure.<sup>22</sup> There are certainly instances where tax evasion is criminal, and the tax code and criminal laws appropriately provide avenues to prosecute individuals engaging in such activity.<sup>23</sup> Ultimately, expecting tax whistleblowers to fill in the enforcement gap in everyday circumstances creates a dangerous platform that would radically alter the operation of the tax system if taken seriously by both the IRS and the public.

It is likely true, as the authors point out, that a successful whistleblower program will beget more whistleblower claims; the converse is also true.<sup>24</sup> Informants are not likely to take the time to file a submission with the IRS if

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20. See generally Jeffrey A. Dubin, *Criminal Investigation Enforcement Activities and Taxpayer Noncompliance*, IRS (2004), <https://www.irs.gov/pub/irs-soi/04dubin.pdf>.

21. Davis-Nozemack & Webber, *supra* note 3, at 327.

22. *Id.*

23. See 26 U.S.C. §§ 7201–7203, 7206.

24. Davis-Nozemack & Webber, *supra* note 3, at 330–31.

they perceive the agency as failing to act on valid claims, although there is probably no such deterrent to spurious claims continuing to arise where revenge or harassment is a motivating factor.<sup>25</sup>

Supporters of a robust tax whistleblower program frequently cite the higher-than-average revenue collection from whistleblower claims as a justification for the whistleblower program, but this statistic on its own should not sustain continued backing of the program.<sup>26</sup> As recent investigative journalism into the federal asset forfeiture program used by local law enforcement agencies has highlighted, reaping financial windfalls because of hard-edged use and interpretation of existing enforcement mechanisms does not make such practices right.<sup>27</sup> Similarly, adoption of a robust whistleblower program solely because of the attraction of a low-cost, high-reward revenue stream may overlook and minimize the long-term risks to the foundational principles of our tax system.

After citing the economic reasons for a powerful tax whistleblower program, the authors focus on a specific procedural component of the IRC § 7623 process as needing improvement: the claims in an informant's submission are first processed by the IRS Whistleblower Office, then sent out to the appropriate agency operating division for evaluation.<sup>28</sup> The authors point to IRS cultural resistance to whistleblowers and limited involvement by informants in the evaluation process as key obstacles to the Program's success.<sup>29</sup> Yet, there are strong reasons for questioning expansion of the controversial role of informants in the examination process in the manner championed by whistleblower advocates. At some level, the existing tension may be good for the tax system.

Hopefully, the IRS will act on meritorious whistleblower claims, resulting in the proper collection of taxes owed; and the uneven fashion in which whistleblowers are utilized after submitting claims to the IRS may be good for the tax system. It should not be too easy for an "outsider" who has no personal stake in a tax collection action (other than the incentive of potential financial reward from a successful claim) to influence the IRS's activity toward any particular taxpayer. While the frustration some whistleblower practitioners and academics have toward the bottlenecks currently present in the claim evaluation process is understandable, loosening up the process to make informants more active participants may

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25. *See id.*

26. *See id.*

27. *See* Radley Balko, Op-Ed., *The Booming Business of Asset Forfeiture*, WASH. POST (Nov. 12, 2005), <https://www.washingtonpost.com/news/the-watch/wp/2015/11/12/the-booming-business-of-asset-forfeiture/>.

28. Davis-Nozemack & Webber, *supra* note 3, at 333.

29. *Id.* at 334–36.

well be a cure worse than the disease if it results in unwarranted enforcement activity.<sup>30</sup> If an IRS subject matter expert or reviewing agent has legitimate doubts about a particular whistleblower submission, should their hesitance and discretion be overcome by an eager informant? The decisions by the IRS so far seem to reflect a guarded and restrained approach in the negative to this question. Although that may upset some, administrative caution may be the most appropriate response for good tax system administration.

The authors forcefully urge the IRS to make the whistleblower debriefing process more extensive.<sup>31</sup> They argue that a more inclusive debriefing process would allow the IRS to better ascertain the informant's claim, flesh out potential legal issues involved in the relationship between the informant and target taxpayer, and permit "expert-like guidance" to the IRS in examining complex tax situations.<sup>32</sup> However, prioritizing investigative assistance in the whistleblower context, as opposed to the general reluctance the authors acknowledge exists in typical examinations to maintain taxpayer privacy protection, lacks any demonstrative support.<sup>33</sup> The need to balance a taxpayer's statutory right to privacy and his or her Fourth Amendment right protection against unreasonable search and seizure with a whistleblower's right to anonymity will create severe legal and administrative challenges in a more robust whistleblower debriefing process.<sup>34</sup>

Whistleblower representatives may be disappointed in the seeming incongruence of the favorable intention to consider a more robust debriefing process expressed by a high-level IRS official with the fact that in reality debriefing is hampered by the lack of specific implementing guidelines at an operational level.<sup>35</sup> Taxpayers, meanwhile, can be thankful that current IRS procedures respect and preserve their privacy as a fundamental policy.<sup>36</sup>

The authors suggest that the IRS can work around the tricky problems of protecting a taxpayer's privacy and Fourth Amendment right against

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30. *Id.* at 336–37.

31. *Id.* at 338, 341–42.

32. *Id.* at 338.

33. *Id.* at 341.

34. U.S. CONST. amend. IV.

35. See Memorandum from Steven T. Miller, Deputy Comm'r for Servs. and Enft, IRS (June 20, 2012), <http://www.tax-whistleblower.com/resources/field-directive-dated-june-20-2012.pdf>.

36. The IRS adopted the Taxpayer Bill of Rights in 2014, enumerating ten rights of taxpayers in dealing with the IRS; the eighth right is "The Right to Confidentiality." See TAXPAYER BILL OF RIGHTS: #8, THE RIGHT TO CONFIDENTIALITY, *supra* note 11.

unreasonable search and seizure while simultaneously protecting a whistleblower's anonymity.<sup>37</sup> In most situations, it is unlikely that a whistleblower's actions would be treated as an extension of the federal government in considering whether the IRS has violated a taxpayer's Fourth Amendment rights. There have been occasions on which tax informants have claimed that government agents pressured them to obtain a taxpayer's internal records, implicating possible constitutional concerns.<sup>38</sup> The Article notes, though, that courts often overlook government involvement in a whistleblower's activity, thus allowing agencies wide latitude in collecting and considering information.<sup>39</sup> The added wrinkle for tax whistleblowers is their ongoing financial interest in infringing on a taxpayer's privacy right. The fact that the Program ultimately exists to collect unpaid taxes, and uses financial awards to incentivize informants to provide information to that end, could potentially push judges into viewing such activity as the government making informants into de facto agents in order to achieve tax administration goals.<sup>40</sup> This area of the law may become more fleshed out in the future, depending on the ultimate success of the Program and resolution of potential taxpayer challenges to IRS actions based on underlying whistleblower activity.

Opponents to the arguments proffered by the authors may well analogize the whistleblower situation to the issues posed in a similar situation at the center of recent controversy: IRS use of outside contractors in the examination process.<sup>41</sup> The ongoing legal battle over the IRS's use of a private law firm to assist in an audit of a taxpayer's transfer pricing practices creates similar tensions to those found in the Program.<sup>42</sup> Whistleblower advocates say that using informants helps the IRS obtain better enforcement results, much in the same way that the IRS has argued that contracting with a private law firm allows it to use the firm's expertise

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37. See Davis-Nozemack & Webber, *supra* note 3, at 342–51.

38. See Jeremiah Coder, *A Whistleblower's Cautionary Tale*, 139 TAX NOTES 695 (2013), <http://www.taxnotes.com/tax-notes-today/criminal-violations/tax-analysts-exclusive-whistleblowers-cautionary-tale/2013/05/09/21636>.

39. Davis-Nozemack & Webber, *supra* note 3, at 343–44.

40. See IRS, *Whistleblower – Informant Award*, (last modified Sept. 16, 2016), <https://www.irs.gov/uac/whistleblower-informant-award/> (“The IRS Whistleblower Office pays money to people who blow the whistle on persons who fail to pay the tax that they owe.”).

41. See Matthew R. Madara, *Microsoft Granted Evidentiary Hearing in IRS Summons Dispute*, 2015 TAX NOTES TODAY 14,367, Dec. 2015, <http://www.taxnotes.com/tax-notes-today/intangible-assets/microsoft-granted-evidentiary-hearing-irs-summons-dispute/2015/06/19/14675661?>

42. *Id.*



to reach the best case resolution.<sup>43</sup> Just as members of the tax bar express deep concern that incorporating non-government personnel into the examination process introduces significant privacy and ethical issues,<sup>44</sup> so too some practitioners believe that expanded participation of whistleblowers as “experts” in the claims evaluation process creates unhealthy risks for taxpayer rights.<sup>45</sup> The IRS’s use of third-party contractors will undoubtedly be resolved in some fashion through litigation unless Congress acts first to address the issue. Comparatively, the narrow structure of IRC § 7623 gives the IRS greater leeway in determining what the administrative process should look like for giving access to whistleblowers.<sup>46</sup>

The thought that whistleblowers might have a hidden “seat at the table” during the course of an exam is troubling to taxpayers and their professional advisers.<sup>47</sup> If the IRS debriefing process is expanded to allow informants the opportunity to provide key information during its investigation, it could shift the IRS from a neutral arbiter of the tax code into a more aggressive advocate out of sync with our nation’s historical approach to tax system administration. Most whistleblowers have an agenda: to get paid an award.<sup>48</sup> Allowing whistleblower advocacy to infiltrate the examination process could be seen as corrupting the traditional systematic review of a taxpayer’s return positions by creating opportunities for IRS personnel to view circumstances and take positions that would be a more forceful interpretation of existing tax rules because of a whistleblower’s influence.

While theoretical at this point, such a concern is highly relevant in

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43. See Amanda Athanasiou, *Microsoft Spars with IRS Over Retention of Quinn Emanuel*, 2015 TAX NOTES TODAY 19,485, Dec. 2015, <http://www.taxnotes.com/tax-notes-today/litigation-and-appeals/microsoft-spars-irs-over-retention-quinn-emanuel/2015/08/26/15225741>; Roger A. Pies, *IRS Prerogative to Hire Outside Counsel*, 148 TAX NOTES 553, 554–55 (2015), at 554–55, <http://www.taxnotes.com/tax-notes/audits/irs-prerogative-hire-outside-counsel/2015/08/03/15078121?>

44. See Ryan Finley, *The IRS Doesn’t Need Outside Law Firms, Observers Say*, 2015 TAX NOTES TODAY 24,387, Dec. 2015, <http://www.taxnotes.com/tax-notes-today/transfer-pricing/irs-doesnt-need-outside-law-firms-observers-say/2015/11/04/17523001?>

45. See, e.g., Michael P. Dolan & Timothy J. McCormally, *Which Way the Wind Blows: Mitigating Whistleblowing Risk*, 139 TAX NOTES 1537, 1537 (2014), <http://www.taxnotes.com/tax-notes/fraud-civil-and-criminal/which-way-wind-blows-mitigating-whistleblowing-risk/2013/06/24/1219006>.

46. Internal Revenue Code, 26 U.S.C. § 7623 (2012).

47. Cf. Kwon, *supra* note 1, at 459.

48. See Jeremiah Coder, *Speakers Detail Frustration with IRS Whistleblower Regs*, 2013 TAX NOTES TODAY 8683, Dec. 2013, <http://www.taxnotes.com/tax-notes-today/compliance/speakers-detail-frustrations-irs-whistleblower-regs/2013/04/11/16196?>

directing the IRS's actions should it seriously consider what an expanded debriefing process might do to tax system administration. If taxpayers start to believe that the IRS is unfairly carrying out examinations and following the motivations of whistleblowers, the IRS's current standing in the eyes of the public and lawmakers could be damaged.

The authors believe that expanded debriefing opportunities would help balance the "inherent structural information asymmetry" present in the IRS exam process.<sup>49</sup> It is generally true that the taxpayer is in more control of the facts and documents than the IRS during the course of an investigation, but the IRS already has broad investigation tools at its disposal through the use of summonses to adequately obtain relevant information.<sup>50</sup> Reliance on a whistleblower might speed up the examination process, but a sufficiently detailed whistleblower submission should, in most cases, be sufficient to reach the same result with the IRS using its enforcement tools to build upon the informant's claims.

### III. A CAUTIOUS RESPONSE

#### *A. Taxpayer Confidentiality Is a Bedrock Principle*

The strict prohibitions set forth in IRC § 6103 against disclosure of tax return information have been critical for maintaining strong compliance with the tax code.<sup>51</sup> The confidence that taxpayers have that their information remains secure and confidential helps foster the self-assessment model on which the U.S. tax system is based.

The potential misuse of a taxpayer's personal records or private information is a real threat if it is shared with a whistleblower during the exam as part of a debriefing process meant to allow greater assistance by the informant.<sup>52</sup> There have been very public instances in which whistleblowers have used court filings and the press to harass and cause reputational harm to taxpayers.<sup>53</sup> In many instances, there is no effective

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49. Davis-Nozemack & Webber, *supra* note 3, at 362–63.

50. See 26 U.S.C. §§ 7602, 7603, 7604 (2012).

51. 26 U.S.C. § 6103.

52. See Dolan & McCormally, *supra* note 45, at 1541.

53. One recent example is the Internal Revenue Code § 7623 claim and qui tam suit brought against The Vanguard Group by a former in-house tax professional. See *New York ex rel. Danon v. Vanguard Grp., Inc.*, 2015 N.Y. Misc. LEXIS 4239 (N.Y. Sup. Ct. Nov. 13, 2015), *vacated by* *Danon v. Vanguard Grp., Inc.*, 2016 U.S. Dist. LEXIS 67773 (E.D. Pa. May 23, 2016)). In *Insinga v. Commissioner*, another claim brought by an in-house employee, pleadings made to the Tax Court publicly revealed the identity of numerous corporate taxpayers and a foreign financial institution as the subject of a whistleblower claim. See *Petition for Whistleblower Action Under Code Section 7623(b)(4)* at 2, *Insinga v.*

restraint on a whistleblower's bad behavior regarding publicity of private tax matters.<sup>54</sup> A loss of taxpayer confidence in the security of their information could be devastating.<sup>55</sup>

*B. Efficiency Should Not Be the Primary Objective*

Pursuing greater program efficiency through the use of informant debriefing, while laudable, results in a skewed vision of IRS goals. Efficient use of IRS resources, including in the Program, is absolutely necessary given the budget and operational challenges facing the IRS.<sup>56</sup> But framing the discussion in this way results, perhaps, in the whistleblower community holding too much sway in the direction of IRS enforcement activities. Incentivizing personnel to act on promising informant leads could result in whistleblowers setting too much of the IRS's administrative direction.

The need to treat taxpayer privacy as paramount in our tax system will not keep the Program from being successful. Indeed, there is a positive outcome that can be achieved in spite of the IRS's cautious handling of IRC § 7623(b) claims.<sup>57</sup> Informants and their representatives can work within the current restrictions by enhancing their efforts to produce informative, detailed submissions upfront. In many circumstances, an informed submission can set up the IRS to adequately process, investigate, and conclude an inquiry based on an IRC § 7623(b) claim alone, without needing to resort to follow-up communications with an informant that carries the aforementioned risks.

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Commissioner, No. 4609-12W (T.C. 2012); *see also* IRS, TAXPAYER ADVOCATE SERVICE, NATIONAL TAXPAYER ADVOCATE, 2015 ANNUAL REPORT TO CONGRESS, VOL. I 157 n.85 (2015) ("At least two whistleblowers shared with the media confidential taxpayer information they acquired pursuant to informal discovery during Tax Court litigation") [hereinafter 2015 CONGRESSIONAL REPORT].

54. *See* IRS, IRS WHISTLEBLOWER PROGRAM FISCAL YEAR 2015 ANNUAL REPORT TO THE CONGRESS, 9–10 (2016); DEPT. OF TREAS., GENERAL EXPLANATIONS OF THE ADMINISTRATION'S FISCAL YEAR 2016 REVENUE PROPOSALS, 250–251 (2015).

55. *See* 2015 CONGRESSIONAL REPORT, *supra* note 53, at 143 ("As Congress is aware, voluntary compliance may be undermined if taxpayers perceive the IRS is not adequately guarding their tax information"); DEPT. OF TREAS., REPORT TO THE CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS, VOL. I, STUDY OF GENERAL PROVISIONS 34 (2000) (stating that "taxpayers who view the IRS as a resource for a variety of other interests will be less inclined to voluntarily turn over sensitive financial information out of fear of where it might ultimately land").

56. Davis-Nozemack & Webber, *supra* note 3, at 324–26.

57. Internal Revenue Code, 26 U.S.C. § 7623(b) (2012).

*C. Let Congress Make the Hard Policy Calls*

Allowing informants to act as quasi-experts to the IRS during an examination prompted by a whistleblower claim is a policy decision that would be best made by lawmakers. If Congress believes that our tax system would benefit from the active use of non-IRS personnel in the exam process, then lawmakers can make the statutory changes necessary to put the IRS onto that path. But such an important decision, with the possibility to dramatically affect public attitudes and the consequent reaction to IRS tax enforcement measures, should not be forced on the IRS without more direction.

## CONCLUSION

It is imperative that the IRS Whistleblower Program be perceived as a fair and efficient component of tax administration, because there are meritorious informant claims that, when acted on, provide necessary enforcement of the tax laws. Delays and frustration may limit public interest in the Program for marginal cases where the investment of time and effort is just not worth any potential monetary reward. However, as evidenced by the few significant reward payments made by the IRS under IRC § 7623(b),<sup>58</sup> Congress's desire to create incentives for obtaining tips on high-dollar evasion and underreporting cases where a whistleblower is key to uncovering and collecting unpaid taxes will likely be successful in the long-run. Although the authors make an energetic academic case for increasing opportunities for tax whistleblowers to be engaged in the claim evaluation process,<sup>59</sup> keeping certain tax system fundamentals in mind may temper such advocacy. In order to maintain our robust voluntary compliance tax system, it is a better course of action for the IRS to stick to policies in the whistleblower claim process that err on the side of taxpayer confidentiality and due process at the expense of greater whistleblower involvement. It would be a poor trade-off to prioritize whistleblower claims if doing so results in less trust in the tax system and a decrease in overall compliance.

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58. See IRS, WHISTLEBLOWER PROGRAM FISCAL YEAR 2015 ANNUAL REPORT TO THE CONGRESS 11 (2015), [https://www.irs.gov/pub/whistleblower/WB\\_Annual\\_Report\\_FY\\_15\\_Final%20Ready%20for%20Commissioner%20Feb%208.pdf](https://www.irs.gov/pub/whistleblower/WB_Annual_Report_FY_15_Final%20Ready%20for%20Commissioner%20Feb%208.pdf).

59. Davis-Nozemack & Webber, *supra* note 3, at 366–67.