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Bounties for Bad Behavior: Rewarding Culpable Whistleblowers under the Dodd-Frank Act and Internal Revenue Code

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REWARDING CULPABLE WHISTLEBLOWERS UNDER THE
DODD-FRANK ACT AND INTERNAL REVENUE CODE

By: Jennifer M. Pacella

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ABSTRACT:

In 2012, Bradley Birkenfeld received a $104 million reward or “bounty” from the Internal Revenue Service (“IRS”) for blowing the whistle on his employer, UBS, which facilitated a major offshore tax fraud scheme by assisting thousands of U.S. taxpayers to hide their assets in Switzerland. Birkenfeld does not fit the mold of the public’s common perception of a whistleblower. He was himself complicit in this crime and even served time in prison for his involvement. Despite his conviction, Birkenfeld was still eligible for a sizable whistleblower bounty under the IRS Whistleblower Program, which allows rewards for whistleblowers who are convicted conspirators, excluding only those convicted of “planning and initiating” the underlying action. In contrast, the whistleblower program of the Securities and Exchange Commission (“SEC”) under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), which was modeled after the IRS program, precludes rewards for any whistleblower convicted of a criminal violation that is “related to” a securities enforcement proceeding. Therefore, because of his conviction, Birkenfeld would not have been granted a bounty under Dodd-Frank had he blown the whistle on a violation of the federal securities laws, rather than tax evasion. This Article will explore an area that has been void of much scholarly attention—the rationale behind providing bounties to whistleblowers who have unclean hands and the differences between federal whistleblower programs in this regard. After analyzing the history and structure of the IRS and SEC programs and the public policy concerns associated with rewarding culpable whistleblowers, this Article will conclude with various observations justifying and supporting the SEC model. This Article will critique the IRS’s practice of including the criminally convicted among those who are eligible for bounty awards by suggesting that the existence of alternative whistleblower incentive structures, such as leniency and immunity, are more appropriate for a potential whistleblower facing a criminal conviction. In addition, the IRS model diverges from the legal structure upon which it is based, the False Claims Act, which does not allow convicted whistleblowers to receive a bounty. In response to potential counterarguments that tax fraud reporting may not be analogous to securities fraud reporting, this Article will also explore the SEC’s recent trend of acting increasingly as a “punisher” akin to a criminal, rather than a civil, enforcement entity like the IRS. In conclusion, this Article will suggest that the SEC’s approach represents a reasonable middle ground that reconciles the conflict between allowing wrongdoers to benefit from their own misconduct and incentivizing culpable insiders to come forward, as such persons often possess the most crucial information in bringing violations of the law to light.
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I. INTRODUCTION

The public’s perception of whistleblowers has evolved drastically in recent years. Initially viewed as “snitches” or “rats” whose willingness to speak out was a sign of disloyalty to their colleagues, whistleblowers have increasingly emerged as heroes possessing the courage to address corporate wrongdoing.1 In 2002, Time Magazine named three whistleblowers as persons of the year — Sherron Watkins of Enron, Coleen Rowley of the FBI, and Cynthia Cooper of WorldCom, each of whom disclosed information pertaining to major corporate wrongdoing within their organizations. 2 More recently, in 2013, Time Magazine chose Natural Security Agency whistleblower Edward Snowden as runner-up for person of the year, naming him the “doomsayer of the information age.”

The emerging importance of whistleblowers as a source of essential information has changed the way in which such individuals are viewed by society. The role of whistleblowers in fraud detection is crucial, as insiders have the most accurate access to information about wrongdoing and the attempts of wrongdoers to hide their behavior.4 Many of the financial scandals of the twenty-first century stemmed from claims that boards of directors were misled or misinformed by management, which may have been avoided had boards established effective whistleblowing programs.5 As tips from whistleblowers account for over 40 percent of all reported occurrences of occupational fraud,6 the value they provide is hard to dispute.

1 Geneva Campbell, Snitch or Savior? How the Modern Cultural Acceptance of Pharmaceutical Company Employee External Whistleblowing is Reflected in Dodd-Frank and the Affordable Care Act, 15 U. PA. J. BUS. L. 565, 571-75 (2013) (discussing the recent distrust of corporations as one reason for an increased sense of acceptance of whistleblowers); Matt A. Vega, Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act “Bounty Hunting,” 45 CONN. L. REV. 483, 491 (2012) (noting that the public perception of whistleblowers has transformed from “morally suspect” to heroic); Joel D. Hesch, Whistleblower Rights and Protections: Critiquing Federal Whistleblower Laws and Recommending Filling in Missing Pieces to Form a Beautiful Patchwork Quilt, 6 LIBERTY U. L. REV. 51, 52-53 (2011) (noting that whistleblowers have recently come to be viewed as heroes, likely as a result of “millions of Americans tasting the bitterness of financial loss from corporate fraud . . .”); Robert A. Prentice & Dain C. Donelson, Insider Trading as a Signaling Device, 47 AM. BUS. L. J. 1, 63 (2010) (acknowledging the distinct popularity of recent whistleblowers who possess “that patina of near-sainthood”); Yuval Feldman & Orly Lobel, The Incentives Matrix: The Comparative Effectiveness of Rewards, Liabilities, Duties, and Protections for Reporting Illegality, 88 TEX. L. REV. 1151, 1159 (2010) (“In the past, popular culture has generally portrayed whistleblowers as ‘lowlife[s] who betray[] a sacred trust largely for personal gain. In recent years, however, the act of whistleblowing has been reshaped in the media as a heroic act that can bring deeply corrupt practices to a halt.”).


5 Frederick D. Lipman, Whistleblowers: Incentives, Disincentives, and Protection Strategies 2 (John Wiley & Sons, Inc. 2012) (presenting findings that whistleblower tips are more effective in detecting fraud than both management reviews and internal and external audits).

6 Id.
Whistleblowers have uncovered some of the most significant injustices pertaining to social, financial, environmental, and economic issues, thereby attaining heroic status in the minds of many. Such an admirable status is justifiable given the enormous risks that most whistleblowers take in their careers. There are many emotional and social hurdles to reporting information about one’s colleagues and friends, thereby explaining why whistleblowers have commonly described their experience as a “nightmare, and a venture ‘fraught with dangers and risks.” Whistleblowers often face retaliation for their efforts, such as exclusion from work activities, verbal abuse, lack of promotions or raises, and relocation or reassignment.

Given the public’s growing tendency to view whistleblowers as heroes, what do we make of those whistleblowers who are themselves complicit in the wrongdoing that they are reporting? This question becomes even more complex when we consider that whistleblowers with unclean hands are not precluded from receiving bounties, or cash rewards, for providing information to either the Securities and Exchange Commission (“SEC”) or the Internal Revenue Service (“IRS”) about securities and tax violations of the law, respectively. There are differences, however, between the two programs’ treatment of culpable whistleblowers. Under the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), the SEC may pay bounty awards to whistleblowers who voluntarily provide it with original information that leads to an SEC enforcement action in an amount of between 10 to 30 percent of the total monetary sanctions collected in that action. The SEC denies bounties to certain types of whistleblowers, including “any whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award . . .”

Although securities whistleblowers who are also convicted criminals are excluded outright from receiving a bounty, the SEC still makes bounties available for those who are complicit in the wrongdoing, although their awards may be decreased, as the SEC considers how much the whistleblower was involved in the action for which they are reporting when determining bounty amounts. In deciding whether to give a bounty on the lower end of the scale, the SEC will consider factors such as the whistleblower’s role

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8 LIPMAN, supra note 5, at 63-65.

9 15 U.S.C. § 78u-6(b)(1). The language of Dodd-Frank pertaining to bounties reads as follows: In any covered judicial or administrative action, or related action, the Commission . . . shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Commission that led to the successful enforcement of the covered judicial or administrative action, or related action, in an aggregate amount equal to (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

10 Id. § 78u-6(c)(2)(B) (emphasis added).

11 17 C.F.R. § 240.21F-6(b)(1). The culpability of the whistleblower is just one of the criteria that the SEC will consider in determining the bounty amount.
in the securities violation, whether the whistleblower acted with scienter, the egregiousness of the fraud committed by the whistleblower, and the timeliness of the report.\textsuperscript{12}

In contrast to the SEC’s complete preclusion of bounties for convicted criminals, the IRS takes a broader approach in its tax whistleblower program, which was amended in 2006 under the Tax Relief and Healthcare Act to enhance the long-standing ability of the IRS to reward informants. While the IRS has a long history of rewarding individuals who provide it with information pertaining to others violating the Internal Revenue Code (“IRC”), the 2006 amendments to the IRS whistleblower program introduced mandatory, rather than discretionary bounties, thereby increasing the availability and size of rewards for tax whistleblowers.\textsuperscript{13} These amendments also recognized that tax whistleblowers may themselves be culpable and thus allowed for bounties to be paid to whistleblowers who are convicted of tax law violations with one caveat—as long as the whistleblower’s conviction is not based on a role in which such person “planned and initiated” the underlying action, he or she can receive a bounty.\textsuperscript{14} Therefore, the IRS’s preclusion of bounties for criminals is only applicable if the tax whistleblower played a leadership role in the wrongdoing and was convicted because of that specific role.

This Article will analyze the differences between the SEC and IRS whistleblower programs, specifically with respect to the issue of granting bounties to culpable and convicted whistleblowers—an area lacking in scholarly attention. Part II will begin this comparison by examining the IRS whistleblower program, including its long-established bounty program and the 2006 amendments that made the program what it is today. This section will also explore the SEC whistleblower program, newly enacted under Dodd-Frank, and its defining characteristics, including the fact that the bounty structure was based on the IRS model,\textsuperscript{15} and will consider how the program differs from that model.

Part III will provide an in-depth examination of Bradley Birkenfeld’s story—from this tax whistleblower’s conviction for his role in UBS’s offshore tax fraud scheme to his receipt of a $104 million bounty from the IRS for blowing the whistle on UBS. This section will also explore why whistleblowers with unclean hands should never be disregarded as a source of key information pertaining to violations of the law.

Part IV will offer criticism of the IRS whistleblower program’s inclusion of those who are criminally convicted as eligible for a bounty. This section will suggest that the existence of alternative whistleblower incentive structures, such as leniency and immunity, are more appropriate for a potential whistleblower facing a criminal conviction, especially in light of an examination of Bradley Birkenfeld’s motivation to come forward with his knowledge of the UBS tax fraud. This section will also explore the various ways in which the IRS whistleblower program strays from the structure upon which it was based, the \textit{qui tam} program of the False Claims Act, which rewards private citizens, even if complicit, for their information regarding individuals who are defrauding

\textsuperscript{12} Id.


\textsuperscript{14} 26 U.S.C. § 7623(b)(3); see also Nozemack & Webber, supra note 13, at 86.

the federal government, excluding, however, the criminally convicted from any award.\textsuperscript{16} This section will offer suggestions as to how the IRS model could be revised to more closely achieve its desired effect.

Part IV will also acknowledge the fundamental differences between the SEC’s mission of disclosure compared to the IRS’s goal of promoting tax compliance but will dismiss the notion that the enforcement mechanisms of both agencies are so divergent as to justify their differences in awarding convicted whistleblowers. This section will explore the emerging theory that the SEC has recently taken on an increasing role of a “punisher,” utilizing enforcement structures that are more akin to a criminal, rather than civil, enforcement agency like the IRS, especially in light of the most recent financial scandals. Finally, this Article will suggest that the SEC whistleblower program offers a reasonable middle ground in reconciling the ever-present conflict of allowing wrongdoers to benefit from their own actions and incentivizing those with critical inside information to come forward. It is the author’s hope that this Article will invite further scholarly discussion on this topic, as legislative history of the applicable statutes and legal debate are lacking in this controversial area of whistleblower law.

II. SEC AND IRS WHISTLEBLOWER PROGRAMS

A. Structure of the IRS Whistleblower Program

The IRS has rewarded informants since the nineteenth century. Codified in present-day Section 7623 of the IRC, the IRS began making rewards available to persons providing information regarding tax noncompliance ever since 1867 under legislation that gave it “the authority to pay . . . sums as [deemed] necessary for detecting and bringing to trial and punish[ing] persons guilty of violating the internal revenue laws or conniving at the same.”\textsuperscript{17} Until 1996, the IRS made these payments from a pool of appropriated funds, at which point legislation was enacted that changed the source of rewards to the proceeds of amounts collected from the taxpayer.\textsuperscript{18} These 1996 amendments also included the detection of underpayments of tax among the types of information that would qualify whistleblowers for a bounty.\textsuperscript{19} During this time, awards for tax whistleblowers were only discretionary, allowing the IRS to grant awards to whistleblowers of one, ten, or fifteen percent of the proceeds with a cap at $10 million, which the IRS sometimes waived.\textsuperscript{20}

\textsuperscript{16} 31 U.S.C. § 3730(b).
\textsuperscript{18} Id.
\textsuperscript{19} Id. Nozemack & Webber also note that the earlier versions of the tax whistleblower rewards did not provide much of an incentive to report and were also underutilized by the IRS. Supra note 13, at 82.
\textsuperscript{20} Id.
The IRS whistleblower program continued in this manner until June of 2006, at which time the Treasury Inspector General for Tax Administration ("TIGTA") conducted an audit of the program upon the request of Congress.\(^\text{21}\) Although the TIGTA audit uncovered that the IRS program was quite successful, it also revealed weaknesses in the discretionary structure of the reward model, including underutilization, administrative problems, and a lack of clarity as to the defined incentives of whistleblowers.\(^\text{22}\) The TIGTA report prompted the incentive for new legislation that would strengthen and enhance the IRS whistleblower program.\(^\text{23}\) Through amendments passed in 2006 as part of the Tax Relief and Healthcare Act, a new and improved IRS whistleblower program was born. The ability of the IRS to grant discretionary awards was retained, although on a non-percentage basis, which is codified in present-day Section 7623(a) of the IRC.\(^\text{24}\)

The 2006 amendments also created the new Section 7623(b) of the IRC, which established a centralized IRS location, the Whistleblower Office, to receive and administer whistleblower tips and determine bounty awards. Section 7623(b) implements a mandatory, rather than discretionary, bounty structure for tax whistleblowers in an amount of at least 15 percent but not more than 30 percent of the collected proceeds, including penalties, interest, and additional amounts that result from any administrative or judicial action that the IRS has taken on the basis of the whistleblower’s information.\(^\text{25}\) To qualify for a bounty, the whistleblower’s information must relate to a business tax noncompliance matter “in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed $2,000,000,” and, when the information relates to an individual taxpayer’s noncompliance, a bounty is only available if that individual’s gross income exceeds $200,000 for at least one of the applicable tax years.\(^\text{26}\)

The Whistleblower Office determines the appropriate amount of the award, whether a minimum of 15 percent or a maximum of 30 percent of the collected proceeds

\(^{21}\) Nozemack & Webber, supra note 13, at 84-85.

\(^{22}\) Id. (citing TREASURY INSPECTOR GENERAL FOR TAX. ADMIN., THE INFORMANTS’ REWARD PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT (2006)), http://www.treasury.gov/tigta/auditreports/2006reports/200630092fr.pdf. In its audit report, TIGTA expressed that, in 32 percent of cases, it was unable to determine the justification for the reward percentage awarded to informants and, in 76 percent of rejected claims, it was unable to determine the reason the reviewer rejected these claims.

\(^{23}\) Id. at 85 (Senator Charles Grassley, “the champion of the Whistleblower Program and author of the 2006 reforms,” persuaded Congress to enact new legislation after the TIGTA report.)

\(^{24}\) Present-day Section 7623(a) of the IRC states:

“The Secretary [of the Treasury] . . . 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. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

\(^{26}\) 2010 Report, supra note 17, at 3; see also Nozemack & Webber, supra note 13, at 85 (noting that Congress intended to use this program as a way to obtain maximum returns in relation to the cost of the program by targeting “high dollar tax abuses.”). One other scholar notes that the high threshold for tax whistleblower awards is likely to defer most claims to the discretionary program of Section 7623(a).

from the IRS action, based on “the extent to which the individual substantially contributed to such action.” The maximum bounty award can be decreased to 10 percent of the collected proceeds if the Whistleblower Office determines that the whistleblower’s information is based principally on allegations disclosed in certain sources of public information, such as a governmental report, hearing, audit, investigation or news media. A whistleblower can also appeal his or her award determination to the United States Tax Court.

The IRS whistleblower program makes bounties available to culpable whistleblowers who were themselves complicit in the tax violations, with variations in reward amounts based on the individual’s level of involvement in the tax noncompliance. As stated in the IRC,

If the Whistleblower Office determines that the claim for an award . . . is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions . . . then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

Therefore, the IRS Whistleblower Office may decrease the amount of a bounty for culpable whistleblowers who planned and initiated the tax noncompliance action and may outright deny a bounty to tax whistleblowers who are convicted because of that particular leadership role. In other words, the IRS still provides a bounty to a convicted criminal who participated in the tax violation but did not plan and initiate the wrongdoing. As the IRS seems to have acknowledged, “promoters of tax shelters and tax fraud are not surrounded by boy scouts and angels,” and often have unclean hands. Afterall, “[y]ou need someone whose hands are dirty to find dirt.” Information from those who played a part in the violation unquestionably consists of details that would otherwise be difficult to locate. The IRS Whistleblower Office receives information from individuals who discover tax noncompliance in any number of ways, including through

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28 Id. § (b)(2)(A); see also 2010 Report, supra note 17, at 3.
29 26 U.S.C. § 7623(b)(4) (such appeals must be filed within 30 days of the award determination).
30 Id. § (b)(3) (emphasis added).
31 Nozemack & Webber, supra note 13, at 81 (citing Letter from Jessica Radack, Dr. Marsha Coleman-Adebayo & Gina Green to Douglas Shulman, Commissioner, Internal Revenue Serv., 3 (Aug. 10, 2011), http://www.grassley.senate.gov/about/upload/PlannedandInitiatedLetter.pdf). In this letter, Radack of the Government Accountability Project, Coleman-Adebayo of the No FEAR Coalition, and Green of the National Whistleblowers Center, wrote to the IRS Commissioner expressing their concern that, the Internal Revenue Manual’s interpretation of “planned and initiated” for purposes of considering a reduced bounty “departs significantly from the traditional understanding of the planned and initiated limitation for [other] whistleblower awards as reflected in Congressional intent, the case law and the clear language of the statute.”
their workplace or daily personal business. “Anecdotal evidence suggests that the [IRS] often receives tips after a relationship has gone bad, be it a familial, romantic, or business relationship. It is this type of intimate relationship that often provides for the ‘detailed inside knowledge that will be the most beneficial in bringing forward tax fraud.’”

In a June 2006 report, the U.S. Treasury expressed that investigations based on the IRS whistleblower program were more effective and efficient in detecting tax noncompliance than the IRS’s primary method of selecting tax returns for further scrutiny. Statistics show that the revised IRS whistleblower program has indeed brought in more tips. Within the first twelve months of the amended program, the IRS received 116 submissions alleging more than $2 million in tax violations, and, at the end of fiscal year 2010, an aggregate of 1328 submissions that concerned 9,532 taxpayers.

Similarly, the SEC whistleblower program, which was implemented pursuant to Dodd-Frank and also provides bounties, has proven to be successful since its enactment. The SEC has noted that it now receives dozens of useful high quality tips per week. The number of whistleblower tips that the SEC received in 2013 increased by approximately eight percent to a total of 3,238. Also in 2013, the SEC made its largest whistleblower award to date—a bounty of $14 million to an individual who provided key information leading to an SEC enforcement action recovering substantial investor funds.

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34 Nozemack & Webber, supra note 13, at 81-82.
35 McKenzie, supra note 33, at 42.
36 Ashcroft et al, supra note 15, at 378-79; see also Procedure Unveiled for Reporting Violations of the Tax Law, Making Reward Claims, IRS (Dec. 19, 2007), http://www.irs.gov/uac/Procedure-Unveiled-for-Reporting-Violations (noting that ever since the 2006 amendments, “informants have come forward with information on alleged tax noncompliance amounting to tens of millions of dollars, and in some cases hundreds of millions of dollars.”).
40 SEC Awards More Than $14 Million to Whistleblower, SEC & EXCH. COMM’N, Oct. 1, 2013, available at http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539854258#.UvUpMdj16So (noting that the first whistleblower bounty of approximately $50,000 was paid out in August 2012, while in August and September 2013, over $25,000 was awarded to three whistleblowers who helped the SEC and the U.S. Department of Justice stop a sham hedge fund).
B. Dodd-Frank Introduces a Bounty Model

The current SEC whistleblower program was enacted in 2010 pursuant to the Dodd-Frank Act, a sweeping piece of legislation aimed at “promot[ing] the financial stability of the United States by improving accountability and transparency in the financial system.” In addition to implementing a myriad of financial regulatory reforms, Dodd-Frank created a robust whistleblower program intended to promote the receipt of information pertaining to violations of securities laws. Section 922 of Dodd-Frank amends the Securities Exchange Act of 1934 by including a new section 21F, “Securities Whistleblower Incentives and Protection,” which not only improves upon the whistleblower retaliation protections of the Sarbanes-Oxley Act of 2002 but creates a new reward program requiring the SEC to pay bounties to whistleblowers who provide “original information” regarding a violation of the federal securities laws that leads to a successful enforcement action. In any “covered judicial or administrative action, or related action,” defined as an “action brought by the [SEC] under the securities laws that results in monetary sanctions exceeding $1,000,000,” the SEC shall pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the [SEC] that led to the successful enforcement of the covered [action] . . . in an aggregate amount equal to (A) not less than 10 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions; and (B) not more than 30 percent, in total, of what has been collected of the monetary sanctions imposed in the action or related actions.

The SEC determines the amount of the bounty in its discretion, taking into consideration the significance of the information and degree of assistance provided by the whistleblower. Whistleblowers who are denied bounties can appeal their denial to federal court. The legislative history of Dodd-Frank reveals that the SEC whistleblower

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43 See LIPMAN, supra note 5, at 179-80.
44 “Original” information is (i) derived from independent knowledge or independent analysis; (ii) not already known to the SEC from another source; (iii) not exclusively derived from an allegation made in a judicial or administrative hearing or governmental report or investigation, and (iv) provided to the SEC for the first time after July 21, 2010 (Dodd-Frank’s enactment). 17 C.F.R. § 240.21F-4(b).
45 17 C.F.R. §§ 240.21F-1, 240.21F-2; see also S. REP. NO. 111-176, at 110-11 (2010) (In its report recommending the passage of the Dodd-Frank bill, the Senate Committee on Banking, Housing, and Urban Affairs noted that the new whistleblower program “aims to motivate those with inside knowledge to come forward and assist the Government to identify and prosecute persons who have violated securities laws and recover money for victims of financial fraud.”).
46 15 U.S.C. § 78u-6(a), (b).
47 Id. § 78u-6(c).
48 Id. § 78u-6(b)(2)(f).
The program was modeled after the 2006 amendments to the IRS whistleblower program.\(^49\) In a Senate Report examining Dodd-Frank, the Senate Committee on Banking, Housing, and Urban Affairs recognized the invaluable contributions that whistleblower tips provide, citing statistics that such tips have “detected 54.1% of uncovered fraud schemes in public companies” while external auditors and SEC exam teams detected only 4.1% of fraud schemes, making whistleblower tips “13 times more effective than external audits.”\(^50\)

The Committee also recognized that a whistleblower has a difficult choice “between telling the truth and the risk of committing ‘career suicide,’” thereby supporting the new bounty structure as an appropriate reward to incentivize whistleblowers.\(^51\) Noting that the SEC whistleblower program is based on the amended IRS program, the Committee expressed that “[t]he reformed IRS program, which, too, has a similar minimum-maximum award level and an appeals process, is credited to have reinvigorated the earlier, largely ineffective, IRS Whistleblower Program,”\(^52\) noting that the “critical component” of the whistleblower program “is the minimum payout that any individual could look towards in determining whether to take the enormous risk of blowing the whistle in calling attention to fraud.”\(^53\)

Despite being based on the IRS model, the SEC whistleblower program differs significantly with respect to the availability of bounties for culpable whistleblowers who are convicted of criminal activity relating to the underlying action for which they are reporting. While the SEC will also reward a culpable whistleblower, it will not reward one who is convicted of the underlying crime.\(^54\) Section 78u-6(c)(2)(B) of Dodd-Frank clearly states that no award “shall be made to any individual who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower otherwise could receive an award.”\(^55\) Although not included on the face of the statute itself, a variation of the “planning and initiating” language that is present in the IRC is codified in the final SEC rules that implement Dodd-Frank but only with respect to how the $1 million threshold is determined.\(^56\) In determining whether the $1 million level has been met for the underlying action, which is a prerequisite of eligibility for a bounty, the SEC will not take into account any monetary sanctions that the whistleblower him/herself is required to pay because he or she is also at fault.\(^57\) In addition, the SEC

\(^{49}\) S. REP. NO. 111-176, at 111 (2010).

\(^{50}\) Id. (citing testimony for the Senate Banking Committee by Certified Fraud Examiner and Madoff whistleblower, Harry Markopolos).

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id.

\(^{54}\) See Heidi L. Hansberry, Comment, In Spite of its Good Intentions, the Dodd-Frank Act Has Created an FCPA Monster, 102 J. CRIM. L. & CRIMINOLOGY 195 (2012) (recognizing that Dodd-Frank “draws a distinction between a cooperating informant who is convicted of a crime and a whistleblower.”); see Richard F. Albert, Would $104 Million IRS Whistleblower Get Stiffed under Dodd-Frank?, FORBES (Sept. 19, 2012), available at http://www.forbes.com/sites/insider/2012/09/19/would-104-million-irs-whistleblower-get-stiffed-under-dodd-frank/ (noting that Bradley Birkenfeld would not have been granted an award if he provided information about corporate securities fraud instead of tax fraud).

\(^{55}\) Id. § 78u-6(c)(2)(B).

\(^{56}\) See 17 C.F.R. § 240.21F-16.

\(^{57}\) 17 C.F.R. § 240.21F-16.
will not take into account any monetary sanctions ordered against an entity for conduct that the whistleblower directed, planned or initiated. The SEC has expressed that the purpose of this provision “is to prevent wrongdoers from benefitting by, in effect, blowing the whistle on themselves.” Therefore, the SEC uses a variation of the “planning and initiating” language found in the IRC not for the purpose of reducing the bounty but to determine eligibility for the bounty itself. The SEC whistleblower program and the False Claims Act *qui tam* program, which will be explored further in Part III of this Article, resemble each other in that both outright deny rewards to whistleblowers who are convicted of any criminal conduct in connection with the underlying action, whereas the IRS whistleblower program makes rewards available for convicted criminals as long as they have not “planned and initiated” the misconduct.

These nuances have a significant practical effect. If Bradley Birkenfeld had blown the whistle on a violation of the securities laws rather than on tax evasion, he would not have been eligible for a bounty.

### III. REWARDING CULPABLE WHISTLEBLOWERS

#### A. Bradley Birkenfeld’s Bounty

Bradley Birkenfeld was an American private banker at UBS’s headquarters in Geneva, Switzerland, whose job was to advise United States taxpayers who held UBS accounts abroad. Birkenfeld, a Massachusetts native who studied banking at the American Graduate School of Business in Switzerland, worked five years for UBS in this capacity. Based in UBS’s Global Wealth Management International & Switzerland unit, Birkenfeld’s primary duty was to acquire and develop new U.S. clients, which he accomplished by travelling to the U.S. on a quarterly basis. Rather than conducting operations that were legal, Birkenfeld found himself in the midst of a major tax evasion scheme facilitated by UBS that helped U.S. taxpayers hide their assets offshore.

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58 17 C.F.R. § 240.21F-16 (emphasis added). This part of the rules also reads, “Similarly, if the [SEC] determines that a whistleblower is eligible for an award, any amounts that the whistleblower or such an entity pay in sanctions as a result of the action or related actions will not be included within the calculation of the amounts collected for purposes of making payments.”


60 *Compare* 15 U.S.C. § 78u-6(b) and 31 U.S.C. § 3730 (b) with 26 U.S.C. § 7623(b).

61 *Id.*

62 John C. McDougal, *The UBS “John Doe” Summons*, SP 017 AM. LAW INST. 931, 962 (2008). UBS is a bank that is headquartered in Switzerland and maintains branches throughout the United States. “provide[d] a comprehensive range of products and services, individually tailored for wealthy and affluent clients around the world.” McDougal conducted an interview with Bradley Birkenfeld on October 12, 2007 regarding Birkenfeld’s practices as a U.S tax advisor in Switzerland.


64 *Id.*
accounts held by sham entities in Switzerland. UBS collaborated with U.S. taxpayers to prepare false IRS forms giving the appearance that non-U.S. taxpayers owned the accounts, thereby avoiding income taxes to be paid by a total of 19,000 clients with tax liabilities of about $19 billion. UBS trained its bankers, including Birkenfeld, to falsely state on customs forms upon their arrival in the U.S. that they were travelling for pleasure instead of business and to carry encrypted laptop computers holding the portfolios of clients, all in an effort to avoid detection. Aware of the illegal scheme, Birkenfeld participated in the tax fraud by recruiting U.S. clients in this manner, helping them to hide their assets from the tax authorities, even to the point of once sneaking diamonds into the U.S. in a toothpaste tube.

While still working at UBS, Birkenfeld began disclosing information about the UBS scheme directly to the Department of Justice in 2007. He offered to wear a wire to record the conversations of high-level UBS executives in exchange for full immunity from criminal prosecution. To his dismay, Birkenfeld was denied immunity because he failed to disclose his relationship with his biggest client, Igor Olenicoff, a U.S. taxpayer and wealthy real estate developer, for whom Birkenfeld helped hide $200 million in offshore hidden accounts. In May of 2008, U.S. authorities arrested Birkenfeld for conspiracy to commit tax fraud, stemming from his involvement with Olenicoff. Birkenfeld pleaded guilty to these charges on June 19, 2008. After Birkenfeld was denied immunity, a lighter sentence, and postponement of prison, Birkenfeld was sentenced to forty months in prison for his involvement in the tax evasion scheme.

67 McDougal, supra note 62, at 962.
69 Harvey, supra note 65, at 476.
70 CBSNEWS, supra note 66.
71 Id.; see also Harvey, supra note 65, at 476.
72 Id. at 962, 965. Birkenfeld later revealed that Olenicoff formed a Bahamian corporation with the assistance of UBS and completed a fraudulent IRS form that made it appear as if the corporation was actually the beneficial owner of his offshore UBS account. Olenicoff then transferred $60 million and a 147-foot yacht to the fake corporation and other sham entities, allowing him to “refrain from reporting the income secure in the knowledge that UBS would maintain the traditional secrecy of Swiss accounts.” Olenicoff pleaded guilty to filing false tax returns in December of 2007. See also Spencer Daly, Secrecy in Limbo: What the Most Recent Settlement with the IRS Means for UBS and the Rest of the Swiss Banking Industry, 10 J. INT’L BUS. & L. 133, 146 (2011).
Birkenfeld’s information as a whistleblower proved monumentally important in uncovering the specific details leading to an investigation of UBS by the Department of Justice. This information allowed the U.S. to penetrate Swiss banking secrecy laws and recover billions of dollars in unpaid taxes.\textsuperscript{75} Birkenfeld assisted the United States by providing internal UBS documents and information pertaining to the countless transactions with U.S. clients that were deeply concealed in Swiss vaults.\textsuperscript{76} Birkenfeld’s information allowed the Department of Justice to garner enough evidence to file a petition in federal court in June of 2008 requesting leave to file an IRS “John Doe Summons.”\textsuperscript{77} This summons would require UBS to disclose the names of all of its U.S. clients who opened bank accounts in Switzerland that were undisclosed to the IRS—an endeavor “represent[ing] the first time that the United States has attempted to pierce Swiss bank secrecy by compelling a Swiss bank to name its U.S. clients.”\textsuperscript{78} When UBS objected to the summons, citing Swiss bank secrecy law, the Swiss government intervened by filing an amicus brief arguing that the United States could obtain accountholder information only through a request under the 1996 U.S.-Swiss tax treaty.\textsuperscript{79} In August 2009, the United States and Switzerland agreed to treat the request as having occurred under the treaty, to sign a protocol amending the treaty, and to have the U.S. government withdraw the John Doe summons.\textsuperscript{80} In February of 2009, UBS signed a deferred prosecution agreement with the Department of Justice pursuant to which it was required to provide the “U.S. government with the names of 200 to 300 U.S. clients of [its] cross-border business, exit the business of providing banking services to U.S. clients with undeclared accounts, and pay a total of $780 million in fines and penalties.”\textsuperscript{81}

Shortly thereafter, the IRS launched the 2009 voluntary disclosure initiative for offshore tax evasion, which required participating taxpayers to pay taxes and interest due on the Swiss accounts for the previous six years and to disclose information about their foreign accounts.\textsuperscript{82} The 2009 program, otherwise known as the Offshore Voluntary Disclosure Initiative or “OVDI”, was a variant of a longstanding initiative that the IRS already had in place to promote voluntary tax disclosures but introduced more formal procedures and rules.\textsuperscript{83} The OVDI proved instrumental in prompting taxpayers to come forward and was believed to be “timed to profit from the publicity about Birkenfeld and UBS.”\textsuperscript{84}

\textsuperscript{75} CBSNEWS, supra note 66.
\textsuperscript{76} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
\textsuperscript{82} Lederman, supra note 77, at 510.
\textsuperscript{83} Paul Marcotte, IRS Winning Game of Offshore Hide and Seek, 46 MD. BAR J. 4, 7 (2013).
\textsuperscript{84} Id.
Following the announcement in May 2008 that the Justice Department had indicted former UBS banker Bradley Birkenfeld, the IRS voluntary disclosure program saw a dramatic rise in taxpayers coming forward to turn over information on previously undisclosed Swiss bank accounts. The 2009 initiative brought in about 15,000 disclosures—many times more than the approximately 1,000 that the IRS reportedly expected. In early 2012, the IRS reported that it had collected $3.4 billion so far from people who participated in the 2009 offshore program, reflecting closures of about 95 percent of the cases from the 2009 program.85

Birkenfeld has been described “as the single most important informant in the U.S. probe of tax evasion and secrecy at UBS and other banks,” “the goose that laid the golden eggs,”86 whose information “led to an investigation that has greatly diminished Switzerland’s status as a secret haven for American tax cheats and allowed the Treasury to recover billions in unpaid taxes.”87

When Birkenfeld finished his prison term, the IRS awarded him what is believed to be “the largest-ever whistleblower payout to an individual.”88 On September 11, 2012, the IRS awarded Birkenfeld a bounty of $104 million pursuant to the IRS whistleblower program.89 Birkenfeld was not disqualified from receiving the reward under the IRC because he was not the “planner and initiator” of the fraud.90 Without insight as to how and why, the IRS determined that Birkenfeld’s conduct did not amount to “planning and initiating,” causing one source to comment that “if Bradley Birkenfeld is award-eligible, your average tax director will have no problem overcoming the planned-and-initiated hurdle.”91 The IRS considered Birkenfeld to have been a low-level employee, “intimating that those higher up planned or initiated the scheme.”92 Although Birkenfeld was deemed not to be a planner or initiator of the tax fraud scheme, he was clearly not innocent. Aware of the illegality of UBS’s direction, Birkenfeld proceeded to assist U.S.

86 Id.
87 Kocieniewski, supra note 63; see also Harvey supra note 65, at 478 (noting that the Department of Justice began pursuing UBS on the basis of Birkenfeld’s information); Bradley J. Bonti, Don’t Tread on Me: Has the United States Government’s Quest for Customer Records from UBS Sounded the Death Knell for Swiss Bank Secrecy Laws? 30 NW. J. INT’L. L. & BUS. 1, 7-8 (2010) (noting that “[i]nformation provided by Birkenfeld pointed prosecutors directly to UBS’s banking operations in Switzerland.”)
88 Saunders & Sidel, supra note 68.
89 Id. See also Saul Ewing LLP, supra note 73.
92 Coder, supra note 91 (citing Barbara T. Kaplan of Greenberg Traurig LLP).
taxpayers hide their assets, including concealment of $200 million of the assets of his largest client, Igor Olenicoff.93

Significant public attention resulted from Birkenfeld receipt of a $104 million bounty,94 creating concerns among many that depicting “a criminal-turned-whistleblower” as a hero could negatively affect the public’s perception of the role that whistleblowers play in society.95 One commentator described Birkenfeld’s bounty as “sordidness piled on sordidness,”96 responding to Birkenfeld’s statement of “I’m the most famous whistleblower in the history of the world. It’s a question of doing the right thing, and that’s what I did” with “[w]hat would have been right was not participating in tax evasion in the first place.”97

B. Should the Law Allow Culpable Whistleblowers to be Rewarded?

The story of Bradley Birkenfeld demonstrates that the issue of allowing culpable whistleblowers to receive a bounty is a controversial one, even more so when the whistleblower is criminally convicted. “Depending on your point of view, [Birkenfeld] is either a felon who was complicit in the crime he reported and does not deserve his reward or he is a new type of whistleblower—one with knowledge of a complicated crime that came from being a part of it.”98 The SEC has recognized that “sometimes we need people with dirty hands to point us in the right direction. It is not necessarily a good feeling for everyone, but sometimes it is necessary.”99

As a basic premise, rewarding whistleblowers with unclean hands provides value to the government, as was recognized by Congress, first, when it enacted the qui tam program and subsequently the IRS and SEC whistleblower programs.100 The qui tam program of the False Claims Act (“FCA”), the statute upon which the 2006 IRC

95 Id.
97 Jenkins, supra note 96.
99 Joe Mont, SEC’s Whistleblower Bounties will be Awarded Subjectively, COMPLIANCE WEEK, June 6, 2012, available at http://www.complianceweek.com/secs-whistleblower-bounties-will-be-awarded-subjectively/article/244605/ (citing the SEC); see Robert Howse & Ronald J. Daniels, Rewarding Whistleblowers: The Costs and Benefits of an Incentive-Based Compliance Strategy, 15 U. PA. SCHOLARLY COMMONS 525, 538 (1995) (noting that “a special difficulty is apparent when a whistleblower is involved in the wrongdoing she has reported, either through complicity or through active initiative.”).
100 See Part IIB.
amendments were modeled, was the first to establish a bounty system and is often referred to as the “gold standard of whistleblower protection and bounty rewards.” Under the FCA, private citizens, known as relators, may bring a “qui tam” civil action on behalf of the United States against individuals who defraud the federal government by committing acts such as submitting false claims for payment to the federal government, knowingly using a false statement to decrease an obligation to pay money to the government, or inducing the payment of a false claim. The qui tam plaintiff brings the action in the name of the U.S. government by filing a complaint in federal district court, at which point the federal government has sixty days to intervene in the lawsuit—if the government declines to intervene, the qui tam plaintiff may proceed with the lawsuit. The FCA, which one scholar has described as “the lodestar of private enforcement of public law,” makes bounties available to a qui tam plaintiff. If the government proceeds with the action, the qui tam plaintiff may receive between 15 to 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action.

The FCA has its origins during the time of the Civil War when Congress was receiving reports of misappropriation of money spent to assist the war effort by government suppliers that “accepted almost every offer and paid almost any price for [war] commodities, regardless of character, quality or quantity . . . For sugar [the government] often got sand; for coffee, rye; for leather, something no better than brown paper; for sound horses and mules, spavined beasts and dying donkeys . . . .” This misappropriation prompted the introduction of the FCA bill in 1863 to “prevent and punish frauds upon the Government of the United States.” The FCA is premised on

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101 Letter from Radack, Coleman-Adebayo & Green, supra note 31, at 1; Michelle M. Kwon, Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions, 29 VA. TAX REV. 447, 457 (2010); Feldman & Lobel Research, supra note 1, at 1168.

102 Rapp, supra note 4, at 76 (noting that although one scholar has described the Sarbanes-Oxley Act as the gold standard of whistleblower protection, most research would support the FCA as such).

103 “Qui tam” is a Latin term that is short for a phrase that translates into “who as well for the king as for himself sues in this matter.” Heather Elliott, Congress’s Inability to Solve Standing Problems, 91 B. U. L. REV. 159, 195 n.219 (2011); Note, Patrick A. Barthle II, Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program, 69 WASH. & LEE. L. REV. 1201, 1217 (2012) (noting that qui tam provisions were popular in England at the time the United States was founded).

104 31 U.S.C. § 3730(b); Kwon, supra note 101, at 457; Dennis J. Ventry, Jr., Whistleblowers and Qui Tam for Tax, 61 TAX LAWYER 357, 368 (2008).

105 Id. If the government intervenes in the qui tam action, it takes on primary responsibility to prosecute the action and the qui tam plaintiff may continue to be a party to the lawsuit. 31 U.S.C. § 3730(c).

106 Ventry, supra note 104, at 368.

107 31 U.S.C. § 3730(d); see also Ventry, supra note 104 (noting that there is no absolute dollar cap on the amount of the bounty that the qui tam plaintiff can receive and reasonable expenses are also reimbursable).


109 Id. at 1265 (citing CONG. GLOBE, 37th Cong. 3d Sess. 955 at 348 (1863) (statement of Senator Henry Wilson)).
the theory that it “takes a rogue to catch a rogue.”\textsuperscript{110} The notion that complicit informants should be granted rewards for their information has its roots in a “strong temptation to get conspirators to turn on each other.”\textsuperscript{111} “The overriding theme of the FCA is virtually to deputize an army of insiders to uncover, inform, and pursue those government contractors who knowingly cheat in their agreements with the government.”\textsuperscript{112} The receipt of information from people on the inside is tremendously valuable, as wrongdoing often “takes place in the shadows [and] may never be visible to anyone but the immediate actors.”\textsuperscript{113} The idea behind this theory, “based on experience as old as modern civilization,” is that one of the most effective ways to detect fraud is to make its perpetrators liable to the action of a private person (the relator) acting “under the strong stimulus of personal ill will or the hope of gain.”\textsuperscript{114} In enacting the FCA, Congress recognized the difficulties inherent in obtaining information from insiders or participants, who commonly feel that they have little to gain from reporting on fraudulent behavior and would more likely do so if financially rewarded.\textsuperscript{115} The policy rationale behind bounty rewards is to “tip the cost-benefit scale facing a potential whistleblower.”\textsuperscript{116} Whistleblower scholars have widely noted the significant difficulties that whistleblowers face in deciding whether to come forward. Richard Moberly has expressed that “almost all of the benefits of whistleblower disclosures go to people other than the whistleblower, while most of the costs fall on the individual whistleblower.”\textsuperscript{117} Geoffrey C. Rapp has similarly noted, “[s]omeone with information about fraud, absent bounties, faces a set of values—related or ethical pressures to blow the whistle, a set of values—related or ethical pressures to remain silent, as well as a set of economic or pecuniary pressures to remain silent.”\textsuperscript{118} When whistleblowers are themselves complicit, their incentives to report are likely to be even lower. In such cases, the cost-benefit scale of reporting is likely to be heavily tipped towards the cost end of

\textsuperscript{110} Id. at 1266 (citing CONG. GLOBE, 37\textsuperscript{th} Cong. 3d Sess. 955 at 348 (1863) (statement of Senator Jacob M. Howard, who expressed the point of view below)).

The bill offers, in short, a reward to the informer who comes into court and betrays his co-conspirator, if he be such . . . I have based the fourth, fifth, sixth, and seventh sections upon the old-fashioned idea of holding out a temptation, and ‘setting a rogue to catch a rogue,’ which is the safest and most expeditious way I have ever discovered of bringing rogues to justice.

\textsuperscript{111} Id.


\textsuperscript{114} Paul E. McGreal & DeeDee Baba, Applying Coase to Qui Tam Actions Against the States, 77 NOTRE DAME L. REV. 87, 123 (2001) (citing United States v. Griswold, 24 F. 361, 266 (D. Or. 1885)).


\textsuperscript{117} Richard Moberly, Protecting Whistleblowers by Contract, 79 U. COLO. L. REV. 975, 980 (2008). “Society as a whole benefits from increased safety, better health, and more efficient law enforcement; shareholders benefit from increased transparency of corporate finances; and employees as a group benefit from improved working conditions. Whistleblowers, on the other hand, face significant retaliation, from isolation at work, to discharge, to physical violence.”

\textsuperscript{118} Rapp, supra note 116, at 59.
the scale. Therefore, it may be argued that bounties become even more important in these circumstances.

As discussed, the legacy of the FCA creates an “innate conflict of using a ‘rogue to catch a rogue.’” [Whistleblower bounty] programs use informants they perhaps should not trust to catch cheats they do not trust. And therein lies the conflict.”

“Whistleblowers, culpable or not, are typically the only individuals who can (and often do) expose wrongdoing. Without whistleblowers, the scandals they report on may never be known.” At the same time, there are concerns that providing bounties to culpable whistleblowers will actually encourage misconduct and may create an incentive to involve other employees in the wrongdoing.

The comments that the SEC received as part of its rulemaking process to implement the whistleblower section of Dodd-Frank provide a good example of the spectrum of perspectives pertaining to the issue of rewarding culpable whistleblowers. Public policy considerations and how best to strike the proper balance between rewarding culpable whistleblowers for their information and avoiding that they report just to obtain a bounty must be thoroughly considered in implementing any bounty structure. The SEC received over 240 comment letters and approximately 1300 form letters from individuals, whistleblower advocacy groups, companies, law firms, and academics critiquing and supporting certain aspects of the proposed rules implementing Dodd-Frank, including the issue of whether awards should be available to culpable whistleblowers.

Several commentators recommended that the definition of “whistleblower” be limited to cover only those individuals who did not participate at all in the violations, thus excluding anyone with unclean hands. Others commented that culpable whistleblowers should still receive awards but on a reduced level as not to create incentives for individuals to engage in wrongdoing. Many commentators were opposed to rules that would exclude culpable whistleblowers completely from eligibility, arguing that insiders possess crucial knowledge and information about fraud and will be

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119 See Beck, supra note 115, at 563 (explaining that inside information about wrongdoing is difficult to obtain because a person who participates in misconduct may have very little to gain and a lot to lose from exposing the fraudulent behavior).
120 Barthle, supra note 103, at 1202.
122 Howse & Daniels, supra note 99, at 538.
124 Id. at 34300. Commentators also expressed views on the proposed exclusions from award eligibility for certain individuals, the procedures for making a claim for a bounty, and the application of the anti-retaliation provision.
125 Id. at 34302 (citing comment letters from Americans for Limited Gov’t; Ryder Sys., Inc.; Fin. Serv. Inst., Inc.; U.S. Chamber of Commerce; Verizon; and White & Case LLP).
126 Id. at 34330 (citing comment letters from Connolly & Finkel, Target, SIFMA, Bus. Roundtable, Washington Legal Found., Morgan Lewis, Fin. Serv. Roundtable, Soc’y of Corporate Sec’y’s, Wells Fargo, Trace, Alcoa Grp, Oppenheimer Funds, Ass’n of Corporate Counsel, and the U.S. Chamber of Commerce Center for Capital Mkts Competitiveness); see also Hansberry, supra note 54 (arguing that Dodd-Frank over-incentivizes whistleblowers by providing culpable whistleblowers who may not be convicted with rewards.)
dissuaded from coming forward without the incentive that a bounty offers. The Auditing Standards Committee of the American Accounting Association was opposed to the SEC’s inquiry as to whether it should define “whistleblower” as an individual who provides information about potential securities law violations “by another person” as to avoid rewarding whistleblowers for their own misconduct. The Auditing Standards Committee argued that limiting the definition of “whistleblower” as such may restrict those who are “tangentially involved” from making a report, which may include instances in which people believe they have participated in wrongdoing because they did not immediately report their observance of the wrongdoing or those who cooperate with wrongdoers under duress or coercion. Attorneys with experience representing whistleblowers bringing qui tam actions under the False Claims Act echoed these sentiments, arguing that defining whistleblowers as such may bar them from reporting even if they had a low level of participation in the wrongdoing. Because insiders have “a first-hand view of the fraud, they are frequently the best source of information in enforcement actions against companies and upper level management.”

In contrast, some commentators, including the Securities Industry and Financial Markets Association, an organization representing securities firms, banks, and asset managers, Business Roundtable, an association of chief executive officers of major corporations, and Oppenheimer Funds, Inc., a registered investment advisor, were in favor of defining a “whistleblower” as an individual who reports on violations committed by “another person.” These organizations argued that allowing individuals to profit while they also took part in the violations is contrary to the intent of Congress to reduce the overall number of violations of the law and incentivizes misconduct.

In an effort to adhere to the language of the statute as enacted by Congress, the SEC included the culpability of whistleblowers (who are not convicted) as a factor that may decrease a whistleblower’s award percentage. For example, the SEC may decrease an award if the whistleblower played a significant role in the wrongdoing, acted with scienter, financially benefited from the violation, is a recidivist, or knowingly

127 Id. at 34330-31 (citing comment letters from Auditing Standards Comm. of the Auditing Section of the Am. Accounting Ass’n, George Merkl and the Nat’l Whistleblower Ctr).
129 Id.
131 Id.
133 Id.
134 Id. at 34331; 17 C.F.R. § 240.21F-6(b)(1).
interfered with the SEC’s investigation of the violation.\textsuperscript{135} The SEC will also consider the egregiousness of the underlying fraud committed by the whistleblower.\textsuperscript{136}

In a separate section of the rules pertaining to awards for whistleblowers who engage in culpable conduct, the SEC made clear that it would not include “any monetary sanctions that the whistleblower is ordered to pay, or that an entity if ordered to pay if the entity’s liability is based substantially on conduct that the whistleblower directed, planned, or initiated” in the required $1,00,000 threshold for an award.\textsuperscript{137} Public comment here largely opposed an outright exclusion of culpable whistleblowers because the information they provide is too valuable.\textsuperscript{138} Those in favor of awarding culpable whistleblowers also believed that bounties may actually deter future conduct because those who violate securities law would be aware of the possibility that a co-conspirator might turn against them and report the wrongdoing in search of a bounty.\textsuperscript{139}

In adopting final rule 21F-16, the SEC stated, “we do not believe that a per se exclusion for culpable whistleblowers is consistent with Section 21F of the Exchange Act . . . the original Federal whistleblower statute—the False Claims Act—was premised on the notion that one effective way to bring about justice is to use a rogue to catch a rogue. This basic law enforcement principle is especially true for sophisticated securities fraud schemes which can be difficult for law enforcement authorities to detect and prosecute without insider information and assistance from participants in the scheme or their coconspirators.”\textsuperscript{140} At the same time, the SEC was sensitive to the fact that a failure to limit culpable whistleblowers’ eligibility for awards could create public policy concerns.\textsuperscript{141} The SEC created a reasonable middle ground to this conflict by enacting final rules that incentivize less culpable individuals to come forward while limiting awards based on the culpable whistleblower’s specific level of involvement.

The outright ban on rewarding whistleblowers convicted of criminal activity in the action for which they are reporting was never altered from Dodd-Frank’s language as enacted by Congress during the SEC rulemaking process, and, in fact, was never discussed in the public comments.\textsuperscript{142} The legislative history of Dodd-Frank similarly lacks any analysis as to why convicted whistleblowers are denied a bounty. Although impossible to pinpoint, this void may be best explained by the view that such a concept—allowing a convicted criminal to obtain a bounty—is morally reprehensible to many.

\textsuperscript{135} Id. at 34331; 17 C.F.R. § 240.21F-6(b)(1). 
\textsuperscript{136} Id. 
\textsuperscript{137} Final SEC Rules, supra note 123, at 34349-50; 17 C.F.R. § 240.21F-16. 
\textsuperscript{138} Id. 
\textsuperscript{139} Id. “[S]ecurities violators would know that they forever face an increased risk that one of their co-conspirators might turn state’s evidence against them.” 
\textsuperscript{140} Id. (noting that “insiders regularly provide law enforcement with early and invaluable assistance in identifying the scope, participants, victims, and ill-gotten gains from these fraudulent schemes. Accordingly, culpable whistleblowers can enhance the [SEC]’s ability to detect violations of the Federal securities laws, increase the effectiveness and efficiency of the [SEC]’s investigations, and provide important evidence for the [SEC]’s enforcement actions.”). 
\textsuperscript{141} Id. 
\textsuperscript{142} See Final SEC Rules, supra note 123 (providing no explanation as to why convicted whistleblowers are denied a bounty).
IV. CRITIQUE OF THE IRS MODEL

In contexts beyond whistleblowing, the law bars convicted criminals from being financially rewarded for their wrongdoing. For example, “Son of Sam laws” prevent felons from retaining the proceeds of books they author or movie rights that they sell. Named after serial killer David Berkowitz, otherwise known as the “Son of Sam,” who sought to capitalize on his notoriety by selling his crime stories to a publishing house for $75,000 in the 1970s, New York was the first state to pass what became known as the Son of Sam law, which prevents criminals from earning a profit from the commercial sale of their crime stories. Son of Sam laws, adopted in over forty states and by the federal government, typically provide that the proceeds from a sale of a criminal’s story will be placed in an escrow account from which victims of the crimes may seek restitution for a certain statutory period, leaving the remaining amounts to a general fund. The sponsor of the original bill described the need for the law as such—“It is abhorrent to one’s sense of justice and decency that an individual . . . can expect to receive large sums of money for his story once he is captured . . . .”

As one scholar notes, the development of statutes like the Son of Sam laws and others that prohibit the criminally convicted to profit from their own crimes is based on one of the oldest legal principles—that “no one should be permitted to profit by his own fraud, or to take advantage of his own wrong.” Although Son of Sam laws typically apply to those who commit murder or cause physical injury to others, the basic premise of these words is a founding principle of our legal system. The law has long-recognized the public policy concerns and societal aversions associated with allowing a convicted criminal, who has either admitted to guilt during a plea bargain process or has been proven guilty beyond a reasonable doubt after trial, to financially benefit from his or her actions.

The IRS whistleblower program disregards these principles by allowing those whistleblowers who undergo a criminal prosecution and conviction to walk away from

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148 Colquitt, supra note 146, at 731 n. 215 (citing Price v. Hitaffer, 165 A. 470, 472 (Md. 1933) (“No one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime.”); Riggins v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (“No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes.”); and Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 119 (1991) (noting that New York courts have long recognized the “fundamental equitable principle” stated in the text)).
their prison time with money, excluding only those who planned and initiated the action. In this way, the IRS whistleblower program creates a risk that such a program may prompt the occurrence of the very behavior that it seeks to prevent.\textsuperscript{149}

A. Immunity and Leniency

A more palatable alternative to the IRS’s current treatment of convicted whistleblowers may be to offer immunity or leniency in lieu of a bounty to those whistleblowers who are facing criminal prosecution, an opportunity that is already in existence and is likely to suffice in incentivizing a culpable whistleblower to come forward.\textsuperscript{150} In one of his media interviews, Bradley Birkenfeld admitted that he was initially motivated to blow the whistle on UBS because of the desire for immunity.\textsuperscript{151} Nothing suggests that Birkenfeld’s motivation was prompted by a potential bounty, as the IRS whistleblower program, although enacted in 2006, had a very slow start.\textsuperscript{152} The IRS was still implementing the law well into 2008\textsuperscript{153} and the first bounty granted under the 2006 amendments was not until fiscal year 2011.\textsuperscript{154}

Birkenfeld claims that his motivations to inform governmental authorities of the tax fraud were mostly altruistic, as he willingly agreed to wear a wire to record conversations of his colleagues in exchange for full immunity for his participation in the fraud.\textsuperscript{155} Birkenfeld proceeded to take on an instrumental role in gathering evidence of the tax fraud, obtaining recordings of high-level UBS executives that detailed knowledge of the wrongdoing.\textsuperscript{156} Despite his cooperation, Birkenfeld was prosecuted and sentenced to forty months in prison, serving two and a half years in jail and the remaining time in

\textsuperscript{149} See Hansberry, supra note 54, at 211 (noting the potential dangers inherent in rewarding complicit behavior).

\textsuperscript{150} See Michael D. Silberfarb, Justifying Punishment for White Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act, 13 B.U. PUB. INT’L L. J. 95, 113 (2003) (citing U.S. DEP’T. OF JUSTICE, STATUS REPORT: CORPORATE LENIENCY PROGRAM (2001), which noted that “over a five year period use of informants was five times more likely to be responsible for detecting and prosecuting cartels than any other tool used.”); see Omari Scott Simmons & James D. Dinnage, Innkeepers: A Unifying Theory of the In-House Counsel Role, 41 SETON HALL L. REV. 77, 102 (2011) (noting that “a prime illustration” of incentives and immunities for whistleblowers is the antitrust arena in which a corporation that is the first to report illegal cartel behavior to the Department of Justice may avoid criminal prosecution); see also Charlotte Dennett, Closing the Impunity Gap: How Lawyers and Judges are Holding Higher-Ups Accountable, 37 Vt. B. J. 32, 33 (2011) (noting that while high level officials who commit crimes are often granted immunity, whistleblowers are being prosecuted).

\textsuperscript{151} CBSNEWS, supra note 66, at 4:26.


\textsuperscript{155} CBSNEWS, supra note 66, at 4:26.

\textsuperscript{156} Id.
Infuriated by this result, especially given his desire for immunity, Birkenfeld commented, “I gave them the biggest tax fraud case in the world. I exposed 19,000 international criminals and I’m going to jail for that?”

When asking during this interview whether he thinks he should be going to jail even though he participated in the fraud, Birkenfeld responded, “I think I shouldn’t . . . I’m the only one going to prison, out of 19,000 accounts and no Swiss bankers.”

Ironically, Birkenfeld was indeed the only participant in the entire UBS tax fraud to be incarcerated. He was ultimately prosecuted because of his relationship with his largest client, wealthy real-estate developer, Igor Olenicoff, who cooperated with the Department of Justice investigation and completely avoided any jail time, paying $52 million in fines and back taxes. Despite the immense amount of information that Birkenfeld provided pertaining to the scheme, he failed to disclose his relationship with Olenicoff and was charged with conspiracy to commit tax fraud, to which Birkenfeld pleaded guilty.

Thomas Perrelli, former Associate Attorney General of the United States, commented that Birkenfeld would likely never have been prosecuted had he come forward from the beginning and told authorities of his relationship with Olenicoff.

After Birkenfeld’s prison sentence, one of Birkenfeld’s attorneys, Stephen Kohn, head of the National Whistleblowers Center, adamantly stated, “the day [Birkenfeld] walks into prison is the day you will lose a generation of tax whistleblowers . . . because no one will blow the whistle.” Kohn touted the contributions of Birkenfeld, claiming that “with 20 or 30 [more] Birkenfelds [we can] fix this [tax evasion] problem [and] lower everybody’s taxes.” Ultimately it was claimed that Birkenfeld “had the last laugh,” as he was rewarded $104 million upon his exit from prison—“more than $4,600 for every hour he spent in prison.”

Birkenfeld’s prosecution and incarceration prompted so much of a public uproar that his massive bounty seemed to serve more as a remedial measure to the fact that he was not granted immunity than as recognition for his whistleblower contributions. Birkenfeld’s attorney remarked,

“The IRS reward will help undo the tremendous damage caused by the ill-conceived decision of the U.S. Department of Justice to . . . prosecute Mr. Birkenfeld. Mr. Birkenfeld was the only UBS banker to blow the whistle and the only UBS banker to be prosecuted. By doing so the DOJ sent the wrong message to international bankers. They caused a chilling effect on the willingness of employees in the international banking industry with direct knowledge of illegal

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157 Coder, supra note 91.
158 Id. at 9:57.
159 Id. at 10:39.
160 Id. at 10:16.
161 Id.
162 Id. at 10:57.
163 Id. at 11:21.
164 Id. at 12:22.
165 Id. at 12:30.
166 Kocieniewski, supra note 63.
offshore banking practices to step forward to report these crimes.\(^\text{167}\)

Many believed that the decision to prosecute Birkenfeld “sends the worst possible message to other financial-industry insiders who might be considering coming forward.”\(^\text{168}\) One source noted that a senior executive at a European bank offering similar U.S. tax shelters had reconsidered blowing the whistle in light of Birkenfeld’s imprisonment.\(^\text{169}\) When Birkenfeld decided to come forward to the government in 2007, he hired the Washington, D.C. law firm, Schertler & Onorato LLP, which began discussions with tax prosecutors.\(^\text{170}\) Prosecutors agreed to a proffer in which Birkenfeld told his story with the supposed assurance that it would not be used against him later.\(^\text{171}\)

As such, Birkenfeld went forward with agreeing to gather evidence against UBS, ultimately providing information that the IRS described as “exceptional in both its breadth and depth . . . form[ing] the basis for unprecedented actions against UBS.”\(^\text{172}\) Government officials claim that Birkenfeld was not entitled to immunity because he never revealed his relationship with Olenicoff, thereby justifying the refusal to offer Birkenfeld a cooperating witness agreement or any other form of protection from prosecution.\(^\text{173}\) Feeling that he was a victim of this “gotcha reflex,”\(^\text{174}\) Birkenfeld asked President Obama for a presidential pardon, citing his “unprecedented voluntary disclosures [that] led directly . . . to the payment of $780 million in fines and penalties.”\(^\text{175}\) His pardon was denied.\(^\text{176}\)

Although government authorities ultimately denied Birkenfeld immunity, his story reveals that the availability of leniency or immunity to potential whistleblowers very likely to face criminal prosecution may be enough to incentivize such persons to disclose wrongdoing. In addition, empirical legal research has proposed that the motivation of whistleblowers to come forward may be due to a personal desire for


\(^\text{169}\) Stier, supra note 168 (citing comments from pro-whistleblower organizations and individuals claiming that Birkenfeld’s case creates a disincentive for future whistleblowers to come forward).


\(^\text{171}\) Id.

\(^\text{172}\) Id.


\(^\text{174}\) Id.

\(^\text{175}\) Id.

remediation. A novel empirical study by legal scholars, Yuval Feldman and Orly Lobel, measured the effects of different regulatory mechanisms, including monetary rewards, anti-retaliation rights, duties to report, and liability fines on the motivations of individuals to become whistleblowers.\textsuperscript{177} This research revealed that monetary rewards to induce whistleblowing frequently affect levels of reporting but found an interesting distinction—that rewards like bounties may have a minimal effect on a person’s motivation to blow the whistle when the action for which they are reporting is perceived as morally offensive, such as in instances of fraud.\textsuperscript{178} Feldman and Lobel’s experiment revealed that an individual’s perception of the severity of the wrongdoing for which they are reporting has an impact on whether they will decide to ultimately report—"the more outraged respondents feel about the illegal behavior, the more likely they are to report and to predict reporting by others."\textsuperscript{179}

Comments as part of the SEC rulemaking process to implement Dodd-Frank explored the notion that culpable whistleblowers facing possible criminal prosecution already have incentives beyond financial awards to come forward. Some commentators opposed making bounties available to any whistleblower with unclean hands.\textsuperscript{180} Many commentators suggested that potential whistleblowers who are culpable are already incentivized to report their misconduct in return for leniency,\textsuperscript{181} including reduced sanctions or credit for cooperating\textsuperscript{182} and participation in cooperation or voluntary disclosure programs that entities like the SEC and IRS already have in place.\textsuperscript{183}

As it stands now, the SEC and IRS will not make amnesty available to culpable whistleblowers just because they have come forward with information. However, both programs recognize the valuable contributions that such persons offer, which is considered when deciding whether to proceed with civil sanctions or criminal prosecutions. The SEC rules implementing Dodd-Frank express that "[t]he fact that [one] become[s] a whistleblower and assist[s] in SEC investigations and enforcement actions does not preclude the [SEC] from bringing an action against [the whistleblower] based upon [his/her] own conduct in connection with violations of the federal securities laws,"\textsuperscript{184} Despite the SEC’s unwillingness to grant immunity to complicit whistleblowers, the SEC rules also state that it will take the whistleblower’s cooperation into consideration in accordance with its Cooperation Policy, which was strengthened in 2010.\textsuperscript{185} The SEC’s current Cooperation Policy attempts to reconcile the tension between

\textsuperscript{177} Feldman & Lobel, \textit{supra} note 1.

\textsuperscript{178} \textit{Id.} at 1200-03.

\textsuperscript{179} \textit{Id.} at 1192.


\textsuperscript{181} \textit{Id.}


\textsuperscript{184} 17 C.F.R. § 240.21F-15.

holding culpable actors fully accountable for their misconduct while, at the same time, providing incentives for such persons to cooperate with law enforcement authorities.\textsuperscript{186} Adopted in the wake of the Bernie Madoff scandal, the SEC Cooperation Policy’s aim is to incentivize individuals to come forward and cooperate with SEC investigations, which former SEC Enforcement Director Robert Khuzami called a potential “game-changer”\textsuperscript{187} given the potential fraud that this policy is likely to uncover.

To determine whether leniency is warranted in an SEC investigation and civil enforcement action under the policy, the SEC examines the level of assistance provided by the whistleblower, the importance of the underlying matter, the societal interest of holding culpable persons accountable for their misconduct, and the appropriateness of cooperation credit based upon the profile of the specific individual.\textsuperscript{188} The SEC offers leniency in various forms. Through a cooperation agreement, the Enforcement Division recommends to the SEC that a cooperator should receive credit for cooperating in investigations if such person offers “substantial assistance” to SEC investigations and enforcement actions.\textsuperscript{189} The SEC may also offer deferred or non-prosecution agreements, or formal written agreements, in which it agrees not to carry out an enforcement action against a cooperator if such individual or company “agrees to cooperate fully and truthfully and to comply with certain reforms, controls and other undertakings.”\textsuperscript{190} The Cooperation Policy also now permits the SEC to make immunity requests to the Department of Justice to obtain testimony or witness cooperation from individuals like culpable whistleblowers who possess valuable information in exchange for protection against criminal prosecution.\textsuperscript{191} In cases when an individual asserts his or her Fifth Amendment privilege against self-incrimination, the SEC may seek statutory immunity to obtain a court order compelling an individual to testify, if such request is approved by the U.S. Attorney General, or letter immunity, which is conferred by agreement between the individual and a U.S. Attorney’s Office.\textsuperscript{192} Both types of immunity prevent any statements or information to be used against the individual in any criminal case, excluding instances of perjury, giving a false statement, or obstruction of justice.\textsuperscript{193}

The SEC’s willingness to cooperate with a culpable whistleblower has proven to be successful, as the SEC reported an increase in the quality of tips it has received since

\begin{footnotes}
\item[186] Id. at 3.
\item[188] Id.
\item[190] Id.
\item[192] Id.
\item[193] Id.
\end{footnotes}
the enactment of Dodd-Frank and adoption of the Cooperation Policy.\footnote{Christina N. Davilas & Steven W. Hansen, \textit{SEC Announces First Deferred Prosecution Agreement With An Individual}, Bingham, Nov. 22, 2013, available at https://www.bingham.com/Alerts/2013/11/SEC-Announces-First-Deferred-Prosecution-Agreement-With-An-Individual.} From the establishment of the policy in August 2011 until the end of fiscal year 2013, the SEC reports that it has received 6,573 tips and complaints from whistleblowers, four of which have resulted in bounty awards to whistleblowers.\footnote{Id.} Similarly, the IRS already has a system in place in which it offers leniency to those who voluntarily provide it with information. The existence of this program and the fact that Bradley Birkenfeld had the possibility of being granted immunity offer support for the suggestion that cooperation measures already in existence may be sufficient to incentivize culpable whistleblowers to report to the IRS,\footnote{See Samantha H. Scavron, \textit{In Pursuit of Offshore Tax Evaders: The Increased Importance of International Cooperation in Tax Treaty Negotiations after United States v. UBS AG}, 9 Cardozo Pub. L. Pol’y & Ethics J. 157, 181 (2010) (noting that there may now be less of an incentive for complicit whistleblowers to come forward given Birkenfeld’s prosecution and incarceration).} which would eliminate the need to make any bounties available to whistleblowers who are criminally convicted.

The power to decide whether criminal prosecution for tax violations is merited is vested in the Criminal Investigation (“CI”) unit of the IRS. CI is the criminal enforcement arm of the IRS that investigates potential criminal tax violations and related financial crimes, consisting of special agents who are trained in unique investigatory skills, computer evidence, and forensic technology to recover financial data that may be hidden by electronic means such as encryption or password protection.\footnote{Criminal Investigation (CI) At-A-Glance, Internal Revenue Serv., http://www.irs.gov/uac/Criminal-Investigation-(CI)-At-a-Glance (last visited Feb. 16, 2014).} Once CI detects fraud, it conducts a criminal investigation to obtain evidence, including “interviews of third party witnesses, conducting surveillance, executing search warrants, subpoenaing bank records, and reviewing financial data.”\footnote{How Criminal Investigations are Initiated, Internal Revenue Serv., http://www.irs.gov/uac/How-Criminal-Investigations-Are-Initiated (last visited Feb. 16, 2014).} After all of the evidence is collected and analyzed, CI special agents will either determine that no criminal activity has been substantiated and discontinue the investigation or, if sufficient evidence of criminal activity has been found, CI agents will prepare a written report of the findings and recommend prosecution.\footnote{Id.} These special agent reports are then reviewed by several other layers within CI and are then forwarded to the Tax Division of the Department of Justice for prosecution, which, if accepted, will allow the CI special agent to assist prosecutors in preparing for trial.\footnote{Id.} The IRS is clear that “[t]he ultimate goal of an IRS Criminal Investigation prosecution recommendation is to obtain a conviction or plea,” suggesting approximately 3,000 criminal prosecutions per year.\footnote{Id.}

In determining whether a criminal prosecution should be recommended, CI must find that the evidence is sufficient to “establish guilt beyond a reasonable doubt and a
reasonable probability of conviction.” In making this determination CI will consider factors such as “whether a voluntary disclosure was made, whether dual or successive prosecution exists, the health, age and mental condition of the taxpayer and whether solicitation of returns has occurred. The presence of any of the foregoing may impact on willfulness and significantly impair or eliminate the probability of conviction.” Therefore, it is fully within the IRS’s discretion to determine whether criminal prosecution is appropriate.

Although a voluntary disclosure on the part of the noncompliant taxpayer will not guarantee immunity outright, leniency for individuals who have voluntarily come forward with information is a long-standing IRS practice. As the Internal Revenue Manual clearly states, a “voluntary disclosure may result in prosecution not being recommended” and occurs when a communication is made to the IRS that is “truthful, timely, and complete, and when (A) [t]he taxpayer shows a willingness to cooperate (and does in fact cooperate) with the IRS in determining his or her correct tax liability; and (B) [t]he taxpayer makes good faith arrangements with the IRS to pay in full the tax, interest, and any penalties determined by the IRS to be applicable.” Disclosures will only be considered voluntary if a CI investigation has not yet been made.

The IRS will provide leniency for those who voluntarily disclose information because incentivizing individuals or businesses who are liable to come forward with information is of utmost importance in the tax arena. The compliance function of the IRS is principally concerned with protecting and enhancing voluntarily compliant conduct by taxpayers. Thus, the IRS relies extensively on the honesty of taxpayers in reporting their income in a system where “[m]any taxpayers are not willing to assist the IRS” by providing accurate and truthful tax returns. Dishonesty of taxpayers has given rise to the ever-growing “tax gap,” which is the difference between the amount of taxes

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203 Id.
205 Id.
206 Id.; Marcotte, supra note 83, at 7 (noting that the IRS will generally not recommend any criminal prosecution as long as a taxpayer makes “a truthful, timely, and complete disclosure before the disclosed information is discovered by the government”).
208 Id.
210 See Morse, supra note 26, at 2.
that are owed to the government and those that are actually collected.\textsuperscript{211} The last report by the IRS of the tax gap was made in 2006, which revealed that the gap for that year was $450 billion, up from $345 billion that was previously reported in 2001.\textsuperscript{212} Research has revealed that the tax gap has steadily increased since 1973.\textsuperscript{213}

IRS leniency initiatives for voluntary disclosure have proven successful. After the IRS discovered the details of the UBS tax fraud discovery through Bradley Birkenfeld,\textsuperscript{214} it created the first official voluntary disclosure program for taxpayers in 2009, who had the option of reporting delinquent taxes in return for reduced penalties, a reduced likelihood of criminal prosecution, or both.\textsuperscript{215} Due to the successes of the 2009 initiative, the IRS offered the program again in 2011 and 2012, proving enormously successful in allowing the IRS to resolve a large number of cases without tapping into the resources of lengthy investigations.\textsuperscript{216} In June of 2012, the IRS announced that its voluntary disclosure programs had brought in more than $5 billion in back taxes, interest and penalties, resulting from over 33,000 voluntary disclosures made.\textsuperscript{217}

Given the essential and historical role that voluntary disclosures have played in the recovery of billions of dollars of lost tax revenue, it is clear that the IRS is heavily reliant on the willingness of individuals, businesses, and whistleblowers in general to come forward. Due to the promise of reduced penalties and possible avoidance of criminal prosecution, sources have noted that voluntary disclosure programs help culpable individuals overcome the fear of being discovered and prosecuted.\textsuperscript{218} Given the notable successes of the program in detecting tax fraud and allowing thousands to avoid criminal prosecution, the programs seems to offer a win-win situation for both a culpable whistleblower and the IRS.

In its rules implementing the whistleblower program, the SEC states that it will

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\item[\textsuperscript{211}] Michelle M. Kwon, \textit{The Tax Man’s Ethics: Four of the Hardest Ethical Questions for an IRS Lawyer}, 9 CARDozo PUB. LAW & POLICY ETHICS J. 371, 393 (2011).
\item[\textsuperscript{214}] See supra Part IIIA.
\item[\textsuperscript{215}] Lederman, supra note 77, at 501.
\end{itemize}
\end{footnotesize}
take the whistleblower’s cooperation into consideration in accordance with its Cooperation Policy in determining whether to move forward with bringing an action against a culpable whistleblower.\textsuperscript{219} The IRS should consider including similar language in its regulations to interpret the IRS whistleblower program, which were issued in December of 2012 and are still in flux.\textsuperscript{220} Such an inclusion would clarify that it is within the IRS’s sole discretion to determine whether prosecution is appropriate for a culpable whistleblower. While the IRS regulations are still pending, there is room for improvement. Commentators have also criticized the IRS’s proposals for straying from the statute upon which the whistleblower program is based, the False Claims Act.

\begin{itemize}
\item \textbf{B. Divergence from the False Claims Act}
\end{itemize}

The amended IRS whistleblower program was modeled after the False Claims Act (“FCA”),\textsuperscript{221} which, as discussed in Part IIIB, was enacted during the time of the Civil War and is premised on the notion that it “takes a rogue to catch a rogue.”\textsuperscript{222} As discussed, the IRS will reduce a bounty award to a whistleblower who “planned and initiated” the action that led to the tax non-compliance and will deny a reward to a whistleblower who is convicted because of this role, while allowing bounties for all other convicted whistleblowers.\textsuperscript{223} The IRS whistleblower program’s use of the words “planned and initiated” is taken directly from the FCA. Section 3730(d) of the FCA states that if a\textit{qui tam} plaintiff\textit{planned and initiated} the wrongdoing upon which the action is based, his or her award may be reduced.\textsuperscript{224} Notably, the FCA also states that if the\textit{qui tam} plaintiff is convicted of criminal conduct arising from his or her role in the wrongdoing, he or she is barred from receiving any award and is dismissed from the action.\textsuperscript{225} Therefore, the IRS whistleblower program diverges from the FCA in that it makes bounties available to those who are convicted, an approach that none of the other federal whistleblower programs take.

Differentiating those who “planned and initiated” from those who participated in the violation to a lesser degree is obviously a key distinction to be made. It would have

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\item \textsuperscript{221} Letter from Radack, Coleman-Adebayo & Green, supra note 31, at 1; Kwon, supra note 101, at 457; Feldman & Lobel Research, supra note 1, at 1168.
\item \textsuperscript{222} \textit{See supra} Part IIIB.
\item \textsuperscript{223} 26 U.S.C. § 7623(b)(3).
\item \textsuperscript{224} 31 U.S.C. § 3730(d)(3) (emphasis added).
\item \textsuperscript{225} \textit{Id; see also} Kwon, supra note 101, at 458-60 (noting that while there are similarities between the FCA and the IRS whistleblower program, there are also differences, such as the whistleblower’s more pronounced involvement in a\textit{qui tam} action, court involvement in FCA actions as opposed to whistleblower claims with the IRS that are primarily administrative proceedings, and the requirement to prove that a defendant has defrauded the government in a\textit{qui tam} action whereas fraud is not a prerequisite to receiving an award under the IRS whistleblower program—“[t]ax whistleblowers may recover from taxpayers’ innocent mistakes or uncertainty in the tax laws.”).
\end{itemize}
made the difference in whether Bradley Birkenfeld walked away with a $104 million bounty. Despite the fact that the “planned and initiated” distinction is the only limitation on whether the IRS will grant a bounty to a criminally convicted whistleblower, Congress has provided no guidance as to the meaning of these words. Instead, the IRS and Treasury Department have made some initial suggestions as to how to determine whether an individual planned and initiated an action in the proposed regulations interpreting Section 7623 that were issued in December of 2012 and remain to be finalized. Under the proposed regulations, the IRS determines that a claimant planned and initiated the underlying acts if he or she “(i) designed, structured, drafted, arranged, formed the plan leading to, or otherwise planned an underlying act, (ii) took steps to start, introduce, originate, set into motion, promote or otherwise initiated an underlying act, and (iii) knew or had reason to know that there were tax implications to planning and initiating the underlying act.”

If the IRS determines that a claimant meets the threshold for planning and initiating the underlying act, it will then categorize the extent to which that claimant was involved as “primary, significant, [or] moderate” and reduce the bounty accordingly. The proposed regulations indicate that the “primary, significant or moderate” categories are intended to “promote consistency, fairness, and transparency in an award determination process that is inherently subjective.” Once this determination is made, the IRS will “reduce the awards of (1) significant planners and initiators by 66% to 100%, (2) moderate planners and initiators by 33% to 66%, and (3) minimal planners and initiators by 0 to 33%.”

The proposed IRS regulations do not adopt the FCA’s approach, which decides whether a whistleblower “planned and initiated” misconduct based on whether he or she was the “principal architect” of the wrongdoing. The proposed IRS regulations indicate that the “principal architect” approach was disregarded due to the notion that more than one individual may plan and initiate the actions that lead to a tax noncompliance.

Commentators have also expressed concern that the examination of Bradley Birkenfeld’s role in the UBS tax fraud offered no explanation of how the IRS will make the “planned and initiated” determination in the future. One source noted the probability that the IRS’s determination with respect to Birkenfeld is not likely to help clarify how the IRS would distinguish between a whistleblower who “planned and initiated” the scheme and one who did not, as it offered no analysis of how it reached this conclusion. Given the broad range of factors that the IRS evaluates in making the

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226 Proposed IRS Rules, supra note 220, at 74803.
227 Id.
228 Id.
229 Id.
230 Id.
232 Id.
233 Id.
234 Coder, supra note 91 (citing Barbara T. Kaplan of Greenberg Traurig LLP).
“planning and initiating” threshold, one commentator argued that the Birkenfeld award “allows whistleblowers who were somewhat involved in a tax avoidance plan to argue for an award as long as they did not create the plan or directly benefit from the taxes saved.”

Many others criticized the IRS for expanding the definition of “planned and initiated” beyond its intended meaning, as evidenced by the legislative history of the FCA. Unfortunately the legislative history of the 2006 amendments to the IRS whistleblower program does not shed light on these discrepancies, as any explanation as to the rationale behind providing bounties to convicted whistleblowers and the intended meaning of “planned and initiated” is lacking. In criticism of the IRS whistleblower program, commentators of the proposed rules have suggested that the “planned and initiated” limitation should only “apply narrowly to principal wrongdoers” or “principal architects” of the underlying violations by encompassing those persons who “both originated, introduced or started the scheme and also designed, drafted and arranged the scheme.”

Commentators have also found fault with the IRS’s inclusion of contributors, advisors, and those who “knew or should have known” that tax noncompliance was likely to occur among those who have planned and initiated an action, arguing that such roles cast too wide of a net and extend beyond the “principal” architect or wrongdoer status as originally envisioned by Congress under the False Claims Act. Senator Grassley himself, the co-author of the 2006 amendments to the IRS whistleblower program, expressed similar criticisms to the proposed rules in a letter to the IRS and Treasury Department in January of 2013. While recognizing that “a delicate balance [needs] to

235 Id. (citing Bryan C. Skarlatos of Kostelanetz & Fink LLP; see also Saul Ewing LLP, supra note 73 (“potential claimants and representatives are still left without full clarification as to exactly how much participation in a tax fraud scheme is permissible before the ‘planned and initiated’ exclusion applies.”)).

236 See Letter from Radack, Coleman-Adebayo & Green, supra note 31, at 2; see also Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws: Pub. Hearing Before the Internal Revenue Serv., Reg. 141066-09 (2013) (statement of Neil V. Getnick, Chairperson, Taxpayers Against Fraud Education Fund).

237 See Nozemack & Webber, supra note 13, at 94 n.85. “Little legislative history is available for the 2006 amendments. This is likely because the whistleblower amendments were only a small, uncontroversial part of the much larger Tax Relief and Health Care Act of 2006, enacted on December 20, 2006.”

238 Letter from Radack, Coleman-Adebayo & Green, supra note 31, at 2-3 (citing 134 CONG. REC. S16697 (daily ed. Oct. 18, 1988) (statement of Senator Grassley) (stating that the amendment would “apply narrowly to principal wrongdoers); 124 CONG. REC. H10637 (daily ed. Oct. 20, 1988) (statement of Rep. Berman) (“[T]he amendment we are voting on today will allay any criticism that the False Claims Act will encourage principal wrongdoers to file false claims actions solely motivated by the desire to profit from their own previous wrongdoing”); 134 CONG. REC. S16697 (daily ed. Oct. 18, 1988) (statement of Senator DeConcini) (expressing that the amendment was designed to prevent those who are “the main force behind a false claims scheme from recovering.”)); see also Pub. Hearing Before the Internal Revenue Serv., Reg. 141066-09, supra note 236, at 23 (statement of Mr. Getnick) (expressing that the IRS’s inclusion of “drafted” within the definition of “planned” “would seemingly penalize innocent employees who merely drafted a document at the direction of his or her superiors,” and that the inclusion of “promoted within the definition of “initiated” would “appear to penalize those who did not actually initiate anything but may only have become involved in the fraud scheme well after it began.”).

239 Letter from Radack, Coleman-Adebayo & Green, supra note 31, at 3.

be struck between weeding out bad actors while not discouraging knowledgeable insiders from coming forward,” Senator Grassley expressed that the inclusion of those “who knew or had reason to know” in the planned and initiated limitation strays from the intent of the statute. The IRS has thus far not responded to these criticisms.

In contrast, the SEC avoids this dilemma altogether by basing exclusions from bounties not on the question of whether a whistleblower “planned and initiated” the wrongdoing but by whether the whistleblower was convicted for taking part, even narrowly, in the scheme. This structure avoids the potential confusion that emerges in attempting to determine whether an individual played a key role in a fraud as opposed to a more nominal role, a distinction that is often hard to ascertain. The SEC model also helps to avoid the classification of those who are only tangentially involved into the category of “planned and initiated,” such as in cases where potential whistleblowers believe that they have participated in wrongdoing because they did not initially report their observance of the misconduct. As to this concern, one source offered the example of Betty Vinson in the WorldCom fraud, who initially cooperated in making false entries under duress and continued to commit wrongdoing under severe pressure from superiors. If persons in such positions were deemed “planners and initiators” because they “knew or had reason to know” that there were tax implications to their actions, then a significantly higher of individuals would likely be excluded from awards. The SEC’s approach of basing exclusions on the existence of a criminal conviction avoids these severe limitations.

C. Recent SEC Trends

This section is intended to anticipate counterarguments that may challenge the suggestion that the IRS whistleblower program should follow the SEC model with respect to making convicted whistleblowers ineligible for a bounty. Counterarguments may center on the notion that the fields of tax law and securities law are distinct, thereby suggesting that securities fraud reporting may not be comparable to tax fraud reporting. The author does not dispute the fact that the IRS and the SEC are based on divergent fundamental missions. While the main tenet of the SEC is the disclosure of information to protect against the potential asymmetry of information between issuers of securities and investors in those securities, the mission of the IRS is to ensure that the public is compliant with their tax reporting obligations.

241 Id. (“There is no reason for the IRS to be recreating the wheel with regard to planners and initiators. There is already established law in this area with respect to FCA claims.”)
242 See Proposed IRS Rules, supra note 220.
244 Id.; see also Ex-WorldCom Accountant Gets Prison Term, N.Y. TIMES, Aug. 6, 2005, available at http://www.nytimes.com/2005/08/06/business/06worldcom.html?ei=5090&_r=0 (noting that Betty Vinson claimed he was pressured by supervisors to make false entries into WorldCom’s books).
Jennifer M. Pacella

The recognition that the goals of the SEC and IRS may not be comparable does not threaten the argument that Congress should amend the IRS whistleblower program to be on par with other federal whistleblower programs in the sense that the criminally convicted should be excluded from bounties because such persons are already incentivized to report by the desire for leniency or immunity, as was Bradley Birkenfeld. Further, recent trends have shown that the SEC and IRS, although designed to fulfill separate needs in the law, increasingly resemble each other in the sense that the SEC has increasingly taken on a “punisher” role utilizing tools that have traditionally been confined to the criminal enforcement arena. Legal scholars have begun to comment on this trend.

The statutory enforcement authority of the SEC does not include criminal sanctions, which are instead vested in the Department of Justice. In contrast, the IRS is a federal criminal investigative agency with the authority to utilize criminal police powers and sanctions, including search warrants, interrogations, and surveillance. The Enforcement Division of the SEC, the entity tasked with the investigation of possible securities violations that recommends SEC action when appropriate, has increasingly redefined itself as a punishing entity, especially in the aftermath of the Bernie Madoff

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fraud and the SEC’s inability to detect it any sooner.\textsuperscript{254} As one scholar notes, the SEC “has recast itself as an all-purpose investigator and punisher” in recent times, removing roadblocks to initiating and pursuing investigations.\textsuperscript{255} At the time that the SEC began this shift, former SEC Chief of Enforcement, Robert Khuzami, recruited two former prosecutors from the U.S. Attorney’s office rather than filling these positions with career SEC attorneys.\textsuperscript{256} Khuzami enacted a number of changes that were aimed at making the SEC Enforcement Division look and act more like a criminal law enforcement agency,\textsuperscript{257} including reorganizing the division into subject matter units dedicated to investigating specific types of noncompliance and announcement of the intention to expand cooperation programs from entities to individual cooperators, a tool already used by criminal law enforcement.\textsuperscript{258}

The 2013 appointment of Mary Jo White as Chair of the SEC, former U.S. Attorney for the Southern District of New York, is also a signal that the SEC is committed to increasing its role as a punishing entity using tools resembling criminal enforcement agencies. With a reputation as “a tough litigator,” White is the first career prosecutor and litigator to chair the SEC, filling key jobs in the enforcement division nearly right away with people she knew well in that arena.\textsuperscript{259} Extensive public comment has noted the more aggressive tone that the SEC embodies due to White’s role, including admissions of guilt by violators, the rejection of settlements to bring more cases to trial, and a growing perception that the SEC is “tougher” than before.\textsuperscript{260}

The SEC Cooperation Policy discussed earlier is one of the primary tools that the SEC has developed to improve its enforcement mechanisms, a program that was “mold[ed] in the image of criminal cooperation tools employed by the U.S. Department of Justice,” thereby enhancing the “criminalization” of the SEC’s procedures and policies.\textsuperscript{261} These tools, discussed in Part IVA, include SEC requests for immunity from

\begin{thebibliography}{99}
\bibitem{254} Baer, supra note 248, at 610.
\bibitem{255} Id.
\bibitem{256} Id.
\bibitem{257} Id. at 623.
\bibitem{258} Id. at 610.
\end{thebibliography}
the U.S. Attorney General and deferred and non-prosecution agreements. The SEC’s shift towards historically criminal tools demonstrates a greater emphasis “on the SEC’s mission to work cooperatively with criminal authorities, to share information, and to coordinate their investigations with parallel criminal investigations when appropriate.”

Criminal and civil law are clearly distinct. While criminal laws look to the existence of mens rea, or a guilty mind of the defendant, civil laws tend to be concerned with liability from an objective standpoint. While civil suits provide redress for disputes between private persons or parties, criminal suits prosecuted by the government are intended to punish those whose conduct violates the moral judgments of society. The Supreme Court’s recent examinations of the criminal-civil distinction have noted that the goals of deterrence, incapacitation, and rehabilitation do not alone have the capability of transforming a seeming civil statute into a criminal statute. Instead, the Supreme Court has recently pinpointed that the key difference between criminal and civil law is that criminal law has a retributive purpose authorizing the state “to impose sanctions to express the community’s blame or condemnation for the commission of an unlawful act.” Although objectives like deterrence and incapacitation are associated with punishment, these goals have also been found to be “compatible with” civil regulatory statutes, thereby failing to serve as the main factor that differentiates criminal law from civil law. The imposition of punishment thus distinguishes a criminally convicted individual from a culpable one. As legal scholar, John F. Stinneford notes,

The centrality of retributive purpose in distinguishing criminal from civil laws reflects an obvious but often overlooked fact: A defendant who is subjected to criminal punishment loses more than property or even liberty: he also loses his good name. He is labeled by the community as a person worthy of blame, stigma,
and retribution. He is labeled a criminal. This is a very serious thing indeed, and it calls for the protections the Constitution affords criminal defendants.\textsuperscript{270}

These observations offer support for the notion that rewarding criminally convicted whistleblowers for their information through a bounty runs contrary to fundamental legal principles that distinguish convicted criminals from those who took a less severe role in the wrongdoing. The fact that the SEC has increasingly manifested itself as a punisher utilizing tools and protections traditionally reserved to criminal enforcement entities like the IRS suggests that the line between the two agencies may be becoming more blurred. Such a premise serves to challenge the perception that the SEC and IRS are so distinct as to justify any varying treatment of criminally convicted whistleblowers.

V. CONCLUSION

As early as the Civil War era, the False Claims Act’s theory that it “takes a rogue to catch a rogue”\textsuperscript{271} has justified rewarding those with unclean hands for the valuable information that they are able to provide. The legacy of these words was applied to both the IRS whistleblower program, as amended in 2006, and the SEC whistleblower program under Dodd-Frank, which each provide sizeable bounties to whistleblowers who are complicit in the wrongdoings for which they are reporting. Both federal agencies have decided not to exclude culpable whistleblowers from being eligible for a bounty but diverge with respect to making bounties available to whistleblowers who are criminally convicted. The SEC whistleblower program follows the False Claims Act model in that it will outright deny a bounty to any convict,\textsuperscript{272} and, for a whistleblower who participated in the wrongdoing but was not convicted, will reduce the amount of the bounty based on such person’s level of involvement.\textsuperscript{273} In contrast, the IRS will allow bounties even for criminally convicted whistleblowers as long as they were not convicted because they “planned and initiated” the wrongdoing.\textsuperscript{274} Bradley Birkenfeld’s contributions as a whistleblower were invaluable in bringing one of the most significant tax frauds to light, leading to initiatives that helped the U.S. government tap into the recesses of Swiss bank secrecy.\textsuperscript{275} Despite Birkenfeld’s legal battle for immunity, he was the only participant in the UBS fraud to be jailed.\textsuperscript{276} Birkenfeld’s $104 million bounty is controversial and threatens long-standing legal principles that convicts should be precluded from financially benefitting from their misdeeds.\textsuperscript{277}

\begin{footnotes}
\footnotetext[270]{Id.}
\footnotetext[271]{Supra Part IIIB.}
\footnotetext[272]{See supra Part IIB.}
\footnotetext[273]{Id.}
\footnotetext[274]{See supra Part IIA.}
\footnotetext[275]{See supra Part IIIA.}
\footnotetext[276]{Id.}
\footnotetext[277]{See supra Part IV.}
\end{footnotes}
This Article has suggested that the incentives of leniency and immunity already inherent in SEC and IRS programs provide enough of an incentive to those whistleblowers who are likely to be successfully prosecuted to report, with Bradley Birkenfeld’s story being a case in point. By amending the IRS whistleblower program to follow that of the SEC model, Congress would more closely adhere to the legacy of the False Claims Act, the statute upon which the present-day IRS program is based and that denies bounties to whistleblowers who are criminally convicted. Such amendments would also eliminate the lack of clarity stemming from the IRS whistleblower program’s current use of the “planning and initiating” limitation, which differentiates those who are denied a bounty outright because of a conviction for this role from those who are not. Commentators have already begun to critique the way in which the IRS makes this determination, arguing that it diverges from the False Claims Act model.

Finally, this Article has acknowledged the distinctions between the areas of tax and securities law but has challenged any counterarguments that may critique this Article’s position based on these differences. Recent trends have revealed that the SEC has emerged as a “punisher” utilizing investigatory and enforcement tools that are more akin to its criminal counterparts, such as the IRS and the Department of Justice. Such trends suggest that perhaps the SEC and IRS are not so different after all, especially in light of the significant need of both agencies to be informed of fraud.

Martin Luther King, Jr. once eloquently expressed that “He who passively accepts evil is as much involved in it as he who helps to perpetrate it. He who accepts evil without protesting against it is really cooperating with it.” These words tell us that even silence is complicity, which may suggest that an individual who observes wrongdoing in silence, taking no action, may have the same level of fault as a participator in the wrongdoing who then reveals it. For this reason, culpable whistleblowers should be acknowledged and rewarded for the inside information that only they can provide, but with caution. Barring the criminally convicted, persons who have undergone criminal prosecution resulting in an ascertainment of guilt, from whistleblower bounties is likely to be a reasonable solution to the conflict between incentivizing those with unclean hands to inform the government of fraud and avoiding that their motivations are merely premised on the promise of potentially millions of dollars.

278 See supra Part IVB.
279 Id.
280 See supra Part IVC.