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Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions

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I. INTRODUCTION

The Internal Revenue Service (Service) has been authorized for over 140 years to pay awards to individuals who blow the whistle on those who do not pay the taxes they owe.[1] Paying cash awards to individuals who turn

[1] Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch. 11, § 3463, 35 Rev. Stat. 686 (1873–74)). Codified as I.R.C. § 7623 (1954). The law as it originally existed in 1954 referred to those blowing the whistle as informants and payments to informants as

in delinquent taxpayers has been controversial. During debate of the 1998 Internal Revenue Service Restructuring and Reform Act, Senator Harry Reid (D-Nev.) proposed to eliminate the Service whistleblower program, which he referred to as the "Award for Rats Program" and the "Snitch Program."[2] Senator Reid found the idea of the Service paying "snitches" to rat on their "associates, employers, relatives, and others" as "unseemly, distasteful, and just wrong."[3] Senator Reid ultimately backed away from his proposal to eliminate the program and instead agreed to a floor amendment that required the Service to study and report to Congress about whether the program should be eliminated or modified.[4] Congress did not eliminate the Service whistleblower program. Instead, eight years later in 2006, Congress modified the program to boost the Service's authority to pay cash awards to tax whistleblowers.[5] Congress likely was prompted to retain the Service whistleblower program because the Treasury Inspector General for Tax Administration (TIGTA), in a June 2006 audit report, found that the program had "significantly contributed to the detection and punishment of tax law violations."[6] TIGTA also found that the program was more effective and less expensive than the Service's primary method of selecting tax returns for audit.[7] Lawmakers find appealing programs that enhance

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rewards. *Id.* The most recent changes refer to whistleblowers as whistleblowers and payments to whistleblowers as awards. I.R.C. § 7623(b). The term "whistleblower" comes from the act of a British bobby, walking his beat armed only with a nightstick, blowing his whistle to alert other law enforcement officers of the commission of a crime. Winters v. Houston Chronicle Pub. Co., 795 S.W.2d 723, 727 (Tex. 1990) (Doggett J., concurring) (citing *Blowing the Whistle* 18 (C. Peters & T. Branch eds. 1972)).

[2] 144 CONG. REC. S4379-05, at S4397-98 (Statement of Sen. Reid); *see also* Ralph Vartabedian, *IRS "Awards for Snitches" Program Comes Under Fire*, L.A. TIMES, April 15, 1998 (referring to whistleblowers as "paid stool pigeons"). Congress passed the Internal Revenue Service Restructuring and Reform Act (the Act) to make the Service "more customer friendly" and to protect "taxpayers from abusive practices and procedures of the IRS." 144 CONG. REC. S4379-05, at S4379-80 (Statement of Sen. Roth describing the main principles of the Act).

[3] 144 CONG. REC. S4379-05, at S4398.

[4] 144 CONG. REC. S4379-05, at S4400; Pub. L. No. 105-206, title III, § 3804, 112 Stat. 783 (July 22, 1998); *see also* JOINT COMMITTEE ON TAXATION, SUMMARY OF PROVISIONS OF THE CONFERENCE AGREEMENT ON H.R. 2676, JCX-50-98R (Comm. Print. June 24, 1998). The Service issued its report in September 1999. IRS, THE INFORMANTS' PROJECT: A STUDY OF THE PRESENT LAW REWARD PROGRAM, *cited in* TREASURY INSPECTOR GEN. FOR TAX ADMIN., *THE INFORMANTS' REWARD PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT* (June 2006) n.13 [hereinafter 2006 TIGTA REPORT].

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

[6] 2006 TIGTA REPORT, *supra* note 4, at 9.

[7] 2006 TIGTA REPORT, *supra* note 4, at 5. TIGTA determined that the Service

Service tax enforcement efforts to shrink the tax gap—the difference between the amount of taxes owed and what is actually collected—which the Service estimates to be approximately $345 billion.[8]

The 2006 amendments have strengthened certain aspects of the Service whistleblower program, but the changes are tempered by section 6103, which provides that returns and return information "shall be confidential" except as otherwise provided by thirteen statutory exceptions.[9] Section 6103 covers, among other things, tax returns filed with the Service; schedules and attachments to tax returns; information the Service gathers or prepares with respect to a return or with respect to the determination of a person's liability; the identity of taxpayers; the nature, source, or amount of a taxpayer's income; and whether taxpayers are under investigation or audit.[10] The definition of return information "has evolved to include virtually any information collected by the Internal Revenue Service regarding a person's tax liability."[11]

There is a tension between protecting taxpayer privacy and effectively administering the enhanced Service whistleblower program. Section 6103 generally would prohibit the Service from disclosing to the whistleblower the status of the whistleblower's claim, including whether the taxpayer is, has been, or will be under audit as a result of the whistleblower's information; why a claim is rejected or denied; or the basis of any eventual award. Furthermore, when Congress enhanced the whistleblower law in

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collected more dollars per hour following whistleblower tips than using DIF scores, the primary method for selecting returns for audit. *Id.* at 4. DIF stands for Discriminant Index Function. *Id.* DIF is a secret mathematical formula that weighs certain return characteristics to attempt to target high-risk returns. *Id.*

[8] U.S. DEP'T OF THE TREASURY, UPDATE ON REDUCING THE FEDERAL TAX GAP AND IMPROVING VOLUNTARY COMPLIANCE 2 (July 8, 2009), *available at* http://www.irs.gov/pub/newsroom/tax_gap_report_-final_version.pdf [hereinafter 2009 TREASURY REPORT]. The net tax gap—the amount owed after subtracting revenue collected through enforcement actions and late payments—is estimated to be $290 billion. *Id.*

[9] I.R.C. § 6103(a) (2009). Unless otherwise noted, all section references are to the Internal Revenue Code as currently in effect.

[10] I.R.C. § 6103(b)(1) (defining return); I.R.C. § 6103(b)(2) (defining return information). Return information is defined to mean "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense . . . ." I.R.C. § 6103(b)(2)(A).

[11] Landmark Legal Found. v. IRS, 267 F.3d 1132, 1135 (D.C. Cir. 2001).

2006, it contemplated that the Service may seek additional assistance from the whistleblower, presumably to help build a case against the delinquent taxpayer.[12] The ability of the whistleblower to assist the Service may be hampered, however, to the extent that section 6103 prohibits the Service from sharing confidential tax information with the whistleblower. Finally, the new law gives whistleblowers the right to appeal Service award determinations to the Tax Court. However, there are questions about how meaningful that appeal right can be, given the restrictions imposed by section 6103.

This article examines the tension between the confidentiality provisions in section 6103 and the Service whistleblower program and attempts to balance the competing interests of taxpayer privacy and tax administration. Part II describes the whistleblower program as it existed before the 2006 amendments. Part III describes the 2006 enhancements. Part IV discusses the section 6103 restrictions, the tension between section 6103 and the Service whistleblower program, and the shortcomings of existing section 6103 exceptions. Part V recommends that the section 6103 restrictions be relaxed so that whistleblowers may receive status updates, collaborate with the Service, and have a meaningful appeal right to the Tax Court. Finally, Part VI articulates the reasons that justify making disclosures to whistleblowers.

II. THE WHISTLEBLOWER PROGRAM BEFORE THE 2006 AMENDMENTS

The Service has been authorized by statute since as early as 1867 to pay awards to whistleblowers.[13] But the statute (codified as section 7623 in 1954 and sometimes referred to in this article as the IRS Whistleblower Act) was underused and, in some respects, ineffective.[14] The Service had virtually unchecked discretion to decide whether to pay an award at all, as well as how much, if any, to pay.[15] Section 7623 authorized the Secretary

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[12] Pub. L. No. 109-432, § 406(b)(1)(C), 120 Stat. 2959.

[13] Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch. 11, § 3463, 35 Rev. Stat. 686 (1873–74)). Codified as I.R.C. § 7623 in 1954.

[14] *See* Dennis J. Ventry, *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357, 363–64 (Winter 2008) (concluding that the law that was in effect before December 2006 had "paltry bounties, stingy administrators, inadequate protection for whistleblowers, and unreceptive courts").

[15] I.R.C. § 7623(a); Treas. Reg. § 301.7623-1(a), (c) (as amended in 1998). Treas. Reg. § 301.7623-1 applies only to claims under section 7623(a). I.R.S. Notice 2008-4, 2008-2 I.R.B. 253, § 2; *see* 2006 TIGTA REPORT, *supra* note 4, at 5. Courts consistently held that section 7623 gave the Service broad discretion to determine whether to pay an award in the first instance and how much to pay. *See, e.g.*, Cambridge v. United States, 558 F.3d 1331, 1333 (Fed. Cir. 2009); Merrick v. United States, 846 F.2d 725, 726 (Fed. Cir. 1988); Carelli

of the Treasury, under regulations it prescribed, "to pay such sums . . . as he deems necessary for . . . detecting underpayments of tax, or . . . detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws."[16] The implementing regulations gave district or service center directors authority to approve awards "in a suitable amount for information that leads to the detection of underpayments of tax, or the detection and bringing to trial and punishment of persons guilty of violating the same."[17] The regulations further provided that "[t]he amount of a reward will represent what the district or service center director deems to be adequate compensation in the particular case."[18]

Before Congress amended section 7623 in 2006, the Service administratively provided for a minimum award to a whistleblower of 1% and a maximum award of 15% of amounts recovered from the person upon whom the whistle was blown with an absolute cap of $10 million.[19] The 15% award was available for "specific and responsible information that caused the investigation or, in cases already under audit, materially assisted in the development of an issue or issues and resulted in the recovery, or was a direct factor in the recovery."[20] An award of up to 10% of the recovered amounts was available for "information that caused the investigation or, in cases already under audit, caused an investigation of an issue or issues, and was of value in the determination of tax liabilities although not specific."[21] An award of 1% was available for providing "general information that caused an investigation or investigation of an issue or issues, but had no direct relationship to the determination of tax liabilities."[22] Essentially, a

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v. IRS, 668 F.2d 902, 904 (6th Cir. 1982); McGrath v. United States, 207 Ct. Cl. 978 (Ct. Cl. 1975); Saracena v. United States, 508 F.2d 1333, 1334–36 (Ct. Cl. 1975) (stating that the Service had "complete discretion in the first instance to determine whether an award should be made and, in the second instance, to fix what, in [its] judgment, amounts to adequate compensation"); Destefano v. United States, 52 Fed. Cl. 291, 293 (2002).

[16] I.R.C. § 7623.

[17] Treas. Reg. § 301-7623-1(a).

[18] *Id.* § 301.7623-1(c).

[19] INTERNAL REVENUE SERV., PUBLICATION 733, REWARDS FOR INFORMATION PROVIDED BY INDIVIDUALS TO THE INTERNAL REVENUE SERVICE (Oct. 2004) [hereinafter IRS PUBLICATION 733], *available at* http://www.unclefed.com/IRS-Forms/2005/p733.pdf; *see* I.R.M. § 25.2.2.5 (as in effect in February 2006). The cap was increased from $2 million to $10 million for payments made after November 7, 2002. S. REP. NO. 109-336 (2006). Since 1997, the Service has paid awards from collected proceeds. Taxpayer Bill of Rights 2, Pub. L. No. 104-168, § 1209(a), 110 Stat.1473 (1996) (amending the flush language of I.R.C. § 7623(a)). Before 1997, the Service used appropriated funds to pay awards.

[20] IRS PUBLICATION 733, *supra* note 19.

[21] *Id.*

[22] *Id.*

15% award was available if the whistleblower's information directly led to the recovery, a 10% award was available if the whistleblower's information indirectly led to the recovery, and a 1% award was available if the whistleblower's information caused an investigation but was unrelated to the recovery.[23] An award could exceed 15% of the recovered amounts if the Service and the whistleblower entered into a special agreement.[24]

Decision making was dispersed among multiple Service offices across the country and there were few standardized procedures to process whistleblower claims.[25] People who wanted to blow the whistle were expected to come forward on their own to request an award. The Service did not advertise its award program; it also instructed its employees not to solicit or encourage persons to provide information in exchange for an award.[26]

Section 7623 as it existed before the 2006 amendments did not give whistleblowers the right to judicially appeal Service award determinations. Instead, judicial review potentially existed under the Tucker Act.[27] The Tucker Act gives the Court of Federal Claims jurisdiction to hear contract claims against the United States in excess of $10,000.[28] A whistleblower could properly file suit to challenge an award or the denial of an award

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[23] 2006 TIGTA REPORT, *supra* note 4, at 2.

[24] *Id.*

[25] 2006 TIGTA REPORT, *supra* note 4, at 1 n.7 (stating that whistleblower claims were handled at five different Service campuses).

[26] I.R.M. § 25.2.1.4 (as in effect before 2006 changes); I.R.M. § 25.2.2.3 (as in effect February 2006) (stating that "[a]n internal revenue employee receiving information from an informant should neither suggest nor encourage the whistleblower to submit a claim for reward"). Perhaps tax whistleblowing is objectionable if the Service is viewed as a tax-collection agency and not a law-enforcement agency; *see Confidentiality of Tax Return Information: Hearing Before the H. Comm. on Ways & Means*, 94th Cong. 129 (1976) (statement of Sheldon Cohen, former Service Comm'r).

[27] 28 U.S.C. § 1491(a)(1) (2008); *see* Abraham v. United States, 81 Fed. Cl. 178, 184 (2008) ("to establish an implied-in-fact contract with the United States, Plaintiff must establish consideration, mutuality of intent, definiteness of terms, and authority of the official whose conduct is relied upon to bind the Government"); Dacosta v. United States, 82 Fed. Cl. 549, 556 (2008); *cf.* Krug v. United States, 168 F.3d 1307, 1310 (Fed. Cir. 1999) (stating that it was "an open question whether an agency's denial of a discretionary award is reviewable at all"). The Federal Circuit in *Krug* upheld the Court of Federal Claims decision that the Service's refusal to make an award to Krug was not an abuse of discretion because no contract existed between Krug and the Service. *Id.* Thus, while the court questioned whether judicial review was appropriate at all, it decided that "such review was at most harmless error" because the Service's decision was upheld. *Id.*

[28] 28 U.S.C. § 1491(a)(1) (2008). The federal district courts have concurrent jurisdiction with the Court of Federal Claims over contract claims of $10,000 or less. 28 U.S.C. § 1346(a)(2) (2009).

under the Tucker Act by establishing that there was a contract with the Service governing the award.[29] However, courts have consistently held that Service administrative guidelines do not themselves create a contract.[30] Rather, Publication 733, which set forth the 1% minimum award and the 15% maximum award, was merely the government's invitation to the whistleblower to make an offer.[31] Even when the Service collected a specific amount from a delinquent taxpayer, the whistleblower could not bind the Service to the award percentages in Publication 733.[32]

The Court of Federal Claims reviewed challenges to Service determinations under an abuse of discretion standard of review.[33] To prevail, a whistleblower had to prove that the Service abused its discretion by acting arbitrarily and unreasonably in making or denying an award.[34] *Krug v. United States* illustrates the no-win situation for whistleblowers under the law in effect before the 2006 amendments.[35] Krug, the whistleblower, provided information that caused the Service to initiate an investigation that resulted in the recovery of millions of dollars from delinquent taxpayers.[36] The Service denied Krug any award, citing the following three reasons in a form letter: (1) the amount recovered was too small to warrant an award; (2) the Service already had the information or the information was publicly available; and (3) the information furnished

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[29] *See, e.g.*, Conner v. United States, 76 Fed. Cl. 86 (2007) (Court of Federal Claims had no subject matter jurisdiction because whistleblower had no contract with the Service); Conway v. United States, 56 Fed. Cl. 572, 573 (2003) (stating that court has jurisdiction over whistleblower's breach of contract claim based on a written contract entered into between the whistleblower and the Service that obligated the Service to pay 10% of any taxes collected).

[30] *See, e.g.*, Cambridge v. United States, 558 F.3d 1331, 1333 (Fed. Cir. 2009).

[31] *Krug*, 168 F.3d at 1309. ("[I]n Publication 733 and pursuant to section 7623 and the regulation, the Government *invites* offers for a reward; [t]he informant *makes* an offer by his conduct; and the Government *accepts* the offer by agreeing to pay a specific sum.").

[32] *Cambridge*, 558 F.3d at 1336. Cambridge provided information to the Service that led to the collection of tax from her ex-husband. *Id.* at 1333. The Service collected $371,709.12 and paid Cambridge $4560.54. *Id.* at 1337 (Newman J., dissenting). Cambridge sought an additional payment of $6906.55, based on the formula provided in Publication 733. *Id.* at 1335. Although the Service had paid Cambridge some amount of an award, the Federal Circuit affirmed the Court of Federal Claims' dismissal of Cambridge's suit, concluding that she failed to show any enforceable contract. *Id.* at 1336.

[33] *See, e.g.*, Lagermeier v. United States, 214 Ct. Cl. 758, 760 (1977) (citing *Saracena*, 508 F.2d at 1334–36).

[34] *Saracena*, 508 F.2d at 1334 (holding that the whistleblowers had not met their burden of showing no rational basis for the Service's determination).

[35] Krug v. United States, 41 Fed. Cl. 96 (1998), *aff'd*, 168 F.3d 1307 (Fed. Cir. 1999).

[36] *Krug*, 41 Fed. Cl. at 97.

did not cause an investigation.[37] The information in the form letter was pretext, but the Service asserted that section 6103 prevented it from disclosing the true reasons.[38] The court saw through the pretext saying that:

> Government counsel ultimately acknowledged that the IRS used the information plaintiff provided to make cases against the taxpayers, that it did not have the information available otherwise, and that it recovered "millions and millions" of dollars in taxes and penalties as a result of plaintiff's information. The Government then gave plaintiff inapplicable possible reasons for denying his claim for reward on the basis that the real reason could not be revealed because of taxpayer privacy laws. The reasons do not affect taxpayer privacy at all.[39]

Nonetheless, the Court of Federal Claims held that the Service did not abuse its discretion in refusing to pay Krug an award.[40] Krug failed to provide any factual allegations to establish that the Service abused its discretion, presumably because section 6103 prevented him from obtaining the true reasons behind the denial of his claim.[41]

The outcome in *Krug* was not an anomaly. While few whistleblowers filed suit to challenge their award determinations, those who did had little success. Professor Terri Gutierrez determined that the Service won every one of the nineteen cases that whistleblowers filed to challenge awards from 1941 to 1998.[42]

III. THE RECONSTRUCTED WHISTLEBLOWER PROGRAM

A. Summary of Section 7623(b)

Congress strengthened the Service whistleblower program in 2006 by adding subsection (b) to section 7623 for information that a whistleblower provides to the Service on or after December 20, 2006.[43] Section 7623(b)

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[37] *Id.*

[38] *Id.* at 98.

[39] *Id.* at 99.

[40] *Id.* at 98–99. The Service reviewed documents in camera to determine whether the Service abused its discretion. *Id.* at 98.

[41] *Id.* at 98–99.

[42] Terri Gutierrez, *IRS Informants Reward Program: Is it Fair?*, 84 TAX NOTES 1203 (Aug. 23, 1999). Professor Gutierrez reported that there were 95,105 whistleblower claims filed from 1989 to 1998. *Id.* at 1205 tbl.1. The Service paid awards in 6310 of those claims. *Id.*

[43] Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, Div. A, Title IV,

applies only if the amounts in dispute, including penalties and interest, exceed $2 million and, if the taxpayer is an individual, the taxpayer's gross income must exceed $200,000 for any taxable year at issue.[44] The Service whistleblower law as it was before the 2006 amendments continues to exist in section 7623(a).[45] Section 7623(a) applies to claims that do not meet the section 7623(b) thresholds and to information submitted before the new law became effective.[46]

Congress, in an off-Code provision, established the Service Whistleblower Office to administer the whistleblower program.[47] Stephen Whitlock was named as the first director of the Whistleblower Office in February 2007.[48] Congress directed Treasury to issue guidance to implement the revised whistleblower program.[49] Treasury has not yet promulgated regulations under section 7623(b), but has issued interim guidance in Notice 2008-4.[50] Other off-Code provisions permit the Service, in its sole discretion, to ask the whistleblower for additional assistance and require Treasury to report to Congress each year about the use of section 7623, including legislative and administrative recommendations.[51]

The 2006 amendments raised the maximum potential award to 30% of the recovered amounts and removed the $10 million cap.[52] The minimum

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§ 406(d), 120 Stat. 2960; Wolf v. Commissioner, 93 T.C.M. (CCH) 1273 (T.C. 2007) (stating that the Tax Court lacked jurisdiction over a whistleblower claim under section 7623(b) if the information was provided to the Service before December 20, 2006).

[44] I.R.C. § 7623(b)(5)(B).

[45] I.R.C. § 7623(a).

[46] *Id.* The 2006 amendments do not apply to supplemental information provided after December 20, 2006 unless the Service takes administrative or judicial action that it would not otherwise have taken on the basis of earlier-supplied information alone. I.R.S. Notice 2008-4, 2008-2 I.R.B. 253, § 3.12.

[47] Tax Relief and Health Care Act of 2006 § 406(b). An off-Code provision is found only in the enacting legislation rather than in the Internal Revenue Code itself.

[48] I.R.S. News Release IR-2007-25 (Feb. 2, 2007).

[49] Tax Relief and Health Care Act of 2006 § 406(b).

[50] I.R.S. Notice 2008-4, 2008-2 I.R.B. 253.

[51] Tax Relief and Health Care Act of 2006 § 406(b), (c) (permitting the Service to seek assistance from the whistleblower under § 406(b) and requiring annual reports to Congress under § 406(c)). The 2008 report was issued in June 2008. IRS, 2008 REPORT TO CONGRESS ON THE WHISTLEBLOWER PROGRAM (June 24, 2008) [hereinafter 2008 WHISTLEBLOWER REPORT], *available at* http://www.irs.gov/pub/whistleblower/whistleblower_annual_report.pdf. In September 2009, the Whistleblower Office issued a report to Congress covering the fiscal year ending September 30, 2008. IRS, ANNUAL REPORT TO CONGRESS ON THE USE OF SECTION 7623 (September 2009) [hereinafter FISCAL YEAR 2008 WHISTLEBLOWER REPORT], *available at* http://www.irs.gov/pub/whistleblower/annual_report_to_ congress_september_2009.pdf.

[52] I.R.C. § 7623(b)(1).

award amount under the new law generally is 15%, which is the maximum award amount under the pre-2006 law set forth in section 7623(a).[53] The award is reduced to 10% if the claim is based principally on already publicly disclosed information unless the whistleblower was the original source of that information.[54] A whistleblower is entitled to an award out of the recovered proceeds only if the whistleblower's information causes the Service to initiate an administrative or judicial action against the taxpayer.[55] The specific amount of an award within the statutorily-mandated ranges depends on the extent to which the whistleblower's information substantially contributed to the Service's investigation.[56] Even a person who planned and initiated the actions that led to the underpayment (for example, a promoter or tax advisor) may be entitled to an award unless that person is convicted of a crime for his or her role.[57]

The 2006 amendments to the IRS Whistleblower Act in many respects model the 1986 amendments to the federal False Claims Act.[58] With the exception of tax claims, which are expressly excluded, the False Claims Act authorizes private citizens known as qui tam plaintiffs to file actions on behalf of the United States against persons who defraud the federal government.[59] The qui tam plaintiff initiates the process by filing a

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[53] *Id.*

[54] *Id.* § 7623(b)(2).

[55] *Id.* § 7623(b)(1).

[56] *Id.*

[57] *Id.* § 7623(b)(3).

[58] Senator Charles Grassley, while chair of the Senate Finance Committee, sponsored the 2006 changes to the IRS Whistleblower Act. Sen. Chuck Grassley, *Grassley Praises IRS's Quick Action on Whistleblower Program*, 2007 TNT 24-69 (Feb. 2, 2007) (stating that Grassley authored the 2006 changes to the IRS Whistleblower Act). Senator Grassley also was a key sponsor of the 1986 amendments to the federal False Claims Act. JAMES T. BLANCH ET AL., CITIZEN SUITS AND *QUI TAM* ACTIONS: PRIVATE ENFORCEMENT OF PUBLIC POLICY 154 (Roger Clegg & James L.J. Nuzzo eds., National Legal Center for the Pub. Interest 1996) (identifying Senator Grassley as one of the principal sponsors of the 1986 Amendments). Amendments were proposed to the IRS Whistleblower Act in 2004, but the legislation was not enacted until 2006. *See* S. 1637, 108th Cong., 2d Sess., § 488 (2004). The 2004 proposal applied to claims if the amount in dispute exceeded $20,000 and gross income exceeded $200,000 if the allegedly delinquent taxpayer was an individual. *Id.* The 2004 proposal also required assistance by whistleblowers to be provided pursuant to a tax administration contract and permitted the Whistleblower Office to reimburse the whistleblower's legal counsel from collected proceeds. *Id.* Under the 2004 proposal, claims could be appealed to the Tax Court, but the small-case procedures described in section 7463 would have applied, which would have precluded appeals of Tax Court decisions. *Id.* Finally, the 2004 proposal referred to section 7461(b)(1), which permits the Tax Court to make any provision to protect confidential information including sealing the record. *Id.*

[59] 31 U.S.C. §§ 3729–3733. When Congress revised the False Claims Act in 1986, it

complaint under seal in the federal district court where the defendant resides or transacts business.[60] The government has at least sixty days to decide whether to intervene in the suit.[61] If the government intervenes, it has primary responsibility for prosecuting the action, but the qui tam plaintiff has the right to continue to be a party.[62] If the government declines to intervene, the qui tam plaintiff has the right to conduct the litigation.[63] The qui tam plaintiff generally is entitled to between 15% and 30% of any amounts recovered, depending on the extent to which she contributed to the case and whether or not the government intervened.[64] If the suit is based on publicly available information, the qui tam plaintiff's share may be limited to 10% of any recovery.[65] A lower percentage may also be awarded to a qui tam plaintiff who planned and initiated the underlying action upon which the case is brought.[66] A qui tam plaintiff convicted of criminal conduct arising from his or her role is not entitled to any award.[67]

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permitted so-called reverse false claims (using a false record to decrease an obligation to the government), but expressly excluded tax claims. 31 U.S.C. §§ 3729(a)(1)(G) (defining a false claim to include reverse false claims), 3729(d) (excluding tax claims); *see also* I.R.C. § 7401 (providing that "no civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced").

The term "qui tam" is an abbreviation of the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as for his own." Roco v. Commissioner, 121 T.C. 160, 168 (T.C. 2003).

Six states permit citizens to bring qui tam actions for tax fraud. John A. Bruegger, *Tax Whistleblower Proceedings at the State Level: Common Themes and a Call to Action*, 19 J. MULTISTATE TAX'N & INCENTIVES 13, 16–22 (May 2009) (discussing false claims acts of Delaware, Florida, Illinois, Indiana, Nevada, and Rhode Island).

[60] 31 U.S.C. §§ 3730(b)(2), 3732(a) (2006).

[61] *Id.* § 3730(b)(4). The complaint remains sealed and is not served on the defendant while the government is investigating the claim. *Id.* § 3730(b)(2).

[62] *Id.* § 3730(c).

[63] *Id.* § 3730(b)(4)(B).

[64] *Id.* § 3730(d). If the government intervenes, the qui tam plaintiff generally may receive 15% to 25% of amounts recovered. *Id.* § 3730(d)(1). If the government does not intervene, the qui tam plaintiff generally may receive 25% to 30% of amounts recovered. *Id.* § 3730(d)(2).

[65] *Id.* § 3730(d)(1). The plaintiff must be the original source of the publicly disclosed information for the court to have jurisdiction over a qui tam suit based on publicly disclosed information. *Id.* § 3730(e)(4)(A). Otherwise, the suit must be brought by the Attorney General. *Id.*

[66] *Id.* § 3730(d)(3).

[67] *Id.*

While there are certain similarities between the federal False Claims Act and the IRS Whistleblower Act, there are some significant differences. One key difference is the extent of the whistleblower's involvement. The False Claims Act promotes a "working partnership" between the qui tam plaintiff and the government by effectively deputizing private citizens to prosecute fraud against the federal government as full participating parties in the litigation, whether or not the government intervenes.[68] By contrast, a person blowing the whistle under the IRS Whistleblower Act has the right to merely report his or her claim, but not the right to prosecute it. A whistleblower cannot compel the Service to investigate a claim. Nor may a whistleblower take up a private cause of action under the IRS Whistleblower Act if the Service declines to pursue an investigation.[69] The Service has total discretion to decide whether to pursue a whistleblower claim in the first instance and the extent of the whistleblower's involvement. Unlike whistleblowers proceeding under the False Claims Act, a tax whistleblower has a seat at the table only if invited by the Service.

A second key difference is that the courts are involved in False Claims Act cases from the time a whistleblower complaint is filed, whereas claims under the IRS Whistleblower Act are primarily administrative proceedings with little judicial involvement.[70] Once a False Claims Act whistleblower files a complaint, the government may dismiss the case only after the court provides the whistleblower a hearing.[71] Likewise, the government may settle a False Claims Act case only after the court holds a hearing and determines that the proposed settlement is "fair, adequate, and reasonable under all the circumstances."[72] By contrast, the Service may settle a claim with a taxpayer without any input from the whistleblower, and until the 2006 amendments, tax whistleblowers usually could not judicially appeal Service award determinations.[73]

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[68] Frederick M. Morgan, Jr. & Jennifer M. Verkamp, *Notes from the Field: Practicalities of the Qui Tam "Working Partnership" Under the 1986 False Claims Act Amendments*, 29 FALSE CLAIMS ACT & QUI TAM Q. REV 11, 11 (Jan. 2003) (quoting 132 Cong. Rec. 29315, 29321–22, Oct. 7, 1986).

[69] Scholars have recommended that qui tam actions be permitted for tax claims. Joshua D. Rosenberg, *The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane*, 16 VA. TAX REV. 155, 205–219 (Fall 1996); Ventry, *supra* note 14, at 370–90.

[70] *An Interview with IRS Whistleblower Office Director Stephen A. Whitlock*, 52 FALSE CLAIMS ACT & QUI TAM Q. REV. 79, 81 (Apr. 2009) [hereinafter *Whitlock Interview*] (describing the Service's process as a "closed process, which the whistleblower does not have a vote in").

[71] 31 U.S.C. § 3730(c)(2)(A).

[72] *Id.* § 3730(c)(2)(B).

[73] *See supra* note 27.

A third key difference is that recovery under the False Claims Act requires proving that the defendant has defrauded the government. Fraud is not a prerequisite to recovery under the IRS Whistleblower Act.[74] Tax whistleblowers may recover from taxpayers' innocent mistakes or uncertainty in the tax laws.[75]

The enhanced IRS Whistleblower Act is described as a mandatory program because section 7623(b)(1) provides that a whistleblower "shall" receive an award if the whistleblower's information causes the Service to investigate the taxpayer.[76] The new law is mandatory in the sense that the Service now generally must pay whistleblowers a minimum award of 15% of the proceeds collected from an administrative or judicial action initiated based on information from the whistleblower.[77] However, many aspects of the Service whistleblower program remain discretionary. First, the Service must decide whether to begin an administrative or judicial proceeding against the taxpayer based on information that the whistleblower provides.[78] Second, assuming the Service proceeds with an investigation based on the whistleblower's information, the Service has discretion to determine the percentage of the collected proceeds to award the whistleblower based on the value of the information provided.[79] Section 7623 provides no guidelines for deciding whether to initiate an action or how to value the whistleblower's information.[80] Just as before the 2006 changes, the Service continues to have discretion to decide whether to pursue the taxpayer and the amount of any whistleblower award.

Notwithstanding weaknesses in the enhanced whistleblower law, it has increased the quantity and quality of claims. From October 2007 until the

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[74] *Whitlock Interview*, *supra* note 70.

[75] *See, e.g.*, Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1033–34 (2009) (describing the impact of judicial doctrines, such as economic substance and business purpose, to validate or invalidate tax shelter transactions ex post by the courts); Ventry, *supra* note 14, at 370–71 (noting that federal tax law "contains countless unknown outcomes" where the "'right' answer is ambiguous at best"); *see also* David B. Blair, George M. Clarke III, & Brian A. Hill, *Tax Whistleblowers: Prevention and Mitigation of Costs Associated With Meritless Claims*, 60 TAX EXECUTIVE 351, 351 (Fall 2008) (discussing the ability to recover from a whistleblower claim where a corporation received a "should" opinion, the Service audits the corporation, and the company decides to settle based on the hazards of litigation).

[76] *See, e.g.*, 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 2.

[77] I.R.C. § 7623(b)(1).

[78] *Id.*

[79] *Id.*

[80] "To provide some transparency," the Whistleblower Office intends to develop criteria to assist in making determinations on award eligibility and award percentages. 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 5.

end of September 2008, the Service had received 476 submissions relating to 1246 taxpayers that apparently met the $2 million threshold.[81] Of those, 228 allege an underpayment of $10 million or more and 64 allege an underpayment of $100 million or more.[82] One claim is for $4.4 billion, reported to be the largest claim ever submitted.[83] Under the prior whistleblower law, "only 12 of 227 full paid claims in 2007 involved collections of more than $2 million, and only 3 [sic] involved collections of more than $10 million."[84]

Congress amended section 7623 in 2006 to encourage insiders to blow the whistle on persons who are not paying their taxes.[85] Higher claim submission rates provide some indication that section 7623(b) is having its intended effect. One recent high-profile whistleblower claim involves Bradley Birkenfeld, a former UBS banker, who blew the whistle on UBS's role in offshore tax shelters.[86] UBS was fined $780 million and agreed to turn over the names of wealthy Americans who participated in illegal shelters.[87] Birkenfeld, who was sentenced to forty months in prison after pleading guilty to one count of conspiracy to defraud the United States for helping a client evade U.S. tax, is seeking to share in the $780 million fine paid by UBS as well as amounts that the Service collects from shelter participants who are audited.[88] Heinrich Kieber, a former employee at LGT Group, a Liechtenstein bank, is also seeking a whistleblower award from the Service for providing information about tax shelter investors.[89]

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[81] FISCAL YEAR 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 7–8. The number of claims surged 1000% from 2007. Stephen Ohlemacher, *Tips on Tax Cheats Skyrocket With Bigger Rewards*, ASSOCIATED PRESS, Oct. 1, 2009.

[82] FISCAL YEAR 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 8. TIGTA reports that the whistleblower claims submitted during calendar year 2008 allege more than $65 billion of unreported income. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2009-30-114, DEFICIENCIES EXIST IN THE CONTROL AND TIMELY RESOLUTION OF WHISTLEBLOWER CLAIMS 1 (Aug. 20, 2009) [hereinafter 2009 TIGTA REPORT], *available at* http://www.ustreas.gov/tigta/auditreports/2009reports/200930114fr.pdf.

[83] Jeremiah Coder, *Law Firm Submits New Record Whistle-Blower Claim*, 2008 TNT 116-1 (June 16, 2008).

[84] 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 4–5.

[85] *Id.* at 1–2.

[86] Bureau of Nat'l Affairs, *Tax Evasion: Banker Who Blew Whistle on UBS Seeks Award from IRS, Attorney Says*, 199 DAILY TAX REPORT K-1 (Oct. 19, 2009).

[87] *Id.*

[88] *Id.*

[89] Lynnley Browning, *Banking Scandal Unfolds Like a Thriller*, N.Y. TIMES, Aug. 14, 2008, at C8.

In 2007, Congress considered several amendments to section 7623.[90] One of these amendments sought to reduce the $2 million threshold to $20,000.[91] Another proposed amendment sought to reimburse the lawyers of whistleblowers for their costs in providing assistance to the Service.[92] Third, the Tax Court would have been permitted to adopt rules to permit whistleblower appeals to be closed to the public and to prohibit public inspection of whistleblower filings and evidence.[93] Fourth, amendments proposed in 2007 would have codified the 2006 off-Code provisions. None of these provisions were enacted.[94]

B. Procedures for Filing Claims with the Whistleblower Office

A person seeking an award under the IRS Whistleblower Act must submit IRS Form 211, *Application for Award for Original Information* to the Whistleblower Office and include attachments that describe "specific [facts] and credible information" concerning the alleged tax violation, the relationship between the whistleblower and the taxpayer, and the amount that the taxpayer owes.[95] A whistleblower proceeding under section 7623(b) cannot submit his or her award request anonymously or using an alias because the request must be signed under penalties of perjury.[96] Although whistleblowers must reveal their true identity in their award request, the Whistleblower Office promises to protect the whistleblower's identity using its common law informer privilege.[97]

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[90] U.S. Troop Readiness, Veterans' Health, & Iraq Accountability Act, H.R. 1591, 110th Cong. § 543(c) (1st Sess. 2005).

[91] *Id.* § 543(a).

[92] *Id.* § 543(c).

[93] *Id.*

[94] Both houses of Congress passed the legislation, but the President vetoed it and Congress failed to override the President's veto. OFF. OF THE CLERK OF THE H. OF REP., 105TH CONGR., FINAL VOTE RESULTS FOR ROLL CALL 276, *available at* http://clerk.house.gov/evs/2007/roll276.xml.

[95] I.R.S Notice 2008-4, 2008-2 I.R.B. 253, § 3.03.

[96] *Id.* at § 3.03(9).

[97] *Id.* at § 3.06. The purpose of the Service informer privilege is to encourage members of the public to come forward and disclose information they have regarding a person's alleged noncompliance with the internal revenue laws. Roviaro v. United States, 353 U.S. 53, 59 (1957). The government's informer privilege is not absolute; it may be overridden if the public's interest in protecting the whistleblower is outweighed by an individual's right to receive a fair determination. *Roviaro*, 353 U.S. at 60–61; Weimerskirch v. Commissioner, 67 T.C. 672, 676 (1977) (discussing balance that court must make between public's interest in protecting whistleblower's identity and individual's right to prepare a defense). The Service recognizes that it may not always be possible to protect the identity of the whistleblower, particularly if the whistleblower is needed as a witness in a judicial proceeding. I.R.S. Notice

The Whistleblower Office conducts an initial review to reject claims that it deems meritless or that do not satisfy the section 7623(b) statutory thresholds (disputed amounts exceeding $2 million and gross income in excess of $200,000 if the allegedly delinquent taxpayer is an individual).[98] The Whistleblower Office also determines whether a fraud referral should be made to the Criminal Investigation Division.[99] Claims that are not rejected and not referred for criminal investigation are sent to subject matter experts at Service operating divisions for evaluation.[100] The subject matter expert handling the claim debriefs the whistleblower and makes a determination about whether to pursue the claim.[101] Claims that the Service decides not to pursue are returned to the Whistleblower Office.[102] Claims that will be pursued are forwarded for examination.[103]

At the end of the examination, there will be two files—a case file, which is used for case processing, and an award claim file, which is sent to the Whistleblower Office to assist in making an award determination.[104] Documentation to be part of the award claim file includes copies of examined returns, portions of the revenue agent's report that reflect the issues impacted by the whistleblower's information, a schedule of adjustments, copies of the information provided by the whistleblower, and any other information that may assist the Whistleblower Office in making a determination.[105] The Whistleblower Office will determine the amount, if

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2008-4, § 3.06, 2008-2 I.R.B. 253, 255. It is uncertain whether a whistleblower's identity will remain confidential if the whistleblower appeals his or her award determination to the Tax Court because the Tax Court rules require the petitioner's name on pleadings and other documents filed with the Court. TAX CT. R. 341(b)(1). Nonetheless, the Court has permitted a petitioner in at least one case to proceed anonymously. Anonymous v. Commissioner, 127 T.C. 89 (2006). The Tax Court recognizes that while it is not required to permit all whistleblowers to proceed anonymously it may on a case-by-case basis permit a whistleblower "to proceed anonymously . . . when appropriate." Press Release, U.S. Tax Court (Oct. 3, 2008), *available at* http://www.ustaxcourt.gov/press/100308.pdf.

[98] 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 3, 8.

[99] I.R.M. § 25.2.2.6(1) (2008).

[100] I.R.M. § 25.2.2.6(2); *see* Memorandum for all LMSB Industry Directors from Frank Y. Ng, Commissioner LMSB, LMSB-4-0508-033 (July 21, 2008) (on file with author). In a report issued in August 2009, TIGTA determined that there were significant delays in the processing of whistleblower claims. 2009 TIGTA REPORT, *supra* note 82, at 11.

[101] I.R.M. § 25.2.2.6(5), (6).

[102] *Id.* § 25.2.2.6(6)(a).

[103] *Id.* § 25.2.2.6.

[104] *Id.* § 25.2.2.6(9).

[105] *Id.* § 25.2.2.6(10).

any, of the award, and will notify the whistleblower in writing of its determination.[106]

C. Summary of the New Tax Court Appeal Right

1. Procedures for Filing Appeals

Whistleblowers who file claims under section 7623(b) (but not under section 7623(a)) have the right to appeal their award determinations to the Tax Court, which has exclusive jurisdiction.[107] A whistleblower commences an action in the Tax Court by filing a petition containing, among other things: the whistleblower's name and address; an explanation of why the whistleblower disagrees with the Whistleblower Office's determination; and the facts that the whistleblower relies on to support his or her position.[108] To be timely, appeals to the Tax Court must be made within thirty days of the determination.[109] A contract is no longer a prerequisite to obtaining judicial review of a Service whistleblower determination.[110]

2. Which Determinations Are Appealable?

Section 7623(b)(4) provides that "[a]ny determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)."[111] Paragraph (1) directs the payment of an award to the whistleblower of 15% to 30% of amounts recovered from the taxpayer if the Service proceeds with an administrative or judicial action based on information from the whistleblower.[112] Paragraph (2) reduces the amount of the award from paragraph (1) to no more than 10% if the whistleblower was not the original source of the

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[106] *Id.* §§ 25.2.2.6(11)–(12), 25.2.2.13(1) (2008).

[107] I.R.C. § 7623(b)(4); *see* Dacosta v. United States, 82 Fed. Cl. 549, 555 (2008) (stating that the Tax Court has exclusive jurisdiction over section 7623(b) claims).

[108] TAX CT. R. 340–341.

[109] I.R.C. § 7623(b)(4). A whistleblower claim that is filed in the Court of Federal Claims cannot be transferred to the Tax Court under 28 U.S.C. § 1631. *Dacosta*, 82 Fed. Cl. at 557. Section 1631 permits the Court of Federal Claims and other courts identified in 28 U.S.C. § 610 to transfer cases among themselves in the "interest of justice" if the claim is filed in a court that lacks jurisdiction. 28 U.S.C. § 1631 (2009). The Tax Court is not one of the courts identified in 28 U.S.C. § 610.

[110] I.R.C. § 7623(b)(6)(A).

[111] *Id.* § 7623(b)(4).

[112] *Id.* § 7623(b)(1).

information.[113] Paragraph (3) reduces the amount of the award from paragraph (1) in cases where the whistleblower planned or initiated the underlying action upon which the investigation against the taxpayer is brought.[114] When read together, paragraphs (1), (2), (3), and (4) seem to mean that whistleblower claims may be appealed to the Tax Court only if the Service actually proceeds with an administrative or judicial action. This results because paragraph (1) is operative only after an administrative or judicial action, and paragraphs (2) and (3) modify paragraph (1).[115] Under that interpretation, a determination by the Service to decline to take any action based on a whistleblower's information would not be appealable. Also, claims that lack merit, or those that are not processed or rejected by the Whistleblower Office because they are not administratively perfected would not be appealable.[116]

If an appeal right is available only after an administrative or judicial action, there likely will be disputes about what constitutes an administrative action or a judicial action. Section 7623 does not define the phrase "administrative or judicial action" and Treasury has not provided any guidance interpreting the phrase. Nonetheless, there should be little doubt that an administrative action has begun once the Service sends the taxpayer an initial contact letter and Publication 1, *Your Rights as a Taxpayer*.[117] If the Service takes that action based on information from the whistleblower, the whistleblower is entitled to an award out of any collected proceeds.[118] But suppose the Service analyzes a taxpayer's return based on a whistleblower's tip and then decides not to proceed any further. If the Service's preliminary analysis constitutes an administrative action within the meaning of section 7623(b), the Service would have to issue a determination denying an award, and section 7623(b)(4) would permit the

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[113] *Id.* § 7623(b)(2).

[114] *Id.* § 7623(b)(3).

[115] *See* TAX CT. R. 341(b)(2) (determination of an award is what is appealable); *Whitlock Interview*, *supra* note 70 (determination of amount of award, not whether to initiate an administrative or judicial proceeding, is what is appealable).

[116] I.R.S. Notice 2008-4, § 3.04, 2008-2 I.R.B. 253, 255 (discussing reasons to reject whistleblower claims); *see also* FISCAL YEAR 2008 WHISTLEBLOWER REPORT, *supra* note 51, at 4–5 (stating that "[t]he whistleblower . . . may not appeal or otherwise challenge an IRS tax administration decision").

[117] *See* I.R.M. §§ 4.10.2.7.4.1, 4.10.2.7.4.2. *But see* Mallas v. United States, 993 F.2d 1111 (4th Cir. 1993) (holding that an audit is not an administrative proceeding for purposes of section 6103(h)(4)). Notwithstanding the Fourth Circuit's decision in *Mallas*, the Service and other courts have concluded that audits are administrative proceedings for purposes of section 6103(h)(4). *See, e.g.*, I.R.S. Chief Counsel Notice 2006-006 (Nov. 22, 2005) and cases cited therein.

[118] I.R.C. § 7623(b); *see* I.R.S. Notice 2008-4, § 3.07, 2008-2 I.R.B. 253, 255.

whistleblower to appeal that determination by filing a petition with the Tax Court within thirty days of the determination.[119] A similar issue arises if the Service conducts an audit based on information from the whistleblower but ultimately agrees to accept the taxpayer's return as filed, making no changes to the taxpayer's reported tax liability. The whistleblower would not be entitled to an award because no proceeds will be collected from the taxpayer. Nonetheless, the whistleblower should receive a determination from the Whistleblower Office denying an award. That determination should be appealable to the Tax Court because the Service did in fact proceed with an administrative action based on the whistleblower's information.

Other concerns arise if the taxpayer is already under Service audit when the whistleblower blows the whistle. In that case, a determination has to be made about whether the Service proceeded with an administrative or judicial action based on the whistleblower's information. The Service has said that the whistleblower's information generally will not be regarded as resulting in administrative or judicial action if it does not change how the issues in the existing proceeding will be approached or resolved.[120]

3. Scope of Review

Section 7623 does not address the scope of review applicable to whistleblower appeals to the Tax Court.[121] Scope of review refers to the span of evidence the court will consider in reaching its decision.[122] A de novo scope of review means that the Tax Court will make its decision by creating a new evidentiary record, considering evidence such as records and testimony that the Service did not consider during the administrative proceeding.[123] An administrative record or abuse of discretion scope of

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[119] No award would be owing because the Service would have no collected proceeds from which to pay a whistleblower award. I.R.C. § 7623(b).

[120] IRS Notice 2008-4, § 3.07, 2008-2 I.R.B. 253, 255.

[121] Section 7623 is also silent regarding the standard of review that should apply to whistleblower award determinations. Jeremiah Coder, *Private Claimant Suits Might Inform Future Whistle-Blower Cases*, 122 TAX NOTES 332 (Jan. 12, 2009). Standard of review refers to how the court will examine the evidence. Ewing v. Commissioner, 122 T.C. 32, 56 (2004) (Halpern, J. & Holmes, J., dissenting), *rev'd on other grounds*, 439 F.3d 1099 (9th Cir. 2006). Under an abuse of discretion standard of review, the Tax Court will overturn the Service's determination only if the petitioner is able to show that the Service's determination was "arbitrary, capricious, clearly unlawful, or without sound basis in fact or law." *Ewing*, 122 T.C. at 39. By contrast, a reviewing court applying a de novo standard of review gives little deference to the original decision maker's determinations.

[122] Porter v. Commissioner, 130 T.C. 115, 126 (2008) (Vasquez, J., concurring).

[123] *Ewing*, 122 T.C. at 56.

review, on the other hand, would limit the Tax Court to reviewing the evidence that the Service considered in making the award determination.[124]

There is a reasonable argument that the same scope of review that applies to collection due process (CDP) cases should apply to tax whistleblower cases. Congress, as part of the 1998 Internal Revenue Service Restructuring and Reform Act, gave taxpayers the right to CDP hearings to administratively challenge the Service's filing of a tax lien and the Service's intent to levy on the taxpayer's property.[125] Congress gave the Tax Court jurisdiction to hear appeals of CDP determinations by providing in section 6330(d) that "[t]he person may, within 30 days of a determination under this section, appeal such determination to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." Section 7623(b) provides that "[a]ny determination regarding an award . . . may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)." Because the language from the CDP provision in section 6330(d) is almost identical to the whistleblower provision in section 7623(b), it is reasonable to assume that Congress intended that the whistleblower provision be interpreted in the same manner as the CDP provision.[126]

Even if one agrees that the same scope of review applies to CDP cases and whistleblower cases, the matter is not resolved because the scope of review for CDP cases remains unsettled. A divided Tax Court in *Robinette v. Commissioner* applied a de novo scope of review, meaning that the Tax Court could gather evidence outside the administrative record during the appeal of the CDP determination.[127] The Eighth Circuit reversed the Tax Court's decision in *Robinette*, holding that the scope of review is limited to the administrative record pursuant to the Administrative Procedure Act's "record rule."[128] The First Circuit also has held that the record rule limits the Tax Court's review to the administrative record in CDP cases.[129]

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[124] Bryan T. Camp, *The Failure of the Adversarial Process in the Administrative State*, 84 IN. L. J. 57, 90 (2009) (referring to record review as "adversary process lite").

[125] Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3401, 112 Stat. 685 (codified as I.R.C. §§ 6230, 6330).

[126] *See Ewing*, 122 T.C. at 38 (citing several relevant cases).

[127] Robinette v. Commissioner, 123 T.C. 85, 94 (2004), *rev'd*, 439 F.3d 455 (8th Cir. 2006).

[128] *Robinette*, 439 F.3d at 461.

[129] Murphy v. Commissioner, 469 F.3d 27, 31 (1st Cir. 2006) (abuse of discretion scope of review in Tax Court); Olsen v. United States, 414 F.3d 144, 155 (1st Cir. 2005) (abuse of discretion scope of review in CDP appeals to District Court); *see also* Living Care Alternatives of Utica v. United States, 411 F.3d 621 (6th Cir. 2005) (in appeal from District Court, abuse of discretion standard and scope of review applies).

Section 706 of the federal Administrative Procedure Act (APA) applies an abuse of discretion scope of review for proceedings before non-Article III courts.[130] The Tax Court is a non-Article III court, but it does not consider itself subject to the APA.[131] Even after the Eighth Circuit's reversal in *Robinette* and the First Circuit's decision in *Olsen*, the Tax Court has not given up its position that a de novo scope of review may be appropriate in CDP cases.[132]

Whistleblower cases and CDP cases that do not involve a challenge to the existence or amount of tax owed are nondeficiency cases. Comparing the language Congress used in section 7330(d) and section 7623(b) to the language used regarding deficiency cases supports the argument that an abuse of discretion scope of review is appropriate for whistleblower and CDP cases. Section 6213(a) permits taxpayers to petition the Tax Court for a "redetermination" of a deficiency determined by the Service. Section 6214(a) gives the Tax Court jurisdiction to "redetermine" the amount of a deficiency. The Tax Court applies a de novo scope of review to deficiency determinations governed by sections 6213 and 6214.[133] The argument is that Congress intended for the Tax Court to apply an abuse of discretion scope of review to CDP cases and whistleblower cases because Congress intentionally refrained from using the words "determine" or "redetermine" in the whistleblower and CDP statutes.[134]

Problems inevitably will arise if an abuse of discretion scope of review applies and the administrative record is underdeveloped or is otherwise inadequate.[135] The Service has had an unimpressive record of maintaining

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[130] 5 U.S.C. § 706 (2006).

[131] The Tax Court is an Article I court. Deficiency cases that the Tax Court hears are not subject to the APA. *See, e.g.*, O'Dwyer v. Commissioner, 266 F.2d 575, 580 (4th Cir. 1959).

[132] Porter v. Commissioner, 130 T.C. 115, 120 n.6 (2008) (stating that "[n]o inference should be drawn that, by distinguishing Robinette v. Commissioner, 439 F.3d 455 (8th Cir. 2006), we are changing our position in lien and levy cases as expressed in [the Tax Court's decision in *Robinette*]."). Some commentators have suggested that a de novo scope of review is appropriate for whistleblower cases because section 7623(b) mandates the payment of an award of at least 15% in certain circumstances. *See* Edward A. Morse, *Whistleblowers and Tax Enforcement: Using Inside Information to Close the "Tax Gap,"* 24 AKRON TAX J. 1, 24 (2009); Levine, Peyser, & Weintraub, 630-4th T.M., *Tax Court Litigation*, at A-5.

[133] *See* Porter v. Commissioner, 130 T.C. at 120.

[134] *Id.*

[135] Nick A. Zotos, *Service Collection Abuse of Discretion: What is the Appropriate Standard of Review and Scope of the Record in Collection Due Process Appeals*, 62 TAX LAW. 223, 227 (Fall 2008) (stating that "if the Tax Court is going to apply a true abuse of discretion standard that is limited to the administrative record, then there must be an administrative record for the Tax Court to review").

adequate records to justify the denial of whistleblower awards or the amount of whistleblower awards paid under the pre-2006 amendments.[136] If the administrative record is inadequate, it is unclear whether the Tax Court would be permitted to remand the claim to the Service to further develop the record.[137] Even under an abuse of discretion scope of review, a court would be permitted to go outside of the record if "there [is a] failure to explain administrative action as to frustrate effective judicial review."[138] Any discovery allowed by the whistleblower that would obtain the taxpayer's returns or return information from the Service presumably would have to comply with the restrictions on disclosure of taxpayer information set forth in section 6103.[139]

The Tax Court recognizes that the scope of review in whistleblower actions is unclear. The Tax Court in a June 2008 press release containing proposed amendments to the Court's rules regarding whistleblower actions said:

> The Court's Rules generally contemplate disposition on the administrative record for disclosure actions and declaratory judgment actions, pursuant to specific legislative guidance. Without specific statutory authority or evidence of legislative

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[136] 2006 TIGTA REPORT, *supra* note 4, at 6–7 (finding that 32% of claims reviewed provided insufficient justification of the amounts paid and 76% of claims reviewed provided insufficient justification for rejecting claims).

[137] There is no provision in the IRS Whistleblower Act to permit the Tax Court to remand claims to the Service. *See* Friday v. Commissioner, 124 T.C. 220, 222 (2005) (denying the government's motion to remand in a stand-alone innocent spouse case); Parker v. Commissioner, 88 T.C.M. (CCH) 327 (2004) (remanding CDP case to provide taxpayer a hearing at the IRS Appeals Office closest to the taxpayer's residence). *But cf.* I.R.C. § 6330(d)(2) (retaining jurisdiction over CDP claims in the IRS Appeals Office).

[138] Camp v. Pitts, 411 U.S. 138, 142–43 (1973) (per curiam). The whistleblower's access to the taxpayer's return information should nonetheless be limited. *See* John A. Townsend, *Section 6103 and the Use of Third Party Tax Return Information in Tax Litigation*, 46 TAX LAW. 923, 934 (1993) (stating that a "court would not permit a taxpayer to engage in a fishing expedition in third party audit files simply upon the hope of obtaining relevant and helpful information").

[139] *See infra* Part IV for a discussion of section 6103. Section 6103 issues will arise in Tax Court appeals of whistleblower claims regardless of whether an abuse of discretion or de novo scope of review applies. The fear is that the Service will not tell the whistleblower or the Tax Court the basis of the Service's whistleblower award determination by relying on section 6103 in refusing to disclose the taxpayer's return information in the Tax Court appeal. *See also* Townsend, *supra* note 138, at 935 (discussing a case where the Service challenged the taxpayers' reliance on their accountants to avoid penalties by relying on return information of the accountants obtained during a preparer penalty investigation, but declining to disclose the accountants' tax return information as a violation of section 6103).

> intent establishing whether whistleblower award actions are to be decided on the administrative record, [the portion of the Tax Court rules applicable to whistleblower actions] as proposed follows the general procedures for deficiency and other types of actions before the Court.[140]

In an October 2008 press release adopting the final whistleblower rules, the Tax Court revised its comments to say that "[w]ithout specific statutory direction establishing whether whistleblower actions are to be decided on the administrative record, the Court contemplates that the appropriate scope of review will be developed in case law."[141]

IV. PROTECTION OF TAXPAYER PRIVACY

A. Summary of Section 6103

Before the Tax Reform Act of 1976, section 6103 gave the executive branch broad discretion to disclose tax information by providing that "[r]eturns . . . shall constitute public records, but . . . shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary or his delegate and approved by the President."[142] In practice, the Service treated tax returns and other return information as a "generalized governmental asset" that was widely disseminated to federal, state, and local government officials.[143] Congress

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[140] Press Release, U.S. Tax Court (June 2, 2008), *available at* http://www.ustaxcourt.gov/press/060208.pdf.

[141] Press Release, U.S. Tax Court (Oct. 3, 2008), *available at* http://www.ustaxcourt.gov/press/100308.pdf.

[142] I.R.C. § 6103(a); *see* REPORT ON ADMINISTRATIVE PROCEDURES OF THE INTERNAL REVENUE SERVICE TO THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. DOC. NO. 94-266, at 835–853 (2d Sess.1975) [hereinafter ADMINISTRATIVE PROCEDURES REPORT] (summarizing the history of the disclosure of federal tax information).

[143] PRIVACY PROT. STUDY COMM'N, FEDERAL TAX RETURN CONFIDENTIALITY, 13–14 (JUNE 1976) [hereinafter PRIVACY COMMISSION REPORT]; *see also* OFFICE OF TAX POLICY DEP'T OF TREASURY, REPORT TO CONGRESS ON SCOPE AND USE OF TAXPAYER CONFIDENTIALITY AND DISCLOSURE PROVISIONS, VOLUME 1: STUDY OF GENERAL PROVISIONS, 21 (2000) [hereinafter 2000 TREASURY REPORT]; JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, H.R. 10612, 94th Cong., 313, 314–15 (1976), *reprinted in* 1976-3 C.B. (vol. 2) 1, 335 [hereinafter 1976 BLUEBOOK] (stating that "the Justice Department and other Federal agencies, as a practical matter, [were] able to obtain that information for nontax purposes almost at their sole discretion"); 122 CONG. REC. 24,013 (1976) (statement of Sen. Weicker) (characterizing the pre-1976 system as a "lending library of confidential tax information" where "a myriad of government agencies have gained access to tax information of the IRS"); ADMINISTRATIVE PROCEDURES REPORT, *supra*

amended section 6103 in 1976 in the aftermath of the Watergate scandal after the Nixon White House obtained some of its political opponents' tax returns from the Service for improper political purposes.[144] The 1976 amendments marked a philosophical shift from treating tax information as a "generalized governmental asset" that the executive branch was able to dole out at will to a confidential, protected asset that only Congress could disseminate.[145]

The amendments to section 6103 made tax returns and return information confidential and prohibited the Service from disclosing taxpayers' tax information absent an explicit legislative exception.[146] Items protected from disclosure include tax returns; the taxpayer's identity; the nature, source, and amount of income, gain, deductions, credits, and other tax return items; as well as whether the taxpayer "was, is being, or will be examined or subject to other investigation or processing."[147] Virtually any information received, prepared, or collected by the Service or furnished to the Service regarding a person's tax liability is protected from disclosure.[148]

Statutory exceptions permit disclosures for tax administration purposes to Congress, Department of Justice and Treasury employees, and state tax officials.[149] However, disclosures are not limited to tax administration.

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note 142, at 832–33.

[144] In fact, one of the articles of impeachment alleged that President Nixon had "endeavored to obtain from the Internal Revenue Service, in violation of the constitutional rights of citizens, confidential information contained in income tax returns for purposes not authorized by law." IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 3 (1974) (quoted in 2000 TREASURY REPORT, *supra* note 143); *see also* James N. Benedict & Leslie A. Lupert, *Federal Income Tax Returns—The Tension Between Government Access and Confidentiality*, 64 CORNELL L. REV. 940, 941–42 (1978–79); *Proposals for Administrative Changes in Internal Revenue Service Procedures: Hearing Before the Subcomm. on Oversight of the H. Committee on Ways & Means*, 94th Cong. (1975) (statement of Hon. Jerry Litton).

[145] PRIVACY COMMISSION REPORT, *supra* note 143, at 28 (concluding that Congress, rather than the Executive branch, should have the authority to permit the Service to make disclosures of tax information); *see also* ADMINISTRATIVE PROCEDURES REPORT, *supra* note 142, at 1023 (stating that "administrative practice should largely be reversed, and the veil of confidentiality drawn around returns once again. If it is to be lifted, Congress should do so.").

[146] I.R.C. § 6103(a) (1976).

[147] I.R.C. § 6103(b)(1) (defining "return"); I.R.C. § 6103(b)(2) (defining "return information").

[148] *See, e.g.*, Snider v. United States, 468 F.3d 500, 506 (8th Cir. 2006) (noting that the term "return information" is defined broadly); Payne v. U.S., 289 F.3d 377, 381 (5th Cir. 2002) (noting the same point).

[149] I.R.C. § 6103(d) (state tax officials); I.R.C. § 6103(f) (Congressional committees); I.R.C. § 6103(h)(1) (Department of Treasury employees); I.R.C. § 6103(h)(2) (Department

There are exceptions to permit disclosures of tax information in nontax criminal cases, to assist in the investigation of terrorist activities, and to federal, state, and local agencies to carry out various government programs such as child support enforcement, student loan programs, and Medicare.[150] In all, section 6103 includes thirteen exceptions.[151] These exceptions represent Congress's attempt to balance taxpayers' privacy interests against the government's interest in effectively administering and enforcing the nation's laws.[152] There is no exception that expressly permits the Service to disclose a taxpayer's tax information to a whistleblower.

B. Penalties for Violating Section 6103

Certain persons making unauthorized disclosures or inspections of tax information are subject to penalties under sections 7213, 7213A, and 7431. Section 7213 imposes a fine not to exceed $5000 and imprisonment of not more than five years on some individuals—federal employees, persons who have tax administration contracts pursuant to section 6103(n), and certain state employees and other persons who willfully disclose returns or return information as defined in section 6103(b).[153] Section 7213A imposes a fine not exceeding $1000 and not more than one year imprisonment on certain individuals, including federal officers or employees and persons with tax administration contracts, who willfully inspect tax information without authorization.[154] A federal employee convicted of violating section 7213 or section 7213A will be discharged from his or her job.[155] Section 7431 permits a taxpayer whose tax information is knowingly or negligently inspected or disclosed without authorization by a federal officer or employee in violation of section 6103 to bring a civil suit against the United States.[156] A taxpayer may also bring a civil suit under section 7431 against any person who knowingly or negligently inspects or discloses the taxpayer's tax information in violation of section 6103 even if the person is

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of Justice employees).

[150] I.R.C. § 6103(i), (l).

[151] I.R.C. § 6103(c)–(o).

[152] 1976 BLUEBOOK, *supra* note 143, at 327 (stating that "Congress strove to balance the particular office or agency's need for the information involved with the citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary tax assessment system"); Joseph J. Darby, *Confidentiality and the Law of Taxation*, 46 AM. J. COMP. L. SUPP. 577, 578 (1998).

[153] I.R.C. § 7213(a)(1), (2).

[154] *Id.* § 7213A.

[155] *Id.* §§ 7213(a)(1), 7213A(b)(2).

[156] *Id.* § 7431(a)(1).

not an officer or employee of the United States.[157] The amount of damages that may be recovered under section 7431 includes the greater of actual damages or $1000 for each unauthorized disclosure plus costs and attorney fees in certain circumstances.[158] There is no liability under section 7431 with respect to any disclosure or inspection that results from a good faith but erroneous interpretation of section 6103.[159]

C. Broken Lines of Communication

Section 6103 hampers communication between the Service and whistleblowers in at least three ways. First, section 6103 generally prohibits the Service from providing meaningful updates to whistleblowers regarding the status of pending whistleblower claims. Second, it is difficult for the Service to seek the assistance of a whistleblower while building a case against the taxpayer because section 6103 prohibits the Service from disclosing the taxpayer's returns or return information to the whistleblower. Third, section 6103 potentially inhibits communication in claims that are appealed to the Tax Court. The fear is that the Service will decline to disclose the basis of its award determination to the extent it must disclose the taxpayer's return information in the Tax Court proceeding by relying on section 6103.[160]

1. Lack of Meaningful Updates and Explanations

Section 6103 generally prohibits the Service from giving meaningful updates to whistleblowers regarding the status of their pending claims.[161] Because the whistleblower cannot be paid until the Service collects from the taxpayer, the whistleblower's claim may be open for years until the taxpayer exhausts his or her appeal rights and the taxpayer's case is finally resolved.[162] TIGTA found it took the Service over 7.5 years from the time a claim was filed to pay a whistleblower under the pre-2006 law.[163]

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[157] *Id.* § 7431(a)(2).

[158] *Id.* § 7431(c).

[159] *Id.* § 7431(b).

[160] Townsend, *supra* note 138, at 935 (discussing a case where the Service relied on return information of accountants obtained during a preparer penalty investigation to challenge the taxpayers' reliance on their accountants to avoid penalties, but declined to disclose the accountants' return information in taxpayers' case due to section 6103).

[161] I.R.M. § 25.2.2, exhibit 25.2.2-4 (as in effect as of Feb. 2006).

[162] I.R.C. § 7623(b)(1) (stating that awards shall be paid from collected proceeds, including penalties, interest, additions to tax, and additional amounts).

[163] 2006 TIGTA REPORT, *supra* note 4, at 2. TIGTA also reported that it took the Service more than six and a half months to reject a claim. *Id.*

Receiving no meaningful status updates during such a long period of time frustrates whistleblowers and may dissuade others from blowing the whistle at all.[164]

Even after the Service makes a determination regarding a whistleblower claim, the whistleblower may never know the specific reasons behind the Service's determination. For example, section 6103 would prohibit the Service from telling a whistleblower that his or her claim is rejected for failing to satisfy the section 7623(b) thresholds because the thresholds (the amount in dispute and an individual taxpayer's gross income) are return information of the taxpayer.[165] Whistleblowers will also be in the dark if the Service rejects a claim because the taxpayer cannot or will not pay because payment information is confidential. Even if a claim is accepted, the Service cannot disclose how it calculated the amount the taxpayer owes or how much the taxpayer paid because those items are return information protected from disclosure by section 6103. The whistleblower will know only the amount of the award.[166] But without knowing what the Service collected, the whistleblower will not know what percentage of the collected proceeds was awarded to him or her.[167] For example, suppose the Service collects $5 million from a delinquent taxpayer based on information from a whistleblower and pays the whistleblower a $1 million award, representing 20% of the collected proceeds. The whistleblower would not know that the award was paid out of $5 million collected proceeds or that the award represents 20% of the collected proceeds. As far as the whistleblower knows, the $1 million award may be 15% of $6.67 million collected or 30% of $3.33 million collected or something in between. Even more fundamentally, the whistleblower must rely on a Service determination of whether he or she is entitled to a determination that is appealable to the Tax Court, because whether or not an administrative or judicial action resulted from the whistleblower's

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[164] 2006 TIGTA REPORT, *supra* note 4, at 2.

[165] I.R.C. § 7623(b)(1) (describing thresholds); I.R.C. § 6103(b)(1) (defining return information to include the amount of income and tax liability); Todd Simmens, *Proposed Whistle-Blower Reforms: Not Ready for Prime Time*, 2004 TNT 212-28 (Nov. 2, 2004) (analyzing changes proposed in 2004 to section 7623). There is no guidance as to when those amounts will be measured. The lack of guidance can be problematic. For example, the amount of the potential deficiency measured at the time the Service initiates an audit of a taxpayer may be different from the amount measured at the time the audit is completed. Suppose the Service, based on tax information from the whistleblower, initiates an audit of the taxpayer. By the time the Service completes the audit, the estimated deficiency is less than $2 million. Does the whistleblower qualify for a whistleblower award under these circumstances?

[166] *See* Conway v. United States, 56 Fed. Cl. 572 (2003).

[167] *See id.*

information is generally based on the taxpayer's return information that is protected from disclosure.

The Service position is that it is able to tell the whistleblower whether his or her claim remains open or has been closed without violating section 6103.[168] If a claim is closed, the Service has said that it may disclose to the whistleblower the amount of the award or that a claim is denied.[169] The letter the Service used to reject claims before the 2006 amendments stated that "[f]ederal disclosure and privacy laws prohibit us from telling you the specific reason for rejecting your claim."[170] The letter listed the following three most common reasons for rejecting a claim: (1) the whistleblower's information did not cause an investigation or result in the collection of tax, penalties, or fines; (2) the Service already had the information that the whistleblower provided; and (3) the taxes recovered were too small to warrant an award.[171] The letter was utterly meaningless to whistleblowers because the actual reason for rejecting a particular whistleblower's claim may have been one or more or none of the listed reasons.[172]

2. Limited Collaboration with Whistleblowers

Section 6103 also impedes meaningful communication because the Service cannot readily collaborate with the whistleblower. The purpose of the Service whistleblower program is to provide the government with information it does not have.[173] Consequently, section 7623 and the Service whistleblower program contemplate a flow of information from a whistleblower to the Service, a situation that does not implicate section 6103.[174] Nonetheless, there inevitably will be situations where it would be beneficial for the Service to collaborate with the whistleblower.[175] A

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[168] IRS, *Confidentiality and Disclosure for Whistleblowers*, *available at* http://www.irs.gov/compliance/article/ 0,,id=181291,00.html.

[169] *Id.*

[170] Letter 1010 (SC), reprinted in I.R.M. § 25.2.2., Exhibit 25.2.2-7 (as in effect as of Feb. 2006).

[171] *Id.*

[172] Krug v. United States, 168 F.3d 1307, 1310 (Fed. Cir. 1999); *see supra* notes 35–41 and accompanying text.

[173] I.R.C. § 7623(b)(2) (providing for potential awards of 15% to 30% of recovered amounts but an award of only up to 10% if the information the whistleblower provides has already been publicly disclosed).

[174] *Id.*; *see also* I.R.C. § 6103(a) (prohibiting Service employees from disclosing returns and return information unless a statutory exception applies).

[175] *Whitlock Interview*, *supra* note 70, at 84 (recognizing that whistleblowers may not have direct knowledge and that the Service may corroborate the information that a whistleblower provides).

whistleblower could help interpret and evaluate documents that the Service obtains pursuant to an administrative summons or otherwise.[176] Alternatively, the Service may want to use the whistleblower to corroborate the taxpayer's position. The whistleblower would help the Service build a case against a potentially delinquent taxpayer, particularly where the delinquency arises from a complex transaction of which the whistleblower has specific knowledge. The Whistleblower Office acknowledges that whistleblowers are "uniquely placed" to assist the Service in its investigations.[177] Yet, section 6103 generally prohibits sharing a taxpayer's returns or return information with the whistleblower.

3. Potentially Meaningless Tax Court Appeal Right

Whistleblowers who file claims under section 7623(b) have the right to appeal their award determinations to the Tax Court by filing a petition within thirty days of the Service's determination[178] An appeal presumably is available only if the whistleblower's information caused the Service to initiate an administrative or judicial action against the taxpayer.[179] For the appeal right to be fair and meaningful, the whistleblower has to understand the basis of the Service's determination.[180] However, the Service has invoked section 6103 in the past to avoid disclosing to whistleblowers the reasons for denying claims or justifying the award amounts paid.

D. Applicability of Existing Section 6103 Exceptions

There are two existing exceptions in section 6103 that potentially permit the Service to communicate and collaborate with the whistleblower but neither exception is very satisfying. One potential exception is the investigative disclosure exception under section 6103(k)(6). The other is the tax administration contract exception under section 6103(n).

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[176] *See, e.g.*, Jarvis v. Commissioner, 47 Fed. Cl. 698, 705 (2000) (noting that the whistleblower "work[ed] for the IRS in reviewing and interpreting documents seized" from the taxpayer).

[177] Stephen Whitlock, ABA Administrative Practice Meeting, New Orleans (CD-ROM, Jan. 9, 2009) (on file with author).

[178] I.R.C. § 7623(b)(4); Dacosta v. United States, 82 Fed. Cl. 549, 555 (2008) (stating that the Tax Court has exclusive jurisdiction over section 7623(b) claims); *see supra* notes 107–141 and accompanying text (discussing the Tax Court appeal right).

[179] *See supra* notes 111–120 and accompanying text.

[180] *Whitlock Interview*, *supra* note 70, at 93.

1. Section 6103(k)(6) Investigative Disclosure Exception

The investigative disclosure exception in section 6103(k)(6) permits Service employees to disclose return information, but not the tax returns themselves, to third parties to obtain information that is not otherwise readily available.[181] This information may include the fact that the taxpayer is under audit or how the taxpayer treated a transaction on a return.[182] The legislative history to section 6103(k)(6) contemplates that the investigative disclosure exception applies only if "no reasonable alternative exists" and that disclosures of information beyond the fact that the taxpayer is under audit or other investigation would be "rare and extraordinary."[183]

Disclosures made using the investigative disclosure exception are to be made only as provided by the Treasury Regulations.[184] The regulations broadly provide that Service employees may disclose return information "to the extent necessary to obtain information" relating to their official duties or to accomplish any activity connected with their official duties.[185] One official duty is "[o]btaining the services of persons having . . . knowledge of particular facts and circumstances relevant" to determining a taxpayer's correct tax liability.[186] The regulations clarify that the term "necessary" does not mean "essential or indispensable, but rather appropriate or helpful in obtaining the information sought."[187] Thus, disclosure is permissible under section 6103(k)(6) if the Service employee reasonably believes at the time of disclosure that the disclosure is appropriate or helpful to obtain information to perform properly his or her official duties or to accomplish any activity in connection with his or her official duties.[188] There is no requirement that the employee seek the information from the taxpayer first.[189] It is also entirely appropriate for an employee to make disclosures to third-party witnesses to corroborate information provided by the taxpayer.[190]

Section 6103(k)(6) may not be used solely to provide information or as part of a quid pro quo arrangement; thus, it cannot be relied on merely to

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[181] I.R.C. § 6103(k)(6). 1976 BLUEBOOK, *supra* note 143, at 350.

[182] *See id.*

[183] 1976 BLUEBOOK, *supra* note 143, at 350.

[184] I.R.C. § 6103(k)(6); *see also* S. REP. NO. 94-938, at 342 (1976), *reprinted in* 1976-3 C.B. (vol. 3) 380 (1976).

[185] Treas. Reg. § 301.6103(k)(6)-1(a)(1) (2006).

[186] Treas. Reg. § 301.6103(k)(6)-1(a)(1)(v).

[187] Treas. Reg. § 301-6103(k)(6)-1(c)(1).

[188] *Id.*

[189] Treas. Reg. § 301.6103(k)(6)-1(c)(3).

[190] Treas. Reg. § 301.6103(k)(6)-1(c)(3) ex. 2.

permit the Service to provide the whistleblower with updates.[191] Section 6103(k)(6) could theoretically be used to permit the Service to collaborate with the whistleblower, but as discussed below, the Service intends that any collaboration or status updates take place using Section 6103(n).

2. Section 6103(n) Tax Administration Contract Exception

Section 6103(n) permits the Service, pursuant to regulations, to disclose returns and return information "to any person . . . to the extent necessary in connection with the processing, storage, transmission, and reproduction of such returns and return information, the programming, maintenance, repair, testing, and procurement of equipment, and the providing of other services, for purposes of tax administration."[192] The implementing Treasury Regulations permit disclosures pursuant to section 6103(n) only pursuant to written contracts or agreements for equipment or services, which are sometimes referred to as tax administration contracts.[193] Disclosure is permitted "only if the performance of the contract or agreement cannot otherwise be reasonably, properly, or economically carried out without the disclosure."[194]

An off-Code provision of the 2006 amendments to section 7623 permits the Whistleblower Office to ask the whistleblower for assistance.[195] The Joint Committee on Taxation's technical explanation contemplates that the assistance of the whistleblower would be an exceptional circumstance that would be accomplished only with a tax administration contract.[196] Consistent with the Joint Committee's statement, temporary Treasury

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[191] Treas. Reg. § 301.6103(k)(6)-1(c)(1) (2006).

[192] I.R.C. § 6103(n); *see also* Treas. Reg. § 301.6103(n)-1(a)(1) (referring to I.R.C. § 6103(b)(4) to define tax administration).

[193] Treas. Reg. § 301.6103(n)-1(a)(1) (2007).

[194] Treas. Reg. § 301.6103(n)-1(b)(1) (2007).

[195] Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(b)(1)(C), 120 Stat. 2922, 2960 (2006).

[196] STAFF OF JOINT COMM. ON TAXATION, 109TH CONG., TECHNICAL EXPLANATION OF H.R. 6408, THE "TAX RELIEF AND HEALTH CARE ACT OF 2006," AS INTRODUCED IN THE HOUSE ON DECEMBER 7, 2006, at 89 (Joint Comm. Print 2006), *available at* http://finance.senate.gov/press/Gpress/2005/prg121206.pdf. The Joint Committee's technical explanation said "[u]nder the provision, the Whistleblower Office may seek assistance from the individual providing information or from his or her legal representative, and may reimburse the costs incurred by any legal representative out of the amount of the reward. To the extent the disclosure of returns or return information is required to render such assistance, the disclosure must be pursuant to an IRS tax administration contract." *Id.* There is an off-Code provision permitting the whistleblower to assist the Service. However, neither the proposed nor enacted form of the legislation contains a provision permitting the reimbursement of whistleblower lawyers out of the award.

Regulations require a tax administration contract to be in place before the Service may collaborate with a whistleblower or provide a whistleblower with status updates of his or her claim.[197] The temporary regulations permit the Service to disclose return information, but not tax returns, to the whistleblower.[198]

The Whistleblower Office acknowledges that whistleblowers are "uniquely placed" to assist the Service in its investigations, but expects to enter into tax administration contracts with whistleblowers "only infrequently."[199] As of January 2009, the Service has not signed a tax administration agreement with a whistleblower under the revised whistleblower law, which means that the Service is not providing status updates to, or collaborating with, whistleblowers.[200]

3. Why Does the Service View Section 6103(n) as Preferable to Section 6103(k)(6)?

There is a reasonable argument that the investigative disclosure exception in section 6103(k)(6) permits the Service to collaborate with a whistleblower to the extent that the Service employee reasonably believes at the time of disclosure that the disclosure is appropriate or helpful to obtain information to perform properly his or her official duties or to accomplish any activity in connection with his or her official duties.[201] Nonetheless, the Service requires that a whistleblower be hired pursuant to a tax administration contract under section 6103(n) rather than relying on the investigative disclosure exception in section 6103(k)(6).[202] Presumably, the Service views section 6103(n) as preferable because there are certain safeguards mandated by section 6103(n) that do not apply to disclosures made under section 6103(k)(6).[203]

Section 6103(a)(3) prohibits persons under a tax administration contract and certain other specified persons from disclosing tax

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[197] T.D. 9389, 2008-18 I.R.B. 863.

[198] Temp. Treas. Reg. § 301.6103(n)-2T(a)(1) (2008).

[199] T.D. 9389, 2008-18 I.R.B. 863, 864.

[200] Jeremiah Coder, *Private Client Suits Might Inform Future Whistleblower Cases*, 2009 TNT 6-4 (Jan. 12, 2009); *see* Temp. Treas. Reg. § 301.6103(n)-2T(b)(3) (2008).

[201] *See* Treas. Reg. § 301.6103(k)(6)-1(a)(1)(v); Jones v. United States, 207 F.3d 508, 510 (8th Cir. 2000).

[202] Temp. Treas. Reg. § 301.6103(n)-2T(a)(1) (2008).

[203] IRS, DISCLOSURE & PRIVACY LAW MANUAL 4-16 (stating that an expert should be retained pursuant to a tax administration contract so that the restrictions and sanctions of section 6103(n) apply).

information.[204] The disclosure restrictions imposed by section 6103(a)(3) do not apply to persons who receive return information under section 6103(k)(6). Persons with tax administration contracts are subject to civil and criminal penalties under sections 7213 and 7213A for the unauthorized inspection or disclosure of return information.[205] In contrast, disclosures made pursuant to section 6103(k)(6) are not subject to these penalties.[206] Persons covered by tax administration contracts, but not those covered by section 6103(k)(6), must submit its facilities to Service inspection to ensure that tax information is adequately protected from unauthorized disclosure.[207]

Not all persons who receive returns or return information are restricted from making disclosures.[208] Nor do the civil and criminal penalties for unauthorized disclosures apply to all persons who receive disclosures under section 6103.[209] Also, there is no coherent rationale justifying the inclusion or exclusion of persons from the disclosure restrictions or the civil or criminal penalties.[210] Consequently, legitimate questions may be raised about whether disclosures to whistleblowers should be subject to disclosure

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[204] I.R.C. § 6103(a)(3); Temp. Treas. Reg. § 301.6103(n)-2T(b)(4) (2008). Other persons prohibited from disclosing tax information include one-percent shareholders who receive disclosures of the corporate return, child support enforcement agencies, agencies seeking to reduce tax overpayments for debts of the taxpayer, and agencies who receive information in connection with federal benefit programs such as Medicare and federal loan programs. I.R.C. § 6103(a)(3). The Treasury Regulations prohibit a contractor from disclosing returns or return information received under section 6103(n) unless the contractor receives written permission from the Service. Treas. Reg. § 301.6103(n)-1(a).

[205] I.R.C. §§ 7213(a)(1), 7213A; Temp. Treas. Reg. § 301.6103(n)-2T(c) (2008).

[206] I.R.C. §§ 7213(a)(1), 7213A(a)(1)(B); Treas. Reg. § 301.6103(n)-1(c), (d) (2007); I.R.M. § 11.3.21.5(1) (Mar. 28 2008); *see supra* notes 153–159 and accompanying text (discussing the penalties that apply to unauthorized disclosures of returns and return information). The notification of possible liability is typically included in the contract for services. I.R.S. Field Service Adv. Mem. 1995 FSA LEXIS 360, at *5 (Mar. 24, 2005). The Privacy Act provides for criminal penalties for unauthorized disclosures by contractors who provide an entire system of records, but the Privacy Act provisions may not apply to disclosures made to whistleblowers under section 6103(k)(6) absent a contract restricting the whistleblower from disclosing any tax information. 5 U.S.C. § 552a(i)(1) (2004); I.R.M. §§ 11.3.21.4 (2008), 11.3.21.5 (2008).

[207] Treas. Reg. § 301.6103(n)-1(c), (e) (2007); Temp. Treas. Reg. § 301.6103(n)-2T(d) (2008).

[208] *See supra* note 204.

[209] *See supra* notes 205–206.

[210] For example, restrictions on disclosure are limited to federal and state officers and employees, certain local law enforcement persons, child support agencies, one-percent shareholders, certain persons who receive tax information for nontax purposes, and contractors with tax administration contracts. I.R.C. § 6103(a).

restrictions and civil and criminal penalties for unauthorized disclosures. Is the sharing of tax information as part of the Service whistleblower program any more intrusive than disclosures made under other section 6103 provisions where recipients are not prohibited from making disclosures and are not subject to civil or criminal penalties for unauthorized disclosures? For example, is disclosing to a third party that a taxpayer is under audit, which could be made under section 6103(k)(6), any more intrusive than disclosing information to a third party who tipped off the Service and thus, is aware of the taxpayer's potential tax problems?

Assuming whistleblowers should be prohibited from disclosing the taxpayer's tax information and subject to civil and criminal penalties for unauthorized disclosure, requiring tax administration contracts is not the most desirable approach. Requiring tax administration contracts as a prerequisite to communicate and collaborate with the whistleblower creates a burden that will extend the processing of whistleblower claims and potentially may limit the number of whistleblower claims.[211] In addition, the Whistleblower Office's intention to use tax administration contracts only infrequently surely is detrimental to the effectiveness of the whistleblower program.

4. Section 6103(h) Exception for Administrative or Judicial Proceedings

While section 6103 generally prohibits the Service from disclosing taxpayer information, section 6103(h)(4) permits the disclosure of returns and return information in certain administrative or judicial proceedings pertaining to tax administration.[212] The term "tax administration" is broadly defined to include "the administration, management, conduct, direction, and supervision of the execution and application of the internal revenue laws" as well as "litigation . . . under such laws."[213] There cannot be any serious dispute that a whistleblower's appeal to the Tax Court pursuant to section 7623(b)(4) is a judicial proceeding pertaining to tax administration within the meaning of section 6103(h)(4), because it is a proceeding before the U.S. Tax Court involving litigation under the internal revenue laws.[214] The

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[211] *See* Paul D. Scott, *Beware the Whistleblower: Will the IRS Take a Page out of DOJ's Playbook*, 58 TAX EXECUTIVE 449, Nov. 1, 2006, *available at* 2006 WLNR 22912304 (describing limitations of the Special Agreement Program under prior law).

[212] I.R.C. § 6103(h)(4) (2006).

[213] I.R.C. §§ 6103(b)(4)(A)(i), 6103(b)(4)(B); *accord* First W. Gov't Secs. Inc., v. United States, 796 F.2d 356, 360 (10th Cir. 1986) (citing Davidson v. Brady, 559 F. Supp. 456, 460–61 (W.D. Mich. 1983)).

[214] Conway v. United States, 56 Fed. Cl. 572, 577 (2003); Confidential Informant v. United States, 45 Fed. Cl. 556, 559 (2000). The phrase "pertaining to tax administration" is

exceptions in section 6103(h) are intended to permit disclosures of tax information of a person whose tax liability gave rise to the litigation but who is not a party to the proceeding (i.e., the person on whom the whistle is blown).[215]

a. Section 6103(h)(4)(B) Item Test

The item test in section 6103(h)(4)(B) may apply to permit the Service to disclose a taxpayer's return or return information to a whistleblower in a whistleblower appeal to the extent that the "treatment of an item reflected on [the nonparty taxpayer's] return is directly related to the resolution of an issue in the [whistleblower] proceeding."[216] The Court of Federal Claims in *Confidential Informant v. United States* applied the item test to permit a whistleblower under the pre-2006 law to discover tax information of the person against whom the whistle was blown.[217] The whistleblower in *Confidential Informant* agreed to provide the Service information about a third party's violation of the federal tax laws pursuant to an agreement entered into between the Service and the whistleblower.[218] The whistleblower sued seeking a declaratory judgment, an accounting, and breach of contract damages after the Service denied the whistleblower's claim for an award.[219] The whistleblower submitted discovery to the Service, seeking information to support its claim to an award, but the Service declined to produce the requested information by relying on section 6103.[220] The Court, concluding that the item test applied, compelled the Service to respond to certain of the whistleblower's discovery requests.[221]

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broadly defined. *See* Hobbs v. United States, 209 F.3d 408 (5th Cir. 2000). In *Hobbs*, the Fifth Circuit found that the Service was permitted to disclose return information pursuant to section 6103(h)(4)(A) to defend against charges that it improperly discharged one of its employees. *Id.* at 411. The discharged employee filed an appeal with the Merit Systems Protection Board and filed a civil rights suit in federal district court. *Id.* at 409. To defend against charges that it improperly discharged the employee, the Service disclosed the former employee's tax information. *Id.* at 410. The Fifth Circuit found the disclosures pertained to tax administration because "[t]he IRS's decision to terminate him for failure accurately to file his own returns was motivated in large part by the fact that this failure undermined the IRS's confidence in his ability to perform his essential job functions, which unquestionably encompassed tax administration." *Id.* at 411.

[215] 2000 TREASURY REPORT, *supra* note 143, at 46.

[216] I.R.C. § 6103(h)(4)(B) (2006); *accord Confidential Informant*, 45 Fed. Cl. at 556.

[217] *Confidential Informant*, 45 Fed. Cl. at 556.

[218] *Id.*

[219] *Id.* at 557.

[220] *Id.*

[221] *Id.* at 559–60.

Notwithstanding the decision in *Confidential Informant*, there are questions regarding the applicability of section 6103(h)(4)(B) to whistleblower appeals. First, the item test requires a direct relationship between an issue in the proceeding and the treatment of an item on the taxpayer's return.[222] Some courts, however, have applied the item test by finding a direct relationship between an issue in the proceeding and the information sought, even if not an item on the taxpayer's return.[223] Second, the whistleblower has to show that an item from the taxpayer's return or other requested information would resolve an issue in the whistleblower proceeding.[224]

The third question is whether the taxpayer's tax information is "directly related" to the resolution of an issue in the whistleblower proceeding. The Court of Federal Claims in *Shell Petroleum, Inc. v. United States* analyzed the meaning of the phrase "directly related" in the item test, which Congress left undefined in the statute.[225] Shell sought return information of its competitors in its refund suit to prove that it was entitled to a tax credit under section 29 for the production of oil from tar sands.[226] Tar sands are "[t]he several rock types that contain an extremely viscous hydrocarbon which is not recoverable in its natural state by conventional oil well production methods including currently used enhanced recovery techniques."[227] The government's position was that Shell was entitled to a section 29 credit only by showing that it used an unconventional method to recover oil from tar sands.[228] Shell filed a motion to compel the Service to turn over tax information attached to the tax returns of Shell's competitors who sought a tax credit under section 43, which gives a credit to taxpayers who recover crude oil using certain recovery methods.[229] Shell sought this information to inferentially support its claim that the production method it used to recover oil from tar sands was not used by anyone else in the industry and thus was unconventional.[230] The Court of Federal Claims, relying on the item test, ordered the Service to produce the information that Shell sought in unredacted form for in camera inspection, and presumably ordered the government to produce redacted information to Shell.[231] The

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222 I.R.C. § 6103(h)(4)(B).

223 *See, e.g.*, Shell Petroleum, Inc. v. United States, 47 Fed. Cl. 812, 816–19 (2000).

224 *Confidential Informant*, 45 Fed. Cl. at 559.

225 *Shell Petroleum, Inc.*, 47 Fed. Cl. at 816–820.

226 *Id.* at 814–15. Congress redesignated section 29 as section 45K in 2005.

227 *Id.* at 815.

228 *Id.*

229 *Id.*

230 *Id.*

231 *Id.* at 820; Vons Companies, Inc. v. United States, 51 Fed. Cl. 1, 19 (2001) (stating

court held that the definition of "relevant evidence" in rules 401 and 404 of the Federal Rules of Evidence "serves as a helpful guide" to determine the meaning of "directly related" in section 6103(h)(4)(B).[232]

A district court in *Beresford v. United States* used the item test to require the Service to disclose to a decedent's estate third-party tax information that the Service had used to value shares of stock held by the decedent at her death.[233] The decedent's estate in *Beresford* paid tax based on the Service's higher valuation of the stock and sought a refund, alleging that the stock was valued incorrectly.[234] The district court granted the estate's motion to compel, reasoning that disclosure of third-party information to the estate was permitted under the item test set forth in section 6103(h)(4)(B).[235] The Service had relied on third-party information to value decedent's stock and thus, the third-party information was directly related to the resolution of an issue in the proceeding.[236] The court ordered the Service to turn over the requested information after redacting the third parties' identifying information. The court restricted the parties' use of the information only to the present proceeding and ordered the parties to destroy the information after the judgment became final.[237]

A fourth question in applying section 6103(h)(4)(B) to whistleblower appeals is whether the item test applies only if the issue to be resolved in the whistleblower proceeding is the whistleblower's tax liability.[238] The government in *Tavery v. United States* made such an argument relying on the legislative history, which provides:

> The disclosure of a third party return in a tax proceeding (including the United States Tax Court) will be subject to the same item and transaction tests described [in section 6103(h)(2)], except

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that following the in camera review, the court in *Shell Petroleum* "apparently released heavily redacted versions of the certificates to the plaintiff"). Although the court in *Shell Petroleum* presumably required that the nonparty's tax information be redacted, the language of section 6103(h)(4) does not require the redaction of information. I.R.C. § 6103(h)(4); *see* Lebaron v. United States, 794 F. Supp. 947, 956 (C.D. Cal. 1992).

[232] *Shell Petroleum, Inc.*, 47 Fed. Cl. at 819; *cf. Vons Companies, Inc.*, 51 Fed. Cl. at 19 (holding that the taxpayer could not obtain third-party tax information in refund suit because information sought was not "directly related" to the resolution of an issue within the meaning of section 6103(h)(4)(B) in the taxpayer's refund suit).

[233] Beresford v. United States, 123 F.R.D. 232, 235 (E.D. Mich. 1988).

[234] *Id.* at 232.

[235] *Id.* at 235.

[236] *Id.*; *see generally* Lebaron v. United States, 794 F. Supp. 947 (C.D. Cal. 1992) (discussing meaning of "directly related").

[237] *Beresford*, 123 F.R.D. at 235.

[238] Tavery v. United States, 32 F.3d 1423, 1429 (10th Cir. 1994).

> that such items and transactions must have a direct relationship to the resolution of an issue of the taxpayer's liability.[239]

The item test applies if the treatment of the information sought is directly related to the resolution of an issue in an administrative or judicial proceeding pertaining to tax administration.[240] Because the statute itself does not limit disclosure only to proceedings where tax liability is at issue, the Tenth Circuit rejected the government's interpretation.[241] The Tenth Circuit in *Tavery v. United States* held that the item test applies even if the issue in the proceeding is not tax liability.[242]

Reading these authorities together seems to mean that disclosure of the taxpayer's tax information in a whistleblower appeal to the Tax Court would be permissible under the item test to the extent that an item on the taxpayer's return or other information sought is relevant to the resolution of an issue in the whistleblower's Tax Court proceeding, namely whether the Service's award determination is appropriate. Thus, the item test set forth in section 6103(h)(4)(B) may apply under the right circumstances to permit the disclosure of the taxpayer's tax information to the whistleblower.

b. Section 6103(h)(4)(C) Transaction Test

A harder case to make is that section 6103(h)(4)(C), the transaction test, should apply in whistleblower actions if there is no transactional relationship between the taxpayer and the whistleblower.[243] Section 6103(h)(4)(C) applies if the "return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding."[244] Examples of transactional relationships that have qualified under section 6103(h)(4)(C) include investors and promoters in a tax shelter, participants in joint ventures or other business deals, and participants in fraudulent conveyances.[245]

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[239] *Id.* (quoting S. Rep. No. 94-938, at 326 (1976), *reprinted in* 1976 U.S.C.C.A.N. 3439, 3755).

[240] I.R.C. § 6103(h)(4)(B).

[241] *Tavery*, 32 F.3d at 1430 (stating that "[t]o the extent tension may exist between the broad but plain language of the statute and its legislative history, we follow Judge Friendly's application of 'the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute'").

[242] *Id.* at 1429–30.

[243] I.R.C. § 6103(h)(4)(C).

[244] *Id.*

[245] *See* Galotto, La Puma & Pai, 625 T.M., *Obtaining Information from the Government—Disclosure Statutes*, notes 970–77 and accompanying text.

c. Section 6103(h)(4)(A) Test

When the Tax Reform Act was enacted in 1976, section 6103(h)(4)(A) permitted the disclosure of returns or return information in a judicial proceeding only if the taxpayer was a party to the proceeding.[246] In 1978, section 6103(h)(4)(A) was expanded to permit disclosures even if the taxpayer was not a party to the proceeding if "the proceeding arose out of, or in connection with, determining the taxpayer's civil or criminal liability . . . in respect of any tax imposed under this title."[247] The 1978 revisions were made to cover summons enforcement proceedings where the taxpayer did not or was unable to intervene and in transferee liability cases.[248]

The Service discloses taxpayer information in transferee liability cases to attempt to hold the transferee liable for the transferor-taxpayer's tax liability. In summons enforcement proceedings, the Service discloses taxpayer information to determine the taxpayer's own tax liability.[249] Whistleblower proceedings are different from summons enforcement proceedings and transferee liability cases because a whistleblower seeks the disclosure of a taxpayer's tax information in a whistleblower proceeding to determine the proper amount of his or her whistleblower award. Nonetheless, there is a reasonable argument that section 6103(h)(4)(A) should permit the Service to disclose the taxpayer's tax information in a Tax Court appeal.[250] The whistleblower proceeding literally arises out of determining the taxpayer's civil or criminal liability as required by section 6103(h)(4)(A). A whistleblower appeal to the Tax Court arises only after the whistleblower provides information to the Service that caused an administrative or judicial proceeding against a taxpayer who violated the tax laws.[251]

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[246] Tax Reform Act of 1976, Pub. L. No. 94-455, sec. 1201, § 6103(h)(4)(A), 90 Stat. 1550, 1667, 1674 (1976) (current version at I.R.C. § 6103(h)(4)(A)).

[247] Revenue Act of 1978, Pub. L. No. 95-600, § 503(b)(2), 92 Stat. 2763, 2880 (1978) (current version at I.R.C. § 6103(h)(4)(A)). Identical language is used in I.R.C. § 6103(h)(2)(A), which permits disclosures of tax information to the Department of Justice.

[248] H.R. REP. NO. 95-1800, vol. 1, at 627 (1978) (Conf. Rep.). *See generally* I.R.C. § 6901 (discussing transferee liability procedures); I.R.C. § 7604 (discussing summons enforcement procedures).

[249] *See* I.R.C. § 6901 (transferee liability procedures); I.R.C. § 7604 (summons enforcement procedures).

[250] There are few cases interpreting section 6103(h)(4)(A) and in many of those cases, the taxpayer is a party to the proceeding. *See, e.g.*, Abelein v. United States, 323 F.3d 1210, 1216 (9th Cir. 2003); Rice v. United States, 166 F.3d 1088, 1092 (10th Cir. 1999); Hartman v. Commissioner, 97 T.C. M. (CCH) 1649 (2009).

[251] *See* 2000 TREASURY REPORT, *supra* note 143, at 43 (stating that "Congress . . .

Section 6103(h)(4)(A) should permit the Service to disclose a taxpayer's tax information during status updates and collaborations with the whistleblower if there is an administrative proceeding pertaining to tax administration.[252] The Service considers an audit to be an administrative proceeding within the meaning of section 6103(h)(4), but there is a conflict in the courts as to whether an audit is an administrative proceeding for purposes of section 6103(h)(4).[253]

Another uncertainty is whether the section 6103(h)(4) exceptions permit disclosure to third parties in administrative or judicial proceedings or only apply to disclosures made to federal officers and employees.[254] The better argument is that section 6103(h) is not limited to disclosures only to government officers and employees. Otherwise, the Service and the Department of Justice would be prohibited from disclosing tax information in judicial proceedings where the taxpayer is a party.[255] Moreover, section 6103(h) is entitled "Disclosure to certain Federal officers and employees for purposes of tax administration, etc." The term "etc." does not modify the phrase "for purposes of tax administration" because all of the subsections of section 6103(h) involve tax administration.[256] Rather, the term "etc." in the title implies that disclosures other than to federal officers and employees are permitted.[257] Finally, section 6103(h)(4)(D) permits the disclosure of return

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permitted the disclosure of tax information of the taxpayer . . . whose liability gave rise to the case.").

[252] I.R.C. § 6103(h)(4).

[253] *Compare* Mallas v. United States, 993 F.2d 1111, 1122 (4th Cir. 1993) (holding that an audit is not an administrative proceeding for purposes of section 6103(h)(4)(C)), *with* I.R.S. Chief Counsel Notice 2006-006 (Nov. 22, 2005) (discussing three cases concluding that audits are administrative proceedings for purposes of section 6103(h)(4)).

[254] *Compare* Chamberlain v. Kurtz, 589 F.2d 827, 837–38 (5th Cir. 1979) (stating that section 6103(h)(4) applies only to disclosures to federal officers and employees), *and* Aloe Vera of Am., Inc. v. United States, 89 A.F.T.R.2d 2002-2788, 2002-2790 (D. Ariz. 2002) (same), *with* First W. Gov't Secs. Inc. v. United States, 796 F.2d 356, 360 (10th Cir. 1986) (disclosure of taxpayer's return information to third parties permitted under section 6103(h)(4)(C)).

[255] I.R.C. § 6103(h)(4)(A).

[256] *See* I.R.C. § 6103(h)(1) (permitting disclosure to Treasury Department officers and employees for tax administration purposes); I.R.C. § 6103(h)(2)–(3) (permitting disclosure to Justice Department officers and employees for tax administration matters); I.R.C. § 6103(h)(4) (permitting disclosure in judicial or administrative proceedings pertaining to tax administration); I.R.C. § 6103(h)(5) (permitting disclosure to the Social Security Administration or Railroad Retirement Board for "purposes of carrying out its responsibilities for withholding tax under section 1441"); I.R.C. § 6103(h)(6) (prohibiting disclosure to employees, detailees, and certain members of the IRS Oversight Board).

[257] Galotto, La Puma & Pai, *supra* note 245, at notes 931–41 and accompanying text.

information to a criminal defendant—who is not a federal officer or employee.

V. PROPOSED SOLUTIONS

A. A Legislative Fix is Required

Section 7623(b) is intended to incentivize insiders who have substantive information to blow the whistle on persons who do not pay their taxes.[258] However, as currently conceived, the Service whistleblower program in section 7623(b) is an "empty promise" because it is at cross-purposes with the confidentiality restrictions imposed by section 6103.[259] Congress enacted the enhancements to section 7623 in 2006 without loosening any of the section 6103 restrictions, leaving the Service to hobble along in its tax administration duties.

To shore up the Service whistleblower program, Congress should make the process more participatory. The devil, of course, is in the details. One obvious solution is to amend section 6103 to specifically permit the Service to communicate and collaborate with whistleblowers without requiring tax administration contracts and to make disclosures in Tax Court appeals.

Another potential solution is to clarify that existing exceptions to section 6103 permit disclosures of taxpayers' return information to whistleblowers during the pendency of a whistleblower claim, including any appeal of an award determination to the Tax Court. At a minimum, the whistleblower, during an appeal to the Tax Court, should have access to the information the Whistleblower Office considered to make its award determination.

Congress should amend section 6103(a)(3) to prohibit whistleblowers from disclosing returns or return information received absent statutory authority or permission from the Service. Congress should also amend section 7213 and section 7213A to subject whistleblowers to civil and criminal penalties for unauthorized disclosures. In the alternative, Congress should amend section 7623 to disqualify a whistleblower who makes unauthorized disclosures from receiving an award, or require the whistleblower to repay an award if found making unauthorized disclosures. Whistleblowers could be notified of the disclosure restrictions and their potential liability for civil and criminal penalties by including such statements in IRS Form 211, the form that whistleblowers must file when applying for an award.

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[258] 2008 WHISTLEBLOWER REPORT, *supra* note 51, at Executive Summary.

[259] Camp, *supra* note 124, at 89 (referring to the right of taxpayers to appeal collection due process determinations made by the Service as an "empty promise").

Congress could use section 6103(k)(10), one of the most recent amendments to section 6103, as a template for making appropriate legislative changes to protect the taxpayer's information. Congress enacted section 6103(k)(10) in 2008 to permit the Service to disclose to the head of the Federal Bureau of Prisons return information of prisoners who may have filed fraudulent tax returns.[260] Lifting the section 6103 restrictions permits the Service to share information with prison officials, which would allow the officials to stop inmates from conspiring with other inmates and non-inmates to submit fraudulent returns in order to receive refunds they are not entitled to.[261] The 2008 legislation subjects disclosures made under section 6103(k)(10) to the safeguards set forth in section 6103(p)(4), which requires certain federal agencies and other recipients, as a condition to receiving disclosures from the Service, to agree to keep the tax information received secure and restrict access to persons whose duties require access. Congress ordered TIGTA to report to Congress not later than December 31, 2010 on the implementation of section 6103(k)(10),[262] which expires at the end of 2011.[263] It seems worth the effort to implement improvements and associated safeguards to the whistleblower program. Any trepidation can be mitigated by making the changes expire, thus requiring Congress to study the effectiveness and consequences of the provisions and affirmatively act to continue them.

There is good evidence that suggests that Congress and the Obama administration may be supportive of amendments to section 6103 to strengthen the IRS Whistleblower Act. While President Obama was in the Senate he co-sponsored the Tax Shelter and Tax Haven Reform Act of 2005, which included amendments to section 7623 similar to the reforms eventually enacted in 2006.[264] Then-senator Obama along with 78 of the other 100 senators and almost 85% of the House of Representatives voted

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[260] Inmate Tax Fraud Prevention Act of 2008, Pub. L. No. 110-428, § 2(a), 122 Stat. 4839 (2008).

[261] *To Examine Tax Fraud Committed By Prison Inmates: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways & Means*, 109th Cong. (2005) (statement of Rep. Jim Ramstad, Chairman, Subcomm. on Oversight of the H. Comm. on Ways & Means), *available at* http://waysandmeans.house.gov/hearings.asp?formmode=view &id=4523. A study conducted by the IRS Criminal Investigation Division found that prisoner returns accounted for 15% of all fraudulently filed returns even though prisoner returns account for only .43% of all refund returns filed. *Id.* (prepared statement of J. Russell George, Treasury Inspector General for Tax Administration, U.S Department of the Treasury).

[262] I.R.C. § 7803(d)(3)(C).

[263] I.R.C. § 6103(k)(10)(D).

[264] Tax Shelter and Tax Haven Reform Act of 2005, S. 1565, 109thCong., § 206 (as introduced July 29, 2005).

for the 2006 reforms to section 7623.[265] Even Senator Reid, the current Senate Majority Leader who in 1998 referred to the Service whistleblower program as the "Rewards for Rats Program," voted for the 2006 amendments.[266] It seems sensible that a Congress who supported the Service's whistleblower program with such strong bipartisan support would back amendments to section 6103 to make the program better. It is difficult to vote against a program that helps reduce the tax gap by collecting taxes more effectively and less expensively than the Service's primary method of selecting tax returns for audit.

Public attitudes may support amendments to section 6103 to improve the effectiveness of the Service whistleblower program.[267] The IRS Oversight Board in its 2008 Taxpayer Attitude Survey reported that 94% of respondents believe it is their civic duty to pay taxes, 89% believe it is never acceptable to cheat on their taxes, and 60% agree that everyone has a personal responsibility to report anyone who cheats on their taxes.[268] These survey results suggest that the public is becoming increasingly intolerant of tax cheats.[269]

B. Tools Available to the Tax Court

To protect the taxpayer's tax information during the appeal of a whistleblower award, the Tax Court could issue a protective order to prohibit the whistleblower from disclosing taxpayer return information received during the appeal and could order appropriate redactions to the record.[270] Tax Court Rule 103 gives the Court broad power to "make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense," including "[t]hat a trade secret or other information not be disclosed or be disclosed only in a designated way."[271] A party or nonparty must make a motion for a protective order and must show good cause.[272]

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[265] 152 CONG. REC. S11674 (daily ed. Dec. 8, 2006) (Roll Call Vote No. 279). One Democrat and eight Republicans voted no, and four Democrats, seven Republicans, and one Independent did not vote. *Id.* 152 CONG. REC. H9024-79 (daily ed. Dec. 8, 2006) (Roll Call Vote 533).

[266] *Id.*; *see also supra* notes 2–3 and accompanying text.

[267] Ventry, *supra* note 14, at 373 (stating that "there is reason to believe that efforts to relax [section 6103] for purposes of further enhancing the tax whistleblower statute might have some traction among current tax officials and legislators seeking increased transparency").

[268] I.R.S. OVERSIGHT BD., 2008 TAXPAYER ATTITUDE SURVEY, at 2–3 (Feb. 2009).

[269] Martin Vaughan, *No Pity for Rich Tax Cheats*, WALL ST. J., Feb. 11, 2009, at D3.

[270] *See* Shell Petroleum Inc. v. United States, 46 Fed. Cl. 719 (2000).

[271] TAX CT. R. 103(a)(7). The Tax Court in *Estate of Yaeger v. Commissioner* held that

The Tax Court could nonetheless exercise its discretion to issue a protective order even if section 6103(h)(4) permits disclosures to whistleblowers. The Tax Court in *Estate of Yaeger v. Commissioner* discussed the intersection of the confidentiality rules in section 6103 and the court's power under Tax Court Rule 103 to issue protective orders.[273] In *Yaeger*, a case involving a challenge to the amount of estate tax owed, the Service sought discovery pertaining to certain financial information to determine the value of stock at the time of decedent's death.[274] The estate asked the court for a protective order to prevent the Service from giving the requested information to the decedent's wife, who had brought several actions to challenge the decedent's will.[275] The Service argued that section 6103(e) permitted it to give the information to the decedent's wife and that the court did not have the authority to override Service statutory authority.[276] While the court acknowledged that section 6103(e) gave the Service authority to give the documents to be produced to the decedent's wife, the court held that it has the authority to "condition and restrict the use of [its] own discovery procedures with respect to information jointly covered by section 6103 and Rule 103."[277] Thus, even if section 6103(h)(4), or another section 6103 exception, permits the Service to disclose the taxpayer's information in the whistleblower proceeding, the Tax Court may nonetheless issue a protective order with respect to the information disclosed.

Tax Court Rule 27(d) authorizes the Court to order the redaction of information in papers filed with the Court and to issue protective orders under Tax Court Rule 103 relating to filings.[278] The Tax Court could also

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a protective order may cover information of any kind and is not limited to trade secrets or other kinds of business-related information. Estate of Yaeger v. Commissioner, 92 T.C. 180, 190 (1989); *see also* Grandbouche v. Commissioner, 99 T.C. 604, 614 (1992) (granting petitioner's motion for protective order to limit information to be produced in response to the Service's discovery request).

[272] TAX CT. R. 103(a). Good cause may exist where confidential information is involved. Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 921 (1985).

[273] *Yaeger*, 92 T.C. 180.

[274] *Id.* at 182.

[275] *Id.* at 181–82.

[276] *Id.* at 184. Section 6103(e) permits the Service to disclose return information to a beneficiary under a will if she has a material interest that will be affected by the information. I.R.C. § 6103(e)(1)(E)(ii). The documents to be produced are return information because it is information collected by the Service with respect to the estate's tax liability. *Yaeger*, 92 T.C. at 186.

[277] *Yaeger*, 92 T.C. at 189.

[278] TAX CT. R. 27(d), 103(a).

issue a protective order to seal all or part of the record.[279] The party seeking to seal all or part of the record must show good cause by explaining the harm to be suffered if a motion to seal the record is denied.[280] The Court of Federal Claims, under what is now section 7623(a), initially filed at least two decisions under seal and then subsequently made the decisions public after making redactions proposed by the whistleblower and the government.[281] Sealing of the record is appropriate only if the interest advanced by the parties outweighs the interest of the public to open judicial proceedings.[282] The public's interest in open judicial proceedings is presumed to override the litigants' interests.[283] The Tax Court, in a press release accompanying the adoption of Tax Court rules relating to whistleblower actions, recognized that it is permitted to seal the record when appropriate, but that it is not required to seal the record in all whistleblower actions.[284]

The person with the strongest potential of making a good cause showing is the taxpayer whose tax information would be disclosed, but who is not a party in the Tax Court proceeding. While nonparties may move for a protective order, the taxpayer upon whom the whistle was blown will not necessarily be aware of the proceeding. If the whistleblower's identity is to be protected, the Service Chief Counsel cannot notify the taxpayer of the proceeding and the Tax Court cannot permit the taxpayer to intervene.[285]

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[279] I.R.C. § 7461(b)(1); TAX CT. R. 27(c) (sealing filings); TAX CT. R. 103(a)(4) (restricting matters that may be inquired into): TAX CT. R. 103(a)(7) (protecting "a trade secret or other information" from disclosure). The general rule is that all reports of the Tax Court and all evidence that the court receives, including transcripts of proceedings in the court, are public records that are open to inspection by the public. I.R.C. §§ 7461(a), 7458. The public has an interest in "free access" to judicial proceedings and an interest in "assuring that courts are fairly run and judges are honest." Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 919 (1985).

[280] *Willie Nelson Music Co.*, 85 T.C. at 920.

[281] *See* Confidential Informant v. United States, 45 Fed. Cl. 556 (2000); Jarvis v. United States, 43 Fed. Cl. 529 (1999).

[282] Anonymous v. Commissioner, 127 T.C. 89, 91 (2006); *Yaeger*, 92 T.C. at 189. In *Anonymous v. Commissioner*, Judge Kroupa granted petitioner's order to seal the record, concluding that the risk of physical harm to petitioner outweighed the public interest favoring access to court records. 127 T.C. at 94.

[283] *Willie Nelson Music Co.*, 85 T.C. at 919.

[284] Press Release, U.S. Tax Court (Oct. 3, 2008), *available at* http://www.ustaxcourt.gov/press/100308.pdf.

[285] I.R.M. § 35.4.6.5(2) (Aug. 11, 2004) (stating that in cases where a petitioner seeks nonparty tax information, the nonparty should be notified); *see Jarvis*, 43 Fed. Cl. at 531 (issuing a protective order prohibiting parties from disclosing taxpayer's tax information after getting taxpayer's consent in whistleblower action under what is now section 7623(a)).

The Service will not seek to seal the record to avoid compromising an ongoing investigation or audit if at the time of the whistleblower's appeal to the Tax Court, a final determination has been made in the taxpayer's underlying action and any pending criminal actions are completed.[286] Nonetheless, the Service may seek an order to protect the absent taxpayer's interests. However, that approach would be contrary to the current policy of the Service's Chief Counsel who, in considering itself as representing the public interest, believes it important to encourage transparency in Tax Court litigation.[287] Its policy is to resist motions for protective orders that limit public access and to urge the court to narrowly construe motions to seal records.[288]

Sealing the record protects disclosures from being made to the public, but does not inhibit the judicial proceedings because the parties in the action will have access to information to adequately litigate their cases. However, whatever value exists to future whistleblowers in open judicial proceedings is reduced to the extent that the Tax Court deemphasizes or edits its factual findings in the opinion.[289]

VI. JUSTIFYING DISCLOSURES TO WHISTLEBLOWERS

Loosening the section 6103 confidentiality restrictions to permit the Service to share taxpayer information with whistleblowers should be unobjectionable because sharing tax information with whistleblowers assists the Service in performing its tax administration duties. Taxpayers can hardly complain that the Service collects information from and about the taxpayer and uses that information to determine the taxpayer's taxes. Nonetheless, critics may balk at sharing taxpayer information with whistleblowers, particularly because taxpayers typically will not be notified or permitted to intervene in whistleblower claims. But disclosures to whistleblowers are justified even if those disclosures are viewed as being made for purposes unrelated to tax administration.

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[286] *See* I.R.C. § 7623(b) (stating that an award is payable from the collected proceeds).

[287] I.R.M. § 35.4.6.5(7) (Aug. 11, 2004).

[288] *Id.*

[289] *See* GERALD A. KAFKA & RITA A. CAVANAGH, LITIGATION OF FEDERAL CIVIL TAX CONTROVERSIES ¶ 7.07 n.56 (2009) ("[T]he court may sometimes minimize the factual findings in its opinion.").

A. Taxpayer Information Will Be Used For Tax Purposes

Congress created the Privacy Protection Study Commission in the Privacy Act of 1974.[290] One of the Commission's charges was to study whether the "Internal Revenue Service should be prohibited from transferring individually identifiable data to other agencies and to agencies of state government."[291] The Commission identified two criteria to be used to determine whether it is acceptable for the Service to disclose taxpayer information.[292] First, disclosure should be permitted if "the purpose for which disclosure is made is clearly compatible with the purpose for which the record originally was created."[293] Second, disclosures for nontax purposes should be permitted only if the benefit to the public outweighs the taxpayer's privacy interests.[294] These criteria are reflected in section 6103, which permits broader disclosures when a taxpayer's tax information is used to administer the federal tax laws.[295] Conversely, narrower disclosures are required when a taxpayer's tax information is used for purposes other than tax administration because the tax information is being used for a purpose inconsistent with the purpose for which the information was collected. The legislative history accompanying the enactment of section 6103 and the scope of the exceptions in section 6103 make clear that Congress was concerned with the potential consequences of disclosing tax information to government agencies to be used for nontax purposes.[296]

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[290] Privacy Act of 1974, Pub. L. No. 93-579, § 5(a), 88 Stat. 1896 (1974).

[291] *Id.* at § 5(c)(2)(B)(ii).

[292] PRIVACY COMMISSION REPORT, *supra* note 143, at 30 (citing the Privacy Act of 1974, § 3(b)).

[293] *Id.*

[294] *Id.*

[295] *Compare* I.R.C. § 6103(h) (disclosures for purposes of tax administration), *with* I.R.C. § 6103(i) (disclosures for nontax purposes). *See also* 2000 TREASURY REPORT, *supra* note 143, at 42.

[296] PRIVACY COMMISSION REPORT, *supra* note 143, at 27–28; 2000 TREASURY REPORT, *supra* note 143, at 33 (stating that "section 6103 grew out of a desire to protect return information from unfettered use by the President and various Federal agencies"); Darby, *supra* note 152, at 579 (stating that accepted use of tax information is for "collection, audit, and investigative processes of the Service, as well as in any civil or criminal proceedings flowing from these tax administrative measures"); S.REP. NO. 94-938, pt. 1, at 317 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 3438, 3747 (stating that "[q]uestions have been raised and substantial controversy created as to whether the present extent of actual and potential disclosure of return and return information to other Federal and State agencies for nontax purposes breaches a reasonable expectation of privacy on the part of the American citizen with respect to such information"); *see also* Beresford v. United States, 123 F.R.D. 232, 233 (E.D. Mich. 1988) (stating that it is "apparent that Congress enacted the statute as a shield to protect taxpayers from improper disclosure by the government of the information they were

However, disclosures made to a whistleblower will be used for tax purposes—to determine whether the whistleblower is entitled to an award that is provided for in the Code for assisting the Service in its tax administration duties. Thus, a reasonable argument can be made that disclosing a taxpayer's tax information to a whistleblower is "clearly compatible with the purpose for which the record originally was created," and thus no balancing of interests is required. The fact that the taxpayer's tax information will be used by the whistleblower, in addition to the Service, is the price to be paid for an effective whistleblower program. Arguably, taxpayers opposed to disclosures on personal privacy grounds have no reasonable expectation of privacy in return information furnished to or collected by the Service for purposes of determining their own tax liability.

B. Disclosures to Whistleblowers Are Justified Even If Considered Nontax Use

For the sake of argument, assume that taxpayers would have a reasonable expectation of privacy in the information reported to or collected by the Service if the Service were to share that information with a whistleblower, even though the information would be used for tax purposes as part of the Service whistleblower program. One reasonable way to analyze whether a taxpayer's tax information should be disclosed to a whistleblower is to apply the specific criteria developed by the Service and Treasury to evaluate proposals from agencies seeking disclosures for nontax purposes.[297] Seven of the nine criteria that the Service and Treasury identified include the following:

> 1. Is the requested information highly relevant to the program for which it is to be disclosed?
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> 2. Are there substantial program benefits to be derived from the requested information?
>
> 3. Is the request narrowly tailored to the information actually necessary for the program?
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> 4. Is the same information reasonably available from another source?

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required to provide to it by law").

[297] 2000 TREASURY REPORT, *supra* note 142, at 68–69.

> 5. Will the disclosure involve significant resource demands on the IRS?
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> 6. Will the information continue to be treated confidentially within the agency to which it is disclosed, pursuant to standards prescribed by the IRS?. . .
>
> 8. Will the disclosure have an adverse impact on tax compliance or tax administration?[298]

Examining these criteria supports the conclusion that disclosures should be made to whistleblowers as part of the Service whistleblower program.

1. Permitting Disclosures Is Relevant and Beneficial to the Whistleblower Program

Giving the whistleblower access to a taxpayer's tax information is highly relevant to the whistleblower program and substantial benefits may be derived from such disclosures. As discussed elsewhere in this article, the whistleblower program currently is less effective because the Service cannot communicate and collaborate with the whistleblower.[299] Moreover, the whistleblower's Tax Court appeal right is virtually meaningless unless the whistleblower at least has access to the taxpayer's tax information that the Whistleblower Office considered in making its determination.[300] Permitting disclosures to whistleblowers will make the Service whistleblower program more meaningful and effective.

Whistleblowers can significantly contribute to Service efforts to enforce the tax laws, particularly when the whistleblower is an insider who has access to information that the Service is not aware of.[301] Without this insider information, detecting some types of tax violations may be difficult, if not impossible.[302] Also, whistleblowers can supplement the Service's understaffed and underfunded resources.[303] Relaxing disclosure restrictions

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[298] *Id.* Two additional considerations include, "(7) Other than section 6103, are there any statutory impediments to implementation of the proposal? . . . (9) Will the disclosure implicate other sensitive privacy concerns?" *Id.*

[299] *See supra* notes 161–177 and accompanying text.

[300] *See supra* notes 178–180 and accompanying text.

[301] William E. Kovacic, *Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting*, 29 LOY. L.A. L. REV. 1799, 1822 (1996) (describing the fact that government has asymmetric information).

[302] *See* Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 190–91 (2000).

[303] Kovacic, *supra* note 303, at 1824–25.

will permit the Service to update whistleblowers regarding the status of their claims and to effectively use whistleblowers' inside expertise. These benefits in turn make the program more effective to the extent that more whistleblowers will provide better information to the Service.

2. Disclosures of Taxpayer Information Can Be Narrowly Tailored and Appropriate Restrictions Can Be Imposed on Whistleblowers to Protect Taxpayer Information

Disclosures can be narrowly tailored to the information actually necessary by giving the Service discretion to determine the frequency and specificity of status updates; although, certainly an update should be more specific than "your case is still open."[304] Moreover, the Service has discretion to decide whether to obtain the assistance of a whistleblower and the scope of disclosure in those situations will be decided on a case-by-case basis. In a Tax Court appeal, the Service, at a minimum, should provide the whistleblower a copy of the information used to make the award determination. Absent facts of a particular case, it is difficult to identify with any specificity the disclosures that should be made. Nevertheless, loosening the confidentiality restrictions of section 6103 will go a long way toward improving the Service whistleblower program by giving the Service the authority to make relevant and necessary disclosures.

Potential harm to the taxpayer from disclosing his or her tax information to a whistleblower is mitigated by the fact that whistleblowers are required to file their claims under penalties of perjury. Moreover, frivolous or meritless claims and claims that do not meet the dollar thresholds in section 7623 are ferreted out during the Whistleblower Office initial screening process, before referring the claims to the Service operating divisions for further review. To qualify for an award under section 7623, the information from the whistleblower must cause the Service to proceed with an administrative or judicial action.[305] Presumably, the Service will not proceed with an administrative or judicial action unless there is a good faith claim and the information is a sufficiently reliable and productive lead, rather than mere conjecture. Thus, charges that whistleblowers are just being vindictive and do not have legitimate claims can be countered. In addition, compromises of taxpayer privacy would be

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[304] *See supra* note 164 and accompanying text; Temp. Treas. Reg. § 301.6103(n)-2T(b)(3) (2008) (stating that the Service may disclose to a whistleblower with a tax administration contract whether the claim is being evaluated for potential investigative action, or is pending due to an ongoing examination, appeal, collection action, or litigation).

[305] I.R.C. § 7623(b)(1) (2006).

very limited because whistleblower claims constitute only a small percentage of Service tax administration efforts.[306]

Formal safeguards to protect taxpayer information in the hands of whistleblowers should be adopted. Such safeguards include prohibiting whistleblowers from disclosing taxpayer information received and imposing civil and criminal penalties on whistleblowers who make unauthorized disclosures.[307]

3. Information Is Not Reasonably Available from Other Sources

A taxpayer may be required to produce his or her tax returns or return information in private litigation unless some privilege applies.[308] In addition, much of the information that section 6103 prohibits the Service from disclosing is disclosed voluntarily by taxpayers for all sorts of nontax purposes, such as car loans, educational loans, and home mortgages.[309] In today's digital world, computer users disclose all sorts of identifying information over the internet and information is much easier to obtain.[310] Also, information included in tax returns is often available from other sources.[311]

Although information reported to or gathered by the Service generally may be obtained from other sources, whistleblowers are not permitted to initiate private litigation against taxpayers to enforce the nation's tax laws. In addition, a whistleblower cannot acquire information from the taxpayer or obtain the taxpayer's consent to permit the Service to make disclosures of the taxpayer's information because the Service protects the whistleblower's identity "to the fullest extent permitted by law" using its

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[306] *See* David E. Joyce, *Raiding the Confessional—The Use of Income Tax Returns in Nontax Criminal Investigations*, 48 FORDHAM L. REV. 1251, 1268 (1980) (noting that permitting the use of state income tax returns in nontax criminal investigations implicates the privacy of "only a few taxpayers").

[307] *See supra* Part V.A.

[308] St. Regis Paper Co. v. United States, 368 U.S. 208, 218–19 (1961); *see* Nancy T. Bowen, *Strategies for Defending Against Discovery Requests for Tax Returns*, 122 TAX NOTES 217 (Jan. 12, 2009) (summarizing common-law privilege to limit discovery of tax returns in nontax civil litigation between private parties).

[309] Joseph J. Thorndike, *News Analysis: Show Us the Money*, 123 TAX NOTES 148 (Apr. 13, 2009) (noting that taxpayers are "willing to disclose [their] returns whenever it suits [their] private purposes").

[310] Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J. L. & JURIS. 95, 101–02 (2005) (describing privacy as a "vanishing commodity").

[311] Bowen, *supra* note 310, at 4.

common law informer privilege.[312] And information regarding the status of a whistleblower's claim is known only to the Service.

4. Disclosures Need Not Impose Significant Demands on the Service

Providing meaningful updates to whistleblowers about the status of their claims and providing a copy of the information that the Service used to make its award determination will not impose significant resource demands on the Service. The Service knows the status of the whistleblower's claim; it merely needs to communicate the status to the whistleblower. Moreover, at the end of the examination, the Service will have an award claim file.[313] Providing a copy of that file to a whistleblower who appeals the award determination involves a minimal amount of Service effort.

5. Effect of Disclosures on Taxpayer Compliance Are Exaggerated

Tax compliance often is cited as the justification for protecting the confidentiality of tax information.[314] The argument begins by recognizing that the United States has a voluntary tax system in the sense that taxpayers compute and self-report their tax liability to the government. In a voluntary tax system, taxpayers are compelled to disclose sensitive, intimate, and proprietary information to the Service so that their self-reported tax liability can be verified.[315] The concern is that taxpayers will be less forthcoming if

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[312] I.R.S. Notice 2008-4, 2008-2 I.R.B. 253, § 3.06; *see also* Roviaro v. United States, 353 U.S. 53, 59 (1957); Weimerskirch v. Commissioner, 67 T.C. 672, 676 (1977), *rev'd on other grounds*, 596 F.2d 358 (9th Cir. 1979) (stating that the informer privilege permits the government to withhold the identity of "persons who furnish information of violation of law to officers charged with enforcement of that law" to encourage the flow of information to the government).

[313] *See supra* notes 104–105 and accompanying text.

[314] *See, e.g.*, 2000 TREASURY REPORT, *supra* note 143, at 21; 1976 BLUEBOOK, *supra* note 143, at 326; I.R.S., DISCLOSURE & PRIVACY LAW REFERENCE GUIDE,1–7 (stating that "there must be public confidence with respect to the confidentiality of personal and financial information given to us for tax administration purposes"). *But see* Richard D. Pomp, *The Disclosure of State Corporate Income Tax Data: Turning the Clock Back to the Future*, 22 CAP. U. L. REV. 373, 443–44 (1993) (stating the counterargument that public disclosure may actually improve voluntary compliance).

[315] S. REP. NO. 94-938, pt. 1, at 316 (1976), *as reprinted in* 1976-3 C.B. (vol. 3) 354 (1976) (stating that "the IRS probably has more information about more people than any other agency in this country"); 1976 BLUEBOOK, *supra* note 143, at 314 (same); PRIVACY COMMISSION REPORT, *supra* note 143, at 25 (stating that the Service "collects and maintains vast amounts of information" that is warranted to ensure tax compliance, and noting the Service's "extra-ordinary investigative powers," which are justified by "overwhelming importance of public revenue collection"). There is a certain irony in the fact that the tax

their tax information is used for purposes other than determining their own tax liability.[316]

Changes made to section 6103 in the Tax Reform Act of 1976 were motivated by questions of whether disclosure of returns and return information for nontax purposes was a breach of taxpayers' privacy expectations, and whether the "public's reaction to this possible abuse of privacy would seriously impair the effectiveness of our country's very successful voluntary assessment system."[317] Yet there is no proof, other than anecdotal observation, that protecting tax information improves compliance.[318] David Joyce, in his article *Raiding the Confessional—The Use of Income Tax Returns in Nontax Criminal Investigations*, disputes the link between voluntary compliance and confidentiality by noting that voluntary compliance decreased after the 1976 changes to section 6103, and

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system itself, which permits all sorts of deductions and credits, drives the Service's need for so much information from taxpayers. In a simpler tax system, less disclosure by taxpayers to the Service would be required. *See* Christopher S. Rizek, *Taxpayer Privacy and Disclosure Issues Will Continue to Touch Us All*, THE FUTURE OF AMERICAN TAXATION: ESSAYS COMMEMORATING THE 30TH ANNIVERSARY OF TAX NOTES 81, 85 (Tax Analysts 2002) (stating that "radical simplification of the tax laws themselves *might* reduce compliance burdens") (emphasis in original).

316 *Confidentiality of Tax Return Information: Hearing Before the H. Comm. on Ways & Means*, 94th Cong. 98 (1976) (statement of Sen. Weicker, Jr.) (stating that "taxpayers disclose their private financial circumstances, things that they would not mention to in-laws or friends, to their government because they understand the need for taxes, and trust their government to keep their private lives private. Undermine that trust and you have undermined our tax system in a fundamental way"); 1976 BLUEBOOK, *supra* note 143, at 315 (stating that section 6103 tries to balance an agency's need for information with the "citizen's right to privacy and the related impact of the disclosure upon the continuation of compliance with our country's voluntary tax assessment system"); 2000 TREASURY REPORT, *supra* note 143, at 34 (stating that "[t]axpayers who view the IRS as a resource for a variety of other interests will be less inclined to voluntarily turn over sensitive financial information out of fear of where it might ultimately land"); PRIVACY COMMISSION REPORT, *supra* note 143 at 537 (stating that tax information must be confidential "if individuals are to be induced to participate in a government undertaking"); ADMINISTRATIVE PROCEDURES REPORT, *supra* note 142, at 943 (stating that "a fully confidential system would presumably improve public compliance with the self reporting system" and "if taxpayers knew that information reported on tax returns could be used only for tax purposes, there would be less reason to falsify a return where accurate information might lead to a non-tax investigation"); *see also* United States v. Bisceglia, 420 U.S. 141, 145 (1975) (stating that the "[g]overnment depends upon the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability").

317 1976 BLUEBOOK, *supra* note 143, at 314.

318 Stephen W. Mazza, *Tax Compliance: Should Congress Reform the 1986 Reform Act: Taxpayer Privacy and Tax Compliance*, 51 KAN. L. REV. 1065, 1070–76 (2003); Joyce, *supra* note 308, at 1267 (stating that the "promise of an ironclad prohibition against disclosure is at best a peripheral inducement to honest reporting").

suggesting that any correlation between voluntary compliance and confidentiality is "merely speculative."[319] Notwithstanding the fact that the Service makes billions of disclosures of taxpayer information every year under existing exceptions to section 6103, the level of voluntary compliance remains quite high at 84%, which seems to undercut the argument that compliance will suffer if taxpayer information is not confidential.[320]

Proponents who want to keep tax returns and tax information confidential worry that voluntary compliance will decrease if the Service discloses taxpayers' information. But there is a reasonable counterargument that making disclosures as part of an effective Service whistleblower program may actually improve voluntary compliance.[321] Potentially noncompliant taxpayers may be deterred from evading their tax liabilities and already compliant taxpayers may be encouraged to stay in compliance by knowing that the Service is fairly enforcing the tax laws to ensure that everyone pays their fair share of tax.[322]

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[319] Joyce, *supra* note 308, at 1267, 1279.

[320] Rizek, *supra* note 317, at 90. The Service estimates the voluntary compliance rate to be approximately 84%. 2009 TREASURY REPORT, *supra* note 8, at 2. The Service's goal for fiscal 2009 is to achieve a rate of 86%. *Id.* at 12. In 2008, the Service made over 5.4 billion disclosures of tax returns or return information under certain of the section 6103 exceptions, up from 4.5 billion disclosures made during 2007. STAFF OF JOINT COMM. ON TAXATION, 111TH CONG., DISCLOSURE REPORT FOR PUBLIC INSPECTION PURSUANT TO INTERNAL REVENUE CODE SECTION 6103(P)(3)(C) FOR CALENDAR YEAR 2008 PREPARED BY THE INTERNAL REVENUE SERVICE (Joint Comm. Print 2009) (disclosures made in 2008); STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., DISCLOSURE REPORT FOR PUBLIC INSPECTION PURSUANT TO INTERNAL REVENUE CODE SECTION 6103(P)(3)(C) FOR CALENDAR YEAR 2007 PREPARED BY THE INTERNAL REVENUE SERVICE (Joint Comm. Press 2009) (disclosures made in 2007); *see* I.R.C. § 6103(p)(3)(C) (stating the statutory requirement to report number of disclosures for 2008).

[321] Mazza, *supra* note 320, at 1084 (concluding that limited publicity of Service enforcement actions "can play a positive role in maintaining and improving levels of compliance by increasing a taxpayer's perception of his risk of detection and punishment and by strengthening the taxpayer's internal motivation toward compliance"); *see also* Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1492–99 (2003).

[322] Dan M. Kahan, *The Logic of Reciprocity: Trust, Collection Action, and Law*, 102 MICH. L. REV. 71, 83 (2003) (discussing reciprocity theory which theorizes that persons comply with the tax law if they perceive other persons also pay their taxes and will not comply if they perceive other persons are not complying); Lederman, *supra* note 323, at 1492–99; Mazza, *supra* note 320, at 1084 (stating that selective publicity of Service enforcement actions may improve tax compliance by "strengthening the taxpayer's internal motivation toward compliance"); Janet Novack, *Are you a Chump?*, FORBES, Mar. 5, 2001, at 122; Ventry, *supra* note 14, at 373–74 (stating that voluntary compliance may increase by lowering privacy protections in section 6103). Some scholars argue that voluntary compliance may be diminished by making taxpayers aware of other taxpayers'

Rather than rely on the promise of confidentiality to encourage taxpayer compliance, the Service primarily relies on third-party withholding and reporting, as well as civil and criminal sanctions.[323] Much of taxpayer income is corroborated by third-party reporting.[324] Taxpayers are less likely to withhold information that third-party payers will report to the Service.[325] Moreover, taxpayers are incentivized to completely and accurately report their tax information to the Service to avoid penalties, interest, and other sanctions that arise from understating their taxes. They are also incentivized to maintain records supporting their losses and deductions.[326] These incentives exist independently of any expectation that the taxpayers' return information will be kept confidential.

VII. CONCLUSION

As this article has discussed, section 6103 imposes serious restrictions that limit the potential success of the enhanced whistleblower statute. Section 6103 as currently written prohibits the Service from updating the whistleblower as to the status of his or her claim. Section 6103 also prevents the Service from readily leveraging the insider knowledge of the whistleblower. Additionally, many questions remain about the effectiveness of the whistleblower's right to appeal the Service's determination to the Tax Court.

Notwithstanding weaknesses in the Service whistleblower program, it is more effective and less expensive than the Service's primary method of selecting tax returns for audit. Congress unquestionably intended that the 2006 amendments would increase the effectiveness of the Service whistleblower program. This increased effectiveness would be obtained by permitting whistleblowers access to taxpayers' tax information. There are also convincing policy reasons to amend section 6103 to permit the Service

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noncompliance. *See, e.g.*, Kornhauser, *supra* note 312, at 96–98.

[323] Joyce, *supra* note 308, at 1266–67.

[324] *See* Rizek, *supra* note 317, at 84 (stating that third-party reporting "in large part accounts for the relatively high rate of income tax compliance that the United States enjoys").

[325] *See* William A. Edmunson, Note, *Discovery of Federal Income Tax Returns and the New "Qualified" Privile*ges, 1984 DUKE L.J. 938, 956 (1984); *see also* 2009 TREASURY REPORT, *supra* note 8, at 6 (stating that "[r]eporting compliance is highest where parties other than the taxpayer are required to file information reports and withhold taxes from payments made"); Rizek, *supra* note 317, at 84.

[326] Edmunson, *supra* note 327, at 955 (citing *Smith v. Bader*, 83 F.R.D. 437, 439 (S.D.N.Y. 1979)); *see* Steve R. Johnson, *The Dangers of Symbolic Legislation: Perceptions and Realities of the New Burden-of-Proof Rules*, 84 Iowa L. Rev. 413, 450–51 (1999) (discussing taxpayer incentives to maintain and produce tax information).

to disclose taxpayer information to whistleblowers.[327] Striking a fair balance between taxpayer privacy and the Service's ability to effectively administer the tax laws weighs in favor of making necessary disclosures of taxpayer information to whistleblowers.

Section 6103 is intended to foster confidence in the tax system by acting "as a shield to protect taxpayers from improper disclosure by the government of the information they were required to provide to it by law."[328] Instead, with respect to the Service whistleblower program, section 6103 acts as a sword for the Service to battle the whistleblower.

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[327] *See supra* Part VI. Scholars have recommended scrapping section 6103 altogether and starting over to give the Service more discretion. *See, e.g.*, George Guttman, *The Confidentiality Statute Needs Rethinking*, 86 TAX NOTES 318 (Feb. 7, 2000).

[328] Beresford v. United States, 123 F.R.D. 232, 233 (E.D. Mich. 1988).