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Jeremiah Coder

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## Articles

### CLASH FOR CASH: THE CONFLICT OVER TAX WHISTLEBLOWER CONTRACTS

JEREMIAH CODER\*

THE Internal Revenue Service's (IRS) handling of the revised statutory tax whistleblower program under Internal Revenue Code section 7623 has faced heavy criticism for several years. Congress, hoping to attract more valuable information on high-dollar tax evasion by sweetening the potential award payout, revamped the program in 2006 as part of the Tax Relief and Health Care Act of 2006.<sup>1</sup> But many whistleblower advocates see the IRS as unwilling to take some actions necessary to make the program truly effective.

The Service's refusal to enter into written information-sharing contracts with informers, as provided for under code section 6103(n), has greatly frustrated tax whistleblower practitioners. Those agreements allow the IRS to sidestep traditional prohibitions on disclosure of confidential tax return information, giving tax whistleblowers access to financial records and other information that are normally deemed out-of-bounds. However, the IRS has steadfastly refused to utilize written contracts, potentially dampening the attractiveness of the program and, according to critics, reducing the nation's revenue coffers by billions in unpaid taxes.

Understandably, one potential reason for the IRS's current course is a fear that giving tax whistleblowers access to sensitive information regarding the individuals and entities who they are submitting claims on will weaken the tax system by making taxpayers feel less safe about the privacy of reported tax information. While improper disclosure is a legitimate concern, whistleblower advocates contend that the use of section 6103(n) agreements is unlikely to harm the continued confidentiality of taxpayer information that supports the tax system. But other practitioners believe any extension of the opportunity to delve into sensitive personal records

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\* The author is a federal tax controversy attorney.

1. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, §§ 302-07, 120 Stat. 2922 (2006).

of another taxpayer puts those individuals and companies at risk of having information misused without effective deterrents in place.

This Article reviews the sharp disagreement between those who want the government to start making written contracts under section 6103(n) a routine part of whistleblower cases versus tax traditionalists who worry that an expanded whistleblower program will end up further impinging on taxpayer rights of confidentiality. Even though the IRS has yet to give in to whistleblower proponents, the aggressive lobbying makes it seem possible that administrative practice could change in the future,<sup>2</sup> leaving corporate and high net-worth taxpayers wondering what such a shift means for their privacy.

## I. TAXPAYER PRIVACY

Section 6103 has operated for the past several decades as a type of high-security firewall guarding against the disclosure of taxpayer information and protecting the integrity of the tax system. The section's current statutory iteration is often viewed as a key mechanism for keeping public compliance with the tax code fairly high. The seemingly tight limits placed on when tax return information can be shared helps foster the self-assessment model upon which the U.S. tax system is based by providing taxpayers a sense of security that the information they provide to the IRS is kept confidential.

Although section 6103 quietly existed from 1910 until its major revision in the 1970s, the predecessor version of the statute actually provided little protection to taxpayers. In characterizing taxpayer returns as public records, the pre-1976 statute allowed the executive branch great license in deciding with whom to share return information. Indeed, the alleged abuse of access to taxpayer information by President Nixon led to the 1976 reforms to section 6103 that made Congress the gatekeeper of tax return information and established the strict privacy regime that exists today.<sup>3</sup>

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2. The U.S. Senate's confirmation of John Koskinen as the new IRS Commissioner, on December 20, 2013, brings substantial potential for agency change in the whistleblower arena. Although Koskinen has no written record on the tax whistleblower program, during Koskinen's nomination process, Senator Charles Grassley wrote asking him to help the IRS change its tune on the program by making the agency friendlier toward whistleblower claims. See Letter from Charles E. Grassley, U.S. Senator, to John A. Koskinen, Nominee, Comm'r of Internal Revenue (Sept. 26, 2013), available at <http://www.grassley.senate.gov/constituents/upload/IRS-Nominee-Grassley-Letter-to-John-Koskinen-9-27-13.pdf>. In later written testimony before the Senate Finance Committee, Koskinen stated that "the IRS benefits from the information and perspective generated by the . . . Whistleblower office." See *Hearing to Consider the Nomination of John Andrew Koskinen to be Commissioner of Internal Revenue: Before the S. Comm. on Finance*, 113th Cong. 3 (2013) (written testimony of John A. Koskinen, Nominee, Comm'r of Internal Revenue), available at [http://www.finance.senate.gov/imo/media/doc/JAK\\_Opening\\_statement\\_FINAL.PDF](http://www.finance.senate.gov/imo/media/doc/JAK_Opening_statement_FINAL.PDF).

3. See Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 VA. TAX REV. 447, 471 (2010) ("The

Section 6103 now prohibits the IRS from disclosing taxpayer information “absent an explicit legislative exception.”<sup>4</sup>

But section 6103 actually is more porous than many taxpayers realize. In 2012, the IRS acknowledged that it legally made more than 8 billion disclosures of tax returns and return information to properly authorized recipients under section 6103.<sup>5</sup> The bulk of those disclosures were made to states, congressional committees, and the Census Bureau. Although the Treasury Department and the Joint Committee on Taxation are required to produce an annual public report detailing disclosures under the exceptions enumerated in section 6103, the statute does not require record-keeping for releases under section 6103(n).<sup>6</sup>

With such a high number of authorized disclosures to various agencies and quasi-governmental entities, one would assume that leaks of taxpayer information would be relatively common. Fortunately, it is rare for taxpayers to be harmed by a violation of section 6103, but IRS vigilance is a crucial component of the good safety record afforded taxpayer information.<sup>7</sup> Unknown is whether the same record could continue if whistleblowers are afforded access to return information when it is possible that the unique motives underlying an informant’s submission may be at odds with sound tax system administration.

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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.”).

4. *Id.*

5. See JOINT COMM. ON TAXATION, DISCLOSURE REPORT FOR PUBLIC INSPECTION PURSUANT TO INTERNAL REVENUE CODE SECTION 6103(p)(3)(C) FOR CALENDAR YEAR 2012 (2013), available at <https://www.jct.gov/publications.html?func=startdown&id=4514>.

6. Section 6103(p)(3)(C) of the Internal Revenue Code states:

Public report on disclosures. The Secretary shall, within 90 days after the close of each calendar year, furnish to the Joint Committee on Taxation for disclosure to the public a report with respect to the records or accountings described in subparagraph (A) which—(i) provides with respect to each Federal agency, each agency, body, or commission described in subsection (d), (i)(3)(B)(i) or (7)(A)(ii) or (l)(6), and the Government Accountability Office the number of—(I) requests for disclosure of returns and return information, (II) instances in which returns and return information were disclosed pursuant to such requests or otherwise, (III) taxpayers whose returns, or return information with respect to whom, were disclosed pursuant to such requests, and (ii) describes the general purposes for which such requests were made . . . .

I.R.C. § 6103(p)(3)(C) (2012). Section 6103(p)(3)(A) provides that “the Secretary shall not be required to maintain a record or accounting of requests for inspection or disclosure of returns and return information, or of returns and return information inspected or disclosed, under the authority of subsections . . . (n).” I.R.C. § 6103(p)(3)(A).

7. The most common occurrences of unauthorized section 6103 disclosures happen from information technology-related security issues or inadvertent online postings.

## II. ADMINISTRATIVE STEPS

Section 6103(n) already permitted the IRS to use services contracts for disclosure of return information prior to the 2006 amendments to section 7623,<sup>8</sup> and the amendments did not specifically address whether Congress intended for the revised whistleblower program to make use of section 6103(n) agreements. That space of silence has generated differing opinions as to what role section 6103(n) should play in the IRS's new whistleblower framework.

The Department of the Treasury (Treasury) issued proposed<sup>9</sup> and temporary<sup>10</sup> regulations in 2008, under the authority of section 6103(n), to allow disclosure to a whistleblower of some return information and claim status information after a contract has been entered into. Final regulations governing section 6103(n) contracts for whistleblowers were released in 2011, adopting the position in the 2008 regulations with only minor grammatical changes.<sup>11</sup>

Under the general rule of the regulation, an IRS or Treasury employee is "authorized to disclose return information" to a whistleblower and legal representative "to the extent necessary in connection with a written contract" involving whistleblower claims.<sup>12</sup> The regulation gives the IRS discretion in deciding whether to enter into a section 6103(n) services contract with an informant.<sup>13</sup> In further language limiting when disclosures in whistleblower cases can occur, Treasury stated that released information "shall be made only to the extent the IRS deems it necessary in connection with the reasonable or proper performance of the contract."<sup>14</sup> In some instances, only portions of the relevant taxpayer return information need be provided under the contract.

As with any improper use of taxpayer return information, unauthorized inspection or disclosure of information obtained under a section 6103(n) contract is subject to strict civil and criminal penalties.<sup>15</sup>

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8. See JOINT COMM. ON TAXATION, TECHNICAL EXPLANATION OF H.R. 6408, THE "TAX RELIEF AND HEALTH CARE ACT OF 2006," AS INTRODUCED IN THE HOUSE ON DECEMBER 7, 2006 88 (2006), available at <http://www.jct.gov/x-50-06.pdf> (noting that present law "permits the IRS to disclose return information pursuant to a contract for tax administration services").

9. Prop. Treas. Reg. § 301.6103(n)-2, 73 Fed. Reg. 15687, 15687-88 (Mar. 25, 2008).

10. Temp. Treas. Reg. § 301.6103(n)-2T (2008).

11. See Treas. Reg. § 301.6103(n)-2 (2011). But one practitioner response panned the proposed regulations as ultimately futile. See Jeremiah Coder, *Proposed Whistleblower Regs Detail Computations and Definitions*, 137 TAX NOTES 1381 (2012) (quoting whistleblower representative as stating that the regulations "provide[ ] little comfort, for not one contract has ever been issued to a whistleblower pursuant to" section 6103(n)).

12. Treas. Reg. § 301.6103(n)-2(a)(1) (2011).

13. See *id.* § 301.6103(n)-2(a)(2).

14. *Id.* § 301.6103(n)-2(b)(1).

15. See *id.* § 301.6103(n)-2(c) (citing I.R.C. §§ 7431, 7213, 7213A (2012)).

Whistleblowers also must agree to a series of restrictions that the IRS labels as “safeguards” under a section 6103(n) contract. For example, whistleblowers agree to comply with any and all requirements that the IRS decides are necessary to protect the confidentiality of return information provided under the agreements.<sup>16</sup> Whistleblowers (and their representatives) also must agree to allow the IRS to inspect their premises as part of the access exchange.<sup>17</sup>

Internal Revenue Manual (IRM) Exhibit 25.2.2-10 provides a sample confidentiality agreement under section 6103(n):

I, (name of whistleblower/representative), have received notice from the IRS of the award recommendation in the case initiated by my submission of a claim for award under 26 U.S.C. 7623 (state claim number). I wish to participate in the administrative proceeding leading to the determination of an award by the Director of the Whistleblower Office in this case, by reviewing additional information related to the award recommendation. I understand that information will not be disclosed to me unless the disclosure is necessary as part of the administrative proceeding, and unless I agree to maintain the confidentiality of any information on taxpayers other than myself (my client) disclosed to me. I agree that I will use any information disclosed to me (my client) by the Whistleblower Office only for the purpose of preparing comments on the recommendation to the Director, or in appealing the Director’s determination by petitioning the US Tax Court. I understand that use of any information disclosed to me (my client) for any other purpose may be considered a negative factor in determining the award payable under 26 U.S.C. 7623, and may result in a reduction of the award (but not less than the minimum award required by law). This agreement applies to any information disclosed as part of the administrative proceeding leading to the determination by the Director of the Whistleblower Office, including information contained in a Preliminary Award Report or any other information made available for my review by the IRS Whistleblower Office. Any disclosures made in connection with a request for review of the Director’s determination by the US Tax Court, including re-disclosure of information previously disclosed as part of the administrative proceeding, will be governed by the rules of the Court.

Signed and witnessed[.]<sup>18</sup>

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16. *See id.* § 301.6103(n)-2(d).

17. *See id.* § 301.6103(n)-2(d)(3).

18. IRM Exhibit 25.2.2-10 (2010), available at [http://www.irs.gov/irm/part25/irm\\_25-002-002.html#d0e1036](http://www.irs.gov/irm/part25/irm_25-002-002.html#d0e1036).

One main reason for seeking a section 6103(n) contract for a whistleblower is the possibility of getting some indication about how the claim is progressing within the IRS. The final regulations permit a whistleblower to make a written request to the IRS, to which the IRS in response “may inform the whistleblower . . . of the status of the whistleblower’s claim for award . . . including whether the claim is being evaluated for potential investigative action, or is pending due to an ongoing examination, appeal, collection action, or litigation.”<sup>19</sup> This avenue can provide insight into the section 7623(b) case pipeline that may not be available when contracts are not used. Whether that justification warrants relaxing the nondisclosure mandate is a central part of the debate surrounding the tradeoffs inherent under section 6103(n).

### III. HESITANCY FAVORED

The IRS has publicly proclaimed that written whistleblower contracts could be a good thing in the right circumstances, but it has not yet entered into a contract under section 6103(n).

The IRS updated the IRM following the 2006 amendments to section 7623 to set out procedures for handling high-dollar award claims. As part of its internal instructions to agents, the manual states that “it may be required and in the best interest of the Government to have a formal agreement with the whistleblower when it is necessary to share information obtained by the IRS from the taxpayer.”<sup>20</sup> Although it characterizes the use of the contracts as happening only in “rare circumstances,” the IRM provision notes that section 6103(n) contracts with whistleblowers would “include safeguards to protect the privacy of any taxpayer information revealed.”<sup>21</sup>

The tone of the IRM provision has seemingly had the effect of discouraging the use of section 6103(n) contracts in practice. For example, the IRM declares that such agreements “must be initiated by the Executive responsible for the function seeking the contract, and approved by the Business Operating Division not lower than the Deputy Commissioner level.”<sup>22</sup> That language has kept written whistleblower contracts from occurring, in part because requiring high-level review to initiate a contract makes it less likely that a subject matter expert or agent in an operating division reviewing an award claim will take the time to pass the request up the management chain.<sup>23</sup> Proponents believe that the whistleblower pro-

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19. Treas. Reg. § 301.6103(n)-2(b)(3) (2011).

20. IRM § 25.2.2.7.11 (2010), available at [http://www.irs.gov/irm/part25/irm\\_25-002-002.html#d0e589](http://www.irs.gov/irm/part25/irm_25-002-002.html#d0e589).

21. *Id.*

22. *Id.*

23. See Jeremiah Coder, *Treasury Finalizes Whistleblower Contract Regs*, 130 TAX NOTES 1399 (2011) (“Thus, the lack of contract use may be partially attributable to the reluctance of the IRS operating divisions rather than the IRS Whistleblower Office.”).

gram would be better served if the IRS determined that the Whistleblower Office, which has the most at stake in helping to change public perception of the program, should have a role in getting section 6103(n) contracts into existence, such as by championing contracts on an individual basis as necessary in each case and working with the appropriate operating division executive.

A 2011 letter<sup>24</sup> to Senator Charles E. Grassley (R-Iowa) from Steven T. Miller, then IRS Deputy Commissioner for Services and Enforcement, provided further insight into the agency's views on section 6103(n) contracts. In the letter, Miller stated that the IRS took to heart the position articulated by the Joint Committee on Taxation that such agreements would "be infrequent and w[ould] be made only when the assigned task cannot be properly or timely completed without the return information to be disclosed."<sup>25</sup> Miller went on to clarify the IRS's position that "[c]ontracts relying on the authority of section 6103(n) are to be rare, based on a finding of necessity to perform a tax administration function."<sup>26</sup> The IRS would decline to enter into informant services contracts when it "can obtain the required information or analysis using its own resources on a timely basis," he said.<sup>27</sup> Yet later in the letter, Miller acknowledged that "there are cases where it would be beneficial for us to contract with the Whistleblower for technical assistance throughout the examination."<sup>28</sup>

In a June 2012 memo,<sup>29</sup> Miller pushed to make the whistleblower program more effective by establishing tighter deadlines for specific actions regarding informant claims. In addition to establishing a "set of expectations for timely actions on whistleblower submissions"—such as initial claim reviews within ninety days of receipt and award decisions provided to whistleblowers within ninety days of a final determination of collected proceeds—Miller tried to convey a new mindset with which whistleblowers should be viewed by the IRS.<sup>30</sup> Noting that whistleblowers have "insights and information that can help the Service understand complex issues or hidden relationships," he called debriefing sessions with whistleblowers

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24. Letter from Steven T. Miller, Deputy Comm'r for Servs. & Enforcement, IRS, to Charles E. Grassley, U.S. Senator (Nov. 22, 2011) [hereinafter Miller Letter].

25. *Id.* (quoting "the Joint Committee on Taxation Report issued in conjunction with the 2006 amendments to section 7623").

26. *Id.*

27. *Id.*

28. *Id.* The IRS has willingly utilized the assistance of whistleblowers in investigations following submission of an award claim. For example, in *Jarvis v. Commissioner*, the court noted that the whistleblower "work[ed] for the IRS in reviewing and interpreting documents seized" from the taxpayer. *Jarvis v. Comm'r*, 47 Fed. Cl. 698, 705 (2000).

29. Memorandum from Steven T. Miller, Deputy Comm'r for Servs. & Enforcement, IRS, to Operating Div. Comm'rs, the Chief of Criminal Investigation, and the Director of the Whistleblower Office, IRS Whistleblower Program (June 20, 2012), 2012 TAX NOTES TODAY 121-15 [hereinafter Miller Memo].

30. *Id.*



“an important component of the evaluation of whistleblower information” and said that debriefings should “be the rule not the exception.”<sup>31</sup>

Miller also wrote that, “with appropriate controls, interaction with a whistleblower during an examination can assist in timely and correct resolution of issues.”<sup>32</sup> A section 6103(n) written services contract, he continued, “may be used when disclosure of taxpayer information is necessary to obtain a whistleblower’s insights and expertise into complex technical or factual issues.”<sup>33</sup>

The permissive instruction of “may” in Miller’s memo was not as emphatic as some would have liked, but it offers the possibility that someday the IRS might allow written contracts as a step in review of a whistleblower award claim.

The memo received high praise from tax whistleblower practitioners, many of whom hoped the directive would spur the IRS to follow the suggested timelines and lead to a more accepting attitude toward informants. Instead, the IRS has continued to eschew whistleblower contracts, which has only increased the perception of many informants and their representatives that the agency is treating them dismissively. For those wanting change, the result of the IRS’s apparent philosophy of avoiding information sharing with whistleblowers only leads to the unnecessary duplication of efforts, wasted resources, and ultimately a slower IRS response to legitimate tax avoidance claims.

#### IV. WORKING SMARTER

Whistleblower practitioners might argue that the IRS’s obstacles in the section 6103(n) context stand in stark contrast to its general goals in almost all other facets of tax administration of achieving efficiency and instituting knowledge management practices.

The IRS has deployed several audit tools in recent years in an attempt to be more efficient in its examinations of taxpayer returns. For example, under the IRS Large Business and International Division’s (LB&I) compliance assurance process (CAP), which some practitioners and government officials refer to as a “real-time audit,” the taxpayer and IRS exam team continuously resolve outstanding tax issues so that the taxpayer obtains certainty much sooner. For the most part, previously contentious disputed issues are resolved before a tax return is filed. The process appeals to many taxpayers and the government because it forgoes a retrospective look at tax transactions wherein information is not as readily available and provides more certainty regarding treatment in future years given an exam’s outcome. CAP has been made even more attractive with the addition of a maintenance phase for CAP taxpayers that the IRS deems low

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31. *Id.*

32. *Id.*

33. *Id.*

risk, which thereby narrows the number of issues that are under continuous audit.

Another example of the IRS's efforts to increase efficiency is the joint LB&I-IRS Appeals initiative called Fast-Track Settlement, which began in 2001 and provides an alternative, accelerated dispute resolution procedure for corporate taxpayers. Although the procedure cannot be used unless all parties—the taxpayer, the exam team, the issue management team coordinator, and the fast-track coordinator—agree to participate, the settlement process typically ends up with more efficient resolutions.

Also, there is the Schedule UTP, on which corporations are required to self-report their uncertain tax positions. Despite widespread corporate criticism,<sup>34</sup> the schedule was rolled out in 2010 as a way to clue auditors in to possible areas of uncertainty that could represent tax noncompliance.<sup>35</sup> The goal is to increase transparency, allowing the IRS to spend less time identifying issues and helping the agency prioritize the selection of issues and taxpayers for examination, while spotting significant areas of uncertainty that require guidance. The corporate reporting requirement affects taxpayers or related parties that issue audited financial statements and have both uncertain tax positions and assets greater than \$10 million.<sup>36</sup> The current filing requirements compel corporate taxpayers to submit a list of UTPs ranked by actual size of the tax reserve amount, along with a concise description of each position. The IRS expanded its policy of restraint, promising to forgo seeking specific documents concerning a corporation's UTPs as well as the workpapers that document the completion of Schedule UTP.

All three processes are examples of initiatives the IRS has established specifically to enhance tax enforcement by streamlining the audit process to use fewer government resources. Given all the energy spent devising and implementing these creative examination processes, critics of the current administrative procedures complain that the IRS whistleblower program is allowed to operate with many obstacles in place that thwart Congress's intended goal of flushing out unpaid taxes via timely and well-placed information on high-dollar tax evasion.

The IRS itself has apparently noted that examinations resulting from informant-provided information are more productive than traditional examinations arising from the use of the Discriminant Index Function

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34. See I.R.S. Announcement 2010-9, 2010-1 C.B. 408 (2010).

35. See Jeremiah Coder, *Desire for Efficiency Drives UTP Proposal, Official Says*, 127 TAX NOTES 760 (2010).

36. I.R.S. Announcement 2010-30 outlined a graduated adoption for companies, requiring only companies with assets greater than \$100 million to report in the first two years, after which companies with assets more than \$50 million would be required to file Schedule UTP. See I.R.S. Announcement 2010-30, 2010-1 C.B. 668 (2010). Companies with \$10 million in assets are not required to file Schedule UTP until tax years beginning in 2014. See *id.*

(DIF).<sup>37</sup> In an unreleased report from 1999, the IRS determined that whistleblower-inspired audits have a highly desirable cost-benefit ratio, with the agency incurring only four cents of costs per dollar collected.<sup>38</sup> That figure contrasts with the ten cents of costs incurred per dollar collected in DIF-selected exams. In a more recent study, the Treasury Inspector General for Tax Administration (TIGTA) discovered in 2006 that the adjustment dollars secured per hour spent on a whistleblower case for tax returns from the 1996–1998 tax years yielded \$946 per hour versus only \$548 per hour for DIF audits.<sup>39</sup> In addition, the no-change rate<sup>40</sup> was significantly lower for audits involving whistleblower-provided information (12%) than for normal examinations (17%).<sup>41</sup> The same return analysis held true for audits examined by TIGTA for fiscal years 2003–2005.<sup>42</sup> The 2006 report concluded that “IRS data indicated that examinations initiated based on informant information were often more effective and efficient than returns initiated using the IRS’ primary method for selecting returns for examination.”<sup>43</sup>

However, tax attorneys who represent corporations and high-net worth individuals say that whistleblower claims are often based on vindictive motives and misleading or incomplete information.<sup>44</sup> Tax audits driven by a whistleblower submission are sometimes merely a reflection of an overlooked mistake or foot-fault that is corrected once the taxpayer is made aware.<sup>45</sup>

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37. The Treasury Inspector General for Tax Administration describes the DIF as “a mathematical technique used to classify income tax returns for examination potential by assigning weights to certain basic return characteristics.” TREASURY INSPECTOR GEN. FOR TAX ADMIN., THE INFORMANTS’ REWARDS PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT 2 n.1 (2006) [hereinafter INFORMANTS’ REWARDS PROGRAM REPORT], available at <http://www.treasury.gov/tigta/auditreports/2006reports/200630092fr.pdf>.

38. See IRS, THE INFORMANTS’ PROJECT: A STUDY OF THE PRESENT LAW REWARD PROGRAM (1999).

39. INFORMANTS’ REWARDS PROGRAM REPORT, *supra* note 37, at 4.

40. An audit is classified as “no-change” when it is closed with no adjustments or changes to the taxpayer’s reported tax liability.

41. INFORMANTS’ REWARDS PROGRAM REPORT, *supra* note 37, at 4.

42. See *id.* at 5. The adjustment dollars for whistleblower cases were \$688 per hour versus \$382 per hour for DIF audits for fiscal years 2003–2005. *Id.* The no-change rate in that period was 21% for whistleblower exams and 28% for DIF audits. *Id.*

43. *Id.* at 1–2.

44. See Jeremiah Coder, *Tax Whistle-Blowing: Many Cases, Few Results*, 125 TAX NOTES 186 (2009), available at [http://www.tax-whistleblower.com/articles/Tax\\_Whistle-Blowing\\_Many\\_Cases\\_Few\\_Results.pdf](http://www.tax-whistleblower.com/articles/Tax_Whistle-Blowing_Many_Cases_Few_Results.pdf) (quoting practitioner who stated that whistleblower rules “do not adequately protect companies against disgruntled employees,” creating “an incentive for even claims of dubious merit to be made’ . . . because there is no fraud requirement in the new framework”).

45. See *id.* (quoting same practitioner who stated that whistleblower program fails to “weed[ ] out claims regarding errors that the taxpayer planned to disclose anyway”).

## V. INFORMATION RELAY

The rub with whistleblower representatives is the belief that in the absence of a written contract that allows a whistleblower to directly interact with IRS employees when necessary, the resulting information gathering processes can be inefficient and limiting for all parties involved. Because of the strictures of section 6103, if an IRS auditor wants to obtain more information in an exam based on a whistleblower claim, the agent must first pass along a request to a taint review team, which gathers the requested information from the whistleblower and relays it to the agent.<sup>46</sup>

The IRS processing of the Form 211 award claim can be long and follow a winding path.<sup>47</sup> When a claim initially appears to meet the section 7623(b) threshold, a Whistleblower Office analyst will review the claim for fraud potential and, if necessary, send the claim to the IRS Criminal Investigation division. If the claim has no fraud component, and the analyst decides to further process the claim, it is sent to a subject matter expert in the applicable operating division.<sup>48</sup> The subject matter expert conducts the taint review, identifies potential legal issues with the whistleblower's information, and often conducts a debriefing with the whistleblower, before deciding whether to recommend pursuing the informant's lead. If the lead is pursued, it is sent along for examination and monitored until the exam is resolved.

Although the IRM envisions the use of debriefings—and those meetings usually occur in practice—whistleblower practitioners do not view debriefings as a sufficient substitute for entering into a section 6103(n) contract. IRM section 25.2.2.7.7 describes the debriefing as a meeting at which the IRS can receive additional information from the informant, assess the informant's credibility, and learn about legal issues affecting the use of documents supplied by the informant. Although subsequent meetings are contemplated to clarify a submission, the IRS generally believes it can “proceed with an investigation or examination without further assistance from the whistleblower.”<sup>49</sup>

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46. One practitioner has called this process a “grown-up game of Operator.” Coder, *supra* note 23.

47. See IRM 25.2.2.7 (2010), available at [http://www.irs.gov/irm/part25/irm\\_25-002-002.html#d0e589](http://www.irs.gov/irm/part25/irm_25-002-002.html#d0e589).

48. If the analyst decides not to process the claim, a rejection recommendation is sent up the chain of command and ultimately a rejection letter is issued to the informant. See IRM 25.2.2.7.4 (2010), available at [http://www.irs.gov/irm/part25/irm\\_25-002-002.html#d0e589](http://www.irs.gov/irm/part25/irm_25-002-002.html#d0e589).

49. IRM 25.2.2.7.10 (2010), available at [http://www.irs.gov/irm/part25/irm\\_25-002-002.html#d0e589](http://www.irs.gov/irm/part25/irm_25-002-002.html#d0e589). The IRM further states:

The law requires the Whistleblower Office to analyze 7623(b) claims, and authorizes the Whistleblower Office to request assistance from the whistleblower or their counsel. In most cases, the IRS should be able to receive information from a whistleblower, conduct a debriefing to ensure the information provided is fully understood and that the IRS has all relevant information the whistleblower can offer, and then proceed with an investigation or examination without further assistance from the

It is possible that the IRS might try to obtain some benefit from additional taxpayer information without the use of a section 6103(n) agreement during the examination phase by expanding the scope of the award determination administrative proceeding. In its 2012 proposed regulations,<sup>50</sup> the Treasury said it was considering allowing whistleblowers to participate in the award determination process before a final award determination is made. Under the proposed regulations, following issuance of a preliminary award recommendation letter, the IRS Whistleblower Office would engage the informant in a “structured process involving correspondence and other communications” that allows the informant to provide more information regarding the claim that is relevant to the award determination.<sup>51</sup>

The IRS’s iteration of negative consequences from violating the terms of a section 6103(n) agreement implicitly acknowledges that violations are possible, even if expected to be rare. The proposed regulations provide that the IRS “may treat a claimant’s violation of the terms of the confidentiality agreement as a negative factor and, thus, as a basis for reducing the amount of an award.”<sup>52</sup> An honest informant understands that failing to abide by the terms of section 6103(n) is self-injurious to the informant’s goal of the maximum award possible, but it is also naive to ignore the likelihood that some whistleblowers, already motivated by either greed or spite, might wantonly disclose confidential information in an attempt to further punish a taxpayer.

#### VI. A FINELY BALANCED ADMINISTRATIVE SOLUTION

IRS officials and agency reports have highlighted the significant increase in the number of whistleblower claims submitted as a result of Congress’s enactment of a higher payout regime for some high-dollar claims. Consequently, the IRS’s decision to avoid the use of any section 6103(n) contracts has led whistleblower practitioners to call the regulations under section 6103(n) practically useless.<sup>53</sup>

In the 2012 proposed regulations, the IRS acknowledged that it would use confidentiality agreements in appropriate circumstances as “safeguards, to minimize possible redisclosures of return information while still

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whistleblower. In some cases, there may be a need to pose additional questions to the whistleblower. Such inquiries are governed by the appropriate disclosure provisions contained in I.R.C. section 6103. When such an inquiry is made of a whistleblower, an exception to the requirement for reporting this type of third-party contact applies.

*Id.* (internal citations omitted).

50. *See* Prop. Treas. Reg. §§ 301.6103(h)(4)-1, 301.7623-1, 301.7623-2, 301.7623-3, 301.7623-4, 77 Fed. Reg. 74798 (Dec. 18, 2012).

51. 77 Fed. Reg. 74798, 74802 (Dec. 18, 2012).

52. *Id.* (discussing administrative proceedings for awards paid under section 7623(b)).

53. *See* Miller Letter, *supra* note 24 (confirming IRS has not entered into any section 6103(n) contracts with whistleblowers in pending claims).

providing meaningful opportunities for claimants to participate in whistleblower administrative proceedings.”<sup>54</sup> Those statements were not assuring to whistleblower representatives, however, who do not believe that the IRS intends to make section 6103(n) contracts a meaningful part of the award claim process.

Instead, the whistleblower community strongly believes that the IRS should adopt a more clearly defined position that makes mandatory the use of whistleblower assistance. One group of commentators who responded to the proposed regulations argued that “[m]andatory language regarding a request for assistance will make clear to enforcement agents in the field that whistleblowers are a valuable resource for ensuring payment by tax scofflaws.”<sup>55</sup> To that end, the commentators urged the IRS to change the text of the proposed rules from “may” to “shall request the assistance of an [informant] . . . in debriefing by meeting in person or by telephone.”<sup>56</sup> Another interest group took the IRS to task for being “silent regarding the use of [section 6103(n)] agreements to promote full utilization of whistleblower knowledge” in timely investigating and resolving whistleblower claims.<sup>57</sup> The Service’s “reluctance to engage with whistleblowers through 6103(n) agreements has impeded” more efficient resolutions, the group claimed.<sup>58</sup>

Presumably, the frequent use of section 6103(n) agreements also would reduce the likelihood of intentional disclosure of taxpayer information during litigation. The IRS has been worried that as part of the award claim process, denial of a claim that raises the right for an informant to challenge that decision in U.S. Tax Court<sup>59</sup> would necessitate disclosure of the Service’s grounds for an award determination, which could include taxpayer information normally protected by section 6103. While noting that both the IRM and the 2012 proposed regulations provide for disclosure under a confidentiality agreement, the IRS rightly acknowledges that “[t]here appears to be no effective sanction, and no effective restraint, when a whistleblower obtains confidential taxpayer information in discovery and chooses to release that information to the public.”<sup>60</sup>

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54. 77 Fed. Reg. 74798, 74804 (Dec. 18, 2012).

55. R. Scott Oswald, David Scher & Richard Peterson, EMP’T LAW GRP., Comment on Proposed Rule for Awards for Information Relating to Detecting Underpayments of Tax or Violations of Internal Revenue Laws 3 (Feb. 15, 2013), *available at* <http://www.regulations.gov/#!documentDetail;D=IRS-2012-0051-0303>.

56. *Id.*

57. Kristin Amerling, President & Exec. Dir., TAXPAYERS AGAINST FRAUD EDUC. FUND, Comment on Proposed Treasury Regulations 3 (Feb. 15, 2013), *available at* <http://www.taf.org/Comments-on-IRS%20December-2012-proposed-rule.pdf>.

58. *Id.*

59. *See* I.R.C. § 7623(b)(4) (2012) (allowing whistleblowers to appeal an award determination to U.S. Tax Court, which is given specific jurisdiction under the statute).

60. IRS, FISCAL YEAR 2012 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623 13–14 (2012), *available at* [http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress\\_mv.pdf](http://www.irs.gov/pub/whistleblower/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress_mv.pdf).

The IRS's deep concern over disclosure to whistleblowers during the discovery process should not be lightly dismissed. The IRS, through its Office of Chief Counsel, can seek appropriate mechanisms during the discovery process that limit the extent to which taxpayer return information could be mishandled. For example, Tax Court rules 27 and 103 expressly permit parties to seek protective orders and privacy protections for filings made with the court. The IRS could ask the court to limit viewing of taxpayer information by a whistleblower to an in camera proceeding or request other limits appropriate to the situation to ensure that return information is handled with the requisite care for privacy.

The Tax Court is grappling with what limits should be placed on discovery during whistleblower award suits. In a current whistleblower challenge to an award denial, the Tax Court has issued multiple orders, including a protective order, that establish a careful process by which the whistleblower is able to access a limited number of documents regarding the underlying taxpayer. The orders have required the IRS to redact the taxpayer documents, place the documents under seal, and subject them to an in camera review. Moreover, the Tax Court has required the whistleblower to submit a discovery request for specific taxpayer documents and granted the whistleblower access to only a small number of the requested redacted documents.<sup>61</sup> The orders clearly state that the produced information may be used for litigation purposes only, and that any violation is subject "to sanctions and punishment in the nature of contempt."<sup>62</sup> Although the limiting mechanisms in Tax Court to preserve the confidentiality of taxpayer information are a first step, it is too early to tell how whistleblowers not represented by competent counsel might handle sensitive information despite the restrictions set in place by the court. A determined whistleblower could very well flout any court orders governing confidentiality in order to cause public embarrassment to a company, even at risk of contempt or other sanctions.

The extent to which company information will become a matter of public knowledge has already occurred as the result of whistleblower litigation in the Tax Court. For example, in *Insinga v. Commissioner*,<sup>63</sup> the whistleblower's public pleadings identified a large company and financial institutions as targets of his award claim, including extensive information regarding the basis of his allegations.<sup>64</sup> The expected increase in litigation arising from revised section 7623 also presages the fact that, despite

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61. See *Hill v. Comm'r*, No. 25539-10W (T.C. July 24, 2013), available at <http://www.ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=6069383>.

62. *Id.*

63. No. 4609-12W (T.C. Mar. 13, 2013), available at <https://www.ustaxcourt.gov/InternetOrders/DocumentViewer.aspx?IndexSearchableOrdersID=98885&Todays=Y> (ordering parties to schedule evidentiary hearing in response to respondent's motion to dismiss).

64. See *Petition for Whistleblower Action Under Code Section 7623(b)(4)*, *Insinga v. Comm'r*, No. 4609-12W (T.C. Dec. 21, 2012), 2012 WL 864738.

noble efforts at protecting taxpayers from unwanted and spiteful exposure, judicial review will inevitably bring more taxpayer information into the public eye. As explicitly recognized in a recent case, the Tax Court's general approach is that litigation within its domain is a matter of public record.<sup>65</sup>

## VII. CONCLUSION

Although the IRS has clear statutory and administrative authority to enter into section 6103(n) whistleblower agreements, it has repeatedly elected not to pursue those agreements in favor of maintaining a cautious approach to information sharing. While proponents argue that the end result of that course of action is diminished capacity to fully investigate viable whistleblower claims, and consequently, to enrich the fisc through collection of high-dollar uncollected taxes, other tax practitioners believe that the IRS is acting fairly to avoid potential serious damage resulting from access to taxpayer information that ultimately cannot be appropriately supervised. Once out of the gate, there is no way to repair a taxpayer's image or credibility if a whistleblower bent on harm is granted access to information within the taxpayer's file.

Protection of taxpayer information is a good and necessary thing, and something that has become an embedded expectation in tax system administration; taxpayers have been harmed by unthinking or accidental IRS dissemination of personal financial information. The whistleblower program can be a useful tool for the IRS to engage informants who have valid claims against tax cheats. But the program must also continue to offer adequate protection of taxpayer information, sometimes even at the risk of making the process more cumbersome, in order to maintain stable tax system administration based on a strong foundation of taxpayer privacy.

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65. See *Whistleblower 14106-10W v. Comm'r*, 137 T.C. 183, 190 (2011).



