



8-1-2014

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Recommended Citation

Dennis J. Ventry Jr., *Not Just Whistling Dixie: The Case For Tax Whistleblowers in the States*, 59 Vill. L. Rev. 425 (2014).

Available at: <http://digitalcommons.law.villanova.edu/vlr/vol59/iss3/2>

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2014]

NOT JUST WHISTLING DIXIE: THE CASE FOR TAX WHISTLEBLOWERS IN THE STATES

DENNIS J. VENTRY, JR.*

I. INTRODUCTION

TAX whistleblowing has been in the news lately. In September 2012, the IRS wrote a check for \$104 million to Bradley Birkenfeld, a former banker with UBS, the Swiss banking giant. The payment, made under the federal government's tax whistleblower program,¹ represented Birkenfeld's cut for providing information to the IRS that exposed how UBS actively concealed taxable income of U.S. clients for decades by hiding assets in secret offshore accounts.² Birkenfeld's assistance was "exceptional in both its breadth and depth," the IRS explained in making the award, and allowed the U.S. government to pursue "unprecedented actions against UBS AG, with collateral impact on other enforcement activities."³

"Collateral impact" hardly does justice to the effect of Birkenfeld's whistleblowing. The "treasure trove of inside information" that Birkenfeld provided U.S. officials formed "the foundation for the UBS debacle and everything that followed."⁴ Indeed, thanks to one of "the biggest whistleblowers of all time,"⁵ the U.S. government (take a deep breath)

* Professor of Law, UC Davis School of Law. I thank Gregory Krakower, Darien Shanske, and Dean Zerbe for their helpful comments. I also benefited from suggestions and conversations at the Norman J. Shachoy Symposium, sponsored by the *Villanova Law Review*, particularly those from Jeremiah Coder and J. Richard Harvey.

1. For a discussion of the IRS whistleblower program, see *infra* notes 349–86 and accompanying text. Birkenfeld's whistleblower payment of \$104 million was calculated off a portion (\$400 million) of the total fine (\$780 million) paid by UBS pursuant to a deferred prosecution agreement reached with the U.S. Department of Justice in early 2009. The \$400 million represented money that UBS failed to withhold from U.S. taxpayer accounts while the remaining \$380 million represented profits that UBS earned from its cross-border business between 2001 and 2008. See William P. Barrett & Janet Novack, *UBS Agrees to Pay \$780 Million*, FORBES (Feb. 18, 2009, 7:00 PM), http://www.forbes.com/2009/02/18/ubs-fraud-offshore-personal-finance_ubs.html; see also *infra* notes 2–3 and accompanying text.

2. Jeremiah Coder, *IRS Pays Birkenfeld \$104 Million Whistleblower Award*, 136 TAX NOTES 1359 (2012).

3. IRS, *IRS Summary Award Report Recommends \$104 Million Payment to Whistleblower*, 2012 TAX NOTES TODAY 177-20 (2012).

4. Robert Goulder, *Year in Review: The 2009 Person of the Year*, 126 TAX NOTES 7, 9 (2010). A DOJ official stated, "without Mr. Birkenfeld walking through the doors of the Justice Department in the summer of 2007, I doubt this massive fraud scheme would have been discovered by the United States government." *Id.*; see also Lee A. Sheppard, *Swiss Banking Derobed: Implications of Birkenfeld*, 136 TAX NOTES 1361 (2012).

5. Goulder, *supra* note 4, at 8.

received: \$780 million and the names of 250 high-dollar Americans with secret accounts as part of a deferred prosecution agreement (DPA) with UBS;⁶ another 4,450 names and accounts of U.S. citizens provided as part of a joint settlement between the U.S. and Swiss governments;⁷ more than 120 criminal indictments of U.S. taxpayers and tax advisors;⁸ additional indictments against foreign bankers, advisors, and lawyers;⁹ still more foreign nationals pleading guilty to conspiring to assist U.S. taxpayers to file false returns and evade U.S. taxes;¹⁰ the closure of prominent Swiss banks—including the oldest private bank¹¹—based on their participation in helping U.S. clients evade tax liability;¹² more than \$5.5 billion collected¹³ from the IRS Offshore Voluntary Disclosure Program (OVDP), with untold tens of billions of dollars still payable due to only a quarter of the 39,000 OVDP cases being closed;¹⁴ program participants ratting out banks as a requirement of their participation;¹⁵ banks themselves disclosing the names and accounts of clients who refuse to participate in the program to avoid their own monetary penalties and to defer or avoid crim-

6. See Jeremiah Coder & Lee A. Sheppard, *UBS Settles with DOJ for \$780 Million*, 122 TAX NOTES 944, 944 (2009). Immediately after signing the DPA, the U.S. Department of Justice sought to enforce a summons against UBS for information pertaining to all 52,000 U.S. account holders. See David D. Stewart, *DOJ Seeks Enforcement of John Doe Summons Against UBS*, 122 TAX NOTES 945 (2009).

7. See David D. Stewart, *Swiss Agree to Expedite Processing of 4,450 UBS Accounts*, 124 TAX NOTES 744 (2009).

8. See Laura Saunders, *More U.S. Taxpayers Admit to Secret Swiss Accounts*, WALL ST. J. (Nov. 1, 2013, 6:42 PM), <http://online.wsj.com/news/articles/SB100014240527023038>.

9. See Kristen A. Parillo, *Offshore Crackdown Seen As a Success Despite Little Jail Time*, 141 TAX NOTES 696, 696 (2013) (quoting Steven R. Toscher of Hochman, Salkin, Rettig, Toscher & Perez, P.C. as calling indictments of foreign nationals “really a watershed event in federal criminal white-collar prosecutions”). One of those indicted, Raoul Weil—a Swiss citizen, the former number three official at UBS, and a fugitive since 2009—was arrested in Italy in October 2013, extradited, and appeared in a U.S. court in December 2013 on charges that he aided and abetted U.S. citizens in evading taxes. See Kristen A. Parillo & Andrew Velarde, *Fugitive Swiss Banker Wanted by U.S. Arrested in Italy*, 141 TAX NOTES 392 (2013); David Voreacos, *Ex-UBS Banker Weil Heads Back to Court As He Prepares Defense*, BLOOMBERG NEWS (Jan. 6, 2014, 6:00 PM), <http://www.bloomberg.com/news/-01-06/ex-ubs-banker-weil-heads-back-to-court-as-he-prepares-defense.html>.

10. See David D. Stewart & Stephanie Soong Johnston, *Swiss Lawyer Pleads Guilty to Helping U.S. Clients Evade Taxes*, 140 TAX NOTES 879 (2013).

11. See Shamik Trivedi, *Swiss Bank Wegelin Ordered to Pay \$58 Million*, 138 TAX NOTES 1171 (2013) (describing winding down of Wegelin, founded in 1741, and its payment of penalties and fines to U.S. government as part of first ever guilty plea of foreign bank charged with conspiracy to evade U.S. tax).

12. See Stephanie Soong Johnston, *Swiss Bank Ends Operations, Citing U.S.-Swiss Tax Dispute*, 141 TAX NOTES 393 (2013) (referring to Bank Frey & Co.).

13. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-318, OFFSHORE TAX EVASION: IRS HAS COLLECTED BILLIONS OF DOLLARS, BUT MAY BE MISSING CONTINUED EVASION 2 (2013), available at <http://www.gao.gov/products/gao-13-318>.

14. See Lee A. Sheppard, *Former IRS Agent Reeves Tells His Tale*, 139 TAX NOTES 979, 982 (2013).

15. See *id.*

inal prosecution;¹⁶ and the IRS aggressively going after taxpayers who tried to “stay under the radar” by failing to participate in the program and then “quietly” filing amended returns on foreign bank accounts for prior years.¹⁷ All because one person blew the tax whistle.

Tax whistleblowers have been busy at the state level too. In 2012, the state of New York sued telecommunications provider Sprint Nextel based on a whistleblower’s information. According to the State’s complaint, Sprint “illegally avoided its New York sales tax obligations” by failing to collect sales taxes on its “flat-rate” calling plans and knowingly filing false tax returns,¹⁸ actions for which New York sought damages exceeding \$300 million under the state’s False Claims Act (FCA).¹⁹ In June 2013, a New York Supreme Court denied Sprint’s motion to dismiss the case after concluding that New York had sufficiently alleged violations of the state’s tax laws,²⁰ a decision unanimously affirmed by the Supreme Court’s Appellate Division.²¹ In a press release announcing the court’s decision on the motion to dismiss, New York Attorney General Eric Schneiderman stated, “[a]s the very first tax case prosecuted under the False Claims Act—which rewards and protects whistleblowers—this ruling sends a message that tax dodgers will be exposed and prosecuted to the fullest extent of the law.”²²

Three years earlier, as a member of the New York State Senate, Schneiderman authored changes to New York’s FCA that prominently included a new section authorizing “claims, records, or statements made under the tax law.”²³ The legislature unanimously passed the changes, making New York the first state to specify tax claims under its FCA.²⁴ The

16. See Stephanie Soong Johnston, *10 Swiss Banks Agree to Participate in DOJ Settlement Program*, 141 TAX NOTES 1285 (2013); Saunders, *supra* note 8.

17. See Jaime Arora, *IRS Taking Closer Look at Quiet Disclosures of Offshore Accounts*, 141 TAX NOTES 273, 273 (2013).

18. Superseding Complaint at 1, *People ex. rel. Schneiderman v. Sprint Nextel Corp.*, 970 N.Y.S.2d 164 (N.Y. Sup. Ct. 2012) (No. 103917-2011), available at <http://www.ag.ny.gov/sites/default/files/press-releases/2012/Sprint-Complaint.pdf>.

19. See Press Release, Eric T. Schneiderman, N.Y. Attorney Gen., A.G. Schneiderman Files Groundbreaking Tax Fraud Lawsuit Against Sprint for Over \$300 Million (Apr. 19, 2012), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-files-groundbreaking-fraud-lawsuit-against-sprint-over-300-million>; see also John Buhl, *New York Sues Sprint for Alleged Sales Tax Fraud*, 64 STATE TAX NOTES 211 (2012). Subsequent to New York filing suit against Sprint, the Securities and Exchange Commission opened its own investigation of Sprint’s state and local sales tax collection practices. See John Buhl, *SEC Investigating Sprint’s Sales Tax Collection Practices*, 65 STATE TAX NOTES 450 (2012).

20. See *Sprint Nextel Corp.*, 970 N.Y.S.2d at 173.

21. See *People v. Sprint Nextel Corp.*, 980 N.Y.S.2d 769 (N.Y. App. Div. 2014).

22. Press Release, Eric T. Schneiderman, N.Y. Attorney Gen., A.G. Schneiderman Announces Court Decision Upholding \$300 Million Tax Case Against Sprint-Nextel Corporation (July 2, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-court-decision-upholding-300-million-tax-case-against-sprint>.

23. N.Y. STATE FIN. LAW § 189(4)(a) (McKinney 2013).

24. See New York False Claims Act, N.Y. STATE FIN. LAW §§ 187–94.

tax press proclaimed the law “the most far-reaching in the country,”²⁵ while Schneiderman proudly called it a “False Claims Act on steroids.”²⁶ It permitted the state, local governments, and whistleblowers to bring tax enforcement actions against businesses with net income or sales exceeding \$1 million and alleged damages exceeding \$350,000.²⁷ It made losing defendants liable for treble damages based on total damages incurred by the state,²⁸ statutory penalties between \$6,000 and \$12,000 per claim,²⁹ and all reasonable costs and expenses for bringing the action (including attorney’s fees).³⁰ Moreover, whistleblowers were entitled to as much as 30% of all proceeds collected from the action,³¹ and the law extended anti-retaliation protections for informants.³² To process and investigate whistleblower submissions, and to enforce the enhanced FCA, Attorney General Schneiderman established the Taxpayer Protection Bureau.³³ Other high-profile tax enforcement efforts based on whistleblower tips processed under the state’s FCA already include a conviction of a New York City “tailor to the stars”³⁴ on felony tax evasion of sales and income taxes,³⁵ a multi-million dollar settlement with a medical imaging company for knowingly evading New York state and city taxes,³⁶ an active investigation of more than a dozen private equity firms for illegally converting ex-

25. Billy Hamilton, *New York’s Qui Tam Law: Jackpot Justice or Creative Tax Tool—or Both?*, 59 STATE TAX NOTES 109, 111 (2011).

26. Amy Hamilton, *New York Attorney General Investigates Equity Firms*, 65 STATE TAX NOTES 698, 698 (2012) (quoting New York Attorney General Eric T. Schneiderman).

27. See N.Y. STATE FIN. LAW § 189(4)(a)(i)–(ii).

28. See *id.* § 189(1)(h).

29. See *id.* The “per claim” penalty becomes significant when actions involve thousands of claims. “If a tax case involves numerous transactions, invoices, or billings, each of those documents can be considered a false claim.” Jack Trachtenberg et al., *Applying False Claims Acts in State Taxation*, 64 STATE TAX NOTES 373, 375 (2012).

30. See N.Y. STATE FIN. LAW § 189(3).

31. *Id.* § 190(6)(b).

32. See *id.* § 191.

33. Amy Hamilton, *New York AG’s Tax Probes Energize Whistleblowers*, 66 STATE TAX NOTES 155, 156 (2012).

34. Laura Italiano, *Tailor to Stars Mohan Ramchandani Pleads Guilty to Tax Evasion*, N.Y. POST (Mar. 6, 2013, 5:00 AM), <http://nypost.com/2013/03/06/tailor-to-stars-mohan-ramchandani-pleads-guilty-to-tax-evasion/>. The tailor, Mohan “Mike” Ramchandani, outfitted, among others, Rudy Giuliani, Ed Koch, New York Knick legends Walt Frazier and Patrick Ewing, and baseball greats Rickey Henderson and Darryl Strawberry. See *id.*

35. As part of his settlement with the state, Ramchandani paid \$5.5 million in back taxes, interest, and penalties. See Press Release, Eric T. Schneiderman, N.Y. Attorney Gen., A.G. Schneiderman Announces Arrest, Conviction and \$5.5 Million Settlement in Tax Fraud Case Against Prominent Tailor (Mar. 5, 2013), available at <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-arrest-conviction-and-55-million-settlement-tax-fraud-case>.

36. Press Release, Eric T. Schneiderman, N.Y. Attorney Gen., A.G. Schneiderman Announces \$6.2 Million Settlement with Lantheus Medical Imaging and Bristol-Myers Squibb for Failing to Pay New York Corporate Income Taxes (Mar. 14,

ecutive management fees charged to investors into personal stakes in fund investments to “substantially reduce or escape [] tax liabilities,”³⁷ another active inquiry into the operations of 501(c)(4) organizations that engage in “electioneering” with the help of *dark money*,³⁸ and cases under investigation that are expected to “dwarf” the Sprint prosecution.³⁹

While some states are experiencing outsized benefits due to tax whistleblowers, others are under siege. Illinois finds itself in a particularly tight spot, with a single Chicago-based class action plaintiffs’ firm filing hundreds of cases against remote sellers under the state’s FCA alleging fraud for failure to collect sales and use taxes.⁴⁰ In all cases, the law firm filed suit after conducting investigations based purely on information already in the public domain or simply after ordering a few items online from an out-of-state retailer and then bringing an action when the vendor failed to charge Illinois sales tax on the sale.⁴¹

2014), *available at* <http://www.ag.ny.gov/press-release/ag-schneiderman-announces-62-million-settlement-with-lantheus-medical-imaging-bristol>.

37. Hamilton, *supra* note 26, at 698; *see also* Nicholas Confessore, Julie Creswell & David Kocieniewski, *Inquiry on Tax Strategy Adds to Scrutiny of Finance Firms*, N.Y. TIMES (Sept. 1, 2012), http://www.nytimes.com/2012/09/02/business/inquiry-on-tax-strategy-adds-to-scrutiny-of-finance-firms.html?pagewanted=all&_r=0. By waiving all or part of a management fee (typically 2% of money under management) in exchange for an investment in the fund, private equity executives attempt to convert the fees (taxed at 39.6% and due upon payment) into “carried interest” plus returns on the fund (treated as long-term capital gains taxed at 20% and payable years later). If the compensation is not at risk of forfeiture, the argument for capital gain treatment is bogus. Or, as one prominent tax attorney has explained, “[t]he less the fees are at risk, the more it seems as though they are current income from labor that should be taxed at ordinary rates.” Reed Albergotti & Laura Saunders, *Informers Sparked New York Probe*, WALL ST. J. (Sept. 12, 2012, 10:34 AM), <http://online.wsj.com/news/articles/SB10000872396390443696604> (quoting Bryan Skarlatos of Kostelanetz & Fink LLP). As part of the investigation, the New York Attorney General is also examining whether private equity executives deferred payment of the converted fees (or treated the fees as a return of invested capital). *See id.*

38. Press Release, Eric T. Schneiderman, N.Y. Attorney Gen., A.G. Schneiderman Adopts New Disclosure Requirements for Nonprofits that Engage in Electioneering (June 5, 2013), *available at* <http://www.ag.ny.gov/press-release/ag-schneiderman-adopts-new-disclos-nonprofits-engage-electioneering>; *see also* Letter from Eric T. Schneiderman, N.Y. Attorney Gen., to Orrin G. Hatch, U.S. Senator, and Dave Camp, U.S. Congressman (Sept. 24, 2012), *reprinted in* 2012 STATE TAX TODAY 187-23 (describing how New York’s FCA “empowers [the AG’s] office to bring cases against entities or individuals that have committed tax fraud,” including 501(c)(4) groups).

39. *See* Pete Brush, *NY Tees up Tax FCA Suits that May Dwarf Sprint Case*, LAW360 (Mar. 13, 2013, 6:08 PM), <http://www.law360.com/articles/423350/ny-tees-up-tax-fca-suits-that-may-dwarf-sprint-case>.

40. *See* Amy Hamilton, *Attorneys Call for Safe Harbors in State False Claims Acts*, 69 STATE TAX NOTES 262, 263 (2013).

41. The basis of these claims is loosely grounded in an Illinois Supreme Court case from 2009 holding that shipping charges for certain internet purchases of tangible personal property are subject to Illinois sales tax. *See* *Kean v. Wal-Mart Stores, Inc.*, 919 N.E.2d 926, 940–41 (Ill. 2009); *see also* Trachtenberg et al., *supra* note 29, at 376.

In response to these improper nuisance suits, a member of the Illinois Assembly, Michael Zalewski, introduced legislation to amend the state's FCA by prohibiting qui tam actions—that is, actions prosecuted by a whistleblower on behalf of the government—based on alleged underpayment of tax.⁴² Specifically, the bill gave the state attorney general sole authority to prosecute tax-related matters originating under the Illinois false claims statute.⁴³ Whistleblowers would still be permitted to submit a complaint alleging tax noncompliance under the FCA,⁴⁴ but the department of revenue would initially investigate the complaint and then make a recommendation to the Attorney General as to the merits of the case. Meritorious claims would proceed under the tax department unless the Attorney General decided to prosecute the case, at which point the administrative action would be stayed until resolution of the judicial action.

Defaulting to the tax department ensured that tax experts would evaluate whistleblower submissions and filter out nuisance claims. Meanwhile, cutting out informants and “bounty hunter” attorneys would further reduce the prevalence of nuisance suits and mitigate the unauthorized disclosure of a defendant's confidential tax return information.⁴⁵ The bill had the support of the Attorney General and the Department of Revenue,⁴⁶ heads of the legislative tax committees, taxpayer organizations, and business groups.⁴⁷ Inexplicably, the proposal died in the Assembly's Rules Committee, but observers predict the bill will be reintroduced in 2014.

42. See 98th Ill. Gen. Assem., House Bill 74, 2013 Sess. (offering new section 740 ILCS 175/4.5(c), introduced on Jan. 9, 2013), available at <http://www.ilga.gov/legislation/full.asp?DocName=&SessionId=85&GA=98&DocTypeID=HB&DocNum=74&GAID=12&LegID=&SpecSess=&Session=>; see also ILL. GEN. ASSEMBLY, *Bill Status of HB0074*, <http://www.ilga.gov/legislation/BillStatus.asp?DocNum=74&GAID=12&DocTypeID=HB&SessionID=85&GA=98> (last visited Apr. 14, 2014) (tracking bill's progress through Illinois legislature).

43. The language of the bill read, “[n]o court shall have jurisdiction over a civil action brought under” the FCA and involving state taxation “unless the action is brought by the Attorney General.” House Bill 74, *supra* note 42.

44. Some observers of the events in Illinois have argued for removing tax claims altogether from the FCA. See, e.g., Amy Hamilton, *MTC Project Would Minimize Seller Exposure to Class Actions*, 65 STATE TAX NOTES 367 (2012) [hereinafter *MTC Project Would Minimize*] (summarizing comments by Todd Lard, general counsel for Council on State Taxation (COST), saying that allowing tax claims under state's FCA “enable[s] enterprising class action attorneys to prey on some of those gray areas of the law”); Amy Hamilton, *Negotiations Underway on Illinois Qui Tam Statute*, 66 STATE TAX NOTES 379, 380 (2012) [hereinafter *Negotiations Underway*] (reporting that Lard proposes barring all claims involving taxes and unclaimed property under statute).

45. For a discussion of the proposal and what motivated it, see Jennifer Carr, *Should the MTC Take on a Model False Claims Act?* 68 STATE TAX NOTES 37, 38–40 (2013); *Negotiations Underway*, *supra* note 44, at 379.

46. In fact, the two offices jointly wrote the draft statute, according to knowledgeable insiders with whom I spoke.

47. See Amy Hamilton, *MTC to Work on Limiting Tax Class Action and Qui Tam Suits*, 67 STATE TAX NOTES 544, 545 (2013).

Illinois's experience with FCA claims involving state taxation has also prompted action from the Multistate Tax Commission (MTC). In particular, the proliferation of nuisance suits under the Illinois FCA raises the specter of an untenable Catch-22 for retail businesses that collect state and local transaction taxes: *over-collect* taxes on behalf of a state and face consumer refund class action suits or *under-collect* taxes on behalf of a state and face qui tam actions initiated and even prosecuted by whistleblowers. To address the "rock and a hard place" dilemma that sellers experience when collecting tax for states,⁴⁸ the MTC has formed a work group charged with considering a model statute that addresses both sides of the whipsaw.⁴⁹ The MTC effort piggybacks on an earlier American Bar Association (ABA) project that produced a model statute to minimize vendor exposure due to under-collection and over-collection of state taxes,⁵⁰ while addressing additional complications due to whistleblower actions under false claims statutes. Resolving the lose-lose paradox in a timely manner is imperative not just for Illinois, but also for other states that permit—or are considering—tax actions under their FCAs.⁵¹

48. I am grateful to Sheldon Laskin, Counsel to the MTC, for the apt phraseology of this dilemma.

49. See Hamilton, *supra* note 47, at 544; see also *MTC Project Would Minimize, supra* note 44. The group, the "Tax Undercollection Class Action & Tax Overcollection False Claims Act Work Group," has been holding regular teleconference meetings. I have participated in the meetings.

50. See ABA, SECTION OF TAXATION, REPORT TO THE HOUSE OF DELEGATES: TRANSACTION TAX OVERPAYMENT MODEL ACT PROJECT 1 (2011) [hereinafter MODEL ACT PROJECT], available at http://www.americanbar.org/content/dam/aba/administrative/taxation/_resolution_with_report_model_model_transactional_tax_overpayment_act.authcheckdam.pdf (describing "two main liability risks" for sellers collecting state and local transaction taxes: "First, if sellers fail to collect sufficient tax, they face liability risks attributable to audit assessments. Second, if sellers over-collect or collect for the wrong jurisdiction, they face potential actions and lawsuits filed on behalf of purchasers or pursuant to consumer protection statutes."). One member of the group that drafted the ABA model statute has said that the extent of the actions and lawsuits for refund "are really only limited by the imagination of plaintiffs' attorneys." Hamilton, *supra* note 47, at 545 (quoting Bruce Johnson, Chair of Utah State Tax Commission). The ABA subcommittee's report was officially adopted by the ABA in 2011. See MODEL ACT PROJECT, *supra* note 50.

51. The North Dakota Senate passed a concurrent resolution last year directing a committee to report at the beginning of the upcoming session on "the growth in use of state False Claims Acts with qui tam provisions in state and local taxation matters and whether that approach is feasible and desirable in North Dakota." Act of Jan. 8, 2013, S. Con. Res. 4007, 63d N.D. Legislative Assembly (introduced by Dwight Cook, Chair of Senate Finance & Taxation Committee), available at <http://openstates.org/nd/bills/63/SCR4007/documents/>; see also Amy Hamilton, *MTC Explores Qui Tam Issues, Advances Passthrough Project*, 67 STATE TAX NOTES 723, 723 (2013) (describing North Dakota resolution). At least two additional state legislatures will take up the issue in 2014, including Kentucky (considering legislation creating a false claims act explicitly barring tax actions, while also considering a separate bill establishing a standalone tax whistleblower program) and Mississippi (considering legislation that is silent as to tax claims, with the bill's sponsors saying it will not apply to tax actions). See Henry J. Reske, *Maryland and*

This Article analyzes arguments for and against tax whistleblowing at the state level, both with respect to permitting tax actions under False Claims Acts and through standalone whistleblower statutes. Part II examines the contention that false claims statutes should be used only for instances of outright fraud, and that mere noncompliance with the law or overaggressive (though good faith) interpretations of the law should be handled through traditional tax administration procedures. After considering both the historic and modern culpability thresholds under false claims statutes, Part II demonstrates that the critics are in fact advocating for a more lenient standard of care under FCAs—both for taxpayers and tax advisors—than currently exists under the Internal Revenue Code (IRC), its underlying regulations, and Circular 230 (the Treasury Department’s prevailing standard of care for tax practitioners).

Part III scrutinizes a related argument from critics that tax law should be off limits to false claims statutes because it is somehow more complex, ambiguous, and uncertain than other areas of the law. It evaluates this argument in the context of assertions that whistleblowing in the tax arena threatens taxpayer rights of process, privacy, and confidentiality, that it circumvents tax administrators and expert review of tax claims, and that it encourages frivolous and harassing actions. In the end, this Part exposes fallacies in the argument that “tax is different” and thus entitled to special treatment—or no treatment at all—under false claims statutes. At the same time, it suggests structural safeguards for FCAs designed to protect against undue disclosure of tax return information, to filter out nuisance suits, and to guarantee that tax experts investigate whistleblower claims. Finally, this Part makes the case that leveraging whistleblowers’ unique, inside information can assist outgunned state tax agencies in combating two persistent and insidious problems in tax administration: namely the information gap and the tax gap.

Part IV addresses flaws in current whistleblower regimes by recommending specific improvements to whistleblower statutes at both the state and federal level. It identifies key characteristics that should be part of any state-level FCA permitting tax whistleblower claims. Moreover, it suggests organizational changes within businesses that reduce risks associated with tax whistleblower laws and that at the same time help organizations uncover economic crime while maximizing the potential of whistleblower procedures and statutes. This Part concludes by offering alternative policies for states to consider beyond authorizing tax claims under FCAs, particularly standalone whistleblower statutes based on section 7623 of the

Kentucky False Claims Act Bills Take Different Approaches to Taxes, 71 STATE TAX NOTES 392 (2014); David Sawyer, *Bill Would Authorize DOR Whistleblower Program*, 71 STATE TAX NOTES 574 (2014); David Sawyer, *Proposed False Claims Act May Permit Qui Tam Actions in Tax Disputes*, 71 STATE TAX NOTES 213 (2014). Another state, Maryland, enacted expansions to its FCA in early 2014, including an amendment clarifying that the statute does not apply to state and local taxes. See Jennifer DePaul, *House Approves Expansion of False Claims Act*, 71 STATE TAX NOTES 690 (2014).

Internal Revenue Code. It offers the case of California as a state ripe for a robust tax whistleblower program.

Part V summarizes the Article's findings by concluding that a properly drafted and implemented tax whistleblower program, either run through a state's FCA or under a standalone statute, can overcome the real and perceived shortcomings of permitting citizens to report tax noncompliance to the government. On balance, there is no compelling reason to prevent or discourage state tax enforcement actions from exploiting invaluable knowledge and information derived from citizen insiders. In fact, soliciting and rewarding such information can help tax enforcement at the state level and potentially yield significant revenue from unpaid tax liabilities.

II. FALSE CLAIMS ACTS DO NOT IMPOSE ANY NEW LIABILITY ON TAXPAYERS

Nearly all criticisms of using false claims statutes to uncover illegal behavior in the tax context focus on the purported uniqueness of tax noncompliance compared to other forms of legal noncompliance. According to this criticism, false claims statutes (beginning in 1863 with the enactment of the federal False Claims Act⁵²) have been used to uncover and prosecute fraudulent behavior, while the overwhelming majority of tax noncompliance fails to rise to the level of fraud. Underpayments of tax, whether to federal or state tax agencies, rarely result from outright tax evasion, defined in the Internal Revenue Code as willful attempts to evade or defeat tax liability.⁵³ Instead, taxpayers and their advisors engage in tax planning to navigate unsettled, complicated, and ambiguous areas of the law to satisfy their tax obligations in good faith.⁵⁴ Permitting whistleblowers to bring claims against taxpayers in this context, the argument goes, would result in inapposite and unfair application of FCAs.

52. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696 (codified at 31 U.S.C. §§ 3729–33 (2012)).

53. I.R.C. § 7201 (2012).

54. See Hamilton, *supra* note 33, at 155 (quoting Jack Trachtenberg as saying that tax noncompliance being swept up in FCA claims is really just about “legitimate tax planning and people legitimately trying to comply with ambiguous tax laws”); *id.* (summarizing defense lawyers as saying that using FCA statutes to uncover and prosecute tax noncompliance is inappropriate, because “False Claims Act cases are intended to address knowing and deliberate fraud”); see also Wal-treese Carroll, *Should State Whistleblower Laws Exclude Tax Fraud?*, 65 STATE TAX NOTES 441, 442 (2012) (quoting Jordan Goodman of Horwood Marcus & Berk as saying, “[p]laintiffs should not be allowed to file qui tam lawsuits for state tax [] because the law is often complicated and unclear and as a result, a taxpayer may be complying with the law to the best of its ability”); *MTC Project Would Minimize*, *supra* note 44, at 367 (quoting Todd Lard of COST as saying that qui tam lawsuits in tax context “focus on unsettled areas of tax law rather than [traditional] whistleblower concerns”); Trachtenberg et al., *supra* note 29, at 376 (stating that taxpayer-defendants in qui tam lawsuits are usually guilty only of taking “good faith” positions in “unsettled” areas of law).

The critics' assertions of inaptness and unfairness stem in part from a fundamental misunderstanding of false claims statutes and, in further part, from the flawed belief that tax is somehow different than other areas of the law and therefore off-limits. Using false claims laws to uncover and prosecute tax noncompliance is not a trap for the unwary, as critics would have us believe, but rather a legitimate and powerful weapon in a multi-faceted tax enforcement regime.

For starters, liability under false claims statutes has encompassed more than fraudulent behavior from the very beginning. Indeed, while the nineteenth century version of the federal False Claims Act aimed to "prevent and punish Frauds upon the Government of the United States" (specifically, with respect to illegal price-fixing and defective weaponry and supplies sold to the Union Army during the Civil War),⁵⁵ it also identified a considerably wider swath of wrongdoing than traditional fraud. For example, the original statute forbade persons from making "any claim upon or against the Government of the United States . . . *knowing* such claim to be *false, fictitious, or fraudulent.*"⁵⁶ "Knowing" or "knowingly" appeared six more times in the statute, and referred to behavior that was "false," "fictitious," and "fraudulent," or that was meant to "cheat," "defraud," "injure," or "conceal."⁵⁷

In 1986, Congress significantly revised the federal FCA,⁵⁸ but preserved the requirement that punishable behavior for submitting "false or fraudulent" claims had to be "knowing."⁵⁹ Moreover, Congress added the "reverse false claim" to covered behavior, whereby persons are prohibited not only from submitting false claims to *obtain* money or property from the

55. Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 696 (codified at 31 U.S.C. § 3729 (2012)). Enacted during the heart of the Civil War, the original version of the FCA was popularly known as both Lincoln's Law and the Informants' Act.

56. *Id.* (emphasis added).

57. *Id.* at 697. It is also worth pointing out to critics of modern-day FCA statutes that the original 1863 statute levied a \$2,000 fine on *each* claim—compared to between \$5,500 and \$11,000 under modern FCA statutes—which translates into \$37,700 (using a simple calculation that multiplies \$2,000 by the percentage increase in the consumer price index from 1863 to 2012), \$451,000 (using an "economic status" index), or \$4,220,000 (using an "economic power" index) in 2012 dollars. See Samuel H. Williamson, *Seven Ways to Compute the Relative Value of a U.S. Dollar*, MEASURINGWORTH (2014), <http://www.com/uscompare/>. In addition, successful whistleblowers received 50% of the amount the government collected from the claim, plus all costs. See Act of Mar. 2, 1863, ch. 67, 12 Stat. 696, 698 (codified at 31 U.S.C. §§ 3729–33).

58. See Act of Oct. 27, 1986, Pub. L. No. 99-562, 100 Stat. 3153, 3154 (codified at 31 U.S.C. §§ 3729–3733). The only notable revision of the statute between 1863 and 1986 took place in 1943. In that year, Congress significantly reduced the power and effectiveness of the law by, among other things, slashing the potential award for whistleblowers from 50% of collected proceeds to 25% in the event the government declined the case and the whistleblower took over primary responsibility for prosecuting the matter, and to just 10% if the government took over and prosecuted the case without the whistleblower. See Act of Dec. 23, 1943, Pub. L. No. 78-213, 57 Stat. 608, 609 (codified at 31 U.S.C. § 3730(d)).

59. 31 U.S.C. § 3729(a)(1)(A).

government, but also to *avoid paying* or transmitting money or property to the government.⁶⁰ In addition, Congress broadly defined the terms “knowing” and “knowingly” to require that a person possess “actual knowledge” of the false information, while also allowing for lower threshold levels of knowledge including acting in “deliberate ignorance of the truth or falsity of the information,” or acting in “reckless disregard” of the same.⁶¹ Under the statute, moreover, establishing “knowing” and “knowingly” does not require any specific intent to defraud.⁶²

The same knowledge requirement is reflected in subnational FCAs. Currently, twenty-nine states have their own false claims statutes.⁶³ All of them proscribe “knowingly” submitting false or fraudulent claims to the state government, and they adopt the broad federal definition of “knowing” and “knowingly.”⁶⁴ In addition, the District of Columbia and four municipalities have followed suit with their own false claims statutes.⁶⁵ Most of the subnational FCAs bar tax claims, as does the federal False

60. *Id.* § 3729(a)(1)(G). The reverse false claim provision covers a person who “knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money” to the government. *Id.*

61. *Id.* § 3729(b)(1)(A).

62. *Id.* § 3729(b)(1)(B).

63. The twenty-nine states with FCAs include California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, Virginia, Washington, and Wisconsin. An inventory of all state-level statutes is available at the Taxpayers Against Fraud Education Fund’s website. See TAXPAYERS AGAINST FRAUD EDUC. FUND, *States with False Claims Acts*, <https://www.taf.org/states-false-claims-acts> (last visited Apr. 15, 2014).

64. A handful of states deploy an even more expansive definition of “knowing” and “knowingly.” For example, Michigan substitutes for actual knowledge a definition covering persons “in possession of facts under which he or she *is aware or should be aware* of the nature of his or her conduct and that his or her conduct is substantially certain to cause the payment of” unwarranted benefits. Michigan Medicaid False Claims Act, MICH. COMP. LAWS § 400.602(f) (2014) (emphasis added).

65. See WHISTLEBLOWERLAWS, *District of Columbia False Claims Act*, <http://www.com/false-claims-act/district-of-columbia-false-claims-act/> (last visited Apr. 15, 2014) (Washington, D.C. act). The four municipalities include Allegheny County Pennsylvania, Chicago, New York City, and Philadelphia. See PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP, *County of Allegheny False Claims Ordinance*, FALSE CLAIMS ACT RES. CTR., http://www.falseclaimsact.com/wp-content/uploads/2013/02/County_Allegheny_Municipality.pdf (last visited Apr. 15, 2014) (Allegheny County act); PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP, *Philadelphia False Claims Act*, FALSE CLAIMS ACT RES. CTR., http://www.falseclaimsact.com/wp-content/uploads/2013/02/_Municipality.pdf (last visited Apr. 15, 2014) (Philadelphia act); WHISTLEBLOWERLAWS, *Chicago False Claims Act*, <http://www.whistleblowerlaws.com/-act/chicago-false-claims-act/> (last visited Apr. 15, 2014) (Chicago statute); WHISTLEBLOWERLAWS, *New York City False Claims Act*, <http://www.whistleblowerlaws./false-claims-act/new-york-city-false-claims-act/> (last visited Apr. 15, 2014) (New York City act).

Claims Act.⁶⁶ Six states impose no bar on tax actions under their FCAs,⁶⁷ while three states impose only partial bars on tax actions involving state income taxes.⁶⁸

Members of the defense bar, the primary critics of FCAs authorizing tax claims (either implicitly or explicitly), express significant anxiety over false claims statutes. In particular, they fear a knowledge requirement for liability and punishment that they believe is too low; that is, for including acts of “deliberate ignorance” or “reckless disregard” of the truth and falsity of the information. They also fear that the use of false claims statutes as a tool for reinforcing state tax enforcement will proliferate as the early adopters enjoy success in uncovering and prosecuting tax underpayments.⁶⁹ And while the threat of insiders blowing the whistle on overaggressive tax positions undoubtedly alters the risk calculus with respect to tax compliance,⁷⁰ some members of the defense bar have overreacted to

66. See 31 U.S.C. § 3729(d) (prohibiting “claims, records, or statements under the Internal Revenue Code of 1986”).

67. These states include Delaware, Florida, Nevada, New Hampshire, New Jersey, and New York. Although Florida’s FCA does not contain a tax bar, the Florida legislature added a provision to the state’s standalone tax whistleblower statute in 2002 that expressly disapproves of informant claims relating to taxes being brought under any other statute other than the tax informant statute:

[T]his section is the sole means by which any person may seek or obtain any moneys as the result of, in relation to, or founded upon the failure by another person to comply with the tax laws of this state. A person’s use of any other law to seek or obtain moneys for such failure is in derogation of this section and conflicts with the state’s duty to administer the tax laws.

FLA. STAT. § 213.30(3) (2013).

68. These states include Illinois and Indiana (barring claims based on all state income taxes) and Rhode Island (barring claims based on personal income taxes).

69. Like the federal FCA, state-level FCAs award civil penalties for each false claim (between \$5,500 and \$11,000 under the federal FCA) plus three times (or treble) the damages “the Government sustains because of the act of that person.” 31 U.S.C. § 3729(a)(1); see also CAL. GOV’T CODE § 12651(a) (West 2013) (awarding between \$5,500 and \$11,000 per claim plus treble damages); 740 ILL. COMP. STAT. 175/3(a)(1)(A) (2013) (same); N.Y. STATE FIN. LAW § 189(1)(h) (McKinney 2013) (awarding between \$6,000 and \$12,000 per claim plus treble damages, “including consequential damages”).

70. Anxiety over tax whistleblowing claims, either under state-level FCAs or the federal tax code’s section 7623, has had a discernible effect on corporate tax departments and outside counsel. See Michael P. Dolan & Timothy J. McCormally, *Which Way the Wind Blows: Mitigating Whistleblowing Risk*, 139 TAX NOTES 1537, 1537 (2013) (writing that uptick in tax whistleblower actions “underscores the need for corporate taxpayers and other tax professionals to take the possibility of tax whistleblowing seriously,” and furthermore that “the headlines” over tax whistleblowing “are alluring or disquieting. For tax executives, they certainly have the potential to be distracting.”); Tim Gustafson et al., *Between a Rock and a Hard Place: Third-Party Enforcement Actions*, 66 STATE TAX NOTES 49, 50 (2012) (“Various aspects of qui tam actions alter the playing field in favor of the government when it comes to enforcing state tax laws. First, after the whistleblower commences the action, the state’s attorney general may take over the case and prosecute the matter as an enforcement action. That places the attorney general in complete control of the litigation, which brings the full force of the government and its resources to bear against the taxpayer.”); Kendall L. Houghton et al., *Qui Tam*

the new compliance landscape with alarmist and misinformed calls for retrenchment. The remainder of this Part identifies and responds to some of these overreactions.

Notwithstanding the long history of false claims statutes imposing liability without the intent to defraud, elements of the defense bar have gone on record as saying that tax actions brought under false claims laws should be reserved exclusively for fraudulent behavior. States “should enact a safe harbor” as part of their false claims statutes, a trio of tax practitioners recently wrote, that would apply “when a corporation has technically violated the false claims act but without willfully intending to defraud.”⁷¹ The same trio suggested enacting a corollary three-year safe harbor to provide corporate taxpayers an opportunity to “perform their necessary internal review to rectify any potential filing or reporting problems that could result in false claims act suits brought by [whistleblowers] during the same period.”⁷² For the duration of the safe harbor, “companies should be immunized from false claims act lawsuits.”⁷³

Both proposals suffer from serious shortcomings. First, they inexplicably treat violations of state tax law differently than other areas of state law, thereby making it easier to cheat a state out of tax revenues than cheating a state out of other moneys and property. Second, both recommendations would limit the use of FCAs to instances of outright fraud, a limitation never imposed on false claims statutes. Third, in combination, the proposals would allow business taxpayers to comply with their annual tax liabilities over three years while all other taxpayers—including individual taxpayers—would still be responsible for satisfying their tax liabilities on an annual basis. Fourth, and finally, the proposals would create huge

Lawsuits: Recommendations for Meaningful Reform—Part 1, 67 STATE TAX NOTES 595, 596 (2013) (noting that “corporations have grown increasingly fearful of qui tam FCA suits”); Mary Kay Martire & Lauren A. Ferrante, *A Decade of Lessons from Litigating State Tax False Claims Act Cases*, 70 STATE TAX NOTES 127, 130 (2013) (advising corporations that “[w]hen deciding whether to take a particular tax position, consider not just the possible penalties and interest associated with an adverse audit determination, but also the risk of FCA or class action litigation. Risky tax positions can be fodder for litigation.”); Trachtenberg et al., *supra* note 29, at 373 (calling tax claims under state FCAs “disturbing trend”).

71. Houghton et al., *supra* note 70, at 595.

72. Kendall L. Houghton, Matthew P. Hedstrom & Charles C. Capouet, *Qui Tam Lawsuits: Recommendations for Meaningful Reform—Part 2*, 68 STATE TAX NOTES 453, 457 (2013).

73. *Id.*; see also Timothy P. Noonan & William Comiskey, *Calling All Tax Whistleblowers—New York Wants You!*, 59 STATE TAX NOTES 349, 352 (2011) (criticizing treble damages under false claims statutes where defendants might “not actually know that the claim was false,” “were not deliberately trying to defraud the government,” and simply “should have known that the claim was false” but did not, due to deliberate ignorance or reckless disregard of truth or falsity of information).

opportunities for tax avoidance and evasion, as companies could neglect internal tax compliance procedures and instead play the audit lottery, knowing that even if they were caught underpaying taxes within the three-year safe harbor they could escape liability.

Other tax practitioners have insisted that false claims acts should never be applied to areas of law—and specifically tax law—that suffer from any uncertainty or ambiguity. In the tax context, these practitioners argue, the permissive knowledge requirement under false claims statutes, when combined with ambiguous and uncertain tax laws, imposes an unfair burden on taxpayers. The knowledge standard—including “deliberate ignorance” and “reckless disregard” of the truth or falsity of the information—“will be a challenge to apply in the tax area, where . . . the law and rules are not a model of clarity, and where mistakes occur even when taxpayers and practitioners act in good faith.”⁷⁴ These standards are especially “unclear in the context of state tax and unclaimed property in which the law itself is unclear and companies regularly take ‘positions’ based on advice.”⁷⁵ In these instances, business taxpayers could be subject to enforcement actions under state-level FCAs, even though they “took reasonable positions regarding unsettled areas of the tax law.”⁷⁶ “Despite taking the correct position,” warns a particularly insistent practitioner, “defendants will settle *qui tam* actions because, if unsuccessful, the risks are so great and the costs are so high.”⁷⁷

These claims of inaptness and unfairness are unfounded. To begin with, innocent mistakes are not prosecuted under false claims statutes. The New York FCA, for instance, explicitly makes “acts occurring by mistake or as a result of mere negligence” a defense under the statute.⁷⁸ Moreover, in interpreting the knowledge requirement under FCAs (at both the state and federal level), courts regularly hold that defendants are not liable for reasonable interpretations of an ambiguous statute or regulation.⁷⁹ Thus, not only would a “correct” position fall outside the purview

74. Noonan & Comiskey, *supra* note 73, at 352.

75. Houghton et al., *supra* note 70, at 600.

76. Trachtenberg et al., *supra* note 29, at 374.

77. Carroll, *supra* note 54, at 442 (quoting Jordan Goodman of Horwood Marcus & Berk).

78. N.Y. STATE FIN. LAW § 188(3)(b) (McKinney 2013); *see also* Noonan & Comiskey, *supra* note 73, at 352 (arguing against knowledge requirement contained in FCAs, but acknowledging that “[s]omething more is required than merely making a mistake”).

79. *See, e.g.,* Long v. Dell Computer Corp., No. PB 03-2636, 2012 R.I. Super. LEXIS 50, at *45 (Apr. 2, 2012) (noting, in context of state sales tax collection, “gray areas in applying the tax law” such that defendant’s “honest misinterpretation of a delicate area of state tax law cannot be held to be an unfair act”); *see also* Noonan & Comiskey, *supra* note 73, at 352 (writing that courts interpreting knowledge requirement under federal FCA “have held that a person who reasonably relies on an interpretation of an ambiguous statute or regulation should not face liability”).

of false claims statutes, but a taxpayer could take an “incorrect” position, even negligently, so long as it was an honest, good faith mistake.

But elements of the defense bar argue that their taxpayer-clients should be free to make not only innocent and negligent mistakes, but also reckless and deliberately ignorant mistakes. They also want clients to be free to take positions contrary to published guidance and clear agency interpretations of the law.⁸⁰ And they further want to advise on those positions and transactions without fear of liability under false claims statutes for either the taxpayer or the tax advisor.

In other words, elements of the defense bar want a more lenient standard of care under FCAs than under either the Internal Revenue Code or the Treasury Department’s standards of practice contained in Circular 230. Even more pointedly, by arguing that deliberate ignorance and reckless disregard of the truth is too high a standard of care for tax compliance under false claims statutes, the critics of permitting tax claims under state FCAs are effectively asking for immunity to engage in behavior that currently subjects taxpayer-clients and tax practitioners to penalty under the IRC and that further subjects practitioners to discipline (including suspension and disbarment) under Circular 230.

Let me explain. Elements of the defense bar complain that FCA statutes “liberally define[]” the term “knowingly” by considering “reckless disregard” and “deliberate ignorance” of the law as knowing violations.⁸¹ Yet taxpayers are currently subject to penalty under the IRC for “negligence or disregard of rules or regulations.”⁸² “Negligence” is defined, moreover, as “any failure to make a reasonable attempt to comply” with the tax law “or to exercise ordinary and reasonable care in the preparation of a tax return,”⁸³ which includes receiving any tax benefit that appears “‘too good to be true’ under the circumstances.”⁸⁴ Meanwhile, the term “disregard” includes “any careless, reckless or intentional disregard of rules or regulations” (the latter of which encompasses provisions of the IRC, temporary or final Treasury regulations promulgated under the IRC, and published Revenue Rulings and Notices).⁸⁵ Finally, taxpayers are not

80. *See, e.g.*, Noonan & Comiskey, *supra* note 73, at 352 (criticizing scenario where “the agency responsible for administering the applicable law or regulation has publicly issued a definitive interpretation intended to resolve that ambiguity” and “a claim that does not comply with that definitive interpretation [] lead[s] to False Claims Act liability”).

81. *Id.* at 353.

82. I.R.C. § 6662(b)(1) (2012).

83. Treas. Reg. § 1.6662-3(b)(1) (2003).

84. *Id.* § 1.6662-3(b)(1)(ii); *see also* Neonatology Assocs., P.A. v. Comm’r, 299 F.3d 221, 234 (3d Cir. 2002) (finding that when taxpayer “is presented with what would appear to be a fabulous opportunity to avoid tax obligations, he should recognize that he proceeds at his own peril”); Stobie Creek Invs., LLC v. United States, 82 Fed. Cl. 636, 713–14 (2008); Jade Trading, LLC v. United States, 80 Fed. Cl. 11, 56 (2007).

85. Treas. Reg. § 1.6662-3(b)(2) (2009).

considered to have disregarded a rule or regulation if they take a position contrary to a Revenue Ruling or Notice so long as the position possesses a “realistic possibility” of success (or a 33% chance) on the merits.⁸⁶

Practitioners, for their part, are subject to penalty for “willful” or “reckless” conduct under the IRC.⁸⁷ Specifically, they are prohibited from any willful attempt to understate a client’s tax liability or to engage in a “reckless or intentional disregard of rules or regulations”⁸⁸ (with “rules and regulations” defined in the same manner as under the analogous statute for taxpayers).⁸⁹ Furthermore, practitioners recklessly or intentionally disregard a rule or regulation if they advise a position on a client’s return or claim for refund “that is contrary to a rule or regulation,” and they “know[] of, or [are] reckless in not knowing of, the rule or regulation in question.”⁹⁰ Finally, practitioners are not considered to have recklessly or intentionally disregarded a rule or regulation if they adequately disclose a position that possessed, at the very least, a reasonable basis for succeeding on the merits.⁹¹ Similarly, in the case of taking a position contrary to a Revenue Ruling or Notice, practitioners can escape liability so long as the position meets the “substantial authority” standard, a level of certainty reflecting a probability of succeeding on the merits approaching 50%.⁹²

Thus, the Internal Revenue Code *already* prohibits the kind of behavior—acting knowingly, in deliberate ignorance, and reckless disregard of the rules and regulations—that members of the defense bar say should not be covered under false claims statutes. Moreover, it *already* prevents taxpayers, except in very limited circumstances, from taking positions contrary to published guidance and clear agency interpretations of the law. And, it *already* punishes practitioners for advising on or facilitating this kind of behavior.

But that’s not all. Current law sanctions additional behavior that elements of the defense bar would like to see protected under state-level FCAs. Under the Internal Revenue Code, taxpayers face a “substantial understatement” penalty⁹³ for taking positions or engaging in tax avoidance transactions unless, on the one hand, the position or transaction possesses “substantial authority,”⁹⁴ or on the other hand, the taxpayer “adequately

86. *Id.*

87. I.R.C. § 6694(b)(2).

88. *Id.*

89. See Treas. Reg. § 1.6694-3(e).

90. *Id.* § 1.6694-3(c)(1).

91. *Id.* § 1.6694-3(c)(2). For discussion of the meaning of “reasonable basis,” see *infra* notes 97–100 and accompanying text.

92. Treas. Reg. § 1.6694-3(c)(3). The practitioner’s “substantial authority” standard is a considerably higher standard than a taxpayer’s “realistic possibility of success” standard. For a discussion of the “realistic possibility of success” standard, see *supra* note 86 and accompanying text, while for the “substantial authority” standard, see *infra* notes 94–98, 101 and accompanying text.

93. I.R.C. § 6662(b)(2).

94. *Id.* § 6662(d)(2)(B)(i).

disclose[s]” and proves a “reasonable basis” for the sought after tax treatment.⁹⁵ Tax practitioners are held to the same standard, subject to penalty for preparing or advising “unreasonable positions” (defined as positions lacking “substantial authority”) that they knew or reasonably should have known were reflected on the return.⁹⁶ As with taxpayers, practitioners can escape penalty if they provide adequate disclosure and establish a reasonable basis for an otherwise “unreasonable position.”⁹⁷ Current law further defines “substantial authority” as “less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard”⁹⁸ (with the latter standard generally reflecting a 10–20% likelihood of success on the merits,⁹⁹ or a level of support that although arguable is “fairly unlikely to prevail in court upon a complete review of the relevant facts and authorities”).¹⁰⁰ Thus, while it is possible to reach “substantial authority” for a position at low levels of confidence, most practitioners would peg the requisite level of certainty as substantially closer to 50% than 10–20%.¹⁰¹

In determining whether substantial authority exists, taxpayers and practitioners must demonstrate that the “weight of the authorities supporting the treatment is substantial in relation to the weight of authorities supporting contrary treatment.”¹⁰² It is possible that substantial authority exists for more than one interpretation of a particular tax issue. However, the substantial authority standard is an objective standard such that a taxpayer’s subjective belief that there is substantial authority for the tax treatment of an item “is not relevant in determining whether there is substantial authority for that treatment.”¹⁰³ The objective authorities to

95. *Id.* § 6662(d)(2)(B)(ii).

96. *Id.* § 6694(a)(1)–(2).

97. *Id.* § 6694(a)(2)(B).

98. Treas. Reg. § 1.6662-4(d)(2) (2014).

99. See Sheldon I. Banoff, *Dealing with the “Authorities”: Determining Valid Legal Authority in Advising Clients, Rendering Opinions, Preparing Tax Returns and Avoiding Penalties*, 66 TAXES 1072, 1128 (1988); see also Treas. Reg. § 1.6662-3(b)(3) (2003) (defining “reasonable basis” as “a relatively high standard of tax reporting, that is, significantly higher than not frivolous or not patently improper. The reasonable basis standard is not satisfied by a return position that is merely arguable or that is merely a colorable claim.”).

100. H.R. REP. NO. 97-760, at 575 (1982).

101. In fact, some authorities state that the level of certainty to achieve substantial authority “should approach” 51% and can extend only as low as 45%. See EXEC. TASK FORCE, IRS, COMMISSIONER’S PENALTY STUDY, REPORT ON CIVIL TAX PENALTIES, 43 (1989). It is worth noting that under no circumstances may a taxpayer or practitioner consider the possibility that a return will not be audited (or that an item not be raised on audit) in determining whether a tax position or transaction possesses either substantial authority or reasonable basis. See Treas. Reg. § 1.6662-4(d)(2) (2014). That is, the position must be evaluated on its merits, as if it were litigated to a final conclusion in a court of law.

102. Treas. Reg. § 1.6662-4(d)(3)(i).

103. *Id.*

be considered (rather than one's sincere though unreasonable belief in a position) include the IRC and other statutory provisions, Treasury Regulations, Revenue Rulings, IRS Memoranda, Notices and other publications, case law, and congressional intent.¹⁰⁴ There is no substantial authority for positions or transactions lacking in economic substance.¹⁰⁵

The Internal Revenue Code provides a limited defense to the above penalties pertaining to "negligence and disregard of rules and regulations" and "substantial understatement." Under section 6664, a taxpayer can mitigate or overcome penalties by demonstrating reasonable cause for the underpayment of tax and, furthermore, acting in good faith in taking the position associated with the underpayment.¹⁰⁶ The taxpayer can meet these requirements by demonstrating reasonable reliance on professional tax advice,¹⁰⁷ with the reasonableness inquiry turning on the practitioner's standard of care in rendering the advice.¹⁰⁸ In particular, the practitioner's advice must itself be reasonable.¹⁰⁹ The relevant inquiry depends on whether the taxpayer knew or had reason to know that the prac-

104. *Id.* § 1.6662-4(d)(3)(iii).

105. *See, e.g.*, *Fidelity Int'l Currency Advisor A Fund, LLC v. United States*, 747 F. Supp. 2d 49, 240 (D. Mass. 2010) (finding no substantial authority "where the transactions lack economic substance or must be recharacterized under the step transaction doctrine"); *Long Term Capital Holdings v. United States*, 330 F. Supp. 2d 122, 204-05 (D. Conn. 2004) (holding that for transaction lacking economic substance, taxpayer cannot cite authority, much less substantial authority, to support claimed tax benefits); *Stobie Creek, Invs., LLC v. United States*, 82 Fed. Cl. 636, 706 n.64 (2008) (stating that where taxpayers' "transactions lack economic substance, or must be disregarded pursuant to the step transaction doctrine, plaintiffs cannot contend successfully that substantial authority supported the tax treatment claimed based on the form of their transactions rather than their substance").

106. *See* I.R.C. § 6664(c)(1) (2012); *see also* Treas. Reg. § 1.6664-4(a) (2003).

107. *See* Treas. Reg. § 1.6664-4(c) (2003); *see also* *United States v. Boyle*, 469 U.S. 241, 251 (1985) ("When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice."); *Stobie Creek*, 82 Fed. Cl. at 717 ("[T]he concept of reliance on the advice of professionals is a hallmark of the exception for reasonable cause and good faith").

108. Indeed, the relationship between the reasonableness of professional advice as defined in section 6664 and the standard of care for advisors in other areas of the IRC and in Circular 230 is so interrelated that the Treasury Regulations for section 6664 explicitly cross-reference "rules applicable to advisors," and include Treas. Reg. §§ 1.6694-1 through 1.6694-3 (regarding preparer penalties), and Circular 230 §§ 10.22 (regarding diligence as to accuracy) and 10.34 (regarding standards for advising with respect to tax return positions and for preparing or signing returns). *See* Treas. Reg. § 1.6664-4(c)(3).

109. *See* Treas. Reg. § 1.6664-4(b)(1); *see also* *Fidelity Int'l*, 747 F. Supp. 2d at 243 (stating that taxpayer's reasonable reliance on professional advice "requires that the advice itself be reasonable"); *Stobie Creek*, 82 Fed. Cl. at 717 (finding that reliance on advice of tax professional "does not necessarily demonstrate reasonable cause and good faith" and noting that "reliance on professional advice must, under all the circumstances, be reasonable." (quoting Treas. Reg. § 1.6664-4(b)(1))).

itioner could not render competent, diligent, and independent advice;¹¹⁰ that the practitioner failed to base her advice on “all pertinent facts and circumstances and the law as it relates to those facts and circumstances[;]”¹¹¹ or that the practitioner based the advice on “unreasonable factual or legal assumptions” or by “unreasonably rely[ing] on the representations, statements, findings, or agreements of the taxpayer or any other person.”¹¹² Nor can the taxpayer reasonably rely on an opinion or advice that states a final or temporary regulation is invalid.¹¹³

Therefore, through section 6664, a taxpayer can escape tax penalties by showing reasonable reliance on professional tax advice unless the taxpayer exhibits behavior that would also trigger liability under false claims statutes. Taxpayers cannot show reasonable reliance on advice when they know or have reason to know (i.e., not just actual knowledge but also deliberate ignorance or reckless disregard of the truth or falsity of the information) that they are entering into a transaction primarily for tax avoidance purposes; that the transaction lacks sufficient business purpose; that the transaction has no pre-tax profit potential; or that they signed off on false or misleading representations.¹¹⁴ Nor can a taxpayer show reasonable reliance on professional advice to mitigate or escape penalties when the taxpayer knows or has reason to know that the tax professional had a conflict of interest and thus was not providing independent advice.¹¹⁵ Exemplary disqualifying conflicts of interest about which taxpay-

110. See Treas. Reg. § 1.6664-4(c)(1).

111. *Id.* § 1.6664-4(c)(1)(i).

112. *Id.* § 1.6664-4(c)(1)(ii); see also I.R.C. § 6664(d)(4)(B)(iii) (2012) (identifying opinions on which taxpayer can never reasonably rely in good faith, including those based on unreasonable factual or legal assumptions, those that unreasonably rely on representations, statements, findings, or agreements of taxpayers or any other person, and those that fail to identify and consider all relevant facts).

113. Treas. Reg. § 1.6664-4(c)(1)(iii).

114. See *id.* § 1.6664-4(c)(1)(i)-(ii).

115. See I.R.C. § 6664(d)(4)(B)(ii) (listing characteristics of “disqualified advisors,” all of which involve conflicts of interests); see also *Am. Boat Co., LLC v. United States*, 583 F.3d 471, 482 (7th Cir. 2009) (“What exactly constitutes an ‘inherent’ conflict of interest is somewhat undefined, but when an adviser profits considerably from his participation in the tax shelter, such as where he is compensated through a percentage of the taxes actually sheltered, a taxpayer is much less reasonable in relying on any advice the adviser may provide.”); *Neonatology Assocs., P.A. v. Comm’r*, 299 F.3d 221, 234 (3d Cir. 2002) (finding that taxpayer’s “reliance itself must be objectively reasonable in the sense that . . . the professional himself does not suffer from a conflict of interest or lack of expertise that the taxpayer knew of or should have known about”); *Chamberlain v. Comm’r*, 66 F.3d 729, 732 (5th Cir. 1995) (“The reliance must be objectively reasonable; taxpayers may not rely on someone with an inherent conflict of interest” (footnote omitted)); *Pasternak v. Comm’r*, 990 F.2d 893, 903 (6th Cir. 1993) (“[T]he purported experts were either the promoters themselves or agents of the promoters. Advice of such persons can hardly be described as that of ‘independent professionals.’”); *Illes v. Comm’r*, 982 F.2d 163, 166 (6th Cir. 1992) (finding no reasonable reliance where accountant was “not a disinterested source” but rather promoter of shelter at issue); *Fidelity Int’l Currency Advisor A Fund, LLC v. United States*, 747

ers are expected to know or should know include advisors participating in the planning, promotion, or sale of the tax avoidance transaction;¹¹⁶ advisors receiving compensation from the planners or promoters of such a transaction rather than from the taxpayer-client;¹¹⁷ advisors whose compensation is contingent upon the taxpayer receiving some or all of the intended tax benefits of a transaction;¹¹⁸ and advisors with any other disqualifying financial interest in the transaction, such as being compensated based on how many opinions they churn out rather than on the quality and independence of their professional advice (such behavior, by the way, also violates Circular 230's prohibition against "unconscionable fees" under section 10.27 and the ABA's prohibition on "unreasonable fees" under Model Rule 1.5).¹¹⁹

Elements of the defense bar do not only want practitioners to be able to engage in behavior under false claims statutes that would otherwise subject taxpayer-clients and their advisors to liability under the IRC. They also want a lower standard of care for tax advisors than is currently demanded under Circular 230, the prevailing standard governing tax practitioners nationwide. For those readers who think that the strictures of Circular 230 only apply to tax professionals with federal tax practices and not state and local practices, think again. For starters, while Circular 230 provides rules "relating to the authority to practice before the Internal Revenue Service,"¹²⁰ such practice is defined broadly and includes any communication with the IRS or any written advice that influences a taxpayer's federal tax liability,¹²¹ including state tax liability. Second, no other practice standard provides such detailed rules of behavior for tax practitioners nationwide, not only for lawyers and accountants, but also for enrolled agents, enrolled actuaries, enrolled retirement plan agents, and registered tax return preparers.¹²² In addition, no other standard garners

F. Supp. 2d 49, 243 (D. Mass. 2010) ("Professional advice may not be objectively reasonable where the taxpayers knew or reasonably should have known that the professional had a conflict of interest.").

116. See I.R.C. § 6664(d)(4)(B)(ii)(I).

117. See *id.* § 6664(d)(4)(B)(ii)(II).

118. See *id.* § 6664(d)(4)(B)(ii)(III).

119. See *id.* § 6664(d)(4)(B)(ii)(IV).

120. 31 C.F.R. § 10.0(a) (2011).

121. See *id.* § 10.2(a)(4).

122. See *id.* § 10.3(a)–(f). A recent U.S. Court of Appeals decision challenged the authority of the Treasury Department to regulate "tax return preparers" under Circular 230. See *Loving v. IRS*, 742 F.3d 1013, 1021–22 (D.C. Cir. 2014) (invalidating CLE and certification requirements, which IRS had imposed in effort to tackle widespread fraud, on hundreds of thousands of unregulated tax return preparers on grounds that authorizing statute provides insufficient authority); see also Brief Amici Curiae of Former Commissioners of Internal Revenue in Support of Defendants-Appellants, *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014) (No. 13-5061), 2013 WL 1386248, at *16–17 ("In 1884, Congress empowered the Treasury to regulate the conduct of claims agents pursuing financial benefits from the government; and in 2013 Treasury retains that authority to regulate the conduct of tax return preparers who similarly assist in preparing and filing tax returns that present to the

as much respect from tax professionals¹²³ or imposes such strictly enforced¹²⁴ and mandatory¹²⁵ disciplinary rules¹²⁶ rather than loosely enforced¹²⁷ aspirational and permissive guidelines.¹²⁸ Finally, no other standard has had as great an influence on the development of the other

Treasury millions of claims worth billions of dollars each year.”); Lawrence B. Gibbs, *Loving v. IRS: The Treasury Department’s Authority to Regulate Tax Return Preparation Conduct of Commercial Return Preparers*, 59 VILL. L. REV. 503, 514 (2014) (arguing that Treasury’s 2011 amendments to Circular 230 regulating tax return preparation by commercial preparers “are authoritative and should be upheld”). *But see* Steve R. Johnson, *Loving and Legitimacy: IRS Regulation of Tax Return Preparation*, 59 VILL. L. REV. 515 (2014) (arguing the statute authorizing Circular 230 does not confer authority on Treasury to regulate tax return preparation).

123. As legal scholar Michael Lang has written, “[w]hen tax practitioners think of who addresses substandard behavior by their colleagues they think of the IRS Office of Professional Responsibility [which enforces Circular 230] and they are right to do so.” Michael B. Lang, *Thinking About Tax Malpractice*, 32 ABA SECTION OF TAXATION NEWSQUARTERLY 1, 1 (2012).

124. The Treasury Department’s Office of Professional Responsibility (OPR) has, unlike state bar disciplinary boards, embraced its authority to regulate and prosecute all “matters related to practitioner conduct and discipline” 31 C.F.R. § 10.1(a)(1); *see also* Jeremiah Coder, *Circular 230 and Due Process*, 135 TAX NOTES 538 (2012); Jeremiah Coder, *OPR’s Role in Guiding Practitioner Sanctions*, 134 TAX NOTES 1347 (2012); Jeremiah Coder, *Strong Headwinds for Those Facing Circular 230 Discipline*, 131 TAX NOTES 539 (2011).

125. *See* 31 C.F.R. § 10.20–10.38 (pertaining to “duties and restrictions relating to practice before the Internal Revenue Service”). The only exception to the mandatory rules under Circular 230 is § 10.33, pertaining to “best practices for tax advisors.” *Id.* § 10.33.

126. *See, e.g., id.* § 10.50 (pertaining to penalties and other sanctions for violating regulation); *id.* § 10.51–10.52 (pertaining to prohibited behavior); *id.* § 10.60–10.82 (pertaining to adversarial disciplinary proceedings for tax practitioners charged with violating its rules).

127. Disciplinary boards of state bar associations, for example, are “notoriously underfunded” and fail to police the behavior of their members with any consistency or enthusiasm. *See* Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1121 (1996) (finding also that state bar disciplinary boards are “unable or reluctant to mount the effort needed to do battle with wealthy class action lawyers and powerful members of the defense bar”).

128. *See, e.g.,* MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2009) (pertaining to limiting scope of representation); *id.* R. 1.6(b) (pertaining to revealing information relating to representation of client); *id.* R. 1.13(c) (pertaining to “reporting out” information of organizational misconduct after failing to receive “timely and appropriate” internal response); *id.* R. 1.14(b) (pertaining to clients with diminished capacity); *id.* R. 1.16(b) (pertaining to declining or terminating representation); *id.* R. 2.1 (pertaining to acting as “advisor” to client); *id.* R. 3.1 (pertaining to meritorious claims and contentions); *id.* R. 3.6(b)–(c) (pertaining to trial publicity); *id.* R. 3.7(b) (pertaining to lawyer as witness); *id.* R. 6.1 (pertaining to voluntary pro bono public service); *id.* R. 6.4 (pertaining to law reform activities affecting client interests); *id.* R. 8.3(c) (pertaining to reporting professional misconduct).

standards of care governing tax practitioners¹²⁹ or has been adopted as widely as the standard of care in both state¹³⁰ and federal courts.¹³¹

Like the Internal Revenue Code, Circular 230 adopts the “knowing and knowingly” standard for liability contained in false claims statutes. Section 10.34 of Circular 230 forbids practitioners from “willfully, recklessly, or through gross incompetence” preparing or advising a position that lacks “reasonable basis” or substantial authority or that amounts to a willful attempt to understate a client’s tax liability or “a reckless or intentional disregard of the rules or regulations.”¹³² Moreover, Circular 230 sanctions practitioners with censure, suspension, or disbarment¹³³ for “willfully” violating any of its sections (other than its rules on “best practices” contained in section 10.33) or for “recklessly or through gross incompetence” violating a handful of sections, including section 10.34.¹³⁴

129. These other standards include the ABA Formal Ethics Opinions interpreting the ABA Model Rules of Professional Conduct as applied to tax lawyers, the AICPA Code of Professional Conduct and the Statements on Standards for Tax Services, and the IRS penalty provisions and corresponding regulations, including most prominently sections 6662, 6664, and 6694. For a detailed discussion of the Circular’s influence on these standards, see Dennis J. Ventry, Jr. & Bradley T. Borden, *Probability, Professionalism, and Protecting Taxpayers*, 68 *TAX LAW.* 1 (2014).

130. See Lang, *supra* note 123, at 28 (writing that “breaches of Circular 230 rules that either parallel state bar ethics rules or are designed to protect clients are likely to be treated like breaches of such state bar ethics rules” and “are likely to be allowed to be offered in court as evidence of the breach of a duty to the client”); see also Carberry v. State Bd. of Accountancy, 28 Cal. App. 4th 770, 790 (1994); Agran v. Shapiro, 127 Cal. App. 2d Supp. 807, 820–21 (1954); N.Y. State Soc’y of Enrolled Agents v. N.Y. State Div. of Tax Appeals, 161 A.D.2d 1, 7 (N.Y. App. Div. 1990); N.Y. State Ass’n of Enrolled Agents, Inc. v. N.Y. State Dep’t of Taxation and Fin., 29 Misc. 3d 332, 334–38 (N.Y. Sup. Ct. 2010); Estate of Heinz, 2006 N.Y. Misc. LEXIS 4230, at *2 (N.Y. Sur. Ct. Dec. 29, 2006).

131. See, e.g., Banister v. U.S. Dep’t of the Treasury, 499 F. App’x 668 (9th Cir. 2012); Diaz v. Century Pac. Inv. Corp., No. 92-56409, 1994 U.S. App. LEXIS 9518 (9th Cir. Apr. 22, 1994); Owrutsky v. Brady, No. 89-2402, 1991 U.S. App. LEXIS 2613 (4th Cir. Feb. 19, 1991); Silvertown v. U.S. Dep’t of the Treasury, 644 F.2d 1341 (9th Cir. 1981); Pope v. United States, 599 F.2d 1383 (5th Cir. 1979); Harary v. Blumenthal, 555 F.2d 1113 (2d Cir. 1977); Falsone v. United States, 205 F.2d 734, 741 (5th Cir. 1953); Ryan, LLC v. Lew, 934 F. Supp. 2d 159, 162 (D.D.C. 2013) (“Simply stated, Circular 230 delineates who may practice before the IRS, the standards and restrictions such persons must follow, and the sanctions imposed for violations of such standards and restrictions.”); United States v. Tomlinson, No. 12-10051-01 JTM, 2013 U.S. Dist. LEXIS 82436, at *6–8 (D. Kan. June 12, 2013); Legel v. U.S. Dep’t of the Treasury IRS Office of Prof’l Responsibility, No. 11-60914-CIV-COHN/SELTZER, 2011 U.S. Dist. LEXIS 136257 (S.D. Fla. Nov. 28, 2011); Banister v. United States Dep’t of the Treasury, No. C 10-02764 JW, 2011 U.S. Dist. LEXIS 152803 (N.D. Cal. Mar. 10, 2011); Daniels v. United States, No. 1:05-CV-0925-BBM, 2006 U.S. Dist. LEXIS 57362 (N.D. Ga. Apr. 11, 2006); Jordan v. United States, No. 3:04V02079, 2005 U.S. Dist. LEXIS 32076 (D. Conn. Dec. 12, 2005); Sicignano v. United States, 127 F. Supp. 2d 325 (D. Conn. 2001); Inst. of Certified Practitioners, Inc. v. Bentsen, 874 F. Supp. 1370 (N.D. Ga. 1994); Poole v. United States, No. 84-0300, 1984 U.S. Dist. LEXIS 15351, at *2 (D.D.C. June 29, 1984).

132. 31 C.F.R. § 10.34(a)(1)–(2) (2011).

133. See *id.* § 10.50(a).

134. *Id.* § 10.52(a)(1)–(2).

Practitioners also face discipline for “knowingly, recklessly, or through gross incompetence” providing a “false opinion,” which includes “intentionally or recklessly misleading” opinions.¹³⁵

As these examples indicate, the standards of care under Circular 230 and the IRC very clearly reflect the “knowing and knowingly” standard under false claims statutes that elements of the defense bar have roundly criticized. Even if the critics succeed in persuading states to prevent tax claims under FCAs, tax practitioners falling below the knowing and knowingly standard would still be subject to liability for advising impermissible positions and transactions, while taxpayers would still be liable for underpayments of tax. Practitioners would also still be liable for claims of professional misconduct if a taxpayer-client were made to pay back taxes, interest, and penalties based on a return position made in reliance on the substandard advice.

III. THE SPECIOUS ARGUMENT THAT TAX IS SPECIAL

Critics of using false claims statutes to uncover and prosecute tax cheats insist that tax is different than other areas of the law. Complying with the tax law is “confusing, ambiguous, and difficult.”¹³⁶ Due to tax law’s complexity and uncertainty, these critics argue that submitting false or fraudulent information in the tax context should be given a pass and treated differently than submitting false or fraudulent information in, say, healthcare or government procurement.

This Part demonstrates that tax law is no more complex, ambiguous, or uncertain than other areas of the law. In so doing, it exposes as nonsense the argument that “tax is different” and thus entitled to special treatment under false claims statutes. Furthermore, it exposes these arguments as self-serving attempts to preserve the status quo. While some members of the defense bar rail against “confusing, ambiguous, and difficult” tax laws, many of them add to the confusion by exploiting the ambiguities and making enforcement of the law that much more difficult. As described in Part III.C, the bluster of the “tax is different” argument—which also falsely asserts that tax whistleblowing is at odds with traditional tax administration—appears to reflect the desire among elements of the defense bar to preserve tax law’s ambiguities and to control the flow of information from

135. *Id.* § 10.51(a)(13). “False opinions” are further defined as: [T]hose which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading.

Id.

136. Hamilton, *supra* note 33, at 158 (summarizing Timothy Noonan of Hodgson Russ questioning wisdom of permitting tax claims under state-level FCAs).

taxpayers to tax agencies. Tax whistleblowers—by unveiling and detailing exploited gray areas in the law—threaten both of those goals.

A. *Tax Law Is No More Complicated Than [Fill in the Blank]*

The argument that tax is different is really three related arguments. First, tax law is more complicated and uncertain than other areas of the law. Second, tax liability should generally not attach when it is premised on violations of unsettled areas of the law, because the accused taxpayer cannot be said to have acted with sufficient culpability. Third, and more specifically, as a result of tax law's unique complexity and uncertainty, it is inappropriate to permit claims of noncompliance that originate outside of traditional tax administration channels, and especially not from whistleblowers.

As to the first argument, that tax law is more complex and uncertain than other areas of the law, its proponents offer no evidence, empirical or otherwise, to verify the repeated injunction. To be sure, tax law, though not as complex as rocket science, is hardly intuitive; understanding, interpreting, and complying with it often requires the assistance of paid experts and professionals. The law is constantly changing, moreover, both at the federal and state level. But the same can be said of other areas of the law, including securities law, environmental law, health law, and corporate law.

As to the second argument, that tax liability should not attach when the law is uncertain because taxpayers cannot be said to possess the requisite *mens rea*, its proponents seem to have forgotten that the very nature of the common law results in potentially capricious results. They also seem to have overlooked the thousands of cases, both civil and criminal, in which a defendant was found liable for wrongdoing in one jurisdiction even though the same behavior would not have subjected the defendant to liability in another jurisdiction.

As to the third argument, that tax law's unique complexity and uncertainty militates against allowing anyone but tax officials to uncover and prosecute noncompliance, its adherents ignore other areas of complex law with regimes that not only permit the participation of whistleblowers in enforcement efforts, but encourage and protect it. Two prominent examples of active whistleblower regimes include the informant programs run through the Securities and Exchange Commission's (SEC) Office of the

Whistleblower¹³⁷ and the Environmental Protection Agency's (EPA) Office of Inspector General (OIG).¹³⁸

An example from securities law exposes the speciousness of all three arguments. The law pertaining to liability under section 10(b) of the Securities and Exchange Act and SEC rule 10b-5 is all over the place, often unclear, and typically evaluated on a case-by-case basis. Defendants are held to an evolving standard, adjudged innocent or guilty by what amounts to a moving target. The only thing we know for certain is that it takes more than mere negligence to be found liable of a securities violation. And while the statute has never contained a private right of action as an enforcement mechanism,¹³⁹ judges have created and reaffirmed implied causes of action under section 10(b) and rule 10b-5 for more than sixty-five years.¹⁴⁰ As importantly, Congress has effectively endorsed these judicial remedies by refraining from amending or reforming section

137. In 2010, section 922 of the Dodd-Frank Wall Street Reform and Consumer Protection Act authorized the establishment of the SEC's Office of the Whistleblower to provide "whistleblower incentives and protections." See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376 (2010). In practice, the Office handles whistleblower tips and complaints, and provides guidance to the SEC Enforcement Division staff based on relevant information received from whistleblowers. According to its website, the SEC whistleblower program embraces whistleblowers as partners in the effort to uncover securities violations and to protect capital markets:

Assistance and information from a whistleblower who knows of possible securities law violations can be among the most powerful weapons in the law enforcement arsenal of the Securities and Exchange Commission. Through their knowledge of the circumstances and individuals involved, whistleblowers can help the Commission identify possible fraud and other violations much earlier than might otherwise have been possible. That allows the Commission to minimize the harm to investors, better preserve the integrity of the United States' capital markets, and more swiftly hold accountable those responsible for unlawful conduct.

See OFFICE OF THE WHISTLEBLOWER, SEC, <http://www.sec.gov/whistleblower> (last visited Apr. 21, 2014). For the agency's final rule implementing the whistleblower provisions of Dodd-Frank (under section 21F of the Securities Exchange Act of 1934), see SEC FINAL RULE: IMPLEMENTATION OF THE WHISTLEBLOWER PROVISIONS OF SECTION 21F OF THE SECURITIES EXCHANGE ACT OF 1934, No. 34-64545 (2011) (codified at 14 C.F.R. §§ 240, 249), available at <https://www.sec.gov/rules/final/2011/34-64545.pdf>.

138. The EPA's OIG operates a hotline to help whistleblowers recognize and report fraud, waste, and abuse "in EPA programs and operations including mismanagement or violations of law, rules, or regulations by EPA employees or program participants. Complaints may be received directly from EPA employees, participants in EPA programs, or the general public." OFFICE OF INSPECTOR GEN., EPA, *OIG Hotline*, <http://www.epa.gov/oig/.html> (last visited Apr. 21, 2014).

139. See William H. Painter, *Inside Information: Growing Pains for the Development of Federal Corporation Law Under Rule 10b-5*, 65 COLUM. L. REV. 1361, 1366 (1965) (writing that "[n]either [rule 10b-5] nor [section 10(b)] expressly provides for a civil remedy").

140. For the first decision implying a private right of action under section 10(b) and rule 10b-5, see *Kardon v. Nat'l Gypsum Co.*, 69 F. Supp. 512, 514 (E.D. Pa. 1946) ("[T]he mere omission of an express provision for civil liability is not sufficient to negative what the general law implies.").

10(b).¹⁴¹ Indeed, as a young Justice William Rehnquist wrote in 1974, “[w]hen we deal with private actions under rule 10b-5, we deal with a judicial oak which has grown from little more than a legislative acorn.”¹⁴² Tack on another forty years of growth, and the judicial oak contains a lot more lumber.

For a specific example, consider *United States v. O’Hagan*,¹⁴³ an insider trading case. Under the “traditional” theory, liability for insider trading attaches when a corporate insider trades in the securities of the corporation on the basis of material, nonpublic information. That kind of trading, the Supreme Court held prior to the events in *O’Hagan*, qualifies as a “deceptive device” under section 10(b), due to the “relationship of trust and confidence between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation.”¹⁴⁴ The “relationship gives rise to a duty to disclose [or abstain from trading] because of the ‘necessity of preventing a corporate insider from . . . tak[ing] unfair advantage of [] uninformed [] stockholders.’”¹⁴⁵ Officers, directors, and other insiders are held accountable under the traditional theory, as are attorneys, accountants, consultants, and other temporary fiduciaries.¹⁴⁶ By comparison, under the “misappropriation theory,” which was still evolving at the time of the events in *O’Hagan*, a person violates section 10(b) and rule 10b-5 when “he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information.”¹⁴⁷ The fiduciary’s undisclosed use of the information “defrauds the principal of the exclusive use of that information.”¹⁴⁸ While the classical theory outlaws “a corporate insider’s breach of duty to shareholders with whom the insider transacts,” the misappropriation theory bars trading on “nonpublic information by a corporate ‘outsider’ in breach of a duty owed not to a trading party, but to the source of the information.”¹⁴⁹

In *O’Hagan*, a defendant “outsider” got caught in the crosshairs of the still uncertain misappropriation theory. Despite the uncertainty, the Supreme Court found Defendant O’Hagan criminally liable for insider trading. O’Hagan was a partner in a law firm retained by a corporation to advise on a tender offer for the common stock of another corporation.

141. See *Herman & MacLean v. Huddleston*, 459 U.S. 375, 380 (1983) (unanimously finding that “[t]he existence of this implied remedy is simply beyond peradventure”).

142. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975).

143. 521 U.S. 642 (1997). I am indebted to Tom Joo for suggesting the example of *O’Hagan* and insider trading.

144. *Chiarella v. United States*, 445 U.S. 222, 228 (1980).

145. *Id.* at 228–29 (second and third alterations in original) (quoting *Speed v. Transamerica Corp.*, 99 F. Supp. 808, 829 (D. Del. 1951)).

146. See *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983).

147. *O’Hagan*, 521 U.S. at 652.

148. *Id.*

149. *Id.* at 652–53.

O'Hagan did no work on the matter but learned of the potential tender offer, at which time he began purchasing call options for the target corporation's stock as well as shares of its common stock. After the acquiring corporation publicly announced its tender offer, the price of the target's stock soared, O'Hagan sold his call options and common stock of the target, and made a sizeable profit.

In applying the misappropriation theory of liability under section 10(b) and rule 10b-5 to corporate "outsiders," the Court wrote that when a "misappropriator [] trades on the basis of material, nonpublic information," the trader "gains his advantageous market position through deception; he deceives the source of the information and simultaneously harms members of the investing public."¹⁵⁰ O'Hagan's actions made him a "misappropriator" and criminally liable under section 10(b) and rule 10b-5. In so holding, the Court reinstated O'Hagan's forty-one month sentence.

Importantly, the Court did not let O'Hagan off the hook notwithstanding the uncertainty swirling around the application of the misappropriation theory at the time of O'Hagan's actions. In retrospect, and for our purposes, if O'Hagan can be found liable and sent to jail under an ambiguous standard in a supremely complex area of the law, the argument that a taxpayer should not be held liable for violations of unsettled areas of the law—and required to pay back taxes, interest, and penalties—is considerably less persuasive. Loss of undeserved, ill-gotten tax benefits does not compare to loss of liberty. And while O'Hagan's misconduct was not discovered and reported by a whistleblower, other forms of misconduct under unsettled areas of the law could certainly be the subject of a whistleblower claim submitted to the SEC's current Office of the Whistleblower and subsequently prosecuted to conclusion.

Two additional examples underscore that tax is certainly not the only area of the law that suffers from ambiguity and uncertainty in outcome. In fact, the following two cases describe an ambiguous area of the law (securities law) that effectively enforces other ambiguous and substantively difficult areas of the law (here, municipal public finance and taxation).

In *SEC v. Dain Rauscher, Inc.*¹⁵¹ the Securities and Exchange Commission had charged an investment banker for an underwriter of municipal offerings with multiple securities violations. According to the SEC, the defendant failed to conduct a proper investigation and omitted material information related to the offering statements of taxable municipal notes.¹⁵² At the time of the offering, taxable municipal notes were new to the industry and used solely for investment purposes and interest arbitrage opportunities rather than for infrastructure improvement, debt reduction,

150. *Id.* at 656.

151. 254 F.3d 852 (9th Cir. 2001).

152. Even more specifically, the SEC charged the defendant with violating section 17(a) of the Securities Act as well as section 10(b), rule 10b-5, and section 15(B)(c)(1) of the Securities Exchange Act. *See id.* at 853–54.

or capital projects. The gambit involved the issuer of the notes planning to pay back bondholders at a certain rate of interest while investing the proceeds from the notes at a higher rate of return to make a profit equal to the spread between the rates.

The defendant argued that he met the standard of care for the securities profession by satisfying the industry standard in preparing and drafting the offering statements. He also reminded the court that it had found similar conduct as satisfying the standard of care in the context of accounting professionals.¹⁵³ The court distinguished its earlier holding respecting accountants, however, and found that meeting the industry standard was just one factor to consider in applying the broader standard of “reasonable prudence.”¹⁵⁴ Unlike the industry standard for accountants, the industry standard for investment bankers and underwriters pertaining to these new securities was “sparse and not particularly helpful.”¹⁵⁵ Even more importantly, it was “set, in part, by [the defendant] himself who was one of the first of the securities professionals to participate in such an offering,”¹⁵⁶ and who might be motivated to develop a standard falling short of ordinary reasonable care.¹⁵⁷ Viewing under an objective standard, the defendant’s conduct—which included failing to describe the investment purpose of the notes, further failing to disclose that the proceeds would be invested in Orange County investment pools (the same pools that hastened the county’s bankruptcy), and making no inquiry into the investments and securities held by the pools¹⁵⁸—the court held in favor of the SEC and remanded for further proceedings.¹⁵⁹

Five years later, in *Weiss v. SEC*,¹⁶⁰ the court evaluated whether bond counsel for a school district made material misrepresentations and deceitful acts in providing an unqualified legal opinion on a bond issuance.¹⁶¹ Section 103 of the Internal Revenue Code excludes interest on local government bonds from gross income of bond purchasers.¹⁶² At the same time, it places limits on the use of “arbitrage bonds,”¹⁶³ bonds offered at,

153. *Id.* at 857. In making this argument, the defendant relied on *SEC v. Arthur Young & Co.*, 590 F.2d 785, 789 (9th Cir. 1979). In *Arthur Young*, the court held that accountants acting “in accordance with Generally Accepted Auditing Standards (GAAS) were not liable under Section 17(a), Section 10(b) or Rule 10b-5, and that the industry standard, namely compliance with GAAS, was the relevant standard for measuring the accountants’ conduct.” *Dain Rauscher*, 254 F.3d at 857 (citing *Arthur Young*, 590 F.2d at 788).

154. *Dain Rauscher*, 254 F.3d at 854.

155. *Id.* at 857.

156. *Id.*

157. *Id.*

158. *Id.* at 855.

159. *Id.* at 859.

160. 468 F.3d 849 (D.C. Cir. 2006).

161. *Id.* at 855. More specifically, bond counsel was charged with violating sections 17(a)(2) and 17(a)(3) of the Securities Act. *Id.*

162. See I.R.C. § 103(a) (2012)

163. See *id.* § 148.

say, a 3% rate of interest with bond proceeds invested in U.S. Treasuries earning a 4% rate of return. If structured in compliance with detailed regulations,¹⁶⁴ issuers can earn a risk-free profit. On the other hand, failure to meet the regulatory requirements turns the tax-exempt bonds into taxable “arbitrage bonds.” Given the importance of meeting the requirements, local government entities hire bond counsel to ensure that the issuance satisfies a series of tests to evaluate whether the issuer possesses a “reasonable expectation”¹⁶⁵ it will spend a certain amount of the bond proceeds on capital projects (rather than on arbitrage opportunities) within a certain period of time.

The court endorsed the SEC’s finding that the defendant failed “to look for even minimal objective indicia of the School District’s reasonable expectations to spend Note proceeds on projects”¹⁶⁶ The extent of his due diligence involved examining a “wish list” of projects that the school district was considering, “not a list of the projects the Board had *decided* to undertake.”¹⁶⁷ And while Weiss argued that his client merely had to “intend” to undertake the project before issuing the bonds,¹⁶⁸ an interpretation of the rules that reflected industry practice, the court held that “the question is not whether the Board *intended* to do projects, but whether a reasonable person would have *expected* the Board to follow through on those projects.”¹⁶⁹ Weiss neglected to conduct a reasonably diligent and objective inquiry to make that determination, and thus “failed to provide investors with full information concerning the substantial risk that the IRS would find the Notes to be taxable.”¹⁷⁰ The court upheld the SEC’s determination.

As these examples indicate, tax is not uniquely complex, ambiguous, or uncertain as compared to other areas of the law. By the same token, violations of the tax law do not deserve special treatment vis-à-vis other equally complex, ambiguous, or uncertain legal contexts. In other words, tax cheats do not deserve lesser enforcement or liability than, say, Medicaid cheats, under either applicable black letter law or under false claims acts.

B. *Whistleblowers Are Not Bad for Tax Administration*

As part of the specious “tax is different” argument, critics of permitting tax claims under false claims statutes assert that tax whistleblowers are bad for tax administration. Allowing citizens to act as pseudo-revenue agents creates an “alternative tax administration process” that erodes tradi-

164. See Treas. Reg. § 1.148-0 through 1.150-5.

165. *Id.* § 1.148-1(b), 1.148-2(b).

166. *Weiss*, 468 F.3d at 855.

167. *Id.* at 856.

168. *Id.*

169. *Id.*

170. *Id.* (internal quotation marks omitted).

tional taxpayer rights of process, privacy, and confidentiality.¹⁷¹ Moreover, according to the critics, whistleblower regimes circumvent tax agencies and expert tax officials trained in identifying noncompliance and instead substitute inexpert citizens looking for a quick settlement or a cut of the larger tax enforcement pie. Citizen enforcement of the tax law also encourages frivolous and harassing claims, whether prosecuted by citizen whistleblowers or overzealous attorneys general acting on information provided by whistleblowers, a result that can sully innocent taxpayers' reputations and drain resources spent on baseless litigation. Such a parallel tax administration process, moreover, conflicts and overlaps with existing (or likely) tax investigations, creating additional expense for taxpayer defendants and duplicative investigations for state tax agencies and attorneys general's offices.

These claims are unnecessarily alarmist. Moreover, they seem to stem from fear of the unknown rather than from practical experience. Many of the assertions reveal critics' lack of familiarity with false claims statutes and how the statutes already address and mitigate the asserted cataclysms. Part III.B.1 addresses these gaps between perception and reality. As importantly, critics exhibit a fundamental misunderstanding of why whistleblowers report alleged misconduct in the first place. Rather than simply reflecting disgruntled employees looking for a quick settlement, study after study reveals that the vast majority of whistleblowers are "motivated more by principle—that is to say, wanting to do the right thing—than by money."¹⁷² Part III.B.2 addresses this misunderstanding.

1. *Whistleblowing Does Not Threaten Taxpayer Rights of Process, Privacy, or Confidentiality*

Elements of the defense bar have charged tax whistleblower laws, particularly qui tam statutes permitting tax claims, with eliminating "many of the rights that exist in the normal tax administration process."¹⁷³ Prominent on the list of endangered rights are administrative procedure, tax privacy, and taxpayer confidentiality. "We are used to litigating tax cases in private," one practitioner has said, "and we're used to taxpayer confidentiality."¹⁷⁴ In the qui tam context, "otherwise confidential tax return

171. Hamilton, *supra* note 25, at 112 (quoting Jim Wetzler, former commissioner of New York's Department of Finance and Taxation, now partner with Deloitte).

172. Dolan & McCormally, *supra* note 70, at 1542.

173. Hamilton, *supra* note 25, at 112 (quoting Wetzler, who further concludes that New York's recently amended FCA is "not good for tax administration . . . and certainly not [good] for taxpayer rights").

174. Waltreese Carroll, *Panelists Question FTB Rationale in Gillette Appeal*, 66 STATE TAX NOTES 623, 623 (2012) (quoting Hollis Hyans of Morrison & Foerster LLP). Ms. Hyans overstates her case: once a tax matter reaches formal litigation (unless it is subject to a court-issued protective order or proceeds under the cloak of arbitration rather than in a courtroom), confidentiality protections for tax return information quickly disappear. See I.R.C. § 6103(h)(4) (2012) (expressly per-

information will become available for public inspection.”¹⁷⁵ Additional rights are jeopardized under some FCAs by longer statutes of limitations for actions brought under false claims statutes versus actions originating under a state’s revenue statutes,¹⁷⁶ as well as retroactive application of FCAs that have been amended to allow tax claims.¹⁷⁷

The critics make it sound as if accused taxpayers will have their tax returns published on the front page of the *Wall Street Journal* and fully searchable in online databases. Such impressions lack reality. It is certainly possible that a taxpayer’s aggressive tax avoidance transaction(s) (and not its entire tax return, which could run thousands of pages) could be exposed to the court of public opinion, an outcome that would, on the one hand, publicize the taxpayer’s knowing submission of false or fraudulent information to the government (which should elicit little sympathy) or, on the other hand, illuminate an area of the law that needs clarification to avoid further knowing exploitation by overaggressive taxpayers. In either event, false claims statutes contain procedural mechanisms (discussed below) that significantly minimize potential harms from publicly

mitting disclosure of tax returns or tax return information in federal and state judicial or administrative proceedings). Ms. Hyans may have been referring to pre-trial dispute resolution procedures or administrative appeals; in that event, she inappropriately extends the litigation model to proceedings that, though perhaps adversarial in the mind of taxpayers and counsel, possess few of the trappings of litigation and reflect an administrative process rather than a judicial process. See Gustafson et al., *supra* note 70, at 54 (“[U]nlike most administrative audits and appeals, qui tam proceedings are public.”); James W. Wetzler, *New York’s False Claims Act—Good or Bad Tax Administration?*, 60 STATE TAX NOTES 165, 169 (2011) (“[M]ost FCA legal proceedings will be publicly disclosed.”).

175. Gustafson et al., *supra* note 70, at 54.

176. See Martire & Ferrante, *supra* note 70, at 130 n.1 (discussing New York’s FCA); Trachtenberg et al., *supra* note 29, at 375–76; Wetzler, *supra* note 174, at 169. In general, New York’s Tax Law provides a three-year statute of limitations on tax enforcement actions, “except in the case of a willfully false or fraudulent return with intent to evade the tax” N.Y. TAX LAW § 1147(b) (McKinney 2013). For knowing submissions of false and fraudulent tax information, the state imposes a ten-year statute of limitations. See N.Y. STATE FIN. LAW § 192(1).

177. See Trachtenberg et al., *supra* note 29, at 375–76; Wetzler, *supra* note 174, at 169. Effective August 13, 2010, the New York Legislature amended the state’s False Claims Act. Among other changes to the statute, the legislature expressly applied the FCA to knowing violations of the New York Tax Law. See 2010 N.Y. Sess. Laws 379 (McKinney), available at <http://ssl.csg.org/dockets/2012cycle/32B/32Bbills/1332b06nywhistleblowerfraud.pdf>. The legislature also made the 2010 amendments retroactive to “apply to claims, records or statements made or used prior to, on or after April 1, 2007.” *Id.* § 13. In June 2013, a New York court upheld the retroactive application of the amendments pertaining to knowing violations of New York’s tax law. See *People ex rel. Schneiderman v. Sprint Nextel Corp.*, 970 N.Y.S.2d 164, 176 (N.Y. Sup. Ct. 2013) (finding that section 189(1)(g) of FCA, pertaining to reverse false claims—whereby persons are liable for avoiding paying or transmitting money or property to government, including tax payments—“is not sufficiently punitive in nature and effect as to warrant preclusive application of the *Ex Post Facto* Clause to [taxpayer’s] alleged conduct prior to August 10, 2010, when the Act was amended to expressly apply to knowing violations of the State’s Tax Law”).

airing a taxpayer's dirty laundry. Meanwhile, for taxpayers who genuinely take a good faith position in an unsettled area of the law, the fear that confidential tax return information will be a news item is remote.¹⁷⁸ Only a fraction of qui tam complaints (which universally proceed under seal) evolve into live actions. Moreover, all false claims statutes limit public access to private or confidential tax return information. And, as further protection for taxpayers, courts have the authority to fashion additional remedies to protect tax return information from undue disclosure.

Under all FCAs, qui tam complaints are filed in camera and remain under seal for a specified period of time.¹⁷⁹ During this period, the government (either state attorneys general or the U.S. Department of Justice) investigates the allegations. The government may request additional time to investigate the matter, while the complaint remains under seal with any supporting affidavits or submissions made in camera.¹⁸⁰ Generally, the seal is lifted once the government notifies the court that it intends to proceed with the action or, alternatively, once the government notifies the court that it declines to proceed and the qui tam plaintiff assumes responsibility for prosecuting the matter.¹⁸¹

Even if a court lifts the protective seal, thereby technically making the proceedings "public," additional means are available to restrict access to confidential tax return information. For example, current FCAs provide avenues for the government to dismiss the action (notwithstanding objections of the whistleblower initiating the action),¹⁸² settle the action with the defendant (again, notwithstanding objections of the whistleblower)¹⁸³

178. It is worth noting that the burden of proof in false claims actions, unlike in administrative tax actions, is on the person or the state agency prosecuting the suit. Thus, as one knowledgeable commentator has observed, "it's possible to argue that taxpayers will have even greater [procedural] protections in the false-claims area than they do in issues before state tax administrators." Hamilton, *supra* note 25, at 112 (quoting William Comiskey, former deputy commissioner of Office of Tax Enforcement with New York Department of Taxation and Finance).

179. *See, e.g.*, 31 U.S.C. § 3730(b)(2) (2012) (at least sixty days); CAL. GOV'T CODE § 12652(c)(2) (West 2014) (up to sixty days); 740 ILL. COMP. STAT. 175/4(b)(2) (2012) (at least sixty days); N.Y. STATE FIN. LAW § 190(2)(b) (at least sixty days).

180. *See* 31 U.S.C. § 3730(b)(2); CAL. GOV'T CODE § 12652(c)(2); 740 ILL. COMP. STAT. 175/4(b)(3); N.Y. STATE FIN. LAW § 190(2)(b).

181. *See, e.g.*, 740 ILL. COMP. STAT. 175/4(b)(2) (providing no explicit directive for when court unseals complaint, but indicating that complaint is in fact unsealed once it is served on defendant); *see also* 31 U.S.C. § 3730(b)(3) (same as Illinois's FCA); CAL. GOV'T CODE § 12652(6)(A)-(B).

182. The statutes require that the person initiating the action be notified of the motion to dismiss and provided an opportunity for a hearing on the motion. *See* 31 U.S.C. § 3730(c)(2)(A); CAL. GOV'T CODE § 12652(e)(2)(A); 740 ILL. COMP. STAT. 175/4(c)(2)(A); N.Y. STATE FIN. LAW § 190(5)(b)(i).

183. The statutes require that a court determine the settlement is "fair, adequate, and reasonable under all the circumstances." 31 U.S.C. § 3730(c)(2)(B); 740 ILL. COMP. STAT. 175/4(c)(2)(B); *see also* CAL. GOV'T CODE § 12652(e)(2)(B); N.Y. STATE FIN. LAW § 190(5)(b)(ii); *State ex rel. Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp.*, 860 N.E.2d 423, 427 (Ill. App. Ct.

with any settlement hearing being held in camera upon a showing of good cause,¹⁸⁴ and impose limitations during the course of litigation on the participation of the whistleblower.¹⁸⁵ The statutes also permit *defendants* to request restrictions on a qui tam plaintiff's participation by showing that such participation "would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense."¹⁸⁶ Moreover, if a qui tam plaintiff ends up prosecuting the action rather than the government, at least one state's FCA requires the plaintiff to obtain approval from the attorney general before even submitting a motion to compel the state's tax agency to disclose a defendant's tax records,¹⁸⁷ a requirement that could be adopted in all jurisdictions. Finally, at their discretion, courts can craft protective orders and require in camera review or redaction of documents and materials to prevent unnecessary disclosure of tax return information.¹⁸⁸

2006) (holding that action could be dismissed by state's attorney general over relator's objections so long as relator was given notice and opportunity to be heard).

184. See 31 U.S.C. § 3730(c)(2)(B); 740 ILL. COMP. STAT. 175/4(c)(2)(B); N.Y. STATE FIN. LAW § 190(5)(b)(ii).

185. The statutes require the government to show that unrestricted participation during the course of litigation by the person initiating the action would "interfere with or unduly delay the prosecution of the case, or would be repetitious or irrelevant." N.Y. STATE FIN. LAW § 190(5)(b)(iii). Enumerated limitations include restricting (i) the number of witnesses the person may call, (ii) the length of witness testimony, and (iii) the person's cross-examination of witnesses. See 31 U.S.C. § 3730(c)(2)(C); 740 ILL. COMP. STAT. 175/4(c)(2)(C); N.Y. STATE FIN. LAW § 190(5)(b)(iii).

186. 740 ILL. COMP. STAT. 175/4(c)(2)(D); see also 31 U.S.C. § 3730(c)(2)(C); N.Y. STATE FIN. LAW § 190(5)(b)(iii).

187. See, e.g., N.Y. STATE FIN. LAW § 189(4)(b).

188. The general rule under section 6103(h)(4) of the Internal Revenue Code provides for disclosure of tax returns and tax return information in judicial and administrative tax proceedings. In this and other ways, the protections afforded tax return information are less absolute than most people think. In 2012, for instance, the IRS made more than eight billion disclosures of tax returns and return information to authorized recipients under section 6103, with the majority of the disclosures constituting government-to-government requests for information, as well as requests from Congressional committees and the U.S. Census Bureau. See JOINT COMM. ON TAXATION, IRS, DISCLOSURE REPORT FOR PUBLIC INSPECTION PURSUANT TO INTERNAL REVENUE CODE SECTION 6103(P)(3)(C) FOR CALENDAR YEAR 2012, JCX-8-13 (2013), available at <https://www.jct.gov/publications.html?func=startdown&=4514>. During the course of investigating false or fraudulent behavior under the New York FCA, for instance, that state's Office of the Attorney General regularly obtains tax return information from the federal government. See Hamilton, *supra* note 33, at 156 (reporting that the New York Attorney General "follows the federally prescribed process for obtaining tax return information"); Letter from Eric T. Schneiderman, *supra* note 38, at 1 (describing "the right of state officials to obtain and utilize information that may appear on tax returns in carrying out [] law enforcement functions").

2. *Whistleblowers Do Not Threaten Expert Tax Administration or Lead to Frivolous Claims*

Critics of tax whistleblowers and qui tam for tax overstate their case even more dramatically when it comes to perceived threats to expert tax administration. “Tax administrators are often relegated to the sidelines in these suits,” the critics allege, “and have limited input as to how the tax law is applied.”¹⁸⁹ Moreover, whistleblower cases disrupt tax enforcement processes in that the misconduct alleged in a whistleblower complaint might already be under government review or would eventually be flagged and investigated.¹⁹⁰ Furthermore, in some states, officials with no tax expertise and motivated more by politics than tax enforcement can “override the tax administrator’s decisions about enforcement priorities and how to interpret the law.”¹⁹¹ And, the argument goes, under FCAs that permit tax claims, “taxpayers immediately get branded in the press as ‘tax frauds’ and ‘tax cheats.’”¹⁹² Elements of the corporate bar even charge that “people who do not understand tax—but understand false claim acts and qui tam actions—are being allowed to decide who gets punished and who does not.”¹⁹³ Interpreting and enforcing the tax law requires “specialized knowledge” and “ought to remain within the authority and expertise of the state’s taxing authority,”¹⁹⁴ rather than with private persons who sim-

189. *MTC Project Would Minimize*, *supra* note 44, at 367 (quoting Todd Lard of COST).

190. *See* Carroll, *supra* note 174, at 623 (quoting Lynn Gandhi, of Honigman Miller Schwartz and Cohn LLP, with respect to New York’s FCA permitting tax claims, saying “I don’t know why we need this,” and suggesting that traditional tax administration process works just fine); Houghton et al., *supra* note 70, at 596 (recommending that state legislatures “enact clear and explicit safe harbors for those corporations that are engaged with the appropriate governmental agency regarding the subject matter of the false claim (for example, as part of a state audit examination, whether conducted by state personnel or retained contract auditors, or as part of a voluntary disclosure process)"); Houghton et al., *supra* note 72, at 458 (“[A]llowing a [whistleblower] to initiate a lawsuit when the company has already alerted the government to the matter, in any form, contradicts the public policy and stated purpose underlying the qui tam statutory regime.”); Wetzler, *supra* note 174, at 167 (discussing potential situations where “a whistleblower simultaneously files claims under the IRS whistleblower program and the FCA, the information provided under the FCA would have eventually been received by the department when the IRS reports federal audit changes to the department through the fed-state information exchange program,” and “[c]ases in which the ordinary tax administration process would have a high probability of uncovering tax underpayments would include . . . allegations based on tax return positions disclosed on the tax return”).

191. Hamilton, *supra* note 25, at 112 (quoting Wetzler).

192. Waltrese Carroll, *Brunori: Transparency Key to Effective Tax Administration*, 64 STATE TAX NOTES 879, 879 (2012) (summarizing comments by Jack Trachtenberg of Sutherland Asbill & Brennan LLP).

193. *Id.* (summarizing comments by Jordan Goodman of Horwood Marcus & Berk).

194. Carr, *supra* note 45, at 38 (summarizing practitioner concerns).

ply initiate whistleblower complaints and then “say that it is fraud—with headline-grabbing allegations against the company.”¹⁹⁵

The critics craft a tale of elected officials misusing and misapplying false claims statutes for personal gain; of ill-informed citizens (usually disgruntled employees or former employees) out for financial windfalls bringing baseless, frivolous, and harassing lawsuits; of innocent taxpayers being accused of cheating on their taxes without due process; and of tax officials completely shut out or circumvented. It all sounds terrible. But it distorts the truth.

For starters, agencies and officials with tax expertise will be as involved in FCA actions as the underlying statute allows (and as it should allow). In New York, for instance, the FCA requires the attorney general to “consult with the commissioner of the department of taxation and finance prior to filing or intervening in any action . . . based on the filing of false claims, records or statements made under the tax law.”¹⁹⁶ The statutory requirement for consultation with the tax agency was one of the reasons that the state’s Department of Taxation and Finance supported the 2010 amendments permitting tax actions to be brought under the FCA.¹⁹⁷ Section 7623 of the Internal Revenue Code also guarantees that tax experts will decide the fate of all whistleblower submissions. In the words of Dan Bucks, former Executive Director of the Multistate Tax Commission, under existing federal and state tax whistleblower regimes, “[c]itizen actions are referred first to the government for the application of the tax agency’s special expertise. The government may then proceed with the case” or allow the whistleblower to prosecute the action.¹⁹⁸ “That general process of combining the information and initiative of the citizen with the established knowledge and expertise of the tax agency,” Bucks concludes, “is appropriate in the realm of taxation.”¹⁹⁹

Even in states without a directive requiring attorneys general to consult with their state’s tax agency, tax experts can (and should) be involved in evaluating and investigating a whistleblower’s complaint. As a matter of prudence, due diligence, and competence, state attorneys general will want to involve their tax agencies in tax-related false claims actions. Moreover, many attorneys general offices enjoy in-house tax expertise. For example, the California Office of the Attorney General includes a Business

195. *Carroll*, *supra* note 174, at 624 (quoting Hollis Hyans of Morrison & Foerster LLP).

196. N.Y. STATE FIN. LAW § 189(4)(b) (McKinney 2013); *see also* Hamilton, *supra* note 25, at 112 (quoting William Comiskey, former deputy commissioner of Office of Tax Enforcement with New York Department of Taxation and Finance: “The statute calls for the Tax Department to have a key role in false-claims act cases,” and “[c]ases are filed under seal and are not made public until they have been vetted by the attorney general and by the department”).

197. *See* Hamilton, *supra* note 25, at 112.

198. Dan Bucks, *Making Corporate Taxes Work, Part 5: Empowering Citizens for Tax Equality*, 69 STATE TAX NOTES 283, 288 (2013).

199. *Id.*

and Tax Section that investigates and litigates complex tax cases. In addition, attorney general offices can leverage the expertise of whistleblowers themselves to understand the true nature of positions or transactions on a taxpayer's 1000-page return. Indeed, according to Gregory Krakower, senior advisor and counselor to the New York Attorney General, the list of persons submitting tax claims under New York's FCA includes potential "accountants, bookkeepers, employees of banks, accounting firms, and other businesses that handle tax matters."²⁰⁰ These insiders are essential to uncovering and then deciphering tax noncompliance "hidden in a complex web of structured transactions," in the opinion of William Comiskey, a former deputy commissioner of the Office of Tax Enforcement with the New York Department of Taxation and Finance.²⁰¹ "The False Claims Act," Comiskey says, "will provide the state with the best tool available to expose these schemes," namely the knowledgeable insider.²⁰²

Concerns over duplicative and premature enforcement investigations due to whistleblower actions are equally unconvincing. Just because a tax agency may be auditing a company's tax return, for instance, does not mean that the investigating agents will flag the transaction that is the subject of a whistleblower submission or, in the event the transaction has been flagged, will understand what is really going on with the transaction beyond what the taxpayer has chosen to reflect on the return.²⁰³ We cannot forget that abusive tax avoidance deals such as LILOs and SILOs resembled plain vanilla leveraged-lease transactions on corporate tax returns, while fraudulent inflated-basis transactions were made to look like run-of-the-mill high-basis, low-value partnership interests. Whistleblowers can illuminate tax-motivated transactions that revenue agents will continue to misinterpret or fail to uncover. And, in fact, insiders rather than revenue agents alerted government officials and members of the press to the inflated-basis transactions in the late 1990s²⁰⁴ as well as other mass-marketed shelter schemes.²⁰⁵ Thus, calls for safe harbors for taxpayers "engaged with the appropriate governmental agency regarding the subject matter of the false claim" could halt otherwise fruitful inquiries into a taxpayer's

200. Hamilton, *supra* note 25, at 111.

201. *Id.* at 112 (quoting William Comiskey).

202. *Id.* (quoting William Comiskey).

203. The observation that traditional audit and tax administration procedures miss or misunderstand items on tax returns also applies to claims that whistleblower complaints are inappropriate because "the ordinary tax administration process would have a high probability of uncovering tax underpayments" associated with disclosed positions (unless, of course, the position is one that had a high probability of being flagged by computer scoring programs such as the IRS Discriminant Function System (DIF) or Unreported Income DIF (UIDIF)). Wetzer, *supra* note 174, at 167.

204. See *infra* note 271 and accompanying text.

205. See Tanina Rostain, *Travails in Tax: KPMG and the Tax-Shelter Controversy*, in LEGAL ETHICS: LAW STORIES 19, ch. 3 (Deborah L. Rhode & David J. Luban eds., 2006) (describing efforts of Michael Hamersley, tax lawyer who blew whistle on KPMG's extensive—and fraudulent—tax shelter practice in 2002).

hidden noncompliance, precisely the kind of misconduct that false claims statutes are designed to reveal.²⁰⁶ If anything, the investigating units (that is, the agents conducting the audit and the unit or agency assigned to investigate the whistleblower submission) should share information and, if appropriate, coordinate their efforts for a more streamlined, thorough investigation. Where a whistleblower submission is deemed valid but in fact duplicative or unripe, a false claims statute could require that the FCA action be stayed while the administrative action proceeded.²⁰⁷

Finally, some commentators have suggested that state-level whistleblower actions are unnecessary when a whistleblower has also filed a claim under the federal whistleblower statute.²⁰⁸ These arguments assume that the IRS will eventually alert the state to any audit changes when the case closes, at which point the state can piggyback on the work performed by the feds. But the whistleblower's claim may include complex issues of state taxation with which the federal examiners are unfamiliar or lack sufficient expertise such that the federal examination would fail to uncover or comprehend issues relevant to the states. Moreover, it takes years for the IRS Whistleblower Office to process and close cases. In 2006, the Treasury Inspector General for Tax Administration reported that whistleblower claims under the federal program languished in administrative and judicial processes for, on average, seven and a half years between the filing of a claim and the payment of a reward, the point at which cases are closed administratively.²⁰⁹ In 2013, six years after Congress significantly enhanced and improved the program, the IRS Whistleblower Office was still advising whistleblowers that the time to process claims could "take five to seven years and longer."²¹⁰ In the intervening period, states reliant

206. Houghton et al., *supra* note 70, at 596.

207. In Illinois, a 2013 attempt to amend the state's FCA by giving the attorney general sole authority to prosecute false claims involving taxation (which would have had the effect of prohibiting qui tam plaintiffs from prosecuting tax claims) adopted a slightly different tact. Upon the submission of a whistleblower complaint, the state's tax department would have the authority to process the allegations through its usual administrative channels. However, if the attorney general decided to turn what would otherwise be an administrative proceeding into a civil action by filing suit, the administrative processes—excepting a tax department audit or investigation—would be stayed until resolution of the judicial action. The bill died in the General Assembly's Rules Committee. See *supra* notes 42–47 and accompanying text.

208. See Wetzler, *supra* note 174, at 167.

209. See TREASURY INSPECTOR GEN. FOR TAX ADMIN., Ref No. 2006-30-092, THE INFORMANTS' REWARDS PROGRAM NEEDS MORE CENTRALIZED MANAGEMENT OVERSIGHT 8 (2006) [hereinafter TIGTA REPORT], available at <http://www.treasury.gov/tigta/audit/2006reports/200630092fr.pdf>. A primary reason for the protracted process is that the IRS cannot make award determinations to whistleblowers until after the taxpayer-defendant exhausts all administrative and judicial appeals.

210. IRS WHISTLEBLOWER OFFICE, FISCAL YEAR 2012 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623 16 (2013), available at http://www.irs.gov/pub/whistlebl/2012%20IRS%20Annual%20Whistleblower%20Report%20to%20Congress_mv.w.pdf. To underscore the lengthy period between submission of a claim and payment of an award, consider that in 2011, the IRS issued the first award

on the federal program would continue to leak revenue due to noncompliance that state-level FCAs or standalone whistleblower statutes could have long since identified and prosecuted.

Part of the argument that tax experts will be cut out of the process for deciding which tax claims to prosecute under FCAs involves concerns over frivolous or harassing lawsuits. As discussed above, however, false claims statutes contain numerous procedural mechanisms that act to filter out such claims:²¹¹ filing complaints in camera and under seal; keeping complaints in camera and under seal while the government investigates the underlying claims; and allowing courts to fashion additional remedies to prevent harassment, undue burden, or unnecessary expense of defendants. Add to that list the fact that the burden of proof in false claims actions, unlike in administrative tax actions, is on the person or the state agency prosecuting the suit.²¹² Furthermore, FCAs can (and do) include threshold levels on (i) the income or sales of the taxpayer against whom the action is brought and (ii) on damages pled, both of which, when combined, mitigate small-dollar claims involving small-time taxpayers;²¹³ FCAs can (and do) provide that courts may award costs to defendants (in the event they prevail in the action) if a court finds that “the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment”;²¹⁴ states could enact additional and more onerous penalties on frivolous and harassing claims;²¹⁵ and, finally, experience indicates that “a decision by the government not to intervene [in a whistleblower complaint] is a signal to plaintiffs’ lawyers that their claim has little merit.”²¹⁶

under section 7623(b), which Congress enacted in 2006. *Id.* at 1. Further consider that the majority of awards paid during fiscal year 2012 involved claims filed under pre-2006 law. *Id.* at 16.

211. See *supra* notes 179–88 and accompanying text.

212. See *supra* note 178.

213. See, e.g., N.Y. STATE FIN. LAW § 189(4)(a)(i)–(ii) (McKinney 2013) (limiting claims to taxpayers with net income or sales over \$1 million and damages pleaded over \$350,000). The federal tax whistleblower statute also includes monetary thresholds to concentrate claims on high-income taxpayers and businesses. See I.R.C. § 7623(b)(5)(A)–(B) (2012) (limiting claims to taxpayers with gross income over \$200,000 and the sum of tax, penalties, interest, additions to tax, and additional amounts in dispute over \$2,000,000).

214. N.Y. STATE FIN. LAW § 190(6)(d) (applying only to qui tam plaintiff); see also 31 U.S.C. § 3730(d)(4); CAL. GOV’T CODE § 12652(g)(9)(A)–(B) (West 2014); 740 ILL. COMP. STAT. 175/4(d)(4) (2012).

215. Such a strategy would be particularly appropriate in jurisdictions such as Illinois, where some law firms are improperly submitting nuisance claims under the state’s FCA. See *supra* notes 40–47 and accompanying text.

216. Trachtenberg et al., *supra* note 29, at 375. Data from the U.S. Department of Justice’s fraud statistics reflect the stunningly low rate of return for whistleblowers on claims where the government declines to proceed, the actions are not dismissed for good cause, and qui tam plaintiffs take over prosecutorial responsibilities. In 2013, in qui tam actions where the government declined to proceed, whistleblowers received a meager 0.5% of total qui tam collections (and an equally paltry 3.5% of total qui tam awards), compared to 12.6% of collections

Notwithstanding these protections, members of the defense bar continue to beat the drum of whistleblower abuse. In fairness, the zealous defense lawyer construes any lawsuit, meritorious or otherwise, as frivolous and harassing. But based on the persistent, outsized fear over whistleblowing run amok, the unavoidable conclusion is that some members of the defense bar are either engaging in purposefully inflammatory resistance to whistleblower laws or they are inappropriately (and to their clients' distinct detriment) stereotyping who blows the whistle and why. The distorted, broad-brush view of whistleblowers states that they are merely puppets deployed by puppeteering, avaricious trial lawyers;²¹⁷ that they are motivated only by the lure of financial gain rather than exposing fraudulent behavior;²¹⁸ that they possess a rolodex of invalid claims, and will move on to the next innocent victim if met with sufficient resistance;²¹⁹ that they are primarily disgruntled employees or former employees;²²⁰ and that unlike the virtuous defenders of frivolous and harassing claims, whistleblowers enjoy too many protections under the law (particu-

when the government intervened or prosecuted the action itself. See CIVIL DIV., U.S. DEP'T OF JUSTICE, FRAUD STATISTICS—OVERVIEW (2013), available at http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf. Over a longer time horizon, the discrepancy persists: between 2009 and 2013, in actions where the government declined to proceed, whistleblowers received 1% of qui tam collections (and 6.4% of total awards), compared to 14.1% of collections when the government intervened or prosecuted the action itself. See *id.* (providing fraud statistics from October 1, 1987 through September 30, 2013).

217. See Hamilton, *supra* note 25, at 109 (quoting Jim Wetzler as saying that ability to bring tax claims under NY's FCA would "open [] up the prospect of qui tam lawsuits against large taxpayers who a trial lawyer thinks might have underpaid state tax").

218. See Carr, *supra* note 45, at 39 ("[A]llowing tax prosecution under the state's FCA gives some individuals a considerable financial interest in bringing in as much revenue for the state as possible. . . . There is always a significant potential for abuse when enforcers of the law are given a personal financial incentive."); Hamilton, *supra* note 25, at 113 (writing that while "we've always admired the people who step bravely forward to expose wrongdoing by the powerful. . . . [I]t seems to me that the issue becomes far more ambiguous when the whistleblowing turns on the prospect of outsized financial reward"); Martire & Ferrante, *supra* note 70, at 130 ("Many whistleblowers file these suits hoping for a quick settlement."); Noonan & Comiskey, *supra* note 73, at 353 ("[A]lmost anyone may become a whistleblower with a financial incentive to report questionable transactions"); Neil Weinberg, *The Dark Side of Whistleblowing*, FORBES (Mar. 14, 2005, 12:00 AM), <http://www.forbes.com/forbes/2005/0314/090.html> (writing, with respect to whistleblower laws generally, "[i]n this hell-bent pursuit of jackpot justice, the prospect of a big payoff draws would-be whistleblowers 'like moths to the flame'").

219. See, e.g., Martire & Ferrante, *supra* note 70, at 130 (counseling would-be defendants of whistleblower or qui tam complaints, "[i]f you make it apparent that you intend to aggressively defend your litigation, the whistleblower may back away, focusing instead on less bothersome opponents").

220. See, e.g., Hamilton, *supra* note 25, at 113 (relaying his experience with Texas' tax bounty statute as former deputy comptroller for Texas Office of the Comptroller of Public Accounts: "Informants often turned out to have a grudge to settle or simply wanted to use the information they had to reap a payday at a former employer's expense").

larly in the form of anti-retaliation statutes) and thus should be forced to exhaust all internal remedies with employers before blowing the whistle.²²¹

There is some truth to these perspectives. To be sure, a limited number of attorneys have abused *qui tam* and whistleblower statutes.²²² Moreover, financial awards surely motivate some whistleblowers to report alleged misconduct, while other whistleblowers would qualify as disgruntled employees or persons who see fraudulent behavior where none exists.

Upon close inspection, however, the reality looks considerably different than the portrait of whistleblowers painted by elements of the defense bar. A 2012 report published by the Ethics Resource Center, a non-profit that has compiled and analyzed organizational ethics and compliance data since 1922, investigated whether potential financial bounties encouraged employees to go outside their company to report misconduct directly to law enforcement agencies.²²³ The results were eye-opening. Respondents reported being considerably more motivated by the nature of the misconduct (82% would report if the crime were “big enough”) as well as its potential harm to others (76% would report if failing to do so might harm people), compared to any financial reward (only 43% would report for the “potential to receive a substantial monetary reward”).²²⁴ Nor are whistleblowers necessarily low-level employees looking for a big payday: the likelihood of reporting to the government increases with seniority (56% of top-management say they would go to the government, compared to 41% of non-management employees)²²⁵ and among employees who consider themselves influential within the company (76% compared to 52% of those who feel unlikely to be heard).²²⁶ Even more surprising, particularly in light of the misimpressions of whistleblowers, only 18% of

221. See Houghton et al., *supra* note 72, at 457 (arguing that whistleblowers “should be required to affirmatively notify the potential defendant of the relator’s belief in writing and provide the potential defendant a three-month window to remedy the issue”); Noonan & Comiskey, *supra* note 73, at 353 (stating, while criticizing whistleblower protections under New York’s false claims statute, that “an employee who pilfers documents from his employer to establish a false claim is protected from retaliation even if the employee violated a rule, contract, or duty owed to his employer when he took the documents”).

222. See, e.g., *supra* notes 40–51 and accompanying text (describing improper nuisance suits in Illinois).

223. See ETHICS RES. CTR., 2011 NATIONAL BUSINESS ETHICS SURVEY: WORKPLACE ETHICS IN TRANSITION (2012) [hereinafter ERC 2011], available at <http://www.ethics.org/files/u5/FinalNBES-web.pdf>; ETHICS RES. CTR., INSIDE THE MIND OF A WHISTLEBLOWER: A SUPPLEMENTAL REPORT OF THE 2011 NATIONAL BUSINESS ETHICS SURVEY (2012) [hereinafter ERC 2012], available at <http://www.ethics.org/files/u5/reportingFinal.pdf>. For another rigorous, though non-survey based analysis of the costs and benefits of blowing the whistle, see Sachin S. Pandya, *Tax Liability for Wage Theft*, 3 COLUM. J. TAX L. 113, 132–40, 143 (2012) (examining whistleblowing in context of illegal wage underpayment by employer).

224. ERC 2011, *supra* note 223, at 44; ERC 2012, *supra* note 223, at 14.

225. ERC 2012, *supra* note 223, at 16.

226. *Id.* at 5.

respondents reported the observed misconduct outside their company,²²⁷ while 92% of those did so only after first attempting to report internally.²²⁸ A mere 3% of all whistleblowers went outside their company as a first resort.²²⁹ Finally the report found that victims of retaliation are far more likely to report misconduct outside the company,²³⁰ a cautionary finding for those offering less than enthusiastic support to anti-retaliation measures.²³¹

The takeaway is clear and summarized thoughtfully by two practitioners advising corporate compliance officers and tax executives on how to create a culture conducive to uncovering internal fraud while also mitigating whistleblower risk. “Providing employees with the means of raising concerns remains a best practice even when a company is not legally required to [do so] because whistleblowers are often motivated more by principle—that is to say, wanting to do the right thing—than by money.”²³² The same source reminds us that whistleblower Bradley Birkenfeld²³³ reported UBS’s misconduct to the federal government only after the company’s compliance office repeatedly ignored his internal complaints.²³⁴ Organizations should embrace whistleblowers, studies em-

227. *Id.* at 2; *see also* ETHICS RES. CTR., NATIONAL BUSINESS ETHICS SURVEY OF THE U.S. WORKFORCE 29–30 (2013) [hereinafter ERC 2013], *available at* <http://www.ethics.org/downloads/2013NBESFinalWeb.pdf> (finding that only 20% of whistleblowers ever reported outside company).

228. ERC 2013, *supra* note 227, at 29; *see also* ERC 2012, *supra* note 223, at 2 (noting that 84% first reported internally); NAT’L WHISTLEBLOWERS CTR., IMPACT OF QUI TAM LAWS ON INTERNAL COMPLIANCE: A REPORT TO THE SECURITIES EXCHANGE COMMISSION 4 (2010) [hereinafter NWC], *available at* <http://www.whistleblowers.org/storage/whistleblowers/documents/DoddFrank/nwcreport-tosecfinal.pdf> (finding that 89.7% first reported internally).

229. ERC 2011, *supra* note 223, at 43. Just 2% of whistleblowers went outside the company without ever reporting the misconduct to their employers. ERC 2012, *supra* note 223, at 2.

230. *See* ERC 2011, *supra* note 223, at 37 (reporting that 90% of employees considered reporting outside company after experiencing retaliation for reporting misconduct, compared to 69% who did not experience retaliation).

231. The anti-retaliation statute contained in New York’s FCA has received particular attention of late. Section 191 protects whistleblowers from retaliation (and provides corresponding relief) due to “lawful acts . . . in furtherance of an action brought under this article or other efforts to stop one or more violations of this article” N.Y. STATE FIN. LAW § 191(1) (McKinney 2013). The definition of “lawful act,” moreover, permits whistleblowers to “violate a contract, employment term, or duty owed to the employer or contractor, so long as the possession and transmission of such documents are for the sole purpose of furthering efforts to stop one or more violations” of the FCA. *Id.* § 191(2).

232. Dolan & McCormally, *supra* note 70, at 1542.

233. *See supra* notes 1–17 and accompanying text.

234. Dolan & McCormally, *supra* note 70, at 1542; *see also* KPMG AUDIT COMM. INST., IS GOVERNANCE KEEPING PACE? CHALLENGES AND PRIORITIES SHAPING THE AUDIT COMMITTEE AGENDA 1 (2012), *available at* <http://www.kpmg.com/BM/en/IssuesAndInsights/ArticlesPublications/Documents/Advisory/IsGovernancekeepingpace.pdf> (“Escalation of complaints outside of the company happens when employees feel like they’re being ignored”); Alex MacLachlan,

phasize, as they represent a uniquely potent tool to combat fraud and economic crime,²³⁵ both of which erode employee integrity, business reputation, and the bottom line.²³⁶

Additional obstacles discourage whistleblowers from doing the right thing, including high emotional and economic costs. Universally, whistleblowers face tremendous risks. “There is a 100 percent chance that you will be unemployed,” says Patrick Burns of Taxpayers Against Fraud, “the question is, [w]ill you be forever unemployable?”²³⁷ Whistleblowers experience “fear of bodily harm, loss of professional license, loss of employment, loss of career, loss of family”²³⁸ in addition to “bankruptcies. . . [h]ome foreclosures, divorce, suicide and depression,”²³⁹ any of which might reasonably muzzle a would-be whistleblower.

Some members of the defense bar express as much concern that the government will initiate and prosecute frivolous suits as disgruntled employees. These practitioners worry that under state-level FCAs, “the attorney general will issue press releases accusing the taxpayer of fraud (even though fraud does not have to be shown),” thereby imposing undue harm on taxpayer-defendants, including “significant reputational risks.”²⁴⁰ Others acknowledge that provisions like the one contained in New York’s FCA requiring the attorney general to consult with state tax authorities on whistleblower complaints “ostensibly gives the commissioner—the custodian of most tax records—some authority as a gatekeeper to influence the attorney general in deciding whether to proceed with a case.”²⁴¹ These same voices express concern, however, that the attorney general, “who is

Ignoring Whistleblower Hotline Costs UBS \$780M, WHISTLEBLOWER SECURITY NEWS (Sept. 13, 2012, 1:34 PM), available at <http://info.whistleblowersecurity.com/blog/bid/221094/Ignoring-Whistleblower-Hotline-Costs-UBS-780M>; *supra* note 228 and accompanying text.

235. See ASS’N OF CERTIFIED FRAUD EXAM’RS, 2008 REPORT TO THE NATION ON OCCUPATIONAL FRAUD & ABUSE 18, 23 (2008), available at http://www.acfe.com/uploadedFiles/ACFE_Website/Content/documents/2008-rttn.pdf (finding that 46% of all frauds perpetrated against U.S. corporations were detected by tip or employee complaint and that 57% of all tips came from whistleblowers); PRICEWATERHOUSECOOPERS, ECONOMIC CRIME: PEOPLE, CULTURE AND CONTROLS 12, 23 (2007) [hereinafter PwC REPORT], available at https://www.pwc.com/gx/en/economic-crime-survey/pdf/pwc_2007gecs.pdf (reporting from global survey of 5,400 firms that 43% of corporate fraud was uncovered by whistleblowers and tips, and that “whistle-blowing systems that are both well designed and properly implemented can play a decisive role in uncovering criminal activity”).

236. See PRICEWATERHOUSECOOPERS, *Global Economic Crime Survey 2014* (2014), <http://www.pwc.com/CRIMESURVEY>.

237. Paul Sullivan, *The Price Whistle-Blowers Pay for Secrets*, N.Y. TIMES (Sept. 21, 2012), http://www.nytimes.com/2012/09/22/your-money/for-whistle-blowers-consider-the-risks-wealth-matters.html?pagewanted=all&_r=0.

238. Thomas C. Pliske, *Is the Tax Whistleblower’s Identity Protected Under the IRS Tax Whistleblower Program?*, TAX WHISTLEBLOWER BLOGS (May 2, 2011), <http://taxwhistleblowerblogs.com/?p=267>.

239. Sullivan, *supra* note 237 (quoting John R. Phillips of Phillips & Cohen).

240. Gustafson et al., *supra* note 70, at 54.

241. Trachtenberg et al., *supra* note 29, at 375.

an independently elected official in New York,” may nevertheless “advance a case over the objection of the Department of Taxation and Finance.”²⁴²

These concerns are unpersuasive. It is certainly possible that an attorney general’s office could interpret a tax statute differently than a state tax agency and choose to proceed with a whistleblower claim where the tax agency would have declined to prosecute. But that possibility seems remote. Prosecutors do not like losing cases of any kind (tax or otherwise), and if a state’s tax experts believe that the chances of successfully challenging a tax position or transaction are slim, there is very little to gain and much to lose by proceeding headlong toward likely defeat. As one practitioner put it, “[i]t would be very irresponsible to use [prosecutorial authority under a false claims statute] as a tool for political gain, other than to do a good job and get headlines for that reason. . . . You’re not going to risk a case and embarrass yourself for personal political purposes.”²⁴³ Indeed, there is a difference between diligently enforcing the law and abusing one’s power, just as there is a difference between advocating fair and effective law enforcement and slipping into conspiracy theories about prosecutorial abuses.

C. *The Positive Case: Whistleblowers Can Bridge the Information Gap and Shrink the Tax Gap*

Part of the claim that tax noncompliance is an inappropriate subject of whistleblower actions (especially actions initiated under FCAs) involves the attempt to control the flow of information from taxpayer to tax agency. Currently, taxpayers and their advisors dictate the sharing of information, a reality that puts tax agencies at a significant disadvantage in enforcing the tax laws. In fact, as I have written elsewhere, tax enforcement “is so severely handicapped by informational asymmetries that taxpayers can engage in abusive tax planning, accurately report transactions associated with that planning, yet still provide [] no indication of abusive activity.”²⁴⁴ Private enforcement of the law—through private attorney general statutes, whistleblower laws, and qui tam statutes—can shrink significantly the information deficits faced by tax officials at all levels of government.²⁴⁵ Such forms of enforcement can rebalance the flow of

242. *Id.*

243. Hamilton, *supra* note 33, at 156 (quoting David Koenigsberg of Menz Bonner Komar & Koenigsberg LLP).

244. Dennis J. Ventry, Jr., *Cooperative Tax Regulation*, 41 CONN. L. REV. 431, 458 (2008).

245. *See id.* at 453–62 (examining resource and information deficits faced by tax officials and discussing private enforcement of law as partial solution); Dennis J. Ventry, Jr., *Whistleblowers and Qui Tam for Tax*, 61 TAX LAW. 357, 376–82 (2008) (same, with particular reference to qui tam actions for tax noncompliance); *see also* William E. Kovacic, *Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels*, 69 GEO. WASH. L. REV. 766, 767, 774 (2001) (writing, in context of private enforcement of cartels, “[o]ne way to counter greater efforts at concealment is to establish mechanisms for inducing [] insiders to disclose their miscon-

information, recalibrate the compliance playing field between taxpayers and their advisors versus tax officials, shift the cost of compliance to the party or parties with the lower cost of monitoring,²⁴⁶ and clarify (rather than exploit) “unsettled” or “uncertain” areas of the law by shining a light on practices that would otherwise remain in the shadows.

For precisely these reasons—transparency, lifting the veil of secrecy, and settling “unsettled” areas of the law—members of the defense bar oppose tax administration regimes that include private enforcement. “Corporate interests favor a process that allows them to raise tax questions for resolution,” writes Dan Bucks, longtime head of the Multistate Tax Commission, “but they do not want citizens to raise questions. . . . In the end, the issues about citizen participation in compliance actions are simply about power and control of the tax agenda. Corporations have that power now, and they prefer not to share it with citizens.”²⁴⁷ Yet there is “no question” that allowing “citizens an incentive to report tax fraud will likely lead to more revenue collection and less undetected fraud,” tax journalist Jennifer Carr has said.²⁴⁸ “Increasing the ability of the state to detect and

duct” such that “private monitoring” becomes “an antidote to concealment”); Joshua D. Rosenberg, *Narrowing the Tax Gap: Behavioral Options*, 117 TAX NOTES 517, 525–31 (2007) (arguing for tax whistleblower laws and qui tam provisions to address shortcomings in traditional tax enforcement regimes); 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 (1996) (stating, while arguing for private enforcement of tax laws through qui tam actions, “[u]nfortunately, the Service is likely to detect noncompliance only when it has access to tax-relevant information. Given the taxpayer’s strong financial incentive to avoid taxes, reliance on the taxpayer to provide self-incriminating information would be, and has been, seriously misplaced.”).

246. Scholars have shown that private enforcement of the law can provide a particularly efficient form of regulation. Modern economic theory, in particular, holds that the optimal solution to allocating compliance burdens often involves shifting the cost of compliance to those with lower monitoring costs, such as to insiders or knowledgeable outsiders with intimate knowledge of potentially noncompliant behavior. As former FTC Commissioner William Kovacic stated the proposition: “The chief virtue of private monitoring is that it gives monitoring tasks to individuals closest to the relevant information.” Kovacic, *supra* note 245, at 774; see also Jonathan B. Baker, *Antitrust in the 1990s*, FTC HISTORY: BUREAU OF ECONOMICS CONTRIBUTIONS TO LAW ENFORCEMENT, RESEARCH, AND ECONOMIC KNOWLEDGE AND POLICY 103–12 (2003), available at http://www.ftc.gov/sites/default/files/documents/public_events/roundtable-former-directors-bureau-economics/directorstablegood.pdf. See generally Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1, 1–15 (1974) (concluding that private enforcement of public laws can be more efficient than public enforcement).

247. Bucks, *supra* note 198, at 287. Bucks served for nearly twenty years as the Executive Director of the Multistate Tax Commission and subsequently as the longest serving Director of Revenue for the state of Montana.

248. Carr, *supra* note 45, at 39; see also Hamilton, *supra* note 25, at 112 (quoting William Comiskey, former Deputy Commissioner of Office of Tax Enforcement with New York Department of Taxation and Finance, in context of enhanced New York FCA authorizing tax claims: “It’s a law that should be welcomed by honest taxpayers and businesses”).

eliminate tax fraud is a positive for law-abiding taxpayers whose tax burdens are bigger because of scofflaws.”²⁴⁹ In addition to leading to “significant recoveries,” expanding tax enforcement regimes to allow citizen participation “will shine a light on major tax abuses that are unknown to government, and it will change taxpayer behavior for the better.”²⁵⁰ In fact, as former New York tax official William Comiskey has observed, private tax enforcement amounts to “the most powerful tool that government has for penetrating complex schemes to defraud the government.”²⁵¹

Tax agencies are totally outgunned. They “need all the help they can get from the public” due to the severe resource and information deficiencies under which they operate.²⁵² Without “access to all the reasonable information they need,” tax agencies simply cannot collect all taxes owed.²⁵³ Whistleblowers can close the information gap by bringing to light complex and hidden interpretations of the law, turning them over to tax officials for investigation, and allowing dispute resolution procedures and the judicial process to “settle” unsettled areas of the law.

Meanwhile, elements of the defense bar argue that some areas of the tax law are so cutting-edge that they should be allowed to develop before being put under the microscope by either tax authorities or courts.²⁵⁴ But, in the words of Dan Bucks, that “is not a credible argument.”²⁵⁵ For one thing, the more complex the law, “the more critical it is to have people with inside knowledge explain what is going on to the taxing authorities.”²⁵⁶ For another, enforcement regimes that get the hard cases in front of tax officials and judges for scrutiny “will clarify the application of the law in more cases, bringing greater certainty and transparency to the entire tax system,” a result all interested parties—taxpayers, tax advisors, tax officials, and regular citizens—should embrace.²⁵⁷ In the event the hard cases involve sufficiently significant ambiguities in the law that militate against attaching liability to an alleged underpayment of tax, courts should be trusted to filter out those situations and concentrate on the

249. Carr, *supra* note 45, at 39.

250. Hamilton, *supra* note 25, at 112 (quoting William Comiskey); *see also* Carr, *supra* note 45, at 39 (noting, while endorsing public participation in tax enforcement, that “the state and its auditors can only do so much because of the number of taxpayers and the complexity of potential tax evasion schemes”).

251. Hamilton, *supra* note 25, at 112 (quoting William Comiskey).

252. Bucks, *supra* note 198, at 287.

253. *Id.*

254. *See id.* (writing that these voices argue that “state tax matters are simply too ambiguous to be reviewed by tax agencies and courts”).

255. *Id.*

256. Carroll, *supra* note 54, at 442 (summarizing comments of Peter Wilson Chatfield of Phillips & Cohen LLP); *see also id.* (quoting Monica Navarro, professor and whistleblower attorney, “[b]ecause the tax laws are complex, insiders are often needed to expose those people who are ‘gaming the system’”).

257. Bucks, *supra* note 198, at 287.

cases that reflect truly culpable behavior.²⁵⁸ If taxpayers and their advisors genuinely believe in good faith that their “ambiguous” or “uncertain” tax position is correct, they can afford themselves of the numerous procedures for resolving the disagreement: seeking a private letter ruling or some other formal or informal advanced guidance; challenging the agency’s interpretation of the position (if the agency has one) by paying the tax and suing for refund; or disclosing the position.

In any event, we should remain suspicious of voices that, on the one hand, criticize ambiguities and uncertainties in the tax law and, on the other hand, undermine efforts to clarify the law. Or, as Dan Bucks has observed, “[i]nterests that thrive on creating, amplifying, and preserving ambiguities in the laws are not well positioned to use those same ambiguities as an argument against allowing citizens to file cases to request and require equitable tax compliance.”²⁵⁹ Over the years, practitioners have exploited “ambiguous” and “uncertain” areas of the tax law to create and endorse tax avoidance transactions for the benefit of taxpayer-clients and for themselves. Many of these transactions were fraudulent and invalidated by courts.

Consider the leveraged-lease and inflated-basis shelters of the late 1990s and early 2000s. Prominent members of the tax bar argued that excessively leveraged-lease transactions—including LILOs, SILOs, and QTEs—were innocuous variants of leveraged-lease deals endorsed by the U.S. Supreme Court in *Frank Lyon Co. v. United States*.²⁶⁰ The transactions were blessed by “decades of settled law,” practitioners insisted, “including decisions of the U.S. Supreme Court and Treasury regulations.”²⁶¹ A number of well-respected law firms vouched for the transactions’ legitimacy,²⁶² rendering opinions that, when examined closely, flouted statutory and regulatory rules, defied regulatory guidance;²⁶³ contrived to

258. See, e.g., *State ex. rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Ctrs., Inc.*, 878 N.E.2d 1152, 1158 (Ill. App. Ct. 2007) (ruling, in analyzing alleged false claim under Illinois FCA, that liability cannot attach when it is premised on violation of unsettled area of law because taxpayer cannot be said to have made “knowingly” false claim).

259. Bucks, *supra* note 198, at 287–88.

260. 435 U.S. 561 (1978).

261. Kenneth J. Kies, “*Leave Us A Loan*”: A Rebuttal to Claims that Defeasance Invalidates Lease Transactions, 102 TAX NOTES 763, 765 (2004); see also Michael J. Flemming, *Equipment Leasing Association Unhappy with LILO Revenue Ruling*, 83 TAX NOTES 477, 477 (1999) (saying that challenges to LILOs were “inconsistent with the fundamental tax principles that have governed similar issues in leasing transactions for more than 30 years”); William A. Macan, IV, *Good vs. Evil? Not this Time: SILO’s Bad Rap*, 103 TAX NOTES 241, 242 (2004) (“SILO transactions present no issues on the transfer-of-control front that have not been a part of leasing from the outset 40 years ago.”).

262. See Kies, *supra* note 261, at 771 (“At least 11 major law firms are understood to have issued tax opinions regarding LILO transactions.”).

263. Despite an onslaught of IRS guidance attacking heavily leveraged-lease deals, leasing shelter lawyers were undeterred and continued to plan, advise, and consummate LILOs, SILOs, and QTEs. The guidance that these shelter lawyers

avoid legislative attempts to curb abusive leasing deals; and virtually ignored longstanding anti-abuse doctrines created by the courts, particularly the economic substance doctrine.²⁶⁴ These deals crumbled once under the judicial microscope, but not before costing the U.S. Treasury billions of dollars. Courts eventually found that the transactions contained none of the efficiencies present in traditional leveraged finance,²⁶⁵ and invali-

largely ignored included most prominently: Rev. Rul. 99-14, 1999-1 C.B. 835 (disallowing tax benefits for interest and rent in connection with a LILO transaction that failed to transfer the indices of ownership and that ultimately lacked economic substance); I.R.S. Notice 2000-15, 2001-1 C.B. 826 (naming LILOs and “[t]ransactions that are the same as or substantially similar” as “listed” tax avoidance transactions); Rev. Proc. 2001-28, 2001-1 C.B. 1338 (modifying and superseding Rev. Proc. 75-21, 1975-1 C.B. 367); Rev. Rul. 2002-69, 2002-2 C.B. 760 (modifying Rev. Rul. 99-14 and adding future interest argument for invalidating LILOs and substantially similar transactions); IRS, COORDINATED ISSUE PAPER—LOSSES CLAIMED AND INCOME TO BE REPORTED FROM LEASE IN/LEASE OUT TRANSACTIONS (2003); Memorandum from Deborah Butler, IRS Assistant Chief Counsel, to Dist. Counsel, Ohio Dist. (June 30, 2000), *available at* F.S.A. 2000-45-002.

264. I describe these activities in a forthcoming article, entitled, *A Tale of Two Shelters: What Tax Advisors Knew or Should Have Known* (examining behavior of tax practitioners in two tax shelter case studies, one involving leveraged-lease transactions and another involving inflated-basis transactions).

265. Commentators and observers had long recognized the sharp distinctions between permissible and impermissible leveraged-lease transactions, even while leasing practitioners blurred the line. *See, e.g., Tax Shelters: Who's Buying, Who's Selling, and What's the Government Doing About It?*, Hearing Before the S. Comm. on Fin. 108th Cong. 3–5 (2003), *available at* <http://www.finance.senate.gov/imo/media/doc/102103janettest.pdf> (statement of “Mr. Janet,” witness pseudonym) (testifying on LILO and SILO deals, and reporting “the leasing industry has not always been this way, nor are all leasing companies involved in this scam. . . . It is mostly [members of the Equipment Leasing Association] belonging to the ‘Big-Ticket Leasing Group’ . . .”); U.S. DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2005 REVENUE PROPOSALS 124 (2004), *available at* <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2005.pdf> (concluding that SILOs “have no meaningful financial or economic utility other than the transfer of tax benefits to a U.S. taxpayer (by means of a purported ‘sale’ of property) in exchange for the payment of an accommodation fee to the tax-indifferent party”); Letter from Edmund S. Cohen to Pamela Olson, Assistant Treasury Sec’y for Tax Policy, Re: Tax-Exempt Leasing Budget Proposal (Jan. 30, 2004), *available at* 2004 TAX NOTES TODAY 29-25 (differentiating between legitimate transactions meeting “‘true-lease’ requirements” and illegitimate “‘defeased’ debt structures” such as “‘SILO’ or ‘LILO’ transactions”); Letter from Pamela F. Olson, Assistant Treasury Sec’y for Tax Policy, to Norman Y. Mineta, Secretary, Dep’t of Transp. (Nov. 26, 2003), *available at* 2005 TAX NOTES TODAY 40-49 (noting that while sale-leasebacks were “a time-honored method of raising capital to finance or refinance acquisition or construction,” SILOs were “fundamentally different”); Lee A. Sheppard, *Lease In, Lease Out: Safe Harbor Leasing Revisited*, 81 TAX NOTES 1167, 1167, 1170 (1998) (“[B]usiness and economics have been stripped out [of LILOs and SILOs] so only the purchase of tax benefits remains. . . . In contrast [to *Frank Lyon* deals], a LILO transaction has no business reason to exist. The real owner of a large and unwieldy asset may want to borrow against it but, as a borrower, it would want the unfettered use of the borrowed funds, which the European government clearly does not have in a LILO deal.”).

dated them as prohibited transfers of tax benefits designed and propped up by over-reaching practitioners. But the damage was done.²⁶⁶

The story was much the same for inflated-basis shelters. Planners and promoters of these deals played even looser with the rules than the leasing shelter lawyers, creating an assembly line of notoriously abusive tax avoidance products including “BOSS” (bond and options sales strategy), which the IRS considered the corporate precursor to its partnership progeny: “Baby Boss”²⁶⁷ or “Son or Boss,” “OPS” (option partnership strategy), “SOS” (short option strategy), and “MLD” (market-linked deposits). As with the leasing shelters, prominent law firms and accounting firms endorsed the inflated-basis deals with legal opinions that circumscribed statutory and regulatory rules, scorned regulatory guidance,²⁶⁸ disdained legislative attempts to curb inflated-basis deals,²⁶⁹ placed undue and unreasonable reliance on a single, inapposite Tax Court case,²⁷⁰ and reck-

266. See, e.g., *BB&T Corp. v. United States*, 523 F.3d 461 (4th Cir. 2008); *Altria Grp., Inc. v. United States*, 694 F. Supp. 2d 259 (S.D.N.Y. 2010), *aff'd*, 658 F.3d 276 (2d Cir. 2011); *Local 295/Local 851 IBT Emp’r Grp. Pension Trust & Welfare Fund v. Fifth Third Bancorp.*, 731 F. Supp. 2d 689 (S.D. Ohio 2008); *AWG Leasing Trust v. United States*, 592 F. Supp. 2d 953 (N.D. Ohio 2008); *Hoosier Energy Rural Elec. Coop., Inc. v. John Hancock Life Ins., Co.*, 588 F. Supp. 2d 919, 921, 928 (S.D. Ind. 2008) (calling aggressively leveraged lease deal at issue “blatantly abusive tax shelter” and “rotten to the core”), *aff’d*, 582 F.3d 721 (7th Cir. 2009); *Wells Fargo & Co. v. United States*, 91 Fed. Cl. 35, 38 (2010) (“Although well disguised in a sea of paper and complexity, the SILO transactions essentially amount to [] purchase of tax benefits for a fee from a tax-exempt entity that cannot use the deductions.”). The only case involving aggressive leveraged-lease deals in which the taxpayer prevailed (and only temporarily) involved unique facts that the court took pains to differentiate from other deals. See *Consol. Edison Co. of N.Y., Inc. v. United States*, 90 Fed. Cl. 228, 232 (2009) (emphasizing that “[t]he conclusions of the court offered in this opinion are based on the specific and unique facts which led to, and were part of, the [] [t]ransaction”), *rev’d*, 703 F.3d 1367 (Fed. Cir. 2013).

267. See Press Release, U.S. Dep’t of the Treasury, Treasury Shuts Down “Son of Boss” Abusive Tax Shelter (Aug. 11, 2000) *available at* <http://www.treasury.gov/press-center/press-releases/Pages/l831.aspx>; Lee A. Sheppard, *Treasury Shuts Down Baby BOSS Deals*, 88 TAX NOTES 850 (2000).

268. The guidance that these shelter lawyers brushed aside included most prominently I.R.S. Notice 99-59, 1999-2 C.B. 761 (warning practitioners and taxpayers that losses generated by BOSS transactions lacked economic substance, were subject to challenge under array of IRC sections, would be disallowed for federal income tax purposes, and that persons who participated in or promoted transactions would face significant penalties); see also I.R.S. Notice 2000-15, 2000-1 C.B. 826 (identifying BOSS deals as “listed” transactions); I.R.S. Notice 2000-44, 2000-2 C.B. 255 (disallowing inflated-basis, contingent liability transactions on statutory, regulatory, and economic substance grounds); I.R.S. Notice 2001-17, 2001-1 C.B. 730 (identifying inflated-basis, contingent liability tax shelters as “listed” transactions).

269. See, e.g., Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763. For a discussion of the Community Renewal Tax Relief Act of 2000, see *infra* note 270.

270. The impertinent case was *Helmer v. Comm’r*, 34 T.C.M. (CCH) 727 (1975), which purportedly established the rule allowing the planners and promoters of inflated-basis transactions to argue that a partner need not account for cer-

lessly disregarded longstanding judicial doctrines, particularly the economic substance doctrine. Even more spectacularly than the leasing shelters, these schemes collapsed when scrutinized by courts: to date, the government has not lost a single case litigated to conclusion involving inflated-basis, contingent liability shelters. Once more, however, the damage had been done with the national exchequer losing tens of billions of dollars.

tain contingent liabilities when determining outside basis. As one practitioner recently put it, the inflated-basis, contingent-liability shelter “was based on taxpayers misapplying a government victory in a case that should not have been precedential . . .” Andrew Velarde, *Supreme Court Applies Valuation Misstatement Penalty in Woods*, 141 TAX NOTES 1014, 1016 (2013) (quoting Jasper L. Cummings, Jr., of Alston & Bird LLP). *Helmer* should have been further irrelevant for shelter lawyers authoring opinions propping up these deals due to proposed retroactive regulations that were part of President Clinton’s fiscal year 2001 budget proposal pertaining to the assumption of liabilities that sought to invalidate the basis arguments allegedly blessed by *Helmer*. See JOINT COMM. ON TAXATION, DESCRIPTION OF REVENUE PROVISIONS CONTAINED IN THE PRESIDENT’S FISCAL YEAR 2001 BUDGET PROPOSAL 317–22 (2000), available at <https://www.jct.gov/publications.html?func=startdown&id=1224>. *Helmer* should have been still further inapposite as precedent when Congress enacted the Community Renewal Tax Relief Act in December 2000, which fulfilled the long-running effort to prevent “duplication of loss through assumption of liabilities giving rise to a deduction,” and also authorized the Treasury Department to prescribe similar anti-abuse rules for partnerships and S corporations with prospective changes made retroactive to October 18, 1999. See Community Renewal Tax Relief Act of 2000, Pub. L. No. 106-554, § 309, 114 Stat. 2763. Together, the provisions “effectively ended the BOSS transactions.” *Clearmeadow Invs., LLC v. United States*, 87 Fed. Cl. 509, 513 (2009). And, according to subsequent court decisions, they put an end to the Son of Boss deals as well. See *Cemco Investors, LLC v. United States*, 515 F.3d 749, 752 (7th Cir. 2008) (concluding that retroactive section 752 regulations “applie[d] to this [Son of Boss] deal and prevent[ed] Cemco’s investors from claiming a loss”); *Maguire Partners—Master Invs., LLC v. United States*, No. CV 06-07371-JFW(RZx), 2009 U.S. Dist. LEXIS 8361, at *59–62 (C.D. Cal. Dec. 11, 2009) (agreeing with *Cemco* court that section 752 regulations should be applied retroactively to contingent partnership liabilities). *But see* *Murfam Farms, LLC v. United States*, 88 Fed. Cl. 516 (2009) (refusing to apply section 752 regulations retroactively). Finally, *Helmer* transactions were already vulnerable to attack under the partnership anti-abuse rules and the economic substance doctrine, even before Congress authorized the Treasury Department to promulgate retroactive regulations. According to two legal scholars:

The controversy over the *Helmer* rule amounted to little more than a distraction because the *Helmer*-based technical arguments advanced by shelter counsel could not survive scrutiny under the economic substance doctrine. Stated differently, shelter counsel invoked the *Helmer* rule to justify rendering penalty-shield opinions while discounting the contrary position of revenue rulings and Notice 2000-44 as well as the lack of economic substance in the contingent-liability shelters.

Karen C. Burke & Grayson M.P. McCouch, *COBRA Strikes Back: Anatomy of a Tax Shelter*, 62 TAX LAW. 59, 79 (2008); see also Karen C. Burke, *Tax Avoidance As a Legitimate Business Purpose*, 118 TAX NOTES 1393, 1398 (2008) (stating that inflated-basis transactions were subject to challenge under section 701 partnership anti-abuse rule, which “explicitly requires a weighing of business purpose against the purported tax benefits”).

These schemes “worked” so long as they were in the shadows. Promoters pitched the “cutting edge” deals individually to potential clients but prohibited anyone from leaving the secretive marketing presentations with even a shred of paper describing the schemes. Taxpayer-clients signed confidentiality agreements that prevented them from discussing the deals with personal lawyers and accountants. Banks colluded with promoters to set up defeasance arrangements and circular cash flows (for the leveraged-lease deals) and offsetting options trades (for the inflated-basis deals) that generated the phony tax benefits. And lawyers and accountants devised ways to hide the schemes on their clients’ tax returns.

It was precisely the environment where the government needed the help of an insider to have any idea what was happening. A lawyer or accountant in one of the firms, a bank official, a member of the promoter’s covert syndicate of tax shelter participants, *anyone* could have provided information to end the deception and enormous revenue loss. And while a sufficient number of anonymous packages made their way to government officials and members of the press containing confidential transaction documents that described some of these deals,²⁷¹ the officials were slow to respond, the deals were opaque, and the IRS whistleblower law at the time was ineffective and virtually invisible to the public, several years away from the 2006 amendments that would invigorate the statute.²⁷² A viable whistleblower regime that afforded knowledgeable insiders a process to turn over information to the government and its army of tax experts could have blown the lid off the shelter shenanigans. In the process, such a program could have saved untold billions of dollars in lost revenue, slashed the number of shelter cases on overloaded court dockets, and allowed officials to allocate resources to core tax administration.

Whistleblowers can do more than just uncover and report knowing violations of the law. They can also prevent noncompliance from happening in the first place. An effective whistleblower program (run either

271. See Lee A. Sheppard, *Captain Sandy’s Tax Shelter*, 89 TAX NOTES 1208, 1209 (2000) (describing “package” sent to author “with the identity of the recipient removed and an anonymous handwritten note asking ‘Why is a VP Tax of a major company peddling this crap?’”); Lee A. Sheppard, *Corporate Tax Shelters: More Plain Brown Wrappers*, 87 TAX NOTES 321, 322 (2000) (discussing “unmarked envelopes [and their contents] that contain tax shelter materials sent anonymously to journalists and government officials”); Lee A. Sheppard, *Shelter Opinions: What They Won’t Do for Money*, 87 TAX NOTES 17, 17 (2000) (discussing contents of “plain brown envelope” that author received, “the tax equivalent of porno—one of the legal opinions used by the investment banker in *ACM Partnership v. Commissioner*”); Janet Novack & Laura Saunders, *The Hustling of X-Rated Shelters*, FORBES (Dec. 14, 1998, 12:00 AM), <http://www.forbes.com/forbes/1998/1214/6213198a.html> (reporting on “two different letters” authored by tax professionals at accounting firm Deloitte & Touche peddling marketed shelter to non-audit clients, and, further, discussing an anonymous letter received by the IRS “blowing the lid off a particularly smelly scheme . . . signed simply ‘A Pressured Practitioner’”).

272. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958–60; see also *infra* notes 354–58 and accompanying text.

through a state's FCA or as a standalone statute) would add significant risk to noncompliance by increasing the probability of detection and the likelihood of potential penalties, the two most important variables in traditional tax deterrence models.²⁷³ In turn, increased aversion to noncompliance—due to increased fear of detection and palpable penalties²⁷⁴ as well as additional variables such as moral, ethical, and reputational inputs²⁷⁵—would result in increased revenue collection and, by

273. For traditional economic deterrence models see Michael G. Allingham & Agnar Sandmo, *Income Tax Evasion: A Theoretical Analysis*, 1 J. PUB. ECON. 323, 324 (1972) (extending classic work of Gary Becker's general theory of criminal deterrence to tax compliance, and arguing that degree of deterrence, calculated as product of probability of detection and size of penalty, determines the amount of income evaded for any particular taxpayer). For studies indicating the importance of detection on tax compliance, see Kurt J. Beron, Helen V. Tauchen & Anne Dryden Witte, *The Effect of Audits and Socioeconomic Variables on Compliance*, in WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 67 (Joel Slemrod ed., 1992); A. Mitchel Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998); Joel Slemrod, Marsha Blumenthal & Charles W. Christian, *Taxpayer Response to an Increased Probability of Audit: Evidence from a Controlled Experiment in Minnesota*, 79 J. PUB. ECON. 455 (2001). For studies indicating the importance of penalties on compliance, see James Alm, Isabel Sanchez & Ana de Juan, *Economic and Noneconomic Factors in Tax Compliance*, 48 KYKLOS 3 (1995); Ana de Juan, Miguel A. Lasheras & Rafaela Mayo, *Voluntary Tax Compliant Behavior of Spanish Income Tax Payers*, 49 PUB. FIN. 90 (Supp. 1994); Steven Klepper & Daniel Nagin, *Tax Compliance and Perceptions of the Risks of Detection and Criminal Prosecution*, 23 L. & SOC'Y REV. 209 (1989).

274. Recent scholarship on tax compliance provides additionally sophisticated analyses of taxpayer behavior and optimal tax enforcement models by examining, among other factors, the role of uncertainty, the use of fault-based penalties and random audits, and the potential for "cooperative" or "responsive" tax administration. See, e.g., Michael Doran, *Tax Penalties and Tax Compliance*, 46 HARV. J. ON LEGIS. 111 (2009); Mark P. Gergen, *Uncertainty and Tax Enforcement: A Case for Modest Fault-Based Penalties*, 64 TAX L. REV. 453 (2011); Sarah B. Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 CONN. L. REV. 161 (2008); Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241 (2013); Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1021 (2009); Kyle D. Logue, *Optimal Tax Compliance and Penalties When the Law Is Uncertain*, 27 VA. TAX REV. 241 (2007); Leigh Osofsky, *The Case Against Strategic Tax Law Uncertainty*, 64 TAX L. REV. 489 (2011); Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 599–605 (2006); Ventry, *supra* note 244.

275. See James Alm & Chandler McClellan, *Tax Morale and Tax Compliance from the Firm's Perspective*, 65 KYKLOS 1 (2012); Marsha Blumenthal, Charles Christian, Joel Slemrod & Matthew G. Smith, *Do Normative Appeals Affect Tax Compliance? Evidence from a Controlled Experiment in Minnesota*, 54 NAT'L TAX J. 125 (2001); Dan M. Kahan, *Trust, Collective Action, and Law*, 81 B.U. L. REV. 333 (2001); Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management As a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863 (2004); Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453 (2003); Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675 (2012); Eric A. Posner, *Law and Social Norms: The Case of Tax Compliance*, 86 VA. L. REV. 1781 (2000); Bruno S. Frey & Lars P. Feld, *Deterrence and Morale in Taxation: An Empirical Analysis* (CESifo Working Paper No. 760) (2002), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=341380>.

extension, reductions in the tax gap at both the federal and state levels. At the federal level in 2006 (the year for which we have the most recent data), the gap between what taxpayers owe and what they pay on time exceeded \$450 billion,²⁷⁶ which, adjusted for inflation, amounts to more than half a trillion dollars in 2014.²⁷⁷ States, too, are leaving money on the table. In California, the Franchise Tax Board (FTB) reports that the state's tax gap surpasses \$10 billion annually,²⁷⁸ a figure that the FTB hopes to shrink through, among other measures, information provided by whistleblowers.²⁷⁹

It cannot be said enough: “[T]ax agencies need all the help they can get from the public.”²⁸⁰ Whether a revenue agent or a whistleblower identifies tax noncompliance should be irrelevant. The point is to stop cheating, in both “settled” and “unsettled” areas of the law.²⁸¹

IV. EASY ANSWERS TO INFLATED CONCERNS OVER TAX WHISTLEBLOWERS

This final Part embraces current tax whistleblowing regimes, while at the same time acknowledging their shortcomings. It offers recommendations for improving whistleblower statutes at both the state and federal level. Moreover, it highlights thoughtful contributions from members of the defense bar suggesting compliance and cultural changes within business organizations designed not only to reduce risks associated with tax whistleblower laws but also to help whistleblower programs succeed in rooting out misconduct. Finally, it offers tax whistleblower alternatives for

276. IRS, TAX GAP FOR TAX YEAR 2006: OVERVIEW 1 (2012), available at http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf.

277. See BUREAU OF LABOR STATISTICS, *CPI Inflation Calculator*, http://www.bls.gov/data/inflation_calculator.htm (last visited Apr. 30, 2014).

278. See CAL. STATE FRANCHISE TAX BD., *Tax Gap*, https://www.ftb.ca.gov/Tax_Gap/index.shtml (last visited Apr. 30, 2014).

279. *Id.* The “Tax Gap” website includes a link to the state’s web-based whistleblower hotline. See CAL. STATE FRANCHISE TAX BD., *Reporting Income Tax Fraud*, https://www.ftb.ca.gov/online/Fraud_Referral/index.shtml (last visited Apr. 30, 2014).

280. Bucks, *supra* note 198, at 287.

281. Some members of the defense bar appear reluctant to embrace tax claims under FCAs, even for settled areas of the law. In a 2011 *State Tax Notes* article expressing a dubious opinion of the New York false claims statute, Timothy Noonan and William Comiskey provide six hypothetical scenarios under which “whistleblowers might find fertile ground.” Noonan & Comiskey, *supra* note 73, at 350. With one possible exception, all of the authors’ hypotheticals reflect instances where the taxpayer knowing or knowingly (as defined under false claims statutes, the Internal Revenue Code, and its underlying regulations) submitted false or fraudulent information to the tax agencies, *exactly* the situations where traditional tax administration desperately needs help from insiders to uncover and prosecute noncompliance. The one hypo that presented a moderately murkier situation involved an aggressive interpretation of a purported “unclear and ambiguous” state sales tax issue; even here, as Part III.C described, exposing the aggressive interpretation to the light of day would clarify rather than exploit any ambiguities.

states to consider beyond permitting tax claims under their FCAs, especially standalone whistleblower statutes based on section 7623 of the Internal Revenue Code.

As others have observed, “[t]he developments in false claims laws [and, I would add, in section 7623] provide an opportunity for designing a broader set of reasonable policies for citizen complaints and actions regarding tax noncompliance.”²⁸² Rather than simply rejecting these policies or attempting to beat them back, the time is ripe to “work out the details of how citizen actions can become a regular part of the compliance process,” to engage in a constructive debate on tax whistleblowing, and “to choose to be on the right side of history.”²⁸³

282. Bucks, *supra* note 198, at 288.

283. *Id.* Some commentators remain on the wrong side of history. *See, e.g.*, Martire & Ferrante, *supra* note 70, at 128 (“Be a strong voice against the enactment of FCA litigation in the tax arena. Emphasize the powerful enforcement mechanisms that already are present and available for use by state tax departments against tax cheats. Explain the risks created when private citizens, with no tax experience, are armed with legislation that gives them the power to drive tax policy by filing whistleblower claims.”); *id.* at 129 (“Speak up in favor of the amendment of existing state FCAs to exclude tax claims, or other modifications designed to limit a whistleblower’s right to file tax-related claims.”); *id.* (“In all likelihood, the state did not initiate the FCA litigation. The state’s attorneys may even agree with you, at least privately, that the whistleblower’s claim lacks merit. Despite this fact, the state may not have the resources to take an active role in the matter. It may simply decline to intervene, which frees the whistleblower to proceed with the litigation on its own. This is cheaper for the state, but it does not relieve the litigation expense for the taxpayer defendant.”). The authors make these observations without any substantive analysis or evidence to support their claims. Moreover, and with respect to the authors’ last assertion, data from the federal False Claims Act (reliable state-level data is not available) clearly indicates that when the government declines to intervene in a whistleblower action, its decision is reinforced by the phenomenally high probability that its enforcement dollars are better spent elsewhere. Indeed, between 1988 and 2013, in instances where the government declined to intervene in a qui tam action, whistleblowers generated just 0.8% of total qui tam collections (and only 4.8% of total qui tam awards). *See* CIVIL DIV., U.S. DEP’T OF JUSTICE, *supra* note 216. There is also substantial evidence that state governments routinely seek dismissal of whistleblower complaints that lack merit or that, in the eyes of the state, should be handled administratively by the tax department. *See, e.g.*, State *ex rel.* Beeler, Schad & Diamond, P.C. v. Burlington Coat Factory Warehouse Corp., 860 N.E.2d 423 (Ill. App. Ct. 2006) (affirming dismissal of action on motion brought by state attorney general over whistleblower’s objections); Int’l Game Tech., Inc. v. Second Judicial Dist. Court, 127 P.3d 1088, 1105 (Nev. 2006) (granting state’s motion to dismiss for good cause, including “consistent interpretation and application of the tax statutes”); *see also* Carroll, *supra* note 174, at 623 (quoting Lynn Gandhi of Honigman on New York’s FCA, “I don’t know why we need this”); Houghton et al., *supra* note 70, at 595 (stating that FCA claims “waste[] valuable resources of the states, the courts, and the defendants forced to defend themselves against overreaching”); Noonan & Comiskey, *supra* note 73, at 350, 353 (exclaiming “Holy smokes!” at three different points in article while purporting to rigorously analyze New York’s FCA).

A. *Constructing a Model False Claims Act Permitting Tax Whistleblower Claims*

The following recommendations do not constitute a “model” false claims statute authorizing tax whistleblower claims, at least not in the traditional sense of the word. Instead, they outline essential threshold components of a model statute. The distinction is important. Jurisdictions need comprehensive baseline provisions to reflect the lessons of past experience, but they also need flexibility to craft a tax whistleblower statute that reinforces their own priorities. Part IV.C, on the other hand, examines how a “model” standalone tax whistleblower statute might look. The recommendations below attempt to offer a standardized yet flexible starting point, while at the same time accounting for the criticisms of FCAs discussed in previous sections of the Article:

- The most important recommendation involves defining who can bring an action under false claims statutes. Too restrictive a definition will quash potentially valid actions, while too permissive a definition will encourage nuisance actions. The definition should reflect the policy foundations of permitting citizens to sue on behalf of the government: *To leverage and reward inside or otherwise unique information or knowledge that uncovers, interprets, or helps prosecute misconduct that, in other respects, would go undetected.*
 - Several caveats are worth noting. The definition should not be restricted to pure insiders—that is, persons employed or contracted by the person or entity against which the action is brought—because it might be interpreted to exclude persons with inside or unique information about, say, an industry practice across many firms. Moreover, the definition should follow existing false claims statutes and embrace whistleblowers with “knowledge that is independent of and materially adds” to allegations or transactions that have already been publicly disclosed.²⁸⁴ Such a definition would shut the door on “parasitic lawsuit[s]” where informants “possess no substantive information at all.”²⁸⁵ Similarly, it would prevent situations where whistleblowers

284. 31 U.S.C. § 3730(e)(4)(B) (2012); CAL. GOV'T CODE § 12652(d)(3)(C) (i)–(ii) (West 2014); 740 ILL. COMP. STAT. 175/4(e)(4)(B) (2012); N.Y. STATE FIN. LAW § 188(7) (McKinney 2013). In perceiving a “threatened relaxation of the public disclosure bars,” members of the defense bar have recommended that the definition be further refined (though not necessarily restricted) to interpret “materially adds” to refer to information “which is derived from inside knowledge, notwithstanding that the information is not inconsistent with that which is already known within the public domain and is necessary to allow suits that have elements which are publicly known.” Houghton et al., *supra* note 70, at 599.

285. United States *ex rel.* Barber v. Paychex, Inc., No. 09-20990-Civ., 2010 U.S. Dist. LEXIS 83789, at *29–30 (S.D. Fla. July 15, 2010).

“did relatively little to no work to uncover the alleged wrongdoing; they simply relied on publicly available information to develop a claim.”²⁸⁶ It would also prohibit the kind of nuisance suits currently being filed in Illinois where law firms (not insiders) are mass-compiling complaints based purely on publicly available (not undetected) information.²⁸⁷

- Make persons liable for “*knowingly*” presenting false or fraudulent claims both to *obtain* money or property and to *avoid paying* or transmitting money or property to the government.²⁸⁸ Furthermore, define “knowing” and “knowingly” to include “*actual knowledge*” as well as “*deliberate ignorance*” and “*reckless disregard*” of the truth or falsity of the information.²⁸⁹ Such a definition reflects the current understanding of liability under all existing false claims statutes. In addition, it reflects the standard to which both taxpayers and tax advisors are already held under the Internal Revenue Code and Circular 230; it thus closes a perverse loophole whereby taxpayers and practitioners would be immune from liability for tax noncompliance under a state’s FCA but liable under substantive tax law at both the federal and state level.²⁹⁰
- Make *innocent mistakes* a defense to liability. Follow the New York FCA and exempt from liability “acts occurring by mistake or as a result of mere negligence.”²⁹¹
- Impose *monetary thresholds* on claims, both with respect to income or sales of the taxpayer (depending on whether the state wishes to include claims under the state income tax, if any, the state sales tax, or any other tax) as well as on the damages pled. For instance, New York requires the net income or sales of the taxpayer to exceed \$1 million and the damages pled to exceed \$350,000.²⁹² Use “gross” income or sales rather than “net” income or sales, because a net figure could be manipulated below the threshold by the kind of ill-

286. Houghton et al., *supra* note 70, at 598.

287. See Trachtenberg et al., *supra* note 29, at 377 (criticizing claims merely reporting information “that was publicly available on the taxpayers’ websites. Arguably, this does not comport with the intent of FCA statutes, which are supposedly designed to give government a tool to uncover fraud that might otherwise go undiscovered”).

288. See *supra* note 60 and accompanying text.

289. See *supra* notes 61–62 and accompanying text.

290. See *supra* notes 52–135 and accompanying text.

291. N.Y. STATE FIN. LAW § 188(3)(b) (McKinney 2013); see also *supra* notes 78–79 and accompanying text.

292. N.Y. STATE FIN. LAW § 189(4)(a)(i)–(ii). The federal whistleblower law also uses thresholds: more than \$200,000 in gross income and more than \$2,000,000 in “tax, penalties, interest, additions to tax, and additional amounts in dispute.” I.R.C. § 7623(b)(5) (2012).

gotten tax benefits that the statute is trying to uncover. These thresholds will help prevent nuisance actions, and focus the statute on significant noncompliance.

- Require whistleblowers to file complaints *in camera* and keep them *under seal* for a specified period of time.²⁹³ Permit the state to request additional time to investigate allegations and to support such motions with affidavits and other submissions, also made *in camera*.²⁹⁴ Consider requiring whistleblowers to sign a declaration under penalty of perjury that the information contained in the complaint is true, as is the practice under the SEC's whistleblower program.²⁹⁵ These recommendations will help prevent the unnecessary disclosure of confidential tax return information.
- Require the court to *dismiss* any action if it is "based on allegations or transactions which are the subject of a pending civil action or an administrative action in which the state . . . is already a party."²⁹⁶ This recommendation can be thought of as a "government party bar" analogous to the "public disclosure bar,"²⁹⁷ and discourages complaints involving matters the taxpayer is already attempting to resolve or that the state is already investigating. It does not contemplate covering matters under audit, because an administrative audit proceeding does not rise to the level of an "action" and thus the government cannot be considered a "party" to the action. If the state desired, the statute could contain an exception for complaints by whistleblowers possessing unique information not already in the state's possession that might assist the state in pending administrative actions or litigation. This recommendation will help thwart parasitic actions.
- *Require* the attorney general to *consult* with the state tax agency or tax department during its investigation and assessment of the complaint, and prior to filing or intervening in any false claims action.²⁹⁸ This recommendation addresses concerns

293. See *supra* note 179 and accompanying text.

294. See *supra* note 180 and accompanying text.

295. See Sullivan, *supra* note 237 (quoting Sean McKessy, Chief of SEC Office of the Whistleblower, as calling requirement "a control" to help avoid being "inundated with nonsense"). For a discussion of the SEC whistleblower program, see *supra* note 137.

296. 31 U.S.C. § 3730(e)(3) (2012); see also CAL. GOV'T CODE § 12652(d)(2) (West 2013); 740 ILL. COMP. STAT. 175/4(e)(3) (2012); N.Y. STATE FIN. LAW § 190(9)(a)(i)-(ii).

297. Telephone Interview with Gregory Krakower, senior advisor and counselor to the N.Y. Attorney Gen. (Jan. 20, 2014). For a discussion of the public disclosure bar, see *supra* note 284 and accompanying text.

298. See *supra* notes 196-99 and accompanying text.

that FCA actions might proceed without the expertise and experience of state tax officials.

- If the subject matter of the complaint is already under review in the state's tax department, require the attorney general and tax department to decide jointly whether to proceed with the action and, if so, whether it should proceed as an administrative or judicial action. If the state decides that the attorney general should prosecute the action, the administrative action would be stayed until resolution of the judicial action. In 2013, a bill in the Illinois Assembly proposed such a procedure for transforming a false claims complaint from a tax administrative action into a judicial action.²⁹⁹ This recommendation further addresses concerns that FCA actions might proceed without the expertise and experience of state tax officials.
- If the jurisdiction wished to rely even more heavily on its tax department than the attorney general to process FCA complaints, it could authorize the tax department to take over primary responsibility for investigating the allegations. It could further provide the tax department a right of first refusal to process the allegations through tax administrative channels before permitting the attorney general to undertake a judicial proceeding. And it could give the tax department additional discretion in determining whether the complaint should proceed at all, effectively giving it veto power.
- The statute should include an explicit expectation that the state will *communicate* with the whistleblower throughout its investigation, assessment, and prosecution of complaints. In order to ameliorate concerns over undue disclosure of taxpayer and tax return information, the state should immediately enter into a *confidentiality agreement* with the whistleblower similar to a "contracts for services" agreement described in IRC section 6103(n).³⁰⁰ In addition to preserving the confidentiality protections of defendant-taxpayers, this recommendation permits the state to leverage a whistleblower's knowledge and information and to conduct sufficiently thorough investigations.
- If the state declines to prosecute the action and the qui tam plaintiff decides to conduct the action, grant the court discretion in *sealing* or *unsealing* the complaint (and have it served on the defendant). Alternatively, authorize the court to seal or unseal the complaint (and have it served on the defendant) if either the state or the qui tam plaintiff prosecutes the

299. See *supra* notes 42–47 and accompanying text.

300. See *infra* notes 376–80 and accompanying text.

action.³⁰¹ Direct the court to keep the complaint sealed in the event neither the state nor the qui tam plaintiff prosecutes the action. These recommendations—subject to the jurisdiction’s rules respecting case files as public records—will help prevent the unnecessary disclosure of confidential tax return information.

- Upon declining to prosecute an action, a jurisdiction might consider permitting the state to make a motion to transform the action into an administrative proceeding (run through the tax department) before giving the whistleblower a chance to assume responsibility for prosecuting the action. If the motion is granted, the state would serve the taxpayer with the complaint, provide the taxpayer an opportunity to review the allegations contained in the complaint, and give the taxpayer a chance to enter into the regular tax administration process. The original whistleblower would be entitled to an award for information that led to the collection of proceeds recovered in the action or in settlement of the action. If the motion is not granted, the state could still submit a motion for dismissal of the action. This recommendation allows the state to pursue tax noncompliance that, in its estimation and in consultation with the state tax department, does not meet the requirements of a false claims action but conflicts with the state’s interpretation of the tax law. It also diminishes the chance for unnecessary disclosure of confidential taxpayer information, and avoids the expense of litigation for all parties.
- If the state declines to prosecute the action, permit it to move for *dismissal* of the action or to settle the action with the defendant notwithstanding the objections of the person initiating the action, provided that the person is provided an opportunity to be heard.³⁰² These recommendations will help, respectively, prevent nuisance actions and restrict disclosure of confidential tax return information.
- If the action proceeds to litigation, allow the court to *impose limitations* on the whistleblower’s participation in the litigation either upon a showing by the state that such participation would “interfere with or unduly delay the prosecution of the case, or would be repetitious or irrelevant,”³⁰³ or upon a showing by the defendant that the action would “be for purposes of harassment or would cause the defendant undue

301. See *supra* note 181 and accompanying text.

302. See *supra* notes 182–84 and accompanying text.

303. See *supra* note 185 (quoting N.Y. STATE FIN. LAW § 190(5)(b)(iii) (McKinney 2013)).

burden.”³⁰⁴ These recommendations will help prevent nuisance actions and restrict unnecessary disclosure of confidential tax return information.

- If the qui tam plaintiff prosecutes the action, courts should craft *protective orders* prohibiting the plaintiff from disclosing the defendant’s tax return information. To achieve the same end, the statute could require qui tam plaintiffs to sign *confidentiality agreements* upon submitting a complaint. In the event a qui tam plaintiff wished to obtain the defendant’s tax return information during the course of litigation, the plaintiff should be required to obtain approval from the attorney general before submitting a motion to compel disclosure.³⁰⁵ These recommendations will help prevent the unnecessary disclosure of confidential tax return information.
- If the defendant prevails in a FCA action and if the court further finds that “the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment,” the court should award the defendant *reasonable attorney’s fees and expenses*.³⁰⁶ If the jurisdiction has been experiencing particularly troublesome nuisance suits, as in Illinois,³⁰⁷ it could also enact additional penalties to discourage such actions.³⁰⁸
- If, after adopting the above statutory recommendations to reduce the prevalence of nuisance suits, a jurisdiction wishes to take additional precautions against frivolous actions, it might consider the proposal contained in a 2013 Illinois Assembly bill.³⁰⁹ In response to a spate of frivolous tax-related suits filed under the Illinois FCA, the bill would have given the state attorney general sole authority to prosecute tax-related matters originating under the false claims statute. Stated differently, it prohibited qui tam plaintiffs from prosecuting tax claims under the state’s FCA. If a state wished to pursue a similar prohibition (which, under a properly drafted and implemented false claims statute, would not be needed to address the problem of nuisance suits), it might consider as an alternative removing tax claims altogether from being brought under the state’s FCA, while simultaneously enacting

304. See *supra* note 186 and accompanying text (quoting 740 ILL. COMP. STAT. 175/4(c)(2)(D) (2012)).

305. See *supra* note 187 and accompanying text.

306. See *supra* note 214 (quoting N.Y. STATE FIN. LAW § 190(6)(d)).

307. See *supra* notes 40–51 and accompanying text.

308. See *supra* note 215 and accompanying text.

309. For a description of the bill and the suits that motivated it, see *supra* notes 40–51 and accompanying text.

a standalone tax whistleblower statute similar to IRC section 7623.³¹⁰

- Keep whistleblower *awards* sufficiently high. In an ideal world, we want whistleblowers to report misconduct internally within organizations that have instituted robust informant processes and protections.³¹¹ But in the event a whistleblower's internal reporting is ignored or disregarded by the whistleblower's organization (as was the case with Bradley Birkenfeld³¹²), sufficiently high awards could induce external reporting of otherwise meritorious claims and "provide incentives for [whistleblowers] to incur the risks and costs associated with an action."³¹³ For the same reasons, if a defendant is found liable under a false claims statute, the court should award reasonable expenses and attorney's fees connected to "a civil action brought to recover any such penalty or damages."³¹⁴
- Keep *penalties* sufficiently high on defendants found liable under false claims statutes. These penalties include treble damages based on total damages incurred because of the defendant's actions as well as civil penalties for each false claim.³¹⁵ Stiff penalties can serve as a deterrent for "knowing" violations of a state's FCA and, along with bad publicity and reputational harms, can induce taxpayers and advisors to rethink the inputs that influence the taxpayer's compliance calculus.³¹⁶ Finally, it should be noted that robust

310. For discussion of such an alternative, see *infra* notes 351–88 and accompanying text.

311. For discussion of such internal procedures, see *infra* notes 320–48 and accompanying text.

312. See *supra* notes 1–17, 228, 234 and accompanying text.

313. Bucks, *supra* note 198, at 288. Currently, FCAs provide largely similar award ranges, though with some notable variation. See 31 U.S.C. § 3730(d)(1)–(3) (2012) (providing 15–30% if state prosecutes action and up to 10% for less substantial contributions, 25–30% if whistleblower prosecutes action, and discretionary reductions if whistleblower "planned and initiated" violation); CAL. GOV'T CODE § 12652(g)(2)–(3) & (5) (West 2014) (providing 15–33% if state prosecutes action, 25–50% if whistleblower prosecutes action, and discretionary judicial reductions if whistleblower "planned and initiated" violation); 740 ILL. COMP. STAT. 175/4(d)(1)–(3) (2012) (awarding between 15–25% if state prosecutes action and up to 10% for less substantial contributions, 25–30% if whistleblower prosecutes action, and discretionary judicial reductions if whistleblower "planned or initiated" violation); N.Y. STATE FIN. LAW § 190(6)(a)–(b), (8) (McKinney 2013) (awarding between 15–25% if state prosecutes action and up to 10% for less substantial contributions, 25–30% if whistleblower prosecutes action, and discretionary judicial reductions if whistleblower "planned or initiated" violation).

314. N.Y. STATE FIN. LAW § 189(3); see also 31 U.S.C. § 3730(d)(2); CAL. GOV'T CODE § 12652(g)(8); 740 ILL. COMP. STAT. 175/4(d)(1).

315. See *supra* note 69.

316. See Ventry, *supra* note 245, at 376–82; see also *supra* notes 273–75 and accompanying text.

whistleblower award programs do not correlate with higher rates of employees reporting out misconduct (in search of a potential award) versus reporting internally.³¹⁷

- Include strong *anti-retaliation* measures and equally strong relief from retaliation. Forms of relief already contained in FCAs include: injunctions to restrain discrimination; reinstatement to the same or equivalent position and seniority status; reinstatement of full fringe benefits; at least two times back pay plus interest; and compensation for special damages sustained as a result of the discrimination (including litigation costs and attorney's fees).³¹⁸ Beyond protecting whistleblowers from reprisal, robust anti-retaliation provisions can help employers. To the extent employers respond to the statute by evaluating current whistleblower procedures and instituting programs that effectively intake and process internal reporting of misconduct—and, that further assess and respond to that misconduct and recognize the organizational contribution of whistleblowers—companies can experience fewer employees reporting out misconduct, less reputational harms, less litigation, and a culture of compliance built on trust and respect.³¹⁹

B. *Creating an Organizational Culture of Compliance with Internal Whistleblower Procedures*

Some members of the defense bar have responded to the proliferation of tax whistleblower actions and statutes with constructive advice to employers. They offer practical and specific suggestions designed to assess, address, manage, and reduce risks associated with tax whistleblower laws. In the words of two commentators, it “behooves” tax executives and compliance officers “to understand the applicable statutory [whistleblower] provisions . . . to confirm that their companies’ processes and procedures for handling whistleblower activity satisfy core legal requirements; and perhaps most critically, to adopt best practices to mitigate the risks associated with tax whistleblowers.”³²⁰ These recommendations emphasize not only managing whistleblower activity but also rewarding

317. See NWC, *supra* note 228, at 5 (“The existence of a qui tam whistleblower reward program has no impact on the willingness of employees to internally report potential violations of law, or to work with their employer to resolve compliance issues.”).

318. See, e.g., 31 U.S.C. § 3730(h); CAL. GOV'T CODE § 12653(a); 740 ILL. COMP. STAT. 175/4(g); N.Y. STATE FIN. LAW § 191.

319. For the benefits of a culture of compliance, see Part IV.B. and *supra* notes 232–36 and accompanying text.

320. Dolan & McCormally, *supra* note 70, at 1537; see also PWC REPORT, *supra* note 235, at 24 (delineating “best practice tips” for internal whistleblower programs).

whistleblowers for reporting misconduct as part of creating an organizational culture of compliance.³²¹ Moreover, they recognize that the combination of substantive regulation and responsive internal controls can alter compliance norms within organizations and at the same time improve the long-term health of firms, an insight that tax scholars have made in the context of corporations adopting a new tax shelter compliance norm in the wake of the Sarbanes-Oxley Act of 2002.³²²

1. *Assessing and Managing Tax Whistleblower Risk*

“A first crucial step,” a group of practitioners recently suggested, “is to undertake a review of past practice and future compliance determinations in light of the new risk environment created by” tax whistleblower litigation.³²³ Such a review would involve assessing procedures for reporting misconduct internally, including fulfilling Sarbanes-Oxley requirements for instituting processes to handle whistleblower allegations and to maintain the confidentiality of whistleblowers.³²⁴ Central to this obligation is establishing an ethics or whistleblower hotline. Beyond generally assessing whistleblower procedures, in-house tax and accounting departments “should confirm that their company’s ethics reporting system can deal effectively with tax matters.”³²⁵

Once instituted, employees throughout the organization should receive regular training in how to handle and resolve internal reports of misconduct. The first order of business should be reminding all employees to avoid misconduct themselves by requiring them to acknowledge and certify adherence to a company’s code of ethics or code of conduct.³²⁶ Employees should be further advised of their responsibility to report observed misconduct internally and of the various avenues for confidentially in alerting the company of perceived wrongdoing. Within tax departments, all personnel should receive periodic training of, at a minimum, their ethical responsibilities under a company’s code of conduct as well as under Circular 230 and the IRC. This training should cover “every employee’s right and, indeed, obligation to raise questions . . . confidentially via the SOX/ethics hotline” or through in-person conversations with supervisors and the chief tax officer (CTO); “the right against retaliation” for reporting observed misconduct; and, finally, “the company’s commit-

321. See Dolan & McCormally, *supra* note 70, at 1538.

322. See Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 *FORDHAM L. REV.* 961, 964 (2006).

323. Gustafson et al., *supra* note 70, at 56 (expressing particular concern for “the rise in consumer class action and qui tam lawsuits”).

324. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775. The Sarbanes-Oxley provisions focus on “complaints . . . regarding accounting, internal accounting controls, or auditing matters,” a universe that encompasses state and federal taxation. *Id.*

325. Dolan & McCormally, *supra* note 70, at 1542.

326. See *id.* at 1541.

ment to and procedures for correcting errors . . . and making disclosures.”³²⁷

Instituting whistleblower procedures and educating employees as to proper processes can lay the groundwork for creating an open and participatory culture of compliance. Proper implementation of the procedures is critical to animating a policy of best practices to mitigate and manage risks associated with tax whistleblowers. First and foremost, employers “should endeavor to establish an ethos of professionalism and compliance that encourages employees to ask questions about transactions or other issues that might otherwise become the subject of an external whistleblower claim.”³²⁸ Within a company’s tax department, moreover, the leadership “should build a culture of trust and respect by emphasizing that if any member of the tax department staff has concerns about a transaction or other matter, then the CTO [chief tax officer] himself has concerns.”³²⁹ To this end, the CTO should engage staff members directly on tax strategies, particularly those involving “unsettled” or innovative areas of the law. The idea is to “demystify tax,” not just with respect to procedures within the tax department but also with respect to how tax planning and compliance is perceived and understood among senior management and the audit committee.³³⁰

A final—and crucial—component of implementing effective whistleblower procedures involves how companies respond to reported misconduct. “Don’t make matters worse,” a thoughtful commentary recently advised, and take every measure to “avoid actual or perceived retaliation.”³³¹ Indeed, retaliating against whistleblowers “misses the point about why the whistleblowing occurred—possible misconduct—and can compound the reputational risk associated with whistleblowing.”³³² It is also illegal,³³³ and can result in costly litigation and high-dollar settlements. Thus, employers should internally evaluate, reinforce, and publicize the company’s existing protections against retaliation. Furthermore, they should emphasize to employees that even in an open and transparent environment, any perceived slight or hint of retaliation—however seemingly innocuous or unintended—could be the basis for a cause of action

327. *Id.*

328. *Id.* at 1543.

329. *Id.*

330. *Id.* Dolan and McCormally further emphasize establishing a belief within the tax department that there is “no right way to do the wrong thing,” a message that “is vitally important to successfully managing the company’s tax risk profile, regardless of whether any whistleblower activities occur.” *Id.*

331. *Id.* at 1541.

332. *Id.*

333. See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802–04 (providing whistleblower protections for employees of publicly traded companies).

against the company.³³⁴ Supervisors and managers, in particular, “should be taught to welcome employee questions openly and respectfully, to affirm employees’ right against retaliation, to act expeditiously in addressing concerns, [] to document and communicate resolution of the matter both to management and affected employees,” and to communicate clearly an “employee’s right to escalate the matter within the company.”³³⁵

2. *Reducing Tax Whistleblower Risk*

Furthering an open and participatory culture of compliance will, in itself, help reduce risks associated with tax whistleblowing. But additional measures should be considered. First, companies could evaluate employees (and reward them, if appropriate) on how they respond to whistleblower reports and concerns. In particular, they could assess “how well [employees] foster the company’s culture of compliance and, specifically, how well they handle any matters falling within the ambit of the whistleblower statute.”³³⁶

Second, companies could seek advance guidance from tax authorities on “unsettled” areas of the law or on specific tax positions and transactions. At the federal level, they could take advantage of a number of pre-filing³³⁷ and dispute resolution programs,³³⁸ while at the state level, they could “consider using state advisory opinion and private letter ruling processes to obtain written guidance when there are gray areas of law.”³³⁹

Third, tax departments might consider modifying their policies of making regular disclosures to the tax authorities in the event such adjustments could “mitigate the risks associated with whistleblower activity.”³⁴⁰ Pursuing “defensive disclosure of information”³⁴¹ to state or federal tax agencies could reduce potential economic exposure under state-level

334. See Dolan & McCormally, *supra* note 70, at 1541 (“[I]f an employee has raised concerns about a transaction or other matter . . . the company must remain sensitive to how any subsequent transfer or any aspect of an employee’s performance review (that is, raise, bonus, or promotion decision) might be interpreted by the employee.”).

335. *Id.* at 1543–44.

336. *Id.* at 1544.

337. See, e.g., Rev. Proc. 2014-1, 2014-1 I.R.B. 1; Pre-Filing Agreement Program, Rev. Proc. 2009-14, 2009-3 I.R.B. 324 (superseding Rev. Proc. 2007-17, 2007-4 I.R.B. 368); Advance Pricing Agreement Program, Rev. Proc. 2006-9, 2006-9 I.R.B. 278; Compliance Assurance Process, I.R.S. Announcement 2005-87, 2005-50 I.R.B. 1144; Industry Issue Resolution Program, Rev. Proc. 2003-36, 2003-18 I.R.B. 859; see also Ventry, *supra* note 244, at 462–67. See generally I.R.S. Priv. Ltr. Ruls.

338. See, e.g., Advance Pricing Agreement Program, Rev. Proc. 2006-9, 2006-9 I.R.B. 278; I.R.S. Announcement 2006-61, 2006-36 I.R.B. 390; LMSB/Appeals Fast Track Settlement Procedure, Rev. Proc. 2003-40, 2003-25 I.R.B. 1044 (modified by I.R.S. Notice 2013-78, 2013-50 I.R.B. 633); OFFICE OF APPEALS, IRS, *Appeals Resolving Tax Disputes* (June 16, 2014), <http://www.irs.gov/Individuals/Appeals>. . .Resolving-Tax-Disputes.

339. Gustafson et al., *supra* note 70, at 56.

340. Dolan & McCormally, *supra* note 70, at 1544.

341. *Id.*

FCAs as well as under IRC section 7623, both of which base awards on how much the whistleblower “substantially contributed” to the action.³⁴² Adopting a strategy of defensive disclosure could also “reinforce the company’s credibility,” strengthen its relationship with tax authorities, and “underscore its commitment to transparency and compliance.”³⁴³

3. *Ameliorating Future Risk by Managing Current Risk*

In the event that a company establishes the validity of an internal whistleblower report alleging misconduct, it might consider several restorative courses of action. First, it could voluntarily disclose the misconduct to tax authorities in a good faith attempt to reveal and remedy the misconduct and perhaps limit liability and penalties. In fact, some states facilitate such a preemptive move with voluntary disclosure programs. New York, for example, has established a voluntary disclosure and compliance program that provides for penalty abatement, minimum statutory interest, and a chance to qualify for a limited look-back.³⁴⁴

In the context of state sales and use taxation, where a company may be vulnerable to a class action lawsuit due to overcollecting tax from consumers,³⁴⁵ two remedial options are worth considering. First, the company could notify its customers of the overcollection and of their right to request a refund from the state.³⁴⁶ For another option, the company might choose to “make its customers whole by repaying the overcollected tax and seeking a refund itself.”³⁴⁷ This second alternative has the benefit of potentially staving off expensive, frivolous class action suits as well as reinserting “the substantive tax question back in the traditional administrative process” where expert administrators rather than plaintiffs’ lawyers and the uncertainty of the judicial process determine the company’s proper tax treatment.³⁴⁸

C. *Statutory Alternatives to Qui Tam for Tax*

Some commentators—typically those critical of false claims statutes that permit tax-related complaints—have suggested that states consider

342. See I.R.C. § 7623(b)(1) (2012); see also 31 U.S.C. § 3730(d)(1) (2012); CAL. GOV’T CODE § 12652(g)(2) (West 2014); 740 ILL. COMP. STAT. 175/4(d)(1) (2012); N.Y. STATE FIN. LAW § 190(6)(a) (McKinney 2013).

343. Dolan & McCormally, *supra* note 70, at 1544.

344. See Gustafson et al., *supra* note 70, at 57. For information on New York’s voluntary disclosure program, see N.Y. STATE DEP’T OF TAXATION AND FIN., *Voluntary Disclosure and Compliance Program—General Program Information* (Sept. 19, 2012), http://www.tax.ny.gov/enforcement/vold/program_info.htm.

345. For a discussion of these circumstances, see *supra* notes 48–51 and accompanying text.

346. See Gustafson et al., *supra* note 70, at 56.

347. *Id.* at 57.

348. *Id.*

standalone whistleblower statutes as an alternative to qui tam for tax.³⁴⁹ Presumably, the appeal of removing qui tam plaintiffs from participating in state tax enforcement involves the perceived benefits of fewer nuisance suits as well as assurances that tax experts (rather than popularly-elected attorneys general with no tax expertise) will investigate and evaluate tax whistleblower allegations. Keeping tax claims within traditional tax administration processes and procedures—that is, in familiar territory and under conditions over which taxpayers and their tax advisors can exert some control—also contributes to the desire to cut out qui tam plaintiffs from the whistleblower process as early as possible.³⁵⁰

While a standalone tax whistleblower statute could further some of these goals—reducing frivolous suits, guaranteeing expert review of tax claims, and restricting the participation of qui tam plaintiffs after submission of a whistleblower complaint—a properly drafted and implemented false claims statute (as discussed throughout this Article and summarized in Part IV.A) could just as readily achieve these aims.³⁵¹ Moreover, standalone tax whistleblower statutes suffer from their own shortcomings, including a lack of funding and staffing; significant delays in processing claims; and protecting the confidentiality of tax return information without fatally interfering with the investigation, evaluation, and resolution of whistleblower allegations.

The remainder of this Part uses the federal tax whistleblower statute, section 7623 of the Internal Revenue Code, as the best current model of a standalone tax whistleblower program.³⁵² It discusses the program's successes as well as its failures. It offers a number of suggestions for states wishing to leverage inside information pertaining to tax noncompliance

349. See Wetzler, *supra* note 174, at 170 (“An alternative to a whistleblower program operated by the attorney general would be a program within the [tax] department. The federal tax whistleblower program, for example, is operated by the IRS outside the purview of the federal False Claims Act.”).

350. See *supra* note 348 and accompanying text; see also *supra* notes 171–243 and accompanying text (discussing efforts by elements of defense bar to rely solely on traditional tax administration for enforcement); *supra* notes 244–81 and accompanying text (discussing efforts by elements of defense bar to control and influence tax administrative process).

351. Indeed, while I am not agnostic as to whether states should adopt tax whistleblower programs (they should), I have no preference as to whether such a program should be run through a state's FCA or a standalone whistleblower statute. States should adopt whichever alternative best meets their jurisdiction's needs and challenges. Other authors are less ambivalent. See, e.g., Franziska Hertel, *Qui Tam for Tax?: Lessons from the States*, 113 COLUM. L. REV. 1897, 1898 (2013) (concluding that “state schemes permitting qui tam provide the most effective enforcement mechanism against tax fraud” compared to IRS whistleblower program).

352. Several states have enacted their own tax whistleblower statutes, though not all of them are operational and none are nearly as robust as the IRS program. See, e.g., CAL. REV. & TAX. CODE § 7060 (West 2014); CAL. REV. & TAX. CODE § 19525; FLA. STAT. § 210.18(3)(b) (2013); FLA. STAT. § 210.18(11); FLA. STAT. § 213.30; KAN. STAT. ANN. § 79-3421 (2013); OR. REV. STAT. § 314.855 (2013). I will discuss two of these programs, both in California, in Part IV.D.

by deploying a standalone statute rather than a false claims statute that covers tax-related actions. And, it concludes by indicating that some states—particularly California—are closer to implementing a robust whistleblower statute than they might think.

By most accounts, the federal tax whistleblower program is a success story. Ineffective and moribund as recently as 2006,³⁵³ Congress breathed life into section 7623 of the IRC with significant amendments to the program.³⁵⁴ Among other changes, it created a centralized Whistleblower Office within the IRS to process, investigate, and analyze informant submissions and to make award determinations;³⁵⁵ it defined information that qualified for a whistleblower award as that which assisted the IRS in “detecting underpayments of tax” or “detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or con-

353. An influential 2006 report from the Treasury Inspector General for Tax Administration (TIGTA) concluded that the program suffered from ineffective decentralized management, no standardized processing of informant tips or IRS payment of awards, and inefficient processing of claims, examinations, and award determinations. See TIGTA REPORT; *supra* note 209, at 7. Moreover, whistleblower claims got tied up in administrative and judicial bottlenecks. See *supra* notes 209–10 and accompanying text. In addition, the program offered paltry awards (if any were paid at all) to whistleblowers. In 1983, the IRS raised the cap on awards from \$50,000 to \$100,000. U.S. GOV'T ACCOUNTING OFFICE, ADMINISTRATIVE CHANGES COULD STRENGTHEN IRS' CLAIMS FOR REWARDS PROGRAM iv (1985), available at <http://www.gao.gov/assets/150/142661.pdf>. The cap remained until 1996, when the IRS increased the ceiling to \$2 million and then to \$10 million in 2004. IRS WHISTLEBLOWER OFFICE, *supra* note 210, at 2. Even with the promise of more lucrative awards, payments to informants were ungenerous and infrequent. Between 1989 and 1998, only 6.6% of claims resulted in payments, while total payments only reached \$29.3 million of the \$1.45 billion recovered from whistleblower tips (or just 2% of collections). Terri Gutierrez, *IRS Informants Reward Program: Is It Fair?*, 84 TAX NOTES 1203, 1205 (1999). Compared to qui tam payments and collections made under the federal False Claims Act, the record of the IRS informants program is particularly disappointing. Between 1989 and 1998, FCA qui tam recoveries totaled \$2.3 billion, with \$360 million paid out to informants, for a payout rate of nearly 15.7% (again, compared to only 2% under the IRS program). CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 216. Also, while annual recoveries under the old IRS whistleblower program never topped \$100 million, qui tam recoveries under the FCA hit \$1.5 billion in 2006. Compare TIGTA REPORT, *supra* note 209, at 3 (providing IRS whistleblower program figure), with CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 216 (providing figure for qui tam recoveries under FCA). Finally, whistleblowers had little recourse to challenge award determinations either administratively or judicially, losing, in fact, every court case between 1941 and 1998 that sought a redetermination of an award. Gutierrez, *supra* note 353, at 1205–06. For a fuller account of the pre-2006 history of the IRS whistleblower statute, see Ventry, *supra* note 245, at 360–68.

354. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406, 120 Stat. 2922, 2958–60.

355. While the statute provides for investigative powers, the IRS Whistleblower Office does not currently investigate claims, but rather assigns them to appropriate IRS offices for investigation.

niving at the same,”³⁵⁶ and that involved amounts in dispute exceeding \$2 million and where the taxpayer had gross income exceeding \$200,000 for at least one taxable year in question;³⁵⁷ and it mandated that whistleblowers be paid between 15% and 30% of the “collected proceeds” resulting from an administrative or judicial action or settlement, with the final award depending upon how much an informant’s submission “substantially contributed” to the detection and recovery of collected proceeds.³⁵⁸

Emboldened by the prospect of a standardized and streamlined review of whistleblower claims—as well as sizeable award payments—submissions under the new program skyrocketed, jumping from 50 in 2007, to 377 in 2008, and 472 in 2009.³⁵⁹ Even more encouraging, amounts collected under the revamped program increased significantly, while amounts paid to whistleblowers rose disproportionately compared to amounts collected, such that the percentage of collections paid to informants multiplied. Over the five-year period between 2008 and 2012, payments to whistleblowers totaled \$180.3 million, compared to amounts collected of \$1.47 billion, or 12.3% of collections.³⁶⁰ By comparison, over the ten-year period between 1989 and 1998, payments totaled \$29.3 million compared to amounts collected of \$1.45 billion, or just 2% of collections.³⁶¹ Such data prompted the program’s biggest supporter, and architect of the 2006 amendments, Senator Charles Grassley (R-IA), to declare that “[t]he potential for this program is tremendous, and it’s up to the IRS to continue paying awards and demonstrating to whistleblowers that the process will work and they will be heard and protected.”³⁶²

In addition to leaps in collections and payments, the IRS whistleblower program has undergone significant improvements in terms of management. In 2012, IRS leadership—which whistleblower practition-

356. I.R.C. § 7623(a)(1)–(2) (2012).

357. *Id.* § 7623(b)(5)(A)–(B).

358. *Id.* § 7623(b)(1).

359. See IRS WHISTLEBLOWER OFFICE, *supra* note 210, at 7. Submissions declined slightly between 2010 and 2012, but still averaged 356 submissions. These figures only reflect submissions under new section 7623(b) (described in the text) and not section 7623(a), the pre-amendment section that continues to co-exist alongside section 7623(b). The figures further undercount the number of actual “cases” contained within a single submission, which typically include allegations of underpayment pertaining to more than one taxpayer. *Id.* at 6 n.12. For instance, the IRS Whistleblower Office received 332 submissions under section 7623(b) in fiscal year 2012, identifying 671 taxpayers. *Id.* at 7.

360. *Id.* at 17.

361. CIVIL DIV., U.S. DEP’T OF JUSTICE, *supra* note 216. It is important to note that the amount of dollars collected under section 7623 understates actual collections—perhaps by a significant degree—due to the government’s narrow reading of “collected proceeds,” which is used to calculate award determinations. See *infra* note 373 and accompanying text.

362. Jeremiah Coder, *Year in Review: Whistleblowers Were Either Rich or Angry After 2012*, 138 TAX NOTES 32, 32 (2013) (quoting Sen. Charles Grassley).

ers and other supporters of the program had consistently charged (not unreasonably) was “holding the whistleblower program back”³⁶³—expressed its commitment to “timely action” on whistleblower submissions,³⁶⁴ communicating with whistleblowers early and often during the evaluation process,³⁶⁵ expanding its use of confidentiality agreements with whistleblowers “to obtain a whistleblower’s insights and expertise into complex technical or factual issues,”³⁶⁶ and generally “improv[ing] the timeliness and quality of decisions as the Service evaluates and acts on whistleblower information.”³⁶⁷ The Whistleblower Office reiterated these goals while adding a few others. It planned expedited guidance for taxpayers and practitioners, particularly with respect to refining key definitions pertaining to award determinations, including “collected proceeds,” “amounts in dispute,” and a taxpayer’s “gross income”;³⁶⁸ streamlining the

363. Jeremiah Coder, *GAO Faults IRS Whistleblower Program for Award Delays*, TAX NOTES TODAY 2011-19188 (2011) (quoting Dean Zerbo of Zerbo, Fingeret, Frank & Jadav and National Whistleblower Center), available at <http://www.tax-whistleblower.com/articles/GAOFaultsIRSWhistleblowerProgramforAwardDelays.pdf>; see also *id.* (quoting Sen. Charles Grassley, “I’m concerned that the IRS management still might have too many opportunities to say ‘no’ to a whistleblower, even when the whistleblower office believes a claim has merit”); *id.* (quoting Bryan Skarlatos of Kostelanetz & Fink LLP, “[t]here continues to be a sense among some IRS personnel that the whistleblower program is not a good idea.”); *id.* (summarizing commentary from Erika Kelton of Phillips & Cohen LLP as saying that IRS had demonstrated “institutional resistance to whistleblowers”). For additional practitioner criticism of the program, see *infra* notes 373–85 and accompanying text.

364. Memorandum from Steven T. Miller, Treasury Deputy Comm’r for Servs. & Enforcement, 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, at 1 [hereinafter Miller Memo]. The Miller Memo, as it came to be known, laid out shorter and explicit timelines for processing submissions, including (1) initial claim evaluation by the Whistleblower Office within ninety days, (2) review by subject matter experts within ninety days, and (3) notification of award decisions within ninety days after final determination of collected proceeds. *Id.* at 2.

365. *Id.* at 2 (committing IRS to “debriefings” with whistleblowers as “the rule not the exception,” and having an “interaction with a whistleblower during an examination [to] assist in timely and correct resolution of issues”).

366. *Id.*

367. *Id.* at 1. Practitioners and the press praised the Miller Memo and its discernible effect on internal whistleblower procedures and on altering the perception of the whistleblower program among IRS leadership. See, e.g., Andrew Velarde, ‘Miller Memo’ Seen as Improving IRS Whistleblower Process, 141 TAX NOTES 35 (2013); Erica L. Brady, *IRS Whistleblower Office Releases Its Annual Report for Fiscal Year 2012*, TAX WHISTLEBLOWER REPORT (Feb. 13, 2013), <http://www.taxwhistleblowerreport.com/guidance/irs-whistleblower-office-releases-its-annual-report-for-fiscal-year-2013/> (stating, primarily in reference to Miller Memo, that “IRS Whistleblower Office made leaps forward in fiscal year 2012”).

368. IRS WHISTLEBLOWER OFFICE, *supra* note 210, at 12, 15–16. These suggested refinements were meant to spur Congressional action and came on the heels of final regulations promulgated under section 7623 that attempted to clarify “collected proceeds” and “proceeds of amounts collected.” See Treas. Reg. § 301.7623-1(a) (2012).

intake process and assessment of potential whistleblower claims;³⁶⁹ and strengthening whistleblower protections.³⁷⁰ For one final example, the Treasury Department sought public comment in December 2012 on proposed regulations providing “comprehensive” guidance on tax whistleblower submissions, administrative procedures on award determinations, additional refinement of key terms used in section 7623, and expanded use of disclosing tax return information “to the extent necessary to conduct whistleblower administrative proceedings.”³⁷¹ In other words, the IRS had finally embraced the notion that whistleblowers could “provide valuable leads, and offer unique insights into taxpayer activity.”³⁷²

Despite these notable advances in the structure and administration of the program, not insignificant problems persist. According to practitioners, the IRS still adheres to an overly restrictive definition of “collected proceeds,” by continuing to exclude tax attributes such as net operating losses as well as foreign bank account reporting penalties and criminal penalties under title 18 of the U.S. Code.³⁷³ In similar fashion, the IRS applies a narrow interpretation for when it must pay out awards based on useful information supplied by a whistleblower. The statute directs the IRS to pay an award if it “proceeds with any administrative or judicial action . . . based on information” provided by a whistleblower,³⁷⁴ but the IRS has interpreted the directive to apply only to situations where it initiates a new action or expands an existing action and not to where a whistleblower’s information increases the amount that would have been collected in an existing action, an interpretation that practitioners consider “illogical.”³⁷⁵

369. IRS WHISTLEBLOWER OFFICE, *supra* note 210, at 12–13.

370. *Id.* at 13 (describing potential rules “on access to and disclosure of taxpayer information [that] could provide stronger protection for taxpayers”). The IRS recommendation for greater protections for whistleblowers reflected the Obama Administration’s commitment to a statutory prohibition on retaliating against tax whistleblowers. See DEP’T OF TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION’S FISCAL YEAR 2014 REVENUE PROPOSALS 204–06 (2013), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/General-Explanations-FY2014.pdf>.

371. See Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws, 77 Fed. Reg. 74,798 (Dec. 18, 2012) (to be codified at 26 C.F.R. pt. 301).

372. Miller Memo, *supra* note 364, at 1; see also Jeremiah Coder, *ABA Section of Taxation Meeting: Whistleblower Program Has Strong Support From IRS*, 138 TAX NOTES 582, 582 (2013) (summarizing comments by Stephen Whitlock, Director of IRS Whistleblower Office, that IRS whistleblower award program “has strong support among senior IRS executives”).

373. See Jeremiah Coder, *IRS Whistleblower Regs Continue to Frustrate Practitioners*, 139 TAX NOTES 250, 250 (2013) [hereinafter *Regs Frustrate Practitioners*]; Coder, *supra* note 362, at 33; Jeremiah Coder, *Fight Continues Over Whistleblower Award Eligibility for FBAR Penalties*, 137 TAX NOTES 1064 (2012).

374. I.R.C. § 7623(b)(1) (2012).

375. *Regs Frustrate Practitioners*, *supra* note 373, at 250 (quoting Erica Brady of Ferraro Law Firm); see also Coder, *supra* note 362, at 33.

With equal rigidity, the IRS continues to “hid[e] behind section 6103” strictures protecting tax return information from disclosure, not only with respect to communicating with whistleblowers while investigating a submission and building a case against a taxpayer but also in keeping them informed of the status of submissions.³⁷⁶ The government’s overly broad reading of tax return confidentiality under section 6103 means limited use of the “contracts for services” exception under section 6103(n) that permits the government to enter into confidentiality agreements with persons not otherwise authorized to receive information pertaining to taxpayer returns.³⁷⁷ Practitioners believe that the agreements “should be mandated” and “entered into in every case.”³⁷⁸ Even without a mandatory requirement, practitioners rightly observe that the IRS should be able to distinguish between providing a status update on an award determination and disclosing confidential tax return information.³⁷⁹ The obvious point is that section 6103 does not cover every communication, the indisputable conspicuousness of which eludes the IRS and exasperates the program’s biggest supporters, including Senator Grassley, who has pled with the agency to “develop communication guidelines that fit within the privacy restrictions to communicate with whistleblowers at every step. At each of these stages the whistleblower should be given an estimate of the time to the next step and also [be] provided periodic updates as appropriate” regarding claim status.³⁸⁰

Part and parcel of the government’s suffocating reading of section 6103 is the glacial pace of award determinations.³⁸¹ More than seven

376. *Regs Frustrate Practitioners*, *supra* note 373, at 251.

377. *Id.* Section 6103(n) provides for the disclosure of returns and return information “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.” I.R.C. § 6103(n). For a discussion of the government’s overly broad reading of confidentiality in the context of section 7623 and for recommendations for reforming current policy, see Jeremiah Coder’s contribution to this issue of the VILLANOVA LAW REVIEW, *Clash for Cash: The Conflict over Tax Whistleblower Contracts*, 59 VILL. L. REV. 409 (2014).

378. *Regs Frustrate Practitioners*, *supra* note 373, at 251 (quoting Thomas C. Plisic of the Tax Whistleblower Law Firm).

379. *See id.* (quoting Bryan C. Skarlatos of Kostelanetz & Fink LLP, “I think a distinction can be made” in those situations).

380. Letter from Charles E. Grassley, Ranking Member, S. Comm. on Fin., to Douglas L. Shulman, IRS Comm’r 4–5 (Sept. 13, 2011), available at 2011 TAX NOTES TODAY 178-51; *see also* Jeremiah Coder, *Strong IRS Headwind Blows Whistleblowers Off Course*, 135 TAX NOTES 938, 941 (2012) (quoting Grassley as lamenting that “communication with whistleblowers is essentially nonexistent”).

381. For detailed examples of IRS delay, see Jeremiah Coder, *A Whistleblower’s Cautionary Tale*, 139 TAX NOTES 695 (2013); Jeremiah Coder, *IRS Formally Denies Award in Whistleblower Challenge*, 139 TAX NOTES 383 (2013); Jeremiah Coder, *Tax Court Scrutinizes Whistleblower Delay*, 138 TAX NOTES 1316 (2013); Jeremiah Coder, *Whistleblower Petitions Tax Court to End Award Obstruction*, 134 TAX NOTES 1353 (2012).

years have elapsed since Congress revamped the whistleblower program, yet the time between submission of information to determination of award (if any) still takes “five to seven years and longer.”³⁸² There are good reasons why years pass between submission of information to the Whistleblower Office and the payment or denial of an award: the issues involved are complex, murky, and hidden; the submissions are incomplete; and the IRS cannot make an award determination until the taxpayer exhausts all administrative and judicial appeals. But, there are no good reasons why the IRS cannot provide periodic updates on a submission or pay awards on unappealed portions of underpayments. Nor is there any good reason for the IRS to “stonewall[]” an award determination, eventually reject the submission, and then return years later to the information contained in the submission “to pursue leads regarding unpaid taxpayer liabilities free from any claims the whistleblower might have to an award.”³⁸³ Yet that is exactly what it appears the IRS has been doing with some submissions, a practice for which the Tax Court recently “re-buke[d]” the Whistleblower Office.³⁸⁴ “We do not know whether these failures were the result of bureaucratic confusion or ineptitude,” the court wrote, “[w]e do know, however, that the obfuscation surrounding this matter has either been caused or exacerbated by [the government].”³⁸⁵

If a state chose to enact a standalone whistleblower statute as part of its tax enforcement regime, it would need to address some of the same shortcomings that afflict the federal program. These issues—timely processing of submissions, communicating with whistleblowers to leverage knowledge and expertise, and making accurate award determinations without undue delay—are not insurmountable. States can learn from the federal government’s experience in terms of program design, administration, and implementation. The federal experience could also help states determine if they want to run the program through their tax department, attorney general office, or both, a determination that would be influenced by the size and agency location of a particular state’s tax administration apparatus. A state will also have to determine whether it wants to create a new, standalone tax whistleblower office to accompany its standalone stat-

382. IRS WHISTLEBLOWER OFFICE, *supra* note 210, at 16.

383. Jeremiah Coder, *The Whistleblower Whipsaw Process*, 138 TAX NOTES 1168, 1170 (2013).

384. See Jeremiah Coder, *Tax Court Rebukes IRS for Hiding Whistleblower Information*, 139 TAX NOTES 851, 851 (2013). According to Coder, one of the most knowledgeable and diligent observers of the IRS whistleblower program, the case was “emblematic of the IRS’s attempts to whipsaw informants by issuing de facto award denials and then later pursuing tax investigations arising from information contained in the whistleblower submissions.” *Id.* at 852.

385. Anonymous 1 & Anonymous 2 v. Comm’r, No. 12-472-11W (T.C. May 10, 2013), *available at* 2013 TAX NOTES TODAY 92-40.

ute—with its own staff, office space, and budget³⁸⁶—or whether it wants to absorb the new program into existing administrative capacity.

D. *The Case of California*

Some states are closer than others to implementing a tax whistleblower program. California is such a state. In fact, it already has two tax whistleblower statutes on its books: one under the authority of the Franchise Tax Board (FTB), pertaining to the personal income tax law (PITL) and corporation tax law (CTL); and the other under the authority of the Board of Equalization (BOE), pertaining to the state's sales and use taxes. Neither program has yet to open for business however.

In 1984, as part of California's first tax amnesty program,³⁸⁷ the legislature authorized the FTB to administer a standalone whistleblower statute. Originally enacted as California Revenue and Tax Code section 19273 (located in the PITL) and 26427 (located in the bank and corporation tax laws), the state legislature consolidated the sections in 1993 under section 19525,³⁸⁸ where the authorization has remained undisturbed and neglected for the last twenty years. From the beginning, the FTB declined to proceed with its authority to administer the program, because (i) it required implementing regulations to establish, and (ii) in its view, the statute did not grant the FTB explicit authority to make payments under the program. Thus, in the eyes of the FTB, it could promulgate regulations to execute the statute, but it would still have no legal authority to pay rewards to whistleblowers. The statutory language reads as follows:

The Franchise Tax Board, under regulations prescribed by the Franchise Tax Board, may establish a reward program for information resulting in the identification of underreported or unreported income subject to taxes [under the Personal Income Tax Law] or [the Corporation Tax Law]. Any reward may not exceed

386. The budget for a standalone office, including personnel, could be allocated through the regular appropriations process or through proceeds of whistleblower collections, in the same way that some states pay for supporting their False Claims Acts. Under California's FCA, for example, the state is entitled to "a fixed 33 percent of the proceeds of the action or settlement of the claim, which shall be used to support its ongoing investigation and prosecution of false claims made against the state or political subdivision." CAL. GOV'T CODE § 12652(g)(1)(C)(2) (West 2014). A standalone whistleblower statute could be funded in the same manner.

387. See 1984 Cal. Stat. 5126-42. I am indebted to Doug Powers, Tax Counsel in the FTB's Technical Resources Bureau, Legal Division, for educating me on the history of the FTB's standalone whistleblower statute. I am further grateful to an opinion piece by Erika Kelton of Phillips & Cohen that first alerted me to these programs. See Erika A. Kelton, *Bridge the Tax Gap: Bringing in the Whistleblowers*, CAPITOL WEEKLY (May 6, 2010), <http://capitolweekly.net/opinion-bridge-tax-gap-bringing-whistleblowers/> (proposing that California create "an effective tax whistleblower program" by "invigorat[ing]" the "mothballed" FTB and BOE whistleblower programs).

388. See 1993 Cal. Stat. 2389-90.

10 percent of the taxes collected as a result of the information provided. Any person employed by or under contract with any state or federal tax collection agency shall not be eligible for a reward provided for pursuant to this section.³⁸⁹

In 2004, the FTB sought the explicit authority it believed it lacked. Through a “Budget Change Proposal” related to “Tax Gap Enforcement Provisions,” the agency requested funding for the “Informant Reward Program.”³⁹⁰ Specifically, the agency asked the legislature “to unambiguously identify that FTB has the sole discretion to determine the amount of each reward paid to an informant” and, furthermore, to “provide a mechanism for FTB to actually pay informants” from taxes collected due to information provided by whistleblowers.³⁹¹ The legislature failed to act on the request. But in 2010, renewed hope for explicit legislative authorization emerged in the form of a bill introduced by State Assembly member, Hector De La Torre. The proposed bill, modeled closely after section 7623 of the Internal Revenue Code, amended section 19525 by requiring the FTB to establish a reward program for tax whistleblowers and to make any payments from the “collected proceeds of the administrative or judicial action . . . or from any settlement in response to that action.”³⁹² The bill never made it out of committee.

Nonetheless, the statutory scaffolding is in place for California to implement a whistleblower program (indeed, perhaps two such programs). The legislature could fund the program, either by explicit appropriation or through anticipated “collected proceeds” of the program and at the same time grant the FTB express statutory authority to pay rewards under the program, at which point the FTB could promulgate implementing regulations. Alternatively, the FTB could act on its own authority and interpret the statute as *already* authorizing the agency to pay awards to whistleblowers up to 10% “of [and from] the taxes collected as a result of the information provided.”³⁹³ Such an interpretation, already a fair reading of the statute, seems even more reasonable after considering that the analogous whistleblower program pertaining to California’s sales and use taxes—provided for in section 7060 and under the administrative authority of the BOE—contains an explicit provision stating that rewards paid under the program “shall be paid from amounts appropriated by the Leg-

389. CAL. REV. & TAX. CODE § 19525 (West 2014).

390. See CAL. STATE FRANCHISE TAX Bd., FISCAL YEAR 2005/06 BUDGET DEVELOPMENT: SUMMARY OF BUDGET CHANGE PROPOSALS, BCP No. 3 at III-1 (2004), available at <https://www.ftb.ca.gov/law/meetings/attachments/082504/7b.pdf>.

391. John R. Dorocak, *State Tax Informants: Rewards and Liabilities Implementation in California and Guidance from the New and Old Federal Program—Should They Be Paid?*, 38 CUMB. L. REV. 279, 285 (2008).

392. See A.B. 2605, 2010 Assemb., Reg. Sess. (Cal. 2010), available at <http://legiscan.com/CA/text/AB2605/id/3481>.

393. CAL. REV. & TAX. CODE § 19525.

islature for that purpose,”³⁹⁴ while section 19525 contains no such limiting directive.

California’s FTB and BOE also run hotlines for, respectively, “tax fraud” and “tax evasion,”³⁹⁵ with the FTB linking to its “tax fraud” webpage from its “tax gap” webpage (which describes the state’s \$10 billion tax gap).³⁹⁶ Both agencies alert would-be whistleblowers on their webpages that they “do not offer rewards for reporting this information.”³⁹⁷ Further, the BOE advises its audit personnel that although its “reward program” is not currently funded nor otherwise paying out awards, individuals might still offer information “that would enable the Board to recover sales tax revenues.”³⁹⁸ In these circumstances, auditors are instructed to say that no funding currently exists to pay awards, but they are also encouraged “to obtain such information by appealing to the person’s sense of duty as a good citizen.”³⁹⁹

As we have seen, civic duty can motivate citizens to blow the whistle on tax noncompliance.⁴⁰⁰ But additional incentives to contribute to tax enforcement efforts may be necessary, and rewarding whistleblowers with a portion of the monies they help put back in state coffers might do the trick. Paying whistleblowers for inside, unique information would also reinforce the policies behind “hotlines” that encourage citizens to report tax noncompliance. And if policymakers in California—or in other states for

394. CAL. REV. & TAX. CODE § 7060(c). While the first paragraph of section 7060 is nearly identical to section 19525 (though pertaining to sales and use taxes), section 7060 contains additional provisions directing the BOE to provide a report to the legislature once the program is up and running that details: (i) the number of written and oral whistleblower submissions made to the BOE within its first two years of operation, (ii) the “amount of additional taxes and penalties assessed and collected as a result of this program and the amount of rewards distributed,” and (iii) the “administrative costs incurred in implementing and operating this program.” CAL. REV. & TAX. CODE § 7060(b).

395. Created in 2006, the FTB hotline prompts individuals to report “income tax fraud.” See CAL. STATE FRANCHISE TAX Bd., *Reporting Income Tax Fraud*, https://www.ftb.ca.gov/online/fraud_referral/index.shtml (last visited May 9, 2014). The BOE hotline, created in 1995, allows individuals “with knowledge of tax evasion involving any of the Board of Equalization’s tax programs . . . to report any violations.” See CAL. STATE Bd. OF EQUALIZATION, *BOE Toll-Free Tax Evasion Hotline*, <http://www.boe.ca.gov/info/evade.htm> (last visited May 9, 2014).

396. See CAL. STATE FRANCHISE TAX Bd., *Tax Gap*, https://www.ftb.ca.gov/Tax_Gap/index.shtml (last visited May 9, 2014).

397. CAL. STATE FRANCHISE TAX Bd., *Reporting Income Tax Fraud*, https://www.ftb.ca.gov/online/fraud_referral/index.shtml (last visited May 9, 2014); see also CAL. STATE Bd. OF EQUALIZATION, *Investigations Division—Frequently Asked Questions*, <https://www.boe.ca.gov/invest/faqinvestigation.htm#3> (last visited May 9, 2014).

398. CAL. STATE Bd. OF EQUALIZATION, SALES & USE TAX DEP’T, AUDIT MANUAL, Ch. 1, § 0122.00 (2014), available at <http://www.boe.ca.gov/sutax/manuals/am-01.pdf>.

399. *Id.*

400. For studies indicating that whistleblowers are motivated more by principle than money, see *supra* notes 223–32 and accompanying text.

that matter—preferred the *qui tam* approach to a standalone statute, “removing a single sentence from the existing False Claims Act”⁴⁰¹ that bars tax claims⁴⁰² could immediately establish an avenue for whistleblowers to uncover tax cheating, assist (if appropriate) in the prosecution of the case, and shrink the state’s tax gap.⁴⁰³

V. CONCLUSION

State tax agencies are outgunned in the fight against overaggressive tax avoidance and evasion. “Public participation,” either through false claims statutes or standalone whistleblower statutes, “can constructively contribute to the administration of taxes”⁴⁰⁴ by uncovering abuse and fraud that state governments may never detect or that they would detect only after considerable revenue loss and misdirected administrative resources.⁴⁰⁵ Authorizing citizens to bring tax claims under FCAs would be “good for tax administration.”⁴⁰⁶ It would help rebalance insidious information asymmetries between taxpayers and tax agencies, while closing the persistent tax gap. Moreover, the “evidence is overwhelming” that the federal FCA “has proven its value in other areas [besides taxation] and has helped government recover billions that would otherwise have been lost to fraud. There is every reason to think,” knowledgeable observers have opined, “that it will have a comparable impact in the tax area.”⁴⁰⁷ The

401. Erika A. Kelton, *To Cut California’s Budget Gap, Cut One Sentence from State Whistleblower Law*, FORBES (May 21, 2012, 2:37 PM), <http://www.forbes.com/sites/erikakelton/2012/05/21/to-cut-californias-budget-gap-cut-one-sentence-from-state-whistleblower-law/> (suggesting same proposal for California to establish “robust tax whistleblower program”).

402. See CAL. GOV’T CODE § 12651(f) (West 2014) (“This section does not apply to claims, records, or statements made under the Revenue and Taxation Code.”).

403. Authorizing tax claims under a false claims act would be particularly appropriate in the case of California, where its FCA already commands that the law “be liberally construed and applied to promote the public interest.” CAL. GOV’T CODE § 12655(c).

404. Bucks, *supra* note 198, at 287.

405. Whistleblowers can be particularly helpful in uncovering taxpayer abuse in areas with less rigorous reporting requirements, such as in the area of partnerships. See Cara Griffith, *Are States Adequately Auditing Real Estate Partnerships?*, 65 STATE TAX NOTES 119, 122 (2012) (writing, in context of real estate partnerships and New York’s FCA, “New York has an added advantage if it pursues potential tax delinquency by partnerships”).

406. Hamilton, *supra* note 25, at 112 (quoting William Comiskey, former deputy commissioner of Office of Tax Enforcement with New York Department of Taxation and Finance).

407. *Id.* In fiscal year 2013, claims brought under the federal False Claims Act generated \$3.8 billion in settlements and judgments plus another \$443 million in recoveries for state Medicaid programs. Press Release, U.S. Dep’t of Justice, Justice Department Recovers \$3.8 Billion from False Claims Act Cases in Fiscal Year 2013 (Dec. 20, 2013), available at <http://www.justice.gov/opa/pr/2013/December/13-civ-1352.html>. Since 2009, moreover, the federal FCA has recovered \$17 billion for the U.S. government and nearly \$40 billion since Congress made significant

same can be said of standalone tax whistleblower statutes, such as the IRS whistleblower program, which, despite its shortcomings,⁴⁰⁸ has brought in close to \$1.5 billion over the last five years,⁴⁰⁹ spawned a vibrant and expert tax whistleblower bar,⁴¹⁰ and significantly altered the compliance and risk calculus for taxpayers.

A properly drafted and implemented tax whistleblower program, run either through a state's FCA or under a standalone statute, could address and overcome critics' primary concerns pertaining to tax whistleblowers (including the proliferation of nuisance suits, undue disclosure of tax return information, and bypassing expert tax administrators) and bring to bear the invaluable knowledge of insiders on state tax enforcement efforts.

enhancements to the statute in 1986. *Id.*; see also CIVIL DIV., U.S. DEP'T OF JUSTICE, *supra* note 216.

408. See *supra* notes 373–85 and accompanying text.

409. See IRS WHISTLEBLOWER OFFICE, *supra* note 210, at 17.

410. See Hertel, *supra* note 351, at 1926 (“Since the institution of the current IRS whistleblower program, the number of plaintiffs’ attorneys specializing in the area of tax law has risen rapidly, and there is no reason to suspect that the tax attorneys’ bar will not grow into a similarly specialized and expert body as the plaintiffs’ bar as a whole.”); Ventry, *supra* note 244, at 461–62 (noting, in 2008, 15%–20% increase in size of tax whistleblower bar in two-year span since Congress revamped IRS whistleblower law).

