False Claims Act & Qui Tam

Quarterly Review

Volume 52 ♦ April 2009
Edited by Cleveland Lawrence III
Taxpayers Against Fraud Education Fund

Spotlight

Best Practices in Pursuing IRS Whistleblower Claims: An Interview with IRS Whistleblower Office Director Stephen A. Whitlock

Best Practices in Pursuing IRS Whistleblower Claims:

An Interview with IRS Whistleblower Office Director Stephen A. Whitlock

The Director of the new IRS Whistleblower Office, Stephen A. Whitlock,[1] *sat down with TAF Member Michael A. Sullivan*[2] *during the TAF Conference and TAF's recent "IRS Whistleblower Boot Camp." For this interview, they discussed the progress of the IRS Whistleblower Office since it was established in early 2007, how the IRS process differs from pursuing qui tam cases under the False Claims Act, and the "best practices" for attorneys who pursue IRS Whistleblower claims.*

Michael Sullivan: Steve Whitlock, thank you for agreeing to speak with me for the *TAF Quarterly* to discuss the "Best Practices for Lawyers in Pursuing IRS Whistleblower Claims."

For lawyers who are used to handling *qui tam* cases, how does the IRS Whistleblower claims process differ?

Steve Whitlock: The biggest difference is that in the False Claims Act, you are filing the action on behalf of the government in court, under seal, and there is a relationship, which you guys understand pretty well, with the Justice Department.

When you bring a case to the IRS, for most purposes, we are not at liberty to work with you or share information with you. It's a closed process.

We do not have a court determining whether the taxpayer is liable; we have the IRS trying to make that determination through a civil process in most cases.

So, you have a situation where, on the False Claims Act side, you file the Complaint, and the Complaint is adjudicated by a judge. The IRS has a process that is largely administrative. It has its own administrative appeals process, as well as several different judicial appeals avenues. The decision whether to proceed with the case against the taxpayer is made in a closed process, which the whistleblower does not have a vote in.

Michael Sullivan: If the IRS decides not to pursue the investigation, that's the end of the matter?

Steve Whitlock: That's the end of the matter. It's not a determination by the Whistleblower Office to proceed, or not proceed. It's a determination by the IRS Operating Division, such as LMSB—Large and Mid-Size Business, or Small Business/

1. Stephen A. Whitlock has been the Director of the new IRS Whistleblower Office since February 2, 2007. During his 29-year government career, Mr. Whitlock has led the IRS Office of Professional Responsibility and has helped run anti-fraud and abuse programs at the Defense Department. In particular, he directed the operations of the Defense Hotline, which served as the model for Inspector General fraud, waste and abuse hotlines throughout the Executive branch. Mr. Whitlock earned a Bachelor of Arts degree in Political Science from Auburn University, a Juris Doctor degree from Catholic University and a Masters in Business Administration degree from George Mason University.

2. Michael A. Sullivan, a partner with Finch McCranie, LLP in Atlanta, has represented tax whistleblowers since the inception of the new IRS Whistleblower Program, including clients in the hedge fund industry, real estate, other financial services, manufacturing, and other industries. At the request of Georgia legislators, Mr. Sullivan also helped draft Georgia's State False Medicaid Claims Act.

Self-Employed. Typically, they will decide whether to do an audit. The Criminal Investigation Division will decide whether to do a criminal investigation. If they decide not to do it, that's the end of the matter from a tax perspective.

Michael Sullivan: So there is no mechanism for the whistleblower to pursue the IRS claim on his own, in a *qui tam* fashion?

Steve Whitlock: That is correct.

Michael Sullivan: In *qui tam* cases, "fraud" or something close to it is typically involved. Is it correct that IRS Whistleblower claims can involve not only tax fraud, but also many other types of violations?

Steve Whitlock: The relevant statute talks about "detecting underpayments of tax, or detecting and bringing to trial and punishment persons guilty of violating the Internal Revenue laws or conniving of the same."

Taxpayers underpay their taxes for a lot of reasons. Sometimes it is because they mean to underpay. Sometimes it is because they do not understand the tax law. Sometimes it is because their accounting records are incomplete or their accountant made a mistake. They may think they are entitled to a credit, and the Service concludes that they are not. This statute allows us to pay an award for information that leads to the collection of an underpayment of tax, regardless of what the motive was on the part of the taxpayer in underpaying the tax in the first place.

Michael Sullivan: So, a good IRS claim could involve negligence or even unknowing violations of the tax laws?

Steve Whitlock: Could very well, yes.

Michael Sullivan: For lawyers screening cases, are there particular types of cases that the IRS is interested in, or particular industries that are more attractive to the IRS?

Steve Whitlock: The IRS puts out an annual plan and has a strategic plan that reaches out five years, which is posted on *www.irs.gov*. We describe our enforcement priorities. We try to touch a little bit of everything in different ways because the tax system is that complex. We try to have some presence in every aspect of the tax law.

The largest corporations tend to be under audit nearly continuously. Issues on international tax noncompliance are getting more attention in recent years because of globalization of the economy. There have been some congressional hearings recently about those kinds of questions where large corporations –multinationals–have the ability to take advantage of the tax code and their business structure to reduce their tax liability. Sometimes that is permitted by the tax code, and sometimes it is not. That is an area of focus—to identify those areas where it is not permitted, but somebody is pushing the envelope.

Someone who is not filing and paying—that is always of interest to us. High-income non-filers are especially interesting to us. Define "high income" how you want to, but we generally look at six figures, $200,000, $250,000 in gross income.

We have concerns in the areas of "trust funds," where a taxpayer is an employer and is withholding from their employees, in order to cover the employees' personal tax liability. When you have someone who is acting in effect as a trustee for the federal government by withholding tax from employee wages, but then says "You know, I'm having a little trouble with the business. I'm going to pay my bills before I pay the tax bill." That's an area that has been an enforcement priority for many years.

We have a whole series of abusive transactions that are identified in our enforcement priorities. CI, on their part of the website, will identify the "Dirty Dozen." Some of those are at the retail level, and some of them are not. Some of them involve fairly sophisticated schemes. So, the Service is interested in a lot of different areas.

Fundamentally if there is serious tax noncompliance, if there's evidence that there is real money involved in it, the Service is going to be interested. If it is below the $2 million threshold in the statute, we still have the backup of the pre-amendment rule, subsection (a) of the statute. We still pay, we still accept, we still process those claims.

Michael Sullivan: But you are interested in all of those claims—the big ones and the small ones.

Steve Whitlock: Yes. We can't have a situation where people say, "Look, the IRS has a materiality threshold of $2 million and anything below that is fair game." That can't happen. We can't send that message in any way. We're open to everything, and we have a separate process to receive and analyze submissions that are below the $2 million threshold for a 7623(b) case.

Michael Sullivan: Are "willful" violations more attractive, or more of a priority for the IRS?

Steve Whitlock: "Willful" can bring in some interesting, additional considerations. When you're talking about the willful failure to file, willful underreporting, you get into matters that may be of interest to our criminal investigators. So, if we've got evidence of willfulness, that can make a difference in terms of which part of the IRS may be interested in the case.

Michael Sullivan: Have you seen any particular types of whistleblowers come into the program more than others?

Steve Whitlock: That's hard to say at this point with the volume of cases, and I'm not looking at all of them. I can tell you we get a wide range. We have people who have a personal relationship with the taxpayer—that could be a family or business relationship with the taxpayer—and they know something is not right. We have business competitors, we have people who are employees or former employees of the taxpayer.

We have some cases where people are just very knowledgeable about the industry, and they can see patterns of behavior that really point to abusive practices. They know what the indicators are. They do some research and get some specifics out of a public filing, or out of some other source, to say, "Okay, when these things are present, almost invariably there is a tax noncompliance issue. This taxpayer has these three things present, and here's where they are." That's an interesting case.

Michael Sullivan: Does a whistleblower have to have *direct* knowledge of the violation?

Steve Whitlock: No. They need to have information that is credible and substantive, and that we can act on. It may be indirect. The more attenuated you get from "real" knowledge, there may be credibility questions that we have to sort through. But we've accepted cases from people who say, "You know, I wasn't in the meeting, but here's what I understand was going on in the meeting." And that is part of their submission, and we'll evaluate that and see if that's enough for us to go on.

Sometimes we can take information provided by the whistleblower and combine it with information known to the IRS, and together that gives us enough of an insight to say, "This is something we are going to go after."

Michael Sullivan: What about true "outsiders?" Somebody who doesn't necessarily work in the entity that is the taxpayer, or doesn't have a relationship with the taxpayer, but who has figured out that "something is going on." Would they have a potential claim?

Steve Whitlock: Sure, we get those. Some of them are very good. Some of them are purely speculative, and you can't get very far with pure speculation. In cases where the core of the submission is an analysis of public documents, we see greater problems with speculation about what the taxpayer is doing.

Michael Sullivan: What should TAF's lawyers look for in screening clients and screening cases?

Steve Whitlock: Documents are helpful. Having "been there" is helpful. The kinds of things that you would look at and say, "Do I believe this person? Can I prove this case? Is evidence going to be available to corroborate this?" Corroboration may not be available to the whistleblower, but the IRS may be able to obtain information directly from the taxpayer or from another source that can prove or disprove the issue raised. The issue raised needs to be something that we can get proof on.

Another thing is it needs to be "material." The IRS has many more taxpayers than we have the resources to audit. We routinely make choices about which taxpayers to audit, knowing that some of those we choose not to audit might have understated their tax liability. So, one of the questions that I would want to understand from the whistleblower is, "Why should the IRS take this case? What is in it for the IRS?" Is it a substantial amount of money? Is this a topic that has a lot of abuse ramifications

outside the particular company? Does this whistleblower give us some insight into the company that we wouldn't otherwise have?

Sometimes we'll go in and do an examination of a taxpayer and we'll say, "We're going to look in this particular aspect of the operation. We're concerned about depreciation, we're concerned about executive compensation." The whistleblower comes in and says, you really need to be concerned about their entertainment expenses in this division because that division has been really playing fast and loose, and here's what's going on. We might not have looked at that division, but for the information the whistleblower is able to provide us. Do we look at every entertainment item on a tax return? No, we can't possibly, but if somebody can point us to one that really makes a difference, that is material, that's something we take a look at.

Michael Sullivan: We have talked a bit in the TAF presentation today about issues arising with certain types of whistleblowers—attorneys, CPAs, or other persons who might have been involved with the whistleblower. Is there a dividing line from your perspective that really raises red flags?

Steve Whitlock: The "current representative" is really a bright red flag. When we have somebody who is currently representing the taxpayer, and they want to become a whistleblower, they need to become the "former representative." There is a conflict of interest there that is really profound.

Michael Sullivan: When you say "representative," do you mean representative before the IRS, as opposed to an attorney in some other capacity?

Steve Whitlock: Exactly right. We are dealing with situation where, at one end of the spectrum, we've got the attorney or the CPA who is appearing in the audit, on behalf of the taxpayer, and might be the only one who shows up to talk to the auditor. The taxpayer might not even appear. And they are supposed to be representing the taxpayer client's position. If that individual is to then provide information to the IRS about non-compliance by their client, that's beyond the pale.

You can suggest a different situation where, let's say the individual is representing the taxpayer on a business transaction or on some other matter and, in the course of that representation, learns that—maybe it's a real estate closing, and they find out that this high income individual has no tax return to provide to the mortgage company in order to document their income for the purposes of their mortgage. Is that client confidence something that can be provided to the IRS? We'd have to work through that and understand the facts and where the privilege lies, and what the law says on that issue. But we cannot deal with them when they are representing the taxpayer in a tax matter before the IRS and want to talk about tax liability problems to the IRS.

Michael Sullivan: In the process of evaluating a claim, if it's determined that it is based at least in part on privileged information, but not necessarily information from the taxpayer's representative in an IRS proceeding, what would typically happen?

Steve Whitlock: Well, we would withhold from the audit team information that's privileged, assuming the privilege does apply, because we're trying to protect the integrity of the audit. What would actually flow to the audit team would be information they can use. We would also make sure that there is no contact between the whistleblower and the audit team, which might otherwise be permissible if we didn't have a concern about privileged information in the whistleblower's submission. We want to insulate the audit team from any contact because we want to be able to say, with integrity, that we have not used information that we are not allowed to use, directly or indirectly, in building the taxpayer case.

Michael Sullivan: The Large and Mid-Size Business Division has described a "Three-Step Process" for whistleblower claims (LMSB-04-0508-033). Is that one that is now serving as a model for other divisions of the IRS?

Steve Whitlock: Right, that really is the model we're using. We built it off of the experience of LMSB and made some variations to accommodate the different organizational structures in other parts of the IRS.

Michael Sullivan: Would you describe the various steps in what happens to a claim when it comes to the Whistleblower Office?

Steve Whitlock: We do an initial administrative scan to make sure that we understand what the case is about. At that level, we're going to see whether the claim meets the statutory thresholds for subsection (a) or (b) of the statute.[3] Is it signed under penalty of perjury? Sometimes they promise that they have documentary evidence, but there's no attachment. We're going to be looking for those kinds of things, and administratively perfect the case as an initial step. If it's below the dollar threshold for a (b) case, we'll send it to the Ogden Informant Claims Examination (ICE) unit to be processed as an (a) case.

The next step in the process is a more in-depth analysis by an experienced analyst on the Whistleblower Office team, who is going to be looking at things like, "Do we have returns filed by this taxpayer?" "Are any of those returns under audit?" "Do we have any prior claims filed against this taxpayer by other whistleblowers?" "Do we have any other pending whistleblower cases from this whistleblower"—to get an understanding of whom we are dealing with, and what we've got, and whether that's something that may be relevant.

They're going to also look for "badges of fraud" and make a determination of whether we should run this case through Criminal Investigation to determine whether a criminal investigation ia appropriate in this matter. In most cases, there are not badges of fraud in the tax sense. Tax fraud has a specific meaning.

Michael Sullivan: Intent to violate the tax laws, as opposed to intent to commit some other offense?

3. Editor's note: Subsection (a) of 26 U.S.C. § 7623 is the "old" IRS rewards provision. The 2006 amendments to the statute added subsection (b), which addresses the "new" rewards available if the statutory criteria are met.

Steve Whitlock: Right. We have a "specific intent" tax fraud statute, so most cases are going to go to the civil side—Large and Mid-Size Business, Small Business/Self-Employed, and a small number to Tax Exempt & Government Entities. They're going to evaluate the case to see whether they want to proceed, whether this is something that, when considering the other ways they could be spending their time, they want to spend some time on this. "Does it contribute to an ongoing audit? Does it cause us to start an audit?"

Those kinds of questions get resolved at this stage with a "Subject Matter Expert" who understands the operations of the IRS, understands the tax matters, understands where the resources are, and can make an assessment of whether it makes sense to go after the issue raised by the whistleblower.

The Subject Matter Expert will also be advised by counsel at that stage on technical tax issues and on evidentiary questions. In most cases, we don't have any evidentiary questions. But in those where, for example, we get a document that is stamped "attorney-client privilege" or "attorney work product" or whatever, we're going to analyze the documents and how the documents came to be in the hands of the whistleblower to determine whether the privilege might apply; and if the privilege might apply, whether it's been waived. All of those sorts of questions have to be sorted out. So, that's the initial review. The end of their analysis should include some interaction with the whistleblower or their counsel, in order to really understand the facts.

Michael Sullivan: Typically an interview?

Steve Whitlock: Yes. Then, the next question is, "Should we proceed?" And the business decision gets made, "Is this something we want to go after?" If the answer is no, that's the end of it.

Michael Sullivan: Who makes that decision?

Steve Whitlock: That decision would be made by the Subject Matter Expert, maybe with a supervisory review. There may be a team of people looking at it, depending on what the nature of the issue is and how that issue is being managed in the IRS. We have some issues that are really rather significant and are being managed as a coordinated team approach to make sure that they are approached consistently around the country.

So, that's the business decision that gets made, "Do we pursue it?"

Then there is a legal question. "Is there anything about the evidence that's been offered?" "Is there anything about this case that should give us pause—that we may have a problem using the information now or in the future, should the taxpayer take us to court at the end of the day." If the answer to that legal question is "no legal issues," then fine, we proceed. If the answer to that question is that we see some legal issues, then we are going to get a "risk analysis" from the lawyers. There will be a decision from a business side as to whether, knowing what the risks are, we want to proceed or not. Or, whether we say, "We're going to proceed, but we're going to keep that information out

of the mix." In that case, those people who have seen the information that we're keeping out of the mix will be walled off from any involvement in the case. So, the question that often comes up is, "Is this a Whistleblower Office determination to pursue the case?" The answer is really no. We're making determinations that are relevant to the *reward*.

As I suggested earlier in discussing the difference between False Claims Act and this statute, the decision on whether to conduct an examination or an investigation is a decision that gets made by the operating side of the IRS, the Large Mid-Sized Business Division, or Small Business/Self-Employed. They're going to make that call, not the Whistleblower Office.

The question of whether the Secretary has taken action "based on" the information provided by the whistleblower is a two-part question. "Did the Secretary take action?" That's the business decision by Small Business/Self-Employed, or Large and Mid-Sized Business. Part 2, if action was taken, was it "based on" the information provided by the whistleblower? The Whistleblower Office will make that determination, and that's a determination that I think would be appealable to Tax Court.

Michael Sullivan: You mentioned that part of the initial screening is to see if prior claims have been filed involving the taxpayer. Is it possible to have two different whistleblowers, or multiple whistleblowers, providing different pieces of the puzzle, where all of the claims would go forward?

Steve Whitlock: I think it is, and part of this depends on the complexity of the tax return that we are looking at. It's not hard to build a scenario where "Whistleblower No. 1" comes in and says, "You should look at "Taxpayer X" on a particular credit," and another person comes in and says, "They've got a problem over here on a transfer pricing issue," and somebody else comes in and says, "You need to take a look at something else."

The IRS is going to make a value determination on whether to pursue all of those issues, or none of those issues. If we pursue those issues, it's possible that all three will be resolved with an assessment and collection of tax—which means in the whistleblower's favor—and we're going to have to decide whose information substantially contributed: which one did we take action based on, and then the extent to which they substantially contributed. That's going to be pretty interesting.

I can also give you a hypothetical where we have a taxpayer that we didn't plan to audit. Whistleblower No. 1 comes in and gives us information about, let's say, a transfer pricing question. Based on that information, the IRS decides to conduct an audit of the taxpayer. When we conduct the audit of the taxpayer, we don't limit our scope to just the transfer pricing issue. When we look at that kind of taxpayer, there are other things that we are going to look at. It might be executive compensation. It might be depreciation issues. Depending on the business the taxpayer is in, what their return looks like, things that we just go ahead and decide to pursue.

Should a second whistleblower come in and say that there's an executive compensation issue that you need to take a look at, then the question I need to ask at the determination of the awards stage is, " Did that second whistleblower substantially

contribute to the decision to look at executive compensation?" Maybe not, because maybe that's a standard part of the examination of any taxpayer of this type, and so once we got into the door with Whistleblower No. 1, maybe Whistleblower No. 2 really doesn't contribute substantially to what we wind up doing.

Michael Sullivan: What if Whistleblower No. 1 has identified Issues 1 and 2, and you naturally come across Issue 3, does Whistleblower No. 1 get credit for what you discovered?

Steve Whitlock: This is a question about whether we would be taking action on issue 3 based on the information the whistleblower provided on issues 1 and 2. If you take the hypothetical where we would not have conducted an audit of the taxpayer but for the information provided by the whistleblower, and we include issue 3 because that is an issue we look at when we audit this type of taxpayer, I think the whistleblower will get credit for issue 3. One of the sort of interesting results of that is, we could go in, look at the issues raised by the whistleblower, and find a $5 million question on those issues. When we open up other issues that we normally look into for this type of taxpayer, we could make a $50 million adjustment. We wouldn't have done the examination, but for the information provided by the whistleblower in the first place. I think we've taken action based on their information. That's a pretty good deal.

Michael Sullivan: That is a good deal. We have talked about the statute of limitations in IRS Whistleblower claims, and how lawyers who are accustomed to *qui tam* cases under the False Claims Act may not realize some differences.

Steve Whitlock: Correct me if I'm wrong, but in the False Claims Act situation generally when you file the Complaint under seal, that filing tolls your statute of limitations. So, when is the statute tolled with our cases? When you bring that case to us, that has no impact on when the statute of limitations is tolled. It is not until the IRS takes a specific type of action in dealing with the taxpayer that we meet our obligation on the statute of limitations.

So in our case, filing the information with the IRS simply starts an IRS investigation or examination, and does nothing to the statute of limitations.

What can happen is, in our evaluation by Subject Matter Experts, they may find that a three-year statute is going to apply in this particular case, and it is six months before that three-year period is going to run out. What can we do at six months? If there's not much we can do in six months, the case is just not going to go forward. It may be that we will be able to pick up that issue in a subsequent year, but if we are close to the statute running out, we have limited options unless we can get agreement from the taxpayer to extend the statute.

Another issue on the statute of limitations is that, of course, there are a number of statutory periods of limitations, depending on what kind of case you are dealing with. One of the points that will never be apparent is that the taxpayer, particularly in large cases, frequently agrees to allow the statute of limitations to be extended. Why do they

do that? Well, suppose there is a complex audit going on, and they think they are going win on some of these issues, and they are not so sure on others. It may be in their interest for us to work together with them and get it right. So by mutual agreement, we extend the statute of limitations. There are other things that can keep the statute open.

That's the key point—the "tax years" may still be open, and you might not know about it.

Michael Sullivan: Is there still is a preference for "recent year" events in these claims?

Steve Whitlock: "Recent" varies depending on the taxpayer. There are some taxpayers who have open audit years that go back a lot more than three years because that's just the nature of the way an examination of that taxpayer progresses. If we've closed a year, it's going to be hard to re-open. There are substantial administrative process hurdles that you have to overcome to do that. It could be that we just now close one from five years ago because it took that long to work through that examination and the appeals aspects. But once it's closed, there is a degree of finality.

If somebody brings us an issue that's four, five, six years old, we can take a look at it. We can see if that year is still open and then inject the issue into that open examination or audit—we use those terms interchangeably.

However, if we have been working through the examination process with the taxpayer for three or four years, and then we come in toward what would otherwise be the end of the process and say, "We want to take a look at your entertainment expenses in the Poughkeepsie division," we may want to have a pretty good reason for doing that. It may need to be pretty material to do that. And, as I suggested earlier, in any business, "recent" is easier to collect than "old." So, those are some of the factors that are going to come into play.

Michael Sullivan: The current regulations endeavor to provide for "confidentiality" of the identity of the informant or whistleblower. What steps generally does the IRS take to try to preserve confidentiality?

Steve Whitlock: Well, you have to begin by understanding that the IRS puts a premium on protecting confidentiality. We have statutory requirement to protect the confidentiality of taxpayer returns and return information is broadly defined. It includes information about the whistleblower, so that's taxpayer information within the scope of the statutory protection. And there's a culture in the IRS about protecting taxpayer information, so we start from there.

We add some additional protections with statements on cover sheets that we send with these documents that this is "informant information," and it's to be put in "seven-level protection." All the emails are supposed to be encrypted, and we have built our software to default to "encrypt," in exchanging emails within the IRS. So we have those kinds of things going on.

We really reinforce the warning, but the biggest protection is just the fundamental ethos in the IRS built around protecting the integrity and confidentiality of taxpayer

information, and that includes whistleblower identity information. People understand that it's a very, very big deal to disclose it. I have a report that I receive every morning that tells us about bad things that happen in the IRS. One of the things on that report every morning is every inadvertent disclosure of taxpayer information. People are really aggressive about these reports. For example, somebody sent something through the mail, and it included a page that it shouldn't have included. That would be an inadvertent disclosure of taxpayer information, and is reported with the mitigation action. The daily report goes all the way up to the Commissioner of IRS, because disclosure of taxpayer information is a very big deal.

Michael Sullivan: Lawyers who try to advise their IRS whistleblower clients accurately sometimes tell them that, while the IRS endeavors to keep their identity confidential, there might be circumstances where their identity would become disclosed, such as if they were needed as a witness in a civil or criminal proceeding.

Steve Whitlock: Right.

Michael Sullivan: Are there others?

Steve Whitlock: Well, you know, there's always human error. Despite everything we do, we do get that report on a daily basis of things that happen. We encrypt all of our laptops, but laptops get stolen, and sometimes the laptop is with a paper file as well, and you haven't encrypted the paper file. Stuff happens. It doesn't happen often, and we're pretty aggressive about it when it does, but you have that situation.

Aside from the "essential witness" situation, I can't think of a case where we would intentionally reveal that information. The other reality is, in many cases the fact that Mr. Smith is interested in this issue is well known to some people. It may not be well known to the taxpayer, but when they see that issue suddenly pop up—"What about this entertainment expense in Poughkeepsie?" "Wait a minute, wasn't that Bob that was giving us a problem about entertainment expenses in Poughkeepsie? I bet Bob was the one that raised that issue."

Michael Sullivan: Someone figures it out, or guesses it.

Steve Whitlock: Yes, and that's going to happen. That's a fact of life in dealing with disclosures in any situation.

Michael Sullivan: There's a seal that prohibits lawyers from talking about cases filed in the *qui tam* arena, but there's no seal in the IRS arena. In fact, we've seen some examples of firms who have sent out press releases about claims they have submitted. From the IRS' perspective, are there any disadvantages or negative effects of publicity about the claims that are filed?

Steve Whitlock: Publicity is a two-edged sword. I would be lying if I said that we received no benefit from some of those press releases. People put some attention on

the Whistleblower Program because of news articles that were written after some of those press releases went out, and we've had a surge in cases. Is that attributable to the press releases? I don't know, but you've got to figure that's a piece of it.

My concern is, fundamentally, "Does that disclosure of information adversely affect our ability to pursue the examination on that issue with that taxpayer?" The more that gets out in a press release, the greater risk that the taxpayer figures out that they either are or may be the target of our interest, and they—if they're so inclined—can begin to take steps to conceal their involvement, conceal their activity, circle up the wagons. That's a bad thing, and so, when I get down to the point where I'm going to make an award determination, I've got a range that I've got to apply. If I've seen a material, adverse impact on our ability to pursue the case as far as it really should go, because of something that the whistleblower has done, I think I have to take that into account, and we'll see how that plays out.

Michael Sullivan: So, would it be fair to say that the "best practice" would be *not* to publicize the submission of an IRS Whistleblower claim, and let the IRS do its job?

Steve Whitlock: That would certainly be our preference. But I understand that it's a closed system, and people get frustrated with the closed system. I understand some of the other motives that might cause somebody to put out a press release, and I can't stop them from doing it, but they need to understand that when they do that, they may be affecting the ability of the IRS to pursue the issue. We're not going to shut down because there's a press release. We're not going to decline the case because there was a press release. We're going to look at it on the merits, but you put an extra element of risk in the case and our ability to pursue it if you give the taxpayer a heads up that the IRS is going to be interested in their behavior.

Michael Sullivan: How can an attorney monitor the progress of the case at all, given the restrictions of section 6103[4] and the privacy issues?

Steve Whitlock: It's very hard because we are really not allowed to say anything substantive about the status of the case. In one sense, no news is good news. If we haven't sent you a letter saying that the case is closed, it means it's still open. We do have people assigned to work the cases that are in their inventory. They'll give you what feedback they can. "Yes, we've been talking to the Subject Matter Expert. I will pass on to them your concern, and your desire to do a debriefing with them." Those kinds of things we can do, but we can't say, "Hey look, we're partway through the audit now," or to make it really interesting, "We identified four partners." We can't tell you that. That would be revealing taxpayer information, and we just don't have the authority to do that.

Michael Sullivan: In *qui tam* cases, the government can interview relators over and over. But the IRS doesn't sit down repeatedly with the informant or the whistleblower, and go over evidence that the IRS has gathered?

4. 26 U.S.C. § 6103 (confidentiality and disclosure of returns and return information).

Steve Whitlock: Generally, that's the rule. One of the things that we talked about in the program is helping our people in the IRS understand is that the whistleblower may have some unique insight. Our people are very good, but sometimes they are going to miss issues. Sometimes they're just going to look at the situation on a particular examination and say, "I think these are the five issues I should pursue." The whistleblower comes in and says, "Here's a sixth that you should go after," and in many cases we know how to go after that issue without further help from the whistleblower.

In other cases, our people need to understand that there may be some expertise that would help them understand a novel issue, or a novel application of the law about this taxpayer or unusual fact situations, or some complexities of relationships, and we ought to get the help where we can.

Michael Sullivan: Is there some effort to work out a way for the IRS to be able to communicate with the whistleblower and their counsel at least a little more?

Steve Whitlock: We're trying. There's one critical area where we have to be able to communicate, and that's at the determination stage. The whistleblower and their counsel have to have some insight into the basis for their determination, if for no other reason than to evaluate whether they should appeal. It's in nobody's interest to have all of these cases appealed to the Tax Court, simply because the Tax Court is more likely to give you discovery on what the basis was than the IRS is. We can't have that result, so we have to find a way to fix that. We think we've got an angle; we're working on it.

Michael Sullivan: If there's a recovery by the IRS, how is the whistleblower notified, and what are you able to tell the whistleblower?

Steven Whitlock: That's what we're working on. Right now, the way it works is we tell you, "Here's X number of dollars, and we can't tell you the way we calculated it." And that just can't be the result.

Michael Sullivan: When there is "rolling" recovery based on a whistleblower submission, and the taxpayer is paying the IRS in installments, would the whistleblower also be paid in installments?

Steven Whitlock: We have done some "partial payments," which is what we call them. We've had a policy on it in the past that I don't think makes a great deal of sense. What we're going to try to do is do something that makes sense.

It's important that the tax issue be resolved. The taxpayer in question must have exhausted their appeal rights on the assessment and have that finally settled. Collection happens reasonably quickly. The taxpayer either has the assets, and they pay, or they don't have the assets and may have to pay over a period of time. If we're in a situation where the payments are going to be made over time, then we can make partial payments if we're sure that there's not going to be something else filed.

I can give you a situation where somebody makes a payment, but we know that the payment has been made in order to create jurisdiction for a refund claim suit. In that situation, although we've been paid, we're not in a position to make the award.

Michael Sullivan: When the taxpayer enters into a settlement agreement with the IRS, it's over at that point?

Steven Whitlock: That's right. And we also have the situation that we have to work through where there are multiple taxpayers. If the abuses occurred in a partnership, the tax liability is visited on the partners. So, let's take the hypothetical situation of the partnership that has 100 partners, which is not all that uncommon. The tax matters partner resolves the issue and concedes the point. The liability then flows through to each of the partners based on whatever the terms of the partnership are, right? And so now, we've got 100 taxpayers to collect from. 50 of them pay up pretty quickly, 25 of them get on an installment agreement, and the other 25 have no assets and come in an offer in compromise, seeking to have the actual liability substantially reduced or eliminated. We've got 100 issues to sort out there.

Michael Sullivan: In determining the reward to the whistleblower within the statutory range of 15–30%, what criteria do you use?

Steven Whitlock: At this point, we are still using the criteria that were provided under the previous policy, which gives a reward of 1%, 10%, 15%, because all of the cases that have come in for an award determination were cases that pre-date the 2006 amendments.

I have drafted some criteria which I intend to publish so that people see what we're going to use, but they're not quite ready. But, we're going to expose the criteria to people so you'll see that we have a starting point, and then adjust from that base level. We have to start somewhere, so we'll start at 15. There are some factors that we would consider to go higher in the range, and some factors that would cause us to say that we shouldn't go higher in the range. Pluses and minuses. We'll see how that sorts out. It can't be algebra, where we plug numbers into a formula and compute a result. This is an art, not a science, and we'll see where that takes us.

I also don't expect that we will ever be in a position where we say that Whistleblower Smith on these facts gets a 16% award, Whistleblower Jones on these facts—which are a little better for Whistleblower Jones—gets an 18 ½% award. You can't divide it that finely. We will likely come up with some relatively arbitrary, but reasonably understandable distinctions between a high, medium, and low, or something like that, and we'll peg some places in the range at 5% increments, or halfway in the range or something else, and that's how we'll make the call.

Michael Sullivan: At the end of the whole process, I take it there is no announcement by the IRS that it has recovered money from "Taxpayer A."

Steven Whitlock: That's correct.

Michael Sullivan: There's also no announcement by the IRS that "Whistleblower B" has recovered a reward, or that "Attorney C" has made a fee in that process. Are there any restrictions on what attorneys can say, or should say, at that point if there is a recovery?

Steven Whitlock: That's between the attorney and the client about how much they want to say about it. There's no prohibition on anyone who has personal knowledge from saying what they know. That's how we get press releases.

In theory, some of those press releases could have identified the taxpayer because the attorney who knows that they've made a submission is not bound by 6103. That's a problem, right? At the end stage, I'm not aware of anything—other than the relationship between the attorney and the client, and their concern about retaliation or some civil liability to the taxpayer—from revealing that, "I received an award of this amount based on my reporting of tax noncompliance by this individual."

We will do a report of our own. We are required by law to do an annual report on actions taken under the statute, and I have to figure out how I'm going to convey that information about awards that we do make.

Michael Sullivan: Are there any statistics available that you can share on types of claims that have come in?

Steve Whitlock: Yes. I am being very careful not to say a whole lot about what the nature of the claims are because (1) I don't want to reveal where we're looking; and (2) every time I do, I get a lot of questions about "Is that mine?"

It's a mix—it's a little bit of everything that the IRS does. We've made referrals to all of the operating divisions. Wage and Investment doesn't do many examinations. Most individual taxpayers are audited by Small Business/Self-Employed. Wage and Investment handles the submission process and things like that. They do some correspondence with the taxpayer to resolve issues, but they generally would not act on something like a whistleblower submission.

So, generally we're talking about Tax Exempt & Government Entities, Large and Mid-Size Business, Small Business/Self-Employed. Criminal Investigations can get involved by taking the case right from the start, or after a civil examination develops additional facts warranting a criminal referral. They're all getting these cases, and it's domestic, it's international. Big guys, medium guys, not many small guys.

Michael Sullivan: I want to conclude by asking you about mistakes that you see attorneys make, and things that you would like to urge lawyers to do, in pursuing these claims.

Steve Whitlock: By and large, the attorneys are doing a pretty good job with the information that they are providing to us. We see reasonably clear arguments. We understand what's going on.

Give us a clear statement about what it is about. If you want to give your client a little extra assurance on confidentiality, one thing that a couple of firms have done is

they will only use the name of the client in the Form 211. Elsewhere in the submission, they will refer to the client as "Mr. X" or some term like that, so that there's not a lot of paper floating around with that person's name on it.

I would also suggest that whistleblowers and their representatives try to understand why we have the process for receiving their submissions in the Whistleblower Office, and not attempt to by-pass the process. We set up the Whistleblower Office review and the Subject Matter Expert review to help us ensure that the audit team gets what they need, but does not get something they can't use. It also helps us to document what we received from the whistleblower, which will be important when the time comes to make an award determination. Another important part is ensuring that the audit team knows what it must do to protect the whistleblower's information from disclosure. Yes, it can be slow and frustrating, but we have a lot of moving parts that need to be coordinated.

Sometimes a whistleblower or a representative will contact an auditor or investigator directly, thinking they can expedite the case and bypass unnecessary bureaucracy. I think that is a mistake, and it can operate against the whistleblower's interests. First, I acknowledge that we had problems getting our program up and running, and some cases sat too long in our hands before getting out to the field. We have taken a number of steps to eliminate those delays, and we can move quickly on a time-sensitive matter.

I think the more important point, from the whistleblower's perspective, is that there can be consequences from direct contact that are not good for the whistleblower. One is that they may give the auditor something he or she is not allowed to have, such as a privileged document. In a case like that, we may have to pull the auditor off the case and start fresh with an "untainted" audit team. That will delay case resolution, at best. It may also provide the taxpayer with a procedural argument to fight the case. If the taxpayer prevails on procedural grounds, there is no assessment and thus no award. Even if the taxpayer loses, there is another opportunity to delay resolution of the case.

Another potential bad outcome for the whistleblower is that the direct submission to the auditor might result in information being included in the audit file that would not otherwise get into the audit file. We try to keep whistleblower information out of the audit file, because the taxpayer has the right to see what is in the audit file under some circumstances. If the direct submission to the auditor gets into the audit file, we might not be able to get it out before the taxpayer sees the file. There is also some risk that the whistleblower's contribution might not be adequately documented if our process is bypassed.

For all of these reasons, I urge whistleblowers and their representatives to work with us, so that we can provide the proper foundation and ensure the information is handled appropriately. That does not mean there will never be direct contact with the auditor or investigator. Rather, it gives us an opportunity to manage the risks.

If you're going to send something in electronic format, it would be helpful to have PDF files or the equivalent, so that for evidentiary purposes, we see what we've really got. To the extent that you do anything really extensive, an index is really essential.

When we get 16,000 pages on a thumb drive, that's a little hard to work through without an index.

A little practice tip is if you send the information in, and you've got electronic media with it that has documentary evidence, don't send that through the U.S. Postal Service. Send it by FedEx or UPS, because our mail process for USPS includes irradiation. Electronic media will get "fried" when it goes through that process.

Michael Sullivan: On behalf of TAF, I thank you, Steve Whitlock.