KENNETH H. RYESKY, ESQ., COMMENTARY SUBMISSION, AUSTRALIAN TREASURY CONSULTATION PAPER FOR REVIEW OF TAX AND CORPORATE WHISTLEBLOWER PROTECTIONS IN AUSTRALIA (20 DECEMBER 2016)

I. INTRODUCTION:

The Australian Government Treasury has posted a public Consultation entitled "Review of tax and corporate whistleblower protections in Australia." [1] The Consultation specifically invites public comments. This Commentary is accordingly submitted.

II. COMMENTATOR'S BACKGROUND AND OTHER PRELIMINARIES:

Background: The Commentator, Kenneth H. Ryesky, Esq. is admitted to the bars of the American courts in the States of New York, New Jersey, and Pennsylvania, and also to practice before the United States Supreme Court. He is currently a Senior Advisor with Ernst & Young (Kost, Forer, Gabbay & Kasierer) in Tel Aviv, Israel. Before joining Ernst & Young, he was a solo practitioner attorney in New York, and for more than 20 years was an Adjunct Assistant Professor, Department of Accounting and Information Systems, Queens College of the City University of New York, where he taught undergraduate and graduate courses in Taxation and Business Law. He has also taught courses in Business Law, and in Taxation, at the Sy Syms School of Business, Yeshiva University.

Prior to entering into the private practice of law, Mr. Ryesky served as an Attorney with the United States Internal Revenue Service ("IRS");[2] before serving with the IRS he was a

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[1] Review of Tax and Corporate Whistleblower Protections in Australia, <http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2016/Review-of-whistleblower-protections> ["*Consultation*"].

Contracting Officer and an Analyst with the U.S. Department of Defense (DoD). In addition to his law degree (JD, Temple University), Mr. Ryesky holds a BBA degree (Temple University), a MBA degree (La Salle University) and a MLS degree (Queens College CUNY). He has authored several scholarly articles on taxation-related subjects, some of which have been cited in court decisions.

During his career, the Commentator has had cognizance over whistleblower cases with the Department of Defense, the IRS, and in his private solo law practice.

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Citation Conventions: The contents of this Commentary will deal mostly if not exclusively with United States law, reflecting the Commentator's direct experiences (until quite recently). Accordingly, citation conventions used by the American taxation bar and bench will be utilized as follows:

The Internal Revenue Code codification is at Title 26 of the United States Code. The common accepted convention among tax practitioners and courts to cite the Internal Revenue Code as "I.R.C." instead of "26 U.S.C." will be utilized in this article. [3] By analogous convention, regulations issued by the Treasury Department pursuant to the Internal Revenue Code will be cited as "Treas. Reg." instead of "26 C.F.R." [4] The Internal Revenue Manual, an internal promulgation by the IRS, will be cited as "I.R.M."

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[2] Though referred to in the Consultation as the ***Inland*** Revenue Service (consistent with the New Zealand governmental agency and, until 2005, an analogous UK agency), the correct name of that U.S. government agency is the ***Internal*** Revenue Service. This misnomer is rendered an irrelevant nullity because this Commentary will follow the convention used in the Consultation and elsewhere, *viz.* referencing the agency by its commonly if not universally used initials "I.R.S." (specifically, "IRS" without the periods, to accommodate keyboard ergonomics).

[3] *See* Tuka v. Commissioner, 348 Fed. Appx. 819, n. 1 at 820 n.1 (3d Cir. 2009); United States v. Maclean, 227 F. App'x 844, 855 (11th Cir. 2007).

[4] *See, e.g.*, Otto Candies, LLC v. United States, 288 F. Supp. 2d 730, n. 274 at 766 (E.D. La. 2003).

Disclaimer: This Commentary reflects the Commentator's personal views, is not written or submitted on behalf of any other person or entity, and does not necessarily represent the official position of any person, entity, organization or institution with which the Commentator is or has been associated, employed, or retained.

III. COMMENTS ON RELEVANT QUESTIONS OF THE CONSULTATION:

The Consultation poses various questions, and specifically provides that "[m]embers of the public are invited to address any matter raised in this paper and should not feel obliged to address each and every question." The questions to which the Commentator sees fit to respond will now be addressed seriatim:

Questions 1 - 3: Persons other than officers and employees often have knowledge of serious violations of the tax law (and/or the securities regulation or bankruptcy statutes). Former employees,[5] former (and soon-to-be former) spouses, [6] jilted ex-paramours,[7] and parties

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[5] *E.g.*, Campbell v. Commissioner, 658 F.3d 1255 (11th Cir. 2011); Whistleblower 13412-12W v. Commissioner , T.C. Memo 2014-93 (20 May 2014).

The Whistleblower 13412-12W case contested the IRS's refusal to pay a reward to the relator. U.S. Tax Court Judge Diane Kroupa granted the relators motion to seal the court record to protect the identity of the relator pending further proceedings because the relator's former employer had the power to cut the relator's pension and similar benefits.

Less than one month after deciding the case, Judge Kroupa inexplicably resigned from the bench; her motivation subsequently became clear with the indictments and subsequent guilty pleas of her and her husband on tax fraud charges, Department of Justice, *U.S. Attorney's Office, District of Minnesota*, Press Release, "Former United States Tax Court Judge Pleads Guilty To Conspiring To Defraud The IRS Of $450,000 In Taxes" (21 October 2016) <https://www.justice.gov/usao-mn/pr/former-united-states-tax-court-judge-pleads-guilty-conspiring-defraud-irs-450000-taxes>.

Imponderable: Judge Kroupa was obviously undergoing audit by the IRS at the time she handed down the Whistleblower 13412-12W decision. Was Her Honor going light on tax fraud relators in hopes of lenity from the IRS and/or the Justice Department?

[6] *E.g.*, United States v. Peters, 153 F.3d 445, 447 - 448 (7th Cir. 1998), *cert. denied* 525 U.S. 1070 (1999); United States v. Lefkowitz, 618 F.2d 1313, 1318 (9th Cir. 1980), *cert. denied*, 449 U.S. 824 (1980); Taxacher v. Torbic, 2000 U.S. Dist. LEXIS 15193 (W.D. Pa. 2000), *aff'd* 251 F.3d 154 (3d Cir. 2000); Turner v. Turner, 809 A.2d 18, 27 (Md. App. 2002).; *see also* Kara Scannell, "Ex-Wife Gets Payment over Pequot Case," *Wall Street Journal*, July 24–25, 2010, p. B3

[7] *E.g.* United States v. Heubusch, 295 F. Supp. 2d 240 (W.D.N.Y. 2003), *vacated and remanded* 2005 U.S. App. LEXIS 2678 (2d Cir. 2005). The Commentator had occasion to have cognizance over a matter in which a jilted ex-mistress gave the IRS some information regarding her former lover's tax defalcations. Disclosure of particulars here would be highly inappropriate (and most foolhardy) in light of the criminal sanctions prescribed under I.R.C. § 7213(a)(1).

to prospective business transactions gone sour, [8] motivated by concerns of patriotism, remuneration, and retribution (not necessarily in such alphabetical order of preference) can be valuable sources of information regarding tax crimes and other attacks upon the integrity of the public fisc. Such persons do not always fit squarely into commonly-assumed stereotypes of a person likely to be an informant. [9]

Questions 4 - 5: Because fraud in taxation and other fiscal areas is consistently evolving, the government (whether US or Australian or otherwise) needs to stay ahead of (or at least not fall too far behind) the fraudsters. [10] Limiting the disclosure areas does not serve such an end. There does, however, need to be a requirement that the disclosure be made on "reasonable grounds" or some other objective measure, else a whistleblower having a personal axe to grind might needlessly tie up the taxpayer, the various governmental agencies, and the courts in costly litigation.

There is also the matter of whether and to what extent the whistleblower has clean hands in the matter. [11]

Questions 6 - 8: Imprimis, IRS employees and employees of U.S. state taxation authorities enjoy anonymity under the appropriate circumstances. [12] The Internal Revenue Restructuring & Reform Act of 1998 contained a provision specifically permitting IRS employees, upon showing of good cause and with supervisory approval, to use pseudonyms in

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[8] *E.g.* Trompeter v. Commissioner, T.C. Memo 1998-35, at *22, *supplemented* 111 T.C. 57 (1998), *vacated and remanded* 279 F.3d 767 (9th Cir. 2002), *decision on remand* T.C. Memo 2004-27.

[9] *See, e.g.* *See, e.g.* Pleasant v. Lovell, 974 F.2d 1222 (10th Cir. 1992) ("Grandbouche" was the name of the person informed upon, and not the name of the informant).

[10] *See, e.g.* Government Accountability Office, " Identity Theft and Tax Fraud: IRS Needs to Update Its Risk Assessment for the Taxpayer Protection Program" (GAO-16-508, May 2016) <http://www.gao.gov/assets/680/677406.pdf >; How New Identity Security Changes May Affect Taxpayers for 2016 (IRS Fact Sheet FS-2016-4, January 2016) <https://www.irs.gov/uac/newsroom/how-new-identity-security-changes-may-affect-taxpayers-for-2016> ("As the criminals evolve, so must we.").

[11] *See* discussion *infra* on the *Rickman* and *Birkenfeld* cases.

[12] *See, e.g.* Long v. Office of Personnel Management, N.Y.L.J., 10/5/2007, p. 34, col. 1, at 36, col. 1, 2007 U.S. Dist. LEXIS 72887 at *59 - *61 (N.D.N.Y., 2007), *aff'd on the issue* 692 F.3d 185 (2d Cir. 2012) (IRS not required to disclose identity of 666 IRS employees who use pseudonyms. Employees' privacy interest outweighs public interest in knowing identities.); Sparks v. Department of Revenue, 2007 Ore. Tax LEXIS 70 (Oregon Tax Ct., No. TC-MD 060821B, 2007) ("Auditor David # 3128 (no last name provided) represented the [Oregon Department of Revenue];" *see also* 10.5.7, Use of Pseudonyms by IRS Employees.

the conduct of their duties. [13] The IRS has regulations to facilitate this, [14] and IRS employees who testify in pseudonymously in court under such provisions are advised to disclose that fact up front. [15] The U.S. Tax Court has sealed its records when the taxpayer or the taxpayer's family would likely face danger if the taxpayer's identity were to be disclosed. [16] Indeed, the Tax Court has special provisions for whistleblower cases. [17] U.S. Federal agencies are required to have policies to protect personally identifiable information, and to respond to security breaches. [18]

There is no "one size fits all" specification for maintaining confidentiality, but there does need to be a process whereby the likely damage from disclosure is weighed against the value of transparency. Certain showings might give rise to a presumption of entitlement to confidentiality (e.g., actual threats to relator or family members,[19] retiree's risk of loss of pension), while other situations might warrant in camera inspection by a judge or other disinterested official. [20]

Questions 9 - 14: There is much to be said for "tiered disclosure" (sometimes referred to as "up-the-ladder reporting). [21] No business operates perfectly, and the larger the business, the greater the chance that some sort of tax discrepancy can or will occur. Tiered disclosure gives the corporation the opportunity and incentive to voluntarily correct its deviations on its own terms without undue governmental coercion, thereby efficiently facilitating economic activity. Tiered

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[13] Public Law 105-206, § 3706, 112 Stat. 685, 778 (22 July 1998), 112 Stat. 685, 778 (uncodified in I.R.C. proper, enacted as a note to I.R.C. § 7804.

Uncodified statutory provisions have the full force of law, *see, e.g.* Exxon-Mobil Corp. v. Commissioner, 689 F.3d 191, 194 (2d. Cir. 2012); In re Weaver, 542 F.3d 257, 259 (1st Cir. 2008).

[14] I.R.M. 10.5.7.

[15] IRS ECC 201303016, CCA_2012121712270550 (18 January 2013) <https://www.irs.gov/pub/irs-wd/1303016.pdf>

[16] *See, e.g.*, Anonymous v. Commissioner, 127 T.C. 89 (2006); *see also* U.S. Tax Court, Rule 27.

[17] U.S. Tax Court, Rules of Practice and Procedure, Title XXXIII.

[18] *See, e.g.* Executive Office of the President, "Preparing for and Responding to a Breach of Personally Identifiable Information" Memo M-17-12 (3 January 2017) <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2017/m-17-12.pdf>.

[19] *E.g., Anonymous v. Commissioner*, 127 T.C. 89 (2006) (Taxpayer had relatives in foreign countries who would be at risk of danger if taxpayer's financial information were known. One relative had already been kidnapped.).

[20] *E.g.*, Sands v. Murphy, 633 F.2d 968 (1st Cir. 1980).

[21] *E.g.*, U.S. House of Representatives Committee on Financial Services, Hearing on "The Role of Attorneys in Corporate Governance," Written Testimony of Prof. Richard W. Painter (4 February 2004) <http://financialservices.house.gov/media/pdf/020404rp.pdf>.

disclosure also gives taxpayers incentive and opportunity to put into place systems to discourage such deviations from occurring in the first place.

Where disclosures are made to third parties such as uninvolved governmental officials, the media, or Wikileaks, the discloser should have the burden of explaining why he or she had no reasonable expectation that such deviation from the "up the ladder" path would be adequately rectified through tiered disclosure. [22]

It is noted that from tax returns of an individual, let alone a corporation, much can be deduced about such person's or corporation's private affairs. [23] A broad scope of permissible disclosees in the first instance defeats the purpose of general tax return confidentiality.

Questions 15 - 19:

The United States statute governing the release of taxpayer and tax return information is very wordy, even by the standards of the notoriously verbose Internal Revenue Code. [24] The scheme limits disclosure by whistleblowers of tax return information made *to* them, [25] provides for criminal and civil sanctions against whistleblowers who violate such restrictions, [26] and imposes safeguards on the conditions under which disclosures are made to the whistleblower. [27] An analogous scheme needs to attend to a successful whistleblower program elsewhere, which should include the following types of provisions:

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[22] *See* 17 CFR §§ 205.3(b)(4) and (9).

[23] *See, e.g.* Kenneth H. Ryesky, "In Defense of Trump's Nondisclosure of his Tax Returns," *American Thinker* <http://www.americanthinker.com/blog/2016/11/in_defense_of_trumps_nondisclosure_of_his_tax_returns.html> (3 November 2016)

[24] IRC §6103. When copied onto A4 size paper in Times Roman 12-point font, the statute consumes 40 printed pages. The word count is approximately 20,000 words. The statute is implemented with numerous supporting Treasury Regulations, Revenue Rulings, and Executive Orders of varying degrees of verbosity.

[25] Treas. Reg. § 301.6103(n)-2(b)(4).

[26] Treas. Reg. § 301.6103(n)-2 (c).

[27] Treas. Reg. § 301.6103(n)-2 (d).

A. "Up-the-Ladder" reporting: In the first instance the whistleblower should take the matter to the lowest and least drastic level; if such level is outside of the company then the whistleblower should be able to explain why less drastic measures could not have reasonably been expected to be effective in bringing about a correction in past and/or future handling of the tax affairs.

B. Protections against retaliation: "Providing whistleblowers with a zone of protection from economic or physical harm is imperative to the success of any whistleblower program." [28]

C. Where the nature of the information sought for disclosure is in question, selective in camera inspection by a judge or other disinterested official. [29]

D. Restrictions upon secondary disclosure by the whistleblower or others.

Question 20:

{Discussed above.} [30]

Questions 21 - 28:

The model from the U.S. False Claims Act [31] is instructive: The whistleblower reports the alleged violation, and the governmental authorities make a decision as to whether or not to undertake the prosecution of the case themselves:

-- If the government takes the case, then the whistleblower sits by the sidelines as the case proceeds.

-- If not, then the whistleblower may further prosecute the case with his or her own efforts/resources.

The whistleblower should be required to cooperate in the prosecution. Funding should come from the proceeds recovered. The False Claims Act sets that funding as a percentage, within a range, of monies recovered.

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[28] *See, e.g.*, IRS Whistleblower Program, Fiscal Year 2016 Annual Report to the Congress, p. 9 <https://www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf>.

[29] *E.g.*, Sands v. Murphy, 633 F.2d 968 (1st Cir. 1980).

[30] *See, e.g.*, IRS Whistleblower Program, Fiscal Year 2016 Annual Report to the Congress, p. 9 <https://www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf>.

[31] 31 U.S.C. §§ 3729–3733.

One downside of funding from the proceeds recovered is where the reward is contingent upon the amount recovered, in which case there may be disputes as to the amounts of unpaid taxes recovered and/or the calculus of such amount. Resolving such disputes can create messy disputes as to just what information is necessary, and who is responsible for providing such information. [32] In the United States, there are many who have expressed the hope that with the new Presidential administration will come a fresh look at the possibilities posed by an expanded calculus base for the amounts recovered. [33]

Questions 29 - 32:

The regulatory burden that would be imposed by internal reporting systems cannot be ignored.

Various legal and regulatory burdens have various thresholds before they take effect. These thresholds can be in terms of minimum dollar amounts, including minimum court jurisdictional thresholds [34] (or, for that matter, maximums,[35]), dollar values associated with securities sales or offerings, or even numbers of employees, [36] A gradient threshold system, if properly implemented, can impose regulatory burdens in a manner commensurate with the taxpayer's ability to shoulder the burdens.

The fact that a company has implemented an internal system that goes beyond the mandates of its size/dollar volume should weigh in its favor in the enforcement of the tax (or securities [37]) laws, particularly if the whistleblower failed to utilize the company's reasonable "up the ladder reporting" alternatives. Conversely, a company should not benefit where a

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[32] *See, e.g.* Insinga v. Commissioner, Docket No. 9011-13W, Order (27 January 2017) <https://ustaxcourt.gov/UstcDockInq/DocumentViewer.aspx?IndexID=7034535>.

[33] *See, e.g.* Practitioners Hope Whistleblower Result Spurs IRS Attitude, 2017 TNT 21-6, Doc 2017-1600 (1 February 2017).

[34] *E.g.* 28 U.S. Code § 1332(a) requires that the amount in controversy exceed $75,000 for a federal district court to have jurisdiction to entertain the case on the basis of diversity jurisdiction.

[35] IRC § 7442 sets $50,000 as the upper limit for U.S. Tax Court Small Tax cases.

[36] Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101 - 2109, requires (with certain exceptions) advance notice of plant closings to be given to employees when 100 or more employees will be affected).

[37] 15 U.S.C. § 77d(a)(6).

whistleblower who does report "up the ladder" is retaliated against, or the company has not established an adequate internal system. [38]

There is much to recommend resolution of problems at the lowest practicable level of an organization; [39] indeed, the principle was known and practiced in biblical times. [40]

Questions 33 - 34:

Consistent with the concept of the preferential resolution of dysfunctions on lower levels, companies ought be given the opportunity to address breaches internally; if that fails to adequately remedy the breach, then the door can be opened for external authorities.

Questions 35 - 36:

As observed by Ricardo, ("[Taxation] frequently operates very differently from the intention of the legislature by its indirect effects." [41] Indeed, there are many areas and instances of conflicts between taxation law and other areas of the law.[42] When enacted in 1954,

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[38] *See, e.g.* Rickman v. Primera Blue Cross, 184 Wash.2d 300, 358 P.3d 1153 (2015), *reconsid. denied* 2015 Wash. LEXIS 1333 (Wash. 2015), *rev'd and remanded on remand*, 2016 Wash. App. LEXIS 1029, and, as of this writing, is still in litigation and currently scheduled for jury trial on 15 May 2017, in the Superior Court, Snohomish County, Washington State (Case No. 10-2-10616-1).

The *Rickman* case is interesting inasmuch as Ericka Rickman, the whistleblower alleging wrongful termination, was herself the subject of an unidentified whistleblower's report that she had approved preferential employment treatment for her own son. Primera Blue Cross, Rickman's former employer, is, of course, insisting that Rickman's termination was on account of that conflict of interest. This question of fact is a matter for the jury to determine (unless the parties settle the case prior to the trial).

[39] Carla Hengst, " Compliance-related investigations take on a unique complexion for home health professionals: performing an investigation at the lowest possible level helps maintain integrity," Journal of Health Care Compliance, vol. . 8, no. 3 (May-June 2006), p53.

[40] Ex. 18:13 - 24

[41] David Ricardo, *The Principles of Political Economy and Taxation*, ch. 16, 157 (Everyman's Library, no. 590, J. M. Dent & Sons, London, 1969) (orginally published 1817)

[42] *See, e.g.* Bank of New England Old Colony, NA v. Clark, 986 F.2d 600 (1st Cir. 1993)*; Hoye v. United States,* 109 F.Supp. 685, 686 (S.D.Cal.1953); New York State Department of Tax v. New York State Department of Law, 44 N.Y.2d 575, 406 N.Y.S.2d 747, 378 N.E.2d 110 (N.Y. 1978); Chester Upland School District v. Mathews, 705 A.2d 473 (Pa. Commonw. 1997);

the U.S. Internal Revenue Code was intended, inter alia, to remove the restraints upon productive economic activity caused by such conflicts. [43]

Whichever regime is enacted regarding whistleblowers should be crafted with an eye towards minimizing the conflicts between whistleblowers in a taxation context and those in other contexts.

One negative to self-reporting of current lapses is the fear of bringing previous lapses to the attention of the taxation authorities, and incurring consequences therefor. [44]

Question 37: Imprimis, all programs are susceptible to abuse in some way, shape, or form. Given all of the positive whistleblower attributes discussed in this Submission (and implicitly touted in the Consultation), the potential harm from a malicious whistleblower cannot be overlooked. [45] In processing the whistleblower report, there needs to be an evenhanded balance between the whistleblower and the taxpayer who is the subject of the whistleblowing. [46]

It has been suggested that a tax system that requires bilateral verification incorporate a means to inform the taxation authorities of discrepancies between identities and/or

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[43] H.R. Rpt. 83-1337, at 1-2(Mar. 9, 1954) (reprinted in 1954 U.S.C.C.A.N. 4017, 4025); Sen. Rpt. 83-1622, 1-2 (Apr. 5, 1954), *Sen. Fin. Comm. Report on Internal Revenue Code of 1954* (1954) (reprinted in 1954 U.S.C.C.A.N. 4621, 4629). The introductory materials to the respective House and Senate documents were mostly verbatim to one another.

The Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2095 (1986), redesignated the Internal Revenue Code of 1954 as the Internal Revenue Code of 1986, retaining consistency in most of the section numbers and providing that except where inappropriate, official reference to one shall entail reference to the other. The 1986 Code was "not intended to change any substantive provision of the [1954 Code] not otherwise modified by [the Tax Reform Act of 1986]," H.R. Conf. Rep. No. 99-841at II-837 (reprinted in 1986 U.S.C.C.A.N. 4925).

[44] *In re* Stransky, 431 Mass. 678, 729 N.E.2d 1085 (Mass. 2000); Matter of Anonymous, Defense Office of Hearings & Appeals, Case No. 02-10280 (14 July 2004). <http://www.dod.mil/dodgc/doha/industrial/02-10280.h1.html>.

[45] *See, e.g.* 1 (U.S.) National Taxpayer Advocate, 2016 Annual Report to Congress, n. 17 at p. 278 and accompanying text; *id.*, p. 304 <https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf>**;** David Brunori,"Qui Tam and a Nation of Rats," State Tax Notes, 12 October 2015, p. 147 (Doc 2015-22237).

[46] *See, e.g.*, IRS Whistleblower Program, Fiscal Year 2016 Annual Report to the Congress, <https://www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf>; *see also* Hillary Stout, "Taxpayer Rights' Legislation of '88 Gets Mixed Review," Wall Street Journal, 9 April 1990, p. A-14 (Reporting that Senator David Pryor "cited claims by a California businessman that an IRS agent there encouraged a group of businessmen to 'snitch' on competitors who cheat. 'I don't want to ever see any program established in this country that creates an underground network of IRS spies that encourages neighbor to turn against neighbor.'"

dollar amounts. This can aid in combatting identity theft,[47] and additionally, remove the whistleblower stigma from those who properly use such a system.

Questions 38 - 57: Whistleblowers who provide information in taxation matters need analogous protections to those who provide information regarding corporation law breaches. While the corporation securities laws and taxation laws do not and cannot be one hundred percent analogous to one another, the corporation law principles expounded upon in response to the preceding questions should be tailored to the extent practicable to the taxation situation to protect tax whistleblowers, and vice versa.

III. CONCLUSION:

There is much to be learned from the notorious matter of Bradley Birkenfeld, who is arguably the greatest whistleblower in history (at least from the tax collector's perspective). [48] The case has several positive and negative lessons on how to best encourage and manage tax whistleblower programs. [49] These include (but are hardly limited to):

The value of offering and paying bounties to whistleblowers;

Lack of coordination among government agencies (including the judiciary);

Overreach on the part of prosecutors;

International conflicts of laws regarding whistleblowing; and

Legal malpractice issues in representing whistleblowers.

The pros and cons of the Birkenfeld / UBS Bank case are accordingly quite instructive for crafting and administering a whistleblower program in such a manner as to facilitate efficient commerce, economic development, and prosperity. Repercussions from Birkenfeld's disclosures continue, even as this Commentary is being written.

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[47] Richard T. Ainsworth, Email Tax Scams: A Solution from Dubai, (2017 TNT 10-12, Doc 2016-23083), 154 Tax Notes 131 (2 January 2017).

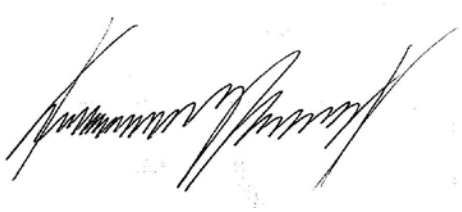
[48] *See, e.g.*, Year in Review: The 2009 Person of the Year, 2010 TNT 1-3, Doc 2009-28454 (29 December 2009) ("Tax Analysts chooses former UBS banker Bradley Birkenfeld as its inaugural tax person of the year for 2009").

[49] *Cf, e,g,* Jeremiah Coder, IRS Pays Birkenfeld $ 104 Million Whistleblower Award, (2012 TNT 177-1, Doc 2012-18996) (11 September 2012) *with, e.g.* Attorneys Ask Obama to Pardon UBS Whistleblower, 20 TNT 73-42, Doc 2010-8338 (15 April 2010).

The basic legislation scheme depicted in the Consultation seems quite reasonable to this tax attorney whose direct knowledge was heretofore effectively limited to taxation in the United States (and, beginning very recently, taxation in Israel), it being understood that the Commentator would defer to those having greater familiarity with the Australian situation as far as crafting a legal scheme that is best compatible with the existing Australian legal system.

Once the legislation is enacted (if indeed any new legislation is enacted), there then will need to be a sensible implementation and administration of it, such that a good balance is struck between, on one hand, encouraging those with information to aid in the enforcement of the tax laws to step forward; and, on the other hand, according due process to the taxpayers.

6 February 2017
Respectfully submitted,



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