NOTES

QUI TAM FOR TAX?: LESSONS FROM THE STATES

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Tax fraud costs the federal government billions of dollars annually. Qui tam litigation, which features individuals bringing lawsuits on behalf of the government, is a powerful tool for the government in its fight against many types of fraud. The False Claims Act, the federal government's most potent qui tam mechanism, however, expressly excludes tax fraud from its scope. Recognizing this gap in coverage, the Internal Revenue Service has instituted a whistleblower program that pays individuals for bringing information on tax fraud to the attention of the Service. A small number of states, on the other hand, allow qui tam suits alleging violations of their tax laws.

This Note reviews the federal False Claims Act and compares it to three different models for involving individuals in the prosecution of tax fraud: the IRS whistleblower program, state false claims acts implicitly authorizing qui tam for tax, and the New York False Claims Act, the first statute to expressly authorize qui tam actions alleging tax fraud. This Note then argues that qui tam lawsuits no more threaten the privacy of taxpayers and the consistent and accurate application of the tax laws than do whistleblower programs, and points out that certain state practices have proven to alleviate potential risks associated with qui tam litigation in the realm of tax fraud.

After reviewing the substantial advantages qui tam litigation demonstrates relative to a whistleblower program, this Note concludes that the federal government and the states should amend their false claims acts to allow qui tam lawsuits alleging tax fraud.

INTRODUCTION

Every year, tax fraud costs the U.S. government hundreds of billions of dollars in revenue. State governments, too, lose millions, if not billions, of dollars to taxpayers who claim fraudulent deductions or fail to report income. While enforcement agencies exist with the mission and authority to track down and punish those who fail to comply with the tax laws of federal and state governments, the fight against fraud in other areas of the law has shown that *public* law enforcement may not be the most efficient form of preventing fraud against the government. So-called "qui tam actions," suits brought by private individuals on behalf of

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the government, have provided a powerful alternative enforcement mechanism in areas such as healthcare and procurement fraud. Yet, the False Claims Act (FCA), the most comprehensive qui tam scheme provided by federal law expressly excludes from its ambit qui tam suits for tax fraud. To fill this gap in coverage, the Internal Revenue Service (IRS or "Service") has instituted a whistleblower program, which rewards individuals for providing information regarding potential tax law violations. Several states, on the other hand, have taken a different path, authorizing qui tam suits for violations of state tax law under their state false claims acts. In the most recent experiment in qui tam and tax, New York instituted a false claims act that expressly provides for qui tam actions in tax fraud cases, while at the same time imposing specific requirements before making qui tam available.

This Note reviews the various statutory schemes and the justifications for and against instituting a different system for tax fraud enforcement than for the enforcement of other types of fraud against the government. It then argues that the states that allow qui tam actions against tax fraud have managed to create qui tam regimes that are immune from the kind of abuse feared by critics of qui tam for tax fraud. This Note concludes that the federal government should learn from the lessons of the states and amend the FCA and the IRS whistleblower program to more effectively reduce the costs of tax fraud to the American public.

Part I describes the problem tax fraud poses to the U.S. government and the public enforcement mechanisms currently available to combat tax evasion. It then summarizes the theory behind private enforcement of public laws and reviews in detail the FCA—the main mechanism for private enforcement actions under federal law—and the tax fraud exception to this statute. Part II analyzes the three different approaches taken to involve private citizens in the enforcement of tax laws: the IRS whistleblower program, the false claims acts of several states that implicitly allow qui tam actions for tax fraud, and the New York False Claims Act, which expressly authorizes limited qui tam suits in cases of tax fraud. In addition, Part II analyzes the justifications for and against applying qui tam to tax law. Part III argues that, in light of the competing policy considerations detailed in Part II, the state schemes permitting qui tam provide the most effective enforcement mechanism against tax fraud, while raising no graver concerns regarding privacy and competence than the existing IRS whistleblower program. Part III concludes by suggesting modifications—some adopted by states, some not—that could further increase the value of qui tam schemes in the fight against tax fraud.

I. TAX FRAUD: IS PRIVATE ENFORCEMENT AN OPTION?

Part I.A introduces the problem of tax fraud, explains the costs tax fraud imposes on the U.S. government and honest taxpayers, and reviews the public enforcement mechanisms currently in place to stop tax evasion. Part I.B then introduces the concept of private enforcement mechanisms—most notably, qui tam suits—and summarizes the arguments for engaging private individuals in the enforcement of public laws. Part I.C reviews the False Claims Act, the federal government's most extensive qui tam statute, and the tax fraud exemption that prevents this statute from harnessing public assistance in the fight against tax fraud.

A. *Empty Government Pockets: The Impact of Tax Fraud and Attempts at Public Enforcement*

The difference between the amount of revenue the U.S. government would collect if everyone fully paid his or her tax liability and the amount the government actually collects, also known as the "tax gap,"[1] has taken on astounding dimensions. Every year the U.S. government loses over $300 billion to tax cheats.[2] In fact, the government has acknowledged that it annually collects only around 84% of the money it is due from taxpayers.[3] The rest disappears in the pockets of fraudsters who underreport their income or fraudulently claim that they are due a refund.[4] And monetary losses are not the only damage done by tax cheats. As the Treasury Inspector General for Tax Administration wrote in a recent report, "[t]he issuance of fraudulent tax refunds erodes the confidence in

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1. See, e.g., IRS, U.S. Dep't of the Treasury, Reducing the Federal Tax Gap: A Report on Improving Voluntary Compliance 6 (2007) [hereinafter IRS, Reducing the Tax Gap], available at http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf (on file with the *Columbia Law Review*) ("The tax gap is defined as the aggregate amount of true tax liability imposed by law for a given tax year that is not paid voluntarily and timely.").

2. U.S. Gov't Accountability Office, GAO-12-651T, Tax Gap: Sources of Noncompliance and Strategies to Reduce It 1 (2012), available at http://www.gao.gov/assets/600/590215.pdf (on file with the *Columbia Law Review*) (estimating in 2006, taxpayers failed to pay $450 billion of taxes on time and after IRS enforcement efforts still withheld $385 billion); Julia Werdigier, Tax Evasion Costs Governments $3.1 Trillion Annually, Report Says, N.Y. Times (Nov. 28, 2011), http://www.nytimes.com/2011/11/26/business/global/26iht-tax26.html (on file with the *Columbia Law Review*) (noting U.S. government loss of $337 billion annually).

3. U.S. Dep't of the Treasury, Update on Reducing the Federal Tax Gap and Improving Voluntary Compliance 2 (2009), available at http://www.irs.gov/pub/newsroom/tax_gap_report_-final_version.pdf (on file with the *Columbia Law Review*); see also Rebecca Jarvis, America at Tax Time: What Cheaters Cost Us, CBS News (Apr. 15, 2012), http://www.cbsnews.com/8301-3445_162-57414288/america-at-tax-time-what-cheaters-cost-us/ (on file with the *Columbia Law Review*) (citing IRS estimate of $385 billion shortfall in revenue); Federal Revenue Lost to Tax Evasion, Demos, http://www.demos.org/data-byte/federal-revenue-lost-tax-evasion (on file with the *Columbia Law Review*) (last visited Sept. 14, 2013) ("Tax evasion will cost the U.S. government $305 billion in 2010 . . . .").

4. See, e.g., Treasury Inspector Gen. for Tax Admin., Reference No. 2012-42-080, There Are Billions of Dollars in Undetected Tax Refund Fraud Resulting from Identity Theft 3 (2012), available at http://www.treasury.gov/tigta/auditreports/2012reports/201242080fr.pdf (on file with the *Columbia Law Review*) (estimating IRS pays out more than $5.2 billion in refunds to undetected identity thieves every year).

our Nation's tax system and increases the burden on those taxpayers who make an honest effort to comply with our Nation's tax laws,"[5] creating a vicious cycle in which noncompliance may lead to more noncompliance.

The Supreme Court once famously wrote that "our system of [income] taxation is based upon voluntary assessment and payment."[6] Yet, while this rhetoric of voluntary tax assessment is frequently invoked by public officials,[7] it presents an incomplete picture of tax collection. Where voluntary compliance fails, the government has created a system providing plenty of coercion, including both civil and criminal sanctions for noncompliance.[8] Three agencies are charged with the enforcement of federal tax laws: the IRS, in particular its Criminal Investigation division (IRS-CI), the Tax Division of the Department of Justice (DOJ), and the U.S. Attorney's Offices around the country.[9] The IRS has initial authority to investigate all crimes arising under the Internal Revenue Code ("Code").[10] In carrying out this authority, agents have the power to execute search warrants, interview witnesses, and make arrests.[11] If it so chooses, the IRS may also collaborate with the DOJ and the U.S. Attorney's Office, employing the resources provided by the federal grand jury system.[12] Once the initial investigation shows cause to believe that a

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5. Id.

6. Flora v. United States, 362 U.S. 145, 176 (1960).

7. See, e.g., IRS, Reducing the Tax Gap, supra note 1, at 6 ("[T]he overall rate of tax compliance in the United States is as high as it is because the vast majority of taxpayers meet their obligations with little or no involvement from the IRS."); Robert Edwin Davis & Danny S. Ashby, Federal Criminal Tax Enforcement in 2009: The Role of Criminal Tax Enforcement in the Federal "Voluntary" Self-Assessment and Payment Tax System, 9 Hous. Bus. & Tax L.J. 237, 238 (2009) ("This characterization of our tax system [as one of voluntary compliance] has been repeatedly offered by subsequent Commissioners of the Internal Revenue Service . . . as well as other Treasury officials.").

8. See, e.g., I.R.C. § 6601 (2006) (imposing interest for late payment of tax); id. § 6662 (imposing civil tax penalties); id. § 7202 (imposing criminal fines, forfeitures, and prison terms for noncompliance).

9. Davis & Ashby, supra note 7, at 241.

10. See I.R.C. § 7608(b) (authorizing IRS agents to execute and serve warrants, subpoenas, and summons; make arrests; and seize property). IRS investigations typically commence with an audit, during which selected tax returns are verified by IRS agents. Returns for audit are chosen by a number of different indicators: via randomized computer program; because information on the return does not match other tax documents applicable to the taxpayer; or because returns by other taxpayers with whom the taxpayer has engaged in transactions have been selected for audit. IRS Audits, Internal Revenue Serv., http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/IRS-Audits (on file with the *Columbia Law Review*) (last visited Aug. 12, 2013).

11. I.R.C. § 7608(b)(2).

12. I.R.S. Treas. Order 150-35(1)(a) (July 10, 2000) [hereinafter Treasury Order], available at http://www.treasury.gov/about/role-of-treasury/orders-directives/Pages/to150-35.aspx (on file with the *Columbia Law Review*). Under some circumstances, grand juries can assist the IRS in efficiently making the factual determinations necessary to pursue criminal actions against taxpayers. The grand jury process provides certain means of collecting documentary evidence and witness statements that go beyond the means

tax crime has been committed, the IRS-CI may recommend to the DOJ that prosecution be commenced.[13] The DOJ may send the case back to IRS-CI for further investigation, decline to prosecute the case, or initiate prosecution.[14] If the DOJ refuses to bring a case, the matter comes to an end.[15] A decision to prosecute leads to development of the case by attorneys in one of the Tax Division's Criminal Enforcement Sections[16] or sends the case to the responsible U.S. Attorney's Office.[17] U.S. Attorney's Offices may not decline to prosecute a case unless specifically authorized by the DOJ's Tax Division to do so,[18] leaving the Tax Division with the sole authority to decide which cases are prosecuted and which are dropped.[19]

In addition to these criminal procedures, the IRS and the DOJ also have civil enforcement mechanisms to ensure tax compliance. The tax code imposes civil penalties, also called "ad valorem" penalties, for failure to pay tax.[20] While civil cases may arise out of criminal investigations initiated by the DOJ-CI, the DOJ-CI need not be involved in civil investigations, which are pursued by other sections of the IRS and DOJ.[21] The Tax Division of the DOJ further litigates refund claims it suspects to be fraudulent and may obtain civil injunctions against the filing of such fraudulent returns and other tax scams.[22]

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available under the IRS's administrative process. See, e.g., IRM 9.5.2.2 (Nov. 5, 2004), http://www.irs.gov/irm/part9/irm_09-005-002.html (on file with the *Columbia Law Review*) (noting IRS may choose to resort to grand jury proceedings where "[u]sing a grand jury would be more efficient" and where "[a]n investigation has proceeded as far as the administrative process allows").

13. Treasury Order, supra note 12.

14. See Davis & Ashby, supra note 7, at 241–42 (outlining DOJ Tax Division's role and prosecutorial options).

15. Id.

16. See About the Tax Division, U.S. Dep't of Justice [hereinafter U.S. Dep't of Justice, Tax Division], http://www.justice.gov/tax/about_us.htm (on file with the *Columbia Law Review*) (last visited Aug. 13, 2013) (describing structure of Tax Division); see also Press Release, U.S. Dep't of Justice, Justice Department Highlights Tax Division's Enforcement Results (Apr. 9, 2013) [hereinafter U.S. Dep't of Justice, Enforcement Results], http://www.justice.gov/opa/pr/2013/April/13-tax-399.html (on file with the *Columbia Law Review*) (noting Tax Division successfully litigated disputes involving almost $1.4 billion).

17. Davis & Ashby, supra note 7, at 241–42.

18. Id. at 242.

19. U.S. Dep't of Justice, Tax Division, supra note 16.

20. I.R.C. § 6662 (2006). For example, a 20% penalty is imposed if a return evidences "[n]egligence or disregard of rules or regulations" or "[a]ny substantial understatement of income tax." Id.

21. IRM 25.1.6 (Oct. 30, 2009), http://www.irs.gov/irm/part25/irm_25-001-006.html (on file with the *Columbia Law Review*) (setting out procedure to be followed in civil fraud investigations).

22. U.S. Dep't of Justice, Enforcement Results, supra note 16. Tax frauds targeted by the Tax Division include abusive tax shelters, identity theft, and offshore evasion. See id. (describing different types of tax fraud prioritized in recent Tax Division litigation).

B. *Qui Tam: Can Private Enforcement Beat Fraud Against the Government?*

Naturally, tax fraud is not the only illegal activity that prevents billions of dollars from flowing into the government's coffers every year. According to one study, for example, the government annually makes as much as $90 billion worth of "improper payments" under its Medicare and Medicaid programs[23] and loses hundreds of millions of dollars on fraudulent procurement contracts.[24] The federal government, however, has created supplemental enforcement mechanisms to help combat these other kinds of costly fraud. In addition to enforcement by public officials and government agencies, the federal government has created avenues through which private individuals can bring lawsuits on its behalf—programs that essentially allow individuals to act as "private attorneys general"[25] to enforce antifraud laws. Under so-called "qui tam" provisions,[26] individuals may allege malfeasance harmful to the government, pursue the matter in court, and, if successful, recover damages on behalf of the government and take a share of the recovery.[27]

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23. Merrill Matthews, Medicare and Medicaid Fraud Is Costing Taxpayers Billions, Forbes (May 31, 2012), http://www.forbes.com/sites/merrillmatthews/2012/05/31/medicare-and-medicaid-fraud-is-costing-taxpayers-billions/ (on file with the *Columbia Law Review*) (citing estimates by U.S. Attorney General Eric Holder).

24. See Gerald H. Lander et al., Government Procurement Fraud 3 (Feb. 23, 2007) (unpublished manuscript), available at http://aaahq.org/GNP/information/activities/2007MYM/Session9_LanderEtAl.pdf(on file with the *Columbia Law Review*) (stating United States recouped $609 million in judgments and settlements from defense procurement fraud in 2006).

25. See, e.g., FCC v. NBC, 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting) (citing Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694 (2d Cir. 1943)) (using term for first time in Supreme Court opinion); William B. Rubenstein, On What a "Private Attorney General" Is—and Why It Matters, 57 Vand. L. Rev. 2129, 2144 (2004) ("A . . . form of attorney general substitution comes through the *qui tam* action.").

26. The term is derived from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who pursues this action on our Lord the King's behalf as well as his own." E.g., Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 768 n.1 (2000); see also Note, The History and Development of Qui Tam, 1972 Wash. U. L.Q. 81, 83 ("The meaning of the expression is that the party bringing the action or information does so as much for the king's as for his own private interest.").

27. See, e.g., False Claims Act, 31 U.S.C. § 3730 (2006) (allowing private parties to bring civil actions for violations of federal law and receive percentage of proceeds from action). Although frequently used interchangeably, the terms "qui tam" and "whistleblowing" are used in this Note to refer to two very different concepts. "Qui tam" is used to refer to schemes that allow private persons to bring lawsuits on behalf of the government and litigate them to a final conclusion, even if the government does not take part in the action. "Whistleblowing," on the other hand, is used to refer to programs that provide rewards for the furnishing of incriminatory information to government agencies by individuals. "Whistleblowers," as opposed to "relators" of qui tam suits, do not have the power to pursue an action if the government agency receiving the information does not choose to prosecute the matter. Others have made this distinction as well. See, e.g., Dennis J. Ventry, Jr., Whistleblowers and Qui Tam for Tax, 61 Tax Law. 357, 372 (2008) [hereinafter Ventry, Qui Tam for Tax] (distinguishing between whistleblowing and qui tam actions and arguing whistleblowing program for tax should be expanded to allow qui tam suits).

The idea behind the private enforcement of public law is simple—it incentivizes individuals to pursue known instances of law-breaking in court.[28] Participation by individuals who stand to reap benefits from bringing actions against, for example, those who defraud the government, can save the agencies otherwise tasked with enforcement significant resources, leading to the prosecution and punishment of a larger number of malfeasors and freeing up resources for the pursuit of other agency priorities.[29] While not without their critics,[30] private enforcement actions have various characteristics that recommend their availability in addition to traditional law enforcement actions. A seminal analysis of regulatory corruption suggested that the potential for corruption is mitigated if incentives to enforce the law are set at the same level as incentives to break the law.[31] Rational enforcers stand to gain more from opposing law-breakers than they would from colluding with them.[32] Similarly, providing standing in court to a large population of potential enforcers helps avoid the problem of "capture" frequently attributed to the regulatory bodies of specific industries.[33] By introducing a virtually unlim-

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28. See Note, supra note 26, at 83 ("A *qui tam* suit . . . involves a combination of two distinct interests; one of which is public, the other private. This manner of combining interests is unique to *qui tam*.").

29. Cf. Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 58 (2002) [hereinafter Bucy, Private Justice] ("The qui tam private justice model . . . has proven to be highly effective in recruiting legal talent who have the skill and resources to handle complex, expensive cases.").

30. See, e.g., William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1, 26–28 (1975) (noting abuses that "would doubtless occur" in private enforcement system, including fabricating offenses, prosecuting innocent people, encouraging people to commit crimes, and not attempting to prevent crimes from occurring). Law and economics scholars have criticized private enforcement actions for their potential to raise enforcement above the level that is socially desirable, arguing that maximum law enforcement is not the same as optimal law enforcement. While this danger is not unique to private enforcement suits, it may be particularly strong given that private individuals cannot take advantage of economies of scale to the same extent larger agencies can. See also Lars Klöhn, Private Versus Public Enforcement of Laws—A Law & Economics Perspective 11 (Dec. 23, 2010) (unpublished manuscript), available at http://ssrn.com/abstract=1730308 (on file with the *Columbia Law Review*) (noting potential of nuisance suits—suits initiated only for their settlement potential or for their negative public relations impact—and danger of "race to the courts" leading to waste of resources on ultimately duplicative lawsuits).

31. Gary S. Becker & George J. Stigler, Law Enforcement, Malfeasance, and Compensation of Enforcers, 3 J. Legal Stud. 1, 14 (1974) (noting private enforcers would not be corrupted "if successful enforcers were paid the amount that they had suffered in damages . . . divided by the probability that they are successful" as then "the gain to victims from enforcement would be the same as the punishment to violators").

32. Id. at 13.

33. Cf. id. (recommending private "market" for enforcement of laws). Referring to both the collusion of the regulatory body with the industry and the lobbying by the industry to reduce the authority or resources of the regulatory body, capture has been a much-lamented phenomenon. See, e.g., Paul Sabatier, Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of "Clientele Capture," 6

ited number of new "regulators," private enforcement actions greatly reduce the possibility that all enforcers may be improperly influenced by the industry they seek to regulate.[34] Furthermore, private enforcement actions may reduce the cost of law enforcement not only to the government, but also to society as a whole.[35] Competitive actions by private individuals can create a market for enforcement where the government currently holds a monopoly, reducing the costs of law enforcement services.[36] At the same time, having individuals act on information they come across in their daily lives reduces the vast costs law enforcement agencies incur trying to assemble all the information necessary to initiate and pursue enforcement actions.[37]

C. *The Federal Government's Qui Tam: The False Claims Act*

Recognizing that private individuals may aid the government in its antifraud efforts, the federal government enacted the FCA, the most notable federal scheme allowing for the enforcement of public laws by private citizens.[38] At its base, § 3729 prohibits both traditional false claims—claims seeking payment from the government to which the claimant is not entitled—and so-called reverse false claims—claims that misrepresent the amount an individual must pay the government.[39] An individual or

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Pol'y Sci. 301, 303 (1975) ("When the policy preferences of regulated and regulator attain . . . coincidence, the agency is said to be 'captured' by its clientele."). See generally George Stigler, The Theory of Economic Regulation, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971) (describing phenomenon of capture).

34. See Klöhn, supra note 30, at 9 (discussing avoidance of capture as one benefit of private enforcement).

35. Becker & Stigler, supra note 31, at 14–15 ("[T]he rewards of innovation will spur technical progress in private enforcement as in other economic callings.").

36. See Klöhn, supra note 30, at 9 (noting this advantage of private enforcement by individuals).

37. See Pamela H. Bucy, Information as a Commodity in the Regulatory World, 39 Hous. L. Rev. 905, 908 (2002) ("[Private justice] is uniquely able to provide the regulatory world with an essential commodity—inside information about wrongdoing—that cannot be found elsewhere."). See generally Bucy, Private Justice, supra note 29 (discussing advantages of different private justice models).

38. See Vt. Agency of Natural Res. v. United States, 529 U.S. 765, 768 (2000) ("[T]he False Claims Act . . . is the most frequently used of a handful of extant laws creating a form of civil action known as *qui tam*."); James F. Barger, Jr. et al., States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts, 80 Tul. L. Rev. 465, 469 (2005) ("There is no question that the federal FCA, with its *qui tam* provisions, is a powerful regulatory tool.").

39. See 31 U.S.C. § 3729(a) (2006) (listing claims against government prohibited by FCA); see also United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc., 377 F.3d 145, 152 (2d Cir. 2004) ("[T]he 'reverse false claims' provision . . . creates FCA liability for false statements designed to conceal, reduce, or avoid an obligation to pay money or property to the Government."); Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 127 P.3d 1088, 1102 (Nev. 2006) ("FCA liability was created for attempts to avoid paying sums owed to the government.").

corporation found to have violated any of the provisions outlined in § 3729 is liable for a civil fine ranging from $5,000 to $10,000, as well as damages three times the amount the government actually lost due to the fraudulent conduct.[40] The Act delegates enforcement power to the Attorney General (AG).[41] More significantly, the Act also allows for actions by "private persons" on behalf of the government—actions the statute describes as being brought "for the person and for the United States Government."[42] These so-called "qui tam actions" allow individuals with knowledge of fraudulent conduct to file suit "in the name of the Government."[43]

The FCA imposes stringent limitations on the person bringing suit and the way in which a suit may be filed. First, individuals may not base suits upon information that has been publicly disclosed.[44] Also known as the "original source rule," this requirement has been strictly enforced and limits the availability of qui tam actions to potential plaintiffs with actual, original knowledge of facts material to the suit.[45] Second, the individual with knowledge of fraud must serve the complaint and disclose all material evidence to the government.[46] The complaint filed in court must remain sealed—and, thus, inaccessible to the public—for at least sixty days, and may not be served on the defendant until the court so orders.[47] During the sixty-day period, the government must decide how to proceed with the action.

The government, represented by the AG, has three options.[48] If the government considers a claim meritorious and sufficiently important to

40. 31 U.S.C. § 3729(a)(1) ("Any person . . . is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.").

41. Id. § 3730(a) (providing AG "diligently shall investigate a violation under section 3729" and "may bring a civil action" against any person he or she finds "has violated or is violating section 3729").

42. Id. § 3730(b)(1).

43. Id.

44. Id. § 3730(e)(4)(A) (stating courts lack jurisdiction over action "based upon the public disclosure of allegations or transactions" through various means, "unless . . . the person bringing the action is an original source").

45. Id. § 3730(e)(4)(B); see also Rockwell Int'l Corp. v. United States, 549 U.S. 457, 475–76 (2007) (concluding plaintiff failed to qualify as original source where his claimed knowledge was merely "a failed prediction" and he thus lacked "direct and independent knowledge of the information upon which his allegations were based"); Robert L. Vogel, The Public Disclosure Bar Against Qui Tam Suits, 24 Pub. Cont. L.J. 477, 491–99 (1995) (discussing circuit courts' varying interpretations of § 3730(e)(4)'s "based upon" and "original source" language).

46. 31 U.S.C. § 3730(b)(2) ("A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government . . . .").

47. Id.

48. Id. § 3730(b)(1), (4).

justify expending public resources, the government may choose to intervene in the action.[49] In that case, the government essentially takes over the individual's suit, assuming "primary responsibility for prosecuting the action."[50] While the individual who initially filed suit may remain a party to the litigation, his or her rights are curtailed by statute,[51] and the government will not be bound by any of his or her actions during the litigation.[52] If the AG considers a claim completely meritless or decides that it should not be pursued for a different reason, the government may seek dismissal of the entire action, refusing to go forward with the case and prohibiting the individual who brought the action from pursuing it on his or her own.[53] This option, however, which puts an end to the suit by the individual, is only available with the express consent of both the court and the AG.[54] A middle ground, likely to be used for potentially meritorious claims that do not justify involvement by the government, permits the government to step back and do nothing. By choosing to neither intervene in the action nor seek dismissal, the government allows the private plaintiff to litigate the action on its behalf.[55] Under the FCA, an individual may thus litigate an action on his or her own even if the government decides not to pursue the case.[56]

If an action first initiated by an individual is successfully litigated, the individual is entitled to a percentage of the total recovery made by the government.[57] The size of this percentage depends on whether or not the government chose to intervene in the original action. If the government intervened, recovery by the individual is limited to 15% to 25% of the total recovery.[58] If the government did not intervene, the individual is entitled to a share ranging from 25% to 30% of the total recovery.[59] Certain limitations are imposed on recovery where the contribution of the

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49. Id. § 3730(b)(4)(A).

50. Id. § 3730(c)(1).

51. See id. § 3730(c)(2) (providing government may, over objection of individual and subject to specific fairness requirements, dismiss or settle case and impose limitations on individual's participation).

52. Id. § 3730(c)(1).

53. Id. § 3730(b)(1); see also False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, U.S. Dep't of Justice, http://www.justice.gov/usao/pae/Documents/fcaprocess2.pdf (on file with the *Columbia Law Review*) (last visited Aug. 13, 2013) (noting option in qui tam suit for government to "move to dismiss the relator's complaint, either because there is no case, or the case conflicts with significant statutory or policy interests of the United States").

54. 31 U.S.C. § 3730(b)(1).

55. Id. § 3730(b)(4)(B).

56. Id.

57. Id. § 3730(d)(1).

58. Id. In addition to a share of the recovery, the qui tam plaintiff is also entitled to reasonable expenses, attorney's fees, and costs. Id.

59. Id. § 3730(d)(2) (providing for attorney's fees and costs in addition to share of recovery).

individual is found lacking in some regard—either because the action was based on information to which the government itself had access[60] or because the individual bringing the action was involved in the fraudulent conduct underlying the action.[61] Over its years administering the program, the DOJ has paid out roughly 16.8% of all amounts it recovered under the FCA.[62] The average penalty imposed on individuals and corporations found liable for fraud ranged between $2 and $3 million, resulting in an average qui tam award to plaintiffs of $330,000 to $500,000.[63]

While the FCA provides extensive private enforcement mechanisms for violations of public laws, its applicability to fraud against the government is not limitless.[64] Most notably, while the FCA applies to a broad range of misrepresentations made to the government, it expressly exempts from its scope "claims, records, or statements made under the Internal Revenue Code of 1986."[65] Known as the "tax bar,"[66] this exemption was added to the FCA in 1986,[67] but courts evaluating the scope of the exemption generally consider it no more than a codification of common law existing at the time of its enactment.[68] Courts have interpreted the

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60. Id. § 3730(d)(1) (limiting awards to "no . . . more than 10 percent of the proceeds" if action relies primarily on information "relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media").

61. See id. § 3730(d)(3) ("[I]f the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may . . . reduce the share of the proceeds of the action which the person would otherwise receive . . . .").

62. 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 (on file with the *Columbia Law Review*).

63. Id.

64. See United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc., No. 95 Civ. 1363(BSJ), 2003 WL 21998968, at *5 (S.D.N.Y. Aug. 21, 2003) ("The FCA, however, does not allow private citizens to pursue all false claims made to the Government."), aff'd, 377 F.3d 145 (2d Cir. 2004).

65. 31 U.S.C. § 3729(e).

66. *Sakura*, 377 F.3d at 152.

67. False Claims Amendments Act of 1986, Pub. L. No. 99-562, § 2, 100 Stat. 3153, 3153–54 (codified as amended at 31 U.S.C. § 3729).

68. See *Sakura*, 377 F.3d at 152–53 ("Those courts that have considered the Tax Bar have concluded that it was intended to codify case law existing before the 1986 amendment, which reserved discretion to prosecute tax violations to the IRS and barred FCA actions based on tax violations."); United States ex rel. U.S.-Namib. (Sw. Afr.) Trade & Cultural Council, Inc. v. Afr. Fund, 588 F. Supp. 1350, 1351 (S.D.N.Y. 1984) (refusing to permit plaintiff to enforce tax laws through FCA prior to codification of tax bar in 1986 amendment). This interpretation of the tax bar is supported by the legislative history surrounding the amendment, which referenced judicial interpretation of the FCA's applicability (or lack thereof) to claims based on tax law violations. See S. Rep. No. 99-345, at 18 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5283 (stating certain questions under FCA had been "subject of differing judicial interpretations . . . [a]lthough it is now apparent

bar broadly to encompass *all* claims based on violations of the Code, not just those that seek recovery of federal taxes owed to the government. In holding that the tax bar prevented application of the FCA to certain allegations, for example, one court focused on the facts that the alleged conduct would not be illegal but for provisions of the Code and that the IRS has authority to prosecute these violations.[69] Claims that may in any way be characterized as "tax fraud" thus may be brought neither as qui tam actions specifically, nor under the FCA more generally.

II. Using Private Enforcement Actions Against Tax Fraud

Part II.A reviews three different approaches to private enforcement of tax law: the federal IRS whistleblower program, the false claims acts of states that implicitly allow for qui tam suits in the realm of tax, and the New York False Claims Act, the first qui tam regime to explicitly authorize qui tam suits against tax fraud. Part II.B then turns to the rationale advanced for excluding tax law from the purview of qui tam under the FCA and concludes with an analysis of the reasons in favor of allowing qui tam suits against tax fraud.

A. *Three Models of Encouraging Private Participation in Tax Enforcement*

Part II.A.1 analyzes the IRS whistleblower program, which offers rewards to individuals who supply information that leads to the discovery and recovery of underpaid federal taxes. Part II.A.2 analyzes the false claims acts of several states which implicitly allow for qui tam actions in cases of tax fraud, sometimes with limitations. Part II.A.3 analyzes a new model implemented in New York, where the state false claims act expressly authorizes qui tam actions for violations of tax laws.

1. *The IRS Whistleblower Program.* — To fill the gap left by the FCA in the enforcement of tax fraud, the IRS administers its own whistleblower program. Under this program, the Secretary of the Treasury ("Secretary") is authorized to make payments necessary for detecting and prosecuting tax fraudsters.[70] Such payments may include rewards to whistleblowers who aid in the detection and prosecution of tax fraud.[71] The current whistleblower program was largely shaped by the Tax Relief and Health Care Act of 2006,[72] which established a "Whistleblower Office" charged with administering the program within the IRS.[73] The Office is

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that the False Claims Act does not apply to income tax[] cases"); see also infra note 156 and accompanying text (discussing legislative history of FCA's tax bar).

69. See *Sakura*, 377 F.3d at 155–56 (concluding tax bar prevented application of FCA to allegation that defendant corporation was liable for rigging public auctions instituted to generate fair market value of securities as required by Code).

70. I.R.C. § 7623(a) (2006).

71. Id. § 7623(b).

72. Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, 120 Stat. 2922.

73. Id. § 406(b)(1), 120 Stat. at 2959.

tasked with analyzing and investigating information provided by whistleblowers and may, if necessary, request further assistance from other IRS offices and the whistleblower.[74] In addition, the Whistleblower Office is tasked with determining the award sizes paid to individual whistleblowers. Reward payments must range between 15% and 30% of the total recovery by the IRS[75] if (1) the amount in dispute in a given case exceeds $2 million,[76] (2) the whistleblower's contribution is found to be substantial,[77] and (3) in the event the allegedly underpaying taxpayer is an individual, his or her gross income exceeded $200,000 for any year subject to dispute.[78] The total amount taken as the basis for the percentage calculation includes penalties, interest, additions to tax, and other amounts.[79] If the case results in a settlement instead of recovery through judicial proceedings, the whistleblower is entitled to a 15% to 30% share of the settlement amount.[80]

Like the FCA, the IRS whistleblower program contains several limitations on the percentage amount a whistleblower may recover under certain circumstances. A reward must be limited to no more than 10% of the total recovery if the whistleblower's contribution was less than substantial.[81] A finding of lack of substantiality may be occasioned if the proceedings were largely based on information already available to the government through a judicial or administrative hearing, a government report, or the news media, but only if the government proceeding or report was not also originally based on information brought forward by the whistleblower in question.[82] Like the FCA, the whistleblower statute further provides that recovery may be reduced if the whistleblower was the one who "planned and initiated" the conduct that led to the underpayment of taxes.[83] The Service must deny recovery altogether if the whistleblower is convicted of criminal charges for his or her involvement in the underpayment of taxes.[84] While the Whistleblower Office is tasked with the initial determination of reward sizes, an informant not satisfied with the size of the reward received may appeal the Whistleblower Office's determination in Tax Court within thirty days.[85] The statute further limits payment of rewards to instances where information was provided under

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74. Id.
75. I.R.C. § 7623(b)(1).
76. Id. § 7623(b)(5)(B).
77. Id. § 7623(b)(1).
78. Id. § 7623(b)(5)(A).
79. Id. § 7623(b)(1).
80. Id.
81. Id. § 7623(b)(2).
82. Id.
83. Id. § 7623(b)(3).
84. Id.
85. Id. § 7623(b)(4).

penalty of perjury,[86] thus foreclosing any rewards for information submitted anonymously.[87]

In 2011, the Whistleblower Office paid out $8 million to ninety-seven different informants.[88] In 2012, the IRS announced its largest single whistleblower award to date, a $104 million reward to the informant who blew the whistle on large-scale fraud involving the banking industry.[89] Excluding this anomalous award, the Service was expected to pay out around $24 million to roughly 100 individual informants during 2012.[90] According to a recent Government Accountability Office report, however, it takes years for claims to move through the Service's system.[91] As of August 2010 (the last year for which complete data is available), of the roughly 9,540 claims received since 2006, the IRS had rejected only about 1,285,[92] leaving about 8,255 claims still pending in the program.[93]

Claims that do not meet the threshold requirements set out above and thus do not fall under the whistleblower program under § 7623(b) may still be brought to the Service's attention under § 7623(a).[94] This section has been interpreted to preserve the Service's discretionary authority to provide awards as it existed prior to the 2006 Act.[95] Under this section, the IRS has absolute discretion as to whether to pay out a reward for information received.[96] Such awards are capped at 15% of the total

86. Id. § 7623(b)(6)(C).

87. U.S. Gov't Accountability Office, GAO-11-683, Tax Whistleblowers: Incomplete Data Hinders IRS's Ability to Manage Claim Processing Time and Enhance External Communication 5 (2011) [hereinafter GAO Whistleblower Report], available at http://www.gao.gov/new.items/d11683.pdf (on file with the *Columbia Law Review*).

88. Sullivan, supra note 62.

89. Id.; see also Ben DiPietro, Birkenfeld Award Boosts Payout Under IRS Whistleblower Law, Wall St. J.: Corruption Currents (Feb. 14, 2013, 8:00 AM), http://blogs.wsj.com/corruption-currents/2013/02/14/birkenfeld-award-boosts-payout-under-irs-whistleblower-law/ (on file with the *Columbia Law Review*) (discussing whistleblower awards paid out during fiscal year 2012).

90. Sullivan, supra note 62.

91. GAO Whistleblower Report, supra note 87, at 8 (noting 66% of claims filed in 2007 and 2008 were still in progress as of August 2011).

92. Id.

93. Id.

94. Treasury Inspector Gen. for Tax Admin., Reference No. 2012-30-045, Improved Oversight Is Needed to Effectively Process Whistleblower Claims 1 (2012) [hereinafter Treasury Inspector Gen., Improved Oversight], available at http://www.treasury.gov/tigta/auditreports/2012reports/201230045fr.pdf (on file with the *Columbia Law Review*) ("If the submission does not meet the criteria for § 7623(b) consideration, the IRS may consider it for an award under the pre-Act discretionary authority (§ 7623(a)).").

95. See Internal Revenue Code IRC 7623(a), Internal Revenue Serv., http://www.irs.gov/uac/Internal-Revenue-Code-IRC-7623(a) (on file with the *Columbia Law Review*) (last updated Mar. 7, 2013) (discussing discretionary nature of awards).

96. Id. ("The award [paid under § 7623(a)] is at the discretion of the Service[;] there is no requirement that an award be issued.").

recovery, with a maximum of $10 million.[97] Award size is entirely discretionary and cannot be disputed in Tax Court.[98]

2. *State False Claims Acts Implicitly Allowing Qui Tam for Tax.* — A number of states have adopted false claims acts modeled after the FCA to combat fraud against the states' governments.[99] Of these states, six have modified the federal model in one significant respect—they have omitted the "tax bar," which explicitly prohibits claims under the federal act for alleged violations of tax laws.[100] These states can be further divided into two categories: Delaware, Florida, and Nevada impose no limitations on qui tam against tax fraud,[101] whereas Illinois, Indiana, and Rhode Island exclude *income* tax fraud from the ambit of qui tam, but implicitly allow actions based on other types of tax fraud.[102]

This section analyzes the statutory schemes and accompanying judicial interpretations of states implicitly allowing qui tam for tax, using Nevada and Illinois as examples. While there is some variation between the specific mechanisms adopted by the different states, Nevada and Illinois courts have addressed the issue of tax claims under their states' false claims acts in the greatest detail and, given the significant similarities between the different states' statutes, provide insights that are applicable to the statutory schemes of other states as well.

Nevada's false claims act largely mirrors the federal FCA. It provides for the filing of actions by individuals on behalf of the government,[103] and requires the state Attorney General to decide whether to intervene in the action and take over litigating on the state's behalf.[104] If the Attorney General decides to intervene, the relator[105] must cede control of

97. Whistleblower—Informant Award, Internal Revenue Serv., http://www.irs.gov/uac/Whistleblower-Informant-Award (on file with the *Columbia Law Review*) (last updated June 10, 2013).

98. Id.

99. Pamela Bucy et al., States, Statutes, and Fraud: A Study of Emerging State Efforts to Combat White Collar Crime, 31 Cardozo L. Rev. 1523, 1524–25 (2010).

100. Del. Code Ann. tit. 6, § 1201 (2005) ("False Claims and Reporting Act"); Fla. Stat. Ann. § 68.081 (West 2012) ("False Claims Act"); 740 Ill. Comp. Stat. Ann. 175/1 (West Supp. 2013) ("Whistleblower Reward and Protection Act"); Ind. Code Ann. § 5-11-5.5-1 (LexisNexis Supp. 2012) ("False Claims and Whistleblower Protection"); Nev. Rev. Stat. Ann. § 357.010 (LexisNexis 2013) ("Submission of False Claims to State or Local Government"); R.I. Gen. Laws § 9-1.1-1 (2012) ("State False Claims Act").

101. Del. Code Ann. tit. 6, § 1201; Fla. Stat. Ann. § 68.081; Nev. Rev. Stat. Ann. § 357.010.

102. 740 Ill. Comp. Stat. Ann. 175/3(c); Ind. Code Ann. § 5-11-5.5-2; R.I. Gen. Laws § 9-1.1-1.

103. Nev. Rev. Stat. Ann. § 357.080(1).

104. Id. § 357.080(4).

105. The term "relator" is frequently used in the qui tam context to refer to the private individual initiating a lawsuit on the government's behalf. See, e.g., Wash. Rev. Code Ann. § 74.66.060 (West Supp. 2013) (referring to private plaintiff in FCA litigation as "relator"); United States ex rel. Mosler v. City of Los Angeles, 414 F. App'x 10 (9th Cir. 2010) (same); United States ex rel. Dimartino v. Intelligent Decisions, Inc., 308 F. Supp. 2d 1318,

the action to the government representative, but remains a party to the action.[106] If the government chooses not to intervene, the qui tam plaintiff is left in charge of the action and indirectly represents the state with the same rights the Attorney General would have.[107] The Attorney General also has the authority to settle the action or to seek dismissal. Dismissal, however, is available only on a showing of "good cause."[108] A qui tam relator whose action leads to successful recovery by the state is entitled to a reward of 15% to 33% of the total recovery if the Attorney General intervenes.[109] A relator litigating the entire action to a successful conclusion without the Attorney General's intervention may recover at least 25% and as much as 50% of the total recovered on behalf of the state.[110] The act imposes a number of limitations on qui tam actions, most notably requiring that the relator be the "original source" of any information that became publicly available prior to the time the qui tam action is brought.[111] Conspicuously absent, however, are any limitations based on the fact that the qui tam relator's allegations are based on potential violations of Nevada's tax laws.[112]

Nevada's highest court has provided significant insight into the specific applicability of the act's qui tam provisions to tax matters. In *International Game Technology, Inc. v. Second Judicial District Court*, several private plaintiffs brought claims under the state's false claims act, alleging that a number of corporations had falsified documents in order to avoid paying sales and use taxes.[113] The Attorney General intervened, and consequently sought dismissal of the actions.[114] The state's claim was essentially threefold: First, the Attorney General argued, Nevada's false claims act did not apply to tax matters; second, the administrative process for determining tax delinquencies preempted litigation by private individuals; and third, there was good cause to dismiss the action even if the false claims act applied to it.[115] In trying to show good cause, the Attorney General argued that Nevada's legislature had demanded that the tax laws

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1319 (M.D. Fla. 2004) (same); Thomas R. Lee, The Standing of Qui Tam Relators Under the False Claims Act, 57 U. Chi. L. Rev. 543, 543 (1990) (same).

106. Nev. Rev. Stat. Ann. § 357.120(1) ("If the Attorney General or a designee of the Attorney General . . . intervenes, the private plaintiff remains a party to an action . . . .").

107. Id. § 357.130(1).

108. Id. § 357.120(2)–(3).

109. Id. § 357.210(1).

110. Id. § 357.210(2).

111. Id. § 357.100.

112. See id. § 357.080(1) (allowing qui tam actions as long as they meet certain criteria, none of which mention tax laws); see also Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 127 P.3d 1088, 1102 (Nev. 2006) ("Although the Nevada FCA was adopted in 1999, after the 1986 amendments to the federal act, no Nevada FCA provision expressly excludes tax liabilities from the scope of possible false claims.").

113. 127 P.3d at 1094–95.

114. Id.

115. Id. at 1095.

be applied in a "uniform and consistent manner" and the state's tax authorities had been given "original authority to execute the state's tax laws."[116] In keeping with this established pattern to ensure uniformity and consistency, the Attorney General argued, the state's tax department should be given an initial opportunity to make determinations regarding the defendant's compliance with state tax laws.[117]

The court rejected the Attorney General's arguments that the Nevada false claims act does not apply to tax matters.[118] Specifically, the court discerned legislative intent to include tax matters in the act's scope based on the fact that the Nevada act was largely modeled on the FCA, but lacked the express "tax bar" that excludes tax matters from the scope of the federal act.[119] The court was slightly more sympathetic to the government's claim that good cause—the need for uniformity—existed to warrant dismissal of the claims despite the false claims act's applicability to claims based on violations of tax laws.[120] The court distinguished two scenarios of potential tax law violations. The first scenario includes situations in which the legal framework for analyzing the alleged conduct is clear and all that is left for a court to decide are questions of fact.[121] Included in this first category are cases based on allegations that the defendant has falsified documents or engaged in similar conduct that, if proven to have occurred, would be clearly fraudulent.[122] In such cases, the court declared, the desire for uniform and consistent application of tax laws does not justify dismissal of the entire action.[123] The second category of cases includes situations in which the "specialized skill and knowledge" of the tax department is required to determine whether the conduct alleged, if proven, constitutes a violation of the revenue laws in the first place.[124] Since such cases implicate questions of legal interpreta-

116. Id.

117. Id.

118. Id. at 1104.

119. Id. ("Thus, facially and otherwise, the inclusion of 'obligations' within the FCA's scope, coupled with the omission of an express tax bar, conclusively demonstrates the Legislature's intent to include tax liability matters within the realm of possible false claims.").

120. Id. at 1105 ("We do, however, recognize that in some instances the need for consistent interpretation and application of the tax statutes may properly form a basis for good cause dismissal.").

121. Id. at 1106 ("[T]he FCA is meant to encourage private persons to reveal instances when a person has cheated or attempts to cheat the government by submitting documents containing manufactured or omitted facts or data.").

122. Id.

123. Id. ("The latter type is perhaps most likely to be discovered by a private whistleblower, does not require the tax department's expertise, and is properly resolved by a court under the FCA.").

124. Id. ("[T]he determinations of fact-based legal issues under the tax statutes should not be made by the courts; rather, those determinations are 'best left to the Department of Taxation, which can utilize its specialized skill and knowledge to inquire into

tion, the court found, dismissal for good cause is appropriate to ensure the consistent and uniform interpretation and application of the state's tax laws.[125] The Nevada Supreme Court thus concluded that the state's false claims act applies to claims of tax fraud, but when such claims implicate the consistent interpretation of the state's revenue laws, good cause justifies dismissal.

The Illinois False Claims Act serves as a good example of a false claims act with a limited tax bar—namely, one that excludes only those actions based on alleged violations of the state *income* tax statute from the ambit of the qui tam provision.[126] The act is largely identical to the federal FCA.[127] However, instead of exempting from its scope all matters brought in connection with alleged violations of the revenue laws, the act only exempts "claims, records, or statements made under the Illinois Income Tax Act."[128] The Illinois Appellate Court considered the applicability of the state false claims act to matters arising under other state tax laws in *State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Centers, Inc.*[129] In a discussion that largely mirrored the analysis conducted by the Nevada court,[130] the court concluded that the Illinois False Claims Act applied to claims based on violations of tax law other than the Illinois Income Tax Act, even though at times dismissal was justified to allow the state tax authorities to interpret the tax laws as they saw fit.[131] The court expressly rejected the argument that all tax matters were excluded by the provision barring claims made under the Income Tax Act.[132] Since the Income Tax Act did not encompass the entire tax scheme of the state and the legislature made a conscious choice to replace the general language of the federal tax bar with more limited language, the court in-

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the facts of the case.'" (quoting Malecon Tobacco, LLC v. Nevada ex rel. Dep't of Taxation, 59 P.3d 474, 477 (Nev. 2002))).

125. Id. ("[I]f the Attorney General moves to dismiss an action because . . . it appears that the action presents issues better suited to resolution through the tax department's specialized knowledge, the Attorney General has asserted good cause for dismissal, and . . . the district court is obligated to dismiss the action.").

126. See 740 Ill. Comp. Stat. Ann. 175/3(c) (West Supp. 2013) ("This Section does not apply to claims, records, or statements made under the Illinois Income Tax Act."); accord Ind. Code Ann. § 5-11-5.5-2(a) (LexisNexis 2006) ("This section does not apply to a claim, record, or statement concerning income tax . . . ."); R.I. Gen. Laws § 9-1.1-3(d) (2012) ("This section does not apply to claims, records, or statements made under the Rhode Island personal income tax law . . . .").

127. Compare 31 U.S.C. §§ 3729–3730 (2006) (U.S. False Claims Act), with 740 Ill. Comp. Stat. Ann. 175 (Illinois False Claims Act).

128. 740 Ill. Comp. Stat. Ann. 175/3(c).

129. 878 N.E.2d 1152, 1156 (Ill. App. Ct. 2007).

130. See supra notes 113–125 and accompanying text (discussing Nevada court's opinion on applicability of tax bar in *International Game Technology*).

131. *Ritz Camera Ctrs.*, 878 N.E.2d at 1167–68.

132. Id. at 1167 ("We must reject defendants' contention that the legislature was unaware that a separate taxing scheme apart from the income taxes of the State exists when it adopted the FCA and overlooked expressly excluding those taxes from the Act.").

ferred that the legislature intended to include other tax laws within the scope of the state false claims act.[133]

3. *New York's False Claims Act.* — While a number of states thus implicitly allow qui tam actions against tax fraud in at least some instances, New York is the only state with a false claims act that *explicitly* includes tax fraud in its ambit. Since the New York False Claims Act provides for qui tam actions and does not exclude tax fraud from the scope of availability of such actions, individuals may bring qui tam actions for violations of New York state tax law.[134]

The New York False Claims Act mirrors the federal FCA in many respects. In much the same language as the federal act, the New York statute prohibits both traditional and reverse false claims against the government, as well as conspiracies to present such false claims.[135] The New York statute further authorizes qui tam suits by individuals on behalf of the government.[136] Like the federal act, the New York statute requires that any qui tam action be filed in camera and remain sealed for sixty days, during which time the state Attorney General (and in some situations, local government agencies) may decide how to proceed with the action.[137] The Attorney General may choose to either (i) supervene in the action and file his or her own complaint on behalf of the people of the state, thereby effectively taking over the lawsuit initially brought by the qui tam relator; (ii) intervene in the action and share responsibility for the suit with the private plaintiff; or (iii) decline to become involved in the action, leaving it entirely to the relator.[138] If the Attorney General decides not to supervene or intervene, the relator may proceed with the action on his or her own,[139] subject to the state's right to seek dismissal of the entire action.[140] A court, however, is tasked with granting such dismissal and can do so only after first providing an opportunity for the relator to be heard.[141] If the relator is allowed to proceed with his or her action without government involvement, he or she must nonetheless continue to inform the state of important developments.[142] The state further has the authority to settle any action in which it chooses to intervene, even over the objection of the relator, as long as the court decides that the

133. Id.

134. N.Y. State Fin. Law § 190(2)(a) (McKinney Supp. 2013); cf. GAO Whistleblower Report, supra note 87, at 7 ("New York's [whistleblower] program has a tax qui tam provision that was enacted in August 2010.").

135. N.Y. State Fin. Law § 189(1); see supra note 39 and accompanying text (discussing difference between false claims and reverse false claims).

136. N.Y. State Fin. Law § 190(2).

137. Id. § 190(2)(b).

138. Id. § 190(2)(c).

139. Id. § 190(2)(f).

140. Id. § 190(5)(b)(i).

141. Id.

142. Id. § 190(2)(f).

settlement is "fair, adequate, and reasonable with respect to all parties under all the circumstances" after giving the relator an opportunity to explain his or her objections.[143] Participation by the relator may be further limited by the court if the state can show that unlimited relator participation would be injurious to the defendant.[144]

Like the federal FCA and the IRS whistleblower program, the New York False Claims Act provides guidelines setting out the range of rewards payable to the relator upon successful completion of the action. If the state supervenes or intervenes in an action, the qui tam plaintiff remains entitled to 15% to 25% of the total recovery resulting from his or her action.[145] This includes amounts recovered through settlements.[146] Within this range, the court may take into account the degree to which the individual plaintiff contributed to the successful completion of the action.[147] Like both the federal FCA and the IRS whistleblower program, the New York statute provides that an action substantially based upon information otherwise available to the state or the public at large may only be rewarded with up to 10% of the total recovery, while an individual involved in the planning or carrying out of the fraudulent conduct may be barred from recovery altogether.[148] If the state chooses to abstain from involvement in the litigation, the qui tam relator's recovery may be increased to 25% to 30% of the total recovery.[149] In addition, the court may award attorney's fees, expenses, and costs.[150]

Contrary to all other false claims statutes, the New York statute explicitly authorizes qui tam suits based on violations of tax law, stating that "this section [prohibiting false claims] shall apply to claims, records, or statements made under the tax law."[151] In the same breath, however, the statute immediately limits the circumstances under which actions alleging tax fraud may be brought. Such actions are permissible only where the net income of the taxpayer equals or exceeds $1 million for any year in controversy and where the damages sought in the action exceed $350,000.[152] The act further requires the state Attorney General to consult with the Commissioner of the New York Department of Taxation and Finance before intervening in the action.[153]

143. Id. § 190(5)(b)(ii).
144. Id. § 190(5)(b)(iii).
145. Id. § 190(6)(a).
146. Id.
147. Id.
148. Id.; id. § 190(8).
149. Id. § 190(6)(b).
150. Id. § 190(7).
151. Id. § 189(4)(a).
152. Id.
153. Id. § 189(4)(b).

B. *Why (or Why Not) Qui Tam for Tax?*

While there is thus significant variation between the private tax enforcement regimes adopted by different legislatures, little explicit reason is given for this variation. While some attention has been paid to the question of whether tax informants should receive monetary rewards in the first place,[154] little academic thought has been given to the exact contours of the ideal rewards program once the concept of the private attorney general for tax fraud has been accepted.[155] This section seeks to address this question, analyzing the different rationales given in favor of including tax fraud among the items for which a citizen can bring a qui tam action and those weighing in favor of establishing a separate regime for private enforcement of the tax laws. Part II.B.1 analyzes the criticisms leveled against qui tam for tax, focusing in particular on arguments of institutional competence and privacy. Part II.B.2 analyzes the benefits of qui tam relative to whistleblowing for tax, focusing in particular on the enforcement advantage of private litigation.

1. *Justifications for Excluding Tax Fraud from Qui Tam Regimes.* — A logical starting place for inquiries into the rationale for prohibiting qui tam actions in the context of tax fraud would be the reasoning of those who first made the choice to bar qui tam actions in the realm of tax. The legislative history of the FCA, however, does not helpfully illuminate the thinking of its drafters. The only mention of the tax bar, found in a committee report, observes simply that "it is now apparent that the False Claims Act does not apply to income tax cases, and the Committee does not intend that it should be so used."[156] As courts have retrospectively reasoned, the decision to include a tax bar in the FCA constituted nothing more than codification of the common law as it existed at the time of the 1986 amendments to the FCA.[157] Reasons for the differential treatment of tax fraud as compared to other frauds must thus be found outside the statute and its legislative history.

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154. See, e.g., Kneave Riggall, Should Tax Informants Be Paid? The Law and Economics of a Government Monopsony, 28 Va. Tax Rev. 237, 242–56 (2008) (noting advantages and disadvantages of paying whistleblowers in realm of tax).

155. Even those few articles purporting to discuss the differences between the qui tam model of the FCA and the whistleblowing model advanced by the IRS ultimately fail to address the central question—why one model or the other is superior in the realm of tax. See, e.g., Ventry, Qui Tam for Tax, supra note 27, at 370–90 (arguing in favor of expanding FCA to tax fraud without discussing why qui tam might be more problematic than whistleblowing for tax).

156. S. Rep. No. 99-345, at 18 (1986), reprinted in 1986 U.S.C.C.A.N. 5266, 5283; see also United States ex rel. Lissack v. Sakura Global Capital Mkts., Inc., 377 F.3d 145, 152 (2d Cir. 2004) ("The legislative history of the Tax Bar is sparse and not useful in determining its precise contours . . . .").

157. See supra notes 68–69 and accompanying text (discussing courts' interpretation of FCA's tax bar).

a. *Institutional Competence.* — When discussing the FCA's applicability to tax matters, courts invariably focus their analysis on § 7401 of the Code.[158] Often characterized as the provision that grants the IRS sole enforcement power over tax matters, the section states that "[n]o civil action for the collection or recovery of taxes . . . shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced."[159] Courts routinely conclude their analysis by finding that this provision would be violated if claims ultimately seeking the "collection or recovery of taxes" could be brought as a qui tam action under the FCA, since a qui tam plaintiff would have commenced the action without the approval of the Secretary or the AG and could proceed with the action even if both the Secretary and the AG disapproved of it and refused to intervene.[160] While this conclusion ends the analysis in which courts engage, it is only the first step in determining why the legislature chose to grant primary enforcement power to the IRS by enacting § 7401 in the first place and left it unchanged when its effect on the FCA became apparent.

Section 7401 can ultimately be characterized as embodying a judgment regarding institutional competence. It reflects the conclusion by the legislature that the IRS, in conjunction with the DOJ, should be left in charge of deciding when to pursue an action for alleged tax fraud, presumably because the legislature has decided that the Service and the DOJ are in the best position to make this determination.[161] This conclusion in turn rests on a number of assumptions regarding the special nature of tax law. Deference to the Service and the DOJ may be based on a desire to promote uniformity and consistency in the way tax provisions are interpreted and tax laws are enforced.[162] Giving the Service the last say over whether certain circumstances constitute a violation and whether such a violation warrants enforcement ensures that tax laws are

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158. See, e.g., *Sakura*, 377 F.3d at 152–53 ("The conclusion that the IRS has exclusive jurisdiction over tax matters stems in part from § 7401 of the Tax Code . . . .").

159. I.R.C. § 7401 (2006).

160. See, e.g., United States ex rel. Roberts v. W. Pac. R.R. Co., 190 F.2d 243, 247 (9th Cir. 1951) ("[I]n respect to tax frauds the legislative purpose was not to permit a[] [qui tam] action . . . to be maintained by an individual, at least without express consent of the Commissioner of Internal Revenue . . . ."); United States ex rel. U.S.-Namib. (Sw. Afr.) Trade & Cultural Council, Inc. v. Afr. Fund, 588 F. Supp. 1350, 1351 (S.D.N.Y. 1984) ("The *qui tam* statute does not authorize a private party to override section 7401 to recover penalties or damages allegedly sustained by the government by virtue of false income tax statements.").

161. Cf. *Sakura*, 377 F.3d at 156 ("These factors implicate the evident purpose of the Tax Bar, which is to prevent private litigants from interfering with the IRS's efforts to enforce the tax laws.").

162. See Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 127 P.3d 1088, 1107 (Nev. 2006) (noting "maintaining uniformity and consistency in the tax laws" was "legitimate []and moreover, legislatively mandated" endeavor).

interpreted and applied consistently to taxpayers in similar situations.[163] These priorities may be particularly important given that the Service does not have the resources to prosecute every potential tax offense and must therefore pick and choose those potential violations it considers particularly important.[164]

Commentators have further argued that the enforcement of tax law should be left to those with specialized knowledge of its intricacies, simply because tax law is too complicated for a layperson to become involved.[165] Given the intricacies of the Code, the argument goes, it would be impossible in many cases for private individuals to know when a violation of tax law has occurred, leading to a potentially high number of frivolous lawsuits.[166] This problem is compounded by the fact that taxpayers themselves may frequently be unaware that they are in potential violation of the tax laws.[167] Allowing qui tam in such circumstances, critics argue, could lead to expensive suits against the unwary and open the door to harassment in court.[168]

b. *Privacy.* — A different rationale frequently advanced in opposition to qui tam against tax fraud concerns the privacy of the taxpayer whose behavior would be the subject of the suit. As commentators have noted, the U.S. tax system rests largely on self-reporting of income and other tax obligations by the taxpayer.[169] Full disclosure, the argument goes, can only be expected if taxpayers can in turn trust that the information they are forced to disclose will be kept private once it is received by the government.[170] This "bargain" with the taxpayer has been codified in numer-

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163. See id.

164. See infra notes 190–192 and accompanying text (discussing IRS's budgetary constraints).

165. See, e.g., Ventry, Qui Tam for Tax, supra note 27, at 370–71 ("[I]s it appropriate for private citizens to enforce the nation's tax laws when application of fact to law contains countless unknown outcomes, and the 'right' answer is ambiguous at best? In many ways, tax law is stochastic, with no clear law at all.").

166. See id. (noting in context of tax law "[t]he law itself often becomes a random variable" and "the difficulty of assigning a particular probability to the different outcomes . . . and making accurate assessments of reporting positions and transactions can become a task of partially informed guesswork").

167. See id. (noting ambiguity and complexity of tax laws).

168. See United States ex rel. Mikes v. Straus, 853 F. Supp. 115, 119 (S.D.N.Y. 1994) ("[T]he intricacy of tax . . . would permit almost any significant entity to become subject to Qui Tam suits were taxation swept into the orbit of the Qui Tam Act. This would give every employee enormous leverage against an employer where any financial aspect of its business . . . might conceivably be challenged.").

169. See Joseph J. Darby, Confidentiality and the Law of Taxation, 46 Am. J. Comp. L. (Supp.) 577, 587 (1998) ("Efficient administration of the American system of taxation depends on the willingness of the taxpayer to comply with the self-assessment features of the income tax."); see also supra notes 6–22 and accompanying text (discussing voluntary compliance and enforcement mechanisms).

170. See Darby, supra note 169, at 577 (arguing taxpayer has "justifiable expectation . . . that the rather extensive information about his personal and financial life that he is

ous provisions of the tax code,[171] most notably in § 6103, which prohibits disclosure of a person's tax information to anyone other than a listed number of persons or agencies.[172] Allowing qui tam for tax, critics have argued, may encourage reckless disclosure of protected tax documents to persons not authorized to receive such disclosure or may lead to individuals seeking access to these protected documents in other ways.[173]

Even given the limitations placed on who may receive taxpayer information from the government, qui tam can be an effective tool against tax fraud without any changes to § 6103. First and most important, § 6103 applies only to disclosures made by the government or its agents.[174] Since qui tam actions essentially rely on information possessed by individuals not already available to the government,[175] the ideal qui tam plaintiff would gather information through channels not regulated by § 6103, thus limiting the applicability of § 6103 in the qui tam context. Second, as noted above, § 6103 already authorizes certain individuals to receive the otherwise protected information,[176] and individuals thus allowed access to the information could bring qui tam actions without violating the law. Finally, § 6103 establishes that tax documents may be used in judicial or administrative proceedings aimed at enforcing federal criminal statutes,[177] and established precedent makes tax documents subject to pretrial discovery in civil actions between private individuals.[178]

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required under threat of fine or imprisonment to furnish to the tax authorities will be held by them in confidence").

171. See I.R.C. § 7213 (2006) (permitting criminal prosecution of officials disclosing tax returns in violation of law); id. § 7431 (providing private cause of action for willful or negligent disclosure in violation of law); Church of Scientology of Cal. v. IRS, 484 U.S. 9, 16 (1987) (holding IRS is prohibited from disclosing tax returns even in response to FOIA requests).

172. I.R.C. § 6103.

173. See Ventry, Qui Tam for Tax, supra note 27, at 372 ("The concern among critics of private enforcement of the tax laws through either a bounty system or *qui tam* approach is that allowing private citizens to profit by disclosing taxpayer information would result in those individuals recklessly exposing information to persons not authorized by statute to receive such information.").

174. I.R.C. § 6103(a) ("[N]o officer or employee of the United States . . . [and] no officer or employee of any State . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise . . . .").

175. See supra notes 28–37 and accompanying text (discussing benefits of private enforcement).

176. I.R.C. § 6103 (authorizing following persons to receive information regarding tax returns filed by another taxpayer: persons designated by taxpayer; state tax officials; persons having material interest (taxpayer himself, spouse, partners, certain shareholders in corporation); and other federal and state officials).

177. Id. § 6103(i)(4)(A).

178. See Darby, supra note 169, at 581 ("In a civil suit between private parties, tax return information may for good cause constitute a proper subject for pre-trial discovery and, where relevant and probative of the issues, may be admitted into evidence at the trial.").

Given that the FCA combines elements of a criminal action by the government and a civil suit between two individuals, it would not be a stretch to argue that disclosure of tax documents in qui tam actions is already appropriate under existing law.

A frequently overlooked side of the privacy argument with serious implications for the choice between qui tam lawsuits and a whistleblower rewards program is the privacy of the informant himself. Whistleblowing is not an easy task.[179] It can lead to emotional and personal problems, ostracism in both professional and personal circles, and a host of other professional difficulties.[180] Several members of the qui tam relators' bar in fact noted that the consequences of blowing the whistle can be so severe that they usually counsel clients against taking their information public, at least until the potential whistleblowers have grappled with all the consequences of their decision.[181] A program that minimizes the public exposure of informants and their personal information has the potential to minimize the negative consequences to the whistleblower, as fewer people would know about the informant's actions. Where qui tam is the only option, the whistleblower's identity is very likely to be revealed. While the initial filing is made in camera and under seal,[182] the qui tam plaintiff's suit ultimately becomes just another lawsuit, with all the ac-

179. It may be argued that a relator's privacy is collateral damage in an action for tax enforcement or that an informant has given up his or her right to remain anonymous in return for the award he or she can potentially receive, and the relator's privacy should thus not be of much concern. However, the prospect of severe harm to one's private and professional life significantly affects the incentive structure created by any rewards program. Where negative consequences are significant and highly likely, a rational informant will discount the potential award not only by the likelihood that he or she will indeed receive such an award, but also by the sacrifices he or she must make to claim his or her reward. The more significant the chance that his or her identity will be uncovered, the less likely an informant will be to bring the claim, all other things being equal. Whistleblower privacy thus becomes an important factor in determining which system encourages the most effective participation of individuals in the enforcement of tax laws.

180. See Sullivan, supra note 62 (quoting Patrick Burns, spokesman for nonprofit Taxpayers Against Fraud, as saying, "There is a 100 percent chance that you will be unemployed—the question is, Will you be forever unemployable?"); Harry Cendrowski & Walter McGrail, Two Options for Tax Whistleblowers, NACD Directorship (July 21, 2011), http://www.directorship.com/tax-whistleblowers-now-have-two-options/ (on file with the *Columbia Law Review*) (quoting Senate Banking Committee's observation that many whistleblowers effectively face "committing 'career suicide'"); see also Is the Tax Whistleblower's Identity Protected Under the IRS Tax Whistleblower Program?, Tax Whistleblower Blogs (May 2, 2011), http://taxwhistleblowerblogs.com/?p=267 (on file with the *Columbia Law Review*) ("The risk to a Tax Whistleblower may be tremendous. There may be the fear of bodily harm, loss of professional license, loss of employment, loss of career, loss of family, etc.").

181. See Sullivan, supra note 62 ("All the lawyers I talked to—and they've all made millions of dollars from cases like these—said they discouraged anyone who walked into their offices from becoming a whistle-blower.").

182. 31 U.S.C. § 3730(b)(2) (2006) ("The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders.").

companying (and identifying) information accessible to the public.[183] The IRS's whistleblower program provides a more favorable procedure to potential informants.[184] As information gathered through the program initially leads to an administrative proceeding in which the taxpayer's liabilities are redetermined within the Service, the chances that the informant's identity will be revealed by the IRS are lower.[185]

2. *Justifications for Including Tax Fraud in Qui Tam Regimes.* — The main reason for allowing qui tam actions for tax fraud is the promise of increased enforcement success. As discussed in Part I,[186] private enforcement regimes have two main benefits—they reduce information costs and increase resources for potential enforcement. While the IRS whistleblower program provides the first benefit, only a qui tam regime substantially provides both.[187] Under the IRS program, a private person with incriminating information may report his or her findings to the Service—but that is where the private individual's role ends. The Service is still tasked with investigating the claims, evaluating their merits, and pushing the actions to resolution.[188] But in a qui tam suit, the relator can take over many of these functions, either by assisting the government in a joint action or by litigating entirely on his or her own if the government chooses not to intervene.[189] Limitations on resources available to the government do not bind the private plaintiffs. If the action does not fall within the prioritized problems identified by the government, the private individual can pursue it without redirecting government funds from where they are most needed. A whistleblower under the IRS program has

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183. See Joel Androphy & Adam Peavy, Bringing Rogues to Justice: The Qui Tam Provisions of the False Claims Act, 65 Tex. B.J. 128, 130 (2002) (noting relator has 120 days to serve defendant after complaint is unsealed).

184. See Cendrowski & McGrail, supra note 180 (observing identity of whistleblower who recently received $4.5 million under IRS program remains unknown).

185. See IRM 25.2.2.11(1)–(2) (June 18, 2010), http://www.irs.gov/irm/part25/irm_25-002-002.html (on file with the *Columbia Law Review*) (mandating whistleblower shall be considered confidential informant and "IRS will protect the identity of the whistleblower to the fullest extent permitted by the law"); see also Whistleblower 14106-10W v. Comm'r, 137 T.C. 183, 206 (2011) (holding under certain circumstances identity of whistleblower will be protected even if he or she files appeal against Whistleblower Office's reward determination in Tax Court).

186. See supra notes 28–37 and accompanying text (discussing benefits of private enforcement).

187. One might argue that by reducing information costs the IRS whistleblower program frees up resources that can be used elsewhere. While this may be true, it does not add resources that were previously unavailable and can therefore be distinguished from the increase in resources attributable to qui tam actions.

188. See Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(b)(1), 120 Stat. 2922, 2959 (setting up IRS Whistleblower Office).

189. See 31 U.S.C. § 3730(c) (2006) (providing relator may remain party to action even if government intervenes and may proceed with litigation if government chooses not to intervene).

no such options. If the Service determines that the claims do not merit its current attention, there is nothing the whistleblower can do.

While information costs have undoubtedly been significant for as long as tax enforcement has been an issue, the Service's budgetary constraints have become increasingly problematic. Despite recent efforts by the Service to increase its budget, it has been confronted with budget decreases,[190] forcing it to cut thousands of positions.[191] Even before these most recent cuts, the Service and the DOJ were unable to pursue every potential (or even actual) violation of the tax laws.[192] Instead, priorities are set and nonpriority matters fall by the wayside.

Political concerns may combine with budgetary constraints to further weaken the enforcement power of the IRS. As commentators have pointed out, the Service, the DOJ, and especially the U.S. Attorney's Offices tasked with prosecuting tax avoiders may face political pressure in choosing their caseload, particularly where prominent members of the community are accused of illicit conduct.[193] While critics can counter that the administration of a qui tam regime like the FCA is also rife with political incentives,[194] the effect of political pressure is counteracted by the fact that qui tam plaintiffs may continue to pursue their claims in

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190. Blake Ellis, IRS Struggles to Keep Up amid Surge in Tax Fraud, CNNMoney (June 28, 2012), http://money.cnn.com/2012/06/28/pf/taxes/irs-tax-fraud/index.htm (on file with the *Columbia Law Review*) ("While the IRS had pushed last year to increase its 2012 budget by $1 billion, the 2012 budget that was ultimately passed by Congress cut the IRS's budget by about 3%, to $11.8 billion.").

191. See David Kocieniewski, Budget Cuts Hamper the I.R.S. in Efforts to Collect Billions in Taxes, Report Says, N.Y. Times (Jan. 11, 2012), http://www.nytimes.com/2012/01/12/business/budget-cuts-hamper-irs-from-performing-its-duties-report-says.html (on file with the *Columbia Law Review*) (noting budget cuts led IRS to offer "buyouts to 5,400 of its 95,000 employees").

192. See Davis & Ashby, supra note 7, at 240 ("Although it may be evident . . . that hundreds of thousands of taxpayers with lawful incomes, perhaps millions, have refused to timely file correct returns and pay their taxes, criminal tax prosecutions have historically been limited to fewer than twelve-hundred individuals and businesses each year through resource and budget constraints." (footnote omitted)).

193. Id. at 240–41 ("[Federal prosecutors'] limited enthusiasm [for bringing criminal tax cases] may result from several causes, including the fact that (1) such cases are often complex and deal with unfamiliar technical tax issues, and (2) wealthy and politically influential local figures and entities may be targeted for prosecution.").

194. Critics may point to, for example, the increasingly political nature of the attorney general's office, tasked with determining in which qui tam suits the government should intervene. Recent New York Attorneys General Eliot Spitzer and Andrew Cuomo demonstrate this point: Both went on to become Governor of New York after their terms as New York Attorney General. Political pressures may thus influence the selection of cases in which an attorney general intervenes. See Scott M. Matheson, Jr., Constitutional Status and Role of the State Attorney General, 6 U. Fla. J.L. & Pub. Pol'y 1, 23 (1993) ("The risk that an attorney general will compromise professionalism and bend to political pressure in rendering opinions and carrying out law enforcement responsibilities is greater with a popularly elected and politically ambitious attorney general who has gubernatorial aspirations.").

court even if the government refuses to join the action. Thus, political considerations will not automatically stop actions brought by individual plaintiffs.

It may in fact be argued that the highly political nature of the AG's office can exert positive influences on the effectiveness of qui tam. Political aspirations may create incentives to produce highly visible results. Visibility, in turn, can affect enforcement of tax laws in three meaningful ways. First, public realization that tax laws are being stringently enforced may itself reduce the frequency of tax fraud, as the perception of an increased chance of detection reduces the incentives for defrauding the public fisc.[195] Second, stringent enforcement can create the perception that the majority of the population abides by the laws and the portion that does not is being punished for its noncompliance. As commentators have observed, an important step toward increasing tax compliance is increasing the public perception that noncompliance is not accepted by society as a whole.[196] Highly visible tax enforcement thus not only signals that tax cheats will be caught, but also sends the important message that tax fraud violates the laws and mores of society.[197] Third, highly visible use of qui tam for the detection of tax fraud can increase the effectiveness of the qui tam provision itself by improving the incentive calculus that potential plaintiffs perceive. Rational private plaintiffs contemplating a qui tam action will calculate their expected reward, discounted by the likelihood that the award will be received, and will balance this figure against the negative consequences associated with reporting the allegedly fraudulent conduct.[198] An increase in the number of highly visible successful qui tam enforcement actions would likely increase other relators' perceptions of the possibility of successful recoveries and thus rewards. Whereas under the IRS system years can pass between receipt of the information and action by the Service,[199] qui tam by its nature is

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195. See Ventry, Qui Tam for Tax, supra note 27, at 382 ("Perhaps most importantly, the threat of *qui tam* actions could alter governance and compliance norms *within* organizations, and deter noncompliant behavior at the source.").

196. See, e.g., Joshua D. Rosenberg, The Psychology of Taxes: Why They Drive Us Crazy, and How We Can Make Them Sane, 16 Va. Tax Rev. 155, 216 (1996) ("[If qui tam for tax were allowed,] [t]ax fraud would no longer be such an easy crime to get away with, it would become a dark secret rather than a prestigious accomplishment, it would become less acceptable, and it would become much less common."); see also supra text accompanying note 5 (identifying erosion of confidence in tax system as potential negative consequence of tax evasion).

197. See Rosenberg, supra note 196, at 216 (predicting "[i]ndividuals and corporations will begin to engage in honest taxpaying behavior, will come to expect others to engage in honest taxpaying behavior, and will begin to understand that such behavior is both appropriate and desirable" if qui tam provisions are implemented).

198. Cf. Christian Gollier, Discounting an Uncertain Future, 85 J. Pub. Econ. 149, 149–50 (2002) (describing how rational investors discount future benefits by risk that will not materialize).

199. See IRS, Fiscal Year 2010 Report to the Congress on the Use of Section 7623, at 12 (2010), available at http://www.irs.gov/pub/whistleblower/annual_report_to_congress

more visible and the qui tam plaintiff is involved in the case even if the AG intervenes. While the IRS system—probably intentionally—operates with a high degree of discretion, the political nature of the AG's office makes it likely that investigations based on qui tam information will be highly publicized, thus increasing the public perception that qui tam relators may actually effect change through their actions—or at least collect rewards for their efforts.[200]

III. IMPROVING THE FEDERAL FALSE CLAIMS ACT: A PROPOSAL

Compelling reasons thus exist both for the government-implemented whistleblower program of the IRS and for the private litigation model of the FCA. A closer look, however, reveals that the problems identified by critics of qui tam for tax enforcement are no more pronounced in the private litigation setting than they are in the context of the agency-administered whistleblower program. Part III.A argues that false claims acts' qui tam regimes, despite their critics, do not raise graver concerns of institutional competence and invasion of privacy than the IRS whistleblower program and concludes that, given its advantages in the enforcement area, the qui tam system constitutes the superior alternative for private enforcement of public laws. Part III.B illustrates how the attempts by New York and other states in shaping their false claims acts to the requirements of tax enforcement can help the federal government amend its private tax enforcement regime to further minimize legitimate privacy and harassment concerns while increasing the effectiveness of its fight against tax fraud.

A. *Why Qui Tam Is Preferable to Whistleblowing*

As discussed in Part II.B.1, critics have pointed to a number of concerns, particularly issues of institutional competence and privacy, to justify their opposition to qui tam in the realm of tax fraud.[201] A closer look at these arguments, however, demonstrates that concerns regarding the competence and motivations of private plaintiffs are unfounded in the present U.S. legal system and that qui tam no more threatens the privacy of individuals than other systems that pay individuals for providing in-

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_fy_2010.pdf (on file with the *Columbia Law Review*) (noting number of claims still pending years after whistleblowers supplied information to Service).

200. Compare, for example, the treatment of investigations of private equity firms' practice of paying taxes on their fees. Before New York Attorney General Eric Schneiderman started his highly publicized inquiry, the IRS had received information about the practice on at least two separate occasions. To the best of the public's knowledge, nothing has come of either instance of whistleblowing with the IRS. See Reed Albergotti & Laura Saunders, Informer Sparked New York Probe, Wall St. J. (Sept. 12, 2012), http://online.wsj.com/article/SB10000872396390443696604577646521609802602.html (on file with the *Columbia Law Review*).

201. See supra Part II.B.1 (discussing arguments advanced by opponents of qui tam against tax fraud).

formation on fellow taxpayers. Given the enforcement advantages of qui tam actions, states and the federal government should strongly consider amending their respective false claims acts to allow for private litigation against tax fraud.

While critics have expressed doubt regarding private individuals' ability to identify meritorious lawsuits and to competently litigate them on behalf of the government, the existence of competent legal counsel mitigates these concerns. Private plaintiffs are already representing the government in a number of complex legal areas, such as antitrust and healthcare procurement.[202] The argument that private citizens are not capable of interpreting complex laws in these areas and predicting whether a violation occurred has been significantly weakened by the emergence of an extremely well-developed plaintiffs' bar.[203] Consisting of attorneys who specialize in representing qui tam plaintiffs, the bar has played a significant role in the development of qui tam litigation over the last several decades.[204] As qui tam rewards have increased over the years and qui tam suits have become a lucrative industry, law firms dedicated solely to the representation of those with insider information have sprung up.[205] Since the institution of the current IRS whistleblower program, the number of plaintiffs' attorneys specializing in the area of tax law has risen rapidly,[206] 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. The fact that individual plaintiffs may not be experts in the field of tax law would thus not prevent them from competently litigating cases implicating tax laws on behalf of the government.

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202. See William E. Kovacic, The Antitrust Government Contracts Handbook 17 (1990) (noting conduct violating antitrust laws, such as bid rigging, has increasingly become basis for qui tam suits); Karen Chopra, Qui Tam—A Whistle Blowers Weapon in the War on Healthcare Fraud [sic], 4 J. Med. & L. 205, 209 (2000) (discussing increasing use of FCA to combat Medicare and Medicaid fraud).

203. See Patrick A. Barthle II, Note, Whistling Rogues: A Comparative Analysis of the Dodd-Frank Whistleblower Bounty Program, 69 Wash. & Lee L. Rev. 1201, 1228–29 (2012) ("[S]ince the 1986 amendments, a considerable '*qui tam* bar' has developed.").

204. See Efrem M. Grail, "Qui Tam" Insurance & False Claim Act Settlements, Health Law., Oct. 1998, at 16, 17 ("Entire specialty law firms, often made up of former Justice Department lawyers who litigated False Claims Act cases for the government, have become extremely effective in enticing the government to intervene in their cases. This often leads to easier, quicker, and larger recoveries . . . .").

205. See David Freeman Engstrom, Harnessing the Private Attorney General: Evidence from Qui Tam Litigation, 112 Colum. L. Rev. 1244, 1281–82 (2012) ("At present, several dozen law firms—and, according to various estimates, roughly 200 lawyers—advertise that they do mostly, or exclusively, relator-side representations or even particular types of FCA claims, such as healthcare fraud." (footnote omitted)); Grail, supra note 204, at 17 ("The *qui tam* provisions have spurned [sic] the development of an entire *qui tam* cottage industry, in which the qui tam plaintiffs' bar has its own quarterly journal ('*The False Claims Act and Qui Tam Review*').").

206. See Dennis J. Ventry, Jr., Cooperative Tax Regulation, 41 Conn. L. Rev. 431, 461–62 (2008) (noting 15% to 20% increase in size of plaintiff bar specializing in tax matters since IRS whistleblower program was overhauled in 2006).

The need for legal counsel in a qui tam action further suggests that harassing lawsuits are unlikely to constitute as large a percentage of all qui tam actions as some critics fear. Since relators' lawyers usually work on a contingency fee basis,[207] their interests in procuring a large verdict or settlement are in line with those of the client seeking a large reward. As such, members of the plaintiffs' bar have significant incentives to bring only those lawsuits that show substantial potential for ultimate recovery and to abstain from pushing those that are initiated for personal reasons only.

Certain safeguards built into the language of the FCA (and the state statutes modeled after it) further limit the likelihood that harassing lawsuits will be filed against inadvertent tax offenders. As the FCA clearly states, it applies only to those who "knowingly" make false claims against the government.[208] Given this scienter requirement, an inadvertent violation of tax law, either because the tax law is so complicated that the taxpayer did not understand it or because the statute had not been interpreted with regard to the specific facts of the case, would not lead to liability under the FCA.[209] With this limitation on the FCA's reach already in place, further limitations may unnecessarily curtail its scope without providing additional safeguards against problems that would merit further protection.

It is similarly unproven that the qui tam regime of the FCA poses a graver threat to taxpayer privacy than the IRS whistleblower program. While general privacy concerns may counsel against any system that pays private citizens for information incriminating fellow taxpayers, the literature lacks an explanation of how qui tam lawsuits pose a greater danger to privacy than the IRS whistleblower program.[210] An argument may be

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207. See Engstrom, supra note 205, at 1281–82 ("Most relator-side practice proceeds on a contingent fee basis, with the lawyer's cut often set at 40%.").

208. 31 U.S.C. § 3729(b) (2006) (defining person who "knowingly" makes false claim as person who "(1) has actual knowledge of the information; (2) acts in deliberate ignorance of the truth or falsity of the information; or (3) acts in reckless disregard of the truth or falsity of the information"); see also Wilkins ex rel. United States v. Ohio, 885 F. Supp. 1055, 1059 (S.D. Ohio 1995) ("A claim under § 3729(a)(7) requires proof . . . that the defendant knew that the statement or record was false . . . ."); United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co., 721 F. Supp. 1247, 1258–59 (S.D. Fla. 1989) (stating as one element of claim under § 3729(a)(1) "that the defendant knew the claim was false or fraudulent").

209. See, e.g., United States ex rel. Hagood v. Sonoma Cnty. Water Agency, 929 F.2d 1416, 1421 (9th Cir. 1991) ("To take advantage of a disputed legal question . . . is to be neither deliberately ignorant nor recklessly disregardful."); State ex rel. Beeler Schad & Diamond, P.C. v. Ritz Camera Ctrs., Inc., 878 N.E.2d 1152, 1158 (Ill. App. Ct. 2007) ("[A] remote retailer cannot make a 'knowingly' false record or statement sufficient to create liability under the Act when the pertinent area of the law is unclear . . . ."); see also Wang v. FMC Corp., 975 F.2d 1412, 1421 (9th Cir. 1992) ("Proof of one's mistakes or inabilities is not evidence that one is a cheat.").

210. See, e.g., Ventry, Qui Tam for Tax, supra note 27, at 372 (identifying, without elucidating, "privacy and harassment concerns" as "[t]wo primary and frequently invoked

made that qui tam requires greater involvement by private citizens—and thus a greater degree of undesirable "snooping" in the private affairs of other individuals. Since qui tam relators generally desire government intervention in their suits,[211] there is an incentive for potential relators to develop a strong factual record of potential violations, thereby increasing the chance that the government will recognize the merits of their cases.[212] If the government chooses not to intervene, the qui tam relators may further pursue claims on their own, in which case they are left entirely to their own devices in developing the evidence.[213] The quality of the claim and evidence, however, also matters for awards under the IRS whistleblower program. While the program enlists the Service's agents in developing the case against allegedly fraudulent practices, the size of the whistleblower's reward depends on the "substantiality" of his or her contribution.[214] The program thus encourages informants to provide solid evidence supporting their claims, just as the possibility of government intervention encourages qui tam plaintiffs to present solid evidence for their claims. In other words, there is no reason, a priori, to suspect that qui tam provisions lead to more frequent or more intense invasions of privacy, and no showings to that effect have yet been made.

In spite of what critics may argue, it is similarly unclear whether the FCA's qui tam regime invariably raises graver concerns regarding the privacy of informants than the agency-administered whistleblower program. While the IRS whistleblower program may provide for a higher likelihood that the informant will succeed in retaining his or her anonymity throughout the proceedings,[215] there is no guarantee that the whistle-

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problems associated with private enforcement of tax law, including bringing *qui tam* to tax").

211. Government intervention is an attractive prospect because it virtually eliminates the efforts and resources required from the private plaintiff while preserving the plaintiff's possibility of recovery. See 31 U.S.C. § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action . . . ."); Androphy & Peavy, supra note 183, at 130 (noting 15% recovery is available even if relator does nothing more than file lawsuit in which government later intervenes, but most qui tam relators should work under "perhaps disheartening assumption" that government is not going to intervene in suit).

212. The government is likely to intervene only in those cases in which it believes the relators' accusations have merit. Cf. Sean Elameto, Guarding the Guardians: Accountability in Qui Tam Litigation Under the Civil False Claims Act, 41 Pub. Cont. L.J. 813, 826 (2012) (suggesting actions in which government intervenes are more likely to be meritorious, leading to higher average recoveries).

213. See 31 U.S.C. § 3730(c)(3) ("If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action.").

214. See I.R.C. § 7623(b)(1)–(2) (2006) (providing for 15% to 30% reward if whistleblower's information was "substantial," but only 10% reward if information was not).

215. See supra notes 179–185 and accompanying text (comparing public disclosure of informant's identity under IRS whistleblower program and qui tam statute and discussing importance of preserving anonymity).

blower's identity will not be revealed during the investigation.[216] The IRS makes clear that at times a whistleblower will be required to testify in judicial proceedings and that under certain circumstances the whistleblower's identity must be revealed to the defendant taxpayer.[217] If the informant's identity is revealed, the FCA does much more than the IRS whistleblower program to limit the negative consequences of such disclosure. The FCA includes provisions prohibiting retaliation against relators,[218] whereas the IRS whistleblower statute does not provide such protections.[219] While the whistleblower's identity may thus be less likely to be revealed, consequences of such revelation may actually be more severe under the whistleblower program.

B. *Improving the FCA: Lessons from the States*

While neither regime thus perfectly addresses all the problems associated with private enforcement of public law, qui tam most effectively balances the enforcement power of private individuals with concerns regarding competence and privacy as they arise particularly in the area of tax enforcement. The fundamental justification for the IRS whistleblower program—the interposition of a government agency between the private informant and the taxpayer accused of wrongdoing[220]—will invariably continue to prevent the IRS program from becoming as effective an enforcement mechanism as qui tam. Private efforts, no matter their volume or strength, will continue to be circumscribed by the limited resources available to the public enforcement agency. The qui tam regime currently embodied by the FCA, on the other hand, can further be shaped to minimize any lingering concerns. The experiences of the states that have authorized suits against tax fraudsters under their respective qui tam statutes can serve to instruct the federal government and other states on how to shape their false claims acts to allow for properly limited qui

216. See, e.g., Sullivan, supra note 62 (discussing identity of one IRS whistleblower).

217. See IRM 25.2.2.11(3) (June 18, 2010), http://www.irs.gov/irm/part25/irm_25-002-002.html (on file with the *Columbia Law Review*) ("Under some circumstances, such as when the whistleblower is an essential witness in a judicial proceeding, it may not be possible to pursue the investigation or examination without revealing the whistleblower's identity.").

218. See 31 U.S.C. § 3730(h) (Supp. V 2012) ("Any employee . . . shall be entitled to all relief necessary to make that employee . . . whole, if that employee . . . is . . . discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under this section . . . .").

219. See Treasury Inspector Gen. for Tax Admin., Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims 13 (2009), available at http://www.treasury.gov/tigta/auditreports/2009reports/200930114fr.pdf (on file with the *Columbia Law Review*) ("[U]nlike the False Claims Act, Whistleblower legislation related to tax fraud does not include specific provisions for employee protection against retaliation by an employer.").

220. See supra notes 161–163 and accompanying text (laying out argument that IRS involvement is necessary to ensure accurate and consistent interpretation of tax laws).

tam actions alleging tax fraud. By implicitly permitting private litigation against alleged tax fraudsters, but granting the state authority to seek dismissal for good cause, the false claims acts of Nevada and Illinois harness the enforcement power of qui tam relators while terminating cases that threaten to undermine the conformity and consistency of state tax laws.[221] The New York False Claims Act even more effectively ensures the participation of private individuals in tax enforcement by expressly allowing for qui tam suits in tax fraud disputes and providing legislatively crafted limitations only applicable to cases implicating tax law,[222] thus specifically addressing the concerns raised by qui tam for tax.

One of the strongest justifications for maintaining a separate whistleblower program to pursue allegations of tax fraud is a desire that tax laws be uniformly interpreted and consistently applied to all taxpayers, and that an agency made up of experts in the field be tasked with resolving the difficult interpretive problems that occasionally arise.[223] The highest courts of Nevada and Illinois, however, have shown that this concern can be addressed without a complete prohibition of qui tam suits for tax violations by giving the government the authority to seek dismissal of those qui tam actions—and those qui tam actions only—that threaten to implicate these concerns.[224] Not only do provisions allowing for dismissal upon the government's request allow tax authorities to voice their opinions regarding which cases they consider important enough to justify expert involvement, but they also specifically provide a means for private enforcement of allegations that the authorities would like to pursue but cannot, due to their limited resources and need to prioritize. The FCA already contains a provision granting the government the authority to seek dismissal of private actions.[225] If the FCA were amended to cover tax fraud, the government could use this dismissal provision to ensure that problematic cases that should be left to review by the Service will be terminated. Without further revision, the statute would allow the IRS to employ its significant expertise where it is really needed, while also allowing private plaintiffs to engage in the "grunt work" of developing factual records through lengthy discovery proceedings where only questions of fact are presented. The provision also constitutes an additional check on

221. See supra notes 120–125, 129–131 and accompanying text (discussing good cause exception as grounds for dismissal of qui tam action).

222. See supra notes 151–153 and accompanying text (explaining New York False Claims Act's language is applicable only to tax fraud).

223. See, e.g., Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 127 P.3d 1088, 1107 (Nev. 2006) (noting state's "desire to defer cases involving disputed legal issues and intensive factual evaluations to the governmental agency statutorily charged with administering the tax laws is rationally related to the legitimate . . . endeavor of maintaining uniformity and consistency in the tax laws"); see also supra Part II.B.1.a (discussing institutional competence argument).

224. See supra notes 120–125, 130 and accompanying text (illustrating how courts have interpreted good cause exception for dismissal of qui tam actions).

225. 31 U.S.C. § 3730(c)(2)(A) (2006).

potentially incompetent or harassing plaintiffs: A court faced with an inept or hostile qui tam relator could dismiss the case based on the limited ability of the plaintiff and his or her counsel to represent the interests of those he or she is representing—in this case the state or federal government. This is a familiar analysis to many courts, as it already constitutes a required aspect of the class action certification process.[226]

While the FCA's dismissal provision as currently written can thus be used to preserve the uniformity and consistency of the tax laws even in the face of qui tam actions, the FCA could further benefit from adopting language permitting dismissal by the government only for "good cause," as that language has been interpreted by state courts.[227] Allowing dismissal only for good cause ensures that courts will only dismiss those cases that the government opposes for legitimate reasons and will prevent illegitimate concerns, such as political pressures, which may already limit public enforcement of certain matters, from swallowing up the private enforcement alternative as well.[228]

The New York False Claims Act's express recognition that it applies to allegations of tax fraud even more effectively harnesses private enforcement power in the fight against tax fraud. Even though the New York statute was enacted later than some of its counterparts in other states, it has already spurred more headlines than the private tax enforcement provision of any other state.[229] Of the six states implicitly

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226. See Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all members only if . . . the representative parties will fairly and adequately protect the interests of the class.").

227. See supra notes 120–125, 129–131 and accompanying text (discussing courts' analyses of good cause dismissal).

228. See supra note 193 and accompanying text (suggesting political constraints of IRS, DOJ, and U.S. Attorney's Offices may be one reason for favoring qui tam over whistleblower program).

229. See, e.g., Reed Albergotti, Sprint Is Sued by New York over Taxes, Wall St. J. (Apr. 20, 2012), http://online.wsj.com/article/SB100014240527023043312045773 53880582832286.html (on file with the *Columbia Law Review*) (noting New York Attorney General's decision to intervene in qui tam suit against Sprint Nextel Corp.); Erika Kelton, The Tax Whistleblower Case Against Sprint: NY Attorney General Gets It, the IRS Doesn't, Forbes (Apr. 20, 2012), http://www.forbes.com/sites/erikakelton/2012/04/20/the-tax-whistleblower-case-against-sprint-ny-attorney-general-gets-it-the-irs-doesnt/ (on file with the *Columbia Law Review*) (same); Brett Molina, N.Y. Attorney General Sues Sprint for $300M, USA Today (Apr. 19, 2012), http://content.usatoday.com/communities/technologylive/post/2012/04/ny-attorney-general-sues-sprint-for-300m/1 (on file with the *Columbia Law Review*) (same); Eric Savitz, Sprint Sued by New York State for $300M+ in Back Taxes, Forbes (Apr. 19, 2012), http://www.forbes.com/sites/ericsavitz/2012/04/19/sprint-sued-by-new-york-state-for-300m-in-back-taxes/ (on file with the *Columbia Law Review*) (same); Celeste Katz, NY AG Sues Sprint-Nextel for Sales Tax Fraud, N.Y. Daily News: Daily Politics (Apr. 19, 2012, 5:15 PM), http://www.nydailynews.com/blogs/dailypolitics/2012/04/ny-ag-sues-sprint-nextel-for-sales-tax-fraud (on file with the *Columbia Law Review*) (same); see also Albergotti & Saunders, supra note 200 (noting whistleblower's role in New York Attorney General's investigation into tax practices of private equity firms); Amy Hamilton, New York AG's Tax Probes Energize Whistleblowers, Set Advisers on Edge, Tax Analysts

allowing for qui tam actions against tax fraud, only the two discussed above—Nevada and Illinois—have any case law interpreting their provisions. In other states, the courts have not clarified whether allegations of tax fraud may be brought under the respective false claims acts.[230] This uncertainty cannot contribute to the effectiveness of the statutes in combating tax fraud. To the contrary, a potential plaintiff would likely hesitate given the prospect of lengthy litigation to determine whether his or her qui tam suit may proceed in the first place. Potential qui tam attorneys, usually operating on a contingency fee basis, would likely shirk from the daunting—and costly—task of litigating a claim before they could be at least reasonably optimistic that recovery would eventually follow, further stymying the efforts of potential plaintiffs. By making clear that the state's false claims act applies to violations of the state tax laws, New York took this significant uncertainty out of the relator's equation, thereby encouraging potential plaintiffs to bring their suits.

Expressly including tax fraud under the New York False Claims Act also enabled the legislature to craft provisions applicable only to qui tam suits implicating tax law, thus addressing the problems particular to tax without hindering the fight against other types of fraud. New York introduced two provisions intended to minimize the potentially negative consequences of qui tam in the realm of tax: first, the implementation of a minimum threshold requirement regarding a taxpayer's wealth and the amount in controversy, and second, the involvement of the state's tax authorities in the private action.[231] Both of these safeguards could be added to the federal FCA to alleviate privacy concerns frequently associated with qui tam for tax by ensuring that the FCA does not become a vehicle for minor claims between feuding spouses or neighbors brought for the sole purpose of harassment.

This is not to say that the federal FCA could not benefit from incorporating some aspects of the IRS whistleblower program or from allowing the whistleblower program's continued existence in areas not covered by the amended Act. Were the FCA to include a minimum dollar threshold as exemplified by the New York False Claims Act, a significant

(Oct. 16, 2012), http://www.taxanalysts.com/www/features.nsf/Articles/33BFC988550E725D85257A99004E4DF6 (on file with the *Columbia Law Review*) (same).

230. See John A. Bruegger, Tax Whistleblower Proceedings at the State Level: Common Themes and a Call to Action, J. Multistate Tax'n & Incentives, May 2009, at 12, 18–19 (noting absence of case law on applicability of state false claims acts to tax law in Delaware, Indiana, Rhode Island, and Florida).

231. See N.Y. State Fin. Law § 189(4)(a) (McKinney Supp. 2013) (providing minimum amount in controversy that must be involved before qui tam suits are permitted); id. § 189(4)(b) (requiring Attorney General to consult with Commissioner of Department of Taxation and Finance before intervening in qui tam action involving tax claims).

number of claims would remain outside the FCA's scope.[232] These claims may continue to interest the Service, and would justify the continued existence of the whistleblower program despite an expanded FCA. Disputes that do not involve amounts sufficiently high to permit qui tam actions could continue to be brought to the attention of the Service under the whistleblower program. Instituting such a "backup" whistleblower program may not even require legislative action. When the IRS whistleblower program was last amended in 2006, a dollar threshold similar to that included in the New York False Claims Act was added, as were new requirements regarding the amount the Service had to pay to successful whistleblowers.[233] Yet, the Service interpreted the 2006 amendments to leave intact and only add to the program as it previously existed—that is, without a threshold requirement and with discretionary award payments.[234] Where the amount in controversy exceeds the threshold sum, the IRS now argues, the whistleblower program as amended in 2006 applies, but where amounts in controversy fall short of the threshold requirement, the previous discretionary scheme applies.[235] This interpretation leaves open the possibility that future amendments to the whistleblower scheme could similarly be interpreted to leave the program intact as it currently exists, obviating any need for complicated legislative action in this area and ensuring that all claims involving tax fraud—whether large in size or not—would receive the scrutiny they deserve.

CONCLUSION

A review of the criticisms leveled against both the IRS whistleblower program and the FCA reveals that neither scheme is perfectly suited to channel private resources into the enforcement of public laws. While the IRS program interposes a government agency between the informant and the taxpayer accused of misconduct, and thereby limits enforcement actions to those for which the Service's limited resources suffice, the FCA requires that individuals with information file their own suits and thereby reveal their identity to a public that frequently reacts in a hostile fashion. While under the whistleblower program the Service develops enforcement actions against taxpayers, and thus ensures that the law is applied evenly and consistently to different taxpayers, qui tam cases are argued

232. See id. § 189(4)(a)–(b) (prohibiting qui tam actions where income of individual taxpayer does not equal or exceed $1 million for any year subject to controversy and where damages sought in action do not exceed $350,000).

233. I.R.C. § 7623(b)(5) (2006) (limiting applicability of amendments to cases where amount in dispute exceeds $2 million and individual taxpayer's gross income exceeds $200,000).

234. See Treasury Inspector Gen., Improved Oversight, supra note 94, at 1 ("If the submission does not meet the criteria for § 7623(b) consideration, the IRS may consider it for an award under the pre-Act discretionary authority (§ 7623(a)).").

235. See supra notes 94–98 and accompanying text (discussing discretionary whistleblower program under § 7623(a)).

by individuals free from political constraints. A closer look at the FCA and the resources available to litigants in the modern U.S. legal system reveals, however, that concerns expressed by critics of qui tam for tax are overstated and that lawsuits by private individuals pose no greater threat of harassment and backlash than enforcement actions supervised by the Service. The FCA's antiretaliation provision protects the future well-being of qui tam relators, while the requirement that false claims have been made "knowingly" protects unwary taxpayers from harassing suits. The existence of a specialized plaintiffs' bar further ensures that the interests of the government are represented by a competent relator and that frivolous suits are reined in.

Several states, seeking to strengthen enforcement of tax laws, have adopted a strategy eschewed by the federal government—allowing qui tam actions that allege violation of tax laws. As these states grapple with the lingering concerns discussed above, they look for ways to limit qui tam suits in situations that are abusive or best dealt with by the experts in tax agencies. New York has reacted by imposing a minimum monetary threshold below which claims alleging tax fraud cannot be brought. Nevada and Illinois have broadly interpreted clauses in their respective false claims acts allowing for dismissal of actions for good cause where novel questions of state tax law arise. As these solutions address some of the gravest concerns brought forward by critics of qui tam actions in the realm of tax law, they demonstrate that a broad ban on qui tam for tax is not the only solution. States have shown that qui tam can be expanded to tax without bringing about the disastrous consequences feared by those arguing against using private enforcement actions to combat tax fraud. As the federal government faces an ever-increasing tax gap and an ever-growing budget deficit, it could profit significantly from expanding the FCA to allow individual plaintiffs to join the fight against tax fraud.

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