Cooperating Individual or Entity: Law Enforcement's Friend in a Time of Escalating Deficits and Tight Budgets

Albert F. Tellechea
INTRODUCTION

Transnational criminal organizations\(^2\) are a corrosive criminal activity. Their financial power corrupts everything. Governments, regulators, law enforcement, prosecutors, judges and financial institutions are not immune.

Under Articles 2 and 3 of the United Nations Convention Against Transnational Organized Crime, a group must meet the following criteria in order to become a TCO:

A. Its members must be organized as a criminal group,
   1. of three or more persons,
   2. existing for a period of time,

\(^{A}\) I want to thank Ms. Caitlin H. Frenkel for encouraging me to submit this article for publication. Ms. Frenkel, a most gifted student and future fellow colleague, is somebody I consider a friend.


2. Transnational criminal organizations are referred to hereinafter as “TCO” when singular, and “TCOS” when plural.
3. not formed by chance for the immediate commission of one offense, and
4. acting together for the purpose of committing one or more serious crimes or offenses to get a direct or indirect financial or other material benefit;

B. The group’s reach must extend beyond one state’s boundaries;

C. And the actual or planned offense or offenses must,
1. be a serious crime (under Article 2 a crime must carry a threshold minimum prison term of at least four years in order to be considered serious),
2. involve the laundering of proceeds of crime, or
3. must obstruct justice by corrupting at least one public official.\(^3\)

Under Article 3, Section 2, for an offense to be considered transnational, it must be committed:

A. in more than one state, but
B. if in one state only, then
1. a substantial part of the preparation, planning, direction or control must happen in another state;
2. the offense involves an organized criminal group that operates in more than one state, or
3. the offense must have a substantial effect in another state.\(^4\)

In its October 2011 report titled *Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Crimes*, the United Nations Office on Drugs and Crime (UNODC) found that TCOS’s proceeds amount to 3.6% of World gross domestic product [GDP] or $2.52 trillion.\(^5\) It concluded that the related global economic costs of the TCOS’s criminal enterprises are as high as 300 percent of the TCOS’s income or $7.56 trillion.\(^6\) This exceeds China’s FY2011\(^7\)

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4. *Id.* at art. III, § 2.
6. *Id.*
7. FY is the acronym for fiscal year, and is used frequently throughout this Article.
GDP by $241.5 billion and is more than half of the United States’ GDP.8

### ESTIMATED EARNINGS FROM CRIMINAL ACTIVITY IN THE U.S.9

<table>
<thead>
<tr>
<th>Year</th>
<th>Criminal Income (billions) (CI+TE)</th>
<th>In % of GDP for CI+TE</th>
<th>Estimated Criminal Income (billions) (CI-TE)</th>
<th>In % of GDP for CI-TE</th>
<th>Ratio of CI-TE to CI+TE</th>
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<td>49.0</td>
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<td>300.0</td>
<td>2.0%</td>
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Estimated earnings from U.S. CI+TE10 reached $780 billion by FY2000.11 If the rate of increase from FY2000 to FY2012 remains constant, earnings from U.S. CI+TE may reach 9.44% of GDP or $1.424 trillion by the end of FY2012.

Tax evasion, drugs, and fraud are the main components of the U.S. overall criminal proceeds. Tax evasion accounted for more than half (1/2) of the total U.S. illegal proceeds.12 Trafficking in drugs and


10. CI+TE is defined as criminal income plus tax evasion. Id. Conversely, CI-TE is criminal income less than tax evasion. Id.

11. Id.

12. Id. at 21.
fraud accounted for one-fifth (1/5) and one-eighth (1/8) respectively.\textsuperscript{13} If we exclude tax evasion from criminal income (CI-TE), drug trafficking was responsible for 47% and fraud for 28% of the total U.S. illegal proceeds.\textsuperscript{14}

The traditional response towards TCOS has been investigation, prosecution, adjudication, and incarceration, accompanied at times by criminal or civil forfeitures. This approach has reduced the $2.52 trillion TCOS's global criminal income by 1% or less.\textsuperscript{15} At the same time, total U.S. CI+TE as a percentage of GDP has increased from 6.8% in FY1965 to 8.0% in fiscal year 2000.\textsuperscript{16} The total U.S. CI+TE as a percentage of GDP is projected to be 9.56% or $1.58 trillion by FY2013.\textsuperscript{17} The Honorable Antonio Maria Costa, the former head of UNODC, succinctly captured the extent of the problem: "Today I cannot think of one bank in the World that has not been penetrated by mafia money."\textsuperscript{18} In order to be successful in our war against TCOS, we must increase our eradication efforts or we must devise, deploy, and implement new tactics and tools.

I. THE BUDGETARY PICTURE

From a financial perspective, the United States is the richest nation on the planet. The total tax revenue from all U.S. Federal, state and local taxes and fees for FY2016 is projected to be $6.7 trillion, an increase of 140% over the last five years.\textsuperscript{19} In FY2016, the U.S. Federal debt is projected to be $19.3 trillion,\textsuperscript{20} and the state and local debt is

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Graph showing budgetary picture of the United States.}
\end{figure}

\begin{thebibliography}{99}
\bibitem{13} Id.
\bibitem{14} Id.
\bibitem{15} Id.
\bibitem{16} See id. at 20.
\bibitem{17} Id. For FY 2013, U.S. Gross Federal Debt is projected to be $17.249 trillion. See The Budget for Fiscal Year 2014, Federal Government Financing and Debt, at 227 (Table. S-13).
\bibitem{18} See John Paul Rathbone, Money Laundering: Taken to the Cleaners, FIN. TIMES (July 20, 2012), http://www.ft.com/cms/s/0/702a64a6-d25e-11e1-ac21-00144feabdc0.html#axzz42S86uQ4s; see also Alessandra Galloni, Vatican, U.S. in Anti-Money-Laundering Deal, WALL ST. J. (May 7, 2013), http://www.wsj.com/articles/SB10001424127887323372504578469033523433940.
\bibitem{20} The Budget for Fiscal Year 2014, supra note 17.
\end{thebibliography}
expected to be $3.05 trillion. The total U.S. National debt will be $22.4 trillion. It will exceed total revenues by a factor of 3.38 to 1.

The interest expense on the outstanding U.S. Federal debt alone for FY2016 was $413.54 billion, from October 2015 to date. Today, about 6% of the U.S. Federal budget is allocated to debt interest payments. If the U.S. economy improves, interest rates will rise. As a result, interest on the debt is projected to increase by FY2020 to $566 billion. By then interest alone will become the fourth largest item on the U.S. Federal budget.

In addition to the debt and the corresponding interest, the U.S. government also has liabilities it must fund or obligations it must pay totaling $123.6 trillion. The states and local governments are responsible for another $3.1 trillion. The combined national unfunded liabilities are $125.2 trillion dollars. This is money the federal, state, and local governments must have to fully fund or pay Medicare, the Medicare Prescription Drug Program, Social Security, Federal military and civil pensions, and state and local pensions, health and other benefits.

Because the rate for U.S. Federal Reserve Funds has not increased above 0.25% since January 1, 2009, the U.S. has been borrowing money at today’s lower rate to pay off older high interest

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22. Id.
27. This information was accurate as of April 20, 2016. See U.S.A. DEBT CLOCK, http://www.usadebtclock.com (last visited June 8, 2016).
29. See generally id.
maturing debt. As existing Treasury bonds come due, the U.S. just borrows more money to redeem maturing obligations.

If the cost of money increases, governments already overburdened by debt will not be able to sustain the cycle of borrowing today to pay yesterday’s debt. They may be tempted to print money and use this new money to pay maturing debt. This may lead to higher inflation, a reduction in the purchasing power of consumers and an increase in taxes and interest rates. This financial scenario can lead to social, political, and business instability or upheaval.


32. Launicella & Burne, supra note 31.

33. Id.

34. The Treaty of Versailles ending World War I and the reparations payments it required, 31.4 billion in 1921 USD, caused Germany’s political deadlock, kept the German economy from functioning, and caused some of the worst hyperinflation in history. The payments demanded by the Allies were considerably higher than Germany’s GDP. When Germany stopped paying, France and Belgium occupied the Ruhr industrial region and took whatever they could. In response, German workers went on a general strike. This got the French and the Belgians to leave, but it brought the German economy to a standstill. In addition, the factories shut down because of a lack of raw materials. This instability caused the Mark to fall from 8.9 to 191.8 per USD from January 1919 to January 1922. By June 1922, the Mark had fallen from 350 to one. And by October of that year, it was 4,500 to one. Between January and November 1923, the value dropped from 18,000 to one to 4.2 trillion per one USD. This hyperinflation not only devastated the Germany economy, but also wiped out life savings and rendered loans worthless. Workers demanded payments twice a day because their wages would otherwise be worth nothing by the time they got off work. People could only obtain goods through barter. The German Mark was more valuable for covering walls or generating heat than as money. This created the environment for the establishment of the Nazi Party after the 1932 elections as the largest parliamentary faction of the Weimar Republic’s government. Adolph Hitler was appointed Chancellor of Germany on January 30, 1933. The Weimar Republic’s Emergency-powers Decree of February 28, 1933, and the Enabling Act of March 23, 1933, conferred dictatorial powers to Chancellor Hitler. On September 1, 1939, Poland was invaded and World War II in Europe officially started. See David E. Laidler & George W. Stadler, Monetary Explanations of the Weimar Republic’s Hyperinflation: Some Neglected Contributions in Contemporary German Literature, 30 J. Money, Credit & Banking 816, 816-31 (Nov. 1998). See also ADAM FERGUSSON, WHEN MONEY DIES: THE NIGHTMARE OF DEFICIT SPENDING, DEVALUATION, AND HYPERINFLATION IN WEIMAR GERMANY (1975).
The United States is in a precarious financial position.\textsuperscript{35} It cannot continue to borrow, increase its debt service, and assume more unfunded liabilities.\textsuperscript{36} Neither can the rest of the world.\textsuperscript{37}

\textsuperscript{35} As Wall Street Journal reporter Jason DeSena Trennert observed:

Ernest Hemingway once said, "The first panacea for a mismanaged nation is inflation of the currency; the second is war. Both bring a temporary prosperity; both bring a permanent ruin. But both are the refuge of political and economic opportunists."
Papa Hemingway saw more than his share of political fraudsters in his day, and he captured a central truth - profligate policies have generally led countries to extricate themselves from their difficulties through sleight-of-hand rather than true reform. A more modern form of inflation - financial repression - is being undertaken today.

Here the wayward state seeks to pay negative real interest rates on its debt and thus, it hopes, allow inflation to chip away at its principal over time. Savers pay the price. Today, the Federal Reserve is the instrument of this surreptitious wealth tax-buying roughly 60\% of the net new issuance of Treasury notes in 2012 - and the main reason why an investor in a money-market fund can only get 0.02\% on his cash while inflation is close to 2\%.

That helps explain why the first quarter of 2013 saw both the Dow Jones Industrial Average and the S&P 500 hit record highs. Investors are taking the "Tina" approach to common stocks: In the late 1970s, British Prime Minister Margaret Thatcher was nicknamed "Tina" for her response to critics of her steadfast support for free markets - "There is no alternative." Ultimately there may be no alternative for investors seeking returns above the rate of inflation.


\textsuperscript{36} As financial reporter Mortimer Zuckerman explained:

The Great Recession is an apt name for America's current stagnation, but the present phase might also be called the Grand Illusion — because the happy talk and statistics that go with it, especially regarding jobs, give a rosier picture than the facts justify.

The country isn't really advancing. By comparison with earlier recessions, it is going backward. Despite the most stimulative fiscal policy in American history and a trillion-dollar expansion to the money supply, the economy over the last three years has been declining. After 2.4\% annual growth rates in gross domestic product in fiscal year 2010 and fiscal year 2011, the economy slowed to 1.5\% growth in fiscal year 2012. Cumulative growth for the past 12 quarters was just 6.3\%, the slowest of all [eleven] recessions since World War II.

Last year's anemic growth looks likely to continue. Sequestration will take $600 billion of government expenditures out of the economy over the next 10 years, including $85 billion this year alone. The 2\% increase in payroll taxes will hit about 160 million workers and drain $110 billion from their disposable incomes. The Obama health-care tax will be a drag of more than $30 billion. The recent 50-cent surge in gasoline prices represents another $65 billion drag on consumer cash flow.

February's headline unemployment rate was portrayed as 7.7\%, down from 7.9\% in January. The dip was accompanied by huzzahs in the news media claiming the improvement to be "outstanding" and "amazing." But if you account for the people who are excluded from that number — such as "discouraged workers" no longer looking for a job, involuntary part-time workers and others who are "marginally attached" to the labor force — then the real unemployment rate is somewhere between 14\% and 15\%.

Other numbers reported by the Bureau of Labor Statistics have deteriorated. The 236,000 net new jobs added to the economy in February is misleading — the gross number of new jobs included 340,000 in the part-time, low wage category. Many of
the so-called net new jobs are second or third jobs going to people who are already working, rather than going to those who are unemployed.

The number of Americans unemployed for six months or longer went up by 89,000 in February 2013 to a total of 4.8 million. The average duration of unemployment rose to 36.9 weeks, up from 35.3 weeks in January 2013. The labor-force participation rate, which measures the percentage of working-age people in the workforce, also dropped to 63.5%, the lowest in 30 years. The average workweek is a low 34.5 hours thanks to employers shortening workers' hours or asking employees to take unpaid leave.

Since World War II, it has typically taken 24 months to reach a new peak in employment after the onset of a recession. Yet the country is more than 60 months away from its previous high in 2007, and the economy is still down 3.2 million jobs from that year.

Just to absorb the workforce's new entrants, the U.S. economy needs to add 1.8 million to three million new jobs every year. At the current rate, it will be seven years before the jobs lost in the Great Recession are restored. Employers will need to make at least 300,000 hires every month to recover the ground that has been lost.

The job-training programs announced by the Obama administration in his State of the Union address are sensible, but they won't soon bridge the gap for workers with skills in science, technology, engineering and mathematics. Nor is there yet any reform of the patent system, which imposes long delays on innovators, inventors and entrepreneurs seeking approvals. It often takes two years to obtain the environmental health and safety permits to build a modern electronic plant, a lifetime in the tech world.

When employers can't expand or develop new lines because of the shortage of certain skills, the employment opportunities for the less skilled are also restricted. To help with this shortage, the administration's proposals for job-training programs do deserve support. The stress should be on vocational training, postsecondary education and every program that will broaden access to computer science and strengthen science, technology, engineering and math in high schools and at the university level.

But the payoffs from these programs are in the future, and it is vital today to increase the number of annual visas and grants of permanent residency status for foreigners skilled in science and technology. The current situation is preposterous: The brightest and best brains from all over the globe are attracted to American universities, but once they get their degrees America sends them packing. Keeping these foreigners out means they will compete against us in the industries that are growing here and around the world.

What the administration gives us is politics. What the country needs are constructive strategies free of ideology. But the risks of future economic shocks will multiply so long as we remain locked in a rancorous political culture with a leadership more inclined to public relations than hard-headed pragmatic recognition of what must be done to restore America's vitality.


37. As explained by George Friedman, a testament to the risks posed by such a course of action can be seen in Cyprus:

The European economic crisis has taken different forms in different places, and Cyprus is the latest country to face the prospect of financial ruin. Overextended banks in Cyprus are teetering on the brink of failure for issuing loans they cannot repay, which has prompted the tiny Mediterranean country, a member of the European Union, to turn to Brussels for help. In March 2013, the European Union and Cypriot president announced new terms for a bailout that would provide the infusion of cash necessary to prevent bankruptcies in Cyprus' banking sector and, more important, prevent a banking panic from spreading to the rest of Europe.
What makes this crisis different from the previous bailouts for Greece, Ireland, or elsewhere are the conditions Brussels has attached for its assistance. Due to circumstances unique to Cyprus, namely the questionable origin of a large chunk of the deposits in its now-stricken banking sector and that sector's small size relative to the overall European economy, the European Union, led by Germany, has taken a harder line with the country. Cyprus has few sources of capital besides its capacity as a banking shelter, so Brussels required that the country raise part of the necessary funds from its own banking sector — possibly by seizing money from certain bank deposits and putting it toward the bailout fund. The proposal has not yet been approved, but if enacted it would undermine a formerly sacred principle of banking in most industrial nations — the security of deposits — setting a new and possibly destabilizing precedent in Europe.

Cyprus' Dilemma

For years before the crisis, Cyprus promoted itself as an offshore financial center by creating a tax structure and banking rules that made depositing money in the country attractive to foreigners. As a result, Cyprus' financial sector grew to dwarf the rest of the Cypriot economy, accounting for about eight times the country's annual gross domestic product and employing a substantial portion of the nation's workforce. A side effect of this strategy, however, was that if the financial sector experienced problems, the rest of the domestic economy would not be big enough to stabilize the banks without outside help.

Europe's economic crisis spawned precisely those sorts of problems for the Cypriot banking sector. But this was not just a concern for Cyprus. Even though Cyprus' banking sector is tiny relative to the rest of Europe's, one Cypriot bank defaulting on what it owed other banks could put the whole European banking system in question, and the last thing the European Union needs now is a crisis of confidence in its banks.

The Cypriots were facing chaos if their banks failed because the insurance system was insufficient to cover the claims of depositors. For its part, the European Union could not risk the financial contagion. But Brussels could not simply bail out the entire banking system, both because of the precedent it would set and because the political support for a total bailout wasn't there. This was particularly the case for Germany, which would carry much of the financial burden and is preparing for elections in September 2013 before an electorate that is increasingly hostile to bailouts.

Under German guidance, the European Union made an extraordinary demand on the Cypriots. It demanded that a tax be placed on deposits in the country's two largest banks. The tax would be about [ten] percent and would, under the initial terms, be applied to all accounts, regardless of their size. This was an unprecedented solution. Since the global financial crisis of the 1920s, all advanced industrial countries — and many others — had been operating on a fundamental principle that deposits in banks were utterly secure. They were not regarded as bonds paying certain interest, whose value would disappear if the bank failed. Deposits were regarded as riskless placements of money, with the risk covered by deposit insurance for smaller deposits, but in practical terms, guaranteed by the national wealth.

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Brussels demanded that the bailout for Cypriot banks be partly paid for by depositors in those banks. That demand essentially violated the social contract on the sanctity of bank deposits and did so in a country that was a member of the European Union — one of the world's major economic blocs. Proponents of the measure pointed out that many of the depositors were not Cypriot nationals but rather foreigners,
many of whom were Russian. Moreover, it was suggested that the only reason for a
Russian to be putting money in a Cypriot bank was to get it out of Russia, and the
only motive for that had to be nefarious. It followed that the confiscation was not
targeted against ordinary people but against shady Russians.

There is no question that there are shady Russians putting money into Cyprus. But
ordinary Cypriots had their money in the same banks and so did many Cypriot and
foreign companies, including European companies, who were doing business in Cy­
prus and need money for payroll and so on. The proposal might look like an attempt
to seize Russian money, but it would pinch the bank accounts of all Cypriots as well
as a sizable amount of legitimate Russian money. Confiscating 10 percent of all de­
posits could devastate individuals and the overall economy and likely would prompt
companies operating in Cyprus to move their cash elsewhere. The measure would
have been devastating and the Cypriot parliament rejected it.

Another deal, the one currently up for approval, tried to mitigate the problem but
still broke the social contract. Accounts smaller than 100,000 Euros (about $128,000)
would not be touched. However, accounts larger than 100,000 Euros would be taxed
at an uncertain rate, currently estimated at 20 percent, while bondholders would
lose up to 40 percent. These numbers will likely shift again, but assuming they are
close to the final figures, depositors putting money into banks beyond this amount
are at risk, depending on the financial condition of the bank.

The impact on Cyprus is more than Russian mafia money being taxed. All corpora­
tions doing business in Cyprus could have 20 percent of their operating cash seized.
Regardless of precisely how the Cypriot banking system is restructured, the fact is
that the European Union demanded that Cyprus seize portions of bank accounts
from large depositors. From a business' perspective, 100,000 Euros is not all that
much when you are running a supermarket or a car dealership or a construction
company, but this arbitrary level could easily be raised in the future, and the mere
existence of the measure will make attracting investment more difficult.

A New Precedent

The more significant development was the fact that the European Union has now
made it official policy, under certain circumstances, to encourage member states to
seize depositors' assets to pay for the stabilization of financial institutions. To put it
simply, if you are a business, the safety of your money in a bank depends on the
bank's financial condition and the political considerations of the European Union.
What had been a haven -- no risk and minimal returns -- now has minimal returns
and unknown risks. Brussels' emphasis that this was mostly Russian money is not
assuring either. More than just Russian money stands to be taken for the bailout
fund if the new policy is approved. Moreover, the point of the global banking system
is that money is safe wherever it is deposited. Europe has other money centers, like
Luxembourg, where the financial system outstrips gross domestic product. There are
no problems there right now, but as we have learned, the European Union is an
uncertain place. If Russian deposits can be seized in Nicosia, why not American de­
posits in Luxembourg?

The question, of course, is whether foreign depositors in European banks will accept
that Cyprus was one of a kind. If they decide that it isn't obvious, then foreign corpo­
rations -- and even European corporations -- could start pulling at least part of their
cash out of European banks and putting it elsewhere. They can minimize the
amount of cash on hand in Europe by shifting to non-European banks and transferr­
ing as needed. Those withdrawals, if they occur, could create a massive liquidity
crisis in Europe. At the very least, every reasonable CFO will now assume that the
risk in Europe has risen and that an eye needs to be kept on the financial health of
institutions where they have deposits. In Europe, depositing money in a bank is no
longer a no-brainer.

Now we must ask ourselves why the Germans would have created this risk. One
answer is that they were confident they could convince depositors that Cyprus was
II. THE INVESTIGATORY PHASE

There are approximately 115 law enforcement agencies, departments, or divisions at the U.S. federal level. These Federal law enforcement units (FLEUs) employed 120,000 law enforcement officers (Fed LEOs) in 2008. Assuming the 2004 - 2008 increase of 14% was repeated from FY2008 to FY2012, the number of FY2013 Fed LEOs should be 137,000.

In FY2012, FLEUs had a combined budget of $31.8 billion, of which $18.0 billion went to the U.S. Customs and Border Protection (CBP) and its sister agency, the U.S. Immigration and Customs Enforcement (ICE), for immigration enforcement. The combined fund allocation going to CBP and ICE for immigration enforcement represents 56.6% of the FLEU’s total fiscal year 2012 budget of $31.8 billion.


40. Id.

The FY2012 budget allocated $8.12 billion to the U.S. Federal Bureau of Investigation (FBI). According to FBI Director Mueller, intelligence operations received $1.68 billion, counter terrorism and counter intelligence received $3.23 billion, and criminal enterprises and other Federal crimes received $2.62 billion. Of the total FY2012 FLEUs budget, the $2.62 billion set aside for investigating criminal enterprises and other Federal crimes is 8.24%.

According to the 2012 Census of State and Local Law Enforcement Agencies by the U.S. Bureau of Justice Statistics, there are 17,985 state and local law enforcement agencies in the United States. In FY2008, they employed 1.1 million persons, of whom 765,000 were law enforcement officers (Non-Fed LEOs). From FY2004 to FY2008, general personnel increased by 5.3% yearly and Non-Fed LEOs by 4.6%. Assuming this trend continues, the projected employment by FY2013 will be 1.35 million overall and 915,773 Non-Fed LEOs.

According to the last decennial census, state and local jurisdictions spent $89.676 billion for law enforcement. This is 270% more than the total FY2012 FLEUs' budget.

III. THE FEDERAL PROSECUTORIAL PHASE

The U.S. Federal government’s prosecutorial apparatus is composed of attorneys, prosecutors, managers and administrators spread mainly between the U.S. Department of Justice (USDOJ) and ninety-three U.S. Attorneys.

U.S. Attorneys are the main prosecutors and litigators for the U.S. Federal government. Each U.S. Attorney is appointed by the President of the United States and confirmed by the U.S. Senate and works

45. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES tbl.344 (Employment by State and Local Law Enforcement Agencies by Type of Agency and Employee) (2012); see also REAVES, supra note 44, at tbl.1.
46. See REAVES, supra note 44, at 3.
under the U.S. Attorney General. Each serves at the pleasure of the President.

The Attorney General appoints all the Assistant U.S. Attorneys (AUSA or AUSAs). They prosecute and litigate under the supervision and control of the U.S. Attorney for each district. The AUSAs serve at the pleasure of the President, the Attorney General, and the U.S. Attorney for the district.

Section 547 of Title 28 of the United States Code gives the U.S. Attorneys three areas of responsibilities:

A. The prosecution of all criminal cases brought by the United States with the exception of cases arising under the Foreign Corrupt Practices Act (FCPA) which are investigated and prosecuted by USDOJ.

B. The prosecution and defense of all civil cases in which the United States is a party.

C. The collection of the debts owed to the United States, which cannot be collected administratively.

In FY2011, the Federal funding was as follows:

51. U.S. ATT'Y'S MANUAL § 9-47.110 (U.S. DEP'T OF JUSTICE 2013). Section 9-47.110 of the United States Attorney Manual (USAM) provides that unless agreed upon by the Assistant Attorney General of the Criminal Division of USDOJ, trial attorneys of the Criminal Division's Fraud Section will conduct all investigations and prosecutions of alleged violations of the FCPA, and all prosecutions of alleged violations of the record-keeping provisions, when such violations are related to an anti-bribery violation.
53. The Civil Rights Division, the Office of the U.S. Trustee, and the Office of the Solicitor General are not included in the table.
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<td>8,497,052</td>
</tr>
<tr>
<td>Medicare</td>
<td>Civ. Div. USDOJ</td>
<td>24,154,224</td>
</tr>
<tr>
<td>Reg. App.</td>
<td>Cr. Div. USDOJ</td>
<td>94,255,000</td>
</tr>
<tr>
<td>RECA(^{54})</td>
<td>Main USDOJ</td>
<td>35,000,000</td>
</tr>
<tr>
<td>Reg. App.(^{55})</td>
<td>Civ. Div. USDOJ</td>
<td>455,300,000</td>
</tr>
<tr>
<td>Reg. App.</td>
<td>U.S. Attorneys</td>
<td>1,926,003,000</td>
</tr>
<tr>
<td>Reg. App.</td>
<td>Tax USDOJ</td>
<td>113,035,000</td>
</tr>
<tr>
<td>Reg. App.</td>
<td>Main USDOJ</td>
<td>33,600,000</td>
</tr>
<tr>
<td>Reg. App.</td>
<td>ENRD USDOJ</td>
<td>109,785,000</td>
</tr>
<tr>
<td>Reg. App.</td>
<td>Antitrust USDOJ</td>
<td>163,170,000</td>
</tr>
<tr>
<td><strong>2011 Funding</strong></td>
<td></td>
<td><strong>2,998,273,276</strong></td>
</tr>
</tbody>
</table>

### 2007/2011 CHANGE IN FEDERAL PROSECUTIONS BY CRIME CATEGORY\(^{56}\)

<table>
<thead>
<tr>
<th>CATEGORY OF CRIME</th>
<th>2007 PROSECUTIONS</th>
<th>2011 PROSECUTIONS</th>
<th>RISE(+) DROP(-)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Violent offenses</td>
<td>2,264</td>
<td>2,176</td>
<td>-4%</td>
</tr>
<tr>
<td>2 Property offenses</td>
<td>12,621</td>
<td>13,020</td>
<td>+3%</td>
</tr>
<tr>
<td>3 Embezzlement</td>
<td>549</td>
<td>527</td>
<td>-4%</td>
</tr>
<tr>
<td>4 Fraud</td>
<td>8,101</td>
<td>9,151</td>
<td>+12%</td>
</tr>
<tr>
<td>5 Forgery &amp; Counterfeiting</td>
<td>825</td>
<td>704</td>
<td>-14%</td>
</tr>
<tr>
<td>6 Drugs</td>
<td>17,046</td>
<td>16,730</td>
<td>-1%</td>
</tr>
<tr>
<td>7 Firearms &amp; Explosives</td>
<td>8,287</td>
<td>7,184</td>
<td>-13%</td>
</tr>
<tr>
<td>8 Sex offenses</td>
<td>2,460</td>
<td>3,291</td>
<td>+34%</td>
</tr>
<tr>
<td>9 General Immigration</td>
<td>16,722</td>
<td>27,292</td>
<td>+63%</td>
</tr>
<tr>
<td>10 Regulatory Offenses</td>
<td>1,660</td>
<td>1,682</td>
<td>+1%</td>
</tr>
<tr>
<td>11 Terrorism</td>
<td>32</td>
<td>40</td>
<td>+25%</td>
</tr>
</tbody>
</table>

---

55. The term "Reg. App." stands for "regular appropriation."
Between FY2007 and FY2011, the prosecution of immigration-related offenses increased by 63%.57 Improper reentry prosecutions accounted for 88% of this increase.58 Sex offense prosecutions increased by 33%.59 Counterfeiting and forgery prosecutions rose by 17%.60 During this same period, U.S. Federal white-collar prosecutions dropped 15.5%, and dropped 21% in the last year.61 In the last seven years, U.S. federal non-drug-related money laundering prosecutions dropped by 24%, while drug-related money laundering prosecutions fell by 60%, of which 12% fell in FY2012 alone.62

**2012 U.S. FEDERAL CIVIL & CRIMINAL CASE AND MATTER LOAD**

<table>
<thead>
<tr>
<th>DIVISION/AGENCY</th>
<th>UNITS</th>
<th>GUILTY PLEAS</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Cr. Division USDOJ</td>
<td>7,071</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>2 Civ. Division USDOJ</td>
<td>56,897</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>3 Tax Division USDOJ</td>
<td>9,000</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>4 ENRD USDOJ</td>
<td>1,266</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>5 Antitrust USDOJ</td>
<td>1,920</td>
<td>N/A</td>
<td></td>
</tr>
<tr>
<td>6 U.S. Attorneys</td>
<td>174,611</td>
<td>58,507</td>
<td></td>
</tr>
<tr>
<td><strong>TOTALS</strong></td>
<td>250,765</td>
<td>58,507</td>
<td></td>
</tr>
</tbody>
</table>

The U.S. taxpayer's cost per unit is $11,956.50.

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57. Immigration crimes are the largest beneficiary of tax dollars earmarked for law enforcement investigations. See Bahrampour, *supra* note 41; see also Meissner et al., *supra* note 41, at 16-19.


59. Id.

60. Id.


63. The caseloads of the Civil Rights Division at the U.S. Department of Justice and of the Office of the U.S. Trustee are not included in the table.

64. A unit is equal to one civil or criminal case or matter.
The U.S. taxpayer’s cost per complex unit\(^{65}\) is $15,595.05.

If we assume that all cases generated by the Criminal, Civil, Tax, Environmental and Natural Resources and Antitrust Divisions of the U.S. Department of Justice are counted in the U.S. Attorneys’ unit number (174,611), and we subtract the guilty pleas (58,507), the U.S. taxpayer’s cost per complex non-repetitive unit\(^{66}\) is $25,824.03.

### COSTS OF PRIVATE PARTY CIVIL LITIGATION\(^{67}\)

<table>
<thead>
<tr>
<th>CATEGORY</th>
<th>AVERAGE PER CASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Automobile</td>
</tr>
<tr>
<td>2</td>
<td>Premises Liability</td>
</tr>
<tr>
<td>3</td>
<td>Real Property</td>
</tr>
<tr>
<td>4</td>
<td>Employment</td>
</tr>
<tr>
<td>5</td>
<td>Contract</td>
</tr>
<tr>
<td>6</td>
<td>Malpractice</td>
</tr>
<tr>
<td><strong>MEDIAN</strong></td>
<td></td>
</tr>
</tbody>
</table>

In the worst case scenario the U.S. taxpayer’s cost per complex, non-repetitive, unit is $25,824.03, or 33.4% of the average U.S. private party’s civil case cost.\(^{68}\)

### IV. THE ADJUDICATORY PHASE

In FY2012, the Judiciary, including the Supreme Court, other federal courts, the Administrative Office of the United States Courts, and the Federal Judicial Center, received a total appropriation of $6.97 billion, which represents .2% of the total Federal Budget for FY2012.\(^{69}\) State and local governments spend $42.6 billion for judicial and adjudi-

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\(^{65}\) See 2011 REPORT ON JUDICIAL BUSINESS, supra note 56. A complex unit is the total of all units less the guilty pleas.

\(^{66}\) See 2011 REPORT ON JUDICIAL BUSINESS supra note 56; see also White Collar Prosecutions 2013, supra note 61.


\(^{68}\) See 2011 REPORT ON JUDICIAL BUSINESS, supra note 56. In criminal matters, FLEUs, state, and local law enforcement agencies, Fed LEOs and Non-Fed LEOs, and U.S. Federal, state and local prosecutors and judges are operating at efficiencies the private sector cannot match in civil matters.

catory functions. Combined, they spend 611% more than the Federal government. The U.S. District Courts exclusive of Probation and Pre-trial Services got $2.494 billion. The eleven U.S. Courts of Appeal received a combined total of $904 million.

The civil and criminal trial caseloads for the U.S. District Courts in FY2011 are as follows:

TOTAL CIVIL CASES - ALL FEDERAL CIRCUITS

| Cases filed | 289,252 |
| Cases terminated | 303,158 |
| Cases pending | 270,839 |

TOTAL CIVIL CASES, U.S. AS A PARTY - ALL FEDERAL CIRCUITS

| Cases filed | 46,869 |
| Cases terminated | 43,303 |
| Cases pending | 43,954 |

TOTAL CIVIL CASES, PRIVATE PARTIES - ALL FEDERAL CIRCUITS

| Cases filed | 242,383 |
| Cases terminated | 259,855 |
| Cases pending | 226,885 |

TOTAL CRIMINAL CASES - ALL FEDERAL CIRCUITS

| Cases filed | 70,440 |
| Cases terminated | 79,836 |
| Cases pending | 79,680 |


Total expenditures for the investigatory, prosecutorial and adjudicatory phases are as follows:

<table>
<thead>
<tr>
<th>NUMBER</th>
<th>ACTIVITY</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Federal litigation and judicial activities</td>
<td>6,970,000,000</td>
</tr>
<tr>
<td>2.</td>
<td>FLEUs</td>
<td>31,800,000,000</td>
</tr>
<tr>
<td>3.</td>
<td>Federal prosecutions</td>
<td>2,998,000,000</td>
</tr>
<tr>
<td>4.</td>
<td>State and Municipal prosecution, adjudicatory and judicial activities</td>
<td>42,600,000,000</td>
</tr>
<tr>
<td>5.</td>
<td>State, county and municipal law enforcement</td>
<td>89,676,000,000</td>
</tr>
<tr>
<td></td>
<td><strong>TOTAL SPENT</strong></td>
<td><strong>174,040,000,000</strong></td>
</tr>
</tbody>
</table>

The amount or the allocation of appropriated funds for FLEUs and state and local law enforcement units, Fed LEOs, Non-Fed LEOs, prosecutors and the Federal, state and local courts will not change. The U.S. National fiscal and political circumstances will not allow it.

The public, businesses, and the media will pressure governments into fighting those crimes they perceive most affect them. In the U.S., TCOS and the transnational financial crimes they engage in are perceived as less threatening than illegal immigrants, sexual offenders, counterfeiters or forgerers.

V. WHISTLEBLOWERS: THE RATIONAL ALTERNATIVE TO HIGHER APPROPRIATIONS AND CHANGING ALLOCATIONS

Regulators and law enforcement are not on the forefront of financial thought, innovation or experimentation. They are not financial leaders but followers. Regulators can only regulate and law enforcers can only prosecute conduct that already exists. What has yet to be created cannot be regulated or prosecuted. In order to stay abreast of the TCOS, regulators and law enforcers must resort to high-level whistleblowers.

Whistleblowing is controlled in the U.S. by a complex patchwork of laws that at times seem to contradict each other. Legal

73. Id.
75. A whistleblower is a person who tells the public or someone in authority about alleged dishonest or illegal activities occurring in a government department or private company or organization. Those reporting misconduct of a fellow employee or superior within their company are internal whistleblowers. External whistleblowers report misconduct by outside persons or entities. The term whistleblower comes from the whistle a referee uses to indicate an illegal or foul play. Ralph Nader coined the phrase in the early 1970s to avoid
protections afforded whistleblowers vary according to the subject matter of the tip or complaint, the particular statute,\textsuperscript{76} and sometimes where the case arises. In passing the 2002 Sarbanes–Oxley Act, the Senate Judiciary Committee found that whistleblower protections were dependent on the patchwork and vagaries of varying statutes.\textsuperscript{77} This patchwork of federal and state laws allegedly protect those who call attention to violations, help with enforcement proceedings, or refuse to obey unlawful directions.

The U.S. False Claims Act of 1863 was the first U.S. law adopted specifically to protect whistleblowers.\textsuperscript{78} It was enacted to combat fraud by United States government vendors during the Civil War. The act protects whistleblowers from wrongful dismissal and promises them a percentage of the money recovered or damages won by the Federal government.\textsuperscript{79}

Another U.S. law that specifically protects whistleblowers is the Lloyd - La Follette Act of 1912.\textsuperscript{80} It guarantees the right of Federal employees to furnish information to the United States Congress.

The Clean Water Act of 1972 was the first U.S. environmental law to include an employee protection provision.\textsuperscript{81} Similar protections were included in subsequent U.S. Federal environmental laws, including the Safe Drinking Water Act of 1974,\textsuperscript{82} the Resource Conservation and Recovery Act of 1976,\textsuperscript{83} the Toxic Substances Control Act of 1976,\textsuperscript{84} the Energy Reorganization Act of 1974,\textsuperscript{85} the Comprehensive Environmental Response, Compensation and Liability Act of 1980,\textsuperscript{86} and the Clean Air Act of 1990.\textsuperscript{87}

\textsuperscript{76} FISCAL YEAR 2010 REPORT TO THE CONGRESS ON THE USE OF SECTION 7623, PART IV.B.5 (2010) (a link to which is included in Erika Kelton, IRS Whistleblowers See Little Reward, FORBES (Mar. 2, 2012), http://www.forbes.com/sites/erikakelton/2012/03/02/irs-whistleblowers-see-little-reward/) [hereinafter FISCAL REPORT 2010].


\textsuperscript{78} See 31 U.S.C. § 3729.


\textsuperscript{81} 33 U.S.C. § 1367(a) (2015).


\textsuperscript{83} 42 U.S.C. § 6971(a) (2015).


\textsuperscript{86} 42 U.S.C.A. § 9610(a) (2015).

\textsuperscript{87} 42 U.S.C.A. § 7622(a) (2015).

To determine the deadlines, protection, rewards, and means for making proper complaints, potential whistleblowers must research how the specific statute applies to the subject matter to be reported, the industry affected, and the locale from whence reporting. While some deadlines are as short as ten days others are as high as six years.100 For example:

- Environmental whistleblowers have 30 days to make a written complaint to OSHA.101
- Federal employees have 45 days to make a written complaint to their agency’s equal employment opportunity officer regarding discrimination, retaliation, or other violations of the civil rights laws.102
- Airline and corporate fraud whistleblowers have 90 days, while nuclear whistleblowers and truck drivers have 180 days to make their complaints to OSHA.103

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• Victims of retaliation against union organizing and other concerted activities to improve working conditions have six months to file complaints with the National Labor Relations Board (NLRB).\textsuperscript{104}

• Depending on whether their state has a deferral agency, private sector employees have either 180 or 300 days to file complaints with the U.S. Equal Employment Opportunity Commission (EEOC) for discrimination claims on the basis of race, gender, age, national origin or religion.\textsuperscript{105}

• Depending on whether a court finds the violation was willful, those facing retaliation for seeking minimum wages or overtime have either two or three years to file a civil lawsuit.\textsuperscript{106}

• Those whistleblowers who suffer adverse employment actions as a result of reporting a false claim against the U.S. Federal government may have up to six years to file a civil suit for remedies under the False Claims Act.\textsuperscript{107}

Whistleblowers may be entitled to as much as 30\% of what the U.S. Federal government recovers from the offenders.\textsuperscript{108} To qualify for an award under some statutes, the whistleblower must be the first to report, and in some cases, must also be the first to file a Federal civil complaint for recovery of the federal funds fraudulently obtained, while at the same time not publicizing the claim until the USDOJ decides whether to prosecute.\textsuperscript{109} Such lawsuits (known as \textit{qui tam} actions) must be filed under seal in many cases, using special procedures to keep the claim from becoming public until the decision on direct prosecution is made.\textsuperscript{110}

Congress in the Dodd-Frank Wall Street Reform and Consumer Protection Act\textsuperscript{111} (Dodd-Frank Act) included an enhanced whistleblower program not only to help the U.S. Federal government root out fraud, but also to encourage corporations to better police them-

\textsuperscript{104} 29 U.S.C.A. § 160(b) (2015).


\textsuperscript{106} 29 U.S.C. § 255(a).


\textsuperscript{110} Federal employees benefit from the Whistleblower Protection Act and the No-FEAR Act (which made individual agencies directly responsible for the economic sanctions of unlawful retaliation). Federal protections are enhanced in those few cases where the Office of Special Counsel will support the whistleblower's appeal to the Merit Systems Protection Board (MSPB). Efforts to strengthen the law have met with failure in recent years but minor reforms seem likely. See, e.g., \textit{Whistleblower Protection Enhancement Act of 2011}, H.R. Rep. No. 3289 (2011).

selves and address illegal conduct head on. Section 922 of the Dodd-Frank Act amended the Securities Exchange Act of 1934\textsuperscript{112} by, among other things, adding Section 21F titled “Securities Whistleblower Incentives and Protection.”\textsuperscript{113} This section directs the U.S. Securities Exchange Commission (SEC) to make monetary awards to eligible individuals who voluntarily provide original information that leads to successful SEC enforcement actions resulting in the imposition of monetary sanctions over $1 million.\textsuperscript{114} Awards are required to be made in the amount of 10% to 30% of the monetary sanctions collected.\textsuperscript{115} They are paid from the SEC Investor Protection Fund.\textsuperscript{116} In addition, Section 924(d) of the Dodd-Frank Act directs the SEC to establish a separate office to administer the whistleblower program.\textsuperscript{117}

The Dodd-Frank Act seeks to motivate those with inside knowledge to come forward and assist the U.S. Federal government to identify and prosecute those violating U.S. securities laws and recover money for victims of financial fraud.\textsuperscript{118} Whistleblowers' tips detected over 50% of fraud schemes uncovered in public companies.\textsuperscript{119}

A whistleblower must meet the following requirements before he can recover under the Dodd-Frank Act:

A. He must give the information voluntarily;

B. The information must be original. It must be obtained from the whistleblower's independent knowledge or analysis;

C. The information must be new (not known by the agency receiving it);

D. The information must result in a successful enforcement action with a U.S. recovery of more than $1 millions; and

E. The whistleblower cannot be


\textsuperscript{115} Id.

\textsuperscript{116} Id.

\textsuperscript{117} Id.


1. an employee of the USDOJ, SEC or U.S. Consumer Financial Protection Board (CFPB) or his family member,

2. a foreign government official, or

3. an employee of a state-owned enterprise; and 120

F. The whistleblower does not have to report the violations to their company before reporting it to the Federal government.121

The Dodd-Frank Act also provides anti-retaliation protection for certain employees and their representatives who provide information regarding potential violations to the CFPB.122 Section 1057 of the Dodd-Frank Act creates a new private right of action for employees in the financial services industry who are retaliated against for disclosing information about unlawful conduct related to the offering or provision of a consumer financial product or service.123 The section provides that no covered employer shall terminate or otherwise discriminate against any covered employee for:

A. providing information to the employer, the CFPB or any other state, local, or Federal government authority or law enforcement agency relating to a violation of Federal consumer financial laws,

B. testifying about a potential violation,

C. filing any lawsuit or other proceeding under any Federal consumer financial law, or

D. refusing to violate U.S. Federal consumer financial laws.124

The Sarbanes-Oxley Act, the Dodd-Frank Act and the myriad of other whistleblower statutes have encouraged individuals to share information resulting in an increase in tips and referrals.125 In FY2012, the SEC got 3001 whistleblower tips, referrals, and complaints.126 The lowest number received, 166, was in November 2011, and the highest, 313, in May 2012. These tips, referrals, and complaints came from all states,127 the District of Columbia, Puerto Rico and 49 countries. Over 10% of the tips were received from individuals outside of the U.S.128

123. 12 U.S.C § 5567 (2010).
125. The number of tips received in the first year by the SEC and CFPB suggests that this is the case.
126. SEC WHISTLE BLOWER PROGRAM REPORT, supra note 114, at 4.
127. California generated 17.4% of all state tips; Florida, 8.1%; Illinois, 4.0%; New Jersey, 4.1%; New York, 9.8%; Pennsylvania, 3.6%; and Texas, 6.3%. Id. at App. B.
128. Id. at App. C.
The tips concentrated around three main areas:
1. corporate disclosure and financials - 18.20%,
2. offerings' fraud - 15.50%, and
3. manipulation - 15.20%.\textsuperscript{129}

During FY2012, the CFPB received 150,000 whistleblower complaints.\textsuperscript{130} It expects this number to increase in FY2013.\textsuperscript{131}

The Sarbanes-Oxley Act, the Dodd-Frank Act, and the myriad of other whistleblower statutes have encouraged individuals to share information resulting in an increase in tips and referrals.\textsuperscript{132}

Whistleblowers are responsible for some of the Federal government's largest recoveries. More than $21 billion were recovered as a result of \textit{qui tam} cases brought under the False Claims Act.\textsuperscript{133} This excludes the billions more recovered as a result of criminal fines or the tens of billions saved by the powerful deterrent effect of a strong whistleblower program.\textsuperscript{134} Siemens AG, paid a combined total of more than $1.6 billion in fines, penalties, and disgorgement of profits, including 800 million to U.S. authorities in connection with the cases investigated by the USDOJ, SEC and the Munich Public Prosecutor's Office.\textsuperscript{135}

In spite of these results, agencies, administrators, and senior personnel still resist. They regard with disdain the help whistleblowers provide regarding major frauds and other law violations. Former IRS Chief Counsel Donald Korb succinctly expressed this anti-whistleblower attitude during a 2010 interview with \textit{Tax Notes} shortly after he left the IRS.

The new whistleblower provisions Congress enacted a couple of years ago have the potential to be a real disaster for the tax system. I believe that it is unseemly in this country to encourage people to

\textsuperscript{129} Id. at 4-5.

\textsuperscript{130} This number was derived from statements made by Kent R. Markus, Director of the Office of Enforcement of the CFBP, during the Enforcers' Roundtable at the Georgetown University Corporate Counsel Institute held in Washington, D.C. on March 7-8, 2013. He repeated these statements at the Corporate Governance in a Dodd-Frank World Roundtable at the Hispanic National Bar Association's 2013 Corporate Counsel Conference held in Atlanta, Georgia on March 13-16, 2013.

\textsuperscript{131} See SEC WHISTLEBLOWER PROGRAM REPORT, supra note 114, at 4-5.

\textsuperscript{132} The number of tips received in the first year by the SEC and CFPB suggests that this is the case.

\textsuperscript{133} See Kelton, supra note 76.

\textsuperscript{134} Id.

\textsuperscript{135} Press Release, United States Department of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines; Coordinated Enforcement Actions by DOJ, SEC and German Authorities Result in Penalties of $1.6 Billion (Dec. 15, 2008).
In the Tax Relief and Health Care Act of 2006 (TRHCA), Congress encouraged whistleblowers to inform the IRS about significant tax frauds and other tax law violations by offering an award from the recoveries. The problem with the IRS whistleblower program is not the law or the quality of the information the IRS is receiving. The problem is the IRS itself.

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136. See Kelton, supra note 76.
137. The Tax Relief and Health Care Act of 2006 made fundamental changes to the IRS whistleblower program. The key change was the creation of 26 U.S.C. § 7623(b), which makes awards mandatory. Under the Act, whistleblowers shall now receive 15 to 30 percent of the collected proceeds. Also, Congress added whistleblower rights of appeal and required IRS to create a Whistleblower Office that reports to the Commissioner. See 26 U.S.C. § 7623(b); see also Fiscal Report 2010, supra note 76.
138. As Erika Kelton noted in March 2012:

Congress made it very clear that it wanted the IRS to encourage whistleblowers to help recover taxes the government is owed. ... [T]he IRS’s Whistleblower Office does its best but faces stiff headwinds from the IRS’s Office of Chief Counsel (OCC), which has stymied the whistleblower program by interpreting the 2006 law in ways that discourage whistleblowers and undermine the program’s potential for success.

The list of problematic guidance from OCC is long and includes rules that have:

- Narrowed the sources of recovery that are the bases of whistleblower awards.
- Imposed unprecedented withholding requirements on whistleblower awards.
- Created roadblocks to IRS interactions with whistleblowers such as the 2008 ‘one-bite’ rule (now relaxed) that limited receipt of information to an initial meeting.
- Defined ‘planners and initiators’ of a tax scheme—who by law these receive only a reduced award (if any)—in a manner that could block employees whose involvement is far removed from the true architects of a scheme from receiving a reward even.

Whistleblowers and their lawyers are also frustrated that the IRS has created a black hole for whistleblowers claims, so they get little or no information about the claims’ status. Perhaps the paramount frustration, however, is due to the apparent unwillingness of the IRS to take advantage of the whistleblowers’ expertise and allow them to assist the IRS in certain, limited circumstances. This assistance is clearly contemplated by the 2006 law and could be allowed without violating confidentiality restrictions through the use of special confidentiality agreements known as ‘6103(b) contracts.’ Why the IRS has ignored resources that it is free to tap is a mystery, especially since the agency suffers through staffing cutbacks.

Kelton, supra note 76.
139. Without citing any authority, the IRS in March 2013 unilaterally cut the amount whistleblowers get by 8.7%. See id. The text of the IRS SEQUESTER NOTICE is reproduced below.

Pursuant to the requirements of the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, certain automatic reductions will take place as of March 1, 2013. These required reductions include a reduction to awards paid under Section 7623 of the Internal Revenue Code. As a result, the sequestration reduction is applied to award payments to whistleblowers issued pursuant to Internal Revenue Code section 7623 on or after March 1, 2013. The sequestration reduction rate will be applied until the end of the fiscal year (September 30, 2013) or intervening Congressional action, at which time the sequestration rate is subject to change. As
The IRS Whistleblower Office reports receiving dozens of whistleblower submissions concerning matters involving tax losses greater than $100 million and thousands involving tax underpayments that exceed $2 million. The first rewards paid based on the TRHCA did not go out until FY2010 -11. In FY2010, the IRS paid a total of $13 million in rewards, a mere 3% of the $464,695,459 million collected because of whistleblower supplied tips and information.

In marked contrast, during FY2012, the IRS received 332 tips and paid whistleblowers $125 million. This anomaly was the result of a one-time payment of $104 million made to Bradley Birkenfeld, a former banker who provided information on UBS's practice of helping U.S. taxpayers hide their assets abroad. His tips paved the way for the 2009 settlement between the U.S. and UBS. The Bank paid $780 million in penalties and turned over the account information of thousands of its U.S. clients. In addition to the payment, Birkenfeld received a 40-month prison term.

Potential whistleblowers, particularly those in the executive suite, are well aware of Birkenfeld’s incarceration and the plight of Luis Octavio López Vega (a U.S. Drug Enforcement Administration informant and former senior adviser to México's drug czar, General

determined by the Department in conjunction with the Office of Management and Budget, whistleblower payments subject to the reduction will be reduced by 8.7%.

The reduction required by the Balanced Budget and Emergency Deficit Control Act of 1985, as amended, will be applied after the Whistleblower Office determines the amount of collected proceeds and the applicable award percentage under Section 7623. The Whistleblower Office will then compute the award that would have been paid, and then apply the reduction. Whistleblowers will be advised of the reduction in correspondence from the Whistleblower Office concerning a proposed award amount and an award determination.


140. Kelton, supra note 76.
141. Fiscal Report 2010, supra note 76.
142. Id. at tbl. 2, n.16.
This attitude of rejecting and not protecting whistleblowers and occasionally punishing them with incarceration, causes potential whistleblowers to think twice about coming forward and risking their families, livelihood, and freedom. The taxpayers and the U.S. Treasury will bear the ultimate loss by not recovering part of the billions of dollars of taxes that go unpaid every year.

The SEC and USDOJ welcome the help of whistleblowers and both have a long standing public-private partnership with them. USDOJ effectively uses whistleblowers to combat fraud against the government through *qui tam* lawsuits brought under the False Claims Act. According to the SEC, in fiscal year 2012, a whistleblower's information saved six to twelve months of investigative time on one matter alone. FCPA enforcement is stronger than it's ever been and getting stronger. In the last two years alone, the Department of Justice (DOJ) has charged over 50 individuals with FCPA-related offenses and has collected nearly $2 billion in penalties. Breuer made clear, however, that the United States is not alone in its fight against corruption. He discussed the proliferation of ant bribery laws throughout the world and the growing and coordinated effort by various governments to combat bribery. As Breuer said, the FCPA is our way of ensuring not only that the [DOJ] is on the right side of history, but also that it has a hand in advancing that history.

Regrettably, other FLEUs and sister agencies at the state and local level appear to have an IRS-similar dislike whistleblowers. This resistance to whistleblowers is hobbling these programs and draining their enormous promise. A whistleblower should be treated fairly and respectfully and not like a pariah.

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CONCLUSION

We have tried eradicating TCaS by tracking one at a time and spending large amounts of resources doing it. If we are successful, we come home with one trophy. Our goal is not to put trophies on the wall but to make TCaS an extinct species. Elimination, not culling the herd is the goal. Only by adequately incentivizing whistleblowers and changing our attitude towards them, will we realize the full potential of their contribution. It is true that some are low lives or bounty hunters but others are concerned citizens. Their reason for cooperating is personal. We must focus only on the information and how it helps to eradicate the TCaS.

To generate the profits and avoid notice by regulators and law enforcement, the TCaS hire the best technical talent. These experts unlike regulators and law enforcement are on the cutting edge of financial thought and innovation. Sometimes the expert only finds out who is the real client after months or years of providing services or rendering professional advice. By then, walking away may no longer be an option; the expert now a corruptor finds himself snared by choice or circumstance. These corruptors manage the TCaS's money - their life-blood. Cut off the access to money and the TCaS will cease to exist.

We must incentivize individuals and entities (yes, under this approach entities can become whistleblowers) to uncover and report proscribed conduct. To appeal to an individual or entity's greed, rewards should be a substantial and fixed percentage, e.g. 50% of any penalty, fine, and disgorgement of profits or recovery made by the government with the proviso that all monetary rewards received are taxable. As additional incentives, governments should offer protection (for example: participation in the U.S. Federal Witness Protection Program) and citizenship or permanent residency to individual whistleblowers and their family members. High-cash rewards more closely approximate the heightened societal deterrence interest and the risk faced by whistleblowers in bringing TCaS and their transactions to the attention of regulators and law enforcement. The high rewards would under most cases exceed any compensation the individual or entity is getting for assisting the TCaS. The whistleblower makes more off the government legally than from the TCaS or their sham transactions.

Also, we must grant absolution to the penitent and contrite corrupter. A one-time amnesty or absolution to those that confess their crimes first must be implemented. This practice has been followed in cases of taxpayer delinquency, in prior disclosures under certain U.S.
regulatory schemes and in immigration unlawful entry matters. To qualify, the penitent and contrite corrupter would disclose everything it knows about the TCOS or the sham transactions. Any corrupter can become a bounty hunter at any time; he can deprive the TCOS of its money while making a large legal profit under the protection of a friendly government. By invoking the specter of corruption of the corruptors and the belief that any of the TCOS's members or advisors may become a contrite penitent at any time, we are injecting suspicion and distrust into the criminal organization. Anyone can seek profit, absolution and redemption at any time. Distrust and suspicion will become a valuable tool in the eradication of the TCOS.