A Primer for Tax Whistleblowers

By Ron West, John H. Skarbnik and Frank L. Brunetti

Ron West, John H. Skarbnik and Frank L. Brunetti provide an extensive primer for tax whistleblowers.

Background

The dictionary defines a "whistleblower" as a "person who informs on another or makes public disclosure of corruption or wrongdoing."[1] The term whistleblower has its origin in the practice of English policemen, known as "bobbies," who would blow their whistles when they noticed the commission of a crime. The whistle would alert both law enforcement officers and the general public of danger.[2] For tax purposes, whistleblowing takes place when a person reports to the IRS alleged violations of, or noncompliance with, tax law, with the informant possibly being entitled to a monetary payment referred to as "reward" or as an "award." The term "reward" has generally been used to describe awards made under Code Sec. 7623 before it was amended in 2006, whereas the term "award" is used to describe mandatory and discretionary awards made under revised Code Sec. 7623. Persons who submit information under the whistleblower program are sometimes referred to as "informants," "claimants" or "whistleblowers." In this article, unless the context specifically requires others, these terms may be used interchangeably.

The government has had the authority to pay awards to whistleblowers for many years. The thrust behind the whistleblower law was aptly captured by the first Director of the Whistleblower Office, Stephen Whitlock, when he remarked soon after the office was created in 2007 that "there are certain kinds of tax noncompliance cases that the Service may have difficulty identifying without the help of a knowledgeable insider."[3] One of the primary purposes for these laws is to encourage people with knowledge of significant tax noncompliance to provide that information to the IRS.[4] The first statutory tax whistleblowing legislation was enacted shortly after the civil war in 1867.[5] It allowed the government to pay awards to individuals who provided information that aided in detecting and punishing those guilty of violating tax laws.

The original law provided the Secretary with the authority "to pay such sums as he deems necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[6] Before 1996, payments were made from appropriated funds. In 1996, the purposes for which awards could be paid were expanded, with the addition of "detecting underpayments of tax" as a basis for making an award. Also, the source of funds to pay awards was changed from IRS operating funds to proceeds of amounts collected from the taxpayer (other than interest).[7] Before the 2006 amendments to Code Sec. 7623, awards to whistleblowers were discretionary, with the amount determined pursuant to IRS policy. "The policy provided a framework for

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assessing the contribution of the information to the collection of proceeds from a taxpayer, and allowed for awards of one percent, 10 percent, or 15 percent of proceeds. The published policy set a cap on awards at $10,000,000, but the IRS waived this cap from time to time under 'special agreements' with a whistleblower."[8]

Largely because the older version of the program was not working well, and to close the tax gap, in 2006, Congress enacted legislation to streamline the program, make it "informant-friendly," and put in place greater financial and more certain incentives to turn in noncompliant taxpayers.[9] As a result of the substantial changes in the law, within a few months of creation of the Whistleblower Office (WBO) within the IRS, there has been a visible increase in number of reported tips and size of cases.[10] The IRS started receiving claims alleging more than $2 million in underpayment of tax almost immediately after enactment of the amendments to Code Sec. 7623.[11]

Growth

There has been a marked increased in the number of submissions of newly enacted Code Sec. 7623(b) claims since the new law was enacted. Overall, the IRS has received over 1,300 whistleblower submissions under Code Sec. 7623(b) alleging tax noncompliance by more than 9,500 taxpayers since the law was amended.[12]

In FY 2007, there were only 49 Code Sec. 7623(b) submissions. By the time the fourth WBO Annual Report to Congress FY 2010 was submitted on July 20, 2011, it was reported that there were 431 submissions for FY 2010 that appeared to meet the $2 million threshold in Code Sec. 7623(b). This was part of a total of 7,577 whistleblower claims submitted in FY 2010.[13] In FY 2010, 97 awards were paid by the IRS, totaling $18.7 million in awards paid, of which nine cases involved collections to more than $2 million. The total collected by the IRS in FY 2010 was $465 million. As a comparison, in FY 2009 the IRS paid out awards of about $5.85 million, while it collected $206 million.[14] The report notes that all the award payments made in FY 2010, as well as in prior years, resulted from claims that were filed prior to the effective date of the new law and as such were based on the prior law and the lower applicable award percentages established in prior IRS policy. There were no Code Sec. 7623(b) payments listed in the FY 2010 report to Congress. The report pointed out that payment of awards under Code Sec. 7623(b) was expected to begin in the second quarter of 2011.[15] This was borne out when in April 2011, an attorney claimed that his client, an in-house accountant, had received the first award—more than $4.5 million—under the new Code Sec. 7623(b) for reporting to the IRS a *Fortune 500* financial services company's unreported tax liability of $20 million.[16]

Commenting on the progress of the program over the past few years since the law was amended, Senate Finance Committee member Chuck Grassley, who was instrumental in authoring the new law, said:

> While the IRS has made great progress, there is still room for improvement. The GAO Report makes clear that the whistleblower program has been successful in providing good information to the IRS about big-dollar tax cheating. The data shows that IRS has received tips on more than 9,500 taxpayers from 1,400 whistleblowers in just five years while only rejecting 1,300 claims so far during that time.[17]

Evidence of the anticipated and continued growth and interest in this area can be gleaned from the cottage industry of the lawyers and law firms that are developing a niche specialty in this area. A cursory search on the internet reveals that there are now numerous websites set up by law firms seeking to profit from this wave of expected growth. The services are typically advertised on a contingent basis. Popular press reports also tout submissions of huge claims. In 2008, a Washington, D.C., law firm, the Ferraro Law Firm, is reported to have submitted claims representing a staggering $40 billion in alleged underpayment.[18] On April 18, 2011, the same law firm, submitting comments to the IRS on proposed regulation on the payments of whistleblower awards, stated that it represents clients who have to date submitted claims representing more than $82 billion in tax underpayments.[19]

The sources and motives of tips can be many and varied. Making headlines are reports of private bankers turned whistleblowers.[20] In fact, the source of tips need not be solely from being close up and exposed to the culpable acts. There is plenty of room to submit claims based on information from a variety of sources that are in the public domain. It is quite possible that the new law will lead to a rise of "bounty hunters" who scour public sources of information on which to base a claim. Sources of leads may run the gamut, from information publicly disclosed, such as filing of reports and financial statements with the SEC, public

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media reports that bring to the fore whiffs of apparent tax violations, to some newspaper article that may provide clues and indications of tax transgressions. Litigations involving the noncompliant taxpayer can be another source, since a great deal of financial information becomes part of the record and thus public. Yet another source is information that is the product of investigations by state and local government regulatory agencies of the taxpayer.[21]

Growth in whistleblowing will likely continue to grow unabated, especially in these difficult economic times with greater numbers of unemployed (some no doubt disgruntled former employees strapped for resources), as well as a greater awareness of ethical lapses in the aftermath of the Ponzi schemes and the Enron-type debacles. With the new law in place, more employees of financial institutions with inside information about unreported offshore accounts can be expected to come forth.[22] Also, an increase in submissions is possible once the WBO starts making bigger payments under the higher awards provisions of the new law as the news draws public attention and entices more whistleblowers to come forth.

Ever since the new law was enacted in late 2006, there have been many developments in this newly evolving area of tax law, including issuance of IRS notices, Internal Revenue Manual revisions, updated forms, temporary and proposed regulations, TIGTA audit reports, annual Whistleblower reports to Congress, court decisions and amendment to Tax Court rules and procedures. This article will survey the 2006 new law and will discuss the developments and guidance issued thereunder.

Shortcomings

The statutory provisions that were in place until 2006 were perceived to be, for the most part, ineffective and in need of an overhaul. Various reasons have been cited for the shortcomings with the program. A key problem with the pre-existing program was that there was no statutory requirement imposing mandatory reward percentage ranges.[23] In effect, the IRS was given complete discretion to make rewards and decide on how much.

Under the prior program, the discretionary reward percentage was provided for in the regulations and ranged from one percent to 15 percent of collected amounts, with an overall published cap generally of not more than $10 million[24] (was up to $2 million until 2004), though IRS had waived the $10 million cap from time to time under "special agreement" with a whistleblower.[25]

Although the statute indicated that a reward may be made to an informant for supplying information, it did not bind the IRS to reward all informants. It was well-settled under case law that submitting a claim for a reward did not automatically entitle the informant to its receipt.[26] Doling out rewards was purely discretionary with the IRS. In fact, there was no requirement that a reward be issued at all. In addition, "[a]wards were generally not paid when the disclosure was based on public information, or when the informant participated in the tax compliance."[27] Unlike payments of awards made under newly enacted Code Sec. 7623(b) which have a 30-percent statutory cap, there was no statutory percentage cap for reward payments prior law—in fact, there wasn't any prescribed statutory reward percentage. One commentator noted that oftentimes, the IRS refused to pay a reward, even though the tip led to substantial recovery of taxes.[28] Another characterized the prior program as "severely underutilized and extremely ineffective prior to the 2006 reform. Whistleblower claims were lost, ignored, relegated to the backroom or forgotten by the responsible divisions at the IRS. On those rare occasions when claims were considered, the IRS would form a committee made up of senior IRS managers to review these whistleblower cases and consider possible awards. In practice this internal committee was the place where whistleblower claims went to die."[29] In *Cooper (Cooper I),* the Court described the pre-existing program as follows:

> The discretionary whistleblower awards have been arbitrary and inconsistent, however, because of a lack of standardized procedures and limited managerial oversight. See Treasury Inspector General for Tax Administration Rept. 2006-30-092, The Informants' Rewards Program Needs More Centralized Management Oversight (June 2006). It took an average of 7 1/2 years for a discretionary award to be paid and an average of

> The future for tax whistleblowing appears to shines bright–bright for everyone except for noncompliant taxpayers.

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6 1/2 months for a claim to be rejected. Id. at 8-9. Moreover, most rejected claims did not provide the rationale for the reviewer's decision because of concerns about disclosing confidential return information to the whistleblower. Id. at 7.[30]

Another shortcoming with the prior reward program as it existed until 2006 was the lack of statutory right to a judicial review of reward determination made by the IRS. Informants' only option, which more often than not led nowhere, was to sue the Federal government for a monetary claim. Since the payment of rewards was uniformly held to be discretionary on the part of the IRS—a discretionary exercise of governmental powers—suits to compel payment were unsuccessful.[31]

A TIGTA report that reviewed the program in 2006 pointed out that the prior version of the program was replete with administrative problems. The report found that processing and evaluation of claims were inconsistent, that delays were common, and that a large majority of claims were rejected by IRS reviewers without adequate explanation. The TIGTA report recommended centralizing the management of the program and standardizing the processing of claims.[32] The combined effect of these perceived shortcomings and "illusory" incentives were seen as dampening the willingness and motivation of informants to blow the whistle. The impact of the program was seen as limited and not realizing its greater potential.[33]

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Rationale for the 2006 Act

The catalyst for the 2006 changes in the law was the idea of re-energizing the reward program which would aid to close the tax gap, estimated at $345 billion for tax year 2001.[34] A primary purpose for the changes was to make the program more attractive by providing "incentive for persons with knowledge of significant tax noncompliance to come forward and assist the IRS."[35] A recent TIGTA report succinctly stated that "[t]he intent of the Tax Relief and Health Care Act of 2006 was to provide focus on large-dollar cases with the potential of collecting billions of dollars for the Department of the Treasury."[36] IRS audits tend to yield better results when they are tied to whistleblowing. In a Treasury report issued in 2006, it was concluded that "examinations initiated based on informant information were often more effective and efficient than returns initiated using the IRS' primary method for selecting returns for examination [*i.e.,* the Discriminant Index Function]."[37] Shortcomings identified in the 2006 TIGTA report were addressed in the 2006 Act, mainly the establishment of centralized WBO within the IRS and granting that office the responsibility to administer a revamped award program.[38] The 2006 Act took cue and was modeled in some respects on the 1986 revised False Claims Act (FCA) applicable to fraud in federal government programs. The amended FCA has proven extremely successful for the government in fraud recoveries based on information furnished by whistleblowers.[39]

New Provisions, Old Law

Section 406 of the Tax Relief and Health Care Act of 2006, P.L. 109-432 ("2006 Act") enacted fundamental changes to the informant reward program, providing a new framework for considering whistleblower claims. The 2006 Act created Code Sec. 7623(b), made changes to existing Code Sec. 7623, which was renumbered as Code Sec. 7623(a), and provided for several administrative provisions that were not placed in the IRC, such as the creation of the Office of the Whistleblower. The changes were effective December 20, 2006, the day of enactment, and are made applicable for information provided to IRS after December 19, 2006.[40]

Despite substantial changes made by the 2006 Act, prior Code Sec. 7623 was not repealed. Instead, under the 2006 Act, the prior discretionary reward provision in former Code Sec. 7623 was re-designated as Code Sec. 7623(a) and was left largely intact but with some updating. As revised by the 2006 Act, Code Sec. 7623, renumbered as Code Sec. 7623(a), was reframed to authorize the IRS, pursuant to regulations, to pay awards to informants such amount deemed necessary for "(1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment person guilty of violating the internal revenue laws or conniving at the same, … ."[41] This authority to pay is limited to cases where the payment of the award is not otherwise authorized by law.[42] The Act substitutes "or" for "and" in Code Sec. 7623 language with the result that an informant may now collect an award for detecting an underpayment even though no person is brought to trial or punished for violating the tax laws.[43]

Under prior law, the Internal Revenue Code provided a more restrictive criteria for rewards by requiring that the information provided result in both "(1) detecting

underpayments of tax, and (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, … ."[44] This two-part statutory test would appear to have denied a reward for other than criminal cases, such as where negligence or some other noncriminal cause was involved. However, according to Congress, rewards were payable when the information submitted by the informant involved civil cases, as well as criminal cases.[45] Thus, the statutory change updates the statute to conform to views that Congress had expressed earlier as to the scope of the reward program and makes it clear that rewards may be granted for information utilized in finding criminal or civil violations.[46]

Another change reflected in Code Sec. 7623(a), which also applies to the newly created Code Sec. 7623(b), now includes interest collected as part of the proceeds eligible for an award. New Code Sec. 7623(b) was added to the Code to house new provisions. Other provisions in the 2006 Act address program administration requirements, such as creation of the Office of the Whistleblower and annual reporting to Congress. However, these are off-code provisions that are not part of the Internal Revenue Code. Submissions for award under Code Sec. 7623(b) apply to claims filed after the enactment date, December 20, 2006. Pre-enactment claims, *i.e.,* those submitted based on information provided before December 20, 2006, are covered by the law and policies in place at the time that the information was submitted.[47] Post-enactment submissions that do not qualify under the new provisions in Code Sec. 7623(b) are now processed under Code Sec. 7623(a).

As a result of the changes made by the 2006 Act, there are now two broad categories of whistleblower cases. In the first are those cases in which the IRS "may pay" the informant under the discretionary authority in Code Sec. 7623(a). These are referred to as "discretionary" awards. In the second category are those cases in which the IRS "shall pay" pursuant to Code Sec. 7623(b). These are referred to as "mandatory" awards.

Generally, claims for rewards that were submitted prior to the enactment date of the 2006 Act, December 20, 2006, are governed by the law and policies that were in effect prior to December 20, 2006. Any supplemental information submitted after December 20, 2006, is not considered a new claim governed by the new law. Rather, the pre-enactment law continues to apply, unless the new information prompts the IRS to take administrative or judicial action that would not otherwise have been taken place based on only the earlier-supplied information.[48] Discretionary claims under Code Sec. 7623(a) continue to be considered pursuant to regulations set forth in Reg. §301.7623-1, which were issued when the pre-enactment Code Sec. 7623 was in effect. A summary of these is reprinted in Publication 733.

Increased Mandatory Awards Under Code Sec. 7623(b)

New Code Sec. 7623(b), added by the 2006 Act, established a mandatory award program. Code Sec. 7623(b) employs "shall" language, rather than "may." Code Sec. 7623(b)(1) provides in relevant part that "[i]f the Secretary proceeds with any administrative or judicial action … based on information brought to the Secretary's attention by an individual, such individual ... shall receive as an award … of the collected proceeds." The IRS's discretion to make awards for valid claims that satisfy various standards and requirements is now greatly reduced.

Although phrased as mandatory, since the whistleblower must meet various conditions to qualify for a Code Sec. 7623(b) award, there is still some measure of discretion that resides with the IRS. Limiting discretion is further aided by another new provision, which, for the first time, grants whistleblowers a right to judicial review in tax court. Authority for making discretionary awards has not been repealed, but remains in place under what is now Code Sec. 7623(a), albeit the procedure as to these discretionary awards has been updated.

The award is a specified percentage of the amount collected as a result of an administrative or judicial action taken was a result of the information provided, unless the contribution is less than substantial.[49] The mandatory Code Sec. 7623(b) payout percentages are prescribed by statute and the percentages have been increased. They now generally range from a minimum of 15 percent to not more than 30 percent of the "collected proceeds" (a term elaborated on later).[50] If the WBO determines that the action was "based principally on disclosures of specific allegations" other than information provided by the whistleblower the award shall not exceed more than 10 percent of the collected proceeds.[51] Prior to the change in the law, the percentages were provided for in the regulations and were lower. Under the prior program, the discretionary reward percentage ranged from one percent to 15 percent of collected amounts, with an

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overall published cap generally of not more than $10 million[52] (was up to $2 million until 2004), though IRS had waived the $10 million cap from time to time under "special agreement" with a whistleblower.[53] As a result, all things being equal, the potential amount of the awards can be much larger than in the past.

Under the new law, there is no ceiling or overall cap on the amount of award. A further increase in the potential award is a broadening of the base on which an award may be paid. The 2006 Act provides that "collected proceeds" now also includes collected interest. This is in addition to the existing base made up of collected tax, penalties, additions to tax, and additional amounts.[54]

Criteria for Code Sec. 7623(b) Awards

To be entitled to an award under Code Sec. 7623(b), the information submitted by the informant must satisfy certain specified dollar thresholds, discussed below. When evaluating a claim, the IRS will consider the information provided by the informant in light of the facts developed by the IRS's investigation.[55] The information furnished by the informant to the IRS must have "substantially contributed" to a decision to take administrative or judicial action (including related actions) against the noncompliant taxpayer that results in a finding that additional tax, penalties, interest, additions to tax and additional amounts are owed, and there must be ultimate collection.[56]

Not all IRS acts result in an "administrative or judicial action." For example, when the alleged non-compliant person is already under investigation and the information provided by the informant does not change the manner of how the issue is approached or resolved, this is not generally considered as resulting in administrative or judicial action and would therefore be ineligible for an award. On the other hand, in the case of large entities that are routinely under audit each year, an administrative action can mean the commencement of a new issue under the audit plan, or a change in the way information about an issue is collected or analyzed, which would not have otherwise taken place without input from the informant. In other cases, an administrative action takes place upon initiation of an audit of the person which would not have otherwise occurred without information provided by the informant.[57]

The Internal Revenue Manual (IRM) provides that "[a]n action is based upon on the information provided by the whistleblower if the IRS would not have acted but for the receipt of the information provided by the whistleblower. Action by the IRS may include the initiation of an examination or investigation that would not otherwise have been undertaken, or the modification of a pending or planned examination or investigation as a result of information provided by the whistleblower."[58]

The determination of the exact amount of the award, to be made by the WBO in each case, depends "upon the extent to which [the information provided by] the individual substantially contributed to such action" that led to detection and recovery of taxes."[59] Neither the Internal Revenue Code nor the regulations define what is "substantial." The more valuable the information furnished by the informant with respect to the proceeds collected, the greater the proportion of an award granted. The IRM provides, "All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, will be taken into account by the WBO in determining whether an award will be paid, and if so, the amount of the award."[60] The Office of the Whistleblower was delegated authority to make the final determination whether an award should be paid and the amount.[61] Awards will only be paid out to the informant if and when the IRS collects money as a result of any administrative or judicial action resulting from the information provided.[62]

Reduced Award Percentage for "Public" Information

The award percentage is reduced to a maximum of 10 percent of collected proceeds, and such percentage could even be lower or none, as considered appropriate by the WBO, in cases where the WBO determines that the IRS administrative or judicial action (or settlement) is based principally on disclosure of specific allegations derived from information sources that are already out in the public domain (rather than information of the informant).[63] These are cases where there has been prior public disclosure of the allegation in some other forum or outlet. Such sources may include judicial or administrative proceedings, governmental reports, hearings, audits or investigations, or new media. The award amount is determined at the discretion of the WBO, taking into account the significance of the informant's bringing the matter to the attention of the IRS and the role of the informant in contributing to the action taken by

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the IRS.[64] Though the whistleblower is not the original source of information, bringing the information to the attention of the IRS may nonetheless be a contributing factor that may lead to the additional collection.[65]

The 2010 revisions to the IRM describe the analysis that is involved to determine whether the information is based principally on specific allegations from public sources:

> [T]he whistleblower office will look at the extent to which the specific allegations disclosed describe the elements of a tax violation or behavior from which a tax violation may reasonably be inferred. The threshold determination would take into account the extent to which the specific allegations disclosed and the potential tax noncompliance issues were discernable to the public from the information that appeared in the public domain as well as the connection between the information provided by the whistleblower and the information developed in the judicial or administrative hearing, governmental report, etc. Among other considerations, the Whistleblower Office will evaluate whether specific information about tax noncompliance appeared in the hearing or report, and whether specific information about financial crimes, fraud or transactions with tax compliance implications appeared in the hearing or report.[66]

If it is determined by the WBO that Code Sec. 7623(b)(2) applies, *i.e.,* the information was "public," the level of award will be determined by taking into account the "significance of the whistleblower information and the role of the [whistleblower] in contributing to the action taken."[67] In so doing, the WBO will evaluate the presence and impact of the positive and negative factors that are listed in the IRM (discussed below) to adjust the award percentage from one percent to four percent, seven percent or 10 percent. Based on the presence and significance of negative factors, the award percentage may be zero and therefore no award will be paid under Code Sec. 7623(b)(2).[68]

Notwithstanding the foregoing, there is no reduction in the award percentage to 10 percent, and the informant is eligible to the mandatory 15- to 30-percent range of collected proceeds, even where the information is "out," if it is determined by the WBO that the informant was the original source of the information which then became public.[69] For example, the whistleblower would be the original source of information in a case where the whistleblower was the plaintiff in a civil action in which the specific allegations were disclosed, or in a case where the whistleblower was the person who reported the existence of a criminal transgression to law enforcement authorities.[70] Before a determination is made to apply a reduced percentage under Code Sec. 7623(b)(2), the whistleblower is given the opportunity to demonstrate that he/she was the original source of the information.[71] The possibility of garnering some award, albeit at a lower discretionary percentage, may serve as an incentive for some to scour publicly disclosed information and records and to keep a vigilant eye for potential allegations that may lead to financial gains. This point was illustrated by a study compiled by the Ferraro Law Firm, a leading law firm specializing in representing whistleblowers, when it reported that the Fortune 500 companies are sitting on almost $200 billion in unrecognized tax benefit reserves that reflect a huge potential for whistleblower claims.[72] Under FASB Interpretation No. 48 (FIN48), now codified under ASC740, a company must, when applicable, reserve and reduce earnings by tax positions for which it believes there is a greater likelihood than not for the IRS to prevail. According to the report, since the issues that currently make up the tax reserve are not generally disclosed to the IRS and stay in the company's tax accrual workpapers, the details in those workpapers could make for fertile grounds for whistleblower claims. However, with the introduction of a requirement that certain companies start to disclose in their tax filing uncertain tax positions (UTP), a move meant to increase transparency, some observers have posited that the number of potential whistleblower submissions will be lower. In the absence of substantial additional information provided by the whistleblower, UTP disclosure will likely serve to deflect many claims. Another observer countered by pointing out that whistleblower claims are still viable for tax issues that for one reason or another are not reserved, as for example when a more likely than not opinion is rendered.[73]

Participation by the Informant

To deter informants from benefitting from their own culpable conduct, an award may be appropriately reduced if the WBO determines that the informant was a participant in the transaction that led to the shortfall in taxes or to the violation of, or conniving to violate, the tax laws.[74] The level of involvement will affect the amount of a diminished award. For

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Code Sec. 7623(a) claims filed before July 1, 2010, the IRM provides that "[i]f the whistleblower participated substantially in the actions that resulted in the underpayment of tax, the WBO may deny an award."[75] As to Code Sec. 7623(a) claims filed after July 1, 2010 and for all Code Sec. 7623(b) claims (whether 7623(b)(1) or 7623(b)(2)), the IRM lists as a negative factor when determining the "whistleblower's role in the underpayment of tax reported, such as when a whistleblower actively and knowingly participates in carrying out the tax noncompliance."[76] Another negative factor may be found present if the whistleblower "directly or indirectly profits from the noncompliance."[77]

Mere participation by the informant in the activities that lead to underpayment in tax is no automatic bar to an award. Apparently, under the 2010 revisions to the IRM, whistleblowers participating in the tax violation (but not involved with the planning and initiation of the act) can still qualify under the increased Code Sec. 7623(b) range of award, albeit at a possibly lower end of the 15- to 30-percent range.

Planning and Initiation

Similar to whistleblower participation discussed above, Code Sec. 7623(b)(3) provides that if the WBO determines that the whistleblower "planned and initiated" the action that led to the underpayment of tax, or to the detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, the WBO may reduce the award.[78] This applies to award determinations made under Code Sec. 7623(b)(1), for which the applicable range is 15- to 30-percent, or (b)(2) determination for which the applicable range is zero to 10 percent.[79] The whistleblower need not be the sole person involved in planning and initiating in order for a reduced Code Sec. 7623(b) award determination to apply.[80] The revised 2010 IRM instructs the WBO to first determine an award percentage that would apply assuming the whistleblower was not involved in planning and initiating the action and to use the same framework that applies to award determinations for the zero to 10 percent and 15- to 30-percent ranges.[81] The WBO is then to evaluate the role of the whistleblower in planning and initiating the action that led to underpayment in taxes based on a consideration of a nonexclusive list of factors. The whistleblower's role as a planner and initiator will be cast in one of three categories: significant, moderate or minimal.[82] The award determined in the earlier step is then reduced to reflect the varying role of the whistleblower. The award is reduced by 66 percent to 100 percent for significant planners and initiators, 33 percent to 66 percent for moderate planners and initiators, and zero to 33 percent for minimal planners and initiators.[83] In more egregious cases, where the informant is convicted of criminal conduct connected with his role in the planning and initiating the action that led to underpayment of taxes, Code Sec. 7623(b)(3) prohibits the making of any awards to the informant.[84]

The following is the list of planning and initiating factors applicable to a determination under Code Sec. 7623(b)(3) set forth in the IRM:

- Was the whistleblower the sole decision maker, one of several contributing planners and initiators, or an advisor to a decision maker?
- The nature of the whistleblower's planning and initiating activities (What did the whistleblower do—was it reasonably legitimate tax planning or objectively unreasonable, were steps taken to hide the actions at the planning stage, was there any identifiable misconduct (legal, ethical, *etc.*) that was either not criminally prosecuted, for whatever reason, or did not result in a criminal conviction (which results in a zero award)?
- The extent to which the whistleblower knew or should have known that tax noncompliance was likely to result from the course of conduct
- The extent to which the whistleblower acted in furtherance of the noncompliance, including efforts to conceal the true nature of the transaction
- The whistleblower's role in identifying and soliciting others to participate in the actions reported, whether as parties to a common transaction or as parties to separate transactions[85]

Thresholds for Submission

Not all submissions are eligible for the mandatory Code Sec. 7623(b) awards. A certain dollar threshold must be met, which was apparently set high enough to eliminate trifling and nuisance submissions and to deter frivolous allegations.[86] To qualify under Code Sec. 7623(b), the information furnished has to relate to a noncompliance tax matter in which the amount potentially owed to the IRS for taxes, penalties, interest, additions to tax and additional amounts must exceed $2 million.[87] In addition, if the alleged noncompliant taxpayer is an individual, there is a further requirement that individual's gross income (not AGI), must exceed $200,000 for at least one of the tax years that is at is-

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sue.[88] There is no such minimum income threshold for businesses that are other than individuals. Assuming the submission meets the prescribed thresholds, the WBO is now required to analyze the case to determine whether the case is worth "pursuing."[89] Awards under Code Sec. 7623(b) can be substantial, which in turn provide ample incentives for individuals to pursue filing claims. To illustrate, if only the minimum threshold of $2 million in underpayment of taxes, penalties and interest is the subject of a successful claim, at a 30-percent award rate, the informant stands to reap a an award of up to $600,000.

Presently, the relatively high threshold of $2 million needed to qualify for a Code Sec. 7623(b) submission will have greater implications to larger businesses, for which large alleged underpayment in taxes are more likely. Most small and even mid-sized business may be less targeted. It is possible that as the program evolves and matures, the threshold for submission will be expanded to cast a wider net.

> There is movement afoot in other areas of the law towards greater utilization of whistleblowers to flush out and bring wrongdoings to the forefront.

Fallback to Discretionary Code Sec. 7623(a) Awards

When a claim submitted does not meet the minimum dollar thresholds under Code Sec. 7623(b), all is not lost and the claim is not automatically rejected. Rather, the claim will be considered for an award and processed under the pre-Act discretionary authority, which is now housed in Code Sec. 7623(a).[90] That subsection authorizes, but does not require, the IRS to pay an award for information that results in the government's recovery of taxes, penalties and also interest (includible in the base for claims filed after December 29, 2006).[91] There is no threshold requirement prescribed for claims under Code Sec. 7623(a). It applies regardless of the amount in dispute and regardless of gross income of the alleged noncompliant individual taxpayer.[92] For the most part, the prior regulatory guidance in Reg. §301.7623-1 continues to apply to claims that fall within the scope of Code Sec. 7623(a), subject to updated interim guidance in Notice 2008-4 and subsequent updating to the IRM.

Where the reward granted is discretionary, the Code does not specify a reward percentage. Instead, the reward percentage was guided by IRS Policy, with the most recent iteration issued in 2004, as Policy Statement P-4-27. The policy was implemented through regulations found under Reg. §301.7623-1, Publication 733 and administrative guidance in the IRM part 25.2, which IRM part has been updated in December 2008,[93] and again in June 2010. Reg. §301.7623-1 does not apply to the new "mandatory" award program embodied in Code Sec. 7623(b).

The regulations, which applied to pre-Act Code Sec. 7623 and now apply only to Code Sec. 7623(a), state that all relevant factors, including the value of the information furnished in relation to the facts developed by an investigation of the violation are considered.[94] Further, the amount of a reward "represent what the district or service center director deems to be adequate compensation in the particular case, generally not to exceed fifteen percent of the amounts … collected by reason of the information."[95] This was no cause for celebration. Although the regulations provided for a reward percentage that could be as high as 15 percent of the proceeds collected, most were much less in the past.[96]

The award computation for Code Sec. 7623(a) claims depends on the date the claim is filed. For rewards filed prior to December 20, 2006, the reward is based on the policy that was in effect at the time the claim was filed. IRM Exhibit 25.2.2-13 sets out the computation guidelines for submission at various timeframes from August 26, 1997, to December 20, 2006.[97] Although the policy under Reg. §301.7623-1 covered claims involving denied refunds, the 2010 revised IRM makes claims based on denied refunds ineligible. Proposed regulations, discussed below, will likely reverse the IRM on this point. In cases where the whistleblower participated substantially in the actions that resulted in the underpayment of tax, the WBO may deny an award. Another set of criteria applies to award computations for Code Sec. 7623(a) claims that are submitted after December 19, 2006, and before July 1, 2010. The award computation, set forth in the 2010 revised IRM, closely tracks the language found in Publication 733 and provides the following guidelines:

A. For specific and responsible information that caused the investigation or, in claim files already

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under audit, materially assisted in the development or identification of an issue or issues and resulted in the recovery, or was a direct factor in the recovery, the award shall be 15 percent of the amounts recovered, with the total award not exceeding $10 million.

B. For information that caused the investigation or, in claim files already under audit, caused an investigation of an issue or issues, and was of value in the determination of tax liabilities although not specific, the award shall be 10 percent of the amount recovered, with the total award not exceeding $10 million.

C. For information that causes the investigation or investigation of an issue, but had no direct relationship to the determination of tax liabilities, the award shall be 1 percent of the amounts recovered, with the total award not exceeding $10 million. No award will be paid if the recovery was so small as to call for payment of less than $100.00 under the above formulas.

D. In a claim file when two or more whistleblowers individually provided original information leading to the recovery of additional tax, penalties, and fines from the same taxpayer, each whistleblower's claim for award should be judged on its own merits. The individual awards should be considered in accordance with the criteria, computation formulas, and limitations stated above.

E. If the whistleblower participated substantially in the actions that resulted in the underpayment of tax, the Whistleblower Office may deny an award.[98]

Yet another set of criteria applies to Code Sec. 7623(a) claims filed on or after July 1, 2010. For these, awards will be paid under the discretionary authority granted in Code Sec. 7623(a), using the same criteria that apply to awards under Code Sec. 7623(b) but without an opportunity for an administrative review and comment within the IRS, nor a right to a Tax court review of a determination made by the WBO.[99]

Collected Proceeds

Awards are payable only from amounts that are ultimately collected from the taxpayer. Code Sec. 7623(a) provides that the IRS may make payment from "proceeds of amounts collected," whereas Code Sec. 7623(b) provides that the IRS shall make payments from "collected proceeds." The terms should be construed the same. Prior to 1996, the source of funds to pay rewards was from IRS operating funds.[100] For claims filed after December 20, 2006, the base upon which an award is computed, *i.e.,* collected proceeds, has been broadened and now also includes interest collected.[101] This applies to both Code Sec. 7623(a) discretionary and Code Sec. 7623(b) mandatory claims. Previously, interest collected was excluded from the base. Collected proceeds continue to include, as it previously did, the underpayment in tax, as well as penalties, additions to tax and additional amounts that result from the action (including any related actions) or from any settlement in response to such action.[102] However, the 2010 IRM provides that criminal fines collected, that have to be deposited into the Victim of Crime fund, cannot be used to pay awards.[103]

The IRM provides that if an informant identifies a single issue with respect to a taxpayer, and the IRS identifies three additional issues, then the informant will only be entitled to an award based upon the collected proceeds on the single issue. However, if the informant identifies a single instance in which a taxpayer engaged in improper activity and the service identifies other instances in which the taxpayer engaged in the improper activity or substantially similar activities, then the collected proceeds will include proceeds from all identified instances of the improper activity.[104] If an informant identifies specific facts relating to a particular taxpayer and the specific code section or a specific legal theory for why the taxpayer's treatment was improper, the informant will be entitled to treat as collected proceeds the entire amount collected even though the IRS may have utilized a different theory or Code section for collection.[105] The IRM further speaks to "collected proceeds" when the informant identifies a promoter and an improper activity. In such a case, the "collected proceeds" may include proceeds from other clients of the promoter that engaged in the improper activity (or a substantially similar improper activity). However, amounts collected from clients that engaged in different activities and amounts collected from clients of other promoters, regardless of whether those clients engaged in the improper activity identified by the informant, are not included in collected proceeds for purposes of calculating the informant's award.[106]

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The fact that the award is payable only out of proceeds eventually and actually collected means that if for any reason proceeds are not collected, for example due to the expiration of the statute of limitation, or if the noncompliant taxpayer is successful in a refund claim for amounts paid stemming from the claim, or for any other reason, then no award will be paid.[107] Even if proceeds are collected, due to an IRS change in policy brought about in FY 2009, the WBO will delay payment until the Code Sec. 6511 statutory period for filing a claim for refund by the noncompliant taxpayer expires which is either three years from filing or two years from the date of payment, or earlier on, upon an agreement between the taxpayer and the IRS that there has been a final determination of tax and there is an agreement that the taxpayer's right to file a claim for refund is waived.[108] As a result, it may take a long time to finalize a case, in the order of several years, from the time information has been submitted to the time payment of the award is made. According to the WBO Annual Report to Congress FY 2010, "Whistleblowers are advised that this process may take five to seven years, and longer when there are protracted appeals or collection actions."[109] Earlier, in a TIGTA report issued in 2009, it was observed that "[b]ecause taxpayers may exercise their judicial appeal rights or enter into alternative payment arrangements, payment of the award could take up to 10 years. The TIGTA report cited an example in which Whistleblower Office made an award payment on a 7623 claim 15 years after the claim was received."[110]

Awards Based on Denials of Refund and Reduction of an Overpayment Credit Balance

An informant's claim may provide information that will culminate in a denial of refund claim of the noncompliant taxpayer that might have otherwise been paid. Eligibility for an award based on such type of an informant claim has flipped back and forth. Existing regulations that were issued prior to the 2006 Act provide that not only is a reward payable for information that results in collection of additional taxes, interest and fines, but a reward is also payable for information that leads to denial of a the payment of a false or erroneous refund claim that otherwise would have been paid.[111] Therefore, the term "proceeds of amounts collected" in Code Sec. 7623(a) encompassed both additional amounts collected because of the information provided and also amounts collected prior to receipt of the information if the information leads to the denial of a refund claim that otherwise would have been paid.[112] The 2006 Act added Code Sec. 7623(b) with the language of "collected proceeds" as the base for payments for Code Sec. 7623(b) awards. In a reversal of position, the 2010 revisions to the IRM define collected proceeds as only new monies collected. The revised IRM expressly provides that "claims may not be paid under 7623(a) or (b) which are based on information which leads to the denial of a claim for refund which otherwise would have been paid."[113] Moreover, the 2010 revisions to the IRM further stated that "[s]atisfaction of taxpayers' liabilities by reducing a credit balance is not within the scope of collected proceeds.[114] In effect, offsets, application of net operating losses, refunds, or other amounts that might reduce a tax liability could not give rise to an award. This interpretation of the statute as reflected in the revised IRM has been roundly criticized by, for example, Chuck Grassley, who was closely involved with the enactment of 2006 revision to Code Sec. 7623.[115]

Subsequently, on January 18, 2011, the IRS issued proposed regulations that clarify the definitions of "proceeds of amounts collected" under Code Sec. 7623(a) and "collected proceeds" under Code Sec. 7623(b).[116] Proposed Reg. §301.7623-1(a)(2) would clarify that the provisions in Reg. §301.7623-1(a) authorizing refund prevention claims are equally applicable to claims under Code Sec. 7623(a) and (b). In addition, the proposed regulations also clarify that any reduction of an overpayment credit balance that is used to satisfy a tax liability because of the information provided is also considered proceeds of amounts collected and collected proceeds for purposes of Code Sec. 7623. In short, the proposed regulations would clarify the definition of collected proceeds to include denials of refunds and reductions in overpayment credit balances when calculating awards to whistleblowers. The proposed regulations will apply for awards that are paid after the proposed regulations are finalized and published in the Federal Register. According to the fourth WBO Annual Report to Congress FY 2010, the IRS expects the final regulations to be issued in FY 2011. The IRM will be revised to reflect changes made by the final regulations.

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Final regulations were issued as T.D. 9850, effective as of February 22, 2012. These regulations adopted without change the proposed regulations discussed above.[117] The final regulations did not expressly incorporate any of the various recommendations made by public comments as to how "collected proceeds" should be defined. Although recommendations to specifically include net operating loss in the definition of collected proceeds were rejected, the preamble points out that NOL and similar tax attributes are component elements of a taxpayer's tax liability. The preamble explains that if an NOL claimed by a taxpayer is disallowed in full or partially as a result of information provided by a whistleblower, the IRS "will factor that disallowance into the computation of the taxpayer's liability, which may, in turn, result in collected proceeds."[118]

Suggestions by commentators to expressly include criminal fines in the definition of collected proceeds were also dismissed. The preamble elaborates:

> Under the Victims of Crimes Act of 1984, criminal fines that are imposed on a defendant by a district court are deposited into the Crime Victims Fund (CVF). 42 U.S.C. § 10601(b)(1). Criminal fines imposed for Title 26 offenses are not exempt from this requirement. The fines imposed in criminal tax cases that are deposited into the CVF are not available to the Secretary to pay awards under section 7623. As criminal fines deposited in the CVF are not available to pay awards, the final regulations do not include criminal fines in the definition of collected proceeds. However, restitution ordered by a court to the IRS is collected as a tax by the IRS and, therefore, is encompassed in the definition of collected proceeds.

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Related Actions

An informant is eligible for an award under Code Sec. 7623(b) based upon a percentage between 15 and 30 percent of all amounts collected "resulting from the action (including any related actions) or from any settlement in response to such action." Neither the Code nor the regulations define "related actions." Section 25.2.2.28 of the 2010 revisions to the IRM elaborates on the term "related action" by stating:

> Generally, a related action is (i) any action involving the taxpayer from the original action and that is based on, either directly or indirectly, the same information on which the original action is based, and (ii) in cases in which the information provided identifies a promoter, preparer, or other similar person and describes underpayments of tax or violations of the tax laws by one or more taxpayers that directly relate to the promoter's activities, any action (involving any taxpayer) that is directly based on the information provided.[119]

The Whistleblower Office

The 2006 Act authorized the creation of a centralized WBO within the IRS. This was, in large measure, in response to a TIGTA report recommending centralizing and streamlining the program.[120] The WBO operates at the direction of, and reports to, the IRS commissioner. On February 2, 2007, the IRS announced the appointment of Stephen Whitlock as the first Director of the WBO. When the WBO was first set up, it had a staff of eight, six of whom were analysts with many years of IRS experience in various compliance programs.[121] Reflecting the continuous and substantial growth in claims submitted, the WBO staff has grown in its second fiscal year from four to 14, and to 17 in its third fiscal year.[122]

The WBO administers and oversees the whistleblower program. When created, it was charged with implementing the revised award program. The WBO manages and tracks whistleblower claims from the time received by the IRS to the time it closes them, either through a rejection letter or an award payment.[123] In carrying out this role, the WBO analyzes information submitted, coordinates and consults with other division within the IRS as needed, and makes award determinations.[124] The WBO receives and starts processing incoming claims. The information submitted by an informant is initially assessed and analyzed by the WBO.[125]

Described in the GAO 2011 Report, "[a]lthough the Whistleblower Office manages the whistleblower program, conducts initial reviews of claims, and makes award determinations, IRS's operating divisions are responsible for investigating claims and conducting examinations under the expanded program."[126] If warranted, the case is assigned to other appropriate areas within the IRS for further investigation.[127] Although the WBO is authorized by law to either investigate the claim itself or to assign the claim for investigation to other appropriate IRS offices, the WBO does not currently itself investigate claims.[128]

Established procedures make a distinction between determinations which the WBO make versus tax administration decisions which are outside is purview. Whereas the WBO is involved in making determinations that relate to evaluating whistleblower submissions, such as eligibility for an award or the amount of the award, it has no role whatsoever in tax administration decisions. For example, the WBO cannot determine the scope of an audit or investigation, nor can it assess taxes, interest and penalties. Similarly, the WBO cannot appeal or otherwise challenge decisions that involve tax administration.[129]

The 2006 Act envisions that at times the WBO may need help from the whistleblower to proceed with the claim. If deemed necessary, the WBO may at its sole discretion request additional assistance from the whistleblower or his legal representative.[130] The 2006 Act directed the Secretary of Treasury to issue guidance which would specify that requests for assistance must be "under the direction and control of the Whistleblower Office or the office assigned to investigate the matter." The Act further cautions that any individual or legal representative whose assistance is so requested cannot by reason of such request represent himself or herself as an employee of the Federal Government.[131] The IRM addresses assistance from the whistleblower in revised Section 25.2.2.7(10)(06-18-2010) stating:

> The law requires the Whistleblower Office to analyze 7623(b) claims, and authorizes the Whistleblower Office to request assistance from the whistleblower or their counsel. In most cases, the IRS should be able to receive information from a whistleblower, conduct a debriefing to ensure the information provided is fully understood and that the IRS has all relevant information the whistleblower can offer, and then proceed with an investigation or examination without further assistance from the whistleblower. In some cases, there may be a need to pose additional questions to the whistleblower. Such inquiries are governed by the appropriate disclosure provisions contained in I.R.C. section 6103. (See IRM 11.3) When such an inquiry is made of a whistleblower, an exception to the requirement for reporting this type of third-party contact applies. (Refer to IRM 4.11.57.6.5)[132]

It is the WBO that has been assigned the authority to make the final determination about whether a Code Sec. 7623(b) award will be paid and the amount of the award. Awards are to be paid in proportion to the value of information furnished.[133] Previously, field executives were delegated the authority to make discretionary reward determinations. However, to promote consistency in the award program and avoid confusion, effective as of July 1, 2008, the IRS revised the delegation order so that all awards determinations under Code Sec. 7623, both discretionary Code Sec. 7623(a) and mandatory Code Sec. 7623(b) awards are to be made by the Director of WBO. [134] This change has been reflected in amended procedures, forms and the applicable sections of the INTERNAL REVENUE MANUAL.[135]

Claim Submission on IRS Form 211

The IRS issued Notice 2008-4 on January 14, 2008, to provide interim guidance on how to submit information to the IRS under the 2006 Act.[136] The notice, which is effective as of January 14, 2008, discusses procedures for submitting a claim, elaborates on the criteria that the WBO will apply to determine if a claim qualifies under Code Sec. 7623(b), explains ineligible submissions, and provides guidance as to the kind of information to be included on the form that is needed to evaluate the submission. The Notice points out that since new Code Sec. 7623(b) has several requirements that are inconsistent with existing regulations and administrative guidance applicable to discretionary award claims under Code Sec. 7623(a), the current regulations under Reg. §301.7623-1 will not apply to the new award program authorized by Code Sec. 7623(b).[137]

Prior guidance has not been made obsolete. The discretionary award program, now reflected in Code Sec. 7623(a) was previously implemented through Reg. §301.7623-1, much of which was reprinted as IRS Publication 733, with additional administrative guidance found in the INTERNAL REVENUE MANUAL. Those regulations continue to be applicable for award claims within the scope of Code Sec. 7623(a), except to the extent that Section 3.02 and 3.03 of Notice 2008-4 provide interim guidance regarding submissions of information under Code Sec. 7623(a).[138] In June 2010, portions of the IRM relating to whistleblower awards has been revamped and updated, including further guidance that addresses the processing of Code Sec. 7623(a) discretionary claims.[139]

A revised Form 211, *Application for Award for Original Information*, accompanied Notice 2008-4.[140] Form 211 must be filed whether the claim is for

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an award under Code Sec. 7623(a) or (b). The purpose of the revised form is to "help whistleblowers present information that is essential to evaluate whether a submission meets the requirements of Section 7623(b)."[141] Following the 2006 Act, all Forms 211 are to be submitted directly to the WBO for review. Information can no longer be directly submitted to other IRS personnel from the informant or their representatives. To act on such information by other IRS personnel may jeopardize the audit or potential audit and any related adjustments.[142] In addition, informant referrals are no longer received "live" over the telephone. Customer Service Call Sites and Taxpayer Assistance Centers (TAC) are provided with procedures to follow. These procedures are outlined in IRM 21.1.1.11.[143] Presently, the form cannot be submitted *via* fax or electronically.[144]

Upon receipt of the Form 211, the WBO will initially determine if the form is complete. If not, it can request additional information. If the form is complete, the WBO will determine whether the claim fits within Code Sec. 7623(b). If the claim qualifies as a potential Code Sec. 7623(b) claim, the whistleblower will be notified of the claim number and the name of the analyst in the WBO assigned the claim file. If it does not satisfy the dollar threshold requirements of Code Sec. 7623(b) or fails to meet any of the other Code Sec. 7623(b) requirements, it will be forwarded to the Informant's Claim Unit in the Ogden, Utah Compliance Center to be processed as a possible Code Sec. 7623(a) claim.[145]

An informant may retain a representative to assist with the submission of the claim. The IRM provides that a whistleblower may be represented during any proceeding by filing a Form 2848, *Power of Attorney,* but it should not be faxed to the Centralized Authorization File (CAF unit).[146] Presently, there is no procedure for tracking this representation.

Form 211 should not be confused with Form 3949A, *Information Referral*. A whistleblower who wishes to report possible instances of suspected tax fraud, but does not seek an award, completes Form 3949A, or provides the information *via* a letter that details the alleged fraudulent activity.[147] For these fraud referrals, no award is granted.[148] There are procedures in place to deal with a submission of Form 3949A that appears to indicate that an award is in fact expected.[149]

Form 211 calls for specific and credible information about the alleged noncompliant taxpayer that will lead to collection of unpaid taxes. The facts should support the belief that there is underpayment in taxes. "Generalized claims or descriptions are insufficient."[150] The form solicits the informant's name, address, date of birth, social security number or taxpayer identification number, contact information, estimate of the amounts of taxes alleged owed, years giving rise to the underpayment and facts supporting the basis for such amounts.[151] As a catch-all requirement, Notice 2008-4 directs the informant to disclose "[a]ny and all other facts and information pertaining to the claim."

Notice 2008-4 instructs the informant to include an explanation of how the information that serves as the basis of the claim became known to the informant, including date(s) when the information was acquired, and a description of the informant's current or former relationship to the alleged noncompliant person. Relationships may be a family member, acquaintance, client, employee, accountant, lawyer, bookkeeper, customer, *etc.* When assessing the credibility of the information whistleblowers provide, the WBO analysts and SMEs will take into account the relationship of a whistleblower to noncompliant taxpayer.[152]

The informant is instructed to submit supporting documentation to substantiate the claim, such as financial data, transaction documents or analysis pertaining to claim, or, if not in their possession, to provide as best as possible information describing such documents and their whereabouts.[153] When submitting a claim, the informant should provide disclosure to the fullest extent possible. Information available to the informant that is withheld may not be considered in determining the award.[154] Notice 2008-4 cautions, "[i]f available information is not provided by the claimant, the claimant bears the risk that such information may not be considered by the WBO in making any award determination."[155] At the same time, however, it is not expected, and indeed not condoned, that the informant engage in any illegal activity to secure documents or any other supporting evidence.

Generally, the informant should provide all the information and evidence with the initial submission. As in any submission of voluminous material, use of an index or table of contents can be helpful. At times, it may be a good idea to contact the WBO for submission guidance, for example, where the evidence is voluminous and complex. An incomplete Form 211 may be returned to the informant for completion and re-submission. In its sole discretion, the WBO may offer the informant an opportunity to meet and discuss the claim so as to better and more fully understand the information submitted and nature of the claim.[156] According to the IRM, unless it is determined that debriefing will not yield information that would be material to evaluating the submission,

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the informant will be debriefed. A debriefing checklist must be completed before any substantive discussion takes place with the informant.[157]

Code Sec. 7623(b) specifically identifies "individuals," as the ones who are eligible for awards Submission by entities such as corporations, limited liability companies, partnerships, and other entities are therefore precluded. Although there is no explicit direction found in Code Sec. 7623, submitted Form 211 is invalid, unless it is signed and submitted under penalty of perjury declaration. Persons representing the informant cannot sign off on behalf of the informant. These requirements stem from the need of WBO analysts and Subject Matter Experts to assess the credibility of whistleblowers and the information they provide.[158]Anonymous submissions or ones under an alias also fails the requirement to submit under penalty of perjury. Since certain individuals, such as some federal employees, are prohibited from receiving whistleblower awards, knowing the identity of the whistleblower helps to enforce this restriction. Joint claims must be signed by each informant.[159] Receipt of the informant's claim will by acknowledged by the WBO in writing.[160]

When the possibility exists that the informant may be implicated with the alleged noncompliant behavior that is the subject of the claim, it is advisable for the informant to consult with an experienced tax attorney in advance, preferably one that specializes in this new developing area of tax law.[161] Involvement in the tax underpayment by the informant can potentially turn into a serious tax problem for the informant based on the informant's complicity.

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Protecting the Whistleblower's Identity by the IRS

The IRS protects the identity of the whistleblower to the "fullest extent permitted by law."[162] Pre-Act regulations state that "[t]he IRS will not divulge the informant's identity to any unauthorized person."[163] The IRM instructs IRS employees that the identity of the informant must not be disclosed to any other services officials or employees, except on a "need to know" basis in the performance of their official duties in accordance with Code Sec. 6103.[164] This admonition was also echoed in SB/SE and LSMB memos.[165] The GAO 2011 Report also notes that "[w]hile the act establishing the expanded whistleblower program does not offer specific protections for whistleblowers, the Whistleblower Office has several policies and procedures to protect the identity of a whistleblower."[166]

According to the IRM, once an individual is identified by the WBO as a "whistleblower" under Code Sec. 7623, the IRS must classify that person as a confidential informant. As a confidential informant, the whistleblower identity must be protected in accordance with Code Sec. 6103(h)(4). Thus, even though Code Sec. 6103(h)(4) permits disclosure of return or return information under certain circumstances in a Federal or State judicial or administrative proceeding pertaining to tax administration, such disclosure cannot be had if the it is determined that such disclosure would identify a confidential informant.

In addition, any contact made between the IRS and the whistleblower will not be treated a third-party contact under Code Sec. 7602(c).[167] Had he contact been treated as a third-party contact, the IRS would have to give the taxpayer some "reasonable notice" prior to the contact. According to a 2008 LMSB memo, when asked by anyone outside the service, examiners were advised to neither confirm nor deny that a whistleblower is involved in any matter.[168] Such a response was to be given in all cases because knowledge that the informant provided information may, in fact, identify the informant.[169]

Whistleblower confidentiality is not absolute. There may be times when the informant is needed as an essential witness in a judicial proceeding. It such cases it may not be possible to pursue the investigation or examination without having to reveal the identity of the informant.[170] Interim guidance provided in Notice 2008-4 stated that the IRS will make every effort to let the informant know, before deciding to proceed with the case.[171] Along these lines, the IRM anticipates that these types of circumstances should be rare and instructs that the IRS will consult with the informant before deciding whether to proceed.[172]

Protecting the Whistleblower's Information by the IRS

Since the identity of persons who furnish information regarding possible tax violations must be protected, the IRM instructs its employees to handle such information in strict confidence and follow the prescribed security measures.[173] Such information must be handled in a special way so as prevent disclosure except to those employees having an absolute "need to know."[174] All notes and memos of oral interviews with informants, or any other communications which might, in any

way identify whistleblowers, including information provided by the whistleblower, must be sealed and handled in the strictest confidence.[175] The IRS is instructed to protect and keep secure all documents and screen displays that identify whistleblower information or the whistleblower.[176] As soon as informant correspondence is recognized by mail classifiers or other employees, it will be sealed in a "To Be Opened by Addressee Only" envelopes and follow referral instructions in IRM chapter 25.2 applicable to whistleblower awards.[177] All claims, reports and information relating to a claim must be kept concealed from all employees in a locked cabinet file until such time as it is forwarded.[178] Cabinet access must be limited to the person or persons responsible for the security and review of the informant documents.[179] When such information is transmitted from office to office, it must be enclosed in a double sealed confidential envelope marked "To Be Opened by Addressee Only."[180] Sensitive whistleblower information has to be maintained in a separate whistleblower award file that is kept separate from the tax file and the other audit workpapers. According to a 2008 LMSB memo, mention of the informant is not permitted to be made to the alleged noncompliant taxpayer, not in the RAR (Revenue Agent Report), and not anywhere in the workpapers.[181]

Disclosure to the Whistleblower About the Noncompliant Taxpayer

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The IRS is severely limited as to the information it can share with whistleblowers and others throughout the whistleblower claim process. Code Sec. 6103 is a lengthy section that addresses the privacy and confidentiality of tax returns and return information; it prohibits the unauthorized disclosure of tax information. The Code provides that it "shall be" unlawful for IRS employees or certain other persons to make unauthorized disclosure. Strict limits are imposed on what can be disclosed about a taxpayer to anyone, including the informant.[182] Following the code, the IRM states that IRS personnel shall not disclose any tax return or account information to the informant about the alleged tax violator (*e.g.,* whether or not the alleged violator filed a return). Subject to certain specified exceptions enumerated in Code Sec. 6103, the IRM points out that the sharing of any such information with anyone beyond the taxpayer is considered an unauthorized disclosure under Code Sec. 6103.[183] There are civil and criminal penalties in place to deter unauthorized disclosure and inspection of returns and return information.

There are some statutory exceptions provided in Code Sec. 6103 to the strict nondisclosure regime that allow the IRS to disclose tax information. In connection with whistleblowing, several exceptions may be implicated. The first exception, discussed immediately below, arises in cases in which the informant is called upon to render further needed and more effective assistance to IRS. The other exceptions are discussed later in this article.

In the course of analyzing, investigating and pursuing the case, there may be times where the WBO determines that further input and assistance is required from the informant or their legal representative. The 2006 Act authorized the IRS to ask for additional assistance from the informant or any legal representative of the informant.[184] For the assistance to be effective, certain information about the noncompliant taxpayer may need to be shared with the informant. The legislative history of the 2006 Act acknowledges that "the Service may need to disclose the taxpayer's return information to the informant in order to carry out effective investigation of the taxpayer."[185] On first blush, disclosure appears to present a dilemma in light of the strict anti-disclosure rules in Code Sec. 6103. As there are carefully circumscribed exceptions outlined in Code Sec. 6103 permitting disclosure, one such exception provided in Code Sec. 6103(n) allows the IRS to enter into contracts with outside parties for services for purposes of tax administration and can disclose tax information to the extent necessary to obtain those services. To protect the confidentiality of tax information, "whistleblowers who enter into section 6103(n) contracts must comply with IRS's safeguards of tax information and are subject to statutory civil and criminal penalties for unauthorized disclosure, which include fines and jail time."[186]

The legislative history to the 2006 Act adopted this disclosure exception for Code Sec. 7623 cases by explaining that "[t]o the extent the disclosure of returns or return information is required [for the whistleblower or his or her legal representative] to render such assistance [to the IRS], the disclosure must be pursuant to an IRS tax administration contract."[187] The legislative history further noted that "[i]t is expected that such disclosures will be infrequent and will be made only when the assigned task cannot be properly or timely completed without the return information to be disclosed."[188] Whether to enter into a Code Sec.

6103(n) contract is a decision that rests with the operating divisions. The decision is not directed by Chief Counsel or the Whistleblower Office, although they may render advice to the operating divisions.[189]

To provide guidance for disclosing and sharing return information by IRS employees with the informant or their representative, the IRS and the Treasury issued temporary and proposed regulations under the authority of Code Sec. 6103(n), effective as of March 25, 2008.[190] The temporary regulations, finalized on March 14, 2011, adopted the temporary regulations as proposed, with only some minor technical changes, mostly reflecting grammatical changes.[191] Disclosure to the informant is permitted pursuant to a written contract (which is basically a nondisclosure agreement) with the IRS so long as the informant acts within the scope of that contract. The regulations give the IRS discretion to decide whether to enter into written contracts for services "relating to the detection of violations of the internal revenue laws or related statutes."[192] The preamble to the temporary regulations pointed out that entering these contracts was meant to be an exception, not the norm, and should be used only infrequently.[193] Furthermore, any contract entered into and any disclosure made under such contract is to be carefully tailored to the specific facts of the case.[194]

Where disclosure is permitted after a contract has been entered into, it is only permitted for "return information," and not for disclosure of "tax returns."[195] Disclosure of return information will be made "only to the extent deemed necessary for the reasonable or proper performance of the contract,"[196] and only for the relevant tax years and types of taxes.[197] The notion here is to disclose as little as possible if partial disclosure will facilitate the rendering of services by the informant.[198]

Information disclosed to the informant cannot be used or disclosed to others, except as expressly authorized in writing by IRS.[199] The regulations provide various safeguards to protect disclosed return information. The informant and their representative must agree in writing to comply with all the conditions and requirements that the IRS may prescribe that are intended to protect the confidentiality of return information and to prevent unauthorized disclosures, use or inspection of return information.[200] Such conditions may pertain to computer security, physical security of return information, and methods of destruction and disposal of the information.[201] The informant and their representative must also agree in writing to permit the IRS to inspect the informant's premises to ensure that steps are taken to protect the confidentiality of the disclosed information. Return information that has been disclosed to the informant must be disposed of as prescribed by the IRS.[202]

To ensure compliance, if the informant or their legal representative fails to meet any of the prescribed requirements, the regulations provide for civil and criminal penalties for any unauthorized inspection or disclosure.[203] The penalties are linked to various existing penalty sections in the Code. Specifically, penalties apply under Code Sec. 7431, which prescribe civil damages for unauthorized inspection or disclosure of returns and return information; under Code Sec. 7213, which imposes criminal penalties for unauthorized disclosure of information; and under Code Sec. 7213A, which provides for criminal penalties for unauthorized inspection of returns or return information.[204]

To account for revisions made to the IRM in 2010 which established a new administrative appeal process for whistleblowers, the preamble to the final regulations provide that the disclosure limitations applicable to Code Sec. 6103(n) contracts are not a limitation on the "use of return information that may be disclosed to a whistleblower or the legal representative of the whistleblower during an award determination administrative proceeding and in an award determination appeal to the U.S. Tax Court."[205]

The 2010 revisions to the IRM reflect the 2006 Act and the temporary regulations in existence at the time of revisions. IRM 25.2.2.7(11) (6-18-2010) provides:

> In rare circumstances, it may be required and in the best interest of the Government to have a formal agreement with the whistleblower when it is necessary to share information obtained by the IRS from the taxpayer or a third party with the whistleblower. In these situations, temporary regulations at 26 CFR 301.6103(n)-2T authorize a contract for services with the whistleblower. Such an agreement will include safeguards to protect the privacy of any taxpayer information revealed to the whistleblower. An agreement under 6103(n) must be initiated by the Executive responsible for the function seeking the contract, and approved by the Business Operating Division not lower than the Deputy Commissioner level. The 6103(n) Contracts will be tracked by the Deputy Commissioner's Office and the Whistleblower Office will be notified of completed contracts.

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Despite the authority given the IRS to employ these contracts, and perhaps reflecting the reluctance expressed in the IRM for entering such contracts except in "rare circumstances." As of April 28, 2011, IRS had not entered into any contracts with whistleblowers.[206] According to Operating division officials, they have not yet come across any claim that would have called for an increased level of interaction with the whistleblower to gather taxpayer information. Moreover, according to the Chief Counsel, and Whistleblower Office, the IRS does not have specific criteria for when a Code Sec. 6103(n) contract should be offered to a whistleblower, other than "it should be used rarely."[207]

In the GAO 2011 Report, the Director of the Whistleblower Office explained that the purpose of many of the steps that IRS takes in processing whistleblower cases, including limiting interaction with the whistleblower, are meant to protect all interested parties—encompassing the privacy of the taxpayer's information, the identity of the whistleblower, and the integrity of the IRS examination. For example, the 2011 GAO 2011 Report elaborates, IRS auditors have to build their cases independent of whistleblowers and have to corroborate all of the information provided by whistleblowers. This independent process is needed to ensure that the audit is not "overly influenced by whistleblowers who have a financial stake in the outcome of examinations; that the identity of a whistleblower is not disclosed; and that taxpayers receive fair and defensible examinations."[208]

Disclosure to the Whistleblower About the Noncompliant Taxpayer for Investigative Purposes

Another important exception to the general nondisclosure rule in Code Sec. 6103 allows the IRS to disclose tax information when it is necessary in conducting investigations and gathering information to administer the tax code. Under Code Sec. 6103(k)(6), the IRS may disclose taxpayer return information to a whistleblower to the extent necessary for investigative purposes.[209] According to the GAO 2011 Report, if the IRS discloses tax information to whistleblowers under Code Sec. 6103(k)(6), whistleblowers would not be subject to penalties for unauthorized disclosure.[210] Notwithstanding, the IRM advises IRS employees to employ Code Sec. 6103(n) contracts to obtain the services of experts for investigative purposes rather than rely on Code Sec. 6103(k)(6) whenever possible.[211]

Informant Is a Current Employee of the Noncompliant Taxpayer

The use of information received from certain kinds of informants presents additional potential legal issues for the IRS. Specifically, there are limitations imposed on contacts and information derived from informants who are current employees of the noncompliant taxpayer when they provide information about their employer that was obtained in the course of employment. Also, severe limitations are imposed on informants who are concurrently acting as the taxpayer's representative in an audit or any other matter pending before the IRS. Initially, Chief Counsel Notice 2008-011 addressed these areas, as well as the use of privileged information received from informants.[212] The IRS's initial stance has been somewhat relaxed as to follow ups with current employees when it issued Chief Counsel Notice 2010-004 that clarified and modified Notice 2008-11.

Under settled case law,[213] the government is legally permitted to use information derived from private persons even if that person obtained the information in an illicit or illegal manner, so long as the government is acting in passive role when receiving the information and does not encourage or acquiesce in the private person's conduct. On the other hand, "[i]f the private party acts as an 'instrument or agent' of the government, ... , the Fourth Amendment, and its handmaiden Exclusionary Rule, may apply and, as a result, a court may exclude the government's evidence."[214] Chief Counsel Notice 2010-004 cautions that "[i]f the information is tainted in such a way that the IRS cannot legally use it, any adjustment that is dependent on the tainted information, or on any information derived from the tainted information, may not be legally supportable and may have to be conceded."[215] In Chief Counsel Notice 2008-011, the IRS announced that this principle, known as the "one-bite" rule, applies to contacts and dealings between the IRS and informants who are currently employed by the noncompliant taxpayer. Following the one-bite rule, the IRS is allowed to use information furnished by an informant who is a current employee, even if obtained by illegal or illicit means, so long as the IRS receives the information in a passive way and does not "encourage" the informant's illegal or illicit conduct.[216] Under this rule, "the IRS should be advised to act as a passive recipient of information at an initial meeting with an informant and to accept any and all information provided by the informant at this initial meeting."[217]

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Following the original application of the one-bite rule, as announced in Notice 2008-11, absent rare circumstances, there generally could be only one meeting with the informant.[218] The government role had to be that of a passive recipient of information from the informant.[219] At the initial meeting, the government had to be prepared to accept any and all information to be provided. The IRS took the position that generally there could not be subsequent meetings or contacts with the informant after the initial meeting.[220] Accepting information after the initial meeting was viewed as presenting a risk that the information supplied would be perceived to result from the IRS encouraging or acquiescing to the informant's actions in violation of the one-bite rule.[221] Any proposed adjustments that derived from, and depended on, information in violation of the one-bite rule could not be legally used and would have to be conceded.[222] Conversely, complying with the one-bite rule was seen as ensuring that interactions by IRS personal and Counsel with the informant would protect the integrity of adjustments that may result from an examination in which current employee information has been used as part of the examination.[223] In rare circumstances, when it was not clear if the initial meeting constituted the one-bite meeting, the possibility of subsequent meeting with the informant, whether requested by the government or by the informant, would have to be decided and cleared by higher echelon within the IRS.[224]

In Notice 2010-004, the IRS stance concerning subsequent meetings to accept additional information from informants who are current employees was revised, expanding the possibility of more interaction by the informant with the IRS. The Notice applies broadly to contacts with all informants who are current employees, which also includes informants who file a claim under Code Sec. 7623.[225] On a case-by-case basis, the Notice allows the IRS to accept additional information from the informant after the initial meeting. The Notice states that "[g]enerally, the IRS may receive and use supplemental information submitted by a current employee informant for the sole purpose of clarifying previously submitted information. For this purpose, supplemental information must reasonably relate to the previously submitted information, based on an analysis of all the facts and circumstances relating to the information and the IRS's contacts with the informant."[226] The more relaxed posture allows the IRS to conduct "limited follow-up contacts, including debriefing, initiated by the IRS to clarify information previously submitted by the informant." Notice 2010-004 does not retract from the prior principle announced in Notice 2008-011 that "to protect the integrity of any proposed adjustments, the IRS should, to the extent possible, remain a passive recipient of information from the informants."[227] Recognizing the risks associated with receiving supplemental information, Notice 2010-004 directs the IRS to consult and coordinate with the Operating Division Counsel. Guidance in the IRM instructs Operating Division Counsel to be present to provide support with respect to all follow-up contacts and debriefings.[228] Steps are outlined in Notice 2010-004 to resolve disagreements within the IRS on whether the supplemental information can be used. The Operating Division Counsel will consult with the Associate Chief Counsel for Procedure and Administration. If they cannot agree on whether the IRS should use the supplemental information, the Deputy Chief Counsel shall determine the Chief Counsel's position.[229] Should counsel advise that, based on its analysis of the legal risks, the IRS should not use the information, then the appropriate IRS Executive will determine whether or how to proceed.[230] Whenever additional contacts with a current employee informant do not fall clearly within the ambit described above, the Notice instructs the IRS to proceed on a case-by-case basis with the involvement of Operating Division Counsel. These situations can arise, for example when it is not clear if the proposed contact is an initial contact, a debriefing, or a subsequent contact, or when the informant submits additional information that relates to a new issue. Additional information submitted by an informant, whether or not a current employee, has to be treated as new claim.[231] Notice 2010-004 only applies to civil cases, either at the administrative level or in litigation. Criminal matters are excluded. Guidance with respect to criminal matters is provided in IRM 9.4.2, Sources of Information.

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Informant Serving as a Representative of the Noncompliant Taxpayer

Another problem situation can arise when information is received from an informant, or would be informant, who is also currently acting as the taxpayer representative (or of related taxpayers) in any administrative matters pending before the IRS (for example, income tax audit) or in any litigation where the IRS has an interest (for example, Tax Court and refund

litigation, collection suits, summon enforcement action). Chief Counsel Notices 2008-11 and 2010-004 make it clear that under no circumstances is the IRS allowed to accept any information from such an informant who is acting in a representative capacity.

Should the representative make direct or indirect overtures to the IRS about becoming an informant, IRS personnel are instructed to no longer interact with the representative as the taxpayer representative and to immediately notify the representative of this outcome. Also, thereafter the IRS should have no further dealings or contact with, or receive any further information from the representative as an informant. It is left up to the representative to try to explain to the taxpayer why they can no longer act in a representative capacity.[232]

Whistleblower Privileged and Confidential Information

A whistleblower may offer information that the IRS may not be able to use, such as information that may be subject to a valid claim of privilege or that is confidential. There is a heightened sensitivity on the part of the IRS concerning privilege and confidentiality issues in cases involving whistleblowers. The use of potentially privileged information can "taint" an issue or the entire case.[233] Chief Counsel Notice 2010-004 warns that the "use of potentially privileged information by the IRS can result in the inability to pursue an issue or an entire case."[234] A determination must be made before the information can be used as to whether and how much of the information may be privileged and whether the privilege has been waived. Notice 2010-004 points out that for current employees it should be assumed there is access to information that may be privileged and for which there has not been an affirmative waiver by the taxpayer. The resolution of these issues depends on the particular facts and circumstances of each case. In all cases where potential issues of privilege are identified, coordination and involvement of counsel is required.[235]

The 2010 revisions to the IRM outline steps to handle "tainted" information, which is information that may be subject to attorney client privilege or any other legal protections that would preclude the IRS from using it in an examination. For Code Sec. 7623(b) submissions, one function of the Subject Matter Expert (SME) when evaluating information submitted is to "insulate any resulting examination or investigation from improperly obtained information or other potential 'taints' that could compromise the tax case." According to the GAO 2011 Report, if SMEs determine that information may be tainted, the Office of Chief Counsel will review the claim to determine which documents can or cannot be shared with the examination or investigation functions. The Reports points out that SMEs can request debrief meetings with whistleblowers to "clarify the tax noncompliance issues alleged or to determine the source of submitted information to ensure it is not privileged."[236]

The IRM states that "[i]f during the SME's review, information is identified that cannot be used in the examination or investigation, the information deemed to be tainted should be returned to the Whistleblower analyst assigned the claim along with any analysis received from Counsel regarding the use of the information. The integrity of the tax case is preserved by withholding that information from the auditor or investigator, and ensuring that the SME is not involved in the examination or investigation."[237]

As to Code Sec. 7623(a) claims, the IRM states that if at any time during the review of the information submitted by informant, potentially tainted information is identified, IRS personnel are to consult with the Operating Division Counsel to identify any potential legal issues in developing the issues presented by the Whistleblower. If it is determined that the information will not be used, it should immediately be returned to the Informant Claims Unit in Ogden along with any analysis received from Counsel regarding the use of the information.[238]

An informant current employee may be serving as an attorney, accountant or other in some other role whereby there is a professional duty of confidentiality owed to the client employer. Furnishing confidential information to the IRS by such informant may be an ethical violation of the duty and will hamper the IRS' ability to use the information provided. The implications to the IRS flowing from such breach of ethical duty, states Notices 2010-004, will depend on the nature of the ethical duty owed and the nature of the breach. The potential impact of any applicable ethical duties has to be considered by counsel in the course of its "taint" review.

Processing Claims–In General

The steps involved in processing informant's claims have been described, in various degrees of detail, in a variety of sources, such as, industry director directives memos issued by the IRS' LMSB and SB/

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SE Operating Divisions,[239] TIGTA audits reports,[240] the Whistleblower annual reports,[241] the GAO 2011 Report,[242] the IRM[243] and on the IRS website.[244] Since the new law was enacted in 2006, the IRM underwent to major revisions and updating.

Starting in December 2007, when the new law was enacted, the IRS directed that all Code Sec. 7623 submissions have to be submitted to the WBO located in Washington.[245] The WBO tracks the claim from intake to final disposition by having an analyst in WBO monitor the case until final resolution of the case and a determination of the informant award. It has been observed in the GAO 2011 Report that some submitted whistleblower claims can be quite complex, with a voluminous amount of documents handed in as support. To evaluate such large of information and data can be "time consuming" noted the Report.[246]

Upon receipt of the claim on IRS Form 211, Application for Award for Original Information, the WBO will perform an initial review to determine whether the Form 211 contains all the necessary information. If it does not, the WBO may correspond with the informant requesting additional information. The correspondence will advise the informant that if a response is not received within 45 days, the WBO will conclude that the informant is no longer interested in an award.[247] If Form 211 appears to be complete, it will next be evaluated for its potential as a Code Sec. 7623(b) claim. Claims that don't meet Code Sec. 7623(b) criteria are forwarded to the Informant Claims Unit (ICE) in Ogden Compliance Center for processing as Code Sec. 7623(a) claims and the informant will be so notified.[248] The ICE Unit evaluates all submissions that do not appear to meet Code Sec. 7623(b) criteria to determine whether the information offered may materially contribute to the assessment or collection of unpaid taxes, penalties, interest, and other amounts. For claims that present a Code Sec. 7623(b) claim, the WBO will notify the informant of the claim number and the analyst in the WBO assigned the claim file. The analyst will monitor the claim file until final resolution of the tax matter and a determination on the whistleblower's award.[249] When a whistleblower claim winds up in examination, the case is treated the same as all other examinations; the operating divisions do not prioritize whistleblower claims. According to IRS officials, "each claim should rise on its own merits alongside other cases that have been selected for examination by other programs."[250]

When a whistleblower case is processed by the IRS, there is little to no contact with the whistleblower. During the initial reviews and examination by the WBO and the SME, the IRS generally has no contact with the whistleblower. Debrief meetings with the whistleblower may take place by the Operating Divisions to clarify information submitted, and these meetings may be the only interactions between the IRS and the whistleblower until the case is either rejected or an award is issued. During examinations, auditors do not involve whistleblowers because the case needs to be corroborated and built independent of whistleblower involvement and to prevent the possibility of being exposed to tainted information.[251]

Processing Code Sec. 7623(a) Claims

Upon receipt of the claim, the Informant's Claim Unit is directed to input the information in its database and notify the informant of the receipt of the information and the claim number.[252] IRM Exhibit 25.2.2-1 contains a sample of *Letter 1891* that is sent out to the informant. The claim file is then forwarded to the appropriate Operating Division for classification. The Operating Division classifier and/or subject matter expert will review the information to determine whether the (i) the taxpayer is currently under audit; (ii) the whistleblower offers information that may be relevant to exam or collections issues (past, current, or prospective); and (iii) the information provided materially contribute to identification, development or resolution of taxpayer liability or collection.[253]

If the classifier determines that the whistleblower's claim does not meet the threshold criteria for an award, a letter will be sent to the informant advising that the information furnished does not qualify for an award.[254] IRM Exhibit 25.2.2-2 contains a sample of *Letter 1010*. If on the other hand the classifier determines the whistleblower's information warrants referral for examination, the Informant Claim Unit (ICU) will forward to the appropriate group or subject matter expert (i) a copy of Form 211(ii) supporting allegations, (iii) returns requested by the classifier; and (iv) an evaluation package, Form 11369, *Confidential Evaluation Report on Claim for Award*.[255]

At any time during the review of the whistleblower's information, if potentially tainted information is identified, Operating Division Counsel will be consulted to identify any potential legal issues in developing the issues presented by the whistleblower. An example of tainted information is information offered by the whistleblower that may be subject to a valid claim of

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privilege. Tainted information that will not be used it is to be immediately returned to the Informant Claims Unit in Ogden in a double-sealed envelope along with any analysis received from Counsel regarding the use of the information.[256]

The IRM calls for debriefing of the whistleblower, unless it determines that a debriefing is unlikely to result in information that would be material to the evaluation of the submission.[257] Contacts with informants who are the taxpayer's employee or representative raise additional concerns which the examining team must carefully consider as discussed above. The IRM points out some of the benefits derived from debriefing, stating that "[a] debriefing may yield additional information that the whistleblower did not recognize as relevant to the taxpayer's matters, information about the credibility of the whistleblower, information relevant to legal issues that can affect the use of documents, and leads to other sources of information. A debriefing may also clarify the whistleblower's submission." IRM Exhibit 25.2.2-4 has a Debriefing Checksheet that must be completed before any substantive issues are discussed with the informant.

At the conclusion of a Code Sec. 7623(a) case, the examiner will prepare two files: (i) a complete case file for regular processing through the appropriate Case Processing function; and (ii) a claim file to be sent to the Ogden Informant Claim Unit (ICE Unit) for processing of the claim for award, together with completed Form 11369, *Confidential Evaluation Report on Claim for Reward*.[258] The purpose of Form 11369 is to document the informant's contribution to the identification of tax noncompliance and collection of taxes, penalties and interest. The form and attachments assists the Director of the WBO, in making an award determination.

IRM Section 25.2.2.6(14) (June18, 2010) lists the following information and documentation that should be included in the claim file:

A. Form 11369 for each taxpayer (for jointly filed returns one joint form should be completed.) The Form 11369 must be approved by the manager and digital electronic signatures are acceptable.

B. Narratives to fully explain the contributions of the whistleblower in the case and fully document the actions taken in regard to the issues.

C. Form 211 filed by the whistleblower and any and all information supplied by the whistleblower either as part of the original submission or obtained during any further contacts with the whistleblower.

D. Copies of any debriefing notes, recorded interviews, etc. held with the whistleblower and/or their representative.

E. Copies of any memorandums prepared by Counsel in regards to information submitted by the informant. All tainted material should be immediately returned to the analyst or Ogden Informant Claims Unit as soon as a decision is made that the material will not be used. Do not wait until the case is resolved to send the material.

F. Full Revenue Agents Report/ Special Agent's Report including explanation of all adjusted items.

G. Signed copy of the Agreement Form (i.e. Form 4549, 870, 870-ad or 906.)

H. Any opinions from Counsel/subject matter experts on issues attributable to the whistleblower information.

I. Copies of first four pages of each tax return and any schedules impacted by the whistleblower's information.

J. Full copy of the initial examination plan and mid-cycle revisions.

K. Copy of activity record for examination/collection case.

L. Copies of any 6103(n) contracts entered into with the whistleblower and/or explanation of extraordinary cooperation by whistleblower.

M. Any information that reflects any negative actions by the whistleblower taken during the examination.

N. Any other information that may assist the Whistleblower Office in making an award determination.

The entire claim package is forwarded from the ICE Unit to the WBO where the documentation is reviewed and a recommendation as to award percentage is

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made to the Director of the WBO. Once the Director of the WBO has concurred on the award percentage, the package is returned to ICE Unit with instruction for monitoring the payment of assessment, and to confirm collection of funds from the noncompliant taxpayer. Pursuant to new IRS policy adopted in FY 2009 payment to the informant cannot be made until after the noncompliant taxpayer can no longer legally retrieve payments made, which is when the statute of limitation to file a refund claim by the noncompliant taxpayer has expired, or has been waived.[259]

Processing Code Sec. 7623(b) Claims

When a claim appears to have a Code Sec. 7623(b) potential, an analyst in the WBO is assigned to the process and monitor claim. Claim will be assessed for fraud potential and possible referral to Criminal Investigation (CI) for its review. If the case is referred to CI for review, and CI decides not to pursue the claim, the analyst will be notified[260] and transferred to an operating division for processing. Conversely, if during an examination an operating division determines there is a criminal component to a claim, it can involve CI.[261]

If the claim is not referred to CI, or if CI decides not to pursue the case, the analyst will review the case to ascertain if it meets the Code Sec. 7623(b) dollar threshold. Cases that do not clear the threshold are forwarded to ICE Unit in Ogden for processing as Code Sec. 7623(a) claims and the informant will be notified of the transfer. If the analyst determines that a claim should not be pursued (see grounds and discussion below) the analyst will forward their rejection recommendation through the Chief, Case Development and Oversight, to the Director of the WBO for concurrence. Upon approval, the whistleblower will be notified that the information did not identify a federal tax issue upon which the IRS will take action.[262] IRM Exhibit 25.2.2-5 contains a sample Rejection Letter that is sent out to the informant.

For claims that satisfy the Code Sec. 7623(b) threshold, the claim file will be forwarded to the SME in the applicable Operating Division. The SME will evaluate the information provided to determine if it may "materially contribute to the identification, development or resolution of taxpayer liability or collection issues."[263] The SME review is intended to "insulate any resulting examination or investigation from improperly obtained information or other potential "taints" that could compromise the tax case."[264] Information identified as tainted cannot be used in examination or collection will be returned back to the analyst in the WBO along with analysis received from Counsel regarding the use of the tainted information.[265] Insolating tainted information from auditors or investigators serves to preserve the integrity of the case. For similar reasons, the SME cannot be involved in the examination or investigation of the taxpayer.

The SME may consult with Operating Division Counsel to identify any potential legal issues in developing the material presented by the whistleblower.[266] The GAO 2011 Report observed that the Office of Chief Counsel does not get involved in every whistleblower claim. It reviews whistleblower claims for legal issues when the Whistleblower Office or operating divisions request such assistance.[267] Advice from Counsel may encompass possible limitations on interactions with the whistleblower and potential application of privileges. The SME may also seek out additional subject matter advice from other experts within the IRS. The SME debriefs the whistleblower, following the same procedures outlined above for Code Sec. 7623(a) claims.[268]

After reviewing the case, the SME will make a recommendation whether to pursue the claim based on the leads provided by the whistleblower. The SME can take one of several actions. If the SME does not believe the information is productive and that the case should not be pursued, the SME will complete Form 11369, *Confidential Evaluation Report on Claim for Reward* and return the file to the WBO's analyst who was assigned to the case.[269] The recommendation to reject the case will be routed to the Director of the WBO for his concurrence. Once approved, the whistleblower will be notified that the information provided did not identify a federal tax issue upon which the IRS will take action.[270] IRM Exhibit 25.2.2-5 contains a sample Rejection Letter.

If on the other hand the information appears to be worth pursuing further, and Operating Division Counsel has not identified potential legal limits on using the information, the SME will forward the case to examination.[271] The assigned analyst in the WBO will monitor the case status while in examination. When a claim contains information that could help bolster an existing collection case, the SME will make a recommendation on the usefulness of the information and what steps should be taken to share the information with collection. When a

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decision is made to withhold documents from field examination or the collection functions, the SME will return these documents to the assigned analyst in the WBO with an explanation. No one who has come into contact with the documents withheld can thereafter be involved with examination or collection of that case.[272]

Some claims may present potential legal limitations on the use of information. When such limitations are identified, the Operating Division Counsel will draft a risk analysis which may be reviewed by Headquarters' Chief Counsel. If the advice given by Counsel is for the IRS not to use the information, the Operating Division Commissioner decides whether and how to proceed. A copy of the risk analysis and any advice of Counsel are shared with the assigned analyst in the WBO.[273]

When a Code Sec. 7623(b) case has been forwarded to field examination, the examiner will prepare two files at the conclusion of the examination. The first is a complete case file for regular processing through the appropriate Case Processing function. The second is a claim file that contains information

Table 1.

Claim Process Steps	Step Description	Potential Outcomes
Step 1 **Whistleblower files claim**	A whistleblower files Form 211, *Application for Award for Original Information*, with Whistleblower Office.	
Step 2 **Whistleblower Office initial claim review**	The Whistleblower Office reviews Form 211 and assesses if the claim qualifies for the expanded whistleblower program.	(1) **The claim does not meet expanded criteria and is processed using the original program rules.** (2) The claim does not qualify for the original or expanded program; **whistleblower receives a Whistleblower Office rejection letter—case closed.** (3) The Whistleblower Office refers the claim to the appropriate operating division.
Step 3 **Operating division subject matter expert (SME) review**	SMEs perform an initial assessment to determine whether the allegation is worthwhile to pursue and ensure that documents received are not privileged.	(1) The SME rejects the claim as something IRS will not pursue; **whistleblower receives a Whistleblower Office rejection letter—case closed.** (2) The SME forwards the claim to the operating division examination function.
Step 4 **Operating division classification and examination**	The operating division determines how a claim fits into its overall examination workload, may perform an examination, and determines the change in tax assessment, if any; when completed, operating division sends award claim file to the Whistleblower Office.	(1) An examination is not included in the workload for various reasons, such as other priority examinations or the issue was reviewed in a prior examination; the case is sent back to the Whistleblower Office; **whistleblower receives a Whistleblower Office rejection letter—case closed.** (2) An examination concludes with no change in tax assessment; award claim file is sent back to the Whistleblower Office; **whistleblower receives a Whistleblower Office rejection letter—case closed.** (3) An examination concludes with a revised assessment for the taxpayer.
Step 5 **Appeals and collections**	(1) The taxpayer may appeal the assessment within IRS or the courts. (2) The taxpayer pays the tax and, if any, penalties and interest.	(1) The taxpayer wins the appeal and has no change in tax liability; **whistleblower receives a Whistleblower Office rejection letter—case closed; or** (2) The taxpayer loses the appeal or does not appeal; IRS collects monies
Step 6 **Taxpayer right to request refund**	Taxpayers have the right to request a refund within two years from the date the tax was paid.	The Whistleblower Office waits to make an award determination until the allowable time for the taxpayer to request a refund has expired, which is typically two years
Step 7 **Whistleblower Office final review**	The Whistleblower Office determines an award percentage and notifies the whistleblower of the intended award amount	(1) The determination shows the whistleblower's information did not contribute to any tax recovery; **whistleblower receives a Whistleblower Office rejection letter—case closed.** (2) The whistleblower receives a notification letter indicating the intended award.
Step 8 **Award payment**	The Whistleblower Office pays the whistleblower.	Whistleblower is paid a taxable sum—**case closed.**

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and documentation specified in a nonexclusive list set forth in IRM 25.2.2.7.16. This list is identical to the one set forth above for processing Code Sec. 7623(a) claims. The claim file is routed, in a confidential envelope, to the Whistleblower analyst assigned to the case.[274]

Table 1 extracted from the GAO 2011 Report outlines the steps involved in a Code Sec. 7623(b) claim process and the potential outcomes at each step.[275] The report described the various steps undertaken by the IRS from the time a claim is first filed by a whistleblower until an award payment might be made and the potential outcomes at each step. The eight steps are: whistleblower files claim, initial review by the Whistleblower Office, subject matter expert review, classification and examination, appeals and collections; taxpayer right to request refund, final Whistleblower Office review, and award payment.

Form 11369: Confidential Evaluation Report on Claim for Award

Form 1139, *Confidential Evaluation Report on Claim for Award,* is employed to help the WBO in making an award determination. Examiners in the field no longer make a recommendation on what the award should be. Form 11319 has been revised, effective October 2008, to provide the WBO the necessary information to make an award determination. Form 11369 is the principle vehicle that the WBO uses to make an award decision, including the percentage. The form is used to assess the value of the information supplied by the informant. The IRM outlines the kinds of documents and information that should be forwarded in a separate completed award claim file along with Form 11369 to ensure the WBO has the necessary information to help the WBO make an award determination.[276] In most instances, it will be necessary to attach a narrative to further detail the answers to the questions on Form 11369.[277]

Whenever a case comes to an end at certain steps in the process, Form 1139 is completed by IRS personnel and forwarded to the WBO. Whenever a claim is not pursued and the case is closed, the Whistleblower Office will notify the informant. Claims that have been surveyed must have a completed Form 11369 with all required signatures and documentation supporting the survey. Surveyed claim packages must contain a narrative explaining why the case was surveyed.[278] In a surveyed claim there is determination to not examine a return that was initially selected for examination. The case is said to be closed by survey. For claims that make it to an Operating Division, the SME recommends whether to pursue the lead offered by the whistleblower. If the lead does not appear productive and the case is not pursued, the SME completes a Form 11369 and returns the case file to the WBO analyst assigned the case.[279] The recommendation to reject the claim will be routed to the Director of the WBO for concurrence. Upon approval, the whistleblower will be notified that the information provided did not identify a federal tax issue upon which the IRS will take action. IRM Exhibit 25.2.2-5 illustrates a sample Rejection Letter.[280]

For claims that are referred to the field, Form 11369 needs to be completed by the examiner for each claim at the conclusion of an examination of a Code Sec. 7623(a) or (b) cases.[281] Examiners are requested to "fully explain the contributions of the informant in the case."[282] Claims for which the examination culminates in a "No Change" must also be accompanied by a completed Form 11369 with all required signatures and documentation supporting the "No Change," including a narrative explaining the "No Change."[283]

Should a taxpayer appeal the proposed deficiency within the IRS, no information about the Whistleblower (including Form 11369) can be included with the file that is forwarded to Appeals.[284] Form 11369 is required to be completed whenever a case is forwarded to Appeals, or there is transfer of a criminal case to civil compliance. However, the tax administration file forwarded to Appeals cannot contain Form 11369.[285]

Computation of Code Sec. 7623(b) Mandatory Awards

The 2010 revisions to the IRM set out guidelines by which the WBO will determine the award percentage.[286] Assuming an award will be granted, the starting point in the analysis begins with the 15-percent statutory minimum percentage. It is then adjusted based on analyzing the presence and significance of specified positive and negative factors that would merit a higher percentage. The specified factors are not exclusive, are not weighted

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and cannot be reduced to a simple mathematical equation. It is possible that one factor may outweigh several others. Negative factors can offset positive factors, but will not reduce the award percentage below the statutory minimum. The absence of negative factors will not necessarily mean that the award percentage will be higher than the statutory minimum. Award percentages are pegged at 15 percent, 18 percent, 22 percent, 26 percent or 30 percent.

The following positive factors listed in the IRM are applicable to the mandatory awards under Code Sec. 7623(b)(1) and the reduced awards under Code Sec. 7623(b)(2):

A. Prompt action by the whistleblower to inform the Government or the taxpayer of the tax noncompliance may, depending on the acts, be a positive factor. For example, providing the Government with an opportunity to address the tax noncompliance early can help mitigate the impact of the noncompliance.

B. The whistleblower submits information that identifies an issue of a type previously unknown to the Government or a taxpayer behavior that the Government was unlikely to identify or was especially difficult to detect through the exercise of reasonable diligence.

C. Submissions in which the whistleblower thoroughly presents the details of the noncompliance in a clear and organized manner may, depending on the facts, be a positive factor. For example, a detailed submission may save the Service work and resources.

D. The whistleblower (and/or his/her representative) provided exceptional cooperation and assistance during the audit, investigation, or trial, including useful technical or legal analysis of the taxpayer's records.

E. The whistleblower identified assets of the taxpayers that could be used to pay the taxpayer's liability or assets not otherwise known to the Service.

F. The whistleblower identified connections between transactions, or parties to transactions, which enabled the Service to understand tax implications that might not otherwise have been revealed.

G. Impact of the report on the behavior of the taxpayer. For example, the whistleblower's report may, directly or indirectly, cause the taxpayer to correct an improper position.

The negative factors (providing an offset against the positive factors) which are applicable to mandatory awards under Code Sec. 7623(b)(1) and reduced awards under Code Sec. 7623(b)(2) are:

A. The whistleblower delayed reporting after learning the relevant facts, and the delay had an adverse impact on the ability of the IRS to pursue the issues raised. Delayed reporting can allow the noncompliant activity to be repeated, increasing the magnitude of the noncompliance and, in some cases, compromising the ability of the Government to assess and collect.

B. The whistleblower's role in the underpayment of tax reported, such as when a whistleblower actively and knowingly participates in carrying out the tax noncompliance. If the whistleblower directly or indirectly profits from the noncompliance, this may also be considered a negative factor.

C. A whistleblower puts the tax case at risk. For example, a whistleblower's premature disclosure to the taxpayer of the existence or scope of IRS planned enforcement activity may be a negative factor if the whistleblower disclosed information regarding the IRS interest in a matter in such a way that permitted the affected taxpayer(s) to impede IRS access to relevant information and thus impeded the exam or audit.

D. Whistleblowers will normally be given specific instructions regarding permissible and impermissible activities; violation of these instructions may be a negative factor in determining the award percentage if it causes the Service to expend additional resources it would not otherwise have spent.[287]

Duration of Process: How Long from Submission to Award Payment

Whistleblowers must be very patient and be prepared to wait a long time to collect on awards.

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The process, from point of submission of the claim until proceeds are collected and become available for payment of awards can spans several years. No commitment is made to the whistleblower by the IRS about the expected duration of the process.[288] According to the Whistleblower Annual Report to Congress FY 2010, whistleblowers are advised that process may take five to seven years and even longer if there are drawn out appeals or collection actions.[289] Whistleblowers may not hear from the Whistleblower Office for years since Code Sec. 6103 restricts the IRS in the amount of information it can disclose to the whistleblower.[290]

In the past, it has not been atypical for award payments to take about seven years to be paid out, and even up to 10 years. The period was at times even longer. In once cited instance, the WBO recently paid an award on a Code Sec. 7623 (discretionary award) claim 15 years after the claim was received.[291] Because of the lengthy time periods to process claims and collect taxes assessed, as of the Annual Report to Congress FY 2010 on the Use of Section 7623 filed by the WBO in July 2011, there were no reported awards yet paid out on Code Sec. 7623(b) claims received, though anticipated payment were forthcoming.[292] The GAO 2011 Report points out that as of as of April 2011, about 66 percent of claims submitted in the first two years of the revised program, namely fiscal years 2007 and 2008, were still in process. Table 3 of the GAO 2011 Report illustrates the status of Whistleblower Claims processed to April 25, 2011.[293] According to the Table 3, of the roughly 8,200 total claims being processed by the IRS from FY 2007 to April 25, 2011, only 36 had arrived at the level of an award evaluation by the Whistleblower Office. The GAO 2011 Report elaborated on the various factors why it can take the IRS a significant time to process a whistleblower claim, including the complex nature of many cases, the numerous other priorities and time demands on the SME, the need to review information for applicable privilege, and the possible debriefings with whistleblowers.[294]

It can take several years after the processing is completed within the IRS to finally determine if the whistleblower is entitled to an award because the noncompliant taxpayer can exercise various administrative and judicial appeal rights. An assessed tax can be appealed, and if a settlement cannot be reached in Appeals, the taxpayer may file a petition for a prepayment review by the U.S. Tax Court. Even when taxes are paid after assessment, the taxpayer may file for a refund claim with the IRS. If denied, the taxpayer may seek an administrative appeal, followed by a refund suit in a U.S. district court or U.S. Court of Federal Claims. These rights also encompass issues that whistleblowers identified. Payment of an award cannot be made to the whistleblower until after, first, there has been a final determination of tax liability (including, taxes, penalties and interest) owed to the IRS, second, there has been actual collection of such liability, and, third, the noncompliant taxpayer has exhausted all administrative and judicial opportunities to pursue a refund of amounts paid to the IRS.[295] When a single award claim form (Form 211) involves more than one taxpayer, payment may be held back until examination and other steps mentioned above are completed as to all the taxpayers.[296]

A final determination of tax liability is the point in time when the taxpayer is foreclosed from further pursuing any administrative or judicial review of the tax liability. At the administrative level a final determination of liability occurs when the taxpayer has exhausted all his appeal rights and the time to file a suit in court has expired, or upon entering a closing agreement that conclusively waives the right to appeal or otherwise challenge the determination. In a judicial proceeding, a determination of liability becomes final when the court decision can no longer be appealed.[297]

Even when amounts are collected from the noncompliant taxpayer, they are still not made available to pay awards. The concept of a final determination of tax liability further encompasses situations where the noncompliant taxpayer pays the shortfall in taxes, interest and penalties and then has the right to seek an adjustment by way of a refund claim. To address this possibility, a final determination of tax does not occur until after the expiration of the statutory period for filing a refund claim within the IRS and then filing a refund suit in court based on that claim, and if a refund suit is filed, then not until judgment in that suit becomes final. Generally, a taxpayer can file a refund claim within either three years from filing or two years from the date of payment. A determination also becomes final when "there is an agreement between the taxpayer and the Service that there has been a final determination of tax for a specific period and a waiver of the right to file a claim for refund is effective."[298] Anytime litigation is commenced, award consideration will be delayed until that litigation has been concluded with finality.[299]

Up to FY 2009, if a noncompliant taxpayer filed an administrative or judicial appeal, the IRS did not pay claims until there was a final resolution of the ap-

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peal. In FY2009, IRS policy changed with the added requirement that claims will not be paid to whistleblowers even when the noncompliant taxpayer has not filed an appeal until the period for filing an appeal has lapsed. This has lengthened the waiting period. In general, a taxpayer may file a claim for refund within two years of the last payment made, unless the right has been waived. Starting in July 2009, the IRS began monitoring cases for both collection and the lapse of the period for filing a claim for refund.[300] As a result, the WBO Annual Report to Congress FY 2009 noted the IRS did not pay some claims that would have otherwise been payable in FY 2009 until FY 2010 or FY 2011.[301]

Status of Filed Claim

When a whistleblower submits a claim, it is natural that at some point during the long process the whistleblower may wish to follow up to find out the status of the claim. Due to strict privacy laws that apply to disclosure of taxpayer information, no information about the status of the claim or the underlying tax matter can be discussed by anyone within the IRS or with the informant or their representative.[302] Code Sec. 6103 governs the protection afforded taxpayer returns and return information. Information regarding the status of a whistleblower's claim is considered to be "return information" as defined in Code Sec. 6103(b)(2) and is therefore confidential under Code Sec. 6103(a).[303] Along these lines, the IRS does not publicly report or comment on specific whistleblower awards, which it also considers to be tax information. The GAO 2011 Report notes that the IRS will only report on aggregate whistleblower award information once the Whistleblower Office has paid a number of awards sufficient to avoid improper disclosure.[304]

To avoid any Code Sec. 6103 disclosure violations, should the informant or their representative contacts anyone in the IRS to find out about the status of the claim submitted, IRS personnel were instructed to forward such quests to the WBO.[305] The IRS website states that informants may only be told whether the claim is still open or has been closed, but not the action taken against the taxpayer.[306]

In PMTA 2011-031,[307] dated February 1, 2010, but released in January 2012, the Chief Counsel's Office advised employees of the Whistleblower Office that they are authorized to disclose to whistleblowers taxpayer return information in making reward determinations pursuant to Code Sec. 7623 and/or "providing status updates to whistleblowers regarding pending, unprocessed, or dismissed claims under Section 7623." However, the specific taxpayer return information that may be disclosed to a whistleblower within the scope of the whistleblower award review and determination process is made pursuant to Code Sec. 6103(h)(4), to the extent the requirements enumerated in any one of the four subsections of Code Sec. 6103(h)(4) are satisfied, and will depend on the facts and circumstances in the particular instance. The PTMA concluded that Code Sec. 6103(h)(4), which authorizes disclosures of such information in judicial and administrative proceedings, permits Whistleblower Office disclosure since a whistleblower award review and determination process is considered an administrative proceeding. Despite the PMTA that was given nearly two years ago, apparently the PMTA has had no practical effect on status information provided to whistleblowers while their claim is pending and before the taxpayer's case is completed. It seems that only when the taxpayer's case reaches the stage when an award determination procedure begins that there is deemed to be an "administrative proceeding" under Code Sec. 6103(h)(4) and only then can disclosure of some otherwise Code Sec. 6103 protected information be made to the whistleblower.

As an exception, Code Sec. 6103(n) authorizes the IRS to make limited status information disclosure concerning the claim to the whistleblower if made pursuant to a written tax administration contract. Upon a written request of a whistleblower or their representative, information may be disclosed about the status of the claim, including whether the claim is being evaluated for "potential investigative action," or is pending due to "an ongoing examination, appeal, collection action, or litigation."[308] However, disclosure may only be made if the IRS determines that doing so would not seriously impair federal tax administration.

Rejection of Claims and Denial of Awards

Whistleblower claims can be rejected at almost any point in the process.[309] For example, claims may not fit the criteria for the award program, the IRS may already have the information that the whistleblower submitted, or an examination may result in no change in tax assessed. Rejection letters sent to whistleblowers do not specify why IRS denied a request for an

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award. According to IRS officials, to provide the reason would violate Code Sec. 6103.[310]

There are many reasons for which claims may be rejected either upon submission or further along as the case is processed.[311] Even if a claim is not rejected, an award may be denied. IRM 25.2.2.5 (June 18, 2010) and Policy Statement P-4-27 enumerate various grounds for not processing claims. Notice 2008-4 also lists several examples of ineligible submissions under Code Sec. 7623(b). According to the GAO 2011 Report study of the claims where the rejection step was tracked, over half were rejected after examination in the Whistleblower Office final review.[312]

A claim may be ineligible for processing when the person submitting the claim is a disqualified person. In this category are claims submitted based on information obtained or divulged in the course of performing official duties by an individual who is or was an employee of the Department of Treasury.[313] The same applies to an individual who obtained such information acting within the scope of his duties as an employee of any Federal, State or local Government.[314] Claims will be rejected when submitted by an individual who is required by Federal law or regulation to disclose the information or, conversely, is precluded by Federal law or regulation from making the disclosure.[315] Claims will not be processed if submitted by an individual who obtained or was furnished the information while acting in an official capacity as a member of a State body or commission having access to such materials as federal returns, copies or abstracts.[316] Claims submitted by an individual who had access to taxpayer information arising out of a contract with the Federal government that forms the basis of the claim will be rejected.[317] Moreover, individuals who are current representatives, such as attorneys or accountants, of the noncompliant taxpayer are not eligible for awards.[318] Disqualified persons cast a wider net in that the WBO may reject claims submitted by individuals who would otherwise qualify when the claim is based on information derived from a disqualified person.[319]

Claims may be dismissed when failing to meet a filing requirement. In this category are claims filed by a person submitting the claim anonymously or under an alias,[320] or when the claim is filed by a person who is not a natural person (individual), such as a claim filed by a corporation or partnership.[321] Claims filed under Code Sec. 7623(b) will not be processed as a Code Sec. 7623(b) claim if the applicable monetary threshold under Code Sec. 7623(b) has not been met. For example, a claim will not be processed as a Code Sec. 7623(b) claim where the alleged noncompliant person is an individual whose gross income is below $200,000 for all tax years at issue in a claim.[322]

There are various grounds for not processing claims and denying awards that go to the substance of the alleged claim. Claims that upon initial review are found to be meritless, speculative or lacking sufficient specific and credible information will not be allowed.[323] The same applies where the information provided does not "identify a federal tax issue" upon which the IRS can take action.[324] Such claims do not provide a sufficient basis for taking action, *i.e.,* initiating an examination of investigation of the issue presented. For example, a claim may not be usable if it is based on information that is subject to privilege that was not waived by the noncompliant taxpayer.[325] Other examples may include situations where the information furnished is already known to the IRS from other sources,[326] where the issue has already been identified by the audit team, such that the claim provides no additional leads, or where the audit team determines not to pursue leads from the informant.[327]

Awards will be denied where the information provided does not result in the detection of underpayment of taxes, awards will be denied.[328] Thus, even if an audit or investigation is conducted, the information furnished by the informant may be of no value because the examination resulted in a "no change" finding[329] and therefore there is a finding of no liability. Even when this is a finding of liability, the taxpayer may be able to successfully reverse the finding in an administrative or judicial appeal.

Awards will be denied if the information provided does not result in collection of proceeds.[330] A taxpayer can be found liable, such a finding may even be sustained if appealed, yet collection efforts may lead nowhere because the taxpayer has no assets from which to collect. As there is no collection of taxes, penalties or interest, no award can be paid. As notes above, even if amounts are collected, payment of award is not certain until the statutory period for filing a claim for refund expires or there is an agreement with the taxpayer and the IRS that there has been a final determination and the taxpayer has waived the right to make a claim for a refund.[331]

Claims are generally not rejected in the examination step. At the conclusion of an audit, examiners send an award claim file to the Whistleblower Office for its analysis to determine how useful the whistleblower's information was to the examination outcome based

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on information the examiner provided. The claim will be rejected by the Whistleblower Office where the examination concluded with no change in assessment or where a whistleblower's information did not contribute to an examination.[332] The GAO 2011 Report was critical of the system currently in use for not tracking the reasons why claims are rejected and for the lack of available information to know how frequently claims are rejected and for what reasons. Whistleblower attorneys interviewed for the GAO 2011 Report study voiced concerns that claims that take years to process are at risk of being rejected because the statute of limitations for assessment may expire before IRS completes its processing of the case.[333]

Whistleblower Award Administrative Proceedings

The whistleblower award review and determination process is treated as administrative proceeding. It begins on the date the claim for award is received by the WBO from the IRS. The administrative proceeding entails a review of the whistleblower contribution to the IRS action against the taxpayer and a determination of an award to the whistleblower.[334]

Under revised IRM procedures issued in June 2010, the whistleblower can, for the first time, provide input regarding the preliminary Code Sec. 7623(b) award recommendation before a final administrative determination is made by the Director of the Whistleblower Office ("Director").[335] Initially, the Director will prepare a preliminary recommendation regarding an award. This step takes place after the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that there has been a final determination of tax for the specific period and the taxpayer has waived his right to file a claim for refund. The Director will forward the recommendation to the Whistleblower Executive Board for their review. If the Board concurs, the preliminary award recommendation will be communicated to the Whistleblower along with the following documents:

- A notice of opportunity to comment on the recommendation
- A proposed summary award report
- An award consent form
- A confidentiality agreement[336]

Sample of these documents can be found in IRM Exhibits 25.2.2-7, -8, -9 and -10 respectively. The whistleblower is given 30 days to react to the preliminary award recommendation, in one of four ways:

1. If the whistleblower does not respond within 30 days, the Director will make a final award determination.
2. If the whistleblower completes and returns the consent form agreeing to the proposed recommendation, the Director will make a final award determination.
3. If whistleblower submits comments but does not complete the confidentiality agreement, the comments will be added to the claim file and will be considered in making the final award determination.
4. If the whistleblower completes and returns the confidentiality agreement, additional administrative review opportunity will be granted to the whistleblower.[337]

As a condition for moving forward with the administrative proceeding and in order to receive taxpayer return information, the whistleblower has to execute a confidentiality agreement. The whistleblower is advised that re-disclosure of confidential information may be treated as negative factor in the award determination analysis. The Confidentiality Agreement provides in relevant part the following:

> I wish to participate in the administrative proceeding leading to the determination of an award by the Director of the whistleblower Office in this case, by reviewing additional information related to the award recommendation. I understand that information will not be disclosed to me unless the disclosure is necessary as part of the administrative proceeding, and unless I agree to maintain the confidentiality of any information on taxpayers other than myself (my client) disclosed to me. I agree that I will use any information disclosed to me (my client) by the Whistleblower Office only for the purpose of preparing comments on the recommendation to the Director, or in appealing the Director's determination by petitioning the US Tax Court … .[338]

Upon submission of a confidentiality agreement, the Director will provide the whistleblower with a preliminary award report package that contains a report stating the amount of proceeds attributable to the whistleblower information, the recommended award percentage, the amount of the award, and a summary of factors considered in making the specific award percentage.[339] IRM Exhibits 25.2.2-11 illustrates a *Sample Preliminary Award Report.* The whistleblower

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has 30 days from receipt of the preliminary award report package to react in one of three ways:

1. The whistleblower may not take any action within such 30 days, in which case the Director will make a final award determination.[340]
2. The whistleblower many not request a meeting but may submit written comments on the award report, in which case those comments will be added to the claim file and will be considered in making the final award determination.[341]
3. The whistleblower may schedule an appointment to review the documents supporting the recommendation, in which case the WBO will supervise the meeting and the whistleblower is then given 30 days from the meeting to submit a written response that will be considered in making the final award determination.[342] Instructions are provided with the preliminary award report package on scheduling an appointment for the whistleblower and their representative, if there is one. The meeting takes place at the WBO in Washington, D.C. The whistleblower is not permitted to make copies of any documents examined during the meeting.

In the course of the administrative proceedings, taxpayer return information may be disclosed to the whistleblower. Such information will manifest itself in such items as the preliminary award recommendation package, preliminary award report package, and final determination letter package. Notwithstanding the general rule in Code Sec. 6103 imposing confidentiality for return information, an exception is provided in Code Sec. 6103(h)(4) that authorizes disclosures of relevant return information in judicial or administrative proceedings pertaining to tax administration that concerns the treatment of an item on a third party's return. The IRM explains that, pursuant to Code Sec. 6103(h)(4), the WBO has the authority to disclose taxpayer return information within the administrative proceeding because "the administrative proceeding arises out of, or in connection with, the determination of the taxpayer's civil or criminal liability or the collection of such civil liability."[343] The extent of disclosure to the whistleblower will hinge on the relevance of the third-party taxpayer return information to the proceeding for determining the award by the WBO. Information that can be disclosed "comprise facts sufficient for a whistleblower to understand the basis of the WBO's decision on the claim."[344] The Sample Preliminary Award Report and a Sample Determination Letter set forth in the IRM, seem to contemplate disclosure about the type of transaction, industry, dates, amounts, tax positions, audit history and other return information of the third party.[345] Disclosed information can only be used by the whistleblower for the purpose of preparing comments on the recommendation to the Director, or in appealing the Director's determination by petitioning the U.S. Tax Court. The use of disclosed information by the whistleblower for any other purposes may be considered a negative factor in determining the award percentage, and may result in a reduced award percentage to the minimum allowed by law.[346]

The opportunity afforded the whistleblower to comment, offer feedback and review the written record that supports the award enables the whistleblower to argue his case administratively within the IRS before seeking judicial review in Tax Court. In many cases, these steps will reduce the need to seek judicial review in Tax Court. In the administrative review process, the whistleblower has a chance to clarify his position and address any errors found in the record.

The administrative proceedings culminate with the Director making a recommendation of the final award amount that will be forwarded to the Whistleblower Executive Board for concurrence. Upon concurrence, the Director's determination will be communicated to the whistleblower, stating the amount of the award and stating the basis for the determination.[347] IRM Exhibits 25.2.2-12 illustrates a *Sample Determination Letter*. The letter, which is sent *via* certified mail, advises the Whistleblower of the right to seek a Tax Court review within 30 calendar days of the date of the determination. Payment to the Whistleblower will be initiated by the Director when the period for seeking U.S. Tax Court review has lapsed, earlier if the whistleblower notifies the Director that the right to seek review has been waived, or at a later date when the US Tax Court has issued a decision and all further judicial appeals have been waived or exhausted.[348]

In its FY 2010 Annual Report to Congress ("TA Report"), the National Taxpayer Advocate found a shortcoming with the exception that permits disclosure of taxpayer return information to the whistleblower in an administrative or judicial proceeding, and made a recommendation for legislative change.[349] The TA Report points out that a significant loophole exists which allows public disclosure of tax return information that is confidential without the taxpayer's knowledge or consent in a proceedings to which the whistleblower—but not the taxpayer—is a party. Such disclosure says the report is a "significant gap in the taxpayer privacy rules and could subject a taxpayer to unwarranted exposure or potentially attract claims for the purpose of exposure."

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An example in the TA Report drives the point home. The example posits an individual who believes that an acquaintance committed a tax fraud and files a claim reporting this belief. After reviewing the claim, the WBO responds with a letter stating that the information did not lead to a federal tax issue upon which the IRS will take action. The whistleblower disagrees with the finding through an administrative proceeding and then files a petition for review by the U.S. Tax Court. These administrative and judicial proceedings will include a discussion of facts relevant to the whistleblower's claim, including the name, gross income and other return information of the acquaintance. Even though the acquaintance was not a party to the whistleblower's case, if the Tax Court opinion is published, it will disclose return information of the acquaintance.[350]

To better protect taxpayers' privacy, the TA Report made a recommendation that Code Sec. 7623 and other Code provisions be amended to require redaction of third-party return information in whistleblowers administrative or judicial claims, with an opportunity for the noncompliant taxpayer to request further redactions before disclosure. The process would be similar to what is the current practice with private letter rulings. To safeguard against mishandling of return information furnished the whistleblower in the course of reviewing the claim, the TA Report recommends a legislatively established right given the noncompliant taxpayer to bring a civil action against the whistleblower within two years of an unauthorized disclosure of return information obtained in the course of an administrative or judicial proceeding, for an amount not less than $1,000, or actual economic damages, including costs and attorney fees.[351]

Suits Against the United States by the Whistleblower

Prior to top passage of the 2006 Act, the U.S. Tax court was devoid of jurisdiction over any whistleblower claims. Under Code Sec. 7623 as it then existed, there was no right to a Tax Court appeal for discretionary reward claims. Aggrieved informants were left to sue the federal government under the Tucker Act in the U.S. Court of Federal Claims for any amount, and concurrently in district courts for amounts not in excess of $10,000. Litigants were overwhelmingly unsuccessful in their attempts to recover in suits grounded either under Code Sec. 7623 or under a theory that a binding contract was entered into with the IRS governing the award.

As to discretionary awards under prior law, the government had almost unfettered capacity to decide whether to pay a reward and how much to pay. Since the payment of rewards under former Code Sec. 7623 was discretionary with the IRS, suits against the U.S. for monetary claims were denied based on the doctrine of sovereign immunity. The thrust behind the doctrine is that the U.S. is immune from being sued, unless it has consented unequivocally to be sued. The discretionary nature of the former Code Sec. 7623 statute (which is now in Code Sec. 7623(a)), along with implementing regulations, have been found not to imply a waiver of sovereign immunity.[352] Generally, complaints filed were dismissed for lack of jurisdiction over the subject matter or for failure to state a claim upon which relief can be granted. The IRS's discretionary authority to determine whether a reward would be paid and the amount of the reward was viewed as complete. Courts lacked the authority to order payment of an award, even in cases where taxes were recovered based on information provided by the whistleblower. For example, in *D.P. Destefano,*[353] the court held that an IRS decision to deny a reward, even if not reasonable, is not reviewable. The code and regulations, the court explained, gave the IRS discretion to determine whether payment of a reward is appropriate and therefore there was no substantive right to money damages that would then confer review jurisdiction on the court. In *Confidential Informant* the court held that it lacked jurisdiction to review IRS's exercise of discretion to grant rewards.[354] In *G.C. Krug,*[355] the court held that the IRS was not required to pay any award, absent a contract, even where the information provided by the whistleblower led to the collection of taxes.[356]

Whistleblower would attempt to appeal award determination to the Court of Federal Claims, asserting that the IRS had entered into a contract, written or implied, with the whistleblower, and the contract was in dispute. Absent negotiations leading to a formal contract, attempts by whistleblowers to find a contractual right in the statute or IRS published guidance as a basis for enforcing rewards did not meet with much success. Several court cases have ruled that IRS Publication 733, which provides for making rewards, does not constitute an offer to enter into an implied-in-fact contract and further reiterated that the decision to grant rewards is discretionary with the IRS.[357] One court noted that Code Sec. 7623 "neither explicitly nor implicitly creates a contract with an individual nor does it create an offer to enter into an implied-

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in-fact contract."[358] This view was further bolstered by regulations that applied to former Code Sec. 7623 discretionary rewards. The regulations stated that "[n]o person is authorized under this section to make any offer, or promise, or otherwise to bind a district or service center director with respect to the payment of any reward or the amount of the reward."[359] Contracts with the IRS are no longer necessary with respect to Code Sec. 7623(b) mandatory awards. With the enactment of 2006 changes, the Code now specifically provides that with respect to the Code Sec. 7623(b) mandatory awards, "[n]o contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection."[360]

Tax Court Review

Under the 2006 Act, and for the first time, whistleblowers have the right to a judicial appeal to the U.S. Tax Court of a Code Sec. 7623(b) award determination.[361] The jurisdiction of the Tax Court over Code Sec. 7623(b) appeal matters is exclusive.[362] Prior to the 2006 Act, cases involving discretionary rewards were generally filed with the U.S. Court of Federal Claims. Following the 2006 Act, informants may appeal with the Tax Court the amount awarded or a denial of an award determination made under Code Sec. 7623(b)(1), (2), or (3).[363]

In a tax court case of first impression, *W.P. Cooper III* (*Cooper I*),[364] a taxpayer appealed an IRS rejection of his whistleblower claim. The IRS argued that since there was no award determination made, the taxpayer did not have the right to appeal. The Tax Court rejected the government's argument and held that its jurisdiction extends not only to reviewing awards made, but also to reviewing denial of awards. The Tax Court stated, "[t]he statute expressly permits an individual to seek judicial review in this Court of the amount or denial of an award determination."[365] It should be noted, however, that the Tax Court's has no jurisdiction to review IRS's decision whether or not to pursue administrative or judicial action against the taxpayer.[366]

In a follow up related case, *Cooper* (*Cooper II*),[367] the Tax Court held that if IRS denies an award because no tax, interest, or penalty was collected from the taxpayer based on the whistleblower's information, the decision denying an award is not reviewable by the Tax Court. Once jurisdiction was found to exit in *Cooper I*, the whistleblower followed up requesting the Tax Court to undertake a complete re-evaluation of the facts and take whatever steps needed to detect underpayment of tax, including compelling the IRS to do so. In *Cooper II*, the Tax Court held that its jurisdiction in whistleblower cases is limited and does not include opening an administrative or judicial action to re-determine the tax liability. The tax court further noted that it is without jurisdiction, as Congress did not authorize it, to compel the IRS to proceed with an administrative or judicial action. The Tax Court held that taxpayer failed to meet the threshold requirements for a whistleblower award, which is predicated on both the initiation of an administrative or judicial action based on information provided by the whistleblower and collection of proceeds. If the IRS does not proceed with an administrative or judicial action against the taxpayer, and if there are no proceeds collected, said the court, there cannot be a whistleblower award. One commentator observed as to the two *Cooper* cases, "In Cooper I, the Tax Court said it has the authority to review the IRS's decision not to pursue a whistleblower claim only to declare in *Cooper II* that the court itself cannot pursue the targeted taxpayer nor can it order the IRS to do so."[368] As of June 21, the GAO 2011 Report noted, the Tax Court had not issued any decision that discuss the merits of IRS's whistleblower award determination where amounts were collected from the taxpayer.[369]

Once the WBO has made a final determination regarding the claim, it will send a correspondence to the informant in writing *via* certified mail regarding its final award determination.[370] To be timely, appeal with the Tax Court must be filed within 30 days of the final award determination. The IRS does not have the authority to extend the period for filing an appeal.[371] When multiple letters are issued by the WBO, it is the first letter that conveys a final administrative decision regarding the whistleblower claim which constitutes a determination that starts the running of the 30-day period to appeal.[372]

Tax Court review of an award may be assigned to special trial judges.[373] If the special trial judge is authorized by the court (Chief Judge) to make a decision, that decision of the special trial judge is considered a decision of the Tax Court.[374] The newly added Tax Court appeal provision in Code Sec. 7623(b)(4) applies only to Code Sec. 7623(b) award claims. A right of appeal to the Tax Court has not been extended to, and does not apply to, discretionary awards made pursuant to Code Sec. 7623(a).[375] For a judicial review of discretionary awards, the whistleblower's only recourse is to file suit against

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the Federal government in the U.S. Court of Federal Claims claiming existence of a contract to pay an award, which was discussed above.

Tax Court Rules of Practice and Procedure

As a result of the newly enacted Tax Court appeal right from a Code Sec. 7623(b) award decision, the U.S. Tax Court in June 2008 proposed amending its Rules of Practice and Procedure regarding whistleblower actions. Final rules were adopted on October 3, 2008, applicable to whistleblower actions in which the information that led to an IRS determination was provided by the informant on or after December 20, 2006 (date the new law conferring Tax Court jurisdiction became effective).[376] The Tax Court adopted a new title, Title XXXIII, containing Rules 340-344 to provide procedures for commencing a whistleblower action. The title was added in response to the Tax Court's expanded jurisdiction under the 2006 Act to review appeals from IRS determinations regarding Code Sec. 7623(b) awards. For the most part, Title XXXIII follows the general procedures for deficiency and other types of action before the Tax Court.[377] Tax Court Rules 340–44 relate to matters such as filing instructions, pleading requirements and place of trial.

To start the judicial appeal process, an informant files a Tax Court petition entitled "Petition for Whistleblower Award Action under Code Section 7623(b)(4)," which must contain the information prescribed in the Tax Court Rules.[378] There is a $60 fee to file the petition. When filing the petition, the petitioner must request a place of trial pursuant to Tax Court Rule 140. Under Tax Court rule 36, the IRS has to respond with an answer within 60 days from the date the petition was served.[379] Conforming amendments were made to several other Tax Court rules and forms to make references to whistleblower actions. For example, since Code Sec. 7443A(b)(6) provide that the chief judge of the Tax Court may assign Special Trial Judges to hear and report on appeal proceedings under Code Sec. 7623(b)(4). Code Sec. 7443A(c), as amended by P.L. 109-432, authorized Special Trial Judges to actually make decisions in the case. Tax Court Rule 182, applicable to cases presided by Special Trial Judges was amended to make references to whistleblower actions.[380] Similar types of conforming amendments were made to Tax Court Rule 34, Petitions, and to Tax Court Rule 13, Jurisdiction.

Privacy Protection Afforded a Whistleblower in a Tax Court Action

Under Code Sec. 7458, Tax Court hearings are open to the public. Similarly, under Code Sec. 7461(a), all reports of the Tax Court and all evidence received by the Tax Court are public records open to the public for inspection. However, pursuant to Code Sec. 7461(b)(1), "[t]he Tax Court may make any provision which is necessary to prevent the disclosure of trade secrets or other confidential information, including a provision that any document or information be placed under seal to be opened only as directed by the court." The Tax Court has procedures in place to protect confidential information. To prevent or restrict disclosure of trade secrets or other confidential information, the Tax Court may, pursuant to Rule 103(a), upon motion of a party or any other person and for good cause shown, issue protective orders.[381] The explanation to Tax Rules changes adopted in 2008, relating to whistleblower actions, state that in appropriate cases, the Tax Court may allow a petitioner to proceed anonymously and seal the record in that case.[382]

In a reviewed Tax Court case issued in December 2011, *Whistleblower 14106-10W,*[383] the court was confronted for the first time, in the context of a tax whistleblower suit, with "novel issues of balancing the public's interests in open court proceedings against petitioner's privacy interests as a confidential informant." The whistleblower requested to seal the record or alternatively to proceed anonymously. The court engaged in an extensive analysis of case law providing judicial anonymity and held that the whistleblower in this case would be permitted to proceed anonymously. Sealing the record was rejected by the court in favor of the preferred and less drastic option of allowing the whistleblower to proceed anonymously by redaction of all identifying information about the whistleblower and the taxpayer named in the claim.[384] This option, the court reasoned, adequately protects the whistleblower's legitimate privacy interest as a confidential informant and also preserves the public's ability to follow the legal proceedings in the case. In the court's view, the whistleblower identity as a confidential informant is entitled to protection upon a sufficient showing of harm that would outweigh the public's interest in having his identity disclosed. The whistleblower in this case was able to make out a sufficient showing of susceptibility to professional harm, economic duress, and retaliation that could jeopardize current and fu-

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ture employment. On balance, these outweighed the public's interest in having his identity disclosed. In a footnote, the court cautioned that the balancing test has to be applied to each request to proceed anonymously, such that each case "must stand on its own." Anonymity would or should not necessarily result in all tax whistleblowers, said the court.[385]

On December 28, 2011, the Tax court announced proposed amendments to its Rules or Practice and Procedure, including the adoption of a new rule, TCR 345, which would formalize existing procedure by which a whistleblower could request permission to proceed anonymously.[386] Proposed Tax Court Rule 345(a)[387] provides:

> (a) Anonymous Petitioner: A petitioner in a whistleblower action may move the Court for permission to proceed anonymously, if appropriate. Unless otherwise permitted by the Court, a petitioner seeking to proceed anonymously pursuant to this Rule shall file with the petition a motion, with or without supporting affidavits or declarations, setting forth a sufficient, fact specific basis for anonymity. The petition and all other filings shall be temporarily sealed pending a ruling by the Court on the motion to proceed anonymously.

Privacy Protection Afforded the Nonparty Taxpayer in a Whistleblower Tax Court Action

In separate letters sent to the Tax Court in March 2011, the IRS Associate Chief Counsel and the National Taxpayer Advocate raised concerns about the privacy protections for nonparty information in whistleblower cases. It was pointed out that the IRS does not disclose taxpayer information in a determination notice issued pursuant to Code Sec. 7623. Nonetheless, whistleblowers are prone to disclose nonparty taxpayer information in their tax court petition. Since a taxpayer in a whistleblower case is not a party to the case, the taxpayer has no control over what information is presented or included in the case. For example, it was observed in one of the letters that in *Cooper I*, the court published the name, the amount of the alleged underpayment, and other identifying information of the taxpayer to whom the whistleblower claim related. The taxpayer was neither a party to the case nor subject to any deficiency determined by the IRS. The Tax Court was requested in these letters to consider amending its rules to provide for appropriate redaction of nonparty taxpayers' identifying information.

Proposed Tax Court Rule 345(b) was issued in December 28, 2011, to require that the party who is making a filing with the Tax Court in a whistleblower action, whether in electronic or paper form, either refrain from using, or redact, certain identifying information of the taxpayer subject of the whistleblower claim. Specifically, proposed TCR 345(b)[388] provides:

> (b) Redacted Filings: Except as otherwise directed by the Court, in an electronic or paper filing with the Court in a whistleblower action, a party or nonparty making the filing shall refrain from including, or shall take appropriate steps to redact, the name, address, and other identifying information of the taxpayer to whom the claim relates. The party or nonparty filing a document that contains redacted information shall file under seal a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list may be amended as a matter of right. Subsequent references in the case to a listed identifier will be construed to refer to the corresponding item of information. The Court in its discretion may later unseal the reference list, in whole or in part, if appropriate.

Explaining the policy consideration for adopting the proposed rule, the Tax Court noted that "protecting a nonparty taxpayer's identity is justified in furtherance of protecting the nonparty taxpayer's tax return information, trade secrets, and other confidential information, which the Court is clearly authorized to protect under section 7461(b)(1). *Anonymous v. Commissioner*, 127 T.C. 89 (2006)." Not all taxpayer information is redacted. The explanatory comments state that since the taxpayer is not a party to the case, and might not even know about the case, "it may be impracticable for the Court adequately to police the redaction of all confidential information about the nonparty taxpayer that might warrant protection." By concealing some identifying information, such as the nonparty taxpayer's name and address, at least early on in the litigation, "the consequences of inadvertent disclosure of such information are greatly mitigated, since the information could not be readily linked to the nonparty taxpayer." But, it is also possible, the comments note, that "at some point in the litigation, if for instance the Court

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decided that the whistleblower was entitled to a large award, the Court might conclude that the public's interest in knowing the nonparty taxpayer's identity was sufficiently great that the nonparty taxpayer's name should no longer be protected." The court could unseal redacted information in whole or in part, after it determines whether the identity of the nonparty taxpayer should remain protected. It is contemplated by the comments that the trial judge would have discretion to direct that prior notice be provided to the nonparty taxpayer, the need and type of notice to be decided on a case-by-case basis. The proposed rules would not require that notice be given to the nonparty taxpayer of the beginning of the case, nor would the rule provide a formal means for intervention.[389]

Tax Treatment of Awards and Costs

Awards received by whistleblowers are includible in gross income and are subject to the normal tax reporting and withholding requirements.[390] Recipients of awards receive Form 1099 or such other forms as may be prescribed.[391] It is presently IRS policy to withhold 28 percent in tax from whistleblower payments; for nonresident aliens, awards may be subject to different withholding rates.[392]

Although there is no specific statutory authority to withhold on whistleblower awards, in Program Manager Technical Assistance 2010-63, the Office of Chief Counsel legal memorandum to the IRS Whistleblower Office concluded that it has the authority and may withhold potential income tax on whistleblower awards under Code Sec. 7623(b) and can to do so at the highest individual income tax rates.[393] Under the prior Code Sec. 7623(a) program, the IRS issued Forms 1099 to recipients but did not withhold on awards paid.[394] In a follow up Program Manager Technical Assistance 2011-001, the Office of Chief Counsel concluded that it is just as permissible to withhold on 7623(a) awards as it previously concluded in PMTA 2010-63 is permissible on Code Sec. 7623(b) awards, and further, that a *de minimis* exception to administrative withholding, such as a $10,000 payment threshold, is legally supportable.[395]

In Program Manager Technical Assistance 2011-02, the IRS concluded that an award paid to nonresident alien individuals under Code Sec. 7623 is characterized as compensation for services. The source of the award payment is to be determined based on the facts and circumstances under Code Secs. 861(a)(3), 862(a)(3) and 863, and Reg. §1.861-4, all of which relate to compensation of services. The payment will be characterized as U.S. source income to the extent of the portion attributable to activities of the nonresident alien whistleblower undertaken in the United States in order to provide information. Taxes must be withheld under Code Sec. 1441 on the portion that is U.S. source, unless specifically exempted by treaty.[396]

Code Sec. 7623 provides only for the making of awards. It does not provide for reimbursements by the IRS to the informant of any costs incurred by the informant. Code Sec. 62 has been amended, however, to allow individuals an above-the-line deduction for attorney fees and court costs incurred by, or on behalf of, the informant in connection with the whistleblower awards paid under Code Sec. 7623(b) (*e.g.,* to recover the award or to appeal an award determination).[397] A deduction is therefore available even if one does not itemize. As an above-the-line deduction, it escapes the two-percent-of-AGI floor on miscellaneous itemized deductions; it isn't subject to the overall limitation on itemized deductions; and, it is fully allowed for AMT purposes. The amount that may be deducted above-the-line is limited. It cannot exceed the amount that is includible in the taxpayer's gross income for the tax year on account of such award (whether received as a result of a suit or agreement and whether received as lump-sum or periodic payments).[398] Any deductible amount in excess of the above-the-line deduction may be taken as an itemized deduction subject to the constraints mentioned above.

Prior to authorizing the release of an award check, the IRS is directed to research the whistleblower's account to make certain returns have been filed and the taxes liabilities are satisfied. Award payment may be applied as an offset against any unpaid balance of taxes due from the whistleblower.[399]

Contingent Fees Arrangements

Subject to certain specified exceptions, Circular 230 prohibits practitioners, as defined hereunder, from charging contingent fee for services rendered in connection with any matter before the IRS.[400] Responding to comments that sought clarification after the final regulations on contingent fees were published in September 2007 and the changes that were made to Code Sec. 7623 in 2006, the Treasury and the IRS issued Notice 2008-43 to provide information and interim guidance.[401] Among other areas covered, the interim guidance made clear that Section 10.27 of 31 USC §330 (Circular 230), relating to contingent fees, permits practitioners to charge contingent fees with respect to services rendered in connection with whistleblower

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claims under Code Sec. 7623. As such, informants can avail themselves of contingent fee arrangements in retaining attorneys and CPAs to represent them. The interim guidance in Notice 2008-43 is applicable to fee arrangements entered into after March 26, 2008, and will remain valid until proposed regulations are finalized. On July 28, 2009, the Treasury and the IRS followed through, by issuing proposed regulations on Section 10.27 of Circular 230 consistent with the guidance provided in Notice 2008-43.[402] The proposed regulation will become effective on the date that final regulations are published in the Federal Register. Until then, one can continue to rely on the guidance given in Notice 2008-43.

Accountability and Progress Reports

The 2006 Act legislated some measure of accountability for the Whistleblower program by requiring the Secretary of the Treasury to annually conduct a study and report to Congress on Code Sec. 7623. It has to encompass the activities and outcomes of both discretionary and mandatory portions of the whistleblower programs. The report to Congress has to address matters such as use of the program in the preceding year, results obtained, and payment of awards. The report also has to report on the effectiveness of the program including any legislative or administrative recommendations on how to improve the program.[403]

Since inception of the new Whistleblower program there have been four annual WBO reports to Congress, all of which are posted on the IRS website.[404] The latest report, the fourth, was submitted to Congress on July 20, 2011. Table 2 shows the amounts collected and awards paid under Code Sec. 7623(a) for FY 2005-2010.[405]

Commenting on the number of cases received, the report points out that it is not possible for the WBO to tell how many of the cases will result in collected proceeds, and whether the whistleblowers' estimates of the amounts alleged in dispute (potential recovery) are accurate. In FY 2010, $465 million in amounts were collected by the IRS, compared with $206 in FY 2009.

As of the fourth WBO Annual Report to Congress FY 2010 issued in July 2011, no awards were made under the new Code Sec. 7623(b) framework, which was instituted in December 2006. The report noted that it takes several years from the time that a claim is submitted to the time payment is made. All award payments made during the fiscal year 2010 and all prior years resulted from claims filed under and governed by prior law, what is now Code Sec. 7623(a). The applicable award percentages reflect prior IRS policy, not the higher percentages set by the 2006 Act. According to the GAO 2011 Report, as of May 12, 2011, IRS has paid a small number of awards under the Code Sec. 7623(b). The IRS does not disclose information on these awards paid as it treats this information private and protected from disclosure under 6103.[406]

The report points out that the amounts paid out from year to year vary significantly, especially when a small number of high-dollar claims are resolved in any one year. The report also highlights a likely reason for the lower payout in FY 2009 when compared to FY 2008, which was a change in policy as to when proceeds will be made available to make award payments. Beginning in FY 2009, the IRS no longer makes payments on claims until the expiration of the period for filing a refund claim by the taxpayer, unless that right is waived, which period ends two years after the last payment was made by the taxpayer. Some claims that under prior policy would have been paid in FY 2009 when collected will not be paid until in FY 2010 or in FY 2011. Because whistleblowers submitted all of the claims that were paid in FY 2010 under the prior Code Sec. 7623 discretionary framework, the data is not helpful in making any estimates about the claims brought under the revised statute.[407]

Table 2.
Amounts Collected and Awards Paid under Code Sec. 7623(a) FY 2005-2010

	2006	2007	2008	2009	2010
Cases Received	4,295	2,751	3,704	5,678	7,577
Awards Paid	220	227	198	110	7
Collections over $2 million	NA	12	8	5	9
Amount of Awards Paid	$24,184,458	$13,600,205	$22,370,756	$5,851,608	$18,746,327
Amounts Collected	$258,590,435	$181,784,287	$155,985,834	$206,032,872	$464,695,459

IRM, Internet, Mailbox and Intranet

IRM Chapter 25.2, *Information and Whistleblower Awards,* outlines procedures and guidance for ser-

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vice personnel to abide by when processing award claims. The manual states that the procedures for processing claims must be "strictly adhered to" and that "[a]ny deviation from this IRM must be approved by the Headquarters Office."[408] In December 2008, the IRS completed a review of the IRM provisions relating to Code Sec. 7623, and to reflect the 2006 changes in law, published revisions to IRM, 25.2.2.[409] In general, these revisions updated references in the prior IRM to reflect the 2006 legislation, and provided procedures for intake and initial evaluation of whistleblower submissions.[410] Comprehensive revisions to IRM Chapter 25.2.2 were again made in June 2010 to provide additional procedures and guidance for IRS personnel in areas such the whistleblower administrative proceeding, IRS authority to disclose information to whistleblowers in connection with pending award claims, award determination criteria, and the extent to which administrative procedures applicable to Code Sec. 7623(b) claims should apply to Code Sec. 7623(a) cases.[411]

As part of its outreach efforts, the IRS has a dedicated page on the IRS public website devoted to the whistleblower program. The site has a great deal of useful information and links (to access the site, type "whistle" in the search box of the IRS.gov website). Among the items posted, there is a description of the law, information about the purpose of the Whistleblower program, direction on how to make a submission, links to Notice 2008-4 and Form 211, and other information about what a whistleblower should expect when making a submission.[412] To facilitate communication and provide further help, those who have additional questions can e-mail inquiries to an IRS electronic mailbox at *WO@IRS.gov*.[413] Internally, and not for the public, there are pages on the IRS Intranet to make information available for IRS personnel.

Conclusion

The future for tax whistleblowing appears to shines bright—bright for everyone except for noncompliant taxpayers. They will increasingly find themselves on the receiving end, subjected to being flagged out by whistleblowers. As claims submitted under the new law work their way through the system, it can be expected that a greater volume of tax underpayments will be asserted, resulting in more awards and greater amounts of awards being doled out. The program has evolved a great deal, and will likely continue to do so in the coming years. Much guidance has been issued since the early days when the new law was enacted, and more can be expected as the program matures. For example, public hearings were held in April 2011 on proposed regulations that would clarify the definition of "collected proceeds." The IRS 2011-2012 Priority Guidance Plan, issued on October 31, 2011, has listed as a priority the issuance of regulations under Code Sec. 7623 regarding whistleblower awards and the operation of the Whistleblower Office.[414] These are expected to be comprehensive regulations that will reflect changes made to Code Sec. 7623 by the 2006 Act.[415]

The IRS continues to develop and revise operating procedures to ensure the proper review of submissions. In 2010, the relevant portions of IRM underwent extensive changes and updating to reflect new procedures for handling whistleblower claims. The Tax Court is busy deciphering various aspects of the new law as new cases are issued. As in any newly developing area of law, it will take some time for certain aspects of the new law to develop and settle.

There is movement afoot in other areas of the law towards greater utilization of whistleblowers to flush out and bring wrongdoings to the forefront. The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted in July 2010, authorize the SEC to pay rewards to individuals who provide the SEC with information about violations of the federal securities laws. States are also on the move. In August 2010, New York State was the first state to specifically expand the reach of the state False Claims Act to cover tax fraud which can now be prosecuted in the form of *qui tam* actions.[416] As the IRS and the Treasury gain more experience and comfort level with the whistleblower program, as the program matures, and in light of large looming deficits, it is possible that the reach of the program will further be expanded by lowering the thresholds for submitting claims and perhaps even expanding the program to include *qui tam* actions modeled after a statute such as the New York State False Claims Act.

ENDNOTES

1 Unless otherwise indicated, all Section references are to the Internal Revenue Code of 1986, as amended, and the regulations promulgated thereunder.
The RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED (2ND ED. 1987, at 2167.

2 *See, e.g., Winters v. Houston Chronicle Pub. Co.*, 795 S.W.2d 723, 727 (Tex. 1990) (Doggett, J., concurring).

3 Conversations: Stephen Whitlock, Jeremiah Coder, 116 TAX NOTES 98, 99 (July 9, 2007).

4 IRS, Whistleblower Office, Annual Report to Congress on the Use of Section 7623, at 1 (hereinafter Third WBO Annual Report to Congress FY 2009), *available at www.irs.gov/pub/irs-utl/whistleblowerfy09rtc.pdf.*

5 ABA Section of Taxation Newsquarterly, Point to remember, Stephen Mazza, *Not Just Whistling in the Dark: Recent Guidance*

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on Whistleblower Awards, Winter 2009, at 10–11 (hereinafter ABA Section of Taxation Newsquarterly). *See* An Act to Amend Existing Laws Relating to Internal Revenue, and for other Purposes, ch. 169, §7, 14 Stat. 471, 473 (1867).

[6] IRS, Whistleblower Office, Annual Report to Congress on the Use of Section 7623, at 4 (hereinafter Fourth WBO Annual Report to Congress FY 2010), *available at www.irs.gov/pub/whistleblower/annual_report_to_congress_fy_2010.pdf*.

[7] Section 1209 of TBOR 2 (P.L. 104-168), 110 Stat. 1452, 1473 (1996).

[8] Third WBO Annual Report to Congress FY 2009, *supra* note 4, at 2.

[9] Robert E. McKenzie, *New Law Raises the Financial Incentive for Turning in Tax Cheats,* PRACTICAL TAX STRATEGIES, July 2007, at 40–42 (hereinafter Robert E. McKenzie).

[10] IR News Release 2007-201 (Dec 19, 2007), *available at www.irs.gov/newsroom/article/0,,id=176632,00.html*.

[11] Third WBO Annual Report to Congress FY 2009, *supra* note 4, at 3.

[12] 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, at 1, and Table 3, at 8 (August 2011) (hereinafter GAO 2011 Report), *available at www.gao.gov/new.items/d11683.pdf*. The study focused on case processing for tax whistleblower claims made under Code Sec. 7623(b). It concluded that "[t]he IRS's handling of the tax whistleblower program suffers from a lack of complete data and a failure to adequately communicate with whistleblowers, leading to lengthy case processing times and reducing the appeal of the program." Coder, *GAO Faults IRS Whistleblower Program for Award Delays,* 2011 TNT 176-3, 1 (Sept. 12, 2011).

[13] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, Table 2 at 16. *See infra* note 405 for accompanying table.

[14] *Id.*

[15] *Id.,* at 11.

[16] Coder*, IRS Pays First Enhanced Whistleblower Award,* 2011 TNT 69-4 (Apr. 11, 2011). The IRS does not publicly report or comment on specific whistleblower awards. Such information is considered to be tax information subject to Code Sec. 6103 nondisclosure. Aggregate award information will be reported only once the WBO has paid a sufficient number of awards to avoid improper disclosure. GAO 2011 Report, *supra* note 12, at 17.

[17] *Grassley Urges Changes to IRS Whistleblower Program,* 2011 TNT 178-51 (Sept. 13, 2011).

[18] Gregory Lynam of the Ferraro Law Firm said his firm has completed more than $40 billion in submitted claims under the Code Sec. 7623(b) whistle-blowing program. *See* Jeremiah Coder, *Tax Whistle-Blowing: Many Cases, Few Results,* 125 TAX NOTES 186 (Oct. 12, 2009).

[19] *Firm's Comments Address Proposed Regs on Payment of Whistleblower Rewards,* 2011 TNT 77-17 (Apr. 18, 2011).

[20] *See, e.g.,* Kevin E. Packman, *IRS Initiatives Make 'Hidden Income' Harder to Keep Secret*, ESTATE PLANNING J., May 2011, at 14 (WG&L).

[21] *See* Robert E. McKenzie, *supra* note 9, at 41.

[22] Sapirie, *WikiLeaks Announcement Points to Importance of Whistleblowers in Tax Enforcement,* 2011 TNT 12-1 (Jan. 19, 2011).

[23] Notice 2008-4, IRB 2008-2, 253 (Jan. 14, 2008) (hereinafter Notice 2008-4), *available at www.irs.gov/pub/irs-irbs/irb08-02.pdf.*

[24] Increase to $10 million implemented by IRS Policy Statement 4-27. *See* IRM 1.2.13.1.12 (approved Aug. 13, 2004), *available at www.irs.gov/irm/part1/irm_01-002-013.html.*

[25] *See* Treasury Inspector General for Tax Administration, *The Informants' Rewards Program Needs More Centralized Management Oversight*, Dept. of the Treasury Reference Number 2006-30-092, at 1 (June 6, 2006) (hereinafter TIGTA 2006 Report), *available at www.ustreas.gov/tigta/auditreports/2006reports/200630092fr.pdf*. According to a TIGTA 2009 report, "Prior to December 2006, awards paid were between 8 and 14 percent of the taxes, fines, and penalties collected during Fiscal Years 2001 to 2005. The percentage was based on the connection of the informant's information to the recovery. From Fiscal Years 2001 through 2005, more than $340 million in taxes, fines, penalties, and interest were recovered based on information obtained through the Informant Rewards Program. Awards of more than $27 million were paid to informants."

[26] *See, e.g., D.P. Destefano*, FedCl, 2002-1 USTC ¶50,316, 52 FedCl 291 (2002).

[27] IRS website, History of the Whilstleblower/Informant Program, *www.irs.gov/compliance/article/0,,id=181294,00.html* (last updated April 21, 2008).

[28] Robert E. McKenzie, *supra* note 9, at 40.

[29] *Grassley Urges Changes to IRS Whistleblower Program,* 2011 TNT 178-51 (Sept. 13, 2011).

[30] *W.P. Cooper III*, 135 TC 70, Dec. 58,265 (2010).

[31] Suing for payment would be "virtually certain to fail, most likely on sovereign immunity grounds." Hochman, Popoff, Perez, Rettig and Toscher, 636-2nd T.M., *Tax Crimes,* III.B.2, and notes 486 and 487. It was uniformly held that the government discretion to make rewards was simply not reviewable. IRS website, History of the Whilstleblower/Informant Program, *www.irs.gov/compliance/article/0,,id=181294,00.html* (last updated April 21, 2008).

[32] TIGTA 2006 Report, *supra* note 25, at 6.

[33] According to one commentator, overall, due to perceived shortcomings with the program, such as a cap on reward, discretion of IRS to make the rewards, lack of ability to challenge rewards in Tax Court whether granted or not, and lack of promotion and visibility of the program, the impact of the program was seen as limited. Paul D. Scott, *Whistleblowers Wanted,* 203 J. ACCOUNTANCY 86 (May 2007), *available at www.journalofaccountancy.com/Issues/2007/May/WhistleblowersWanted.htm.*

[34] *See, e.g.,* Robert E. McKenzie, *supra* note 9, at 42.

[35] IRS, Whistleblower Office, Annual Report to Congress on the Use of Section 7623, at 1 (hereinafter First WBO Annual Report to Congress FY 2007), *available at www.irs.gov/pub/whistleblower/whistleblower_annual_report.pdf.*

[36] Treasury Inspector General for Tax Administration, *Deficiencies Exist in the Control and Timely Resolution of Whistleblower Claims*, Dept. of the Treasury Reference Number 2009-30-114, at 2 (Aug. 20, 2009) (hereinafter TIGTA 2009 Report), *available at www.ustreas.gov/tigta/auditreports/2009reports/200930114fr.pdf.*

[37] TIGTA 2006 Report, *supra* note 25, at Synopsis.

[38] *See, e.g.,* Section of Taxation Newsquarterly, *supra* note 5, at 10–11. *See also* IRM 25.2.1.1 (2): Overview: Authority and Policy (Dec. 23, 2008). All citations in this article to the current version of the IRM can be found online on the IRS website at *www.irs.gov/irm/index.html.*

[39] Since its amendment in 1986, including increasing the award percentage to 25–30 percent for *qui tam* suits (previously 10–25 percent), the Department of Justice reports that fraud recoveries under the FCA have risen "exponentially," from less than $100 million in 1987, to over $3 billion in 2006, with over $20 billion in total. Barbara A. Ruth, *New Whistleblower Program May Prompt Informants to Come Forward,* THE LEGAL INTELLIGENCER, July 1, 2008. The latest figure is at $27 billion, cited in a September 9, 2011, memo by Senator Chuck Grassley. *Grassley Lauds GAO Tax Whistleblower Report,* 2011 TNT 176-60 (Sept. 9, 2011).

[40] Tax Relief and Health Care Act of 2006 (P.L. 109-432), div A, title IV, §406, 120 Stat. 2922, 2958 (Dec. 20, 2006) (hereinafter Tax Relief and Health Care Act of 2006), *available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ432.pdf.*

[41] Code Sec. 7623(a).

[42] Code Sec. 7623(a) and Reg. §301.7623-1(a)

[43] M. Saltzman, IRS PRACTICE AND PROCEDURE (Warren, Gorham and Lamont rev. 2d ed. 2010), at ¶12.03[3][a] (hereinafter M. Saltzman). The regulations issued under the prior law also reflected the "or" and not the "and" formulation. Reg. §301.7623-1(a).

[44] Prior to amendment in 1996, Code Sec. 7623 read as follows: "The Secretary, under

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regulations prescribed by the Secretary, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefore, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law." Code Sec. 7623 (2005).

[45] Section 1209 of TBOR 2 (P.L. 104-168), 110 Stat. 1452 (1996) amended Code Sec. 7623 to clarify that rewards may be paid for information relating to civil, as well as criminal, violations.

[46] House Committee Report on P.L. 104-168 (Taxpayer Bill of Rights 2) (1996).

[47] Notice 2008-4, *supra* note 23, at §3.12. IRM 25.2.2.9 (June 18, 2010) states that "[c] laims will be considered under the law and policies in place at the time the information was submitted …"). Supplemental information provided on or after December 20, 2006, will not be considered a new claim unless its receipt prompts the IRS to take an administrative or judicial action that would not otherwise have been taken on the basis of the earlier-supplied information alone. *Id.* Resubmission of information already in the possession of the IRS prior to the date of enactment does not qualify under Code Sec. 7623(b). IRM 25.2.2.2(1): General (June 18, 2010).

[48] IRM 25.2.2.2 (1): General (June 18, 2010) and IRM 25.2.2.9: Award Computation (June 18, 2010)

[49] Notice 2008-4, *supra* note 23, at §3.07.

[50] Code Sec. 7623(b)(1).

[51] Code Sec. 7623(b)(2)(A).

[52] Increase to $10 million implemented by IRS Policy Statement 4-27. *See* IRM 1.2.13.1.12 (Aug. 13, 2004).

[53] TIGTA 2006 Report, *supra* note 25, at 1.

[54] Code Sec. 7623(b)

[55] Notice 2008-4, *supra* note 23.

[56] Code Sec. 7623(b)(1). IRM 25.2.2.9.2(1) (June 18, 2010) states, "[T]he Whistleblower Office determines that the information submitted by the whistleblower substantially contributed to the IRS' detection and recovery of taxes, penalties, interest, additions to tax, and additional amounts."

[57] Notice 2008-4, *supra* note 23, at §3.07. *See also* What Happens to a Claim for an Informant Award (Whistleblower), *www.irs.gov/compliance/article/0,,id=181290,00.html* (last updated April 21, 2008).

[58] IRM 25.2.2.2.5 (June 18, 2010).

[59] Code Sec. 7623(b)(1). IRM 25.2.2.9.2(1) (June 18, 2010) states, "The amount of any award under Section 7623(b) (1) depends on the extent of the whistleblower's substantial contribution to the action."

[60] IRM 25.2.2.2.6 (June 18, 2010).

[61] Code Sec. 7623(b)(1).

[62] Code Sec. 7623(b)(1).

[63] Code Sec. 7623(b)(2)(A). *See also* IRM 25.2.2.9.2(6) (June 18, 2010), and IRM 25.2.2.2.3 (June 18, 2010).

[64] *Id.*

[65] *Id.*

[66] IRM 25.2.2.9.2 (8) (June 18, 2010).

[67] IRM 25.2.2.9.2 (9) (June 18, 2010).

[68] *Id.*

[69] Code Sec. 7623(b)(2)(B). *See id. See also* Notice 2008-4, *supra* note 23.

[70] IRM 25.2.2.9.2 (7) (June 18, 2010)

[71] *Id.*

[72] Coder, *Practitioners Disagree Over Effect of UTP Reporting on Whistleblower Claims,* 2010 TNT 117-1 (Sept. 2, 2010); *Law Firm Analyzes Unrecognized Tax Benefit Reserves Among Fortune 500,* 2010 TNT 170-36 (undated) (*Ferraro 500—Uncertain Tax Positions"*).

[73] *Id.*

[74] Code Sec. 7623(b)(3).

[75] IRM 25.2.2.9.1: Award Computation—Section 7623(a) Claims filed before July 1, 2010 (June 18, 2010).

[76] IRM 25.2.2.9.2: Award Computation—Section 7623(a) claims filed on or after July 1, 2010 and Section 7623(b) claims (June 18, 2010).

[77] *Id.*

[78] *See also* IRM 25.2.2.2 (4): General (June 18, 2010).

[79] IRM 25.2.2.9.2(13): Award Computation—Section 7623(a) claims filed on or after July 1, 2010 and Section 7623(b) claims (June 18, 2010)

[80] *Id.,* at (13)(A).

[81] *Id.,* at (13)(B).

[82] *Id.,* at (13)(C).

[83] *Id.,* at (13)(D).

[84] Code Sec. 7623(b)(3). *See also* IRM 25.2.2.2.4 (June 18, 2010). ("If the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the action, the Whistleblower Office shall deny any award.")

[85] IRM 25.2.2.9.2 (14): Award Computation—Section 7623(a) claims filed on or after July 1, 2010 and Section 7623(b) claims (June 18, 2010).

[86] Section of Taxation Newsquarterly, *supra* note 5, at 10–11.

[87] Code Sec. 7623(b)(5).

[88] Code Sec. 7623(b)(5). *See also* IRM 25.2.2.2.5 (June 18, 2010).

[89] *See generally* IRS website, What Happens to a Claim for an Informant Award (Whistleblower) *www.irs.gov/compliance/article/0,,id=181290,00.html* (last updated April 10, 2008).

[90] IRM 25.2.2. 4 (1) (Dec. 30, 2008). *See also* Memorandum dated Sept. 28, 2009, from John Tuzynski, Chief, Employment Tax Operations, Small Business/Self-Employed Division, regarding Interim Guidance on IRC 7623(b) Referrals from the Whistleblower's Office, Control No: SBSE-04-0909-054, Sept. 28, 2009, at 1.

[91] IRM 25.2.2.9.1(2): Award Computation—Section 7623(a) Claims filed before July 1, 2010 (June 18, 2010). *See also* IRM 25.2.2.12(3): Funding Awards (June 18, 2010), and Notice 2008-4, *supra* note 23.

[92] *See* M. Saltzman, *supra* note 43, at ¶12.03[3] [a] at note 111 (RIA, updated as of July 2010).

[93] Notice 2008-4, *supra* note 23.

[94] Reg. §301.7623-1(c).

[95] Reg. §301.7623-1(c). The regulation is effective with respect to rewards paid after January 29, 1997 (Reg. §301.7623-1(g)). For rewards paid prior to that date, the maximum amount was 10 percent of the amount recovered.

[96] Prior to the change in the law, "awards paid were between 8 and 14 percent of the taxes, fines, and penalties collected during Fiscal Years 2001 to 2005. *See* TIGTA 2006 Report, *supra* note 25, at 1.

[97] *See* IRS Publication 733, *Rewards for Information Provided by Individuals to the Internal Revenue Service* (rev. October 2004). Publication 733 (last revised in 2004) provided the following guidelines:

1. For specific and responsible information that caused the investigation or, in cases already under audit, materially assisted in the development of an issue or issues and resulted in the recovery, or was a direct factor in the recovery, the reward shall be 15 percent of the amounts the Service recovers, with the total reward not exceeding $10 million.

2. For information that caused the investigation or, in cases already under audit, caused an investigation of an issue or issues, and was of value in the determination of tax liabilities although not specific, the reward shall be 10 percent of the amounts the Service recovers, with the total reward not exceeding $10 million.

3. For general information that caused the investigation or investigation of an issue or issues, but had no direct relationship to the determination of tax liabilities, the reward shall be 1 percent of the amounts the Service recovers, with the total reward not exceeding $10 million.

4. No award will be granted where the award will be less than $100.00 under the above formulas.

The $10 million ceiling applies to submission made on after August 13, 2004. Between August 26, 1997 and August 13, 2004 the ceiling was $2 million. Both the ceiling and percentages can be increased with a special agreement. Joint Committee on Taxation, Technical Explanation of H.R. 6408, the "Tax Relief and Health Care Act of 2006," as introduced in the House on 12/7/2006, at 89, JCX-50-06 (Dec. 7, 2006) (hereinafter Explanation of 2006 Act by Joint Committee on Taxation), *available at www.jct.gov/publications.html?func=startdown&id=1471.*

[98] IRM 25.2.2.9.1.2: Award Computation—Section 7623(a) Claims filed before July 1,

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2010 (June 18, 2010).

[99] IRM 25.2.2.9.2(3): Award Computation—Section 7623(a) Claims filed on or after July 1, 2010 and Section 7623(b) claims (June 18, 2010). For a comparison of the current features of 7623(a) and 7623(b) awards, *see* GAO 2011 Report; *supra* note 12, Table 1, at 4.

[100] Third WBO Annual Report to Congress FY2009, *supra* note 4, at 1. ("Before 1996, the IRS made payments from appropriated funds.")

[101] In 2006, the prior parenthetical restriction "other than interest" was struck from the current Code Sec. 7623(a). *See* Relief and Health Care Act of 2006 (P.L. No. 109-432), §406(a)(1)(C), 120 Stat. 2922, 2958 (2006). *See also* IRM 25.2.1.1(4): Overview: Authority and Policy (Dec. 23, 2008).

[102] IRM 25.2.2.12 (3) (June 18, 2010).

[103] IRM 25.2.2.12 (9) (June 18, 2010). This position, that criminal penalties are not subject to tax whistleblower awards, has been criticized by commentators, for example, one observer, Gregory Lynam, tax partner of the Ferraro Law Firm, which specialized in this area. "This is clearly contrary to Section 7623(b)(1), which requires that whistleblowers receive 15 to 30 percent of any amount collected for the underpayment of tax or the punishment of persons guilty of violating the internal revenue laws, " said Lynam. It is possible, he said, that if challenged the provision would be quickly struck down by a court. Coder*, IRS Issue Whistleblower Award Determination Procedures,"* 2010 TNT 117-2 (June 18, 2010).

[104] IRM 25.2.2.2.8(A) (June 18, 2010).

[105] IRM 25.2.2.2.8(B) (June 18, 2010).

[106] IRM 25.2.2.2.8(C) (June 18, 2010).

[107] "The IRS cannot make an award determination until the underlying taxpayer matter is completed, including any administrative or judicial appeals the taxpayer may choose to pursue." Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 19.

[108] Third WBO Annual Report to Congress FY 2009, *supra* note 4, at 8. The change in policy was implemented in IRM 25.2.2.8 (2) (June 18, 2010), and IRM 25.2.2.6 (23) (June 18, 2010). The sharp dip in award payments for FY 2009, despite the increased amount of collections the IRS has made, has been attributed by the Third WBO Report to this change in policy.

[109] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 19.

[110] TIGTA 2009 Report, *supra* note 36, at 2.

[111] Reg. §301.7623-1(a). ("[P]roceeds of amounts … collected by reason of the information provided include both additional amounts collected because of the information provided and amounts collected prior to receipt of the information if the information leads to the denial of a claim for refund that otherwise would have been paid.")

[112] *See* Preamble to Reg. §301.7623-1(a), T.D. 8780, Aug. 20, 1998; 63 FR 44777 (Aug. 21, 1998), *available at http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=ujb07y/0/2/0&WAISaction=retrieve.*

[113] IRM 25.2.2.12(8) (June 18, 2010). *See also* IRM 25.2.2.1(7) (June 18, 2010) ("'Collected proceeds' are the monies the Service obtains directly from a taxpayer(s) …").

[114] IRM 25.2.2.12 (1) (June 18, 2010).

[115] Senate Finance Committee ranking minority member Chuck Grassley, R-Iowa, in a June 21, 2010, letter to Treasury Secretary Timothy Geithner wrote:

> …, the new definition of "collected proceeds" [in the IRM] is particularly troubling because it seems to limit the payment of awards to whistleblowers only in those instances where the IRS receives cash payment from a taxpayer. An IRS spokesperson, in response to an inquiry from the media, stated that the IRS is bound by the written statute. Yet, this was never raised with me or my staff. The denial of a whistleblower award where the whistleblower's information leads to the denial of a claim for refund seems to create a perverse incentive for the whistleblower to wait until the IRS has paid an improper refund. In addition, the IRM says that satisfaction of a taxpayer's liabilities by reducing a credit balance is not within the scope of collected proceeds so the whistleblower would receive no award.

Grassley Calls for Delay in Changes to IRS Whistleblower Program, 2010 TNT 128-70 (June 21, 2010).

[116] Proposed Reg. §301.7623-1(a); Rewards and Awards for Information Relating to Violations of Internal Revenue Laws, 76 FR 2852 (Jan. 18, 2011), IRB 2011-8, 519 (Feb. 22, 2011) *available at www.irs.gov/pub/irs-irbs/irb11-08.pdf.*

[117] Reg. §301.7623-1, Rewards and awards for information relating to violations of internal revenue laws, T.D. 9850, Feb. 14, 2012; FR Doc. 2012-3989, 77 (No. 35) FR 10370 (Feb. 22, 2012), *available at http://www.gpo.gov/fdsys/pkg/FR-2012-02-22/pdf/2012-3989.pdf.*

[118] *Id.,* at Preamble. ("For example: a taxpayer reports an NOL of $10 million for 2009 and a whistleblower's information results in a reduction of the NOL to $5 million. If the NOL is unused as of the date the IRS computes the amount of collected proceeds, there are no collected proceeds. If, however, the 2009 NOL was partially carried back to 2008, initially generating a $3 million refund, and the whistleblower's information reduced the carryback amount, resulting in a $1.5 million reduction in the refund for 2008, then the amount of the erroneous refund recovered and collected would be collected proceeds.")

[119] IRM 25.2.2.2.8 (June 18, 2010).

[120] TIGTA 2006 Report, *supra* note 25.

[121] First WBO Annual Report to Congress FY 2007, *supra* note 35, at 3.

[122] Third WBO Annual Report to Congress FY 2009, *supra* note 4, at 3. As of May 2011, the Whistleblower Office had 20 staff members. GAO 2011 Report, *supra* note 12, at 4.

[123] GAO 2011 Report, *supra* note 12, at 4.

[124] Third WBO Annual Report to Congress FY 2009, *supra* note 4, at 2.

[125] *Id.*

[126] GAO 2011 Report, *supra* note 12, at 4–5. (All operating divisions may be involved except for W&I. "Due to the high income and tax criteria for the expanded whistleblower program, W&I is not involved in investigating whistleblower claims under the expanded program." *Id.,* at note 7.)

[127] *Id.*

[128] *Id.*

[129] *Id.,* at 3.

[130] Tax Relief and Health Care Act of 2006, *supra* note 40, at §406(b)(1)(C).

[131] *Id., at* §406(b)(2). *See also* Notice 2008-4, *supra* note 23, at §3.05.

[132] As of April 28, 2011, IRS had not entered into any contracts with whistleblowers. GAO 2011 Report, *supra* note 12, at 18. According to operating division officials, they have not yet had a claim that "necessitated this increased level of interaction with a whistleblower to gather information about the taxpayer." *Id.,* at 18. Operating division, Chief Counsel, and Whistleblower Office officials also pointed out that the "IRS does not have specific criteria for when a section 6103(n) contract should be offered to a whistleblower, other than it should be used rarely." *Id.,* at 19.

[133] IR-News Rel. 2007-201 (Dec. 19, 2007), *available at www.irs.gov/newsroom/article/0,,id=176632,00.html. See also* IRM 25.2.2.1.9 (June 18, 2010). ("The decision on the payment of an award and the percentage of the award, including those under Code Sec. 7623(a), is made by the Director, Whistleblower Office.")

[134] Delegation Order 25-7 (Rev. 1), IRM 1.2.52.2 (07-01-2008)*; See also* IRM 25.2.2.9 (June 18, 2010) *and* IRM 25.2.2.6.20 (June 18, 2010).

[135] IRM 25.2.2.9: Award Computations (June 18, 2010). ("Effective July 1, 2008, the Director of the Whistleblower Office assumed the responsibility for all award determinations and percentages.")

[136] Notice 2008-4, supra note 23.

[137] *Id.*

[138] Notice 2008-4, *supra* note 23, at §2.

[139] IRM 25.2.2.6 (June 18, 2010).

[140] First WBO Annual Report to Congress FY 2007, *supra* note 35, at 3.

[141] *Id.,* at 4.

[142] IRM 25.2.1.5: Documenting the Information (Dec. 23, 2008).

[143] IRM 25.2.1.3 (Dec. 23, 2008).

[144] Notice 2008-4, *supra* note 23, at §3.02.

[145] IRM 25.2.2.4 (June 18, 2010). *See also* IRM 25.2.2.6 (June 18, 2010).

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[146] IRM 25.2.2.3.6 (June 18, 2010).
[147] IR News Release 2008-41 (Mar 13, 2008), *available at www.irs.gov/newsroom/article/0,,id=180075,00.html.* The completed form or a letter detailing the alleged fraudulent activity should be addressed to the IRS, Fresno, CA 93888. The mailing should include specific information about who is being reported, the activity being reported, how the activity became known, when the alleged violation took place, the amount of money involved and any other information that might be helpful in an investigation. The person filing the report is not required to self-identify, although it is helpful to do so. The identity of the person filing the report can be kept confidential.
[148] IRM 25.2.1.3 (Dec. 23, 2008). Steps to be taken by the IRS as to fraud referrals are outlined in IRM 25.2.1.
[149] IRM 25.2.1.4: Request for Reward for Information Provided (Dec. 23, 2008).
[150] Barbara A. Ruth, *New Whistleblower Program May Prompt Informants to Come Forward.* The Legal Intelligencer, July 1, 2008.
[151] Notice 2008-4, *supra* note 23, at §3.03.
[152] One of several recommendation made by a GAO 2011 Report is to have Form 211 designed to include stand-alone questions to elicit the following information: the relationship of the whistleblower to the target taxpayer, the employer of the whistleblower, whether the whistleblower has submitted the information to any other federal or state agencies, and whether the whistleblower has included all information relevant to the claim. IRS officials believe that this information more clearly identified at the start of the review process could help process claims more efficiently. GAO 2011 Report, *supra* note 12, at 11.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.,* at §3.05.
[157] IRM 25.2.2.7.7 (June 18, 2010). *See also* Exhibit 25.2.2-4: Debriefing Checksheet. According to a GAO 2011 Report, Debrief meeting is optional in SBSE. GAO 2011 Report, *supra* note 12, at 16.
[158] GAO 2011 Report, *supra* note 12, at 11.
[159] Notice 2008-4, *supra* note 23, at §3.03.
[160] *Id.,* at §3.05. *See also* IRM Exhibit 25.2.2-3: Acknowledgement Letter for Code Sec. 7623(b) awards, and IRM Exhibit 25.2.2-1: 1891 Letter for Code Sec. 7623(a).
[161] *Id.*
[162] Notice 2008-4, *supra* note 23, at §3.06. *See also* IRM 25.2.2.11 (1): Confidentiality of the Whistleblower (June 18, 2010).
[163] Reg. §301.7623-1(e).
[164] IRM 25.2.1.2 (2): Disclosure/Security Procedures (Dec. 23, 2008).
[165] For example, according to an LMSB memo, the "identity of person who furnishes information regarding possible tax violation must be protected." Memorandum dated Dec. 3, 2008 from Robert L. Trujillo, Director, Planning, Quality, Analysis and Support, Large and Mid-Size Business Division, regarding Whistleblower/Informant Claims for Award, Control No: LMSB-4-1108-052, Dec. 3, 2008 (hereinafter LMSB-4-1108-052). This memo has been superseded and incorporated into the revised 2010 IRM.
[166] GAO 2011 Report, *supra* note 12, at 5.
[167] *See* IRM 4.11.57, Third Party Contacts. IRM 25.2.2.11(2): Confidentiality of the Whistleblower (June 18, 2010).
[168] Memo LMSB-4-1108-052, *supra* note 165, at 4. This memo has been superseded and incorporated into the 2010 revised IRM.
[169] *Id.,* at 4.
[170] Notice 2008-4, *supra* note 23, at §3.06.
[171] *Id. See also* IRM 25.2.2.11(3): Confidentiality of the Whistleblower (June 18, 2010).
[172] *Id.*
[173] IRM 10.2.13.2.2: Protection of Informant Information (Sept. 30, 2008).
[174] IRM 25.2.1.2 (2): Disclosure/Security Procedures (Dec. 23, 2008).
[175] IRM 10.2.13.2.2: Protection of Informant Information (Sept. 30, 2008).
[176] IRM 25.2.1.2(3): Handling the Information (Dec. 23, 2008).
[177] IRM 10.2.13.2.2 (2): Protection of Informant Information (Sept. 30, 2008).
[178] *Id.,* at IRM 10.2.13.2.2.3.
[179] *Id.,* at IRM 25.2.1.8: Storage of Informant's Information (Dec. 23, 2008).
[180] IRM 10.2.13.2.2: Protection of Informant Information (Sept. 30, 2008).
[181] Memo LMSB-4-1108-052, *supra* note 165.
[182] *See generally,* Code Sec. 6103.
[183] IRM 25.2.1.2: Disclosure/Security Procedures (Dec. 23, 2008).
[184] Tax Relief and Health Care Act of 2006, *supra* note 40, at 406.
[185] Section of Taxation Newsquarterly, *supra* note 5, at 10–11. *See also* Explanation of 2006 Act by Joint Committee on Taxation, *supra* note 97, at 89.
[186] GAO 2011 Report, *supra* note 12, at 18.
[187] Explanation of 2006 Act by Joint Committee on Taxation, *supra* note 97.
[188] *Id.,* at 89.
[189] GAO 2011 Report, *supra* note 12, at 18.
[190] Temporary Reg. §301.6103(n)-2T(c) and (d), T.D. 9389, REG-114942-07 (Mar. 25, 2008), 73 FR 15,668 (Mar. 25, 2008).
[191] T.D. 9516, 76 (No. 50) FR 13,880-2 (Mar. 15, 2011).
[192] Reg. §301.6103(n)-2(a)(2).
[193] Preamble to T.D. 9389 (Mar. 25, 2008).
[194] *Id.*
[195] Preamble to T.D. 9389 (Mar. 25, 2008). The term "return information" for purposes of Code Sec. 6103 is defined in Code Sec. 6103(b)(2), whereas the term "return" is defined in Code Sec. 6103(b)(1).
[196] Preamble to T.D. 9389 (Mar. 25, 2008).
[197] Preamble to T.D. 9389 (Mar. 25, 2008).
[198] *Id.*
[199] Reg. §301.6103(n)-2(b)(4), T.D. 9516 (Mar. 15, 2011).
[200] *Id.* at §301.6103(n)-2(d)(2).
[201] *Id.* at §301.6103(n)-2(d)(3) and Preamble to T.D. 9389 (Mar. 25, 2008).
[202] Reg. §301.6103(n)-2(d)(3), T.D. 9516 (Mar. 15, 2011).
[203] *Id.* at §301.6103(n)-2(c). If the informant or the representative does not comply with the prescribed requirements for safeguarding return information, the IRS can take administrative action it deems necessary using procedures set forth the regulations under Reg. §301.6103(p)(7)-1.
[204] *Id.*
[205] Preamble to T.D. 9516 (Mar. 15, 2011).
[206] GAO 2011 Report, *supra* note 12, at 18. *See also* Coder, *Treasury finalizes whistleblower contract regs but isn't using them,* 2011 TNT 50-1 (Mar. 15, 2011).
[207] GAO 2011 Report, *supra* note 12, at 18–19.
[208] GAO 2011 Report, *supra* note 12, at 20.
[209] 26 CFR §301.6103(k)(6)-1.
[210] GAO 2011 Report, *supra* note 12, at 18.
[211] GAO 2011 Report, *supra* note 12, at 18, note 24. IRM 11.3.21.4 (3) and (6): Contractual Disclosures for Investigative Purposes (Mar. 28, 2008):

> 3. Whenever possible, the services of experts for investigative purposes should be engaged under Code Sec. 6103(n) and its implementing regulation, rather than Code Sec. 6103(k)(6) and its implementing regulation, because safeguard and Privacy Act provisions apply to the former whereas the statutory confidentiality protection provisions of the IRC do not apply to the latter. Revenue Ruling 2004-53 has additional information.
>
> ….
>
> 6. Contracts for expert services under Code Sec. 6103(k)(6) do not require the safeguard provisions that are applicable to contracts under Code Sec. 6103(n), nor are they subject to the Privacy Act provisions regarding contracts, *See IRM 11.3.21.5, Limitation on Redisclosure By Contractors.*

[212] IRS Chief Counsel's Notice CC-2008-011 (Feb. 27, 2008).
[213] *See, e.g., Burdeau v. McDowell,* 256 US 465 (1921) (purely private searches held not subject to fourth amendment constitutional restrictions).
[214] CC-2010-004 (Feb. 17, 2010) , *available at www.irs.gov/pub/irs-ccdm/cc-2010-004.pdf.*
[215] CC-2010-004 (Feb. 17, 2010).
[216] CC-2008-011(Feb. 27, 2008).
[217] CC-2010-004 (Feb. 17, 2010).
[218] CC-2008-011 (Feb. 27, 2008).
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*

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[223] *Id.*
[224] *Id.*
[225] CC-2010-004 (Feb. 17, 2010).
[226] *Id.*
[227] *Id.,* at 2.
[228] IRM Exhibit 25.2.2-6 (Memo from Steven T. Miller, Deputy Commissioner for Operation Support, dated February 17, 2010, regarding Informant Contacts).
[229] CC-2010-004 (Feb. 17, 2010).
[230] *Id.*
[231] *Id.*
[232] CC-2010-004 (Feb. 17, 2010) and CC-2008-011 (Feb. 27, 2008). This is not an application of the bypass rule in IRM 4.11.55.3 (Apr. 20, 2010), whereby the IRS can bypass the representative and contact the taxpayer directly.
[233] *Id.*
[234] CC-2010-004 (Feb. 17, 2010).
[235] IRM 25.2.2.6 (9): Processing of the Form 211 7623(a) Claim for Award (June 18, 2010), IRM 25.2.2.7: Processing of the Form 211 7623(b) Claim for Award (June 18, 2010), IRM Exhibit 25.2.2-6: Memorandum from Steven T. Miller, Feb. 17, 2010, *available at www.irs.gov/irm/part25/irm_25-002-002.html.*
[236] GAO 2011 Report, *supra* note 12, at 9.
[237] IRM 25.2.2.7 (5): Processing of the Form 211 7623(b) Claim for Award (June 18, 2010).
[238] IRM 25.2.2.6 (9): Processing of the Form 211 7623(a) Claim for Award (June 18, 2010).
[239] In 2008, the LMSB Division of the IRS (where the bulk of the claims are handled) issued two memorandums that detail step-by-step how claims are processed. The first memorandum addressed to LMSB Directors and to the Deputy Commissioner (International) supplements IRS 25.2.2 and provides detailed instructions and the steps involved for disseminating LMSB Whistleblower claims to the field for examination. A useful flowchart that further details the receipt and evaluation of informant claim is appended to the LMSB memo. Memorandum dated July 21, 2008, from Frank Y. Ng, Commissioner, Large and Mid-Size Business Division, regarding Whistleblower/Informant Cases and Subject Matter Experts, Control No: LMSB-4-0508-033, July 21, 2008. The second memorandum was issued by LMSB in late 2008 and was addressed to all LMSB Industry Directors, Field Specialists and all LMSB Headquarters Directors. It too supplements IRM 25.2.2 and provides internal guidance and review process for considering claims. In the memo, the IRS addressed various requirements and considerations for the award program, including how to file the claim, how it is processed, contacting the informant, and protection of identity. Memorandum dated Dec. 3, 2008 from Robert L. Trujillo, Director, Planning, Quality, Analysis and Support, Large and Mid-Size Business Division, regarding Whistleblower/Informant Claims for Award, Control No: LMSB-4-1108-052, Dec. 3, 2008. The guidance issued under LMSB-4-0508-033 and LMSB-4-1108-052 are now incorporated into the IRM 25.2.2.
[240] *See generally,* TIGTA 2009 Report, *supra* note 36, and TIGTA 2006 Report, *supra* note 25.
[241] *See generally*, First WBO Annual Report to Congress FY 2007, *supra* note 35; IRS, Whistleblower Office, Annual Report to Congress on the Use of Section 7623, at executive summary (hereinafter Second WBO Annual Report to Congress FY 2008), *available at www.irs.gov/pub/whistleblower/annual_report_to_congress_september_2009.pdf;* Third WBO Annual Report to Congress FY 2009, *supra* note 4; and Fourth WBO Annual Report to Congress FY 2010, *supra* note 6.
[242] GAO 2011 Report, *supra* note 12.
[243] IRM 25.2.2 Whistleblower Awards.
[244] *See generally,* IRS website, What Happens to a Claim for an Informant Award (Whistleblower), *www.irs.gov/compliance/article/0,,id=181290,00.html* (last updated April 21, 2008).
[245] IRM 25.2.2.3(1) (June 18, 2010).
[246] GAO 2011 Report, *supra* note 12, at 9.
[247] IRM 25.2.4(1.A) (June 18, 2010).
[248] IRM 25.2.4(1.B) (June 18, 2010).
[249] IRM 25.2.4(1.B) (June 18, 2010).
[250] GAO 2011 Report, *supra* note 12, at 10.
[251] GAO 2011 Report, *supra* note 12, at 17–18.
[252] IRM 25.2.2.6(2) (June 18, 2010).
[253] IRM 25.2.2.6(4) (June 18, 2010).
[254] IRM 25.2.2.6(5) (June 18, 2010). *See also* IRM Exhibit 25.2.2-2.
[255] IRM 25.2.2.6(6) (June 18, 2010).
[256] IRM 25.2.2.6(9) (June 18, 2010).
[257] IRM 25.2.2.6(10) (June 18, 2010).
[258] IRM 25.2.2.6(13.A) and B (June 18, 2010).
[259] IRM 25.2.2.6 (June 18, 2010).
[260] IRM 25.2.2.7(2) (June 18, 2010).
[261] GAO 2011 Report, *supra* note 12, at 4–5.
[262] IRM 25.2.2.7(4) (June 18, 2010).
[263] IRM 25.2.2.7(5) (June 18, 2010).
[264] *Id.*
[265] IRM 25.2.2.7(9) and (12) (June 18, 2010).
[266] IRM 25.2.2.7(6) (June 18, 2010).
[267] GAO 2011 Report, *supra* note 12, at 4.
[268] IRM 25.2.2.7(7) (June 18, 2010).
[269] IRM 25.2.2.7 (8.A) (June 18, 2010). The analyst is also directed to contact the Operating Division's Collections if the information if the information would enhance existing collection case. IRM 25.2.2.7.8.C (June 18, 2010).
[270] IRM 25.2.2.7(14) (June 18, 2010).
[271] *See* IRM 25.2.2.7(8.B) (June 18, 2010) (also provides that the analyst will continue to monitor the case while it is in examination).
[272] IRM 25.2.2.7(12) (June 18, 2010).
[273] IRM 25.2.2.7(9) (June 18, 2010).
[274] IRM 25.2.2.7(15), (16) and (17) (June 18, 2010).
[275] Source: Table 2: Expanded Whistleblower Program Claim Process Steps and Potential Outcomes. GAO 2011 Report, *supra* note 12, at 6.
[276] *Id. See also* Memo LMSB-4-1108-052, *supra* note 165, at 5.
[277] IRM 25.2.2.6: Processing of the Form 211 7623(a) Claim for Award (June 18, 2010) and IRM 25.2.2.7: Processing of the Form 211 7623(b) Claim for Award (June 18, 2010). *See also* Memo LMSB-4-1108-052, supra note 165, at 5.
[278] IRM 25.2.2.6 (15) (June 18, 2010).
[279] IRM 25.2.2.7(8.A) (June 18, 2010).
[280] IRM 25.2.2.7 (14) (June 18, 2010).
[281] IRM 25.2.2.6 (13) and 25.2.2.7 (16) (June 18, 2010).
[282] IRM 25.2.2.7 (16): Processing of the Form 211 7623(b) Claim for Award (June 18, 2010). A 2008 LMSB memo called for "comment as to the value of the in information provided and the extent to which it assisted in the outcome of relevant issue(s)." Memo LMSB-4-1108-052, *supra* note 165, at 5.
[283] IRM 25.2.2.6 (15) (June 18, 2010).
[284] IRM 25.2.2.8(4): Evaluation Report on Claims for Award—Form 11369 (Dec. 30, 2008).
[285] IRM 25.2.2.7(8.D) (June 18, 2010), and IRM 25.2.2.6(13.C) (June 18, 2010).
[286] *See generally* IRM 25.2.2.9.2: Award Computation—Section 7623(a) claims filed on or after June 1, 2010, and Section 7623(b) claims (June 18, 2010).
[287] IRM 25.2.2.9.2(10) and (11): Award Computation—Section 7623(a) Claims filed on or after July 1, 2010 and Section 7623(b) claims (June 18, 2010).
[288] Notices 2008-4, *supra* note 23, at §3.08.
[289] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 14.
[290] GAO 2011 Report, *supra* note 12, at 17.
[291] *See* TIGTA 2009 Report, *supra* note 36, at 2.
[292] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 19.
[293] GAO 2011 Report, *supra* note 12, at 8.
[294] GAO 2011 Report, *supra* note 12, at 9. To reduce the time it takes the IRS to process claims, the GAO 2011 Report recommended that the "IRS collect more information—including data on the time each step takes for all claims and reasons for claim rejection—in its claim tracking system, establish a process to follow up on claims that exceed review time targets, and include more information on these issues in its annual reports to congress" *Id.,* at 1.
[295] Notice 2008-4, *supra* note 23, at §3.08. Third WBO Annual Report to Congress FY 2009, *supra* note 4, at 7, and Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 14–15 (same language).
[296] GAO 2011 Report, supra note 12, at 10. Whistleblower officials point out that "waiting until all claims under one submission are complete can be to the benefit of whistleblowers if, for example, claims only meet the disputed tax amount criteria for the expanded program when considered in aggregate." GAO 2011 Report, *supra* note 12, at 10.
[297] *See* Code Sec. 7481. "Examples of when a final determination of tax liability can be made include, but are not limited to: (1) at the administrative level, when the Service and person that is the subject of the claimant's al-

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legations enter into a closing agreement which conclusively waives the right to appeal or otherwise challenge a deficiency or additional tax liability determined by the Service; (2) if the person that is the subject of the claimant's allegations petitions the United States Tax Court for a redetermination of a deficiency, when the decision in that case becomes final within the meaning of section 7481; and (3) after the expiration of the statutory period for a taxpayer to file a claim for refund and to file a refund suit based on that claim against the United States or, if a refund suit is filed, when the judgment in that suit becomes final. In a case in which litigation is commenced, any award consideration will be delayed until that litigation has been concluded with finality." Notice 2008-4, *supra* note 23, at §3.08.

[298] IRM 25.2.2.1(6): Overview: Authority and Policy (June 18, 2010) and 25.2.2.12(6): Funding Awards (June 18, 2010).

[299] Notice 2008-4, *supra* note 23, at §3.08.

[300] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 14–15.

[301] Third WBO Annual Report to Congress FY2009, *supra* note 4, at 8. The change in policy was implemented in IRM 25.2.2.8 (2) (June 18, 2010), and IRM 25.2.2.6 (23) (June 18, 2010).

[302] *See, e.g.,* Memo LMSB-4-1108-052, *supra* note 165.

[303] "Return information" is defined in Code Sec. 6103(b)(2) to include "a taxpayer's identity, the nature, source, or amount of income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, over assessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to investigation, or any other data received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, … ." The GAO 2011 Report states that "[a]ccording to IRS, disclosing to a whistleblower that IRS is examining a taxpayer reveals tax information; therefore, IRS does not inform whistleblowers on the progress of their claim other than to confirm that the claim is either open or closed. GAO 2011 Report, *supra* note 12, at 17.

[304] GAO 2011 Report, *supra* note 12, at 17.

[305] *Id.*

[306] *See generally,* IRS website, Confidentiality and Disclosure for Whistleblowers, *www.irs.gov/compliance/article/0,,id=181291,00.html* (last updated April 21, 2008). *See also* GAO 2011 Report, *supra* note 12, at 17.

[307] PMTA 2011-031, *Whistleblower Office May Disclose Taxpayer Return Information in Some Cases,* 2012 TNT 18-19 (Feb. 1, 2010), *available at www.irs.gov/pub/lanoa/pmta_2011-31.pdf.*

[308] Reg. §301.6103(n)-2(b)(3), T.D. 9516 (Mar. 15, 2011).

[309] Table 4 in the 2011 GAO Report shows a breakdown of rejected claims by noncompliant taxpayers from FY 2007 to much of FY 2011 and identifies the step in the process where the rejection occurred. GAO 2011 Report, *supra* note 12, at 13. There were roughly 9,500 total claims received from roughly 1,400 whistleblowers in the past five years compiled in the 2011 GAO Report. The IRS is in some stage of processing on roughly 8,300 of these claims. A total of roughly 1,300 claims have been rejected so far. *Id.,* Table 3, at 8.

[310] GAO 2011 Report, *supra* note 12, at 19.

[311] *See generally* IRS website, How Do You File a Whistleblower Award Claim Under Section 7623 (a) or (b), *www.irs.gov/compliance/article/0,,id=181292,00.html* (last updated April 10, 2008).

[312] GAO 2011 Report, *supra* note 12, at 13.

[313] IRM 25.2.2.5(1)(A) (June 18, 2010).

[314] *Id., at* IRM 25.2.2.5(1)(B) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(1). However, Reg. §301.7623-1(b)(2) provides that "[a]ny other current or former federal employee is eligible to file a claim for reward if the information provided came to the individual's knowledge other than in the course of the individual's official duties. Thus, for example, a postman who overhears a taxpayer boasting to a customer in a store concerning his nonpayment of income taxes is allowed a reward if his information resulted in recovery of taxes. *See* former IRM Section 25.2.2.16 (Apr. 27, 1999) (obsoleted).

[315] IRM 25.2.2.5(1)(C) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(2).

[316] IRM 25.2.2.5(1)(D) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(3).

[317] IRM 25.2.2.5(1)(E) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(4).

[318] GAO 2011 Report, *supra* note 12, at 9, *citing* CC 2010-004.

[319] IRM 25.2.2.5(3) (June 18, 2010).

[320] IRM 25.2.2.5(1)(G) (June 18, 2010).

[321] IRM 25.2.2.5(1)(H) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(6) and (7).

[322] IRM 25.2.2.5(1)(I) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(8).

[323] IRM 25.2.2.5(1)(F) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(5).

[324] IRM 25.2.2.5(2)(A) (June 18, 2010). *See also* Notice 2008-4, *supra* note 23, at §3.04(5).

[325] IRM 25.2.2.6(9) (June 18, 2010).

[326] *Id.,* at 4. *See also* Second WBO Annual Report to Congress FY 2008, *supra* note 241, at 3, IRM 1.2.13.1.12: Policy Statement 4-27 (Formerly P-4-86) (Aug. 13, 2004), and Memo LMSB-4-1108-052, *supra* note 165, at 6.

[327] *See, e.g.,* Memo LMSB-4-1108-052, *supra* note 165, at 6.

[328] IRM 25.2.2.5(2)(B) (June 18, 2010).

[329] IRM 1.2.13.1.12 (6.A): Policy Statement 4-27 (Formerly P-4-86) (Aug. 13, 2004). *See also* IRM 25.2.2.6 (17) (June 18, 2010). According to the first Whistleblower annual report to congress "[t]he information might be of no value because it did not provide a sufficient basis for initiating an examination or investigation of the issue presented, or because the examination resulted in a "no change" finding." First WBO Annual Report to Congress FY 2007, *supra* note 35, at 1.

[330] IRM 25.2.2.5(2)(C) (June 18, 2010).

[331] IRM 25.2.2.12(7) (June 18, 2010). *See also* IRM 25.2.2.1 (6) (June 18, 2010).

[332] GAO 2011 Report, *supra* note 12, at 13, note 3.

[333] *Id.,* at 14.

[334] *See* National Taxpayer Advocate, 2010 Annual Report to Congress, Vol. I, pages 397 (Dec. 31, 2010) (hereinafter National Taxpayer Advocate, 2010 Annual Report to Congress), *available at www.irs.gov/pub/irs-utl/legislativerecomendations_2010arc.pdf. See also* IRM 25.2.2.8 (1) (June 18, 2010).

[335] IRM 25.2.2.8 (1) (June 18, 2010).

[336] IRM 25.2.2.8(2) (June 18, 2010).

[337] *Id.,* at IRM 25.2.2.8.3 (June 18, 2010).

[338] *Id.,* at Exhibit 25.2.2-10 (June 18, 2010).

[339] *Id.,* at IRM 25.2.2.8.4 (June 18, 2010).

[340] *Id.,* at IRM 25.2.2.8.5 (1) (June 18, 2010).

[341] *Id.,* at IRM 25.2.2.8.5 (2) (June 18, 2010).

[342] *Id.,* at IRM 25.2.2.8.5 (1) (June 18, 2010).

[343] IRM 25.2.2.8(9): Whistleblower Award Administrative Proceeding (June 18, 2010). *See also* IRM 11.3.22.19: Disclosures of Third Party Tax Information in Administrative Proceedings (July 13, 2005).

[344] *Id.* (referring to IRM Exhibits 25.2.2-11 and -12).

[345] *Id.*

[346] IRM 25.2.2.8(6) (June 18, 2010).

[347] *Id.,* at 25.2.2.8 (8).

[348] IRM 25.2.2.8(8): Whistleblower Award Administrative Proceeding (June 18, 2010). However, payment "cannot be completed until the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that there has been a final determination of tax for the specific period and the right to file a claim for a refund has been waived." IRM 25.2.2.12 (6) and (7): Funding Awards (June 18, 2010).

[349] *See* National Taxpayer Advocate, 2010 Annual Report to Congress, *supra* note 334, at 50 and 396–99.

[350] For an example, *see Cooper,* 135 TC No. 4 (July 8, 2010).

[351] *See* National Taxpayer Advocate, 2010 Annual Report to Congress, *supra* note 334, at 399.

[352] *F. Carelli*, CA-6, 82-1 USTC ¶9131, 668 F2d 902, (1982). (The language in former Code Sec. 7623 was held not to imply a waiver of sovereign immunity since the IRS has been given discretion to pay awards.)

[353] *See also Henry,* DC-LA, 2002-2 USTC ¶50,678 (2002)*; R.C. Ward,* DC-CA, 2002-2 USTC ¶50,572 (2002); *Destefano, supra* note 26.

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(Code Sec. 7623 is not an express waiver of sovereign immunity. It is a discretionary statute empowering the IRS to determine whether a reward is paid and the amount of any reward. It does not mandate monetary rewards and consequently it does not create a substantive right to money damages.) *Destefano, supra* note 26.

[354] *Confidential Informant,* FedCl, 2000-1 USTC ¶50,228, 46 FedCl 1 (2000). (The Court of Federal Claims held that it had no jurisdiction to review IRS's refusal to make a reward. Neither the statute nor the regulations contained specific requirements that an informant must meet to be eligible for compensation, nor a sum certain for the reward, both factors needed to meet the "money-mandating" requirement for the court's jurisdiction.)

[355] *G.C. Krug*, FedCl, 98-2 USTC ¶50,617, 41 FedCl 96, 97 (1998), *aff'd*, DC-FC, 99-1 USTC ¶50,281, 168 F3d 1307 (1999).

[356] *See, e.g., J.A. Thomas*, ClsCt, 91-1 USTC ¶50,149, 22 ClsCt 749 (1991) (Claims Court held that the whistleblower was not entitled to an award even though the information provided by the whistleblower resulted in collected proceeds); *Barker v. Lein*, CA-1, 66-2 USTC ¶9731, 366 F2d 757, 758 (1966) (Appeals Court held that even though taxes were recovered from the noncompliant taxpayer based on a whistleblower's information, it did not provide a sufficient basis for a whistleblower award).

[357] *See, e.g., Krug, supra* note 355 (holding that the language in IRS publication and implementing regulations that describes policy for rewards are not, without more, an offer that can give rise to an implied contractual duty to pay a reward. Further, the publication merely provides a basis on which a reward will be computed if the IRS authorizes payment of a reward. Without an agreement or contract between the informant and the IRS, payment of any reward is within IRS discretion). *Compare R. Merrick*, CA-FC, 88-1 USTC ¶9316, 846 F2d 725 (1988) (even absent a formal contract, an agreement to pay a reward along with the IRS telling the informant of the formula to be used to compute the reward under a specific paragraph of an IRS publication was found sufficient to state a contract claim. The IRS provided the basis for a contract by making the reward offer definite). *But cf. J. Dacosta*, FedCl, 2008-2 USTC ¶50,444, 82 FedCl 549 (2008) (the court rejected taxpayer's argument that jurisdiction over his whistleblower appeal was based on an implied contract claim. The court held that Code Sec. 7623(a) doesn't provide a substantive right to monetary damages that would confer that form of jurisdiction, and that the taxpayer and the IRS had not negotiated for a specific monetary award which taxpayer was seeking to enforce). *See also D.D. Cambridge*, CA-FC, 2009-1 USTC ¶50,264, 558 F3d 1331 (2009) (the IRS acted within its discretion when it refused to grant any additional reward beyond those granted. The informant did not show that the IRS had negotiated any specific additional award amount. IRS Publication 733 that was sent to the informant did not create a contract. The IRS was not required to calculate the reward pursuant to Publication 733 because it never agreed to do so. Thus, the informant had failed to state a claim upon which relief could be granted). *H.B. Wilson,* FedCl, 2007-2 USTC ¶50,615 (2007) (the court held that it had no jurisdiction over an IRS informant's whistleblower reward claim. The case involved an informant allegedly providing information regarding three specific companies that resulted in the IRS collecting over $200 million in taxes. The court reasoned that Code Sec. 7623 gives the IRS broad discretion to decide whether and how much of an award to make to an informant. Although Publication 733 establishes the basis upon which a reward will be calculated if the government authorizes an award, it does not mandate payment of an award. The informant's argument that he had a contractual right to payment grounded in the statute and publication was rejected. Moreover, the informant was not able to show that he negotiated a specific award amount with the IRS).

[358] *J.K. Swofford*, DC-IL, 2000-1 USTC ¶50,506 (2000). *See also Thomas, supra* note 356 (complaint alleging IRS is obligated to pay reward for information was denied for failure to state a claim. The complaint and attachments showed there was no agreement that an award should be paid in specific amount. Absent specific agreement, it was entirely within IRS's discretion to decide whether an award should be granted, and in what amount. The court couldn't review IRS's action to determine whether it was arbitrary or capricious); *S. Schein*, DC-NY, 73-1 USTC ¶9264, 352 FSupp 182 (1972).

[359] Reg. §301.7623-1(c). *See, e.g., Barker v. Lein, supra* note 356 (claim denied based on allegations that IRS agent orally promised that the IRS would pay); *Confidential Informant, supra* note 354 (claim denied based on oral assurances of FBI agent and IRS criminal investigator that the informant will receive a reward. FBI and IRS agents with whom informant met didn't have express actual authority to bind government where agents' implied authority was questionable).

[360] Code Sec. 7623(b)(6)(A).

[361] Code Sec. 7623(b)(4). *See also* Explanation of 2006 Act by Joint Committee on Taxation, *supra* note 97.

[362] M. Saltzman, *supra* note 43, at ¶12.03[3][a], note 109 (RIA, updated as of July 2010). In a press release issued in October 2008, the Tax Court announced it adoption of amendments to its Rules of Practice and Procedure to reflect its jurisdiction over appeals concerning informant awards. *See www.ustaxcourt.gov/press/100308.pdf. See also Dacosta, supra* note 357 (whistleblower award appeal brought in the Court of Federal Claims was denied on jurisdictional grounds, holding that the Tax Court has exclusive jurisdiction over appeals of award claims that arise under Code Sec. 7623(b)).

[363] Code Sec. 7623(b)(4).

[364] *Cooper, supra* note 30.

[365] *Cooper*, *supra* note 30. Not long after, in July 2011, in *Kasper*, the Tax Court followed its 2010 decision in *Cooper*, holding again that a letter rejecting a whistleblower claim is a "determination" for the purposes of Code Sec. 7623(b)(4) which then gives the tax court review jurisdiction with respect to such matter.

[366] GAO 2011 Report, *supra* note 12, note 26, at 19.

[367] *Cooper, supra* note 350.

[368] M. Kwon, *Scratching Our Heads Over* Cooper v. Commissioner, 2011 TNT 182-9 (Sept. 21, 2011). Analyzing the *Cooper* cases and what the future may portend, Kwon observed, "Beyond cases like Cooper, it also remains to be seen what standard and scope of review the Tax Court will apply to review the denial or amount of an award when the IRS actually uses the whistleblower's information to collect back taxes. Section 7623 is silent regarding both the standard and scope of review applicable to whistleblower claims in the Tax Court. The standard of review refers to how the court will examine the evidence and the amount of deference it will give to the IRS, and scope of review refers to the span of evidence the court will consider to reach its decision. Those issues will need to be resolved in future litigation." *Id.,* at 1281.

[369] GAO 2011 Report, *supra* note 12, note 26, at 19.

[370] Notice 2008-4, *supra* note 23, at §3.11; IRM 25.2.2.10: Appeal Rights under Section 7623(b) (June 18, 2010).

[371] IRM 25.2.2.10: Appeal Rights under Section 7623(b) (June 18, 2010).

[372] *M.S. Friedland*, 102 TCM 247, Dec. 58,753(M), TC Memo. 2011-217.

[373] Code Sec. 7443A(b)(6). *See also* Explanation of 2006 Act by Joint Committee on Taxation, *supra* note 97.

[374] Code Sec. 7443A(c).

[375] Notice 2008-4, *supra* note 23, at §3.11.

[376] Press Release, Tax Court, *The Court has adopted amendments to its Rules of Practice and Procedure regarding whistleblower award actions and electronic service, and other amendments to its Rules and forms* (Oct. 3, 2008) (hereinafter Tax Court Press Release 2008), *available at www.ustaxcourt.gov/press/100308.pdf.*

[377] *Id.,* at 5 (Explanation to new Tax Court Rule 340).

[378] Tax Court Rules 340(a) and 341(a), *available at www.ustaxcourt.gov/notice.htm* (Tax Court Rules of Practice and Procedure).

[379] Under Tax Court Rule 343(a), the IRS must file an answer or move with respect to the petition within the periods and rules of Tax Court Rule 36, which in general calls for an answer

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within 60 days from the date of service of the petition, or a motion with respect to the petition within 45 days from that date. Pursuant to Tax Court Rule 343(b), provisions relating to the filing of a reply follow Tax Court Rule 37. A whistleblower award action will be deemed at issue under Tax Court Rule 344 as provided in Tax Court Rule 38. In appropriate cases, the Tax Court may pursuant to Code Sec. 7461(b)(1) and Tax Court Rule 103(a) permit a petitioner to proceed anonymously and seal the record in that case. *See* Press Release 2008, *supra* note 374.

[380] Press Release, Tax Court, *The Court has adopted amendments to its Rules of Practice and Procedure regarding whistleblower award actions and electronic service, and other amendments to its Rules and forms,* at 3–4 (Oct. 3, 2008), *available at www.ustaxcourt.gov/press/100308.pdf* (Explanation to amended Tax Court Rule 182).

[381] *See Anonymous,* 127 TC 89, Dec. 56,613 (2006). *See also* Press Release, Tax Court, *The Court has adopted amendments to its Rules of Practice and Procedure regarding whistleblower award actions and electronic service, and other amendments to its Rules and forms,* at 4–5 (Oct. 3, 2008), *available at www.ustaxcourt.gov/press/100308.pdf* (Explanation to new Tax Court Rule 340).

[382] Tax Court Press Release 2008, *supra* note 376, at 5: "The Court contemplates that these generally applicable statutory provisions … and related case law, while they do not require the Court's records in all whistleblower actions to be sealed or require the Court to permit all petitioners in those cases to proceed anonymously, do provide authority for the Court to allow a petitioner to proceed anonymously and to seal the record when appropriate in whistleblower actions."

[383] *Whistleblower 14106-10W,* 137 TC No. 15, Dec. 58,830 (2011).

[384] To further protect the whistleblower's identity, the name of his counsel was also been omitted from the case. *Id.,* at note 1.

[385] *Id.,* at note 29.

[386] Press Release, Tax Court, *The Tax Court has announced proposed amendments to its Rules of Practice and Procedure reducing the number of copies required for papers filed with the Court, requiring electronic filing by most parties represented by counsel, providing privacy protections in whistleblower cases, and making other miscellaneous and conforming changes* (hereinafter Tax Court Press Release 2011), *available at www.ustaxcourt.gov/press/122811.pdf.*

[387] Tax Court Press Release 2011, *supra* note 386, at 16.

[388] Tax Court Press Release 2011, *supra* note 386, at 16.

[389] *Id.,* at 16–20.

[390] Code Sec. 61 provides generally that all accessions to wealth are income unless otherwise provided by law. Reg. §1.61-2(a)(1) specifically includes rewards in gross income.

[391] Notice 2008-4, *supra* note 23, at §3.10. *See also* IRM 25.2.2.13.2 (10): Procedures (June 18, 2010) ("Form 1099 MISC will be issued to taxpayers annually ...").

[392] GAO 2011 Report, *supra* note 12, at 7. Commentators have expressed criticism with the IRS's policy of withholding 28-percent tax on award payments, noting that taxes could be over withheld for some whistleblowers, particularly those represented by attorneys. Attorney fees, which can reach 30 percent or more of award, are deductible from gross income, thereby effectively reducing the taxable amount of an award. Even thought over withheld funds can be refunded when the whistleblower files a tax return for the tax year of the award, nonetheless there could be a year or more between award payment and the refund of the over withheld part of the award. *Id.,* at 7 and 21.

[393] PMTA 2010-63, *IRS Can Withhold Income Tax From Whistleblower Award,* 2011 TNT 77-12 (Sept. 30, 2010), *available at www.irs.gov/pub/lanoa/pmta-2010-063.pdf.* Historically, all identified existing withholding regimes have a statutory basis. *Id.,* at note 5, but neither is there a "direct prohibition against doing so," the PMTA states.

[394] *Id.,* at note 2.

[395] PMTA 2011-001, *IRS Can Withhold Income Tax From Whistleblower Awards,* 2011 TNT 78-16 (Mar. 11, 2011), *available at www.irs.gov/pub/lanoa/pmta-2011-001.pdf.*

[396] *Whistleblower Award Paid to Nonresident Alien May Be U.S Source Income,* 2011 TNT 78-17 (Mar. 22, 2011), *available at www.irs.gov/pub/lanoa/pmta-2011-002.pdf.*

[397] Code Sec. 62(a)(21), as added by the Tax Relief and Health Care Act of 2006, *supra* note 40, at §406(b)(1)(C).

[398] Explanation of 2006 Act by Joint Committee on Taxation, *supra* note 97.

[399] IRM 25.2.2.6.25 (June 18, 2010).

[400] Treas. Dept Circ No. 230, §10.27(b)(1), 31 CFR, Subtitle A, part 10, *available at www.irs.gov/pub/irs-pdf/pcir230.pdf.*

[401] Notice 2008-4, *supra* note 23.

[402] Contingent Fees Under Circular 230, 74 FR 37183 (July 28, 2009); 31 CFR part 10, §10.27.

[403] Tax Relief and Health Care Act of 2006, *supra* note 40, at §406. Under prior law, the Secretary of the Treasury was required to submit an annual report to Congress reporting on the payments under Code Sec. 7623 during the year and on the amounts collected for which such payments were made. The Taxpayer Bill of Rights 2, P.L. 104-168, §1209(d), 110 Stat. 1452, 1474 (Jul 30, 1996) *available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ168.104.pdf.*

[404] *See supra* note 241.

[405] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, Table 2, at 16.

[406] According to IRS view, to avoid violating Code Sec. 6103 indirectly, it cannot report on the exact number of awards before a sufficient number of payments have been made. There not a sufficient number of awards paid to meet the threshold for aggregate public disclosure. GAO 2011 Report, *supra* note 12, note 3, at 2.

[407] Fourth WBO Annual Report to Congress FY 2010, *supra* note 6, at 19.

[408] IRM 25.2.1.1: Authority and Policy (Dec. 23, 2008).

[409] This initiative was outlined in the second Whistleblower Annual Report to Congress FY 2008, *supra* note 237, at 6.

[410] Third WBO Annual Report to Congress FY 2009, supra note 4, at 4.

[411] *Id.,* at 7.

[412] *Id.,* at *8.*

[413] Notice 2008-4, *supra* note 23, at §3.13.

[414] Department of Treasury, 2011-2012 Priority Guidance Plan, at 27 (Oct. 31, 2011), *available at www.irs.gov/pub/irs-utl/2011-2012_pgp_1st_update.pdf.*

[415] Coder, *IRS Whistleblower Office Reports Increased Claims, Award Activity in 2010,* 2011 TNT 140-2 (July 21, 2011).

[416] A *qui tam* action is one that is "brought by a person on behalf of a government against a party alleged to have violated a statute esp. against defrauding the government through false claims and that provides for part of a penalty to go to the person bringing the action." MERRIAM-WEBSTER'S DICTIONARY OF LAW. Springfield: Merriam-Webster, 1996. *Credo Reference*. Web. July 8, 2011.

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