MSP #13 WHISTLEBLOWER PROGRAM: The IRS Whistleblower Program Does Not Meet Whistleblowers' Need for Information During Lengthy Processing Times and Does Not Sufficiently Protect Taxpayers' Confidential Information from Re-Disclosure by Whistleblowers

RESPONSIBLE OFFICIALS

Jeff Wallbaum, Chief Financial Officer
John M. Dalrymple, Deputy Commissioner for Services and Enforcement
Edward Killen, Director, Privacy, Governmental Liaison and Disclosure
Douglas W. O'Donnell, Commissioner, Large Business and International
Sunita Lough, Commissioner, Tax Exempt and Government Entities Division
Karen Schiller, Commissioner, Small Business/Self-Employed Division
Richard Weber, Chief, Criminal Investigation
Kirsten B. Wielobob, Chief, Appeals
Lee D. Martin, Director, Whistleblower Office
William J. Wilkins, Chief Counsel

TAXPAYER RIGHTS IMPACTED[1]

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to Confidentiality*

DEFINITION OF PROBLEM

In 2006, in the light of empirical evidence that audits initiated on the basis of whistleblower information resulted in the recovery of hundreds of millions of dollars of unpaid tax and cost less than half, per dollar of taxes collected, of other Internal Revenue Service (IRS) enforcement programs, Congress concluded that "rewarding whistleblowers is one of the best ways to fight tax cheats."[2] The legitimate use of whistleblowers, however, creates risks for the subject of the whistleblower claim, especially when the claim is unsupported or not pursued. As Congress is aware, voluntary compliance may be undermined if taxpayers perceive the IRS is not adequately guarding their tax information.[3] It is possible to balance these two

1 See Taxpayer Bill of Rights, *available at* www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 See Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2006-30-092, *The Informants' Rewards Program Needs More Centralized Management Oversight* 3-4 (June 6, 2006) (describing the contents of IRS, *The Informants' Project: A Study of the Present Law Reward Program* (Sept. 1999)); *Grassley Says IRS, Treasury Need to Put Out "Welcome Mat" for Whistleblowers*, 2006 TNT 112-96 (June 12, 2006).

3 See Dept. of Treas., *Report to The Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions*, Vol. I, Study of General Provisions 34 (Oct. 2000) (stating that "[t]axpayers who view the IRS as a resource for a variety of other interests will be less inclined to voluntarily turn over sensitive financial information out of fear of where it might ultimately land").

concerns; however, the whistleblower program as currently administered by the IRS and the Internal Revenue Code (IRC) do not adequately strike that balance.

The legitimate use of whistleblowers, however, creates risks for the subject of the whistleblower claim, especially when the claim is unsupported or not pursued. As Congress is aware, voluntary compliance may be undermined if taxpayers perceive the IRS is not adequately guarding their tax information.

The IRS has long had the authority, at its own discretion, to compensate informants who report violations of the internal revenue laws.[4] Using this discretion, now codified as subsection (a) of IRC § 7623, the IRS adopted a policy of paying informants up to 15 percent of the amount recovered, subject to a $10 million cap.[5] In 2006, Congress added subsection (b) to IRC § 7623, significantly expanding the scope of the statute by *requiring* the IRS to award certain whistleblowers an amount between 15 and 30 percent of the collected proceeds, with no maximum dollar limit.[6]

Whistleblowers took an immediate interest in IRC § 7623(b), making 50 submissions in fiscal year (FY) 2007 that appeared to meet the threshold requirements, including that the amount in dispute exceed $2 million.[7] The number of submissions under IRC § 7623(b) increased dramatically thereafter; there were 352 in FY 2014 alone.[8] The IRS paid the first IRC § 7623(b) award in 2011 and paid 11 such awards from FYs 2011 to 2014.[9] The total amount of awards under IRC § 7623 was $13.6 million in FY 2007 (when the IRS paid claims only at its discretion, under IRC § 7623(a)) and fluctuated over the years, reaching a high of $125 million in FY 2012 (when the IRS paid claims under both subsections).[10]

Despite the increased willingness of whistleblowers to come forward, the effectiveness of the whistleblower program has been undermined by conditions such as:

- The length of time it takes to resolve whistleblower cases, which averaged almost six years for awards paid in FY 2014;[11]
- Statutory provisions that impede the IRS from communicating effectively and regularly with whistleblowers; and

4 *See* Act of Mar. 2, 1867, ch. 169, §7, 14 Stat. 471, 473 (codified by ch.11, § 3463, 35 Rev. Stat. 686 (1893-74)).

5 IRC § 7623(a); Internal Revenue Manual (IRM) 1.2.13.1.12, *Policy Statement 4-27* (Aug. 13, 2004).

6 Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(a)(1)(D), 120 Stat. 2921, 2958 (adding subsection (b) to IRC § 7623); IRC § 7623(b)(1). The IRS does not take into account penalties collected for failing to file Form TD F 90-22.1 (now FinCEN Form 114), *Report of Foreign Bank and Financial Accounts (FBAR)*, as required by 31 U.S.C. § 5314 in making awards under IRC § 7623. *See* Legislative Recommendation: *Whistleblower Program: Amend IRC §§ 7623 and 6103 to Provide Consistent Treatment of Recovered Foreign Account Tax Compliance Act (FATCA) and Report of Foreign Bank and Financial Accounts (FBAR) Penalties for Whistleblower Award Purposes*, *infra*.

7 IRS Whistleblower Office (WO), *Fiscal Year 2011 Report to the Congress on the Use of Section 7623*, Table 1; IRC § 7623(b)(5)(B). As the WO annual reports note, the number of submissions reported was subject to change. For this reason, we cite to the most recent report for which the cited data is available.

8 IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623*, Appx. Table 2.

9 *Id*. at 4.

10 IRS WO, *Fiscal Year 2011 Report to the Congress on the Use of Section 7623*, Table 4; IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623*, Appx. Table 6.

11 IRS WO response to TAS information request (Aug. 27, 2015) (noting that 101 awards were paid in FY 2014, with an average elapsed time from Form 211 receipt to award payment date of 5.8 years). The timeframes ranged from 2.4 years to 14.8 years, with a median of 5.3 years. For the 11 awards paid under IRC § 7623(b) from FYs 2011-2014, the average elapsed time from Form 211 receipt to award payment date was 4.9 years. The timeframes ranged from 3.9 years to 6.1 years, with a median of 4.9 years.

- The lack of statutory protection of whistleblowers from retaliation.[12]

Moreover, the whistleblower program does not adequately protect taxpayers from disclosure of their confidential information by whistleblowers. The causes of some of these difficulties are beyond the IRS's control, and the IRS shares some of the National Taxpayer Advocate's concerns.[13] However, the IRS has moved slowly to address issues within its purview, and has occasionally exacerbated the difficulties.[14] The whistleblower program enjoys the support of the IRS Commissioner but has yet to realize its full potential.[15]

ANALYSIS OF PROBLEM

Accepting Assistance From Whistleblowers Is an Efficient Enforcement Mechanism But Carries Heightened Risk for the Subject of the Claim

The IRS selects returns for audit in a variety of ways, most often using Discriminant Index Function (DIF) formulas.[16] In 1999, the IRS reported that audits of 1996-1998 returns initiated on the basis of information from an informant (now referred to as a whistleblower) "had a higher dollar yield per hour[17] and a lower no-change[18] rate" than returns selected on the basis of DIF scores.[19] Moreover, the cost/benefit ratio of whistleblower audits compared favorably with other IRS enforcement programs: "[t]he report estimated the IRS incurred slightly over four cents in cost (including personnel and administrative costs) for each dollar collected from the Informants' Rewards Program (including interest), compared to a cost of over ten cents per dollar collected for all enforcement programs."[20] From FYs 2001-2005, audits based on whistleblower information resulted in a total recovery of tax, fines, interest and penalties of more than $340 million.[21]

When the IRS accepts assistance from a whistleblower, the risk arises that the audited taxpayer's confidential information will be inappropriately disclosed to the whistleblower, a risk for which Congress and the IRS have little tolerance. IRC § 6103 generally prohibits IRS employees from disclosing a taxpayer's

12 The Government Accountability Office (GAO) has voiced similar concerns. See GAO, GAO-16-20, *IRS Whistleblower Program Billions Collected, but Timeliness and Communication Concerns May Discourage Whistleblowers* (Oct. 2015).

13 See IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623* 6-7.

14 See the discussion below pertaining to the IRS's refusal to enter into tax administration contracts with whistleblowers, its determination that an "administrative proceeding" begins when the IRS proposes an award, and the inadequacy of confidentiality agreements executed by whistleblowers to deter re-disclosure of taxpayer information.

15 See, *e.g.*, William Hoffman, *Tax Analysts Interview with John Koskinen* (Oct. 17, 2014) (reiterating his support for the whistleblower program generally, expressing his willingness to explore ways to improve communication with whistleblowers, and noting the need for anti-retaliation legislation).

16 See IRM 4.22.1.5, *Benefits of NRP* (Oct. 1, 2008); IRM 4.19.11.1.5.1, *How DIF Works* (Nov. 9, 2007) (explaining, among other things, that "DIF is a mathematical technique used to score income tax returns as to examination potential").

17 Dollar yield per hour refers to the total recommended adjustments to tax liability divided by the number of examiner hours charged to examinations. (fn. in original.)

18 For the purpose of this analysis, an examination of a return results in a "no-change" when the examination is closed in the Audit Information Management System (AIMS) using Disposal Code 02 (no adjustments or changes to tax liability). (fn. in original.)

19 TIGTA, Ref. No. 2006-30-092, *The Informants' Rewards Program Needs More Centralized Management Oversight* 4 (June 6, 2006) (describing the contents of IRS, *The Informants' Project: A Study of the Present Law Reward Program* (Sept. 1999)).

20 *Id.*

21 *Id.* at 3

"return" or "return information" and civil and criminal penalties are imposed for violating the bar.[22] The broad definitions of "return" and "return information" forbid the IRS from telling a whistleblower, for example:

- Whether the claim led to an audit;
- Why a claim did not lead to an audit;
- Whether an audit resulted in assessment of additional tax; or
- The extent to which any additional tax was collected.[23]

The following statutory provisions allow taxpayers to recover damages for unauthorized disclosures and permit imposition of fines and prison terms, in addition to requiring termination of employment if the violator was a federal employee:

- IRC § 7431 generally allows a taxpayer whose return or return information was knowingly or negligently disclosed to bring a civil action for statutory damages of $1,000 or actual damages;[24]
- IRC § 7213 imposes a fine of up to $5,000 and imprisonment of up to five years for willful disclosure of return or return information;[25] and
- IRC § 7213A imposes a fine of up to $1,000 and imprisonment for up to one year for willful unauthorized inspection of a taxpayer's return or return information.[26]

Additionally, IRC § 6103(p) imposes requirements that pertain generally to appropriate storage and secure access of return information and requires the specified possessor to "provide such other safeguards which the Secretary determines (and which he prescribes in regulations) to be necessary or appropriate to protect the confidentiality of the returns or return information."[27]

22 IRC § 6103(a) prohibits the IRS from disclosing taxpayers' returns or return information absent an exception. There are 13 exceptions found in IRC § 6103(c)-(o), none of which expressly allows disclosures to whistleblowers. IRC § 6103(b)(1) defines "return" as "any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed." IRC § 6103(b)(2)(A) defines "return information" to include "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, 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."

23 As the IRS advises, "[o]nce a claim is submitted, the informant may be told only the status and disposition of the claim — not the action taken in the taxpayer case. We can say whether the claim is still open or has been closed. If closed we can say that a claim is payable (and the amount) or that the claim is denied." *Confidentiality and Disclosure for Whistleblowers*, *available at* www.irs.gov/uac/Confidentiality-and-Disclosure-for-Whistleblowers.

24 IRC § 7431(a)(2), (c) (imposing the same penalties for unauthorized inspection and for disclosure). In addition, the *Taxpayer Bill of Rights Enhancement Act of 2015*, § 202, S. 1578, introduced on June 16, 2015, would increase the statutory damage amount to $5,000 for each instance of unauthorized inspection and $10,000 for each instance of unauthorized disclosure, among other things.

25 IRC § 7213(a)(1) (also providing that a federal employee who violates IRC § 7213 "shall, in addition to any other punishment, be dismissed from office or discharged from employment upon conviction for such offense"). In addition, the *Taxpayer Bill of Rights Enhancement Act of 2015*, § 201, S. 1578, introduced on June 16, 2015, would increase the maximum fine for unauthorized disclosure to $20,000.

26 IRC § 7213A(a)(1)(B), (b)(1). A federal employee "who is convicted of any violation of subsection (a) shall, in addition to any other punishment, be dismissed from office or discharged from employment." IRC § 7213A(b)(2). In addition, the *Taxpayer Bill of Rights Enhancement Act of 2015*, § 201, S. 1578, introduced on June 16, 2015, would increase the maximum fine for unauthorized inspection to $5,000.

27 IRC § 6103(p)(4)(D).

The National Taxpayer Advocate has long been a proponent of enforcing and extending (where appropriate) these statutory sanctions and safeguarding provisions.[28]

Although Similar to Whistleblower Provisions of the False Claims Act, the Tax Whistleblower Statute Differs in Important Respects

In 1863, Congress enacted the False Claims Act (FCA) to address the rampant fraud on the government perpetrated during the Civil War.[29] Under the FCA, the United States Attorney General and the Department of Justice (DOJ) are delegated the discretion to bring a civil suit for statutory penalties and damages on the basis of an informant's information, but if the government declines to proceed with the action, the informant may continue alone as a *qui tam* plaintiff in the name of the government.[30] Prior to 1987, courts had discretion to award the informant up to ten percent of the proceeds collected if the government brought suit, and up to 25 percent of the proceeds collected, as well as the reasonable expenses for the costs of litigation, if the government declined to proceed and an individual brought the action.[31] In 1987, amendments to the FCA strengthened the *qui tam* provisions by *requiring* payments to the informant of between 15 and 25 percent of the proceeds if the government brought suit, or 25 to 30 percent if the informant proceeded alone, and adding protections from retaliation for employee whistleblowers.[32] The amendments also included a "tax bar," which codified prior court holdings that tax fraud is excluded from the purview of the FCA.[33]

28 *See* National Taxpayer Advocate 2003 Annual Report to Congress 232-54 (recommending that "[d]uring pilots and in statutory disclosures, agencies and their contractors must be subject to the safeguard provisions of IRC § 6103(p)(4), and agencies and their contractors or agents must be subject to the civil and criminal sanctions of IRC §§ 7213, 7213A, and 7341"); National Taxpayer Advocate 2010 Annual Report to Congress 396 (recommending that taxpayers be allowed to recover damages for unauthorized disclosure by whistleblowers). The President's Budget submissions for FYs 2014-2016 included legislative proposals to amend IRC § 6103 "to provide that the section 6103(p) safeguarding requirements apply to whistleblowers and their legal representatives who receive returns and return information in whistleblower administrative proceedings. In addition, the proposal extends the penalties for unauthorized inspections and disclosures of returns and return information to whistleblowers and their legal representatives." *See General Explanations of the Administration's Fiscal Year Revenue Proposals* (Treasury Greenbook) FYs 2014-2016 at 205, 236, and 250-51, respectively, *available at* www.treasury.gov/resource-center/tax-policy/Pages/general_explanation.aspx. As discussed below, the National Taxpayer Advocate this year recommends that Congress make the safeguarding provisions and statutory sanctions applicable to whistleblowers. *See* Legislative Recommendation: *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC § 6103(p)*, *infra*.

29 H.R. Rep. No. 99-660, at 17 (1986).

30 31 U.S.C. § 3730(a), (b); 31 U.S.C. § 3729. *Qui tam* is "[a]n action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive." Black's Law Dictionary (9th ed. 2009). The private person who brings a *qui tam* action is the "relator." According to one 2011 DOJ memo, "[t]here are no statistics reported on the length of time the average *qui tam* case remains under seal [the preliminary period during which DOJ investigates a FCA complaint and decides whether it will intervene]… In this District, most intervened or settled cases are under seal for at least two years (with, of course, periodic reports to the supervising judge concerning the progress of the case, and the justification of the need for additional time)." See *False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits* 2, *available at* http://www.justice.gov/sites/default/files/usao-edpa/legacy/2011/04/18/fcaprocess2_0.pdf. The length of time the suit will take appears to vary widely. *See, e.g.*, Ben Hallman, *Whistleblowers, Beware: Most Claims End in Disappointment, Despair, available at* http://www.huffingtonpost.com/2012/06/04/whistleblower-law-false-claims-act-awards-james-holzrichter_n_1563783.html, reporting on FCA suits that took as long as 17 years to resolve, as well as one that took less than a year to resolve.

31 *See* Pub. L. 97-258, § 3730(c)(1) and (2), 96 Stat. 877, 978.

32 *See* False Claims Amendment Act of 1986, Pub. L. 99-562, Sec. 3, § 3730(d)(2), 100 Stat. 3153, 3154-3157.

33 31 U.S.C. § 3729(d). As one commenter observed, "[s]ince the [False Claims Act] deals only with misrepresentations made in connection with the presentation of claims, misrepresentations for the purpose of defrauding the Government are in many situations not proscribed. The Supreme Court [in *United States v. Cohn*, 270 U.S. 339 at 345] has defined a 'claim' as a demand upon the Government for the payment of money or delivery of property… However, where the citizen uses false statements to reduce his own liability to the Government, the statute is inapplicable" (fn. refs. omitted). Note, *The False Claims Act*, 69 Harv. L. Rev. 1106 (1956).

Although there is room for improvement in the cycle time of whistleblower cases, these cases are often complex and involve built-in time constraints and waiting periods.

The "tax informant statute," now codified as IRC § 7623, was enacted in 1867.[34] Prior to 2006, payments to tax whistleblowers were not mandatory (like payments under the FCA prior to 1986); whether to pay an award and the amount of any award were within the IRS's discretion.[35] In 2006, following a Treasury Inspector General for Tax Administration (TIGTA) report identifying weaknesses in the whistleblower program, Congress added subsection (b) to IRC § 7623.[36] The 2006 amendments made whistleblower awards mandatory in certain cases, specified an award amount from 15 to 30 percent of the collected proceeds (with no cap on the amount of the award), created the IRS Whistleblower Office (WO), and provided for United States Tax Court review of whistleblower award determinations.[37] The IRS and Treasury drafted proposed regulations implementing IRC § 7623(b) in 2012, and after notice, public comment, and a public hearing, issued final regulations in August 2014.[38]

Under IRC § 7623, a tax whistleblower's statutory role has always been limited to reporting information to the IRS, which, like the Attorney General for purposes of the FCA, has the discretion to pursue the claim or not.[39] Unlike the FCA, there is no *qui tam* provision in the IRC allowing a tax whistleblower to proceed on behalf of the government, and tax whistleblowers do not have the benefit of statutory protections from retaliation.[40] Tax whistleblowers are protected by statute from having their identities disclosed in certain situations, however, and the IRS provides heightened security for whistleblower information

34 *See* Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch.11, § 3463, 35 Rev. Stat. 686 (1893-74)).

35 As noted above, the IRS adopted a policy of paying informants up to 15 percent of the amount recovered, subject to a $10 million cap. IRM 1.2.13.1.12, *Policy Statement 4-27* (Aug. 13, 2004).

36 Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432, § 406(a)(1)(D), 120 Stat. 2922, 2958. *See* Joint Committee on Taxation, Technical Explanation of H.R. 6408, the "Tax Relief and Health Care Act of 2006," JCX-50-06, No. 2 (Dec. 7, 2006) (referencing TIGTA, Ref. No. 2006-30-092, *The Informants' Rewards Program Needs More Centralized Management Oversight* (June 6, 2006)).

37 Tax Relief and Health Care Act of 2006, Pub. L. No. 109-432 § 406(b), 120 Stat. 2922, 2959 (an "off-Code" provision creating the WO); IRC § 7623(b)(4) (providing for Tax Court review of the IRS's award determination). For administrative ease, the IRS subsequently changed its policy of awarding only up to 15 percent of the amount recovered for subsection (a) claims, and now applies the same criteria and percentages to subsection (a) claims submitted after July 1, 2010, as for subsection (b) claims. IRM 25.2.2.7.4, *Award Computation - IRC 7623(a) claims filed on or after July 1, 2010 and IRC 7623(b) claims* (Aug. 7, 2015); WO response to TAS information request (Oct. 20, 2015).

38 Notice of Proposed Rulemaking, 77 Fed. Reg. 74798, 2013-3 I.R.B. 289 (Dec. 18, 2012); *Preamble*, T.D. 9687, 79 Fed. Reg. 47246 (Aug. 12, 2014) (noting that the IRS and Treasury held a public hearing on April 10, 2013, at which eight commenters testified).

39 The House proposed including in the 1867 statute a provision allowing *qui tam* actions by informers, but the proposal was rejected, without explanation, by the Senate. *See* Cong. Globe, 39th Cong. 2d Sess. (1867) 1545, 1919. Moreover, a rule similar to the one found in what is now IRC § 7401 (that "[n]o civil action for the collection or recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced") was in place prior to enactment of the 1867 tax informant statute (Act of July 13, 1866, ch. 184, § 9, 13 Stat. 111), and was left intact. *See also Cohen v. Comm'r*, 139 T.C. 299, 302 (2012) (holding that "section 7623 [does not] confer authority [on the Tax Court] to direct the Commissioner to commence an administrative or judicial action").

40 The President's Budget submissions for FYs 2014, 2015, and 2016 included legislative proposals to provide whistleblowers with protection from retaliation. *See* Treasury Greenbook FYs 2014-2016 at 204, 235, and 250-51, respectively, *available at* www.treasury.gov/resource-center/tax-policy/Pages/general_explanation.aspx. The GAO has also recommended that Congress consider such legislation. *See* GAO, GAO-16-20, *IRS Whistleblower Program Billions Collected, but Timeliness and Communication Concerns May Discourage Whistleblowers* 45 (Oct. 2015).

contained in administrative files.[41] Perhaps the biggest difference between the two whistleblower regimes is due to the protection of taxpayers' confidential information afforded by IRC § 6103, discussed above.

It Takes the IRS Almost Five Years on Average to Make Payouts of IRC § 7623(b) Claims

The IRS paid its first whistleblower award pursuant to IRC § 7623(b) in 2011.[42] Although there is room for improvement in the cycle time of whistleblower cases, these cases are often complex and involve built-in time constraints and waiting periods. The process that culminates in an award under IRC § 7623(b) takes close to five years and generally begins with review of Form 211, *Application for Award for Original Information*, by the WO's Initial Claim Evaluation (ICE) Team.[43] The claim is perfected if necessary (*e.g.*, the submitter may be asked to complete an incomplete Form 211 or provide an original signature) and then considered by a classifier in one of the IRS operating divisions.[44] If the classifier, after reviewing Form 211 and completing a classification check sheet, advises the WO that the claim has merit, the WO refers the claim to the appropriate operating division subject matter expert, who reviews the file and advises whether the IRS should open an audit.[45] If an audit ensues, the general progress of the claim includes: the audit itself; collection of any additional tax resulting from the audit; expiration of any period of limitations within which the audited taxpayer could request a refund; determining the amount of the award; and processing payment.[46]

41 *See* IRC § 6103(h)(4) (allowing disclosure of return or return information in judicial and administrative tax proceedings, except where "the Secretary determines that such disclosure would identify a confidential informant or seriously impair a civil or criminal tax investigation"); Treas. Reg. § 301.7623-1(e) (providing that "[u]nder the informant's privilege, the IRS will use its best efforts to protect the identity of whistleblowers"); IRM 25.2.2.5, *Examining a Whistleblower Claim* (Aug. 7, 2015) (instructing that there be "no mention or discussion of the whistleblower in the regular examination activity log, work papers, or case file" (which the IRS interprets to mean that the existence of a whistleblower, as well as his or her identity, is not to be mentioned). WO response to TAS information request (Oct. 20, 2015)); IRS Notice 2008-4, § 3.06, 2008-2 I.R.B. 253 (providing that the IRS maintains the confidentiality of the whistleblower's identity "to the fullest extent permitted by law").

42 IRS WO, *FY 2011 Report to the Congress on the Use of Section 7623* at 3. The WO's annual reports do not identify, for awards paid, the year in which the claim was submitted.

43 WO response to TAS information request (Aug. 27, 2015) (noting that for the 11 awards paid under IRC § 7623(b) from FYs 2011-2014, the average elapsed time from Form 211 receipt to award payment date was 4.9 years). Timeframes ranged from 3.9 years to 6.1 years, with a median of 4.9 years.

44 IRM 25.2.2.4, *Initial Form 211 Processing* (Aug. 7, 2015). We note that the perception of the independence of the WO's determinations would be enhanced if the classifiers reported to the WO Director, similar to the structure of TAS, where revenue agents and revenue officers bring their skills and experience to TAS, and as TAS employees follow TAS's mission, with their head of office the National Taxpayer Advocate.

45 IRM 25.2.2.4.2, *Selecting a Claim* (Aug. 7, 2015). Alternatively, the classifier may recommend that the WO reject the claim, deny the claim, refer the claim to another group for consideration, or, where the claim requires special handling or coordination among operating divisions, refer the claim(s) to the WO's Case Development and Oversight group, which analyzes and decides whether to send the claim to the field for possible audit. A classifier who recommends not proceeding with the claim must provide documentation showing he or she considered the issue(s) reflected on the Form 211 and provide the reason he or she did not select the claim. WO Procedural Guide, *ICE Process: Classification* 18 (rev. Mar. 27, 2015). A subject matter expert who ultimately determines not to proceed with the case must complete Form 11369, *Confidential Evaluation Report on Claim for Award*, which his or her manager approves, and submit it to the WO Analyst, who forwards it for approval by a WO manager or senior manager. IRM 25.2.2.4.4(8), *Operating Division SME Responsibilities* (Aug. 7, 2015).

46 *See* IRM 25.2.2, *Whistleblower Awards* (Aug. 7, 2015). A claim may be transferred to Criminal Investigation (CI), accompanied by Form 11369 explaining the reason for the transfer, and CI may recommend the claim for prosecution, assist the Tax Division of the DOJ in prosecuting the claim, and at its conclusion, return it to the WO for consideration of an award. IRM 9.4.1.5.1.1(7), *Information Items and Whistleblowers* (Mar. 30, 2012). If CI determines that the referral lacks prosecution potential, it returns the case to WO, which may refer the claim to an operating division for audit consideration. IRM 9.4.1.5.1.1(4), *Information Items and Whistleblowers* (Mar. 30, 2012). A decision by CI to initially not take action does not prevent a criminal referral by an operating division after further development.

Even if performance goals (which do not include the time it takes to conduct the audit) are met or exceeded, and even assuming the claim is never suspended pending the outcome of an appeal, collection action, or similar case developments, it will take more than three and a half years on average for a claim to culminate in an award to the whistleblower.

Performance goals established by the IRS Deputy Commissioner of Services and Enforcement apply to some (but not all) phases of the process.[47] For example, there are no target timeframes for completing whistleblower field audits, which take about a year and a half on average and account for the claims of more than a third of all whistleblowers.[48] Even if performance goals (which do not include the time it takes to conduct the audit) are met or exceeded, and even assuming the claim is never suspended pending the outcome of an appeal, collection action, or similar case developments, it will take more than three and a half years on average for a claim to culminate in an award to the whistleblower.[49] A substantial number of whistleblowers (221 out of 1,489, or about 15 percent) were awaiting the WO's review of audit results to determine whether there is sufficient information to make an award decision, which takes almost a year.[50] The number of days this phase consumes presents an opportunity for the IRS to truncate the cycle time for whistleblower cases and reduce the time whistleblowers must wait to learn whether they will receive an award.[51] Figure 1.13.1 shows the principal phases required in most successful IRC § 7623(b) claims.

47 Memo from John M. Dalrymple, Deputy Commissioner for Services and Enforcement, to Commissioners of the Large Business & International (LB&I), Small Business/Self-Employed (SB/SE), Tax Exempt and Government Entities (TE/GE) divisions, Chief of CI, and Director of the WO (Aug. 20, 2014).

48 CI response to TAS information request (Sept. 3, 2015); TE/GE response to TAS information request (Aug. 5, 2015); SB/SE response to TAS information request (July 30, 2015); LB&I response to TAS information request (July 29, 2015). IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623*, 20,18 Appx. Tables 5, 4 (showing field audits in WB cases take on average 544 days, with 2,344 days (more than six years) the longest audit and that as of May 14, 2015, out of 1,489 whistleblowers with open claims, the claims of 500 whistleblowers (34 percent) were in field audit). Criminal investigations of whistleblower claims take on average close to two years. CI response to TAS information request (Sept. 3, 2015) (noting that the average number of days from the start of an investigation to its completion for investigations closed in FYs 2012, 2013, and 2014 was 572, 656, and 762, respectively).

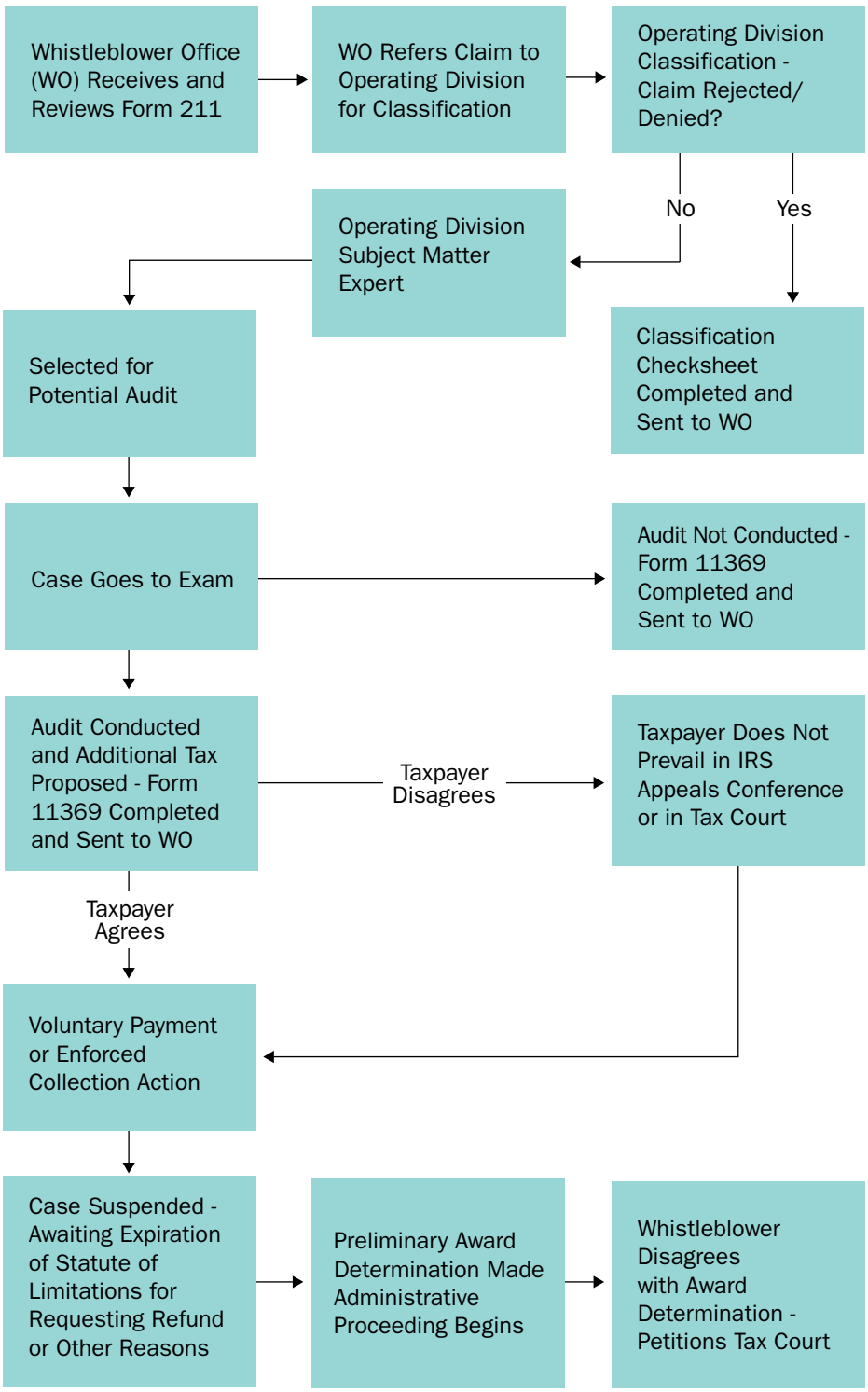
49 The WO is in the process of updating its records to reflect new status categories and expects its future reports to more accurately capture the status of subsection (b) claims. Current data shows that it takes 85 days on average for the WO to complete its initial review of the claim (which is faster than the 90-day target); 80 days on average for operating division subject matter expert review to determine whether to audit (which is also faster than the 90-day target); 544 days on average for operating division OD field examination; 362 days on average for the WO review of the results of field action to determine whether there is sufficient information to make an award decision; 45 days on average for the whistleblower to be notified of award decision after collected proceeds are finally determined (which is faster than the 90-day target); and 218 days for final award processing. The sum of these periods is 1,334 days, more than 3.5 years. IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623* 20 Appx. Table 5.

50 *Id.* at 18, 20 Appx. Tables 4 and 5 (noting that this step takes 362 days on average). As noted, the WO is in the process of updating its records. It is possible that some claims included in this step will be re-classified as in another status, which could affect the average number of days claims await the WO's review of audit results. WO response to TAS information request (Oct. 20, 2015).

51 A 90-day time period for this phase would be an appropriate performance goal.

FIGURE 1.13.1

Principal Phases of Most Successful IRC § 7623(b) Claims



If the claim is suspended, which could occur for a variety of reasons, the average timeframe is extended, potentially for several additional years.[52] One important reason for suspending a claim, at least in cases where the taxpayer has not waived the right to request a refund, is to allow the statutory period of limitations for requesting a refund to expire.[53] Suspending the claim obviates the risk that the IRS would pay an award to a whistleblower out of collected proceeds it is later required to refund to the taxpayer. Treasury regulations permit, but do not require the IRS to separate the components of a claim so that a payout on one issue can go forward while other issues are litigated.[54]

Because processing times may be lengthy, whistleblowers seek information about the status of their claims. They approach the WO with requests for information, they submit requests to the IRS under the Freedom of Information Act (FOIA), and they inform TAS of systemic delays.[55]

The IRS Has Never Availed Itself of IRC § 6103(n), an Exception to the Statutory Prohibition on Disclosing Confidential Taxpayer Information, That Would Allow the IRS to Update Whistleblowers on the Status of Their Claims and Protect Taxpayer Confidential Information From Re-Disclosure by the Whistleblower

There are exceptions to the nondisclosure rules of IRC § 6103, some of which may apply in the context of whistleblower claims, although none specifically addresses disclosures to whistleblowers. For example, a whistleblower and the IRS may enter into a contract under IRC § 6103(n), sometimes referred to as a "tax administration" contract, for the whistleblower's services relating to the detection of violations of the internal revenue laws or related statutes.[56] In that event, the IRS "may inform the whistleblower and, if applicable, the legal representative of the whistleblower, of the status of the whistleblower's claim for award under IRC § 7623, including whether the claim is being evaluated for potential investigative action, or is pending due to an ongoing examination, appeal, collection action, or litigation."[57] If a tax administration contract is in effect, the regulations under IRC § 6103 provide that the sanctions imposed by IRC §§ 7431, 7213, and 7213A, discussed above, apply to the whistleblower.[58] Moreover, a whistleblower who executes a contract under IRC § 6103(n) must "permit an inspection of the whistleblower's

52 The shortest average suspension period, arising while the claim is awaiting collection action, affected 76 whistleblowers in FY 2014 and adds about nine months on average to the timeframe. The longest average suspension period, arising while the IRS evaluates a bulk claim involving a large number of taxpayers, affected ten whistleblowers in FY 2014 and adds almost three years to the timeframe. IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623* at 17 Appx. Table 4.

53 Generally, taxpayers must request a refund within three years from the date their return was filed, or two years from the time the tax was paid, whichever occurs later, or, if no return was filed, within two years from the time the tax was paid. IRC § 6511(a). If taxpayers meet the three-year requirement, they can recover payments made during the three-year period that precedes the date of the refund request, plus the period of any extension of time for filing the return. Taxpayers who do not meet the three-year requirement can recover only payments made during the two-year period preceding the date of the refund request. IRC § 6511(b)(2).

54 *See* Treas. Reg. § 301.7623-4(d)(2), T.D. 9687, 79 Fed. Reg. 47246, 47275 (Aug. 12, 2014). In any event, Form 870, *Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment*, provides that the consenting taxpayer cannot petition Tax Court, but "[y]our consent will not prevent you from filing a claim for refund (after you have paid the tax) if you later believe you are so entitled."

55 From FYs 2012-2015 (as of June 22), the IRS received 38 FOIA requests seeking access to whistleblower records, 11 of which were from whistleblowers seeking access to records about their claim. In those cases, the whistleblower can obtain the claim and any attachments he or she provided to the IRS, and the IRS can confirm that the claim exists and is still open or closed, but cannot provide any other information about actions the IRS will take on the claim. Privacy, Governmental Liaison and Disclosure response to TAS information request (June 29, 2015); SAMS 31265, submitted Aug. 18, 2014.

56 *See* IRC § 6103(n); Treas. Reg. § 301-6103(n)-2.

57 Treas. Reg. § 301.6103(n)-2(b)(3).

58 Treas. Reg. § 301.6103(n)-2(c) (providing "[a]ny whistleblower, or legal representative of a whistleblower, who receives return information under this section, is subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of the return information").

or the legal representative's premises by the IRS" to ensure that return information is adequately protected from unauthorized disclosure.[59]

The IRS advises its officials they may use an IRC § 6103(n) contract when disclosure to a whistleblower is "necessary to obtain a whistleblower's insights and expertise into complex technical or factual issues,"[60] and as discussed below, the regulations under IRC § 7623 contemplate the use of such contracts.[61] At the same time, the IRS views these contracts as "not intended to be used to disseminate information to whistleblowers."[62] On the contrary, "[a] whistleblower who thinks the IRS will grant a section 6103 contract 'without a compelling need on the part of the IRS to get information from the whistleblower has just misunderstood what (n) contracts were intended to do.'"[63] In any event, the IRS has never entered into an IRC § 6103(n) contract with a whistleblower.[64]

The IRS Does Provide Confidential Taxpayer Information to Whistleblowers Under Provisions That Do Not Adequately Protect Taxpayers from Re-Disclosure of Their Confidential Information by Whistleblowers

The IRS does disclose return information to whistleblowers pursuant to another exception to IRC § 6103 for what are sometimes referred to as "investigative disclosures."[65] Under IRC § 6103(k)(6), to the extent necessary to obtain information related to the IRS's official duties or to accomplish properly any activity connected with such official duties, the IRS may disclose return information to third parties (persons other than the taxpayer). Whether or not this exception would allow the IRS to provide status updates to a whistleblower, a whistleblower to whom a disclosure is made under IRC § 6103(k)(6), unlike a whistleblower to whom a disclosure was made pursuant to an IRC § 6103(n) contract, is not subject to statutory requirements for safeguarding the information or the statutory sanctions for re-disclosing it.[66]

The IRS discloses taxpayer information to a successful whistleblower pursuant to another exception to IRC § 6103 after it concludes an audit, collects proceeds from the taxpayer, determines that a

59 Treas. Reg. § 301.6103(n)-2(d)(3). *See also* Treas. Reg. § 301.6103(n)-1 (providing analogous provisions that apply to tax administration contracts generally (not only those entered into by whistleblowers)).

60 Memorandum from John M. Dalrymple, IRS Deputy Commissioner for Services and Enforcement to Commissioners of the LB&I, SB/SE, TE/GE divisions, Chief of Criminal Investigation, and Director of the Whistleblower Office (Aug. 20, 2014); Memorandum from Steven Miller, IRS Deputy Commissioner for Services and Enforcement to Commissioners of the LB&I, SB/SE, TE/GE and W&I divisions, Chief of Criminal Investigation, and Director of the Whistleblower Office (June 20, 2012), 2012 TNT 121-15.

61 *Preamble*, T.D. 9687, 79 Fed. Reg. 47246, 47256 (Aug. 12, 2014).

62 Andrew Velarde, *Whistleblower Status Letters Seen as a Good Start but Not Enough* 2015 TNT 53-5 (Mar. 19, 2015) (describing the WO Director's view of IRS § 6103(n) contracts).

63 *Id*. (quoting the WO Director).

64 SB/SE response to TAS information request (July 31, 2015); LB&I response to TAS information request (July 29, 2015); TE/GE response to TAS information request (Aug. 5, 2015). The GAO has recommended that the IRS "[d]evelop guidance for examiners in operating divisions to use in determining whether an Internal Revenue Code section 6103(n) contract with a whistleblower would be beneficial and outline the steps for requesting such a contract." *See* GAO, GAO-16-20, *IRS Whistleblower Program Billions Collected, but Timeliness and Communication Concerns May Discourage Whistleblowers* 46 (Oct. 2015).

65 Andrew Velarde, *Whistleblower Status Letters Seen as a Good Start but Not Enough* 2015 TNT 53-5 (Mar. 19, 2015) (reporting that according to the WO Director, "as a practical matter, investigative disclosures under section 6103(k)(6) can be and have been used to interact with whistleblowers, and auditors are confident in using that authority, which 'works a little easier' and serves as a fair substitute" for IRC § 6103(n) contracts). For a detailed discussion of disclosures under IRC § 6103(k)(6) to third parties other than whistleblowers, where it is *presumed* that the contact with the third party will be disclosed to the taxpayer, see Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*, *supra*. In contrast, as discussed above, IRS procedures require that it not disclose a whistleblower's identity to the affected taxpayer.

66 Treas. Reg. § 301.6103(k)(6)-1(c)(1) provides that these disclosures "may not be made indiscriminately or solely for the benefit of the recipient or as part of a negotiated *quid pro quo* arrangement." The National Taxpayer Advocate does not view providing status updates pursuant to a confidentiality agreement as contravening this requirement.

whistleblower award could be paid, and notifies the whistleblower of a preliminary, or proposed, award.[67] The preliminary award the IRS communicates to the whistleblower includes "a summary report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, the recommended award amount… and a list of the factors that contributed to the recommended award percentage."[68]

Although the Internal Revenue Manual (IRM) initially treated the administrative process as beginning on the date the WO received the claim for award, Treasury regulations now provide that sending the preliminary award marks the beginning of an "administrative proceeding."[69] Pursuant to IRC § 6103(h)(4), the IRS may disclose returns and return information during a whistleblower administrative proceeding.[70] The regulations under IRC § 7623 require the whistleblower to execute a confidentiality agreement before the IRS will share any information beyond that already provided in the preliminary award.[71] Violating the confidentiality agreement, including by re-disclosing return information, is a negative factor the IRS takes into account in calculating the amount of the award.[72] Noting that "[a]s a practical matter, this factor would be ineffective after payment," the National Taxpayer Advocate recommended that taxpayers be allowed to recover damages for subsequent unauthorized disclosure by whistleblowers.[73] The WO has raised the same concern, noting "current law does not provide an effective sanction if the whistleblower discloses taxpayer information in violation of the confidentiality agreement and section 6103(h)."[74]

More Robust Sanctions for Re-Disclosure of Taxpayer Information by Whistleblowers and Less Restrictive Interpretations of IRC §§ 7623 and 6103 Would Better Protect Taxpayers While Allowing Status Updates to Whistleblowers

The regulatory provision that a whistleblower "administrative proceeding" (which triggers an exception to the disclosure rules) begins only when the IRS proposes an award is an obvious impediment to effective communication with whistleblowers while the case is unfolding and wending its way through various phases that lead to an award. In response to a request for comment on proposed regulations under IRC § 7623, "[s]everal commenters suggested that whistleblower administrative proceedings should begin earlier. The commenters offered different suggestions for how this could be accomplished, including

67 IRC § 6103(h)(4), discussed below.

68 Treas. Reg. § 301.7623–3(c)(2)(ii) (for preliminary awards under IRC § 7623(b)). *See* Treas. Reg. § 301.7623-3(b)(1) (for a similar provision for preliminary awards under IRC § 7623(a)).

69 *Compare* IRM 25.2.2.8, *Whistleblower Award Determination Administrative Proceeding - 7623(a) Claims* (June 18, 2010), *with* Treas. Reg. § 301.7623–3(b) and (c). In practice, the IRS has never treated the administrative proceeding as beginning with receipt of the claim for award from the whistleblower. WO response to TAS information request (Oct. 20, 2015). Issuance of a preliminary denial letter or preliminary rejection letter in IRC § 7623(b) cases also marks the beginning of a whistleblower administrative proceeding. *See* Treas. Reg. § 301.7623-3(c)(7) and (8). (The WO does not conduct whistleblower administrative proceedings for claims rejected or denied under IRC § 7623(a). *See* Treas. Reg. § 301.7623-3(b)(3).)

70 Treas. Reg. § 301.7623–3(a); Treas. Reg. § 301.6103(h)(4)-1.

71 Treas. Reg. § 301.7623-3(c)(3)(iii),(c)(4). Requiring a whistleblower to execute a confidentiality agreement before disclosing taxpayer information pursuant to IRC § 6103(h)(4) is intended to "balance whistleblowers' desire for increased communication with protections and safeguards for taxpayers' confidential information," in view of the lack of any prohibition on re-disclosure of taxpayer information in IRC § 6103(h)(4). *Preamble*, T.D. 9687, 79 Fed. Reg. 47246, 47258 (Aug. 12, 2014).

72 Treas. Reg. § 301.7623-4(b)(2)(vi).

73 National Taxpayer Advocate 2010 Annual Report to Congress 396-97 Legislative Recommendation: *Protect Taxpayer Privacy in Whistleblower Cases*, discussed below.

74 IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623* at 6.

beginning whistleblower administrative proceedings at the time that a claim is submitted on the Form 211."[75] However,

> [a]fter considering the comments received, Treasury and the IRS determined that beginning the administrative proceeding before the preliminary award determination letter would not meaningfully increase a whistleblower's ability to participate in and provide comments relating to the award determination. As discussed earlier in this preamble, the IRS will use several tools, including debriefings, section 6103(n) contracts, and section 6103(k)(6) disclosures to communicate with whistleblowers following the submission of a claim.[76]

Implicit in the response is the IRS's position that once a whistleblower submits a claim, further communication with the whistleblower is appropriate only after the IRS determines to make an award (unless the IRS needs information from the whistleblower in the meantime). In view of the lengthy timeframes involved, this approach seems inconsistent with the IRS's announced support for the whistleblower program and its commitment to finding ways of improving communication with whistleblowers.[77]

Neither IRC § 6103 nor any other statute impedes the IRS and Treasury from defining a whistleblower "administrative proceeding" as beginning with the filing of Form 211, and the IRS and Treasury could revise the regulations under IRC § 7623 to allow annual or bi-annual notifications to whistleblowers with basic information, such as whether the claim resulted in an audit, whether an audit has been concluded, whether proceeds from the audit have been collected, and an estimated time within which the WO expects to send a preliminary award. This would allow the WO to retain significant discretion about what it will disclose and how early. As the WO develops procedures for making periodic updates, the IRS and Treasury could update the applicable regulations to define what and when the WO will disclose. However, these changes should not be adopted unless the appropriate regulations (whether under IRC § 6103 or IRC § 7623) are also revised to require whistleblowers who wish to receive status updates to execute confidentiality agreements that carry the statutory penalties imposed by IRC §§ 7431, 7213, and 7213A, and subject them to the safeguarding requirements of IRC § 6103(p).[78]

75 *Preamble*, T.D. 9687, 79 Fed. Reg. 47246, 47256 (Aug. 12, 2014).

76 *Id*. The IRS may meet with a whistleblower as part of a "debriefing," but the purpose of these meetings "is to help us understand what you know," rather than to disclose information to the whistleblower. IRM 25.2.2-1, *Debriefing Checksheet* (Aug. 7, 2015).

77 *See, e.g.*, William Hoffman, *Tax Analysts Interview with John Koskinen* (Oct. 17, 2014) (reiterating his support for the whistleblower program generally, expressing his willingness to explore ways to improve communication with whistleblowers, and noting the need for anti-retaliation legislation).

78 Because IRC § 7623(b)(6)(A) provides that "[n]o contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection," the requirement that a whistleblower execute a confidentiality agreement would arise if the whistleblower requests status updates, not necessarily in every case. The National Taxpayer Advocate recommends legislative adjustments that would provide an independent statutory basis for imposing the same liability on whistleblowers whether or not a confidentiality agreement is in place. *See* Legislative Recommendation: *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC § 6103(p)*, *infra*.

Tax Court Rules Protect Taxpayer Information and Whistleblower Identity in Court Filings, But Legislation Is Needed to Protect Taxpayers From Re-Disclosure of Their Confidential Information by Whistleblowers and to Protect Whistleblowers From Retaliation in the Event Their Identity Becomes Known

If a challenge to the proposed award under IRC § 7623(b) is not resolved administratively, the whistleblower may petition the Tax Court for review of the award.[79] Disclosure of relevant return information in a judicial tax proceeding is allowed pursuant to IRC § 6103(h)(4) (the same exception that allows disclosure in "administrative proceedings") and disclosures made in open court are generally in the public domain.[80] Unlike whistleblower cases brought pursuant to other statutes, such as the FCA, in which the alleged wrongdoer is a party to the case, in a tax whistleblower case the alleged wrongdoer (the taxpayer) is not a party and may be unaware the case even exists. As the National Taxpayer Advocate has noted:

> A taxpayer's privacy interest generally should not be compromised without consent, which is implicit in civil litigation initiated to contest a tax deficiency or obtain a refund, but not in whistleblower litigation. In the criminal context, considerable procedural protections leading up to a criminal charge and trial that discloses return information, coupled with the significant public interest in obedience to criminal laws, take the place of taxpayer consent.[81]

In 2010, the National Taxpayer Advocate recommended that Congress:

- Require the redaction of third-party return information in administrative and judicial proceedings relating to whistleblower claims;
- Notify a taxpayer of the intent to disclose confidential information and allow the taxpayer to request further redactions before disclosure; and
- Allow taxpayers to recover damages for subsequent unauthorized disclosure by whistleblowers.[82]

In 2012, the Tax Court adopted Rule 345, *Privacy Protections for Filings in Whistleblower Actions*, which:

- Allows a petitioner in a whistleblower case to proceed anonymously; and
- Requires a party or nonparty making the filing to refrain from including, or to redact, the name, address, and other identifying information of the taxpayer to whom the claim relates.[83]

The Tax Court, in its explanation for the proposed change relating to whistleblower cases, noted and discussed the National Taxpayer Advocate's concerns in detail.[84]

These changes in Tax Court rules, while they offer protection to both taxpayers and whistleblowers with respect to documents filed with the court, do not impede a whistleblower from re-disclosing taxpayer

79 IRC § 7623(b)(4), providing Tax Court jurisdiction to review any determination regarding an award under IRC § 7623(b). The Tax Court's review is limited to the WO's determination; "section 7623 [does not] confer authority to direct the Commissioner to commence an administrative or judicial action." *Cohen v. Comm'r*, 139 T.C. 299, 302 (2012).

80 *See Lampert v. U.S.*, 854 F.2d 335, 337 (9th Cir. 1988) (stating "once return information is disclosed in court, such information is no longer confidential, the taxpayer loses any privacy interests in that information") *cert. den'd* 490 U.S. 1034 (1989).

81 Even in a criminal trial, a taxpayer as a party could make a motion to protect private information. *See* FED. R. CRIM. PROC. 49.1. In a whistleblower case, unlike in a criminal or civil tax case, the taxpayer whose return information is disclosed is a third party. National Taxpayer Advocate 2010 Annual Report to Congress 396, 398 (Legislative Recommendation: *Protect Taxpayer Privacy in Whistleblower Cases*).

82 National Taxpayer Advocate 2010 Annual Report to Congress 396 (Legislative Recommendation: *Protect Taxpayer Privacy in Whistleblower Cases*).

83 *See* TAX CT. R. 345 (effective July 6, 2012). The rule also cross references Rules 27 and 103(a), pertaining to privacy protections and protective orders.

84 *See* United States Tax Court, Press Release (Dec. 28, 2011), *available at* www.ustaxcourt.gov/press/122811.pdf.

information acquired during the whistleblower administrative proceeding or through discovery in the Tax Court proceeding, in a different venue or medium.[85] However, the Tax Court has been proactive in responding to this risk. In *Whistleblower One 10683-13W v. Comm'r*, the Tax Court granted whistleblowers' motions to compel discovery of information in the IRS's hands that should be included in an administrative record, and also ordered:[86]

- The IRS to mark it as "CONFIDENTIAL—Section 6103 Information Subject to Protective Order" any confidential taxpayer information it provides to the whistleblowers;
- "Any person receiving confidential information" to use it "solely for the *bona fide* purpose of conducting this litigation and not for any other purpose whatsoever," on pain of exposure to "sanctions and punishment in the nature of contempt;"
- Whistleblowers and their counsel to not disclose any confidential information directly or indirectly to any person "except for the sole purpose of trial preparation and in accordance with the provisions of the protective order;"
- Whistleblowers and their counsel, when providing confidential information to other persons for trial preparation, "to provide a copy of this order to the person receiving confidential information and inform the person that he or she must comply with the terms of the order. Before providing confidential information, petitioners and their counsel shall obtain the person's signature on a copy of the order, followed by a business or home address of that person at which service of process can generally be made during business hours. Petitioners and their counsel shall retain the signed copy of the order until one year after the decision in this case becomes final;" and
- Whistleblowers, their counsel, "and any other persons who receive confidential information" to "return all copies of any confidential information to respondent or certify in writing to respondent the destruction of all confidential information" upon final resolution of the case.[87]

Imposing meaningful statutory penalties on whistleblowers who engage in such unauthorized re-disclosure would also help protect taxpayers' *right to confidentiality*.[88] In the meantime, the WO could mitigate this risk by requiring whistleblowers who seek status updates to execute confidentiality agreements that would impose safekeeping requirements on whistleblowers and grant affected taxpayers a remedy for unauthorized re-disclosure of their confidential information.[89]

As for whistleblowers, even proceeding in court anonymously does not guarantee that their identity will not come to light or be inferred, at least by some interested members of the public, including their

85 The WO has also voiced concern about this potential for disclosure of taxpayer information. *See* IRS WO, *Fiscal Year 2014 Report to the Congress on the Use of Section 7623* 6-7. At least two whistleblowers shared with the media confidential taxpayer information they acquired pursuant to informal discovery during Tax Court litigation. *See* Jesse Drucker and Peter S. Green, *IRS Resists Whistle-Blowers Despite Wide U.S. Tax Gap* Bloomberg Business (June 19, 2012). Chief Counsel response to TAS information request (Aug. 6, 2015).

86 *Whistleblower One 10683-13W v. Comm'r*, 145 T.C. No. 8 and Order in docket no. 10683-13W (Sept. 16, 2015).

87 *Id*.

88 *See* Legislative Recommendation: *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC § 6103(p)*, *infra*.

89 For litigated claims, IRS Chief Counsel attorneys could also seek to protect taxpayer information a whistleblower acquires during discovery or any other phase of the litigation. Tax Court Rule 103, *Protective Orders*, provides in paragraph (a): "Upon motion by a party or any other affected person, and for good cause shown, the Court may make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, including but not limited to one or more of the following:… (7) That a trade secret or other information not be disclosed or be disclosed only in a designated way."

employers. As noted above, unlike whistleblowers who proceed under the False Claims Act, tax whistleblowers do not enjoy statutory protection from retaliation. The National Taxpayer Advocate believes IRC provisions are needed to protect tax whistleblowers from retaliation.[90]

CONCLUSION

With its 2006 amendments to the IRC, Congress intended to encourage tax whistleblowing as an efficient means of enforcing the tax laws. The IRS paid only 11 awards under IRC § 7623(b) in the nine years since those amendments and has interpreted statutory provisions protecting taxpayer privacy in ways that prevent it from communicating effectively with whistleblowers who offer to assist the government in recovering unpaid taxes. The IRS relies on exceptions to the same nondisclosure rules in ways that do not adequately protect taxpayers' confidential information from re-disclosure by whistleblowers. Regulatory provisions crafted by the IRS and Treasury reflect these interpretations and should be adjusted to better protect taxpayers and meet the needs of whistleblowers.[91]

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise the regulations under IRC § 7623 to provide that a whistleblower "administrative proceeding" within the meaning of IRC § 6103(h)(4) commences with the whistleblower's submission of Form 211.
2. Revise the regulations under IRC § 6103 or IRC § 7623 to provide that the IRC §§ 7431, 7213 and 7213A penalties apply to re-disclosures of returns or return information by a whistleblower who has executed a confidentiality agreement as part of an IRC § 6103(h)(4) administrative proceeding, and that the IRC § 6103(p) safeguarding requirements also apply to such a whistleblower.
3. Revise the regulations under IRC § 7623 to require the IRS, upon the whistleblower's execution of a confidentiality agreement as part of an administrative proceeding under IRC § 6103(h)(4), to provide bi-annual status updates sufficient to allow a whistleblower to monitor the progress of the claim (*e.g.*, whether the claim resulted in an audit, whether the audit has concluded, the existence of any collected proceeds, and whether the case has been suspended) according to procedures developed by the WO.

90 See Legislative Recommendation: *Whistleblower Program: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers*, *infra*.

91 Legislative action is also necessary. See Legislative Recommendation: *Whistleblower Program: Make Unauthorized Disclosures of Return Information by Whistleblowers Subject to the Penalties of IRC §§ 7431, 7213, and 7213A, Substantially Increase the Amount of Such Penalties, and Make Whistleblowers Subject to the Safeguarding Requirement of IRC § 6103(p)*; Legislative Recommendation: *Whistleblower Program: Enact Anti-Retaliation Legislation to Protect Tax Whistleblowers*, *infra*.