Finance Committee Proposes Reforms To IRS Whistleblower Program

by Kristen A. Parillo

Providing for *de novo* review and establishing a presumption of anonymity in Tax Court proceedings are among the improvements that Senate Finance Committee leaders want to make to the IRS whistleblower statute.

The IRS Whistleblower Program Improvement Act of 2021, introduced June 15 by Finance Committee Chair Ron Wyden, D-Ore., and committee member Chuck Grassley, R-Iowa, would make several common-sense clarifications and reforms to section 7623, according to a summary of the bill.

The summary says the IRS whistleblower statute, which Congress revamped in 2006, "has resulted in the U.S. Treasury directly collecting over $6 billion from wealthy individuals and businesses caught dodging taxes."

The provisions in the proposed bill would improve one of the IRS's most effective tools in curbing tax noncompliance, according to the summary. The proposals to provide for *de novo* review and to establish a presumption of anonymity have been on whistleblower attorneys' wish list for years.

The bill's summary notes that section 7623 gives whistleblowers the right to appeal IRS award determinations to the Tax Court, but the court has interpreted that to mean it must apply an abuse of discretion standard of review. The bill would amend section 7623 by explicitly requiring the Tax Court to apply a *de novo* standard.

> ***Identifying the whistleblower may also lead to the identification of the target taxpayer, who isn't a party to the case, the summary says.***

The summary also notes that section 7623(b) provides no mechanism for preserving whistleblowers' anonymity when challenging award determinations in Tax Court. Instead, whistleblowers must file a motion under Tax Court Rule 345(a), which requires them to present a "sufficient, fact-specific basis for anonymity."

The IRS has increasingly contested Rule 345(a) motions, which puts whistleblowers in jeopardy and deters the willingness of others to come forward and share actionable information, the summary says. It added that identifying the whistleblower may also lead to the identification of the target taxpayer, who isn't a party to the case.

The issue of whistleblower anonymity was addressed in an April 26 *Tax Notes* article, in which a whistleblower, whose Rule 345(a) bid for anonymity was denied by the Tax Court and affirmed by the D.C. Circuit, said that insiders would stop providing valuable information on tax crimes if Congress didn't fix the statute. (Prior coverage: *Tax Notes Federal*, Apr. 26, 2021, p. 668.)

The bill would amend section 7623(b) by stating that for purposes of Rule 345(a) motions, "There shall be a rebuttable presumption that a whistleblower would be subject to retaliation, physical harm, social and professional stigma, or economic distress which outweighs the countervailing societal interests in knowing the whistleblower's identity."

The amendment would apply to Tax Court petitions that are pending on, or filed on or after, the act's date of enactment.

Other Improvements

The bill would also exempt section 7623 awards from budget sequestration, allow interest to accrue if the IRS fails to issue an award determination within a defined period, permit the IRS to retain 3 percent of proceeds collected to fund program costs, correct section 62 to clarify that attorney fees for awards given under the section 7623(a) discretionary program are deductible, and require that the IRS Whistleblower Office's annual report to Congress list the top 10 areas in which whistleblowers have identified tax avoidance schemes.

"Tax whistleblowers are extremely heartened by these improvements put forward by Senator Grassley and Chairman Wyden," Dean Zerbe of Zerbe, Miller, Fingeret, Frank & Jadav LLP told *Tax Notes*. Zerbe, who drafted the 2006 whistleblower reform legislation while serving as tax counsel to Finance Committee Republicans, said that strengthening the program must be part of any serious effort to deal with the tax gap.

Zerbe said that by enacting the bill and increasing IRS audits, the program could bring in billions of dollars in additional revenue —

directly through exams and indirectly through improved taxpayer compliance.

"Providing for *de novo* review of tax whistleblower cases — as was always intended by Congress — is absolutely necessary for the whistleblower program to be a success," Zerbe said. That provision would give whistleblowers the confidence that their claims will be subject to an independent review, he said.

The proposal for a presumption of anonymity is also welcome because it would help reassure whistleblowers — many of whom put their careers and lives in harm's way by reporting tax crimes — and avoid time-consuming litigation, Zerbe said.

Also important is the bill's clear signal that "the IRS must make it a priority to move out whistleblower awards, or else interest will start to run," Zerbe said. "Too often, whistleblowers are waiting years for a final award to be made." ■

House Committee Urges Joint Agency Scrutiny of College Conversions

by Fred Stokeld

The IRS and Department of Education should work together more closely to ensure for-profit colleges that convert to nonprofit status don't receive tax exemption when organization insiders improperly benefit from the conversions, according to a House committee.

Greater coordination between the two agencies is needed to address shortcomings in the department's monitoring of for-profit college conversions that were described in a recent Government Accountability Office report, House Education and Labor Committee Chair Robert C. "Bobby" Scott, D-Va., told Education Secretary Miguel Cardona in a June 3 letter that was copied to IRS Commissioner Charles Rettig.

The defects increase the risk that insiders will take advantage of nonprofit institutions at student and taxpayer expense, Scott wrote, citing the GAO report.

Inadequate coordination between the IRS and Department of Education exacerbates the problem by possibly allowing organizations established to benefit insiders to obtain exempt status, Scott said.

> ***Scott recommended that the department establish formal interagency channels to share conversion decisions with the IRS and brief the IRS on its findings whenever the department denies a conversion of an institution the IRS has approved for tax-exempt status.***

For example, he said, the IRS hasn't been told that the department recently denied conversion requests to two schools after concluding in both cases that private individuals or corporations would have been the primary beneficiaries of the "alleged nonprofit," possibly making the colleges ineligible for exemption.

The Department of Education and IRS "must take steps to reform their processes and halt the approval of all conversions until they finalize those reforms," Scott wrote.