

The IRS Whistleblower Program: A New Dawn?

By Dean Zerbe*

The modern Internal Revenue Service (“IRS”) whistleblower program, put in place in 2006 with the creation of Code Sec. 7623(b),¹ is undergoing a significant administrative overhaul as well as enjoying marked support from senior management at the IRS. Much is changing in the awards program, with the overall result being a fresh new welcome mat for whistleblowers to come forward with information. While not everything is sunshine and roses for the program, certainly brighter days are ahead.

This article provides an overview of the new leadership and proposed administrative reforms at the IRS Whistleblower Office (“WBO”); the trend in awards to whistleblowers; current interests of the IRS as to information from whistleblowers; the possible impact of various IRS whistleblower cases, including the *Lissack* case before the D.C. Circuit after the Supreme Court decision in *Loper Bright*; and, the outlook for proposed legislation and other reforms.²

New Support and New Leadership

While the whistleblower award program had been somewhat of a forgotten orphan in years past, the WBO and the award program received a jumpstart with the enthusiastic engagement of then-Commissioner Charles Rettig. Commissioner Rettig saw the possibilities for the program in helping the IRS address its most difficult problems of tax evasion by wealthy individuals (especially overseas accounts) and large businesses.

This newfound appreciation for the whistleblower award program reflected, in part, the realization within the IRS of the enormous benefit of whistleblowers in enabling the IRS to go after illegal offshore accounts, especially Brad Birkenfeld shed light on UBS and its noncompliance, as well as other whistleblowers that followed in Birkenfeld’s wake.³

Commissioner Rettig not only put the weight of his office behind the WBO, but also had a hand in selecting the new Director of the WBO, John Hinman. Mr. Hinman, with a charge to revitalize the program, was a break from previous Directors as he previously served as a senior official at Large Business & International (“LB&I”) with 39 years as a career IRS employee.

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Commissioner Rettig's successor, Danny Werfel, has continued the strong support of the WBO, with Commissioner Werfel providing significant budget and full-time equivalent (FTE) numbers to expanding the WBO.

Reforms of the WBO

Director Hinman has embraced the charge to reform the whistleblower program and move it forward. After consultation with his own team, key offices at the IRS, as well as outside practitioners, Director Hinman has been ambitious in reforms that are current and ongoing as of this writing.

The WBO has listed as follows the seven strategic priorities the reforms are organized around:

- 1) Increase the capacity for claim submissions the IRS can act on;
- 2) Use high-value whistleblower information effectively;
- 3) Award whistleblowers fairly and as soon as possible;
- 4) Keep whistleblowers informed of the status of their claims and the basis for IRS decisions on claims;
- 5) Strengthen collaboration with Whistleblower Program stakeholders;
- 6) Safeguard whistleblower and taxpayer information; and
- 7) Ensure that our workforce is supported with effective tools, technology, training, and other resources.

Helping to make all this a reality is Commissioner Werfel agreeing to an increase of the WBO staff from roughly 40 employees historically to approximately 80 currently, and with authority to expand the office to 130-plus employees.

To that end, here are some comments and observations on the reform proposals:

First and foremost, and touching on the top two reforms, the WBO has revised Form 211 (the basic tip submission form for whistleblowers). The new Form 211 (which will have the ability to be filed electronically) is focused on assisting the IRS in better identifying what the allegations are and getting the filing in front of the right people (as well as determining whether it is an area of particular interest to the IRS). It is important to remember that the WBO receives thousands of submissions a year, so separating wheat and chaff is a significant challenge. Hand-in-hand with that, the WBO is looking at having more senior employees conduct the initial reviews of the submissions so that, again, good submissions are not lost.

Then comes the issue of rewarding whistleblowers fairly and as soon as possible. As discussed below, when it comes to rewarding whistleblowers fairly, the WBO has done much good here. As to "soon as possible," there is still an opportunity to improve, especially in the area that the WBO refers to as "partial awards." Too often, there is a

scenario where the IRS has collected taxes already, thanks to the whistleblower, but an award is being delayed for a variety of reasons. Some are justified. For example, the statute of limitations has not ended. However, some situations are not the case. For example, there is an open audit cycle on the same issue for the same taxpayer but other audit cycles have closed, and dollars collected.

The WBO recognizes that the question of not making "partial awards" is a sore point, with Congress also weighing in on the need to get awards out sooner.⁴ However, we have made progress. To the WBO's credit, recent changes in the Internal Revenue Manual ("IRM"), such as adding Section 25.2.2.6.1.1 in September 2024, provide policy on when disaggregation (essentially, partial awards) will now be allowed. This new guidance should hopefully in practice open the doors for the payment of many awards that have been in limbo.

The IRS has gotten better at letting the public know what its exam priorities are and also what the IRS is interested in hearing about from whistleblowers. The IRS is especially all ears about information related to wealthy individuals evading taxes (especially offshore), failures to file, systemic tax shelters and tax evasion, and certainly corporate shelters.

Keeping whistleblowers informed is also a key area for discussion. The Congressional requirement that the WBO notify the whistleblower of the status and stage, and other updates of the submission have been of help. The WBO recognizes though that there can be improvements in the information provided.

Strengthening collaboration is also a critical area of focus. The WBO has been extremely good at reaching out and meeting with practitioners representing whistleblowers. Of particular importance though is that the WBO is more and more now at the table of key meetings within the IRS, such as the Lead Development Center, dealing with tax shelter promoters as early as possible. Further, the WBO now reports directly to the IRS' Chief Tax Compliance Officer, which helps the WBO be a more effective advocate for

whistleblowers. All of this is certainly good news. The great value of whistleblowers is found in getting their information quickly into the hands of the IRS front-line employees who can take action based on the whistleblower's information.

This ultimately is good news for whistleblowers, good news for honest taxpayers, and bad news for those seeking to evade the laws the IRS is authorized to administer, enforce, or investigate.

Then comes safeguarding whistleblower and taxpayer information. In my work, I find that the top question from whistleblowers is whether their identity will be protected. The IRS takes the protection of the whistleblower's identity very seriously and does an excellent job in this area. Of note, Congress in 2019 added Code Sec. 7623(d) to the whistleblower law, which provides for anti-retaliation whistleblower protection for employees.

Increase in Awards—Proof in the Pudding

The most tangible proof of the upswing of the program is the recent increase in awards. Awards are important not only in rewarding whistleblowers who have provided valuable information to the IRS that has resulted in increased taxes collected but also in signaling to individuals considering blowing the whistle that the award program is viable and is paying. In short, awards build the success of the program.

The awards for the program had been in a valley since a fiscal year ("FY") 2018 high of \$312 million in awards, to a low of \$37 million in FY 2022, and now finally rebounding to \$88 million for FY 2023. As important, the FY 2023 award number reflects \$337.9 million dollars returned to the Treasury. The recent announcements of a significant award, highlighted in Sabrina Willmer and David Voreacos' *Bloomberg News* article, "Tax Tipsters Getting \$74 Million Shows IRS Progress, Lawyers Say," from September 18, 2024, underscores that awards are moving along. I see that conclusion reflected in my own practice with clients recently getting low seven-figure awards.

One reason for the increase in awards is Congress clarifying the definition of "collected proceeds" with the passage in 2018 of Code Sec. 7623(c), confirming the Tax Court decision in *Whistleblower 21276-13W*.⁵ Code Sec. 7623(c) defines "collected proceeds" for purposes of Code Sec. 7623 as including criminal and civil fines, penalties, proceeds, taxes, interest, *etc.*, arising from the laws for which the IRS is authorized to administer, enforce, or investigate. The impact of the recent changes in the IRM to disaggregation of awards (partial awards) discussed above has the potential to also bring forward a large number of awards in the near future. NOTE: the decision in *Whistleblower 21276-13W* coupled with the passage of Code Sec. 7623(c) serve to underscore that while it is understandable to focus on the IRS whistleblower program as being a tax whistleblower program, the IRS whistleblower award program actually covers violations of law beyond just tax, including a range of other financial crimes, such as money laundering, that are investigated by the IRS.

It is worth noting that in the most recent annual report, the average award is 26.3% of collected proceeds (generally, the law allows for an award for the Code Sec. 7623(b)(1) awards of 15–30%) (and Code Sec. 7623(b)(2) allows for an award of 10% or less if based principally on specific allegations from public sources).⁶ So certainly, the WBO has not been miserly in the percentages it has awarded to whistleblowers. That being said, whistleblowers are far better off making their argument about the appropriate award percentage to the WBO as opposed to seeking relief from the Tax Court. The Tax Court has provided no love to whistleblowers seeking an increase in their award percentage. For example, in *Whistleblower 8391-18W*,⁷ the court rejected an argument from the whistleblower to increase the award from 22% to 30%, upholding an award percentage unless finding the determination to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

Finally, particularly telling of the bright future ahead for the IRS whistleblower award program is the fact that the WBO in its FY 2023 annual report, in footnote 8, commented that, "As of September 30, 2023, the Whistleblower Office is *monitoring for collection of several billions in assessed amounts* related to whistleblower information. The assessments being monitored for collection grew by over a quarter of a billion for Fiscal Year 2023." Emphasis added.

It seems clear that with the WBO monitoring several billions of dollars in collections attributable to

whistleblowers, the whistleblower program has been the mighty duck, quiet on the surface but paddling madly below.

The IRS and Whistleblowers: What Does the IRS Want to Hear About? (And a Note of Caution on Privilege)

The IRS has gotten better at letting the public know what its exam priorities are and also what the IRS is interested in hearing about from whistleblowers. The IRS is especially all ears about information related to wealthy individuals evading taxes (especially offshore), failures to file, systemic tax shelters and tax evasion, and certainly corporate shelters.

In practice, I find that the IRS is particularly focused on filings that deal with current activities, meaning open tax years, and/or ongoing behavior. If the issues presented are old and cold, not so much. Exceptions come for overseas accounts and failure to file where the tax year remains open. The IRS also likes good documentation where possible, but practitioners must make sure to explain the documents, including what they say, why they matter, and their provenance. Ideally, the claim should involve real dollars (proportional to the taxpayer's size, \$10 million for a wealthy individual may be worth a look, \$10 million for a *Fortune 500* company ...). Further, the IRS wants to have confidence in the credibility of the whistleblower, their background and knowledge, and the source of the documents.

While seemingly obvious, it is a point of extreme frustration for the WBO that whistleblower submissions often do not clearly lay out who the taxpayer is and what the specific issue being reported is. Other reminders for practitioners and whistleblowers alike: avoid dripping the information to the IRS/WBO. Provide the WBO everything in Form 211 at the same time to the extent possible. Obviously, if you are providing a U-Haul's worth of information this can be a different story. Also, do not make multiple filings with the IRS to different offices as it grinds the gears as they try to ensure everything matches. The best practice is to file with the WBO first if you are going to provide the same information to IRS Criminal Investigation ("CI"). Alternatively, barring that, a whistleblower should file a Form 211 as quickly as possible with the WBO if you/the client has already been talking to another entity. For example, IRS CI, the FBI, the Department of Justice, or elsewhere.

Now a word of caution regarding privilege, confidentiality issues, and information. If the whistleblower is a tax representative of the taxpayer (or even a cousin, *i.e.*, not just signing the Form 2848), if there are potential Code Sec. 7525 confidentiality issues, or attorney/client privilege issues, you need to be very eyes open as to your filing and the documents you provide (and whether it is advisable to file a Form 211). A good filing should be made upfront to discuss these matters. The WBO and IRS counsel are focused on these concerns. And while it can be possible to navigate and make a submission, it is a minefield.

Litigation Update

The Supreme Court's recent decisions in *Loper Bright Enterprises v. Raimondo*, sending off the Chevron doctrine, as well as *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, where it was found an Administrative Procedure Act claim with a six-year statute of limitations does not accrue until injury by final agency action, will have a wide impact, including for whistleblowers under Code Sec. 7623.⁸

Focusing specifically on one case in the new post-*Loper* world, the Supreme Court vacated the decision in *Lissack*, and remanded back to the D.C. Circuit for further consideration in light of the Court's decision in *Loper Bright*. The *Lissack* case centers around the definition of "administrative action" and "any related action" from Code Sec. 7623(b). In brief, the Treasury Regulations are quite narrow in giving a whistleblower credit for what is encompassed by "any administrative action" and "any related action." For example, the whistleblower identifies taxpayer A and issue 1. Thanks to the whistleblower, the IRS audits taxpayer A but instead focuses on issue 2. The whistleblower, under the Treasury regulations, is denied an award.

This narrow view of "any administrative action" and "any related action" is a somewhat blinking result given the sweeping language of the statute. Nor do the regulations (and the policy considerations driving the regulations) reflect the difficulty the IRS has of even correctly identifying a taxpayer who is not compliant with the tax laws, witnessing the high no-change rate that hamstring the IRS examination of wealthy individuals.⁹ In short, there is much value in the whistleblower identifying to the IRS an individual/company that is productive to audit.

Further, when the law was amended in 2006, the old award program did award a whistleblower even if all the

whistleblower did was identify the person to audit, but not the specific issue (albeit the award was commonly a small percentage).

That the 2006 laws that strengthened and expanded the award program can be read to curtail the then-current award policy is head-scratching. Finally, the Treasury Regulations fail to recognize the very real concern of Congress that the IRS (and especially the taxpayer if aware or suspicious that there is a whistleblower) will give away or horse trade the issue for which the whistleblower would get an award in exchange for resolution of a separate issue for which the whistleblower will not get credit. Congress was rightly concerned with the perils of the whistleblower not being at the table. The D.C. Circuit will have an opportunity to weigh all this as it revisits its earlier decision. But the potential impact for whistleblowers and the whistleblower program is significant.

Legislative Update

The bipartisan and bicameral “IRS Whistleblower Program Improvement Act” provides much-needed reforms. These include clarifying that the review standard by the U.S. Tax Court is *de novo*, ending sequestration for awards,

including a presumption of anonymity in Tax Court for whistleblowers, interest running on awards if a Preliminary Award Recommendation Letter is not sent to the whistleblower, and no double taxation of Code Sec. 7623(a) awards for attorney’s fees (there is no double taxation of attorney’s fees for Code Sec. 7623(b) awards already).

These reforms are popular and there is no opposition. Common for small provisions such as this, the journey is about finding a larger tax bill to attach to the legislation. There have not been any major tax bills moving through the Congress, but the hope is that when such a bill moves, this legislation will be included.

Conclusion

The IRS whistleblower award program is benefitting from renewed positive focus and attention from IRS senior management, especially the Commissioner. The program’s new Director, John Hinman, has made important steps in improving the administration of the program coupled with a needed focus on getting awards out the door. This ultimately is good news for whistleblowers, good news for honest taxpayers, and bad news for those seeking to evade the laws the IRS is authorized to administer, enforce, or investigate.

ENDNOTES

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¹ For a history of the creation of the 2006 amendments creating the modern tax whistleblower program, see A Legislative History of the Modern Tax Whistleblower Program, by Dean Zerbe, TAX NOTES, October 26, 2020.

² See *M. Lissack*, CA-DC, 68 F4th 1312 (2023), cert. granted, judgment vacated, 144 Sct 2707 (2024).

³ For more on the benefits of the tax whistleblower program in addressing tax evasion—and especially the recognition by Treasury officials of the value of the program—see *Shrink the Tax Gap by Strengthening the IRS Whistleblower Program*, by Dean Zerbe, TAX NOTES, November

22, 2021. See also “*The Deterrence Effects of Tax Whistleblower Laws: Evidence from New York’s False Claims Acts*” by Yoojin Lee et al., Management Science, August 14, 2024.

⁴ See *Grassley Presses Werfel to Listen to IRS Whistleblowers after Learning Their Meeting Requests Have Gone Unanswered*, Senator Grassley press office, April 16, 2024 (“[... T]he average wait time for people to get their case closed has gotten longer and is now up to 10 years. The long average wait time is in part due to the IRS policy against paying partial awards. Under this policy, the IRS will wait years until all years of a claim are completed to pay anything whatsoever. Effectively, the IRS has created barriers to paying awards on its own that are not in the Whistleblower statute passed by Congress. You need to examine the unnecessary policy

in the IRS Revenue Manual and work to allow partial awards to be paid to whistleblowers as quickly as possible. Could you do that?”).

⁵ *Whistleblower 21276-13W*, 147 TC 121 (2016).

⁶ See IRS Whistleblower Office Report for 2023, link available at www.irs.gov/pub/irs-pdf/p5241.pdf.

⁷ *Whistleblower 8391-18W*, 161 TC 5 (2023).

⁸ See *Loper Bright Enterprises v. Raimondo*, 603 US __, 144 Sct 2244, 219 L. Ed. 2d 832 (2024); see also *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 US __, 144 Sct 2440, 219 L. Ed. 2d 1139 (2024).

⁹ See Virginia La Torre Jeker, “IRS Increased Audits of The Rich: A Flop in Finding Noncompliance,” *Forbes*, August 27, 2024 (discussing Treasury Inspector General Tax Administration report finding high no-change rate in examinations of wealthy individuals).

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