



July 25, 2023

Senator Wyden
Chairman
Senate Whistleblower Protection Caucus
U.S. Senate
Washington, D.C.

Senator Grassley
Chairman
Senate Whistleblower Protection Caucus
U.S. Senate
Washington, DC.

Dear Chairman Wyden and Senator Grassley:

On behalf of National Whistleblower Center (“NWC”), we write to you in your positions as co-chairs of the Senate Whistleblower Protection Caucus. This letter regarding the administration’s recent nomination of Marjorie Rollinson to be IRS Chief Counsel, and the importance of reinforcing the value of whistleblowers as you consider Ms. Rollinson’s nomination.

The nomination of Ms. Rollinson, and her position as IRS Chief Counsel, will markedly impact whether the IRS Whistleblower Program will continue to be successful. NWC has long been a strong advocate for the IRS Whistleblower Program and greatly appreciates the long-time leadership both of you have exhibited in supporting its goals. Due to the success of the program, American taxpayers have seen more than \$6 billion dollars returned to the Treasury.

Through NWC’s work – and in detailed and extensive discussions with tax whistleblowers and representatives of tax whistleblowers – it is clear that the IRS Office of Chief Counsel (“Counsel”) plays a significant role in the tax whistleblower program. Unfortunately, Counsel has at times undermined the IRS Whistleblower program and ultimately limiting the ability of the IRS to go after big-time tax cheats.

We strongly encourage you as Chairman and former Chairman of the Senate Finance Committee. We trust that despite seeking a quick process for moving forward with this nomination, you will take this opportunity to impress upon Ms. Rollinson the importance of the IRS Whistleblower Program. The Chief Counsel needs to support efforts by the Director of the IRS Whistleblower Office to strengthen and improve the program by both encouraging whistleblowers to come forward and making awards to whistleblowers.

The IRS Whistleblower Program is at a pivotal point – with dollars collected and awards distributed coming out flat for the past several years. Thanks to the energetic new leadership of John Hinman, Director of the Whistleblower Office, NWC is hopeful that the whistleblower

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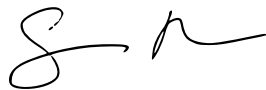
program is beginning to turn things around. Together the Chief Counsel and Director can make much needed improvements to processing times for tips and award determinations – but only if the IRS Whistleblower program is given the attention it deserves. Key to this is the IRS Whistleblower Office has recently embarked on a complete review and overhaul of the program.

It is critical that Congress make clear it expects the Office of Chief Counsel to both serve a positive role in this review effort (as well as the day-to-day operations of the IRS Whistleblower Office), seek out new solutions, and avoid creating roadblocks that would potentially hinder whistleblowers from coming forward and awards being paid.

As part of this letter, the NWC is providing you with a separate memorandum that discusses specific issues we would encourage you to raise with the nominee for IRS Chief Counsel. We would be happy to discuss these recommendations if any questions come to mind. NWC is grateful for your commitment to whistleblower issues, and we hope these recommendations prove helpful in your consideration of Ms. Rollinson's nomination.

Thank you for your consideration and for all your good work on behalf of tax whistleblowers. Feel free to contact National Whistleblower Center at info@whistleblowers.org with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Siri Nelson', with a stylized flourish at the end.

Siri Nelson
Executive Director
National Whistleblower Center

Memorandum

FROM: National Whistleblower Center

TO: U.S. Congress

DATE: July 25, 2023

RE: Tax Whistleblower Program – Specific Areas of Concern/IRS Office of Chief Counsel

I. Undermining and Improperly Limiting the Statutory Language of Section 7623 (Whistleblower Award)

1) Treasury Regulations and IRM Improperly Narrow Definition of “Any Administrative Action.”

Section 7623(b) provided for an award when the IRS takes “any administrative action” based on a whistleblower’s information that resulted in collected proceeds. The statute was written broadly with the intent to capture all ways that the IRS can or may respond with information provided by a whistleblower – including a notice, guidance, letters, reporting requirements, compliance initiative programs etc. – beyond just through an examination or audit of a specific taxpayer.

However, the Treasury regulations provided a narrow limitation of “any administrative action” to be essentially only a specific action against a specific taxpayer – ignoring the myriad of ways by which IRS addresses tax evasion – tax evasion brought to their attention by a whistleblower.

The answer to Treasury’s improper narrowing of the statute is twofold – a) revisit the definition of “any administrative action” and; b) return to the traditional flexibility for awards that the IRS can make under the discretionary award program under 7623(a).

The IRS whistleblower program dates to 1867 and was a discretionary award program that provided the IRS enormous flexibility of when to award a whistleblower for information provided to the IRS. In sum, if the IRS found that the information assisted their enforcement efforts, the IRS could provide an award. With the creation of the mandatory award program under 7623(b) – the IRS through the IRM eliminated this powerful flexible tool of the discretionary award program – and rewrote 7623(a) as a mirror of the 7623(b) award program – for those whistleblowers coming forward with information about tax losses under \$2 million in tax (which are not covered by the 7623(b) mandatory program). There is nothing in the statute or legislative history that supports such a finding and decision that Congress intended to eliminate the highly flexible discretionary award program that had long-existed under Section 7623(a).

In limiting 7623(a) the Treasury and IRS eliminated a significant number of whistleblowers who had traditionally could receive an award under 7623(a) – specifically the regulations denied an award to: 1) those whistleblowers who provided information that assisted the IRS in enforcement of the tax laws – where the information was used by the IRS to assist their

enforcement work in something other than an audit or examination of a specific taxpayer named by the whistleblower (ex. a notice, issuance of letters, change in reporting or forms, etc.); 2) those whistleblowers who provided information to the IRS that was used in examination or audit involving over \$2 million dollars in tax – but the whistleblower’s assistance was not substantial (discussed in detail below); 3) barring as whistleblowers under a broadly defined “taxpayer representative” – far beyond a “taxpayer representative” as defined in IRS guidance.

In sum, the Treasury Regulations -- in response to the 2006 amendments which are widely recognized as intending to strengthen and expand the whistleblower award program – the Treasury Regulations actually curtailed and limited the numbers of whistleblowers that can receive an award. The Treasury Regulations by limiting the awards to whistleblowers – effectively discourages whistleblowers from coming forward and ultimately undermines the IRS efforts to address tax evasion.

The bottom line: imagine operating behind a curtain: why would the IRS elect to not encourage and award whistleblowers who provide important information that results in the IRS addressing a tax issue through a notice, reporting requirement, letter, or other administrative means which results in hundreds of millions of dollars being collected? A whistleblower’s award should not depend on the whim of how the IRS chooses to use the information the whistleblower has provided to address the tax matter that the whistleblower has brought to light. An examination, yes. A notice, no. That is not the right answer – the right answer is what is provided by the statute: that if the whistleblower provides information, the IRS uses that information to take “any administrative action” that results in collected proceeds – the whistleblower should receive an award.

2) Creating Bar of “Substantial Contribution” for Whistleblowers

As discussed above, with the passage of the 2006 amendments creating the mandatory award program, Treasury issued regulations that narrowly limited the whistleblower award program in three ways: 1) narrowly defining “any administrative action” to just examinations and audits; 2) creating a bar of “substantial contribution” for whistleblowers to be eligible for an award; and, 3) limiting who would be eligible as a whistleblower (discussed below).

Section 7623(b) as it is plainly written provides that a whistleblower gets an award if the whistleblower: 1) provides information; 2) that the secretary uses to proceed with any administrative or judicial action; and, 3) results in collected proceeds. The amount of the 7623(b) mandatory award (15-30%) “. . . shall depend upon the extent to which the individual **substantially contributed** to such action.” The Treasury has inappropriately through regulations changed the “substantially contributed” measure for an award – to a bar for qualifying for an award under 7623(b).

In addition, the Treasury Regulations by creating the mirror for the discretionary award program under 7623(a) for meeting a substantial threshold as well – for those cases under \$2 million dollars in taxes has now eliminated any award for a whistleblower who has assisted and helped the IRS in its efforts to address tax evasion – but has provided assistance that doesn’t rise to the IRS created “substantial contribution” test.

Treasury's curtailing and limiting of awards to whistleblowers by creating a test of "substantially contributes" goes directly against the long-time practice of the IRS prior to the 2006 amendments.

Under the IRM 25.2.2.5 in effect at the time of the 2006 amendments – the IRS provided not a full award for: "specific and responsible information that caused the investigation and resulted in the recovery, **or was a direct factor in the recovery**" as well as a lesser award "For information that caused the investigation and was of value in the determination of tax liabilities although not specific . . . " or "For information that causes the investigation, but had no direct relationship to the determination of tax liabilities. . . ." In sum, the IRS administered 7623(a) with broad authority to provide awards to whistleblowers who had provided information -- information that was markedly below a "substantially contributed" test.

In response to the 2006 amendments – designed to strengthen and improve the whistleblower award program – Treasury/IRS through the regulations and IRM wrote off a high number of whistleblowers from receiving any award – under both 7623(b) with the regulations and 7623(a) – through the IRM which limited the awards to those under \$2 million and also imposed the "substantially contributed" test created by Treasury. Thus, whistleblowers that previously would have received an award prior to the 2006 amendments are now denied an award. The failure to award whistleblowers who have assisted the IRS; who have identified tax evaders; who provided value to the IRS in its works; only serves to undermine the whistleblower program and discourage whistleblowers from coming forward. The IRS should put in place policies that award all whistleblowers who identify tax evaders; who assist the IRS and bring value to the IRS – and not impose arbitrary barriers and bars to awards.

3) Improperly Limiting Who Can Be a Whistleblower

The cornerstone of the IRS whistleblower award program was to encourage informed knowledgeable insiders to come forward with information about tax evasion by wealthy individuals and large corporations. The IRS has put forward policy goals that essentially seek to bar such informed knowledgeable insiders from even coming forward and the IRS considering their information.

Historically the only limitation on who can be a whistleblower and receive an award under the IRS tax whistleblower award program are government officials – particularly IRS/Treasury employees. The 2006 amendments also made clear that an individual that both planned and initiated actions that led to the underpayment of tax the individual could have his award reduced; and that an individual who was criminally convicted for his role in such an action would be denied an award.

The IRS in the IRM has created its own limitation of who can be a whistleblower – an individual who is a "taxpayer representative." The narrow limitation of "taxpayer representative" to individuals named as the power of attorney Form 2848 for that specific matter/tax year is understandable given the right to effective counsel. Unfortunately the IRS in practice has expanded its prohibition far beyond that narrow term – rejecting first-rate whistleblower filings provided by knowledgeable and informed insiders who are giving the IRS

a roadmap to billions of dollars in tax evasion – tax evasion that will never be uncovered but for the whistleblower.

The IRS chief counsel notices – CC-2010-004 (updating CC-2008-011) clearly envision that current employees of a taxpayer can be whistleblowers – limiting the IRS to being a passive recipient – but certainly allowing “A current employee informant may submit additional information to the IRS following the initial submission.” In short, while a current employee requires special handling to avoid concerns of the whistleblower being an “agent” of the government – information can be received and used by the IRS from a current employee. The working relationship with the whistleblower and the IRS in this case has certainly complied with those requirements laid out in the counsel memos.

Both counsel memos then discuss informants who have been designated as a current representative of the taxpayer. The memos provide a bar to the taxpayer representative being an informant (and the IRS using the information) – this for taxpayer’s representatives for any administrative or litigation matter pending before the IRS/courts. However, there is nothing in either memorandum to suggest that the definition of “taxpayer representative” is anything other than that provided in the IRM – that a “taxpayer representative” is identified by the taxpayer in a Form 2848 – power of attorney.

The IRM makes clear at 601.502(a) that a recognized representative is an individual who meets two requirements: (a)(1) “appointed as an attorney-in-fact under a power of attorney” . . . and (a)(2) – meeting certain categories (including attorney, full-time employee, etc.).

In sum, the chief counsel notices clearly allow for current employees to be a whistleblower. The only exception are those individuals (who may or may not be an employee) who are designated as “taxpayer representatives.” Taxpayer representatives are defined in the IRM as those individuals who receive a power of attorney (Form 2848) from the taxpayer that is provided to the IRS (and also meet the category requirements of 601.502(a)(2)).

It is widely recognized that the IRS benefits from informed knowledgeable insiders. Yet, the IRS in a recent modification to the IRM at 25.2.2.3 states that the requirement of a Form 211 to submit information under penalty of perjury precludes submissions by: 1) a person serving as a representative of the claimant; 2) a person otherwise acting on behalf of the claimant; or 3) an entity other than a natural person. The 2006 statutory requirement for a filing to be made under penalty of perjury was done to ensure the seriousness of purpose of filing a Form 211 and the consequences of false statements – not to serve as a means of barring individuals from blowing the whistle.

Particularly disturbing is that the IRM gives no indication of confirming that a representative of the claimant is limited to the Form 2848 signatures. In addition, the vague “a person otherwise acting on behalf of the claimant” – is wholly undefined. Further, this creation of a new category – “person otherwise acting . . .” – was never even contemplated by the IRS itself in providing guidance on the 2006 amendments – See Notice 2008-4 (3.02(9)). Further, in IRM 25.2.1.4.3.2 – makes clear that the prohibition on communication is for someone that is the “taxpayer’s representative” in any proceeding . However, again in practice the IRS has taken a vague and

expansive definition of “taxpayer representative” – far beyond the historical understanding of the taxpayer representative identified under a Form 2848.

1) Disregarding and Undermining Director of Whistleblower Office’s Role in Making Award Determination.

When Section 7623 was modernized in 2006 it also created the Whistleblower Office and established the role of Director of the Whistleblower Office to oversee and make award decisions. The IRM is clear: “The authority to approve and determine awards under IRC 7623 for individuals . . . is delegated to the Director of the Whistleblower Office under Delegation Order 25-7(Rev 5). IRM 25.2.2.1.3

The regulations underscore the singular role of the Whistleblower Office in making awards – stating that it is the whistleblower that shall “determine and pay awards”. 3017623-3(a). However, in practice time and again the Office of Chief Counsel is improperly asserting itself into award decisions – and seeking to dictate whether an award will be made to a whistleblower. This improper action by the Office of Chief Counsel is particularly acute in remands from Tax Court where the Office of Chief Counsel is refusing to abide by factual determinations made by the Whistleblower Office. In the alternative, Counsel will seek to impose its own factual burdens and requirements on an award determination made by the Whistleblower Office – placing extreme burdens on limited whistleblower office resources – and adding significant additional time to any award determination. The Office of Chief Counsel’s actions are to essentially replace the statutory role of the Director of the Whistleblower Office in making award determinations.

II. Reforms to Improve Administration of Whistleblower Award Program – and Prompt Payment of Awards

2) Partial Awards When Tax Years Closed

The 2006 statute provides three requirements for an award to be made – 1) information provided by the whistleblower; 2) the IRS takes any action based on that information; and, 3) the results are collected proceeds. Collected proceeds have been defined in the regulations as when the dollars have been collected and all rights to appeal by the taxpayer have been terminated.

There are not uncommon situations where the whistleblower has brought forward information about a major corporation engaged in underpayment of tax and the IRS will review that matter for open years under audit – ex. 2015, 2016, and 2017 – a cycle under audit. In practice, the issue brought forward by the whistleblower may then be reviewed in the next cycle of audit – ex. 2018, 2019 and 2020.

The current practice of the IRS whistleblower office is to NOT pay the whistleblower an award for the years 2015, 2016 and 2017 even when those years are closed, all payments have been made by the taxpayer and there are no rights to appeal for the taxpayer. Instead, the whistleblower office will state that it will wait until the next audit cycle (containing the same issue – but not effecting the previous tax years) is completed. Thus, the whistleblower can see there wait extended five or six years waiting for the next audit cycle to be completed, payment made and rights for appeal have ended. Thus, a whistleblower can easily be waiting 10 – 12

years (or even longer if the IRS continues to raise the issue in future audit cycles) for an award payment.

It is unconscionable – particularly with no interest running on award payments, and with inflation eating into the value of the award – that the whistleblower has to wait years and years for an award when all the requirements of the statute have been met. The IRM provides that under 25.2.2.8.2 a partial award payment will be made only when it is in the best interest of the IRS.

Congress has made clear that it expects and wants whistleblowers to be provided timely awards. Further, payments to whistleblowers is the bedrock of encouraging other whistleblowers to come forward. When the award payment would be more than de minimis, the whistleblower office should be making partial award payments.

III. Office of Chief Counsel Needs to Provide Timely Support to Whistleblower Office and to Whistleblowers.

3) Delays In Providing WBO Guidance

We are seeing significant delays in awards often due to the whistleblower office waiting for guidance from Office of Chief Counsel – commonly taking months or more.

4) Delays In Resolving Cases In Remand and Discovery In Tax Court

We are seeing significant delays in whistleblower cases that have been remanded to the whistleblower office – with Office of Chief Counsel itself often imposing additional burdens and requirements further delaying a determination. These remand cases have not uncommonly been for over a year. In addition, discovery is extremely slow in many cases – often taking months if not over a year to get the most common discovery requests (the administrative files).

5) Anonymity in Tax Court

The 2006 amendments allow a whistleblower to go to tax court. However, it is vital that for most whistleblowers that they are able to proceed to tax court anonymously. While not as common as previously -- we continue to see whistleblowers anonymity challenged by Office of Chief Counsel. This challenge of anonymity has a significant chilling impact on whistleblowers willing to come forward and protect their rights.

IV. Fair and Equal Treatment for all Awards: Provide Fair and Equitable Treatment for all Mandatory and Discretionary Awards

The IRS has provided through the Internal Revenue Manual that mandatory and discretionary tax whistleblower awards will be provided the same percentage (15-30%). IRM 25.2.2.6.4. However, the IRS has severely limited the percentage and amount of a discretionary award that will be made for applications that are still pending in cases where the application was made before December 20, 2006 (date of enactment of the reforms). Such an arbitrary policy of limiting and capping awards for this small subset of pre-2006 discretionary award applications that meet the IRS' "substantially contributed" test – enacted without notice and comment under the APA – goes against the Congressional goals of making substantial awards to whistleblowers

to encourage other whistleblowers to come forward and to recognize the value of the whistleblowers information.

As important, the IRS policy of capping and limiting pre-December 2006 awards goes directly against the recent Tax Court case of *Shands v. CIR*, 160 TC 5 (2023). In the case of *Shands*, the Tax Court rejected the whistleblower's argument that the IRS should be bound by the IRS policies at the time the whistleblower filed his Form 211. The Tax Court in *Shands* found that the whistleblower was bound to the IRS policies at the time that the whistleblower's case was pending/decided. The IRS is wishing to have it both ways – seeking to bind whistleblowers to the IRS policies at the time of a decision when it is not in the whistleblower's favor as in the case of *Shands*; and then seeking in the IRM to bind whistleblowers to the IRS policies at the time the whistleblower filed in the case of pre-December 2006 whistleblowers. Heads or tails – the IRS is calling it against the whistleblower. The IRS should be consistent and fair in its application of its policies – and pre-2006 applications whose cases are still pending should be eligible for the same awards as every other applicant whose case is pending. The IRS embracing a policy of treating pre-2006 applications the same as all other whistleblower applications is especially fair given that these whistleblowers have been waiting roughly 20 years for the IRS to finally make a determination of an award.

Compounding this anti-whistleblower policy of limiting pre-2006 awards, is the apparent policy of treating pre-2006 submissions as one submission. Thus, even when the whistleblower's pre-2006 submission may have covered a number of different taxpayers and/or different and distinct issues – for purposes of an award it is treated as one claim and thus severely limiting the whistleblower's award. By contract under current practice for new submissions, the IRS whistleblower office provides separate claim numbers for each taxpayer that the whistleblower identifies (or that are related actions from the original submission) and there is no cap. The IRS should be consistent and treat each taxpayer or issue identified by the whistleblower in a pre-2006 submission as a separate claim for purposes of an award determination.