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Chief Counsel Approves More Interaction With Whistleblowers

by Jeremiah Coder

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In a February 17 chief counsel notice, the Office of Associate Chief Counsel (Procedure and Administration) said the IRS could consider, on a case-by-case basis, accepting additional information presented after an initial meeting with an informant if it reasonably relates to the prior submission. The advice gives the IRS the ability to conduct "limited follow-up contacts, including debriefings, initiated by the IRS to clarify the information previously submitted by the informant." (For CC-2010-004, see *Doc 2010-3568* or *2010 TNT 34-22*.)

The notice warned, however, that "the IRS should, to the extent possible, remain a passive recipient" of whistleblower information when the informant is a current employee so as to avoid interactions that "could be perceived as encouraging or acquiescing" in the informant's conduct.

The IRS's policy toward informants who are current representatives of a taxpayer did not change. "Under no circumstances is it appropriate to accept any information" from a whistleblower who is a taxpayer's representative in an administrative matter pending before the IRS, the notice said.

The IRS must give careful consideration to the possibility that information it receives from whistleblowers may be privileged, the notice said. But considerations of privilege should also take into account that "portions of the information will nonetheless likely not be subject to privilege," depending on the facts and circumstances of each case, the IRS said.

In 2008 a chief counsel notice imposed tight restrictions on IRS interaction with whistleblowers, limiting receipt of information to the initial meeting under the one-bite rule, absent rare circumstances. (For CC-2008-011, see *Doc 2008-4425* or *2008 TNT 42-16*.)

Although CC 2010-004 characterized its advice as a clarification of the 2008 notice, the IRS is actually retracting its prior position, Scott A. Knott of the Ferraro Law Firm said. Blocking later-provided information under the guise of the one-bite rule was, in practice, "a huge roadblock," he said.

Knott added that the new notice will allow the IRS to administer the revised whistleblower program "consistent with congressional intent and in a manner that makes use of the best information available."

Gregory S. Lynam of the Ferraro Law Firm said the restrictions laid out in the 2008 notice were based on an "erroneous and overly conservative application of the one-bite rule" that "severely constrained the IRS's ability to use information lawfully obtained by informants currently employed by the taxpayer."

Lynam appreciates the greater possibility for informant interaction with the IRS. "In our experience, high-level employees -- the insiders Congress hoped to attract when they created the whistleblower reward program -- can best provide the type of information that ultimately leads the IRS to assess and recover unpaid taxes, and they obtain that information legally because it is in their job description to have it," he said.

Lynam told Tax Analysts that according to conversations he had with individuals inside the IRS, the old policy was in direct conflict with the Justice Department's policy toward whistleblowers. He also dismissed the notion that permitting additional informant communications could cause investigations to become tainted, because only the whistleblower is providing information. "The notice doesn't open up a two-way street under section 6103," he said.

Bryan C. Skarlatos of Kostelanetz & Fink LLP called the notice an important development. "As long as it appears that the information isn't otherwise tainted, the government's interest in developing the case requires that they have access to all appropriate sources of information," he said. Skarlatos noted the complexity of some whistleblower cases, saying, "The IRS should be able to get all the help it needs."

In an interview with Tax Analysts last month, former IRS Chief Counsel Donald Korb called the whistleblower program "a ticking time bomb," predicting "some huge scandal with the program that becomes front-page news." (For the interview, see *Doc 2010-836* or *2010 TNT 11-7*.)

In reaction to the release of the notice, Korb, now a partner at Sullivan & Cromwell LLP, said, "Unfortunately, this appears to be a step in the wrong direction."

George M. Clarke III of Miller & Chevalier said the fact that the IRS chose to readdress how to handle tax whistleblower information is a "wake-up call to corporate America that this issue is real" and gaining steam. Of particular concern is the rising prevalence of tax advisers becoming informants, he said. "That companies are having documents stolen by employees is not new, but it is completely shocking that advisers are also ratting them out," Clarke said.

The notice doesn't entirely dump the one-bite rule and does appear to loosen up the inflow of information to the IRS, Clarke said. The new rule seems to be more principles-based than the bright line of the one-bite rule, which might create problems because it could be interpreted differently among various IRS functions, he said.

The IRS's position in examining privilege claims could lead to motions or discovery battles, Clarke said. "The notice puts more pressure on whether a document is privileged," he said.

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