

Treasury Finalizes Whistleblower Contract Regs but Isn't Using Them

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The Treasury Department on March 14 finalized regulations permitting the IRS to enter into written contracts with whistleblowers or their legal representatives that allow the agency to disclose some return information, which it is typically prohibited from doing under section 6103. Yet despite having the authority to enter into those contracts, the IRS confirmed to Tax Analysts that it has yet to use them in any pending claims.

Section 6103 generally prohibits the IRS from sharing tax return information with anyone outside the Service, but subsection (n) provides an exception allowing disclosure when necessary for "the providing of other services, for purposes of tax administration." The IRS issued proposed and temporary regulations in 2008 under the authority of section 6103(n) to allow the disclosure to a whistleblower of some return information and claim status information after a contract has been entered into. The final regs adopt the position in the 2008 regs with only minor grammatical changes. (For T.D. 9516, see *Doc 2011-5298*. For REG-114942-07, see *Doc 2008-6392* or *2008 TNT 58-6*. For T.D. 9389, see *Doc 2008-6391* or *2008 TNT 58-5*. For prior coverage, see *Doc 2008-6550* or *2008 TNT 59-2*.)

IRS officials and agency reports have recently highlighted the significant increase in the number of whistleblower claims submitted as a result of congressional enactment of a higher payout regime for some high-dollar claims. (For prior coverage, see *Doc 2010-26590* or *2010 TNT 240-4*.)

But though there is increased interest in the Service's whistleblower program, the IRS has held off on entering into any contractual agreements like those permitted by the regs, prompting one practitioner to say the regs are useless if the IRS doesn't take advantage of the authority granted by them to get the best information possible in investigating a whistleblower claim. Gregory S. Lynam of the Ferraro Law Firm told Tax Analysts that the current process of field agents asking questions of the taint review team, which then gets answers from the tax whistleblower and relays the information back, is a "grown-up game of Operator because no one in the IRS knows who can and should be setting up section 6103(n) agreements."

"The IRS is missing out on an amazing opportunity to work with truly knowledgeable informants who are real experts in their field and would greatly benefit an audit," Lynam said. "While we really appreciate how the IRS has incorporated tax whistleblower information into the audit process, this is beyond a dropped ball, as the IRS should be entering into a section 6103(n) agreement with nearly every tax whistleblower."

The current policy seems to stem from Internal Revenue Manual section 25.2.2.7.11, "Processing of the Form 211 7623(b) Claim for Award," released last June, which says contracts under section 6103(n) are expected to be issued only under "rare

circumstances" when it is in the IRS's best interest to "have a formal agreement with the whistleblower when it is necessary to share information obtained by the IRS from the taxpayer or a third party with the whistleblower." The IRM explains that section 6103(n) whistleblower agreements will include taxpayer privacy safeguards and "must be initiated by the Executive responsible for the function seeking the contract, and approved by the Business Operating Division not lower than the Deputy Commissioner level." Thus, the lack of contract use may be partially attributable to the reluctance of the IRS operating divisions rather than the IRS Whistleblower Office. (For the IRM provisions governing section 7623(b) claims, see *Doc 2010-13536* or *2010 TNT 117-20*.)

Practitioners say the IRS's reluctance to enter into section 6103(n) agreements with whistleblowers is unwarranted given the harsh penalties for unauthorized disclosure and the strict confidentiality safeguards governing individuals and their legal representatives subject to an agreement. "The IRS is not entering into these contracts because of either extreme caution bordering on neglect, a failure of internal communication, or both," said Scott A. Knott of the Ferraro Law Firm. "The IRS is simply squandering the opportunity to make the best and highest use of the insiders that Congress was seeking when it amended section 7623 in December of 2006."

Knott said his firm has made whistleblowers available to the IRS to provide their expertise and technical assistance to the exam team, but that the agency still has not entered into contracts with any whistleblowers. "Even though we do our best to break down tax avoidance schemes factually and legally in our initial submission to the IRS so that they have a roadmap of how to attack the abusive scheme, they have still refused the additional ongoing help we offered," he said.

The preamble to the final regs says the outlined limitations covering contracts "are not a limitation on the use of return information that may be disclosed to a whistleblower or the legal representative of a whistleblower during an award determination administrative proceeding and in an award determination appeal to the U.S. Tax Court."

One comment letter on the proposed regs submitted on behalf of Taxpayers Against Fraud asked the IRS to allow the release of status information without a written contract in place with a whistleblower and to relax the inspection requirements for a whistleblower's premises. In the preamble to the final regs, Treasury rejected both requests as inconsistent with the procedural safeguards necessary under section 6103(n). (For the letter, see *Doc 2008-14273* or *2008 TNT 127-28*.)