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Whistleblower Status Letters Seen as a Good Start but Not Enough

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Summary by **taxanalysts**[®]

While an IRS pilot program that proposes to send status letters to whistleblowers with open claims is a step in the right direction, it may not go far enough in relieving whistleblower anxiety over a lack of communication with the Whistleblower Office, according to practitioners.

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While an IRS pilot program that proposes to send status letters to whistleblowers with open claims is a step in the right direction, it may not go far enough in relieving whistleblower anxiety over a lack of communication with the Whistleblower Office, according to practitioners.

"Just writing someone that his case is 'open' isn't going to mean a better night's sleep for most whistleblowers. Like the Clash, whistleblowers want to know, 'Should I stay or should I go?,'" Dean Zerbe of Zerbe, Fingeret, Frank & Jadav PC told Tax Analysts.

On March 6 the IRS announced a test program in which it will be sending status letters in March and April to whistleblowers with open claims, informing them that their claim is still under consideration. According to a posting  on the IRS website, a random sample of whistleblowers with claims open for at least three years will be eligible for selection. If all goes well with the program, the IRS Whistleblower Office may adopt an annual status letter program.

"The purpose of the test is to evaluate the benefits and costs of providing annual status information on open whistleblower claims as well as potential design features for an annual status letter program," the IRS says on its website.

The amount of information in these letters, however, is minimal. Apart from informing whistleblowers that their claim is still open, the IRS "cannot provide any information regarding actions that are being considered or may have been taken in response to their submission," the IRS states. The Service also says that the whistleblowers who receive a letter in the pilot program should not contact the Whistleblower Office seeking additional information, because nothing more can be provided.

The test program will include about 300 random claims, according to Kevin Gillin, special counsel to the IRS Office of Chief Counsel (Small Business/Self-Employed), who spoke at a Federal Bar Association Section on Taxation event in Washington March 6. (Prior coverage )

Even though information on the open status of a claim can be gained with a call to the Whistleblower Office, the pilot program is designed to avoid the need for that because of the proactive reassurance it provides for taxpayers, IRS Whistleblower Office Director Stephen Whitlock told Tax Analysts March 18.

Other Tools of Communication

"While this one-way flow of information about the status of a claim is helpful, the IRS should be asking itself why it isn't more frequently enlisting the help of knowledgeable insider whistleblowers through two-way communication that is protected by a [section 6103\(n\)](#) agreement," Scott A. Knott of the Ferraro Law Firm said.

[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." In March 2011 the IRS finalized regs (T.D. 9516 ) permitting the agency to enter into written contracts with whistleblowers or their legal representatives that allow the agency to disclose some return information, but there is still practitioner criticism that the IRS fails to use this vehicle. (Prior coverage )

Whitlock said that although disclosure authority is available, section 6103(n) contracts are not intended to be used to disseminate information to whistleblowers. He added that as a practical matter, investigative disclosures under [section 6103\(k\)\(6\)](#) can be and have been used to interact with whistleblowers, and auditors are confident in using that authority, which "works a little easier" and serves as a fair substitute.

A whistleblower who thinks the IRS will grant a section 6103(n) contract "without a compelling need on the part of the IRS to get information from the whistleblower has just misunderstood what (n) contracts were intended to do," Whitlock said.

Practitioners have not been shy in criticizing the whistleblower program for a lack of communication with claimants following their entry into the system. In a September speech , IRS Commissioner John Koskinen said he was committed to improving communications with existing and potential whistleblowers. Earlier and further communication may still be coming to the program in some circumstances. (Prior coverage )

Whitlock, pointing to the final regs (T.D. 9687 ) issued in August, said that the Whistleblower Office is permitted to provide whistleblowers with proposed award letters even though a taxpayer claim of refund could potentially be filed, but that the opportunity to do so had yet to occur. (Prior coverage )

"What the regulation allows us to do, which we really haven't done yet, because it just hasn't been ripe to do it, is that we could start that notice and opportunity-to-comment process before everything is final," Whitlock said. This would contrast with the Whistleblower Office's current policy of waiting for all taxpayer rights to be exhausted, including assessment, resolution of appeal, payment, and the waiver or expiration of the opportunity for a refund filing, Whitlock noted. Any letters that would be provided while a claim for refund could still be filed would include

a caveat disclosing that information, Whitlock said.

"The criticism has been that by waiting for the claim of refund statute of limitations to lapse, we're leaving people in limbo for something that doesn't really happen that often. We're going to give it a shot," Whitlock said, referring to the earlier notice letters. "We just haven't had a case yet where we have been in a position to do that." Whitlock declined to provide a timeline of when the right cases for earlier notices might arise, because cases currently in the queue are based on the rules before the final regs' implementation.

According to the Whistleblower Office's fiscal 2013 report  to Congress, as of March 6, 2014, 161 [section 7623\(b\)](#) claims had cases suspended as they awaited the expiration of the statute of limitations on a taxpayer refund claim.

Zerbe said the real key for the program is for the IRS to disclose both the status of a submission - - whether the IRS is taking action on the claim -- and a general time frame for resolution. He also praised Koskinen for being responsive to congressional concerns.

"While the update letters have gotten the attention, my hope is that with the additional staff Commissioner Koskinen provided the IRS Whistleblower Office, we can start to see more of the letters whistleblowers really want to receive: award letters. Getting out more awards will do a world of good for the program," Zerbe said.

Tax Analysts Information

Code Sections: Section 7623 -- Expenses of Detecting Frauds
Section 6103 -- Tax Return Disclosure

Jurisdiction: United States

Subject Areas: Compliance
Fraud, civil and criminal
Information disclosure
Practice and procedure

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