



## POLICY POINT

# The State of the Tax Whistleblower Law

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Internal Revenue Code section 7623(b) provides mandatory awards to whistleblowers who provide information to the IRS that results in the collection of additional tax, interest, penalties or fines from corporations, high net worth individuals, and other entities. The statute is designed to incentivize whistleblowers to assist the government in detecting and deterring tax fraud and tax non-compliance.

While the law has had many successes, it also faces challenges that threaten its goals. Recent amendments to the statute have strengthened its purpose, clarifying that the mandatory award provision applies to the collection of foreign bank account (FBAR) penalties, criminal fines, and civil forfeitures as a result of whistleblower information, and providing whistleblowers protection against retaliation. IRS policy protects the identity of whistleblowers, and legislation pending in Congress would enhance such protection. In addition, the standard and scope of review that the Tax Court must apply in whistleblower cases is the subject of ongoing litigation in the courts and possible change by Congress. Finally, the pace of whistleblower awards has slowed recently, and the time that whistleblowers must wait to receive awards has increased.

Notwithstanding these challenges, the law has resulted in over \$1 billion in awards to whistleblowers,<sup>1</sup> and both Congress and the IRS Whistleblower Office (WBO) appear committed to ensuring the continued viability of the law as a major tool in the IRS's arsenal for detecting and deterring tax-related wrongs.

## What Is the Tax Whistleblower Law?

Although the IRS whistleblower law has existed in one form or another since 1867, it originally only provided for discretionary awards by the IRS to whistleblowers. [Section 7623\(a\) of the current version of the law](#) still gives the IRS the power to make discretionary awards for whistleblower information that leads to detecting tax underpayments or bringing to trial and punishment persons guilty of violating the internal revenue laws. A whistleblower has no right to judicial review of a discretionary award determination made under Section 7623(a).

<sup>1</sup> [IRS Whistleblower Office Fiscal Year 2021 Annual Report](#), Message from the Director, at 2.

The statute was amended in 2006, however, to add section 7623(b), which provides for mandatory whistleblower awards when certain criteria are met. The amendment was designed to incentivize whistleblowers to report major tax fraud by making it easier to collect whistleblower awards. Section 7623(b) requires the IRS to give an award to a whistleblower when the IRS proceeds with “administrative or judicial action” based on the whistleblower’s information that results in a collection of proceeds. The collection of proceeds can include tax, penalties, interest, and other amounts collected from the target taxpayer. The mandatory award under section 7623(b) ranges from 15% to 30% of collected proceeds. When the whistleblower’s information is based on publicly available information of which the whistleblower is not the source, however, the award is capped at 10%.<sup>2</sup> Section 7623(b)(5) sets out certain monetary thresholds that must be met for the mandatory award provision to apply. Awards under section 7623(b) are determined and administered by the IRS WBO. Section 7623(b)(4) gives whistleblowers the right to appeal to the United States Tax Court any WBO determination regarding an award under section 7623(b). A Tax Court whistleblower appeal can be further appealed to the D.C. Circuit Court of Appeals at the conclusion of the Tax Court case.

In making an award determination, the WBO assesses whether the whistleblower’s information “substantially contributed” to the IRS action at issue and to the collection of proceeds. IRS regulations recognize that the IRS proceeds are based on whistleblower information when the IRS “initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action,” that the IRS would not have initiated, expanded, or continued to pursue “but for” the whistleblower information. There are also a number of factors that may increase or decrease the amount of an award within the 15% to 30% range provided in section 7623(b). Positive factors include acting promptly to alert the IRS of the issue, identifying an issue or transaction of a type previously unknown to the IRS, identifying taxpayer behavior that was particularly difficult to detect through the IRS’s exercise of reasonable diligence, identifying connections between transactions or parties that enabled the IRS to understand tax implications that the IRS might not otherwise have understood, and identifying assets of the taxpayer that could be used to pay liabilities. Negative factors include disclosing the existence or scope of IRS enforcement activity, violating instructions provided by the IRS to the whistleblower, and participating in the tax noncompliance at issue.

A whistleblower award under section 7623(b) is most likely when the IRS makes a formal adjustment relating to the issue identified by the whistleblower, or the government successfully pursues a criminal tax case against the taxpayer, or the IRS’s investigation of the whistleblower information results in the taxpayer amending its tax returns causing it to pay more tax.

[Current Treasury regulations](#) provide that when the WBO issues a preliminary award or denial letter, the WBO will provide a “whistleblower administrative proceeding” during which the whistleblower can comment on the preliminary award or denial.<sup>3</sup> In

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<sup>2</sup> IRC §7623(b)(2)(B).

<sup>3</sup> The regulations regarding section 7623(b) claims also provide an opportunity for a whistleblower to review the administrative claim file and respond to the detailed report after receiving a preliminary award. See, e.g., Treas. Reg. §301.7623-3(c)(4)-(5). Similar access may be provided for denials. Treas. Reg. §301.7623-3(c)(8) (referencing (c)(1)-(6) in cases of denials).

those situations, whistleblowers and their representatives should consider submitting a memo to the WBO detailing how they believe the IRS used the whistleblower's information, and how the use of that information "substantially contributed" to the IRS action at issue and to the collection of any proceeds from the taxpayer.

## Anonymity in Whistleblower Cases

While a whistleblower must disclose their identity to the IRS WBO if the whistleblower wishes to receive an award under section 7623(b), the whistleblower need not fear that the IRS will disclose their identity to the taxpayer. Treasury Regulation § 301.7623-1 states that the "IRS will use its best efforts to protect the identity of whistleblowers" while a whistleblower case is investigated by the WBO (and any IRS field agents), and the IRS's Internal Revenue Manual reiterates that policy. Thus, a whistleblower can provide information to the IRS and receive an award from the WBO if the IRS collects proceeds as a result of that information, all while remaining anonymous to the taxpayer that is the subject of the whistleblower claim—unless, of course, litigation ultimately requires disclosure of informants as testifying witnesses.

If, however, the whistleblower appeals the WBO's award determination to the Tax Court—either because the WBO denied an award or because the whistleblower considers the amount of the award too low—then the presumption of anonymity is flipped. The presumption in civil lawsuits in the United States, including suits in the Tax Court, is that the public is entitled to know the identity of the parties to the lawsuit. Thus a whistleblower appealing a WBO award determination to Tax Court must be prepared to publicly disclose their identity in their Tax Court filing or instead make a motion to proceed anonymously in Tax Court.

In order to proceed anonymously in a Tax Court whistleblower case, a whistleblower must be able to demonstrate some risk of harm if their identity is disclosed, such as a risk of job loss, blacklisting from an industry, or professional stigma. Whistleblowers who are able to provide the IRS with non-public inside information, such as when the whistleblower is a former employee of the taxpayer that is the subject of the claim, are often granted anonymity in Tax Court because of the risk of reprisal from the subject taxpayer. Unfortunately, whistleblowers whose information is based solely on publicly available information not sourced from the whistleblower are often less successful in obtaining anonymity in Tax Court.

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## Successes and Set Backs with the Tax Whistleblower Law

As noted in the [WBO's Annual Report to Congress for 2021](#), since 2007 the WBO has paid out more than 2,500 awards to whistleblowers totaling over \$1.05 billion, and the IRS's use of whistleblower information has led to the collection of \$6.39 billion from non-compliant taxpayers. In 2012, former UBS banker Bradley Birkenfeld received the largest known award to date under the tax whistleblower law—\$104 million.<sup>4</sup> More recently, however, the pace of whistleblower awards has slowed, and members of Congress have expressed concern. The WBO issued \$312 million and \$120

<sup>4</sup> Because whistleblower awards are not generally publicized, it cannot be ascertained whether this is the largest ever award.

million in whistleblower awards in 2018 and 2019, respectively. But the WBO issued just \$86 million in whistleblower awards in 2020, followed by an even smaller \$36 million in awards in 2021.

U.S. Senator Charles Grassley, the main sponsor of the 2006, 2018, and 2019 amendments to the whistleblower law, wrote to the WBO in June 2022 expressing concern with the slowing pace of whistleblower awards, as well as the WBO's concession that it is now taking longer to issue awards to whistleblowers. The WBO has indicated that it is looking for ways to gain internal efficiencies to move cases forward as quickly as possible, while also seeking ways to raise awareness about the program for potential whistleblowers.

## Litigation Over the Tax Whistleblower Law

The [IRS Taxpayer Advocate Service's 2021 Annual Report to Congress](#) noted that whistleblower award determinations under section 7623(b) had appeared for the first time in the list of most litigated issues in Tax Court, with 12 opinions in which taxpayers challenged an IRS whistleblower award determination between June 1, 2020 and May 31, 2021.<sup>5</sup>

In addition to litigation over award determinations, a number of procedural and jurisdictional issues have arisen in Tax Court whistleblower litigation, including the scope of the record to be reviewed by the court, discovery available to whistleblowers, and the applicability of section 6103 (dealing with taxpayer confidentiality) to limit discovery.<sup>6</sup>

The standard of review to be employed by the Tax Court in whistleblower cases is not set forth in section 7623(b) and has not yet been settled through litigation. The appropriate standard of review was an issue of first impression in 2018 in [Kasper v. Commissioner](#), in which the Tax Court ruled that it would review WBO award determinations using a deferential “abuse of discretion” standard. The appropriate whistleblower case standard of review continues to be the subject of ongoing litigation.

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Although the issue was recently raised at the D.C. Circuit Court of Appeals in [Lissack v. Commissioner](#), the D.C. Circuit's May 26, 2023 opinion expressly declined to address the proper standard of Tax Court review in whistleblower cases.<sup>7</sup> In addition, a bipartisan “[IRS Whistleblower Program Improvement Act of 2023](#)” was introduced in March 2023 in both the Senate and [House](#) (essentially the same as introduced in the 117th Congress): it would provide that the proper standard of review in whistleblower appeals is a de novo standard of review that does not give deference to the WBO's award determination.

The IRS had also challenged the Tax Court's jurisdiction over whistleblower cases, notwithstanding the language in section 7623(b)(4) that “any determination regarding an award” under section 7623(b) may be appealed to the Tax Court. In two recent D.C. Circuit appeals—the afore-mentioned [Lissack v. Commissioner](#) case and [Villa-Arce v. Commissioner](#), D.C. Cir. Case No. 22-1006—the IRS

<sup>5</sup> [IRS Taxpayer Advocate Service's 2021 Annual Report to Congress](#), at 184 (Figure 3.1 whistleblower cases 7th under the “historical approach” methodology), 187 (noting 12 Tax Court opinions in the annual period of review).

<sup>6</sup> [Whistleblower 972-17W v. Commissioner](#), 159 T.C. No. 1 (July 13, 2022) was a recent whistleblower discovery victory, holding that disclosure of a third-party taxpayer's unredacted administrative record (subject to limited exceptions) is not barred by section 6103(h).

<sup>7</sup> [Lissack v. Commissioner](#), D.C. Cir. Case No. 21-1268 (appealing [Michael Lissack](#) 157 T.C. No. 5 (8/18/21)). See, e.g., [Amicus brief No. 21-1268](#) (April 2022) (arguing for de novo review).

asserted that the Tax Court's jurisdiction to hear whistleblower appeals under section 7623(b) is limited to cases in which there is both an administrative action and an actual collection of proceeds. Because these D.C. Circuit appeals affect the Tax Court's jurisdiction over whistleblower cases, the Tax Court started to stay pending whistleblower cases while awaiting a decision from the D.C. Circuit on the jurisdictional issue. The Circuit's May 26, 2023 opinion in *Lissack*, however, rejected the IRS's proposed limitation on jurisdiction. It held, instead, that the Tax Court has jurisdiction in whistleblower cases whenever the IRS has taken an administrative or judicial action based on the whistleblower's information and the WBO has subsequently issued a final decision granting or denying an award. That opinion removed a potential barrier to judicial review, since it foreclosed any requirement that there be an actual collection of proceeds for the Tax Court to have jurisdiction to hear a whistleblower case.

## Recent Changes to the Statute and Pending Legislation

In 2018, Congress amended the statute to add section 7623(c), which clarifies that the mandatory whistleblower award provision applies not just to amounts collected under Internal Revenue Code provisions, but to proceeds arising from any laws that the IRS is authorized to administer, enforce, or investigate. This includes criminal fines and civil forfeitures, and penalties for violating information reporting requirements, such as penalties for failure to report foreign bank accounts on an FBAR form.

In 2019, Congress further amended the statute to add section 7623(d), which provides protections for tax whistleblowers against retaliation from their employers. An aggrieved whistleblower can file a complaint with the Secretary of Labor and may seek remedies such as reinstatement, 200 percent of back pay and 100 percent of all lost benefits, and compensation for any special damages.

The bipartisan IRS Whistleblower Program Improvement Act of 2023, currently pending in Congress, would further refine the statute. In addition to clarifying the standard of review in Tax Court whistleblower appeals, the pending bill would expand the type of evidence that can be considered by the Tax Court on appeal, create a presumption of anonymity for whistleblowers who appeal an award determination to the Tax Court, exempt whistleblower awards from budget sequestration, and allow the WBO to retain some proceeds for the administration of the program.

Both the recent and pending changes to the statute demonstrate Congress's commitment to fortifying the whistleblower program and further incentivizing whistleblowers to come forward with information regarding tax fraud. ■