

IRS Whistleblower Program

Annual Report to the Congress

Fiscal Year 2011



**Fiscal Year 2011 Report to the Congress
on the Use of Section 7623**

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FY 2011 Report to Congress on the Use of Section 7623

I. Executive Summary

The Tax Relief and Health Care Act of 2006 (the Act) enacted significant changes in the IRS award program for whistleblowers. For information provided to the IRS after December 19, 2006, new section 7623(b) of the Internal Revenue Code (the Code) generally requires the IRS to pay awards if information an individual provides substantially contributes to the collection of tax, penalties, interest, and other amounts when the amounts in dispute are more than \$2,000,000. The law set award ranges based on percentages of the collected proceeds, and established a Whistleblower Office within the IRS to administer those awards.

The Secretary of the Treasury must conduct an annual study and report to Congress on the use of section 7623 and the results obtained, and include any legislative or administrative recommendations for section 7623 and its application (section 406(c) of the Act). This report discusses program activities for fiscal year (FY) 2011. It includes a review of the law and regulations applicable to whistleblower awards, changes made in program administration since the Act, a description of internal and external program guidance, administrative priorities, and data on awards paid. The IRS pays awards from collected proceeds which result from an audit or investigation. Because payments are not made until the taxpayer has exhausted all appeal rights and the statutory period for the filing of a claim for refund has expired or been waived by the taxpayer, the IRS may not make payments for several years after the whistleblower has filed the claim. The IRS paid the first awards under the 2006 amendments in FY 2011; however, most of the awards paid during FY 2011 resulted from claims filed under the prior law.

The primary purpose of the Act was to encourage people with knowledge of significant tax noncompliance to provide that information to the IRS. In FY 2011, the IRS received 314 submissions that appear to meet the section 7623(b) criteria, identifying 732 taxpayers. Many of the individuals submitting this information claim to have inside knowledge of the transactions they are reporting, and often provide extensive documentation to support their claims. The IRS cannot yet tell how many of the cases will result in collected proceeds, and whether the whistleblowers' estimates of the amounts in dispute are accurate.

This report describes the legal framework that forms the basis for developing program guidance that the IRS issued in FY 2011. On January 18, 2011, the IRS published a proposed change to the applicable Treasury Regulation, seeking public comment on the definition of "collected proceeds" that the IRS will use in determining award amounts. A public hearing on the proposed regulation was held on May 11, 2011. Internal program guidance, including the Internal Revenue Manual (IRM), will be revised to reflect the final regulation issued on February 22, 2012.

II. Program History

A. Prior Law and Policy

The IRS has had the authority to pay awards to whistleblowers for many years. What is now section 7623(a)¹ of the Code has its origins in legislation Congress enacted in 1867. The original law provided the Secretary with the authority “to pay such sums as he deems necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same.” Before 1996, the IRS made payments from appropriated funds. In 1996, section 1209 of the Taxpayer Bill of Rights 2 (PL 104-168) expanded the purposes for which the IRS may pay awards, adding “detecting underpayments of tax” as a basis for making an award and changed the source of funds from IRS operating funds to proceeds of amounts collected from the taxpayer (other than interest).²

Before the 2006 amendments to section 7623, awards to whistleblowers were discretionary, and IRS policy determined the amount.³ The policy provided a framework for assessing the contribution of the information to the collection of proceeds from a taxpayer, and allowed for awards of 1 percent, 10 percent, or 15 percent of proceeds. The published policy set a cap on awards at \$10,000,000, but the IRS waived this cap from time to time under “special agreements” with a whistleblower.

The IRM provided several grounds for rejecting a claim for award, including participation in the evasion scheme that was the subject of the report the whistleblower provided. Other common reasons for rejecting claims included:

- The information provided was of no value.
- The IRS already had the information or the information was available in public records.
- No collection of taxes and penalties existed from which the IRS could pay an award.

The information might be of no value because it did not provide a sufficient basis for initiating an examination or investigation of the issue presented, or because the examination resulted in a “no change” finding.

¹ The 2006 amendments re-designated the prior section 7623 as section 7623(a), added new provisions as section 7623(b), and included program administration requirements that were not incorporated into the Internal Revenue Code. The appendix to this report reprints section 7623, as amended, as well as additional provisions in the Act that Congress did not incorporate into the Code.

² The IRS has separate authority to pay informant expenses from appropriated funds available for confidential criminal investigation expenditures. The IRS makes those payments under authorities delegated to Criminal Investigation and they are not within the scope of the Whistleblower Office or this report to Congress.

³ Regulations implementing what is now section 7623(a) appear at Code of Federal Regulations Title 26, section 301.7623-1. The last version of the policy issued prior to the 2006 amendments was published in 2004, as Policy Statement P-4-27. The policy was revised in FY 2010, through revisions of the Internal Revenue Manual that were described in the FY 2010 Annual Report, which can be found on the IRS web site at http://www.irs.gov/pub/whistleblower/annual_report_to_congress_fy_2010.pdf.

B. 2006 Amendments

The Tax Relief and Health Care Act of 2006 (section 406) (PL 109-432) created section 7623(b) of the Code. This section set a new framework for the consideration of whistleblower submissions and established the Whistleblower Office within the IRS to administer that framework. Operating at the direction of the Commissioner of the IRS, the Whistleblower Office coordinates with other divisions of the IRS, analyzes information submitted, and makes award determinations. The statute provides that the Whistleblower Office may investigate the claim itself or assign it to the appropriate IRS office for investigation. The Whistleblower Office does not currently investigate claims itself. Individuals may appeal Whistleblower Office determinations to the U.S. Tax Court.

A whistleblower must meet several conditions to qualify for the section 7623(b) award program.⁴ To qualify for a whistleblower award, the information must:

- Relate to a tax noncompliance matter in which the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000; and
- Relate to a taxpayer, and for individual taxpayers only, one whose gross income exceeds \$200,000 for at least one of the tax years in question.

If the information meets the above conditions and substantially contributes to a decision to take administrative or judicial action that results in the collection of tax, penalties, interest, additions to tax, or additional amounts, the IRS will pay an award of at least 15 percent, but not more than 30 percent, of the collected proceeds resulting from administrative or judicial actions (including related actions), or from any settlement in response to an administrative or judicial action. The maximum award percentage decreases to 10 percent for cases based principally on specific allegations disclosed in certain public information sources (such as government audit reports). The Whistleblower Office also can reduce the percentage if the whistleblower planned and initiated the actions that led to the underpayment of tax.

C. Implementing the 2006 Amendments

On December 19, 2007, Notice 2008-4, 2008-2 Internal Revenue Bulletin 253,⁵ provided initial guidance on how to submit whistleblower information to the IRS. The IRS continues to develop and revise operating procedures to ensure the proper review of each submission. Individuals may appeal award determinations made under section 7623(b) to the Tax Court. Procedures established to evaluate whistleblower submissions make a clear distinction between determinations regarding awards, made by the Whistleblower Office (such as eligibility for an award or the amount of an award), and tax administration decisions, made by IRS operating divisions (such as the scope of an examination or investigation, or the assessment of taxes, penalties, and interest). The whistleblower may not appeal or otherwise challenge an IRS tax administration decision as only determinations are subject to Tax Court review.

⁴ If the submission does not meet the criteria for section 7623(b) consideration, the IRS may consider it for an award under the pre-Act discretionary authority (what is now section 7623(a) of the Code).

⁵ <http://www.irs.gov/pub/irs-drop/n-08-04.pdf>

III. Program Developments

A. Staffing

At the beginning of FY 2011, the Whistleblower Office staff of 17 included ten analysts with decades of experience in a broad array of IRS compliance programs, and recruiting was underway to increase the staff to 21. While additional staff was hired, staff retirements resulted in an on-board staff of 18 at the end of the fiscal year. In addition, the IRS Office of Chief Counsel appointed a senior attorney to serve as Special Counsel to the Director of the Whistleblower Office. The Special Counsel provides legal advice to the Director and coordinates support provided by other Chief Counsel offices.

B. Case Management Information System

The IRS began to receive whistleblower submissions alleging more than \$2,000,000 in underpayment of tax almost immediately after enactment of the amendments to section 7623. The IRS initially evaluated the submissions using processes and systems designed for the pre-amendment informant awards program. The IRS recognized that the case management information system designed for the pre-amendment program would not be adequate to manage the case load under the new law. Therefore, the IRS supplemented it with other automated and manual case management tools as a stop-gap until it could design and implement a new case management system.

In January 2009, the IRS began using a new case management system based on commercial-off-the-shelf technology to record all new section 7623 claims. By the end of FY 2009, the IRS converted all section 7623(b) claims recorded on the old systems to the new system and began planning to convert legacy data to the new system. The legacy data on pre-amendment claims and section 7623(a) claims submitted prior to January 2009 was loaded into the new system in July 2010, and records on all open legacy cases were updated to incorporate the enhanced features of the new system.⁶

In August 2011, the Government Accountability Office (GAO) published a report on its review of the Whistleblower Office. Among its findings and recommendations were several issues related to the case management information system. GAO recommended increased data collection to make the case management system a more effective tool for identifying aging cases, and for tracking decisions made by various IRS offices in the evaluation of whistleblower submissions. The IRS generally agreed with the information system recommendations. In fact, the IRS had been working on adjustments and enhancements to the information system in FY 2010 and early FY 2011, but had to suspend those efforts for much of FY 2011 so that it could provide support to two audit teams—one from GAO and the other from the Treasury Inspector General for Tax Administration (TIGTA). The specific recommendations from GAO will be incorporated into a broader review of user requirements as the IRS develops a comprehensive plan for system changes and enhancements. . The IRS plans to fully implement the actions to the GAO 2011 report by October 15, 2012, and will make additional improvements during the Winter of FY 2013.

⁶ Legacy data on closed cases is available for research and reference in the new system, but was not updated.

C. Program Guidance

The IRS issued Notice 2008-4 to provide initial guidance on how to submit information to the IRS. A revision to Form 211, Application for Award for Original Information,⁷ accompanied this notice. The notice addressed the most pressing guidance requirements—how to submit information and the criteria that the IRS will apply to determine whether the information qualifies under section 7623(b). The notice included the requirement that an individual submit the information under penalty of perjury and defines ineligible submissions. A submission may be ineligible because the person submitting it is disqualified (e.g., a federal employee who learned of the tax noncompliance in the course of performing his or her duties), or because the information does not provide a basis for IRS action. The latter category includes information that is speculative or that the IRS already knows. The notice also described the types of information that the whistleblower should include for the IRS to be able to evaluate the submission.

The IRS published revisions to the IRM on June 16, 2010. Those revisions update procedures for receipt and processing of whistleblower submissions, and provide the framework for making award determinations. An important policy change reflected in the IRM was that awards paid in section 7623(a) cases submitted on or after July 1, 2010 (those in which the statutory thresholds for 7623(b) claims are not met) will be determined using the same criteria and percentages that apply to 7623(b) claims. Section 7623(a) claims submitted prior to July 1, 2010, will be evaluated under the rules and policy in effect at the time the claim was filed.

The IRM includes a definition of the term “collected proceeds,” which changed the prior rule that permitted awards to be paid when whistleblower information resulted in denial of a taxpayer claim for refund. Subsequent to publication of the IRM, the Whistleblower Office received Chief Counsel advice that application of the prior rule was permissible. While awaiting publication of a final regulation, the Whistleblower Office relied on the Chief Counsel advice as its authority to make award payments when information results in denial of a refund claim.

On January 18, 2011, the IRS issued proposed regulations seeking public comment on a proposal to define the term “collected proceeds” for both section 7623(a) and (b). After a public hearing on May 11, 2011, the IRS issued final regulations on February 22, 2012. This regulation clarifies the definitions of “proceeds of amounts collected” and “collected proceeds” for purposes of section 7623, and states that the provisions of Treas. Reg. §301.7623-1(a) concerning refund prevention claims are applicable to claims under section 7623(a) and (b). In clarifying the definitions of proceeds of amounts collected and collected proceeds, this proposed regulation also provides that the reduction of an overpayment credit balance is also considered proceeds of amounts collected and collected proceeds under section 7623.

Final regulations governing the use of contracts for services related to the detection of violations of the internal revenue laws or related statutes were published and became

⁷ <http://www.irs.gov/pub/irs-pdf/f211.pdf>

effective on March 15, 2011. These regulations describe the circumstances under which the disclosure of taxpayer information to a whistleblower (and, if applicable, the whistleblower's representative) may be made, limitations on the use of any disclosed information, and safeguards to ensure those limitations are followed.

D. Program Operations

As noted above, in December 2007, the IRS directed that all section 7623 submissions go first to the Whistleblower Office. The Whistleblower Office reviews the information to identify matters that appear to meet the section 7623(b) criteria, and forwards those that do not to the Ogden Informant Claims Examination unit for further action. That unit evaluates all submissions it receives to determine whether the information offered may materially contribute to the assessment or collection of unpaid taxes, penalties, interest, or other amounts.

In FY 2011, the Whistleblower Office paid the first claims under the 2006 amendments to section 7623. Taxpayer privacy laws do not permit the publication of data on specific claims, and allow reporting on consolidated data only when the number of claims paid is large enough to produce a statistical report. The IRS paid awards for 97 claims in FY 2011, but the number of claims paid under 7623(b) was too small to qualify for separate reporting.. While the IRS cannot provide specific information about these cases, they are a significant event in the development of the program. Evaluation of these cases, and others that will be paid in FY 2012, has highlighted policy and procedure issues that are addressed below in the section on Administrative Priorities and Issues.

During FY 2011, the IRS received 314 whistleblower submissions relating to 732 taxpayers⁸ that appeared to meet the \$2,000,000 of tax, penalties, interest, and additions to tax threshold in section 7623(b). Many of the individuals submitting information to the IRS claimed to have inside knowledge of the reported transactions, often with extensive documentation to support their claims. It is not yet known how many of these cases will result in collected proceeds after examination or investigation, as the amounts alleged reflect only the whistleblower's estimate of the potential recovery. Only 4 of 97 claims paid in FY 2011 involved collections of more than \$2,000,000. However, because most of the claims paid in FY 2011 were submitted under the old Informant Award Program, this data does not assist in making estimates about the claims brought under the revised statute.

⁸ The Whistleblower Office often receives submissions that allege underpayment of tax by more than one taxpayer. In most cases, the IRS must evaluate the liability of each taxpayer individually—a single audit or investigation cannot resolve the issues for all taxpayers identified in the submission.

(Table 1)
7623(b) SUBMISSIONS BY FISCAL YEAR⁹

	Submissions	Taxpayers Identified¹⁰
2007	50	875
2008	377	1369
2009	472	2178
2010	422	5545
2011	314	734

The charts below provide information on the status of open claims identified as potentially exceeding the \$2,000,000 threshold for section 7623(b). These claims are identified during initial review of submissions by the Whistleblower Office, and then forwarded to subject matter experts (SMEs) in the IRS Operating Divisions. The SMEs determine whether the whistleblower information will be provided to field offices for audit or investigation, considering the quality of the information provided, IRS enforcement priorities and, in some cases, legal limitations on the use of the information submitted. Once information is provided to a field office, it may be incorporated into an on-going audit or investigation, a new audit or investigation may be started, or it may be deferred or declined in favor of higher priority cases or issues. Upon completion of an audit or investigation, or after a decision by an SME or a field office not to act on the information provided by the whistleblower, the file is returned to the Whistleblower Office. The Whistleblower Office determines whether a whistleblower is eligible for an award and, if so, the amount of the award.

The tables below include a category called “Whistleblower Office-Suspended.” Action on claims may be suspended for several reasons. These include waiting for collection action after tax has been assessed, waiting for the taxpayer to exhaust or waive appeal rights, and waiting for action on related cases. A related case suspension would be appropriate when a whistleblower submission identifies multiple taxpayers, and the IRS decides to take action with respect to some but not others. The declined cases would be suspended until the actions on other taxpayers are resolved. Another reason to suspend for related cases would be that actions have been completed on some taxpayers, but the amount in dispute is below the \$2,000,000 threshold for section

⁹ Statistics on 7623(b) submissions and taxpayers identified are based on the best information available at the time the report is produced. The classification of a particular submission as a potential 7623(b) case, and the number of taxpayers identified, can change as additional information is developed. As a result, the numbers for a particular fiscal year included in previous annual reports do not match the numbers reported here.

¹⁰ A relatively small number of submissions account for a large number of taxpayers identified, as they contain long lists of taxpayers involved in the reported activity, or they lead to the identification of a large number of taxpayers. While the number of taxpayers identified for FY 2011 is substantially lower than prior years, experience has shown that this number is likely to rise (and may rise dramatically) as the information submitted is further analyzed.

7623(b). Suspending action to determine whether additional actions could push the aggregate amount in dispute over the threshold preserves the whistleblower's potential Tax Court appeal right. The Whistleblower Office has not recorded the reason for suspension in the information system in a way that would permit statistical reporting, but will include a change in data collection to permit this information to be reported in the 2012 Annual Report.

(Table 2)
Current Status of Open 7623(b) Claims

Current Status	Submissions	Taxpayers	Whistleblowers	Claim #s
Not recorded	6	7	6	7
Appeals ¹¹	17	44	17	23
CI Review	6	27	6	24
Operating Division Field Examination	564	2905	447	2798
Operating Division Subject Matter Expert Review	264	1016	209	951
Whistleblower Office - Award Evaluation	33	84	29	69
Whistleblower Office - Case Suspended	85	4339	68	4280
Whistleblower Office - Form 11369 Review	131	385	109	351
Whistleblower Office - Initial Review	70	142	61	140
Total	1176	8949	952	8643

¹¹ Current Status Appeals refers to claims related to matters in which the taxpayer has sought review by IRS Appeals

(Table 3)

Open claims, Days in Current Status

Current Status	Average	Longest	Shortest
Appeals ¹²	200	596	7
CI Review	842	1071	604
Operating Division Field Examination	299	1393	1
Operating Division Subject Matter Expert Review	328	1003	0
Whistleblower Office - Award Evaluation	285	881	7
Whistleblower Office - Case Suspended	315	783	0
Whistleblower Office - Form 11369 Review	214	1106	0
Whistleblower Office - Initial Review	131	909	15

E. Outreach and Communications

The IRS has developed a communications plan to address outreach to both the public and IRS personnel on changes in the whistleblower program. The plan includes efforts to identify opportunities for improvement and potential barriers to change.

The Whistleblower Office has a page on the IRS Intranet to make information available to IRS personnel, and provides articles for internal newsletters and speakers for professional education events to reach employees who are most likely to deal with a whistleblower case. In November 2010, the Whistleblower Office hosted a meeting of managers and employees from the Whistleblower Office and the Ogden Informant Claims Examination (ICE) Unit to discuss issues related to claim intake and evaluation, and award determinations and payment. One result of this meeting was to begin planning for the transfer of the ICE Unit from the Small Business/Self Employed Operating Division to the Whistleblower Office. This realignment, to be implemented in FY 2012, will consolidate staffs working on section 7623 claims, offering opportunities to improve efficiency and productivity.

A dedicated page on the public website, www.irs.gov¹³, contains information for the public about the purpose of the Whistleblower Program, how to make a submission, and what to expect after making a submission, as well as links to Notice 2008-4 and Form 211. The Whistleblower Office also makes presentations to professional groups involved in the representation of taxpayers and whistleblowers, including Taxpayers Against Fraud and the American Bar Association Tax Section, both to describe program developments and to obtain outside perspectives on the program.

¹² Current Status Appeals refers to claims related to matters in which the taxpayer has sought review by IRS Appeals

¹³ <http://www.irs.gov/compliance/article/0..id=180171.00.html>

IV. Administrative Priorities and Issues

The Whistleblower Office continues to work with the IRS Office of Chief Counsel and Treasury Department to develop appropriate administrative program guidance. Based on the Whistleblower Office's experiences in administering the whistleblower program since its formation in 2007, the IRS has identified several areas it believes should be addressed through administrative guidance and as well as other issues.

A. Administrative Priorities

1. Guidance

A top priority is to update formal published guidance for section 7623. As described below, this includes drafting proposed regulations that would update the current regulations to reflect the statutory changes made by the 2006 amendments to section 7623. As is noted under "Program Developments," the IRS issued final regulations to define "collected proceeds." The IRS Office of Chief Counsel, working with the Assistant Secretary for Tax Policy, the Whistleblower Office, and other IRS offices, is drafting comprehensive proposed regulations that will revise the current regulations implementing section 7623 to reflect the remaining 2006 amendments to the statute, and expects to issue proposed regulations in the Summer of 2012.

2. Other Priorities

a. First awards for claims made under section 7623(b). In FY 2011, the IRS paid the first awards for claims made under section 7623(b). In June 2010, the IRS published procedures and criteria for making award determinations under the 2006 Amendments, including providing an opportunity for whistleblowers in section 7623(b) cases to provide comments on award recommendations before a final award determination is made. Those procedures and criteria were generally adequate for the initial section 7623(b) cases. However, the initial cases highlighted potential areas for improvement in the administrative process for evaluating the whistleblower contribution, and for communicating with the whistleblower about a proposed award determination. These topics will be further explored in developing a comprehensive revision to the Treasury Regulations and the IRM planned for the summer of 2012.

b. Review and update internal operating procedures to improve program performance. The IRS plan to conduct a comprehensive review of whistleblower program internal operating procedures in FY 2011 was deferred because of the need to provide support to audit teams from GAO and TIGTA. This effort was re-started in FY 2012, and includes collecting information from Operating Divisions and Chief Counsel staff who evaluate whistleblower information in order to identify opportunities to more efficiently and effectively evaluate and process whistleblower claims. The IRS will begin implementing changes in the Summer of 2012.

B. Other Issues of Interest

A number of additional issues exist in the administration of the Whistleblower Program.

- 1. There are statutory and computational limitations to determining what constitutes “collected proceeds.”** The FY 2010 Annual Report highlighted issues related to the definition of collected proceeds. Potential taxpayer liabilities are sometimes resolved in a manner that does not result in collected proceeds from which an award may be paid. This can occur when the taxpayer has a net operating loss carryback or carry forward. In addition, if a taxpayer is prosecuted for a criminal violation of the internal revenue laws, a sentence after conviction may include fines. Criminal fines are not available to pay awards under section 7623 because the Victims of Crime Act (42 U.S.C. section 10601 et seq.) requires that all criminal fines be deposited in the Victims of Crime Fund.

The Whistleblower Office has identified another area where recoveries from taxpayers cannot be used to pay awards under section 7623. The IRS is responsible for administering internal revenue laws under Title 26 of the United States Code. The IRS has also been delegated responsibility to administer other laws, such as those related to the Bank Secrecy Act and Foreign Bank Account Reports (FBARs). The IRS has used FBAR penalties as an important component in its efforts to combat use of offshore bank accounts to evade U.S. tax obligations. However, those laws appear in Title 31 of the United States Code, which also provides for a separate award program for information that leads to the identification of violations. The authority to pay awards under section 7623 extends only to recoveries under title 26, and does not permit awards to be paid based on collection of FBAR penalties.

- 2. The dollar amount thresholds for “gross income” and “amounts in dispute” should be clarified.**¹⁴ Section 7623(b)(5) sets two thresholds for application of section 7623(b), which also serve to define the jurisdiction of the U.S. Tax Court to review whistleblower award determinations. The general rule applicable to all claims requires that “the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000.” The law also provides that subsection (b) shall apply “in the case of any individual [taxpayer], only if such individual’s gross income exceeds \$200,000 for any tax year....” Because neither term is defined in the statute, there is uncertainty in both the administration of the whistleblower program and in determining whether the U.S. Tax Court has jurisdiction to consider an appeal.

The “individual’s gross income” limitation was apparently included in the law to ensure that the focus of the award program under section 7623(b) is on relatively high income taxpayers. In the absence of a definition, the IRS must look to other provisions of the Internal Revenue Code to determine how to calculate “gross income.” This may require complex calculations in cases where allocation of partnership income or other similar issues apply. The IRS questions whether this effort is intended or justified, given that failure to satisfy the gross income threshold generally shifts the claim from a mandatory section 7623(b) claim to a discretionary section 7623(a) claim. Approximately 85 percent of submissions do not appear to meet the income or amount in dispute thresholds but will be

¹⁴ This issue was included in the FY 2010 report.

considered for awards under section 7623(a) if the IRS acts on them and collects proceeds. To the extent that the individual income threshold was intended to provide a limit on U.S. Tax Court jurisdiction, the practical impact appears to be limited. Few cases involving individual taxpayers will exceed the \$2,000,000 threshold but not have at least one taxpayer whose income exceeds \$200,000 or at least one taxpayer that is not an individual.

Similar concerns pertain to the \$2,000,000 “amount in dispute” threshold. Section 7623(b)(5)(B) requires that “the tax, penalties, interest, additions to tax, and additional amounts in dispute” must exceed \$2,000,000. The term “in dispute” is not defined in the law, the legislative history, or elsewhere in the Internal Revenue Code, nor does the law or legislative history indicate the point at which the amount in dispute is determined. An allegation by a whistleblower does not create a dispute between the IRS and a taxpayer, nor does the amount asserted by the whistleblower to be owed by a taxpayer satisfy the statutory threshold. The IRS requires that the dispute in question be between the IRS and one or more taxpayers (or persons who may be required to pay penalties or “other amounts”). In cases where action is taken on multiple taxpayers as a result of information provided by a whistleblower, the IRS aggregates the disputed amounts of multiple taxpayers to determine whether the \$2,000,000 threshold has been exceeded.

The IRS and whistleblowers would have greater certainty about the application of section 7623(b) if the “gross income” and “amount in dispute” thresholds were replaced by a reference to a threshold that can be reasonably ascertained, such as the amount of collected proceeds.

- 3. Rules on access to and disclosure of taxpayer information do not fully protect taxpayers.** A whistleblower can appeal any determination on an award under section 7623(b)(1), (2), or (3) of the Code to the Tax Court (section 7623(b)(4) of the Code). A meaningful right to appeal to Tax Court requires disclosure to the whistleblower of the basis for the award determination, which oftentimes will include taxpayer information that is protected from disclosure under section 6103. Consistent with section 6103(h), the IRM provides for disclosure of taxpayer information by the IRS to the whistleblower if the whistleblower enters into a confidentiality agreement and agrees not to disclose the information other than as permitted in that agreement.

The FY 2010 Annual Report noted two concerns regarding the disclosure of taxpayer information to the whistleblower as part of an award determination. First, current law does not provide an effective sanction if the whistleblower discloses taxpayer information in violation of the confidentiality agreement and section 6103(h). Second, the whistleblower may, against the wishes of the taxpayer, disclose the identity of the taxpayer in a Tax Court or other judicial proceeding. The taxpayer is not a party to any dispute between the IRS and a whistleblower over eligibility for or the amount of an award under section 7623, but both pleadings and court decisions in these cases routinely include details

about the taxpayer.¹⁵ Cases brought before the Tax Court in FY 2011 continue to raise this issue. In addition, whistleblowers who challenge IRS decisions on their award claims continue to raise questions about the separate decisions made regarding the taxpayer's liability, and seek information through pre-trial discovery on those decisions. While the Tax Court has ruled in a few cases that its jurisdiction to consider whistleblower award claim appeals does not include the authority to order IRS action with respect to taxpayer liability, it has not yet ruled on the scope of permitted discovery. The ability of the IRS to successfully resist overbroad or otherwise improper whistleblower discovery requests related to taxpayer liability issues is unclear, and an area of concern.

- 4. The Whistleblower Office has limited information about the extent of the whistleblower's contribution in some criminal cases.**¹⁶ In some criminal cases, information available to the Whistleblower Office on the extent of the whistleblower's contribution may be limited by grand jury secrecy rules. The Whistleblower Office may not review and consider grand jury information protected from disclosure under the Federal Rules of Criminal Procedure, unless an exception to the secrecy rules is granted on a case-by-case basis. Without that information, it may not be possible for the Whistleblower Office to independently assess the extent of the whistleblower's contribution when making a determination regarding an award under section 7623.
- 5. The law does not provide for whistleblower protection.**¹⁷ Unlike other laws that encourage whistleblowers to report information to the government, section 7623 does not prohibit retaliation against the whistleblower. When the whistleblower is an employee of the taxpayer, retaliation can take the form of a job-related action. In other cases, whistleblowers may face threats of physical harm or damage to economic interests. In such cases, whistleblowers reporting information under section 7623 may have recourse under state law, but federal law does not appear to provide a remedy.

The IRS has, as a matter of policy and as an application of section 6103, committed to protect a whistleblower's identity, and even the fact that the agency received whistleblower information in a particular case. This commitment is qualified, however, as the IRS tells whistleblowers it may identify them if they are an essential witness in a judicial proceeding or if ordered to do so by a court of competent jurisdiction. Despite the IRS's commitment to protect whistleblower identities, litigation has highlighted a tension between the IRS's commitment to whistleblowers and its obligations in civil discovery. Certain litigants have sought information on informant involvement in tax matters even in cases where the government did not identify the whistleblower as a potential witness at trial. The appropriate response to such a request should be to neither confirm nor deny

¹⁵ On December 28, 2011, the Tax Court proposed rules to require protection of taxpayer information in Tax Court proceedings, and to address circumstances under which the identity of the whistleblower may also be protected. If adopted, these rule changes will address the concern about disclosure in Tax Court proceedings.

¹⁶ This issue was included in the FY 2010 report.

¹⁷ This issue was included in the FY 2010 report.

informant involvement, because a truthful denial in some cases will allow individuals to draw a conclusion in other cases. The authority to take this approach is premised in case law, however, and an adverse ruling on a discovery request could open the door to fishing expeditions to identify whistleblower involvement and targeted requests to determine whether particular individuals made whistleblower submissions.

V. Whistleblower Awards Paid

The table below provides information on informant claims paid. The IRS cannot make an award determination until the underlying taxpayer matter is completed, including any administrative or judicial appeals the taxpayer may choose to pursue. Whistleblowers are advised that this process may take five to seven years, and longer when there are protracted appeals or collection actions. In FY 2011, the first awards were paid based on information submitted under the 2006 amendments to section 7623. However, most awards have been based on claims covered by the pre-2006 law. Taxpayer privacy laws do not permit the publication of data on specific claims, and allow reporting on consolidated data only when the number of claims paid is large enough to produce a statistical report. The number of claims paid under the 2006 amendments is too small to qualify for separate reporting, so that data has not been segregated from other award payments made in FY 2011. For most of the cases included in the table below, the applicable award percentages were those established in prior IRS policy, not the higher percentages set by the 2006 law.

The number and amount of awards paid each year can vary significantly, especially when a small number of high-dollar claims are resolved in one year (as was the case in FY 2008). One factor contributing to the lower award payments in FY 2009 was a change in the IRS definition of the point at which proceeds in a tax case are available to make an award payment. In the past, the IRS monitored the tax case to ensure that it collected proceeds before processing the award claim. Where the taxpayer filed an administrative or judicial appeal, the IRS did not pay claims until the court finally resolved the appeal. After consultation with the Office of Chief Counsel, the IRS determined that it should not pay claims even when the taxpayer has not filed an appeal until the period for filing an appeal has lapsed. The general rule is that a taxpayer may file a claim for refund within two years of the last payment, unless he or she has waived that right. Thus, beginning in July 2009, the IRS monitors cases for both collection and the lapse of the period for filing a claim for refund. As a result, the IRS did not pay some claims that it would have otherwise paid in FY 2009 until FY 2010 or FY 2011.

(Table 4)
Amounts Collected and Awards Paid under 7623 FY 2007-2011¹⁸

	2007	2008	2009	2010	2011
Cases Received	2,751	3,704	5,678 ¹⁹	7,577	7,471
Awards Paid	227	198	110	97	97
Collections over \$2,000,000	12	8	5	9	4
Total Amount of Awards Paid²⁰	\$13,600,205	\$22,370,756	\$5,851,608	\$18,746,327	\$8,008,430
Amounts Collected	\$181,784,287	\$155,985,834	\$206,032,872	\$464,695,459	\$48,047,500
Awards paid as a percentage of amounts collected.	7.5%	14.3%	2.8%	4.0%	16.7%

¹⁸ All awards paid from FY 2007 through FY 2010 were paid under section 7623(a), the pre-amendment law governing award claims. FY 2011 includes a limited number of awards paid under 7623(b).

¹⁹ The implementation of a new case management information system included changes in the way the IRS recorded submissions under 7623(a). The IRS cannot determine the extent to which this change was a factor in the higher number of cases received after the new system was implemented in FY 2009.

²⁰ The amount of awards paid includes both fully-paid awards and partially-paid awards. In FY 2011, there were no partial payments.

VI. Appendix: Revised Section 7623 and other provisions of law

A. Revised 26 USC Section 7323

TITLE 26 - INTERNAL REVENUE CODE

Subtitle F - Procedure and Administration

CHAPTER 78 - DISCOVERY OF LIABILITY AND ENFORCEMENT OF TITLE

Subchapter B - General Powers and Duties

Sec. 7623. Expenses of detection of underpayments and fraud, etc.

(a) In General- The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for -

(1) detecting underpayments of tax, or

(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,

in cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

(b) Awards to Whistleblowers-

(1) IN GENERAL- If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

(2) AWARD IN CASE OF LESS SUBSTANTIAL CONTRIBUTION-

(A) IN GENERAL- In the event the action described in paragraph (1) is one which the Whistleblower Office determines to be based principally on disclosures of specific allegations (other than information provided by the individual described in paragraph (1)) resulting from a judicial or administrative hearing, from a governmental report, hearing, audit, or investigation, or from the news media, the Whistleblower Office may award such sums as it considers appropriate, but in no case more than 10 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action, taking into account the significance of the individual's information and the role of such individual and any legal representative of such individual in contributing to such action.

(B) NONAPPLICATION OF PARAGRAPH WHERE INDIVIDUAL IS ORIGINAL SOURCE OF INFORMATION- Subparagraph (A) shall not apply if the information resulting in the

initiation of the action described in paragraph (1) was originally provided by the individual described in paragraph (1).

(3) REDUCTION IN OR DENIAL OF AWARD- If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award. If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award.

(4) APPEAL OF AWARD DETERMINATION- Any determination regarding an award under paragraph (1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter).

(5) APPLICATION OF THIS SUBSECTION- This subsection shall apply with respect to any action--

(A) against any taxpayer, but in the case of any individual, only if such individual's gross income exceeds \$200,000 for any taxable year subject to such action, and

(B) if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000.

(6) ADDITIONAL RULES-

(A) NO CONTRACT NECESSARY- No contract with the Internal Revenue Service is necessary for any individual to receive an award under this subsection.

(B) REPRESENTATION- Any individual described in paragraph (1) or (2) may be represented by counsel.

(C) SUBMISSION OF INFORMATION- No award may be made under this subsection based on information submitted to the Secretary unless such information is submitted under penalty of perjury.'

B. Other provisions of Section 406 of the Tax Relief and Health Care Act of 2006

(a)(2) ASSIGNMENT TO SPECIAL TRIAL JUDGES-

(A) IN GENERAL- Section 7443A(b) (relating to proceedings which may be assigned to special trial judges) is amended by striking 'and' at the end of paragraph (5), by redesignating paragraph (6) as paragraph (7), and by inserting after paragraph (5) the following new paragraph:

(6) any proceeding under section 7623(b)(4), and'.

(B) CONFORMING AMENDMENT- Section 7443A(c) is amended by striking '(5)' and inserting '(5), or (6)'.

(3) DEDUCTION ALLOWED WHETHER OR NOT TAXPAYER ITEMIZES- Subsection (a) of section 62 (relating to general rule defining adjusted gross income) are amended by inserting after paragraph (20) the following new paragraph:

(21) ATTORNEYS FEES RELATING TO AWARDS TO WHISTLEBLOWERS- Any deduction allowable under this chapter for attorney fees and court costs paid by, or on behalf of, the taxpayer in connection with any award under section 7623(b) (relating to awards to whistleblowers). The preceding sentence shall not apply to any deduction in excess of the amount includible in the taxpayer's gross income for the taxable year on account of such award.'

(b) Whistleblower Office-

(1) IN GENERAL- Not later than the date which is 12 months after the date of the enactment of this Act, the Secretary of the Treasury shall issue guidance for the operation of a whistleblower program to be administered in the Internal Revenue Service by an office to be known as the 'Whistleblower Office' which--

(A) shall at all times operate at the direction of the Commissioner of Internal Revenue and coordinate and consult with other divisions in the Internal Revenue Service as directed by the Commissioner of Internal Revenue,

(B) shall analyze information received from any individual described in section 7623(b) of the Internal Revenue Code of 1986 and either investigate the matter itself or assign it to the appropriate Internal Revenue Service office, and

(C) in its sole discretion, may ask for additional assistance from such individual or any legal representative of such individual.

(2) REQUEST FOR ASSISTANCE- The guidance issued under paragraph (1) shall specify that any assistance requested under paragraph (1)(C) shall be under the direction and control of the Whistleblower Office or the office assigned to investigate the matter under paragraph (1)(A). No individual or legal representative whose assistance is so requested may by reason of such request represent himself or herself as an employee of the Federal Government.

(c) Report by Secretary- The Secretary of the Treasury shall each year conduct a study and report to Congress on the use of section 7623 of the Internal Revenue Code of 1986, including--

(1) an analysis of the use of such section during the preceding year and the results of such use, and

(2) any legislative or administrative recommendations regarding the provisions of such section and its application.

(d) Effective Date- The amendments made by subsection (a) shall apply to information provided on or after the date of the enactment of this Act.