

IRS Whistleblower Program: Update

By Dean Zerbe

Dean Zerbe interviewed Director Lee Martin of the IRS Whistleblower Office at this year's NYU Tax Forum. Below are Dean's insights from the interview.

Mr. Martin's comments provided a good opportunity to take the temperature of the whistleblower award program at the IRS. The theme of the interview was "past, present and future" for the whistleblower program.

Old Cases

The discussion on the past generally highlighted that the IRS has been emphasizing closing out a lot of "old and cold" cases—translating mostly into a lot of "thanks, no thanks" letters going out to whistleblowers. Cleaning out the old caseload is necessary—but unfortunately led to a number of whistleblowers being unhappy with the news—particularly after so long a wait. Understandably, many of the whistleblowers translated that not hearing "no" for so long meant the IRS was on the case—and the letters have dashed raised expectations. The IRS is seeking to have rejection letters better communicate why the submission did not pass muster—this has been somewhat of a mixed bag.

Good Filing/Bad Filing

Of particular note though was Mr. Martin's emphasis on why whistleblower filings are rejected—or a nicer way of saying it, what makes for a good whistleblower submission. Mr. Martin commented that a key reason for rejection was that the allegations were not specific to a taxpayer, lacked credibility or were darts-in-the-air.

Whistleblowers and their representatives need to be focused on these constructive criticisms from the Director. Too often when I hear from whistleblowers about their case being rejected—it is not all that difficult to see why. A submission having vague references to problems in an industry or sector of the economy just are not going to cut it.

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The submissions that have the better chance to get traction and interest from the IRS are those that:

- 1) Name specific taxpayer(s)—list all of them, all related parties, *etc.*—and also if it is a big company be as granular as you can in terms of the subsidiary, division, *etc.*
- 2) Specific violation of law—what exactly is the law that is being violated—providing a legal analysis of the law and why the whistleblower believes it is being violated can in many cases be helpful.
- 3) *Current.* The IRS is not going to be excited about old and cold cases—arguing that the taxpayer engaged in fraud, and therefore, there is no statute of limitations is not a winning hand. One exception—illegal/undeclared accounts. Focus on submissions addressing open tax years.

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- 4) *Dollars.* For an individual or small business it is understandable the dollars may be lower—but for a big company, it should be big dollars. The corporations are under continual audit in most cases and the IRS is not going to go to the fishing hole looking for minnows.
- 5) *Documents/Details/Credibility.* The more the whistleblower has documents and details that support the allegation all the better. Related to this, is the credibility of the whistleblower—their education, knowledge and experience. Recognize that the IRS has limited manpower and before they start an audit—they want to have some heightened confidence that the whistleblower knows what they are talking about and that there is some “there, there.”

To be candid, the IRS is less and less enamored with submissions that they receive from whistleblowers who are reviewing an industry or sector of the economy—with little or no particular inside knowledge—who are speculating that “x” or “y” violation of the tax laws may or might be happening.

Not surprisingly, Mr. Martin stated that he found useful and particularly welcomed submissions from whistleblowers that were represented by lawyers—primarily because of the screening and vetting that the lawyers themselves engage in in seeking to provide a good submission.

Processing of Submissions

Discussing the present, a priority for Mr. Martin has been to speed up the processing of whistleblower submissions. There is no question that his focus on the issue of processing has borne fruit. Previously, a whistleblower could often go long weeks/months before finally getting an acknowledgement of their submission and the ball beginning to roll. Now, it is common for a whistleblower to get an acknowledgement and a case number assigned within 30 days. Coupled with that, whistleblowers are often seeing rejection letters very quickly as well—for submissions that are not meeting the mark.

After Submission

While processing of initial filings is markedly better, there is still not a straightforward process of the whistleblower receiving an interview from the IRS. By comparison, the IRS is not where the Securities and Exchange Commission (SEC) whistleblower program is in providing quick, detailed, thorough, substantive interviews of whistleblowers in a timely manner. However, to their credit, the IRS is interested in understanding how the SEC does what it does and whether there are lessons to be learned. To the IRS's defense, the IRS faces significant staffing and overall budget restraints (even though the IRS Koskinen has been a supporter of the whistleblower program at the IRS and has provided the Whistleblower Office a fair amount of resources).

The IRS Criminal Investigations (CI) division is first-rate in working with whistleblowers—reflecting the long-time relationship with informants over the years. However, IRS civil (especially Large Business and International) seems to be going in the right direction—and I have seen a number of cases where LB & I has clearly engaged in a thorough and thoughtful review of the whistleblower's submission—even if it did not result in LB & I going forward with the whistleblowers claims.

The IRS still is a slow work in progress when it comes to working closer with the whistleblower in the civil setting—*i.e.*, providing a contractual relationship under 6103(n) with the whistleblower so that the whistleblower can receive 6103 information and more ably assist the IRS. While it is common for CI to work closely with a whistleblower, (as a number of my clients have)—it still is the rarest of birds on the civil side. Mr. Martin expressed his continued interest in seeing the IRS enter into contracts with whistleblowers—but I fear it is going to be a long, slow ride to accomplish this change in culture at the civil side of IRS. This failure to engage with the whistleblower

speaks to whistleblowers in their original submissions need to cover the waterfront of their knowledge—and anticipating the potential defenses put forward by the taxpayer.

With the improvements in the processing of submissions, I anticipate the next labor for Mr. Martin will be to look at speeding up the processing of awards. Mr. Martin has continually stated his desire to make awards and I think there is no question that he is sincere. However, there clearly are areas in the processing of awards that can benefit from the whip-hand of management to get a move-on.

Communication

For the future, Mr. Martin provided good news as he noted that the IRS is seeking to address one of the biggest problems in the whistleblower program—communication. While as of this writing it still has not been formally announced, Mr. Martin stated that the IRS will be putting forward a better framework for communicating with whistleblowers.

Currently, after the submission of the claim by the whistleblower, it goes very dark in terms of any guidance from the IRS of what—if anything—is going on. Mr. Martin recognizes that and the hope is that the new guidance will be particularly useful of providing some illumination of where things stand for the whistleblower

at the point that proceeds have been collected—*i.e.*, dollars in hand but the taxpayer's rights to appeal have not ended. While not perfect, this is a good step forward—and certainly Mr. Martin should be commended for working these changes administratively in an environment at the IRS that is not in all corners all-embracing of the whistleblower award program.

My old boss, Senator Grassley (R-IA), the great champion of the IRS whistleblower program, has also had passed by the Finance Committee legislation that would provide for some limited communications with the whistleblower prior to proceeds being collected (*e.g.*, that the taxpayer is being audited on the issue raised by the whistleblower). We will see what the Congress does in lameduck on taxes—but hopefully that will become law if not this year, next year.

Conclusion

The IRS whistleblower program is moving in the right direction—but it takes an institution as large as the IRS a long time to culturally adapt and adjust to the “new, new.” However, it is also the case that whistleblowers and their representatives need to adapt and adjust as well—recognizing what are good cases to file and refining their submissions so that they will garner the attention of the IRS.

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