February 5, 2013

Dear Commissioner,

I have taken an interest in the proposed whistleblower regulations, using them in my class as an example of how to make public comments. My thoughts are below, and I have attached this same document as an MS-Word file, which has the original formatting.

I congratulate Meghan M. Howard and Robert T. Wearing of the Office of the Associate Chief Counsel (Procedure and Administration) for their drafting of these Whistleblower Office regulations. They are a big improvement from the practice so far, even though there are still major problems. I also commend whoever in the executive branch of government put together the general comment system used by http://www.regulations.gov/#!docketDetail;D=IRS-2012-0051, where I am posting this comment.

Each comment starts on a separate page. The topics are:

1. Using the term "claimant" instead of "individual".

2. Allowing the claimant to assign his claim to any legal person, as with patents, and taxing the assigned person as the awardee.

3. Electronic filing practical details.

4. The future underpayment averted issue, tax attributes, NOL's, etc.

5. A new negative factor: the information was useless to the IRS (e.g., was gotten from the WSJ)

6. Races by claimants with the same information.

7. Re-Opening claims that were initially denied.

8. Penalties for breach of the confidentiality agreement.

9. Selling one's claim as a solution to the delay problem.

I particularly hope that Assisant Secretary Mazur will think about the issues in (4) and (6), which would benefit from his area of expertise.

I have changed the spacing and fonts of the regulations quoted below wherever I thought it could make things easier for the reader. Also note that I might sometimes miss putting an ellipsis where I have skipped parts.

I am not a lawyer, a fact which may be useful if the reader of this finds some comments naive or finds that I have misused legal terms.

I wish to remain remain out of the public eye, so I am signing this as n17147781@gmail.com.
Yours truly,

n17147781@gmail.com

## 1. Using the term “claimant” instead of “individual”.

**PART 301--PROCEDURE AND ADMINISTRATION…**
§301.7623-1 General rules, submitting information on underpayments of tax or violations of the internal revenue laws, and filing claims for award....
(b) Eligibility to file claim for award. (1) In general. Any individual, other than an individual described in paragraph (b)(2) of this section, is eligible to file a claim for award and to receive an award under section 7623 and §§ 301.7623-1 through 301.7623-4.

Add:

**These regulations will refer to the individual who files the claim as “the claimant”.**

I suggest that the word **“claimant”** be used instead of “individual” when referring to the whistleblower.

**Explanation:** “Whistleblower” would be the best word except that it’s four syllables long. “Claimant” is shorter, and will avoid possible confusion of the individual whistleblower with an individual taxpayer. I realize that “individual” is used in the statute, but I think it’s okay to use a synonym in the regulation.

## 2. Allowing the claimant to assign his claim to any legal person, as with patents, and taxing the assigned person as the awardee.

**PART 301--PROCEDURE AND ADMINISTRATION…**
§301.7623-1 General rules, submitting information on underpayments of tax or violations of the internal revenue laws, and filing claims for award....
(b) Eligibility to file claim for award. (1) In general. Any individual, other than an individual described in paragraph (b)(2) of this section, is eligible to file a claim for award and to receive an award under section 7623 and §§ 301.7623-1 through 301.7623-4.

Append

**"The claimant must be an individual, but may assign his claim to any other legal person, in which case the other legal person, not he, will receive and pay income taxes on the award."**

**Explanation.** The statute says that only "an individual" can be whistleblower, not partnerships and corporations. In this, claims is like patents, which must be issued to individuals. The statute says, "an individual" to "individuals". Perhaps Congress intended a group of individuals to also be eligible. The proposed regulations take that for granted in other places, treating the claimants as having, in effect, a common-law partnership. The regulations do not consider the possibility that corporations, trusts, local governments, etc. might be claimants, something which the statutory language also seems to exclude.

The singular "individual" might not be a scrivener's error. There is some point to requiring a single individual human being to be the claimant. It makes that person liable for imprisonment for perjury, and makes it simpler for the IRS and Tax Court to communicate with the claimant and, especially, avoids the problem of claimants with conflicting desires to for example, argue about an award. It also makes it easier to assign blame if the confidentiality agreement is breached.

It would also be good to allow whistleblowers to share rewards and responsibility if they want to and have thought it out, though. I therefore suggest clarifying that an individual can assign his claim to a corporation, trust, etc., as my proposed addition does. I don't think this is a change in the law, actually--- I should think that application of standard legal principles would allow it--- but it would be good to make it clear. Otherwise, a claimant might be afraid that if, for example, he assigns the claim to his employer, he will have to pay income tax on it himself and then perhaps his employer will have to pay income tax on it too.

It would be useful for the application form (Form 211) to have a box somewhere to check if the claim has been assigned, with a request that details about the assignment to be attached to the application. Here are a couple of convenient Web documents that might be useful in thinking about Comment 2:

US Patent Office, Instructions for the patent application form, http://www.uspto.gov/forms/aia_ads_form_inst.doc

Robert Platt Bell, "ASSIGNMENT of Patents," http://robertplattbell.blogspot.com/2009/03/assignment-of-patents.html

## 3. Electronic filing practical details.

§301.7623-1(c)
(2) Filing claim for award. To claim an award under section 7623 and §§ 301.7623-1 through 301.7623-4 for information provided to the IRS, an individual must file a formal claim for award by completing and sending Form 211, "Application for Award for Original Information," to the Internal Revenue Service, Whistleblower Office, at the address provided on the form, or by complying with other claim filing procedures as may be prescribed by the IRS in other published guidance. The Form 211 should be completed in its entirety and should include the following information:
(i) The date of the claim;
(ii) The claimant's name;
(iii) The claimant's address and telephone number;
(iv) The date of birth of the claimant;
(v) The taxpayer identification number of the claimant; and
(vi) An explanation of how the information on which the claim is based came to the attention and into the possession of the claimant, including, as available, the date(s) on which the claimant acquired the information and a complete description of the claimant's present or former relationship (if any) to the person(s) identified on the Form 211.

**Specific Comment Request: Whether electronic claim filing would be appropriate and beneficial to claimants, and, if so, what features should be included in an electronic claim filing system.**

Substitute language like this:

**``Ordinarily, submissions must be made electronically. This speeds processing and will prevent one claimant's submission from slowing down others'. Documents and sound files may be submitted by email to EMAIL ADDRESS if they sum to less than 5MB of data, and otherwise should be put on a CD, DVD, or thumbdrive and delivered to MAILING ADDRESS. The submission may be made by other means if the claimant first submits evidence of hardship and the IRS agrees."**

**Explanation:** Exclusive electronic filing will speed the process. It imposes more of the burden on the claimant, but that is OK in this context, since it could actually be good to weed out nonserious claimants. Include the explanation "This speeds processing..." so naive claimants don't get irritated. Include the exception clause, "The submission may be made..." to allow for special cases.

Security would be a concern if normal email were used, so the IRS should set up a webpage form for electronic filing.

## 4. The future underpayment averted issue, NOL's, etc.

§301.7623-2 Definitions.
(d) Collected proceeds.
(1) In general. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the terms proceeds of amounts collected and collected proceeds (collectively, collected proceeds) include: tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided; amounts collected prior to receipt of the information if the information provided results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided. Collected proceeds are limited to amounts collected under the provisions of title 26, United States Code. ...
(4) Computation of collected proceeds.
(i) In general. The Whistleblower Office will monitor each case for collection of proceeds. Pursuant to § 301.7623-4(d)(1), the IRS cannot make an award payment until there has been a final determination of tax. For purposes of determining the amount of an award under section 7623 and §§ 301.7623-1 through 301.7623-4, after there has been a final determination of tax as defined in §301.7623-4(d)(2), **the IRS will compute the amount of collected proceeds based on all information known with respect to the taxpayer's account, including with respect to all tax attributes, as of the date the computation is made.**
(ii) Partial collection. If the IRS does not collect the full amount of taxes, penalties, interest, additions to tax, and additional amounts assessed against the taxpayer, then any amounts that the IRS does collect will constitute collected proceeds in the same proportion that the adjustments attributable to the information provided bear to the total adjustments.

**Specific Comment Request:** Each of the key terms defined in this section. [ planned and initiated and final determination of tax, proceeds based on, related action, and **collected proceeds,** action, administrative action, judicial action, amount in dispute, and gross income. ]

**Another Specific Comment Request: Whether and how the IRS could determine any amount of collected proceeds that arise as a result of a taxpayer's use of tax attributes such as NOLs after the final determination of tax and the computation of collected proceeds, as provided in the proposed regulations.**

The award should be a reward for all money saved by the whistleblower, even if it was harm averted ex ante rather than remedied ex post. Thus, I suggest that language and examples likethe following be used, with appropriate removal of existing language that conflicts with it.

SUGGESTED CHANGE:

**"Collected proceeds refers not just to amounts collected at the instant of the initial award determination but all amounts collected at any time as a result of the whistleblower's information. The award's payment may thus be made at a variety of times, as different proceeds from the same information are collected.**

**Example 1. In 2003, a corporation lists nonexistent net operating losses (NOL's) on its books, intending to carry them forward to reduce future taxes. The claimant reports this in 2005, when the corporation has already underpaid its 2004 tax but still has enough NOL's to reduce its 2005 and 2006 taxes. The IRS determines in 2005 that the whistleblower's information is valuable enough to entitle him to 20% of the extra 2004 tax collected plus interest and fines, and pays that sum out. Under the proposed rule, the IRS makes additional payments to the whistleblower in 2005 and 2006 of 20% of the amount of taxes that would have been underpaid had the whistleblower not informed the IRS. These second two payments do not include any interest or fines, because no interest or fines is levied or collected.**

**Example 2. The same as Example 1, but the corporation goes bankrupt in 2006. The IRS recovers zero of the 2005 tax, and no 2006 tax is due. The whistleblower receives only his initial payment based on its 2004 tax underpayment. The tax underpayment averted must be collected to justify an award.**

**Example 3. The same as Example 1, except that the corporation pays its 2005 tax late and is assessed for interest and fines. The claimant's award based on 2005 taxes includes interest on the amount that would have been underpaid had he not provided his information, but it does not include anything for the fines, because the fines were for misbehavior unrelated to his information."**

**Example 4. The claimant submits memos to the IRS in which the taxpayer's CFO writes to the CEO that if certain cost items are improperly expensed instead of depreciated, the corporation will save $5 million in taxes. The CEO writes back asking for details. On investigating, the IRS can find no further evidence, and when the tax's due date arrives, the corporation depreciates the items in question. The IRS determines that the collected proceeds are zero and denies the claimant any award. The IRS believes that on appeal to Tax Court, the claimant would lose because the Court would defer to the IRS on the fact issue of whether the corporation would have expensed the items but for the claimant's submission.**

**Explanation of Comment 4.**

**1. Statutory Language.** The statute, Title 26 paragraph 7623(b), says:

(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.

Our task is to define "collected proceeds". "Collected proceeds resulting from the action" literally means "proceeds that are collected because the action took place." It does not mean, "Proceeds that are collected because the action took place, but excluding those are collected after the date of the action." We might with no less justification say, "Proceeds that are collected because the action took place, but excluding those are collected before the date of the action." Instead, and most simply, ignore the dates, and calculate the amount of money collected as a result of the whistleblower's information, regardless of timing. Any rule that differs from this simple and literal meaning would require special justification. Possible justifications will be discussed below.

**2. Ambiguity of the proposed regulation.** The proposed regulation is not entirely clear in its definition. I think (4)(i) means "Proceeds that are expected to be collected based on returns already filed when the IRS has finished analyzing the claimant's information, whether or not they are actually collected," but then 4(ii) retracts that by adding, in effect, "unless it turns out later that the expected proceeds are less than the actual proceeds."

**Example X-1.** On January 10, 2004 the claimant provides information showing that the taxpayer corporation underpaid its 2002 taxes and has taken active steps to underpay its 2003 and 2004 taxes. The IRS investigates based on the information, and on November 1, 2004 tells the corporation that it underpaid its 2003 and 2004 taxes and must pay the deficiency plus fines and interest. As a result, the corporation drops its plan to underpay its 2005 taxes and does pay them in full. It delays sending a check to the IRS for its 2003 and 2004 underpayments, however, until it goes bankrupt in 2006 and so never does send the check. Under the Proposed rule, I think what happens is that on November 1, 2004 the claimant is told he will get an award based on the 2003 underpayment he reported and the 2004 underpayment he predicted, but not on the 2005 underpayment he predicted but which was averted. The claimant does not receive his award immediately, however. The IRS answer his inquiries by saying that the actual

proceeds collected have not yet been determined, until 2006, when company goes bankrupt because the IRS says that the actual award will be zero because the ex post collected proceeds are zero.

**3. Statutory Purpose.** One reason the word "collected" in "collected proceeds" is important because it prevents the Treasury from coming out a loser as the result of the whistleblower action, as it would if it made an award but was not able to actually collect the tax because of the taxpayer's bankruptcy.

More generally, the purpose of the statute is to reward claimants in proportion to the value of their information to the US Treasury. If no proceeds are collected, the information is valueless, so there is no reward. If proceeds are collected from payment of back taxes and fines, the information is valuable. If proceeds are collected from payment of future taxes that would not otherwise have been paid, the information is just as valuable. The value of the information is simply the amount the Treasury would not have collected **but for the claimant' information**. Whether the payments are received via ordinary tax returns or via deficiency payments does not matter; a dollar is a dollar. What we want is for the taxpayer to have incentive and reward that lets him share in whatever he gets for the Treasury, something like a commission.

A good way to see this is to imagine that the information is purely prospective, as in the Example X-2.

**Example X-2.** On December 1, 2004 the claimant informs the Treasury that the taxpayer forged documents listing nonexistent expenses that it intends to claim when it files its 2004 tax return. The FBI raids the corporationon January 1, 2005 and seizes the documents. The corporation's president immediately plead guilty to conspiracy to underpay taxes and are sentenced to 6 months in prison. The corporation then files its 2004 tax return correctly on April 15, 2005, not using the forged documents. Under the Proposed regulation, the collected proceeds are zero, and the claimant receives no award. Under the Harm Averted modification, the claimant would receive an award based on the amount the corporation would have underpaid tax had it used the forged documents.

Under the Proposed rule, a sophisticated and self-interested claimant, knowing that if he filed his information on December 1, 2004 he would receive no award, would wait until April 15, 2005 instead, so that a tax infraction would occur. Not only is this unpalatable in itself, but it might happen that in the meanwhile, he might by chance or by discovery of the corporate president, lose his ability to prove that the documents were forged, or might die, or might decide to collude with the president instead of becoming a claimant.

Example X-3. Suppose the proposed rule is in place, rather than the In 2020, corporation X mistakenly records a tax credit carryforward of $20 million but has negative income. For each of the years 2021, 2022, and 2023, X uses $1 million of the tax credit. The claimant discovers this in 2025. He correctly predicts that the company will become even more profitable in the future, so he waits. For each of the years 2024, 2025, and 2026, X uses $4 million of the tax credit. The claimant then informs the IRS of the violation. Under the Proposed rule, his award is based on $12 million in "collected proceeds instead of the $3 million he would have collected had he reported the violation immediately. Even if his award percentage is reduced from 22% to 15%, waiting has profited the whistleblower. The delay has cost the government $3 million in taxes, however, because the statute of limitations has run out on the first three years of tax underpayment.

The statutory purpose argument probably would be repeated in a **Legislative Intent argument**, if we looked back at the legislative history, but I have not tried to do that.

**4. Administrative Convenience Does Not Preclude Awards for Harm Averted.** The *Explanation* of the

proposed regulations says:

The proposed regulations' definition of collected proceeds, therefore, does not refer explicitly to NOLs, tax credits, or any other tax attributes that may factor into the computation of a taxpayer's liability. Furthermore, the proposed regulations' computational rule does not attempt to assign a present value to these attributes, given that whether, when, or to what extent they may affect a taxpayer's liability or the amount of collected proceeds cannot be determined in advance of their actual use. Nor does the computational rule require the IRS to continue tracking these taxpayers, who may not be under examination, and attributes into future years, **given the significant costs and heavy administrative burden that would be required.**

To be sure, it would be unwise to try to make a single payment by estimating the probability of future proceeds and computing their present value. But why would it be unduly burdensome to continue tracking the taxpayer? The process could be entirely automated in most cases. Where human judgement is required--- and where the whistleblower process is inevitably costly--- is in determining whether the information is valuable and how it affects the tax liabilities and attributes of the taxpayer, not in deciding whether actual payments equal expected payments.

Example X-2 above is one typical scenario. The hard part is determining that the taxpayer is intending to underpay. Once that is determined, it is straightforward to prevent the taxpayer from underpaying and straightforward to program the IRS computer to mail a check to the claimant depending on how much tax the taxpayer pays and when he pays it. No further audits are needed. Computerized tracking of a given taxpayer's tax attributes (e.g. NOL's) over time is certainly possible; even TurboTax does this, automatically inserting numbers from the individual's tax return of the previous year, and the IRS computers ought to be doing this as a simple check for consistency even apart from any need for use in whistleblower awards

Even under the Proposed rule, the IRS to keep track of the taxpayer over time in order to make the award. That is because the award is *not* certain at the date of the IRS determination that there will be an award. The award is not really based on tax underpayments up to the date of the award: it is based on extra taxes collected as a result of taxunderpayments up to the date of the award. If the taxpayer never pays, the award is zero. If the taxpayer pays in installments, it is not clear from the Proposed rule when the award is made--- whether it is in occasional payments as new checks arrive from the taxpayer, or all at once when all the tax due is finally paid off or the statute of limitations has run and it is clear it will not all be collected. The bookkeeping of keeping track of Harm Averted is easy by comparison.

Here is an example of that.

**Example X-4.** On December 1, 2000 the taxpayer corporation falsely publishes on its public balance sheet a tax credit carryforward of 20 million dollars. On December 15, the claimant informs the IRS of the falsehood. On April 15, 2001, the corporation submits a return for the year 2000 saying that the the tax credit reduces the tax due from $5 million to $0. On June 1, the IRS determines that the corporation must pay an additional $5 million in taxes plus $1 million in penalties, and the corporation pays this on December 1 and removes the tax asset from its balance sheet. On April 15, 2002, the corporation pays $12 million in taxes on its 2001 income. On April 15, 2003, the corporation pays $50 million in taxes on its 2002 income. Under the Proposed Rule, the claimant receives 22% of $6 million onDecember 1, 2001, which is 5 months after the award is made. Under the Harm Averted Rule, the claimant receives 22% of $6 million on December 1, 2001, plus 22% of $12 million on April 15, 2002, plus 22% of $3 million on April 15, 2003, after which the $20 million tax credit would be irrelevant. Only the Proposed Rule is the award based on predicted rather than actual proceeds.

Calculations show that the administrative cost would not be high enough to be a significant bar to administration of the award over several years. Suppose a claimant showed that a corporation's carryforward had to be reduced from $20 million to zero. All the IRS would have to do is to check every year when that corporation files its return to see if it owed positive taxes in that year and had paid them. If it pays taxes of X in a given year, the claimant paid .15X in that year, up until the post-claim tax proceeds reach $20 million, at which point the claimants' award flow ends. This shouldn't take more than 20 hours of programming for this and all other tax credit carryforwad claims, which at $100/hour would cost $2,000, and the rest is automated. Each year, it would be prudent for some human to OK the check before it goes out, since the amounts at stake are so high. Checking should not take more than 1 hour per payment, adding another $100. Overestimating the costs, suppose they are $5,000 for the $20 million collected proceeds. That is an administrative cost of 0.025%, or 1/40 of 1%--- a trivial amount. We could also calculate this in terms of how much it adds to the cost of processing a claim. A whistleblower claim of this size would likely involve considerable analysis by IRS employees and likely would need input from the legal staff, even if the taxpayer gave in and there was no litigation. For civil tort cases, legal cost are customarily 1/3. The cost fraction would not be so high here, since it is a large amount at stake, but the legal talent required would also be more expensive than for a routine car accident tort. In addition, the IRS must take the time to determine which award fraction is appropriate and it must incur the administrative cost to keep track of when the tax due is actually paid and then mail the check to the claimant, the same kind of cost as future payments incur. I could be an order of magnitude too low, but $250,000 seems a reasonable estimate--- 3 months of time for 8 professional employees at $100,000/year and 4 less skilled employees at $50,000/year. The $5,000 administrative cost for future payments would add just 2% to the cost of the process--- and remember, it only needs to be paid for claims that are ultimately successful.

Other tax attributes, such as NOL's, would be only slightly harder to program, but even if they are 20 times as hard to keep track of as tax credits, the administrative cost would still not have reached 1% of the amount being processed. To be sure, glitches would come up sometimes that would require some thinking, but glitches are the exception, not the rule, and even if they double the cost the effect is still trivial.

If 1/40 of 1% is nonetheless regarded as too heavy, that still is not a reason for excluding future payments in all cases. The regulation could be written to exclude "small" cases like the $20 million one. The administrative cost on large awards would be no greater, and so would be a smaller percentage. If the regulation excluded awards with carryforwards of less than $200 million, for example, it would reduce the administrative costs to 1/400 of 1%. Surely that is not too high.

**Note:** Returning to statutory purpose: it might be objected that under the Harm Averted definition of collected proceeds, the claimant still has incentive to delay filing his information because his award will be higher if it is based on underpayment plus penalty than if it is based on underpayment alone,e.g. as in Example X-4, he would prefer to have his award based on $5 million + $1 million than on just $5 million. The solution to that problem is to be found in the list of factors influencing the award percentage. The claimant would prefer to get 22% of $5 million ($1.1 million) rather than 15% of $6 million ($900,000), which is what he would get if the IRS gave him only 15% because he had not promptly filed his information.

## 5. The Prospect of Disputes over Fact Does Not Preclude Awards for Harm Averted.

It might be objected that claimants will argue that they prevented underpayment when they really didn't. They surely will. But they argue over everything anyway. This is no trickier a point than whether a borderline possible underpayment is worth pursuing given the limited manpower of the IRS. It will be decided by Tax Court on the same basis---that is, with substantial deference to the IRS on questions of fact such as the likelihood that but for the claimant's action the taxpayer would have underpaid. Since normally taxpayers do not underpay, the claimant has the

burden of proving that the claimant would have underpaid had the IRS not investigated.

## 5. A new negative factor: the information was useless to the IRS (e.g., was gotten from the WSJ)

§ 301.7623-4 (b) Factors used to determine award percentage.
(1) Positive factors. The application of the following non-exclusive factors may support increasing an award percentage under paragraphs (c)(1) or (2) of this section:
(i) The individual acted promptly to inform the IRS or the taxpayer of the tax noncompliance.
(ii) The information provided identified an issue of a type previously unknown to the IRS.
(iii) The information provided identified taxpayer behavior that the IRS was unlikely to identify or that was particularly difficult to detect through the IRS's exercise of reasonable diligence.
(iv) The information provided thoroughly presented the factual details of tax noncompliance in a clear and organized manner, particularly if the manner of the presentation saved the IRS work and resources.
(v) The individual (or the individual's legal representative, if any) provided exceptional cooperation and assistance during the pendency of the action(s), for example by providing a useful technical or legal analysis of the taxpayer's records in response to a request from the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel.
(vi) The information provided identified assets of the taxpayer that could be used to pay liabilities, particularly if the assets were not otherwise known to the IRS.
(vii) The information provided identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood by the IRS.
(viii) The information provided had an impact on the behavior of the taxpayer, for example by causing the taxpayer to correct a previously-reported improper position.

(2) Negative factors. The application of the following non-exclusive factors may support decreasing an award percentage under paragraphs (c)(1) or (2) of this section:
(i) The individual delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS's ability to pursue an action or issue.
(ii) The individual contributed to the underpayment of tax or tax noncompliance identified.
(iii) The individual directly or indirectly profited from the underpayment of tax or tax noncompliance identified.
(iv) The individual (or the individual's legal representative, if any) negatively affected the IRS's ability to pursue the action(s), for example by disclosing the existence or scope of an enforcement activity.
(v) The individual (or the individual's legal representative, if any) violated instructions provided by the IRS, particularly if the violation caused the IRS to expend additional resources.
(vi) The individual (or the individual's legal representative, if any) violated the terms of the confidentiality agreement described in § 301.7623-3(b)(2).
(vii) The individual (or the individual's legal representative, if any) violated the terms of a contract entered into with the IRS pursuant to § 301.6103(n)-2.
(viii) The individual provided false or misleading information or otherwise violated the requirements of section 7623(b)(6)(C) or § 301.7623-1(c)(3).

**Specific Comment Request: [things for ] the Whistleblower Office to consider in determining the amount of awards under these regulations.**

Add

**(ix) More likely than not, the IRS would have come across the information later even if the individual had not provided it.**

**Example: The *Wall Street Journal* publishes a story saying that a major corporation has filed a false return. The next day, the claimant relays this information to the IRS. Although public information claimants are eligible for up to a 10% award, the individual would receive 0%.**

Explanation: This information is useful in the sense that the IRS needed that information to pursue the delinquent taxpayer, it is useless in the sense that the IRS would surely have come across it even without the claimant's action, and so there is not point to rewarding the claimant.

## 6. Races by claimants with the same information.

(5) Multiple claimants. If two or more independent claims relate to the same collected proceeds, then the Whistleblower Office may evaluate the contribution of each individual to the action(s) that resulted in collected proceeds. The Whistleblower Office will determine whether the information submitted by each individual would have been obtained by the IRS as a result of the information previously submitted by any other individual. If the Whistleblower Office determines that multiple individuals submitted information that would not have been obtained based on a prior submission, then the Whistleblower Office will determine the amount of each individual's award based on the extent to which each individual contributed to the action(s). The aggregate award amount in cases involving two or more independent claims that relate to the same collected proceeds will not exceed the maximum award amount that could have resulted under section 7623(b)(1) or section 7623(b)(2), as applicable, subject to the award reduction provisions of section 7623(b)(3), if a single claim had been submitted.

**Specific Comment Request: Whether the IRS should determine and pay multiple awards in cases in which two or more independent claims relate to the same collected proceeds, as provided under the proposed regulations, or whether only the first individual to provide information or submit a claim relating to particular collected proceeds should receive an award.**

There is no point to encouraging a race to be the first claimant. We wish claimants to only submit carefully considered information, rather than to file frivolous claims or to submit sketchy claims that need to be supplemented later. Also, we wish to encourage submissions to be clear and to make the job of the IRS easier, rather than submissions being merely suggestive.

Since the process is confidential, restricting awards to the first in time does not serve the purpose of eliminating duplicative effort by claimants. A claimant will not know his submission is duplicative until too late,because he will not be told in time that he has lost the race and need not have gone to the effort of making a careful submission.

Therefore, the rule should be that the IRS should reward all claimants who provide useful information unless they know that someone else is the original source. The sharing of the award among the claimants should be at the discretion of the IRS according to the same factors that determine the percentage of the award (which include promptness, but only as one factor among many), subject, of course, to the review of Tax Court for clear error.

## 7. Re-Opening claims that were initially denied.

A rule should be added for what happens if a claim is denied, but the IRS later changes its mind and does use the information. The claimant should be notified by the IRS if that happens. The rule might say that the claimant must be notified if the IRS takes any action against the taxpayer that might possibly have been the result of the information the claimant provided. The initial notification could be vague, with more detailed notification requiring the claimant to sign a confidentiality agreement.

Even the claimant has appealed to Tax Court already and lost, he should be allowed to appeal again if the IRS uses his information and he disputes the amount of the award.

## 8. Penalties for breach of the confidentiality agreement.

**Specific Comment Request: Comments are specifically requested on whether the proposed regulations strike an appropriate balance between minimizing possible redisclosures of confidential return information and providing meaningful opportunities for claimants to participate in the administrative processing of their claims.**

The penalty for breach of the confidentiality agreement by the claimant is the loss of some or all of his award. Generally, the prospect of that penalty should be more than sufficient to deter breach; 15% of 2 million dollars is $300,000. In addition, I suppose the breacher would be liable to the IRS for breach of contract and perhaps even liable to whatever penalties an IRS employee or contractor would incur for releasing information improperly.

It might, though, be desirable to mention the penalty not only where it is now, in the section on determination of the award amount, but also where the confidentiality agreement is first mentioned. Or perhaps that is unnecessary, because the penalty can be clearly explained in the preliminary award letter and is irrelevant for anybody who does not get such a letter.

## 9. Selling one's claim as a solution to the delay problem.

One problem with the whistleblower process is the length of time it takes. This is unavoidable; audits, litigation, and collection take a long time if they're done right. The effects of delay can nonetheless be mitigated. The proposed regulations are a huge improvement, with their provisions for keeping the claimant informed of what's going on, and in particular the preliminary determination of the award will be extremely useful. It is not a guarantee, but it lets the claimant know what the IRS is thinking, which permits the claimant to plan his finances much better.

The problem remains that the whistleblower doesn't get his money until years into the future, and he may need it at the present. He can't even borrow based on his future award income, because confidentiality prevents him from telling lenders about it.

What is needed is a way for a claimant to sell his claim without violating the taxpayer's privacy. It would be nice if he could sell it to the law firm representing him, since usually whistleblowers do have counsel. Then, nobody new has to be told the details of the case. But that is too much of a conflict of interest for the counsel, and I think there is some common law barrier besides (barratry? maintenance?).

What we need is a process by which a claimant can market his claim to a select few outsiders. The natural buyers are tax lawyers, because they can estimate the value of the claim best. There are two ways regulations could help with this:

1. Clarifying ways in which early claims can be sold, and the tax consequences. This applies when the only information the claimant can release is his own, not anything he hears from the Whistleblower Office. I don't know the current law on it, except that the tax on the award income is tricky. Must the claimant pay tax on the award, even if he has sold the claim earlier? Does he pay tax on his sale price too? Can he deduct his legal fees? Does his lawyer continue to represent him, or does he now represent the claim's buyer?

2. Permitting potential buyers to sign confidentiality agreements and see information such as the preliminary award letter. Once the claim has been sold, there should be no problem with the buyer replacing him or accompanying him (e.g., if only half the claim was sold). This is no different in principle from when a claimant dies and his executor or heir takes his place. It would also be desirable for a potential buyer to be allowed to sign an agreement and see some information. There is no policy problem with this--- the IRS could block it if they thought the potential buyer was a confidentiality risk--- but there might be a statutory problem. It would perhaps be less of a problem, though, if the potential buyer is a member of the bar, an officer of the court, as we would ordinarily expect.