

# IRS More Aggressive in Closing Whistleblower Cases, Data Shows

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- \* More money awarded, more unpaid taxes collected
- \* Communications with whistleblowers, funding issues, still major concerns

By Llewellyn Hinkes-Jones

(Bloomberg Law) -- The Internal Revenue Service's Whistleblower Office-which takes in tips of alleged tax fraud and evasion-is running full-steam ahead compared with where it was 10 years ago.

The office has closed significantly more cases, paid more claims, awarded more money, and collected more unpaid taxes on average compared with the prior 10 years, according to data in the agency's annual reports. It handed out four times the number of awards in 2016 than the year before.

The accomplishments follow high-profile cases resulting in large awards, numerous changes to whistleblower policy beginning in 2006, and a sizable staffing increase despite budget cuts for the IRS as a whole.

The office is just catching up to where it should be and still lags far behind similar whistleblower operations at other agencies, said whistleblower representative Matthew Stock of Zuckerman Law in Washington.

## Whistleblower Struggles

Stock said the Securities and Exchange Commission and the Commodity Futures Trading Commission are better at working with whistleblowers to further the missions of the agencies and don't have the limitations and inefficiencies, both legal and technical, the IRS faces.

"Compared to the limitations at the IRS, working with those agencies on a whistleblower case is a pleasure," Stock added.

Part of the struggle is that the IRS has large privacy concerns to deal with, according to Mark Matthews, an attorney with Caplin & Drysdale, Chartered, in Washington, and former IRS deputy commissioner.

"The IRS will improve how it communicates with whistleblowers over time, but it has to walk a fine line on taxpayer privacy, which is critical to confidence in the system and deeply ingrained in everybody who works there," said Matthews.

But the attention and progress the office received bodes well for further growth, according to Dean Zerbe, a partner with Zerbe, Fingeret, Frank & Jadav P.C. in Houston.

"The recent D.C. circuit opinion on collected proceeds-which allows whistleblowers to also receive a portion of criminal fines and civil forfeitures-put out the red carpet for more cases to come forward," said Zerbe who was counsel for the whistleblower in Whistleblower 21276-13W v. Commissioner, and has represented dozens of other whistleblowers.

In March, the U.S. Court of Appeals for the District of Columbia Circuit dismissed the IRS's appeal in Whistleblower 21276-13W, in a dispute over whether criminal fines and civil forfeitures should be included in whistleblower awards. The IRS attempted to argue that, under the tax code, only collected proceeds-the amount the IRS collects based on the whistleblower's information-could be used in calculating the award.

## Clearing Backlog

In 2015, former IRS commissioner John Koskinen added 19 people to the Whistleblower Office, most of them to the initial claim evaluation unit.

The result has been a clearing out of old cases and improved efficiency at turning around claims, according to Zerbe,

who helped write tax code amendments enacted by the Tax Relief and Health Care Act of 2006, which created the IRS Whistleblower Office and outlined specifications for whistleblower awards. At the time, Zerbe was counsel to Senator Charles E. Grassley (R-Iowa), then chairman of the Senate Finance Committee, who has made whistleblower protections one of his signature issues.

Grassley co-authored the landmark 1989 Whistleblower Protection Act, which expanded protections for federal employees who reported abuse in the government, and created a caucus focused specifically on problems faced by whistleblowers.

"The IRS wasn't closing files that fell through the cracks or providing claim numbers. Now it's rare if you don't get a claim number right away," Zerbe added.

The IRS began steadily recouping more unpaid taxes following a reorganization of the office after the 2006 law changes and a spike in awards followed in 2012.

The office was flooded with tips following the case involving UBS whistleblower Bradley Birkenfeld, who was awarded \$104 million by the IRS for providing insider information on Swiss bank UBS's illegal offshore scheme.

While the Birkenfeld case prompted many worthwhile tips, Zerbe said there were also a number that couldn't be acted upon and added to the backlog.

"The IRS wants good specific information-current and well-informed, not unspecific and broad. They want Colonel Mustard in the library with the candlestick," Zerbe added.

Matthews said any discussion of the Whistleblower Office's growth needs to include the larger issues affecting the IRS.

"It's great that the IRS is expanding the Whistleblower Office, but the IRS needs more resources overall to work the leads it already has." The IRS isn't short on leads, he told Bloomberg Tax.

Neither the IRS or Grassley's office responded when contacted for comment on whistleblower issues.

#### Delays, Lack of Communication Persist

Sources who spoke to Bloomberg Tax acknowledged the office's continuing delays and lack of communication as ongoing issues for potential whistleblowers.

Whistleblowers can wait, on average, five to seven years before receiving an award, without being given details on the status of their claims, Stock said.

The lengthy processing time and faulty communication were highlighted by the Taxpayer's Advocate's Office in 2015 as one of the agency's most serious problems. Similar concerns were raised in a 2015 Government Accountability Office report and a 2016 report from the Treasury Inspector General for Tax Administration.

A broad interpretation of the IRS's confidentiality statutes prevents whistleblowers from knowing the status of their claims, and a lack of an anti-retaliation policy could leave employees who blow the whistle on their employers at risk.

Bryan C. Skarlatos, a partner with Kostelanetz & Fink LLP in New York, told Bloomberg Tax that "there is no conforming legislation" to allow the Whistleblower Office to communicate with claimants.

"It's something the Treasury could fix, but it might need a legislative fix to convince those at the IRS who are conservative with respect to whistleblower law," Skarlatos added.

The increased focus on the Whistleblower Office could prompt the IRS to be more efficient in light of consistent budget reductions, Josh O. Ungerman, partner with Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP in Dallas and former IRS senior trial attorney, told Bloomberg Tax.

Ungerman said that whistleblowers save the agency substantial upfront effort incurred in selecting, evaluating, and filtering potential cases.

"The time spent on a case is reduced exponentially. Many whistleblower cases include a tranche of documentation provided by the whistleblower so that the IRS knows where to look when they begin examination," Ungerman added.

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