

The IRS Whistleblower Program: What To Do When The IRS Isn't Moving On Your Submission

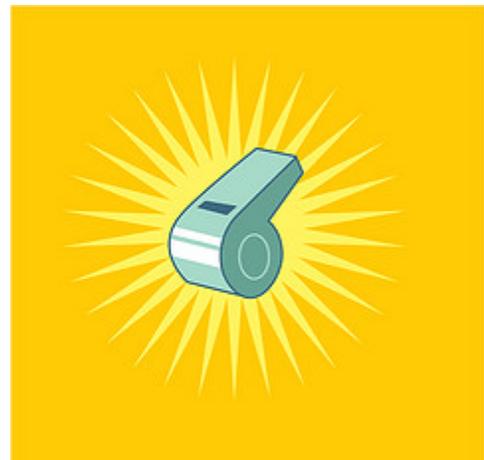


Dean Zerbe Contributor
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Since Brad Birkenfeld received an eye-blinking \$104 million dollar award this last fall



English: A Fox 40 whistle from the late 1980s. (Photo credit: Wikipedia)



from the IRS whistleblower office for his pivotal role in exposing UBS AG's role in helping Americans hide billions of dollars offshore, I have received a number of emails and phone calls from whistleblowers wondering (or frustrated) about the status of their submission (I was one of Birkenfeld's lawyers in his IRS claim). I've been pleased to help a number of whistleblowers but thought it might be useful to provide a more general discussion.

It may be easier to divide this into three areas: 1) issues and delays that you can (partially/somewhat) control; 2) issues and delays that are mostly out of your control; and, 3) big picture points to bear in mind.

Issues and Delays That You (Maybe) Can Control

The simplest issue first – do you have a claim number from the IRS in response to your filing the Form 211? If you don't have a claim number – as my drill sergeant in Ft. Benning would say: "You are wrong." No claim number -- you have not filed with the IRS whistleblower office (WBO) – it's as simple as that. Have a claim number – otherwise, contact the WBO and get

one (or resubmit). Also important is to have a hard appreciation of whether your submission meets the [the 5 keys the IRS is looking for](#) in terms of a good whistleblower filing.

Make certain that you have given the IRS all the material and information that you have. Some whistleblowers have, meaning well, not given the IRS all the relevant and supporting information they have. Provide the information in a clear, tabbed, easily understandable format (ex. table of documents). If you have any new information or material in addition to what was earlier submitted – provide that without delay.

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Explain to the IRS how –tactically (and tactfully) -- they may wish to consider going forward with your submission. I have been impressed by the IRS' commitment to protecting a whistleblower's identity. Part of that commitment though makes the IRS' work more difficult – the whistleblower tells them X or gives them Y document – how does the IRS proceed in the examination of the taxpayer without signaling to the taxpayer that there is a whistleblower? You can assist the IRS by providing suggestions for how they may want to proceed – ex. names of key people to interview (including location if they've moved on); who has control of documents; where documents are kept and labeled; what key documents are part of a greater file, etc. This shouldn't be a treatise – but really a one pager at best in most cases.

If you haven't done so already, consider giving the IRS a legal analysis of your submission – basically, what are the tax laws that have been violated. I have seen submissions from whistleblowers that provide the facts for a complicated transaction but not a discussion of the tax issues. While there are certainly instances where it is straightforward (the company paid a million dollar bribe and then tried to deduct it – can't do that) however, it is always useful to go through the legal analysis (and such an analysis will also perhaps tighten your submission in terms of key facts and the elements that need to be proven). For a complicated case a legal analysis is particularly important. The IRS examiner reviewing your submission may not be an attorney and having an outside take on the relevant law can at times be helpful. The constant to keep in mind at all times, not just on this issue – the IRS folks are capable and smart – but they are overwhelmed with a massive workload that is not getting any easier with tight budgets. Make it easy for them.

Smoking out what the problem may be. This is more art than science. For some whistleblowers I work with we've often spent a good deal of time thinking, talking and grappling with what is the delay or holdup. You have to bear in mind that this is still a new

program in many ways and the WBO and the rest of IRS, Chief Counsel and the Treasury are still grappling with a number of issues. Known issues that have caused delays include:

Planned and Initiated (what was your involvement in the tax activity – while the IRS is getting better on this issue – it is still something to be aware of);

The scope of **Related Actions** (the extent to which you are getting credit for your submission based on all the actions the IRS took in response to your submission);

Collected Proceeds (a number of issues, but one example -- if the government collects non-tax dollars thanks to your submission – should that count for your award);

Proceeds Based On; (of great concern for me that the IRS may take your information and then may seek to claim no award for you because it didn't proceed based on the information – ex. was already auditing the taxpayer – even if they use the information you provided) are just some of the big ones.

Finally, you should be mindful that the IRS maybe concerned that the information you are providing is **tainted** – because of privileges. The IRS conducts a taint review of submissions – where appropriate – good to explain and have an analysis of why you believe the information you are providing is not tainted.

To give you a flavor for all this – of all the potential issues that may be slowing or sidetracking your case – you may find it useful to read the [submission](#) Steve Kohn and I wrote for the National Whistleblower Center (NWC) in response to the draft IRS/Treasury regulations on the IRS whistleblower program. This may strike a spark for you – both in situations where the examination of the taxpayer is still ongoing and where the examination has been completed (and a whistleblower award should be being processed). If you are able to determine what is the hold-up or concern – I strongly suggest addressing it now (dangerous to wait for the IRS to decide, hoping good things will happen) – provide the facts (and documents) that you think are relevant to support your take on the matter and also providing a legal analysis.

Issues That You Can't Control

The tax whistleblower claims do take time to work. Once past the original processing – it can be a very slow boat until there are collected proceeds -- ie payments made without any further rights of redress for the taxpayer. It is common that only then – after collected payments and no rights to redress – that the wheels start to turn for considering a whistleblower award (although the IRS WBO is trying to improve on that score).

For example, a whistleblower in year 2010 tells the IRS about Company X and its tax problems for tax years 2009. The IRS proceeds based on the whistleblowers submission (oh happy day) and does so in its examination of 2009 which takes place in . . . 2012. The examination takes place and the IRS finally reaches a determination in 2013. Company X questions the findings and goes to IRS senior management and ultimately IRS appeals – welcome now to 2015.

Company X decides to litigate the matter and files in Tax Court -- 2016. The Tax Court assigns the case and sets a calendar date – for 2017. On the courthouse steps the matter is resolved and the taxpayer makes the payments – 2018 (and the statute has run now on any appeals rights for the taxpayer). Now the WBO begins to process a possible award -- although as mentioned earlier, to their credit the WBO is looking at trying to move the timing of the award process up. The WBO office processing of an award is also no walk in the park – with many of the issues discussed above now showing up.

The taxpayer has significant appeal rights – and should have these rights – to help protect the fairness of the tax system. The whistleblower has to recognize that these rights can be lengthy – while the above timeline is a long one, and not everyday – it is also not extraordinary – particularly if a major company is involved.

Big Picture – Good News

The IRS Acting Commissioner Steve Miller sent out a [memorandum](#) in June of last year that signaled that he expected more focus and tighter deadlines from the IRS in dealing with whistleblower claims – particularly in the initial processing as well as for an award determination once funds have been collected by the IRS. While this doesn't change the delays due to the examination process and taxpayer rights to appeal – it does showcase that key players at the IRS and IRS WBO recognizes the issues and concerns caused by delays. While the jury is still out on its impact – I have seen the IRS working to be timely in response to new submissions.

More importantly, the Tax Court in a recent [order](#) on the Insinga case basically shot a round across the bow of the IRS Chief Counsel's office – in effect stating that extended delay by the IRS of a whistleblower case was not acceptable. The Tax Court didn't rule on the [amicus brief](#) filed by the National Whistleblower Center (authored by Steve Kohn and myself) arguing that the Court should exercise its authority under the Administrative Procedures Act (APA) and direct the IRS to make a determination within 90 days – however the Tax Court did acknowledge the arguments made in the amicus brief in its order (and I think expressed sympathy to the NWC's arguments). The Tax Court in Insinga is basically going to first determine whether the IRS has in fact made a “de facto decision” regarding Mr. Insinga's submission. The Tax Court appears to be taking (properly) a hard stance in favor of

whistleblowers in the Insinga case should serve as a significant wakeup call for the IRS – to the benefit of many other whistleblowers. It is clear that the bells are tolling for those at the IRS wishing to delay and delay a determination of a whistleblower’s submission.

It is a long road for the IRS whistleblower – but there are things the whistleblower may be able to do to make the journey somewhat faster, easier and more rewarding. ●



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