

Department
of the
Treasury

Internal
Revenue
Service

Office of
Chief Counsel

Notice

CC-2017-005

April 4, 2017

Subject: Approval Procedures for Identifying Whistleblowers
Cancel Date: Upon incorporation into the CCDM

Purpose

This notice sets forth procedures for Chief Counsel attorneys to obtain approval to disclose the existence or identity of a whistleblower. This notice applies only to civil tax cases, whether at the administrative level or in litigation, and is intended to assist Counsel attorneys in providing advice regarding identifying whistleblowers in those cases. It does not apply to criminal matters. For guidance with respect to criminal matters, refer to IRM 9.4.2.5, Informants.

Background

Internal Revenue Code (I.R.C.) section 7623 authorizes the payment of awards to persons who provide information to the Service relating to the detection of underpayments of tax or violations of the internal revenue laws (whistleblowers). The confidentiality of whistleblowers is of critical importance not only to whistleblowers, but also to the Service's whistleblower program. Section 7623 has no anti-retaliation provision,¹ and the Service recognizes that whistleblowers may experience adverse consequences (e.g., economic or physical harm) if their identity is revealed. Given these considerations, and the value of whistleblower information to the Service, the Service is committed to keeping the existence and identity of whistleblowers confidential.

Counsel shares the Service's commitment to protecting the confidentiality of whistleblowers.² The identity or existence of a whistleblower is subject to the possibility of disclosure, either directly or indirectly, during any proceeding against the party suspected of underpaying tax or violating the internal revenue laws. In this regard, the identity of a whistleblower should be protected to the fullest extent permitted by the law. Counsel should generally avoid responding

¹ Other whistleblower award statutes contain such anti-retaliation provisions. See, e.g., 7 U.S.C. § 26 (prohibiting employers from discharging or otherwise discriminating against an individual for providing information to the Commodity Futures Trading Commission); 15 U.S.C. § 78u-6(h)(1)(A) (prohibiting employers from discharging or otherwise discriminating against an individual for assisting the Securities and Exchange Commission); 31 U.S.C. § 3730(h) (prohibiting an employer from discharging, demoting, suspending, threatening, harassing, or in any other manner discriminating against an employee in the terms and conditions of employment because of lawful acts done by the employee in furtherance of an action under the False Claims Act).

² It is Counsel's long-standing practice to not disclose the identity of confidential sources, whether in the context of responding to a FOIA request or in an administrative or judicial proceeding, and for attorneys to apprise the Deputy Chief Counsel (Operations) prior to any potential disclosure. See CC-2003-001, Protection of Confidential Sources (archived on August 11, 2004, when it was incorporated into CCDM 35.4.6).

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to inquiries in a manner that could confirm or deny the existence of a whistleblower. Depending on the circumstances, Counsel should assert I.R.C. § 6103(h)(4), or the informant's privilege, or both.

Treasury Regulation § 301.7623-1(e) states that the Service will use its best efforts to protect the identity of whistleblowers. The regulations also recognize that in some instances it may be necessary to reveal a whistleblower's existence or identity. Id. For example, Counsel may not be able to defend the Service's adjustments without revealing the existence or identity of a whistleblower (e.g., whistleblower is an essential witness in a judicial proceeding). In those instances, Counsel will carefully consider and weigh the potential risks to the whistleblower and the Government's need for the disclosure, and look for alternative solutions. Counsel has implemented a multi-level approval process—detailed below—to ensure that disclosure occurs only after careful consideration and high level approval. When disclosure is necessary, Counsel will also make every effort to notify the whistleblower prior to the disclosure. See Treas. Reg. § 301.7623-1(e).

Approval Process

Counsel must obtain approval from the Director of the Whistleblower Office and the Deputy Chief Counsel (Operations) before disclosing the existence or identity of a whistleblower. To request approval, Counsel attorneys must submit a memorandum, approved by the Division Counsel, to Procedure and Administration (PA), Branch 5, in the format described below. PA will coordinate through Criminal Tax with IRS-CI to determine whether there is any potential overlap with a related criminal matter.³ PA will forward the memorandum to the Director of the IRS Whistleblower Office and the Deputy Chief Counsel (Operations) for their review and consideration. PA will then communicate the denial or approval to the Counsel attorney. Additionally, regardless of whether approval to disclose is ultimately sought, all cases in which a court orders the Service or Counsel to disclose information that could identify the existence or the identity of a whistleblower should be immediately coordinated with PA. Finally, any disclosure that occurs without approval must also be immediately coordinated with PA.

Format of Memorandum for Approval

Subject and Heading: State the reason for the request. For example, request to use a whistleblower as a witness or request to use documents that may identify the existence or identity of a whistleblower. The subject line should also provide the case name, docket number, and the whistleblower claim number.

Purpose: State the purpose of the memo, e.g., to call the whistleblower as a witness or use documents that may identify the whistleblower. This section should also explain any time limitations, such as an expiring assessment statute or any relevant trial deadlines.

Background and Issues: Provide a brief summary of the pertinent facts of the case, including a general overview of the case and an explanation of why it is necessary to reveal the existence or identity of a whistleblower. If the request is to use a whistleblower as a witness, the facts should explain how the whistleblower obtained the relevant knowledge, the whistleblower's relationship to the taxpayer, and any other relevant facts about the whistleblower. If the request

³ In cases in which there is potential overlap with a criminal matter, PA will seek approval from IRS-CI, Director of Operations, Policy, and Support. The views of IRS-CI will be incorporated into the memorandum.

is to use whistleblower documents in a manner that could identify the whistleblower, the Counsel attorney should describe the documents, the information contained in the documents, and any known information about how the whistleblower acquired the documents. Following the statement of facts, provide a brief explanation of the relevant issues and law related to the alleged tax noncompliance along with a description of the Service's position and the taxpayer's position.

The Whistleblower is a Necessary Witness/the Whistleblower Documents are Essential to the Service's Case: This section should tie together the facts and issues stated in the section above to explain the following: (1) why the whistleblower is needed to testify or the whistleblower documents are needed for the government's case; (2) alternatives to disclosure, if any, and whether or not they are available; (3) how the whistleblower or whistleblower documents would be used to prove the government's case; (4) the extent of any known potential risks faced by the whistleblower as a result of being identified; (5) whether any privilege issues exist; (6) whether there are any unusual contacts or other issues relating to the whistleblower's relationship with the Service; and (7) any other information that may be relevant in weighing the protection of the whistleblower's identity against the government's interest.

Disclosure: This section should state whether the whistleblower is represented by an attorney and whether the whistleblower is willing to be identified. This section should also note any concerns or requests that the whistleblower expresses with respect to being identified. The Counsel attorney must explain to the whistleblower that his or her status as a whistleblower will have to be disclosed if used as a witness.

Conclusion: This section should summarize how revealing the existence or identity of the whistleblower is necessary to prove the government's case.

Questions regarding this notice or related issues regarding the disclosure of a whistleblower's existence or identity should be directed to Procedure & Administration, Branch 5, at (202) 317-5437.

/s/

Drita Tonuzi
Associate Chief Counsel
(Procedure & Administration)