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"AWARDS FOR INFORMATION RELATING TO DETECTING UNDERPAYMENTS OF TAX OR VIOLATIONS OF THE INTERNAL REVENUE LAWS"

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PROCEEDINGS

(10:01 a.m.)

MR. KANE: If everyone could take their seats, I think we'll get started. Good morning, thank you all for coming. This is the Public Hearing on Proposed Regulations, Reg No. 14106609, Awards For Information Relating to Detecting Underpayments of Tax Or Violations of the Internal Revenue Laws.

We have a number of speakers scheduled to appear this morning, and so we're going to move forward here rather quickly. I would like to thank everyone that has come today for their interest in tax administration, and I would particularly like to thank the speakers and their organizations for participating in the rule making process, which is a very important part of our tax administration process. So thank you very much.

A couple of housekeeping matters -- if that's for me, I'm busy -- the people who are not with the IRS are under escort outside of this room, so if you have to leave the room for any reason, there will be people at each of the entrances available to escort you to wherever you need to go.

In addition -- well, why don't I introduce the panel. My name is Tom Kane, I'm with the Office of the Associate Chief Counsel for Procedure and Administration; next to me is Alexandra Minkovich with the Office of Tax Policy at the Treasury Department; Steve Whitlock is in the middle, and he's the Director of the Whistleblower Office, and I'm sure a well-known figure to most of the people in this room.

Next to Steve is Jennifer Best, who is with the Office of the Commissioner; and finally, at the end, and maybe the most important person on the panel is Robert Wearing, also with the Office of the Associate Chief Counsel for Procedure and Administration. And he's important because he's minding the clock, and each of our speakers gets ten minutes, and the clock determines your ten minutes, and Robert will be monitoring your time very carefully.

Finally, although not on the dais up here, Melissa Jarboro, who is the Drafting Attorney for the Regulation Project is in the audience, so you can be sure that

she will be hearing your comments and will be able to take those into account as we move forward in the drafting process. So, with that, I think we'll turn to the first speaker for this morning's presentation, Mark Scott.

If Mark is here, Mark, why don't you come on up, and when you're ready, we're ready.

MR. SCOTT: Good morning, I'm ready. Thank you very much for the opportunity to speak this morning, my name is Mark Scott, I'm an attorney in private practice. My comments today will primarily address the impact of the proposed whistleblower regulations on the federal tax compliance of state and local government. State and local governments have created more than 60,000 separate entities with authority to issue tax-exempt bonds. Many of these entities, such as hospital districts, are treated as integral parts of the state or local governments that created them. Under the proposed regulations, all employees of these entities would generally be prohibited from filing whistleblower claims.

I would note that the existing regulations carve out only employees of the IRS for exclusion from claim filing. I understand why this exclusion might be broadened to include those state agencies, bodies, or commissions who receive return information under 6103(d), but I cannot find any support for the substantial broadening of this exclusion to cover literally thousands of entities that could be defined as state or local governments, nor could I come up with any policy justification for the proposed substantial broadening of this exclusion, so I'm at somewhat of a loss as to why this exclusion was broadened so greatly.

Lastly, as I discussed in my written submission, I believe this would add substantial complexity to the regulations as to determining which of these entities is a state or local government can oftentimes be very difficult. Therefore, I'm hoping that you simplify the regulations by generally permitting all employees of state and local governmental entities to file whistleblower claims, especially claims based on tax violations of their employers with only a limited exclusion for claims based on confidential return information received pursuant to 6103(d).

With respect to the 10 percent cap, I could not find any authority to expand on the list of public source information defined in the statute, so I would ask for a simple change in the regulations; the word including in 76234(c)(2), one little I, should simply be changed to the word means, MEANS. Lastly, and again, with respect to the 10 percent cap, substituting a subjectively applied reasonable inference test for an objectively applied specific allegation test is fraught with uncertainty, especially as this reasonable inference test will be applied only after the tax violation has been highlighted by the whistleblower.

I believe it is beyond dispute that the reasonable inference of an IRS employee, trained in tax law, is not the same standard as a specific allegation of wrong doing. It doesn't even approximate the same standard. The IRS could greatly simplify the regulations by jettisoning this substitute reasonable inference first. I'm hopeful that will happen, but I'm being a little pessimistic, I'm not sure it will.

So I have proposed an alternative, and that would be to clarify the application of this test. I didn't arrive at this alternative on my own, the same clarification is implied in the IRM language. Simply, if the reasonable inference test is going to be retained in the regulations, the correct standard should be whether the violation is discernible to the public. In other words, whether an average person, someone not trained in tax law, could reasonably infer a tax violation from the public domain information. That should, at the very least, increase certainty of application for the substitute test.

Let me wrap up. When the IRS Office of Taxes and Bonds first stood up in 2000, we received quite a few tips, even before the whistleblower program was expanded. TIGTA agreed that my office was effective in using these tips to target our limited resources to the worst transactions, which also had the positive effect of reducing the impact of non-productive examinations on compliant state and local taxpayers. The effective use of this information was one of the primary reasons for the successful introduction of the new bond examination program.

Therefore, it should come as no surprise that I am a strong believer in an IRS whistleblower program, and the positive impact an effectively run whistleblower program can have on insuring effective IRS examination efforts even during lean times. For that reason, I thank you for your work, and I appreciate the opportunity to provide my two cents today on the proposed whistleblower regulations.

MR. KANE: Thank you, Mark. Before you leave, I'll ask the panelists if anybody's got questions for you. And there seems to be no questions, so thank you very much.

Our next speaker is Felipe Bohnet-Gomez from Kohn, Kohn & Colapinito, LLP.

MR. BOHNET-GOMEZ: Thanks. Yeah, as Tom said, my name is Felipe Bohnet-Gomez, and I'm speaking in place of Steve Kohn, who was unable to attend today's hearing. I just want to take this opportunity to thank the Treasury and the IRS for their work on the regulations, we think they're an important step forward in communicating with whistleblowers and represent important progress in other areas, as well.

My remarks today will focus on the regulations, the definition of the key terms; related action, collected proceeds, and, if I've got time, proceeds based on. These concepts form the core of the whistleblower program. In general, we believe that the proposed regulations greatly narrow the breadth of these terms as they are expressed in the statutory language, and thereby diminish not only the scope of the whistleblower program, but its effectiveness as well.

Now, with respect to related action, the IRS has proposed a one-step rule. We think, however, that this is too narrow and it's not necessary to address the IRS's concerns. Ee think the IRS should look to the False Claims Act for guidance, and we propose a standard similar to approximate cause. Now, although the False Claims Act does not include identical language on related actions, it accomplishes the same result through the concept of any alternative remedy.

If a false claims relator brings an action, the government can't sidestep them and bring its own action, thereby denying them a reward. In the False Claims Act context, the government proceeds with an action based on the relator's information, then the relator is entitled to share the proceeds, no matter the form of the action. The related action language of section 7623 addresses the same issue and accomplishes the same goal.

If the IRS brings an action against an unidentified taxpayer, and that action is based on a whistleblower's information, then that action is a related actions that encompassed by the statute. In *Barrios*, the Ninth Circuit False Claims Act case, the government chose not to intervene on the relator's suit, instead proceeded with a disbarment action. And the Court noted the purpose of the statute was clear; Congress intended to fight fraud by encouraging whistleblowers to come forward.

The statutory language was similarly clear; the government could not pursue an alternative remedy without compensating the relator, and it didn't matter that the disbarment action could not have been brought by the relater and was otherwise unrelated to the FCA violations. Now, whereas realtors in the FCA context are masters of their own complaint, in the tax context, the IRS is in the driver's seat, therefore, while the FCA includes alternative remedies, section 7623 includes related actions.

The end result is the same if a whistleblower provides the IRS information uncovering a fraudulent tax scheme, then the award under section 7623 should encompass all parts of that scheme, whether or not there were directly related to taxpayers directly identified by the whistleblower. Now, we understand the need for line drawing and administrability, and the IRS's concern that a whistleblower could claim unrelated actions, but we think the IRS should adopt a more standard-like and less rule-like criterion for determining what is a related action.

We propose the following standard all actions that proceed from the original action in a natural and continuous sequence unbroken by any new and independent cause or related actions under the statute. Now, the standard is borrowed from tort law where it has a long history, and we think it's applicable here. The types of intervening cause that would break the chain of related events are the types of events that address the IRS's concerns about its independent administration of the tax laws existing and independent audits, independent information from other sources, and so on.

If the whistleblower's information does lead to uncovering a domino-like series of clients and promoter, and they would not have been uncovered but for the whistleblower's information, then it is appropriate that they receive an award based on that. We think the IRS's regulations go too far in treating all information obtained by the IRS as independent, even if it is clear that they would not have been obtained but for the whistleblower's contribution or our obvious next steps in the investigation.

Whistleblowers rarely have a full omniscient view of the conduct, especially if they did not plan and initiate the conduct. Instead, they have important

information on some aspects of the wrongdoing and other information that enables the IRS to uncover the rest. It is both fair and in line with the statute's purpose that the whistleblower be rewarded a share of all the benefits going to the Treasury as a result of their information.

Now, with respect to collected proceeds, the IRS has proposed a criminal's fine deposited into the Victims of Crime fund are not collected proceeds. We think this is the wrong approach. The Victims of Crime Act directs the government what to do with its money, section 7623 carves out a share for whistleblowers before that Act kicks in. Alternatively, if they're in conflict, we think the Victims of Crime Act must yield to section 7623's more recent and more specific mandate. Section 7623 was amended in 2006, the Victims of Crime Act was passed in 1984. More importantly, 7623 is self-appropriating.

Congress explicitly mandated that funds from the collected proceeds shall be available for payment of awards. The proposed regulations which redefine the proceeds based on the Service's interpretation of availability have it backwards; criminal fines and penalties are collected proceeds, and section 7623 requires an inclusion in whistleblower awards.

Now, the Service has also made clear to you that 7623 applies only to Title 26 violations. We think, however, that there's no basis at all in the statute for this view. In fact, subsection (a) clearly gives the Secretary, allows the Secretary to give awards for detecting violations of the tax laws. We think that other violations outside of Title 26, including the FBAR are clearly relevant in detecting underpayments of tax. If the IRS proceeds with an FBAR action, then those penalties are collected proceeds. Now, with respect to proceeds based on, the proposed regulations require the initiation of a new action, expansion of the scope of an existing action, or the continuation of such an action. The Joint Committee on Taxation's technical explanation of the 2006 amendments, however, explain that the provision provides for an award where "The IRS moves forward with an action."

Additionally, the statute speaks in terms of the whistleblower contributing to the IRS's action. We think the regulations are a bit ambiguous on this point, and they should recognize that contributions come in many forms and do not require the information necessarily lead to a new action or the expansion or continuation of such an action. We think whistleblowers are able to provide, and that the statute intended this, that they are able to provide a legal or other source of analysis, able together and organized information making it useful for the IRS, and that where the IRS proceeds based on such information, incorporating it into the action in some way, that they should be rewarded for that.

Additionally, the statute establishes a two-tier system of award percentage based on the substantiality of the contributions, and we think that the appropriate way to differentiate between different whistleblower claims is to adjust the ward percentage based on that statutory scheme.

In general, the touchstone for the regulations should always be the statutory language. If the facts fit under a plain reading of the statutory language, then we'd feel the regulations should reflect that.

Thank you for your time.

MR. KANE: Thank you. Any questions from the panel? Looks like you're good, thank you. Dean Zerbe is our next speaker.

MR. ZERBE: I've got handouts. We'll make these available on the National Whistleblower's Center website today. I apologize that we didn't have more handouts for everyone here, we didn't anticipate the popularity of the whistleblower regs.

MR. KANE: These will be included in our record, as well.

MR. ZERBE: Yeah, that's great, thank you for that. I'm ready to start when you're starting.

MR. KANE: You're on.

MR. ZERBE: Thanks much for having me here today and for the ten minutes. I'll accomplish that by speaking very fast, so I apologize for that as well, too. Because of Steve Kohn's illness, Felipe did a wonderful job, better than I could have explained. My part, what I was going to speak on, I will try to give credit to Steve's terrific knowledge and background in his areas, as I covered his work.

I think what we're trying, I'm trying to do here, you're going to hear from a number of very bright, capable people, knowledgeable on the details of the regs and those questions. I think, what I want to fill in is the policies, that are involved with this that animated Congress in terms of writing this law, and that they should be animating you as you are looking at the regulations.

I think that's lost some time, as we're looking at it, to not understand what we're trying to accomplish from a policy matter, what Congress was thinking about and doing. So that is my focus, and I think it serves, if you will, as the soil for everyone else as they're taking root with their details on specific issues going forward.

Just as a background, the National Whistleblower's Center, obviously one of the leading groups for whistleblowers, form a long history, here, representing them, so the organization has a long involvement. There's great respect on the Hill, an organization that the Hill looks to very much for guidance, as well as Executive Branch does, as well, too, FCC, things of that nature.

I wanted to talk about the role of employees in fraud detection, which is basically what we're trying to accomplish, here, more than anything is that to remember that fraud is intended to be hidden. Tax evasion is intended to be hidden. It is not meant to be found. That is the point of it, and that the employees are in the best position to find that fraud. And, let me see, we're going to go through a lot of numbers and statistics.

This isn't special pleading, this isn't well, yes, of course, these boys are saying, you'll see, this is based on statistics and number analysis, University of Chicago and BER, other independent surveys, here, this is not just sounds-good-to-us type of things, this is based on the review. So you're got employees as a key in terms of fraud detection, and then you've got this chart, which I think I see you all on. This is kind of a critical chart, this shows that, overwhelmingly, the source of information on fraud, and this is from the Association of Certified Fraud Examiners, is from tips, meaning whistleblowers.

That is the source, and this is very much supported by studies, the Chicago study, the NBR study that I mentioned. That is where you're going to get information, is from that, not from -- as you can see, it very much drops down in terms of internal audit, in terms of outside organizations, external audit, all those are very, very low. It is basically tips from whistleblowers, regardless of the entity, for-profit, nonprofit, government, that is where you're going get the information.

And, as you see in the next slide, ACFC, again, reports that tips have been the most consistently common way to detect fraud. The impact of tips is, if anything, understated by the fact that so many organizations fail to implement fraud reporting systems. So, in a sense, what you've got is us at the government trying to figure out how can we encourage people to come forward is that you've got this issue with if employees do not report fraud to the appropriate authorities.

And you see this in the next chart. Basically, we've had a random walk regarding corporate reporting in terms of that. We're still 40 percent of employees that are aware of fraud do not even come forward. 60 percent do, but 40 percent do not even come forward. And then when you go to the next chart, what you will see is that, when people do come forward, it's overwhelmingly to internal sources.

If you look at that, only 4 percent of the 60 percent of employees go to outside sources, meaning primarily the government, in terms of coming forward with their information of what's going on. So what that really means is we're only getting, from the IRS' viewpoint, 2.8 percent of those who are aware and informed about tax problems and tax mischief are coming forward to the government to speak to it.

That is what we're trying to deal with, that is what we're trying, as a policy goal, to change to get more people to come forward and talk. Mark Scott said it exactly right in his commentary, the benefits of that are enormous for the work in terms of targeting IRS resources on the bad actors. That is what is driving the goals of the policy, the IRS whistleblower's law based on the False Claims Act is what can we do to get those numbers up.

Again, you go to the next slide. One of the critical challenges facing both enforcement and compliance officers and government enforcement officials in convincing employees to step forward when misconduct occurs. And, again, this is from the Ethics Resource Shop, this is a government -- I beg your pardon -- this is a corporate entity, the Ethics Resource Shop, there's a lot of big corporate donors, but that's where it's coming from. That is the challenge you've got.

So then you've got the next question: the whistleblower's reward programs, do they work? And I take you back, just to remind you, that all these laws, all these whistleblower laws, are based on the False Claims Act. And you have to understand that history. My constant concern is that the Service views that it's an orphan in the wind, created almost as Zeus created Athena from his head; that it sprang from nothing. It did not; it sprang from the False Claims Act, it sprang from years and years and years of efforts in this field. And the IRS will benefit from recognizing that and recognizing where things have gone well, things have gone wrong, but understanding that history.

This is a good example of it, though, the whole basis of the False Claims Act was a rogue to catch a rogue. Not to get into details, because otherwise, others will get into it, but it what is very concerning when we see extremely tight, overly tight language regarding plans initiated. We absolutely understood that we were not going to have the choir angels coming in to tell you about fraud. They're going to be the people that are informed and insiders knowing what's going on.

But this is your key chart, here, is this one. This is what happened before the False Claims Act came forward in terms of the amount of fraud coming in, and this is what you had afterwards, and the growth. And you can see it's overwhelmingly -- we've had a massive increase in fraud. Why? Because of the False Claims Act. Why? Because it works when you reward whistleblowers to come forward.

And, again, why is that? These whistleblowers are sacrificing everything. I'm not going to give you a parade of tears and big handkerchiefs, but all the whistleblower lawyers who work here, and you've got an enormous number of talented folks who can tell you, it is the devil to try to get a whistleblower to come forward. They're giving up family, they are giving up enormous job security, a lot of uncertainty in terms of that, and anything that can be done in regs to get them more comfortable, confident to come forward is going to be a huge help.

Anything that makes them more uncertain, you can imagine for them, and these are going to be well placed, well paid individuals to go home to their spouse and say, honey, I'm going to give up my job, I'm going to give up my stock options, I'm going to give up my retirement because I think we need to take a flier on a program that may or may not work somewhere down the line. They may not tell me anything for seven, eight years. That is extremely difficult, and that's our challenge, as lawyers, but it is your challenge, as well, to say how can we get them in that car today, how can we get them comfortable, how can we give them greater confidence, because that is how you're going to get them coming forward.

But this is the chart that shows how much whistleblowers are worth. And, again, you can see it, as well, with this chart, which has shown that government efforts have basically stayed flat lined, False Claims Act has ballooned. And you're seeing it already with the IRS Whistleblowers, already with the great work at Steve's shop, what Steve's shop and his folks have done in terms of it, just with where we are right now, has been tremendous coming in.

But there's so much more we can do and accomplish with this. I just give you this in terms of additional sources. These are some of the studies I've been citing in here, Chicago, other studies, but I would just mention this, it really goes back to Mark Scott's good point. There's a study that was buried and buried again, and it raised from the dead, and then they stuck it on a shelf and buried it again.

It's a 1999 study by Treasury, that particular report, in 2006, unearthed, because it was never released, which showed that, basically, no change rate for audits -- and this is before the law was passed -- no change rate for IRS examinations involving a tip from a whistleblower was 12 percent. The no change rate was 17 percent for ones that were regarding diff scores. And, of course, we all know that the no change rate virus is now skyrocketed north of 33 percent, according to a 2012 TIGTA report.

Similarly, the hours worked per dollar was $946 for whistleblower claims, $548 for claims that were not coming from a whistleblower. The IRS, the whistleblower law allows the IRS to target limited resources at bad actors, and that is to the good of not only the IRS's limited resources, but, quite frankly, all the honest taxpayers who are having to suffer and be grinded by IRS examinations that are resulting in no change. So it's extremely important that the IRS's own policies, that we expand this program and make it as effective as possible in terms of the work.

Just a couple of other notes, here, I just want to make a couple points on a few things. In brief, I think communications is going to be one of the most important things that's liable to get into a lot more details. I think the regs, the draft regs are trying to take some baby steps that way. We've got to get further, we've got to get -- administrative proceedings have got to start early, we've got to have communications with the whistleblower, what their status is.

This is going to help the IRS in its own work. We wouldn't be stuck with the *Insinga* case in court and how much time and effort for Chief Counsel if there was just simply a small opening to say here's where we are, here's where we think you are, here's where we think your status is, here's where we think we can see things moving. That's the case for almost every single whistleblower.

They don't need to know everything, they should be protected under 6103, no one takes taxpayer rights and taxpayer protection of information more seriously than I do, but you've got to be able to have basic minimum communications with the whistleblower. Similarly with awards, I'll just make a quick point. I think you've got to look at the reality of that and start in the middle on that, at 22 percent. It should be more like a bell Ccrve, it is clearly slanted towards keeping it to 15 percent.

More than anything, I worry that the awards system, the communications are all geared towards how can we grind the whistleblower in front of us in terms of their award instead of looking long term to say, the long term policy impact, how we're going to encourage it, get more whistleblowers coming forward. Those are just a couple of minor points. Thank you very much for your time.

MR. KANE: Thank you, Dean. Does anybody have any questions for Dean? You're good to go.

MR. ZERBE: Thank you.

MR. KANE: Thank you. The next speaker Erica Brady, who apparently has a hard act to follow here. I'm sure she'll do well.

MS. BRADY: Good morning, and thank you so much for the time. My name is Erica Brady, and I'm speaking today on behalf of the Ferraro Law Firm. Our practice is exclusively devoted to representing whistleblowers in front of the IRS.

We truly believe that this program has the potential to be a great tool for the IRS to un-root billions of dollars of tax underpayments. However, the IRS needs to do a much better job of attracting whistleblowers into the program.

The program has been plagued since its inception with the perception that the IRS simply does not welcome whistleblowers. And these regulations really do very little to dispel that belief.

I'd like to start by repeating something that one of our partners said at the last hearing:

> "First, do no harm." The clearer congressional intent in enacting 7623(b) was to bring well-placed, knowledgeable insiders, and giving them an incentive to come forward with information regarding these tax underpayments. Any regulation that does not serve that purpose has no business being finalized.

I'd like to take a real quick survey of the room. By a show of hands -- does anyone here actually think that these regulations, as written, will bring whistleblowers into the program? Anybody that didn't write the regs?

That speaks volumes. Look at the bar that's here. These are the people that practice with and represent whistleblowers. I would suggest taking a serious look at these regs, and possibly starting over. However, we're here to talk about the proposed regulations today, as written.

I would like to direct my attention for the remaining time on four issues that we've deemed to be the most urgent: Definitions that could potentially invalidate the whole regulation, flaws in the computation of collected proceeds, flaws in the award computation process, and when the administrative proceeding starts.

First, definitions that can invalidate the whole reg -- statutory interpretation 101 is, the plain language of the statute controls the meaning.

These proposed regulations are replete with examples where the definitions don't follow the plain language of the statute. Many of those will be addressed by other people that are here today. I'd like to focus, however, on the proceeds based on at proposed Treasury regulation section 301.7623-2b.

The plain language of section 7623-b1 states, "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 two, receive 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 settlements in response to such actions."

Thus, the plain language of section 7623(b) requires that the IRS must pay an award when the IRS uses information provided by the whistleblower.

On the other hand, the proposed regulations at section 301.7623-2b1 state, "The Internal Revenue Service proceeds based on information provided by an individual only when the IRS initiates a new action, expands the scope of an ongoing action, or continues to pursue an ongoing action that the IRS would not have initiated, expanded the scope of, or continued to pursue, respectively, but for the information provided by the individual."

The proposed regulations seem to leave absolutely no room for an individual that comes forward with additional facts that would lead to a much larger assessment in tax.

For example, if you're auditing a large taxpayer who's under continual audit, and the IRS regularly looks at their transfer pricing program. At the opening of the audit, they request their 6662 documentation. There appears to be no room for a whistleblower to come forward with significant facts that details a $1 billion underpayment.

How could this possibly be Congress's intent, that this person gets cut away from an award? That simply can't be a logical conclusion.

Therefore, we suggest either striking the language or replacing it with language that is in line with the statute.

Second, flaws in the computation of collected proceeds -- we've had an entire regulation project devoted to this particular area, so I'm not going to address most of it. I'd like to focus in on the reduction and tax attributes.

The Secretary's half right: Whistleblowers should be awarded further reduction in tax attributes. However, applying an arbitrary cutoff date of the award determination is just that; it's an arbitrary cutoff.

Payments made by a taxpayer the day, the week, even years after the award determination is made are just as significant as those paid the day before the award determination is made.

It appears that the Secretary is placing administrative convenience above all else, and this is not an appropriate method to interpret a statute. While there is a slight burden, it's the IRS's burden, and not the whistleblower's.

Additionally, it's laughable to believe that the IRS is not actually tracking these tax attributes somewhere in their tax system.

Therefore, we request that the language regarding tax attributes follows out of the statute.

Third, flaws in the award computation process. The proposed Treasury regulation, at section 301.7623-4c, starts the process to determine the award percentage at the bottom of the statutory range.

This sends the message to whistleblowers that the IRS is only interested in providing minimum awards. It continues that belief that they're just not welcome.

While I'm sure that the members of the bar here would love for awards to start at 30 percent, that's not practical, either.

We believe that the most logical place to start is in the middle -- 22.5 percent. This allows for adjusting up or down, based on positive and negative factors. It'll allow for awarding whistleblowers that go above and beyond. It allows for punishing those who have, in some way, delayed or inhibited the IRS's progress, while their current standard of starting at the bottom prevents this from happening.

A whistleblower that has no positive or negative factors is treated exactly the same as a whistleblower who hits every negative factor, simply because there's no room to go down from where the regs propose starting.

Therefore, we suggest changing the language to starting the middle of the range, as opposed to starting at the bottom.

Fourth, when does an administrative proceeding start? Under the proposed Treasury regulations, the administrative proceeding doesn't start until the proposed award determination is mailed.

As was mentioned by Dean Zerbe, this whole mess could have been changed. We could have prevented the *Insinga* case from happening, simply by starting the administrative proceeding earlier.

According to the IRM part 25.2.2.8 paragraph one, the whistleblower award review and determination process is an administrative proceeding that begins on the date the claim for an award is received by the whistleblower office.

This has been the standard that the IRS has been using since day one. The sky has not fallen. The tax system has not crumbled. It would be nice to see that standard included as the official start of the administrative proceedings in the finalized regs.

However, if that's wholly unacceptable, even starting when Form 11369 is transmitted from the field would allow for greater cooperation between the IRS and whistleblowers and their counsel, and allow for greater discussion of the appropriate award percentage, as we believe it's going to be easier to effect the appropriate award percentage prior to writing of the official report.

Again, I want to thank everybody for their time and consideration, and ask that, in finalizing these regulations, all those involved keep in mind the true intent of the statute was to attract whistleblowers to come forward.

Thank you.

MR. KANE: Thank you, Erica. Questions for Erica, anybody on the panel?

MS. BRADY: Thank you.

MR. KANE: And you're good to go. Thank you. Mr. Skarlatos, you're next.

MR. SKARLATOS: Thank you. I didn't bring any handouts, but I do have (inaudible).

Thank you for having me here this morning; may it please the court.

I'm Brian Skarlatos, from Kostelanetz & Fink in New York, and I focus my practice primarily on tax controversies, but I do have the significant practice of representing whistleblowers.

And I'm here because I'm interested in proper tax administration, but, also, to be truthful, I represent claimants who have made billions of dollars worth of claims -- or reported billions of dollars worth of tax noncompliance to the Internal Revenue Service.

Listen, you guys were handed a very big job back in 2006 when you were asked to incorporate this new program into the IRS's enforcement.

And I think you've actually done a commendable job of putting together the IRS Whistleblower Office, allocating resources or getting resources allocated, and, in drafting these regs, getting together procedures to handle this new law that balances a lot of competing interests -- the interests of, of course, the claimants, which I think everybody's talked about a bit, and, also, the interests of the taxpayers against whom the claims are being made. The taxpayers do have rights, as well.

And that's one of the things out of my practice I notice when we're representing taxpayers before the IRS. That's actually mostly what I do. I'm very interested in the taxpayers' rights. So, that is a big thing that has to be balanced here, as well.

And, at the same time, you've been dealing with the IRS's restrictions and limitations -- restrictions such as taxpayer confidentiality, and, also, restrictions on how much funding and resources you can allocate -- especially in these times of limited resources, it's particularly difficult, I imagine.

Now with the regs, though, there are a lot of things, I think, that can be changed. And I think, really, what we're talking about is rebalancing some of those things, with respect to some specific areas -- to sort of recognize some areas where tweaks can be made, and a lot of that has been mentioned already -- and particularly a harken to some of Dean's comments -- that this law really is going to help the IRS in the long run, and I know everybody here appreciates that.

But I think we can maybe balance a little bit more in favor of trying to make this whistleblower law an important part of tax enforcement in the long run.

Now, specifically, some particular comments I had -- one thing I wanted to talk about is the idea of aggregating several taxpayers and several tax years into one final award determination.

Now that can be a problem, because what happens here is that you have a whistleblower who makes a claim, and it involves lots of tax years -- because it involves an issue such as basis or cost of goods sold -- and it's going to spread over five, seven, ten tax years. And they may not pay all of that tax at once. They may pay for the first three years, wait until they get audited to pay the rest of the tax.

Similarly, you could have somebody who's making a claim that involves several taxpayers. Maybe it's a claim against a partnership that sold ten tax shelters. So, there are ten taxpayers that are involved in the claim, and that one claim process involves all ten taxpayers. And two of the taxpayers may pay early, and eight of them may wait years to pay.

But the final award determination may wait until all of the years' taxes have been paid, or may wait until all of the taxpayers have paid their taxes.

And by combining several tax years and taxpayers into that one final award determination, you're going to generate huge delays in making the final award determination to the taxpayer.

Now I realize that there are reasons why that has to be done -- because this is going to be a real mess if you're making several final award determinations with respect to one claimant. You could even have several tax court cases. I do get that. Maybe there's a motion to consolidate in the tax court, or motion to put things on hold because you've got another case coming up.

But I think that, in balancing those interests against the huge delays that are going to occur, I think it does make sense to consider re-tweaking the regs in that part and saying that a final award determination should be made with respect to each year, with respect to each taxpayer.

Adopt the annual accounting concept, and the idea that each taxpayer is separate in that context. And that's what I would urge in that context.

Now I'd like to move onto a suggestion for computing collected proceeds when you've got net operating loss carryforwards.

I think the Whistleblower Office, actually, and the IRS, you know, really did recognize that there are times when a taxpayer comes forward with information that's going to effectively reduce a taxpayer's net operating loss, okay? And that net operating loss should be part of the collected proceeds. That reduction in net operating loss should be part of collected proceeds when it generates taxes that are paid to the Treasury.

So, I think I commend the IRS for adopting that interpretation of collected proceeds. But there is this sticky issue of when you've got a net operating loss carryforward, and that carryforward is extending into future years and hasn't yet generated collected proceeds -- either because it's still being used up and it's wiping out the taxpayer's taxes, or the taxpayer has lots of losses, and so you're not getting any real collected proceeds from this net operating loss carryforward.

And what the regs say is that the IRS is going to go ahead at some point, and make a final award determination. And that's something claimants usually want. They want a final award determination so that they can get their award. But here, you're going to make a final award determination and cut off the possibility of any future collected proceeds, based on that final award determination.

And what I would suggest is one of two things -- and I know one has been suggested, and you've considered it, and there are probably some problems that we're all not aware -- and constantly monitoring taxpayers to say, "When is that net operating loss going to generate taxes that can be used as collected proceeds for purposes of award determination?" It's just not practical for the IRS to do that. I've got to confess, I don't fully understand that, but there may be things I'm not aware of.

So, I think that the best thing to do would be to require continuous monitoring of the taxpayer to see when the net operating loss would be used.

If that's not possible, however, I think one thing that can be done is you can go ahead and make a final award determination, then put the burden back on the claimant to say, "When you know or believe that that net operating loss has generated collected proceeds three, four, five years from now, you are free to make another whistleblower claim based on those collected proceeds, and we'll pay out on that claim, if, in fact, based on the net operating loss carried word, it's been used up, and has generated tax payments, and we have those collected proceeds."

So, I'd like to leave the door open for whistleblowers to come back and make new whistleblower claims in the case of net operating loss carryforwards.

What I'd also like to talk about is a process for getting communication to the whistleblowers sooner. I got to tell you, it's a tough practice; it is. You've heard some of the problems. You may say, "Well, that's just the way the cookie crumbles."

But you've got claimants who want to come forward and report information, and I have to tell them that it's going to be seven, eight, maybe ten years before you can expect anything, and during that period, you're not going to hear anything.

And, also, it's hard to get -- there are whistleblower lawyers in this room, but, you know, it's not that big a deal. It's a relatively small bar. And I got to tell you, you know, for the record, I'm 51 years old. When a claimant comes into me, I've got to think about, you know, do I really want this case? It's going to be 10 years out. I may not collect anything on my fee, if it's a good claim, until I'm into my 60s.

You know, and so that does affect how people are going to approach this, and you're not going to get the same sort of momentum behind it that Dean Zerbe was talking about you're going to want, in order to make this effective.

And I know that there are reasons why you can't pay sooner. You got to let the taxpayers exercise their rights; you have to. And I do understand why you wait two years for the claim for refund period to pass.

I get all of that, but what you can do is a little bit more communication earlier on. You can't violate taxpayer confidentiality. That's important; you can't do it. But I don't know that communicating the status of an award proceeding is the same as violating taxpayer confidentiality. I think that a distinction could be made there.

But, also, as importantly, there is a procedure in here for making a preliminary award recommendation after you've collected, right? And I think that's a good thing. You don't wait to tell the taxpayer until there's a final award determination. You actually can communicate a preliminary award determination soon.

I think if you do that as soon as possible, that's going to be very helpful in getting taxpayers to understand that they're in a process that works and they're not just being stiff-armed or being shut out of the process.

Now the only thing is that this preliminary award determination -- it can be made, really, anytime after you collect proceeds. And I'd like to see some time limit, if you could. Maybe it's 90 days. Maybe it's 120 days. Maybe it's 180 days -- six months after there are collected proceeds.

My suggestion would be, within some period after collected proceeds, you're required -- the IRS is required to make the preliminary award determination and communicate it to the claimant. So, that's my suggestion there.

The last suggestion I'd like to emphasize -- in addition to the written comments that I submitted -- does have to do with what people have already talked about, so I'm not going to spend much time.

It has to do with computing award percentages, all right, and this idea that you start off at the bottom. And I just have to say, there is an immediate feel that that is going to create a gravitational pull for all claims to be toward the 15 percent.

And I imagine you guys thought about this, you debated it internally, but it does create a situation where claimants who come in, and they just have a simple claim -- you know, just the T&E -- they're going to be treated just the same as somebody who's a bad claimant -- who has profited from the transaction, who has disclosed the existence of the whistleblower proceeding, and they delayed providing the information because they thought that they may benefit -- and they make an award; they're going to be treated just the same as a purely innocent, good whistleblower claimant, and I don't think that's right.

And I think the idea of starting the process at 15 percent instead of 22 percent really creates that gravitational pull that's going to lower claims across the spectrum. And I think that just sends the wrong message to whistleblowers.

So, that's the extent of my comments.

And I'd like to thank you for all of your efforts in this, and your time today. Thanks.

MR. KANE: Brian, got a question for you.

MR. SKARLATOS: Oh, got a question.

MR. KANE: All right. In the suggestion that we do, you know, one taxpayer, one year, we reach a conclusion, how do you account for issues where there are multiple-year implications from the adjustments?

For example, we correct something in year one that increases liability, but it has an effect in future years to reduce future-year liability. Do we offset for that? Do we anticipate that offset, and do that in the first year, or do we wait and aggregate at a later date?

MR. SKARLATOS: I think I would prefer that if you offset it, and you anticipate -- you say you believe that there is going to be an offset, you make a preliminary award determination based on that --

MR. KANE: Mm-hmm.

MR. SKARLATOS: -- and then if the taxpayer wants to reject that and say, "No, I'd rather wait," then you give them the opportunity of waiting, or if they want to accept it with the offset, you allow them to do that at that time. All right?

MR. KANE: Anybody else, before he escapes?

MR. SKARLATOS: Thank you.

MR. KANE: You're good.

MR. SKARLATOS: Thank you.

MR. KANE: The next speaker is Eric Young. No response, so we'll move on. That leaves us with Scott Oswald. Scott, could you come up?

MR. OSWALD: Good morning, and thank you. My name is Scott Oswald, and I am the managing principal of the Employment Law Group.

I represent insiders, individuals who work for corporate America, and are coming forward, really, first and foremost, to protect their careers, to protect their jobs. Now these are the individuals that really, as we've heard a number of speakers talk about, have the information, the keys to the castle at these corporations, but they really are very concerned.

And one of the things that I want to stress to you that's very important -- because we've talked about how the whistleblower statute is very similar, in some ways, in concept, to other statutes.

In one way, it's very different: It does not contain an anti-retaliation provision. And so whistleblowers who come forward and complain about potential violations of our tax code are not protected by federal statute -- at least, not by the Internal Revenue Service's statute -- from retaliation.

So, it makes it even more of a real challenge for them in their careers, in taking this step, and filing a claim.

MS. MINKOVICH: Before you go down the anti-retaliation road any farther, I'm just going to point out to everyone that the President's budget is being released today, and one of the new budget proposals that's contained in the President's budget is a legislative proposal that would specifically add an anti-retaliation provision to section 7623.

MR. OSWALD: And I think most people in this room applaud that and support it very much.

But in terms of the world in which we live right now, and in the claims that are being filed right now, for us who are employment lawyers and advising our clients of whether to come forward, this is an important consideration.

And we all know what the statistics are -- whereas other offices there, the number of claims are going up -- for instance, at the SEC Whistleblower Office, we now have almost 3,000 claims being submitted in last fiscal year. The False Claims Act has seen an increase; I think it's almost 70 percent over year-over-year. At the IRS Whistleblower Office, we've seen a diminution of claims, a reduction in claims.

And I think it's important to understand maybe why that's happening -- because if we're right, that most of the individuals that are coming forward, that have the information that the IRS needs, are insiders, it's important to understand where they're coming from.

My clients, first and foremost, when they're offered this opportunity, they look at what they'd be giving up. And what they're giving up, potentially, is their careers. They're highly paid professionals, and what the balance is for them is whether or not they give up their careers and that income stream going forward for many years, in order to make a claim, or to make the claim, and then -- or not make the claim, and then continue in the corporation over the long term. That's really what the challenge is, for many of them.

And so what I think is important is transparency through the process and cooperation. Those are the two most important things that the IRS Whistleblower Office needs to try to promote in its regulations, just in terms of broader types of changes.

The first is the issue of transparency, because what we have now is -- certainly, there's been some change since July, and we applaud that in the whistleblower bar -- but prior to July of last year, after receiving your acknowledgement of receipts, sometimes you go years without any kind of knowledge of what was happening in a case. And no contact, and you would call, and try to make some determination as to what the status was, and it kind of fell into this black hole.

And what we have been told about it in the whistleblower bar is that there's these competing interests, and there's taxpayer privacy concerns. And we understand that, but there's really a very simple fix to this. And that, really, is the 6103N agreement.

6103N provides the Internal Revenue Service the opportunity to enter into an agreement with a contractor, including a whistleblower, and share information with the whistleblower about the process that is occurring, even provide tax return information.

And these kinds of agreements, as I understand it, have never been entered into at the IRS to date. In fact, I don't think there's one that's been entered into. They're routine in other areas of whistleblower practice.

For example, under the False Claims Act, regularly, U.S. attorneys' offices and main justice will enter into confidentiality agreements with whistleblower and their counsel in order to provide information to cooperate -- because, oftentimes, if the whistleblower, the individual himself, has the information, has the goods, sometimes they have disclosed the information to the Whistleblower Office, but the IRS actually wants something a little bit different. They want it either described differently, or they want a different aspect of the information, and the whistleblower has no information at all about what it is that they want.

And so in the interviews that we've had with IRS examiners, when it's gone into enforcement, it's really this one-way type of conversation, and these have occurred, I think, with some regularity since July.

So, an ability to cooperate over time with the Internal Revenue Service, an ability to enter into an agreement where the whistleblower and his or her counsel can provide the information that the IRS needs in its administration of both claims -- and, of course, in prosecuting or auditing function.

In terms of cooperation early -- sometimes, my clients have information of ongoing potential violations that are going over a very significant period of time.

And I only get word from the Whistleblower Office years into it, whereas there's been a significant amount of tax evasion over the interim period of time and potential criminal conduct.

And one of the problems about the whistleblower regulations now is that, to the extent that there is an alternate proceeding, and there are rewards -- let's say there's a recovery in the alternate proceeding -- my whistleblower may not be eligible to receive those amounts under the current regulations.

So, we have to work almost exclusively through the IRS Whistleblower Office, whereas there may be ongoing criminal activity that's occurring separate and apart from that. And we, as fiduciaries, as lawyers for our clients, have an obligation to represent our clients. And so it may not be in our client's interest to disclose that other aspect of the fraud, the criminal aspect of the fraud, outside the IRS Whistleblower Office.

So, if we have a cooperative relationship, if we know that the IRS Whistleblower Office is taking into account the disclosures in their entirety, then those kinds of communications that we can have to stop ongoing criminality can occur, and it can occur with much more regularity.

So, the cooperation and transparency is essential to let whistleblowers know what is happening during the process so that they -- to the extent they have new information, they can provide it. To the extent that the IRS needs different information about what they've already provided, they can do that, and that we can be as great a resource to the Whistleblower Office as possible.

In sum, I think that the Whistleblower Office, as other offices have said, needs to be much more open, and much more welcoming of whistleblowers in the future.

And my hope is that, with the comments that you have on these regulations, that we can take a step in that direction.

I'm happy to answer any questions.

MR. KANE: Thank you. Anybody?

MR. OSWALD: Thank you. Thanks.

MR. KANE: Thank you very much. Neil, I think you're up. Did you receive the notice for the testimony?

MR. GETNICK: Yes, we did receive something this morning.

MR. KANE: Thank you so much, and it will be made part of the record.

MR. GETNICK: Appreciate it. Good morning. I'm Neil Getnick. I'm the Managing Partner of the law firm of Getnick & Getnick LLP based in Manhattan, and I'm testifying today in my capacity as the Chairperson of Taxpayers Against Fraud Education Fund.

The TAF Education Fund is a nonprofit, public-interest organization dedicated to combating fraud against the government and protecting public resources through public/private partnerships. The organization is supported by successful whistleblowers and their counsel, as well as by membership dues and foundation grants.

My testimony today speaks to the proposed rule issued by the IRS on December 18, 2012, concerning the services Whistleblower Program, codified at 26USC Section 7623. I refer to you and incorporate by reference the TAF Education Fund's February 15, 2013, written comments letter to the IRS expanding on my testimony this morning. Specifically today I will be addressing the topics of preliminary denial letters and the definitions of the following key terms under the proposed rule: (1) Proceeds based upon; (2) related action; (3) collected proceeds; and (4) planned and initiated. So let's start with the topic of preliminary denial letters.

In an effort to reduce the number of appeals filed by whistleblowers whose claims have been denied, proposed Section 301.7623-3(c)7 would allow the IRS to issue preliminary denial letters and then begin administrative proceedings that would allow the Service to share information about its denial decision with the whistleblower pursuant to Section 6103(h). In order for this approach to be effective, these preliminary denial letters must be as detailed as possible;

otherwise the Service will continue to see appeals of its determinations, which will continue to waste resources for all concerned.

Let's now turn to the definition of key terms, noting at the outset several of the proposed rules definitions unnecessarily go far beyond the scope of the Tax Relief and Health Care Act of 2006, which I will refer to going forward as simply "the statute." First, let's examine the definition of the term "proceeds" based upon the proposed rules definition of this term. It is far more restrictive than the language included in the statute as the proposed rule would allow the IRS to deny a whistleblower a reward even if the Service relies on the whistleblower's information to take action against the taxpayers if the Service in its sole discretion and with virtually no transparency believes that the whistleblower's information did not expand the scope of an ongoing audit or cause the Service to continue to pursue an issue, if the Service already has some but incomplete information regarding matters identified by a whistleblower, and even if the Service believed that it could have conceivably pursued the matter on its own. Instead of adopting these overly burdensome standards, the Service should adopt the SEC's model in this regard, which includes an expansive definition that rewards whistleblowers who "significantly contribute" to the ultimate success of an existing investigation. The SEC's approach also rewards whistleblowers whose efforts cause a taxpayer to self-report violations to the Commission. The IRS should also encourage and reward whistleblowers who report tax violations internally and thereby cause taxpayers to self-disclose to the Service, particularly since IRS whistleblowers do not enjoy specific statutory protections from retaliation as do SEC whistleblowers as other speakers have spoken to earlier today.

Second, let's turn to the definition of the term "related action." The proposed rules definition is, again, inconsistent with the statutory language as the proposed rule limits related actions from which whistleblowers can receive a reward to actions that are no more than one step removed from a taxpayer identified in the whistleblower's submission. As an initial matter, the Service again has the sole discretion to determine how many steps removed an initial action is from a related action. Moreover, the Service's proposed definition is at odds with the plain meaning of the word "related," which is not limited to only one degree of separation.

Third, let's look at the definition of the term "collected proceeds." The proposed rules definition creates an unfair framework when applied to net operating losses or NOLs as it would only reward whistleblowers in cases in which the NOLs have been used as of the date the IRS computes the amount of the collected proceeds rather than to simply determine whether the government recovers funds each year as the result of NOLs reduced by whistleblower information and then reward the whistleblower accordingly.

Fourth, let's probe the definition of the term "planned and initiated." Similar to the provisions of the False Claims Act and the SEC and CFTC whistleblower program, the IRS whistleblower program provides for the reduction of awards to whistleblowers who planned and initiated the actions that led to the violations

reported by the whistleblower. But the proposed IRS rule goes beyond the scope of these other provisions and deviates from the statute as it includes "drafted" within the definition of "planned," which would seemingly penalize innocent employees who merely drafted a document at the direction of his or her superiors, and it includes "promoted" within the definition of "initiated," which would appear to penalize those who did not actually initiate anything but may only have become involved in the fraud scheme well after it began. Such individuals should not be discouraged from reporting tax fraud to the Service but rather are precisely the types of knowledgeable whistleblowers the IRS needs to expose fraud and recover money owed. And here, again, I point to the panoply of speakers who preceded me who practice in this field and who have attested to the same.

Beyond my testimony today, I refer you to the TAF Education Fund's February 15, 2013, written comments letter generally, and specifically regarding its note on the use of Section 6103(n) agreement. With the right rules and the right approach, the IRS whistleblower law continues to have great potential. Those of us in the whistleblower community who have come to know Steven Whitlock, the Director of the IRS whistleblower Office, appreciate his dedicated work and that of Robert Gardner and the rest of their support team in service of the whistleblower law, the whistleblowers who bring it to life, and U.S. taxpayers who are the ultimate beneficiaries of its provisions, thank you both on behalf of the TAF Education Fund and personally for the opportunity to appear and testify before you today.

MR. KANE: Thank you very much, Neil.

Anybody have a question for Neil?

MR. GETNICK: Thank you.

MR. KANE: Thank you. The next and last listed speaker on our agenda is Tom Pliske.

MR. PLISKE: Good morning. My name's Tom Pliske. I represent individuals with inside information before the Internal Revenue Service, and we, too, call them whistleblowers. Here today I want to thank the panel for giving us time, for the people in the audience, and for those that wrote or helped write the regulations.

The statute was enacted in 2006. It's an ongoing process, and it's changing over time. I think the regulations came a long way. My first go-through reading the regulations I could see that a real effort was made to balance the whistleblowers' rights, taxpayers' rights, tax administration. Second time through the proposed regulations I got a little bit more critical. I wrote some comments. I came here today looking at all my colleagues' comments and trying to pick my comments so that I wouldn't duplicate, although I may duplicate a little bit, but I do support all the comments that were made previously.

I want to start off talking about disclosure, confidentiality agreements, communication -- I think they all go hand in hand under the program. The statute

is confusing, 7623 is confusing, very ambiguous. We're here a second time around for regulations. We're trying to define simple terms as collected proceeds, planned and initiated. The one thing that's not confusing, though, is that Congress did intend for individuals to come forward with inside information to help the IRS collect taxes, and I think they've done so. And I'd like to piggyback on one thing and that is the communication and disclosure agreements in 6103.

Up until this point of time, the IRS is pretty much hiding behind 6103 and won't disclose anything. Impatiently we understand 6103; it's to protect taxpayers, taxpayer rights, taxpayer information, and I know the rule of thumb is if in doubt, do not disclose. I get it. The way around it is confidentiality agreements and the regulations talk about a confidentiality agreement, and it's presented at the end of the process. It's presented at the end of the process and common sense says it would be presented at the beginning of the process, not when a preliminary determination is made. We know as whistleblowers or whistleblower attorneys, our clients know when they submit inside information, when they receive an opening letter, when they go through a taint analysis, when they talk to the subject matter expert, they know directly or indirectly what the IRS is doing hopefully; that an examination is taking place. I've got to tell you, I think a confidentiality agreement should be entered in every case -- it should be mandated every whistleblower enter into a confidentiality agreement. Don't wait till the end of the case. Even arguably a rejection letter four years later that says thanks for your information, we've collected no proceeds. That's to the taxpayer for which you provided information -- arguably that's a 6013 violation. Every whistleblower should be put under a confidentiality agreement and once that's done, the information can't be disclosed. Some information, basic information, can be disclosed to a whistleblower. They're not asking for much. And our job as whistleblower attorneys, we take -- I was going to say hundreds, but it is hundreds -- of calls from our clients every year, hundreds and hundreds, explaining 6103, explaining what the IRS can't tell us, and we save those calls from coming into the IRS. Right now the IRS will tell us, and we know the claim remains open. That's all an analyst can tell us. We get it. We understand it. It would be very simple to say the claim properly remains open. We don't know that it properly remains open. We just know we submitted it three, four, five, six years ago, and we haven't gotten a rejection letter. Even a better response might be after a review of the file and proper inquiry, the claim properly remains open. My point is simply to help with communication, and I think a confidentiality agreement in every case is the way to go and not at the end of the process, but at the beginning of the process.

The other area that I do want to talk about today is a final determination of tax that's used throughout the regulations. It comes at the end of the proposed regulations. And the final determination of tax is perhaps the first time there is communication between the IRS and the whistleblower. It's pretty much made at the time a preliminary determination of an award is made, and when is that? That's two years after the tax is collected unless under one exception, unless a confidentiality agreement is entered into by the parties, parties being the IRS and the taxpayer, and the taxpayer agrees -- if I said confidentiality agreement, a

closing agreement -- where the taxpayer agrees to give up its rights to file a claim for refund. That's a two-year wait. That was something I don't think Congress intended or even thought of back when the statute was enacted. In fact, the first time it surfaced, I believe, was June of 2010 when the Internal Revenue manual was published and added two years on the wait time. Again, the intent of 7623 is to encourage, not discourage, whistleblowers to come forward. A two-year wait is two years on top of four- or six-year wait already, a 30 or 40 percent increase in time with no information. I propose that that final determination of tax can be with a confidentiality agreement. I think it could be in other circumstances. I understand the two-year wait. The last position the IRS whistleblower office ever wants to be in is to make an award payment, have a taxpayer -- although a small chance -- successfully file a claim for refund and then go to the whistleblower and say give me back the award. Nobody wants to be in that position. I don't want to be in that position as an attorney for a whistleblower.

However, there are other situations that that unlikely would even happen. A civil tax assessment based on a criminal prosecution, a guilty plea, the chance of a taxpayer ever filing a claim for refund, is zero I would say. The chance is small, but zero. There could be other situations where a taxpayer double deducts a deduction, a large deduction, or a loss is carried back and the same loss is carried forward. Exam knows that there will never be a successful claim for refund. And in those situations, and there are lots of situations -- I can only think of two, three, four at this moment -- there is something the IRS can do and that is allow the whistleblower to put up a bond, put up a bond to protect that the bonding company will reimburse the IRS the amount of an award. The Internal Revenue Code contains a half-dozen situations where taxpayers are allowed to put up a bond to protect themselves against collections, liens, state tax situations. Allow a whistleblower under certain circumstances, in the best interest of the government, final determination whistleblower, if you want, your award two years earlier post a bond, put them on notice.

Anyway, my time's about out. I'll stop here unless there are some questions.

MR. KANE: Any questions? Thank you, Tom.

MR. PLISKE: Thank you.

MR. KANE: Appreciate it. We've come to the end of the list, but since we passed over Eric Young, I'll make a call for Eric Young one more time just in case he snuck in to be sure that we haven't missed him; and no response so I will offer anyone who wants to spend a few minutes at the mic who is not on the agenda. If there's anyone who thinks that they have something to say, I'll offer that now to anyone in the room. And no takers on that, and so I think we are done with this hearing. Yes?

SPEAKER: I have one question. You have 12 months in which to get the regulations together. Why does it take you 7 years before the IRS to get these finalized regulations?

MR. KANE: The opportunity to speak was an opportunity to make comments and not question the panel. So I'll -- the regulation process is a long and complicated one. That's all I'll say on that subject.

Anybody else? Thank you very much, and we're adjourned.

(Whereupon, at 11:20 a.m. the HEARING was adjourned.)

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