JAMES L. FERRARO*
DAVID A. JAGOLINZER**

SCOTT A. KNOTT***
GREGORY S. LYNAM+
DINO G. GALARDI
JUAN P. BAUTA, II
ERICA L. BRADY+++
JEFFREY H. SLOMAN
ALLAN B. KAISER****
MELISSA DAMIAN VISCONTI
MARC P. KUNEN
DAVID J. FINGER
LAUREN M. POMPONIO
AMANDA A. KESSLER*****
JANPAUL PORTAL

HONORABLE JOHN GALE ++

THE FERRARO LAW FIRM

MIAMI • WASHINGTON, D.C. • NEW YORK

4000 PONCE DE LEON BOULEVARD
SUITE 700
MIAMI, FLORIDA 33146
TELEPHONE (305) 375-0111
TELEFAX (305) 379-6222
TOLL FREE (800) 275-3332
www.ferrarolaw.com

*ALSO LICENSED IN MA, NY, OH
**ALSO LICENSED IN MA, DC, NY
*** ALSO LICENSED IN DC
**** ALSO LICENSED IN MO
***** ALSO LICENSED IN OH, IL, MO
+ONLY LICENSED IN CA, IL
+++ ONLY LICENSED IN CA, NY

++ OF COUNSEL

Via eRulemaking Portal (IRS REG-141066-09)

February 19, 2013

Ms. Meghan M. Howard
Internal Revenue Service
CC:PA:LPD:PR (REG-141066-09), Room 5203
PO Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments of the Ferraro Law Firm re Proposed Treas. Reg. §301.6103(h)(4)-1; §301.7623-1; §301.7623-2; §301.7623-3; and §301.7623-4.

Dear Ms. Howard:

The Ferraro Law Firm respectfully submits herein comments on behalf of its clients who have to date made hundreds of tax whistleblower submissions to the Internal Revenue Service ("IRS") representing more than $100 billion in tax underpayments. Specifically, we write to comment on the Proposed Treasury Regulations under section 6103 and section 7623 of the Internal Revenue Code ("IRC") that were published in the Federal Register on December 18, 2012 (the "Proposed Regulations"). These Proposed Regulations at sections 301.7623-1 through 301.7623-4 address many aspects of the IRS Whistleblower Program and whistleblower award regime pursuant to IRC section 7623, and section 301.6103(h)(4)-1 which relates to taxpayer confidential information under IRC section 6103 which is necessarily disclosed pursuant to that regime.

If we had listened to our mothers when they told us "*If you don't have anything nice to say, don't say anything at all*" then we would not be submitting comments to these Proposed Regulations. The Treasury Department should collectively step back and recall why it has undertaken this regulation project in the first place, then ask itself the following question and consider why it has issued the Proposed Regulations in their current form:

Question:	*What is the purpose of these Proposed Regulations?*
If the answer is:	*To persuade prospective whistleblowers <u>not</u> to come forward.*
Then Treasury should:	Finalize these Proposed Regulations as-is.
If the answer is:	*To persuade prospective whistleblowers to come forward.*
Then Treasury should:	Either rewrite or never finalize these Proposed Regulations.

Based on our discussions over the last six years with literally thousands of prospective whistleblowers, The Ferraro Law Firm believes that the Proposed Regulations offer no additional guidance that could possibly attract a whistleblower to the IRS. In particular, well informed insiders who are themselves tax professionals – the very best whistleblowers the IRS could possibly hope to attract in our opinion – are particularly disadvantaged by the Proposed Regulations due to their role in the complex corporate tax arena in which they work. Specifically, section 301.7623-4 continues to scare insiders with "planned and initiated" language that apparently ignores years of jurisprudence, and all that does is raise questions in the minds of these insiders about whether or not the IRS will try to improperly deny them an award otherwise required by statute. The general guidelines of section 301.7623-1 were already put in place by Notice 2008-4, so there is nothing new there. The definitions of section 301.7623-2 do more to define when an award will not be paid rather than assure prospective whistleblowers that they will be paid. Section 301.7623-3, with respect to the award determination administrative procedure, serves to provide guidance to whom exactly … Whistleblower Office employees? And finally, section 301.6103(h)(4)-1 just rubs salt in the wound of highly knowledgeable and insider whistleblowers with valuable and extensive information about well hidden noncompliance, whistleblowers whose potential for continued utility is simply ignored after they file their initial submissions with the IRS.

In summary, our specific comments, organized by their corresponding section of the Proposed Regulations, are as follows:

1) Disclosures can be made under section 6103 before the preliminary award determination letter is sent out;
2) The procedures for how to file a claim are already known;
3) The definitions of "proceeds based on" and "collected proceeds" are an erroneous interpretation of the statute;
4) Award determination administrative proceedings start before the preliminary award determination letter; and
5) The starting point of the Award Computation is unfair to whistleblowers.

We address each of those comments in turn as follows:

Comments on Proposed Treas. Reg. section 301.6103(h)(4)-1 - Disclosures can be Made Under Section 6103 Before the Preliminary Award Determination Letter is Sent Out.

It was already fairly clear from the statutory language of section 6103(h)(4), which provides an exception to the general prohibition to disclosures by the IRS of taxpayer confidential information when such disclosure is made in connection with an administrative or judicial proceeding, that a whistleblower award determination was an "administrative or judicial proceeding pertaining to tax administration" under section 6103(h)(4). However, the Proposed Regulation incorrectly assumes that this proceeding only starts at the time that the preliminary award determination letter is sent to the whistleblower, and therefore it is improperly limiting disclosures to whistleblowers. This preliminary award determination letter does not automatically descend from the heavens, it is prepared by IRS employees in the Whistleblower Office as part of and throughout a procedure that evaluates the contribution made by a whistleblower's information. Therefore, by definition the proceeding must begin at least when the process starts to prepare such preliminary award determination letter, if not sooner, such as when the Form 11369 is transmitted by the field at the conclusion of the investigation of the taxpayer. If Treasury does not like the Form 11369 transmittal date as the start of the award determination administrative proceeding, perhaps the Internal Revenue Manual can help shed some light on what the IRS itself thinks. It says:

> **IRM 25.2.2.8 (06-18-2010) Whistleblower Award Administrative Proceeding**
> 1. The whistleblower award review and determination process is an administrative proceeding that begins on the date the claim for award is received by the Whistleblower Office.

So if the IRS would like to begin to exchange information with whistleblowers starting anytime after the Form 211 is filed, that would be permitted by section 6103(h)(4).

In several instances now we have provided detailed information about how the information provided by our client was used by the IRS before the preliminary award letter was sent out. Based on the feedback we received, we believe that this information significantly assisted the IRS in preparing such a letter. Therefore, that exchange of information clearly was part of the "award determination administrative proceeding." In those instances our exchange of information was a one way street: we provided detailed information about how the whistleblower's information was connected to the taxpayer adjustments, and analyzed the effect of those adjustments on the collected proceeds based on the whistleblower's information, taking into consideration credits, offsets, carrybacks and carryforwards, etc. If we had more access to IRS information about the tax, interest, penalties, credits, offsets, and how other adjustments were computed in every case, instead of just relying on the information we have from our clients who are insiders, we could be of even more help in coming to the right answer of what the award should be. Once the preliminary award determination letter and detailed report are written, however, we think it is going to be very difficult for whistleblowers to change the result. This results in not a cooperative process, but an adversarial one.

This Proposed Regulation states in relevant part:

> (1) By communicating a preliminary award recommendation or preliminary denial letter to the individual;

Suggested Language for the Proposed Regulation to Address Comment #1:

Treas. Reg. section 301.6103(h)(4)-1 should read as follows:

> (1) By communicating with the whistleblower about a preliminary award recommendation or by communicating a preliminary denial letter to the individual;

Or:

> (1) By communicating with the whistleblower after the filing of the Form 211;

By opening up the language in the Proposed Regulation to at least cover communications with the whistleblower that occur in advance of the "preliminary award determination letter," the IRS could further benefit from the information that can be obtained from whistleblowers to properly compute the award determination and to consider all the facts relevant to that determination.

With all that said, the Proposed Regulation is still missing the forest for the trees. The biggest problem with respect to guidance under section 6103 as it relates to the IRS Whistleblower Program is the failure of the IRS to persuade its own employees that whistleblowers have the potential to greatly assist in the collection of additional tax revenue. Considering that after more than six years the IRS has not entered into a single 6103(n) agreement with a whistleblower, adding a regulation that purports to authorize disclosures under section 6103 only at the award determination phase is an insult to whistleblowers. Simply put, by the time disclosures are made after the preliminary award determination letter is sent to the whistleblower, it is too late to do the IRS any good in terms of collecting more money from noncompliant taxpayers.

Comment on Prop. Treas. Reg. section 301.7623-1 - The General Rules of How to File a Claim are Already in Place.

This ground was already covered by Notice 2008-4. Five years ago. Does adding a list of ineligible whistleblowers help attract whistleblowers? Furthermore, undertaking a project to allow for the electronic filing of Forms 211 would be in our view a complete and utter waste of scarce IRS resources.

Comments on Prop. Treas. Reg. section 301.7623-2 - Several of the Definitions are in Conflict with Section 7623(b).

The "proceeds based on" definition of Prop. Treas. Reg. section 301.7623-2(b) needs to be stricken from the Final Regulation as it is contrary to the statute. Nowhere in section 7623(b) does it say that the IRS must do any of the following things listed in the Proposed Regulation based on information provided by a whistleblower before it is required to pay an award:

> (i) Initiates a new action;
> (ii) Expands the scope of an ongoing action; or
> (iii) 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.

Prop. Treas. Reg. section 301.7623-2(b)

The law that this Proposed Regulation purports to be interpreting actually says in relevant part:

> If the Secretary proceeds with any administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax, and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

Section 7623(b)(1)

On its face the law simply requires that the IRS uses the information provided by a whistleblower, and the use of that information means the whistleblower provided a substantial contribution to an action, then the IRS must pay an award. By adding this overly narrow definition of "proceeds based on" in the Proposed Regulation the IRS may improperly deny awards to whistleblowers whose information was vital to their investigations.

Through this Proposed Regulation the Secretary proposes adding in the word "only" to the statute. Specifically, the statute does **NOT** say:

> If the Secretary proceeds with any administrative or judicial action described in subsection (a) **ONLY** based on information brought to the Secretary's attention by an individual, …

That is an unauthorized interpretation. The statute does not require the whistleblower's information be the only reason the IRS proceeds with a judicial or administrative action. The statute does not even require the whistleblower's information be the primary reason the IRS proceeds with a judicial or administrative action. All the statute requires is that the whistleblower's information be used. The statute further notes that where on the 15-30 percent award spectrum the whistleblower falls depends on the substantial contribution of the whistleblower. If any baseline can be drawn from the statute it is whether the whistleblower "substantially contributed to such action." Section 7623(b)(1)

Logically speaking, the IRS does not proceed with a judicial or administrative action based upon a whistleblower's information unless that information substantially contributes to the assessment or collection of tax, interest, penalties, or additions to tax. This position can be justified by the statute and fulfills what some at the IRS have suggested as needed with this regulation - the IRS will not have to pay an award just because they considered a whistleblower's information. The IRS is, however, required to pay an award whenever it uses a whistleblower's information - there is no free lunch. We would therefore suggest that rather than finalize a regulation that is invalid on its face the Director of the Whistleblower Office should utilize the actual language of the statute when making award determinations.

We also wish to comment briefly that the Secretary is not attracting any whistleblowers by again defining "collected proceeds" in Prop. Treas. Reg. section 301.7623-2(d) to only include "amounts collected under the provisions of title 26, United States Code." If Congress wanted to specify Title 26, they would have done so. Instead, Congress said that awards shall be paid when a whistleblower helps the IRS in:

(1) detecting underpayments of tax, or
(2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same, …

IRC section 7623(a); and

collected proceeds (including penalties, interest, additions to tax, and additional amounts)…

IRC section 7623(b).

Even when the Secretary defines "collected proceeds" in Prop. Treas. Reg. section 301.7623-2(d) to mean only amounts collected under title 26, it is done in a way to further disadvantage tax whistleblowers under the guise of administrative convenience. Specifically, Prop. Treas. Reg. section 301.7623-2(d)(4) "Computation of Collected Proceeds" purports to limit awards on reduced tax attributes like tax credits and net operating losses to only those situations in which the reduced tax attribute results in the payment of tax before the date of the award determination. The Secretary is halfway there. The arbitrary cutoff date of the award determination date has no meaning. The taxes paid the day after the award determination date are just as attributable to the significant contribution of the whistleblower as those paid the day before. While we recognize that these complex attributes create an administrative burden (the IRS must be able to determine that a taxpayer pays tax), that burden is the Service's and not the whistleblower's. The Secretary has no authority to limit the award in this manner, and that limitation is contrary to section 7623(b). Again, section 7623(b) does not say that the IRS shall pay an award on collected proceeds ONLY when it is convenient to do so, it says the Secretary shall pay an award on collected proceeds. Full Stop.

The Proposed Regulations contradict themselves by taking the position that reducing a Net Operating Loss does result in award eligibility when the first dollar of tax is next paid. The Secretary is therefore authorizing the payment of awards for the effect a whistleblower's information has on a taxpayer's attributes, such as Net Operating Losses, but only when it is convenient to do so. Tracking the utilization of tax attributes based on a whistleblower's information is a matter of convenience, it is not an impossibility. Are we seriously to believe that the IRS has a hard time knowing when a taxpayer pays tax or utilizes a Net Operating Loss? Section 7623(b) clearly does not authorize the IRS to avoid paying awards where it would be difficult to track administratively.

Suggested Language for the Proposed Regulation to Address Comment #3:

The definition of "proceeds based on" in Prop. Treas. Reg. section 301.7623-2(b) should be eliminated. There is no ambiguity in the statute and no question as to when the IRS must pay an award for the use of a whistleblower's information. Similarly, the definitions of collected proceeds" and "computation of collected proceeds" in Prop. Treas. Reg. section 301.7623-2(d) and Prop. Treas. Reg. section 301.7623-2(d)(4), respectively, should also be stricken.

Comments on Prop. Treas. Reg. section 301.7623-3 - The Whistleblower Administrative Proceeding is the Whole Process of Tax Whistleblowing which Begins with the Filing of a Form 211, not just the Award Determination Process of Prop. Treas. Reg. section 301.7623-3(c)(1)-(6).

As stated above with respect to Proposed Regulation section 301.6103(h)(4)-1, section 6103(h)(4) does not limit the scope of potential disclosures to begin when the "preliminary award determination letter" is sent. Section 6103 proscribes only that disclosures be made as part of an "administrative or judicial proceeding pertaining to tax administration," and that proceeding begins with the filing of a Form 211. *See IRM 25.2.2.8 (06-18-2010) Whistleblower Award Administrative Proceeding;* as discussed above with respect to comment 1. It is erroneous for the Secretary to say that the whistleblower administrative proceeding begins with the sending of the preliminary award determination letter and ends with the final payment, as set forth in Prop. Treas. Reg. section 301.7623-3(c)(1)-(6) and the preamble to the Proposed Regulations on page 16. At the very least, the administrative proceeding with respect to the award determination itself begins before that letter is sent, because that award must actually be preliminarily determined for that letter to have any contents. However, the proceeding as a whole clearly begins at the time the whistleblower submits her information to the IRS and files a Form 211. By making this preliminary award determination letter appear to be the start of this whistleblower administrative proceeding, the Secretary is limiting its disclosures to the detriment of both the Fisc and whistleblowers. The Secretary's position is akin to stating that a field examination audit begins when the IRS issues a Notice of Deficiency.

Comments on Prop. Treas. Reg. section 301.7623-4 - The Award Computation Process is Flawed in Concept and in Practice.

The Award Computation Process of Prop. Treas. Reg. section 301.7623-4 (c)(1)(i) gives off the illusion of being rational, but we do not believe that in reality the computation methods it proposes for awards are consistent with the statute, which requires awards to be paid in a specified range. The computation is flawed to the detriment of whistleblowers to virtually eliminate the possibility that awards can be paid at the top end of the range.

First, even if all of the positive factors that could apply are met, the IRS is still starting with the premise that the whistleblower should get 15% instead of 30%. This starting from the bottom mentality - in other words paying whistleblowers the bare minimum required by law - discourages whistleblowers with further evidence that they will not be treated fairly. Starting in the middle of the range of 15-30% (22.5%), and then adding or subtracting to that amount as positive or negative factors apply, would be an approach that would appeal to whistleblowers while complying with both the letter and spirit of the law. Again, isn't the Secretary trying to attract whistleblowers? Starting at the bottom is philosophically flawed even if the Secretary is genuinely trying to discourage whistleblowers. Starting at the statutory minimum prohibits the Director of the Whistleblower Office from "punishing" bad whistleblowers who only have Negative Factors and no Positive Factors. Under the proposed regulations, a whistleblower with no Negative or Positive Factors is treated exactly the same as a whistleblower who hits every Negative Factor in the proverbial book; they both get 15%.

Secondly, this proposed computation method appears to eliminate the possibility that a whistleblower can get an 18 % or 26% award unless a negative factor applied to reduce it from 22% or 30%, respectively. The 18%, 22%, and 26% brackets are arbitrary to begin with, but this methodology appears to limit the discretion of the Director of the Whistleblower Office and saddle

him with an obscure and limiting false construct. It would be highly preferable to whistleblowers to at least have a chance at getting a higher award at the discretion of the Director rather than have that possibility mathematically eliminated by an ill advised Regulation. Therefore, we believe that the Director should have the ability to decide the award percentage based on a comparison of the value added in that particular case as compared with the value added by whistleblowers in other cases rather than confining his discretion with this nonsensical artificial construct.

And thirdly, we'd like to see an example of when a 30% award would be warranted. To our knowledge, the IRS has not issued any. Frankly, we are concerned that they may never issue a 30% award no matter how extraordinary the contribution of the whistleblower. Based on the listed positive factors, it appears that a highly knowledgeable corporate insider in a Fortune 500 company setting is ineligible for a 30% award, irrespective of how much she substantially contributed to the IRS's action.

With respect to the "planned and initiated" language of Prop. Treas. Reg. section 301.7623-4(c)(3), it simply ignores the most important fact: who made the decision not to comply with the law. Prop. Treas. Reg. section 301.7623-4 (c)(3)(iv)(A) almost grasps the importance of that fact, but it misses the point by looping back on itself and referring to multiple planners and initiators. We expect that our colleagues in the False Claims Act Bar will be enlightening the Secretary of the well established jurisprudence with respect to who a "planner and initiator" is under the statute that section 7623(b) was modeled after, so we will defer to them on this point. However, we again believe that the Proposed Regulation must be consistent with the statute, and this guidance is ill advised and simply kryptonite to insiders. The prospective whistleblowers who care about this issue are the very same corporate insiders who Congress was trying to attract with section 7623(b). Finally, the examples should provide guidance about what it means to plan and initiate, not how to compute the award. Who is the Secretary trying to provide guidance to here, Director Whitlock or prospective whistleblowers?

Prop. Treas. Reg. section 301.7623-4(c)(5) breaks new ground in providing negative guidance in the area of multiple awards. The statute does not say that multiple claimants who file submissions about the same taxpayer effectively have to split a single award. Period.

Finally, Prop. Treas. Reg. section 301.7623-4(d) raises yet another point that is detrimental to whistleblowers, which is that the IRS forces whistleblowers to waive their appeal rights in order to receive their award. It is patently unfair and discriminatory that whistleblowers have to waive their right to appeal first in order to be paid an award. Just like the extra statutory withholding regime that was unilaterally imposed on whistleblowers in PTMA 2010-63, whistleblowers are again being treated like their own class of second rate citizens. Taxpayers do not waive their right to appeal when they make payments of tax, nor does the IRS waive its right to appeal an erroneous refund when it pays back those taxes as a refund. Yet, in the Proposed Regulation, whistleblowers have no such rights. As a practical matter, the inability to at least be paid some amount of the award they believe they are entitled to under the law applies tremendous pressure on whistleblowers to accept a less than fair award rather than the alternative of waiting possibly several more years of appeals before their award can be paid. This is the kind of rule an adversary writes to give him leverage over a foe. Whistleblowers are not your enemy. Section 7623 does not require this waiver in order for an award to be paid, nor should the IRS.

In closing, we again believe that the Proposed Regulations are detrimental to whistleblowers and will discourage well-informed whistleblowers from participating in the IRS Whistleblower

Program. In particular, the most discouraged will be the highly valuable insider whistleblowers that Congress had hoped to attract when amending section 7623. The Secretary should: avoid reading terms into the statute which can only serve to reduce or eliminate awards; empower the Director of the Whistleblower Office to make his own decisions about how the level of substantial contribution by the whistleblower should be compensated within the full range provided by the law; and not promulgate rules that further restrict disclosures to whistleblowers in a climate of non-cooperation which is currently bordering on negligence. The lack of cooperation with whistleblowers and the ignoring of valuable information is already an issue for which we believe there will be a reckoning, so the Secretary should not ignore the Congressional intent of section 7623 by finalizing these regulations and making it worse. Perhaps the Secretary should take the advice of our mothers and say nothing.

Respectfully submitted,

Scott A. Knott, Esq.

Gregory S. Lynam, Esq.

cc: Robert T. Wearing, Internal Revenue Service.