

# Recent Legislation Expands Tax Whistleblower Awards and Provides Protection from Retaliation

October 17, 2019

Over the past two years, new legislation has enacted considerable reforms to the [IRS's whistleblower program](#) and introduced protections for employees who report tax violations.

## The IRS Whistleblower Award Program

The Internal Revenue Code (IRC) allows for awards to eligible whistleblowers who provide the IRS with information about the underpayment of tax or other violations of the IRC. See 26 USC § 7623(a). Whistleblowers may receive an award where the total proceeds from an enforcement action exceed \$2 million; in the case of a violation by an individual, that individual's gross income must also exceed \$200,000 for each taxable year subject to the enforcement action. See § 7623(b)(5). Eligible whistleblowers receive 15-30% of the "collected proceeds" or settlement from any resulting enforcement action. See § 7623(b)(1). The Whistleblower Office may also provide smaller awards of up to 10% in cases where the whistleblower's contribution was "less substantial." § 7623(b)(2). The IRS may reduce the award if the informant planned or initiated the reported wrongdoing, and the IRS must deny the award if the informant is convicted of criminal conduct for the reported wrongdoing. See § 7623(b)(3).

## Expanding Whistleblower Awards

Until recently, the total "collected proceeds" on which the IRS based an award was limited to payments collected under the IRC and did not include criminal tax penalties. On February 9, 2018, President Trump signed into law the Bipartisan Budget Act of 2018, which includes an update to the definition of "proceeds" under the whistleblower law to include "criminal fines and civil forfeitures, and violations of reporting requirements." [Bipartisan Budget Act of 2018 § 41108](#), 26 U.S.C. § 7623(c). This change to the definition of "proceeds" expands the amount of collections by the government on which the IRS will calculate the 15-30% whistleblower award.

## Reforms under the Taxpayer First Act

On July 1, 2019, President Trump signed into law the Taxpayer First Act (TFA), which passed Congress with bipartisan support. The law enacted a number of sweeping changes to the IRC, including the creation of new IRS notification requirements and an anti-retaliation provision for whistleblowers. The TFA's new whistleblower provisions took effect on July 1, 2019.

### 1. Permissive and mandatory disclosures

The new law outlines certain disclosures that the IRS may make and others it must make to whistleblowers who have submitted a tip. The IRC generally prohibits the IRS from disclosing taxpayer returns and return information, subject to certain exceptions. See 26 U.S.C. §

6103. Because of this prohibition, the IRS Whistleblower Office previously could only tell whistleblowers (1) if their claim was open or closed and (2) the office's determination, i.e., if the whistleblower would receive an award (and the amount) or if the IRS dismissed the claim. See IRS, Publication 5251, [The Whistleblower Claim Process and Timeline](#) (Mar. 2019) . The IRS could not, for instance, tell whistleblowers what sort of investigative or enforcement actions it took, such as audits, collection proceedings, or criminal investigations. See *id.*

The TFA amends the IRC's confidentiality provisions to allow the IRS to disclose to a whistleblower tax return information related to the investigation of the taxpayer against whom the whistleblower provided a tip. See Taxpayer First Act § 1405(a), 26 U.S.C. § 6103(k)(A). However, the IRS may only disclose this information to the extent necessary "in obtaining information, which is not otherwise reasonably available, with respect to the correct determination of tax liability for tax, or the amount to be collected with respect to the enforcement of any other provision of [the IRC]." *Id.*

In addition to those permissive disclosures, the TFA also requires the IRS to provide information to the whistleblower in certain instances. First, the IRS must provide notice within 60 days when it refers a case for audit or examination. See 26 U.S.C. § 6103(k)(B)(i). Second, it must give notice within 60 days when the taxpayer against whom the whistleblower filed the tip makes a tax payment with respect to the tax liability to which the whistleblower's tip relates. See § 6103(k)(B)(ii). Finally, subject to further agency rulemaking, the IRS must respond to a whistleblower's written request for information about (1) the status or stage of the investigation or (2) in the event of a final determination, the amount of any award and the reasons for the determination. See § 6103(k)(B)(iii). The IRS will only respond by mail to written requests sent by mail. See IRS, Whistleblower Reforms Under the Taxpayer First Act, <https://www.irs.gov/compliance/whistleblower-reforms-under-the-taxpayer-first-act>.

## **2. Anti-retaliation provision**

The TFA establishes an important new anti-retaliation provision for employees who report tax violations. This represents a significant step in protecting employees from retaliation by their employers for raising concerns about tax violations, and in doing so, also incentivizes more whistleblowers to come forward. Since at least 2010, in its annual reports to Congress, the IRS has called on lawmakers to include anti-retaliation provisions to protect whistleblowers. See IRS, Fiscal Year 2010 Report to the Congress on the Use of Section 7623 at IV.B.5 (2010), [https://www.irs.gov/pub/whistleblower/annual\\_report\\_to\\_congress\\_fy\\_2010.pdf](https://www.irs.gov/pub/whistleblower/annual_report_to_congress_fy_2010.pdf). The Obama administration's budget included an anti-retaliation legislative proposal each year since FY 2014. See IRS, IRS Whistleblower Program Fiscal Year 2016 Annual Report to the Congress at 9 (2016), [https://www.irs.gov/pub/whistleblower/fy16\\_wo\\_annual\\_report\\_final.pdf](https://www.irs.gov/pub/whistleblower/fy16_wo_annual_report_final.pdf).

The anti-retaliation provision largely tracks other OSHA-administered whistleblower statutes, namely the [Sarbanes-Oxley Act](#) (SOX), which covers employees of publicly traded companies reporting securities violations and certain types of fraud, including against shareholders. The law prohibits employers—as well as officers, employees, or contractors of employers—from retaliating against an employee in reprisal for participating in government actions or for reporting underpayment of tax, violations of the tax code, or violations of any federal law related to tax fraud. See Taxpayer First Act § 1405(b), 26 U.S.C. § 7623(d)(1). The law covers employees who report such tax violations to a number of government entities, including the IRS, the Department of Treasury, the Department of Justice, and Congress. See *id.* Importantly, like SOX, the law also explicitly covers internal reports to "a person with supervisory authority over the employee, or any other person working for the employer who has the authority to investigate, discover, or terminate the misconduct." § 7623(d)(1)(A).

Like SOX and several other whistleblower statutes, an employee has 180 days to file a complaint with OSHA and may remove the case to federal district court after 180 days. See §§ 7623(d)(2)(A)(ii), 7623(d)(2)(B)(iv). The TFA generally models the rules and procedures after the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21) whistleblower program, after which SOX is also modeled. See § 7623(d)(2)(B)(i). Tax whistleblowers will also have the same relatively whistleblower-friendly burdens of proof as AIR21 and SOX claimants. A complainant must show that his or her protected activity was a “contributing factor” to the adverse action; then, the employer must demonstrate by “clear and convincing evidence” that it would have taken the same adverse action in the absence of the protected activity. See § 7623(d)(2)(B)(iii) (citing 49 U.S.C. § 42121(b) (AIR21 burdens of proof)).

The available relief under the TFA tracks SOX remedies. A prevailing employee may receive “all relief necessary to make the employee whole.” § 7623(d)(3)(A). The employee is also entitled to compensatory damages including reinstatement with seniority status and double back pay with interest. § 7623(d)(3)(B). The employee may also recover “special damages,” including litigation costs and reasonable attorneys’ fees. *Id.*

Like SOX, the TFA provides that employees may not waive their rights under this section as a condition of employment. See § 7623(d)(5). Importantly, predispute arbitration agreements that govern disputes arising under the law are not valid or enforceable. See *id.*

## **Key Takeaways**

The Bipartisan Budget Act and the TFA have introduced much-needed reform to the IRS Whistleblower Program. The effect of the Bipartisan Budget Act’s expanded definition of collected proceeds has been immediate. In the same fiscal year that the law passed, the IRS’s total awards to whistleblowers increased nearly tenfold from the previous fiscal year—over \$312 million in FY 2018, as compared to about \$33 million in FY 2017. See IRS, Whistleblower Program Fiscal Year 2018 Annual Report to Congress 9 (2018), [https://www.irs.gov/pub/whistleblower/fy18\\_wo\\_annual\\_report\\_final.pdf](https://www.irs.gov/pub/whistleblower/fy18_wo_annual_report_final.pdf).

Under the TFA, the new disclosure provisions represent a welcome step in a program that has long faced criticism for its “black box” nature. The law, however, has given the IRS considerable discretion to determine the exact contours of the disclosures. Forthcoming agency guidance, therefore, will likely offer a better idea of how significant an impact the IRS’s procedures for written “snail-mail” updates will have on tipsters.

The anti-retaliation provision offers important protection not only to would-be tipsters, but to employees who report wrongdoing internally. The explicit coverage of internal whistleblowing offers a legal remedy to employees who attempt to correct tax violations before going to the authorities, but then face retaliation. It remains to be seen how courts will interpret the statute. Given how closely the language tracks SOX, courts will likely look to interpretations of SOX and similar whistleblower statutes for guidance. It similarly remains to be seen how broadly the agency and courts will read the enumerated violations that employees may report: the underpayment of tax, the violation of internal revenue laws, and the violation of “any provision of Federal law relating to tax fraud,” which reads like a catch-all provision. By comparison, the tip program contemplates reporting on the underpayment of tax and violations of internal revenue laws, but does not include a similar catch-all for tax fraud. See § 7623(a). Once these cases make their way through litigation, whistleblowers and their counsel will see how administrative and federal courts will interpret the various provisions of the statute.