

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 9687]

RIN 1545-BL08

Awards for Information Relating to Detecting Underpayments of Tax or Violations of the Internal Revenue Laws

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: These regulations provide comprehensive guidance for the award program authorized under Internal Revenue Code (Code) section 7623. The regulations provide guidance on submitting information regarding underpayments of tax or violations of the internal revenue laws and filing claims for award, as well as on the administrative proceedings applicable to claims for award under section 7623. The regulations also provide guidance on the determination and payment of awards, and provide definitions of key terms used in section 7623. Finally, the regulations confirm that the Director, officers, and employees of the Whistleblower Office are authorized to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. The regulations provide needed guidance to the general public as well as officers and employees of the IRS who review claims under section 7623.

DATES: Effective Date: These regulations are effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Applicability Date: Sections 301.7623-1, 301.7623-2, 301.7623-3, and 301.6103(h)(4)-1 apply to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under sections 7623(a) and 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Section 301.7623-4 applies to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under section 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

FOR FURTHER INFORMATION CONTACT: Melissa A. Jarboe at (202) 317-5437 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

### **Background**

Section 406 of the Tax Relief and Health Care Act of 2006 (the 2006 Act), Public Law 109-432 (120 Stat. 2922), enacted on December 20, 2006, amended section 7623 of the Code regarding the payment of awards to certain persons who provide information to the IRS relating to the detection of underpayments of tax or the detection and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. In this preamble, the Treasury Department (Treasury) and the IRS use the phrase “underpayments of tax and violations of the internal revenue laws” as a shorthand reference for the range of civil and criminal matters to which information and, in turn, awards may relate under the statute. Section 406 redesignated the existing statutory authority to pay awards at the discretion of the Secretary of the Treasury as section 7623(a), and it added a new provision regarding awards to certain

individuals as section 7623(b). Generally, section 7623(b) provides that qualifying whistleblowers will receive an award of at least 15 percent, but not more than 30 percent, of the collected proceeds resulting from the action with which the Secretary proceeded based on the information provided to the IRS by the whistleblower. In off-Code provisions, section 406 also addressed several award program administrative issues and established a Whistleblower Office within the IRS, which operates at the direction of the Commissioner, to analyze information received under section 7623, assign the investigation to the appropriate IRS office, and determine the amount of the award under section 7623(b).

In Notice 2008-4, 2008-1 CB 253 (January 14, 2008) (see §601.601(d)(2)(ii)(b)), Treasury and the IRS provided guidance on filing claims for award under section 7623. In the notice, Treasury and the IRS recognized that the award program authorized by section 7623(a) had been previously implemented through regulations appearing at §301.7623-1 of the Procedure and Administration Regulations. The Internal Revenue Manual (IRM) provided additional guidance to IRS officers and employees on the award program authorized by section 7623(a). The notice provided that the IRS would generally continue to follow §301.7623-1 and the IRM provisions for claims for award within the scope of section 7623(a), subject to certain exceptions listed in the notice. The notice also provided, however, that the regulations would not apply to the new award program authorized under section 7623(b). Instead, the notice provided interim guidance applicable to claims for award submitted under section 7623(b).

On March 25, 2008, Treasury and the IRS published Temp. Treas. Reg. §301.6103(n)-2T, and corresponding proposed regulations, describing the

circumstances and process in and by which officers and employees of the Treasury may disclose return information to whistleblowers (and their legal representatives, if any) in connection with written contracts for services relating to the detection of violations of the internal revenue laws or related statutes. Whistleblowers and legal representatives that receive return information pursuant to these regulations are subject to the civil and criminal penalty provisions of sections 7431, 7213, and 7213A for the unauthorized inspection or disclosure of return information. Treasury and the IRS finalized the proposed regulations on March 15, 2011 (the 2011 regulations).

In December 2008, the IRS revised IRM Part 25.2.2, updating policies and procedures concerning the handling of information, processing of claims for awards, and payment of awards under section 7623. The IRS also redelegated the authority to approve section 7623(a) awards to the Director of the Whistleblower Office, thereby promoting consistency across the full range of award decisions. Delegation Order 25-07 (Rev.1) (2008). In July 2010, the IRS further revised IRM Part 25.2.2 to provide detailed instructions to IRS officials and employees on the computation and payment of awards under section 7623 and to describe the administrative procedures applicable to claims for award under section 7623(b). The revised IRM introduced many guidance elements that are developed in these regulations, including definitions of key terms, the whistleblower administrative proceedings, the fixed percentage award framework and criteria for making award determinations, and rules on handling multiple and joint claimants.

On January 18, 2011, Treasury and the IRS published proposed regulations (76 FR 2852) clarifying the definitions of the terms proceeds of amounts collected and

collected proceeds for purposes of section 7623 and providing that the provisions of existing §301.7623-1(a), concerning refund prevention claims, apply to claims under both section 7623(a) and section 7623(b). The proposed regulations further provided that the reduction of an overpayment credit balance constitutes proceeds of amounts collected and collected proceeds for purposes of section 7623. Treasury and the IRS finalized the proposed regulations on February 22, 2012 (the 2012 regulations).

On December 28, 2012, Treasury and the IRS published proposed regulations in the Federal Register (77 FR 74798) providing comprehensive guidance with respect to section 7623 (the proposed regulations). The proposed regulations provided guidance on issues relating to the award program under section 7623 from the filing of a claim to the payment of an award, focusing on three major elements of the program: (i) the submission of information and filing of claims for award; (ii) the whistleblower administrative proceedings applicable to claims for award under section 7623; and (iii) the computational determination and payment of awards. The proposed regulations also provided definitions of key terms under section 7623 and confirmed that the Director, officers, and employees of the Whistleblower Office are authorized to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. Treasury and the IRS received 859 comments in response to the proposed regulations. Commenters requested a public hearing, which was held on April 10, 2013. At the hearing, Treasury and the IRS received testimony from eight commenters. After consideration of the comments and hearing testimony, Treasury and the IRS made some modifications to the proposed regulations, which are discussed in detail later in this preamble. This Treasury decision adopts the proposed regulations,

as modified. These final regulations provide comprehensive guidance for the award program authorized under section 7623.

### **Summary of Comments and Explanation of Revisions**

Over 70 percent of the 859 written comments received were identical form letters. These one-page letters expressed support for the comments of Senator Charles Grassley, which were set out in a January 28, 2013, letter from Senator Grassley to Acting Treasury Secretary Neal Wolin, Acting IRS Commissioner Steven Miller, and Assistant Secretary (Tax Policy) Mark J. Mazur. Two other comments incorporated Senator Grassley's January 28, 2013, letter in its entirety, and several comments offered general support for Senator Grassley's views on the IRS Whistleblower Program. In addition to the comments referencing Senator Grassley's letter or views on the Whistleblower Program, Treasury and the IRS received several substantive comments containing specific recommendations for the final regulations. Treasury and the IRS also received over 30 nearly identical comments expressing concern that the proposed regulations restricted the scope of the Whistleblower Program and awards, prohibited whistleblowers from collecting awards on technical grounds, limited the size of whistleblower awards, and failed to require the IRS to act on whistleblower claims. The issues raised in these comments are addressed in greater detail in the discussion that follows.

Treasury and the IRS also received over a hundred comments that referred generally to a need to protect and support whistleblowers and the IRS's Whistleblower Program. These comments offered no further substantive discussion or specific recommendations with respect to the regulations. Treasury and the IRS, however,

considered the general message behind these comments in considering whether changes should be made to the proposed regulations. A few of the comments received suggested that the Chief Counsel, himself, should not be involved in the process of finalizing the regulations due to his professional experience prior to becoming Chief Counsel. After considering these comments, Treasury and the IRS found that the concerns expressed in the comments were unfounded. Accordingly, the Chief Counsel did not recuse himself from the process. Finally, Treasury and the IRS received a few comments that were completely unrelated to the proposed regulations and the IRS Whistleblower Program. These unrelated comments were outside the scope of the regulations and therefore are not discussed further in this preamble or these final regulations.

Information Disclosures in Whistleblower Administrative Proceedings—§301.6103(h)(4)-  
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Under section 6103(a), returns and return information are confidential, unless an exception applies. Section 6103(h)(4) authorizes the disclosure of returns and return information in administrative or judicial proceedings pertaining to tax administration in certain circumstances. A whistleblower administrative proceeding under section 7623 is an administrative proceeding under section 6103(h)(4). Section 301.6103(h)(4)-1 of the proposed regulations specifically confirmed the authority of the Director, officers, and employees of the Whistleblower Office to disclose return information to the extent necessary to conduct whistleblower administrative proceedings. To minimize the potentially adverse consequences of the disclosure, and possible redisclosure, of return information, the proposed regulation provided that the Whistleblower Office will use confidentiality agreements in section 7623(b) whistleblower award determination

administrative proceedings, as well as other safeguards, while still providing meaningful opportunities for whistleblowers to participate in whistleblower administrative proceedings.

In general, the comments received viewed these provisions favorably. One commenter recommended that section 6103 and §301.6103 be amended to permit greater communication between the IRS and whistleblowers. Treasury and the IRS lack the authority to amend section 6103. Accordingly, the final regulations do not adopt this comment. Instead, in the proposed regulations, Treasury and the IRS took steps to expand the opportunities for communication between the IRS and whistleblowers within the confines of the IRS's existing authority under section 6103. For example, Treasury and the IRS provided for whistleblower administrative proceedings, in part, to increase the IRS's ability to communicate with whistleblowers. Some comments suggested that whistleblower administrative proceedings should begin earlier, and these comments are more fully addressed in the discussion of §301.7623-3. Treasury and the IRS determined that the proposed regulations struck an appropriate balance among minimizing possible redisclosures of confidential return information, providing meaningful opportunities for claimants to participate in the administrative process, and placing an undue burden on the Whistleblower Office. After consideration of the comments, the proposed regulation under section 6103 is adopted without substantive change.

#### Submitting Information and Filing Claims for Award—§301.7623-1

This final regulation provides guidance on submitting information to the IRS and filing claims for award with the Whistleblower Office. The regulation is intended to



clarify the process whistleblowers should follow to be eligible to receive awards under section 7623. The final regulation, in large part, tracks the rules that Treasury and the IRS have previously provided, as set forth in the 2012 regulations, the proposed regulations, Notice 2008-4, and the IRM. The comments received and any changes to proposed §301.7623-1 are discussed in the sections that follow.

#### Terminology for Individuals who Submit Information and Claim an Award

Under section 7623(a), the Secretary possesses the discretionary authority to pay awards for information necessary to detect underpayments of tax or violations of the tax laws. Section 7623(b) further requires the payment of awards to individuals in certain circumstances. The proposed regulations used both the term “individual” and the term “claimant” in various respects. Generally, the terminology in the proposed regulations was designed to mimic the statute’s use of the term “individual(s).” One commenter suggested that the final regulations should use the term “claimant” throughout and eliminate all references to the term “individual.” The final regulations recognize, however, that not all individuals who submit information to the IRS regarding tax non-compliance become award claimants. To achieve consistency with Treas. Reg. §301.6103(n)-2 and reduce any confusion caused by the use of several terms, Treasury and the IRS changed almost all of the references to “individual” or “claimant” to “whistleblower” in the final regulations. In some instances, however, the final regulations still use the term “individual” to mimic the statute. These changes are not intended to be substantive in nature.

#### List of Ineligible Whistleblowers

Section 7623 does not specifically exclude any whistleblower from filing a claim for award, although awards under section 7623(b) are limited to individuals. Moreover, section 7623(b)(3) requires the Whistleblower Office to deny an award to a whistleblower convicted of a crime arising from the whistleblower's role in planning and initiating the actions that led to the underpayment of tax or violations of the internal revenue laws. The regulations in effect under section 7623 at the time of the 2006 amendments to the statute, however, restricted the eligibility of Federal employees to file claims for award. The 2006 amendments to section 7623 did not address, and thus did not seek to change, the rule of Federal employee ineligibility. In the proposed regulations, the IRS identified as ineligible certain categories of individuals that would have access to return information of third parties by virtue of their relationship with the Federal Government. These categories were identified in Notice 2008-4, and their exclusion was based upon the understanding that such individuals have a pre-existing legal or ethical obligation to disclose any violations of the internal revenue laws. For example, section 7214 of the Code requires "[a]ny officer or employee of the United States acting in connection with any revenue law of the United States...who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law...to report, in writing, such knowledge or information to the Secretary."

Treasury and the IRS received two comments suggesting that the list of ineligible or excluded claimants included in the proposed regulations was overbroad, and one comment recommending that the proposed regulations should be finalized without change. One commenter suggested that, with respect to State and local government

employees, only those that have access to Federal tax return records related to State and local taxpayers should be ineligible. The other commenter suggested that the only whistleblowers excluded from receiving awards under the statute are those convicted of a crime for planning and initiating, and thus the IRS should not identify any ineligible whistleblowers. This commenter also expressed concern that the exclusion of individuals required to disclose (or to not disclose) information under Federal law was too vague and would discourage whistleblowers from submitting information. Finally, the commenter that suggested the proposed regulations should be adopted without change noted that individuals should not be eligible to receive awards after obtaining information in the course of their employment as a Federal employee.

The final regulations address the concerns raised by commenters that the categories of ineligible claimants in the proposed regulations were too broad. Treasury and the IRS agree with the commenters that the categories of ineligible whistleblowers should be narrowly defined. Accordingly, in finalizing the regulations, Treasury and the IRS removed State and local government employees and members of a Federal or State body or commission from the categories of ineligible whistleblowers. Treasury and the IRS determined that the final regulations should continue to reflect the longstanding statutory, regulatory, and contractual requirements that Federal employees and contractors have a duty to disclose information and are prohibited from seeking an award for the performance of such duty. Similarly, under the final regulations, an individual otherwise required to disclose information or precluded from disclosing information by Federal law or regulation is not eligible to claim an award for providing such information. This reflects Treasury and the IRS's determination that

section 7623 does not incentivize conduct that is either already mandated by, or contrary to, Federal law.

#### Submission of Information

Any individual may submit information to the IRS regarding suspected underpayments of tax or violations of the internal revenue laws. The proposed regulations provided that the information submitted must be specific and credible if the individual intends to submit a claim for award based on the information submitted. In this regard, the proposed regulations provided that a whistleblower submitting a claim should identify a person and describe and document the facts supporting the whistleblower's belief that the person owes taxes or violated the tax laws.

One commenter suggested that the proposed regulations improperly required whistleblowers to identify a specific taxpayer in the submission of information. The proposed regulations did not, however, require that a whistleblower's information identify a taxpayer by name. The IRS and the Whistleblower Office must be able to identify a taxpayer in order to proceed with an action and, ultimately, to determine an award. The more identifying information that a whistleblower includes in the submission, the more likely it is that the submission will be considered to identify a taxpayer. Treasury and the IRS determined that the concerns raised in the comment are adequately addressed by the language in the proposed regulations. Accordingly, these regulations retain the rule from the proposed regulations.

#### Penalty of Perjury Requirement

To form the basis for an award under section 7623(b), section 7623(b)(6)(C) requires that information be submitted under penalty of perjury. The proposed

regulations required any claim for award to be accompanied by an original signed declaration under penalty of perjury that the application is true, correct, and complete to the best of the applicant's knowledge. One commenter suggested that the final regulations should expressly address how the penalty of perjury declaration applies to information submitted by a whistleblower subsequent to the initial claim for award. In general, the IRS requires a penalty of perjury declaration only as part of the initial claim for award. In most cases, the IRS does not require that a whistleblower reaffirm the original penalty of perjury declaration and, instead, the IRS deems the original declaration to cover any subsequent information submitted by the whistleblower. This is reflected in the Instructions to the Form 211, "Application for Award for Original Information," which provide that supplemental submissions of information need not be submitted as a claim for award with the corresponding penalty of perjury declaration. In some cases, however, the IRS may ask a whistleblower to reaffirm the penalty of perjury declaration with respect to a subsequent information submission. In those cases, the whistleblower will be given an opportunity to—and must—reaffirm the penalty of perjury declaration for the information to be considered submitted under penalty of perjury. Treasury and the IRS anticipate that these cases will be rare, and additional information submitted after a claim for award may be addressed by the IRS on a case-by-case basis. Accordingly, these regulations retain the rule from the proposed regulations.

#### Request for Assistance

The 2006 Act provided that the IRS may ask for assistance from whistleblowers. As noted, in the 2011 regulations, Treasury and the IRS provided final rules under

section 6103(n) describing the circumstances and process in and by which officers and employees of the Treasury may disclose return information to whistleblowers (and their legal representatives, if any) in connection with written contracts for services and assistance. The proposed regulations clarified that the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel may request assistance from a whistleblower or the whistleblower's representative. The proposed regulations provided that such assistance shall be at the direction or control of the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel. The proposed regulations also referred to Treas. Reg. §301.6103(n)-2 for rules regarding written contracts between the IRS and whistleblowers or their representatives.

Several commenters suggested that the regulations should do more to improve and expand communications between the IRS and whistleblowers. Many commenters specifically addressed the IRS's use of section 6103(n) contracts. Commenters often expressed concern that the IRS does not effectively utilize section 6103(n) contracts and suggested that the IRS should make better use of its section 6103(n) contract authority to facilitate increased communication with, and participation by, whistleblowers. One commenter suggested that the regulations should clarify when the IRS will use its contract authority and establish protocols for its use. This commenter also suggested that the regulations could do more to clarify when and what type of information can be shared with the whistleblower so that he or she may assist the IRS. Another commenter suggested that the regulations should require the Whistleblower Office and the IRS Office of Chief Counsel to request assistance by conducting a debriefing of the whistleblower in all cases.

As noted, returns and return information are confidential pursuant to section 6103, unless an exception applies. In a 2012 memorandum to the IRS Operating Divisions, the IRS stressed the use of methods of communicating with whistleblowers within the framework of section 6103. IRS Whistleblower Program Memorandum (Deputy Commissioner for Services and Enforcement Steven T. Miller, June 20, 2012) (the 2012 memo). The 2012 memo recognized the value of whistleblower debriefings and stated the expectation that debriefings will be the rule, not the exception. The IRS routinely debriefs whistleblowers to clarify and develop the information provided. Although not discussed in the 2012 memo, the IRS has also relied, and will continue to rely, on section 6103(k)(6) to disclose information to whistleblowers when the disclosure is necessary to obtain information from the whistleblower. These investigatory disclosures are a routine element of the IRS's enforcement activities. The 2012 memo also noted that section 6103(n) contracts may be used when disclosure of taxpayer information is necessary to obtain a whistleblower's expertise into complex technical or factual issues. Although the IRS's need for this level of expertise into complex issues arises less commonly than the need for section 6103(k)(6) investigative disclosures, the IRS Operating Divisions will use this tool as needed. Specific issues regarding the use of section 6103(n) contracts by the IRS and whistleblowers are beyond the scope of these regulations. These regulations do not specifically address section 6103(n) contracts because they are already provided for in regulations under section 6103, as appropriately reflected by the cross reference contained in the proposed regulations and these regulations. Nevertheless, debriefings, section 6103(k)(6) disclosures, and section 6103(n) contracts are not the only methods by which the IRS communicates

with whistleblowers. Later in the life cycle of the underlying tax matter, the IRS Office of Chief Counsel may, under section 6103(h)(4), seek assistance from a whistleblower in litigating a case. For example, the IRS Office of Chief Counsel has relied on, and will continue to rely on, whistleblowers as potential witnesses in Tax Court cases, but only as needed and only following appropriate consideration of whistleblower confidentiality concerns, as discussed later in this preamble. Finally, as discussed both earlier and later in this preamble, these regulations provide whistleblower administrative proceedings that will, in many cases, enable two-way communications with whistleblowers before the IRS makes the award determination.

#### Confidentiality of Whistleblowers

Section 7623 does not provide any protections regarding the identification of whistleblowers. Treasury and the IRS, however, are very sensitive to the legitimate concerns whistleblowers have with protecting their identities. In the Administration's Fiscal Year 2014 and 2015 Revenue Proposals, Treasury recommended amending section 7623 to explicitly protect whistleblowers from retaliatory actions, consistent with the protections currently available to whistleblowers under the False Claims Act. Moreover, existing Treas. Reg. §301.7623-1(e) provides that "[n]o unauthorized person will be advised of the identity of an informant." The proposed regulations reaffirmed the commitment of Treasury and the IRS to safeguard the identity of whistleblowers who submit information under section 7623. Under the proposed rules, the IRS reaffirmed that it will use its best efforts to: (i) prevent the disclosure of a whistleblower's identity; and (ii) notify a whistleblower prior to any disclosure. One commenter suggested that the final regulations should go further and require notification to a whistleblower prior to



any disclosure. Another commenter suggested that whistleblowers should be allowed to opt out of the informant privilege. This commenter suggested that allowing the whistleblower to opt out of the informant's privilege would decrease the amount of time for an administrative action because it would allow the IRS to use and rely upon documents provided by the whistleblower, rather than seeking to independently gather the documents.

The informant privilege allows the Government to withhold the identity of a person that provides information about violations of law to those charged with enforcing the law. The informant privilege is held by the Government, not the informant, and is not an absolute privilege. There may be instances when, after careful deliberation and high-level IRS approval, the disclosure of the identity of a whistleblower may be determined to be in the best interests of the Government. Nonetheless, in such cases, the IRS first carefully considers and weighs the potential risks to the whistleblower and the Government's need for the disclosure, and looks for alternative solutions.

The final regulations reflect the determination of Treasury and the IRS that preventing the disclosure of whistleblower information is of critical importance not only to whistleblowers, but also to the IRS's whistleblower program. The IRS has implemented a multi-level review process to ensure that the identities of whistleblowers are disclosed only after careful consideration. The IRS will continue to use its best efforts to prevent disclosures and to provide notification prior to any disclosure. The IRS recognizes, however, that despite its best efforts, it may not always be possible to provide such notification.

In some instances, whistleblowers have consented to the disclosure of their identities in the hope that the IRS will proceed with a tax case more quickly. Even when a whistleblower consents to disclosure, however, disclosing the whistleblower's identity may not be in the Government's best interest. Moreover, a whistleblower cannot unilaterally opt out of the informant privilege because the privilege is held by the Government. Finally, it is the longstanding practice of the IRS to justify tax adjustments through information obtained independently of the whistleblower. This enables the IRS to better defend tax adjustments in court and supports the IRS's sound administration of the tax case. As such, the IRS will act on specific and credible information regarding tax compliance issues when that information can be corroborated, as part of a balanced tax enforcement program, and will not forgo this process at the whistleblower's request to expedite a potential award. Accordingly, these regulations retain the rule from the proposed regulations.

#### Electronic Claim Filing

Section 7623 does not require the submission of information or claims for an award to be in a particular format. To claim an award for information provided to the IRS, the proposed regulations provided that a whistleblower must file a formal claim for award by completing and sending Form 211, "Application for Award for Original Information," to the Internal Revenue Service, Whistleblower Office, at the address provided on the form, or by complying with other claim filing procedures as may be prescribed by the IRS in other published guidance. Currently, a whistleblower cannot file a Form 211 electronically. The proposed regulations solicited comments on whether

electronic claim filing would be appropriate and beneficial to whistleblowers, and if so, what features should be included in an electronic claim filing system.

Treasury and the IRS received several comments suggesting that such procedures would be beneficial, but some commenters expressed concern with how an electronic claim filing system would be implemented. Based upon the varied comments received, Treasury and the IRS have decided not to include specific guidance on electronic claim filing in the final regulations. The final regulations adopt the proposed rule and require whistleblowers to file a formal claim for award by completing and sending a Form 211 to the IRS. The language in the final regulations does, however, allow for the IRS to specify an alternative submission method pursuant to additional guidance. If Treasury and the IRS implement electronic claim filing, the comments received on the proposed regulations regarding implementation will be considered and addressed in future guidance.

#### Definitions of Key Terms—§301.7623-2

These final regulations define several key terms for purposes of determining awards under section 7623 and the corresponding regulations. These terms include: action, administrative action, judicial action, proceeds based on, related action, collected proceeds, amount in dispute, and gross income. Two other key terms, planned and initiated and final determination of tax, are described and defined in §301.7623-4 of these regulations. The definitions are intended to facilitate the IRS's administration of the whistleblower award program in a manner that is consistent with the statutory language. As described later in this preamble, several of the definitions, including the definition of the terms proceeds based on, related action, and collected

proceeds, build on definitions contained in Notice 2008-4, the 2012 regulations, and the IRM. The comments received and any changes to the definitions of these terms are addressed in the sections that follow.

### Administrative Action

The application of section 7623(b) hinges on whether the IRS proceeds with an action, and more specifically, an administrative or judicial action, against a taxpayer. Section 7623 does not, however, define the terms action, judicial action, or administrative action. The proposed regulations defined an administrative action as all, or a portion of, an IRS civil or criminal proceeding against a person that may result in collected proceeds. Examples of an administrative action include an examination, a collection proceeding, a status determination proceeding, or a criminal investigation. And, as noted, under the proposed regulations, an administrative action can be a discrete portion of an IRS civil proceeding. For example, the examination of a single issue, within a multi-issue examination, can constitute an administrative action. In such a case, determinations such as whether the IRS proceeded with the action based on the whistleblower's information or the extent of the whistleblower's substantial contribution to the action will be made by reference to just the discrete and relevant portion of the examination to which the information provided relates.

One commenter suggested that an administrative action should begin with the filing of a claim for an award. Although the commenter made this suggestion in the context of the definition of "administrative action," Treasury and the IRS believe that it relates to the whistleblower award administrative proceedings discussed later in this preamble. Some commenters suggested that the definition of the term "administrative

action” should be broader. More specifically, one commenter suggested that the list of examples should include making an assessment and another commenter suggested that the term “administrative action” should encompass all actions taken by the IRS to initiate taxpayer compliance by any means. Finally, commenters expressed concern that a whistleblower would not be entitled to an award when the whistleblower’s information related to an issue that was already being examined, but resulted in the IRS making a greater assessment than the IRS would have made without the whistleblower’s information. Commenters raised a similar concern in discussing the proposed regulations’ definition of the term proceeds based on. This concern is addressed in that section of this preamble.

Off-code provisions of the 2006 Act explicitly provide that the IRS will analyze information received under section 7623 and investigate the matter. Given that this requirement must be satisfied by the IRS with respect to all information provided, it follows that the techniques and tools used by the IRS to do the analysis and investigation of the whistleblower’s claim cannot in and of themselves provide a basis—they cannot be the administrative action—that supports an award determination. Nonetheless, if a whistleblower’s information contributes to the IRS’s use of these techniques and tools, for example, the issuance of a summons or Information Document Request, and these intermediate steps result in an administrative action, as defined in the regulations, then the IRS will determine whether it proceeded with that resulting administrative action based on the information, as described further in the discussion of the definition of proceeds based on. Similarly, an assessment is a bookkeeping entry employed by the IRS to reflect a determination that results from an administrative action

within the meaning of section 7623. Because an assessment merely reflects the determination that results from an administrative action, it is not appropriate to include the making of an assessment in the definition of the term administrative action. Essentially, the definition of administrative action is broadly analogous to the definition of judicial action, as each term focuses on a case against a taxpayer that may result in collected proceeds, rather than on any particular tools or techniques used to conduct the case. After considering the comments on the definition of administrative action, the definition in the proposed regulations is adopted without change. Treasury and the IRS did, however, address some of the concerns raised by the comments on this definition through changes to the definition of proceeds based on, as described in the discussion that follows.

#### Proceeds Based On

Section 7623(b) provides that if the Secretary proceeds with an administrative or judicial action based on the information provided by a whistleblower, then the whistleblower will receive an award from the collected proceeds resulting from the action (including any related actions). Under the proposed regulations the IRS proceeds based on information provided by an individual only when the IRS: (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. The IRS does not proceed based on when the IRS merely analyzes the information provided by the individual and investigates the matter.

Commenters to the proposed regulations generally expressed concern that the regulatory language narrowed the scope of the statute by limiting the instances in which the Whistleblower Office will determine that the IRS proceeded based on a whistleblower's information. Some commenters disagreed with the use of the words "only" and "but for" in the proposed regulations' definition and suggested removing this language. One commenter recommended removing the last sentence in the proposed regulations' definition—"The IRS does not proceed based on when the IRS merely analyzes the information provided by the individual and investigates the matter." Some commenters suggested that the IRS should be considered to proceed based on information anytime that the IRS "uses" the information, or more specifically, anytime the information is transmitted by the Whistleblower Office to an IRS field office for further investigation. Some commenters suggested that the definition needed to specifically include instances when a whistleblower's information materially or substantially assists in or significantly contributes to the IRS's detection and recovery of tax. As noted in the discussion of the definition of administrative action, some commenters expressed concern that a whistleblower would not be entitled to an award when the whistleblower's information related to an issue that was already being examined or was included in a general audit plan, but resulted in the IRS making a greater assessment than the IRS would have made without the whistleblower's information. Similarly, some commenters expressed concern that under the proposed regulations' definition, the IRS could use a whistleblower's information but assert that it would have acted without the information and therefore determine that the IRS did not proceed based on the information.

As noted, the off-Code provisions of the 2006 Act require the IRS to analyze the information provided by the whistleblower (in the Form 211 and otherwise, such as through debriefs) and investigate the matter. As a result, it follows that for the IRS to proceed based on the information provided, the IRS must do more than this analysis or investigation. Therefore, Treasury and the IRS retained this explanatory language in the final regulations. Treasury and the IRS recognize, however, that, by listing exclusive actions taken by the IRS, the proposed regulations created the appearance that individuals who provide information that is not only used by the IRS, but is in fact critical to sustaining tax adjustments, might not receive awards. Accordingly, these final regulations adopt a general standard for when the IRS proceeds based on information provided—when the information substantially contributes to the action—and the list of exclusive actions are cited as examples of when the information provided may substantially contribute to an action. In addition, the final regulations remove the word “only” from the definition. Accordingly, under the final regulations, the Whistleblower Office must determine when the information provided substantially contributed to the underlying action, and this determination will depend on the facts and circumstances of each individual case. Nevertheless, the final regulations provide additional examples to clarify the operation of the rule. These examples illustrate that the whistleblower’s information substantially contributes to the underlying action if it leads to an examination, an expansion of an issue already being examined, an expansion of the examination to another year, or an additional adjustment. The examples also illustrate that the whistleblower’s information does not substantially contribute to the underlying



action if that information merely supports information obtained independently by the IRS.

#### Related Action

Under section 7623(b), when the IRS proceeds with an action based on a whistleblower's information, the whistleblower receives an award from the collected proceeds resulting from the action (including any related actions). Under the proposed regulations the term related action was limited to: (i) a second or subsequent action against the person(s) identified in the information provided and subject to the original action if, in the second or subsequent action, the IRS proceeds based on the specific facts described and documented in the information provided; and (ii) an action against a person other than the person(s) identified in the information provided and subject to the original action if: (A) the other, unidentified person is directly related to the person identified in the information provided; (B) the facts relating to the underpayment of tax or violations of the internal revenue laws by the other person are substantially the same as the facts described and documented in the information provided (with respect to the person(s) subject to the original action); and (C) the IRS proceeds with the action against the other person based on the specific facts described and documented in the information provided. Under the proposed regulations an unidentified person was directly related to the person identified in the information provided if the IRS can identify the unidentified person using only the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).

The definition of the term related action contained in the proposed regulations defined which actions may be included for purposes of computing collected proceeds by requiring a clear link between the original action and the other, related action(s). This clear link required: (i) a direct relationship between the person identified in the information provided and subject to the original action and the person(s) subject to the other action(s); and (ii) a substantial similarity between the specific facts contained in the information provided and the relevant facts of the other action(s).

In general, comments received on the definition of related action in the proposed regulations, including the form letters, suggested that the definition was too restrictive. The commenters suggested that instead of requiring a direct relationship, the IRS should conduct a proximate cause analysis, under which related actions are those actions with which the IRS proceeds in a natural and continuous sequence from the actions first taken in response to a whistleblower's information. One commenter suggested that a direct relationship or one-step rule is inconsistent with the ordinary meaning given to the term "related." Another commenter suggested that a related action should be any issue that is related to the whistleblower's submission with respect to the tax year, the taxpayer, or the tax issue. This commenter expressed concern that the definition of related action would exclude subsequent years of the same taxpayer for which the same issue exists, unless the information provided contained specific facts and documentation from those subsequent years. Two other commenters suggested that the language at Prop. Reg. §301.7623-2(c)(i) describes an original action rather than a related action. These commenters suggested that when the IRS initiates a second or subsequent action against a person identified in the information provided by

the whistleblower based on the specific facts described and documented in the information provided, then the IRS has proceeded based on the information and there is therefore no need to look to the definition of related action to determine the whistleblower's eligibility for an award.

After considering the comments, Treasury and the IRS determined that the concern that whistleblowers would not be given full credit for the information provided was partially addressed through the changes made to the definition of the term proceeds based on in the final regulations and described earlier in this preamble. Moreover, the broadened language of the definition of the term proceeds based on in the final regulations encompassed and made redundant the language in Prop. Reg. §301.7623-2(c)(i) that focused on actions involving subsequent tax years and, thus, it was removed from the final regulations. The corresponding example illustrating the application of the rules to actions involving subsequent tax years moved with the rule to the definition of proceeds based on. Finally, Treasury and the IRS made several non-substantive revisions to the language of the definition of related action.

The final regulations retain the proposed regulations' requirement of a clear link between the original action and any other, related action(s), which requires: (i) a substantial similarity between the specific facts contained in the information provided and the relevant facts of the other action(s); and (ii) a relationship between the person identified in the information provided and subject to the original action and the person(s) subject to the other action(s). This conjunctive test excludes from the definition of related action actions that are merely factually similar to the original action, for example, actions against unidentified taxpayers that merely engaged in substantially similar

transactions to the transaction identified in the information provided. The relationship test in the second prong thus retains a one-step rule: the taxpayer subject to the related action can be no more than one step removed—in terms of identification by the IRS—from a taxpayer identified in the information provided. In addition, the final regulations at §301.7623-1(c)(1) provide that certain information submissions relating to pass-through entities and firms will be considered to have identified certain persons who were not explicitly identified in the information provided.

Despite commenters' requests that the definition should be even broader and more subjective, Treasury and the IRS determined that the clear link approach is a reasonable interpretation and application of the language contained in section 7623. Treasury and the IRS determined that the final regulations' definition of the term related action finds a reasonable middle ground between overly narrow and overly broad interpretations. For example, the term could be given a narrow application, encompassing only actions that follow from the action with which the IRS proceeded based on the information and actually produce collected proceeds. Given that many administrative and judicial actions produce no collected proceeds, this interpretation would give effect to the statutory language in such cases by ensuring that whistleblowers would receive awards when any related actions produce collected proceeds. Treasury and the IRS have concluded that such a definition would be too narrow because, under this interpretation, a related action (such as a collection action) would be required in almost every case. At the other end of the spectrum, the term related action could be broadly interpreted to include every similar fact pattern entered into by any taxpayer at any time. Such an interpretation is overly broad and would be

impossible for the IRS to administer because it would require the IRS to keep whistleblower claims open and search for similar fact patterns in perpetuity.

Instead, these final regulations adopt a definition that finds a reasonable middle ground. The definition encompasses a finite group of actions that, while likely unknown to the whistleblower, are objectively connected to the information provided. Treasury and the IRS adopt the one-step approach of the proposed regulations because, by setting a clear standard for the Whistleblower Office to apply, the one-step approach is administrable. Tort law concepts, on the other hand, are rarely applied to tax, and the appropriate application of such concepts is unclear. Finally, based on the IRS's experience administering whistleblower claims, Treasury and the IRS believe that, in most cases, the results of a proximate cause analysis and a one-step approach are likely to be the same. Ultimately, Treasury and the IRS determined that the definition in the final regulations provides an administrable, objective test that strikes an appropriate balance between the IRS's and the whistleblower's substantial contributions.

#### Collected Proceeds

Section 7623(a) provides the Secretary with the authority to pay such sums as he deems necessary from proceeds of amounts collected based on information provided to the Secretary when the information relates to the detection of underpayments of tax or the detection and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. Section 7623(b) requires the Secretary to pay awards to whistleblowers if the Secretary proceeds with an administrative or judicial action that results in collected proceeds based on information provided by the whistleblower. The definition of collected proceeds contained in the proposed

regulations built on the definition contained in the 2012 regulations. The definition in the proposed regulations restated the rule from those final regulations that collected proceeds include: tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided; amounts collected prior to receipt of the information provided if the information results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided. The definition also addressed refund netting, criminal fines that must be deposited into the Victims of Crime Fund, and a computational rule for determining collected proceeds. Finally, consistent with provisions in the IRM, the proposed regulations provided that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds, because the language of section 7623 authorizes awards for detecting underpayments of tax and violations of the internal revenue laws. Several commenters addressed various aspects of the definition of collected proceeds contained in the proposed regulations. The substance of these comments and the determinations of Treasury and the IRS are set out in detail in the preamble discussion that follows.

#### Timing Issues and Treatment of Tax Attributes Including Net Operating Losses (NOLs)

Section 7623 provides for the payment of awards from collected proceeds, but it does not specifically address the treatment of claims that involve tax attributes that do not result in collected proceeds for many years, if ever. The proposed regulations provided a computational rule that reflects the discussion contained in the preamble to the 2012 regulations. There, Treasury and the IRS noted that tax attributes such as NOLs do not represent amounts credited to the taxpayer's account that are directly

available to satisfy current or future tax liabilities or that can be refunded. Rather, tax attributes such as NOLs are component elements of a taxpayer's liability. The disallowance of an NOL claimed by a taxpayer may affect the taxpayer's liability and, in the context of a whistleblower claim, may result in collected proceeds or it may be carried forward 20 years and expire, thus never resulting in collected proceeds. To enable the IRS to administer the Whistleblower Program, the proposed regulations' computational rule provided that, after there has been a final determination of tax, the IRS would compute the amount of collected proceeds taking into account all information known with respect to the taxpayer's account (including all tax attributes such as NOLs). Under the proposed regulations, any tax attributes that have been used at the time of the final determination of tax may affect the award amount. The proposed regulations reflected Treasury and the IRS's attempt to make an award determination and pay any resulting award as soon as possible after proceeds are collected. The proposed regulations also reflected Treasury and the IRS's determination that tracking tax attributes into the future after payment of an award would impose significant costs and a heavy administrative burden. Thus, the proposed rule attempted to balance the whistleblower's interest in receiving a timely award determination and payout with the Government's interest in maintaining an administrable program.

Several commenters suggested that the proposed regulations did not strike the appropriate balance and recommended that tax attributes, specifically NOLs, should be included in the definition of collected proceeds. The commenters generally expressed concern that under the proposed regulations, a whistleblower might not receive credit for proceeds collected after the final determination of tax, as a result of tax attributes

being carried forward to reduce a later liability. Some commenters suggested that the IRS should attempt to calculate and apply a present value to determine an award amount for any unused tax attributes. Other commenters recommended that, in the final regulations, the IRS should agree to track tax attributes for a specific period of time, for example, ten years. One commenter suggested that after the period of time that the IRS had agreed to track, the whistleblower and the IRS could enter into a settlement agreement wherein the whistleblower could agree to the amounts computed as of that date and waive any rights to a future appeal. Finally, one commenter recommended that the IRS should allow whistleblowers to submit a new claim for award when the whistleblower was aware of subsequently collected proceeds.

In light of the comments received, Treasury and the IRS have reconsidered the approach in the proposed regulations. These final regulations provide that the Whistleblower Office will monitor the relevant taxpayer account or accounts until the IRS receives collected proceeds as a result of a reduction in the tax attribute, or the taxpayer's ability to apply the tax attribute expires unused. For example, if a NOL is reduced as a result of actions taken based on whistleblower information, the Whistleblower Office will periodically review the taxpayer account to determine whether future year tax payments are made that would not have been made if the NOL had not been reduced. Under the approach in the final regulations, awards will be paid on any such post-determination collected proceeds. If the NOL carry-forward period expires before the reduced NOL results in a tax payment, no award will be payable.

The decision to monitor future year activities for impact on the amount of collected proceeds will apply to all claims, not just claims involving NOLs. As a result, in



some cases, the Whistleblower Office may defer action on an award claim. For example, whistleblower information may result in IRS action to disallow a taxpayer's treatment of the purchase of an asset as an expense in Year 1, because the asset should be capitalized and depreciated in accordance with the applicable depreciation schedule. As a result, taxable income in Year 1 is increased by the purchase price of the asset, less allowable Year 1 depreciation. Taxable income in future years would be reduced by the allowable depreciation for each year, until the asset is fully depreciated (or sold or otherwise disposed of). When this occurs, the Whistleblower Office will monitor the taxpayer's account to determine whether future year offsetting reductions in liability related to the Year 1 tax liability occur, and will reduce the amount of collected proceeds accordingly.

The adoption of a monitoring approach in the final regulations, however, is only intended to explicitly enable the IRS to make an additional award payment when a tax attribute produces collected proceeds after an award has been determined, as described in the preceding paragraphs. It is not intended to, and does not in any way, limit the Whistleblower Office's discretion to aggregate or disaggregate claims, nor does it provide a basis for, or enable the IRS to make, mandatory, partial, or ongoing award determinations and payments every time the IRS collects some amount of proceeds. In other words, monitoring does not alter the general rule that no award will be paid until there has been a final determination of tax, as defined in the final regulations.

#### Amounts Collected Under Title 26

Section 7623 of Title 26 provides for awards for information leading to detection of underpayments of tax or violations of the internal revenue laws. The proposed

regulations provided that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds for award purposes. The majority of comments, including the form letters, suggested that such amounts, specifically amounts collected under Title 18 and Title 31, should be included in collected proceeds. Many of the comments suggested that not including amounts collected under Title 18 and Title 31 eliminates a whistleblower's incentive to provide information on violations under those titles and could reduce the number of whistleblowers willing to provide such information to the IRS. The comments generally suggested that collected proceeds should include any amounts that are collected by the IRS. A few comments also suggested that the statutory language "collected proceeds (including penalties, interest, additions to tax, and additional amounts)" means that Congress intended for collected proceeds to be a broad and inclusive concept consisting of any amounts collected by the IRS and any amounts to be collected by the IRS in the future. Similarly, one commenter suggested that the use of the word "any" throughout the statute was another reason that the statute and Congress' intent with respect to the statute should be interpreted broadly.

Like section 7623, the internal revenue laws are contained in Title 26 and implementing guidance is issued under that title. Although the IRS may collect penalties for violations of Title 31, Money and Finance, and seize property under Title 18, Crimes and Criminal Procedure, those penalties and seizures do not relate to "underpayments of tax," may be imposed independently of whether a tax underpayment occurs, and are not related to violations of the internal revenue laws under Title 26. Moreover, administrative actions under Title 26 and Title 31 entail separate

administrative proceedings, and administrative distinctions persist even when the actions proceed at the same time. In some cases, the IRS may collect penalties for failure to file Form 114, "Report of Foreign Bank and Financial Accounts" (FBAR), which is an information reporting requirement under Title 31 the violation of which does not necessarily result in an underpayment of tax. As a result, FBAR penalties do not constitute collected proceeds. Moreover, sections 5323(a) and 9703(a) of Title 31 provide independent authority, separate and apart from section 7623, for the payment of rewards for information relating to certain violations of Title 31 or Title 18. Finally, the terms "additions to tax" and "additional amounts" have long been used to encompass the penalties under Subchapter A of Chapter 68 of Subtitle F of the Code and they are routinely used in forms issued by the IRS pursuant to Title 26 to refer to those penalties. They do not provide any support for treating non-Title 26 amounts as collected proceeds. The comments received did not change the view of Treasury and the IRS that section 7623 only authorizes awards for amounts collected under the internal revenue laws, which are contained in Title 26, the Internal Revenue Code. Treasury and the IRS recognize the commenters' concern that the statute may reduce the incentive to provide information to the IRS regarding non-Title 26 violations. The language of the statute does not, however, support a broader, more-inclusive definition of collected proceeds. Treasury and the IRS instead emphasize that when the IRS collects amounts based on information related to non-Title 26 violations and also collects related proceeds under Title 26, the Title 26 collected proceeds may form the basis for an award under section 7623. Moreover, depending on the facts and

circumstances, the non-Title 26 proceeds may form the basis for an award under a whistleblower award program other than the one authorized by section 7623.

#### Amounts Deposited in the Victims of Crime Fund

Under the Victims of Crimes Act of 1984, criminal fines that are imposed on a defendant by a district court shall be deposited into the Victims of Crime Fund. See 42 U.S.C. 10601(b)(1). Although the Victims of Crime Act does except certain specified amounts that are payable to other sources pursuant to other statutory mandates, amounts payable under section 7623 are not included in the exceptions. The proposed regulations provided that criminal fines that must be deposited into the Victims of Crime Fund do not constitute collected proceeds. One commenter suggested that such criminal fines are collected proceeds and that the award amount should be paid before the rest of the proceeds are transferred to the Victims of Crime Fund. As noted above, the Victims of Crime Act of 1984 mandates that the entire amount of fines imposed in criminal tax cases be deposited into the Victims of Crime Fund, meaning that the IRS lacks the authority to deposit only a portion of the fines into the Victims of Crime Fund, and these funds cannot be available to the Secretary to pay awards under section 7623. As a result, these regulations retain the rule from the proposed regulations, reflecting the determination that amounts deposited in the Victims of Crime Fund do not constitute collected proceeds. Criminal restitution, however, may be collected by the IRS as a tax under section 6201(a)(4)(A), and in such instances, the amounts collected as restitution are included in the definition of collected proceeds.

#### Amended Returns

The proposed regulations did not address whether amounts collected based on a taxpayer's future compliance were included in collected proceeds. Commenters requested clarification on whether a whistleblower could receive an award based on amounts collected due to amended returns. Some commenters suggested that the definitions of administrative action or proceeds based on should be interpreted as providing for an award in cases when a taxpayer files an amended return in response to a whistleblower's information. Similarly, these commenters suggested that the final regulations should encourage and reward whistleblowers who report internally and cause taxpayers to self-report to the IRS.

In the proposed regulations, Treasury and the IRS intended to include certain amounts collected based on amended returns as collected proceeds. The final regulations are modified to explicitly provide for this outcome. Section 7623(b) requires that the IRS proceed with an administrative or judicial action based on the information provided. Once the IRS proceeds with an action, however, the amounts collected based on amended returns may constitute collected proceeds. Specifically, if a whistleblower files a claim, the IRS begins an administrative or judicial action, and the taxpayer subsequently files an amended return, any proceeds collected based on that amended return, and related to the information provided, will constitute collected proceeds under the final regulations' general definition of the term collected proceeds. But if the IRS does not proceed with an action, for example if a taxpayer files amended returns, preemptively self-assessing and paying the liability before the IRS initiates any action, then, consistent with the plain language of the statute, there can be no collected proceeds.

While Treasury and the IRS certainly encourage internal reporting and preemptive action to correct incorrect returns, the plain language of the statute does not provide for a determination of awards in such cases. Moreover, it would be nearly impossible for the Service to connect amended returns to internally-reported whistleblower claims. Ultimately, if the amounts paid based on amended returns can be linked to any action with which the IRS proceeded based on the whistleblower's information, then the amounts will be included as collected proceeds. In such instances, the proceeds can be attributed to IRS action, as required by section 7623, and the proceeds collected may be determined by reference to the difference between the original amount reported as tax and the amount of tax assessed and collected based on the amended return. Treasury and the IRS believe that the changes to the final regulations reflect the statutory requirement that awards stem from IRS action and provide an administrable rule without discouraging whistleblowers from engaging in internal reporting and taxpayers to self-police.

The final regulations do not incorporate the comments suggesting that the IRS should also look to future years in which a taxpayer is compliant and determine collected proceeds in those years based on previous noncompliance. Unlike cases in which the taxpayer has already filed an original return, in these cases, the IRS would have no way to determine with any reasonable certainty what the taxpayer's reporting position would have been if not for the underlying action and whether the taxpayer's compliance was a direct result of the underlying action. Similarly, the IRS has no way of knowing whether a whistleblower's internal reporting of an issue caused a taxpayer to self-report and pay taxes.

### Amount in Dispute

Section 7623(b)(5) provides that subsection (b) applies only when the tax, penalties, interest, additions to tax, and additional amounts in dispute in an action against a taxpayer exceed \$2,000,000 (and in the case of an individual taxpayer, when the individual's gross income exceeds \$200,000 for any taxable year subject to the action). The proposed regulations defined amount in dispute as the maximum total of tax, penalties, interest, additions to tax, and additional amounts that could have resulted from the action(s) with which the IRS proceeded based on the information provided, if the formal positions taken by the IRS had been sustained. The proposed regulations further provided that the IRS would compute the amount in dispute, for purposes of award determinations, after the final determination of tax. Finally, the proposed regulations provided that, for purposes of conducting whistleblower administrative proceedings, the IRS may rely on the whistleblower's description of the amount owed by the taxpayer(s) or other information. These rules were intended to ensure that administrative proceedings would be conducted for every claim that could arguably satisfy the requirements of section 7623(b)(5), even before the IRS knows whether the claim actually does.

Treasury and the IRS did not receive any comments recommending changes to the definition of amount in dispute. Nevertheless, Treasury and the IRS recognize the need to clarify an aspect of the definition that was not clear and that, without the clarification, could have led to unintended results. Specifically, the final regulations delete the reference to "could have resulted" so as not to suggest that a hypothetical computation is required. The final regulations further clarify that the amount in dispute

is the greatest of the amounts actually determined and amounts stated in the formal positions actually taken by the IRS. Treasury and the IRS also added additional examples to further clarify the application of the rule adopted in the final regulations.

The definition will apply, regardless of whether an award is paid pursuant to section 7623(a) or section 7623(b), including for purposes of Tax Court review. For purposes of applying the administrative proceedings provided for under the final regulations, however, the Whistleblower Office may rely on the whistleblower's description of the amount owed if that amount is higher than the maximum total amount asserted by the IRS in its formal position in an administrative or judicial action.

#### Affiliated Claimants

Under section 7623(b)(6)(C), no award may be made under section 7623(b) based on information submitted to the Secretary unless such information is submitted under penalty of perjury. In Notice 2008-4 and the proposed regulations, Treasury and the IRS provided that this requirement precludes the filing of a claim for award by a person serving as a representative of, or in any way on behalf of, another individual as part of implementing the statutory requirement that a claim for award be filed under penalties of perjury. Nonetheless, the proposed regulations provided a definition of affiliated whistleblowers and related rules for addressing eligible and ineligible affiliated whistleblower cases. Treasury and the IRS have reconsidered the need for the affiliated whistleblower rules in light of the statutory penalty of perjury requirement. Indeed, given that the final regulations retain the rule prohibiting a whistleblower from submitting a claim on behalf of another, the definition for affiliated individuals and the cross reference to the rule for ineligible affiliated individuals at §301.7623-1(b)(3) were



removed from the final regulations. The rule for eligible affiliated whistleblowers at §301.7623-4(c)(4) of the proposed regulations was also removed. The final regulations retain the rule, however, stating that the Whistleblower Office will reject claims filed by ineligible affiliated whistleblowers, to discourage and prevent whistleblowers from claiming an award in their own names based on information obtained from ineligible whistleblowers. In the final regulations, the rule is relocated and added to the list of ineligible whistleblowers.

#### Whistleblower Administrative Proceedings—§301.7623-3

Section 7623 does not require that the IRS conduct a particular administrative process prior to making an award determination, rejection, or denial. Treasury and the IRS, however, have determined that such processes will help ensure that whistleblowers have a meaningful opportunity to participate in the determination process, enable the Whistleblower Office to make award determinations based on complete information, and ensure a fully-documented record on appeal to the Tax Court. This regulation describes the administrative proceedings applicable to claims for award under both section 7623(a) and section 7623(b).

For purposes of applying the whistleblower administrative proceedings, the final regulations provide that the Whistleblower Office may rely on the whistleblower's description of the amount owed or on other information. This rule is intended to ensure that the IRS can provide whistleblowers the benefits of proceedings applicable to section 7623(b) claims even before having made a final determination of tax.

For awards under section 7623(a), the proposed regulations provided that the Whistleblower Office will send a preliminary award recommendation letter to the

whistleblower. Sending this letter marks the beginning of the whistleblower administrative proceeding. The whistleblower will then have 30 days within which to provide comments to the Whistleblower Office. This approach is intended to provide whistleblowers under section 7623(a) with an opportunity to participate in the award process, both to add transparency to the proceeding and to assist the Whistleblower Office in considering all potentially relevant information in paying awards under section 7623(a), even though those awards are not subject to Tax Court review. The proposed regulations did not, however, provide preliminary notice and comment procedures for rejections or denials of claims for award that are treated, for administrative purposes, as claims made under section 7623(a), given the large administrative burden associated with such procedures.

In cases in which the Whistleblower Office determines and pays an award under section 7623(b), the proposed regulations provided that a whistleblower administrative proceeding also begins when the Whistleblower Office sends out the preliminary award recommendation letter. After this letter is sent to the whistleblower, the whistleblower (and the whistleblower's representative, if any) may participate in the administrative proceeding under section 7623(b), which will ultimately culminate in an award determination letter issued by the Whistleblower Office. Finally, the proposed regulations provided that prior to denying or rejecting a claim under section 7623(b), the Whistleblower Office will send a preliminary denial letter to the whistleblower, beginning the administrative proceeding and after which the whistleblower has 30 days to provide comments to the Whistleblower Office. Again, this approach is intended to foster a transparent and accurate review process.

The final regulations in large part adopt the proposed regulations. The comments received and any changes to the proposed rules for §301.7623-3 are discussed in the sections that follow.

#### Beginning of Whistleblower Administrative Proceedings

Under the proposed regulations, in cases in which the Whistleblower Office recommends payment of an award under section 7623(a) or determines and pays an award under section 7623(b), the Whistleblower Office will first send a preliminary award recommendation letter to the whistleblower. In these cases, the whistleblower administrative proceeding begins when this letter is sent. In cases in which the Whistleblower Office rejects or denies a claim for award under section 7623(b), the Whistleblower Office will first send a preliminary denial letter to the whistleblower. In these cases, the whistleblower administrative proceeding begins when this letter is sent. In cases in which the Whistleblower Office rejects or denies a claim for award under section 7623(a), there will not be a separate administrative proceeding. (For further information, see Rejections and Denials, later in this preamble.) The final regulations largely adopt the proposed regulations. The comments received and the changes made are discussed in further detail in this section.

Several commenters suggested that whistleblower administrative proceedings should begin earlier. The commenters offered different suggestions for how this could be accomplished, including beginning whistleblower administrative proceedings at the time that a claim is submitted on the Form 211 or when the Form 11369, "Confidential Evaluation Report on Claim for Award," is transmitted to the Whistleblower Office by the Operating Division. One commenter suggested that the regulations should require the

Whistleblower Office to notify the whistleblower and begin the administrative proceeding within 90 days of a taxpayer agreeing to pay any taxes, penalties, interest or additional amounts, and requesting that the whistleblower provide any information relevant to an award determination within 30 days. This commenter suggested that the IRS should then send another notification to the whistleblower within 90 days after the IRS had collected proceeds.

The proposed regulations provided for whistleblower administrative proceedings in an effort to respond to whistleblowers' concerns regarding the IRS's ability to communicate with whistleblowers. After considering the comments received, Treasury and the IRS determined that beginning the administrative proceeding before the preliminary award determination letter would not meaningfully increase a whistleblower's ability to participate in and provide comments relating to the award determination. As discussed earlier in this preamble, the IRS will use several tools, including debriefings, section 6103(n) contracts, and section 6103(k)(6) disclosures to communicate with whistleblowers following the submission of a claim. The whistleblower award administrative proceedings discussed in this section of the preamble are intended to facilitate communication with whistleblowers before the IRS makes the award determination.

#### Deadlines for IRS Whistleblower Office Action

The proposed regulations provided no mandatory deadlines for Whistleblower Office action. The proposed regulations instead provided for payment of an award, when appropriate, as promptly as circumstances permit. Recognizing that the timely and comprehensive evaluation of information provided by whistleblowers is essential to

the success of the program, the IRS has articulated goals for Whistleblower Office action in other internal guidance. IRS Whistleblower Program Memorandum (Deputy Commissioner for Services and Enforcement Steven T. Miller, June 20, 2012). This memorandum established goals for action on whistleblower submissions, and demonstrates the IRS's commitment to timely and comprehensive evaluation of whistleblower information. The memorandum also recognizes the need for flexibility and recognizes that there are times when the established goals will not be met. This does not detract from the emphasis placed on timely action, but instead flows from a recognition of the unique nature of these claims and a desire to ensure that when the Whistleblower Office takes action, it has available all relevant and necessary information relating to an action.

The form comment letters suggested that the regulations should adopt and expand on the guidelines set out in the June 20, 2012, IRS Whistleblower Program Memorandum. Several commenters suggested that the final regulations should incorporate mandatory deadlines for action by the Whistleblower Office. Two commenters generally suggested that the regulations should require that preliminary award determination letters be sent by a specified time after proceeds are collected, for example, between 90 and 180 days after the IRS has collected proceeds. One commenter suggested that the regulations should require the Whistleblower Office to notify the whistleblower and begin the administrative proceeding within 90 days of a taxpayer agreeing to pay any taxes, penalties, interest or additional amounts, and requesting that the whistleblower provide any information relevant to an award determination within 30 days. This commenter suggested that the IRS should then

send another notification to the whistleblower 90 days after the IRS had collected proceeds. This commenter suggested that these measures should be implemented to ensure that preliminary award determination letters are issued prior to a final determination of tax.

As noted, the June 20, 2012, IRS Whistleblower Program Memorandum identified timelines and policy goals for Whistleblower Office action. Treasury and the IRS have determined not to adopt these program goals as regulatory requirements to retain flexibility to make changes to accommodate future developments. The Whistleblower Office, however, remains committed to taking timely action on whistleblower submissions from the date a claim is first submitted through the date on which an award is determined or the claim is denied.

#### Deadlines for Whistleblower Action or Response

The proposed rules at §301.7623-3 contained several deadlines for whistleblower action. These deadlines are designed to ensure that the administrative proceedings are conducted in a timely fashion. In cases in which the Whistleblower Office recommends payment of an award under section 7623(a), a whistleblower has 30 days to submit comments on the Whistleblower Office's preliminary award determination. In cases in which the Whistleblower Office denies an award under section 7623(b), a whistleblower has 30 days to submit comments on the Whistleblower Office's preliminary denial letter. Finally, in cases in which the Whistleblower Office determines an award under section 7623(b), the whistleblower has 30 days to respond to the preliminary award recommendation letter; when applicable, the whistleblower has 30 days to respond after receiving a detailed report from the Whistleblower Office; and

when applicable, the whistleblower has 30 days to submit comments after receiving an opportunity to review the documents supporting the award report recommendations. Under the proposed regulations, the time periods for responding in cases in which the Whistleblower Office determines an award under section 7623(b) may be extended at the sole discretion of the Whistleblower Office.

Several commenters generally suggested that all of the time periods for whistleblowers to respond or submit comments should be more flexible. One commenter requested that different, longer time periods be applied to whistleblowers located outside of the United States. Another commenter suggested that “good cause” should be added as a reason why a whistleblower may take longer than 30 days to respond or submit comments to the Whistleblower Office. Finally, one commenter requested clarification on when the 30-day period to respond to the detailed report would begin.

After considering the comments, Treasury and the IRS adopt the proposed regulations without substantive change. The deadlines for whistleblower action in the final regulations are intended to allow whistleblower administrative proceedings to proceed in a timely and efficient manner. Further, the Whistleblower Office has the discretion to extend the time periods and has routinely done so at the request of whistleblowers or their representatives. In response to the comments, however, Treasury and the IRS included language in the final regulations intended to clarify that the periods begin when the Whistleblower Office sends the notices.

#### Award Consent Forms

A number of comments were received that expressed frustration with the amount of time that it takes from when a whistleblower submits a claim for award to when the Whistleblower Office pays the award. The factors that contribute to this length of time are largely outside of the control of whistleblowers and the Whistleblower Office. The proposed regulations, however, provided for award consent forms, which allow the Whistleblower Office to make an award determination and pay an award, without providing an award determination letter and waiting for the whistleblower's time to appeal such determination to expire. The purpose of the award consent form is to expedite the administrative process for cases in which the whistleblower agrees with the Whistleblower Office's preliminary award recommendation. A whistleblower may submit an award consent form to the Whistleblower Office at any time during the whistleblower administrative proceeding.

One commenter suggested that the award consent form is unfair because it forces the whistleblower to waive any appeal rights before receiving an award. Under the proposed rules, a whistleblower can receive an award regardless of whether an award consent form is submitted. For example, if a whistleblower declines to execute the award consent form, then after the whistleblower has finished participating in the whistleblower administrative proceeding and after a final determination of tax, as defined in §301.7623-4(d)(2), the Whistleblower Office will provide the whistleblower with a determination letter, stating the amount of any award. In such cases, the award would be payable after all appeals of the Whistleblower Office's determination were final. Executing the award consent and waiving the appeal rights serves to decrease the time between the determination and payment of the award. Because the execution



of an award consent form is at the option of the whistleblower, these regulations retain the proposed regulations' rules regarding the use of award consent forms. Under the final regulations, whistleblowers may choose to execute an award consent form at any time during the whistleblower's participation in the administrative proceeding for award under section 7623(b). If the whistleblower signs, dates, and returns the award consent form, the Whistleblower Office will pay the award to the whistleblower as promptly as circumstances permit after there has been a final determination of tax. Thus, while there is absolutely no requirement that a whistleblower execute the award consent, doing so provides whistleblowers a way to get the benefit of finality and, assuming there are no other open issues, a faster award payment.

#### Confidentiality Agreements

Treasury and the IRS recognize that, while detailed administrative claim files assist the Whistleblower Office in making fair and accurate award determinations, safeguards aimed at preventing the potential redisclosure or misuse of the taxpayer's confidential return information contained in those files remain critical. Section 6103(h)(4) and §301.6103(h)(4)-1 of the proposed regulations confirmed the authority to disclose return information in the course of a whistleblower administrative proceeding, but neither provides redisclosure prohibitions or penalties. In the Administration's Fiscal Year 2014 and 2015 Revenue Proposals, Treasury recommended amending section 6103 to provide that the section 6103(p) safeguarding requirements apply to whistleblowers and their legal representatives who receive tax return information in whistleblower administrative proceedings. Despite the lack of statutory redisclosure prohibitions and penalties, Treasury and the IRS, in the proposed regulations, sought to

balance whistleblowers' desire for increased communication with protections and safeguards for taxpayers' confidential information. Accordingly, the proposed regulations required whistleblowers to execute confidentiality agreements before they may receive a detailed description of the factors that contributed to the preliminary award recommendation or view documents that support the recommendation. A whistleblower is not required to execute a confidentiality agreement before appealing an award determination to the Tax Court, and executing an agreement does not prevent a whistleblower from seeking Tax Court review.

One commenter recommended that every whistleblower should be required to enter into a confidentiality agreement with the Whistleblower Office at the time that they submit a claim. This commenter suggested that such agreements would allow the Whistleblower Office to share information with the whistleblower earlier in the process, prior to any whistleblower administrative proceeding. Another commenter also suggested that confidentiality agreements should be mandatory in every case to allow for the disclosure of information to whistleblowers and to provide protection to taxpayers with respect to disclosed information.

Although Treasury and the IRS support the use of confidentiality agreements as a mechanism for protecting confidential taxpayer return information disclosed during the course of an administrative proceeding, the agreements do not in themselves authorize the IRS or the Whistleblower Office to disclose such information. In addition, Treasury and the IRS have determined that disclosures are not necessary in every case. Accordingly, the final regulations do not mandate the use of confidentiality agreements in every case. Instead, the final regulations adopt the rule in the proposed regulations

permitting whistleblowers to choose to enter into confidentiality agreements with the Whistleblower Office during whistleblower administrative proceedings for awards under section 7623(b). When the whistleblower signs, dates, and returns the confidentiality agreement, the Whistleblower Office will provide the whistleblower with a detailed award report and an opportunity to review documents supporting the report.

#### Opportunity to Review Documents Supporting Award Report Recommendations

Under the proposed regulations, if a whistleblower signs, dates, and returns the confidentiality agreement accompanying the preliminary award determination, then after reviewing the Whistleblower Office's detailed report, the whistleblower can request an appointment to review the documents supporting the detailed report. During this appointment, the Whistleblower Office will provide for viewing the pertinent information from the administrative claim file. The Whistleblower Office will supervise the whistleblower's review of the documents and the whistleblower will not be permitted to make copies of the documents. Thus, while the proposed regulations provide whistleblowers with an opportunity to view information in the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges, the proposed regulations provided rules intended to safeguard the disclosure of information to a whistleblower.

One commenter suggested that the whistleblower should be able to review all non-privileged information in the administrative claim file, whether or not it is deemed pertinent. Treasury and the IRS have determined that the rules applicable to the document review—including on site review and no copying—adequately protect

taxpayer information from redisclosure. Accordingly, in response to this comment, the final regulations remove the term “pertinent.”

#### Administrative Record

Under the proposed regulations, the administrative record comprises all information contained in the administrative claim file that is not protected by one or more statutory privileges that is relevant to the award determination. One commenter suggested that the IRS Whistleblower Office should be required to provide a privilege log to detail any items that are excluded from the administrative record. After considering the comment, Treasury and the IRS have determined that creating a privilege log in every administrative proceeding involving privileged documents that are withheld by the Whistleblower Office would offer minimal benefits and pose an unjustifiable administrative burden. As a result, no changes were made to the proposed regulations.

#### Rejection and Denial Letters

The proposed regulations provided for rejection and denial letters in cases under section 7623(a) and 7623(b). In practice, a rejection is a determination that relates solely to the whistleblower and the information on the face of his or her claim that pertains to the whistleblower, while a denial often relates to or implicates taxpayer information (for example, because the IRS did not proceed based on the information provided or did not collect any proceeds). Pursuant to proposed §301.7623-3(b)(3), for rejections or denials under section 7623(a), the Whistleblower Office will provide written notice to claimants of the rejection or denial of award claims without an administrative proceeding. One commenter expressed concern with the amount of information

contained in rejection and denial letters. In these cases, because there is no whistleblower administrative proceeding, section 6103 (which provides that all tax return information is confidential, unless an exception applies) operates to limit the amount of taxpayer information that the Whistleblower Office can provide. Treasury and the IRS considered whether to make denials of claims under section 7623(a) subject to an administrative proceeding similar to the denial of claims under section 7623(b). However, given the nature of claims under section 7623(a) and the large number of such claims, Treasury and the IRS determined that the administrative burden of providing an administrative proceeding would significantly outweigh the small amount of additional information that would be provided in the denial letters. We note, however, that the same section 6103 concerns are not present with rejection letters. Accordingly, in the case of a rejection under section 7623(a) or (b), the written notice is not subject to the same limitations under section 6103 and will explain the basis for the rejection. Although no substantive changes were made, to improve clarity, the final regulations separate the rules for rejections under section 7623(b) and denials under section 7623(b) into separate provisions and describe when a claim is rejected or denied.

#### Subsequent Determinations

One commenter suggested that the definition of collected proceeds should take into account circumstances in which a whistleblower submits a claim for an ongoing issue and an administrative action is taken for some, but not all years (apparently because the statute of limitations has expired). If the taxpayer becomes compliant in future years, the commenter suggested that the whistleblower's award should be

determined based on collected proceeds for future years determined as the difference between what is reported and paid, and what would have been reported and paid, if not for the whistleblower's information and the IRS' administrative action. The commenter suggested limiting the future years to the number of years for which the IRS allowed the statute of limitations to expire with respect to the whistleblower claim. No changes were made to the proposed regulations because the commenter's concern—that the IRS will not be diligent in preserving the statute of limitations—is ameliorated by the fact that the IRS suffers a greater harm than the whistleblower if the IRS permits the statute of limitations to expire and, therefore, the IRS is motivated to preserve the statute of limitations.

Another commenter suggested that the final regulations should include procedures for reopening a claim that was initially denied if the information is later used by the IRS, for example, by a different Operating Division. The proposed regulations did not provide specific procedures for addressing the use of a whistleblower's information following a denial. However, nothing in the proposed regulations precluded future IRS action based on a whistleblower's information or the determination of an award in such instances. For example, the proposed regulations did not preclude the Whistleblower Office from making a second or subsequent determination when the IRS proceeds based on the information after having already made a determination. This situation, however, is distinguishable from timing cases, discussed earlier in this preamble, in connection with the definition of collected proceeds, in which the IRS recomputes and pays an award based upon information not known with respect to the taxpayer's account as of the date of the final determination of tax. These cases would

include, for example, those in which whistleblower information results in the elimination of an NOL but does not result in collected proceeds until after the final determination. In such cases, there are no new circumstances, only additional collected proceeds. A second or subsequent determination, however, is appropriate when there are new circumstances that result in collected proceeds. Although this result was not precluded under the proposed regulations, Treasury and the IRS added language to the definition of final determination of tax at §301.7623-4(d)(2) of the final regulations to explicitly clarify this point. Because the final regulations allow for subsequent determinations when proceeds are collected after an initial determination, and any such subsequent determination will be subject to all the rules and procedures applicable to an initial determination, no additional procedures are needed in these final regulations.

#### Determining the Amount of Awards and Paying Awards—§301.7623-4

This regulation provides the framework and criteria that the Whistleblower Office will use in exercising the discretion granted under section 7623 to make awards. Under the regulation, based on the Whistleblower Office's review of the entire administrative claim file, the Whistleblower Office will assign a fixed percentage to claims for award by evaluating the substantial contribution of the whistleblower to the underlying action(s). The rules of this section apply to claims for awards under both section 7623(a) and section 7623(b). The comments received and any changes to proposed §301.7623-4 are discussed in the sections that follow.

#### Fixed Percentage Computational Framework

Under section 7623(b), whistleblowers may receive as an award at least 15 percent but not more than 30 percent of the collected proceeds resulting from an action

(including any related actions), assuming that there is no reduction in award pursuant to section 7623(b)(2) or (3). The proposed regulations adopted a fixed percentage approach pursuant to which the Whistleblower Office will assign claims for award to one of a number of fixed percentages within the applicable award percentage range. Under the proposed regulations, to compute an award, the Whistleblower Office will look to the administrative claim file to determine whether there are any positive factors present that would merit an increased award of 22 or 30 percent. The Whistleblower Office will then determine whether there are negative factors present that would merit a decreased award of 15, 18, 22, or 26 percent.

One commenter disagreed with the use of fixed percentages, suggesting that instead the Whistleblower Office should have the discretion and flexibility to consider the full range of award percentages in reaching an award determination. A number of the comments received, including the form comment letters, suggested that starting the award computation framework at 15 percent sends the wrong message to whistleblowers and would discourage whistleblowers by limiting the size of whistleblower awards. One commenter suggested that starting at 15 percent was unnecessarily biased toward the lower end of the statutorily mandated range of 15 to 30 percent. This commenter suggested that this approach would invite litigation and would limit the upward effect of positive factors. Instead, this commenter recommended that the Whistleblower Office should begin its analysis at 22.5 percent. Another commenter suggested that starting at the bottom prevents the Whistleblower Office from punishing whistleblowers that have only negative factors and also suggested that the Whistleblower Office should begin its analysis at 22.5 percent. One commenter



suggested that the regulations should also require payment of a minimum 15-percent award both when a taxpayer self-reports a tax liability after a whistleblower submits information to the IRS and when a whistleblower provides information and the IRS subsequently proceeds with an administrative action without using the whistleblower's information. Finally, several commenters requested that the final regulations provide additional information on when a 30-percent award would be appropriate under the statute. These commenters suggested that the regulations should provide an example of a case in which the Whistleblower Office would determine a 30-percent award. To that end, one commenter suggested that a maximum 30-percent award should be paid when a whistleblower submits information that leads to the collection of additional amounts in an otherwise nearly completed audit, provides specific information that forms the basis for an assessment of tax, provides nearly all of the information and documentation needed by the IRS to conduct an audit, provides assistance or is willing to provide assistance during the administrative action, testifies or is willing to testify in a court proceeding, or wears a wire or is willing to wear a wire to assist in an investigation. Finally one commenter expressed concern with the language in the preamble to the proposed regulations that provided that the Whistleblower Office would determine a 30-percent award only in extraordinary cases.

Treasury and the IRS continue to believe that the fixed percentage approach provides a structure that will promote consistency in the award determination process by enabling the Whistleblower Office to determine awards across the breadth of the applicable percentage range based on meaningful distinctions among cases. The fixed percentage approach also avoids having to draw fine distinctions that might seem unfair

and arbitrary, given the differences among claims for award with respect to both the facts and law of the underlying actions and the nature and extent of the substantial contribution of the whistleblowers. Accordingly, the final regulations retain the fixed percentage approach.

Further, Treasury and the IRS determined that starting the award determination at 15 percent merely reflects the fact that the claim has met the threshold requirements for an award under section 7623(b). All awards under section 7623(b)(1) are paid to whistleblowers that made a substantial contribution to the underlying action(s).

Congress, through the plain language of the statute, provided that a 15-percent award is appropriate for a whistleblower that makes a substantial contribution to the underlying action(s). Although commenters are correct that this approach may lead to the same result for both whistleblowers with no positive factors and whistleblowers with all negative factors, Treasury and the IRS do not believe that whistleblowers who merely submit a claim that reflects none of the positive factors and offer nothing beyond the bare minimum to support an award should be entitled to an award above the statutory minimum. A 15-percent award is a significant financial incentive to whistleblowers and starting the award proceedings at 15 percent, with the opportunity for a larger potential award increase, provides the whistleblower with a greater incentive to provide better information and assistance to the IRS than starting at 22.5 percent. Because the presence of positive factors is largely within the whistleblower's control, Treasury and the IRS have adopted an approach that incentivizes whistleblowers to provide high quality submissions that reflect positive factors.

Moreover, the approach taken in the final regulations—starting at 15 percent and applying positive and negative factors, based on the extent of the whistleblower’s substantial contribution—is consistent with the approach taken by other government agencies in the regulations and practices that govern the administration of their whistleblower award programs, including the Department of Justice (in making recommendations in False Claims Act cases), the Securities and Exchange Commission, and Commodity Futures Trading Commission (in applying Federal whistleblower statutes). As it has done since the 2006 amendments to the statute, the Whistleblower Office will increase the award percentage, based on the presence of positive factors. The final regulations provide several positive factors designed to allow for increased awards across a broad range of claims, as merited.

Moreover, the concern expressed by some commenters that the IRS will pay minimum awards in most cases is not supported by the evidence. To date, using this computational approach the IRS has paid awards totaling approximately \$175 million on collected proceeds totaling approximately \$700 million, reflecting an award average of approximately 25 percent—nearer the top than the bottom of the statutory range. After considering the concerns raised by these comments, the final regulations retain the fixed percentage approach adopted in the proposed regulations. Finally, in response to the comments received on 30-percent awards, Treasury and the IRS revised the example, extending it to illustrate the full award percentage range.

#### Factors Used to Determine Award Percentage

Pursuant to section 7623(b), the Whistleblower Office’s determination of an award amount depends on the extent to which the claimant’s information substantially

contributed to the underlying action(s). Under the proposed regulations, the Whistleblower Office reviews the administrative claim file and applies the positive factors and negative factors, listed in §301.7623-4(b), to the facts to determine the fixed percentage applicable to a claim for award.

Some commenters offered suggestions for additional positive factors. These suggestions included: i) the whistleblower provides information on multiple unrelated taxpayers; ii) the whistleblower identifies the target taxpayer; iii) the whistleblower provides information that leads to a related party; iv) the IRS would not have discovered a violation “but for” the whistleblower’s information; and v) there is a close nexus between related actions. Some of these suggested factors are already threshold elements required to merit any award. For example, identifying the target taxpayer is required to make a claim. Others restate the circumstances for which the proposed regulations already compensated whistleblowers. For example, if a whistleblower provides information on multiple unrelated taxpayers or uncovering a close nexus between related actions, and the IRS proceeds based on the information and collects proceeds, then the whistleblower’s contribution to each action will be evaluated and accounted for in determining the award. Further, the final regulations, like the proposed regulations, provide that the positive factors and negative factors are non-exclusive. Accordingly, the final regulations do not incorporate any of these suggested factors. The Whistleblower Office may recognize and apply additional factors in a particular case that are appropriate in light of the particular facts.

One commenter suggested that the positive factor at §301.7623-4(b)(1)(ii), regarding information that identifies an issue of a type previously unknown to the IRS,

should apply when the information provided identifies facts of a type previously unknown to the IRS, rather than an issue of a type previously unknown to the IRS. In response, the final regulations expand the factor to include a transaction previously unknown to the IRS.

Several commenters suggested that the positive factor at §301.7623-4(b)(1)(v) should look only to the whistleblower's willingness to provide assistance, rather than to assistance offered in response to a request from the IRS. These comments expressed concern that whistleblowers have not been given opportunities to provide assistance and, therefore, suggested deleting the language "in response to a request from the Whistleblower Office, the IRS or the IRS Office of Chief Counsel." Treasury and the IRS agree that it is the whistleblower's act of providing exceptional cooperation and assistance that should be treated as a positive factor, regardless of whether that cooperation and assistance was in response to a request. As a result, the final regulations delete this language. One commenter suggested that the regulations should provide more information on what would be meaningful whistleblower participation. Treasury and the IRS believe that the positive factors in the final regulations should remain broadly defined providing the Whistleblower Office with the necessary discretion to increase a whistleblower's award percentage in appropriate cases. Exceptional assistance depends on the facts and circumstances and could evolve in response to specific whistleblower claims. Accordingly, no changes are made in the final regulations in response to this comment. Nevertheless, the IRS will continue to provide further explanations to staff, as appropriate and needed.

One commenter suggested an additional negative factor—when it is more likely than not that the IRS would have discovered the information on its own. One commenter suggested that the IRS should consider mitigating factors when the whistleblower delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS’s ability to pursue an action or issue. Treasury and the IRS have decided not to incorporate any new negative or mitigating factors into the final regulations, which would serve only to make it harder for whistleblowers to recover. The Whistleblower Office will consider all of the relevant facts and circumstances when looking to apply the positive and negative factors identified in the regulations.

One commenter suggested that the negative factor when the whistleblower contributed to the underpayment of tax or tax noncompliance identified is already addressed by the planned and initiated test. The inclusion of this factor signifies that not all situations when a whistleblower contributes to the actions that led to the underpayment will constitute planning and initiating under the statute and regulations—as discussed later in this preamble, the threshold for planned and initiated is higher than being a mere contributor. In cases when a whistleblower does not plan and initiate within the meaning of the statute and regulations, but nonetheless contributes to the action(s) that led to tax noncompliance, the Whistleblower Office will not apply the threshold planner and initiator test, but in such a case, it may still be appropriate to decrease the award amount because the whistleblower’s actions diminish the extent of the whistleblower’s substantial contribution to the action. Thus, the Whistleblower Office will instead consider the whistleblower’s contribution to the tax noncompliance as a factor that may justify a decrease within the 15-to-30 percent award percentage

range. For example, this factor may apply if a whistleblower engaged in planning or initiating activities, but not both, that diminished the whistleblower's substantial contribution to the action with which the IRS proceeded. This factor will not, however, be applied to reduce an award in cases in which the Whistleblower Office determines that the threshold for planned and initiated has been met. If the threshold for planned and initiated is met, the planned and initiated framework will be applied, and the final regulations have been clarified accordingly.

#### Award for Less Substantial Contribution

Section 7623(b)(2) provides for a reduced award when the Whistleblower Office determines that the action was based primarily on disclosures of specific allegations resulting from a judicial or administrative hearing, a governmental report, hearing, audit, or investigation, or the news media, unless the whistleblower was the original source of the information. Under the proposed regulations, if the Whistleblower Office determined that an action was based principally on disclosures of specific allegations resulting from public source information then the Whistleblower Office will determine an award of no more than 10 percent of the collected proceeds resulting from the action, unless the whistleblower was the original source of the information. The proposed regulations provided that the Whistleblower Office would make the determination based on the extent to which the public source information described a tax violation or facts and circumstances from which a tax violation could be reasonably inferred. Under the proposed regulations, public source information included a judicial or administrative hearing, a government report, hearing, audit, or investigation, or the news media.

Treasury and the IRS received two comments on this proposed rule. One commenter suggested that public source information should be limited to the types of information specified in the statute. This commenter disagreed with the proposed regulations' use of the word "including" and expressed concern that this language would allow the Whistleblower Office to expand on the statutory list of public sources. This commenter also suggested that the regulations should exclude public source information that is only available by request. Another commenter disagreed with the application of the original source test in the proposed regulations. This commenter suggested that rather than looking to whether the whistleblower was the original source of the public source information, the regulations should instead look to whether the IRS takes action based on the information provided, and if so, should treat the whistleblower as the original source of the information. Both commenters expressed concern that the proposed regulations did not accurately apply the specific allegation requirement from the statute, and one of the two commenters further suggested that the regulations should employ an ordinary, lay person standard if a "reasonable inference" test is retained as a substitute to the "specific allegation" requirement in the statute.

In response to the first commenter's concerns, the final regulations remove the term "public source information" and the "including" language and instead rely solely on the list of statutory sources. In determining that the final regulations should rely solely on the statutory list, Treasury and the IRS also decline to place additional limitations on the statutory language, for example, excluding information available only upon request. The final regulations also clarify the application of the original source test and the specific allegation requirement by more clearly tracking the language of the statute.



The final regulations clarify that the reasonable inference test does not replace the specific allegation requirement, but instead provides guidance on how the Whistleblower Office will apply the statute's specific allegation requirement. Changes were also made to the example to illustrate the operation of the reasonable inference test.

#### Reduction in Award and Denial of Award

Under the proposed regulations, the Whistleblower Office will make a threshold determination of whether a whistleblower planned and initiated the underlying acts, and, if this threshold is met, then the Whistleblower Office will categorize and evaluate the extent of the whistleblower's planning and initiating of the underlying acts, based on the application of factors listed in §301.7623-4(c)(3)(iv) to the facts contained in the administrative claim file, to determine the amount of the appropriate reduction, if any.

Commenters on this issue generally expressed concern that the threshold determination for planned and initiated is too broad and could discourage potential whistleblowers from coming forward. These commenters suggested that the regulations should adopt the "principal architect" approach used in evaluating claims under the False Claims Act. Two of the commenters expressed concern that the standard at §301.7623-4(c)(3)(ii)(C), which asked whether the whistleblower knew or had reason to know that there were tax implications to planning and initiating the underlying act, was too broad. One of these commenters suggested that instead, the standard should be whether the whistleblower knew or had reason to know that tax noncompliance could result from the planning and initiating of the underlying act. Similarly, one commenter suggested that the standard should be whether the individual knew or had reason to

know that there were “unlawful” or “improper” tax implications. Some commenters suggested that the language at §301.7623-4(c)(3)(ii)(C) should specifically exclude a whistleblower who performed any of the underlying activities at the direction of a senior employee or manager. One commenter suggested that including the word “drafted” in the definition of “planned” created the possibility that an employee drafting a document at the direction of superiors could fall within the definition. This commenter also suggested that including the term “promoted” in the definition of “initiated” could include someone involved well after the scheme was actually initiated. One commenter suggested that the primary, significant, or moderate categories are not supported by the statute, and risk being implemented in a way that a whistleblower can be something other than a principal architect. Finally, two commenters offered suggestions for the examples in the proposed regulations. The comments on the examples focused on the application of the planned and initiated standard rather than on the application of the computational framework. One comment specifically suggested that the examples should provide guidance about what it means to plan and initiate, rather than guidance on the application of the computational framework.

The final regulations do not adopt a “principal architect” approach to the application of section 7623(b)(3), based in part on the statutory language, which does not require a single planner and initiator but instead provides for the possibility of multiple planners and initiators. More than one individual may plan and initiate the actions that lead to a tax underpayment or violation, whether as co-planners or as planners of independent actions that each led to the underpayment or violation. However, the terms “plan” and “initiate” suggest some voluntary action on the part of the

individual. Thus, where an individual is acting under the direction and control of a supervisor, he or she should not be considered as planning or initiating. For example, the planned and initiated standard is not intended to apply to a junior associate acting under the direction of a partner. Nonetheless, the application of these rules is dependent on the relevant facts and circumstances of each case and, at some point, an associate or other employee becomes experienced enough to act sufficiently on his or her own to be considered a planner and initiator. The final regulations modify the examples to clarify the treatment of junior employees.

In addition, in response to the commenters' concern that the standard at §301.7623-4(c)(3)(ii)(C) was too broad, the final regulations change "knew or had reason to know there were tax implications" to "knew or had reason to know that a tax underpayment or a violation of the internal revenue laws could result," consistent with the full range of tax matters—from underpayments of tax to violations of the internal revenue laws—described in section 7623(a).

As the commenters noted, section 7623(b)(3) does not provide categories for planned and initiated. It does, however, provide that after a determination is made that an individual planned and initiated, "the Whistleblower Office may appropriately reduce such award." The final regulations retain the primary, significant, or moderate categories to ensure that any appropriate reduction is made through the application of an established framework. The regulations' use of these categories, like the use of the fixed percentage and criteria approach for determining awards in substantial contribution and less substantial contribution cases, is intended to promote consistency, fairness, and transparency in an award determination process that is inherently

subjective. As with the positive and negative factors, the IRS will continue to provide explanations to staff and examples, as appropriate and needed. Treasury and the IRS recognize the value that all whistleblowers, including those who participate in the actions that led to the underpayment, may provide, and the final regulations balance the goal of incentivizing whistleblowers with the plain language of the statute by providing for a sliding scale of reductions to an award for planning and initiating.

#### Eligible Affiliated Whistleblowers

As discussed earlier in this preamble, Treasury and the IRS decided not to incorporate the proposed rule for eligible affiliated whistleblowers at §301.7623-4(c)(4) in the final regulations because it is inconsistent with the rule that prohibits a whistleblower from submitting a claim on behalf of another individual.

#### Multiple Whistleblowers

Section 7623 does not address whether multiple whistleblowers may receive an award from the same collected proceeds. The proposed regulations provided rules for determining awards when two or more independent claims, based on different information, relate to the same collected proceeds. In these situations, the proposed regulations allowed the Whistleblower Office to determine multiple awards, limited in aggregate amount to the maximum amount that could have been awarded to a single whistleblower, rather than restricting the determination to a single award payable to the first whistleblower that files a claim for award or payable on some other basis.

Treasury and the IRS received two comments on this issue. One commenter suggested that multiple whistleblowers should not have to share an award. The other commenter suggested that the first whistleblower should receive full credit for their

information and that later whistleblowers should only receive an award for information that was not provided by the first whistleblower. After consideration of the comments, Treasury and the IRS determined to leave open the possibility of award payments for multiple whistleblowers. This determination was based in part on the recognition that the tax administration process is a long and multi-faceted one that may extend over the course of many years and may involve multiple substantial contributions from different sources. Given the unique nature of the tax administration process, Treasury and the IRS determined that it would not be fair or appropriate to determine an award only for the substantial contribution of whistleblowers who submit their information first-in-time. Accordingly, the proposed regulations are adopted without change.

#### Payment of Awards

Section 7623 provides for payment of an award to the individual that submits information and makes a claim for award. Under the proposed regulation, the IRS will pay any award under section 7623 to a whistleblower as promptly as circumstances permit after there has been a final determination of tax with respect to the action(s) and after the Whistleblower Office has determined the award and all appeals of the determination are final or the whistleblower has executed an award consent form.

Treasury and the IRS received two comments on this proposed rule. One commenter suggested that the final regulations should provide procedures for payment of an award to attorney trust accounts. Another commenter suggested that whistleblowers should be allowed to assign or sell their claim for award. The issues raised in these comments are beyond the scope of the current regulations and, accordingly, the regulations have been finalized as proposed.

### Final Determination of Tax

Under the proposed regulations, the Whistleblower Office can only pay an award determined pursuant to section 7623 after there is a final determination of tax. A final determination of tax may be made after the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) has waived the right to file a claim for refund.

Comments on this provision generally suggested that the IRS should make a final determination of tax as early as possible. The commenters suggested that the Whistleblower Office should make multiple partial payments on an award by making a final determination of tax with respect to each tax year for each taxpayer. One commenter suggested that the regulations should require mandatory partial payments of tax whenever a final determination is possible. One commenter suggested that it would be inappropriate to aggregate action(s) for purposes of making a final determination of tax because this could delay awards. Other commenters suggested that awards should be paid prior to a final determination of tax. One commenter suggested that the definition of final determination of tax should be triggered by each of the following events: the collection of proceeds by the IRS, the posting of a bond by a whistleblower, a determination by the Secretary that payment is in the best interests of the government, and the entering into of a closing agreement between the IRS and a partnership. Moreover, this commenter suggested that a taxpayer's right to file a refund

suit should not be relevant to the definition, as taxpayers only file refund suits in a small percentage of cases.

Treasury and the IRS understand the commenters' view that whistleblowers should receive awards as quickly as possible. Under the statute, however, an award cannot be made until there are collected proceeds, and the IRS has not collected proceeds with finality until the taxpayer no longer has a right to seek a refund of the amounts that constitute collected proceeds. The general rule set out in the proposed regulations and adopted in these final regulations provides that a final determination can be made when the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) have waived the right to file a claim for refund. This general rule already includes the commenter's suggestion that, in many cases, a final determination may occur when the IRS and the taxpayer enter into a closing agreement and the taxpayer makes full payment of the liability. As a result, the regulations were not revised in light of this comment. Recognizing that some claims result in more than one action, the definition provides the Whistleblower Office with the discretion to aggregate or disaggregate actions arising out of a single claim, meaning that the Whistleblower Office can, in appropriate cases, make more than one final determination with respect to a single claim for an award. For example, the Whistleblower Office generally will aggregate two actions, for award determination purposes, when the outcome of one will have an effect on the amount of collected proceeds that will result from the other. As discussed earlier

in this preamble, the final regulations include new language that explicitly allows for subsequent determinations when the IRS proceeds based on the information provided after having already paid, rejected, or denied an award. This rule is illustrated through the addition of a new example.

As noted, Treasury and the IRS declined, however, to provide for mandatory, partial or ongoing payments of awards in the final regulations, based on the determination that issuing multiple appealable final determinations as a rule would impose an unreasonable burden on the IRS and the Whistleblower Office. Accordingly, the final regulations' explicit statement that a final determination of tax does not preclude a subsequent final determination of tax is not intended to, and does not in any way, limit the discretion of the Whistleblower Office to aggregate or disaggregate actions for purposes of determining awards. The Whistleblower Office will continue to consider numerous factors relating to efficient tax administration in exercising this discretion, including the factors that it has previously identified in instructions to staff, instructions which are available via the IRS's website and that will be incorporated into the IRM when it is next updated.

#### Deceased Whistleblowers

Existing Treas. Reg. §301.7623-1(b)(3) allows an executor, administrator, or other legal representative to file a claim for award for a deceased whistleblower, if evidence is provided to show that the representative has legal authority to act on behalf of the deceased. The proposed regulations provided that when a whistleblower dies before or during a whistleblower administrative proceeding, the Whistleblower Office will substitute an executor, administrator, or other legal representative on behalf of the



deceased whistleblower for purposes of conducting the whistleblower administrative proceeding. No comments were received on this provision. Because the proposed regulations' use of the word "will" could be read to suggest that the regulations require substitution, Treasury and the IRS changed this word to "may" in the final regulations. Consistent with the regulations in effect under section 7623 at the time of the 2006 amendments to the statute, the Whistleblower Office will substitute such parties for a deceased whistleblower only when a party can make a proper showing that he or she is legally authorized to act for the deceased. The Whistleblower Office has no obligation to locate or determine a substitute for a deceased whistleblower. Accordingly, the final regulations provide that when a whistleblower dies before or during a whistleblower administrative proceeding, the Whistleblower Office may substitute an executor, administrator, or other legal representative on behalf of the deceased whistleblower for purposes of conducting the whistleblower administrative proceeding.

#### Tax Treatment of Awards

Under the proposed regulations, all awards are subject to current Federal tax reporting and withholding requirements. No comments were received on this provision. Treasury and the IRS, however, added language to the final regulations to clarify that whistleblower awards are includible in gross income.

#### Effective/Applicability Dates

Sections 301.7623-1, 301.7623-2, 301.7623-3, and 301.6103(h)(4)-1 were proposed to apply to information submitted on or after the date the rules are adopted as final regulations in the **Federal Register**, and to claims for award under sections 7623(a) and 7623(b) that are open as of that date. Likewise, §301.7623-4 was

proposed to apply to information submitted on or after the date the rules are adopted as final regulations, and to claims for award under section 7623(b) that are open as of that date. Section 301.7623-4 was not proposed to apply to claims for award under section 7623(a) that are open as of that date.

Treasury and the IRS received two comments on the proposed effective dates. One commenter suggested that the proposed rules at §301.7623-2 affect substantive rights of whistleblowers and should only be applicable to claims filed after the adoption of the final regulations. The other commenter similarly suggested that the regulations should be prospective and apply only to submissions made after the regulations have been finalized.

The final regulations do not negatively affect substantive rights of whistleblowers because the proposed and final regulations largely incorporate existing practices adhered to by the Whistleblower Office, and changes from existing practices are designed to be favorable to whistleblowers. For example, the regulations provide for whistleblower administrative proceedings, but as discussed earlier in this preamble, these proceedings are intended to benefit whistleblowers, providing them with additional due process and opportunities to participate in a whistleblower award determination. Finally, applying two sets of rules to whistleblower proceedings will be difficult for the Whistleblower Office to administer. The effective dates for the regulations will allow the Whistleblower Office to administer the Whistleblower Program in an efficient manner. Accordingly, after considering the comments, Treasury and the IRS adopt the proposed regulations without changes.

### **Special Analyses**

It has been determined that this Treasury decision is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that these regulations will primarily affect individuals who file whistleblower claims under section 7623. Accordingly, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

#### **Drafting Information**

The principal author of these regulations is Melissa A. Jarboe of the Office of the Associate Chief Counsel (Procedure and Administration).

#### **List of Subjects in 26 CFR part 301**

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

#### **Adoption of Amendment to the Regulations**

Accordingly, 26 CFR part 301 is amended as follows:

#### **PART 301--PROCEDURE AND ADMINISTRATION**

Paragraph 1. The authority citation for part 301 is amended by removing the entry for §301.7623-1 and adding entries in numerical order for §§301.6103(h)(4)-1 and 301.7623-1 through 301.7623-4 to read as follows:

Authority: 26 U.S.C. 7805.

\* \* \* \* \*

Section 301.6103(h)(4)-1 also issued under 26 U.S.C. 6103(h)(4) and 26 U.S.C. 6103(q).

\* \* \* \* \*

Sections 301.7623-1 through 301.7623-4 also issued under 26 U.S.C. 7623.

\* \* \* \* \*

Par. 2. Section 301.6103(h)(4)-1 is added to read as follows:

§301.6103(h)(4)-1 Disclosure of returns and return information in whistleblower administrative proceedings.

(a) In general. A whistleblower administrative proceeding (as described in §301.7623-3) is an administrative proceeding pertaining to tax administration within the meaning of section 6103(h)(4).

(b) Disclosures in whistleblower administrative proceedings. Pursuant to section 6103(h)(4) and paragraph (a) of this section, the Director, officers, and employees of the Whistleblower Office may disclose returns and return information (as defined by section 6103(b)) to a whistleblower (or the whistleblower's legal representative, if any) to the extent necessary to conduct a whistleblower administrative proceeding (as described in §301.7623-3), including but not limited to--

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

(2) By providing the whistleblower with an award report package;

(3) By conducting a meeting with the whistleblower to review documents supporting the preliminary award recommendation; and

(4) By sending an award decision letter, award determination letter, or award denial letter to the whistleblower.

(c) Effective/applicability date. This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This rule applies to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under sections 7623(a) and 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Par. 3. Section 301.7623-1 is revised to read as follows:

§301.7623-1 General rules, submitting information on underpayments of tax or violations of the internal revenue laws, and filing claims for award.

(a) In general. In cases in which awards are not otherwise provided for by law, the Whistleblower Office may pay an award under section 7623(a), in a suitable amount, for information necessary for detecting underpayments of tax or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same. In cases that satisfy the requirements of section 7623(b)(5) and (b)(6) and in which the Internal Revenue Service (IRS) proceeds with an administrative or judicial action based on information provided by an individual, the Whistleblower Office must determine and pay an award under section 7623(b)(1), (2), or (3). The awards provided for by section 7623 and this paragraph must be paid from collected proceeds, as defined in §301.7623-2(d).

(b) Eligibility to file claim for award. (1) In general. Any individual, other than an individual described in paragraph (b)(2) of this section, is eligible to file a claim for award and to receive an award under section 7623 and §§301.7623-1 through 301.7623-4.

(2) Ineligible whistleblowers. The Whistleblower Office will reject any claim for award filed by an ineligible whistleblower and will provide written notice of the rejection to the whistleblower. The following individuals are not eligible to file a claim for award or receive an award under section 7623 and §§301.7623-1 through 301.7623-4--

(i) An individual who is an employee of the Department of Treasury or was an employee of the Department of Treasury when the individual obtained the information on which the claim is based;

(ii) An individual who obtained the information through the individual's official duties as an employee of the Federal Government, or who is acting within the scope of those official duties as an employee of the Federal Government;

(iii) An individual who is or was required by Federal law or regulation to disclose the information or who is or was precluded by Federal law or regulation from disclosing the information;

(iv) An individual who obtained or had access to the information based on a contract with the Federal Government; or

(v) An individual who filed a claim for award based on information obtained from an ineligible whistleblower for the purpose of avoiding the rejection of the claim that would have resulted if the claim was filed by the ineligible whistleblower.

(c) Submission of information and claims for award. (1) Submitting information.

To be eligible to receive an award under section 7623 and §§301.7623-1 through 301.7623-4, a whistleblower must submit to the IRS specific and credible information that the whistleblower believes will lead to collected proceeds from one or more persons whom the whistleblower believes have failed to comply with the internal revenue laws. In general, a whistleblower's submission should identify the person(s) believed to have failed to comply with the internal revenue laws and should provide substantive information, including all available documentation, that supports the whistleblower's allegations. Information that identifies a pass-through entity will be considered to also identify all persons with a direct or indirect interest in the entity. Information that identifies a member of a firm who promoted another identified person's participation in a transaction described and documented in the information provided will be considered to also identify the firm and all other members of the firm. Submissions that provide speculative information or that do not provide specific and credible information regarding tax underpayments or violations of internal revenue laws do not provide a basis for an award. If documents or supporting evidence are known to the whistleblower but are not in the whistleblower's control, then the whistleblower should describe the documents or supporting evidence and identify their location to the best of the whistleblower's ability. If all available information known to the whistleblower is not provided to the IRS by the whistleblower, then the whistleblower bears the risk that this information might not be considered by the Whistleblower Office for purposes of an award.

(2) Filing claim for award. To claim an award under section 7623 and §§301.7623-1 through 301.7623-4 for information provided to the IRS, a whistleblower must file a formal claim for award by completing and sending Form 211, "Application for Award for Original Information," to the Internal Revenue Service, Whistleblower Office, at the address provided on the form, or by complying with other claim filing procedures as may be prescribed by the IRS in other published guidance. The Form 211 should be completed in its entirety and should include the following information--

- (i) The date of the claim;
- (ii) The whistleblower's name;
- (iii) The whistleblower's address and telephone number;
- (iv) The whistleblower's date of birth;
- (v) The whistleblower's taxpayer identification number; and

(vi) An explanation of how the information on which the claim is based came to the attention and into the possession of the whistleblower, including, as available, the date(s) on which the whistleblower acquired the information and a complete description of the whistleblower's present or former relationship (if any) to person(s) identified on the Form 211.

(3) Under penalty of perjury. No award may be made under section 7623(b) unless the information on which the award is based is submitted to the IRS under penalty of perjury. All claims for award under section 7623 and §§301.7623-1 through 301.7623-4 must be accompanied by an original signed declaration under penalty of perjury, as follows: "I declare under penalty of perjury that I have examined this application, my accompanying statement, and supporting documentation and aver that



such application is true, correct, and complete, to the best of my knowledge.” This requirement precludes the filing of a claim for award by a person serving as a representative of, or in any way on behalf of, another individual. Claims filed by more than one whistleblower (joint claims) must be signed by each individual whistleblower under penalty of perjury.

(4) Perfecting claim for award. If a whistleblower files a claim for award that does not include information described under paragraph (c)(2) of this section, does not contain specific and credible information as described in paragraph (c)(1) of this section, or is based on information that was not submitted under penalty of perjury as required by paragraph (c)(3) of this section, the Whistleblower Office may reject the claim or notify the whistleblower of the deficiencies and provide the whistleblower an opportunity to perfect the claim for award. If a whistleblower does not perfect the claim for award within the time period specified by the Whistleblower Office, then the Whistleblower Office may reject the claim. If the Whistleblower Office rejects a claim, then the Whistleblower Office will provide notice of the rejection to the whistleblower pursuant to the rules of §301.7623-3(b)(3) or (c)(7). If the Whistleblower Office rejects a claim for the reasons described in this paragraph, then the whistleblower may perfect and resubmit the claim.

(d) Request for assistance. (1) In general. The Whistleblower Office, the IRS, or IRS Office of Chief Counsel may request the assistance of a whistleblower or the whistleblower’s legal representative. Any assistance shall be at the direction and control of the Whistleblower Office, the IRS, or the IRS Office of Chief Counsel assigned

to the matter. See §301.6103(n)-2 for rules regarding written contracts among the IRS, whistleblowers, and legal representatives of whistleblowers.

(2) No agency relationship. Submitting information, filing a claim for award, or responding to a request for assistance does not create an agency relationship between a whistleblower and the Federal Government, nor does a whistleblower or the whistleblower's legal representative act in any way on behalf of the Federal Government.

(e) Confidentiality of whistleblowers. Under the informant's privilege, the IRS will use its best efforts to protect the identity of whistleblowers. In some circumstances, the IRS may need to reveal a whistleblower's identity, for example, when it is determined that it is in the best interests of the Government to use a whistleblower as a witness in a judicial proceeding. In those circumstances, the IRS will make every effort to notify the whistleblower before revealing the whistleblower's identity.

(f) Effective/applicability date. This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This rule applies to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under sections 7623(a) and 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Par. 4. Section 301.7623-2 is added to read as follows:

§301.7623-2 Definitions.

(a) Action. (1) In general. For purposes of section 7623(b) and §§301.7623-1 through 301.7623-4, the term action means an administrative or judicial action.

(2) Administrative action. For purposes of section 7623(b) and §§301.7623-1 through 301.7623-4, the term administrative action means all or a portion of an Internal Revenue Service (IRS) civil or criminal proceeding against any person that may result in collected proceeds, as defined in paragraph (d) of this section, including, for example, an examination, a collection proceeding, a status determination proceeding, or a criminal investigation.

(3) Judicial action. For purposes of section 7623(b) and §§301.7623-1 through 301.7623-4, the term judicial action means all or a portion of a proceeding against any person in any court that may result in collected proceeds, as defined in paragraph (d) of this section.

(b) Proceeds based on. (1) In general. For purposes of section 7623(b) and §§301.7623-1 through 301.7623-4, the IRS proceeds based on information provided by a whistleblower when the information provided substantially contributes to an action against a person identified by the whistleblower. For example, the IRS proceeds based on the information provided 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, but for the information provided. The IRS does not proceed based on information when the IRS analyzes the information provided or investigates a matter raised by the information provided.

(2) Examples. The provisions of paragraph (b)(1) of this section may be illustrated by the following examples:

Example 1. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's foreign sales in Country A, and, based on those facts, alleges that the taxpayer was not entitled to a foreign tax credit relating to its foreign sales in

Country A. The IRS receives the information after having already initiated an examination of the taxpayer. The IRS's audit plan includes foreign tax credit issues but focuses on taxpayer's foreign sales in Country B and does not specifically address the taxpayer's foreign sales in Country A. Based on the information provided, the IRS expands the examination of the foreign tax credit issue to include consideration of the amount of foreign tax credit relating to the taxpayer's foreign sales in Country A. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the portion of the IRS's examination of the taxpayer relating to the foreign tax credit issue with respect to Country A is an administrative action with which the IRS proceeds based on the information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS's examination.

Example 2. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes in Year 1. The IRS proceeds with an examination of the taxpayer for Year 1 based on the information provided by the whistleblower. The IRS discovers that the taxpayer engaged in the same activities in Year 2 and expands the examination to Year 2. In the course of the examination, the IRS obtains, through the issuance of Information Document Requests (IDRs) and summonses, additional facts that are unrelated to the activities described in the information provided by the whistleblower. Based on these additional facts, the IRS expands the scope of the examination of the taxpayer for both Year 1 and Year 2. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the portion of the IRS's examination relating to the activities described and documented in the information provided is an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided substantially contributed to the action by causing the expansion of the IRS's examination of Year 1 and Year 2. The portions of the IRS's examination of the taxpayer in both Year 1 and Year 2 relating to the additional facts obtained through the issuance of IDRs and summonses are not actions with which the IRS proceeds based on the information provided by the whistleblower because the information provided did not substantially contribute to the action.

Example 3. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes in Year 1. The IRS receives the information after having already initiated an examination of the taxpayer for Year 1. During the examination, the information is provided to the Exam team and the Exam team uses the information provided to confirm the correctness of adjustments made based on other information. Although the whistleblower's information confirms the correctness of the IRS's adjustments, the IRS does not rely on the whistleblower's information when it makes the adjustments, nor does the information cause the IRS to expand the scope of its examination. The whistleblower's information merely supports information independently obtained by the IRS. For purposes of section 7623 and §§301.7623-1

through 301.7623-4, the IRS's examination is not an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided did not substantially contribute to the action.

Example 4. Same facts as Example 3. During the examination, however, the Exam team identifies inconsistencies between the information provided by the whistleblower and other information already in the Exam team's possession. The Exam team uses the information provided by the whistleblower to make additional adjustments that it would not have made based solely on the other information. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the portion of the IRS's examination relating to the additional adjustments is an administrative action with which the IRS proceeds based on information provided by the whistleblower because the information provided substantially contributed to the action.

(c) Related action. (1) In general. For purposes of section 7623(b) and §§301.7623-1 through 301.7623-4, the term related action means an action against a person other than the person(s) identified in the information provided and subject to the original action(s), when--

(i) The facts relating to the underpayment of tax or violations of the internal revenue laws by the other person are substantially the same as the facts described and documented in the information provided (with respect to the person(s) subject to the original action);

(ii) The IRS proceeds with the action against the other person based on the specific facts described and documented in the information provided; and

(iii) The other, unidentified person is related to the person identified in the information provided. For purposes of this paragraph, an unidentified person is related to the person identified in the information provided if the IRS can identify the unidentified person using the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).

(2) Examples. The provisions of paragraph (c)(1) of this section may be illustrated by the following examples:

Example 1. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a taxpayer (Taxpayer 1), describes and documents specific facts relating to Taxpayer 1's activities, and, based on those facts, alleges tax underpayments by Taxpayer 1. The information provided also identifies an accountant (CPA 1) and describes and documents specific facts relating to CPA 1's contribution to the activities of Taxpayer 1 that the whistleblower alleges resulted in tax underpayments. The IRS proceeds with an examination of Taxpayer 1 based on the information provided by the whistleblower. Using the information provided, the IRS obtains CPA 1's client list and identifies two taxpayer/clients of CPA 1 (Taxpayer 2 and Taxpayer 3) that appear to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 2 and finds that Taxpayer 2 engaged in the same activities as those described in the information provided with respect to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 3 and finds that Taxpayer 3 engaged in different activities from those described in the information provided with respect to Taxpayer 1. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the examination of Taxpayer 2 is a related action because it satisfies the conditions of paragraph (c)(1) of this section. The examination of Taxpayer 3 is not a related action because the relevant facts are not substantially the same as the facts relevant to the examination of Taxpayer 1.

Example 2. Same facts as Example 1. Using the information provided by the whistleblower, the IRS identifies a co-promoter of CPA 1 (CPA 2) that appears to have engaged in activities similar to CPA 1. CPA 2 is not a member of CPA 1's firm. The IRS subsequently obtains the client list of CPA 2 and identifies a taxpayer/client of CPA 2 (Taxpayer 4) that appears to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an examination of Taxpayer 4 and finds that Taxpayer 4 engaged in the same activities as those described in the information provided with respect to Taxpayer 1, and that CPA 2 contributed to the activities in the same way as described in the information provided with respect to CPA 1. The IRS proceeds with an examination of CPA 2's liability for promoter penalties under section 6700 in connection with the activities described in the information provided with respect to Taxpayer 1 and CPA 1. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the examination of CPA 2 is a related action because it satisfies the conditions of paragraph (c)(1) of this section. The examination of Taxpayer 4 is not a related action because Taxpayer 4 was not related to a person identified in the information provided. CPA 2 was not identified in the information provided and the IRS first had to identify CPA 2 before identifying Taxpayer 4 and proceeding with the examination of Taxpayer 4.

Example 3. Same facts as Example 1. An accountant (CPA 3) is a member of CPA 1's firm. Using the information provided by the whistleblower, the IRS obtains the client list of CPA 3 and identifies a taxpayer/client of CPA 3 (Taxpayer 5) that appears to have engaged in activities similar to Taxpayer 1. The IRS proceeds with an

examination of Taxpayer 5 and finds that Taxpayer 5 engaged in the same activities as those described in the information provided with respect to Taxpayer 1, and that CPA 3 contributed to the activities in the same way as described in the information provided with respect to CPA 1. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the examination of Taxpayer 5 is a related action because Taxpayer 5 is related to CPA 3, a person considered to be identified in the information provided under §301.7623-1(c)(1), and the facts relating to Taxpayer 5 are substantially the same as the facts described and documented in the information provided. An IRS examination of CPA 3's liability for promoter penalties under section 6700, based on the facts described and documented in the information provided with respect to Taxpayer 1 and CPA 1, is an administrative action based on the information provided.

Example 4. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a taxpayer (Taxpayer 1), describes and documents specific facts relating to Taxpayer 1's activities, and, in particular, Taxpayer 1's participation in a transaction. Based on those facts, the whistleblower alleges that Taxpayer 1 owed additional taxes. The IRS proceeds with an examination of Taxpayer 1 based on the information provided by the whistleblower. The IRS identifies the other parties to the transaction described in the information provided (Taxpayer 2 and Taxpayer 3). The IRS proceeds with examinations of Taxpayer 2 and Taxpayer 3 relating to their participation in the transaction described in the information provided. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the IRS's examinations of Taxpayer 2 and Taxpayer 3 relating to the activities described and documented in the information provided are related actions because they satisfy the conditions of paragraph (c)(1) of this section.

(d) Collected proceeds. (1) In general. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the terms proceeds of amounts collected and collected proceeds (collectively, collected proceeds) include: tax, penalties, interest, additions to tax, and additional amounts collected because of the information provided; amounts collected prior to receipt of the information if the information provided results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided. Collected proceeds are limited to amounts collected under the provisions of title 26, United States Code.



(2) Refund netting. (i) In general. If any portion of a claim for refund that is substantively unrelated to the information provided is--

(A) Allowed, and

(B) Used to satisfy a tax liability attributable to the information provided instead of refunded to the taxpayer, then the allowed but non-refunded amount constitutes collected proceeds.

(ii) Example. The provisions of paragraph (d)(2)(i) of this section may be illustrated by the following example:

Example. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a corporate taxpayer (Corporation), describes and documents specific facts relating to Corporation's activities, and, based on those facts, alleges that Corporation owed additional taxes. Based on the information provided by the whistleblower, the IRS proceeds with an examination of Corporation and determines adjustments that would result in an unpaid tax liability of \$500,000. During the examination, Corporation informally claims a refund of \$400,000 based on adjustments to items of income and expense that are wholly unrelated to the information provided by the whistleblower. The IRS agrees to the unrelated adjustments. The IRS nets the adjustments and determines a tax deficiency of \$100,000. Thereafter, Corporation makes full payment of the \$100,000 deficiency. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the collected proceeds include the \$400,000 informally claimed as a refund and netted against the adjustments attributable to the information provided, as well as the \$100,000 paid by Corporation.

(3) Amended returns. Amounts collected based on amended returns constitute collected proceeds if--

(i) The IRS proceeds based on the information provided;

(ii) As a result, the person subject to the action(s) with which the IRS proceeds files amended returns; and

(iii) The amounts collected based on the amended returns relate to the activities or facts described in the information provided.



(4) Criminal fines. Criminal fines deposited into the Victims of Crime Fund are not collected proceeds and cannot be used for payment of awards.

(5) Computation of collected proceeds. (i) In general. Pursuant to §301.7623-4(d)(1), the IRS cannot make an award payment until there has been a final determination of tax. For purposes of determining the amount of an award under section 7623 and §§301.7623-1 through 301.7623-4, after there has been a final determination of tax as defined in §301.7623-4(d)(2), the IRS will compute the amount of collected proceeds based on all information known with respect to the taxpayer's account, including with respect to all tax attributes, as of the date the computation is made.

(ii) Post-determination proceeds. If, based on all information known with respect to the taxpayer's account as of the date of the computation described in paragraph (d)(5)(i) of this section, there is a possibility that the IRS may collect additional proceeds, then the Whistleblower Office will continue to monitor the case. If the Whistleblower Office identifies additional collected proceeds, then the IRS will compute and pay accordingly.

(iii) Partial collection. If the IRS does not collect the full amount of taxes, penalties, interest, additions to tax, and additional amounts assessed against the taxpayer, then any amounts that the IRS does collect will constitute collected proceeds in the same proportion that the adjustments attributable to the information provided bear to the total adjustments.

(e) Amount in dispute and gross income. (1) In general. Section 7623(b) applies with respect to any action against any taxpayer in which the tax, penalties, interest,

additions to tax, and additional amounts in dispute exceed \$2,000,000 but, if the taxpayer is an individual, then only if the taxpayer's gross income exceeds \$200,000 in at least one taxable year subject to the action.

(2) Amount in dispute. (i) In general. For purposes of section 7623(b)(5) and §§301.7623-1 through 301.7623-4, the term amount in dispute means the greater of the maximum total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action(s) with which the IRS proceeded based on the information provided, or the maximum total of such amounts that were stated in formal positions taken by the IRS in the action(s). The IRS will compute the amount in dispute, for purposes of award determinations described in §301.7623-3(c)(6), when there has been a final determination of tax as defined in §301.7623-4(d)(2).

(ii) Examples. The provisions of paragraph (e)(2)(i) of this section may be illustrated by the following examples:

Example 1. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a corporate taxpayer, describes and documents specific facts relating to the taxpayer's activities, and, based on those facts, alleges that the taxpayer owed additional taxes. The IRS proceeds with an examination of the taxpayer based on the information provided by the whistleblower; makes adjustments to items of income and expense and allows certain credits; and, ultimately, determines a deficiency against the taxpayer of \$1,900,000 and issues the taxpayer a statutory notice of deficiency. The taxpayer petitions the notice to the United States Tax Court. The Tax Court sustains the IRS's position resulting in a deficiency of \$1,900,000. Following the final determination of tax, the IRS computes that the total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action was \$2,500,000. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the amount in dispute is \$2,500,000.

Example 2. Same facts as Example 1, except the IRS determines a deficiency of \$1,500,000; the Tax Court sustains the deficiency of \$1,500,000; and, following the final determination of tax, the IRS computes that the total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action was \$1,750,000. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the amount in dispute is \$1,750,000.

Example 3. Same facts as Example 1, except the IRS determines a deficiency of \$2,100,000; the Tax Court redetermines a deficiency of \$1,500,000; and, following the final determination of tax, the IRS computes that the total of tax, penalties, interest, additions to tax, and additional amounts that resulted from the action was \$1,750,000. For purposes of section 7623 and §§301.7623-1 through 301.7623-4, the amount in dispute is \$2,100,000.

(3) Gross income. For purposes of section 7623(b)(5) and §§301.7623-1 through 301.7623-4, the term gross income has the same meaning as provided under section 61(a). The IRS will compute the individual taxpayer's gross income, for purposes of award determinations described in §301.7623-3(c)(6), when there has been a final determination of tax as defined in §301.7623-4(d)(2).

(f) Effective/applicability date. This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This rule applies to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under sections 7623(a) and 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Par. 5. Section 301.7623-3 is added to read as follows:

§301.7623-3 Whistleblower administrative proceedings and appeals of award determinations.

(a) In general. The Whistleblower Office will pay awards under section 7623(a) and determine and pay awards under section 7623(b) in whistleblower administrative proceedings pursuant to the rules of this section. The whistleblower administrative proceedings described in this section are administrative proceedings pertaining to tax administration for purposes of section 6103(h)(4). See §301.6103(h)(4)-1 for additional rules regarding disclosures of return information in whistleblower administrative proceedings. The Whistleblower Office may determine awards for claims involving

multiple actions in a single whistleblower administrative proceeding. For purposes of the whistleblower administrative proceedings for rejections and denials, described in paragraphs (b)(3), (c)(7), and (c)(8) of this section, the Internal Revenue Service (IRS) may rely on the whistleblower's description of the amount owed by the taxpayer(s). The IRS may, however, rely on other information as necessary (for example, when the alleged amount in dispute is below the \$2 million threshold of section 7623(b)(5)(B), but the actual amount in dispute is above the threshold).

(b) Awards under section 7623(a). (1) Preliminary award recommendation. In cases in which the Whistleblower Office recommends payment of an award under section 7623(a), the Whistleblower Office will communicate a preliminary award recommendation under section 7623(a) and §§301.7623-1 through 301.7623-4 to the whistleblower by sending a preliminary award recommendation letter that states the Whistleblower Office's preliminary computation of the amount of collected proceeds, recommended award percentage, recommended award amount (even in cases when the application of §301.7623-4 results in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage. The whistleblower administrative proceeding described in paragraphs (b)(1) and (2) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary award recommendation to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office

will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and pay an award, pursuant to paragraph (b)(2) of this section.

(2) Decision letter. At the conclusion of the process described in paragraph (b)(1) of this section, and when there is a final determination of tax, as defined in §301.7623-4(d)(2), the Whistleblower Office will pay an award under section 7623(a) and §§301.7623-1 through 301.7623-4. The Whistleblower Office will communicate the amount of the award to the whistleblower in a decision letter.

(3) Rejections and denials. If the Whistleblower Office rejects a claim for award under section 7623(a), pursuant to §301.7623-1(b) or (c), or if the IRS either did not proceed based on information provided by the whistleblower, as defined in §301.7623-2(b), or did not collect proceeds, as defined in §301.7623-2(d), then the Whistleblower Office will not apply the rules of paragraphs (b)(1) or (2) of this section. The Whistleblower Office will provide written notice to the whistleblower of the rejection or denial of any award and, in the case of a rejection, the written notice will state the basis for the rejection.

(c) Awards under section 7623(b). (1) Preliminary award recommendation. For claims under section 7623(b) other than those described in paragraphs (c)(7) and (c)(8) of this section (rejections and denials), the Whistleblower Office will prepare a preliminary award recommendation based on the Whistleblower Office's review of the administrative claim file and the application of the rules of section 7623 and §§301.7623-1 through 301.7623-4 to the facts of the case. See paragraph (e)(2) of this section for a description of the administrative claim file. The whistleblower

administrative proceeding described in paragraphs (c)(1) through (6) of this section begins on the date the Whistleblower Office sends the preliminary award recommendation letter. The preliminary award recommendation is not a determination letter within the meaning of paragraph (c)(6) of this section and cannot be appealed to Tax Court under section 7623(b)(4) and paragraph (d) of this section. The preliminary award recommendation will notify the whistleblower that the IRS cannot determine or pay any award until there is a final determination of tax, as defined in §301.7623-4(d)(2).

(2) Contents of preliminary award recommendation. The Whistleblower Office will communicate the preliminary award recommendation under section 7623(b) to the whistleblower by sending--

(i) A preliminary award recommendation letter that describes the whistleblower's options for responding to the preliminary award recommendation;

(ii) A summary report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, the recommended award amount (even in cases when the application of section 7623(b)(2) or section 7623(b)(3) results in a reduction of the recommended award amount to zero), and a list of the factors that contributed to the recommended award percentage;

(iii) An award consent form; and

(iv) A confidentiality agreement.

(3) Opportunity to respond to preliminary award recommendation. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the preliminary

award recommendation letter to respond to the preliminary award recommendation in one of the following ways--

(i) If the whistleblower takes no action, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(ii) If the whistleblower signs, dates, and returns the award consent form agreeing to the preliminary award recommendation and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(iii) If the whistleblower signs, dates, and returns the confidentiality agreement, then the Whistleblower Office will provide the whistleblower with a detailed award report, and an opportunity to review documents supporting the report pursuant to paragraphs (c)(4) and (5) of this section, and any comments submitted by the whistleblower will be added to the administrative claim file; or

(iv) If the whistleblower submits comments on the preliminary award recommendation to the Whistleblower Office, but does not sign, date, and return the confidentiality agreement, then the comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination, pursuant to paragraph (c)(6) of this section.

(4) Detailed report. (i) Contents of detailed report. If the whistleblower signs, dates, and returns the confidentiality agreement accompanying the preliminary award recommendation under section 7623(b), pursuant to paragraph (c)(3) of this section, then the Whistleblower Office will send the whistleblower--

(A) A detailed report that states a preliminary computation of the amount of collected proceeds, the recommended award percentage, and the recommended award amount, and provides a full explanation of the factors that contributed to the recommended award percentage;

(B) Instructions for scheduling an appointment for the whistleblower (and the whistleblower's legal representative, if any) to review information in the administrative claim file that is not protected by one or more common law or statutory privileges; and

(C) An award consent form.

(ii) Opportunity to respond to detailed report. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date the Whistleblower Office sends the detailed report to respond in one of the following ways--

(A) If the whistleblower takes no action, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section;

(B) If the whistleblower requests an appointment to review information from the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges, then a meeting will be arranged pursuant to paragraph (c)(5) of this section;

(C) If the whistleblower does not request an appointment but does submit comments on the detailed report to the Whistleblower Office, then the comments will be added to the administrative claim file and reviewed by the Whistleblower Office in making an award determination pursuant to paragraph (c)(6) of this section; or



(D) If the whistleblower signs, dates, and returns the award consent form agreeing to the preliminary award recommendation and waiving any and all administrative and judicial appeal rights, then the Whistleblower Office will make an award determination, pursuant to paragraph (c)(6) of this section.

(iii) Additional rules. The detailed report is not a determination letter within the meaning of paragraph (c)(6) of this section and cannot be appealed to Tax Court under section 7623(b)(4) and paragraph (d) of this section. The detailed report will notify the whistleblower that the IRS cannot determine or pay any award until there is a final determination of tax, as defined in §301.7623-4(d)(2).

(5) Opportunity to review documents supporting award report recommendations. Appointments for the whistleblower (and the whistleblower's legal representative, if any) to review information from the administrative claim file that is not protected from disclosure by one or more common law or statutory privileges will be held at the Whistleblower Office in Washington, D.C., unless the Whistleblower Office, in its sole discretion, decides to hold the meeting at another location. At the appointment, the Whistleblower Office will provide for viewing the information from the administrative claim file. The Whistleblower Office will supervise the whistleblower's review of the information and the whistleblower will not be permitted to make copies of any documents or other information. The whistleblower will have 30 days (this period may be extended at the sole discretion of the Whistleblower Office) from the date of the appointment to submit comments on the detailed report and the documents reviewed at the appointment to the Whistleblower Office. All comments will be added to the

administrative claim file and reviewed by the Whistleblower Office in making an award determination, pursuant to paragraph (c)(6) of this section.

(6) Determination letter. After the whistleblower's participation in the whistleblower administrative proceeding, pursuant to paragraph (c) of this section, has concluded, and there is a final determination of tax, as defined in §301.7623-4(d)(2), a Whistleblower Office official will determine the amount of the award under section 7623(b)(1), (2), or (3), and §§301.7623-1 through 301.7623-4, based on the official's review of the administrative claim file. The Whistleblower Office will communicate the award to the whistleblower in a determination letter, stating the amount of the award. If, however, the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the award determination, pursuant to section 7623(b)(4) and paragraph (d) of this section, then the Whistleblower Office will not send the whistleblower a determination letter and will make payment of the award as promptly as circumstances permit.

(7) Rejections. A rejection is a determination that relates solely to the whistleblower and the information on the face of the claim that pertains to the whistleblower. If the Whistleblower Office rejects a claim for award under section 7623(b), pursuant to §301.7623-1(b) or (c), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary rejection letter that states the basis for the rejection of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary rejection letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the

information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary rejection letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either provide written notice to the whistleblower of the rejection of the claim, including the basis for the rejection, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

(8) Denials. A denial is a determination that relates to or implicates taxpayer information. If, with respect to a claim for award under section 7623(b), the IRS either did not proceed based on the information provided by the whistleblower, as defined in §301.7623-2(b), or did not collect proceeds, as defined in §301.7623-2(d), then the Whistleblower Office will not apply the rules of paragraphs (c)(1) through (6) of this section. The Whistleblower Office will send to the whistleblower a preliminary denial letter that states the basis for the denial of the claim. The whistleblower administrative proceeding described in this paragraph begins on the date the Whistleblower Office sends the preliminary denial letter. If the whistleblower believes that the Whistleblower Office erred in evaluating the information provided, the whistleblower has 30 days from the date the Whistleblower Office sends the preliminary denial letter to submit comments to the Whistleblower Office (this period may be extended at the sole discretion of the Whistleblower Office). The Whistleblower Office will review all comments submitted timely by the whistleblower (or the whistleblower's legal representative, if any) and, following that review, the Whistleblower Office will either

provide written notice to the whistleblower of the denial of any award, including the basis for the denial, or apply the rules of paragraphs (c)(1) through (c)(6) of this section.

(d) Appeal of award determination. Any determination regarding an award under section 7623(b)(1), (2), or (3) may, within 30 days of such determination, be appealed to the Tax Court.

(e) Administrative record. (1) In general. The administrative record comprises all information contained in the administrative claim file that is relevant to the award determination and not protected by one or more common law or statutory privileges.

(2) Administrative claim file. The administrative claim file will include the following materials relating to the action(s) to which the determination relates--

(i) The Form 211, "Application for Award for Original Information," filed by the whistleblower and all information provided by the whistleblower (whether provided with the whistleblower's original submission or through a subsequent contact with the IRS).

(ii) Copies of all debriefing notes and recorded interviews held with the whistleblower (and the whistleblower's legal representative, if any).

(iii) Form(s) 11369, "Confidential Evaluation Report on Claim for Award," including narratives prepared by the relevant IRS office(s), explaining the whistleblower's contributions to the actions and documenting the actions taken by the IRS in the case(s). The Form 11369 will refer to and incorporate additional documents relating to the issues raised by the claim, as appropriate, including, for example, relevant portions of revenue agent reports, copies of agreements entered into with the taxpayer(s), tax returns, and activity records.

(iv) Copies of all contracts entered into among the IRS, the whistleblower, and the whistleblower's legal representative (if any), and an explanation of the cooperation provided by the whistleblower (or the whistleblower's legal representative, if any) under the contract.

(v) Any information that reflects actions by the whistleblower that may have had a negative impact on the IRS's ability to examine the taxpayer(s).

(vi) All correspondence and documents sent by the Whistleblower Office to the whistleblower.

(vii) All notes, memoranda, and other documents made by officers and employees of the Whistleblower Office and considered by the official making the award determination.

(viii) All correspondence and documents received by the Whistleblower Office from the whistleblower (and the whistleblower's legal representative, if any) in the course of the whistleblower administrative proceeding.

(ix) All other information considered by the official making the award determination.

(f) Effective/applicability date. This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This rule applies to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under sections 7623(a) and 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

Par. 6. Section 301.7623-4 is added to read as follows:

§301.7623-4 Amount and payment of award.

(a) In general. The Whistleblower Office will pay all awards under section 7623(a) and determine and pay all awards under section 7623(b). For all awards under section 7623 and §§301.7623-1 through 301.7623-4, the Whistleblower Office will--

(1) Analyze the claim by applying the rules provided in paragraph (c) of this section to the information contained in the administrative claim file to determine an award percentage; and

(2) Multiply the award percentage by the amount of collected proceeds. If the award determination arises out of a single whistleblower administrative proceeding involving multiple actions, the Whistleblower Office may determine separate award percentages on an action-by-action basis and apply the separate award percentages to the collected proceeds attributable to the corresponding actions. The Internal Revenue Service (IRS) will pay all awards in accordance with the rules provided in paragraph (d) of this section. All relevant factors will be taken into account by the Whistleblower Office in determining whether an award will be paid and, if so, the amount of the award. No person is authorized under this section to make any offer or promise or otherwise bind the Whistleblower Office with respect to the amount or payment of an award.

(b) Factors used to determine award percentage. (1) Positive factors. The application of the following non-exclusive factors may support increasing an award percentage under paragraphs (c)(1) or (2) of this section--

(i) The whistleblower acted promptly to inform the IRS or the taxpayer of the tax noncompliance.

(ii) The information provided identified an issue or transaction of a type previously unknown to the IRS.

(iii) The information provided identified taxpayer behavior that the IRS was unlikely to identify or that was particularly difficult to detect through the IRS's exercise of reasonable diligence.

(iv) The information provided thoroughly presented the factual details of tax noncompliance in a clear and organized manner, particularly if the manner of the presentation saved the IRS work and resources.

(v) The whistleblower (or the whistleblower's legal representative, if any) provided exceptional cooperation and assistance during the pendency of the action(s).

(vi) The information provided identified assets of the taxpayer that could be used to pay liabilities, particularly if the assets were not otherwise known to the IRS.

(vii) The information provided identified connections between transactions, or parties to transactions, that enabled the IRS to understand tax implications that might not otherwise have been understood by the IRS.

(viii) The information provided had an impact on the behavior of the taxpayer, for example by causing the taxpayer to promptly correct a previously-reported improper position.

(2) Negative factors. The application of the following non-exclusive factors may support decreasing an award percentage under paragraphs (c)(1) or (2) of this section--

(i) The whistleblower delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS's ability to pursue an action or issue.

(ii) The whistleblower contributed to the underpayment of tax or tax noncompliance identified.

(iii) The whistleblower directly or indirectly profited from the underpayment of tax or tax noncompliance identified, but did not plan and initiate the actions that led to the underpayment of tax or actions described in section 7623(a)(2) .

(iv) The whistleblower (or the whistleblower's legal representative, if any) negatively affected the IRS's ability to pursue the action(s), for example by disclosing the existence or scope of an enforcement activity.

(v) The whistleblower (or the whistleblower's legal representative, if any) violated instructions provided by the IRS, particularly if the violation caused the IRS to expend additional resources.

(vi) The whistleblower (or the whistleblower's legal representative, if any) violated the terms of the confidentiality agreement described in §301.7623-3(c)(2)(iv).

(vii) The whistleblower (or the whistleblower's legal representative, if any) violated the terms of a contract entered into with the IRS pursuant to §301.6103(n)-2.

(viii) The whistleblower provided false or misleading information or otherwise violated the requirements of section 7623(b)(6)(C) or §301.7623-1(c)(3).

(c) Amount of award percentage. (1) Award for substantial contribution. (i) In general. If the IRS proceeds with any administrative or judicial action based on information brought to the IRS's attention by a whistleblower, such whistleblower shall, subject to paragraphs (c)(2) and (3) of this section, receive as an award at least 15 percent but not more than 30 percent of the collected proceeds resulting from the action (including any related actions) or from any settlement in response to such action. The amount of any award under this paragraph depends on the extent of the whistleblower's



substantial contribution to the action(s). See paragraph (c)(4) of this section for rules regarding multiple whistleblowers.

(ii) Computational framework. Starting the analysis at 15 percent, the Whistleblower Office will analyze the administrative claim file using the factors listed in paragraph (b)(1) of this section to determine whether the whistleblower merits an increased award percentage of 22 percent or 30 percent. The Whistleblower Office may increase the award percentage based on the presence and significance of positive factors. The Whistleblower Office will then analyze the contents of the administrative claim file using the factors listed in paragraph (b)(2) of this section to determine whether the whistleblower merits a decreased award percentage of 15 percent, 18 percent, 22 percent, or 26 percent. The Whistleblower Office may decrease the award percentage based on the presence and significance of negative factors. Although the factors listed in paragraphs (b)(1) and (2) of this section are described as positive and negative factors, the Whistleblower Office's analysis cannot be reduced to a mathematical equation. The factors are not exclusive and are not weighted and, in a particular case, one factor may override several others. The presence and significance of positive factors may offset the presence and significance of negative factors. But the absence of negative factors does not constitute a positive factor.

(iii) Examples. The operation of the provisions of paragraph (c)(1)(ii) of this section may be illustrated by the following examples. The examples are intended to illustrate the operation of the computational framework. The examples provide simplified descriptions of the facts relating to the claims for award, the information provided, and the facts relating to the underlying tax cases. The application of section

7623(b)(1) and paragraph (c)(1)(ii) of this section will depend on the specific facts of each case.

Example 1. Facts. Whistleblower A, an employee in Corporation's sales department, submitted to the IRS a claim for award under section 7623 and information indicating that Corporation improperly claimed a credit in tax year 2006. Whistleblower A's information consisted of numerous non-privileged documents relevant to Corporation's eligibility for the credit. Whistleblower A's original submission also included an analysis of the documents, as well as information about meetings in which the claim for credit was discussed. When interviewed by the IRS, Whistleblower A clarified ambiguities in the original submission, answered questions about Corporation's business and accounting practices, and identified potential sources to corroborate the information.

Some of the documents provided by Whistleblower A were not included in Corporation's general record-keeping system and their existence may not have been easily uncovered through normal IRS examination procedures. Corporation initially denied the facts revealed in the information provided by Whistleblower A, which were essential to establishing the impropriety of the claim for credit. IRS examination of Corporation's return confirmed that the credit was improperly claimed by Corporation in tax year 2006, as alleged by Whistleblower A. Corporation agreed to the ensuing assessments of tax and interest and paid the liabilities in full.

Analysis. In this case, Whistleblower A provided specific and credible information that formed the basis for action by the IRS. Whistleblower A provided information that was difficult to detect, provided useful assistance to the IRS, and helped the IRS sustain the assessment. Based on the presence and significance of these positive factors, viewed against all the specific facts relevant to Corporation's 2006 tax year, the Whistleblower Office could increase the award percentage to 22 percent of collected proceeds. If, however, Whistleblower A's claim reflected negative factors, for example Whistleblower A violated instructions provided by the IRS and the violation caused the IRS to expend additional resources, then the Whistleblower Office could, based on this negative factor, reduce the award percentage to 18 or 15 percent (but not to lower than 15 percent of collected proceeds).

Example 2. Facts. Whistleblower B, an employee of Financial Advisory Firm 1 (Firm 1), submitted to the IRS a claim for award under section 7623 and information indicating that Firm 1 helped clients engage in activities that were intended to, and did, result in substantial tax underpayments. The activities were designed to avoid detection by the IRS, and prior IRS audits of several clients of Firm 1 had failed to detect underpayments of tax. Whistleblower B learned of the activities after being reassigned to a new position with Firm 1. Whistleblower B provided the information to the IRS soon after he understood the scope, nature and impact of the activities. The information provided consisted of numerous documents containing client profiles and marketing strategies, as well as descriptions of the transactions and structures used by Firm 1 and its clients to obscure the clients' identities and to generate the substantial tax underpayments. Whistleblower B also provided an analysis of the documents, as well

as information about meetings in which the transactions and structures were discussed. When interviewed by the IRS, Whistleblower B clarified ambiguities in the original submission, answered questions about Firm 1's execution of specific client transactions, and identified potential sources to corroborate the information provided. Whistleblower B also notified the IRS of steps taken by Firm 1 to limit the disclosure of information requested by the IRS, enabling the IRS to obtain full disclosure of the information through the targeted use of summonses.

Analysis. Ultimately, the IRS collected tax, penalties, and interest from Firm 1 and multiple clients. In addition, Treasury and the IRS issued a notice identifying the impropriety of the transactions and structures employed by Firm 1 and its clients. Whistleblower B provided specific and credible information that formed the basis for action by the IRS. The information provided identified transactions that were difficult to detect. Whistleblower B acted promptly after he understood the activities at issue and he provided useful assistance to the IRS. Whistleblower B's assistance, and the information he provided, helped the IRS overcome the efforts made to obscure the activities and the clients' identities. And the information provided by Whistleblower B contributed to the decision to issue the notice, which may have a positive effect on client behavior and save IRS resources. Based on the presence and significance of these positive factors, the Whistleblower Office could increase the award percentage to 30 percent of collected proceeds. If Whistleblower B directly or indirectly profited from Firm 1's and the clients' activities resulting in the tax underpayments, then the Whistleblower Office could, based on this negative factor, reduce the award percentage to 26, 22, 18 percent or 15 percent (but not to lower than 15 percent of collected proceeds).

(2) Award for less substantial contribution. (i) In general. If the Whistleblower Office determines that the action described in paragraph (c)(1) of this section is based principally on disclosures of specific allegations resulting from a judicial or administrative hearing; a government report, hearing, audit, or investigation; or the news media, then the Whistleblower Office will determine an award of no more than 10 percent of the collected proceeds resulting from the action (including any related actions) or from any settlement in response to such action. If the whistleblower is the original source of the information from which the disclosures of specific allegations resulted, however, then the award percentage will be determined under paragraph (c)(1) of this section.

(ii) Computational framework. The Whistleblower Office will analyze the administrative claim file to determine--

(A) Whether the claim involves specific allegations regarding a tax underpayment or a violation of the internal revenue laws that reasonably may be inferred to have resulted from a judicial or administrative hearing; a government report, hearing, audit, or investigation; or the news media;

(B) Whether the action described in paragraph (c)(1) of this section was based principally on the disclosure of the specific allegations; and

(C) Whether the whistleblower was the original source of the information that gave rise to the specific allegations. If the Whistleblower Office determines that the action was based principally on disclosures of specific allegations, as stated in paragraph (c)(2)(ii)(B) of this section, and that the whistleblower was not the original source of the information, then, starting at 1 percent, the Whistleblower Office will analyze the administrative claim file using the factors listed in paragraph (b)(1) of this section to determine whether the whistleblower merits an increased award percentage of 4 percent, 7 percent, or 10 percent. The Whistleblower Office will then determine whether the whistleblower merits a decreased award percentage of zero, 1 percent, 4 percent, or 7 percent using the factors listed in paragraph (b)(2) of this section. The Whistleblower Office may increase the award percentage based on the presence and significance of positive factors and may decrease (to zero) the award percentage based on the presence and significance of negative factors. Like the analysis described in paragraph (c)(1)(ii) of this section, the Whistleblower Office's analysis cannot be reduced to a mathematical equation. The factors are not exclusive and are not

weighted and, in a particular case, one factor may override several others. The presence and significance of positive factors may offset the presence and significance of negative factors. But the absence of negative factors does not constitute a positive factor.

(iii) Example. The operation of the provisions of paragraph (c)(2)(ii) of this section may be illustrated by the following example. The example is intended to illustrate the operation of the computational framework. The example provides a simplified description of the facts relating to the claim for award, the information provided, and the facts relating to the underlying tax case(s). The application of section 7623(b)(2) and paragraph (c)(2)(ii) of this section will depend on the specific facts of each case.

Example. Facts. Whistleblower A submitted to the IRS a claim for award under section 7623 and information indicating that Taxpayer B was the defendant in a criminal prosecution for embezzlement. Whistleblower A's information further indicated that evidence presented at Taxpayer B's trial revealed Taxpayer B's efforts to conceal the embezzled funds by depositing them in bank accounts of entities controlled by Taxpayer B. Taxpayer B's failure to pay tax on the embezzled funds was not explicitly stated during the judicial hearing, but could be reasonably inferred from the facts and circumstances, including Taxpayer B's efforts to conceal the funds.

Analysis. In this case, Whistleblower A's information is based principally on disclosures of specific allegations resulting from a judicial hearing. Absent information demonstrating that the investigation leading to the embezzlement charge was based on information provided by Whistleblower A, section 7623(b)(2) and paragraph (c)(2) of this section apply to the determination of Whistleblower A's award. In this case, there is no reason for the Whistleblower Office to increase the applicable award percentage above 1 percent, the starting point for its analysis, given the absence of positive factors. Accordingly, Whistleblower A may receive an award of 1 percent of collected proceeds.

(3) Reduction in award and denial of award. (i) In general. If the Whistleblower Office determines that a claim for award is brought by a whistleblower who planned and initiated the actions, transaction, or events (underlying acts) that led to the underpayment of tax or actions described in section 7623(a)(2), then the Whistleblower

Office may appropriately reduce the amount of the award percentage that would otherwise result under section 7623(b)(1) and paragraph (c)(1) of this section or section 7623(b)(2) and paragraph (c)(2) of this section, as applicable. The Whistleblower Office will deny an award if the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the underlying acts.

(ii) Threshold determination. A whistleblower planned and initiated the underlying acts if the whistleblower--

(A) Designed, structured, drafted, arranged, formed the plan leading to, or otherwise planned, an underlying act,

(B) Took steps to start, introduce, originate, set into motion, promote or otherwise initiate an underlying act, and

(C) Knew or had reason to know that an underpayment of tax or actions described in section 7623(a)(2) could result from planning and initiating the underlying act.

(D) The whistleblower need not have been the sole person involved in planning and initiating the underlying acts. A whistleblower who merely furnishes typing, reproducing, or other mechanical assistance in implementing one or more underlying acts will not be treated as initiating any underlying act. A whistleblower who is a junior employee acting at the direction, and under the control, of a senior employee will not be treated as initiating any underlying act.

(E) If the Whistleblower Office determines that a whistleblower has satisfied this initial threshold of planning and initiating, the Whistleblower Office will then reduce the

award amount based on the extent of the whistleblower's planning and initiating, pursuant to paragraph (c)(3)(iii) of this section.

(iii) Computational framework. After determining the award percentage that would otherwise result from the application of section 7623(b)(1) and paragraph (c)(1) of this section or section 7623(b)(2) and paragraph (c)(2) of this section, as applicable, the Whistleblower Office will analyze the administrative claim file to make the threshold determination described in paragraph (c)(3)(ii) of this section. If the whistleblower is determined to have planned and initiated the underlying acts, then the Whistleblower Office will reduce the award based on the extent of the whistleblower's planning and initiating. The Whistleblower Office's analysis and the amount of the appropriate reduction determined in a particular case cannot be reduced to a mathematical equation. To determine the appropriate award reduction, the Whistleblower Office will--

(A) Categorize the whistleblower's role as a planner and initiator as primary, significant, or moderate; and

(B) Appropriately reduce the award percentage that would otherwise result from the application of section 7623(b)(1) and paragraph (c)(1) of this section or section 7623(b)(2) and paragraph (c)(2) of this section, as applicable, by 67 percent to 100 percent in the case of a primary planner and initiator, by 34 percent to 66 percent in the case of a significant planner and initiator, or by 0 percent to 33 percent in the case of a moderate planner and initiator. If the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating the underlying acts, then the Whistleblower Office will deny an award without regard to whether the Whistleblower

Office categorized the whistleblower's role as a planner and initiator as primary, significant, or moderate.

(iv) Factors demonstrating the extent of a whistleblower's planning and initiating.

The application of the following non-exclusive factors may support a determination of the extent of a whistleblower's planning and initiating of the underlying acts--

(A) The whistleblower's role as a planner and initiator. Was the whistleblower the sole decision-maker or one of several contributing planners and initiators? To what extent was the whistleblower acting under the direction and control of a supervisor?

(B) The nature of the whistleblower's planning and initiating activities. Was the whistleblower involved in legitimate tax planning activities? Did the whistleblower take steps to hide the actions at the planning stage? Did the whistleblower commit any identifiable misconduct (legal, ethical, etc.)?

(C) The extent to which the whistleblower knew or should have known that tax noncompliance could result from the course of conduct.

(D) The extent to which the whistleblower acted in furtherance of the noncompliance, including, for example, efforts to conceal or disguise the transaction.

(E) The whistleblower's role in identifying and soliciting others to participate in the actions reported, whether as parties to a common transaction or as parties to separate transactions.

(v) Examples. The operation of the provisions of paragraphs (c)(3)(ii) and (iii) of this section may be illustrated by the following examples. These examples are intended to illustrate the operation of the computational framework. The examples provide simplified descriptions of the facts relating to the claim for award, the information



provided, and the facts relating to the underlying tax case. The application of section 7623(b)(3) and paragraph (c)(3) of this section will depend on the specific facts of each case.

Example 1. Facts. Whistleblower A is employed as a junior associate in a law firm and is responsible for performing research and drafting activities for, and under the direction and control of, partners of the law firm. Whistleblower A performed research on financial products for Partner B that Partner B used in advising a client (Corporation 1) on a financial strategy. After Corporation 1 executed the strategy, Whistleblower A submitted a claim for award under section 7623 along with information about the strategy to the IRS. The IRS initiated an examination of Corporation 1 based on Whistleblower A's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. Whistleblower A did nothing to design or set into motion Corporation 1's activities. Whistleblower A did not know or have reason to know that an underpayment of tax or actions described in section 7623(a)(2) could result from the research and drafting activities. Accordingly, as a threshold matter, Whistleblower A was not a planner and initiator of Corporation 1's strategy, and the award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section is not subject to reduction under section 7623(b)(3) and paragraph (c)(3) of this section.

Example 2. Facts. Whistleblower C is employed in the human resources department of a corporation (Corporation 2). Corporation 2 tasked Whistleblower C with hiring a large number of temporary employees to meet Corporation 2's seasonal business demands. Whistleblower C organized, scheduled, and conducted job fairs and job interviews to hire the seasonal employees. Whistleblower C was not responsible for, had no knowledge of, and played no part in, classifying the seasonal employees for Federal income tax purposes. Whistleblower C later discovered, however, that Corporation 2 classified the seasonal employees as independent contractors. After discovering the misclassification, Whistleblower C submitted a claim for award under section 7623 along with non-privileged information describing the employee misclassification to the IRS. The IRS initiated an examination of Corporation 2 based on Whistleblower C's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would not be subject to a reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower C did not satisfy the requirements of the threshold determination of a planner and initiator. Whistleblower C did not know and had no reason to know that her actions could result in an underpayment of tax or actions described in section 7623(a)(2) or that Corporation 2 would misclassify the employees as independent contractors.

Example 3. Facts. Whistleblower D is employed as a supervisor in the finance department of a corporation (Corporation 3) and is responsible for planning Corporation 3's overall financial strategy. Pursuant to the overall financial strategy, Whistleblower D and others at Corporation 3, in good faith but incorrectly, planned tax-advantaged transactions. Whistleblower D and others at Corporation 3 prepared documents needed to execute the transactions. After Corporation 3 executed the transactions, Whistleblower D reached the conclusion that the tax consequences claimed were incorrect and Whistleblower D submitted a claim for award under section 7623 along with non-privileged information about the transactions to the IRS. The IRS initiated an examination of Corporation 3 based on Whistleblower D's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would be subject to an appropriate reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower D satisfies the requirements of the threshold determination of a planner and initiator. Whistleblower D planned the transactions, prepared the necessary documents, and knew that an underpayment of tax could result from the transactions. Whistleblower D was not the sole planner and initiator of Corporation 3's transactions. Whistleblower D did nothing to conceal Corporation 3's activities. Corporation 3 had a good faith basis for claiming the disallowed tax benefits. On the basis of those facts, Whistleblower D was a moderate-level planner and initiator. Accordingly, the Whistleblower Office will exercise its discretion to reduce Whistleblower D's award by 0 to 33 percent.

Example 4. Facts. Same facts as Example 3, except that Whistleblower D independently planned a high-risk tax avoidance transaction and prepared draft documents to execute the transaction. Whistleblower D presented the transaction, along with the draft documents, to Corporation 3's Chief Financial Officer. Without the further involvement of Whistleblower D, Corporation 3's Chief Financial Officer, Chief Executive Officer, and Board of Directors subsequently approved the execution of the transaction. After Corporation 3 executed the transaction, Whistleblower D submitted a claim for award under section 7623 along with non-privileged information about the transaction to the IRS. The IRS initiated an examination of Corporation 3 based on Whistleblower D's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would be subject to an appropriate reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower D satisfies the requirements of the threshold determination of a planner and initiator. Whistleblower D planned the transaction, prepared the necessary documents, and knew that an underpayment of tax or actions described in section 7623(a)(2) could result from the transaction. Working independently, Whistleblower D designed and took steps to effectuate the transaction while knowing that the planning and initiating of the transaction was likely to result in tax noncompliance. Whistleblower D, however, did not approve the execution of the transaction by Corporation 3 and,

therefore, was not a decision-maker. On the basis of these facts, Whistleblower D was a significant-level planner and initiator. Accordingly, the Whistleblower Office will exercise its discretion to reduce Whistleblower D's award by 34 to 66 percent.

Example 5. Facts. Whistleblower E is a financial planner. Whistleblower E designed a financial product that the IRS identified as an abusive tax avoidance transaction. Whistleblower E marketed the transaction to taxpayers, facilitated their participation in the transaction, and, initially, took steps to disguise the transaction. After several taxpayers had participated in the transaction, Whistleblower E submitted a claim for award under section 7623 along with non-privileged information to the IRS about the transaction and the participating taxpayers. The IRS initiated an examination of the identified taxpayers based on Whistleblower E's information, determined deficiencies in tax and penalties, and ultimately assessed and collected the tax and penalties as determined. Whistleblower E was not criminally prosecuted.

Analysis. The award that would otherwise be determined based on the application of section 7623(b)(1) and paragraph (c)(1) of this section would be subject to an appropriate reduction under section 7623(b)(3) and paragraph (c)(3) of this section because Whistleblower E satisfies the requirements of the threshold determination of a planner and initiator. Whistleblower E designed the financial product, marketed and facilitated its use by taxpayers, and knew that an underpayment of tax or actions described in section 7623(a)(2) could result from the transaction. Whistleblower E was the sole designer of the transaction, solicited clients to participate in the transaction, and facilitated and attempted to conceal their participation in the transaction. Whistleblower E knew that the planning and initiating of the taxpayers' participation in the transaction was likely to result in an underpayment of tax or actions described in section 7623(a)(2). On the basis of these facts, Whistleblower E was a primary-level planner and initiator. Accordingly, the Whistleblower Office will exercise its discretion to reduce Whistleblower E's award by 67 to 100 percent.

(4) Multiple whistleblowers. If two or more independent claims relate to the same collected proceeds, then the Whistleblower Office may evaluate the contribution of each whistleblower to the action(s) that resulted in collected proceeds. The Whistleblower Office will determine whether the information submitted by each whistleblower would have been obtained by the IRS as a result of the information previously submitted by any other whistleblower. If the Whistleblower Office determines that multiple whistleblowers submitted information that would not have been obtained based on a prior submission, then the Whistleblower Office will determine the amount of each whistleblower's award based on the extent to which each whistleblower contributed to

the action(s). The aggregate award amount in cases involving two or more independent claims that relate to the same collected proceeds will not exceed the maximum award amount that could have resulted under section 7623(b)(1) or section 7623(b)(2), as applicable, subject to the award reduction provisions of section 7623(b)(3), if a single claim had been submitted.

(d) Payment of Award. (1) In general. The IRS will pay any award determined under section 7623 and §§301.7623-1 through 301.7623-4 to the whistleblower(s) that filed the corresponding claim for award. Payment of an award will be made as promptly as the circumstances permit, but not until there has been a final determination of tax with respect to the action(s), as defined in paragraph (d)(2) of this section, the Whistleblower Office has determined the award, and all appeals of the Whistleblower Office's determination are final or the whistleblower has executed an award consent form agreeing to the amount of the award and waiving the whistleblower's right to appeal the determination.

(2) Final determination of tax. (i) In general. For purposes of §§301.7623-1 through 301.7623-4, a final determination of tax means that the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) have waived the right to file a claim for refund. A final determination of tax does not preclude a subsequent final determination of tax if the IRS proceeds based on the information provided following the payment, denial, or rejection of an award.

(ii) Example. The provisions of paragraph (d)(2)(i) of this section, regarding subsequent final determination of tax, may be illustrated by the following example:

Example. Information provided to the IRS by a whistleblower, under section 7623 and §301.7623-1, identifies a taxpayer (Corporation 1), describes and documents specific facts relating to Corporation 1's activities, and, based on those facts, alleges that Corporation 1 owed additional taxes in Year 1. The Whistleblower Office processes the incoming claim and provides the information to an IRS Operating Division (Operating Division 1). Operating Division 1 reviews the claim and the allegations and ultimately decides not to proceed with an action against Corporation 1. Operating Division 1 conveys its determination not to proceed with an action against Corporation 1 to the Whistleblower Office on a Form 11369 along with all of the relevant supporting documents. The Whistleblower Office provides written notice to the whistleblower, denying any award pursuant to §301.7623-3(c)(8), and the whistleblower does not appeal the notice to Tax Court within 30 days.

Two months after the Whistleblower Office denies the award, the Whistleblower Office recognizes a potential connection between the information provided and a recently-initiated, ongoing, examination of a second taxpayer by a second IRS Operating Division (Operating Division 2). The Whistleblower Office provides the information to Operating Division 2. Operating Division 2 evaluates the information and proceeds with an action against Taxpayer 2 based on the information provided. Ultimately, Operating Division 2 assesses and collects taxes resulting from the action and totaling \$3 million. Following the conclusion of the whistleblower's participation in a whistleblower administrative proceeding described in §301.7623-3(c) and the expiration of the statutory period for filing a claim for refund by Taxpayer 2, the Whistleblower Office determines the amount of the award and communicates the award to the whistleblower in a determination letter. The whistleblower may appeal the notice to the Tax Court within 30 days.

(3) Joint Whistleblowers. If multiple whistleblowers jointly submit a claim for award, the IRS will pay any award in equal shares to the joint whistleblowers unless the joint whistleblowers specify a different allocation in a written agreement, signed by all the joint whistleblowers and notarized, and submitted with the claim for award. The aggregate award payment in cases involving joint whistleblowers will be within the award percentage range of section 7623(b)(1) or section 7623(b)(2), as applicable, and subject to the award reduction provisions of section 7623(b)(3).

(4) Deceased Whistleblower. If a whistleblower dies before or during the whistleblower administrative proceeding, the Whistleblower Office may substitute an executor, administrator, or other legal representative on behalf of the deceased whistleblower for purposes of conducting the whistleblower administrative proceeding.

(5) Tax treatment of award. All awards are includible in gross income and subject to current Federal tax reporting and withholding requirements.

(e) Effective/applicability date. This rule is effective on **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. This rule applies to information submitted on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**, and to claims for award under section 7623(b) that are open as of **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

John Dalrymple  
Deputy Commissioner for Services and Enforcement.

Approved: July 20, 2014

Mark J. Mazur  
Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2014-18858 Filed 08/07/2014 at 11:15 am; Publication Date: 08/12/2014]