

Talking Points For Multistate Tax Commission
IRS Whistleblower Program
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Essential Components of a Whistleblower Statute

- Clearly define the program scope
 - If dollar thresholds are used, use an objective criteria with a clear definition
 - What taxes and other amounts are within the scope of the program
 - Is the program limited to fraud and willful violations, or (like the IRS program) underpayment of tax.
- Be clear on any program exclusions
 - Some whistleblowers have participated in the activity they are reporting. Balance rewarding “bad actors” against the value that the insider can bring.
 - Consider the relationship between the whistleblower program and other programs. Can a whistleblower be excluded if the information is not provided voluntarily, but rather may have been prompted by another (perhaps unrelated) enforcement action
 - Define the point at which a whistleblower must “declare” his/her interest in an award. This should occur when the information is provided, so that documentation of use of the information can be collected and to protect the taxpayer’s rights.
- Consider tradeoffs between transparency and taxpayer interests. Whistleblowers want to know what is happening with the submission, particularly when an audit can take years to resolve. If the whistleblower is to receive meaningful status information, there should be a clear and enforceable sanction for use of that information for any other purpose.
- Be clear about rules of engagement, and what the whistleblower can expect from the process.
- Consider the level of incentive necessary to encourage the whistleblowers to submit information. Whistleblower programs are sometimes criticized for “lottery payouts,” particularly in cases where the whistleblower had a role in the non-compliance. However, if paid as a percentage of proceeds, these large awards simply reflect even larger recoveries for the tax administration agency.
- Consider explicit anti-retaliation protection
- Who will make award decisions, and will those decisions be subject to administrative or judicial review? If reviewable, what is the standard of review?

Program Administration Issues

- Be prepared for efforts to use the whistleblower program to pursue non-revenue objectives (whistleblower disputes with the taxpayer) or policy objectives (concerns that a group/industry is getting a tax treatment that the whistleblower believes is inappropriate or contrary to legislative intent). Have review processes to protect taxpayers and the tax administration/policy interests, but do not dismiss because the whistleblower has a different agenda.
- Roles and responsibilities within the tax administration agency need to be clearly defined
 - Who will interact with the whistleblower?
 - What are the debriefing protocols?
 - What level of confidentiality commitment can be made, and how is it to be protected within the tax administration agency?
 - Establish clear rules on documenting the use of whistleblower information, record access, and tracking action on both the award claim and related taxpayer actions (audits, investigations).
 - Consider the impact of possibly related actions in future tax periods, such as timing adjustments, impact on credits carried forward or back.
 - Should the whistleblower get “credit” for corrective actions affecting future periods?
- Consider the extent to which a whistleblower will get “credit” for actions related to the information provided—other taxpayers, other tax issues, and other tax periods. How close must the connection be?
- Consider potential limits on use of information
 - If the tax case results in a criminal investigation, will grand jury secrecy rules limit access to information needed to evaluate whistleblower contributions?
 - To what extent will privileges and confidentiality obligations control the use of information offered by a whistleblower?
 - Possibly “privileged” information can be used to develop leads to develop a case, but may not be directly admissible if the case is litigated
 - Does a duty of confidentiality owed to a taxpayer under state law, professional services regulation or employment contract limit the ability of a whistleblower to report violations to a law enforcement agency