

UNITED STATES TAX COURT

In the Matter of:	)	
	)	
JOSEPH A. INSIGNA.	)	
	)	
Petitioner	)	
	)	Docket No. 4609-12W
v.	)	
	)	
COMMISSIONER OF INTERNAL	)	
REVENUE,	)	
	)	
Respondent	)	

Date: June 27, 2012

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**MOTION OF NATIONAL WHISTLEBLOWERS  
CENTER FOR LEAVE TO  
FILE BRIEF AS *AMICUS CURIAE***

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The National Whistleblowers Center (NWC) moves this Court for leave to submit a brief as *amicus curiae* in this matter. Undersigned counsel have conferred with counsel for Petitioner and counsel for Respondent and Petitioner has consented to the motion, but we have received no direction from Respondent.

Established in 1988, NWC is a non-profit tax-exempt public interest organization. The Center regularly assists corporate employees throughout the United States who suffer from illegal retribution for lawfully disclosing violations of federal law. The NWC has filed as *amicus curiae* in U.S. federal court.<sup>1</sup> For example, the NWC has participated as *amicus curiae* on behalf of whistleblowers in the following Supreme Court cases: *FAA v. Cooper*, 132 S.Ct. 1441 (2012); *Beck v. Prupis*, 529 U.S. 494 (2000); *Doe v. Chao*, 540 U.S. 614 (2004); *Vermont Agency Of*

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<sup>1</sup> [http://www.whistleblowers.org/index.php?option=com\\_content&task=category&sectionid=11&id=105&Itemid=223](http://www.whistleblowers.org/index.php?option=com_content&task=category&sectionid=11&id=105&Itemid=223)

*Natural Resources v. United States ex rel. Stevens*, (98-1828) 529 U.S. 765 (2000); *EEOC v. Waffle House*, 534 U.S. 279 (2002); *Haddle v. Garrison*, 525 U.S. 121 (1998); *English v. General Electric*, 110 S.Ct. 2270 (1990).

The NWC advocates on behalf of whistleblowers because these truth-tellers uncover grave problems facing our federal government and our nation. Whistleblowers are a bulwark of accountability against those who would corrupt government or corporations. Therefore, aggressive defense of whistleblowers is crucial to any effective policy to address wrongdoing or abuse of power. Conscientious employees who raise ethical concerns about the legality of their companies' activities should be rewarded for their courage and conscientiousness to both reward the whistleblower in question and encourage others to come forward in the future.

NWC can assist this Court by providing information about the legal precedent, the legislative history of the APA, and policy arguments concerning the issue of forcing agency action under APA § 701(b). NWC can also assist this Court by discussing at length the implications of the memorandum released on June 20, 2012<sup>20</sup> by Steven Miller of the IRS and the suggestions contained therein concerning 90-day deadlines for processing whistleblower claims. NWC's many years of experience in this area of the law, and its familiarity can assist this Board. Finally, "the prime, if not the sole, purpose of an *amicus curiae* brief is what the name implies, namely, to assist the court on matters of law." *Banerjee v. Board of Trustees of Smith College*, 648 F.2d 61, 66 n.9 (1st Cir. 1981). An *amicus curiae* serves for the benefit of the Court and its purpose is to assist the Court in cases of general public interest. *Unites States v. Gotti*, 755 F. Supp. 1157, 1158 (E.D.N.Y. 1991).

A copy of the proposed order granting the motion for NWC to file its *amicus brief*, the *amicus brief*, and certificate of service are attached.

Respectfully submitted by:

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Stone  
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and  
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June 27, 2012

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JOSEPH A. INSINGA.

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COMMISSIONER OF INTERNAL  
REVENUE,

Respondent

Docket No. 4609-12W

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**ORDER**

**NOW**, this 27th day of June, 2012, upon receipt of the National Whistleblowers Center (NWC) motion to file as *amicus curiae*, it is hereby:

**ORDERED**, that the motion is granted.

ENTER:

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Petitioner	)	
	)	Docket No. 4609-12W
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COMMISSIONER OF INTERNAL	)	
REVENUE,	)	
	)	
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Date: June 27, 2012

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**BRIEF OF *AMICUS CURIAE*  
NATIONAL WHISTLEBLOWERS CENTER  
SUPPORTING PETITIONER URGING THAT THE TAX  
COURT COMPEL THE IRS TO MAKE A FINAL  
DECISION WITHOUT DELAY**

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### Statement of Interest of *Amicus Curiae*<sup>1</sup>

The National Whistleblower Center (NWC) respectfully submits this memorandum of law as *amicus curiae*. *Amicus* asks the Court to accept this brief and urges the Court to find that it has jurisdiction in this matter, given that the Internal Revenue Service (IRS) unreasonably delayed its actions. This delay gives the Tax Court authority under the Administrative Procedures Act (APA)<sup>2</sup> to direct Respondent to provide a determination of an award amount for Petitioner within a limited number of days.<sup>3</sup>

The NWC, founded in 1988, has long been recognized as a leading voice for whistleblowers by policymakers in Washington, D.C. The NWC and attorneys associated with the NWC have supported whistleblowers in the courts and before Congress and achieved victories for environmental protection, government contract fraud, nuclear safety, and government and corporate accountability. The NWC and associated attorneys work with tax whistleblowers who have filed submissions with the IRS under Internal Revenue Code (IRC) § 7623(b). The NWC has served as *amicus curiae* in several cases.<sup>4</sup>

*Amicus* believes that this brief brings to the Tax Court's attention issues that have not been properly briefed or discussed before the Court, especially as to how the APA relates to the Respondent's failure to act in a timely manner, i.e. that the unreasonable delay by the Respondent provides the Tax Court jurisdiction and authority to act based on the APA.<sup>5</sup> *Amicus*

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<sup>1</sup> The undersigned counsel would like to thank Kohn, Kohn, & Colapinto law clerk Barrett Hunter and interns Sam Brazill and Julia Maloney for their contributions to this brief.

<sup>2</sup> 5 U.S.C. § 706(1) (2006).

<sup>3</sup> *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 61-2 (2004).

<sup>4</sup> E.g., *Doe v. Chao*, 540 U.S. 614 (2004), *EEOC v. Waffle House*, 534 U.S. 279 (2002), *Beck v. Prupis*, 529 U.S. 494 (2000), *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765 (2000), *Haddle v. Garrison*, 525 U.S. 121 (1998), *English v. Gen. Electric*, 496 U.S. 72 (1990), *Kan. Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *Mann v. Heckler & Koch Defense*, 630 F.3d 338 (4th Cir. 2010), *Stone v. Instrumentation Lab. Co.*, 591 F.3d 239 (4th Cir. 2009).

<sup>5</sup> See *S. Utah Wilderness Alliance v. Norton*, 301 F.3d 1217, 1226 (10th Cir. 2002) (holding that inaction can qualify as action with regard to finality if unreasonably delayed); *Id.* at 1226 n.6

will also review whether the IRS's failure to act in a timely manner meets the *Telecommunications Research and Action Center* ("TRAC") tests for the Tax Court to take action, the remedies available to the Tax Court under the APA, and Congressional intent in passing IRC § 7623(b).<sup>6</sup> Finally, *Amicus* hopes that the Court will benefit from a broader perspective from whistleblowers and the whistleblower community on the questions before the Court as well as new facts that have come out regarding the whistleblower program.

*Amicus* believes that this brief fits well within the goals for an *amicus* cited by the Tax Court in *Erwin*.<sup>7</sup>

The importance of this case reaches far beyond just Petitioner. It is not an overstatement to say that the success of the IRS whistleblower program is in the hands of the Court. To allow the IRS to delay indefinitely a decision on a mandatory award to a whistleblower, and that failure to act not be subject to review by the Court, would fatally undermine the public interest, Congressional policy, and the law. A failure to act by the Court will bring great harm to all whistleblowers who in good faith relied on the law and voluntarily submitted information to the IRS, which has resulted in the successful collection of billions of dollars in taxes.

### **Statement of Tax Court Jurisdiction and Finality**

As discussed below and as noted by the Tax Court in *Friedland*, the Tax Court's statutory authority under 26 U.S.C. § 7623(b)(4) is for any determination of a whistleblower award (not

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("once a court determines that an agency 'unlawfully withheld' action, the APA requires that courts compel agency action")

<sup>6</sup> *Telecommunications Research and Action Center v. Federal Communications Commission*, 750 F.2d 70 (D.C. Cir. 1984)

<sup>7</sup> *Erwin v. Comm'r*, T.C. Memo 1986-474, 5 (1986) ("[T]he amicus [may] enlarge upon points which the party cannot, or prefers not to expound in detail. An amicus may be more knowledgeable than a party as to facts underlying particular arguments. An amicus would often be in a superior position "to inform the courts of interests other than those presented by the parties, and to focus the court's attention on the broader implication of various possible rulings" – citing Stern, Gressman, & Shapiro, *Supreme Court Practice* 570 (1986), citing Ennis, 'Effective Amicus Briefs' 33 Cath. U.L. Rev. 603, 608 (1984). Fn ref. omitted.").

just a final determination). The courts have made clear that the finality requirement should be applied in a flexible and pragmatic way and that it does not preclude a court from reviewing claims of unreasonable agency delay.<sup>8</sup> An unreasonable delay in determination is a determination, as discussed below.

Further, as the Tax Court notes in *Kasper*, “Congress clearly intended to provide a whistleblower with due process; i.e. notice and an opportunity to be heard.”<sup>9</sup> The Tax Court cannot allow the IRS to circumvent Congressional intent of due process by allowing the IRS to refuse to make a determination.

### **Authority of Court**

The Court’s authority to act under the APA comes from the fact that it can compel an agency “to take a *discrete* agency action that it is *required to take*.” The Court is limited to directing the agency to “perform a ministerial or non-discretionary act, or to take action upon a matter, without directing *how* it shall act [emphasis in original].”<sup>10</sup>

It is commonplace for the Court to direct a specific date for completion<sup>11</sup> or alternatively to retain jurisdiction over the case and order an agency to give an accounting of its progress

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<sup>8</sup> See *TRAC*, 750 F.2d at 75, 75 n.27 (“Although the finality doctrine does limit judicial action, it does not do so in a precise and inflexible way. As the Supreme Court instructed in *Abbot Laboratories* . . . 387 U.S. [at] 149-150 . . . a federal court should apply the finality requirement in a “flexible” and “pragmatic” way . . . we found that the finality requirement does not preclude us from reviewing claims of unreasonable agency delay.”); see also *United States Gypsum Co. v. Muszynski*, 209 F. Supp. 2d 308, 309 (S.D.N.Y. 2002) (“An agency action is final . . . when it ‘mark[s] the consummation of the agency’s decisionmaking [sic] process’ . . . The agency need not ‘dress [ ] its decision with the conventional accouterments of finality’ for the Court to decide that agency has acted with finality and that its decisions has been given practical effect”).

<sup>9</sup> *Kasper v. Commissioner*, 137 T.C. No. 4, 9 (2011).

<sup>10</sup> See *Sandoz, Inc. v. Leavitt*, 427 F. Supp. 2d 29, 34 (D.D.C. 2006) (quoting *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004)).

<sup>11</sup> See *In re Int’l Chem. Works Union*, 958 F.2d 1144, 1150 (D.C. Cir. 1992) (Petitioner’s Motion to Impose a Deadline is granted and Respondents ordered to issue a final rule by August 31, 1992).

every 30 days.<sup>12</sup>

## **Law and Argument**

### **I. The Administrative Procedures Act Applies to the IRS in Regards to Whistleblower Awards**

“Gentleman, this is a football.” The legendary football coach Vince Lombardi thought it important to start the beginning of practices with a review of the basics. Similarly, it is useful to be reminded of the basics: the IRS is an “agency” under the APA, so none of the exceptions to the APA apply to the IRS.<sup>13</sup>

The Tax Court has not been shy about applying the APA in reviewing decisions by the IRS.<sup>14</sup> In the case before the Court, the traditional limitations on Tax Court review under the Anti-Injunction Act and the Declaratory Judgment Act are not applicable because the issue at hand does not involve the assessment, payment, recovery, or collection of tax payments made by Petitioner.<sup>15,16</sup> The relief sought by Petitioner and the relief proposed by *Amicus* do not seek money damages and therefore do not raise questions of sovereign immunity. APA § 702 allows for actions seeking relief other than money damages in a claim that an agency acted or failed to act.<sup>17</sup>

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<sup>12</sup> See *Air Line Pilots Ass’n, Int’l v. Civil Aeronautics Bd.*, 750 F.2d 81, 87 (D.C. Cir. 1984).

<sup>13</sup> See 5 U.S.C. § 551(a) (2006), 5 U.S.C. § 701(b)(1) (2006); see also *Cohen v. U.S.*, 650 F.3d 717, 723 (D.C. Cir. 2011) (“The IRS is not special in this regard; no exception exists shielding it – unlike the rest of the federal Government – from suit under the APA”).

<sup>14</sup> See, e.g., *Schwalbach v. U.S.*, 111 T.C. 9 (1998) (holding that the IRS complied with APA requirements in issuing regulations).

<sup>15</sup> 5 U.S.C. § 702 (2006).

<sup>16</sup> See *Cohen*, 650 F.3d at 736 (D.C. Cir. 2011) (Court concluded that because the taxpayers did not seek a restraint in the assessment or collection of taxes, and were rather disputing the refund process set forth in the Notice, the majority held that neither the AIA nor the DJA applied); Patrick J. Smith, *D.C. Circuit: The IRS Is Not Special*, Tax Notes Today, Aug. 30, 2011.

<sup>17</sup> “A person [harmed] because of agency action . . . is entitled to judicial review thereof. An action . . . seeking relief other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.”

## **II. The Tax Court Jurisdiction of IRS Determinations Regarding Whistleblower Claims**

While the Tax Court is a court of limited jurisdiction, the Tax Court was provided direct authority to review “*any determination*” [emphasis added] made by the IRS as to a whistleblower’s application for a mandatory award.<sup>18</sup> As discussed further below, any determination also includes a failure to act or an unreasonable delay.

## **III. The Tax Court and the APA Regarding Whistleblower Claims**

In summary: 1) the IRS is subject to the APA; 2) the Tax Court and other courts apply the APA to the IRS; 3) the traditional limitations of the APA as it relates to the IRS are not applicable in the case of mandatory awards to whistleblowers; and 4) the Tax Court is provided direct authority to review any determination by the IRS regarding a whistleblower claim.

Now let us turn to the APA, whistleblower claims under IRC § 7623(b), and the case before the Court. First, the definition of an “agency action” under the APA, which is the keystone for everything else that follows is given in 5 U.S.C. § 701(b)(2), which directs us to 5 U.S.C. § 551(13), which states that “agency action includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*” [emphasis added]. Second, relief is defined in 5 U.S.C. § 551(11):

“relief” includes the whole or a part of an agency—

- (A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;
- (B) recognition of a claim, right, immunity, privilege, exemption, or exception; or
- (C) taking of other action on the application or petition of, and beneficial to, a person;

The determination of a whistleblower’s claim for a mandatory award certainly falls well within the ambit of relief and a failure to act is considered an agency action under the APA. Third, 5 U.S.C. § 702 provides the whistleblower’s right of judicial review:

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<sup>18</sup> 26 U.S.C. § 7623(b)(4) (2006).

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Finally, 5 U.S.C. § 706(1), Scope of Review, provides the Court the following authority:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) *compel agency action unlawfully withheld or unreasonably delayed*  
[emphasis added]

A threshold issue for a Court in reviewing an agency action under 5 U.S.C. § 706(1) is whether it is a mandatory or discretionary action.<sup>19</sup> The mandatory requirement of an award to a whistleblower was one of the key enhancements to the law in 2006, with 26 U.S.C. § 7623(b) mandating awards to whistleblowers, stating that whistleblowers “shall” receive an award. Thus, making an award to a whistleblower is a mandatory, not discretionary, act.

In sum, the IRS’s failure to act in a reasonable timeframe on a whistleblower award (which is a mandatory agency action discussed above) is an agency action that is subject to judicial review and the Court has the authority to compel agency action.

Actions for relief under 5 U.S.C. § 706(1) are certainly not uncommon, with hundreds of cases filed and decided requesting relief from unreasonable delay from a wide array of government agencies.<sup>20</sup>

#### **IV. The IRS Has Been Unreasonably Delayed In Its Whistleblower Decision – the Six *TRAC* Standards<sup>21</sup>**

In determining whether the IRS has failed to act or has unreasonably delayed in making a

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<sup>19</sup> If the action is mandatory, then the reviewing court shall compel agency action. *See Environmental Defense Fund v. Costle*, 657 F.2d 275 (D.D.C. 1981).

<sup>20</sup> *See generally*, Carol Miaskoff, Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedures Act, 55 Geo. Wash. L. Rev. 635 (1987) (overview of cases and issues related to 5 U.S.C. § 706(1)).

<sup>21</sup> *See, e.g., Muwekma Tribe v. Babbitt*, 133 F. Supp.2d 30, 36-42 (D.D.C. 2005) (shows application of *TRAC* criteria) (holding that agency must submit plan for resolution within one year).

decision, the Tax Court is guided by the six standards established by the U.S. Court of Appeals for the District of Columbia Circuit.<sup>22</sup> The six standards are as follows:

**A. The time agencies take to make decisions must be governed by a “rule of reason.”<sup>23</sup>**

Petitioner’s original filing with the IRS whistleblower office was in April, 2007.<sup>24</sup> The petition states that payments were paid by companies to the Treasury in May, 2011 based on the information he provided.<sup>25</sup>

The IRS official responsible for Petitioner’s case indicated on Thursday, September 30, 2011<sup>26</sup> that he had forwarded his recommendation of a mandatory award for the Petitioner to the Director of the IRS Whistleblower Office (“Director”), Mr. Stephen Whitlock.

As background, recent reports by the Government Accountability Office (GAO)<sup>27</sup> and the Treasury Inspector General for Tax Administration (TIGTA)<sup>28</sup> make clear that the forwarding of a written recommendation for an award by the responsible official in the whistleblower office to the Director is the last step in the process before the Director makes a decision and sends a preliminary recommendation letter to the whistleblower.<sup>29</sup>

Unfortunately, the position of Petitioner is not unique. There are scores of claims by whistleblowers that have been placed in this area of uncertainty in which there has been a written recommendation made to the Director for an award and yet no action is taken. Months and

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<sup>22</sup> *TRAC*, 750 F.2d at 80.

<sup>23</sup> *Id.*

<sup>24</sup> Pet. ¶ a.

<sup>25</sup> Pet. ¶ m.

<sup>26</sup> Email from Robert Gardner to Andrew Carr, (Sept. 30, 2011).

<sup>27</sup> GAO-11-683, U.S. Gov’t Accountability Office, Tax Whistleblowers: Incomplete Data Hinders IRS’s Ability To Manage Claim Processing Time and Enhance External Communication, 6 (2011), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/gao report.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/gao%20report.pdf).

<sup>28</sup> Treasury Inspector General for Tax Administration Report, Improved Oversight Is Needed to Effectively Process Whistleblower Claims, 2012-30-045 (2012), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/tigta report 2012-30-045.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/tigta%20report%202012-30-045.pdf).

<sup>29</sup> Internal Revenue Manual 25.2.2.8(2).

sometimes even years pass with no final recommendation made and the IRS does not provide any timeline of when a final recommendation letter will be sent.<sup>30</sup> This is shown in Petitioner's situation in which the IRS refused to respond to Petitioner's request from his attorney of record to provide a denial letter. The issue of the IRS failing to act promptly on whistleblower program cases was also raised by Senator Grassley in his September 13, 2011 letter to the Commissioner of the IRS.<sup>31</sup> The IRS is not permitted to fail to make a mandatory award even if there is no statutory time limit; unreasonable delay of a required decision or action is not permitted.<sup>32</sup>

The number of whistleblowers waiting for action and the length of waiting is highlighted in Table 2 and Table 3 of the recently released FY 2011 Report to the Congress on the Use of Section 7623, which shows that often hundreds of days pass at each step of the process. *Amicus* would note that this timetable in the IRS Report to Congress does not even include the step relevant to the whistleblower in this case, which is where an award evaluation has been made and the IRS has yet to notify the whistleblower.

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<sup>30</sup> See GAO-11-683, U.S. Gov't Accountability Office, Tax Whistleblowers: Incomplete Data Hinders IRS's Ability To Manage Claim Processing Time and Enhance External Communication, 6 (2011), *available at*

[http://www.whistleblowers.org/storage/whistleblowers/docs/birk/gao report.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/gao%20report.pdf), letter from Senator Grassley (Apr. 30, 2012), *available at*

[http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(apr. 30, 2012\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(apr.%2030,%202012).pdf), letter from Senator Grassley to IRS Commissioner (Sept. 13, 2011), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley to irs commissioner \(sept. 13, 2011\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(sept.%2013,%202011).pdf), letter from Senator Grassley (Jun. 21, 2010), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jun. 21, 2010\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jun.%2021,%202010).pdf), letter from Senator Grassley to Treasury Secretary Henry Paulson (Jan. 5, 2007), *available at*

[http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jan. 5, 2007\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jan.%205,%202007).pdf).

<sup>31</sup> Letter from Senator Grassley to IRS Commissioner (Sept. 13, 2011) ("Table 3 of the GAO report highlights another very troubling data set – the number of claims for FY 2007 through FY 2009 sitting at Whistleblower Office in final review, award evaluation or suspended status. . . . It is important that the Whistleblower Office lead by example and quickly dispose of claims."), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley to irs commissioner \(sept. 13, 2011\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20to%20irs%20commissioner%20(sept.%2013,%202011).pdf).

<sup>32</sup> *Asrani v. Chertoff*, 2007 WL 3521366 (D. Minn. 2007) (holding that the U.S. Citizenship and Immigration Services was subject to the APA requirement that they process immigration applications in a reasonable time).



When the Petitioner submitted his claim in April 2007, the IRS and Treasury responded within a matter of days to contact the whistleblower and arranged a series of meetings and briefings with Petitioner in May and June of 2007.<sup>33</sup> The IRS and Treasury, to their credit, did not waste time in taking advantage of the whistleblower's information. However, this stands starkly in contrast with the time that it has taken for the IRS to make a determination for Petitioner.

Petitioner has waited five years since his original submission, over one year since the Treasury has received payments, and nearly nine months since the written recommendation was given to the Director, which is the next-to-last step in the process, with no official response whatsoever. *Amicus* encourages the Court to find such a delay unreasonable based on the factors cited below, especially given that delay will cause irreparable harm to Petitioner and that similar periods of time that Petitioner has had to wait were found to be unreasonable delays by other courts<sup>34</sup> and that the IRS's own guidelines indicate that notification should be made within 90 days, discussed further below.

The IRS and Treasury moved promptly when it was in their interest to respond to the whistleblower's claim, from which the public has benefitted. Now that the whistleblower can receive an award for his work, effort, and risk, that same prompt response from the IRS and Treasury is missing.

Finally, the Deputy Commissioner of the IRS, Steven Miller, recently issued a memorandum stating that "whistleblowers should be notified of an award decision within 90

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<sup>33</sup> Pet. ¶ a.

<sup>34</sup> See, e.g., *Sharadanant v. United States Citizenship & Immigration Serv. 's*, 543 F. Supp. 2d 1071 (D.N.D. 2008) (holding that a two-year delay in processing an immigration application is unreasonable).

days of when collected proceeds can be finally determined.”<sup>35</sup>

There is no per se rule on time,<sup>36</sup> but it is a rule of reason recognized by the IRS (see discussion below in subsection D) that the IRS should be required to move just as promptly in rewarding a whistleblower as it did in acting on the information that the whistleblower voluntarily provided and within the timeframe it has established itself for making a decision. The factors below further support a rule of reason for prompt action by the IRS and for the Tax Court to find that there has been a failure to act or unreasonable delay by the IRS.

**B. Where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason.<sup>37</sup>**

Congress has made clear the urgency with which it expects in the IRS Whistleblower Office to act, both in statute and through statements by the author of the legislation, then-Chairman Senator Grassley.

The statute creating the IRS Whistleblower Office and establishing the mandatory award program for whistleblowers directs that not later than 12 months after enactment, the Secretary of Treasury shall issue guidance for the operation of a whistleblower program.<sup>38</sup> The 12 months certainly is an indication of Congress’s urgency in having a fully operational whistleblower program. That urgency is for a whistleblower program that is both receiving timely information from and issuing timely awards to whistleblowers, processes which naturally go hand-in-hand.

The author of the IRS whistleblower law, Senator Grassley, has made clear in letters to senior IRS and Treasury officials his extreme frustration with the pace of issuing mandatory

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<sup>35</sup> Memorandum from Steven T. Miller, Deputy Commissioner for Enforcement, IRS Whistleblower Program, June 20, 2012, *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/miller memo.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/miller%20memo.pdf).

<sup>36</sup> It should be noted that though there is no per se rule on delay, many courts have given timeframes for what is reasonable delay. *See, e.g., In re American Rivers and Idaho Rivers United*, 372 F.3d 413, 419 (D.C. Cir. 2004).

<sup>37</sup> *TRAC*, 750 F.2d at 80

<sup>38</sup> P.L. 109-432 IV § 406(b).

awards, e.g. “The IRS’s current problem is processing and compensating whistleblowers in a timely manner.”<sup>39</sup>

The claim by Respondent that “there is no limitation on the amount of time given to the Whistleblower Office to Issue a determination or pay an award”<sup>40</sup> is incorrect when considered in conjunction with the APA. As discussed above, the APA makes it clear that the timing for agency action must be reasonable.<sup>41</sup> Further, the courts have long recognized the APA’s requirement of an agency to accomplish its work in a “reasonable time.”<sup>42,43</sup>

The “no limitation” statement by Respondent reveals all the more reason why a timely intervention by the Tax Court would be beneficial: as the IRS believes that there is no time limit by which they must make a decision, they do not think that they are bound by the APA’s requirement to make a decision within a reasonable amount time. Using this reasoning, the IRS could claim that it has no duty to act decades later. The IRS has refused to give Petitioner and scores of other whistleblowers any specific timeline about when a decision will be made, even once monies have been successfully collected by the IRS. The failure by the IRS to provide any

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<sup>39</sup> See also, letter from Senator Grassley (Jun. 21, 2012), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jun. 21, 2012\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jun.%2021,%202012).pdf), letter from Senator Grassley (Apr. 30, 2012), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(apr. 30, 2012\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(apr.%2030,%202012).pdf), letter from Senator Grassley to IRS Commissioner (Sept. 13, 2011), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley to irs commissioner \(sept. 13, 2011\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20to%20irs%20commissioner%20(sept.%2013,%202011).pdf), letter from Senator Grassley (Jun. 21, 2010), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jun. 21, 2010\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jun.%2021,%202010).pdf), letter from Senator Grassley to Treasury Secretary Henry Paulson (Jan. 5, 2007), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jan. 5, 2007\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jan.%205,%202007).pdf).

<sup>40</sup> Resp. to Pet’r’s First Am. Objection; Resp. to Resp’t’s Mot. to Dismiss ¶ 3.

<sup>41</sup> 5 U.S.C. § 706(1).

<sup>42</sup> 5 U.S.C. § 555(b) (2006).

<sup>43</sup> See *TRAC*, 750 F.2d at 77 (“section 706(1) coupled with Section 555(b) does indicate a congressional view that agencies should act within reasonable time frames and that court’s designated by statute to review agency actions may play an important role in compelling agency action that has been improperly withheld or unreasonably delayed”).

timeline is a fact that the Court should consider as an indication that a delay is unreasonable.<sup>44</sup> It is vital that the Tax Court intervene to correct the IRS's view that it is not required to proceed in a reasonable time and that there is "no limitation" on the IRS's time to make a decision.<sup>45</sup>

Contrary to Respondent's claim,<sup>46</sup> the experience of timely and prompt payment under the False Claims Act, as cited by Petitioner,<sup>47</sup> indicates the speed with which Congress intends the IRS to act in making mandatory awards to whistleblowers. The IRS Whistleblower Law is built on the success and the architecture of the False Claims Act.

The relationship between the two laws is acknowledged repeatedly by the author of the whistleblower law, Senator Grassley, who is also the author of the modern False Claims Act. In a letter written soon after the passage of the legislation, Senator Grassley states that the IRS Whistleblower legislation "provides significant guidelines based on the success of the False Claims."<sup>48</sup> More recently, in a September 13, 2011 letter, Senator Grassley specifically cites the case law of the False Claims Act as it relates to the terms "planned and initiated" (a term common to both laws) as a guide to the IRS and Treasury in how to implement this limitation on mandatory awards to whistleblowers who are the chief architect or chief wrongdoer.<sup>49</sup>

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<sup>44</sup> See *Muwekma Tribe*, 133 F. Supp.2d at 37 ("the ambiguous, indefinite time frame for review of the plaintiff's petition constitutes unreasonable delay within the meaning of APA § 706(1) . . . DOI's noncommittal estimate coupled with the specific history of interaction between these parties gives rise to a finding of 'unreasonable delay'"). While *Amicus* is pleased with the recent June 20th, 2012 memorandum by the Deputy Commissioner seeking to establish deadlines for actions in whistleblower actions, these deadlines are of limited scope and the IRS has given no indication that they are applicable in this case.

<sup>45</sup> *Id.* at 39 ("Congress [did not intend] petitions to languish in the review process indefinitely. Yet such is the case that brings these parties before this court. Thus, the second TRAC factor weighs in favor of finding unreasonable delay.").

<sup>46</sup> Resp. to Pet'r's First Am. Objection, Resp. to Resp't's Mot. to Dismiss, ¶ 4.

<sup>47</sup> Pet'r's First Am. Objection and Resp. to Resp't's Mot. to Dismiss, ¶ 6.

<sup>48</sup> Letter from Senator Grassley to Treasury Secretary Henry Paulson (Jan. 5, 2007), available at [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jan. 5, 2007\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jan.%205,%202007).pdf).

<sup>49</sup> Other examples of commonality between the two provisions are the allowance for payment schemes based on the level of information provided by the whistleblower; e.g. a range of 15% to 30% of payment to a whistleblower is authorized if action taken on the whistleblower's

The IRS Whistleblower law is a rib from the False Claims Act; the two share a host of key provisions, including the right of a whistleblower to a mandatory award and having that award or denial subject to judicial review. The experience of the False Claims Act in practice and in the courts is certainly relevant to the Tax Court. Congress looked to the experience of the False Claims Act with its speedy payment of Relators as a guide to its expectation for the IRS in payment to whistleblowers. The Tax Court should as well.

The Tax Court itself notes in *Cooper*<sup>50</sup> that a part of the legislative intent was derived, in part, from a TIGTA article regarding the informants' reward program<sup>51, 52</sup>. A key finding of the TIGTA report was that it was taking an average of 7.5 years for a discretionary award to be paid. Congress addressed the issues of timing and uncertainty, in part, by providing a designated office, the IRS Whistleblower office, to have centralized management, establishing a framework for approving and denying awards, making the providing of awards a mandatory act, and giving the whistleblowers protection of review by the Tax Court (and by effect bringing the program and awards under the APA).

All indications are that Congress intended for the speedy establishment of a whistleblower program at the IRS in all of its particulars including payment. Congress was informed by and looked to the experience of quick payment under the False Claims Act as a guide and the author of the IRS Whistleblower law has raised significant and repeated concerns

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information; a broad definition of what will be considered "amounts" for determination of a whistleblower award ("alternate remedy" under the False Claims Act); the parallel treatment of less than 10% for a less substantial contribution under 26 U.S.C. § 7623(b)(2) and awards under 31 U.S.C. § 3730(d) for False Claims Act. Rather than focusing on the few differences between the two laws, the Tax Court should consider that the two statutes share a closer relationship to each other than to any other statutes in federal law. Kissing cousins would blush as to how closely related the statutes are to each other.

<sup>50</sup> *Cooper*, 135 T.C. at 73.

<sup>51</sup> Treasury Inspector General for Tax Administration Report, The Informants' Reward Program Needs More Centralized Management Oversight, 2006-30-092 (2006), *available at* [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/tigta report 2006-30-092.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/tigta%20report%202006-30-092.pdf).

<sup>52</sup> Authors' note – the TIGTA Report was requested by the Finance Committee as part of its review of 26 U.S.C. § 7623 and whether changes in the law were necessary.

about the lack of timeliness of IRS actions.

In summary, Congress anticipated and expected a rational course of action from the IRS, i.e. it would quickly establish a whistleblower office, that office would have a mandatory award system to encourage whistleblowers to voluntarily divulge information which could be used to collect taxes, and, when the taxes were paid, the whistleblowers would be paid in a timely manner.

**C. Delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake.<sup>53</sup>**

*Amicus* can hardly improve on the Court's own work in highlighting the significant hardships that face whistleblowers. In its recent case *Whistleblower 14106-10W v. Commissioner*,<sup>54</sup> the Court cites a number of studies showing that whistleblowers can face significant retaliation, unemployment, and economic hardship in seeking to blow the whistle.

Further, a recent study by the *New England Journal of Medicine* conducted a survey and found that insiders who blew the whistle were subject to pressures from the company and, in some cases, devastating financial consequences. The survey found that financial difficulties were associated with personal problems, including divorce, marital strain, family conflict, and stress-related health problems, including shingles, psoriasis, autoimmune disorders, panic attacks, asthma, insomnia, temporomandibular joint disorder, migraine headaches, and generalized anxiety.<sup>55</sup>

Finally, the IRS's view has been that while the Treasury has collected the funds with interest from the taxpayer(s), there is no duty to pay the applicable interest to the whistleblower even as the Treasury enjoys full use of these funds for an excessive period of time.

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<sup>53</sup> *TRAC*, 750 F.2d at 80.

<sup>54</sup> *Whistleblower 14106-10W v. Comm'r of Internal Revenue*, 137 T.C. 183, 201 (2011) (Citing *Mgmt. Info. Techs., Inc. v. Alyeska Pipeline Serv. Co.*, 151 F.R.D. 478 (D.D.C. 1993)).

<sup>55</sup> Aaron S. Kesselheim, David Studdert, & Michelle Mello, Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies, 362 N. Engl. J. Med. 1832, 1836 (2010).

Whistleblowers face a significant economic loss from the delay and inaction by the IRS and Treasury, a loss for which the Court may be significantly limited in its authority to make a whistleblower whole. Petitioner and similarly situated whistleblowers have lost millions of dollars in interest and use of funds because of the failure to act and unreasonable delay by Respondent. The IRS should be specifically directed to state on the record whether or not it will include interest as part of the award payment. If interest will not be included, this case is in a very different posture because whistleblower will suffer irreparable harm. The harm of lost interest could be extremely significant in the event of high inflation rates or if the IRS were able to maintain its position that it could indefinitely delay a reward, which would result in years of lost interest. When Congress set the whistleblower award at 30%, they likely meant 30% in today's dollars, which would not be possible if interest is not granted and there are significant delays.

*Amicus* has seen first-hand that these economic, mental, and physical hardships for whistleblowers are exacerbated by the extremely long waiting period that they must endure for the IRS to reach a final decision and by the failure of the IRS to provide or abide by any meaningful timelines as to when a final decision will be made.

The Tax Court should recognize that whistleblowers have taken action in reliance on the law and placed themselves in great jeopardy because of these actions. The initiation of action by the whistleblowers, based on reliance on the law and the IRS complying with the law in reasonable time, places Petitioner and other whistleblowers in a unique situation compared to others seeking relief under the *TRAC* tests and so should be given considerable weight by the Court. The toll in human health and welfare from Respondent's failure to act and unreasonable delay is also extraordinary.<sup>56</sup>

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<sup>56</sup> See generally, *Air Line Pilots Ass'n*, 750 F.2d at 86 (unreasonable delay found when placing pilots in serious financial jeopardy).

**D. The Court should consider the effect of expediting delayed action on agency activities of a higher or competing priority.<sup>57</sup>**

The IRS will not be delayed or subject to higher or competing authority by being directed to take action. As discussed above, the IRS has already completed the great majority of steps in making a decision and a recommendation for Petitioner has been provided to the Director of the Whistleblower Office (and similarly with scores of other cases).

Further, the IRS has certainly been able to take advantage of the information voluntarily provided by the whistleblower, translating into billions of dollars successfully collected by the Treasury. This situation makes arguments that staffing and resources are not available to process awards specious at best. The IRS had the resources to act on the information. The IRS cannot fairly argue that it does not have the resources to make an award to the whistleblower that allowed them to act in the first place. The whistleblower program is all of one piece: encouraging whistleblowers to come forward, benefitting from the information, and rewarding the whistleblower. This interconnectedness of the program is reflected in the June 20, 2012 memorandum by Commissioner Miller that establishes three timelines: 90 days for an initial review of a whistleblower submission by the whistleblower office; 90 days for subject matter experts to review; and 90 days for notification of an award decision to the whistleblower.<sup>58</sup>

The Tax Court should exercise the authority that it has been given to ensure that the IRS pays its bills to the whistleblower in a timely manner.

Finally, *Amicus* notes that the IRS has imposed a deadline for whistleblowers for completion and review of their claims. Whistleblowers are subject to a strict 30-day limitation in responding to the IRS after receiving a preliminary recommendation letter under Internal Revenue Manual 25.2.2.8(3). *Amicus* raises no objections to the 30-day limitation for a

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<sup>57</sup> *TRAC*, 750 F.2d at 80.

<sup>58</sup> Memorandum from Steven T. Miller, Deputy Commissioner for Enforcement, IRS Whistleblower Program, June 20, 2012, available at [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/miller\\_memo.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/miller_memo.pdf).



whistleblower to exercise its rights of appeal to the IRS. Rather, *Amicus* encourages the Court to direct specific timelines for the IRS to complete its work in this case just as the IRS requires of whistleblowers. *Amicus* suggests that the 90 days established by the Deputy Commissioner should be considered by the Court in this case.<sup>59,60</sup>

The Court will not have a negative impact on IRS actions by directing an expedited decision, nor will it have a negative impact on accepting whistleblower submissions. The IRS already recognizes that accepting a whistleblower's information, acting on it, and rewarding the whistleblower are all of one piece, so mandating that the IRS perform each activity with the same diligence and speed as the rest will not have negative repercussions for the agency. In the case before the Court, all the steps necessary to make a decision have already been performed and a final decision is now sitting on the Director's desk.

**E. The Court should also take into account the nature and extent of the interests prejudiced by delay.<sup>61</sup>**

The sole purpose of the statute is being completely undermined by the delay in making mandatory awards to whistleblowers. The purpose of the statute is to encourage whistleblowers to come forward and provide useful information to the IRS. *Amicus* has seen firsthand that whistleblowers are discouraged by the lack of payment in deciding whether to come forward.<sup>62</sup>

The failure to make payments to whistleblowers in a timely manner is frustrating the Congressional intent and policy of establishing the IRS Whistleblower Office and requiring

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<sup>59</sup> *TRAC*, 750 F.2d at 80 (holding that despite agency's assurances that it is moving expeditiously, agency's failure to meet its own deadline is sufficient for the court to retain jurisdiction over the case).

<sup>60</sup> Courts have held agencies accountable to their own internally-established deadlines, a trend which this Court should follow by holding the IRS to its own 90-day schedule. *See, e.g., Fla. Home Builders Ass'n v. Norton*, 496 F. Supp. 2d 1330, 1332-33 (M.D. Fla. 2007).

<sup>61</sup> *TRAC*, 750 F.2d at 80.

<sup>62</sup> *See also*, Erika Kelton, Whistleblowers See Little Reward, Forbes On-Line (Mar. 02, 2012), <http://www.forbes.com/sites/erikakelton/2012/03/02/irs-whistleblowers-see-little-reward/>

payments of awards to whistleblowers.<sup>63</sup> In a letter from Senator Grassley to Secretary of the Treasury Geithner and Commissioner of the Internal Revenue Service Shulman on April 30, 2012, Senator Grassley expressed that, “The lack of progress [in paying claims] is demoralizing whistleblowers so that I am now concerned that whistleblowers will stop coming forward.” The recent report by the IRS on the whistleblower program shows that Senator Grassley’s concerns of whistleblowers not coming forward are well founded; the number of whistleblowers submitting claims has gone from 472 in 2009 to 422 in 2010 and now 314 in 2011.<sup>64</sup>

Further, as discussed above, the nature and extent of prejudice to the whistleblowers personally of delay in a decision is substantial, exacting economic, mental, physical, and emotional tolls.

The policy implications of continued delays by the IRS and the Tax Court failing to take action will not only significantly prejudice the whistleblowers, but will also jeopardize the IRS whistleblower program. Hundreds of millions of dollars in taxes have been recovered thanks to the whistleblower program. As the Deputy Commissioner stated in his June 20, 2012 memorandum:

[T]housands of whistleblowers have reported hundreds of millions of dollars in suspected tax compliance issues, resulting in a wide range of audits and investigations. Some of these audits and investigations have yielded significant results, demonstrating that whistleblower information can be an important tool in our compliance programs.

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<sup>63</sup> See also, letter from Senator Grassley (Apr. 30, 2012) [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(apr. 30, 2012\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(apr.%2030,%202012).pdf), letter from Senator Grassley to IRS Commissioner (Sept. 13, 2011), available at [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley to irs commissioner \(sept. 13, 2011\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20to%20irs%20commissioner%20(sept.%2013,%202011).pdf), letter from Senator Grassley (Jun. 21, 2010), available at [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jun. 21, 2010\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jun.%2021,%202010).pdf), letter from Senator Grassley to Treasury Secretary Henry Paulson (Jan. 5, 2007), available at [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter from senator grassley \(jan. 5, 2007\).pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/letter%20from%20senator%20grassley%20(jan.%205,%202007).pdf).

<sup>64</sup> Internal Revenue Service, *Fiscal Year 2011 Report to Congress on the Use of Section 7623*, Jun. 20, 2012, available at [http://www.whistleblowers.org/storage/whistleblowers/docs/birk/irs whistleblower report.pdf](http://www.whistleblowers.org/storage/whistleblowers/docs/birk/irs%20whistleblower%20report.pdf).

Not encouraging whistleblowers with timely reward payments eviscerates the purpose of the statute and will deprive the country of billions of dollars in future tax revenue.

**F. The Court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is “unreasonably delayed.”<sup>65</sup>**

The Tax Court does not have to find impropriety to determine that an agency action is unreasonably delayed. However, *Amicus* agrees with the statements of the courts that bad faith by the agency should lead to a conclusion that the delay is in fact unreasonable.

“[I]f the court determines that the agency [has] delay[ed] in bad faith, it should conclude that the delay is unreasonable.”<sup>66</sup> The District of Columbia Circuit later explained that “[w]here [an] agency has manifested bad faith, as by singling someone out for bad treatment or asserting utter indifference to a congressional deadline, the agency will have a hard time claiming legitimacy for its priorities.”<sup>67</sup> Here, *Amicus* is concerned that the IRS may be unintentionally singling out the entire class of whistleblowers for poor treatment and that the IRS has expressed to the Tax Court an unwillingness to set any timeline or deadline for action, specifically saying that the timeline has “no limitation,” as the Tax Court is informed by Respondent.<sup>68</sup>

*Amicus* encourages the Tax Court to have its eyes open to the realities present in these cases and the history of the whistleblower program at the IRS. As noted earlier, the Court in *Cooper* provided a useful brief history of the whistleblower program, highlighting the TIGTA report which showed that, prior to enactment, the award program for whistleblowers was arbitrary, inconsistent, lacked standardized procedures, and had limited managerial oversight.<sup>69</sup>

As Senator Grassley stated in his June 21, 2010 letter to Treasury Secretary Geithner:

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<sup>65</sup> *TRAC*, 750 F.2d at 80.

<sup>66</sup> *Cutler v. Hayes*, 818 F.2d 879, 898 (D.C. Cir. 1987).

<sup>67</sup> *In re Barr Labs., Inc.*, 930 F.2d 72, 76 (D.C. Cir. 1998) (citing *in re Monroe Communications Corp.*, 840 F.2d 942, 946-47 (D.C. Cir. 1988)).

<sup>68</sup> Resp. to Pet’r’s First Am. Objection; Resp. to Resp’t’s Mot. to Dismiss ¶ 3.

<sup>69</sup> *Cooper*, 135 T.C. at 73

I have learned from my almost three decades of experience with whistleblowers that government agencies will often seek to undermine or undercut the whistleblower. Prior to 2006 changes, there was a culture of hostility towards and intimidation of whistleblowers at the IRS.

Unfortunately, the situation has not improved as much as predicted even after the law was enhanced in 2006. Reflecting a mindset of some at the IRS were comments by the former IRS Chief Counsel, who characterized the new law as “unseemly” and the “potential to be a real disaster.”<sup>70</sup> Time has clearly proven that the whistleblower program has been an unprecedented success, e.g. a courageous whistleblower is almost entirely responsible for the success of the IRS voluntary disclosure program of illegal offshore accounts.<sup>71</sup>

*Amicus* recognizes that the vast majority of IRS employees act in good faith, especially at the IRS whistleblower office, and are committed to the success of the whistleblower program. However, *Amicus* fears that the mindset reflected in these uninformed comments by the former Chief Counsel still grips some at the IRS. This is shown by the constant grind of GAO and TIGTA reports highlighting problems and delays in the IRS whistleblower program, the hundreds of frustrated whistleblowers, and the continued oversight by the author of the legislation, Senator Grassley.<sup>72</sup>

While *Amicus* is heartened by the June 20th, 2012 memorandum of the Deputy Commissioner, and hopes it is a sign of better days ahead, the Tax Court should recognize it is limited in its scope and it remains to be seen how it will fare in implementation. It is vital that

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<sup>70</sup> Jeremiah Coder, Conversations: Donald Korb, Tax Notes 310, 312 (2010).

<sup>71</sup> Year in Review: The 2009 Person of the Year, Tax Notes Today, January 4, 2010 (Choosing Bradley Birkenfeld as the Person of the Year) (“The short answer is that UBS was outed by an insider with firsthand knowledge of what goes on in the wealth protection units of the world’s major banks. The UBS scandal and its aftermath, is largely because of the efforts of one man: Bradley Birkenfeld. Simply put, Birkenfeld must be considered among the biggest whistleblowers of all time.”).

<sup>72</sup> Even for those involved in the extremely rare success -- someone receiving an award -- they also find that the program is troubled. See, e.g., Richard Lavinthal, IRS Keeps Ignoring Tax Whistleblowers, The Washington Examiner, April 12, 2012 (Op ed by media consultant for whistleblower attorneys for whistleblower to receive an award) (“Instead of shooting these easy fish in a barrel, the agency has floundered.”).

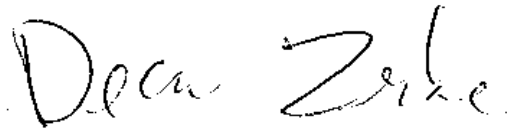
the Tax Court fulfill the role appointed it by Congress of protecting the rights of whistleblowers and ensuring that they are afforded due process.

The Tax Court should give consideration that the sixth *TRAC* factor may be at issue in regard to the actions of at least some at the IRS as it relates to mandatory whistleblower awards.

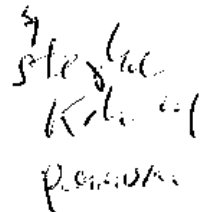
### **Conclusion**

Petitioner has amply met the guidelines established by the Appellate Court in *TRAC* for the Tax Court to find that the IRS has failed to act or unreasonably delayed its actions in providing a determination of a mandatory award to the whistleblower and for the Tax Court to direct that the IRS make a decision within a limited number of days.

Respectfully submitted,



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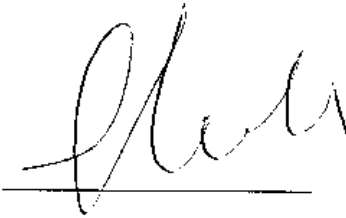
Counsel for *amicus curiae*

### CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing Motion of NWC for Motion to File Brief as *amicus curiae*, the proposed order to grant the motion to file as *amicus curiae*, and the *amicus curiae* brief were served by regular mail, <sup>sent 6/15/12</sup> on the following persons of the following address on this 27th day of June, 2012:

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