

Ukraine War Fuels Push To Expand Tax Whistleblower Program

By Alan K. Ota

Law360 (March 10, 2022, 4:18 PM EST) -- A bipartisan proposal aimed at strengthening the federal tax whistleblower program has gained traction in Congress as a potential tool to help federal investigators deliver on President Joe Biden's vow to investigate potential financial crimes by Russian oligarchs.



Federal agents stand in front of a Russian oligarch's home in October. A proposal to expand the government's tax whistleblower program could support U.S. efforts to put pressure on Russia by investigating potential financial misdeeds by elites. (AP Photo/Manuel Balce Ceneta)

Several senior Democrats said there were good prospects for advancing a bipartisan plan to expand the tax whistleblower program as lawmakers hunt for ways to ramp up pressure on Russia and President Vladimir Putin to end the war in Ukraine. While the proposal was not included in the fiscal 2022 **omnibus spending bill**, H.R. 2471, that passed the House late Wednesday, they said it could move in other legislation as Democrats try to deliver on **tax priorities** such as **green energy incentives** and **business tax breaks** included in the stalled Build Back Better Act, H.R. 5376.

House Ways and Means Committee Chair Richard Neal, D-Mass., said his panel would vet the plan, H.R. 4107, to expand the whistleblower program as part of a review of measures dealing with Russia and its oligarchs.

"We're going to examine everything when it comes to the oligarchs," Neal told Law360.

Neal said the proposal, sponsored by Rep. Mike Thompson, D-Calif., was one of several measures that could support Biden's vow in his State of the Union address "to go after the crimes of the Russian oligarchs."

"We are joining with European allies to find and seize their yachts, their luxury apartments, their private jets. We are coming for you," Biden told a joint session of Congress last week. The probe, led by the U.S. Department of Justice, is expected to focus on potential tax violations, money laundering and other financial crimes.

Thompson, who chairs the Ways and Means Select Revenue Measures Subcommittee, said an investigation of Russian oligarchs could lead to the discovery of tax violations and help to shrink the annual gap between taxes owed and paid.

"Those guys have so much money stashed," Thompson told Law360.

Dean Zerbe, a partner at Zerbe Miller Fingeret Frank & Jadav LLP in Houston, said the enthusiasm in both parties for economic sanctions and other restrictions aimed at Russia could help to rally support for the whistleblower bill.

"It should put more fire into Congress to get this done today rather than tomorrow," Zerbe, a former tax counsel to the Senate Finance Committee, told Law360.

He said the bill could entice advisers of Russian oligarchs to follow the path of former banker Bradley Birkenfeld, **who won** a \$104 million Internal Revenue Service whistleblower award in 2012 for providing data on clients of Swiss bank UBS, his old employer.

In order to expedite the handling of award claims, the House bill would require the IRS to pay interest when whistleblower awards are delayed for more than a year after the agency receives payment of taxes pursuant to information provided by a whistleblower. It would also provide a rebuttable assumption that a whistleblower's identity should be kept hidden when there are disputes over award claims in the U.S. Tax Court, in order to protect the informant from retaliation, physical harm, social and professional stigma or economic distress.

The measure also would **require the Tax Court** to take a fresh, or de novo, look at the record and evidence when a whistleblower appeals **the denial** or partial denial of an award claim. That proposal would reverse a 2018 Tax Court ruling in **Kasper v. Commissioner of Internal Revenue** that a whistleblower must prove the IRS abused its discretion when deciding not to approve an award claim.

The bill also would allow the IRS to keep 3% of the tax proceeds in whistleblower cases in order to run and expand the program, and it would shield whistleblower awards from sequestration, or across-the-board cuts, to enforce spending caps under the 2011 **Budget Control Act**.

The IRS has reported that sequestration in fiscal 2020 forced a net reduction in whistleblower awards of about \$5 million, or 5.9%, from the total for that year of about 160 total whistleblower awards worth some \$86 million. Overall, the government has distributed about \$1 billion in whistleblower awards while collecting more than \$6 billion since Congress approved mandatory whistleblower awards of 15% to 30% of tax proceeds in qualified cases in the 2006 **Tax Relief and Health Care Act**.

In the Senate, Finance Committee Chair Ron Wyden, D-Ore., has promoted a bipartisan companion bill, S. 2055, aimed at encouraging more whistleblowers to contact the IRS. He said the bill would appeal to Democrats as a step toward ensuring fair treatment for all taxpayers.

"We shouldn't have two tax codes — one for the big guys, where they can go lickety-split and get what they want, and one for the people without power," Wyden told Law360.

Supporters of the bill have said it would reassure potential informants that there is a fair, efficient system for processing whistleblower award claims.

The proposed changes would follow up on safeguards in the 2019 **Taxpayer First Act**, which allowed whistleblowers to file employer retaliation complaints with the U.S. Department of Labor and file suit in district court if there was no action on such filings within 180 days.

Siri Nelson, executive director of the National Whistleblower Center, a nonprofit group that helps whistleblowers find legal aid, said in a statement that the bipartisan legislation would "provide a much improved avenue for whistleblowers who wish to come forward to report evidence of tax fraud."

For their part, Republicans **have been unified in opposing** the BBB Act's framework for providing the IRS with \$92 billion in funding over 10 years, including \$72.8 billion for enforcement. They sought to limit upgrades for audits and enforcement that go beyond targets in the fiscal 2022 omnibus spending measure, which provided \$12.9 billion in IRS funding, an overall increase of 5.7%, or \$675 million.

But Rep. Mike Kelly, R-Pa., a member of the Ways and Means Committee and a supporter of the Thompson bill, said he believed Republicans would be willing to support the proposed tweaks to the whistleblower program as a way to strengthen tax enforcement without hurting taxpayer rights.

"We are looking for balance," Kelly told Law360. "And we are looking for the truth all the time."

Senate Minority Whip John Thune, R-S.D., said he and other Republicans probably would be open to supporting the Senate version of the whistleblower bill, sponsored by Sen. Chuck Grassley, R-Iowa, former chair of the Finance Committee, and backed by Wyden. But he said GOP lawmakers wanted to make sure efforts to expand the whistleblower program and to probe Russian oligarchs would not lead to more IRS scrutiny of families and small businesses.

"I'm interested if you can do that without casting a net wide enough to catch a lot of innocent people. I'm all for going after oligarchs," Thune told Law360.

Despite GOP concerns about an expansion of IRS enforcement, Grassley said he believed he would be able to rally support in both parties for the bill as a way to improve tax administration and support an investigation of financial crimes involving Russian oligarchs.

"You need whistleblowers all the time," Grassley told Law360. "It's the biggest way to fight fraud."

--Editing by Aaron Pelc and Roy LeBlanc.