

Practice

TIGTA Evaluation of the IRS Whistleblower Program

By Charles P. Rettig

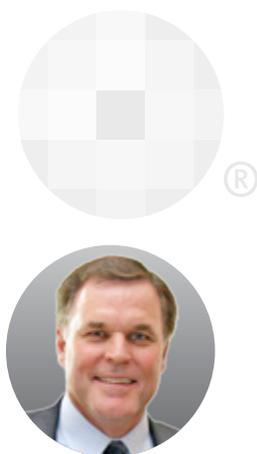
The Treasury Inspector General for Tax Administration (TIGTA) recently audited the IRS Whistleblower Program to determine whether whistleblower claims are appropriately and timely processed before referral for investigation or examination.¹ Code Sec. 7623 authorizes the IRS to pay monetary awards to whistleblowers for information leading to the detection of underpayments of tax or bringing to trial and punishment persons guilty of violating tax laws. The Code Sec. 7623 requirement that claims be paid from collected proceeds generally means that payment cannot be made for many years after the information is submitted because the underlying taxpayer's case (including any appeals) must be finally resolved.

The IRS Whistleblower Program plays an important role in reducing the Tax Gap by providing an avenue for reporting tax evasion. Tax whistleblowers provide valuable leads and often offer unique insights into compliance challenged taxpayers. In these situations, the Whistleblower Office is charged with processing financial awards to people who provide information about the tax indiscretions of others. It can be lucrative for the informant and greatly enhance the ability of the IRS to pinpoint tax noncompliance without having to unnecessarily utilize limited tax enforcement resources.

The IRS generally requires specific and credible information that results in the collection of taxes, penalties, interest or other amounts from the noncompliant taxpayer. They look to receive solid information, not an “educated guess” or unsupported speculation. Information provided by disgruntled former spouses, former employees and business competitors is often highly suspected. Absent a real and significant tax issue—it is not a program for resolving personal problems or disputes about a business relationship. If the IRS uses information provided by the whistleblower, it can award the whistleblower up to 30 percent of the additional tax, penalty and other amounts collected!

Statutory Authority Under Code Sec. 7623

Some form of informant award has been available since March 1867, allowing the Secretary of the Treasury to pay such amounts as he deems necessary “for



CHARLES P. RETTIG is a Principal with Hochman, Salkin, Rettig, Toscher & Perez, P.C. in Beverly Hills, California. Mr. Rettig is Past-Chair of the IRS Advisory Council, a member of the Advisory Board for the California Franchise Tax Board, a past-member of the Advisory Council for the California State Board of Equalization and a Regent and Elected Fellow of the American College of Tax Counsel.

detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same.”² A form of the current statutory provision has been around since at least the 1939 Code and in its earliest versions, authorized discretion for the payment of awards to informants largely for information leading to criminal tax violations.³ In December 2006, the Tax Relief and Health Care Act of 2006 created the IRS Whistleblower Office and made substantive changes by creating Code Sec. 7623(a) for the discretionary awards previously paid under Code Sec. 7623 and adding Code Sec. 7623(b) for mandatory awards with rights to appeal award decisions to the U.S. Tax Court.

The IRS Whistleblower Program plays an important role in reducing the Tax Gap by providing an avenue for reporting tax evasion. Tax whistleblowers provide valuable leads and often offer unique insights into compliance challenged taxpayers.

There are two basic types of whistleblower awards under Code Sec. 7623. Pursuant to Code Sec. 7623(b), if the taxes, penalties, interest and other amounts in dispute exceed \$2 million, and a few other qualifications are met, the IRS will pay 15 percent to 30 percent of the amount collected. If the noncompliant taxpayer is an individual, their annual gross income must exceed \$200,000.⁴ There is no limit on the dollar amount of the award. A reduced award amount of up to 10 percent is available in cases based principally on disclosure of specific allegations resulting from: (i) judicial or administrative hearings; (ii) from a governmental report, hearing, audit or investigation; or (iii) from the news media. The award is reduced if the whistleblower “planned and initiated” the noncompliance and the award is to be denied if the whistleblower is convicted of criminal conduct arising from their role in planning and initiating the noncompliance.⁵ Awards are subject to appeal to the U.S. Tax Court.⁶

If the thresholds in Code Sec. 7623(b) are not satisfied, Code Sec. 7623(a) authorizes, but does not require, payment for information relating to violations that result in recovery of tax.⁷ The maximum Code Sec. 7623(a) award is 15 percent of up to \$10 million. In addition, Code Sec. 7623(a) awards are discretionary and there are no statutory appeal rights for award determinations.

The TIGTA Report

The Whistleblower Program has resulted in the collection of significant amounts of revenue by facilitating whistleblower claims reporting violations of the tax laws that may otherwise go unidentified. From FY 2011 through February 2016, the IRS collected more than \$2 billion by reason of information provided by whistleblowers. According to TIGTA, the 732 awards paid to whistleblowers from FY 2011 to FY 2016 totaled more than \$363 million.

The Whistleblower Office has recently reduced inventory backlogs largely due to staffing increases from 20 employees in FY 2011 to 61 employees in FY 2015. In FY 2011, there were 6,561 submissions [of which 6,234 were pursuant to Code Sec. 7623(a); 327 were pursuant to Code Sec. 7623(b)]; in FY 2015 there were 5,026 submissions [of which 4,901 were pursuant to Code Sec. 7623(a); 125 were pursuant to Code Sec. 7623(b)]; and through March 31, 2016, for FY 2016 there were 2,723 submissions [of which 2,684 were pursuant to Code Sec. 7623(a); 39 were pursuant to Code Sec. 7623(b)].

During FY 2015, the Whistleblower Office closed 10,615 claims and had already closed 12,984 claims in FY 2016 (as of February 2016). The majority of claim closures in FYs 2015 and 2016, 83 and 85 percent, respectively, were rejected or denied before going to an operating division field group for an investigation or examination, with only a small portion (two percent each year) resulting in an award. Most claims were rejected because the allegations were not specific enough for the IRS to take action or denied because the allegation was below the threshold to justify resources for compliance action.

During FY 2011, the Whistleblower Office collected \$48 million, paying out 97 awards totaling \$8.0 million (16.7 percent of collected proceeds); during FY 2015, the Whistleblower Office collected \$501.3 million, paying out 99 awards totaling \$103.5 million (20.6 percent of collected proceeds); and during FY 2016 (as of February 2016), the Whistleblower Office collected \$221.8 million, paying out 174 awards totaling \$20.4 million (9.2 percent of collected proceeds). The amounts for collected proceeds and awards have decreased, due in part to 165 of 174 FY 2016 awards being paid for discretionary Code Sec. 7623(a) claims, compared to 80 of 99 claims in FY 2015.

According to TIGTA, whistleblowers are not always contacted to clarify allegations although they often have insights and information which can help the IRS understand complex issues or hidden relationships. After reviewing a sample of 89 submissions randomly selected from the estimated 1,388 submissions sent for evaluation during FY 2014, TIGTA found that 16 of those

89 submissions had debriefing interviews and six had a justification recorded for not having a debriefing. Of the remaining 67 submissions, TIGTA stated that debriefing the whistleblowers may have benefited the operating division's evaluation for 16 submissions.

The IRS is limited in what information can be disclosed to whistleblowers because Code Sec. 6103 prohibits unauthorized disclosure of return or return information. However, there are exceptions for disclosure of some information to whistleblowers. Specifically, Code Sec. 6103(h)(4) authorizes the Whistleblower Office to disclose information with whistleblowers while communicating award determinations during administrative proceedings, and Code Sec. 6103(k)(6) allows the IRS to disclose return information in order to obtain information for the determination of a tax liability. In addition, Code Sec. 6103(n) provides the authority to enter into a contract with an individual to share information for the purposes of advancing tax administration.

TIGTA determined that improvements are needed to monitor the timeliness of claim processing and ensure that rejection/denial decisions are properly supported. Furthermore, TIGTA believes that the Whistleblower Office does not have appropriate controls in place to allow for sufficient oversight of whistleblower claim processing. Specifically, we have the following:

- A lack of performance measurement and quality review impedes program evaluation.
- Computerized tracking data are not always accurate.
- Coding of claims on the Audit Information Management System is inconsistent.
- Guidance for claim processing can be improved.

In addition, claims made by ineligible persons are not always identified.

TIGTA recommended that the Director, Whistleblower Office, implement the Balanced Performance Measurement System for the Whistleblower Program and implement controls to ensure the consistent, appropriate and expeditious processing of whistleblower claims. In response to the report, IRS management agreed with and plans to implement corrective actions for nine of our 10 recommendations. IRS management believes that existing guidance is sufficient for the storage of supporting documentation for claim determinations. TIGTA maintains that existing guidance only requires documentation of the decision and not the support for the decision.

Filing a Whistleblower Claim

Whistleblower claims must be submitted under penalty of perjury on Form 211, Application for Award for Original

Information whether submitted under Code Sec. 7623(b) or Code Sec. 7623(a). Form 211 should be mailed to the IRS, Whistleblower Office—ICE, 1973 N. Rulon White Boulevard, M/S 4110, Ogden, UT 84404. The claim must include a declaration under penalty of perjury stating “I declare, under penalty of perjury, that I have examined this application and my accompanying statement and supporting documentation and aver that such application is true, correct and complete, to the best of my knowledge.” It must also include an explanation of how the information that forms the basis of the claim came to the attention of the claimant, including the date(s) on which this information was acquired, and a complete description of the claimant's present or former relationship (if any) to the person that is the subject of the claim (*e.g.*, family member, acquaintance, client, employee, accountant, lawyer, bookkeeper, customer). If the claimant identifies multiple person(s) as the subject of a claim, describe his or her relationship to each person. A whistleblower who wishes to report possible instances of tax fraud by another individual, and does not want an award, should complete IRS Form 3949 A, *Information Referral*, or provide the information *via* a letter.

The potential benefits to our system of tax administration associated with a successful whistleblower program cannot be ignored.

Examples of claims that will not be processed under Code Sec. 7623(b) include situations where the whistleblower is an employee of the Department of Treasury, or is acting within the scope of his or her duties as an employee of any Federal, State or local Government; the individual is required by federal law or regulation to disclose the information, or the individual is precluded by federal law or regulation from making the disclosure; the individual obtained or was furnished the information while acting in his or her official capacity as a member of a State body or commission having access to such materials as federal returns, copies or abstracts; the individual had access to taxpayer information arising out of contract with the federal government that forms the basis of the claim; the claim is found to have no merit or the claim lacked sufficient specific and credible information; the claim was submitted anonymously or under an alias; the claim was filed by a person other than an individual (*e.g.*, corporation or partnership); or the alleged noncompliant taxpayer is an individual whose gross income is below \$200,000.

Examples of claims that will not be processed under Code Sec. 7623(a) include situations where the individual is an employee of the Department of Treasury, or is acting within the scope of his or her duties as an employee of any Federal, State or local Government; the individual is required by federal law or regulation to disclose the information, or the individual is precluded by federal law or regulation from making the disclosure; the individual obtained or was furnished the information while acting in his or her official capacity as a member of a State body or commission having access to such materials as federal returns, copies or abstracts; the individual had access to taxpayer information arising out of contract with the federal government that forms the basis of the claim; the claim is found to have no merit or the claim lacked sufficient specific and credible information; the claim was submitted anonymously or under an alias; and the claim was filed by a person other than an individual (*e.g.*, corporation or partnership).

If the whistleblower withholds available information, the whistleblower bears the risk that withheld information may not be considered by the Whistleblower Office in making any award determination. If the documents or supporting evidence are known to the whistleblower but not in his/her possession, the whistleblower should describe these documents and identify their location to the best of his or her ability. Except in the most unusual cases involving boxes of data, the whistleblower should include the evidence with the initial submission. Under no circumstance will the IRS expect or condone illegal actions taken to secure documents or supporting evidence.

Evaluating the Whistleblower's Claim

An analyst in the Whistleblower Office will initially consider the information provided by the whistleblower. Claims involving at least \$50,000 of unreported income per year are routed to IRS Criminal Investigation (CI) for review.⁸ A threshold requirement for any award Code Sec. 7623 is that the information must lead to judicial or administrative action—an audit or investigation resulting in the collection of proceeds. In the case of a large corporate taxpayer whose returns are audited each year, an administrative action can mean the creation of a new issue under the Audit Plan or a change in the way information about an issue is collected or analyzed, which would not otherwise have occurred without the information provided by the whistleblower. In other cases, an administrative action can mean placing a taxpayer under audit who was not already under audit.

An action is based on the information provided by the whistleblower if the IRS would not have acted but for

the receipt of the information from the whistleblower. Action by the IRS may include the initiation of an examination or investigation that would not otherwise have been undertaken, or the modification of a pending or planned examination or investigation as a result of information provided by the whistleblower. All relevant factors, including the value of the information furnished in relation to the facts developed by the investigation of the violation, will be taken into account by the Director in determining whether an award will be paid, and, if so, the amount of the award.

The process, from submission of complete information to the IRS until the proceeds are collected, may be from five to seven years, and longer when there are protracted appeals or collection actions. The requirement that claims be paid from collected proceeds generally means that payment will not be made until there is a final determination of tax liability (including taxes, penalties, interest, additions to tax and additional amounts) owed to the government and such amounts have been collected by the IRS. A final determination of tax does not occur until the statutory period for filing a claim for refund expires or there is an agreement between the taxpayer and the IRS that there has been a final determination of tax for a specific period and a waiver of the right to file a claim for refund is effective. Therefore, the IRS may not make payments for several years after the whistleblower has filed the claim.

The Whistleblower Office will analyze various factors to determine whether the case merits an award percentage in excess of 15 percent. Negative factors can offset positive factors but cannot result in an award that is less than the statutory minimum. The absence of negative factors does not mean that the award percentage will be larger than 15 percent. The Whistleblower Office will generally determine awards of 15 percent, 18 percent, 22 percent, 26 percent or 30 percent.

Positive factors include: (i) prompt action by the whistleblower to inform the Government or the taxpayer of the tax noncompliance may, depending on the acts, be a positive factor. For example, providing the Government with an opportunity to address the tax noncompliance early can help mitigate the impact of the noncompliance; (ii) the whistleblower submitting information that identifies an issue of a type previously unknown to the Government or a taxpayer behavior that the Government was unlikely to identify or was especially difficult to detect through the exercise of reasonable diligence; (iii) submissions in which the whistleblower thoroughly presents the details of the noncompliance in a clear and organized manner may, depending on the facts, be a positive factor saving examination resources of the IRS; (iv) the whistleblower

(and/or his/her representative) provided exceptional cooperation and assistance during the audit, investigation or trial, including useful technical or legal analysis of the taxpayer's records; (v) the whistleblower identified assets of the taxpayers that could be used to pay the taxpayer's liability or assets not otherwise known to the IRS; (vi) the whistleblower identified connections between transactions, or parties to transactions, which enabled the IRS to understand tax implications that might not otherwise have been revealed; and (vii) and the impact of the report on the behavior of the taxpayer. For example, the whistleblower's report may, directly or indirectly, cause the taxpayer to correct an improper position.⁹

Negative factors include: (i) the whistleblower delayed reporting after learning the relevant facts, and the delay had an adverse impact on the ability of the IRS to pursue the issues raised. Delayed reporting can allow the noncompliant activity to be repeated, increasing the magnitude of the noncompliance and, in some cases, compromising the ability of the Government to assess and collect; (ii) the whistleblower's role in the underpayment of tax reported, such as when a whistleblower actively and knowingly participates in carrying out the tax noncompliance. If the whistleblower directly or indirectly profits from the noncompliance, this may also be considered a negative factor; (iii) a whistleblower puts the tax case at risk. For example, a whistleblower's premature disclosure to the taxpayer of the existence or scope of IRS planned enforcement activity may be a negative factor if the whistleblower disclosed information regarding the IRS interest in a matter in such a way that permitted the affected taxpayer(s) to impede IRS access to relevant information and thus impeded the exam or audit; and (iv) whistleblowers will normally be given specific instructions regarding permissible and impermissible activities; violation of these instructions may be a negative factor in determining the award percentage if it causes the IRS to expend additional resources it would not otherwise have spent.¹⁰

Under Code Sec. 7623(b)(3), the Whistleblower Office may reduce an award determination made under either Code Sec. 7623(b)(1) or (b)(2) if the whistleblower planned and initiated the actions that led to the tax underpayment or actions described in Code Sec. 7623(b)(2). The applicable range for this category is 0–30 percent. The whistleblower need not have been the only person involved in planning and initiating for Code Sec. 7623(b)(3) to apply. The Whistleblower Office will then evaluate the whistleblower's role in planning and initiating the actions that led to the underpayment and, based on this evaluation, categorize the whistleblower's role as a planner and initiator as significant, moderate or minimal.¹¹

Planning and initiating factors applicable to Code Sec. 7623(b)(3) determinations include: (i) was the whistleblower the sole decision maker, one of several contributing planners and initiators or an advisor to a decision maker?; (ii) the nature of the whistleblower's planning and initiating activities. What did the whistleblower do—was it reasonably legitimate tax planning or objectively unreasonable, were steps taken to hide the actions at the planning stage, was there any identifiable misconduct (legal, ethical, *etc.*) that was either not criminally prosecuted, for whatever reason, or did not result in a criminal conviction (which results in a zero award?); (iii) the extent to which the whistleblower knew or should have known that tax noncompliance was likely to result from the course of conduct; (iv) the extent to which the whistleblower acted in furtherance of the noncompliance, including efforts to conceal the true nature of the transaction; and (v) 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.¹²

Tax Treatment of Awards

All whistleblower awards will be subject to current federal tax reporting and withholding requirements. The whistleblower will receive a Form 1099 or other form as may be prescribed by law, regulation or publication.

Confidentiality and Disclosure for Whistleblowers

Although the IRS will attempt to protect the identity of the whistleblower, the specific nature of later government inquiries often serves to help the noncompliant taxpayer identify the whistleblower. The identity of the whistleblower will only be disclosed within the IRS on a "need to know" basis in the performance of their official duties in accordance with Code Sec. 6103.¹³ To the extent that the Whistleblower Office determines that an individual is a "whistleblower" under Code Sec. 7623, such individual shall be deemed to be a confidential informant whose identity shall be protected in accordance with Code Sec. 6103(h)(4). Any contact made between the IRS and the whistleblower will not be a third-party contact under Code Sec. 7602(c). Service personnel are required to treat the identity of the whistleblower and the whistleblower's information as highly confidential and to exercise extreme security precautions. Also, if the whistleblower is an essential witness in a judicial

proceeding, it may not be possible for the government to avoid identifying the whistleblower.

Once a claim is submitted, the whistleblower may be told only the status and disposition of the claim—not the action taken in the taxpayer case. A claim can be denied if: (i) the IRS already had the information from another source, (ii) an audit or investigation is conducted but leads to no finding of taxpayer liability, (iii) a finding or liability is made but the taxpayer is successful in an administrative or judicial appeal or (iv) a finding of liability is made and sustained but there is no collection because the taxpayer has no known assets that the government can collect. Information about the taxpayer is covered by privacy laws that impose strict limits on what the IRS is able to disclose.

Whistleblowers Who Are Current Employees of the Taxpayer

It is generally assumed that a current employee whistleblower has access to information that may be subject to a privilege that has not been affirmatively waived by the taxpayer. Accordingly, the IRS is particularly sensitive to the privilege issues that may be present in current employee situations. These cases may also raise other issues, such as Constitutional issues and confidentiality issues, which could limit the IRS's ability to use information received from the informant in any subsequent litigation.

A current employee informant may submit additional information to the IRS following the initial submission of information. Generally, the IRS may receive and use this “supplemental” information for the sole purpose of clarifying previously submitted information. Supplemental information includes information that reasonably relates to the previously submitted information, based on an analysis of all the facts and circumstances relating to the information and the IRS's contacts with the informant, but does not include information that relates to new issues. The IRS must coordinate the analysis with Operating Division Counsel. If Counsel advises that the IRS should not use the information, based on its analysis of the legal risks, then the appropriate Service Executive will determine whether or how to proceed.

Appeal Rights

The Whistleblower Office will communicate the final claim determination, in writing to the claimant. Final determinations regarding awards under Code Sec. 7623(b) may, within 30 days of such determination,

be appealed to the U.S. Tax Court.¹⁴ The IRS does not have the authority to extend the 30-day time period for filing an appeal. Decisions under Code Sec. 7623(a) may not be appealed to the tax court. A letter from the Whistleblower Office denying a claim on the grounds that no award could be made under Code Sec. 7623(b) constitutes a determination conferring jurisdiction upon the tax court.¹⁵

Recently, the tax court permitted a whistleblower to pursue his claim anonymously by requiring redaction of all identifying information—both for the whistleblower and for the company referenced in the award claim.¹⁶ The whistleblower, a senior executive in an unnamed company, filed an informant claim with the IRS after allegedly witnessing the company significantly underpay its tax liability through noncompliance with the tax code. The IRS reviewed the informant's claim but concluded that there were no grounds to make an award under Code Sec. 7623(b). In timely petitioning the tax court to review the award claim denial, the whistleblower also filed a motion asking for a protective order that would either seal the record or allow him to proceed anonymously. Although the whistleblower had departed from the company he claimed was tax noncompliant, he argued that revealing his identity in court would create psychological and financial harm, including potential harmful employment repercussions. While the tax court's general approach is that litigation within its domain is a matter of public record, the court also has “broad discretionary authority,” both as a statutory matter and under internal rules, to offer privacy protection.

In a footnote, the tax court warned that all whistleblowers should not expect anonymity because each request to proceed anonymously must stand upon its own. Some noted that the tax court was making it too easy as a general rule of law to claim the need for anonymity to avoid negative career repercussions in making a whistleblower claim. Congress could have included specific protections for whistleblowers in Code Sec. 7623, yet chose to remain silent on the issue. As such, it might be that Congress intended whistleblowers to bear the privacy risks inherent in asking for review of their whistleblower claims in a public forum.

Summary

The whistleblower statute is intended to provide valuable leads to the IRS, which effectively preserves other precious tax enforcement resources. The potential benefits to our system of tax administration associated with a successful whistleblower program cannot be ignored. Information

provided by whistleblowers is especially helpful when IRS resources are being stretched thin and compliance functions curtailed. Tax enforcement operations of the IRS (including the Whistleblower Office) must be appropriately funded and staffed.

Deterrence can be a persuasive and relatively inexpensive tax enforcement tool. A visible, well-respected IRS whistleblower program increases public interest in the program and could cause countless otherwise compliance challenged taxpayers to voluntarily comply.

ENDNOTES

¹ TIGTA Report, *The Whistleblower Program Helps Identify Tax Noncompliance; However, Improvements Are Needed to Ensure That Claims Are Processed appropriately and Timely* (August 30, 2016; reference Number: 2016-30-059).

² See *An Act to Amend Existing Laws Relating to Internal Revenue and for Other Purposes*, Ch.169, 7, 14 Stat. 471, 473 (1867), authorizing the commissioner of internal revenue to pay amounts "deemed necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws."

³ The 1939 Code and the 1954 Code authorized payments to persons "for detecting and bringing to trial and punishment persons guilty of violat-

ing the internal revenue laws, or conniving at the same."

⁴ Code Sec. 7623(b).

⁵ Code Sec. 7623(b)(3).

⁶ Code Sec. 7623(b)(4).

⁷ Code Sec. 7623(a) and Reg. §301.7623-1.

⁸ IRM, pt. 25.2.1.6 (Dec. 23, 2008).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ IRM, pt. 25.2.2.12 (Aug. 7, 2015).

¹⁴ Before 2006, there was no express statutory provision for judicial review of tax whistleblower claims. See *R. Colman*, FedCl, 2011-1 usdc ¶150,196, 96 FedCl 633, 638 (stating that the

pre-2006 tax whistleblower law "cannot serve as the substantive law on which to predicate" jurisdiction of the Court of Federal Claims). This situation changed with the enactment of Code Sec. 7623(b)(4), which provides that the tax court shall have jurisdiction with respect to any determination regarding an award under Code Sec. 7623(b)(1), (2) or (3). See *J. DaCosta*, FedCl, 2008-2 usdc ¶150,444, 82 FedCl 549, 553-555 (holding that claims under Code Sec. 7623(b) are within the exclusive jurisdiction of the tax court).

¹⁵ *W.P. Cooper III*, 135 TC 70, 73, Dec. 58,265 (2010).

¹⁶ *Whistleblower 14106-10W*, 137 TC No. 15, Dec. 58,830 (Dec. 8, 2011).

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