NATIONAL WHISTLEBLOWERS
LEGAL DEFENSE & EDUCATION FUND

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Steven T. Miller
Acting Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

Dear Mr. Miller:

On December 18, 2012, the Department of the Treasury ("Treasury") and the Internal Revenue Service ("IRS") published a Notice of Proposed Rulemaking relating to the whistleblower provisions of 26 U.S.C. 7623. The proposed regulations "provide guidance on submitting information regarding underpayments of tax or violations of the internal revenue laws and filing claims for award, as well as on the administrative proceedings applicable to claims for award under section 7623."[1] The proposed regulations are extensive, and impact several important areas. Pursuant to the Administrative Procedure Act,[2] the National Whistleblowers Center ("NWC"), the National Whistleblowers Legal Defense and Education Fund ("Fund"), Bradley Birkenfeld, Scott Rosen, and Gene Ross jointly submit the following comments in response to the Internal Revenue Service's Notice of Proposed Rulemaking.[3]

First, the proposed regulations impact the size and scope of the whistleblower program as a whole by redefining key statutory terms. The regulations purport to implement and provide a regulatory framework for 26 U.S.C. § 7623(b), which "provides that if the Secretary proceeds with an administrative or judicial action (including any related actions) based on the information provided by the individual, then the individual will receive an award from the collected proceeds resulting from the actions."[4] This simple, straightforward summary of section 7623(b)'s operation is not at all reflected by the proposed regulations.

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[1] 77 Fed. Reg. 74798 (Dec. 18, 2012).

[2] 5 U.S.C. § 553(c).

[3] The NWC is a 501(c)(3) nonprofit public interest organization that regularly assists whistleblowers throughout the United States. See http://www.whistleblowers.org. The Fund is a nonprofit law firm which for over twenty years has represented whistleblowers in a variety of cases, including several under section 7623(b). Additionally, the Fund maintains a nationwide attorney referral service for whistleblowers. Bradley Birkenfeld and Scott Rosen both have pending section 7623 claims that will be detrimentally affected by the proposed regulations. Gene Ross, with whom the NWC and Fund are working to prepare section 7623 claims and obtain representation regarding section 7623, and whose rights under section 7623 will be impaired under the proposed regulations.

[4] 77 Fed. Reg. 74800.

The proposed regulations make important progress in some areas. However, by greatly narrowing and limiting the definition of "related action," "collected proceeds," and "proceeds based on," the regulations cut off whistleblower awards in situations where the Secretary has, in fact, proceeded based on information provided by whistleblowers. As we describe below, these proposed regulations are contrary to the plain language of section 7623, contrary to Congressional intent, and bad policy that will both hurt whistleblowers and make it more difficult in the long run for the Service to reduce tax fraud.

Second, the proposed regulations impact how the size of whistleblower awards is calculated once the IRS has collected proceeds. The IRS's proposed regulations in this area fail to reflect the statutory requirement that an individual must both plan *and* initiate the underlying action in order for the award percentage to be reduced. The regulations should instead adopt a "chief architect" standard. Additionally, the default award percentage should not be set at the statutory minimum, and the IRS should, as discussed below, weigh positive and negative factors differently.

Third, the proposed regulations also implement several rules and guidelines relating to administrative proceedings before the Whistleblower Office, communication between the IRS Whistleblower Office and whistleblowers, and safeguards to protect both whistleblowers and taxpayers.

Finally, the IRS has also requested comments relating to other issues, including "[w]hether electronic claim filing would be appropriate and beneficial to the claimants, and, if so, what features should be included,"[5] "[w]hether the IRS should determine and pay multiple awards in cases in which two or more independent claims relate to the same collected proceeds,"[6] as well as "whether the proposed effective dates are appropriate."[7] As requested we provide our comments on these issues below.

As a general comment, we appreciate the time and effort of IRS and Treasury officials in putting forward these regulations. There are several provisions in the draft regulations we view as beneficial to achieving the policy goals of the legislation—we note and applaud those sections in our comments below.

Unfortunately, many provisions are a step backward, and undermine the policy goals of the act and are without support in the underlying statute. With respect to many of these proposed regulations, the IRS does not supply sufficient reasoning for its choices. Drafters of these proposed regulations should be cautioned by the recent District Court decision in Loving, which struck down Treasury regulations regarding paid tax preparers because the regulations were not supported by the statute.[8] In Loving, the court reminded the IRS that an agency "cannot rely on its general authority to make rules necessary to

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[5] Id.
[6] Id. at 74803.
[7] Id. at 74804.
[8] Loving v. I.R.S, __ F.Supp.2d __, 2013 WL 204667 (D.D.C., Jan. 18. 2013).

carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area."[9] This is particularly the case with section 7623, which is not a tax statute, but rather a whistleblower law, and therefore implicates a different area of technical expertize than do other statutes the Treasury and IRS are charged with administering.

Too often, the regulations for the whistleblower program read as how the IRS and Treasury wish the statute had been written—instead of reflecting how the statute was drafted by Congress. We encourage Treasury and IRS to be guided by the Administrative Procedure Act[10] and the Supreme Court's decision in Mayo,[11] and in drafting the regulations, to return to the plain meaning of the statute's language, and the policies—based in large part on the demonstrated success of the False Claims Act[12]—animating section 7623, namely actively encouraging whistleblowers to come forward.

Finally, we encourage the Treasury and IRS to be mindful of the long-term policy implications of the proposed regulations. Too often, the proposed regulations read as if they were written with a goal of limiting awards to whistleblowers to the greatest extent possible. This approach narrowly focuses on the short-term, to the detriment of honest taxpayers, as it significantly undermines the policy goals of the whistleblower program—to encourage knowledgeable and informed whistleblowers to come forward and blow the whistle on significant tax evasion and fraud.

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[9] Loving, 2013 WL 204667 at *5 (citing Am. Petroleum Inst. v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995)).

[10] 5 U.S.C. § 500 *et seq.*

[11] Mayo Foundation v. United States, 562 U.S. ___, 131 S.Ct. 704, 2011 WL 66433 (Jan. 11, 2011) (no exceptions for tax at Chevron step two).

[12] 31 U.S.C. §§ 3729–3733.

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I. THE PROPOSED REGULATIONS IMPROPERLY REDUCE THE SCOPE OF THE WHISTLEBLOWER PROGRAM

The proposed regulations purport to "provide definitions of key terms used in section 7623."[13] These terms include "*proceeds based on*, *related action*, and *collected proceeds*."[14] Previously, "[o]n January 18, 2011, Treasury and the IRS published proposed regulations (REG-131151-10) clarifying the definitions of the terms *proceeds of amounts collected* and *collected proceeds* for purposes of section 7623."[15]

Today we submit comments on the IRS's proposed definitions of the key terms "proceeds based on," "related action," and "collected proceeds." We object to the IRS's proposed definitions not only on policy grounds, but because the proposed definitions narrow—without statutory basis—the effect of section 7623 contrary to the statute's plain language and Congress's clearly-expressed intent.[16] We believe that the proposed regulations go far beyond Congress's grant of rulemaking authority, and that the IRS is fundamentally altering the policies of section 7623, effectively re-legislating the statute rather than implementing Congress's clearly-expressed intent. In particular—

Proceeds based on

The IRS's proposed regulations narrow the circumstances under which the IRS will be considered to "proceed based on" a whistleblower's information. This narrowing, however, is without statutory basis, and is contrary to Congressional intent regarding section 7623(b).

Related Action

The IRS's proposed regulations purport to " defin[e] [...] the term *related action* [...] [in order to] clarif[y] which actions may be included for purposes of computing collected proceeds by requiring a clear link between the original action and the other, related

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[13] 77 Fed. Reg. 74799.

[14] Id. at 74800 (emphasis in original).

[15] Id. at 74799. These regulations provided, in relevant part, that "[f]or purposes of section 7623 and [26 C.F.R. §301.7623-1], both proceeds of amounts collected and collected proceeds include: tax, penalties, interest, additions to tax, and additional amounts collected by reason of the information provided; amounts collected prior to receipt of the information if the information provided results in the denial of a claim for refund that otherwise would have been paid; and a reduction of an overpayment credit balance used to satisfy a tax liability incurred because of the information provided." 76 Fed. Reg. 2853 (Jan. 18, 2011); 26 C.F.R. § 301.7623-1(a)(2).

[16] As the IRS is well aware, it may define a statutory term only if it is ambiguous. See Loving v. I.R.S., 2013 WL 204667 at *6 ("the D.C. Circuit has specifically rejected the argument that a statute is ambiguous when it fails to define a broad term") (citing Goldstein v. S.E.C., 451 F.3d 873, 878 (D.C. Cir. 2006)).

action(s)."[17] The proposed regulations impose a narrow "conjunctive test," ostensibly "to strike an appropriate balance between the individual's substantial contribution and the IRS's independent administration of the tax laws."[18]

This narrow definition of a related action, however, contravenes the unambiguous use of the term in section 7623(b). Even if section 7623(b)'s use of the term "related action" were ambiguous, the IRS's unduly narrow definition would be arbitrary, capricious and manifestly contrary to the statute.

Collected Proceeds

Regarding section 7623(b)'s use of the term "collected proceeds," the IRS's proposed regulations "provide that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds because the plain language of section 7623 authorizes awards for detecting 'underpayments of tax' and violations of the internal revenue laws."[19] The "proposed regulations also provide that criminal fines that must be deposited unto the Victims of Crime Fund do not constitute collected proceeds."[20]

The proposed regulations' narrowing of "collected proceeds" is, however, without statutory support, and contravenes the unambiguous use of the term in section 7623(b). It misconstrues the plain language of section 7623 by selectively ignoring statutory language that broadens the scope of "collected proceeds." The IRS's proposed regulation would be arbitrary, capricious and manifestly contrary to the statute, even if Congressional intent as to the scope of "collected proceeds" were ambiguous.

A. IRS's Proposed Regulations Misconstrue "Proceeds Based On"

The IRS's Notice of Proposed Rulemaking states that "[t]he definition of the term *proceeds based on* contained in these proposed regulations reflects the ways in which information provided to the IRS may ultimately result in an award under [section 7623(b)]."[21] The proposed regulations, however, construe "proceeds based on" narrowly to limit awards in a manner manifestly contrary to the plain language and meaning of section 7623(b). Moreover, the proposed regulations frustrate Congressional intent regarding the whistleblower program established by the Tax Relief and Health Care Act of 2006 ("2006 Act").[22] The proposed regulations' narrowness additionally reflects a

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[17] 77 Fed. Reg. 74800.

[18] Id.

[19] Id. at 74801.

[20] Id.

[21] Id. at 74800.

[22] Pub. L. 109–432 (Dec. 20, 2006). The 2006 Act required the IRS to establish a whistleblower office, and "issue guidance for the operation of a whistleblower program to be administered in the Internal Revenue Service." Id. at § 406(b). This delegation of rulemaking authority, by its plain language, extends only to regulations necessary to administer the whistleblower program, and does not extend the legislative process to the scope of the whistleblower program or other fundamental policy matters. The IRS's

misunderstanding of the substantial potential benefits whistleblowers can bring to the IRS and its work.

1. The IRS's Definition is Contrary to the Plain Meaning of Section 7623

Under the proposed regulations, the IRS is considered to "proceed based on" a whistleblower's information

> *only* when the IRS initiates a new action that it would not have initiated, expands the scope of an ongoing action, or continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, respectively, but for the information provided by the individual.[23]

This proposed definition of "proceeds based on" narrows the statute by reading the word "only" into the statute, whereas no such language or limitation is contained in section 7623 itself.[24] Congress's intent is to reward whistleblowers who assist the IRS, even where the Taxpayer in question is under audit, or likely would have been audited. The IRS need only "proceed [...] based on *information* brought to the Secretary's attention by an individual."[25] An individual therefore, under the plain meaning of the statute, need not provide the IRS with information regarding an entirely new action or a new or different 'tax issue' to qualify for an award under section 7623(b).

Proposed regulation 26 CFR § 301.7623-2(b)(1) provides that the IRS, for the purposes of section 7623(b):

> *proceeds based on* information provided by an individual only when the IRS:
> (i) Initiates a new action;
> (ii) Expands the scope of an ongoing action; or
> (iii) Continues to pursue an ongoing action, that the IRS would not have initiated, expanded the scope of, or continued to pursue, respectively, but for the information provided by the individual. The IRS does not proceed based on when the IRS merely analyzes the information provided by the individual and investigates the matter.[26]

This definition, however, unnecessarily limits the circumstances under which the IRS will be considered to proceed based on whistleblower information. As described in the Notice of Proposed Rulemaking, the purpose of the regulation is intended to "reflect[] the requirement, under Section 406 of the 2006 Act, that the IRS must analyze and

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proposed regulations fundamentally alter the whistleblower program established by the 2006 Act, and far exceed the rulemaking authority Congress granted the Treasury and IRS with respect to the whistleblower program.

[23] 77 Fed. Reg. 74806 (emphasis added; internal punctuation removed).

[24] See 26 U.S.C. § 7623(b)(1).

[25] Id.

[26] 77 Fed. Reg. 74806 (emphasis in the original).

investigate the information received under section 7623(b)."[27] That requirement, however, would be fully accommodated by the portion of the proposed regulation providing that "The IRS does not 'proceed based on' when the IRS merely analyzes the information provided by the individual and investigates the matter."

By contrast, the proposed regulation needlessly—and without statutory support—creates several categories into which the IRS's action must fall to qualify for an award. These categories, while extensive, do not capture the full extent of agency action for which Congress intended to reward whistleblowers.

In the example to the proposed regulation, a whistleblower who "identifies a taxpayer, describes and documents specific facts relating to the taxpayer's foreign sales in Country A, and, based on those facts, alleges that the taxpayer was not entitled to a foreign tax credit relating to its foreign sales in Country A" would not qualify for an award if "the [IRS's] examination of the taxpayer included the foreign tax credit issue before the individual provided the information [...] unless the IRS would not have continued to pursue the examination but for the information provided."[28] This example, however, fails to take into account that a whistleblower may provide information that increases the tax collected even where the taxpayer was already under examination for a particular tax issue, and the IRS would have proceeded against the taxpayer on that issue even without the whistleblower's information. Although such a scenario could arguably be encompassed under proposed section 301.7623-2(b)(1)(ii)'s "[e]xpands the scope of an ongoing action" language, the proposed regulations are ambiguous on the issue. The IRS should clarify it "proceeds on" a whistleblower's information where, as a result of the whistleblower's information, the IRS collects more proceeds from a taxpayer than it otherwise would have.[29]

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[27] Id. at 74800. The 2006 Act, in relevant part, requires that the Whistleblower Office "analyze information received from any individual described in section 7623(b) of the Internal Revenue Code of 1986 and either investigate the matter itself or assign it to the appropriate Internal Revenue Service office." Tax Relief and Health Care Act of 2006 § 406, Pub. L. 109–432 (Dec. 20, 2006).

[28] Id. at 74806.

[29] We suggest that the illustrative example be changed to read: "If the examination of the taxpayer included the foreign tax credit issue before the individual provided the information [on the foreign tax credit], and the information provided by the individual did not expand the scope of the ongoing action in any way, then no portion of the IRS's examination of the taxpayer is an administrative action with which the IRS proceeds based on the information, unless the IRS would not have continued to pursue the examination but for the information provided."

We also suggest an additional example to clarify the statutory meaning of "proceeds based on": "If the examination of the taxpayer included the foreign tax credit issue before the individual provided the information [on the foreign tax credit], and the information provided by the individual expanded the scope of the ongoing action – by expanding the tax and/or penalties at issue in foreign tax credits; providing additional factual support that was credible and substantial and significantly assisted the IRS in its examination of

There are several situations where the whistleblower can provide information on an ongoing examination—including on a specific issue—and is still eligible for an award under 7623(b). The whistleblower could provide information that expands the scope—including the dollar amounts at issue—or gives the IRS an alternative, simpler, stronger factual or legal justification for its actions.[30] All these are examples of the IRS proceedings based on the information provided by the whistleblower.

The proposed regulations are correct that the IRS 'proceeds based on' a whistleblower's information if it "initiates a new action."[31] However, the proposed regulations undermine this provision by strongly suggesting, if not requiring, that whistleblower submissions identify a specific taxpayer.[32] While the NWC agrees that whistleblowers should name taxpayers when known, there are rare cases where a well-placed whistleblower has specific and credible information of a transaction—e.g., a new tax shelter—but does not know the specific identities of taxpayers who have participated in the tax shelter.

If the whistleblower can provide specific and credible information—beyond mere speculation—that identifies and explains the *transaction* to the IRS, and provides information that assists the IRS in identifying which taxpayers engaged in the transaction, then any action that the IRS initiates as a result falls well within the ambit of "proceeds based on." Because the IRS initiated a new action against a taxpayer based on the information provided by the whistleblower, the IRS "proceeds based on" the whistleblower's information. Without the whistleblower, the IRS would not have known of the transaction, and would not have identified the taxpayers.

While a whistleblower's inability to name a specific taxpayer may, in some cases, make the work of the IRS more difficult, the whistleblower is still eligible under a plain reading of section 7623. Although the IRS may consider a whistleblower's failure to name a specific taxpayer as a negative factor in determining an award percentage with respect to the unnamed taxpayer, it should not bar a whistleblower who caused the IRS to proceed based on his information.

This broader definition also is a better solution than the proposed regulation's overly narrow definition of "related action."[33] Under the proposed regulations, whistleblowers who provide specific and credible information about a tax shelter, and the IRS proceeds

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the foreign tax credit issue; or providing a substantive and credible information that provided the IRS an alternative factual or legal claim as to the foreign tax credit issues -- and the IRS proceeded based on that information, then that is an action with which the IRS proceeds based on the information provided by the individual."

[30] See 77 Fed. Reg. 74806 (proposed 26 C.F.R.§§ 301.7623-2(b)(ii) and (iii)).

[31] Id. (proposed 26 C.F.R. § 301.7623-2(b)(1)(i)).

[32] See id. at 74805 (proposed 26 C.F.R. § 301.7623-1(c)(1)) ("[i]n general, an individual's submission should identify the person(s) believed to have failed to comply with the internal revenue laws").

[33] See "IRS's Proposed Regulations Misconstrue "related action," infra at § I(B).

based on that information—are treated differently based solely on whether they provided the identities of the taxpayers in question. If the whistleblower identified the taxpayers, they receive an award; if, however, the whistleblower identified all details of the transaction, save the taxpayers' identity, then the whistleblower gets nothing. In both cases, however, the IRS "proceeds based on" the specific and credible information about the tax shelter provided by the whistleblower, and under section 7623's plain language must receive an award. Just as the "map with no names" may be indispensible to a treasure-hunter, so too can a transactional blueprint to a tax shelter be of tremendous benefit to the IRS, even if the blueprint does not include an address or social security number.

Further, close adherence to the statutory requirement that the IRS proceed based on a whistleblower's information also prevents the scenario under the proposed regulations where a whistleblower provides a name and specific and credible information about the tax shelter but the IRS pursues different taxpayers for a similar transaction that would not have been discovered but for the whistleblowers' information. In this case, the IRS "proceeds based on" the whistleblowers information—but not against the taxpayers specifically identified by the whistleblower. In this example, the statutory requirement that the IRS proceeded based on the whistleblowers information was met—and the whistleblower should not be denied an award.

The most critical element in "proceeds based on" is whether an IRS action resulting in the collection of proceeds has any basis in the information provided by a whistleblower to the IRS. If it does, then section 7623(b) requires that the Service award the whistleblower a portion of the collected proceeds, regardless of whether the whistleblower's information caused the IRS to "[i]nitiate[] a new action," "[e]xpand[] the scope of an ongoing action," or "[c]ontinue[] to pursue an ongoing action."[34] If the whistleblower's information provides a basis for collecting proceeds, and the IRS ultimately collects those proceeds, then the whistleblower is entitled to a reward.

2. The IRS's Definition is Contrary to Congressional Intent Regarding Section 7623

Similarly, Congress intended to reward whistleblowers who provide information that significantly eases the IRS's tasks, even where the IRS would have proceeded against the taxpayer. The IRS "proceeds based on" a whistleblower's information where the whistleblower provides the IRS with analysis or other relevant information that the IRS *has not yet* produced or discovered itself, without regard to whether the IRS *would have* eventually produced such information. Tax fraud often occurs through novel and often complex transaction structures. Congress recognized that whistleblowers can be extremely effective in assisting the IRS not only in detecting and identifying tax violators, but also in analyzing the transactions and tax issues.[35]

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[34] Id.

[35] See Senator Charles E. Grassley, January 28, 2013 Letter to Secretary Wolin and Commissioner Miller ("Grassley Letter") at 5 ("the statute envisions having

As Senator Charles Grassley—the original drafter of section 7623(b)—has written, "[t]he intent of the law is to reward whistleblowers [...] who have substantially assisted the IRS even in situations where the taxpayer is already under audit and even if the issue is under audit – if the whistleblower has provided information that [...] reduces the amount of time and resources the IRS has to devote to the examination."[36] Senator Grassley has additionally written that "the statute envisions having whistleblowers and their advisors helping to pull the oars in examination and investigation."[37]

The intent of Section 406 of the 2006 Act was—as with any whistleblower law—to align the interests of whistleblowers and the government by partnering with whistleblowers in detecting and enforcing tax violations and other tax-related laws. Congress, in enacting section 7623(b), drew on the long history of the False Claims Act, recognizing the IRS itself does not have the resources to detect all violations.[38] Congress further recognized whistleblowers are often in a position to have more extensive and immediate knowledge of violations, and that marshaling their expertise is often the best and most efficient way to enforce the law. Congress thus intended that whistleblowers be rewarded in cases where their information assists the IRS in its enforcement activities, even where they are already ongoing. Using the whistleblowers expertise in uncovering information and analyzing complex transactions frees up limited agency resources, and allows their use elsewhere.

The IRS should therefore amend the proposed regulation to eliminate the narrowing requirements, and to clarify that, for the purposes of section 7623(b) the IRS "proceeds based on" a whistleblower's information where the IRS incorporates or uses a whistleblower's factual information or analysis in an action resulting in the collection of proceeds.

Indeed, such an inclusive standard is contemplated by the overall statutory scheme of section 7623. Section 7623(b)(1) provides award range from fifteen to thirty percent. The amount of a whistleblowers award in this range is explicitly "depend[ent] upon the extent to which the individual substantially contributed to such action."[39] Moreover, section 7623(b)(2) specifically provides a lower award percentage of 10 percent or less "in case[s] of less substantial contribution." These statutory provisions—along with the IRS's proposed limitation on eligible claimants, section 301.7623-1(b)(2) and section 7623(b)'s requirement that there be collected proceeds—accomplish the objective of

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whistleblowers and their advisors helping to pull the oars in the examination and investigation"), available at http://www.grassley.senate.gov/about/upload/WB-Regs.pdf.

[36] Id. at 4.

[37] Senator Charles E. Grassley, September 13, 2001 Letter to Commissioner Schulman, available at http://www.grassley.senate.gov/about/upload/Shulman-re-IRS-9-13-11.pdf.

[38] Section 7623(b), including "proceeds based on," must be read *in pari materia* with the False Claims Act. See, infra, § I(C)(2).

[39] 26 U.S.C. § 7623(b).

appropriately awarding only whistleblowers who meaningfully contribute to an enforcement action. The IRS's proposed definition of "proceeds based on" is not only foreclosed by the plain meaning of the statute, but is also overbroad. The IRS should consider more precise, narrowly targeted regulation that does not exclude whistleblowers Congress intended to reward.

B. IRS's Proposed Regulations Misconstrue "Related Action"

The IRS's proposed regulations also purport to "clarif[y] which actions may be included for purposes of computing collected proceeds by requiring a clear link between the original action and the other, related action(s)."[40] The regulations are intended "[t]o enable the IRS to administer the award program and to strike an appropriate balance between the individual's substantial contribution and the IRS's independent administration of the tax laws."[41]

The proposed regulations provide that "[a]n action against a person other than the person(s) identified in the information provided and subject to the original action" will be considered a *related action* for purposes of section 7623(b) only if

> [the] unidentified person is directly related to the person identified in the information provided if the IRS can identify the unidentified person using *only* the information provided (without first having to use the information provided to identify any other person or having to independently obtain additional information).[42]

The proposed regulations regarding *related action* do not, however strike the intended "appropriate balance" between a whistleblowers' contributions and the IRS's administrative prerogatives. Instead, the proposed regulations not only arbitrarily narrow the reach of section 7623(b) with no basis in the statute or legislative history, but are also manifestly contrary to the plain meaning of section 7623(b) and frustrate Congress's intent in enacting the statute.

1. The IRS's Definition of "Related Action" is Arbitrary, and is Contrary to Congressional Intent

The proposed regulations do not relate in any reasonable way to the IRS's objectives. Whereas the IRS's stated purpose in defining "related action" is to enhance the administrability of the whistleblower program, the regulations accomplish this not by creating procedures for tracking actions and communicating with whistleblowers, but by severely limiting what actions qualify for an award.

It is not apparent how a "conjunctive test" requiring a "direct relationship" between a taxpayer identified by the whistleblower and an unidentified taxpayer—who the IRS

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[40] 77 Fed. Reg. 74800.

[41] Id.

[42] Id. at 74806 (proposed § 301.7623-2(c)(1)) (emphasis added).

would not have identified but for the whistleblower's information—contributes to the objective of "strik[ing] an appropriate balance between the individual's substantial contribution and the IRS's independent administration of the tax laws." Setting aside the fact that Congress has already struck this balance in favor of the whistleblower, the IRS's independent administration of the tax laws would be furthered not by a "conjunctive test," but by a standard similar to that of proximate cause, namely that related action are those actions which the IRS proceeds with in a natural and continuous sequence from the actions first taken in response to a whistleblower's information.

If, for example, a whistleblower analyzes a novel tax shelter or other fraudulent transaction that the IRS was unaware of, all factually similar actions that the IRS proceeds on as a result of the whistleblower's information are "related actions," and the whistleblower is entitled to a reward from any proceeds collected from those actions. If a whistleblower merely brings to the IRS's attention a common tax issue—albeit one the IRS was not aware of—then the scope of related actions is limited to those with a more direct relationship to the whistleblower's information.

2. The IRS's Definition is Contrary to the Plain Meaning of Section 7623

As the courts continually remind us—"[i]n the land of statutory interpretation, statutory text is king."[43] It is also a widely recognized canon of statutory construction that a statute should be interpreted to give meaning to every word.[44] The IRS's proposed regulations ignore these rules, and read out of the statute several words, including the word "any," as well as impose narrowing requirements not present in the statutory language or structure.

Section 7623(b)(1) encompasses a much broader scope of IRS actions than do the IRS's proposed regulations implementing section 7623. The statute merely requires an IRS action be "related" to an original action; it does not require the action be "directly related" or even "closely related." Although the IRS may have preferred that Congress require the sort of "direct" relationship it now attempts to impose through regulation, it is well-settled that a statute is not ambiguous merely because Congress used a broad term, such as "related."[45]

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[43] Loving, 2013 WL 204667 at *11; see also Smith v. United States, 508 U.S. 223, 228 (1993) (any determination of a law should start with a plain reading of the words).

[44] See Singer and Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:6 (7th ed.) (Each word given effect: "'It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.' A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant [...]") (citations omitted).

[45] Loving, 2013 WL 204667 at *6; Goldstein v. S.E.C., 451 F.3d 873, 878 (D.C. Cir. 2006).

The word 'any' is also continually used to modify terms of the statute, and the concept of a "related action".[46] Statutory construction of "any" demonstrates its expansive meaning: "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"[47] As the Ninth Circuit explained in Barajas:

> The term 'any' is generally used to indicate lack of restrictions or limitations on the term modified. According to Webster's Third New Int'l Dictionary (3d ed. 1986), 'any' means 'one, no matter what one'; 'ALL'; 'one or more discriminately from all those of a kind.' This broad meaning of 'any' has been recognized by this circuit.[48]

Given the copious use of 'any' throughout section 7623, it is clear not only that the statutory language must be construed to reach broadly, but that Congress was concerned that the IRS would narrowly interpret the statute. Through expansive language, Congress actively sought to avoid the proposed regulations' interpretation.

Indeed, the statutory language and structure plainly indicate Congress's intent to reward a broad class of whistleblowers for their assistance to the IRS. Section 7623(b)(1) rewards whistleblowers from "the collected proceeds [...] resulting from ['any administrative or judicial action [...] based on information the Secretary's attention by an individual'] *including any related actions*." (emphasis added). The statutory language, therefore, forecloses the Service's narrowing interpretation. As discussed above, the statutory scheme contemplates rewarding whistleblowers based on the substantiality of their contributions.

Nothing in the statutory scheme suggests there can be only one "original action" against a specified taxpayer. The language of section 7623(b) requires that the IRS award a whistleblower in every instance that the Service collects proceeds in any action based on a whistleblower's information *or in any related action*. Proposed section 301.7623-2(c)(1), by contrast, merely describes another "original action," and does not comport with the meaning of "related action" under the plain language of the statute. If the IRS proceeds "against the person(s) identified in the information provided [...] based on the

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[46] 26 U.S.C. § 7623(b)(1) ("*any* administrative or judicial action;" "*any* related actions;" "*any* settlement") (emphasis added).

[47] Ali v. Federal Bureau of Prisons, 552 U.S. 214, 219 (2008) (quoting United States v. Gonzales, 520 U.S. 1, 5 (1997) (noting also that use of the word 'any' indicated Congress did not intend to limit the applicability of a statute to categories similar to those specifically enumerated).

[48] U.S. *ex rel.* Barajas v. United States, 258 F.3d 1004, 1011 (9th Cir. 2001) (internal citations omitted); see also Basreback Kraft AB v. U.S., 121 F.3d 1475 (Fed. Cir. 1997) (the word 'any' is generally used in the sense of 'all' or 'every' and its meaning is most comprehensive) (internal quotations omitted).

specific facts described and documented in the information provided," then the IRS's action is an "original action," not a "related action."[49]

The IRS has needlessly complicated—and impermissibly narrowed—the phrase "any related action," and the concept of relatedness in particular. Relatedness under section 7623 should encompass any action with a reasonable connection—that is, any action which proceeds in a natural and continuous sequence from the actions first taken in response to a whistleblower's information. The IRS is understandably concerned that a an overbroad definition of relatedness would allow a whistleblower to claim an award for IRS actions which are not based on a whistleblower's information. The proposed regulations' definition, however, goes too far in the other direction, and is contrary to Congress's intent of awarding whistleblowers and avoiding needless litigation over whistleblower awards.

3. The IRS's Examples Regarding "Related Action" Compound Difficulties With Its Statutory Interpretation.

The five examples provided for related action highlight the problems with the IRS's overly narrow and convoluted "related action" standard, and demonstrate why the simpler and more logical approach is to instead look at whether the action proceeds in a natural and continuous sequence from the actions first taken in response to a whistleblower's information.

Regarding example 1, the fact that the IRS issued an IDR or a summons is wholly irrelevant to whether or not an action is related. Yet, the IRS's determination that the second issue is not a related action appears to turn on this fact. If the IRS had issued a summons or IDR for the same set of facts for the second year, it appears that the IRS would also determine that is was not related. This hair-splitting is without foundation. Certainly, the examination of the same issue for years one and two are related. The facts, however, do not provide enough analysis on whether the second issue is actually related as contemplated by the statute—namely, whether the second issue arose in a natural and continuous sequence from the first action.

Regarding example 2, the whistleblower identifies the accountant—"CPA 1." The example then the example states that "using *only* the information provided" the IRS obtained the accountant's client list.[50] The example then has the IRS proceed on the accountant's clients, Taxpayers 2 and 3. Taxpayer 2 engaged in the same activity and is viewed as related and Taxpayer 3 engaged in different activities and is viewed as not related. Again, the underpinning should be a close look at whether these matters arose in a natural and continuous sequence from the whistleblower's information.

Of additional concern is the IRS's use of the word "only." The relatedness of an action is not based on whether the IRS proceeded based on *only* the whistleblower's information, but whether it proceeded in any significant capacity based on the

[49] 77 Fed. Reg. 74806 (proposed 26 C.F.R. § 301.7623-2(c)(1)(i)).
[50] Id. at 74806 (emphasis added).

whistleblower's information. By requiring that related actions *exclusively* be based on a whistleblower's information, the IRS is setting up a policy that goes directly against Congressional intent by viewing that even some reliance on other information will effectively knock the disqualify the action, even if the action arose in a natural and continuous sequence from the whistleblower's information. There is no justification in the statute or policy for such a result.

If the IRS proceeds based on the whistleblower's information and the action a natural and continuous sequence then, under a plain reading of the statute, the action is related. Again, the fact that Taxpayer 2 is engaged in the same activities as Taxpayer 1 demonstrates the relatedness of the action. In order to determine that the action against Taxpayer 3 was not related, the example's facts would have to show that the investigation of Taxpayer 3 did not arise in natural and continuous manner from the whistleblower's information. This would be the case if, for example, the issues on Taxpayer 3 were of a different nature and kind. In practice, it is likely that the IRS will apply a "substantially the same" standard too narrowly, and should instead use a broader definition to the effect that that there is *not* relatedness for Taxpayer 3 when the issues are "significantly *different* in nature and result."

In example 3, the whistleblower identifies "CPA 1," and again using "only" the information provided by the whistleblower, the IRS identifies "CPA 2" a co-promoter from a different firm than CPA 1.[51] The IRS obtains the client list of CPA 2 and identifies CPA 2's client Taxpayer 4, who engaged in the same activities as Taxpayer 1 (whom the whistleblower identified).

Again, this example is contrary to the statutory language and Congressional policy, and, just as important, the on-the-ground reality of tax whistleblowing. Proceeding "only" based on a whistleblower's information is an unrealistically high hurdle for relatedness, and ignores the "low hanging fruit" borne from whistleblowers' information, such as client lists and correspondence obtained from identified taxpayers, which, in turn identify further taxpayers in a natural and continuous manner. A requirement that an action, much less a "related action"," be based "only" on the whistleblower's information is a nowhere to be found in the statute. Moreover, such a requirement is contrary to the IRS's own standard procedures relating to certain investigations into tax shelters.[52] The example and the IRS's proposed rule envision a process where the IRS disregards the IRM, does no investigation itself, and relies "only" on the whistleblower. Such a policy is doomed to failure, and undermines the whistleblower program and policy.

As shown by the IRM, it is standard procedure for the Service to follow through on investigatory leads to find other promoters, as well as to look also for the clients of those other promoters.[53] These steps are logical fit sensibly with the requirement that a related

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[51] Id. at 74807.

[52] See, e.g., Internal Revenue Manual §§ 5.20.8 and 4.32.2 ("Promoter/Preparer Investigations" and "The Abusive Transaction Process," respectively).

[53] Id.

action proceed in a natural and continuous manner from the original. The IRS itself certainly views finding other promoters and their clients as the natural and continuous action from an initial investigation. It should not now deny whistleblowers, in contravention of section 7623, an award from proceeds of related actions.

Returning to the facts of example 3, CPA 2 is related because his identification is natural and continuous from the initial action against CPA 1. The identification of CPA 2's clients for the same action as Taxpayer 1 is also related on the grounds that it is a natural and continuous result of the IRS' own investigatory procedures. Taxpayer 4 should therefore be included. If, however, Taxpayer 4 was examined on substantially different issues, based on separate information (for example, information provided by another whistleblower) then those factors would weigh against a finding Taxpayer 4 is related.

Example 3 highlights exactly the fact pattern under which Congress, when drafting section 7623, intended to ensure the whistleblower was awarded, because it reflects the reality of informing on and investigating abusive transactions and shelters. Such transactions usually involve a wed of related promoters and Taxpayers, and commonly the whistleblower will not have an omniscient view of it all. Congress's intent is to award the whistleblower broadly, recognizing that the whistleblower's information is instrumental in untangling the transactional web. Congress was well aware of IRS's practice of finding a promoter or a taxpayer and then locating all related promoters and their clients or coconspirators.

Similarly, example 4 again places this requirement of "only" that is unsupported by reality, statute or policy. The example deals with CPA 3—a CPA related to CPA 1—and Taxpayer 5, who is engaged in same activities as Taxpayer 1 and is a client of CPA 3. The differences in examples 3 and 4 demonstrate the arbitrary and capricious nature of the IRS's regulations. Thanks to the whistleblower, the IRS opened up an examination, the natural and continuous result of which was the identification of all the transaction's promoters—CPA 2 and CPA 3—and their clients—Taxpayers 4 and 5. Though the whistleblower's contribution is recognized for CPA 3's client Taxpayer 5, the whistleblower's contribution is *not* recognized for Taxpayer 4 merely because CPA 2 is not in the same accounting firm. This is a distinction without a difference. Both actions are all part of the same effort by the IRS—an effort that would not have been successful but for the whistleblower's information. All the examples' parties are related and are encompassed in a commonsense, plain-language reading of "any related action."

The whistleblowers' contributions to the actions illustrated in the examples—the ordinary actions that the IRS takes in a shelter or abusive transaction case—must be rewarded under the "any related action" language of section 7623. While there many fact patterns where either the taxpayer or the tax issue is so attenuated that the whistleblower should not receive an award, none of the IRS's examples illustrate such a scenario. On the contrary, all of the actions in the example are encompassed by the statute's plain language and Congress's intent of encouraging whistleblowers.

C. IRS's Proposed Regulations Misconstrue "Collected Proceeds"

The IRS Office of General Legal Services ("IRS Counsel") has explained the Service's view that "violations of non-tax laws, such as the provisions of Titles 18 and 31, for which the IRS has delegated authority, cannot form the *basis* of an award under section 7623."[54] The IRS's "proposed regulations provide that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds."[55] In particular, the proposed regulations specify that "[c]ollected proceeds are limited to amounts collected under the provisions of title 26, United States Code."[56] The proposed regulations also provide that "[c]riminal fines deposited into the Victims of Crime Fund are not collected proceeds and cannot be used for payment of awards."[57]

The IRS's proposed regulations build on interpretations of section 7623 prepared by the IRS Office of General Legal Services. These interpretations—and the proposed regulations based on them—misconstrue the plain meaning of section 7623's language, and selectively omit significant statutory language. Taken as a whole, and viewed in light of similar whistleblower regulations, both the statutory language of section 7623 and Congressional intent with respect to "collected proceeds" clearly indicate that violations of Title 18 and 31 for which the IRS has delegated authority are encompassed in the scope of "collected proceeds," and may form the basis for a whistleblower award.

The IRS has misinterpreted the plain language of sections 7623(a) and (b), both of which extend broadly beyond the confines of Title 26 and provide additional bases for whistleblower awards which the IRS's proposed regulations impermissibly foreclose. The IRS has failed to consider the legislative purpose motivating Congress's expansion of the IRS Whistleblower Program, and has not interpreted the law in accordance with similar whistleblower laws, such as the False Claims Act, which indicate a much broader construction favoring whistleblowers and the public policies and goals of the whistleblower program. Lastly, the IRS has—based on its misinterpretation of section 7623—concluded that only funds sourced from Title 26 and certain other provisions are 'available' for payment to whistleblowers. Section 7623, however—as the IRS itself concedes—appropriates its own funds from proceeds collected by the government as a result of a whistleblower's information. Because Section 7623 is, as intended by Congress, considerably broader than the proposed regulations, so too is the 'availability' of funds for payment of awards greater than interpreted by the IRS.

1. The IRS Has Impermissibly Misconstrued the Plain Language of Section 7623

The IRS argues that, because "the plain language of section 7623 authorizes awards for detecting 'underpayments of tax' and violations of the internal revenue laws,"

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[54] IRS Program Manager Technical Advice 2012-10 at 1 (April 23, 2012) ("IRS Memorandum") (emphasis added).

[55] 77 Fed. Reg. 74801.

[56] Id. at 74807 (proposed 26 C.F.R. § 301.7623-2(d)(1)).

[57] Id. (proposed 26 C.F.R. § 301.7623-2(d)(3)).

provisions of non-Title 26 laws do not constitute collected proceeds."[58] IRS Counsel has further elaborated the Service's view that the "plain language of section 7623, examined in the context of the entire Code, and its legislative history indicate that congress intended the statute to authorize payment of whistleblower awards only with respect to violations of the tax laws under Title 26."[59]

The IRS's interpretation of section 7623 is premised on the theory that "[t]he internal revenue laws are contained in Title 26, Internal Revenue Code and guidance issued under that title."[60] The plain language of section 7623, however, indicates that the whistleblower program covers a broad range of activities, and extends to all taxes, penalties, and other violations which the IRS is authorized to collect or enforce—including "penalties for failure to file Form 90-22.1, 'Report of Foreign Bank and Financial Accounts' ("FBAR"), as required under provisions of the Bank Secrecy Act.[61] Even assuming, *arguendo*, that Section 7623(a) applies only to violations of laws under Title 26, Section 7623(b) nonetheless broadens the scope of what may form part of a whistleblower award under that subsection. While IRS Counsel argues that "section 7623 provides two bases on which the IRS may make a whistleblower award,"[62] such an interpretation not only ignores Section 7623(b), but also the "or conniving at the same" language of Section 7623(a), which forms an additional basis upon which a whistleblower award may be made.

i. FBAR Penalties Are Within the Scope of Section 7623(a)

"In the land of statutory interpretation, statutory text is king," and in determining a statute's plain meaning, a court will first look to statutory definitions or terms of art.[63] Words that are not terms of art are given their ordinary meaning.[64] A statute is not rendered ambiguous merely because Congress chose not to define a broad term.[65] The Supreme Court has also stated that, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."[66] It is against the background of such traditional principles of statutory construction that Congress itself legislates.[67]

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[58] Id. at 78401.

[59] IRS Memorandum at 3.

[60] 77 Fed. Reg. 74801.

[61] Id.

[62] IRS Memorandum at 4.

[63] Loving, 2013 WL 204667.

[64] See F.D.I.C. v. Meyer, 510 U.S. 471, 476 (1994) (In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning").

[65] Loving, 2013 WL 204667 at *6 (citing Goldstein v. SEC, 451 F.3d 873, 878 (D.C. Cir. 2006))

[66] United States v. Boisdoré's Heirs, 49 U.S. 113, 122 (1850) (*per curiam*)

[67] See, e.g., McNary v. Haitian Refugee Center, 498 U.S. 479, 496 (1991) (Court presumes "that Congress legislates with knowledge of our basic rules of statutory construction").

The phrase 'internal revenue laws' is not a term of art given statutory definition anywhere in the United States Code, nor does it have an accepted meaning in the area of law addressed by section 7623, namely whistleblower awards. Nor was the phrase borrowed from a statute under which it had an accepted meaning—rather, it originates with the original 19th Century statute that forms the basis of the present-day section 7623, and therefore predates the statutes and cases The IRS urges define it. While the IRS contends that 'internal revenue laws' applies exclusively to Title 26, a straightforward construction of '*internal revenue* laws' is any law relating to internal revenue or administered by the *Internal Revenue* Service. Consequently, the plain meaning of 'internal revenue laws' forecloses the proposed regulation's limitation of 'collected proceeds' to Title 26.

Additionally, because the FBAR reporting requirement is administered by the IRS—and because the FBAR itself is directly related to the government's ability to detect tax evasion both in practice and in purpose—the FBAR is an 'internal revenue law' under a pragmatic, functionalist definition of the phrase. Even supposing, for the sake of argument, that 'internal revenue laws' can be limited to Title 26, the plain language of section 7623 explicitly includes those things necessary for 'detecting' such violations, and therefore extends beyond Title 26.

a. Section 7623(a)'s Use of 'Internal Revenue Laws' Does Not Limit Applying the Whistleblower Program to Title 26

At the outset, the IRS misreads the plain language of the statute. Section 7623(a) applies its provisions to "*detecting* underpayments of tax" and to "*detecting* [...] persons guilty of violating the internal revenue laws." 26 U.S.C. § 7623(a) (emphasis added). The plain meaning of the statutory language, therefore, is broader than that employed in the proposed regulations, which ignore the statute's use of "detecting" entirely. Section 7626(a), in authorizing the Secretary to pay discretionary awards for detection of both underpayments of tax and violations of the internal revenue laws, casts a wider net. Information, such as that relating to undisclosed foreign bank accounts, may be indispensable in detecting underpayments of tax, without directly relating to the underpayments themselves.[68] Where the information relates to 'detecting' underpayments of tax or violations of internal revenue laws, section 7623(a) clearly authorizes the Secretary to pay a reward for such information.

In its memorandum describing the legal rationale for its interpretation, IRS Counsel cites a number of authorities for the proposition that 'internal revenue laws' and 'tax laws' refer to Title 26 exclusively.[69] These authorities, however, are inconclusive or inapplicable to the issue. 26 U.S.C. § 6301 states that "[t]he Secretary shall collect the

[68] See, e.g., Department of Justice Press Release 08-579, "Justice Department Asks Court to Serve IRS Summons for UBS Swiss Bank Account Records" (information about FBAR violations led IRS "to request information from [UBS] about U.S. taxpayers who may be using Swiss bank accounts to evade federal income taxes").

[69] See IRS Memorandum.

taxes imposed by the internal revenue laws." Yet this statement, by itself, indicates that the concept of 'internal revenue laws' is broader than 'taxes,' and may include other related laws such as the FBAR. Section 6301, then, does not define 'internal revenue laws,' but merely delegates authority to collect taxes. Indeed, it suggests that the concept of 'taxes' and that of 'internal revenue laws' do not overlap completely, for if they did there would be no need to employ both terms. Similarly, the mere presence of statutory language in Title 26 discussing "the internal revenue laws," does not amount to a definition restricting internal revenue laws to Title 26 exclusively.[70]

IRS Counsel additionally cites 26 U.S.C. § 7212, which penalizes "[a]ttempts to interfere with the administration of internal revenue laws." Because the provision penalizes "intimidat[ing] or imped[ing] any officer or employee of the United States acting in an official capacity under this title," IRS Counsel argues that 'internal revenue laws' are limited to Title 26. That title, however, contains enabling statutes for IRS officials, who may be—and have been—delegated authority under laws codified elsewhere in the United States Code. The phrase "official capacity under this title," does not, therefore conclusively delimit "internal revenue laws" to Title 26 and, moreover, does not provide evidence of the scope of "internal revenue laws" contemplated by section 7623(a).

Conversely, other statutes indicate that a definition of 'internal revenue laws' need not be confined to Title 26. 26 U.S.C. § 7803(2)(A), for example, provides that the IRS Commissioner shall have the power to "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes," indicating that those laws administered by the Commissioner are "internal revenue laws," or at the very least "related statutes" that are conceptually linked with internal revenue laws. Because the FBAR penalties are executed and applied by the Commissioner, they ought to be treated as in a like manner as "internal revenue laws." Lastly, the annotation to 5 U.S.C. § 603 cited by IRS Counsel, stating that "[t]he internal revenue laws of the United States, referred to in subsec. (a), are classified *generally* to Title 26, Internal Revenue Code" clearly indicates internal revenue laws are not *exclusive* to Title 26, but are merely *generally* codified there.[71]

Additionally, the fact that section 7623(a) specifies both "detecting underpayments of tax" and "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws" as grounds for a reward is evidence that "internal revenue laws" have a broader scope than merely tax. It is a basic principle of statutory interpretation that statutes should be construed "so as to avoid rendering superfluous" any statutory

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[70] See 26 U.S.C. § 6065 (cited by IRS Counsel); 26 U.S.C. § 1400S(e) (same); see also Trainmen v. Baltimore & Ohio R.R., 331 U.S. 519, 529 (1947) (an act's title or a section heading may illuminate ambiguities but it "cannot limit the plain meaning of the text"); Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241, 256 (2004) (quoting Trainmen).

[71] 5 U.S.C. § 603 note (emphasis added).

language.[72] Because Congress specified "underpayments of tax" separately from "internal revenue laws," the phrases have separate and distinct meanings. Indeed, in Bailey v. United States, the Supreme Court held that "we assume that Congress used two terms because it intended each term to have a particular, nonsuperflous meaning."[73] If, therefore, "internal revenue laws" are limited to taxes imposed by Title 26, then the phrase "underpayments of tax" is rendered superfluous. Since Congress in 1996 amended the statute to add the phrase "underpayments of tax" and, in doing so, did not remove the phrase "violating the internal revenue laws" it is clear that 'internal revenue laws' are not limited to taxes, but extend to related laws such as the FBAR provisions.[74]

Lastly, the history of section 7623 itself indicates that "internal revenue laws" is not limited to Title 26. Section 7623 dates to 1867—following closely on the heels of the 1863 False Claims Act—and allowed the government to pay for information related to "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same."[75] This original law "remained separate from the revenue acts until Congress enacted section 3792 of the Revenue Act of 1934, providing expenses for the 'detection and punishment of *frauds*' related to the internal revenue laws."[76] It is clear from this legislative history, therefore, that Section 7623 is not only closely related to the False Claims Act, but that it existed apart from 'the internal revenue laws'—let alone Title 26—for a long period of time, and that it extends to 'frauds' relating to the internal revenue laws, not solely to Title 26.

b. The FBAR Operates Substantively As An Internal Revenue Law

The IRS arbitrarily contends that "[a]lthough the IRS may collect penalties for violations of Title 31 [...] and seize property under Title 18 [...], those penalties and seizures do not relate to 'underpauments of tax,' [...] and are not related to violations of the internal revenue laws under Title 26."[77] In particular, the IRS finds the FBAR provisions are not "related to violations of the internal revenue laws" because their violation "does not necessarily result in an underpayment of tax."[78] As argued above, the plain language of section 7623 extends the scope of the whistleblower program to laws necessary for the *detection* of violations of the internal revenue laws, and not merely to the violations of the internal revenue laws themselves. Additionally, the FBAR provisions are so intertwined with the internal revenue laws codified in Title 26, that the fact they are codified in Title 31 has no consequence with respect to section 7623.

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[72] Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

[73] 516 U.S. 137, 146 (1995).

[74] See Taxpayer Bill of Rights, Pub. L. 104-168, § 1209 (July 30, 1996).

[75] Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch. 11, § 3463, 35 Rev. Stat. 686 (1873-74)); see also Dennis J. Ventry, Jr., "Whistleblowers and *Qui Tam for Tax,*" 61 TAX LAWYER 357, 360 n.14 and accompanying text (describing history of IRS Whistleblower Program).

[76] Ventry, 61 TAX LAWYER 357, 361 (citing Revenue Act of 1934, ch. 3792, 48 Stat. 680).

[77] 77 Fed. Reg. 74801.

[78] Id.

Because they are administered by the IRS, are reported alongside income tax returns, and have a strongly tax-related purpose, they are 'internal revenue laws,' and should be treated as such when construing section 7623's reach.

1. The IRS is Charged With Enforcing the FBAR

While the FBAR is codified in Title 31, it has increasingly become administered by the IRS, and increasingly associated with the federal income tax return.[79] The Bank Secrecy Act authorizes the Secretary of the Treasury to "delegate duties and powers under this subchapter to an appropriate supervising agency."[80] Accordingly, the Secretary of the Treasury delegated to the IRS authority to investigate possible civil violations of the FBAR reporting requirements.[81] Criminal examination authority for most of the Bank Secrecy Act was delegated to the IRS in 1999.[82]

In April, 2003, civil penalty authority for enforcement of FBAR requirements was redelegated within the Department of the Treasury from the Financial Crimes Enforcement Network ("FinCEN") to the IRS.[83] This FBAR delegation is broad, giving the IRS the power to assess and collect civil penalties for noncompliance with the FBAR requirements, investigate possible violations, employ summons power, issue administrative rulings, and the power to take "any action reasonably necessary" to implement and enforce the FBAR requirements.[84]

2. The FBAR is Administered Alongside Title 26 Provisions

In accordance with the IRS's increasing responsibility for the FBAR provisions, and in recognition of the close substantive relationship between the FBAR and revenue collection, the Service has administered the FBAR alongside its efforts to increase compliance with the income tax. While "the obligation to file an FBAR arises under Title 31, individual taxpayers subject to the FBAR reporting requirements are alerted to this requirement in the preparation of annual Federal income tax returns," which are filed

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[79] See Internal Revenue Manual §§ 4.26.5.2, *et seq.* (December 12, 2006).

[80] 31 U.S.C. § 5318(a)(1). We note that section 7623 itself grants authority to the Secretary, not to the IRS directly.

[81] Treasury Directive 15-41 (December 1, 1992); see also 31 C.F.R. § 1010.360.

[82] See Treasury Directive 15-42 (January 21, 1999).

[83] See 31 C.F.R. § 1010.810(g) ("The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS").

[84] 31 C.F.R. § 1010.810(g); see also FinCEN "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act" at 5 (April 8, 2005) ("delegation now allows Internal Revenue Service to create interpretive education outreach materials for the FBAR, revise the form and instructions, examine individuals and other entities, and assess civil penalties for violations").

pursuant to Title 26.[85] Individuals subject to the regulations implementing the Bank Secrecy Act are directed to complete Department of Treasury Form TD F 90-22.1 ("Report of Foreign Bank and Financial Accounts," otherwise referred to as "FBAR").[86] Schedule B of IRS Form 1040 includes a question where an individual must mark whether he or she has an interest in a financial account in a foreign country by checking 'Yes' or 'No' in the appropriate box. The Schedule B additionally directs the taxpayer to Form TD F 90-22.1 for the FBAR filing requirements.

The IRS's Taxpayer Education and Communication section has attempted to "increase efficiency and standardize educational materials regarding FBAR compliance," by implementing an "outreach effort that leverages relationships with outside stakeholders such as *tax* practitioner groups, financial associations, income *tax* software developers and the media."[87]

As the Director of FinCEN has stated, "[u]nlike other Bank Secrecy Act reports, FBARs are filed mainly by individuals and are more closely related to tax enforcement."[88] Because of these and other administrative similarities between FBAR and Title 26 provisions, delegating FBAR oversight and enforcement authority with the IRS was "a natural fit."[89]

Consolidation of FBAR authority under IRS occurred well before the 2006 law enacting section 7623(b).[90] Congress, therefore, was well aware of wide scope of IRS enforcement activities extending beyond Title 26—particularly the well-publicized FBAR—and intended to include such closely related activities in the sweep of section 7623. Statutory silence regarding Titles 31 and 18 is, therefore, acquiescence to the IRS's regulatory and enforcement authority.

3. The Purpose of the FBAR is Tax-Related

While the FBAR is not itself a tax, its use and purpose are intimately related to taxation and collection of revenue by the government. The statute's own "Declaration of Purpose" makes explicit the law's "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[91] Even the Department of the Treasury itself

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[85] Joint Committee on Taxation, "Technical Explanation of H.R. 4213," JCX-60-09 at 144 (December 8, 2009).

[86] See 31 C.F.R. § 1010.350.

[87] See "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act" at 9 (April 8, 2005) (emphasis added).

[88] IRS Press Release IR-2003-48 (April 10, 2003) (joint FinCEN and IRS remarks on delegation of FBAR authority to IRS).

[89] Id.

[90] See Internal Revenue Manual 4.26.16.1(2) (July 1, 2008) ("In April 2003, the IRS was delegated civil enforcement authority for the FBAR").

[91] 31 U.S.C. § 5311; see also Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why it Matters*, 7 HOUSTON BUS. & L.J. 1, 3 (2006) (purpose

has explicitly recognized the close relationship between tax and FBAR, recommending to Congress in 2002 that authority to impose civil penalties for FBAR be delegated to the IRS, rather than to FinCEN, because "the FBAR is directed more towards tax evasion, as opposed to money laundering or other financial crimes, that lie at the core mission of FinCEN."[92]

The subsequent consolidation of FBAR administration and enforcement to the IRS is further indication of FBAR's tax-related function and purpose. Moreover, the interrelationship between FBAR filing requirements and the income tax has been used in the past by prosecutors as a tool for charging violations under Title 26.[93] Lastly, the acting IRS Commissioner Bob Wenzel stated in response to the announcement of the IRS having responsibility for FBAR: "Our nation will benefit not only from improved *compliance with the tax laws*, but also our determination to make certain that those with accounts in foreign countries meet their reporting requirements."[94] It is undeniable that FBAR is part and parcel of the tax laws and the enforcement of those tax laws. As a result, the FBAR is an 'income tax law' for the purposes of section 7623(a).

ii. Section 7623(b) Expands the Scope of the Whistleblower Program Beyond Section 7623(a)'s Reach

Setting aside whether violations of laws outside Title 26 fall within the purview of section 7623(a)—though for the reasons discussed above they do—a whistleblower who voluntarily provides information leading to an IRS action that *does* include Title 26 violations, and which leads to any IRS settlement based in some part on Title 26 violations, or which is related to detecting Title 26 violations, must nonetheless be rewarded under section 7623(b) for "additional amounts" collected from such an underlying action, and for amounts collected from "any related actions" and from "any settlements in response to such action."[95]

a. Section 7623(b) Applies to the Entirety of an Action Satisfying 7623(a)'s Requirements, and to Any Related Action or Settlement

Section 7623(a) creates a discretionary reward program, authorizing the Secretary of the Treasury "to pay such sums *as he deems necessary* for (1) detecting underpayments

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of the Bank Secrecy Act includes increasing government's ability to collect tax revenues).

[92] See "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act," at 4 (April 24, 2003).

[93] See Department of the Treasury, "A Report to Congress in Accordance With s. 361(b) of the USA PATRIOT Act" at 9 (April 26, 2002) ("[I]n criminal tax matters, prosecutors sometimes charge willfully subscribing false tax returns in violation of 26 U.S.C. 7206(1) for failing to "check the box" on the Schedule B providing for disclosure of the foreign financial accounts.").

[94] IRS Press Release IR-2003-48 (April 10, 2003) (joint FinCEN and IRS remarks on delegation of FBAR authority to IRS) (emphasis added).

[95] 26 U.S.C. § 7623(b).

of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[96] The Secretary may, however, only pay such discretionary awards "in cases where such expenses are not otherwise provided for by law."[97] The statute additionally establishes that such awards "shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments."[98]

Section 7623(b), on the other hand, creates a wholly separate whistleblower reward scheme. Whistleblower rewards under subsection (b), which unlike rewards under subsection (a) are not discretionary, apply where "the Secretary proceeds with *any* administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual."[99] Section 7623(b) is triggered when the Secretary "proceeds with *any* administrative or judicial action" relating to (1) "detecting underpayments of tax," (2) "detecting violati[ons] of the internal revenue laws," or (3) detecting those "conniving at [violating the internal revenue laws]."[100] If such "administrative or judicial action" was "based on information brought to the Secretary's attention by [a whistleblower]," then the whistleblower "*shall* [...] receive an award" that is based on the "collected proceeds [...] resulting from the action" and "any related actions" or "any settlement in response to such action."[101] Additionally the "collected proceeds" include, but are not limited to, "penalties, interest, additions to tax, and *additional amounts*."[102]

Section 7626(b), therefore, merely requires some part of the Service's action be related to "detecting underpayments of tax," "detecting violati[ons] of the internal revenue laws," or detecting those conniving at the same. Once this threshold requirement is met, however, section 7626(b) casts a wide net, bringing in not only all "collected proceeds" from the underlying action, but from any "related action" and "any settlement in response to such action." Where a whistleblower provides information to the IRS leading to an assessment of penalties for underpayment of tax, but the Service at the same time assesses other penalties under Titles 18 or 31—or any other laws it is charged with enforcing—such additional amounts, or amounts collected from related actions, are explicitly included by section 7623(b) in calculating the whistleblower's reward.

The plain language of section 7623(b) therefore compels the IRS to pay awards based on any of the laws it is charged with administering if some part of the Service's action stems from a violation of Title 26, or is aimed at detecting a violation of Title 26, even where the Service does not assess or collect any monies under Title 26 directly.

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[96] Id. at § 7623(a) (emphasis added).
[97] Id. at § 7623(a)(2).
[98] Id.
[99] Id. at § 7623(b)(1) (emphasis added).
[100] Id. at §§ 7623(a)-(b).
[101] Id. at § 7623(b)(1) (emphasis added).
[102] Id. (emphasis added).

b. "Proceeds" Under Section 7623(b) Are Not Limited to Amounts Collected Under Title 26.

The IRS's proposed regulations limit collected proceeds "to amounts collected under the provisions of title 26, United States Code."[103] IRS Counsel has argued that "amounts [...] collect[ed] as a result of non-tax violations [...] should not be included as collected proceeds under section 7623," because "section 7623 defines the scope of 'collected proceeds' in a manner consistent with the Code's definition of 'tax.'"[104] Because the IRS ignores critical statutory language in section 7623, and the operation of other whistleblower award programs, the IRS's conclusions misconstrue the scope of the whistleblower program under section 7623.

The IRS's proposed regulations provide that 'collected proceeds' "include: tax, penalties interest, additions to tax, and additional amounts collected because of the information provided."[105] IRS Counsel contends that the terms 'penalties,' 'additions to tax,' and 'additional amounts' have a specific meaning under the [Internal Revenue] Code that does not extend beyond the definition of 'tax.'"[106] To support this contention, IRS Counsel refers to Section 6665 of the Internal Revenue Code, which states that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter."[107] Section 6665, however, lends scant support to the IRS's argument. Just as it does not follow that, simply because all squares are rectangles, all rectangles are squares, neither does it follow that the terms "additions to the tax, additional amounts, and penalties" are limited to tax simply because Chapter 68 of the Internal Revenue Code defines 'tax' as including those terms.

While the statutory cannons of construction generally teach that a list of enumerated items operates to exclude those things not listed, this principle does not apply when the list is illustrative and not intended to be exclusionary. In particular, section 7623(b) uses the term 'including' as a term of illustration and definition, not of limitation.[108] Congress, therefore, did not intend to limit "proceeds" to "penalties, interest, additions to tax, and additional amounts," or to tax. Indeed, if, as IRS Counsel argues "identical words used in different parts of the Internal Revenue Code should have the same meaning," then the fact that Congress, while clearly aware of the term "tax," nonetheless specifically and deliberately used the term "proceeds," is strong evidence that Congress did not intend to limit whistleblower awards to collected taxes only, and did not intend to limit the applicability of the whistleblower program to Title 26 only.

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[103] 77 Fed. Reg. 74807 (proposed 26 C.F.R. §301.7623-2(d)).

[104] IRS Memorandum at 3-4.

[105] 77 Fed. Reg. 74807.

[106] IRS Memorandum at 7.

[107] 26 U.S.C. § 6665(a)(2).

[108] See U.S. v. Ward, 833 F.2d 1538 (11th Cir. 1987) (Tax Code definition of "United States" to "include" United States territories and District of Columbia did not limit jurisdiction to District of Columbia and Federal territories).

Notwithstanding IRS Counsel's overreliance on 26 U.S.C. § 6665, IRS Counsel also overstates the Supreme Court's holding in Commissioner v. Lundy.[109] IRS Counsel contends that Lundy stands for the proposition that "identical words used in different parts of the Internal Revenue Code should have the same meaning."[110] The language at issue in Lundy, however, only applies to "words used in different parts *of the same act*," whereas sections 7623 and 6665 stem from entirely different legislative origins.[111] Importantly, the sections interpreted by the Court in Lundy were directly adjacent, and the Court noted there was "no reason to believe that Congress meant the term 'claim' to mean one thing in section 6511 but to mean something else altogether in the *very next section* of the statute."[112] Moreover, the Supreme Court, in the progenitor to the line of the cases culminating with Lundy, specified that such a "presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent."[113] The fact that section 7623 stems from different Congressional acts than section 6665 and related provisions, as well as the fact they are not codified in close proximity, but in altogether different chapters of Title 26, is more than sufficient to rebut the Lundy presumption without even considering the sections' vastly differing purposes.

Similarly, Williams v. C.I.R. is cited by IRS Counsel for the proposition that, amounts covered by section 7623(b) applies only to "penalties or recoveries [...] assessed under chapter 68 of the Code."[114] The Tax Court's jurisdiction is not, however, limited to 'taxes' generally, but only certain enumerated types of taxes, which do not even encompass all taxes imposed by Title 26. The Tax Court held in Williams that it lacked jurisdiction over the FBAR penalties not, as IRS Counsel claims, because the FBAR is not an 'internal revenue law,' but because Title 26 only grants the Tax Court jurisdiction over notices of deficiency pertaining to "certain taxes," as well as jurisdiction over liens and levies issued under Title 26.[115] The Tax Court further clarified its statutory jurisdiction under Title 26 is narrower than jurisdiction over all 'tax laws' or all 'internal revenue laws,' stating that "other taxes—*even if imposed in Title 26*—fall outside this Court's deficiency jurisdiction."[116] There are, therefore, other 'tax laws,' both in Title 26 *as well as in other Titles* of the United States Code, over which the Tax Court does not have jurisdiction. Moreover, whether the Tax Court has jurisdiction over FBAR penalties is irrelevant to the question at hand. There is no doubt that the Tax Court has jurisdiction

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[109] See IRS Counsel Memorandum at 5, 7.
[110] Id. at 7 (quotations omitted).
[111] 516 U.S. 235, 250 (1996).
[112] 516 U.S. at 249-250 (emphasis added).
[113] Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 433 (1932).
[114] IRS Memorandum at 7.
[115] 131 T.C. 54, 57-58 (2008).
[116] Id. at 58 (emphasis added).

over whistleblower claims, including whether a whistleblower is entitled to an award including FBAR penalties.[117]

Moreover, in defining 'collected proceeds,' the IRS entirely ignores the broad statutory language relating to 'related actions' and 'settlements' in Section 7623(b). As described above, this language in Section 7623(b) expands the scope of the 'proceeds' subject to a whistleblower's award.[118] Because the ordinary meaning of 'related' is extremely broad, an action or settlement may be 'related' to a Title 26 provision despite being codified elsewhere. The sense of the word as used in section 7623 is clearly that of a relation or connection with the whistleblower's information and the government's response to it—if the government collects 'proceeds' due to a whistleblower's information, then that action is 'related.'

The ordinary meaning of 'proceeds' is extremely broad, generally encompassing everything that emanates from something else—in this case the IRS's actions in response to a whistleblower's information. Black's Law Dictionary states in part that, "[p]roceeds does not necessarily mean only cash or money [but] [t]hat which results, proceeds or accrues from some possession or transaction."[119] The U.S. Supreme Court noted long ago that "[p]roceeds are not necessarily money," and that it "is also a word of great generality."[120] Because of the broad ordinary meaning of proceeds, and because Congress was well aware that it could limit the statute's applicability by using the well-worn term 'tax,' the fact that Congress instead used 'proceeds' clearly indicates the applicability of section 7623(b) is not limited to Title 26.

iii. Section 7623(a)'s 'Conniving at' Language Provides Another Basis for Whistleblower Awards

Section 7623(a) provides that the Secretary of the Treasury may reward those providing information related to "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws *or conniving at the same*."[121] The IRS's proposed regulations entirely ignore the effect of this statutory language on the scope of the whistleblower program under section 7623. While IRS Counsel has argued—and the IRS's proposed regulations reflect—that "section 7623 provides two bases on which the IRS may make a whistleblower award," section 7623(a)(2)'s "conniving at" language provides an additional basis for a whistleblower award.[122]

The plain and ordinary meaning of 'conniving' embraces additional grounds for granting an award. Black's Law Dictionary defines "to connive" as "[l]oosely, to

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[117] See 26 U.S.C. § 7623(b)(4) ("*Any* determination regarding an award under paragraph (1), (2), or (3) may [...] be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)") (emphasis added).

[118] See "IRS's Proposed Regulations Misconstrue "related action," supra at § I(B)

[119] Black's Law Dictionary 1204 (6th ed. 1990).

[120] See Phelps v. Harris, 101 U.S. 370, 380 (1879).

[121] 26 U.S.C. § 7623(a)(2) (emphasis added).

[122] IRS Memorandum at 4.

conspire."[123] Because a conspiracy to do an act is a separate offense from the act that is the object of the conspiracy, 'conniving' may include violations outside Title 26, or even conduct that does not violate any law or regulation. Concealment of foreign bank accounts that is done to evade taxes falls within the plain meaning of section 7623(a)'s language, and may therefore form the basis of a whistleblower award.

Congress's use of the "conniving at" language in section 7623(a) ought to be construed so it has a nonsuperflous meaning.[124] To do so, the phrase cannot—as it does in the IRS's proposed regulations—simply have the same meaning as "detecting underpayments of tax" or "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws," but must extend beyond them to provide an additional basis for satisfying section 7623(a)'s requirements. Moreover, in interpreting a statute, the meaning arrived at ought to "avoid[] [...] a construction implying Congress was ignorant of the meaning of the language it employed."[125] In this case, Congress clearly was aware that 'conniving' is akin to 'conspiring' and, in any case, need not comprise an actual violation of the 'internal revenue laws,' let alone Title 26.

2. Section 7623 Must be Construed in Light of the False Claims Act and Other Whistleblower Laws

Section 7623 must not only be read in light of the statute's plain language, but must also be read taking into account similar statutes such as the False Claims Act ("FCA"), as well as statutory cannons of construction relating to remedial statutes generally, and whistleblower award statutes in particular in particular. As Judge Learned Hand stated,

> [i]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[126]

Reading the language of section 7623 in concert with the FCA—in which the IRS whistleblower statute is *in pari materia*—the intent and policy goals of Congress relating to the broad scope and operation of IRS whistleblower program are clear. Because Congress intended only to encourage whistleblowing, the IRS may not issue 'clarifying' regulations that have the opposite effect, namely discouraging whistleblowers from coming forward with information by making it more difficult to do so, and by restricting awards to whistleblowers.

i. Section 7623 Must be Read In Pari Materia *with the FCA*

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[123] Black's Law Dictionary (9th ed. 2009).

[124] See Astoria Federal Savings & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991) (stating general principle of statutory construction).

[125] Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[126] Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945).

Courts have long held that statutes with similar language and purpose should be construed together and given similar effect.[127] The Supreme Court has additionally held that in interpreting a statute, it should be "assume[d] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject."[128] Reliance on previous judicial interpretations from related statutes is appropriate because, "where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed."[129] The FCA—which uses similar language and creates a similar statutory scheme—preceded section 7623, and is therefore highly relevant to understanding and interpreting the IRS whistleblower program.

The whistleblower program under section 7623 was modeled after the example of the False Claims Act, and the two share a host of key provisions. Commonalities include the right of a whistleblower to a mandatory award, the right to have any award determination subject to judicial review, and a limitation on an award where the whistleblower "planned and initiated" an action.[130] These and other structural similarities between the two statutes are significant grounds for finding that the intent and meaning of 'proceeds'—as well as the concept of 'alternative remedy' discussed in greater detail below—within the FCA should serve as an interpretative guide to the same phrases and policies of the IRS whistleblower program.

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[127] See, e.g., Merill v. Fahs, 324 U.S. 308 (1945) (applying the doctrine of *in pari materia* to the construction of provisions of the Internal Revenue Act); see also Quentin Johnstone, "An Evaluation of the Rules of Statutory Construction," 3 U. KAN. L. REV. 1, 3 (1954) ("All courts make great use of statutes *in pari materia*").

[128] Erlenbaugh v. U.S., 409 U.S. 239, 244 (1972); see also Miles v. Apex Marine Corp., 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation").

[129] Morissette v. United States, 342 U.S. 246, 263 (1952). The IRS has essentially interpreted "internal revenue laws" as a term of art equating to Title 26. However, section 7623 is not a tax law, but rather a whistleblower law, and therefore is more closely connected with the FCA than with the authority cited by IRS Counsel. Moreover, as discussed above, the term 'internal revenue laws' is not a term of art because it is not defined by statute and does not have a settled judicial meaning.

[130] 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 fifteen to thirty percent of payment to a whistleblower is authorized if action is taken on the whistleblower's information; a broad definition of what will be considered "amounts" for determination of a whistleblower award (including "alternate remedies" under the False Claims Act); the parallel of awarding less than a ten percent award 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. In sum, the two statutes are a classic example *of in pari materia*–as emphasized by the author of both bills–Senator Grassley. See Grassley Letter.

ii. The FCA Defines 'Proceeds' Broadly

The term 'proceeds' is used by the FCA—just as it is by section 7623(b)—to define the award the whistleblower is entitled to: "[the whistleblower] shall receive at least 15 percent but no more than 25 percent of the *proceeds* of the action or settlement."[131] Likewise, the IRS whistleblower program under Section 7623 awards a percentage—fifteen to thirty percent—of the 'proceeds' to the whistleblower. While attempting to define the phrase 'collected proceeds' as a whole, the IRS has failed to recognize that this is not a phrase but rather one key word, namely ' proceeds.' The word 'collected' serves only as a modifier to signal that the proceeds must actually be in the possession of the government—an especially important requirement in the area of tax where there is often a difference between the taxes *due* and the taxes *collected* by the government. The use of the term 'proceeds' in section 7623(b), therefore is not coincidence, but rather a deliberate act on the part of Congress, considering that the term has a long history of usage in the FCA—on which the IRS whistleblower award law was based.[132]

As used in the FCA, the term 'proceeds' is expansive.[133] The Ninth Circuit, in defining the scope of 'proceeds' as used in the FCA, stated that it has "looked to the dictionary definition of the word [...] when interpreting its use in other statutes," and would do the same when interpreting the term's usage in the FCA.[134] In examining the dictionary definition, the Court found that "Webster's Third New International Dictionary defines 'proceeds' as 'what is produced or derived from something [...] by

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[131] 31 U.S.C. § 3720(d)(1) (emphasis added).

[132] The following legislative history is typical: "Right now, the IRS is allowed to pay rewards to whistleblowers, but there's no guarantee of a reward and, therefore, less incentive for whistleblowers. This provision models an IRS rewards program on the False Claims Act." Statement of Chairman Grassley in response to Senate Passage of the JOBS Act of 2004, which contained the same amendments to Section 7623(b) as were enacted in 2006. Senator Grassley was the author of both the IRS whistleblower law as well as the False Claims Act–a fact which only strengthens a finding that the two statutes should be viewed as *in pari materia*. Senator Grassley has made numerous other statements that the IRS whistleblower law is based on the False Claims Act: "The taxpayers have reaped the success of the False Claim Act whistleblower rewards program. They'll benefit from the same concept applied to tax cheating." (Statement from Senator Grassley on January 5, 2007 in a press release praising the naming of Mr. Whitlock to be head of the new IRS Whistleblower Office). "The [IRS whistleblower] statute provides significant guidelines based on the success of the False Claims Act [...]" (Letter from Senator Grassley to Treasury Secretary Paulson, January 5, 2007 urging effective implementation of the IRS Whistleblower Law).

[133] See, e.g., Thornton v. Science Applications Int'l Corp., 79 F. Supp. 2d 655, 657 (N.D. Texas 1998) (determining 'proceeds' included claims released pursuant to a settlement agreement).

[134] U.S. *ex rel.* Barajas v. United States, 258 F.3d 1004, 1013 (9th Cir. 2001).

way of total revenue: the total amount brought in'; 'the net profit made on something.'"[135] Because the Court had previously "held that the term 'proceeds,'[as] used in another statute that, like the FCA, [did] not define the term, need not 'always consist of money or some tangible asset,'" it found that 'proceeds' as used in the FCA was equally broad.[136]

Inherent in the FCA—as in section 7623 and any other statute providing for a whistleblower award—is a tension between the whistleblower, who seeks to maximize his reward, and the government, which, regrettably, often seeks to minimize it, or even to eliminate it altogether.[137] The Court in SAIC underscored this tension when it stated: "The government has not always been magnanimous to its relators at the end of the day."[138] Unfortunately, SAIC is not an outlier:

> In view of their widespread use, it is worthy of note that the Department of Justice has considered such individuals [whistleblowers] as adversaries rather than allies. This is not the first case where this Court has noted the antagonism of the Justice Department to a whistleblower. The reason continues to be unknown, but the attitude is clear.[139]

As a result, the scope of 'proceeds' in the FCA context has been frequently litigated, and is subject to a large body of case law. Congress well knew of this history when it amended section 7623, and deliberately drafted the law broadly using the word 'proceeds' to protect whistleblowers and reward them fairly based on a comprehensive view of the benefits accruing to the government as a result of their disclosures.

iii. The FCA's Alternative Provision and its Application to Section 7623

In understanding the policies and statutory language of section 7623 it is important to understand that the language of 31 U.S.C. 3730(c)(5)—the 'alternate remedy' provision of the FCA—is intertwined with the concept of 'proceeds.' In sum, if the government decides to pursue a FCA case through any alternate remedy, the relator remains entitled to the same share of the recovery to which she would have been entitled had the government pursued its claim by intervening in the relator's *qui tam* suit.[140] In Barajas the question was whether the whistleblower's share should include sums recovered by the Air Force in its agreement with the contractor to resolve suspension and debarment

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[135] Id.

[136] Id. (citations omitted).

[137] See U.S. v. Science Applications International Corporation ("SAIC"), 207 F.3d 769, 775 (5th Cir. 2000) (noting the frequently adversarial nature of the relationship between whistleblowers and the Department of Justice).

[138] Id. at 773

[139] U.S. v. General Electric, 808 F. Supp. 580, 584 (S.D. Ohio 1992) (rejecting government's efforts to reduce an award for a whistleblower because of a claim that the whistleblower should have come forward sooner).

[140] See U.S. *ex rel.* Barajas v. United States, 258 F.3d 1004, 1006 (9th Cir. 2001).

proceedings.[141] The Court noted that there are no restrictions on the alternative remedy that the government might pursue, since under the law the government may use "any" alternative remedy available.[142] Under the FCA, therefore, if the government chooses to pursue a resolution outside of the relator's case, the results are still swept in under section 3730(c)(5), and are included in the whistleblower's share for purposes of determining an award. In other words, any recovery under an alternate remedy is still considered 'proceeds' for the purpose of determining a whistleblower's award.

Congress's intent with respect to the 'alternative remedies' provision becomes clear once the legislative history of the 1986 FCA amendments is examined. The House Committee Report states that "the Government may pursue its claim through alternative remedies available to it, such as a *criminal prosecution* or an [administrative adjudication]."[143] That alternative remedies include criminal prosecutions attests to the breadth of the concept. The Report further states:

> These alternative remedies may include, *but are not limited to*, and administrative proceedings to determine a civil money penalty. This section provides that if the Government pursues an administrative *or* alternative remedy, the person who initiates the action shall have the same rights as if the action were conducted in district court.[144]

This legislative history of the FCA shows that Congress did not intend for the government to be able to affect a whistleblower's award simply by its choice of how to pursue the claim.[145]

With this understanding of 'alternative remedy' from the FCA context, it is clear that the intent of section 7623—with its use of 'proceeds' (already a broad term) and its 'any related actions,' 'any settlements' and 'additional amounts' language—is to transparently seek the same policy goals as the FCA, namely that the whistleblower receive the benefit of his or her actions regardless what particular approach the government elects to pursue its interests. Congress—and the courts—have made it clear that the government cannot deny a whistleblower an award by seeking to limit the definition of proceeds, relabeling or reclassifying a payment made to the government, or by seeking an alternate remedy. The policy goals of the FCA are the same as those of section 7623, namely that a

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[141] 258 F.3d at 1004.

[142] Id. at 1010-11.

[143] H.R. Rep 99-660 at 24 (June 26, 1986) (emphasis added).

[144] Id. at 31 (emphasis added).

[145] Similarly, Congress did not intend for the IRS to be able to exclude categories of whistleblowers through rulemaking. The 2006 Act delegates Treasury and the IRS authority only with regard to the "operation" of the whistleblower program. See, supra, note 22 and accompanying text.

whistleblower ought to receive an award based on the benefits—defined broadly—that the government has received from his or her actions.[146]

iv. Section 7623 Should be Construed in Favor of Whistleblowers

Assuming, for the sake of argument, there is any serious doubt that Congress intended to award whistleblowers for proceeds collected under provisions outside Title 26, any such ambiguities in a remedial statute should be resolved in favor of persons for whose benefit the statute was enacted—whistleblowers and prospective whistleblowers.[147]

In this case, Congress amended section 7623 in order to greatly expand the scope of awards made to IRS whistleblowers—and to eliminate the Secretary of the Treasury's

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[146] Reflecting the policy goals of Congress with respect to a broad application of Section 7623, particularly as it relates to Section 31 is a recent statement by Senator Grassley, the author of both the FCA and Section 7623: "The 2006 legislation was intended to obtain valuable information about major tax fraud and prevent the IRS from shortchanging whistleblowers. So far, the IRS is using questionable tactics like the Justice Department did when the False Claims Act was updated 25 years ago to limit whistleblower awards, including now saying that collections of penalties under the Bank Secrecy Act aren't eligible for whistleblower awards." Statement by Senator Grassley on June 21, 2012 (announcing a letter to the Treasury Secretary and IRS Commissioner raising questions about the administration of the IRS whistleblower program). While not commonplace, the U.S. Supreme Court has previously cited and relied on statements made by legislators after a bill has been signed into law to guide their determination of legislative intent—especially when those statements come from lawmakers, such as Senator Grassley, who were key figures in the drafting of the provision. See Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 220 n.23 (1983) (relying on a 1965 explanation by "an important figure in the drafting of the 1954 [Atomic Energy] Act"); see also North Haven Board of Education v. Bell, 456 U.S. 512, 530-531 (1982) (stating "postenactment history of Title IX provides additional evidence of the intended scope of the Title and confirms Congress' desire" and citing postenactment statement in Congressional Record as well as statements made by Senator Bayh two years after passage).

[147] See, e.g., Smith v. Heckler, 820 F.2d 1093, 1095 (9th Cir. 1987) (Social Security Act "is remedial, to be construed liberally [...] and not so as to withhold benefits in marginal cases"); King v. St. Vincent's Hospital, 502 U.S. 215, 220 n.9 (1991) ("provisions for benefits to members of the Armed Forces are to be construed in the beneficiaries' favor); see also U.S. *ex rel.* Marcus v. Hess, 317 U.S. 537 (1943) (proceedings under FCA are "remedial"); DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983) (Energy Reorganization Act is remedial legislation warranting broad interpretation); Kansas Gas and Elec. v. Brock, 780 F.2d 1505 (10th Cir) (warning against a narrow, technical definition of whistleblower provision); U.S. v. Griswold, 30 Fed. Rep. 762 (D. Or. 1887) (relator's interest was property right; court refused to construe statute to take away that interest unless it were "far more specific in its provisions" and expressed intention to do so "in terms so plain, and explicit, that they will bear no other construction").

discretion with respect to such awards—to encourage more whistleblowers to provide the government, at great risk to themselves and their careers, with useful and valuable information. The IRS's unduly narrow interpretation of section 7623 thwarts those purposes, and would in many cases allow the Commissioner—at his discretion—to avoid paying sums to whistleblowers. In a settlement with a taxpayer the Service could characterize a large percentage of the settlement amount as stemming from Title 31 or Title 18 violations, and a relatively much smaller percentage as stemming from Title 26 violations. The whistleblower program would be severely crippled in its ability to entice whistleblowers to come forward because it would not straightforwardly guarantee a nondiscretionary reward, and Congress's purpose in amending section 7623 would be frustrated. To the extent, therefore, that section 7623 is ambiguous, it should be construed strongly in favor of whistleblowers.[148]

3. Fines and Penalties Collected by the IRS are 'Available' for Payment of Whistleblower Awards

The IRS's proposed regulations provide that "[c]riminal fines deposited into the Victims of Crime Fund are not collected proceeds and cannot be used for payment of awards."[149] The IRS argues that "[t]he fines imposed in criminal tax cases that are deposited into the Victims of Crime Fund are not available to the Secretary to pay awards under section 7623" because "[c]riminal fines imposed for Title 26 offenses are not exempt" from 42 U.S.C. § 10601(b)(1).[150] IRS Counsel has argued that in those cases there is no fund from which the whistleblower could be paid a reward.[151] The plain language of section 7623(b), however, appropriates funds for whistleblower awards directly from the proceeds collected by the IRS—before payment into the Victims of Crime Fund.

IRS Counsel has attempted to impose an additional bar to whistleblowers' collection of an award for violations outside Title 26—such as the FBAR—by contending more generally that "amounts collected as penalties or criminal fines under Titles 31 or 18 are not 'available' to the Secretary for payment of whistleblower awards."[152] The IRS now argues that fines and penalties under Titles 18 and 31 are not 'collected proceeds' under section 7623 because "sections 5323(a) and 9703(a) of Title 31 provide independent authority, separate and apart from section 7623 for the payment of rewards for information relating to certain violations of Title 31 or Title 18."[153] Such funds, according to IRS Counsel, are not 'available' because Title 31 contains a discretionary informant reward provision, and rewards for such violations are therefore "otherwise provided for by law," and cannot form part of a whistleblower award under section

[148] Moreover, section 7623 is not a tax statute, but rather a whistleblower award statute. Therefore, any principles of statutory construction relating to narrowly construing tax laws are inapplicable.

[149] 77 Fed. Reg. 74807 (proposed 26 C.F.R. § 301.7623-2(d)(3)).

[150] Id. at 74801.

[151] IRS Memorandum at 8.

[152] Id. at 4.

[153] 77 Fed. Reg. 74801.

7623.[154] The IRS's interpretation is, however, contrary to both the plain language and structure of the statute. Section 7623's "otherwise provided for by law" language applies only to subsection (a) and not to subsection (b), and because the statute itself, as discussed above, does not limit 'collected proceeds' to Title 26, and specifies that an award "shall" be paid to whistleblowers. The Title 31 program is discretionary and therefore does not preclude section 7623(b).

i. Section 7623 Appropriates Funds for Whistleblower Awards from all "Proceeds" Collected by the Government

Although the IRS argues that criminal fines, including those under Title 26, must be "deposited into the Victims of Crime Fund," it concedes that "[r]estitution ordered by a court to the IRS [...] is collected by the IRS as a tax and, therefore, is encompassed in the definition of collected proceeds."[155] Yet, while the authority cited for this proposition resides in Title 26, at section 6201(a)(4), IRS Counsel has nonetheless contended that because "Congress did not include fines arising under Titles 18 or 31 among the specific exceptions [under 42 U.S.C. 10601(b)(1)]" and because "nothing in the Victims of Crimes Act, Title 18, or Title 31 indicates that Congress intended to exclude fines under Titles 18 or 31 from this requirement." The authority, however, for making an award from all proceeds collected by the government resides in Title 26 as well, namely in Section 7623 itself.[156]

The 1996 Taxpayer Bill of Rights amended section 7623 and authorized payment of awards from "the proceeds of amounts [...] collected by reason of the information provided."[157] Prior to the 1996 amendments, section 7623 authorized payment of sums not exceeding amounts appropriated for that purpose, thereby explicitly requiring an appropriation of funds elsewhere.[158] Congress indicated it "believe[d] improvements should be made to [the] program," and therefore "provide[d] that the rewards are to be paid out of the proceeds of amounts (other than interest) collected by reason of the information provided."[159] When Congress again expanded section 7623 in 2006, it did so intending that the awards should come directly from the proceeds collected as a result of

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[154] See id.; IRS Memorandum.

[155] 77 Fed. Reg. 74801; see also IRS Memorandum at 9 n.4 ("[b]ecause criminal restitution ordered pursuant to 18 U.S.C. § 3556 goes to the IRS [...] amounts paid as such restitution are 'available' to the IRS for payment of whistleblower awards").

[156] The False Claims Act, as discussed above, does not limit a relator's award in cases where the government pursues criminal sanctions. See, supra, § I(C)(2) (discussing legislative history of the FCA).

[157] Pub. L. 104-168, § 1209 (July 30, 1996).

[158] The original law provided: "The Secretary or his delegate, under regulations prescribed by the Secretary or his delegate, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law." 26 U.S.C. § 7626 (1954 Codification).

[159] H.R. Rep. No. 104-506, 51 (1996).

the whistleblower's disclosure, and did not intend for the IRS to withhold payment to whistleblowers for lack of appropriated funds.

Indeed, the IRS concedes as much, recognizing a Congressional appropriation need not reside "in an annual appropriations act," but can take the form of "any provision of law" that "authoriz[es] an *obligation* or expenditure of funds for a specific purpose," and recognizing as well that in enacting section 7623, "Congress has created a permanent appropriation funded with *collected proceeds*."[160] Because the IRS misconstrues the scope of collected proceeds under section 7623, it consequently misconstrues the scope of the appropriated funds. Since the 'proceeds' covered by the program include all amounts collected by the government as a result of a whistleblower's information, and because Congress, in section 7623 itself, appropriated such funds for whistleblower awards, such proceeds are 'available' for payment to whistleblowers regardless of whether they stem from violations outside Title 26.

IRS Counsel additionally contends that because the Bank Secrecy Act "does not specify any particular fund or account into which amounts paid as penalties should be deposited [...] amounts paid as BSA penalties should be deposited into the Treasury's General Fund."[161] Because, however, section 7623 includes Title 31 violations in its sweep, any such 'proceeds' from Title 31 penalties that are 'collected' by the Treasury, are therefore included in Congress's 'permanent appropriation' for whistleblower awards.

To be clear, the IRS Counsel Memorandum on this point engages in a tautology. Because IRS Counsel improperly construes which funds are considered 'proceeds' it naturally follows that it improperly states what funds are available for payment to the whistleblowers. A proper interpretation of collected proceeds as reaching beyond Title 26 will likewise lead to the correct determination that such proceeds are also available for payment to the whistleblower—rendering the 'availability' issue moot.

ii. Title 31's Informant Reward Program Does not Preclude a Whistleblower from Receiving a Reward Under Section 7623(b)

While IRS Counsel contends that recoveries under Title 31 "cannot serve as the basis of an award under section 7623" because "Title 31 separately provides for informant awards," the existence of another discretionary program does not equate to an award 'provided by law' under the meaning of Section 7623(a).[162] Where the award payment is discretionary, it cannot be said it is 'provided by *law*,' but rather that it is 'provided' at the *discretion* of the appropriate official. Moreover, the statutory language and structure of Section 7623 clearly indicate that any such limitation does not apply to subsection (b), but, at most, implicates subsection (a). Consequently, the existence of "independent authority, separate and apart from section 7623, for the payment of rewards for

[160] IRS Memorandum at 8 (emphasis added).
[161] Id. (interpreting 31 U.S.C. 3302(b)).
[162] Id. at 4.

information relating to certain violations of Title 31 or Title 18" is not a valid basis for limiting the definition of "collected proceeds."[163]

31 U.S.C. § 5323(a) does not establish a whistleblower reward program comparable to that established by section 7623. Rather, it establishes a discretionary reward program for informants, providing that "[t]he Secretary *may* pay a reward to an individual who provides original information which leads to a recovery [...] for a violation of this chapter."[164] Under 31 U.S.C. § 5323(a), the Commissioner has total discretion to determine size of award.[165] The informant reward program therefore differs fundamentally from whistleblower reward programs. Informants, for example, have no right of action under section 5323.[166] By contrast, the award scheme under section 7623(b) is not only explicitly nondiscretionary, but section 7623(b) also explicitly provides whistleblowers a mechanism to enforce their rights under the law.[167]

The IRS can point to no cases where a whistleblower has been precluded from obtaining a nondiscretionary award due to the existence of a discretionary award program. Such discretionary award programs abound throughout the United States Code. The Major Fraud Act, for example, provides that the Attorney General, "in his or her sole discretion, [...] is authorized to make payments from funds appropriated to the Department of Justice to persons who furnish information relating to a possible prosecution."[168] Notwithstanding the availability of such discretionary rewards, a whistleblower's right to a recovery under the FCA, or other whistleblower programs, such as those created by the Dodd-Frank Act, is unaffected.

In any case, as is clear from the statutory structure, section 7623's "not otherwise provided for by law" language applies only to the discretionary award program established by section 7623(a), and does not limit the nondiscretionary award scheme created under section 7623(b). Whereas section 7623(a) provides that "[t]he Secretary [...] is authorized to pay such sums as he deems necessary [...] *in cases where such expenses are not otherwise provided for by law*," section 7623(b) applies "[i]f the

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[163] 77 Fed. Reg. 74801.

[164] 31 U.S.C. § 5323(a) (emphasis added).

[165] See Katzberg v. United States, 36 F. Supp. 1023, 1023 (Ct. Cl. 1941), cert. denied, 314 U.S. 620 (1941).

[166] See Arroyo-Torres v. Ponce Federal Bank, F.B.S., 918 F.2d 276 (1st Cir. 1990) (informant who was retaliated against had no recourse under 31 U.S.C. § 5323); see also Krug v. United States, 168 F.3d 1307, 1309 (Fed. Cir. 1999) (26 U.S.C. § 7623(a) did not create implied-in-fact contract; enforceable contract arises only after an informant and the Service negotiate and fix a specific award).

[167] See 26 U.S.C. § 7623(b)(4) (right of appeal to Tax Court).

[168] 18 U.S.C. § 1031(g)(1); see also 42 U.S.C. § 7413(f) (authorizing award for information about Clean Air Act violations); 42 U.S.C. § 9609(d) (authorizing award for information about CERCLA violations); 19 U.S.C. § 1619 (authorizing awards relating to violations of customs laws); 12 U.S.C. § 78u-1(e) (authorizing reward for information leading to insider trading penalty collection).

Secretary proceeds with any [...] *action* described in subsection (a)," namely an action aimed at "detecting underpayments of tax or detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same."[169] Any preclusion, therefore, applies—if it applies at all—only to the Secretary's *discretion* under section 7623(a), and not to the Congressionally-mandated award established by section 7623(b).

Lastly, the IRS's interpretation creates a paradox within section 7623. Supposing the "not otherwise provided for by law" limitation applies to section 7623(b), and discretionary informant award programs such as those established by section 7623(a) and 31 U.S.C. § 5323(a), then section 7623(b) would be ineffective, because it would not apply where the Secretary has discretionary authority, "otherwise provided for by law" in section 7623(a). A statutory interpretation—even if it is ostensibly based on the statute's plain meaning—must be rejected if it would produce an "absurd result."[170] An interpretation of "not otherwise provided for by law" that would cripple the IRS whistleblower program in this way absurdly hollows out Congress's 2006 amendments to section 7623, and is therefore untenable.

II. THE PROPOSED REGULATIONS IMPROPERLY REDUCE THE SIZE OF WHISTLEBLOWER AWARDS OR OTHERWISE IMPROPERLY DISQUALIFY WHISTLEBLOWERS FROM RECEIVING AN AWARD

Besides defining the key terms "proceed based on," "related action" and "collected proceeds," which, as described above, greatly affect which claims whistleblowers are eligible to receive awards for, the IRS's proposed regulations additionally impact the size of awards to whistleblowers, and the extent to which whistleblowers will have their awards reduced or denied on grounds of having "planned and initiated" the underlying violations.[171] Specifically, "[s]ection 301.7623-4 of these proposed regulations provides the framework and criteria that the Whistleblower Office will use in exercising the discretion granted under section 7623 to make awards," and provides guidelines "to determine the amount of an appropriate reduction under [section 7623(b)(3)]."[172]

With respect to their implementation of award reductions under the "planned and initiated" language of section 7623(b)(3), the proposed regulations do not go far enough in clearly delineating those whistleblowers who, as the statute requires, both planned and initiated the underlying action, from those claimants who merely participated in an auxiliary fashion. Additionally, the IRS ought to adopt a "chief architect" standard, as Congress intended. With respect to the regulations' implementation of factors affecting the award percentage, the IRS should not begin its analysis at the statutory minimum, and

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[169] 26 U.S.C. § 7623 (emphasis added).

[170] U.S. v. Granderson, 511 U.S. 39, 47 n.5 (1994); see also Public Citizen v. Dep't of Justice, 491 U.S. 440, 454 (1989) (rejecting "odd result").

[171] See 26 U.S.C. §§ 7623(b)(2) and (3).

[172] 77 Fed. Reg. 74802-74803.

should weigh positive and negative factors in a way that more realistically reflects the realities most whistleblowers face in coming forward with information.

A. Planned and Initiated

The IRS's Notice of Proposed Rulemaking makes an astounding assertion: "Section 7623(b)(3)[reduction of award for planned and initiated], unlike section 7623(b)(1) and section 7623(b)(2) , provides no direction to the Whistleblower Office on what to consider in exercising this grant of discretion."[173]

On August 3, 2012, in a letter to Commissioner Schulman, the National Whistleblowers Center responded to the Service's invitation to comment on Section 7623 and implementing regulation and policy.[174] In particular, the NWC commented on the IRS's interpretation of "planned and initiated" as contained in the Internal Revenue Manual—substantially the same interpretation that the IRS now seeks to implement through notice and comment rulemaking. We hereby incorporate the comments of our August 3, 2012 letter, to supplement our instant comments to the Notice of Proposed Rulemaking.

As Senator Grassley—the author of the IRS Whistleblower Law and the modern amendments to the False Claims Act—has stated repeatedly, the basis of section 7623(b)'s "planned and initiated" limitation is the language in the False Claims Act.[175] The reason "no direction" was provided is because the term "planned and initiated" has been subject to extensive litigation and review in the context of the False Claims Act – which the IRS whistleblower statute is *in pari materia*.[176] It was understandably viewed as unnecessary to provide additional direction given that "planned and initiated" is a term of art widely understood in the whistleblower community. The framework for determining awards and reductions under section 7623(b)(3) is the framework provided by the case law and legislative history of "planned and initiated" under the False Claims Act.

1. The IRS Should Adopt a "Chief Architect" Standard

The proposed regulations provide that a whistleblower will meet a threshold determination that they "planned and initiated" only

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[173] Id. at 74803.

[174] See National Whistleblowers Center, August 2, 2012 to Commissioner Shulman Re: IRS Interpretation of Planned and Intiated Limitation of IRC 7623, available at http://http://www.whistleblowers.org/storage/whistleblowers/documents/lettertoirs.8.3.12.pdf.

[175] See Grassley Letter. See also, "Section 7623 Must be Construed in Light of the False Claims Act and other Whistleblower Laws," supra at § I(C)(2).

[176] See, "Section 7623 Must be Construed in Light of the False Claims Act and other Whistleblower Laws," supra at § I(C)(2).

if the claimant (i) designed, structured, drafted, arranged, formed the plan leading to, or otherwise planned an underlying act, (ii) took steps to start, introduce, originate, set into motion, promote or otherwise initiated an underlying act, and (iii) knew or had reason to know that there were tax implications to planning and initiating the underlying act.[177]

The NWC supports the recognition in the proposed regulations that the threshold determination of meeting all three tests must be met before any consideration of a reduction of an award under (b)(3) can be made. This comports with the statutory requirement that an individual must both plan *and* initiate the underlying action. With respect to the third prong of the above threshold requirements, however, the IRS should specify that the claimant "knew or had reason to know that there were *improper* tax implications to planning and initiating the underlying act" or "knew or had reason to know that there were *unlawful* tax implications to planning and initiating the underlying act." Such a clarification would avoid including mere ignorance or incompetence in the sweep of "planned and initiated," and would comport more closely with the intent of the statutory language.

Proposed section (3)(ii)(C) excludes from the sweep of "planned and initiated" any individual who "merely furnishes typing, reproducing, or other mechanical assistance in implementing one or more underlying acts will not be treated as initiating any undying act." This restriction is, however, too meager. By stating that these individuals are excluded, the proposed regulations suggest that an individual who engaged in other acts may be encompassed under "planned and initiated." The IRS should expand this language to exclude from the sweep of "planned and initiated" any individual who performed any of the underlying activities or analysis at the direction of a senior employee and/or manager will not be treated as initiating any underlying act.

The NWC is, moreover, concerned that the proposed regulations' "[c]ategoriz[ation] [of] the individual's role as a planner and initiator as primary, significant, or moderate" will effectively result in a lower standard than that required by the statute.[178]

The IRS's Notice of Proposed Rulemaking notes that "[t]he proposed regulations do not adopt a 'principal architect' approach to the application of section 7623(b)(3), based in part on the plain language of the statutory provision, which does not require a single planner."[179] This statement is accurate but it is also misleading. The concept of the "chief architect" or "chief wrongdoer" has been used by Congress and the Courts repeatedly, in discussing "planned and initiated" in the context of the False Claims Act, to signify the key person or persons responsible for planning and initiating rather than the lieutenants. The phrase "chief architect" or "principal architect" conveys strongly and clearly who is limited or barred from receiving an IRS whistleblower award, and should therefore be adopted.

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[177] 77 Fed. Reg. 74812 (proposed 26 C.F.R. § 301.7623-4(c)(3)(ii)).
[178] Id. (proposed 26 C.F.R. § 301.7623-4(c)(3)(iii)(A)).
[179] Id. at 74803.

The need for the "chief architect" or "principal architect" standard is underscored by the regulations' use of "primary", "significant" and "moderate" categories for "planned and initiated."[180] Again, these categories are unsupported by the statute, and risk being implemented in a way that a whistleblower can be something other than the "chief architect"—a "moderately involved architect," for example—and still be subject to the limitations of section 7623(b)(3). Such a policy will have the effect of discouraging scores of knowledgeable insiders from coming forward to assist the IRS regarding tax evasion and fraud. While the NWC appreciates that the IRS desires to show consistency and a known framework for making decisions about reducing awards under section 7623(b)(3), the proposed solution is vague and contrary to statutory language and Congressional intent.

2. Comments on Examples Illustrating the Proposed "Planned and Initiated" Regulations

The proposed regulations include several "examples [] intended to illustrate the operation of the computational framework" for reduction of awards for whistleblowers who "planned and initiated" the underlying action.[181]

Regarding examples 1 and 2, the NWC agrees that both examples meet the three threshold tests: Individuals A and C, respectively, did not plan, did not initiate, and did not have reason to know of any tax implications.

The NWC is, however, concerned that it is precisely individuals such as A and C that the IRS will subject to a reduction in their award based on the negative factors in proposed sections 301.7623-4(a)(2)(ii) and (iii). If the Corporation issued a bonus based on its increased profits due to the savings from independent contractor, it is unclear whether A and C "contributed" with their actions within the meaning of the proposed regulations. The inappropriately vague and expansive definition of "contributed" or "profited" contained in the IRS's proposed computational framework should be clarified and greatly limited.

With respect to example 3, the fact that D initiated the action should be made more clear by the example. D's initiation of the action appears to be assumed, but is not clear in the example's facts. This ambiguity on the question of initiation is underscored by the fact that the example states that "D planned the transactions, prepared the necessary documents and knew the tax implications of the transactions," yet does not mention that D initiated the transaction.[182] The example should be clarified accordingly. As discussed earlier, the facts should be clarified that D is not a "moderate" planner and initiator but rather that there are mitigating factors which support something less than zero.

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[180] Id. at 74812 (proposed 26 C.F.R. § 301.7623-4(c)(3)(iii)(A)).
[181] Id. (proposed 26 C.F.R. § 301.7623-4(c)(3)(v)).
[182] Id. 74813.

Regarding, example 4, the fact that D was the initiator should be clarified. Again, the sentence "[i]ndividual D planned the transaction, prepared the necessary documents, and knew the tax implications of the transaction," is ambiguous as to whether D initiated the transaction or not.[183] The facts of the example should clearly show that D also initiated this activity as well. The threshold determination implemented by the proposed regulations is a three-part test—that D meets the "initiated" prong of the test is not clear. Again, rather than using the misleading term of "significant level" planner and initiator, the IRS should instead clarify that there were limited mitigating factors given the facts, and therefore the whistleblower's award was reduced.

Similarly, the IRS should clarify in the facts of example 5 that individual E initiated the transaction and was its sole designer. Again, the IRS should state that, regarding individual E, the facts support "limited mitigation." This will help minimize any future confusion as to whether an individual who does not truly meet the statutory planned and initiated standard could nonetheless be wrongly subject to the regulations' planned and initiated test.

B. Factors Determining Percentage of Award

With respect to determining the percentage amount of an award, the proposed regulations "adopt a fixed percentage approach" to attempt to "avoid[] having to draw fine distinctions that might seem unfair and arbitrary."[184] The National Whistleblowers Center appreciates the Service's desire to bring fixed principles to what is inherently a subjective exercise, and believes that the general approach adopted by the proposed regulations is appropriate. Notice to whistleblowers of, and adherence to, published guidelines and factors will enhance the transparency of the award determination process, and will enhance the efficient functioning of the program by letting whistleblowers know what to expect, and by "promot[ing] consistency in the award determination process."[185]

The proposed regulations, however, begin the analysis of a whistleblower's award percentage "at the statutory minimum."[186] Arbitrarily beginning the analysis at the lowest amount possible sends the wrong message to whistleblowers, is without statutory basis. Moreover, the Service's chosen method of weighing positive and negative factors suggests a starting point in the middle of the statutory range is a more appropriate method to generate consistent awards.

1. Positive Factors

Regarding proposed positive factor (viii), "[t]he information provided had an impact on the behavior of the taxpayer (and/or other taxpayers including related taxpayers/actions) on a going-forward basis,"[187] The IRS should recognize that, while the

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[183] Id.
[184] Id. at 74803.
[185] Id.
[186] Id. at 74811 (proposed 26 C.F.R. § 301.7623-4(c)).
[187] Id. at 74810 (proposed 26 C.F.R. § 301.7623-4(b)(1)(viii)).

whistleblower does not receive an award under section 7623 based on changing taxpayer behavior, the public will often benefit not only from a taxpayer's payment of taxes owed, but also from increased compliance going forward. This compliance may often have a broader impact across an industry or sector of the population, and should be a factor weighed strongly in favor of an increased percentage award.

Additionally, we respond to the IRS's specific request for comment on "[w]hether there are additional positive factors [...] that would be useful for the Whistleblower Office to consider in determining the amount of awards under these regulations."[188]

As discussed above, it is inappropriate for the IRS to limit a whistleblower due to a whistleblower's failure to specifically identify a particular taxpayer, as the language section 7623(b) not only does not require a whistleblower to identify a taxpayer, but also specifically requires that an award be paid where the IRS collects proceeds based on a whistleblower's information without regard to whether the whistleblower specifically identified the taxpayer in question. It would, however, be appropriate for the IRS to consider whether the information identifies the specific taxpayer (or promoter) engaged in tax noncompliance as a positive factor in determining the award percentage.

Similarly, while it is inappropriate for the IRS to limit related actions by requiring a whistleblower to specifically identify related parties, the Service should consider, as a positive factor in determining an award percentage, whether the information provided by the whistleblower and taxpayers identified by the whistleblower allowed the IRS to identify a related party engaged in tax noncompliance that the IRS was unlikely to identify, or that was particularly difficult to detect through the IRS's exercise of reasonable diligence. Section 7623 views the award to the whistleblower as encompassing both original actions and related actions. The positive factors used in determining an award percentage should therefore all consider related parties, e.g., if the individual provided exceptional cooperation and assistance (as in proposed factor v) relevant for both the action but also all related actions.

The National Whistleblowers Center is concerned that, in practice, the proposed regulations limit all related actions to the statutory minimum of fifteen percent, regardless of any other factors. Such a result is not in keeping with section 7623's language and Congressional intent, and would ultimately impede the goals and policies of the whistleblower statute and the IRS generally. The IRS should be encouraging whistleblowers who can cast a wide net. The statute envisions an award of fifteen to thirty percent for related parties, as they are included within the scope of section 7623(b)(1). Additionally, Congress created a separate category for "less substantial" contributions in section 7623(b)(2), and specifically defined who is in that category. It is inappropriate for the IRS and Treasury to create a third category for related actions with a ceiling of fifteen percent.

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[188] Id. at 74803.

Lastly, the IRS should consider whether the Service would have discovered the tax violation 'but for' the whistleblower's information. If it determines that it likely would not, the IRS should view this as a strongly positive factor for increasing the award size. Similarly, with respect to related actions, the IRS should consider the 'nexus' between the related action and any original action. If the related action is closely related to an original action, either in time or through the direct relationship of the parties involves, the Service should consider this close relationship a positive factor in determining an award percentage.

2. Negative Factors

Regarding proposed negative factor (i), "[t]he individual delayed informing the IRS after learning the relevant facts, particularly if the delay adversely affected the IRS's ability to pursue an action or issue," the IRS ought to consider mitigating facts for why the individual did not promptly inform the IRS.[189] As courts have noted in the False Claims Act context it is improper to punish a whistleblower because they didn't race to the phone upon hearing of noncompliance. It is commonplace for whistleblowers to first spend considerable time and effort raising their concerns internally. In the context of tax, whistleblowers are often subject to significant retaliation, as well as the threat of physical harm and prison time (if the whistleblower resides in some foreign jurisdictions). As the Whistleblower Office's 2012 Report to Congress recognizes, there is no federal law protecting tax whistleblowers from retaliation. The IRS should recognize that coming forward with information is often a major life decision for a whistleblower, and should weigh this against any delay in determining an award percentage.

Proposed negative factor (ii), "[t]he individual contributed to the underpayment of tax or tax noncompliance identified," contains an inappropriate backdoor reduction of award percentage based on whether a taxpayer "planned and initiated" the underlying violations. In section 7623(b)(3), Congress specifically provided that there should be a reduction or denial of an award "brought by an individual who planned and initiated the actions."[190] Given that Congress has spoken on the specific issue, it is inappropriate for the IRS to punish someone for "a little" planning and initiating. Moreover, this also goes against the intent and policy of the statute, namely encouraging knowledgeable insiders to come forward, particularly those who may have had some involvement with the underlying actions, and thus have valuable and specific information. The IRS has stated repeatedly that it values these whistleblowers.

Yet, regulations such as those proposed fail to recognize the reality that in the tax context, the most valuable and knowledgeable information will often come from those who have contributed to the tax noncompliance to some extent—that is simply how whistleblowers often come to the knowledge. As the IRS knows, those engaging in tax evasion try to conceal their wrongdoing not only from the Service, but also from those who are not involved. While the NWC has grave reservations about this factor, at a minimum, it should be reserved only for those instances where the individual fell just

[189] Id. at 74811 (proposed 26 C.F.R. § 301.7623-4(b)(2)(i)).
[190] 26 U.S.C. § 7623(b)(3).

short of meeting section 7623(b)(3)'s planned and initiated test. The current "contributed" language is far too broad.

The positive and negative factors, in their proposed form, combine to thwart Congressional policy of awarding a whistleblower up to thirty percent. Positive factors include providing detailed information, "thoroughly presented" facts of the tax noncompliance, identification of taxpayers who are noncompliant, information identifying connections – in short, the entire transaction. The expectation, as outlined in the proposed regulations' factors, is that the whistleblower somehow accomplish this without delay after learning the facts, that the whistleblower do so without contributing in any way to the tax noncompliance, and that the whistleblower not profit in any way—including by earning a salary by doing so.

From many years of experience working with whistleblowers, it is clear to us that the IRS has created a fantasy. Informed, knowledgeable insiders that can meet the regulations' positive factors will, by their nature, run afoul of its negative factors. The IRS has set an unreasonably high bar for whistleblowers—no matter how valuable the information, whistleblowers will almost always fail to achieve a 30% award.[191]

The IRS should remember the courts' admonition to the Department of Justice in the context of the False Claims Act:

> It is the crux of the argument by the United States Department of Justice that [the whistleblower] waited too long,; that had he supplied the information available to him when he became aware of the truth, he arguably could have reduced the loss to the United States. [...] It is very easy to fall into the trap of 'should have.' Lawyers particularly are prone to use that argument when after the benefit of excellent hindsight a different method of procedure can be devised.[192]

The IRS must recognize—as Congress has—that for a whistleblower the decision to come forward is often a step into the void, with a host of unknowns. This is particularly the case in the tax context where the years-long wait and limited communication between the IRS and whistleblower only add to the uncertainty for the whistleblower, who, as the IRS has noted, has no recourse under Federal law if retaliated against. The IRS would best meet the policy goals of the Congress regarding the whistleblower program under section 7623 if it tempered the proposed negative factors with a recognition of the on-the-ground realities faced by whistleblowers.

C. Net Operating Losses (NOLs)

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[191] Although the IRS states that it designed the proposed factors to lead to an award of 30 percent of collected proceeds "only in extraordinary cases," 77 Feg. Reg. 74803, we note that nothing in the statute suggests that Congress intended such a result, let alone one where it is essentially impossible for a whistleblower to achieve the statutory maximum.

[192] U.S. v. General Electric, 808 F. Supp. 580, 583 (S.D. Ohio 1992)

Aside from the aspects of the IRS's proposed definition of "collected proceeds" discussed above, "the proposed regulations' definition of collected proceeds also addresses refund netting and the treatment of tax attributes generally, which include net operating losses (NOLs)."[193] The proposed regulations treat NOLs as "component elements of a taxpayer's liability," and implement a "computational rule" whereby "the IRS will compute the amount of collected proceeds taking into account all information known with respect to the taxpayer's account" at the time of the computation.[194] Significantly, this proposed computational rule does not "require the IRS to continue tracking these taxpayers, who may not be under examination, and attributes into future years, given the significant costs and heavy administrative burden that would be required."[195]

The National Whistleblowers Center disagrees with the IRS and Treasury position on NOLs reflected in the proposed regulations, and agrees with Senator Grassley's view that the proper procedure is for the Service to periodically review information on taxpayers for which NOLs constitute potential collected proceeds to monitor whether the IRS had collected NOL proceeds from the taxpayer, and to do so for a reasonable period of time.[196] The National Whistleblowers Center also agrees that Senator Grassley's proposed window of ten years is a reasonable compromise between the IRS's administrative burdens and the Congressionally-established right of whistleblowers to collect an award under section 7623(b) for proceeds—including NOLs—collected by the IRS based on information the whistleblower provided.[197]

Ten years is also the statute of limitations for collections. It is questionable that the proposed regulations seek to impose no time allowance whatsoever for payments to whistleblowers, when there is no such restriction in the statute itself. At the same time, there is a ten-year period for the IRS to collect from taxpayers. It is not unduly burdensome for the IRS to review a taxpayer's filings once a year to ascertain whether taxes have been paid. Again, the IRS, without difficulty, tracks taxes owed to the IRS by a company or individual for up to ten years. Failing to do the same when it comes to whistleblowers not only signals hostility toward whistleblowers on the part of the Service, but is manifestly contrary to the statutory language, which requires payment of collected proceeds—without regard to whether they are disallowed NOLs and without time limitation. The benefits to the Treasury of encouraging whistleblowers are great and the overall positive impact on encouraging whistleblowers is significant enough to outweigh the additional administrative burden of tracking NOLs for a reasonable period of time. Moreover, the administrative burden is currently negligible, and for the

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[193] 77 Fed. Reg. 74800.
[194] Id.
[195] Id. at 74801.
[196] See Grassley Letter.
[197] Id.

foreseeable future is likely to remain low—the IRS has, to date, given out only five section 7623(b) since the enactment of the 2006 Act.[198]

By not giving credit to a whistleblower for reducing NOLs, the proposed regulations add another layer of uncertainty to whistleblowers considering whether to risk coming forward with information, and discourages them from providing valuable and knowledgeable information. The proposed regulations deny an award where the whistleblower comes forward, provides valuable information, which the IRS acts on, and based on which taxes are ultimately collected, simply because the taxes are not collected immediately. Such a limitation is not only arbitrary but is, on its face, counter to the spirit and Congressional policy of the whistleblower program encouraging whistleblowers to come forward by providing them awards. Section 7623 contains no time limitation for when proceeds must be collected for a whistleblower to receive an award. The appropriate policy—and what is required by the language of the statute—is that the eligible whistleblower be paid an award at such reasonable time—i.e., ten years—that taxes are collected and all rights to refund have expired.

Lastly, as a matter of procedure, the National Whistleblowers Center suggests that, in addition to an annual determination of whether tax has been collected from the taxpayer by disallowing a NOL, the rules of proportionality proposed under "partial collection" be followed in determining the amount or percentage going to the whistleblower.

D. List of Ineligible Claimants

"The proposed rules also include [...] a list of ineligible claimants."[199] Those meeting the criteria "are not eligible to file a claim for award or receive an award under section 7623."[200]

The National Whistleblowers Center believes section 7623 itself contains in its language all categorical exclusions Congress intended with respect to the whistleblower program, and does not believe the list of ineligible claimants should be expanded. The only categorical limitation on awards provided in the statute itself is the bar for individuals who have planned and initiated the transaction, and the only category of claimants entirely excluded by the statute are claimants who were convicted of a crime for planning and initiating the underlying action.[201]

Of special concern is the proposed regulations' limitation on "[a]n individual who is or was required by Federal law or regulation to disclose the information or who is or was precluded by Federal law or regulation from disclosing the information."[202] This proposed limitation is both overbroad, and is vague as to which individuals are excluded

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[198] See IRS Whistleblower Office, "Fiscal Year 2012 Report to the Congress on the Use of Section 7623" at 6 ("Five claims have been paid under the revised law").

[199] 77 Fed. Reg. 74799.

[200] Id. at 74805 (proposed 26 C.F.R. § 301.7623-1(b)(2)).

[201] See 26 U.S.C. § 7623(b)(3).

[202] 77 Fed. Reg. 74805 (proposed 26 C.F.R. § 301.7623-1(b)(2)(iii)).

from receiving an award under section 7623. This proposed provision should be eliminated, or alternatively, should be reworked to specify exactly which categories of potential claimants are affected.[203] Rather than clarifying a potential claimant's eligibility, the rule, as proposed, is confusingly vague, and undermines section 7623's purpose of encouraging whistleblowers to come forward. Whistleblowers crave as much certainty as possible when coming forward—often jeopardizing their families and livelihood. Paragraph (b)(2)(iii) brings only uncertainty.

Treasury and IRS should additionally provide the statutory support for the limitations under proposed section 301.7623-1(2), particularly given the plain language of the statute itself provides only one limitation for awards, namely that for those individuals "convicted of criminal conduct arising from [planning and initiating the underlying action]."[204] As the canon of statutory construction holds: *expressio unius est excusio alterius*, the inclusion of one is the exclusion of others.[205]

Additionally, there are numerous individuals who may be considered "mandatory reporters" under various state laws or rules of professional responsibility. This class of potential whistleblowers is often in the best position to identify fraud, and was unquestionably within the group of persons for whom Congress intended to create a monetary incentive for reporting. Section 7623 does not provide any support whatsoever for excluding these so-called "mandatory reporters." To the contrary, the empirical data demonstrate that despite legal requirements for making disclosures, the overwhelming majority of fraud still goes undetected. We strongly object to proposed rule 301.7623-1(b)(2) and any other rule that would increase the number of categorically disqualified potential claimants beyond that specified by the statute's plain language.

III. THE PROPOSED REGULATIONS DO NOT GO FAR ENOUGH IN ESTABLISHING A TIMETABLE FOR ADMINISTRATIVE ACTION AND COMMUNICATING WITH WHISTLEBLOWERS

In proposed regulation 26 C.F.R. § 301.7623-3, the IRS "describes the administrative proceedings applicable to claims for award under both section 7623(a) and section 7623(b)."[206]

The IRS and Treasury should be commended for their focus on improving communication between the government and whistleblowers. However, we believe more work can be done in this regard, and that improving communication will not only benefit whistleblowers but will increase the efficiency and effectiveness of the IRS

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[203] Opportunity to comment should be provided for any revised provision.

[204] 26 U.S.C. § 7623(b)(3).

[205] See, e.g., Andrus v. Glover Const. Co., 446 U.S. 608, 616-17 (1980) (citing Continental Casualty Co. v. United States, 314 U.S. 527, 533 (1942)) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent.").

[206] 77 Fed. Reg. 74801.

whistleblower program. We believe the Whistleblower Office should establish regulatory timeframes for administrative action, should communicate more with whistleblowers and begin administrative proceedings prior to a preliminary award, and enhance confidentiality protections for whistleblowers.

A. The Proposed Regulations Should Include Time Limits for Administrative Action

While the IRS's proposed rules for "whistleblower administrative proceedings." provide needed guidelines relating to preliminary award recommendations and communications between the Whistleblower Office and whistleblowers, the receipt of a preliminary award recommendation comes too late in the process to assist with tax administration and too late to provide whistleblowers meaningful opportunity to comment.[207]

In practice these preliminary award letters will be sent only after the whistleblower has already spent years waiting, and after the IRS has already solidified its position regarding the whistleblower's award determination. Waiting to communicate with a whistleblower for the first time at the preliminary award stage therefore fails to serve the policy goal of effectively administering the whistleblower program. The Whistleblower Office's recent 2012 annual report to Congress on the whistleblower program highlights the extraordinary length that a whistleblower must wait for a determination—on average several years—and demonstrates the need for improved communication.[208]

The IRS ought to promulgate regulations requiring the IRS to issue a "Notice of Administrative Review" to the whistleblower within 90 days of the taxpayer paying—or agreeing to pay—taxes or penalties in response to an IRS action based on information provided by the whistleblower. This communication would be limited to notifying the whistleblower that taxes have been paid based on the whistleblower's information and that these taxes are, where appropriate, not considered collected proceeds at this time. The IRS would thereby inform the taxpayer they should submit any information relevant to a potential award determination within 30 days. This "Notice of Administrative Review" would begin the administrative process between the whistleblower and the IRS, and the letter notice and its contents would be subject to section 6103 protections.

The IRS ought additionally to send a "Notice of Action" within 90 days after the collection of proceeds by the Service (i.e., the taxpayer has exhausted all appeal rights). This notice ought to state proceeds have been collected, provide the whistleblower a general timeframe for when the IRS anticipates providing a preliminary award letter, and also advise the whistleblower on any legal or factual issues that the whistleblower may wish to address. This notice and its contents would also be subject to 6103 protections.

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[207] Id. at 74808 (proposed 26 C.F.R. § 301.7623-3).

[208] See IRS Whistleblower Office, "Fiscal Year 2012 Report to the Congress on the Use of Section 7623" ("WBO 2012 Report") at 10 (average wait for open claims at the Whistleblower Office Award Evaluation stage is 1141 days, or 3.12 years; average wait at the Operating Division Field Examination is 424 days).

This policy of beginning the administrative process with a Notice of Administrative Review and a Notice of Action will significantly aid the administration of the whistleblower program. First, it will, early in the administrative process, provide the IRS with timely and relevant information regarding legal or factual issues that should be considered in making an award, greatly reducing the need to revisit a matter after a preliminary award has been made. Second, it will provide whistleblowers a meaningful opportunity to comment on legal and factual issues prior to a preliminary award being made, improving the quality of administrative outcomes and reducing appeals. Third, the notices will serve as a check to ensure that the timelines and policy goals established in Steven Miller's June 20, 2012 memorandum are followed.[209] Fourth, the notices will greatly increase the transparency of the program vis-à-vis whistleblowers by providing timely information on the status of whistleblower's claims. This transparency will encourage more whistleblowers to come forward and participate in the section 7623 whistleblower program.

As the 2012 Whistleblower Office Report to Congress highlights, due to several factors, the time between a submission and an award is significant – often stretching to years.[210] This delay, however, includes significant time even after the taxpayer has made payments to the IRS. This delay, along with a lack of communication with whistleblowers, greatly undermines the success of the program and hamstrings the administration of the whistleblower program, and the policy goals of the statute. The lack of communication and a time frame for administrative decisions discourages whistleblowers from coming forward – and is one of the top complaints that the NWC hears from whistleblowers about the IRS program. A modest improvement in communication and a beginning of the administrative process at the logical point when taxes are first paid will be a big improvement, and will greatly benefit both the whistleblower program and the IRS.

The IRS's comments to the proposed regulations themselves state that the Service envisions the whistleblower administrative proceeding beginning even before there is a final determination of tax in the underlying taxpayer action. This objective is laudable, but we are concerned that preliminary award recommendation letters will only be issued long after a final determination of tax—a concern borne out by the 2012 Whistleblower Office Report to Congress. For these reasons, the IRS ought to implement the above recommendations, which will more practically ensure the policy goals of early and improved communication.

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[209] See Steven T. Miller, Field Directive Dated June 20, 2010 at 2, available at http://www.irs.gov/pub/irs-utl/field_directive_dated_june_20_2012.pdf ("claims received should be initially evaluated by the Whistleblower Office within 90 days," "review by subject matter experts should be completed within 90 days of receipt," and "whistleblowers should be notified within 90 days of when collected proceeds can be finally determined").

[210] See, supra, note 207.

Additionally, where a whistleblower's claim is still being considered for action, the IRS Whistleblower Office ought to periodically communicate to the whistleblower that their claim remains "under review." Similarly, where the IRS has proceeded based on a whistleblower's information, the IRS Whistleblower Office ought to communicate to the whistleblower that their claim is "active." These communications could be made in a limited manner and time frame (e.g., every 6 months) so as to not overburden the Whistleblower Office's limited administrative resources. These would also be subject to section 6103 confidentiality protections.

B. Communication With Whistleblowers

As discussed in more detail above, the NWC believes that beginning the administrative proceeding before a final determination of tax will provide a meaningful benefit for whistleblowers. The NWC strongly encourages the IRS to involve and benefit from the expertise of the whistleblower and their attorneys during examination of the taxpayer. Where the IRS elects not to do so, informing the whistleblower when taxes are first received by the IRS, and beginning the administrative proceeding at that time, profoundly benefit whistleblowers and the whistleblower program.

Whistleblowers and their advisors are often accustomed to the False Claims Act which provides, roughly, for continuous and ongoing communication of the status of the whistleblower's claim, often because the whistleblowers themselves are in control. The IRS whistleblower claim is, under current policies and procedures, a black hole. This lack of communication and lack of certainty as to claims' status undermines the whistleblower program and discourages other whistleblowers from coming forward. Having dealt with many whistleblowers over the years, the NWC is certain that communications regarding the status of a claim, as well as a general timeframe for administrative action, would greatly enhance the whistleblower program's effectiveness. The earlier these communications are made, the better—and they should be made well before a final determination of tax. Improved communication and beginning the administrative proceeding earlier benefit to the IRS regarding tax administration—by providing detailed information and sending a positive message of support for whistleblowers and the whistleblower program, more informed whistleblowers will be encouraged to participate, and the Service can collect more taxes and related fines and penalties.

The IRS's proposed regulations additionally provide that where the Whistleblower Office rejects or denies a claim, "[t]he Whistleblower Office will send to the claimant a preliminary denial letter that states the basis for the denial of the claim," and the claimant will then have 30 days to respond with comments.[211]

We applaud the IRS's proposed regulations on denials, allowing for an opportunity at the administrative level for the whistleblower to respond to a denial. A candid discussion between the IRS and the whistleblower regarding a claim's denial will strengthen support for the program with greater transparency and perceived fairness, will encourage better

[211] 77 Fed. Reg. 74809 (proposed 26 C.F.R. § 301.7623-3(c)(7)).

submissions—especially as it becomes more widely understood what makes for a good submission—and will limit appeals of denials in Tax Court.

C. Confidentiality Protections

To minimize disclosure of confidential return information, while still "providing meaningful opportunities for claimants to participate in whistleblower administrative proceedings," the proposed regulations adopt the use of a confidentiality agreement between the whistleblower and the Service.[212]

While the NWC appreciates the IRS's commitment to meaningful and productive collaboration with whistleblowers, and generally approves procedures in this section, we encourage setting of reasonable timelines for both the whistleblower and the IRS. In particular, the IRS should set a timetable for responding to a whistleblower whether the whistleblower responds to a preliminary award letter by entering into a confidentiality agreement, as under proposed section 301.7623-3(c)(3)(iii), or submits comments without entering into a confidentiality agreement, as under proposed section 301.7623-3(c)(3)(iv).[213]

Given that a whistleblower has often waited years to receive a preliminary award letter it is understandable that she is concerned about the timeline for any review or appeal of the preliminary award letter. We recognize that the IRS has administrative burdens and would therefore suggest a reasonable period of sixty days for the IRS to respond to any responsive comments provided under proposed section 301.7623-3(c)(3)(iv), or to provide the whistleblower a "detailed report" under proposed section 301.7623-3(c)(4).[214] The whistleblower should be assured that the IRS will move in a reasonable period in providing the report and responding to the whistleblower's comments. Otherwise, the benefit to the IRS and the whistleblower of reviewing preliminary awards is limited.

The IRS has also asked "[w]hether additional safeguards should be adopted to further protect taxpayer return information disclosed in the course of whistleblower administrative proceedings and, if so, what safeguards would be effective and appropriate."[215] The NWC takes seriously the need to protect taxpayer return information from inappropriate disclosure. We encourage the IRS to require that, in all cases of discovery for taxpayer information in the tax court, as well as in other tax court proceedings, that the IRS seek a protective order for the information and consider other protections, such as *in camera* review, where appropriate. The IRS revealed, in the Whistleblower Office's 2012 Report to Congress, that protective orders were only sought in "some" cases.[216] It should be the IRS's policy to seek protective orders in all cases.

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[212] Id. at 74804; see also id. at 74809 (proposed 26 C.F.R. § 301.7623-3(c)(2)(iv)).
[213] Id. at 74809.
[214] Id.
[215] Id. at 74802.
[216] See IRS Whistleblower Office, "Fiscal Year 2012 Report to the Congress on the Use of Section 7623."

D. The Proposed Regulations Should Include Guidance Allowing the Whistleblower Office to Transfer an Award to Attorney Trust Accounts

The proposed regulations should, on grounds of further encouraging whistleblowing, as well as on Constitutional grounds, include guidance allowing the Whistleblower Office to directly transfer section 7623 awards to claimants' attorney trust accounts.

It is well established that the right to effective assistance of counsel is a fundamental constitutional right.[217] Without access to competent, well-qualified attorneys, many potential whistleblowers will not step forward and risk their careers—or even their freedom—in order to provide the IRS with original information. The IRS whistleblower rules must therefore consider the impact of its procedures on the ability of whistleblowers to obtain the effective assistance of counsel.

One significant impediment to obtaining an attorney is the IRS rule that prohibits or restricts the payment of a reward into an authorized "IOLTA" client trust account. Such transfers are standard practice under the False Claims Act, where a *qui tam* reward or proceeds obtained in a settlement can be paid directly into a client trust account. In this manner, the attorney can ensure that all responsible persons, such as experts and attorneys who worked on the case, are paid.[218] Client trust accounts are carefully policed by the Bar, and violating the strict accounting procedures mandated under these rules generally results in severe sanctions and even disbarment.

If reward proceeds are not placed in a client trust account the attorney is at risk, not only of not being paid, but also of being held liable for third-party vendor costs that were incurred during the representation, including expert witness fees.

The rules governing client trust accounts are carefully constructed to ensure that clients—including whistleblowers who utilize the IRS rewards program—are fully protected.[219] As an example, D.C. Bar Rule 1.15, and the ethics opinions interpreting that rule, provide clear and unequivocal protection for clients whose funds are deposited in such accounts. These protections adequately address any interest the IRS may have in ensuring that rewards paid are in fact paid to the whistleblower. Based on these important bar rules, the IRS should, with the written consent of the whistleblower, permit reward payment to be made directly into a client trust account. Any rule or policy to the contrary will have a chilling effect on the willingness of qualified attorneys undertake the representation of clients—and therefore on the ability of potential whistleblowers to obtain such representation—and will undermine the effectiveness of the program.

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[217] See Martin v. Lauer, 686 F.2d 24 (D.C. 1982); Jacobs v. Schiffer, 47 F.Supp.2d 16 (D.D.C. 1999); Jacobs v. Schiffer, 204 F.3d 259 (D.C. Cir. 2000).

[218] In many jurisdictions, it is the responsibility of counsel, not the client, to pay any experts retained.

[219] See D.C. Bar Rule 1.15, and Comments thereto (citing several Ethics Opinions in support).

Moreover, any IRS rule prohibiting the right of a whistleblower to request that his or her reward be paid directly into his or her client trust account would violate whistleblower's constitutional right to counsel and also violate other laws, rules and regulations governing a client's right to control his or her money and to obtain counsel of his or her choice. The right to counsel implies a right for a client to ensure that his or her reward money is deposited into a client trust account, especially when such a deposit is required as a term or condition in a client representation agreement. It would be unfair and unconstitutional for the IRS to enforce a rule that renders it impossible for a whistleblower to obtain counsel of his or her choice in circumstances in which the prospective attorney requires that the reward be deposited into a IOLTA-approved client trust account as a term and condition of representation.

IV. COMMENTS RELATING TO OTHER ISSUES

The IRS has also requested comments relating to other issues, including "[w]hether electronic claim filing would be appropriate and beneficial to the claimants, and, if so, what features should be included,"[220] "[w]hether the IRS should determine and pay multiple awards in cases in which two or more independent claims relate to the same collected proceeds,"[221] as well as "whether the proposed effective dates are appropriate."[222] As requested we provide our comments on these issues.

A. Electronic Submissions

The National Whistleblowers Center appreciates the Treasury and IRS offering electronic filing, and believes it would make it easier for whistleblowers to file in certain cases. We also recognize the administrative burden placed on the IRS by the whistleblower program and would view electronic filing as beneficial only if it would assist the IRS Whistleblower Office in its work. The Whistleblower Office's limited administrative resources would be better spent addressing the areas of concern identified in our above comments to the proposed regulations, and in expediting the review of submitted whistleblower claims.

The IRS Whistleblower Office encourages—and the whistleblower program benefits from—whistleblowers coming forward with additional information and documentation to supplement their claims. Any electronic filing should provide for a means of sending such additional information electronically as well.

B. Proposed Effective Dates & Retroactivity

A rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new disability in respect to transactions or

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[220] 77 Fed. Reg. 74800.
[221] Id. at 74803
[222] Id. at 74804.

considerations already past."[223] Retroactive regulations must specifically be authorized by Congress.[224]

As discussed throughout these comments, the proposed regulations undeniably have retroactive effect in that they narrow the scope of the whistleblower program and disqualify whistleblowers or otherwise reduce whistleblower awards. This is especially the case with respect to the regulations' definitions of "related action," "proceeds based on" and "collected proceeds." Congress has not authorized the IRS to promulgate retroactive regulations regarding section 7623. Consequently, the effective date of the regulations should be prospective, applying only to submissions made after the regulations have been finalized.

C. Multiple Awards and Claimants

We agree with the IRS's approach to awarding multiple claimants, and note that the False Claims Act follows a similar approach to multiple claims by whistleblowers. The IRS and the whistleblower program will benefit from encouraging whistleblowers to come forward and provide novel information from different sources that will strengthen a case.

D. Final Determination of Tax

The IRS's proposed regulations provide that:

> a final determination of tax means that the proceeds resulting from the action(s) subject to the award determination have been collected and either the statutory period for filing a claim for refund has expired or the taxpayer(s) subject to the action(s) and the IRS have agreed with finality to the tax or other liabilities for the period(s) at issue and the taxpayer(s) have waived the right to file a claim for refund.[225]

This definition, however, is contrary to the plain language of the statute and congressional intent. When there is finality of the tax on the issue raised by the whistleblower, and the IRS has collected proceeds, that is the end of it and the whistleblower is entitled to an award.

For purposes of section 7623, it is irrelevant that there are other issues involved for the same tax period or. The statute required that the IRS pay the whistleblower an award where proceeds have been collected. The statute does not support the overbroad test that

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[223] Marrie v. S.E.C., 374 F.3d 1196, 1207 (D.C. Cir. 2004); see also Hughes Aircraft Co. v. U.S. *ex rel.* Schumer, 520 U.S. 939, 947 (1997).

[224] Bowen v. Georgetown University Hosp., 488 U.S. 204, 207 (1988) ("a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress").

[225] 77 Fed. Reg. 74814 (proposed 26 C.F.R. § 301.7623-4(d)(2)).

the IRS seeks to implement in the proposed regulations. The IRS cannot retain proceeds that have been collected merely on the grounds that the IRS may have to refund the taxpayer down the road for an entirely separate and unrelated issue, or because issues unrelated to the section 7623 proceeds remain outstanding.

V. Conclusion and Request for Public Hearing

The respect owed to IRS interpretations of section 7623 through regulation will depend upon the thoroughness evident in its consideration, the validity of its reasoning, and upon the Service's consistency with its earlier and later pronouncements.[226] Under the familiar Chevron framework, an agency's rulemaking is invalid if it is inconsistent with the "unambiguously expressed intent of Congress."[227]

An agency interpretation of a statute is only entitled to deference on issues where Congressional intent is ambiguous, or if the statute is silent on the matter, in which case courts may only review whether the agency's rules derive from a "permissible construction of the statute."[228] No deference is owed to an agency when "Congress has directly spoken to the precise question at issue."[229] Additionally, courts are not obligated to defer to an agency's interpretations that are contrary to the plain and sensible meaning of the statute.[230] Finally, "judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue."[231]

To determine Congressional intent, courts first look to the plain language of the statute and employ "traditional tools of statutory construction."[232] For the above reasons, the plain language of section 7623, as well as "traditional tools of statutory construction" foreclose the IRS's narrow interpretation of section 7623, particularly regarding the proposed definitions of "proceeds based on," "related action," "collected proceeds," and "planned and initiated."[233]

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[226] Tax and Accounting Software Corp. v. U.S., 301 F.3d 1254 (10th Cir. 2002).

[227] Chevron v. Natural Resources Defense Counsel, 467 U.S. 837, 843 (1984).

[228] Id.

[229] Id. at 842

[230] See Mota v. Mukasey, 543 F.3d 1165, 1167 (9th Cir. 2008).

[231] Monex Int'l, Ltd. v. Commodity Futures Trading Comm'n, 83 F.3d 1130, 1133 (9th Cir. 1996).

[232] Chevron, 476 U.S. at 843 n.9; see also I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 448 (1987); Natural Resources Defense Council v. E.P.A., 489 F.3d 1250 (D.C. Cir. 2007).

[233] For the same reasons, the Service's proposed changes to Internal Revenue Manual § 25.2.2—in particular paragraphs 25.2.2.1(7) and 25.2.2.13(1), which reflect the IRS's erroneous interpretations, are invalid. See Stephen Whitlock, "Updates to Internal Revenue Manual (IRM) 25.2.2 Information and Whistleblower Awards, Whistleblower Awards," WO-25-0612 (June 7, 2012) (Whistleblower Office memorandum outlining prospective changes).

Rather, section 7623 requires payment of a whistleblower award from all proceeds collected by the Treasury or IRS as a result of any action—or any related action—where the Treasury or IRS proceeds based on a whistleblower's information. Under the plain reading of the statutory language, it is irrelevant what Title of the United States Code the penalty may be codified in, whether the whistleblower specifically identified the taxpayer, whether the taxpayer was one or more degrees removed from the taxpayer identified by the whistleblower, or whether the IRS proceeded based "only" on the whistleblower's information.

In the final analysis, the IRS attempts every argument possible to stingily deny whistleblowers an award based on the benefits they have provided the government. The IRS, however ignores one simple—but critical—fact: Congress could have easily written into section 7623 the limitations it now seeks to impose through regulation. Congress did not. As made clear in these comments, Congress took the opposite tack, repeatedly indicating with clear statutory language that it intended—just as it had in the FCA—whistleblower awards to widely encompass all benefits that the government received due to the whistleblower's information.

If the IRS nonetheless believes that section believes that section 7623 is ambiguous, then it must hew closely to the legislative history of section 7623 and similar laws such as the False Claims Act.[234] Indeed, Congress's *only* intent with respect to section 7623—a fact borne out in the legislative history—was to encourage whistleblowers to come forward with information on tax fraud and related violations. The proposed regulations contradict and undermine this clearly-expressed Congressional intent—they in many ways narrow the scope of the whistleblower program, arbitrarily disqualify certain whistleblowers, create uncertainties as to which whistleblowers are eligible and to what extent awards will be reduced, and erect more hurdles for whistleblowers considering disclosing information to the IRS.

Following section 7623's clear language and Congressional intent, as outlined in these comments, will help ensure that whistleblowers receive an award based on the benefit provided to the government. More importantly, such a decision by the IRS and Treasury will aid the vast majority of honest taxpayers who will shoulder less of a burden as a consequence of the extraordinary assistance to tax administration and revenue collection that will be realized—and to a certain extent has already been realized—by a robust and successful IRS Whistleblower Program that encourages all whistleblowers to come forward.

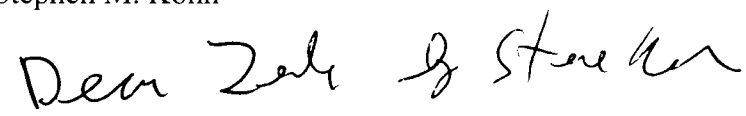
Failure to give effect to section 7623's plain meaning will hurt whistleblowers and cripple the whistleblower program. Moreover, it will frustrate Congressional intent with respect collaborating with whistleblowers to enhance government's ability to enforce its laws. We encourage the IRS to take a hard look at its proposed regulations, and withdraw

[234] See, supra, § I(C)(2). Additionally, we refer the IRS and Treasury to the NWC's comments on rulemaking relating to whistleblower provisions of the Dodd-Frank Act, which fully explain the importance of encouraging whistleblowing.

or reconsider them, where appropriate, in light of our comments. Additionally, we hereby request that we, be allowed to participate in and present testimony at a public hearing on the proposed regulations. The IRS and Treasury should note that, while we are hopeful that the notice and comment process can lead to improved regulatory outcomes, we are prepared to seek judicial review of any final regulations that are contrary to section 7623's language and which impair whistleblowers' rights.

Respectfully Submitted,

Stephen M. Kohn



Dean A. Zerbe

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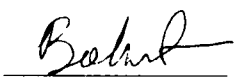

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Attorney for the National Whistleblower Legal Defense and Education Fund.

NWC | NATIONAL WHISTLEBLOWERS CENTER

August 3, 2012

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: IRS Interpretation of Planned and Initiated Limitation of IRC 7623

The National Whistleblower Center (NWC) is writing in response to the invitation from the Deputy Commissioner of the Internal Revenue Service (IRS), Steven Miller, at a recent meeting with whistleblower attorneys to provide comments on potential areas of review and regulation by the IRS and the Department of Treasury in regards to IRC 7623 – the whistleblower award statute.

A key part of the IRS whistleblower statute – Internal Revenue Code (IRC) 7623 – potentially limits the award provided to a whistleblower who has "planned and initiated" the action that led to the underpayment of tax for which the whistleblower seeks an award. It should be understood that the limitation is also a protection – seeking to send a clear signal to whistleblowers who were involved in an activity (but did not plan and initiate) that they will be entitled to an award if they come forward with information.

Unfortunately, the Internal Revenue Manual (IRM), as currently written, has defined "planned and initiated" in a manner that is at odds with the statute, undermines Congressional policy and actively discourages knowledgeable and informed whistleblowers from coming forward. Further, the IRM fails to take into consideration the history and context of the "planned and initiated" limitation– which is based on the 1988 amendments to the False Claims Act (FCA) – as well as the interpretation of "planned and initiated" in the FCA by the courts and the Department of Justice.

IRS and Treasury officials should recognize that correctly interpreting the "planned and initiated" language is a linchpin to the success of the whistleblower program and addressing significant tax evasion.

The IRS's annual report on the whistleblower program acknowledges in the executive summary that vital to the success of the program is encouraging insiders to come forward: "The primary purpose of the Act was to encourage people with knowledge of significant tax noncompliance to provide that information to the IRS . . . **Many of the individuals submitting this information claim to have inside knowledge of the transactions they are reporting, and often provide extensive documentation to support their claims.**" Internal Revenue Service, *Fiscal Year 2011 Report to Congress on the Use of Section 7623*, Jun. 20, 2012 (emphasis added).

The whistleblower program has been a success in assisting the IRS, as acknowledged by the Deputy Commissioner of the IRS Steven T. Miller in his June 20, 2012 memorandum on the program:

> [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.

Unfortunately, the FY 2011 report on the whistleblower program highlights a drop in the number of whistleblower claims that are being filed. We appreciate that senior IRS officials have expressed concerns about the reduction in filings by whistleblowers. While there are a number of factors involved in whistleblowers being reluctant in coming forward, there is no question that the inappropriate and overly broad definition of "planned and initiated" is a significant factor – especially in discouraging key whistleblowers with inside knowledge from submitting information to the IRS.

We take in good faith the IRS's desire to have whistleblowers assist the IRS in addressing tax underpayments and evasion. To that end, it is vital that the implementation of the "planned and initiated" language provide for limitation on awards only to those whistleblowers who are the Principal Person, Chief Architect or Chief Wrongdoer – in keeping with the longstanding guidance by the Congress and the courts as well as the counsel provided by the leading authority in Congress on whistleblowers and successfully encouraging whistleblowers to come forward, Senator Grassley. For the IRS whistleblower program to thrive, a clear signal must be sent that the IRS welcomes and will award whistleblowers who come forward with valuable inside information. The IRS must recognize that whistleblowers with inside information who receive awards will often not be perfect.

The NWC encourages the IRS to remove and rewrite the IRM provisions regarding "planned and initiated" and to also ensure that any regulations on "planned and initiated" conform to Congressional intent as well as the courts' interpretation under the FCA. Such steps will benefit the vast majority of honest taxpayers and will help to ensure the success of the whistleblower program in assisting the IRS in its vital work.

A. The Law – IRS Whistleblower Law § 7623(b)(3) and FCA § 3730(d)(3)

The limitation of awards for tax whistleblowers that "planned and initiated" an action is found in the IRS whistleblower law § 7623(b)(3):

> **If the Whistleblower Office determines that the claim for an award under paragraph (1) or (2) is brought by an individual who planned and initiated the actions that led to the underpayment of tax or actions described in subsection (a)(2), then the Whistleblower Office may appropriately reduce such award.** If such individual is convicted of criminal conduct arising from the role described in the preceding sentence, the Whistleblower Office shall deny any award. IRC § 7623(b)(3) (emphasis added).

The language from § 7623(b)(3) is similar to the language in the FCA, which is widely recognized as the precursor and basis for the IRS whistleblower statute. "The taxpayers have reaped the success of the False Claim Act whistleblower rewards program. They'll benefit from the same concept applied to tax cheating." Press Release, Senator Grassley, author of FCA and the IRS whistleblower laws (Jan. 5, 2007) (praising the naming of Mr. Whitlock to be head of the new IRS Whistleblower Office). "The [IRS whistleblower] statute provides significant guidelines based on the success of the False Claims Act . . ."Letter from Senator Grassley to Treasury Secretary Henry Paulson (Jan. 5, 2007) (urging effective implementation of the IRS Whistleblower Law).

The FCA provision regarding "planned and initiated" is as follows:

> Whether or not the Government proceeds with the action, **if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action** which the person would otherwise receive under paragraph (1) or (2) of this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice. 31 U.S.C. § 3730(d)(3) (emphasis added).

As mentioned earlier, the IRS whistleblower provision is based on the FCA. When the IRS Whistleblower law is using exact terms and phrases as the FCA – as is the case with "planned and initiated" then the term as understood and applied to the FCA should carry substantial weight.

It has been long-viewed as a canon of statutory interpretation that courts look to previously enacted statutes (especially statutes on the same subject – *in pari materia*) to assist in determining Congressional meaning and intent. *See Erlenbaugh v. U.S.*, 409 U.S. 239, 243-244 (1972) ("The rule of *in pari materia*. . . is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a particular word with a consistent meaning in a given context. . .a 'later act can . . . be regarded as a legislative interpretation of [an] earlier act . . . in the sense that it aids in ascertaining the meaning of the words as used in their contemporary setting,' and 'is therefore entitled to great weight in resolving any ambiguities and doubts.' The rule . . . necessarily assumes that **whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject**. . .") (emphasis added) (internal citations omitted).

The Supreme Court in *Erlenbaugh* cites in support of this view *United States v. Freeman*, 44 U.S. 556, 564-565 (1845). *Freeman* is arguably the definitive statement by the Court on this issue and is worth reading the relevant section:

"The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in pari material are to be taken together, as if they were one law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. . ."

The term "planned and initiated" was contained in an amendment regarding limitations on payments of whistleblowers under the FCA and was authored by Senator Grassley. The term "planned and initiated" was similarly included as a provision regarding limitation on payments of whistleblowers under the IRS Whistleblower Act and was authored by Senator Grassley as well. As to *in pari materia*, the IRS Whistleblower law is a rib from the FCA; the two share a host of key provisions, in addition to the "planned and initiated" limitation, other common provisions include the right of a whistleblower to a mandatory award and having that award or denial subject to judicial review.[1] These facts (and others footnoted) are significant grounds for finding that the intent and meaning of "planned and initiated" contained in the FCA should serve as the key for guidance interpretation of the same phrase for the IRS whistleblower law.

Finally, Senator Grassley himself states:

"I ask that you give serious consideration to the points raised in their letter. As they note, there is along and established history regarding the meaning of "planned and initiated. The IRS should consider this history and practice at other federal agencies and not attempt to create its own policy that could conflict with this longstanding practice.

On a related matter, in IRM section 25.2.2.9.2.13.C, the IRS attempts to categorize a "whistleblower's role as a planner and initiator as significant, moderate, or minimal." As stated in the letter from the three organizations, limitations for planners and initiators was intended to apply to the ***chief architect*** or the ***chief wrongdoer***. I ask that you take into consideration the established law in this area with respect to FCA claims." Letter from Senator Grassley to the IRS Commissioner (Sept. 13, 2011) (citing favorably to an Aug. 10, 2011 letter by a number of whistleblower organizations, including NWC, that raises many of the concerns in this latter and cites to the traditional meaning of "planned and initiated") (emphasis in original).

More recently, Senator Grassley asked about regulations about planners and initiators – and stated: "As I have said before, there is no reason for the IRS to recreate the wheel in this

[1] 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 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. In sum, the two statutes are a classic example *of in pari materia*.

area."[2] Letter from Senator Grassley to Treasury Secretary and IRS Commissioner (Apr. 30, 2012).

The standards of statutory construction and the author of the legislation both speak to the IRS looking to the FCA, the legislative intent of the FCA in adding the "planned and initiated" language, and the court cases interpreting "planned and initiated" under the FCA for the relevant guidance in constructing the meaning of "planned and initiated" for interpreting "planned and initiated" under §7623.

B. Legislative Intent of Planned and Initiated – The "Principal Architect" and "Principal Wrongdoer" Test

There is no discussion of "planned and initiated" in the legislative record of § 7623(b)(3). This is understandable given that the key Senator responsible for the legislation, Senator Grassley, would have viewed additional guidance as unnecessary given that the well-worn phrase had already benefitted from significant illumination by Congress when it was the focus of a special amendment to the FCA in 1988. Further, as shown above Senator Grassley fully intended that the "planned and initiated" provision of § 7623 would be read in keeping with the interpretation of the same language in the FCA. Fortunately, there is significant evidence of legislative intent of the term "planned and initiated" when it was added to the FCA in 1988 by Senator Grassley and other members of Congress. This legislative history is of great relevance in providing an understanding of "planned and initiated" when used in the IRS whistleblower law.

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[2] Senator Grassley is cited in this submission as a guide on "planned and initiated" to the IRS for both Congressional intent of the IRS whistleblower language and general policy. This is because Senator Grassley is not only the author of the provision – but also because of his widely recognized leadership in whistleblower issues for years by the entire federal government. Senator Grassley's thoughts and input of what can lead to success for the whistleblower program are invaluable and should serve as a shining light to the IRS and Treasury as it seeks to draft effective policy in this area.

It should be kept in mind that while not commonplace, the U.S. Supreme Court has cited and relied on statements made by legislators after a bill has been signed into law to guide them in determining legislative intent – especially when those statements come from lawmakers who are key figures in the drafting of the provision as is the case with Senator Grassley: *See Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461, U.S. 190, 220 n.23 (1983) ("While expressions of a subsequent Congress generally are not thought particularly useful in ascertaining the intent of an earlier Congress, Senator Hickenlooper, the sponsor of the 1965 amendment, was an important figure in the drafting of the 1954 Act.");*North Haven Board of Education v. Bell*, 456 U.S. 512, 530-531 (1982) ("The post enactment history of Title IX provides additional evidence of the intended scope of the Title and confirms Congress' desire to ban employment discrimination in federally financed education programs. Following the passage of Title IX, Senator Bayh published in the Congressional Record a summary of the final version of the bill. That description expressly distinguishes Title VI of the Civil Rights Act of 1964 with respect to employment practices . . ."). The Court further went on to cite statements made by the Senator Bayh two years after passage.

The legislative intent demonstrates that the drafters of the "planned and initiated" provision under the False Claims Act desired that the amendment would "apply *narrowly to principal wrongdoers*." 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley); *see also* 134 Cong. Rec. H10637 (daily ed. Oct. 20, 1988) (statement of Rep. Berman) ("amendment we are voting on today will allay any criticism that the False Claims Act will encourage *principal wrongdoers* to file false claims actions solely motivated by the desire to profit from their own previous wrongdoing."). The amendment was designed to prevent those who are the "main force behind a false claims scheme" from recovering. 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. DeConcini).

In fact, Senator Grassley said this of his 1988 proposed amendment: "[m]y amendment simply clarifies that in an extreme case where the qui tam plaintiff was a *principal architect* of a scheme to defraud the Government, that plaintiff would not be entitled to any minimum guaranteed share of the proceeds of the action." 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley).

In addition, the drafters of the amendment recognized that often only the people who participated to an extent in the fraud would have knowledge of its actions. 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley). Furthermore, the original FCA, as a whole, was premised on the notion that it requires "a rogue to catch a rogue." *See* Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (remarks by Senator Howard explaining that the law was meant to provide "a strong temptation to betray his conspirator, and bring him to justice.").

In applying the "planned and initiated" limitation, the courts have understandably looked to the above cited Congressional statements of intent to guide them. *See Barajas v. Northrop Corp.*, U.S. Dist. LEXIS 22817 *15-17 (C.D. Cal. 1992) (citing statements by Congressman Berman and Congressman Grassley that the "planned and initiated" limitation was directed at the principal wrongdoer or the principal architect). The U.S. Government has also cited the Congressional history for determining the intent of "planned and initiated." *See id.* at *37-38 (Department of Justice citing the whistleblower as "the principal wrongdoer").

The entire relevant statement by the *Barajas* Court is worth review:

> "The legislative history of the 1988 FCA amendment, which added section 3739(d)(3), suggests that "**in an extreme case** where the qui tam plaintiff is a **principal architect** of a scheme to defraud the government," that plaintiff may not be entitled to any share of the proceeds of the action." *Id.* at *36-37 (emphasis added).

The *Barajas* court goes on to embrace the Principal Architect test: "The Court must finally consider the extent to which Barajas can be considered a *principal architect* of the testing fraud . . ." *Id.* at *39 (emphasis in original).

The Congress made clear its legislative intent and the courts have followed – "planned and initiated" is a limitation that is intended to be rarely invoked in extreme cases and only for the "Principal Architect" or "Principal Wrongdoer."

C. Dictionary Definition – Plain Meaning of "Planned and Initiated"

The words "plan" and "initiate" have plain meanings in the English language. "Plan" means "a delineation; a design; a draft, form or representation...a scheme; a sketch. Also, a method of design or action, procedure, or arrangement for the accomplishment of a particular act or object." Black's Law Dictionary (5th ed. 1979). "Initiate" denotes to "commence; start; originate; introduce; inchoate." *Id.*

Why does a plain meaning of the words "plan" and "initiate" matter? In *Schindler Elevator*, a FCA case, the Court referred to several Dictionary definitions of the word "report" to ascertain its meaning. *Schindler Elevator Corp. v. U.S. ex rel. Kirk*, No. 10-188, slip. op. (U.S. May 16, 2011) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose').

A similar review of the dictionary definition of "planned" and "initiated" combined sits comfortably with what is the express Congressional intent of the phrase "planned and initiated" as being limited to the "Principal Wrongdoer" or "Principal Architect."

D. "Principal Architect" or "Principal Wrongdoer" Test for "Planned and Initiated"

As seen above, a fair reading of the Congressional intent, adopted by the courts (as seen further below) and the plain language of the words leads to a conclusion that the "planned and initiated" exception is to apply to an extremely narrow group of individuals – the "Principal Architects," or "Principal Wrongdoers" – i.e. the individuals who *both* originated, introduced or started the scheme *and also* designed, drafted and arranged the scheme. Underscoring the narrowness of the test is that it is a requirement of planned *and* initiated not "or" – the individual must do both – plan *and* initiate to be subject to the limitation. It is commonly recognized in statutory construction that the use of the word "and" means that all the listed requirements must be satisfied. *See* Statutory Interpretation: General Principles and Recent Trends, March 30, 2006, Congressional Research Service Report 8 (2006). Furthermore, it should be noted that courts have established that, when interpreting whistleblower law language, they should interpret in a way that is most favorable to the whistleblower.[3]

To give an example, it is the Madoffs of the world – the "Principal Wrongdoer" or "Principal Architect" who Congress was seeking to ensure did not get an award when it added the "planned and initiated" test. Congress recognized that the vast majority of insiders – while not perfect, and not with clean hands – were also not the Principal Architect or Wrongdoer and

[3] *See Haley v. Retsinas*, 138 F.3d 1245, 1250 (8th Cir. 1997) ("when the meaning of the statute is unclear from its text, courts tend to construe it broadly, in favor of protecting the whistleblower. This is often the best way to avoid a nonsensical result and 'to effectuate the underlying purposes of the law.'" S.A., 129 F.3d at 998.); *Hill v. Mr. Money Fin. Co. & First Citizens Banc Corp.*, 309 Fed. Appx. 950, 961 (6th Cir. 2009) ("when statutory language of whistleblower provisions is ambiguous and/or broad, courts do tend to construe the language "in favor of protecting the whistleblower.").

were exactly the individuals that were most likely to know about the fraud and who Congress wanted to reward and encourage to come forward when it created the IRS whistleblower law.

In line with the "Principal Architect" or "Principal Wrongdoer" test of the "planned and initiated" limitation being a high bar, the Department of Justice has recognized that there are only a rare number of cases where the "planned and initiated" limitation should even be considered. *See Barajas* at *17 (Government claims that it intends to use *section 3730(d)* the planned and initiated limitation sparingly and that the Government has only had occasion to invoke the provision once before).

E. Cases on Planned and Initiated Test

The courts that have applied the FCA "planned and initiated" exception have been in line with both the Congressional intent and the plain language of the statute as summarized above – finding a very narrow reading of when the planned and initiated limitation applies and applying it in practice only to the "Principal Wrongdoer" or "Principal Architect."

1. *Marchese v. Cell Therapeutics, Inc.*

In *Marchese*, the court considered whether the whistleblower, Mr. Marchese, was subject to the planned and initiated limitation. *Marchese v. Cell Therapeutics, Inc.*, 2007 WL 4410255 (W.D. Wash. 2007).Mr. Marchese worked as a sales representative at a drug company, Cell Therapeutics, Inc. (CTI) that manufactured a product called Trisenox. For a drug being used for an "off-label" purpose (not what FDA approved the drug to be used for) to be eligible for Medicare requires that it be cited in a specific drug compendium (there were two such compendia at the time).

Mr. Marchese was the lead person at CTI for seeking to have Trisenox's off-label products listed in a compendium and presumably reimbursable by Medicare. Mr. Marchese prepared an analysis on how CTI could get Trisenox's off-label indications listed in the compendia so those indications could be reimbursable by Medicare. *Id.* at *3.

It was Mr. Marchese's idea to seek publication of Trisenox's off-label indications in the compendia based on Trisenox's orphan drug designations. Mr. Marchese benefitted from analysis by Documedics – an outside consultant – that stated that if the off-label purposes received orphan drug status that would qualify for listing in the compendia and thus subject to Medicare reimbursement. Documedics was wrong – while orphan drug status did provide listing in the Compendia – only in Volume III and thus not subject to Medicare reimbursement (Volume I is where the drug usage needed to be listed for purposes of Medicare reimbursement). Mr. Marchese's superiors at CTI also advised Mr. Marchese, erroneously, that an off-label orphan drug designation would allow for Medicare reimbursement. *Id.* at *3-4.

Trisenox is listed in Volume III and in that compendium it is noted that they are not reimbursed by Medicare (Mr. Marchese was unaware of this notation). Mr. Marchese and an employee of Documedics wrote the early drafts of a letter to physicians stating that Trisenox off-

label was now listed in the compendia and available for Medicare. Mr. Marchese's supervisors and consultants at Documedics reviewed the letter for accuracy.

In response to the letter drafted by Mr. Marchese, physicians began proscribing the drug and (improperly) asking for Medicare reimbursement. Over time, beginning in December 2001, Mr. Marchese became disillusioned by the actions of CTI in general and in particular about the off-label promotion of Trisenox when he learned that the drug was causing patient harm and that the clinical trials had been discontinued and began to raise concerns internally.

During this time Mr. Marchese learned that CTI was violating federal regulations in its promotion of Trisenox for off-label uses. Mr. Marchese did not immediately report these violations. Instead, Mr. Marchese sought approval from the company, in the form of a promotion, for his efforts in having Trisenox published in the compendium. Mr. Marchese was fired from CTI in September 2002. In November/December 2002 Mr. Marchese contacted the Office of Inspector General about his concerns about the off-label use. The Office did not respond. Mr. Marchese contacted officials at the FDA in 2003 also about the health risks as well as the FBI in 2004 about CTI matters. *Id.* at *6-8.

In sum the Court found that: Mr. Marchese was the responsible official; Mr. Marchese prepared the (false) analysis for getting the off-label drug listed in the compendia so that it could be eligible for Medicare; Mr. Marchese first had the idea to get the off-label usage listed in the compendia so that it could be (falsely) eligible for Medicare; Mr. Marchese co-drafted the letter to the physicians informing them (falsely) that the off-label drug was listed and now available for Medicare reimbursement; and, Mr. Marchese when he became aware that CTI was violating federal regulations did not report the violations. Despite all these facts, the Court *still* found that Mr. Marchese was *not* the planner and initiator. *Id.* at *8-9.

> Finally, the Court does not find that Mr. Marchese was the planner and initiator of a scheme to deceive physicians into believing Trisenox was a medically accepted drug for its off-label uses and to deceive Medicare into reimbursing those off-label prescriptions. The Court concludes that Mr. Marchese relied on consultants at Documedics and his supervisors who advised that prescription for off-label uses was eligible for Medicare reimbursement if that indication has been granted orphan drug status. *Id.* at *8.

2. *U.S., ex rel. Taxpayers Against Fraud v. General Electric Co.*,

Given the key role played by whistleblowers who are insiders in discovering a fraud, it is not surprising that the cases in the False Claims Act are replete with examples of individuals who are not perfect, engage in certain inappropriate actions and may even be in management – yet still receiving significant awards. These individuals are found not to have met the planned and initiated limitation (in fact, the issue of "planned and initiated" is rarely even addressed because the bar is so high). A good example of these cases is found in *General Electric* involving a middle manager. *United States ex rel. Taxpayers Against Fraud v. GE*, 41 F.3d 1032 (6th Cir. 1994).

In brief, *General Electric* dealt with an effort by Israeli military officials and others to skim millions of dollars from U.S. Government military-aid funds. The whistleblower, Mr. Walsh, was an employee of GE at the time. GE accused the whistleblower of planning and initiating the fraud, as the whistleblower held "the principle responsibility for administrating" the contracts in question. GE further claimed the whistleblower was "directing the creation of false-claim documentation and devising the paper trail by which the transactions were structured," and "preparing counterfeit notices and work-completion certificates." *Id.* at 1039-40.

The whistleblower's response was that the fraud had been planned and initiated prior to his arrival, and that when he learned of the scheme after more than two year on the job, the whistleblower began taking steps to uncover and stop it. *Id.* at 1037.

The Appellate Court in *General Electric* cites the record of the district noting: "At one point during the final day of the Attorneys' Fees Litigation, the district court said that "[t]here is not one iota of evidence before me that Mr. Walsh participated in the fraud. Not one." However, the judge's remarks were not confirmed as part of the court's formal findings."

The district court held a hearing *in camera* because an investigation was ongoing and awarded the whistleblower a 22.5% share of the civil recover (where 25% was the maximum possible recovery). *Id.* at 1040.

One minor but perhaps relevant note, the District Court in its discussion of the case chastised the Department of Justice for attacking the whistleblower for not coming forward sooner.

The most that the Department of Justice can assert is that he "should have" revealed this information earlier. It is very easy to fall into the trap of "should have." Lawyers particularly prone to use that argument when after the benefit of excellent hindsight a different method of procedure can be devised. *United States v. Gen. Elec.*, 808 F. Supp. 580, 583 (S.D. Ohio 1992).

3. *Barajas v. Northrop Corp.*

While the *Marchese* and *General Electric* courts highlight how high a bar it is to make a finding of planned and initiated, it is perhaps even more illuminating to look at the extremely rare cases where the court has found the planned and initiated limitation has been met.

Barajas dealt squarely with the question of the "planned and initiated" test. As noted earlier, the Court cited to the statements by Congressman Berman and Senator Grassley to help explain the purpose of the provision and citing with emphasis the "Principal Architect" requirement stated by Senator Grassley. *Barajas*, U.S. Dist. LEXIS 22817 at *37. The government also agreed that the "Principal Wrongdoer" test was correct – stating that the plan and initiate test was appropriate in the case because Barajas, the whistleblower, was the *principal wrongdoer* in the view of the government. *Id.* at *36.

Mr. Barajas began working at Northrop in 1981 and continued until 1987. Barajas' job was one of two people in Northrop's testing division that was principally responsible for testing the Flight Data Transmitters (FDTs) to be used on a cruise missile. Northrop was required under

the contract to subject these FDTs to three performance tests before sending them to Boeing for installation: 1) a test of the circuit boards; 2) a product reliability verification test (PRVT); and, 3) a Final Acceptance Test (the "Acceptance Test"). *Id.* at *17-19.

Mr. Barajas began performing the PRVT and Acceptance Tests in early 1982 and continued to the principal test until his departure from Northrop in 1987. Barajas admitted that beginning in 1983 he began to systematically fake many of the FDT test results by recording made up numbers on the test charts rather than actually performing the required series of tests. Although Barajas was directed to falsify some of the PRVT test results by his supervisors, he admitted that he falsified many of the Acceptance Tests on his own initiative due to the time pressure to complete his work and his belief that the equipment provided by Northrop was faulty. *Id.* at *19.

Mr. Barajas testified to a number of falsified test results. Mr. Barajas admitted that when Boeing's inspector came, Mr. Barajas would open the test machines and alter them so that they would artificially indicate that the machines met the proper specifications. *Id.* at *20.

Over time Mr. Barajas' test falsifications increased. For example, for one subset of tests ("Power Input") he had earlier in 1983 falsified 50% of the tests and later during 1984-86 he falsified 99 percent of the tests. *Id.*

Although Barajas' supervisors actively participated in and directed him to falsify the data in the PRVT tests, Barajas has admitted that no one ever directed him to falsify the results of the Acceptance Tests he performed (representing 2/3rd of the value of the $8 million settlement in the case). Mr. Barajas admitted that in many instances that he never told his supervisors that he was falsifying the acceptance tests. Only Mr. Barajas knew of certain testing violations. *Id.* at *21.

The Court found that the evidence is undisputed that Mr. Barajas began falsifying the Acceptance tests in 1983 on his own initiative due to the time pressure and his belief that the FDTs would fail the Acceptance Tests anyway. The Court found that Mr. Barajas admitted that he took it upon himself to falsify the tests and makeup phony results and *acknowledged that he was never directed to do so.*

Moreover, Mr. Barajas never directly told any of his supervisors that he was falsifying the Acceptance tests. The Court found that Mr. Barajas engaged in not a one-time lapse, but an ongoing program of lying and falsification which Barajas initiated on his own and kept secret even from his own supervisors.

As mentioned in Section B discussion above, the Court enunciated the "Principal Architect" test from the legislative history and proceeded to apply the "Principal Architect" test separately to the two tests that were falsified: the PRVT and the Final Acceptance tests. *Id.* at *37,39.

The Court found that Mr. Barajas did **not** "plan or initiate" the fraud of the PRVT tests. The PRVT tests were ones that Mr. Barajas falsified – but at the direction of his supervisor. The

Court awarded Mr. Barajas a one-third share of the $1.44 million recover attributed to the PRVT test – $480,000 **without any reduction**. *Id.* at *39-40.

The Court found that Mr. Barajas was the principal architect of the falsification of the Final Acceptance tests. *Id.* at * 40.

These were the tests that were falsified at Mr. Barajas' own initiative and without informing his supervisors. Nevertheless despite finding that the planned and initiated limitation was met, the Court in *Barajas* still awarded the whistleblower proceeds from the recovery of the false Final Acceptance tests as well. Overall, Mr. Barajas received $864,000 or 10.8 percent of the settlement. *Id.* at *41-42.

The Court cited in making its determination to award Mr. Barajas the fact that Northrop created an environment which encouraged and at least tacitly condoned such conduct. The Court also found that the information provided by Mr. Barajas was of great importance to the government since it helped the United States uncover testing violations taking place in an important weapons system. The Court also stated its belief that Mr. Barajas was the first person to reveal evidence to the government of Northrop's testing fraud. *Id.* at *30-31.

4. *Stearns v. Lane*

In a recent case, *Stearns*, dealing with fraud in Housing Assistance Payments (HAP), the Court found the whistleblower had planned and initiated the action and the whistleblower was denied any award. *United States ex rel. Stearns v. Lane*, No. 2:08–CV–175, 2010 WL 3702538 at *6 (D. Vt. 2010).This case is particularly illuminating because it provides the rare example of someone actually found to have planned and initiated by the Court.

The basic facts are as follows: Ms. Stearns, the whistleblower, received a Section 8 voucher for housing. Ms. Stearns asked to approve Mr. Lane's premises for a Section 8 subsidy. On her application, Ms. Stearns falsely represented that her husband would not be residing with her, in order to avoid having his disability payment included in the calculation of her portion of the rent. Ms. Stearns and Mr. Lane entered into a lease for $1,100 and $50 for water. There were two copies of the lease with Ms. Stearns – one which stated that Ms. Stearns had paid the security deposit, which was required in order to use the Section 8 housing and a second that stated that only $154.00 had been paid, as was actually the case. *Id.* at *1-2.

Given the requirements of the HAP contract, Mr. Lane wrote a lease for $1,081.00. However, Mr. Lane informed Ms. Stearns that he would need to continue to receive the amount of the original lease ($1,000 plus $50 for water). Ms. Stearns did not tell the government that she was paying Mr. Lane any additional money during this year, nor did she inform the government that her husband was residing with her. *Id.*

Ms. Stearns' husband (who had been living with her the entire time) had gotten violent and Mr. Lane stated that Ms. Stearns needed to tell the Government about her husband's presence and get him on the lease. After several months, Ms. Stearns informed the government that her husband was residing with her, and her contribution to the rent rose by over $400.00 per

month. In response to these developments, Ms. Stearns reported to the government her side payments to Mr. Lane. *Id.* at *2.

Not surprisingly, given these facts – that the entire proposal from stem to stern was Ms. Stearns'– the Court found that Ms. Stearns met the planned and initiated limitation. *Id.* at *5. Ms. Stearns planned the fraud and she initiated the fraud.

5. Conclusions – Courts Applying "Principal Architect/Wrongdoer" Test to "Planned and Initiated" Limitation

As seen in the cases discussed, the courts either openly state that in deciding on the "planned and initiated" limitation that they are applying the "Principal Architect" or "Principal Wrongdoer" or effectively do so in practice.

The bar for finding "planned and initiated" has been set very high by the courts. Even in findings that an individual meets the "planned and initiated" limitation, the court still will look at other factors – such as knowledge, concealment, direction by management – to find that the whistleblower does not meet the "Principal Architect" or "Principal Wrongdoer" test.

In brief, no "plan and initiated" limitation in the case of *Marchese* – where the individual was the initiator of the idea, planned the idea (but under a misunderstanding of its false premise as well as reliance on superiors – mitigating factors in favor of the whistleblower). *General Electric* – no planned and initiated limitation despite individual being middle manager – scheme was ongoing prior to his arrival. *Barajas* – the Court splits the baby finding the "planned and initiated" limitation was met when tests were falsified at the whistleblowers initiative and he actively covered it up from his supervisors – that he was the "Principal Architect"; and, alternatively, that the whistleblower did NOT meet the "planned and initiated" limitation and the "Principal Architect" test when he falsified tests done at the direction of his supervisors. Finally, in *Stearns* the Court found that the individual was entitled to no award when she put forth and implemented her proposal of falsifying her application – and there were no extenuating circumstances.

H. Summation of Law, Precedent, Congressional Intent and Policy of Planned and Initiated

The law, precedent and Congressional intent are all of a piece and arrive at the same place as to the "planned and initiated" limitation. The plain reading of the statute requires for both planning and initiating an action. This fits easily with Congress' intent that planned and initiated should apply only to the "chief wrongdoer" or "chief architect" – that is naturally who will be planning and initiating.

The courts have similarly viewed planned and initiated as a high threshold (as has the Department of Justice) and have consistently found that an individual who is not the chief architect or chief wrongdoer – i.e. who did not plan and initiate – is not subject to the planned and initiated limitation – even in cases where the whistleblower has been closely involved with the actions and did not have clean hands. Conversely, in the rare instance where planned and

initiated has been invoked it is in a case where the person planned and initiated – they were the chief architect or chief wrongdoer.

Finally, the definition of planned and initiated as the chief wrongdoer or chief architect has ensured that Congressional policy is not frustrated. A definition of planned and initiated that was sweeping – encompassing anyone who assisted, furthered, advised, etc. – would effectively shut off for the government the valuable information it receives from inside and knowledgeable whistleblowers. To limit awards to whistleblowers to only those individuals who help the girl scouts prior to work and go to choir practice right after work is to ensure the failure of the whistleblower program – with only those engaged in tax evasion benefitting. Unfortunately, as discussed further below, the IRM definition of planned and initiated is not helpful to the success of the whistleblower program. The IRM fails to follow the plain reading of the law, the caselaw, Congressional intent and in doing so frustrates the public policy goal of encouraging whistleblowers with inside knowledge to come forward.

I. Internal Revenue Manual – Determination and Factors for Planning and Initiating

The IRM lists at 25.2.2.9.2.13.C and D that in making a 7623(b)(3) determination, the whistleblower office will:

> "C. [E]valuate 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. The Whistleblower's Office evaluation will be informed by, but not restricted to, its consideration of the factors described below.
>
> D. The whistleblower Office will reduce the awards of (1) significant planners and initiators by 66% to 100%, (2) moderate planners and initiators by 33% to 66%, and (3) minimal planners and initiators by 0 to 33%. . ."

The IRS in IRM25.2.2.9.14lists the following five factors to be used in the Whistleblower Office's determination of whether the whistleblower planned and initiated the underpayment of tax:

> "Planning and Initiating Factors (applicable to section 7623(b) (3) determinations):
>
> A. Was the whistleblower the sole decision maker, one of several contributing planners and initiators, or an advisor to a decision maker?
> B. 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)?
> C. The extent to which the whistleblower knew or should have known that tax noncompliance was likely to result from the course of conduct.

D. The extent to which the whistleblower acted in furtherance of the noncompliance, including efforts to conceal the true nature of the transaction.
E. The whistleblower's role in identifying and soliciting others to participate in the actions reported, whether as parties to a common transaction or as parties to separate transactions."

J. Analysis of IRM Factors and Definitions

Paragraph "D" of 25.2.2.9.2.13 creates a grey area and a series of degrees of planning and initiating that is wholly at odds with the law. The Congress by including "planned and initiated" sought to limit awards solely to the chief architect or chief wrongdoer. By contrast, the IRM seeks to create a new category of a "minimal," "moderate" and "significant" planner and initiator. This concept is utterly alien to the plain reading of the law, Congressional intent and the courts. Either an individual is a planner and initiator – chief wrongdoer or architect – or they are not. To use an old phrase – Congress intended that the door is either open or closed. The IRS appears to seek with Paragraph "D" to create a "little bit pregnant" concept that dangerously suggests an interpretation that someone can be a "minimal" planner and initiator or a "moderate" planner or initiator. There is no support in the law for reducing an award for a whistleblower for planning and initiating except in the case where they are the chief wrongdoer or chief architect.

Under the IRS view conceivably a secretary who formulated and put together the address list for a mailing will now be seen as a "minimal" or "moderate," planner and initiator. The intent of the "planned and initiated" language was both to ensure that the chief architect or chief wrongdoer is limited in any award (up to zero) but also to signal that there is a safe harbor for other individuals with inside knowledge or involvement to come forward and assist the IRS with information – and that they will not be subject to a reduction in their award. The IRS through paragraph "D" conceivably labels almost every whistleblower with a taint of being some level of planner and initiator and therefore subject to a reduction in an award. The IRS action frustrates Congressional intent and hamstrings enormously the IRS whistleblower program.

Similarly, the factors in the IRM at 25.2.2.9.14 obfuscate, cloud and inappropriately expand who can be a planner and initiator and seeks to encompass as a planner and initiator a far broader class of individuals than the plain reading of the law.

Factor "A" – sole decision maker, one of several contributing planners and initiators, or an advisor." This is potentially a very broad expansion from chief wrongdoer or chief architect and encompassing anyone at the table, anyone at the meeting can now be viewed as a factor potentially as having "planned and initiated." Under the IRM an advisor to a decision maker (chief architect/chief wrongdoer) would improperly be considered as a "planner and initiator?"

Factor "B" – the nature of the whistleblower's planning and initiating activities. Again, this moves significantly away from "planned and initiated" – and the chief architect or chief wrongdoer test – with *any* identifiable misconduct – legal, ethical *or etc.* (i.e. completely undefined and left to the whim of the IRS) now considered as a factor for "planned and initiated." A whistleblower could have neither planned nor initiated but has engaged in other inappropriate behavior (in the eyes of the IRS) and is now viewed as possibly having "planned

and initiated." The IRM also asks if it is "objectively" unreasonable – so therefore if the whistleblower was ignorant or uninformed or relied on other guidance again it is now viewed as a factor for "planned and initiated." The IRM is creating a broad brush to improperly paint anyone who engaged in misconduct as having planned and initiated. That is not a proper test of planned and initiated.

Factor "C" – knew or should have known that tax noncompliance was likely to result from the course of conduct. Again, substituting the "planned and initiated" requirement (and the Congressional intent of Chief Architect or Chief Wrongdoer) with a very low bar – applying a knowledge test – knew or should have known – about tax compliance is now a factor. This seems to place the whistleblower in a damned either way proposition – the IRS requires in the Form 211 that the whistleblower sign under perjury to his beliefs of why there was a tax violation and describe it in detail (Question 14 of Form 211) – yet at the same time that very knowledge can now be evidence as a factor for planned and initiated. Again, a whistleblower could have not "planned and initiated" but because of the knowledge test – now it is (inappropriately)a factor to find that the whistleblower did plan or initiate. The only logic to Factor "C" is to show that a whistleblower under the teachings of *Marchese* is *not* subject to the planned and initiated limitation in a case where the whistleblower didn't have knowledge but otherwise was the Chief Architect. As above, with Factor "B," the IRM casts far too wide of a net and improperly taints a whistleblower who has knowledge of having "planned and initiated."

Factor "D"– furtherance or concealment test. As in Factor "C," and "B" this test seeks to replace the requirements of "planned and initiated" with a whole new construct – that a whistleblower who has furthered the action (e.g. mailed a letter, attended a meeting, followed instructions, done his job) can now be found to have "planned and initiated." The entire concept of the whistleblower laws – it takes a rogue to catch a rogue is being eviscerated by this Factor and the other Factors. Fundamentally the IRS needs to ask itself – by the very term – "furtherance of the noncompliance" – shows that the whistleblower was not a planner and initiator. D is not an indicia of "planned and initiated" and goes directly against the court's finding in *Barajas* where the facts were that the whistleblower had engaged in many activities in furtherance but was found not to have "planned and initiated."

Factor "E" – "identifying and soliciting others to participate in the actions reported" As with Factors "D" it is a variant of the furtherance test and is again replacing the requirements of "planned and initiated" and the Congressional intent of "Principal Architect" or "Principal Wrongdoer" so that any sales person or middle manager performing her duties is now encompassed by this factor.

In sum, the IRS in drafting these IRM provisions has lost the thread. The effort is to determine whether individuals have both planned and initiated an effort to avoid taxes – not to determine whether a person's hands are totally clean.

K. Conclusion

The IRM's factors for "planned and initiated" on its face are directly at odds with the plain reading of the law and the intent of Congress. Instead, the IRM provides a significantly

broader view than what is supported by Congressional intent from the False Claims Act (which the IRS Whistleblower Act is based on) and by the interpretation of the courts of "planned and initiated." The IRM does not reflect the very narrow view of "planned and initiated" of being for rare situations and solely for the "Chief Architect" or "Chief Wrongdoer" but casts a net that conceivably will capture anyone from the lowest official on up and conjuring up wholly new categories of wrong doing as well as creating out of whole cloth different classes of wrong doing "significant, moderate and minimal").

The danger is that this broad interpretation will undermine the entire policy basis for the IRS Whistleblower law – that it takes a rogue to catch a rogue. The IRM can be read as barring awards to not only those who planned and initiated but to a much wider net of whistleblowers who do not have clean hands. The overly broad language in the IRM on "planned and initiated" has already had a dampening impact on encouraging knowledgeable whistleblowers from coming forward.

If the whistleblower acted without knowledge or consent of his or her supervisor, they may fall within the "planned and initiated" category, except no reward can be less than 15% unless the whistleblower is convicted of a crime directly related to his or her having planned and initiated the underlying fraud.

K. Recommendations

The IRM sections regarding "planned and initiated" should be withdrawn immediately. The IRM should issue a new IRM that follows the plain reading of the statute, Congressional intent, precedent and helps ensure the success of the IRS Whistleblower program. We suggest the following new language:

25.2.2.9.2.13.

C. Evaluate the whistleblower's role – if any –in planning and initiating the actions that led to the underpayment – specifically determining whether the whistleblower was the principal person, chief architect or chief wrongdoer of the activity that led to the understatement of tax. As necessary, this evaluation should be done separately for each action. For example, a whistleblower could be found to have planned and initiated one action for one taxpayer for one tax year but not for another taxpayer or for a different tax year. The Whistleblower's Office evaluation will be informed by, but not restricted to, its consideration of the factors under paragraph (1) and (2) described below. In general, the Whistleblower Office should use the planned and initiated designation sparingly and with an awareness that the general policy and intent is to encourage whistleblowers with inside information to come forward – including those closely involved with an action that led to an understatement of tax.

D. The whistleblower Office will reduce the awards of someone who has planned and initiated by 0 to 100% as appropriate – considering the factors under paragraph (3) below.

25.2.2.9.14 – Planning and Initiating Factors

(1) Factors for finding planning and initiating

A. The whistleblower was the principal person, chief architect or chief wrongdoer who planned and initiated the action that led to the understatement of tax. In making this determination there must be a finding that the whistleblower:

i. Planned or designed the action that led to the understatement of tax;
ii. Initiated, started or introduced the action that led to the understatement of tax; and
iii. Acted without knowledge or consent of his or her supervisor.

B. In making this determination, consideration must also be given to the mitigating factors in paragraph (2) below.

(2) Factors mitigating against finding the whistleblower was a planner and initiator

A. The whistleblower acted at the direction of another individual.
B. The whistleblower did not have knowledge that the action would lead to an understatement of tax.
C. The whistleblower was only involved in planning and did not initiate the action.
D. The whistleblower initiated the action but was not involved in the planning.
E. The whistleblower was involved in both planning and initiating but was not the principal person, chief architect or chief wrongdoer in planning and initiating.
F. The whistleblowers actions were only in furtherance of the action.
G. The action was ongoing prior to the whistleblowers involvement.
H. The whistleblower only advised or assisted in regards to the action.

(3) Factors mitigating in favor of providing an appropriate award to a whistleblower who planned and initiated.

A. The timeliness of the information provided.
B. The completeness of the information provided.
C. The value to the IRS of the information provided in bringing action.
D. The value of the whistleblowers information for public policy purposes separate from tax.
E. The cooperation of the whistleblower.
F. The amount of recovery to the Treasury.
G. The benefit as a matter of tax administration of encouraging similar whistleblower to come forward.
H. The financial loss and any other suffering by the whistleblower.
I. Did the whistleblower work in an environment that encouraged and condoned actions that led to the understatement of tax.

(4) Factors permitting the Service to reduce an award below the minimum 15% threshold:

A. If the whistleblower is convicted of criminal conduct arising from his or her role in planning and initiating a fraud, the whistleblower office shall deny the award as to collected proceeds directly related to the part of the fraud for which the whistleblower planned and initiated.

Note: the factors in paragraph (3) should be considered in concert with the positive and negative factors cited in the IRM at 25.2.2.9.2.10 and 11.

As to regulations, we would suggest the following language:

> If the IRS whistleblower office determines that a whistleblower planned and initiated the actions that led to an understatement in tax, the whistleblowers reward may be reduced as appropriate. A whistleblower is considered to have planned and initiated an action that led to an underpayment of tax in those instances where the whistleblower is the principal individual, the chief architect or chief wrongdoer who both planned and initiated the action that led to an underpayment of tax. Merely assisting, advising or participating in activities that led to an understatement in tax is not considered planning and initiating.

Inclusion of this language in the IRM and regulations will go far in encouraging whistleblowers with valuable inside information to come forward and assist the IRS in its work. Further, the proposed language changes in the IRM and regulations will ensure that the IRS is conformance with the plain language of the statute, Congressional intent and precedent.

We thank you for your review of our submission and would be pleased to meet with your staff to discuss further any issues or questions they may have.

Sincerely,

Dean Alexis Zerbe Steve Kohn

cc: Emily McMahon, Acting Assistant Secretary for Treasury (Tax Policy)
Steven T. Miller, Deputy Commissioner, IRS
Steve Whitlock, Director, IRS Whistleblower Office

Attachments –
August 10, 2011 letter to IRS Commissioner from whistleblower organizations.
Senator Grassley letter to IRS Commissioner September 13, 2011
Senator Grassley letter to Treasury Secretary and IRS Commissioner April 30, 2012

August 10, 2011

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: IRM Factors For Determining Planned and Initiated Under The IRS Whistleblower Law - - 7623

Dear Mr. Commissioner:

As organizations that are a voice for whistleblowers and dedicated to fighting government waste, fraud and abuse – we are writing to express our strong concern about a provision in the Internal Revenue Manual (IRM) regarding the IRS whistleblower program and factors for determining whether a whistleblower should have a reduced award because the whistleblower "planned and initiated" an action.

The IRM factors for determining whether a whistleblower planned and initiated an action depart significantly from the traditional understanding of the planned and initiated limitation for whistleblower awards as reflected in Congressional intent, the caselaw and the clear language of the statute. The overly broad language included in the IRM will impact negatively on the success of the IRS whistleblower program and efforts to fight tax fraud.

When Senator Grassley (R-IA) wrote the IRS Whistleblower law, he incorporated a limitation for awards for individuals who planned and initiated the action – Section 7623(b)(3). This "planned and initiated" language has a long history and was taken from an amendment that Senator Grassley and Congressman Berman (D-CA) had previously included in a 1988 amendment to the False Claims Act (FCA) that similarly limited a whistleblower award if they planned and initiated the action – Section 3730(d)(3) of the FCA. The use of the "planned and initiated" language for the IRS whistleblower program is understandable given that Senator Grassley has stated repeatedly that the IRS whistleblower program is modeled on the FCA.

The courts have long recognized that in interpreting statutes a court should look to previously enacted statutes (and particularly in the case of statutes on the same subject – *in pari materia*) to help understand Congressional meaning and intent. The Supreme Court has stated:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in pari material are to be taken together, as if they were one law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; . . ."

United States v. Freeman, 3 How. 556, 564-565 (1845).

Thus, significant weight should be placed on the Congressional intent and caselaw for the limitation of "planned and initiated" in the FCA as the IRS administers the same "planned and initiated" limitation for the IRS whistleblower law.

There is substantial evidence of legislative intent of the term "planned and initiated" when it was added to the FCA in 1988 by Senator Grassley (also author of the IRS whistleblower provision) and other members of Congress.

The legislative intent demonstrates that the drafters of the "planned and initiated" provision under the False Claims Act desired that the amendment would "apply *narrowly to principal wrongdoers*." 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley); see also 134 Cong. Rec. H10637 (daily ed. Oct. 20, 1988) (statement of Rep. Berman) (stating that the "amendment we are voting on today will allay any criticism that the False Claims Act will encourage *principal wrongdoers* to file false claims actions solely motivated by the desire to profit from their own previous wrongdoing."). The amendment was designed to prevent those who are the "main force behind a false claims scheme" from recovering. 134 Cong. Rec. S 16697 (daily ed. Oct. 18. 1988) (statement of Sen. DeConcini).

In fact, Senator Grassley said this of his 1988 proposed amendment: "[m]y amendment simply clarifies that in an extreme case where the qui tam plaintiff was a *principal architect* of a scheme to defraud the Government, that plaintiff would not be entitled to any minimum guaranteed share of the proceeds of the action." 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley).

This very narrow definition of what actors are encompassed by the planned and initiated limitation reflects the drafters recognition that often only the people who participated to an extent in the fraud would have knowledge of its actions. 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley). To cast a wide net of whistleblowers to be denied or limited an award would eviscerate the policy of encouraging whistleblowers to come forward. The original False Claims Act ("FCA"), as a whole, was premised on the notion that it requires "a rogue to catch a rogue." See Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (remarks by Senator Howard explaining that the law was meant to provide "a strong temptation to betray his conspirator, and bring him to justice.").

The Courts in applying the "Planned and Initiated" limitation have understandably looked to the above cited Congressional statements of intent to guide them. See *Barajas v. Northrop Corp.* U.S. Dist. LEXIS 22817 *15-17 (C.D. Cal. May 14, 1992, aff'd 147 F.3d 905 (9th Cir. 1998)(citing statements by Congressman Berman and Congressman Grassley that the "Planned and Initiated" limitation was directed at the principal wrongdoer or the principal architect). The U.S. Government has also cited the Congressional history for determining the intent of "Planned and Initiated." See *Barajas* at *37-38 – the Department of Justice citing the whistleblower as"the principal wrongdoer").

The entire relevant statement by the Barajas Court is worth review:

> The legislative history of the 1988 FCA amendment, which added section 3739(d)(3), suggests that "**in an extreme case** where the qui tam plaintiff is a **principal architect** of a scheme to defraud the government," that plaintiff may not be entitled to any share of the proceeds of the action. 134 Cong. Rec. H. 10641 (Oct. 20, 1988(statement of Sen. Grassley). (emphasis added). See * 36-37.

The Barajas Court goes on to embrace the Principal Architect test: "The Court must finally consider the extent to which Barajas can be considered a *principal architect* of the testing fraud . . . (emphasis in original)." See *39.

It is clear from the intent of Congress, as followed by the courts (and in keeping with the plain language of the words of the statute) that the "planned and Initiated" exception is to apply to an extremely narrow group of individuals – the "Principal Architects," or "Principal Wrongdoers" – i.e. the individuals who *both* originated, introduced or started the scheme *and also* designed, drafted and arranged the scheme.

Unfortunately, the IRM has created factors that go directly against the traditional understanding of the "planned and initiated" limitation on whistleblower awards as stated by the Congress and followed by the Courts. The IRS in the Internal Revenue Manual (IRM25.2.2.9.14, Effective June 18, 2010) lists five factors to be used to determine whether the person is subject to the planned and initiated limitation.

These factors provide that not only the sole decision maker, but anyone who contributes or advises could be found to have planned and initiated an action. This is an impossibly wide net that is being cast and goes far beyond the principal architect or principal wrongdoer envisioned by Congress and undermines the whole policy of the whistleblower award program that it takes a rogue to catch a rogue.

Further, the IRM states that if the whistleblower knew or should have known that the activity may lead to tax noncompliance than that is a factor. This sweeping definition would conceivably capture every whistleblower – since all whistleblowers coming forward would hopefully know or have reason to know that the activities led to tax noncompliance. This factor goes directly against IRS directions asking that whistleblowers come forward with detailed knowledge.

Other factors reflect an absolute failure to grasp the key point which is that it is individuals with detailed inside knowledge that will be the most beneficial in bringing forward tax fraud. The factors work directly against encouraging knowledgeable insiders to come forward – stating that those who have played a role in the action or assisted in the action can also be found to have planned and initiated even though they were not the chief architect or chief wrongdoer. Nonsensically, under the IRM an individual who neither planned or initiated a tax fraud could still be found to have found to have met factors of planning and intitiated.

The IRS must recognize that promoters of tax shelters and tax fraud are not surrounded by boy scouts and angels. The IRS needs to realize that the whistleblowers will often not have clean hands – that as Congress recognized it takes a rogue to catch a rogue.

The IRM's factors for "planned and initiated" on its face is directly at odds with the intent of Congress – providing a significantly broader view than what is foreseen by Congressional intent from the False Claims Act (which the IRS Whistleblower Act is based on) and by the interpretation of the courts of "Planned and Initiated." The IRM does not reflect the very narrow view of "planned and initiated" of being for rare situations and solely for the "Chief Architect" or "Chief Wrongdoer."

We respectfully request that the IRM be revised immediately to have the factors for planned and initiated be focused on those individuals who are first found to have been the "Chief Architect" or "Chief Wrongdoer" in keeping with Congressional intent and the rulings of the courts. This revision will do much to ensure that the IRS whistleblower program is a success in assisting the IRS in its efforts to fight tax fraud. Thank you for your consideration.

Sincerely,

Jesselyn Radack
National Security & Human Rights Dir.
Government Accountability Project

Dr. Marsha Coleman-Adebayo
Chariwoman
No FEAR Coalition

Gina C. Green
Chair, Board of Directors
National Whistleblowers Center

cc: Steve Whitlock, Director
IRS Whistleblower Office

Senator Grassley
Congressman Berman