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).