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Via Federal Express

November 5, 2012

Mr. Steven Miller
Acting Commissioner
1111 Constitution Ave., NW
Internal Revenue Service
Washington, D.C.

Dear Commissioner Miller:

The National Whistleblower Center (NWC) is writing in response to your good invitation from last Spring at a 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. At that meeting, the issue of the definition of "collected proceeds" or, more accurately, "proceeds" was raised and specifically whether it includes FBAR violations as well as other provisions of Titles 18 and 31 for which the IRS has delegated authority. We appreciate you giving the NWC this opportunity.

We are pleased to provide you today the NWC's submission on this important topic. We are confident that the suggestions we provide will greatly benefit the work of the IRS and further encourage knowledgeable whistleblowers to come forward.

It is particularly important for the IRS and Treasury to closely review and revisit this matter given the significant problems in the analysis of these matters provided by the IRS Office of Chief Counsel in its April 23, 2012 memorandum ("the memorandum"), as well as in the Service's proposed updates to IRM 25.2.2, particularly paragraphs 25.2.2.1(7) and 25.2.2.13(1). See Stephen Whitlock, *Updates to Internal Revenue Manual (IRM) 25.2.2 Information and Whistleblower Awards, Whistleblower Awards*, WO-25-0612-01 (June 7, 2012) (Whistleblower Office memorandum outlining prospective changes). In brief, the memorandum does not embrace the most fundamental rules of statutory construction – such as to give meaning to all words in the statute; disregards several other canons of statutory construction; and goes directly against Congressional policies and goals. In doing so, the memorandum does potentially great harm to efforts of the IRS whistleblower program.

The law that is at issue – Section 7623 – is quite straightforward and the language fits well within the traditional and successful policies that Congress enacted for the False Claims Act – at the time of enactment of Section 7623, the only major whistleblower program for the U.S. government. The law at Section 7623 states:

a) In general

The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for –

1) Detecting underpayments of tax, or
2) 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. Any amount payable under the preceding sentence 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.

b) Awards to Whistleblowers

1) IN GENERAL – If 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, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the collected proceeds (including penalties, interest, additions to tax and additional amounts) resulting from the action (including any related actions) or from any settlement in response to such action. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action.

However, as the attached memorandum shows, the Chief Counsels' radical interpretation of the statute ignores key words and phrases of the law as well as disregarding the history and policies of the IRS whistleblower law. In sum, the Chief Counsel memorandum effectively rewrites the statute as follows:

a) In general

The Secretary, under regulations prescribed by the Secretary, is authorized to pay such sums as he deems necessary for –

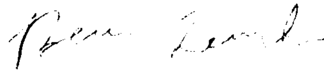
~~1) Detecting underpayments of tax, or~~
~~2) Detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same,~~ FINDINGS OF VIOLATIONS OF TITLE 26

In cases where such expenses are not otherwise provided for by ANY DISCRETIONARY OR MANDATORY AWARD PROGRAM EXCLUDING SUBPARAGRAPH (b) OF THIS law. Any amount payable under the preceding sentence shall be paid from the TAXES (HEREIN EXCLUSIVELY DEFINED AS PENALTIES, INTEREST, ADDITIONS TO TAX AND ADDITIONAL AMOUNTS UNDER TITLE 26~~) proceeds of amounts~~ collected by reason of the information provided, and any TAXES ~~amount~~ so collected shall be available for such payments.

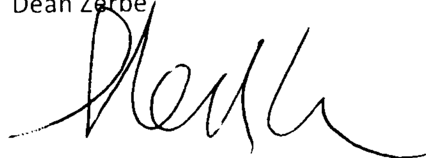
> IN GENERAL – If the Secretary proceeds with ~~any~~ administrative or judicial action SOLELY FOR PURPOSES OF ENFORCING TITLE 26 ~~described in subsection (a)~~ based on information brought to the Secretary's attention by an individual, such individual shall, subject to paragraph (2), receive as an award at least 15 percent but not more than 30 percent of the TAXES ~~collected proceeds (including~~ -- (HEREIN EXCUSIVELY DEFINED AS penalties, interest, additions to tax and additional amounts UNDER TITLE 26) resulting from the action (~~including any related actions~~) ~~or from any settlement in response to such action~~. The determination of the amount of such award by the Whistleblower Office shall depend upon the extent to which the individual substantially contributed to such action ONLY TO THE EXTENT IT RELATES TO TITLE 26.

We hope that our memorandum will serve as a useful guide for IRS and Treasury as it revisits and rethinks this important issue – and seeks to conform with the clear language in the statute as well as Congressional intent and the history of whistleblower provisions. We greatly appreciate your willingness and openness to discuss these matters – and thank you again for your leadership in ensuring the success of the IRS whistleblower program.

Sincerely,



Dean Zerbe



Steve Kohn

MEMORANDUM

<u>From</u>: Dean Zerbe, Steve Kohn, Felipe Bohnet-Gomez
<u>To</u>: Steven Miller
<u>Date</u>: November 5, 2012
<u>Subject</u>: **Scope of Whistleblower Awards Under Section 7623**

I. INTRODUCTION

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

The IRS Counsel has, however, misinterpreted Section 7623. It has misinterpreted the plain language of subsections (a) and (b), both of which extend broadly beyond the confines of Title 26 and provide more bases for whistleblower awards than IRS Counsel addresses. Additionally, IRS Counsel 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 law. Lastly, IRS Counsel 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 IRS Counsel 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 IRS Counsel's reading, so too is the 'availability' of funds for payment of awards greater than interpreted by IRS Counsel.

II. THE IRS HAS IMPERMISSIBLY MISCONSTRUED THE PLAIN LANGUAGE OF SECTION 7623

IRS Counsel argues 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." IRS Memorandum at 3.

The plain language of Section 7623, however, indicates that a broad range of activities is covered by the whistleblower program, which extends to all taxes, penalties, and other violations which the IRS is authorized to collect or enforce—such as the Report of Foreign Bank and Financial Accounts ("FBAR") provisions of the Bank Secrecy Act—as well as to related actions and settlements. 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. Additionally, while IRS Counsel argues that "section 7623 provides two bases on which the IRS may make a whistleblower award," IRS Memorandum at 4, 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.

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

Statutory interpretation begins with the plain language of the statute, and in determining a statute's plain meaning, a court will first look to statutory definitions or terms of art. Words that are not terms of art are given their ordinary meaning. See *FDIC 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"). 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." *United States v. Boisdoré's Heirs*, 49 U.S. 113, 122 (1850) (*per curiam*). It is against the background of such principles of statutory construction that Congress itself legislates. 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 rewards. 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 IRS Counsel urges define it. Consequently, while IRS Counsel urges that 'internal revenue laws' applies exclusively to Title 26, a more straightforward construction of 'internal revenue laws' is any law relating to internal revenue or administered by the internal revenue service.

Additionally, because the FBAR reporting requirement is administered by the IRS, and because the FBAR itself is linked 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 '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.

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

At the outset, IRS Counsel 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 is

contended by IRS Counsel, who ignores 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. *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"). 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.

IRS Counsel cites a number of authorities for the proposition that 'internal revenue laws' and 'tax laws' refer to Title 26 exclusively. These authorities, however, are either inconclusive or inapplicable to the issue. 26 U.S.C. § 6301, for example, states that "[t]he Secretary shall collect the 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. *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*).

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 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 that internal revenue laws are not *exclusive* to Title 26, but are merely *generally* codified there. 5 U.S.C. § 603 note (emphasis added).

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" 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 language. *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Because Congress chose to specify "underpayments of tax" separately from "internal revenue laws," this strongly indicates that 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," 516 U.S. 137, 146 (1995). 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. *See* Taxpayer Bill of Rights, Pub. L. 104-168, § 1209 (July 30, 1996).

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." 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). 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." Ventry, 61 TAX LAWYER 357, 361 (citing Revenue Act of 1934, ch. 3792, 48 Stat. 680.) 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, furthermore, that it extends to 'frauds' relating to the internal revenue laws, not solely to Title 26.

ii. <u>The FBAR Operates Substantively As An Internal Revenue Law</u>

The FBAR provisions are so intertwined with the internal revenue laws codified in Title 26, that the fact they are codified in Title 31 ought to be of no consequence.

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

a. 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. See Internal Revenue Manual §§ 4.26.5.2, *et seq.* (December 12, 2006). The Bank Secrecy Act authorizes the Secretary of the Treasury to "delegate duties and powers under this subchapter to an appropriate supervising agency." 31 U.S.C. § 5318(a)(1). Pursuant to Treasury Directive 15-41 (December 1, 1992), the Secretary of the Treasury delegated to the IRS authority to investigate possible civil violations of the FBAR reporting requirements, *See also* 31 C.F.R. § 1010.360. Criminal examination authority for most of the Bank Secrecy Act was delegated to the IRS in 1999. *See* Treasury Directive 15-42 (January 21, 1999).

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. 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"). 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, as well as the power to take "any action reasonably necessary" to implement end enforce the FBAR requirements. 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").

b. 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 the 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 pursuant to Title 26. Joint Committee on Taxation, *Technical Explanation of H.R. 4213*, JCX-60-09 at 144 (December 8, 2009). 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"). *See* 31 C.F.R. § 1010.350. 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." See "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act" at 9 (April 8, 2005) (emphasis added).

Additionally, 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." IRS Press Release IR-2003-48 (April 10, 2003) (joint FinCEN and IRS remarks on delegation of FBAR authority to IRS). 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." *Id.*

Consolidation of FBAR authority under IRS occurred well before the 2006 law enacting section 7623(b). *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"). Congress, therefore, can be said to have been aware of wide scope of IRS enforcement activities extending beyond Title 26, and can be assumed to have intended to include such closely related activities in the sweep of Section 7623. Any statutory silence with regard to Titles 31 and 18 is, therefore, acquiescence to the IRS's regulatory and enforcement authority.

c. 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." 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 of the Bank Secrecy Act includes increasing government's ability to collect tax revenues). Even the Department of the Treasury itself 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." See "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act," at 4 (April 24, 2003).

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. *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."). 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." IRS Press Release IR-2003-48 (April 10, 2003) (joint FinCEN and IRS remarks on delegation of FBAR authority to IRS) (emphasis added). 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 should be considered an 'income tax law' for the purposes of Section 7623(a).

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

Setting aside the issue of whether violations of laws outside Title 26 fall within the purview of Section 7623(a)—though for the reasons discussed above it is clear that they do—a whistleblower who voluntarily provides information leading to an IRS action that *does* in some part include Title 26 violations, 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, as well as for amounts collected from "related" actions and from "any settlements in response to such action." 26 U.S.C. § 7623(b).

i. Section 7623(b) Applies to the Entirety of an Action Satisfying 7623(a)'s Requirements, as Well as 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 of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. § 7623(a) (emphasis added). The Secretary may, however, only pay such discretionary awards "in cases where such expenses are not otherwise provided for by law." 26 U.S.C. § 7623(a)(2). 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." 26 U.S.C. § 7623(a)(2).

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 in circumstances 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." 26 U.S.C. § 7623(b)(1) (emphasis added). In other words, 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]." 26 U.S.C. §§ 7623(a)-(b). 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" as well as "any related actions" or "any settlement in response to such action." 26 U.S.C. § 7623(b)(1) (emphasis added). Additionally the "collected proceeds" include, but are not limited to "penalties, interest, additions to tax, and *additional amounts*." *Id.* (emphasis added).

Section 7626(b), therefore, merely requires that 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" as well as "any settlement in response to such action." Where, for example, 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.

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

IRS Counsel argues 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.'" IRS Memorandum at 3-4. Because IRS Counsel ignores critical statutory language in Section 7623, as well as the operation of other whistleblower award programs, IRS Counsel's conclusions misconstrue the scope of the Whistleblower Program under Section 7623.

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.'" IRS Memorandum at 7. 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." 26 U.S.C. § 6665(a)(2). Section 6665, however, lends scant support to IRS Counsel'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. 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). 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.

Notwithstanding IRS Counsel's overreliance on 26 U.S.C. § 6665, IRS Counsel also overstates the Supreme Court's holding in *Commissioner v. Lundy*. See IRS Counsel Memorandum at 5, 7. 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." *Id.* at 7 (quotations omitted). 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. 516 U.S. 235, 250 (1996). Importantly, the sections interpreted by the Court in *Lundy* were directly adjacent, and the Court noted that there was "no reason to believe that Congress meant the term 'claim' to mean one thing in § 6511 but to mean something else altogether in the *very next section* of the statute." 516 U.S. at 249-250 (emphasis added). 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." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). The fact that Section 7623 stems from different Congressional acts than does Section 6665 and related provisions, as well as the fact that 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." IRS Memorandum at 7. 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. 131 T.C. 54, 57-58 (2008). The Tax Court further clarified that 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." *Id.* at 58 (emphasis added). 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 over whistleblower claims, including whether a whistleblower is entitled to award including FBAR penalties. 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).

Moreover, IRS Counsel entirely ignores the broad statutory language relating to 'related actions' and 'settlements' in Section 7623(b). This language in Section 7623(b) expands the scope of the 'proceeds' subject to a whistleblower's award. Because the ordinary meaning of 'related' is extremely broad action or settlement may be 'related' to a Title 26 provision while being codified elsewhere. Additionally, the sense of the word as used in Section 7623 is clearly a relation or connection with the whistleblower's connection as well as the government's response thereto—if the government collects 'proceeds' due to a whistleblower's information, then that action is 'related.'

As the courts continually remind us—the beginning of any determination of a law should start with a plain reading of the words. See, e.g. *Smith v. United States*, 508 U.S. 223, 228 (1993). Further, it is a widely recognized canon of statutory construction that a statute should be interpreted to give meaning to every word.[1] The memorandum by Chief Counsel effectively ignores this rule and reads out of the statute a number of words, including "any related actions", "any settlements" and "including."

The word 'any' is also continually used to modify terms of the statute. 26 U.S.C. § 7623(b)(1) ("*any* administrative or judicial action;" "*any* related actions;" "*any* settlement") (emphasis added). 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.

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[1] *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).

U.S. ex rel. Barajas v. United States, 258 F.3d 1004, 1011 (9th Cir. 2001) (internal citations omitted). Given the copious use of 'any' in Section 7623, it is clear not only that the statutory language should be construed to reach broadly, but that Congress was particularly concerned that the IRS would narrowly interpret the statute, and sought to avoid such an interpretation through the use of expansive language.

The ordinary meaning of 'proceeds' is, moreover, extremely broad, generally encompassing everything that emanates from something—in this case the IRS's actions in response to a whistleblower's disclosure. Black's Law Dictionary, for example, 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." Black's Law Dictionary 1204 (6th ed. 1990). 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." *See Phelps v. Harris*, 101 U.S. 370, 380 (1879). Because of the broad ordinary meaning of proceeds, and because Congress knew it could limit the statute's applicability by using the well-worn term 'tax,' the fact that Congress instead used 'proceeds' is clear indication that the applicability of Section 7623(b) is not limited to Title 26.

C. *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*." 26 U.S.C. § 7623(a)(2) (emphasis added). While IRS Counsel argues 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. IRS Memorandum at 4.

The ordinary meaning of 'conniving' obviously embraces additional grounds for granting an award. Black's Law Dictionary defines "to connive" as "[l]oosely, to conspire." Black's Law Dictionary (9th ed. 2009). 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.

The use of the "conniving at" language in Section 7623(a) ought furthermore to be construed so that it has a particular nonsuperflous meaning. See *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (stating general principle of statutory construction). In order to do so, the phrase cannot 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." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). In this case, Congress clearly was aware that 'conniving' is akin to 'conspiring' and, in any case, need not consist of an actual violation of the 'internal revenue laws,' let alone Title 26.

III . 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 rewards 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.

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

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

Courts have long held that statutes with similar language and purpose should be construed together and given similar effect. *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*"). 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." *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"). 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."[2] *Morissette v. United*

[2] IRS Counsel has essentially argued that "internal revenue laws" be treated as a term of art that equates 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.

States, 342 U.S. 246, 263 (1952). 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 IRS Whistleblower Program was modeled after the example of the False Claims Act; the two share a host of key provisions. Common provisions include the right of a whistleblower to a mandatory award , the right to have any award determination subject to judicial review, as well as a limitation on an award in cases where the whistleblower "planned and initiated" an action.[3] 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 further below—contained within the FCA should serve as an interpretative guide to the same phrases and policies of the IRS Whistleblower Program.

B. *The FCA Defines 'Proceeds' Broadly*

The term 'proceeds' is used by the FCA—just as it is in 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." 31 U.S.C. § 3720(d)(1) (emphasis added). Likewise, the IRS Whistleblower Program under Section 7623 awards a percentage—in this case fifteen to thirty percent—of the 'proceeds' to the whistleblower. While attempting to define the phrase 'collected proceeds' as a whole, IRS Counsel 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 amount of taxes *due* and the amount of 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.[4]

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[3] 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* footnote 4).

[4] 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

As used in the context of the FCA, the term 'proceeds' is expansive. *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). 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. *U.S. ex rel. Barajas v. United States*, 258 F.3d 1004, 1013 (2001). In examining the dictionary definition, the Court fount that "Webster's Third New International Dictionary defines 'proceeds' as 'what is produced or derived from something [...] by way of total revenue: the total amount brought in'; 'the net profit made on something.'" *Id.* Additionally, 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. *Id.* (citations omitted).

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 seeks to minimize it, or even to eliminate it altogether. *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). 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." *Id.* at 773, 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.

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).

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 was well aware 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

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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).

comprehensive view of the benefits accruing to the government as a result of their disclosures.

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

In understanding the policies and statute of Section 7623 it is important to understand that intertwined with 'proceeds' is the language of 31 U.S.C. 3730(c)(5)—the 'alternate remedy' provision of the FCA. 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. See *U.S. ex rel. Barajas v. United States*, 258 F.3d 1004, 1006 (9th Cir. 2001). 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 proceedings. 258 F.3d 1004. 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. *Id.* at 1010-11. Under the FCA, therefore, if the government chose to pursue a resolution outside of the relator's case, the results were still swept in under Section 3730(c)(5) and were to be 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.'

Moreover, 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, for example, states that "the Government may pursue its claim through alternative remedies available to it, such as a *criminal prosecution* or an [administrative adjudication]." H.R. Rep 99-660 at 24 (June 26, 1986) (emphasis added). 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."

Id. at 31 (emphasis added). 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.

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 as shown earlier) and inclusion of 'any related actions,' 'any settlements' and 'additional amounts'—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—as well as 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 same policy goals of the FCA the same as those of Section 7623, namely that a whistleblower ought to receive an award based on the benefits—defined broadly—that the government has received from his or her actions.[5]

D. Section 7623 Should be Construed in Favor of Whistleblowers

Assuming, for the sake of argument, that there is any serious doubt that Congress intended to award whistleblowers for proceeds collected under provisions found beyond Title 26, any such ambiguities in a remedial statute should generally be resolved in favor of persons for whose benefit the statute was enacted—in this case whistleblowers and prospective whistleblowers. *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").

In this case, Congress amended Section 7623 in order to greatly expand the scope of awards made to whistleblowers—as well as to eliminate the Secretary of the

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[5] 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, as noted earlier 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 ofthe 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).

Treasury's discretion with respect to such awards—in order to encourage more whistleblowers, at great risk to themselves and their careers, to provide the government with useful and valuable information. IRS Counsel's unduly narrow interpretation of Section 7623 thwarts those purposes, and would in many cases allow the Commissioner—essentially at his discretion—to avoid paying sums to whistleblowers. In a settlement with a taxpayer the Service could, for example, 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 thereby be severely crippled in its ability to entice whistleblowers to come forward by straightforwardly guaranteeing 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 strongly construed in favor of whistleblowers.

IV. PENALTIES COLLECTED BY THE GOVERNMENT FOR VIOLATIONS OUTSIDE TITLE 26 ARE 'AVAILABLE' FOR WHISTLEBLOWER REWARDS UNDER SECTION 7623

IRS Counsel also contends that there is an additional bar to whistleblowers' collection of a reward for violations outside Title 26—such as the FBAR provisions—namely that "amounts collected as penalties or criminal fines under Titles 31 or 18 are not 'available' to the Secretary for payment of whistleblower awards." IRS Memorandum at 4. IRS Counsel argues that such funds 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 7623. Additionally, IRS Counsel argues that there is no fund from which the whistleblower could be paid a reward. IRS Memorandum at 8. Because, however, 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, contains no limitation on payments made from Title 31 and Title 18, and specifies that an award "shall" be paid to whistleblowers, IRS Counsel's objections are not applicable. Additionally, the Title 31 program is discretionary and therefore does not in any case preclude Section 7623.

A. *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" on the grounds that "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). IRS Memorandum at 4. Where the award payment is discretionary, it cannot be said that it is 'provided by *law*,' but rather that it is 'provided by' 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).

31 U.S.C. § 5323(a) does not establish a whistleblower reward program comparable to those established by 26 U.S.C. § 7623 and elsewhere. Rather, 31 U.S.C. §

5323(a) 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." (emphasis added); see also *Katzberg v. United States*, 36 F. Supp. 1023, 1023 (Ct. Cl. 1941), *cert. denied*, 314 U.S. 620 (1941) (Commissioner has total discretion to determine size of award). The informant reward program differs fundamentally from whistleblower reward programs. For example, informants have no right of action under Section 5323. 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). 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. See 26 U.S.C. § 7623(b)(4) (right of appeal to Tax Court).

IRS Counsel 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. Indeed, 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." 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). 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, the "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 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." (emphasis added). 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, IRS Counsel'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 in cases 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." *U.S. v. Granderson*, 511 U.S. 39, 47 n.5 (1994); *Public Citizen v. Dep't of Justice*, 491 U.S. 440, 454 (1989) (rejecting "odd result"). 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.

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

Although IRS Counsel contends that "Congress requires that all criminal fines [...] be paid into the Crime Victims Fund (CVF)," IRS Counsel concedes that "[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." IRS Memorandum at 9 n.4. Yet, while the authority cited for this proposition resides in Title 26 § 6201(a)(4), IRS Counsel nonetheless contends 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.[6]

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." Pub. L. 104-168, § 1209 (July 30, 1996). 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.[7] Congress indicated that 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." H.R. Rep. No. 104-506, 51 (1996). Consequently, 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 the whistleblower's disclosure, and did not intend for the IRS to withhold payment to whistleblowers for lack of appropriated funds.

Indeed, IRS Counsel concedes as much, recognizing that a Congressional appropriation need not reside "in an annual appropriations act," but can take the form of

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

[7] 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).

"any provision of law" that "authoriz[es] an *obligation* or expenditure of funds for a specific purpose," recognizing as well that in enacting Section 7623, "Congress has created a permanent appropriation funded with *collected proceeds*." IRS Counsel Memorandum at 8 (emphasis added). Because IRS Counsel has, as discussed above, misconstrued the scope of collected proceeds under Section 7623, it has consequently misconstrued 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 disclosure, 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." IRS Counsel Memorandum at 8 (interpreting 31 U.S.C. 3302(b)). Because, however, Section 7623 includes Title 31 violations, for the reasons given above, 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 determination of proceeds as reaching beyond Title 26 will likewise lead to the correct determination that such proceeds are also available for payment to the whistleblower—thereby rendering the 'availability' issue moot.

V. CONCLUSION

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. *Tax and Accounting Software Corp. v. U.S.*, 301 F.3d 1254 (10th Cir. 2002). For the above reasons, IRS Counsel's narrow interpretation of Section 7623 is inaccurate and invalid, as are the Service's proposed changes to Internal Revenue Manual 25.2.2—and in particular paragraphs 25.2.2.1(7) and 25.2.2.13(1)—which reflect IRS Counsel's erroneous interpretation. 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 whistleblower awards from all proceeds collected by the government that relate to—or are in any way connected with—the information provided by the whistleblower, without regard to what Title the particular provision providing for such a penalty may be codified. This is especially so in actions that are directly or indirectly related to tax evasion.

In the final analysis, the IRS Counsel attempts every argument possible to stingily deny whistleblowers an award based on the benefits they have provided the government. However, IRS Counsel's arguments, as shown above, fall short for a number of reasons. Plainly said, IRS Counsel cannot overcome one simple fact: Congress could have easily written in Section 7623 that awards were only limited to taxes provided for under Title 26. Congress did not. In fact, as made clear in this memorandum, Congress took the opposite tack, repeatedly indicating with clear statutory language that it intended—just as it had in the FCA—proceeds to widely encompass all benefits that the government received due to the whistleblower's actions.

Following Section 7623's clear language and Congressional intent, as outlined in this memorandum, 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.