UNITED STATES TAX COURT

In the Matter of:	)	
	)	
WHISTLEBLOWER 22716-13W	)	
	)	
Petitioner	)	Docket No. 22716-13W
	)	
v.	)	
	)	
COMMISSIONER OF INTERNAL REVENUE.	)	
	)	
	)	
Respondent	)	

Date: July 20, 2015

BRIEF OF *AMICUS CURIAE*
NATIONAL WHISTLEBLOWERS CENTER SUPPORTING PETITIONER URGING THAT THE TAX COURT DETERMINE THAT FBAR PENALTIES ARE COLLECTED PROCEEDS FOR PURPOSES OF A WHISTLEBLOWER AWARD

Dean Zerbe
Zerbe, Fingeret, Frank & Jadav
3009 Post Oak Blvd., Houston, TX 77056
Tel: (713) 877-9600
Fax: (713) 877-9657 dzerbe@zffjlaw.com

Stephen M. Kohn
Kohn, Kohn, & Colapinto, LLP
3233 P St., NW Washington, DC
Tel: (202) 342-6980
Fax: (202) 342-6984
sk@kkc.com

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Statement of Interest of *Amicus Curiae*

The National Whistleblower Center (NWC) respectfully submits this memorandum of law as *amicus curiae*. *Amicus* asks the Court to accept this brief and urges the Court to find that civil penalties of the Foreign Bank Accounts Report (FBAR) should be treated as "collected proceeds" under Section 7623(b) of the Internal Revenue Code – and for which eligible whistleblowers can receive an award payment.

The NWC, founded in 1988, has long been recognized as a leading voice for whistleblowers by policymakers in Washington, D.C. The NWC and attorneys associated with the NWC have supported whistleblowers in the courts and before Congress and achieved victories for environmental protection, government contract fraud, nuclear safety, and government and corporate accountability. The NWC and associated attorneys work with tax whistleblowers who have filed submissions with the IRS under Internal Revenue Code (IRC) § 7623(b) and who have obtained awards under 7623(b). In addition, the associated attorneys have represented whistleblowers before the Tax Court in the decisions of *Whistleblower 10949-13W v. CIR,* TC Memo 2014-106 (2014) and *Whistleblower 21276-13W v. CIR,* 144 T.C. 15 (2015**).** The NWC has served as *amicus curiae in* several cases.[1]

[1] *E.g., Doe v. Chao,* 540 U.S. 614 (2004), *EEOC v. Waffle House,* 534 U.S. 279 (2002), *Beck v.Prupis,* 529 U.S. 494 (2000), *Vt. Agency of Natural Res. v. United States ex rel. Stevens,* 529 U.S. 765 (2000), *Haddle v. Garrison,* 525 U.S. 121 (1998), *English v. Gen. Electric,* 496 U.S. 72 (1990), *Kan. Gas & Electric Co. v. Brock,* 780 F.2d 1505 (1Oth Cir. 1985), *Mann v. Heckler & Koch Defense,* 630 F.3d 338 (4th Cir. 2010), *Stone v. Instrumentation Lab. Co.,*

Amicus believes that this brief brings to the Tax Court's attention issues that have not been properly briefed or discussed before the Court, especially the legislative history of Section 7623, the relevant interpretation of the courts, the administrative practice of the IRS, as well as the policy implications of a decision to allow the IRS to reverse long-time agency practice and to now deny whistleblowers awards for FBAR penalties.

Amicus hopes that the Court will benefit from a broader perspective from whistleblowers and the whistleblower community on the questions before the Court.

Amicus believes that this brief fits well within the goals for an *amicus* cited by the Tax Court in *Erwin.*[2] The importance of this case reaches far beyond just Petitioner. The implications of this case will effect a strong number of whistleblowers and will in particular have a dramatic impact on the future of the IRS whistleblower program – especially in the area of illegal offshore accounts (and with that the success of the IRS to bring to justice individuals with undeclared foreign bank accounts). A number of whistleblowers who have put their security and future at risk to help the US government look to the Courts decision in this matter – to ensure that the IRS cannot ignore the plain reading of the statute as well as Congressional intent and deny them the awards for which they are entitled.

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591 F.3d 239 (4th Cir. 2009). Before the Tax Court in the tax whistleblower case of *Insigna v. CIR*, docket No. 4609-12W.

[2] *Erwin v. Comm 'r, T.C. Memo 1986-474, 5 (1986) ("*"[T]he *amicus* [may] enlarge upon points which the party cannot, or prefers not to expound in detail. Amicus may be more knowledgeable than a party as to facts underlying particular arguments. Amicus would often be in a superior position "to inform the courts of interests other than those presented by the parties, and to focus the court's attention on the broader implication of various possible rulings' -*citing Stern, Gressman, & Shapiro, Supreme Court Practice 570 1986), citing Ennis, 'Effective Amicus Briefs' 33 Cath. U.L. Rev. 603, 608 (1984). Fn ref. omitted.").*

Introduction

We will put forward a detailed rebuttal to the arguments of Respondent, raise additional points from the statute, legislative history and policy that the Respondent has failed to address that supports a finding that FBAR should be considered "collected proceeds" for purposes of a whistleblower award. We will also explain why the Treasury Regulations are not applicable to the issues before the Court. Finally, in the appendix we discuss in detail the False Claims Act – the fact that this statute is in pari materia to the IRS Whistleblower law and the relevance that has to the question before the Court.

I. All FBAR Payments Are Collected Proceeds Under Section 7623

The taxpayer on August 3, 2011, pleaded guilty in US District Court to willfully making and subscribing to a false federal individual income tax return and paid a Foreign Bank Accounts Report (FBAR) penalty of $6.8 million dollars. The question before the court is whether the FBAR penalty is considered "collected proceeds" under Section 7623(b) – the IRS whistleblower award program.

Respondent has explained that it believes collected proceeds are limited to amounts collected under the provisions of title 26, United States Code, and that the provisions of non-Title 26 laws do not constitute collected proceeds, because the language of section 7623 authorizes awards for detecting underpayments of tax and violations of the internal revenue laws. See Respondent's Motion for Summary Judgement paragraph 30. Section 7623, however, does not limit collected proceeds to Title 26 amounts. Rather, the IRS

whistleblower award program is much broader, encompassing all amounts collected as a result of actions taken on the basis of violations of internal revenue laws, including criminal fines and penalties, as well as penalties imposed under other titles, such as Title 31. The relevant analysis amount for purposes of calculating a whistleblower award under section 7623(b)(1) is the total amount of proceeds that are collected by the government as a consequence of the information the whistleblower brought to the Secretary's attention. Accordingly, in this matter the FBAR penalties collected by the government from the taxpayer qualify as collected proceeds under section 7623, and are available for a whistleblower award.

a. Collected Proceeds Are Not Limited to Title 26

The Service interprets section 7623 such 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. NOTE: as discussed in detail below, the recently promulgated regulations are not binding on the whistleblower or the Court in this matter.

Section 7623 is, however, considerably broader than the Service's new interpretation. In particular, the plain language of the statute itself is very broad, and encompasses fines and penalties under Titles 18 and 31 if they are tax-related and collected as a result of the whistleblower's information. The history of section 7623 confirms that Congress intended the statute to apply broadly rather than be confined to amounts collected under Title 26 of the Internal Revenue Code. Indeed, the IRS has previously interpreted section 7623 broadly, and has approved whistleblower awards based on proceeds collected under Title 31 and Title 18 provisions – both prior to the 2006 amendments and after the 2006 amendments as discussed below.

i. Statutory Language Does Not Limit the Scope of Whistleblower Awards to Title 26

Section 7623 authorizes awards for "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). The phrase 'internal revenue laws,' however, is not a term of art existing in any statutory definition in the United States Code, nor does it have an accepted meaning in the area of law addressed by section 7623, namely whistleblower awards. However, neither section 7623 nor any other Code provision defines the term 'internal revenue laws.'

Words that are not terms of art are given their ordinary meaning. *See F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning"). A statute is not rendered ambiguous merely because Congress chose not to define a broad term. *Loving*, 917 F. Supp. 2d at 74 (citing *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006)).

While the IRS contends that the term 'internal revenue laws' applies exclusively to Title 26, the best and most straightforward construction of '*internal revenue* laws' is any law relating to internal revenue or administered by the Internal Revenue Service. While the violations underlying a whistleblower award may need to be rooted in—or relate to the Code—the proceeds need not. A whistleblower award may encompass proceeds collected using non-Title 26 laws if the facts establish a Title 26 or internal-revenue-related violation, even though the government may have chosen to proceed against the Taxpayer under another Title—such as Title 18 or 31.

The IRS's interpretation of section 7623 is premised on the theory that the internal revenue laws are contained exclusively in Title 26, Internal Revenue Code and guidance issued under that title. While "Title 26 [...] contains *most* of the Federal *tax* law," it does not follow that it contains *all* of the Federal tax law, let alone all of the *internal revenue* laws. IRM 4.10.12.1.2(3) (Nov. 11, 2007). To take just one example, Title 7 of the United States Code authorizes the Service to collect "[t]he taxes provided in this chapter." 7 U.S.C. § 619(a) (collection of commodity processing taxes).

The codification of most laws—including the reporting requirements of the Bank Secrecy Act—is not a part of the act passed by the Congress and signed into law, but is instead a process independently undertaken by the House Office of Law Revision Counsel ("OLRC"). *See, e.g.*, Pub. L. 91-508, 84 Stat. 1118 (Oct. 26, 1970) (later codified as part of Title 31). The Service's exclusive focus on Title 26 becomes all the more implausible when one considers that the Unites States Code did not even exist[3] in 1867—when the statutory language was first drafted—and that the OLRC can editorially reclassify many, if not most, provisions of the U.S. Code—a process that does not require bicameralism and presentment.[4]

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

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[3] The first U.S. Code was produced in 1926, and did not codify original informant law which is the predecessor to section 7623.

[4] As the Office of Law Revision Counsel explains, the Office "must occasionally undertake editorial reclassification projects to reorganize areas of law that have outgrown their original boundaries." In this process "[t]he provisions are merely transferred from one place to another in the Code." OLRC, *Editorial Reclassification*, *available at*

http://uscode.house.gov/editorialreclassification/reclassification.html.

punishment of *frauds*' related to the internal revenue laws." Dennis J. Ventry, Jr., "Whistleblowers and *Qui Tam for Tax*," 61 TAX LAWYER 357, 361 (citing Revenue Act of 1934, ch. 3792, 48 Stat. 680). It is clear from this legislative history that the whistleblower award statute existed separately from 'the internal revenue laws' for a long period of time, and, furthermore, that it extends to 'frauds' relating to the internal revenue laws, not solely to Title 26.

Limiting section 7623 merely to 'Title 26' is overly narrow and simplistic—particularly since section 7623 refers neither to the Internal Revenue Code nor to the U.S. Code—and subordinates the intent of Congress to the interpretive and editorial judgments of attorneys in the OLRC. This is especially so since such a reading needlessly erodes the underlying purpose of section 7623.

Moreover, at least one Federal Circuit has rejected the argument—put forward in a parallel context here by the Service—that the term 'internal-revenue tax' "encompasses only those taxes imposed under Title 26 of the United States Code," noting that it has "a broader view of 'internal-revenue tax,'" and "read the term as *referring not to the Internal Revenue Code, but to revenue generated within the boundaries of the United States, as opposed to 'external' revenue*, which is derived from foreign sources such as import and customs duties." *Horizon Coal Corp. v. United States*, 43 F.3d. 234, 239 (6th Cir. 1994).

Congress surely knew how to invoke the limitation urged by the service: use the term "tax." Instead, Congress deliberately used the term "proceeds." The ordinary meaning of 'proceeds' is broad, encompassing everything that emanates from something else—in this case the IRS's actions in response to a whistleblower's information. Black's Law Dictionary states 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 similarly 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). The "collected proceeds" are the benefits accruing to the government because of the whistleblower's information, including—*but not limited to*—recoveries under Chapter 68 of the Code.

This interpretation (and the traditional interpretation) of a more expansive meaning of "proceeds" is further supported by the fact that, in elaborating on "collected proceeds," Congress also used the expansive term "including."[5] The use of this term in section 7623(b) indicates that the enumerated categories of collected proceeds are merely illustrative rather than exclusionary or limiting. *See, e.g.*, *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. 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 aware of the term "tax," nonetheless specifically and deliberately used the term "proceeds," is strong evidence that Congress did not intend to limit whistleblower

[5] The statutory language of 7623 (b) uses a parenthetical to state that collected proceeds "includes" and lists a number of items that are encompassed by collected proceeds. It has long been recognized that "[w]hen a definitional action says that a word "includes" certain things, that it usually taken to mean that it may include other things as well." Antonin Scalia and Bryan Garner, *Reading Law: The Interpretation of Legal Texts*, 226 (West 2012) (footnotes omitted). Respondent completely ignores this canon of construction and not only narrowly and improperly reads what is included in the definition of collected proceeds but also views the parenthetical as the exclusive list and thus ignoring completely the use of the term "including." By the most basic reading "proceeds" must include something beyond just taxes, penalties, interest and additional amounts.

awards to the total tax liability alone, and did not intend to limit the applicability of the whistleblower program to Title 26 only.

ii. Section 7623 Covers More than "Underpayments of Tax" or "Internal Revenue Laws."

Besides misinterpreting "internal revenue laws," Respondent has ignored important parts of the statute that provide additional bases for whistleblower awards. At the outset, Section 7623(a) applies its provisions to "*detecting* underpayments of tax" and to "*detecting* […] persons guilty of violating the internal revenue laws *or conniving at the same*." 26 U.S.C. § 7623(a) (emphasis added). In an early decision interpreting the IRS's informant law, the Court of Claims noted that "[t]he discretion conferred by this statute is *very broad* [...] and the only restriction […] is that the money shall be paid 'for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws or conniving at the same [...]." *William's Case*, 12 Ct. Cl. 192, 199 (Ct. Cl. 1876) (emphasis added). The effect of the 2006 amendments to section 7623—which are at the heart of the IRS's current whistleblower program—was not to reduce the overall reach of the law, but to establish a process for awards and eliminate discretion by mandating award payments where certain conditions were met as well as provide for de novo review by the Tax Court. *See* 26 U.S.C. § 7623(b)(5).

The statutory language, therefore, has two additional elements which expand its meaning beyond 'internal revenue laws'—(1) the concept of paying awards in connection with the *detection* of tax violation, and (2) the concept of paying awards related to identifying individuals or entities 'conniving'—that is, conspiring or *intending*—to evade taxes. Respondent's interpretation—which ignores the statute's use of "detecting" and "conniving at the same" entirely—would limit the scope of the law to "tax laws under Title

26" or "laws imposing taxes," limitations nowhere to be found in the statute itself. Rather, section 7623 encompasses related statutes, such as those imposing reporting requirements designed to facilitate tax administration, and tax-related criminal laws in Title 18.

To take just one example, the Internal Revenue Code imposes a variety of reporting requirements which are not "laws imposing taxes." Section 6048 requires taxpayers to report certain transactions with foreign trusts—including the creation of a foreign trust, transfer of property from a foreign trust, and receipts of distributions from a foreign trust. Under section 6677, the Service may impose a penalty of up to 35 percent of the reportable amount, regardless of whether any tax is due.[6]

It is not clear whether the Service's interpretation of section 7623 would extend its reach to violations of section 6048—although section 6048 is in Title 26, it is not a 'law imposing taxes.' On the other hand, section 6048 is related to "detecting underpayments of tax" or "persons guilty of violating the internal revenue laws or conniving at the same," for the purpose of the reporting requirement is unquestionably to aid in detecting a category of transactions commonly used to evade income tax.

In this respect, the FBAR is substantially similar to section 6048 and other reporting requirements, with the exception that the FBAR has been codified in Title 31 while section 6048 is in Title 26. Additionally, provisions of the Foreign Account Tax Compliance Act require taxpayers to report foreign assets above a certain threshold value in Form 8938 filed with a taxpayers federal return. This disclosure is remarkably similar to the FBAR. *See, e.g.*, IRS, Comparison of Form 8938 and FBAR Requirements, Feb. 10, 2014, *available at* http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-

[6] Similarly, section 6039F requires the reporting of certain foreign gifts, and the failure to do so can result in a 25 percent penalty.

Requirements. The relation between section 6048, Form 8938, and the FBAR demonstrate the relatedness of the FBAR to internal revenue laws and tax administration.[7]

Section 7623(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 than does Respondent's position. 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. Where the information relates to 'detecting' underpayments of tax or violations of internal revenue laws, section 7623(a) authorizes the Secretary to pay a reward for such information.

The plain and ordinary meaning of 'conniving' embraces additional grounds for granting an award. Black's Law Dictionary defines "to connive" as "[l]oosely, to conspire." Black's Law Dictionary 1204 (6th ed. 1990). Because "[t]he criminal tax statutes in Title 26 [...] do not include a statute for the crime of conspiracy [...] tax-related conspiracies are generally prosecuted under 18 U.S.C. § 371." Justice Department, *Criminal Tax Manual*, § 23.02 (2001). The IRS has jurisdiction to investigate several tax-related crimes outside Title 26. *See, e.g.*, IRM 9.1.3 (listing revenue-related offenses in Titles 26, 18, 31, and elsewhere). Congress plainly intended to include such tax-related laws in the scope of section 7623. See further discussion of this issue in Section iv below.

[7] For a detailed discussion of the legislative history of the FBAR, as well as the history of its administration and enforcement, *see* National Whistleblowers Center, *The Legality of the IRS' Proposed Whistleblower Rule: Flunking the* Loving *Test* §2.2 *et seq.*, published in Tax Notes Today, June 5, 2014.

iii. The Legislative History of Section 7623 Demonstrates Congress Intended Broad Scope of Collected Proceeds

It is telling that the trend of Congressional action regarding section 7623 has been to expand the scope of collected proceeds. Section 7623 was not altered until 1996, when Congress enacted the Taxpayer Bill of Rights 2. Pub. L. 104-168 (July 30, 1996). This act amended section 7623, adding "detecting underpayments of tax" as a basis for which an award could be paid to an informant. The law now authorized the Secretary "to pay such sums as he deems necessary for (1) detecting underpayments of tax, and (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." *Id.* § 7623, 110 Stat. 1473. The available legislative history indicates that Congress "believe[d] that improvements should be made to this program," and that the amendments "clarifie[d] that rewards may be paid for information relating to civil violations, *as well as criminal violations*." H. R. Rep. 104-506 at 51 (emphasis added). There is no indication in the legislative history that Congress intended to limit these civil and criminal violations to Title 26. Congress believed that the original language encompassed tax-related crimes, but felt it necessary to specify that "underpayments of tax" not rising to the level of a crime were also encompassed.

Prior to the 2006 amendment to section 7623, the 1996 amendments—and Service's regulations—explicitly excluded interest from 'collected proceeds: "Any amount payable […] shall be paid from the proceeds of amounts (*other than interest*) collected by reason of the information provided […]." Pub. L 104-168, 110 Stat. 1473 (emphasis added). In doing so, Congress showed it knew how to specifically exclude any amounts it wished from collected proceeds under section 7623.[8] That it did not specifically exclude Title 31 and Title 18

[8] Removing the prior restriction on interest also indicates Congress sought to broaden the scope of the law.

amounts, while broadly including "proceeds of *amounts collected by reason of the information provided*," indicates that Congress did not intend such amounts to be excluded. Moreover, Congress was aware in 2006 that there were no limitations on discretionary awards (other than interest payments) and that awards were being given for FBAR enforcement, Title 18 recoveries, and other amounts outside of Title 26 – that was the practice of the IRS at the time.[9]

Tellingly, in the 2006 amendments, Congress struck the limiting language of no award payments on interest, thus eliminating the only specific restriction on collected proceeds in place at the time – and allowing for award payments to whistleblowers on interest paid by the taxpayer. The intent of Congress in the 2006 amendments was to expand the amounts received by the government that would count towards a whistleblower award – not restrict, limit and cutback on long-time IRS practice for making awards based on FBAR enforcement, Title 18 recovers, Title 31 recoveries and other amounts outside of Title 26.

The legislative reenactment doctrine is applicable here given that the Congress was well aware of the IRS administration of the IRS whistleblower program – having requested the TIGTA review of the program, the Finance Committee conducting its own independent review of the program and the author of the legislation – Senator Grassley's – long involvement and work with whistleblowers. Further, while there were significant changes

[9] See affidavit of former IRS whistleblower office executive Robert Gardner paragraph 5 "The long-time practice of the WBO was that the WBO paid awards under section 7623 based on a percentage of all the dollars paid by the taxpayer – regardless of whether the dollars paid were based on violations of criminal or civil laws, and without regard to the Title of the United States Code in which the underlying statute imposing the penalties were codified. See also Treasury Inspector General for Tax Administration report "The Informants' Rewards Program Needs More Centralized Management Oversight, June 2006, p. 2 "The dollar amount of the reward is computed by multiplying the reward percentage by the amount of taxes, fines and penalties (but not interest) collected."

to the whistleblower award program – the process of awards, the mandating of awards, tax court review, etc. there was no language that could be read to curtail or limit the making of awards – quite the contrary.

"When the statute giving rise to the longstanding interpretation has been re-enacted without *pertinent* change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *FDIC v. Philadelphia GearCorp.*, 476 US 426, 437 (1986) quoting *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) (emphasis added).

The reenactment doctrine has been applied in cases of tax – including the Supreme Court: "We have held in many cases that such a longstanding administrative interpretation, applying to a substantially reenacted statute, is deemed to have received congressional approval and has the effect of law." *CIR v. Noel*, 380 US 678, 682 (1965)(question of inclusion of insurance policy in husband's gross estate);

Given the facts here – with the drafters highly aware of IRS practice of the whistleblower award – the Courts have found the re-enactment doctrine particularly relevant: "[I]t may not always be realistic to infer approval of judicial or administrative interpretation from congressional silence alone." Nevertheless, "once an agency's statutory construction has been 'fully brought to the attention of the public and the Congress' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *Reese Brothers, Inc. v. United States*, 447 F.3d 229, 238 (3rd Cir. 2006) Citing *United States v. Rutherford*, 442 US 544, 554. n. 10 (1979)(*Reese* involved excise taxes for long-distance

telephone service). *See also American Bankers Insurance Group v. United States*, 408 F.3d 1328, 1335 (11th Cir. 2005).

Similarly, the Tax Court stated in *Tutor-Saliba Corporation v. CIR,* 115 TC 1, 15 fn. 8 (2000): "Under the successive reenactment doctrine, if Congress reenacts without change the statutory language that has been constructed by the agency administering that statute, Congress' decision not to change that statutory language may be persuasive evidence that the agency's construction is the one intended by Congress." *Citing Commodity Futures Trading Commn. V. Schor*, 478 U.S. 833, 845-846.

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 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).

iv. Congress expands the bases for making awards

In 2006 Congress explicitly uncoupled the two bases for awarding a whistleblower by replacing the word "and" with the disjunctive "or." Pub. L. 109-432 § 406(a)(1)(B), 120 Stat. 2958 (Dec. 20, 2006) (providing that "The Secretary, […], is authorized to pay such sums as he deems necessary for— (1) detecting underpayments of tax, ~~and~~***or*** (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same")(emphasis added).

The difference between "and" and "or" is clear: "Ordinarily, as in everyday English, use of the conjunctive 'and' in a list means that *all* of the listed requirements must be satisfied, while use of the disjunctive 'or' means that *only one of the listed requirements need be satisfied*." Yule Kim, *Statutory Interpretation: General Principles and Recent Trends* (CRS 97-598), Aug. 31, 2008, 8 (citing *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1292 (D. N. Mex. 1996) (meaning of 'and'); *Zorich v. Long Beach Fire and Ambulance Serv.*, 118 F.3d 682, 684 (9th Cir. 1997) ('or'); *United States v. O'Driscoll*, 761 F.2d 589, 597-98 (10th Cir. 1985) ('or')). Thus "detecting underpayments of tax" is an entirely separate basis for an award than is "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)(1)–(2).

Because subsection (a)(2) is distinct from "underpayments of tax," it therefore follows that 'tax violations' are not the *exclusive* basis upon which whistleblower awards can be made under section 7623. This is particularly the case in light of the "basic principle of statutory interpretation […] that courts should 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.'" *Id.* at 12 (citing *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)); *see also* 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). If section 7623 awards can only be based on 'tax violations'—i.e., "underpayments of tax" and "amounts assessed under chapter 68 that increase the total amount of *tax* liability," PMTA 2012-10 at 7—then the language of subsection (a)(2) is rendered superfluous and without distinct meaning. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning").

Similarly, subsection (a)(2) also uses the word "or" to disjoin "violating the internal revenue laws" from "conniving at the same." 26 U.S.C. § 7623(a)(2). Accordingly these terms, too, must have a separate and distinct meaning. In particular, "conniving at [violating the internal revenue laws]" is broader than "violating the internal revenue laws." *Id.* As argued above, "conniving at" violating the internal revenue laws includes tax-related criminal laws—such as conspiracy to defraud the United States—under Title 18, and tax- and revenue related penalties under Title 31. The IRS in its analysis completely ignores (and hopes the Court won't notice) the fact that the Congress in 2006 expanded the bases for an award with the use of the word "or" replacing "and" – and providing three wholly separate groundings for an award. As discussed in Section II below– the FBAR penalty is a picture perfect example of activities that fall within "conniving."

In sum, Congress made critical changes to section 7623 in 2006 establishing a process for awards, mandating payment of awards, providing tax court de novo review, striking the restriction on awards for interest payments, broadening "collected proceeds"

and by replacing "and" with "or" in 7623(a) widened the scope of the law further. Combined, these changes represent a significant expansion of the whistleblower award program and the rights of whistleblowers as well as plainly refuting Respondent's argument that the 2006 amendments to Section 7623 were intended to reverse longtime IRS practice of making whistleblower award payments on FBAR penalties.

v. Past IRS Practice is Consistent With an Expansive Reading of Section 7623.

The history of section 7623 shows that it was taken for granted that the law applied to the most serious tax-related criminal violations, in addition to the collection of taxes due from a delinquent taxpayer. Moreover, the IRS itself has, until recently, used its authority under Section 7623 to award payments from amounts collected through non-Title 26 violations, including criminal fines imposed under Title 18, as well as Title 31 penalties.

In 1876, the Secretary of the Treasury requested the opinion of the Attorney General--Alphonso Taft--regarding whether "the authority given by the statute [was] exceeded by including within the terms of [the IRS's] offers a reward for *taxes* recovered by reason of information furnished by the claimant." 15 Op. Atty Gen. 133 (emphasis in original). In response, Taft reviewed "the acts of 1872, 1873, 1874, and 1875," as well as "IRS Circulars No. 99, No 99 revised, and No. 99 second revision," concluding that offering a reward for taxes recovered was "within the spirit of the law as well as within the letter." *Id.* He reasoned that, because "[i]t is the duty, under the laws," to file correct tax returns, that "[a] failure to do this is a 'violation' of the internal-revenue laws." Therefore, "[t]o expose this omission of duty is a detection of such violation," and consequently was encompassed by the statute's language. *Id.* The question when the original law was passed was not whether it authorized payment to detect "non-tax" violations—it was understood

that a core purpose of the law was to empower the Service to detect frauds and crimes. Instead, until Taft's opinion, there was doubt as to whether the law authorized awards merely for information on underpayment of tax.

Not only did section 7623 reach criminal violations—since codified in Title 18 and elsewehere—and underpayments of tax, but the law was also interpreted to authorize awards in situations where the information did not result in underpayment of tax, nor even in any fine or penalty. In 1918, the Secretary of Treasury referred to the Comptroller of the Treasury the question of "whether rewards may be paid [...] in cases where the conviction [...] carries no fine and no offer as specific penalty is made or taxes collected." 24 Decisions of Comp. Gen. 430 (Jan. 26, 1918). The Comptroller noted that section 7623's language "does not specifically provide for information of internal revenue violations, but has been so interpreted and accepted." The Comptroller then reasoned that the Service's offer limiting rewards to "ten per cent of the net amount of the fines penalties, forfeitures, and taxes recoveries or sum accepted in compromise" was "not decisive of the question but indicates *only the extent to which rewards have been heretofore permitted administratively*." Considering the breadth of the statutory language, the Comptroller concluded that awards were authorized even if there is no fine, penalty, or tax collected.

Informant awards under section 7623(a) were plainly not limited to underpayments of tax. An early court decision demonstrates that the informant law was used to authorize awards "lead[ing] to the forfeiture of any distillery *whose proprietor has not given the notice required by law* to the assessor of the district, and which information shall lead to the conviction of any person engaged in operating the said distillery." *William's Case*, 12 Ct. Cl. 192, 193 (1876) (emphasis added) (noting also that "[t]he discretion conferred by this statute is very broad."). The history of the IRS is replete with examples of "non-tax" laws

being directly or indirectly administered by the Service. For example a Treasury Department "compilation contain[ing] the internal revenue laws in force March 1, 1920" included a prohibition on the sale of alcoholic beverages during the First World War, and various other prohibition acts. *See, e.g.*, 40 Stat. 1046 ("War-Time Prohibition Act"). Early application of section 7623(a) does not appear to distinguish whether the underlying action was a notice requirement, an underpayment of tax, or a tax-related crime—much less whether the underlying basis for action was codified in Title 26 rather than in Title 18 or 31.

Perhaps most importantly, prior to the 2006 amendments to Section 7623, the Service routinely awarded discretionary section 7623 awards to informants based on violations outside Title 26. As former IRS Whistleblower Office Senior Program Analyst Robert Gardner has attested – Affidavit of Robert Gardner of July 6th 2015, these discretionary awards included payments for information leading to the collection of FBAR penalties under Title 31 and Title 18 violations—regardless of "whether the payment made by the taxpayer was for a Title 18, Title 26 or Title 31 penalty / violation—the whistleblower got paid a percentage." Affidavit of Robert Gardner at ¶ 5. Indeed, the longstanding policy of the Whistleblower Office—which "preceded the 2006 change in the law and continued unchanged for a year and a half after the change in the law"—was that whistleblowers "received an award under Section 7623 based on the total dollars that were agreed to between the government and the taxpayer." *Id.* at ¶ 4. That is, the Whistleblower Office "paid awards under Section 7623 based on a percentage of all the dollars paid by the taxpayer—regardless of whether the dollars paid were based on violations of criminal or civil laws, and without regard to the Title of the United States Code in which the underlying statute imposing the penalties were [*sic*] codified." *Id.* at ¶ 5.

The only limitations on collected proceeds available for whistleblower awards were "asset forfeitures made by a taxpayer for anti-money laundering violations," as well as interest, *Id.* at ¶ 6, which was not considered collected proceeds because it was specifically excluded in a 1996 amendment to Section 7623. Pub. L. 104-168, § 1209 (July 30, 1996). This interest exclusion was specifically excised by the 2006 amendments to section 7623. Pub. L. 109-432 § 406(a)(1)(C), 120 Stat. 2958 (Dec. 20, 2006). Thus, Congress focused on expanding the definition of collected proceeds rather than limiting the definition in 2006.

The Service's position that section 7623 is limited to Title 26 laws is not in the original statutory language of section 7623 or in the 2006 amendments to it. Rather, it is a recent change —"done at the direction of the IRS Office of Chief Counsel," Ex. B., Dec. 23, 2014 Affidavit of Robert Gardner ¶ 8—that upends the Service's own longstanding practice, that whistleblowers be given an award based on a percentage of the total amount of proceeds collected by the government from the taxpayer, and not merely those amounts collected under Title 26 provisions.

b. The Statute's Use of "any related action" and "any settlement" Is Broad and Encompasses Amounts Received By Other Agencies in Tax-Related Matters

Section 7623(b)(1) also explicitly includes within the scope of the term "collected proceeds" those proceeds "resulting from […] any related actions," and "any settlement," not just the original action "described in subsection (a)." 26 U.S.C. § 7623(b)(1). By including this language, Congress sought to reward whistleblowers for their contribution by including the proceeds of "any related actions" and "any settlement" that the government undertakes because of the whistleblower's information, recognizing that the government has a great

amount of prosecutorial discretion, and can often choose from several different paths in how to respond to illegal conduct. Respondent fails to address this clear statutory mandate.

In including "any" related actions, Congress sought to eliminate hyper-technical distinctions such as the Service's proposed distinction between chapter 68 penalties and other penalties within the IRS and Federal Government's jurisdiction to impose or recommend. Congress sought to reward whistleblowers based on the information given and the proceeds collected, regardless of the path taken by the government or the response of the taxpayer. The Government itself has great discretion in deciding how—and under which provisions of law—to make use of a whistleblower's information. This is evident in reviewing how the Government proceeded against the taxpayer, collecting proceeds through a settlement agreement that effectively directed how the Government was to receive its dollars in six different legal pots from the taxpayer. To read the statute as Respondent does, while recognizing that the Government can dictate into which bucket the proceeds will go, renders section 7623 discretionary in direct contravention of the central purpose of the 2006 amendment: the creation of a mandatory award program. The Government effectively can return the whistleblower program to a discretionary program by directing and naming how the taxpayer will make payments – directly against the policy goals of a mandatory whistleblower award program.

This Congressionally-intended reading of "any related actions" as being expansive in scope is confirmed by the breadth of the term "related," and by the statute's use of "any" and "any settlement." In the context of section 7623(b) "related" means it was "based on information brought to the Secretary's attention by [the] individual." 26 U.S.C. § 7623(b)(1). Because the ordinary meaning of 'related' is broad, an action or settlement may be 'related' to a Title 26 provision despite being codified elsewhere. The sense of the word as used in

section 7623 is that of a relation or connection with the whistleblower's information and the government's response to it—that is, if the government collects 'proceeds' due to a whistleblower's information, then that action is 'related.'

Although the statute is broad to begin with, the term "any" expands the scope of related actions even further. In section 7623, "any" is continually used to modify the statute's terms, including the concept of a "related action". 26 U.S.C. 7623(b)(1). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *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). 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.

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) (emphasis added). 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 Service would narrowly interpret the statute. Through expansive language, Congress actively sought to avoid an interpretation like the one that has been put forth by Respondent. See discussion below in the appendix I.b. of the often hostile treatment of whistleblowers by the Government under the False

Claims Act – a fact that was very much in the minds of drafters of the 2006 amendments to Section 7623 – and seeking to address.

The inclusion of "any settlement" within the scope of "collected proceeds" exemplifies the breadth of the statute. Notably, Congress used the general term "settlement," rather than the Title-26 term "compromise." *See, e.g.*, 26 U.S.C. § 7122 (granting authority to "compromise any civil or criminal case arising under the internal revenue laws prior to reference to the Department of Justice for prosecution or defense"). As a settlement is essentially an agreement *not* to proceed under formal, statutory procedures, but rather by way of agreement between the parties, the Service's action need not be "related" to underpayments of tax, but rather to the whistleblower's information.

That other agencies are involved in an action against a taxpayer, or in collecting proceeds from that taxpayer—as they were in the case of the taxpayer—has no effect on the amount of collected proceeds upon which a whistleblower award is based. Rather, if the action was, as is required by section 7623(b)(1) brought about by a whistleblower's bringing of information to the Secretary's information, then all proceeds collected as a result of the government's action(s) against the taxpayer are collected proceeds from which an award must be paid. This is confirmed by the statutes use of the expansive term "any related action," as described above. That amounts collected by agencies other than the service are added to the amount of collected proceeds is inherent in the structure of section 7623, and how it uses the term "related action." In particular, section 7623(b)(1) first describes the proceeds from "any administrative or judicial action" that "the Secretary proceeds with," and states that amounts "resulting from the action" are collected proceeds. However, the statutory language also adds amounts from "any related actions," yet does not modify these related actions as actions that "the Secretary proceeds with." Congress could have specified

that collected proceeds included only "related actions brought by the Secretary," but did not, recognizing that other agencies, such as the DOJ, are often involved in proceeding against taxpayers for violations of internal revenue laws, and in collecting proceeds from those taxpayers.

Finally, the Court may also want to consider that 7623(b)(1) describes the proceeds as coming from "**any** administrative or **judicial** action" (emphasis added). Again, not just the use of "any" once again but also the use of the word "judicial" – a judicial action certainly carries with it the implications of potentially criminal actions – and far beyond just tax. The whole drumbeat of 7623(b) is to cover the waterfront and ensure that at the end of the day the whistleblower is awarded when the Government uses her information – whatever road the Government takes (a very real concern as shown given the history of whistleblowers and the False Claims Act – as discussed in the appendix).

It is disconcerting that Relator in its filings with the court has ignored the language of both "any related action" and "any settlement" – violating the most basic canon of statutory construction that the Courts should give meaning to every word and not have surplusage. By giving meaning to every word of the statute the Tax Court will find that is plain that whistleblowers can receive awards from FBAR payments.

As a note on statutory interpretation relevant here – the word "any" appears 10 times in the 2006 amendment of 7623(b)(**any** related action, **any** settlement, etc) – this is not by accident – it clearly underscores that Congress intended an expansive reading of the whistleblower award statute. The Fourth Circuit similarly found in *U.S. v. Ickes*, 393 F.3d 501 (4th Cir. 2004) that the repeated use of "any" in U.S. 1581(a) as indicative of Congressional intent and a guide to statutory construction:

> In drafting 1581(a), Congress chose to use the word "any" no less than five times. . . As we have explained before, "[t]he word 'any' is a term of great breadth. Read naturally, [it] has an expansive meaning." *Mapoy v. Carroll,* F.3d 224, 229 (4th Cir. 1999 (internal quotations and citations omitted). Given Congress's repeated use of the word "any" immediately preceding its list of what may be searched, we find it unreasonable to construe the list restrictively. Ickes at 504.

Similarly here, the Court should not accept Respondent's invitation to ignore the statutory words of "any related action," "any settlement" – as well as to turn a blind eye to the use of the expansive word "any" 10 times in the 2006 amendments creating 7623(b).

c. Section 7623(b) Should be Construed in Favor of Whistleblowers

Assuming, for the sake of argument, there is doubt that Congress intended to award whistleblowers for proceeds collected under provisions outside Title 26, any such ambiguities in a remedial statute should be resolved in favor of persons for whose benefit the statute was enacted—whistleblowers and prospective whistleblowers. *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"). Judges of this Court, too, have recognized that certain remedial code provisions ought to be construed broadly. *See, e.g.*, *Cheshire v. Commissioner*, 115 T.C. 183, 201 (2000) (Parr, J., dissenting) ("Section 6015 is a remedial statute; therefore, its provisions should be construed and applied liberally in favor of those whom the statute was designed to benefit.").

In this case, Congress amended section 7623 in order to establish a process for awards, expand the scope of awards made to IRS whistleblowers—and to eliminate the Secretary of the Treasury's discretion with respect to such awards—to encourage more whistleblowers to provide the government, at great risk to themselves and their careers, with useful and valuable information. Respondent's unduly narrow interpretation of section 7623 thwarts this Congressional policy, and would in some cases allow the IRS at its discretion—to avoid paying sums to whistleblowers by how payments from taxpayers characterized. In a settlement with a taxpayer the Service could characterize a large percentage of the settlement amount as stemming from Title 31 or Title 18 violations, and a relatively much smaller percentage as stemming from Title 26 violations – as was done in the case here. The whistleblower program would be severely crippled in its ability to entice whistleblowers to come forward because it would not straightforwardly guarantee a nondiscretionary reward, and Congress's purpose in amending section 7623 would be

frustrated. Therefore, to the extent that section 7623 is ambiguous, it should be construed strongly in favor of whistleblowers.[10]

II. FBAR Operates Substantively As An Internal Revenue Law

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 and, alternatively, FBAR certainly meets the tests of 7623(a) for the purpose of detecting violations of the internal revenue laws or conniving at the same discussed above.

a. The IRS is Charged with Enforcing FBAR

While FBAR is codified in Title 31, it has increasingly become administered by the IRS, and 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 FBAR reporting requirements, *See also* 31 C.F.R. §

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

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 delegated 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."). The FBAR delegation is broad, giving the IRS the power to assess and collect civil penalties for noncompliance with 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 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 mart whether he 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," 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).

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 the wide scope of IRS enforcement activities extending beyond Title 26, and can 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. Purpose of 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."). Finally, 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 Announces Expansion of Enforcement Authority for Overseas Accounts (IR-2003-48)(emphasis added). It is undeniable that FBAR is part and parcel of the tax laws and the enforcement of the tax laws. As a result, the FBAR should be considered an 'income tax law' for the purposes of Section 7623(a) or alternatively is a law that is used to assist in detecting underpayments of tax or conniving in the same – 7623(a) or finally, part of "any related action" or "any settlement" for 7623(b).

III. Penalties Collected by the Government for Violations Outside Title 26 are "Available" For Whistleblower Rewards Under Section 7623

Respondent also contends that there is an additional bar to whistleblowers' collection of a reward for violations of FBAR, 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. Respondent argues that such funds are not 'available' because Title 31 contains a discretionary informant reward provision, rewards for FBAR 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. Because, however, the Title 31 program is

discretionary and therefore does not preclude Section 7623(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, Respondent's objections are not applicable.

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

While Respondent 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). 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 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 clearly not discretionary, 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. 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). Indeed, such discretionary award programs abound throughout the United States Code. See 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).

Additionally, Respondent'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**

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.[11] 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 amended Section 7623 again 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.

Because Respondent has, as discussed above, misconstrued the scope of Section 7623, it has consequently misconstrued the scope of the appropriated fund. Because 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.

Respondent 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. 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

[11] 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).

the Treasury, are therefore included in Congress's "permanent appropriation" for whistleblower awards.

To be clear, the Respondent's view on this point engages in a tautology: A =A. Because Respondent improperly states what 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 that encompasses title 31 will then lead to the correct determination that these title 31 proceeds are also available for payment to the whistleblower

Finally, Respondent focuses on whether particular funds are "available" for payment of whistleblower awards, rather than on the total amount of funds collected form a taxpayer. The term "available" is used only in section 7623(a), and is used in that subsection's discretionary informant award authorization—a section that, unlike the scope subsections of (a)(1) and (a)(2), is not referred to by section 7623(b). Under section 7623(b)(1), a whistleblower "shall receive as an award at least 15 percent but not more than 30 percent of the collected proceeds." Therefore, the relevant analysis for determining the size of a whistleblower award under section 7623(b) is not whether particular amounts are "available," but simply the total amount of proceeds collected through an action or settlement, as well as any related actions and any settlement.

IV. No Whistleblower Awards for FBAR—Results in Absurd Policy and Goes Against Congressional Intent

Congress sought to reward whistleblowers based on the information given and the proceeds collected, regardless of the path taken by the Government or the taxpayer in response. The Government itself has great discretion in deciding how – and under which provisions of law – to make use of a whistleblower's information.

A US Attorney may proceed under money laundering statutes rather than under Title 26, because he believes there is an easier path to conviction as compared to tax fraud on the same facts. Similarly, whether a taxpayer participates in the Service's Offshore Voluntary Disclosure Initiative ("OVDI") has the potential to affect a whistleblower's reward under the IRS Counsel's reading of the statute.

If the taxpayer participated in OVDI, a whistleblower may be entitled to a share of the settled amount, explicitly including amounts for FBAR violations, whereas if the taxpayer does not participate, a whistleblower will receive no portion of proceeds collected due to FBAR provisions under the hall of mirrors policy put forward by Respondent.

Congress intended to reward whistleblowers from the collected proceeds resulting from their information, and did not intend – prosecutorial discretion – or the decisions of implicated taxpayers – to affect the whistleblower's eligibility to receive an award.

If the Tax Court embraces the strained reading put forward by Respondent, it will serve to undermine significantly the intent of Congress in having a whistleblower award program with a large welcome mat. With these major limitations put forward by the IRS on when a whistleblower is entitled to an award, some whistleblower's will understandably begin to consider the amount and type of information and material they provide – and what door they knock on – to ensure that they do not potentially jeopardize an award. Even worse, some whistleblowers may stay silent because of this limitation. The Congress wanted to make the door for whistleblowers as wide open as possible to encourage all whistleblowers to come forward. Respondent is asking the Court to start to close that door and add uncertainty and doubt in the minds of whistleblowers – who are often risking everything -- whether they will get an award if they come forward with key information

that the Government needs to go after bad actors. All directly against the policy intended by Congress – and an absurd result.

V. The IRS's Regulations, to the Extent They Are Inconsistent With the Statutory Language of Section 7623, Are Impermissibly Retroactive

It is important for the Court to bear in mind that the Treasury regulations do not apply in this case. The reason for their inapplicability is that reading the regulations otherwise would allow an impermissible retroactive effect in violation of IRC 7805(b) (barring retroactive applicability of regulations). Further, the regulations, with the exception of one provision, do not meet any of the exceptions under Sections 7805(b)(2)–(8).

Even if the Court finds that the regulations are retroactive the regulations relevant to the Court's questions are still not applicable. This is because the cited regulations, with the exception noted in the next paragraph, redefine "collected proceeds," "related action," and other terms, ignore the plain language of the statute, interpret the statute in impermissibly narrow ways, and otherwise fail to meet the *Chevron* standard enunciated by the Supreme Court.[12]

The one exception to the inapplicability of the cited regulations relates to the first of the Court's questions. Under the IRS regulations, a whistleblower has the opportunity to correct any defects in the submission of his or her award claim. 26 C.F.R. § 301.7623-

[12] *Chevron USA., Inc v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) (Two-part test for determining whether an agency's interpretation of a statute is entitled to deference. First, whether the plain language of the statute addresses the precise issue. Second, failing the first test, whether the agency's answer is based on a permissible construction of the statute.).

1(c)(4)(perfecting claim for award)).[13] This provision of the regulations applies because it meets the exception under Section 7805(b)(5) for internal regulations.

a. The New Regulations Do Not Apply Retroactively to this Case

In reviewing the question set out by the Court, Petitioners believe it is useful to review the timeline of the Service guidance in this area and the actions of the Whistleblowers in this case: The Treasury and IRS issued proposed regulations on January 18, 2011 (concerning definitions of the terms "proceeds of amounts collected" and "collected proceeds" among other items). The IRS finalized these proposed regulations on February 22, 2012 (2012 regulations).

On December 28, 2012, Treasury and the IRS published proposed regulations providing more comprehensive guidance in regards to Section 7623. These regulations were finalized on August 12, 2014 (the 2014 regulations).

The whistleblower filed his Form 211 claim on October 31, 2010. That is the relevant date for the Court's consideration of this matter -- when Petitioners first came forward with information to the government. The whistleblower brought this information to the government's attention—information which the government used as the basis to take action—predates both the 2012 and 2014 regulations being proposed or made final. Therefore, the 2012 and 2014 regulations have an impermissible retroactive effect on the actions of Petitioners, which took place in 2009–2010.

b. Regulations and Retroactivity – 7805(b)

[13] Other portions of the regulations—especially regarding IRS internal processing and practices—may also be retroactively applicable (under the exception of Section 7805(b)(5)). However, Petitioners wish to spare the court an exhaustive discussion of the treatment of all the regulations' provisions—and thus only focus on those most relevant to this case.

It is a long understood rule of administrative law that barring a specific exception or allowance that regulations may not have a retroactive effect. As the Supreme Court stated in *Bowen v. Georgetown University Hospital*: "Retroactivity is not favored in the law. Thus, Congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 US 204, 208, 109 S. Ct. 468, 472 (1988) (citations omitted).

Congress, in enacting Section 7805(b) as part of the Taxpayer Bill of Rights 2 in 1996, essentially reaffirmed that basic rule of administrative law: "The Congress believed that it is generally inappropriate for Treasury to issue retroactive regulations." Joint Committee on Taxation, Bluebook 1996 at 44 (Reasons for Change – Relief from retroactive application of Treasury Department regulations).[14] While providing for a general bar against retroactive regulations, Congress in enacting Section 7805(b) also provided for limited exceptions to this bar. 26 U.S.C. § 7805(b)(2)-(8) (discussed further below).

Section 7805(b)(1) provides that temporary and proposed regulations must have an effective date no earlier than the date of publication in the Federal Register (alternatively, the date of a temporary regulation or public notice that relates to the final regulation; or the date of a public notice which substantially describes the expected contents of any temporary, proposed or final regulation is issued to the public).

The Service's 2014 regulations ignore section 7805(b)'s general bar against retroactive regulations by purporting to apply not only to claims submitted on or after

[14] For a useful overall discussion of the history of Section 7805(b) in the Taxpayer Bill of Rights 2 see Cohen and Harrington, "*Is the Internal Revenue Service Bound by its Own Regulations and Rulings?*," The Tax Lawyer, Vol. 51, No. 54, 675 at 696–707 (Summer 1998).

August 12, 2014 but also to claims for awards that are open as of August 12, 2014. See 26 C.F.R § 301.7623-3(e). Therefore, Petitioners, who took action bringing information to the Secretary's attention prior to when the regulations—or any temporary or proposed regulations—were published, are improperly encompassed by the 2014 regulations (regulations which, as discussed earlier, go against long-standing IRS practice in regards to the definition of "proceeds" for purposes of calculating awards). The IRS and Treasury provide an astonishingly incorrect justification for the impermissible retroactivity of their regulations:

> The final regulations do not negatively affect substantive rights of whistleblowers because the proposed and final regulations largely incorporate existing practices adhered to by the Whistleblower Office, and changes from existing practices are designed to be favorable to whistleblowers. [. . .]
>
> Finally, applying two sets of rules to whistleblower proceedings will be difficult for the Whistleblower Office to administer. The effective dates for the regulations will allow the Whistleblower Office to administer the Whistleblower Program in an efficient manner.

79 Fed. Reg. 47264 (Aug. 12, 2014).

Contrary to the statement from the IRS and Treasury, as has been shown throughout this submission and especially the affidavits of the former Senior Program Analyst at the IRS Whistleblower Office, Robert Gardner, the 2014 regulations deviate substantially from previous practice of the whistleblower office and dramatically limit and reduce the rights of whistleblowers and awards to whistleblowers. Further, as will be shown below, administrative convenience for the Whistleblower Office is not a justification or allowable exception to section 7805(b)'s ban on retroactivity.

IRS and Treasury provide no justification for why the 2014 regulations are not subject to Section 7805(b) or what exception they meet under section 7805(b). As the Tax

Court has stated previously, the IRS and Treasury must live with their failure to provide any stated defense or justification. *See Carpenter Family Investments v. CIR*, 136 Tax Court 373, 380 (2011) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)).[15] The IRS cannot now conjure up *post hoc* trial rationales and justifications after the fact. "As we did previously when reviewing the temporary regulations, and as we now do in testing the final regulations, we 'must judge the propriety of . . . [respondent's] action solely by the grounds invoked by' him.'" *Id.*

c. 7805(b) – Exceptions for Retroactivity

In brief, the justifications provided by the IRS/Treasury to the Court for retroactivity of the regulations are prior practice and administrative convenience. Unfortunately for Respondent, Section 7805(b) contains no exceptions in those categories.

The Court is bound by the Supreme Court's holding in *Burlington Truck* to only give consideration to the justification of administrative convenience provided by the Treasury/IRS in the regulations (including the summary and comments of the regulation). *Burlington Truck Lines, Inc. v. United States* 371 U.S. 156 (1962). Petitioners will nonetheless review all seven of section 7805(b)'s exceptions to highlight that Treasury/IRS proposal for retroactivity meets none of them:

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[15] Judge Wherry in writing the opinion of *Carpenter Family* goes on to further expand on this point in footnote 6 of the opinion: "However, agency action can be upheld only on the ground previously advanced by the agency. See e.g. *Burlington Truck Lines, Inc. v. United States,* 371 US 156, 169 (1962)(holding that under *Chenery* "For the courts to substitute their or counsel's discretion for that of the . . . [agency] is incompatible with the orderly functioning of the process of judicial review]."

Subsection (b)(2) contains an exception for promptly issued regulations. This is, however, limited to regulations issued within 18 months of the date of enactment. The whistleblower regulations fail this test: the law was passed in December 2006 and the first proposed regulations were not put forward until January, 2011—over 4 years later.

Subsection (b)(3)'s exception for prevention of abuse is not applicable here – these regulations do not involve an abusive situation.

Subsection (b)(4)'s exception for the correction of procedural defects applies to correct procedural defects in prior regulations, which are not at issue here. Section 7623(b) is a new statute and no regulations had been previously issued in response to the enactment of Section 7623(b).

Subsection (b)(5) provides an exception for internal regulations, namely those relating to internal Treasury Department policies, practices or procedures. This exception is not relevant for the majority of the 2014 regulations, particularly the definitions of "collected proceeds," "related action" and other terms regarding awards, which cannot be seen as rules relating to internal procedures. However, the exception is applicable to some internal proceedings of the whistleblower office, in particular the "perfecting claim for award" provision of the regulations 26 C.F.R. § 301.7623-1(c)(4). This part of the regulations allows for curing of defects in an award claim, and does not harm a whistleblower's rights. Further, the provision governs an internal procedure for management of submissions for information and claims for awards.

Subsection (b)(6) provides an exception for Congressional authorization. That is, retroactive regulations are allowed if there is specific legislative action by Congress authorizing such regulation. There is none in this instance. The statute directed the

creation of a Whistleblower Office and directed the Secretary of Treasury to issue guidance for the operation of the whistleblower program within 12 months, but it is silent as to retroactivity. Pub. L. 109-432 § 406(b).

Subsection (b)(7), whereby the Secretary may provide for any taxpayer to elect to apply any regulation, is plainly inapplicable.

Subsection (b)(8), whereby the Secretary may prescribe the extent, if any, to which any ruling relating to the internal revenue laws shall be applied without retroactive effect. This exception, too, is not applicable here—we are considering regulations not rulings.

Lastly, it should be understood by the Court that given the manifest purpose of a bar on retroactivity, the relevant point in time for determining when regulations should first apply is when individuals are on notice and therefore can know the impact of their actions. And the relevant action in this case, is when an individual took the action required or prescribed under that statute – providing the government information on which the government took action (in this case the date the whistleblower provided the information on a Form 211.[16] As explained by the Ways and Means Committee's Subcommittee on Oversight:

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[16] See *Stobie Creek Investments v. US*, 82 Fed. C. 636, 669-671 ("Whether plaintiffs had "notice" that their transactions would be subject to scrutiny has no bearing on whether a Treasury regulation, seeking retroactively to effect a change in the law, can serve to disallow plaintiff's reporting position. For a general overview of Section 7805(b) before the Courts see *Statutory Protection From IRS Reinterpretation of Old Laws* by John Bunge, Tax Notes, September 9, 2014 (with a particular emphasis on the applicability of Section 7805(b) to laws enacted prior to 1996 – not applicable here because the relevant statute – Section 7623(b) -- was enacted in 2006. Also of benefit (but with a similar focus on the issue of retroactivity) is the American College of Tax Counsel's amicus curiae to the Supreme Court on US v. *Home Concrete & Supply* (pages 12 – 18 and 25 - 39) which provides a useful

> The complexity of the tax regulations and the lengthy period of time it takes the IRS to publish them, creates a significant hardship for taxpayers who seek in good faith to comply with the statutory tax law in the period of time before the regulations are published. If the taxpayer interprets the law in a way which is different from the position taken in a subsequent regulation, the taxpayer may be subject to additional taxes, penalties, and interest. The Subcommittee believes taxpayers should have more protections from the retroactive application of regulations.

U.S. House of Representatives Ways and Means Subcomm. On Oversight, 104th Cong., 2nd Sess, *Explanation of Taxpayer Bill of Rights 2* (1995).

In sum, the final regulations published in 2012 and 2014—other than internal regulations, such as those regarding perfecting a claim for award—are impermissibly retroactive and do not meet any of the exceptions provided by the statute. Therefore, they do not apply to the facts of this case—either as the case is considered by the Court or if the case were remanded. In the alternative, if the Court were to find that the regulations are not subject to the bar against retroactivity in Section 7805(b)—the cited regulations still do not apply in this case because, as discussed above the regulations fail both steps under *Chevron*.

VI. Conclusion

We view that the statute, the legislative history and Congressional policy all speak directly to a finding that eligible whistleblowers may receive awards from FBAR payments. We close by noting that the Tax Court recently had to deal with a similar effort by the IRS to disregard its own long-time practices in the whistleblower program and create new restrictions and limitations on whistleblowers – without any support in the law.

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overview of Section 7805(b) as well – at actonline.org (under "activities – amicus curiae briefs").

The recent Tax Court decision authored by Judge Jacobs (*Whistleblower 21276-13W v. CIR,* 144 TC No. 15 (2015)) centered on the long-time practice that a whistleblower could file an application for an award (a Form 211) at any time (e.g., after first providing information to the IRS or other government officials).

Sometime after the enactment of the 2006 amendments, the IRS unilaterally decided to put forward a new requirement that "an individual must submit the whistleblower information to the Whistleblower Office on Form 211 before any IRS action or examination is carried out with respect to that information." (144 TC No. 15 at p. 19).

Pointing to this new requirement – the IRS denied a request for a whistleblower award from a whistleblower who had twice worn a wiretap for the US government (at significant risk to her life) in order to obtain extraordinarily valuable information on a taxpayer. As the facts of the case, and Judge Jacobs decision makes clear – such a requirement of filing an application for an award with the IRS whistleblower office prior to providing information to the government would undermine the whistleblower program. "And we are loath to interpret a statute in a manner that leads to an absurd result." p. 24.

Similar to the instant case, Judge Jacobs noted that: "[IRS] concedes that section 7623(b) does not specifically include a timing requirement regarding when whistleblower information must be submitted to the Whistleblower Office." p. 18. As here, Respondent seeks to fog the issue – but cannot escape the hard truth that they can point to no language that specifically overturns either the long-time practice of the IRS of paying on non-title-26 penalties or that contradicts the sweeping language of inclusion in awards issued under section 7623(b)n -- "any related action," "any settlement," "proceeds" "including", etc.

Judge Jacobs provided a commonsense approach –look at the plain language of the statute; Congressional intent, the goals of the statute, the long-time practice of the agency and finally, the impact of a decision on the practical administration of the statute. For example, "Upon examination of the [Form 11369], we do not believe it must be completed contemporaneously with a taxpayer-related examination." (p. 26) All these same factors – as shown in this brief -- also point to a finding here for the whistleblower that proceeds from the administration of the FBAR rules are considered "collected proceeds."

At the end of the day – the IRS is once again asking the Tax Court to interpret Section 7623 in a manner that will lead to an absurd result. The IRS is asking the Tax Court to embrace an fanciful interpretation that what Congress really meant with the 2006 amendments to Section 7623 was to silently and with no specific language override long-time IRS practice and interpretation and with the end result of severely curtailing and limiting awards provided to whistleblowers – and discouraging whistleblowers from coming forward. Such an interpretation is completely inconsistent with a statute wholly designed to strengthen and expand the rights of whistleblowers, to encourage whistleblowers to come forward – as well as improve the administration and processing of whistleblower awards. The Tax Court was right to reject the IRS request for an absurd result in *Whistleblower 21276-13W* and it should reject the IRS request for an absurd result here.[17]

Respectfully Submitted by:

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[17] "[E]ven if a regulation does not clearly contradict the language of the statute it purports to interpret, the regulation may still be invalid if it is fundamentally at odds with or inconsistent with the statute's origin and purpose. *Tutor-Saliba Corporation v CIR* 115 TC 1 at 9 (2000), citing *United States v. Vogel Fertilizer* at 26, 455 U.S. 16 (1982). Here, the Tax Court is faced not even with a regulation – but merely an informal agency position.

Dean Zerbe
Zerbe, Fingeret, Frank & Jadav
3009 Post Oak Blvd, Suite 1700
Houston, TX 77056
Tel: 713-350-3529
Fax: 713-350-3607
Email: dzerbe@zffjlaw.com

Stephen M. Kohn
Kohn, Kohn, and Colapinto, LLP
3233 P. St., NW
Washington, DC 20007
Tel: 202-342-6980
Fax: 202-342-6984

Counsel for *amicus curiae*

Appendix: *In Pari Materia*—the False Claims Act and the IRS Whistleblower Statute

I. Section 7623 Must be Construed in Light of the False Claims Act

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 canons 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); 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."[18] *Morissette v. United States*, 342 U.S. 246, 263 (1952). The FCA, which uses similar language and creates a similar statutory scheme, preceded Section 7623,

[18] 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.

is therefore highly relevant to understanding and interpreting the IRS Whistleblower Program.

The IRS Whistleblower law is a rib from the False Claims Act; the two share a host of key provisions, common provisions include the right of a whistleblower to a mandatory award and having that award or denial subject to judicial review as well as a limitation on an award in cases where the whistleblower "planned and initiated" an action.[19] These facts (and others footnoted) are significant grounds for finding that the intent and meaning of "proceeds" (as well as the concept of "alternative remedy" discussed further below) contained in the FCA should serve as a key for guidance and interpretation of the same phrases and policies for the IRS whistleblower law.

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 as 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 '

[19] Other examples of commonality between the two provisions are the allowance for payment schemes based on the level of information provided by the whistleblower; e.g. a range of 15% to 30% of payment to a whistleblower is authorized if action taken on the whistleblower's information; a broad definition of what will be considered "amounts" for determination of a whistleblower award ("alternate remedy" under the False Claims Act); the parallel treatment of less than 10% for a less substantial contribution under 26 U.S.C. § 7623(b)(2) and awards under 31 U.S.C. § 3730(d) for False Claims Act. Further examples, factors for favorable and unfavorable percentages for awards have basic similarities. In sum, the two statutes are a classic example *of in pari materi* – as emphasized by the author of both bills – Senator Grassley [DELETE (*see* footnote 4).

proceeds.' The word 'collected' serves only as a modifier to signal that the proceeds must actually be in the possession of the government—especially important 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 and the taxpayers rights to appeal have been exhausted. 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.[20]

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

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[20] 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 – which only strengthens a finding that the two statutes should be viewed as in pari materia.

Senator Grassley has made numerous other statements about the fact that the IRS whistleblower law is based on the False Claims Act: "The taxpayers have reaped the success of the False Claim Act whistleblower rewards program. They'll benefit from the same concept applied to tax cheating." (Statement from Senator Grassley – author of both the FCA and the IRS Whistleblower Law – 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).

"looked to the dictionary definition of the word [...] when interpreting its use in other statutes," and would do the same when interpreting the FCA. *U.S. ex rel. Barajas v. United States*, 258 F.3d 1004, 1013. In examining the dictionary definition, the Court found that "Webster's Third New International Dictionary defines 'proceeds' as 'what is produced or derived from something. . . by 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,' 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*, 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 Science Applications International Corporation brought this home when it stated: "The government has not always been magnanimous to its relators at the end of the day." *U.S. v. Science Applications International Corporation* (SAIC) 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, when amending Section 7623, was well aware of this history, and deliberately drafted the law broadly using the word "proceeds" to protect whistleblowers and reward them fairly based on a comprehensive view of the benefits accruing to the government as a result of their disclosures.

c. The FCA Provision for Alternative Remedy 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 brief, 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. *Barajas v. U.S.*, 258 F.3d 1004, 1006 (9th Cir. 2001).

Thus, under the law of the FCA if the government chose to pursue a resolution outside of the relator's case, the results were still swept in under 3730(c)(5) to be included in the whistleblower's share for purposes of an award. Bottom line – an alternate remedy is still considered "proceeds" for purposes of determining an award.

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/debarment proceedings. 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. At 1010-11.

It is with the understanding of "alternative remedy" that the intent of Section 7623 to ensure that "proceeds" encompasses "any related actions," "any settlements" and "additional amounts" is transparently seeking the same policy goal – that the whistleblower will receive the benefit of her actions regardless of the direction the government elects to pursue its claim.

The bottom line: the Congress (and supported by the courts) has 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 seeking an alternate remedy. The same policy goals of the FCA are provided in the IRS whistleblower law – that a whistleblower should receive an award based on the benefits – widely defined – that the government has received from her actions.[21]

[21] Reflecting the policy goals of Congress with Section 7623 and its broad application 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, for example," Statement by Senator Grassley June 21, 2012 in announcing letter to the Treasury Secretary and IRS Commissioner raising questions about administration of the IRS whistleblower program.

While not commonplace, the U.S. Supreme Court has cited and relied on statements made by legislators after a bill has been signed into law to guide them in determining legislative intent – especially when those statements come from lawmakers who are key figures in the drafting of the provision as is the case with Senator Grassley: See *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461, U.S. 190, 220 fn 23 (1983) "While expressions of a subsequent Congress generally are not thought particularly useful in ascertaining the intent of an earlier Congress, Senator Hickenlooper, the sponsor of the 1965

CERTIFICATE OF SERVICE

I certify that a true and copy of the foregoing Motion of NWC for Motion to File Brief as amicus curiae, the proposed order to grant the motion to file as amicus curiae, and the amicus curiae brief were served by hand, on the following persons of the following address on this 20th day of July, 2015:

Ashley M. Bender
Tax Court Bar No. KA0402
Senior Attorney
(General Legal Services)
Office of General Counsel,
Internal Revenue Service,
National Office
1111 Constitution Ave., NW
Room 6404 CC:GLS:PCTL
Washington, DC 20224
Telephone: (202) 317-6999

John Arthur

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amendment, was an important figure in the drafting of the 1954 Act." See also *North Haven Board of Education v. Bell*, 456 U.S. 512, 530-531 (1982) "The postenactment history of Title IX provides additional evidence of the intended scope of the Title and confirms Congress' desire to ban employment discrimination in federally financed education programs. Following the passage of Title IX, Senator Bayh published in the Congressional Record a summary of the final version of the bill. That description expressly distinguishes Title VI of the Civil Rights Act of 1964 with respect to employment practices: . . . ". The Court further went on to cite statements made by the Senator Bayh two years after passage.

Senior Counsel
Office of Chief Counsel
Internal Revenue Service,
National Office
1111 Constitution Ave., NW
Room 6404 CC:GLS: PCTL
Washington, DC 20224
Telephone: (202) 317 6999

Robert Katzberg
Kaplan & Katzberg
767 Third Avenue, 26th Floor
New York, NY 10017
Tel: 9212) 750-3100