NWC | NATIONAL WHISTLEBLOWERS CENTER

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Via Federal Express

November 5, 2012

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

Dear Commissioner Miller:

The National Whistleblower Center (NWC) is writing in response to your good invitation from last Spring at a meeting with whistleblower attorneys to provide comments on potential areas of review and regulation by the IRS and the Department of Treasury in regards to IRC 7623 – the whistleblower award statute. At that meeting, the issue of the definition of "collected proceeds" or, more accurately, "proceeds" was raised and specifically whether it includes FBAR violations as well as other provisions of Titles 18 and 31 for which the IRS has delegated authority. We appreciate you giving the NWC this opportunity.

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

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

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

a) In general

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

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

In cases where such expenses are not otherwise provided for by law. Any amount payable under the preceding sentence shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments.

b) Awards to Whistleblowers

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

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

a) In general

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

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

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

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

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

Sincerely,

Dean Zerbe

Steve Kohn

MEMORANDUM

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

I. INTRODUCTION

The IRS Office of General Legal Services ("IRS Counsel") has explained the Service's view that "violations of non-tax laws, such as the provisions of Titles 18 and 31 for which the IRS has delegated authority, cannot form the *basis* of an award under section 7623." IRS Program Manager Technical Advice 2012-10 at 1 (April 23, 2012) ("IRS Memorandum") (emphasis added).

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

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

IRS Counsel argues that the "plain language of section 7623, examined in the context of the entire Code, and its legislative history indicate that congress intended the statute to authorize payment of whistleblower awards only with respect to violations of the tax laws under Title 26." IRS Memorandum at 3.

The plain language of Section 7623, however, indicates that a broad range of activities is covered by the whistleblower program, which extends to all taxes, penalties, and other violations which the IRS is authorized to collect or enforce—such as the Report of Foreign Bank and Financial Accounts ("FBAR") provisions of the Bank Secrecy Act—as well as to related actions and settlements. Even assuming, *arguendo*, that Section 7623(a) applies only to violations of laws under Title 26, Section 7623(b)

nonetheless broadens the scope of what may form part of a whistleblower award under that subsection. Additionally, while IRS Counsel argues that "section 7623 provides two bases on which the IRS may make a whistleblower award," IRS Memorandum at 4, such an interpretation not only ignores Section 7623(b), but also the "or conniving at the same" language of Section 7623(a), which forms an additional basis upon which a whistleblower award may be made.

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

Statutory interpretation begins with the plain language of the statute, and in determining a statute's plain meaning, a court will first look to statutory definitions or terms of art. Words that are not terms of art are given their ordinary meaning. See *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (In the absence of a statutory definition, "we construe a statutory term in accordance with its ordinary or natural meaning"). The Supreme Court has also stated that, "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Boisdoré's Heirs*, 49 U.S. 113, 122 (1850) (*per curiam*). It is against the background of such principles of statutory construction that Congress itself legislates. See, e.g., *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991) (Court presumes "that Congress legislates with knowledge of our basic rules of statutory construction").

The phrase 'internal revenue laws' is not a term of art given statutory definition anywhere in the United States Code, nor does it have an accepted meaning in the area of law addressed by Section 7623, namely whistleblower rewards. Nor was the phrase borrowed from a statute under which it had an accepted meaning—rather, it originates with the original 19th Century statute that forms the basis of the present-day Section 7623, and therefore predates the statutes and cases IRS Counsel urges define it. Consequently, while IRS Counsel urges that 'internal revenue laws' applies exclusively to Title 26, a more straightforward construction of 'internal revenue laws' is any law relating to internal revenue or administered by the internal revenue service.

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

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

At the outset, IRS Counsel misreads the plain language of the statute. Section 7623(a) applies its provisions to "*detecting* underpayments of tax" and to "*detecting* [...] persons guilty of violating the internal revenue laws." 26 U.S.C. § 7623(a) (emphasis added). The plain meaning of the statutory language, therefore, is broader than is

contended by IRS Counsel, who ignores the statute's use of "detecting" entirely. Section 7626(a), in authorizing the Secretary to pay discretionary awards for detection of both underpayments of tax and violations of the internal revenue laws, casts a wider net. Information, such as that relating to undisclosed foreign bank accounts, may be indispensable in detecting underpayments of tax, without directly relating to the underpayments themselves. *See, e.g.*, Department of Justice Press Release 08-579, "Justice Department Asks Court to Serve IRS Summons for UBS Swiss Bank Account Records" (information about FBAR violations led IRS "to request information from [UBS] about U.S. taxpayers who may be using Swiss bank accounts to evade federal income taxes"). Where the information relates to 'detecting' underpayments of tax or violations of internal revenue laws, Section 7623(a) clearly authorizes the Secretary to pay a reward for such information.

IRS Counsel cites a number of authorities for the proposition that 'internal revenue laws' and 'tax laws' refer to Title 26 exclusively. These authorities, however, are either inconclusive or inapplicable to the issue. 26 U.S.C. § 6301, for example, states that "[t]he Secretary shall collect the taxes imposed by the internal revenue laws." Yet this statement, by itself, indicates that the concept of 'internal revenue laws' is broader than 'taxes,' and may include other related laws such as the FBAR. Section 6301, then, does not define 'internal revenue laws,' but merely delegates authority to collect taxes. Indeed, it suggests that the concept of 'taxes' and that of 'internal revenue laws' do not overlap completely, for if they did there would be no need to employ both terms. Similarly, the mere presence of statutory language in Title 26 discussing "the internal revenue laws," does not amount to a definition restricting internal revenue laws to Title 26 exclusively. *See* 26 U.S.C. § 6065 (cited by IRS Counsel); 26 U.S.C. § 1400S(e) (same); see also *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 529 (1947) (an act's title or a section heading may illuminate ambiguities but it "cannot limit the plain meaning of the text"); *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (quoting *Trainmen*).

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

Conversely, other statutes indicate that a definition of 'internal revenue laws' need not be confined to Title 26. 26 U.S.C. § 7803(2)(A), for example, provides that the IRS Commissioner shall have the power to "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes," indicating that those laws administered by the Commissioner are "internal revenue laws," or at the very least "related statutes" that are conceptually linked with internal revenue

laws. Because the FBAR penalties are executed and applied by the Commissioner, they ought to be treated as in a like manner as "internal revenue laws." Lastly the annotation to 5 U.S.C. § 603 cited by IRS Counsel, stating that "[t]he internal revenue laws of the United States, referred to in subsec. (a), are classified *generally* to Title 26, Internal Revenue Code" clearly indicates that internal revenue laws are not *exclusive* to Title 26, but are merely *generally* codified there. 5 U.S.C. § 603 note (emphasis added).

Additionally, the fact that Section 7623(a) specifies both "detecting underpayments of tax" and "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws" is evidence that "internal revenue laws" have a broader scope than merely tax. It is a basic principle of statutory interpretation that statutes should be construed "so as to avoid rendering superfluous" any statutory language. *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991). Because Congress chose to specify "underpayments of tax" separately from "internal revenue laws," this strongly indicates that the phrases have separate and distinct meanings. Indeed, in *Bailey v. United States*, the Supreme Court held that "we assume that Congress used two terms because it intended each term to have a particular, nonsuperflous meaning," 516 U.S. 137, 146 (1995). If, therefore, "internal revenue laws" are limited to taxes imposed by Title 26, then the phrase "underpayments of tax" is rendered superfluous. Since Congress in 1996 amended the statute to add the phrase "underpayments of tax" and, in doing so, did not remove the phrase "violating the internal revenue laws" it is clear that 'internal revenue laws' are not limited to taxes, but extend to related laws such as the FBAR provisions. *See* Taxpayer Bill of Rights, Pub. L. 104-168, § 1209 (July 30, 1996).

Lastly, the history of Section 7623 itself indicates that "internal revenue laws" is not limited to Title 26. Section 7623 dates to 1867—following closely on the heels of the 1863 False Claims Act—and allowed the government to pay for information related to "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same." Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473 (codified by ch. 11, § 3463, 35 Rev. Stat. 686 (1873-74)); see also Dennis J. Ventry, Jr., "Whistleblowers and *Qui Tam for Tax,*" 61 TAX LAWYER 357, 360 n.14 and accompanying text (describing history of IRS Whistleblower Program). This original law "remained separate from the revenue acts until Congress enacted section 3792 of the Revenue Act of 1934, providing expenses for the 'detection and punishment of *frauds*' related to the internal revenue laws." Ventry, 61 TAX LAWYER 357, 361 (citing Revenue Act of 1934, ch. 3792, 48 Stat. 680.) It is clear from this legislative history, therefore, that Section 7623 is not only closely related to the False Claims Act, but that it existed apart from 'the internal revenue laws'—let alone Title 26—for a long period of time, and, furthermore, that it extends to 'frauds' relating to the internal revenue laws, not solely to Title 26.

ii. The 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.

a. The IRS is Charged with Enforcing the FBAR

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

In April, 2003, civil penalty authority for enforcement of FBAR requirements was redelegated within the Department of the Treasury from the Financial Crimes Enforcement Network ("FinCEN") to the IRS. See 31 C.F.R. § 1010.810(g) ("The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS"). This FBAR delegation is broad, giving the IRS the power to assess and collect civil penalties for noncompliance with the FBAR requirements, investigate possible violations, employ summons power, issue administrative rulings, as well as the power to take "any action reasonably necessary" to implement end enforce the FBAR requirements. 31 C.F.R. § 1010.810(g); *see also* FinCEN "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act" at 5 (April 8, 2005) ("delegation now allows Internal Revenue Service to create interpretive education outreach materials for the FBAR, revise the form and instructions, examine individuals and other entities, and assess civil penalties for violations").

b. The FBAR is Administered Alongside Title 26 Provisions

In accordance with the IRS's increasing responsibility for the FBAR provisions, and in recognition of the close substantive relationship between the FBAR and the revenue collection, the Service has administered the FBAR alongside its efforts to increase compliance with the income tax. While "the obligation to file an FBAR arises under Title 31, individual taxpayers subject to the FBAR reporting requirements are alerted to this requirement in the preparation of annual Federal income tax returns," which are filed pursuant to Title 26. Joint Committee on Taxation, *Technical Explanation of H.R. 4213*, JCX-60-09 at 144 (December 8, 2009). Individuals subject to the regulations implementing the Bank Secrecy Act are directed to complete Department of Treasury Form TD F 90-22.1 ("Report of Foreign Bank and Financial Accounts," otherwise referred to as "FBAR"). *See* 31 C.F.R. § 1010.350. Schedule B of IRS Form

1040 includes a question where an individual must mark whether he or she has an interest in a financial account in a foreign country by checking 'Yes' or 'No' in the appropriate box. The Schedule B additionally directs the taxpayer to Form TD F 90-22.1 for the FBAR filing requirements.

The IRS's Taxpayer Education and Communication section has attempted to "increase efficiency and standardize educational materials regarding FBAR compliance," by implementing an "outreach effort that leverages relationships with outside stakeholders such as *tax* practitioner groups, financial associations, income *tax* software developers and the media." See "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act" at 9 (April 8, 2005) (emphasis added).

Additionally, as the Director of FinCEN has stated, "[u]nlike other Bank Secrecy Act reports, FBARs are filed mainly by individuals and are more closely related to tax enforcement." IRS Press Release IR-2003-48 (April 10, 2003) (joint FinCEN and IRS remarks on delegation of FBAR authority to IRS). Because of these and other administrative similarities between FBAR and Title 26 provisions, delegating FBAR oversight and enforcement authority with the IRS was "a natural fit." *Id.*

Consolidation of FBAR authority under IRS occurred well before the 2006 law enacting section 7623(b). *See* Internal Revenue Manual 4.26.16.1(2) (July 1, 2008) ("In April 2003, the IRS was delegated civil enforcement authority for the FBAR"). Congress, therefore, can be said to have been aware of wide scope of IRS enforcement activities extending beyond Title 26, and can be assumed to have intended to include such closely related activities in the sweep of Section 7623. Any statutory silence with regard to Titles 31 and 18 is, therefore, acquiescence to the IRS's regulatory and enforcement authority.

c. The Purpose of the FBAR is Tax-Related

While the FBAR is not itself a tax, its use and purpose are intimately related to taxation and collection of revenue by the government. The statute's own "Declaration of Purpose" makes explicit the law's "high degree of usefulness in criminal, tax, or regulatory investigations or proceedings." 31 U.S.C. § 5311; *see also* Hale E. Sheppard, *Evolution of the FBAR: Where We Were, Where We Are, and Why it Matters*, 7 HOUSTON BUS. & L.J. 1, 3 (2006) (purpose of the Bank Secrecy Act includes increasing government's ability to collect tax revenues). Even the Department of the Treasury itself has explicitly recognized the close relationship between tax and FBAR, recommending to Congress in 2002 that authority to impose civil penalties for FBAR be delegated to the IRS, rather than to FinCEN, because "the FBAR is directed more towards tax evasion, as opposed to money laundering or other financial crimes, that lie at the core mission of FinCEN." See "Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act," at 4 (April 24, 2003).

The subsequent consolidation of FBAR administration and enforcement to the IRS is further indication of FBAR's tax-related function and purpose. Moreover, the interrelationship between FBAR filing requirements and the income tax has been used in

the past by prosecutors as a tool for charging violations under Title 26. *See* Department of the Treasury, "A Report to Congress in Accordance With s. 361(b) of the USA PATRIOT Act" at 9 (April 26, 2002) ("[I]n criminal tax matters, prosecutors sometimes charge willfully subscribing false tax returns in violation of 26 U.S.C. 7206(1) for failing to "check the box" on the Schedule B providing for disclosure of the foreign financial accounts."). Lastly, the acting IRS Commissioner Bob Wenzel stated in response to the announcement of the IRS having responsibility for FBAR: "Our nation will benefit not only from improved *compliance with the tax laws*, but also our determination to make certain that those with accounts in foreign countries meet their reporting requirements." IRS Press Release IR-2003-48 (April 10, 2003) (joint FinCEN and IRS remarks on delegation of FBAR authority to IRS) (emphasis added). It is undeniable that FBAR is part and parcel of the tax laws and the enforcement of those tax laws. As a result, the FBAR should be considered an 'income tax law' for the purposes of Section 7623(a).

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

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

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

Section 7623(a) creates a discretionary reward program, authorizing the Secretary of the Treasury "to pay such sums *as he deems necessary* for (1) detecting underpayments of tax, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same." 26 U.S.C. § 7623(a) (emphasis added). The Secretary may, however, only pay such discretionary awards "in cases where such expenses are not otherwise provided for by law." 26 U.S.C. § 7623(a)(2). The statute additionally establishes that such awards "shall be paid from the proceeds of amounts collected by reason of the information provided, and any amount so collected shall be available for such payments." 26 U.S.C. § 7623(a)(2).

Section 7623(b), on the other hand, creates a wholly separate whistleblower reward scheme. Whistleblower rewards under subsection (b), which unlike rewards under subsection (a) are not discretionary, apply in circumstances where "the Secretary proceeds with *any* administrative or judicial action described in subsection (a) based on information brought to the Secretary's attention by an individual." 26 U.S.C. § 7623(b)(1) (emphasis added). In other words, Section 7623(b) is triggered when the Secretary "proceeds with *any* administrative or judicial action" relating to (1) "detecting

underpayments of tax," (2) "detecting violati[ons] of the internal revenue laws," or (3) detecting those "conniving at [violating the internal revenue laws]." 26 U.S.C. §§ 7623(a)-(b). If such "administrative or judicial action" was "based on information brought to the Secretary's attention by [a whistleblower]," then the whistleblower "*shall* [...] receive an award" that is based on the "collected proceeds [...] resulting from the action" as well as "any related actions" or "any settlement in response to such action." 26 U.S.C. § 7623(b)(1) (emphasis added). Additionally the "collected proceeds" include, but are not limited to "penalties, interest, additions to tax, and *additional amounts*." *Id.* (emphasis added).

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

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

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

IRS Counsel argues that "amounts [...] collect[ed] as a result of non-tax violations [...] should not be included as collected proceeds under section 7623," because "section 7623 defines the scope of 'collected proceeds' in a manner consistent with the Code's definition of 'tax.'" IRS Memorandum at 3-4. Because IRS Counsel ignores critical statutory language in Section 7623, as well as the operation of other whistleblower award programs, IRS Counsel's conclusions misconstrue the scope of the Whistleblower Program under Section 7623.

IRS Counsel contends that the terms 'penalties,' 'additions to tax,' and 'additional amounts' have a specific meaning under the [Internal Revenue] Code that does not extend beyond the definition of 'tax.'" IRS Memorandum at 7. To support this contention, IRS Counsel refers to Section 6665 of the Internal Revenue Code, which states that "any reference in this title to 'tax' imposed by this title shall be deemed also to refer to the additions to the tax, additional amounts, and penalties provided by this chapter." 26 U.S.C. § 6665(a)(2). Section 6665, however, lends scant support to IRS Counsel's argument. Just as it does not follow that, simply because all squares are

rectangles, all rectangles are squares, neither does it follow that the terms "additions to the tax, additional amounts, and penalties" are limited to tax simply because Chapter 68 of the Internal Revenue Code defines 'tax' as including those terms.

While the statutory cannons of construction generally teach that a list of enumerated items operates to exclude those things not listed, this principle does not apply when the list is illustrative and not intended to be exclusionary. In particular, Section 7623(b) uses the term 'including' as a term of illustration and definition, not of limitation. See *U.S. v. Ward*, 833 F.2d 1538 (11th Cir. 1987) (Tax Code definition of "United States" to "include" United States territories and District of Columbia did not limit jurisdiction to District of Columbia and Federal territories). Congress, therefore, did not intend to limit "proceeds" to "penalties, interest, additions to tax, and additional amounts," or to tax. Indeed, if, as IRS Counsel argues "identical words used in different parts of the Internal Revenue Code should have the same meaning," then the fact that Congress, while clearly aware of the term "tax," nonetheless specifically and deliberately used the term "proceeds," is strong evidence that Congress did not intend to limit whistleblower awards to collected taxes only, and did not intend to limit the applicability of the Whistleblower Program to Title 26.

Notwithstanding IRS Counsel's overreliance on 26 U.S.C. § 6665, IRS Counsel also overstates the Supreme Court's holding in *Commissioner v. Lundy*. See IRS Counsel Memorandum at 5, 7. IRS Counsel contends that *Lundy* stands for the proposition that "identical words used in different parts of the Internal Revenue Code should have the same meaning." *Id.* at 7 (quotations omitted). The language at issue in *Lundy*, however, only applies to "words used in different parts *of the same act*," whereas Sections 7623 and 6665 stem from entirely different legislative origins. 516 U.S. 235, 250 (1996). Importantly, the sections interpreted by the Court in *Lundy* were directly adjacent, and the Court noted that there was "no reason to believe that Congress meant the term 'claim' to mean one thing in § 6511 but to mean something else altogether in the *very next section* of the statute." 516 U.S. at 249-250 (emphasis added). Moreover, the Supreme Court, in the progenitor to the line of the cases culminating with *Lundy*, specified that such a "presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 433 (1932). The fact that Section 7623 stems from different Congressional acts than does Section 6665 and related provisions, as well as the fact that they are not codified in close proximity, but in altogether different chapters of Title 26, is more than sufficient to rebut the *Lundy* presumption without even considering the sections' vastly differing purposes.

Similarly, *Williams v. C.I.R.* is cited by IRS Counsel for the proposition that, amounts covered by section 7623(b) applies only to "penalties or recoveries [...] assessed under chapter 68 of the Code." IRS Memorandum at 7. The Tax Court's jurisdiction is not, however, limited to 'taxes' generally, but only certain enumerated types of taxes, which do not even encompass all taxes imposed by Title 26. The Tax Court held in *Williams* that it lacked jurisdiction over the FBAR penalties not, as IRS Counsel claims,

because the FBAR is not an 'internal revenue law,' but because Title 26 only grants the Tax Court jurisdiction over notices of deficiency pertaining to "certain taxes," as well as jurisdiction over liens and levies issued under Title 26. 131 T.C. 54, 57-58 (2008). The Tax Court further clarified that its statutory jurisdiction under Title 26 is narrower than jurisdiction over all 'tax laws' or all 'internal revenue laws,' stating that "other taxes—*even if imposed in Title 26*—fall outside this Court's deficiency jurisdiction." *Id.* at 58 (emphasis added). There are, therefore, other 'tax laws,' both in Title 26 *as well as in other Titles* of the United States Code, over which the Tax Court does not have jurisdiction. Moreover, whether the Tax Court has jurisdiction over FBAR penalties is irrelevant to the question at hand. There is no doubt that the Tax Court has jurisdiction over whistleblower claims, including whether a whistleblower is entitled to award including FBAR penalties. See 26 U.S.C. § 7623(b)(4) ("*Any* determination regarding an award under paragraph (1), (2), or (3) may [...] be appealed to the Tax Court (and the Tax Court shall have jurisdiction with respect to such matter)") (emphasis added).

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

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

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

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

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

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

The ordinary meaning of 'proceeds' is, moreover, extremely broad, generally encompassing everything that emanates from something—in this case the IRS's actions in response to a whistleblower's disclosure. Black's Law Dictionary, for example, states in part that, "[p]roceeds does not necessarily mean only cash or money [but] [t]hat which results, proceeds or accrues from some possession or transaction." Black's Law Dictionary 1204 (6th ed. 1990). The U.S. Supreme Court noted long ago that "[p]roceeds are not necessarily money," and that it "is also a word of great generality." *See Phelps v. Harris*, 101 U.S. 370, 380 (1879). Because of the broad ordinary meaning of proceeds, and because Congress knew it could limit the statute's applicability by using the well-worn term 'tax,' the fact that Congress instead used 'proceeds' is clear indication that the applicability of Section 7623(b) is not limited to Title 26.

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

Section 7623(a) provides that the Secretary of the Treasury may reward those providing information related to "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws *or conniving at the same*." 26 U.S.C. § 7623(a)(2) (emphasis added). While IRS Counsel argues that "section 7623 provides two bases on which the IRS may make a whistleblower award," Section 7623(a)(2)'s "conniving at" language provides an additional basis for a whistleblower award. IRS Memorandum at 4.

The ordinary meaning of 'conniving' obviously embraces additional grounds for granting an award. Black's Law Dictionary defines "to connive" as "[l]oosely, to conspire." Black's Law Dictionary (9th ed. 2009). Because a conspiracy to do an act is a separate offense from the act that is the object of the conspiracy, 'conniving' may include violations outside Title 26, or even conduct that does not violate any law or regulation. Concealment of foreign bank accounts that is done to evade taxes falls within the plain meaning of Section 7623(a)'s language, and may therefore form the basis of a whistleblower award.

The use of the "conniving at" language in Section 7623(a) ought furthermore to be construed so that it has a particular nonsuperflous meaning. See *Astoria Federal Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (stating general principle of statutory construction). In order to do so, the phrase cannot simply have the same meaning as "detecting underpayments of tax" or "detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws," but must extend beyond them to provide an additional basis for satisfying Section 7623(a)'s requirements. Moreover, in interpreting a statute, the meaning arrived at ought to "avoid[] [...] a