

June 5, 2014

The Honorable Jacob J. Lew
Secretary
Department of Treasury
1500 Pennsylvania Ave., NW
Washington, D.C. 20220

Dear Mr. Secretary:

On behalf of the National Whistleblower Center (NWC), I am submitting commentary regarding the Department of Treasury's proposed regulations regarding the IRS whistleblower program: – "The Legality of the IRS' Proposed Whistleblower Rule: Flunking the *Loving* Test." The NWC's comments are focused on Treasury's improper narrow interpretation of "collected proceeds."

Treasury's proposed interpretation of "collected proceeds" harms the efforts of the Treasury Department to combat offshore tax evasion in particular and in general undermines Congressional policy of awarding whistleblowers.

The NWC analysis of the Treasury proposed regulations is done in light of the recent court decision in *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. Feb. 11, 2014) – where the Court held that the IRS exceeded its statutory authority in regulations of tax-return preparers. Similar to the Court in *Loving*, the NWC finds that a review of the IRS whistleblower statute's text, history, structure and context shows that Treasury/IRS has exceeded its statutory authority in its narrow interpretation of "collected proceeds."

The Treasury's proposed regulations for the IRS whistleblower program were issued before the *Loving* decision. The Department of Justice recently announced it would not appeal the *Loving* decision. The NWC views it as vital that the Treasury revisit the proposed IRS whistleblower regulations with a full consideration of the Appellate Court's decision.

I appreciate your directing the appropriate responsible Treasury and IRS officials to review the NWC's submission on this matter. The NWC would be pleased to meet and discuss this matter further with those officials. The success of the IRS whistleblower program is vital to our nation's efforts to deal with tax fraud, evasion and illegal offshore banking.

Thank you for your time and courtesy.

Sincerely,



Dean Alexis Zerbe

Attached – NWC submission – “The Legality of the IRS’ Proposed Whistleblower Rule: Flunking the *Loving* Test. “

cc

Senator Charles E. Grassley

Senator Ron Wyden

Senator Orrin Hatch

The Honorable Mark Mazur, Assistant Secretary of Treasury for Tax Policy

The Honorable John Koskinen, Commissioner of Internal Revenue Service

The Honorable William J. Wilkens, Chief Counsel for the Internal Revenue Service

Stephen A. Whitlock, Director of the Whistleblower Office – IRS

THE LEGALITY OF THE IRS' PROPOSED WHISTLEBLOWER RULE: FLUNKING THE *LOVING* TEST

By: Dean Zerbe¹ and Stephen M. Kohn² ----

Introduction

On February 11, 2014, a three-judge panel of the D.C. Circuit unanimously ruled against the Service, striking down its newly-issued regulation of tax-return preparers.³ The Court held that the Service exceeded its statutory authority, and that “the traditional tools of statutory interpretation -- including the statute’s text, history, structure, and context -- foreclose[d] and render[ed]” the IRS’s interpretation of the challenged provision of the tax code “unreasonable.”⁴

While the Service rarely sees its rulemaking authority challenged in a serious manner, the *Loving* case is an important reminder for the Service as it issues regulation in areas outside its core, technical competency: tax administration. One such peripheral area is the IRS whistleblower award program, which, like the enabling statute at issue in *Loving*, has roots deep into the 19th Century.⁵

This article examines the Service’s proposed regulations implementing its whistleblower award program and argues that IRS regulations excluding violations of—or recoveries under—non-Title 26 provisions would be struck

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² Stephen Kohn is a partner in the law firm of Kohn, Kohn and Colapinto, LLP and the author of *The Whistleblower’s Handbook: A Step-by-Step Guide to Doing the Right What’s Right and Protecting Yourself* (Lyons Press 2013). Mssrs. Kohn and Zerbe acknowledge the significant contribution made by Felipe Bohnet-Gomez in researching and writing this article.

³ *Loving v. IRS*, 742 F.3d 1013, (D.C. Cir. Feb. 11, 2014).

⁴ *Id.* at 16-17.

⁵ 31 U.S.C. § 330, the statute at issue in *Loving*, was originally enacted in 1884. 26 U.S.C. § 7623(a), the original IRS informant statute, was originally enacted in 1867, and was expanded in 2006 to include a mandatory award program, 26 U.S.C. § 7623(b).

down by a court applying the same analytical framework as used in *Loving*. 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.”⁶ Besides limiting the scope of section 7623, the IRS’s “proposed regulations [also] provide that amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds.”⁷ In particular, the proposed regulations specify that “[c]ollected proceeds are limited to amounts collected under the provisions of title 26, United States Code.”⁸

IRS Counsel has further explained the Service’s view that the “plain language of section 7623, examined in the context of the entire Code, and its legislative history indicate that Congress intended the statute to authorize payment of whistleblower awards only with respect to violations of the tax laws under Title 26.”⁹

As this article will show, however, section 7623 is considerably broader than the Service’s interpretation. In particular, fines and penalties under Titles 18 and 31 may form the basis of a whistleblower award under section 7623 if they are collected as a result of the whistleblower’s information.

In *Loving*, the District Court reminded the IRS that an agency “cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of the agency in a particular area.”¹⁰ Any final rule issued by the Service interpreting the whistleblower regulations must be able to withstand an attack under the *Loving* standard. The Service’s current proposed whistleblower rules flunk the five factors set forth in *Loving* whistleblower for judging the Service’s actions outside of its narrow area of expertise.

⁶ IRS Program Manager Technical Advice 2012-10 at 1 (April 23, 2012) (“IRS Memorandum”).

⁷ 77 Fed. Reg. 74801 (Dec. 18, 2012).

⁸ *Id.* at 74807 (proposed 26 C.F.R. § 301.7623-2(d)(1)). The Service contends that “Congress intended [section 7623] to authorize payment of whistleblower awards only with respect to violations of the tax laws under Title 26.” PMTA 2012-10 at 3. As explained below, the Service’s interpretation essentially limits the reach of section 7623 to back taxes and Chapter 68 penalties.

⁹ IRS Memorandum at 3.

¹⁰ *Loving v. IRS*, 917 F. Supp. 2d 67, 73 (D.D.C. 2013)

In determining that the Service had strayed beyond its statutory authority, the *Loving* court analyzed the matter from five perspectives: (1) the meaning of key statutory terms and phrases;¹¹ (2) the statute’s history;¹² (3) the “broader statutory framework”;¹³ (4) “the nature and scope of the authority being claimed by the IRS”;¹⁴ and (5) “the IRS’s past approach to th[e] statute.”¹⁵

In the first section, we show that the plain language of the statute itself is very broad, and encompasses a wide sweep of conduct and the proceeds collected by the government.

In the second section, we argue that the history of section 7623 confirms that Congress intended the statute to apply broadly; and the history of the Bank Secrecy Act reveals that its reporting requirements are intimately connected with revenue and tax administration.

The third section compares section 7623 to other whistleblower laws such as the False Claims Act and the whistleblower provisions of the Dodd-Frank Act. In the fourth section we argue that the IRS’s proposed rules exceed its congressionally-delegated authority, because they alter the policy underpinning section 7623, and do so in a way Congress did not intend.

Last, in the fifth section, we show that the IRS has previously interpreted section 7623 broadly, and that it has previously administered Title 31’s reporting requirements alongside other return information originating in Title 26.

1. Statutory Terms and Phrases

“In the land of statutory interpretation, statutory text is king,” and in

¹¹ *Id.* at 1016-1019 (analyzing the meaning of “representatives” and “practice [...] before the Department of the Treasury”).

¹² *Id.* at 1019-1020.

¹³ *Id.* at 1010-1021.

¹⁴ *Id.* at 1021.

¹⁵ *Id.* The DOJ recently decided not to challenge the *Loving* decision. *See, e.g.,* Andrew Velarde and Jaime Arora, *ABA Meeting: U.S. Won't Take Loving Decision to Supreme Court*, Tax Notes Today, May 12, 2014.

determining a statute's plain meaning, a court will first look to statutory definitions or terms of art.¹⁶ Accordingly, the *Loving* court began its analysis there. In *Loving*, the IRS sought to include tax preparers within the statutory definition of "representatives."¹⁷ The D.C. Circuit--drawing on sources such as the Oxford English Dictionary and Black's Law Dictionary--found, however, that the Service's use did not fit the term's "traditional[] and common" definition.¹⁸ The court found that "[o]ther IRS directives buttress[ed] the understanding that tax-return preparers are not representatives."¹⁹ The *Loving* court additionally recognized that "the meaning an agency attaches to a term in its regulation is not always the same as the meaning Congress intends to give that term when Congress includes it in statutes."²⁰

Additionally, "the IRS expanded its definition of 'practice' to cover tax-return preparers."²¹ (at 8). While the court agreed that the work of tax-return preparers "could be considered a 'practice' of sorts," it held that the statute "does not regulate the act of 'practice' in the abstract." Instead, the operative phrase was "practice [...] *before the Department of the Treasury*," and the IRS's proposed definition did not make sense when the phrase was considered in its entirety. The court found that the meaning of "practice before" was "further illustrated by the next subsection of the statute," which referred to the representatives "presenting their cases."

While the Service argued that section 330's language should be read disjunctively—that is, that the statute's listed requirements be read as alternatives—the court was not persuaded: "[m]ost obviously, the statute uses the conjunctive 'and' -- not the disjunctive 'or' -- when listing the various requirements, a strong indication that Congress did not intend the requirements as alternatives."²² Similarly, we will discuss the effect of reading the section 7623 disjunctively—reflecting its use of 'or'—rather than

¹⁶ *Loving*, 917 F. Supp. 2d at 79 (D.D.C. 2013).

¹⁷ *Loving*, 742 F.3d at 1016 (D.C. Cir. 2014)

¹⁸ *Id.*

¹⁹ *Loving*, 742 F.3d at 1017.

²⁰ *Id.* (citing *FAA v. Cooper*, 132 S. Ct. 1441, 1449) ("But an agency's use of a term can be valuable information not only about ordinary usage but also about any specialized meaning that people in the field attach to that term. That is particularly true when, as here, the term is one that the agency uses in a number of contexts.")

²¹ *Id.*

²² *Id.* at 1019.

the Service’s conjunctive interpretation.²³

Importantly, the court referred “to the language of Section 330’s predecessor statute,” enacted in 1884, to illuminate the meaning of the statute’s language. “On balance,” the court found that Congress “envisioned that practice before the agency would involve traditional adversarial proceedings.”²⁴

As in *Loving*, a court reviewing the proposed whistleblower regulations will look first to the statutory language of section 7623 in evaluating the Service’s proposed regulations. The question is whether the statutory language limits section 7623 to Title 26 tax and penalties—as the Service contends—or whether it is broader in scope, and could permit awards from monies collected under Titles 26, 18, and 31.

1.1 ‘Internal Revenue Laws’ Are Not Exclusive 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.”²⁵ The phrase ‘internal revenue laws,’ however, is not a term of art given statutory definition anywhere in the United States Code, nor does it have an accepted meaning in the area of law addressed by section 7623, namely whistleblower awards. The Service itself admits that “neither section 7623 nor any other Code provision defines the term ‘internal revenue laws.’”²⁶

Nor was the phrase borrowed from a statute under which it had an accepted meaning—rather, it originates with the original 19th Century statute that forms the basis of the present-day section 7623, and therefore predates the statutes and cases the IRS urges define it. This original law provided:

That the commissioner of internal revenue, with the approval of the Secretary of Treasury, is hereby authorized to pay such sums, not

²³ See § 2.1.2, *infra*. Section 7623 authorizes payment of awards 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 (emphasis added).

²⁴ *Loving*, 742 F.3d at 1019.

²⁵ 26 U.S.C. § 7623(a)(2).

²⁶ IRS Memorandum, *supra*, note 13, at 5.

exceeding in the aggregate the amount therefor, as may in his judgment be deemed 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 appropriated for by law.²⁷

Words that are not terms of art are given their ordinary meaning.²⁸ A statute is not rendered ambiguous merely because Congress chose not to define a broad term.²⁹ While the IRS contends that ‘internal revenue laws’ applies exclusively to Title 26, the best, 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 submitted by the whistleblower address a Title 26 or internal-revenue-related violation, even though the government may have proceeded against the Taxpayer under Title 18 or 31 rather than Title 26.

The IRS’s interpretation of section 7623 is premised on the theory that “[t]he internal revenue laws are contained [exclusively] in Title 26, Internal Revenue Code and guidance issued under that title.”³⁰ 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.³¹ To take just one example, Title 7 of the United States Code authorizes the Service to collect “[t]he taxes provided in this chapter.”³² 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

²⁷ Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473.

²⁸ 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”).

²⁹ *Loving*, 917 F. Supp. 2d at 74 (citing *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006))

³⁰ 77 Fed. Reg. 74801 (Dec. 18, 2012).

³¹ IRM 4.10.12.1.2(3) (Nov. 11, 2007)

³² 7 U.S.C. § 619(a) (collection of commodity processing taxes).

Counsel (“OLRC”).³³ The Service’s exclusive focus on Title 26 becomes all the more implausible when one considers that the United States Code did not even exist³⁴ in 1876—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.³⁵ Limiting section 7623 merely to ‘Title 26’ is overly narrow and simplistic—especially since section 7623 refers neither to the Internal Revenue Code nor to the U.S. Code—the IRS subordinates the intent of Congress to the interpretive and editorial judgments of attorneys in the OLRC.

Significantly, in a dispute concerning the jurisdiction of Federal district courts under Title 28 to review coal reclamation fees imposed under Title 30, “the heart of the issue [was] the meaning of the term ‘internal-revenue tax,’” contained in 28 U.S.C. sec. 1346(a)(1).³⁶ The government argued—as it does here—that “this term encompasses only those taxes imposed under Title 26 of the United States Code,” and that the action should have been heard in the federal claims court.³⁷ Rejecting this argument, the court noted 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.*”³⁸

The term “internal revenue laws,” therefore, cannot be formalistically reduced to “Title 26,” but must be interpreted in a functionalist sense, with regard to its plain meaning. As the following discussion shows, the plain language of section 7623 indicates that the whistleblower award program covers a broad range of activities, and extends to all taxes, penalties, and other violations over which the IRS has jurisdiction—including violations of

³³ See, e.g., Pub. L. 91-508, 84 Stat. 1118 (Oct. 26, 1970) (later codified as part of Title 31).

³⁴ The first U.S. Code was produced in 1926, and did not include the predecessor to section 7623. See, *infra*, § 2.1 (discussing codification of section 7623 and its predecessors).

³⁵ 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>.

³⁶ *Horizon Coal Corp. v. United States*, 43 F.3d. 234, 239 (6th Cir. 1994).

³⁷ *Id.*

³⁸ *Id.*

Title 18 and penalties for failure to file Form 90-22.1, Report of Foreign Bank and Financial Accounts (“FBAR”), as required under provisions of the Bank Secrecy Act.

1.2 Section 7623 Covers More than “Underpayments of Tax” or “Internal Revenue Laws”

Besides misinterpreting “internal revenue laws,” the IRS 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*.”³⁹ 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 [...]’.”⁴⁰ 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 eliminate discretion by mandating award payments where certain conditions were met.⁴¹

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. The Service’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—

³⁹ 26 U.S.C. § 7623(a) (emphasis added)

⁴⁰ *William’s Case*, 12 Ct. Cl. 192, 199 (Ct. Cl. 1876) (emphasis added).

⁴¹ *See* 26 U.S.C. § 7623(b)(5).

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.⁴²

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 reporting requirement 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.⁴³ The relation between section 6048, Form 8938, and the FBAR demonstrate the relatedness of the FBAR to internal revenue laws and tax administration.

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 than do the proposed regulations. 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.⁴⁴

⁴² Similarly, section 6039F requires the reporting of certain foreign gifts, and the failure to do so can result in a 25 percent penalty.

⁴³ 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-Requirements>.

⁴⁴ As discussed in greater detail below, section 7623 has historically been interpreted to permit the payment of an award even where no specific tax or penalty was implicated. See, *infra*, § 5.1.1.

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.”⁴⁵ 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.”⁴⁶ The IRS has jurisdiction to investigate several tax-related crimes outside Title 26.⁴⁷ Congress plainly intended to include such tax-related laws in the scope of section 7623.

1.3 “Collected Proceeds” Unambiguously Includes Non-Tax Monies.

Section 7623(b) provides that “[i]f 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,” an award must be made based on “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 Service has concluded that “amounts recovered under the provisions of non-Title 26 laws do not constitute collected proceeds” based on its view that “the plain language of section 7623 authorizes awards [only] for detecting “underpayments of tax” and violations of the internal revenue laws.”⁴⁸ The Service has also argued that “collected proceeds” under section 7623 do not include amounts unrelated to tax liability because “the terms ‘penalties,’ ‘additions to tax,’ and ‘additional amounts,’ [are terms of art that] have a specific meaning under the Code that does not extend beyond the definition of ‘tax.’”⁴⁹ The Service maintains, essentially, that “these terms refer to amounts assessed under chapter 68 that increase the total amount of *tax* liability.”⁵⁰

To support this view, the Service points chiefly to Section 6665, which provides that “any reference in this title to ‘tax’ imposed by this title shall be

⁴⁵ Black’s Law Dictionary 1204 (6th ed. 1990).

⁴⁶ Justice Department, *Criminal Tax Manual*, § 23.02 (2001).

⁴⁷ *See, e.g.*, IRM 9.1.3 (listing revenue-related offenses in Titles 26, 18, 31, and elsewhere).

⁴⁸ 77 Fed. Reg. 74801 (Dec. 18, 2012) (explanatory comments to proposed regulation).

⁴⁹ IRS Memorandum, *supra*, note 13, at 7.

⁵⁰ *Id.* (emphasis added).

deemed also to refer to the additions to the tax, additional amounts, and penalties provided by *this chapter*.”⁵¹ Section 6665, however, defines ‘tax,’ not ‘penalties, interest, additions to tax, and additional amounts.’ On its face, section 6665 only speaks to how amounts under Chapter 68 of the Code are to be collected, and does not amount to a substantive definition of ‘additional amounts’ or ‘penalties.’ While ‘additions to tax’ and ‘additional amounts’ may arguably be terms of art referring to sections under Chapter 68, the term ‘penalties’—as used in section 7623—cannot reasonably be construed as a term of art especially considering that Chapter 75 imposes numerous penalties.

The Service also cites *Williams v. Commissioner*, a Tax Court case where “the Tax Court held that it lacked jurisdiction to consider challenges to FBAR penalties,”⁵² for the proposition that, amounts covered by section 7623(b) applies only to “penalties or recoveries [...] assessed under chapter 68 of the Code.”⁵³ 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 26.⁵⁴ In particular, its jurisdiction is limited to the specifically enumerated deficiency procedures of sections 6212–6214. 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,” and jurisdiction over liens and levies issued under Title 26.⁵⁵ The Tax Court further clarified its statutory jurisdiction under Title 26 is narrower than jurisdiction over all ‘tax laws’ or all ‘internal revenue laws,’ stating that “other taxes—even if imposed in Title 26—fall outside this Court’s deficiency jurisdiction.”⁵⁶ There are, therefore, other ‘tax laws,’ both in Title 26 *and 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: the Tax Court has jurisdiction over whistleblower claims, including whether a whistleblower is

⁵¹ 26 U.S.C. § 6665 (emphasis added).

⁵² IRS Memorandum, *supra*, note 13, at 7; *Williams v. Commissioner*, 131 T.C. 54 (2008).

⁵³ IRS Memorandum, *supra*, note 13, at 7.

⁵⁴ *See, e.g., Naftel v. Commissioner*, 85 T.C. 527, 529 (1985) (the tax court is a court of limited jurisdiction).

⁵⁵ 131 T.C. 54, 57-58 (2008).

⁵⁶ *Id.* at 58 (emphasis added).

entitled to an award including FBAR penalties.⁵⁷

The Service also mis-cites *Commissioner v. Lundy*, as holding that, “absent evidence of contrary congressional intent, “identical words used in different parts,” of the *Internal Revenue Code* should have “the same meaning”).⁵⁸ *Lundy*, however, applied “the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning” to a situation where the interpretation of a term used “in the very next section of the statute” was in question.⁵⁹ Here, section 7623(b) was promulgated by Congress in an altogether different act than was section 6665.⁶⁰

Congress surely knew how to invoke the limitation urged by the service: use the word “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.”⁶¹ 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.”⁶² 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.

⁵⁷ 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).

⁵⁸ PMTA 2012-10 at 7 (emphasis added) (citing *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996)).

⁵⁹ *Comm’r v. Lundy*, 516 U.S. 235, 250 (1996) (emphasis added).

⁶⁰ 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 section 6665 and related provisions, as well as the fact they are not codified in close proximity, but in altogether different chapters of Title 26, is more than sufficient to rebut the *Lundy* presumption without even considering the sections’ vastly differing purposes.

⁶¹ Black’s Law Dictionary 1204 (6th ed. 1990).

⁶² See *Phelps v. Harris*, 101 U.S. 370, 380 (1879).

This interpretation is further supported by the fact that, in elaborating “collected proceeds,” Congress also used the expansive term “includes,” which indicates that the enumerated categories are merely illustrative rather than exclusionary. In particular, section 7623(b) uses the term ‘including’ as a term of illustration and definition, not of limitation.⁶³ 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 awards to the total tax liability, and did not intend to limit the applicability of the whistleblower program to Title 26 only.

Moreover, it is telling that the trend of Congressional action regarding section 7623 has been to expand the scope of collected proceeds. Prior to the 2006 amendment to section 7623, the 1996 amendments—and Service’s regulations—explicitly excluded interest from ‘collected proceeds.’ In 2006, however, Congress specifically struck that limiting language, eliminating the only specific restriction on collected proceeds in place at the time.

1.4 “Any Related Actions” Plainly Encompasses Related Non-Tax Actions Based on the Whistleblower’s Information.

Section 7623(b)(1) also includes within “collected proceeds” those proceeds “resulting from [...] any related actions,” not just the original action “described in subsection (a).”⁶⁴ By including this language, Congress sought to reward whistleblowers for their contribution by including the proceeds of “any related actions” 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 responses to illegal conduct.

In including “any” related actions, Congress sought to eliminate hyper-

⁶³ 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).

⁶⁴ 26 U.S.C. § 7623(b)(1).

technical distinctions such as the Service’s distinction between chapter 68 penalties and other penalties within the IRS’s jurisdiction to impose or recommend.⁶⁵ 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 U.S. 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 proposed regulations: 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. 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.⁶⁶

This expansive reading of “related actions” 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.”⁶⁷ 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—if the

⁶⁵ The Service also contends that “[a]lthough the IRS may collect penalties for violations of Title 31 [...] and seize property under Title 18 [...] those penalties and seizures do not relate to ‘underpayments of tax,’ may be imposed independently of whether a tax underpayment occurs, and are not related to violations of the internal revenue laws under Title 26.” 77 Fed. Reg. 74801 (Dec. 18, 2012). In addition to falling within the scope of “any related actions,” such penalties and seizures fall within the scope of section 7623(a), as argued above. *See, supra*, §§ 1.1–1.3.

⁶⁶ Of course, nothing in the section 7623 requires the IRS to take action based on a whistleblower’s information, and the Service retains the discretion of *whether* to act. At issue here is whether the Service’s choice *among* possible actions should affect a whistleblower’s entitlement to an award based on the proceeds that were actually collected.

⁶⁷ 26 U.S.C. 7623(b)(1).

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” is itself a broadening term. In section 7623, “any” is continually used to modify the statute’s terms, and the concept of a “related action”.⁶⁸ “Read naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’”⁶⁹ 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.⁷⁰

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

Last, inclusion of “any settlement” within the scope of “collected proceeds” indicates the breadth of the statute. Notably, Congress used the general term “settlement,” rather than the Title-26 term “compromise.”⁷¹ 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.

⁶⁸ *Id.* (“any administrative or judicial action;” “any related actions;” “any settlement”) (emphasis added).

⁶⁹ *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).

⁷⁰ *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).

⁷¹ 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”).

* * *

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

(2) Legislative History

The *Loving* court found that Section 330’s “original language plainly would not encompass tax-return preparers.”⁷² In *Loving*, “Congress made clear *in the statute itself* that it intended no change to the statute’s scope” by including language in the bill stating it intended to revise the law “without substantive change.”⁷³ With respect to the IRS whistleblower law, Congress did not include such language, but, by leaving the original law intact as subsection (a)(except for the expansion with the change from “and” to “or” discussed at section 2.1.2 below), and explicitly using that law’s scope as the *basis* of the new mandatory awards provided for by subsection (b), Congress did not intend to substantively alter the original law’s reach, except to expand it remove obstacles to awarding whistleblowers based on the money collected as a result of their information.

The history of section 7623 reveals that the language and breadth of the original 1867 law was preserved, through the 1996 and 2006 amendments to the law, to the present. The history of the 2006 amendments—and their language—also shows that Congress intended to move from a “voluntary”

⁷² *Loving*, 742 F.3d at 1019.

⁷³ *Id.* at 1020 (emphasis in original).

award program to a “mandatory” award program.

Because the Service has claimed that Title 31 penalties are beyond the scope of section 7623, it is also instructive to look at the history of the FBAR. As we will discuss in § 2.2 below, this history shows that the reporting requirements had an explicit tax- and revenue-related purpose.

2.1 History of Section 7623

The origins of the current IRS whistleblower program date to March 2, 1867,⁷⁴ when Congress authorized the Service “to pay such sums [...] as may in his judgment be necessary for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws, or conniving at the same.”⁷⁵ Initially, Congress appropriated \$100,000 to pay informants, a large sum at the time.⁷⁶

⁷⁴ Prior to 1867, Congress nonetheless authorized the Secretary of Treasury to pay a ‘moiety’—i.e., half-of forfeitures to informants in certain cases:

And, where not otherwise provided for, such share as the Secretary of Treasury shall, by general regulation provide, not exceeding one moiety nor more than five thousand dollars in any one case, shall be to the use of the person, to be ascertained by the court which shall have imposed or decreed any such fine, penalty, or forfeiture, who shall first inform of the cause, matter, or thing whereby such fine, penalty, or forfeiture shall have been incurred; and when any sum is paid without suit, or before judgment, in lieu of fine, [penalty], or forfeiture, and a share of the same is claimed by any person as informer, the Secretary of Treasury, under general regulations to be by him prescribed, shall determine whether any claimant is entitled to such share as above limited, and to whom the same shall be paid, and shall make payment accordingly.

Act of June 30, 1864, ch. 173, § 179, 13 Stat. 305. Although this system was later repealed, Act of June 6, 1872, § 39, 17 Stat. 256, early decisions did not distinguish between civil and criminal penalties.

⁷⁵ Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473. The act was subsequently codified by ch. 11 § 3463, 35 Rev. Stat. 690 (1873-74). The text of the law was unchanged and reproduced under the section heading “Detection and punishment of frauds.” *see also* Dennis J. Ventry, Jr., “Whistleblowers and *Qui Tam* for Tax,” 61 Tax Lawyer 357, 360 n.14 and accompanying text (describing history of IRS Whistleblower Program).

⁷⁶ Act of Mar. 2, 1867, ch. 169, § 7, 14 Stat. 471, 473.

Although it was codified in the Revised Statutes,⁷⁷ 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.”⁷⁸ The Internal Revenue Code of 1939, which was “intended to include all [laws] [...] relating *exclusively* to internal revenue,” did not include the informant law.⁷⁹ Not until 1954 was the law codified at Section 7623 of the Code.⁸⁰

2.1.1 The 1996 Amendments

Section 7623 was not altered until 1996, when Congress enacted the Taxpayer Bill of Rights 2.⁸¹ 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.”⁸² 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*.”⁸³ Again, there is no indication in the legislative history that Congress intended to limit these civil and criminal violations to Title 26.⁸⁴ 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.

The 1996 amendments explicitly excluded interest from the amount forming the basis of the award: “Any amount payable [...] shall be paid from the proceeds of amounts (*other than interest*) collected by reason of the

⁷⁷ 35 Rev. Stat. 690 (1865).

⁷⁸ Ventry, 61 Tax Lawyer 357, 361 (citing Revenue Act of 1934, ch. 3792, 48 Stat. 680).

⁷⁹ I.R.C. § 4 (1939), 53 Stat. 1.

⁸⁰ I.R.C. § 7623 (1954).

⁸¹ Pub. L. 104-168 (July 30, 1996).

⁸² *Id.* § 7623, 110 Stat. 1473.

⁸³ H. R. Rep. 104-506 at 51 (emphasis added).

⁸⁴ Indeed, the Service’s prior practice under section 7623 indicates that awards were not limited to Title 26. *See, e.g.*, § 5.1, *infra*.

information provided [...].”⁸⁵ In doing so, Congress knew how to specifically exclude any amounts it wished from collected proceeds under section 7623.⁸⁶ That it did not specifically exclude Title 31 and Title 18 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 surely aware in 2006 that discretionary awards were being given for FBAR enforcement, Title 18 recoveries, and other amounts outside of Title 26.

2.1.2 The 2006 Amendments

In 2006, Congress amended and expanded the informant law, re-designating the original law as subsection (a) of section 7623, and creating, under subsection (b), a mandatory award program, similar to that of the False Claims Act,⁸⁷ which required the payment of an award if certain conditions were met.

Critically, the new additions to section 7623 removed the Service’s discretion regarding whether or not to grant an award by providing that whistleblowers “*shall* [...] receive an award.”⁸⁸ The main effect of the 2006 amendments was to move from a discretionary award program to a mandatory award program.

Congress, as argued above,⁸⁹ broadly included “any related actions” and “any settlements” in the award amount. Congress was not only aware that once a whistleblower provides the Service with actionable information, the government often has discretion to pursue recoveries under several theories—including settlements and penalties under Titles 31 and 18—but also that that Congress intended that whistleblowers be given an award based on the “collected proceeds” “collected by reason of the information provided,” regardless of which particular approach the government takes to law enforcement.

The Service has placed great emphasis on the fact that in 1996 “Congress

⁸⁵ Pub. L 104-168, 110 Stat. 1473 (emphasis added).

⁸⁶ Removing the prior restriction on interest also indicates Congress sought to broaden the scope of the law. *See, supra*, § 1.4.

⁸⁷ Ventry, 61 Tax Lawyer 357.

⁸⁸ 26 U.S.C. § 7623(b)(1).

⁸⁹ *See, supra*, §§ 1.3–1.4.

added ‘detecting underpayments of tax’ as a basis for making whistleblower awards to *clarify* that information pertaining to civil, as well as criminal, violations can form the basis of an award.”⁹⁰ The Service has interpreted this to mean “Congress [...] intended the statute’s original language regarding violations of ‘internal revenue laws’ to refer to violations (both civil and criminal) of *tax* laws.” Whether or not this was actually the case regarding the 1996 amendments, in 2006 Congress explicitly uncoupled these two bases for awarding a whistleblower by replacing the word “and” with the disjunctive “or.”⁹¹

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.*”⁹² 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.’”⁹³ If section 7623

⁹⁰ PMTA 2012-10 at 4 (citing H.R. Rep. 104-506 at 51 (1996)).

⁹¹ 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, or (2) detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws or conniving at the same”),

⁹² 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’)).

⁹³ *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).

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”⁹⁴—then the language of subsection (a)(2) is rendered superfluous and without distinct meaning.⁹⁵

Similarly, subsection (a)(2) also uses the word “or” to disjoin “violating the internal revenue laws” from “conniving at the same.”⁹⁶ 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.”⁹⁷ 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 31.⁹⁸

In sum, Congress made critical changes to section 7623 in 2006 which reversed some of the changes Congress had made to the section in 1996. These reversals broadened the law, eliminating the old restrictions and implementing a new, more expansive test: by eliminating striking the restriction on interest, ‘collected proceeds’ was broadened, and by replacing ‘and’ with ‘or,’ Congress again widened the scope of the law. Together these changes represent a significant expansion of the law, and cast doubt on the Service’s argument that, because of the 1996 amendments, section 7623 applies only to ‘underpayments of tax.’⁹⁹

* * *

As the legislative history of section 7623 shows, Congress has kept the 1867 law’s original language intact, and—with one exception¹⁰⁰—has continued to

⁹⁴ PMTA 2012-10 at 7 (emphasis in original).

⁹⁵ *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”)

⁹⁶ 26 U.S.C. § 7623(a)(2).

⁹⁷ *Id.*

⁹⁸ *See, e.g., supra*, § 1.2.

⁹⁹ PMTA 2012-10 at 4.

¹⁰⁰ The 1996 amendments to section 7623 excluded interest from the amounts available to pay an award. Pub. L. 104–168, title XII, § 1209(a) (July 30, 1996), 110 Stat. 1473. The 2006 amendment eliminated this exclusion. Pub. L. 109–432, div. A, title IV, § 406(a)(1)(c) (Dec. 20, 2006), 120 Stat. 2958.

strengthen and broaden the law. And critically, the 2006 amendment replaced the “and” separating subsections (a)(1) and (2) with “or,” showing that Congress intended to include a broad array of tax- and revenue-related laws within the scope of section 7623, and did not intend to limit awards to only “underpayments of tax.” Indeed, as shown below, section 7623’s predecessor has historically been interpreted broadly to include criminal conduct, and non-Title 26 laws—such as the FBAR—have been treated as revenue laws by both the Service and by the courts.¹⁰¹

2.2 History of the Report of Foreign Bank and Financial Accounts

Because the Service contends that provisions outside Title 26 cannot be considered “internal revenue laws,” it is instructive to look at the history of one set of such provisions: the information reporting requirements of the Bank Secrecy Act. We additionally focus on these reporting requirements—in particular the Report of Foreign Bank and Financial Accounts (“FBAR”)—because it is common for information provided by whistleblowers to result in violations of such reporting requirements, and because the Service actively uses the FBAR provisions. The history of these reporting requirements reveals that laws codified by OLC outside Title 26—in the case of the FBAR, in Title 31—can nonetheless have clear and explicit tax- and revenue-related purposes.

The FBAR—with section 6048—is one of “two categories of reporting requirements designed to curtail the use of [offshore] accounts [...] to facilitate *tax evasion by U.S. taxpayers*.”¹⁰² The FBAR stems from the Bank Secrecy Act of 1970 (“BSA”).¹⁰³ “The express purpose of the Act is to require the maintenance of records, and the making of certain reports which ‘have a high degree of usefulness in criminal, *tax*, or regulatory investigations or proceedings.’”¹⁰⁴ In particular, “31 C.F.R. § 1010.420 requires *tax-payers* using offshore bank accounts to keep and maintain [banking information] for

¹⁰¹ See, *infra*, § 5.1.

¹⁰² Joint Committee on Taxation, *Selected Issues Relating to Tax Compliance With Respect to Offshore Accounts and Entities* (JCX-65-08), July 23, 2008, 8.

¹⁰³ Pub. L. 91-508, 84 Stat. 1118 (1970).

¹⁰⁴ *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 26 (emphasis added) (citing 12 U.S.C. §§ 1829b (a)(2), 1951; 31 U.S.C. § 1051).

government inspection.”¹⁰⁵ Similarly, under FACTA, the Service requires taxpayers to report foreign assets on Form 8939 as an attachment to their tax return.

As the Supreme Court has recognized, “Congress was apparently concerned with [...] the enforcement of the regulatory, *tax*, and criminal laws of the United States,” and in particular “a serious and widespread use of foreign financial institutions [...] for the purpose of violating or evading domestic criminal, *tax*, and regulatory enactments.” *Id.* (emphasis added). As the legislative history of the Bank Secrecy Act itself clarifies, Congress was concerned by the use of “[s]ecret foreign bank accounts [...] by Americans *to evade income taxes*,” resulting in the loss of “hundreds of millions in *tax revenues*.”¹⁰⁶ Given this legislative history, the relation of the FBAR to internal revenue is clear and explicit.

The House Report of the bill noted that, “Secret foreign bank accounts and secret foreign financial institutions [...] have been utilized by Americans to *evade income taxes*,” and that have resulted in the loss of “hundreds of millions in *tax revenues*.”¹⁰⁷ The House Report went further, stating that “[o]ne of the most damaging effects of an American’s use of secret foreign financial facilities is its *undermining of the fairness of our tax laws*” because secret foreign bank accounts “offer[] a convenient means of *evading U.S. taxes*.”¹⁰⁸ The report continued:

In these days when the citizens of this country are crying out for *tax reform and relief*, it is grossly unfair to leave the secret foreign bank account open as a convenient *avenue of tax evasion*. The former U.S. Attorney for the Southern District of New York has characterized the secret foreign bank account as the *largest single tax loophole permitted by American law*.¹⁰⁹

Congress also specifically knew of the importance of secrecy in committing

¹⁰⁵ *M.H. v. United States*, 648 F.3d 1067, 1070 (9th Cir. 2011) (individuals must “report[] [such information] to the IRS annually [...] and maintain [it] for IRS inspection”).

¹⁰⁶ H.R. Rep 91-975 at 12–13 (1970) (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 13 (emphasis added).

¹⁰⁹ *Id.* (emphasis added).

tax crimes, and directly connected the FBAR with tax administration: “With the growing use of secret foreign bank accounts, law enforcement officials have become increasingly concerned with the *loss of tax dollars*.”¹¹⁰ Given this surfeit of legislative history, Congress saw the BSA as having a strong and central tax purpose—indeed, that it was closing a significant tax loophole in enacting the FBAR provisions.

2.2.1 The FBAR Was Return Information Filed Along With a Taxpayer’s Federal Tax Return.

When the FBAR was first implemented, it was as return information which had to be provided directly to the Service as part of a taxpayer’s return. “Beginning with certain [tax] returns filed for tax year 1970, taxpayers were required to answer either yes or no to a question on the *tax return* directed at determining whether they had a foreign bank account. Taxpayers who responded affirmatively were directed to report information on the foreign account on *IRS Form 4683, U.S. Information Return on Foreign Bank, Securities, and Other Financial Accounts, to be filed with their Federal income tax return*.”¹¹¹ Taxpayers had to file Forms 4683 with the IRS until 1977, when “disclosure problems between IRS and other agencies in Treasury”—caused by restrictions implemented in the Tax Reform Act of 1976—caused them to have to “file Treasury Form 90-22.1 with the Treasury Department rather than with their tax returns sent to IRS.”¹¹²

One purpose of keeping the FBAR at some distance from Title 26—including codifying the FBAR requirement in Title 31—is to avoid subjecting it to the stringent confidentiality and non-disclosure requirements of section 6103.¹¹³

¹¹⁰ See S. Rep. 91-1139, at 4 (emphasis added).

¹¹¹ U.S. General Accounting Office, *Better Use of Currency and Foreign Account Reports by Treasury and IRS Needed for Law Enforcement Purposes* (GGD-79-224), at 3 (April 6, 1979) (emphasis added), available at <http://archive.gao.gov/f0302/109024.pdf>.

¹¹² *Id.*

¹¹³ See *A Report to Congress in Accordance with Sec. 361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, April 26, 2002, 4 n. 4 (“Because an FBAR is a Title 31 report, it is not subject to the dissemination restrictions of 26 U.S.C. 6103.”); see also Brief of the Taxation Committee of the New York County Lawyers’ Association as *Amicus Curiae, T.W. v. United States* (No. 12-853), at 13, (“The [FBAR] requirements are in Title 31, rather than Title 26, the Tax Code, in order to enhance

The Tax Reform Act of 1976 “tightened restrictions governing IRS’ disclosure of *tax information* thus raising questions concerning whether IRS could legally disseminate foreign bank account data.”¹¹⁴ As a result, Treasury determined that “[r]equiring that taxpayers submit a supplementary tax form describing their foreign bank accounts could, therefore, defeat one purpose of the [BSA]—dissemination of such information to various Federal agencies.”¹¹⁵ So, “by converting IRS form 4683 to Treasury Form 90-22.1 for tax years beginning after 1976, the Secretary apparently resolved disclosure problems.” The FBAR—and its associated failure-to-file penalties—intrinsically remains an ‘internal revenue law,’ ‘conniving,’ or ‘related action’ within the meaning of section 7623.

2.2.2 In Recent Years, FBAR Requirements have Been Delegated to the IRS and Expanded Significantly.

Since 1977, the FBAR has, however, again moved closer in orbit to the Service. The USA PATRIOT Act of 2001 required the Treasury Department to study FBAR compliance and report its findings to Congress.¹¹⁶

Treasury’s first report recognized that “[t]he FBAR is an ‘information return or report’ that is filed with the IRS”—albeit to a different office than a taxpayer’s return—“and input into [a] database.”¹¹⁷ Consistent with its tax-related purpose, “[f]iling an FBAR is a two-part reporting process,” one part of which has required taxpayers to “indicate an interest in a financial account in a foreign country by checking ‘Yes’ or ‘No’ in the appropriate box [on Form 1040 Schedule B, Part III].”¹¹⁸ In 1992 “the Secretary delegated to the IRS the authority to investigate possible violations of [the FBAR reporting requirement].”¹¹⁹ The report also suggested that “the authority to impose civil

law enforcement’s ability to share information about taxpayer’s interests in foreign accounts. Title 26 information would be limited to use by the IRS.”).

¹¹⁴ U.S. General Accounting Office, *Better Use of Currency and Foreign Account Reports by Treasury and IRS Needed for Law Enforcement Purposes* (GGD-79-224), at 23 (April 6, 1979) (emphasis added), available at <http://archive.gao.gov/f0302/109024.pdf>.

¹¹⁵ *Id.*

¹¹⁶ Pub. L. 107-56, title III, § 361(b) (Oct. 26, 2001), 115 Stat. 332.

¹¹⁷ Secretary of the Treasury, *A Report to Congress In Accordance With § 361(b) of the USA PATRIOT Act*, April 26, 2002, 4.

¹¹⁸ *Id.* at 5.

¹¹⁹ *Id.* at 4.

sanctions for the failure to file FBARs should be delegated from FinCEN to IRS.”¹²⁰

Reviewing the Treasury Department’s reports, the Senate Committee on Finance first sought to impose a new penalty for failure to comply with the FBAR reporting requirements, because “the number of individuals involved in using offshore bank accounts *to engage in abusive tax scams* has grown significantly in recent years.”¹²¹ In particular, “[t]he Committee is concerned about [the use of offshore accounts to conceal income from the IRS] and believes that improving compliance with this reporting requirement is vitally important to *sound tax administration* [...] and to *preventing the use of abusive tax schemes and scams*.”¹²² The Senate Committee on Finance continued to make the same recommendation until the new civil penalty was enacted in 2004.¹²³

Meanwhile, the centrality of the tax purposes underlying the FBAR was confirmed when, in April, 2003, civil penalty authority to enforce FBAR requirements was redelegated within the Department of the Treasury from the Financial Crimes Enforcement Network (“FinCEN”)¹²⁴ to the IRS.¹²⁵ Treasury itself explained that the redelegation was desirable because “the FBAR is *more directed towards tax evasion, as opposed to money laundering or other financial crimes*, that lie at the core mission of FinCEN.”¹²⁶ This FBAR delegation is broad, giving the IRS the power to assess and collect civil penalties for noncompliance with the FBAR requirements, investigate

¹²⁰ *Id.* at 13.

¹²¹ S. Rep. 107-189 at 20 (emphasis added).

¹²² *Id.* (emphasis added).

¹²³ S. Rep. 107-211 at 86–87; S. Rep. 108-11 at 100; S. Rep. 108-192 at 107; S. Rep. 108-257 at 31

¹²⁴ Notably, FinCEN did not exist until 1990, and thus played no role in the first two decades of administering the BSA’s reporting requirements.

¹²⁵ See 68 Fed. Reg. 26, 468 (May 16, 2003) (codified at 31 CFR §103.56(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”); IRM 4.26.1.2.1.D (04-05-11); Memorandum of Agreement and Delegation of Authority for Enforcement of FBAR Requirements (April 2, 2003), IRM Exhibit 4.26.1-3.

¹²⁶ Secretary of the Treasury, *A Report to Congress in Accordance With §361(b) of the USA PATRIOT Act*, at 4 (April 24, 2003) (emphasis added). Commentators have also noted the same. Hale E. Sheppard, *Evolution of the FBAR: Where We Are, and Why It Matters*, 7 Houston Bus. and Tax L.J 1, 16 (2006) (emphasis added).

possible violations, employ summons power, issue administrative rulings, and the power to take “any action reasonably necessary” to implement and enforce the FBAR requirements.¹²⁷

In a news release discussing this relegation, IRS acting Commissioner Bob Wenzel stated that the redelegation would result in “improved compliance with the tax laws,” and the director of FinCEN stated that, “[u]nlike other Bank Secrecy Act reports, FBARs [...] are *more closely related to tax enforcement*.”¹²⁸ Consequently, “Placing oversight of FBARs with the IRS is a natural fit.” The Service further stated that “agents assigned to examine returns will also recommend assertion of the FBAR penalties where appropriate.”¹²⁹

In 2004, Congress—knowing that the IRS had been delegated civil enforcement over the FBAR—created a new civil penalty for non-willful violations of the reporting requirement. This penalty was included in the American Jobs Creation Act of 2004, which was intended “[t]o amend the Internal Revenue Code of 1986 to remove impediments in such Code and make our manufacturing, service, and high-technology businesses and workers more competitive and productive both at home and abroad.”¹³⁰

Regarding this new FBAR penalty, the Senate Report states it “may be waived if any income from the account was properly *reported on the income tax return* and there was reasonable cause for the failure to report.” S. Rep. 108-192. The Conference Report on the bill shows that a Senate amendment to the bill was accepted, whereby the additional penalty was increased from

¹²⁷ 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”).

¹²⁸ News Release, Internal Revenue Service, IR-2003-48 (April 10, 2003) (emphasis added).

¹²⁹ *Id.*

¹³⁰ American Jobs Creation Act of 2004, 108 P.L. 357, 118 Stat. 1418, 1419; *see also* H. Rep. 108-393 at 194–95 (“The Committee believes that imposing a new civil penalty for failure to report an interest in foreign financial accounts that applies (without regard to willfulness) will increase reporting of foreign financial accounts.”); H. Rep. 108-548 at 275–76 (same) (Report on American Jobs Creation Act of 2004).

\$5,000 to \$10,000, and “the Senate amendment increases the present-law penalty for willful behavior to the greater of \$100,000 or 50 percent of the amount of the transaction or account.” H. Rep. 108-755 at 615.

Consolidation of FBAR authority under IRS occurred well before the 2006 law enacting section 7623(b).¹³¹ Congress, therefore, well knew of the wide scope of IRS enforcement activities extending beyond Title 26—particularly the well-publicized FBAR—and intended to include such closely related activities in the sweep of section 7623. Statutory silence regarding Titles 31 and 18 is, therefore, acquiescence to the IRS’s regulatory and enforcement authority.

(3) Broader Statutory Framework

In evaluating the IRS’s proposed tax-return preparer regulations, *Loving* considered their effect on the broader statutory context, or overall statutory scheme.¹³² In doing so, the court concluded that the IRS’s regulations “would effectively gut Congress’s carefully articulated system for regulating tax return preparers.”¹³³

In particular, the court found significant that the IRS’s purported regulatory authority would have rendered unnecessary the numerous provisions specifically regulating tax-return preparers that Congress has enacted over the years. While the court cautioned that the views of later Congresses “can be a hazardous basis for interpreting the meaning of an earlier enacted statute,” it found “at least some significance in the fact that multiple Congresses” acted as though Section 330 did not cover tax-return preparers.

Just as in *Loving*, the broader statutory context shows that Congress intended the Service’s whistleblower award program to have a broad reach. This statutory context includes other whistleblower laws, like the False

¹³¹ 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”).

¹³² *Loving*, 742 F.2d at 1020 (quoting *Roberts v. Sea-Land Services, Inc.*, 132 S. Ct. 1350, 1357 (2012)). This approach is consistent with the Supreme Court’s instruction 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*).

¹³³ *Id.*

Claims Act (“FCA”) and the whistleblower provisions of the Dodd-Frank Act, with which section 7623 should be read *in pari materia*. With respect to the FBAR requirement it includes other internal revenue laws, such as section 6048, and FACTA foreign asset reporting requirements under Form 8938.

3.1 Section 7623 Must Be Read *In Pari Materia* With Other Whistleblower Award Laws

Courts have long held that statutes with similar language and purpose should be construed together and given similar effect.¹³⁴ When 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.”¹³⁵ Not only is Congress presumably aware of related statutes, but “where Congress borrows terms of art [...], it presumably knows and adopts the cluster of ideas that were attached to each borrowed word [...]”¹³⁶ All whistleblower programs have a similar purpose, namely to encourage knowledgeable insiders to offer information on fraud, waste, or abuse, with the understanding that there is a *guaranteed* award based on the collected proceeds regardless of the path the government ultimately chooses to do so. The whistleblower program under section 7623 was modeled after the example of the False Claims Act, and the two share a host of key features. The FCA—which uses similar language and creates a similar statutory scheme—preceded the 2006 amendments to section 7623, and is therefore highly relevant to understanding and interpreting the IRS whistleblower program.

Commonalities between the FCA and section 7623(b) include the right of a whistleblower to a mandatory award, the right to have any award

¹³⁴ See, e.g., *Merill v. Fahs*, 324 U.S. 308 (1945) (applying the doctrine of *in pari materia* to the construction of provisions of the Internal Revenue Act); see also Quentin Johnstone, “An Evaluation of the Rules of Statutory Construction,” 3 U. KAN. L. REV. 1, 3 (1954) (“All courts make great use of statutes *in pari materia*”).

¹³⁵ *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”).

¹³⁶ *Morissette v. United States*, 342 U.S. 246, 263 (1952). The IRS has essentially interpreted “internal revenue laws” as a term of art equating to Title 26. However, section 7623 is not a tax law, but rather a whistleblower award 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.

determination subject to judicial review, and a limitation on an award where the whistleblower “planned and initiated” an action.¹³⁷ These and other structural similarities between the two statutes are significant grounds for finding that the intent and meaning of ‘proceeds’—and the concept of ‘alternative remedy’ discussed in greater detail below—are consistent among the FCA and section 7623.

In addition, the SEC whistleblower program—established by the Dodd-Frank Act—demonstrates that Congress intended agency jurisdiction—not codification of violations—to determine the basis of awards under these related whistleblower statutes.

3.1.1 Both the FCA and Section 7623 Define “Proceeds” Broadly

The term ‘proceeds’ is used by the FCA—just as it is by section 7623(b)—to define the scope of the whistleblower’s award.¹³⁸ It is an expansive term, but is also a term with particular meaning and importance in the FCA.¹³⁹ The Ninth Circuit, “looked to the dictionary definition of the word” in interpreting its meaning the FCA and in other statutes.¹⁴⁰ 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’”—a “broad” term.¹⁴¹

Congress well knew of the usage and meaning of “proceeds” when it used the term and in using it—rather than the term “tax,” which would comport with

¹³⁷ Other examples of commonality between the two provisions are the allowance for payment schemes based on the level of information provided by the whistleblower; e.g., a range of fifteen to thirty percent of payment to a whistleblower is authorized if action is taken on the whistleblower’s information; a broad definition of what will be considered “amounts” for determination of a whistleblower award (including “alternate remedies” under the False Claims Act); the parallel of awarding less than a ten percent award for a less substantial contribution under 26 U.S.C. § 7623(b)(2) and awards under 31 U.S.C. § 3730(d) for False Claims Act. In sum, the two statutes are a classic example of *in pari materia*—as emphasized by the author of both bills—Senator Grassley. See, e.g., Ventry, 61 Tax Lawyer 357, at 367.

¹³⁸ 31 U.S.C. § 3720(d)(1) (“[the whistleblower] shall receive at least 15 percent but no more than 25 percent of the proceeds of the action or settlement.”) (emphasis added).

¹³⁹ See, *supra*, § 1.3 (discussing plain meaning of collected proceeds).

¹⁴⁰ *U.S. ex rel. Barajas v. United States*, 258 F.3d 1004, 1013 (9th Cir. 2001).

¹⁴¹ *Id.*

the Service’s interpretation—deliberately drafted section 7623 broadly to ensure whistleblowers would be awarded based on the full measure of their contribution, not only those parts in Title 26.

3.1.2 Section 7623 Parallels the FCA’s Alternative Remedies Provision

The FCA recognizes that “the Government may elect to pursue its claim through any alternate remedy available to [it],” and guarantees whistleblowers a right to share in the proceeds of any such alternative remedy or proceeding brought based on their information.¹⁴² Courts have held 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.¹⁴³

In including any alternative remedy within the FCA’s scope, Congress sought to reward whistleblowers for all proceeds stemming from their information regardless of the discretionary actions the government undertook to collect those whistleblower-derived proceeds. The House Report to the 1986 FCA amendments states that “the Government may pursue its claim through alternative remedies available to it, such as a *criminal prosecution* or an [administrative adjudication].”¹⁴⁴ That alternative remedies include criminal prosecutions attests to the breadth of the concept. Congress did not intend for the government to affect a whistleblower’s award by its choice of how to pursue the claim.¹⁴⁵ Just as in the FCA context—tax prosecutors have great discretion in choosing how to pursue a case to completion. In particular, U.S. Attorneys may choose to pursue a taxpayer under Title 18 or 31, rather than Title 26 tax fraud under the same facts.

In including within the scope of section 7623(b) awards ‘any related actions,’ ‘any settlements’ and ‘additional amounts,’ Congress intended to import the FCA’s ‘alternative remedy’ concept, and apply it to awards under section

¹⁴² 31 U.S.C. § 3730(c)(5).

¹⁴³ *U.S. ex rel. Barajas v. United States*, 258 F.3d 1004, 1010-11 (9th Cir. 2001).

¹⁴⁴ H.R. Rep 99-660 at 24 (June 26, 1986) (emphasis added).

¹⁴⁵ Similarly, Congress did not intend for the IRS to be able to exclude categories of whistleblowers through rulemaking. The 2006 Act delegates Treasury and the IRS authority only with regard to the “operation” of the whistleblower program. *See, e.g.*, § 4, *infra*.

7623. In both cases, Congress fixed the whistleblower’s award based on the intrinsic value of the information and the money the recovered as a result thereof—and without regard to the government’s choice of which tools were used. Congress—and the courts—have clarified that the government cannot deny a whistleblower an award by seeking to limit the definition of proceeds, relabeling or reclassifying a payment made to the government, or by seeking an alternate remedy. The policy goals of the FCA are the same as those of section 7623, namely that a whistleblower ought to receive an award based on the benefits—defined broadly—that the government has received from his or her actions.¹⁴⁶

3.1.3 The FCA Does Not Distinguish Between Criminal and Civil

The effect of the government’s ability to pursue criminal action on a whistleblower’s award has been addressed in the context of the False Claims Act in *Bisig*, a case which lends support to the argument that criminal fines and penalties—or other non-Title 26 amounts—are “collected proceeds” for which a whistleblower can receive an award.¹⁴⁷ *Bisig* is directly relevant to the issue of whether FBAR penalties, criminal fines and penalties, can form part of a section 7623 award, and has not been addressed by the Treasury,

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

¹⁴⁷ *U.S. v. Bisig*, 2005 U.S. Dist. LEXIS 38316 (S.D. Ind. December 21, 2005)

IRS Chief Counsel and the IRS Whistleblower Office in its deliberations on this important matter.

In *Bisig*, the relator/whistleblower brought a *qui tam* action against an Indiana Medicaid pharmacy provider, alleging fraudulent practices. The federal government joined the investigation and brought a criminal prosecution against the pharmacy provider, ultimately seizing and recovering over \$1 million dollars in property. At issue in *Bisig* was whether a whistleblower is entitled to a relator's share when the government recovers assets through a criminal prosecution. The short answer is: yes.

Both *Bledsoe*¹⁴⁸ and *Barajas*¹⁴⁹ are FCA cases that focus on rewarding the *source* of the government's information, not on what *procedure* the government used in recovering the proceeds of the fraud. Whether the United States recovered proceeds of the fraud through the *qui tam* action itself, or through criminal forfeiture, the results is the same: the relator must be rewarded for his part in uncovering the fraud.¹⁵⁰

It is the same policy which lies at the core of Section 7623, namely that the whistleblower must be rewarded for uncovering fraud – how the government recovers the fraud is irrelevant. That the IRS could use its authority under either FBAR or under Title 26 with “offshore penalties” to recover proceeds is irrelevant for purposes of awarding the whistleblower. The government cannot undermine the Congressional policy of rewarding whistleblowers by choosing one path—FBAR—over another—offshore penalties—even if that path is a criminal action. The United States cannot—merely by electing to recover through criminal forfeiture proceedings—sidestep the statutory requirement to share the recovery with the relator who first discovered and informed the United States of the fraud.¹⁵¹

As with the Court's analysis of the FCA in *Bisig* – policy underlying Section 7623 (to which the FCA is *in pari materia*) is to reward the source of the information, not the procedure used to recover the proceeds. This policy is made clear in the statutory language of 7623 providing for an award when the Secretary proceeds with “*any* administrative or judicial action” based on

¹⁴⁸ *U.S. ex rel. Bledsoe v. Cmty. Health Sys., Inc.*, 342 F.3d 634 (6th Cir. 2003).

¹⁴⁹ 258 F3d. 1004 (9th Cir. 2001).

¹⁵⁰ *Bisig* 2005 U.S. Dist. LEXIS 38316 at *15.

¹⁵¹ *Id.* at *12-13.

the information provided by the whistleblower and resulting in proceeds resulting from the action or *any* settlement or *any* related action. The repeated use of the word “any” in the statute was deliberately done to reach the same result as the FCA, namely to cover as broadly as possible all resolutions, recoveries and any alternative remedies that the government may pursue. This was done to avoid exactly the result being put forward by the Office of IRS Chief Counsel – that the government can benefit from the whistleblower’s work and then escape its obligation to award the whistleblower – ultimately destroying Congress’ policy of encouraging whistleblowers.

The *Bisig* court placed particular emphasis on the FCA’s use of the word “any”: By using the word “any,” the court concluded that the FCA unambiguously places no restriction on the alternative remedies reached by the statute.¹⁵² Similarly, Section 7623 by repeatedly using “any,” the statute underscores there are no restrictions on the proceeds that are available to reward a whistleblower.

The decision in *Bisig* also rejects the Service’s claim that payments could not be made to the relator because they conflict with the Mandatory Restitution Act of 1996 that funds recovered must be placed in a special fund and are ‘unavailable’ for payment of whistleblower awards.¹⁵³ In brief, the Court disagreed with the government’s similar litigation position stating: “Thus, as Congress recognized by allowing *qui tam* actions, it is only fair to allow the relator to be rewarded for its role in stopping the fraud.”

Additionally, the Service’s theory on the availability of funds goes against not only a plain reading of the statute but also traditional standards of statutory construction – Predicate-Act Canon: “[...] whenever a power is given by a statute, everything necessary to making it effectual or requisite to attaining the end is implied.”¹⁵⁴

The core objective of section 7623 and similar whistleblower award laws is to reward whistleblowers who come forward and expose fraud and violations of law by ensuring that the whistleblower is rewarded without regard to the

¹⁵² *Id.* at *9.

¹⁵³ PMTA 2012-10 at 9.

¹⁵⁴ Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 193 (citing James Kent, *Commentaries on American Law* at 464)

form of redress chosen by the government – be it criminal, civil or otherwise.

The fact that the government elects to receive payment in response to a 7623(b) claim by, for example, pursuing FBAR penalties, rather than by pursuing Title 26 violations is irrelevant for purposes of computing the whistleblower’s award. The irrelevancy of how the government recovers is also supported by the broad terms Congress employed in section 7623(b), stating that awards should come from “proceeds” that are specifically not limited to tax, penalties, interest, additions to tax and additional amounts, and the fact that the statute requires that the award is due from proceeds from “*any* settlement” and “*any* related action.”

3.1.4 The FCA Specifically Excludes Tax Claims

“[C]laims, records, or statements made under the Internal Revenue Code of 1986” are specifically excluded from the FCA.¹⁵⁵ It is possible that claims under Titles 18 and 31 excluded under the service’s currently-proposed regulations may fall within the scope of the FCA. The FCA’s specific exclusion of tax claims is relevant to interpreting section 7623 for two reasons. First, the statutory language in the FCA is an example of language Congress could have used to similarly exclude Title 18 and 31 claims from section 7623. Second, Congress presumably knew of the FCA exclusion when it expanded section 7623 to cover actions beyond the FCA. Considering section 7623 in light of the FCA’s exclusion, Congress created a coherent system of whistleblower awards and incentives. Interpreting Title 31 claims and tax-related Title 18 claims to fall outside both the FCA and section 7623 would disrupt Congress’s carefully-articulated scheme.

3.1.5 The Dodd-Frank Act Shows Agency Jurisdiction is the Basis for Whistleblower Programs’ Reach

The Dodd-Frank Act represents Congress’s most recent effort to craft a whistleblower program in the mold of the FCA and the IRS award program. Congress, in drafting the legislation, this time defined “[t]he term ‘covered judicial or administrative action’ means any judicial or administrative action *brought by the Commission* under the securities laws.”¹⁵⁶ This language—

¹⁵⁵ 31 U.S.C. § 3729(d).

¹⁵⁶ Dodd-Frank Act, Pub. L. 111-203, § 922(a) (July 21, 2010), 124 Stat. 1841.

although absent from section 7623—demonstrates, when considering the relation of the IRS and SEC whistleblower programs to each other, that Congress intended the awards given by the programs to be based on the jurisdiction of their respective agencies, and not narrowly on where in the United States Code a particular violation is codified. A whistleblower who provides the SEC information that leads the Commission to take a series of actions will receive an award based on *all* those actions. A whistleblower who provides the IRS with information leading the Service to take a particular set of actions should also be awarded from all “amounts collected by reason of the information provided.”¹⁵⁷

3.2 Section 7623 Contemplates More Substantial Awards for More Substantial Information

The more proceeds are collected under section 7623—and the more substantial a whistleblower’s contribution—the larger the award will be. Intrinsic to this statutory scheme is the idea that more serious violations—which presumably result in a larger amount of proceeds being collected—will result in a greater award. Another way to measure the seriousness of a violation is whether it is deemed a civil violation or a criminal violation.

The two prongs of the program—civil and criminal recoveries—are intertwined, with the whistleblower receiving a share of whatever proceeds are collected. Regarding whistleblower award programs, a strange result occurs if they are separated. If the whistleblower’s information is sufficient for the Service to proceed against the taxpayer under Title 18, then, under the Service’s proposed regulations, the whistleblower will receive less of an award than if the information sufficed only to impose civil penalties. In general, criminal violations are more serious or severe than mere civil violations. The Service’s proposed rules therefore have the potential to reverse the statute’s underlying principle that “the better the information, the better the award” and may lead to absurd results in certain cases. The proposed rules have not only the potential to lead to absurd results, but also to undermine the Congressional intent underlying the statute, namely to encourage insiders to come forwards and to reward whistleblowers commensurate to the value of their information. Instead of encouraging disclosure of the most damaging information—that which could lead to

¹⁵⁷ 26 U.S.C. § 7623(a)

criminal violations—the rules encourage whistleblowers to hold back information, going directly against the teeth of the Congressional policy not only of section 7623, but of all whistleblower laws.

The Service’s interpretation of the statute acts as a gatekeeper, whereby more egregious violations and violations leading to harsher criminal penalties are siphoned off, and the whistleblower is given a reduced award or denied an award altogether. This interpretation could additionally result in attorneys advising their whistleblower clients that, given the Service’s regulations, they may be better off withholding information relating to intent, willfulness, or other criminal conduct, so the Service proceeds civilly against the taxpayer, rather than criminally. Advice given by attorney that does not reflect this reality could expose those attorneys to claims of malpractice. This result was not intended by Congress and turns the policy underpinning the IRS whistleblower program on its head.

Moreover, section 6103 contains a clause related to the Service’s communications with the Department of Justice. This clause is an example of the commingling between civil and criminal tax penalties. That Congress mandated information sharing is evidence that Congress intended cooperation and sharing regarding the whistleblower award program.

3.3 The FBAR Fits Into the Broader Context of Internal Revenue Laws

The FBAR is in harmony with section 7623 and other Title 26 provisions. First, the FBAR is essentially similar to other internal revenue laws. In reviewing the constitutionality of the BSA the Supreme Court noted that “the reporting requirements of the Act and the settled practices of the tax collection process are similar.”¹⁵⁸

Other Title 26 provisions impose reporting requirements similar and complimentary to the FBAR. Section 6048, for example, requires taxpayers to report a variety of transactions regarding foreign trusts, including the creation of a foreign trust, transfer of property from a foreign trust, and receipts of distributions from a foreign trust. Section 6039F requires the reporting of certain foreign gifts. The Service may impose a penalty of up to

¹⁵⁸ *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 60 (1974).

35 percent (25 percent in the case of gifts) of the reportable amount.¹⁵⁹

Nothing in section 7623, the BSA, or elsewhere in Title 26 is a barrier to including FBAR penalties within the scope of the Service’s whistleblower program.

3.4 Fines and Penalties Collected by the IRS are ‘Available for Payment of Whistleblower Awards

The Service’s proposed regulations provide that “[c]riminal fines deposited into the Victims of Crime Fund are not collected proceeds and cannot be used for payment of awards.”¹⁶⁰ The Service argues that “[t]he fines imposed in criminal tax cases that are deposited into the Victims of Crime Fund are not available to the Secretary to pay awards under section 7623” because “[c]riminal fines imposed for Title 26 offenses are not exempt” from 42 U.S.C. § 10601(b)(1),¹⁶¹ and that in those cases there is are no funds available from which the whistleblower could be paid a reward.¹⁶² Section 7623(b), however, appropriates funds for whistleblower awards directly from the proceeds collected by the Service—before payment into the Victims of Crime Fund.

The Service has also attempted to impose an additional bar to whistleblowers’ collection of an award for violations outside Title 26—such as the FBAR—by contending that “amounts collected as penalties or criminal fines under Titles 31 or 18 are not ‘available’ to the Secretary for payment of whistleblower awards,”¹⁶³ because “sections 5323(a) and 9703(a) of Title 31 provide independent authority, separate and apart from section 7623 for the payment of rewards for information relating to certain violations of Title 31 or Title 18.”¹⁶⁴ Such funds, according to Service, are not ‘available’ because Title 31 contains a discretionary informant reward provision, and rewards for such violations are therefore “otherwise provided for by law,” and cannot form part of a whistleblower award under section 7623.¹⁶⁵ The IRS’s interpretation is, however, contrary to both the plain language and structure

¹⁵⁹ 26 U.S.C. § 6677.

¹⁶⁰ 77 Fed. Reg. 74807 (Dec. 18, 2012) (proposed 26 C.F.R. § 301.7623-2(d)(3)).

¹⁶¹ *Id.* at 74801.

¹⁶² PMTA 2012-10 at 8.

¹⁶³ *Id.* at 4.

¹⁶⁴ 77 Fed. Reg. 74801.

¹⁶⁵ *See id.*; PMTA 2012-10.

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

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

Although the IRS argues that criminal fines, including those under Title 26, must be "deposited into the Victims of Crime Fund," it concedes that "[r]estitution ordered by a court to the IRS [...] is collected by the IRS as a tax and, therefore, is encompassed in the definition of collected proceeds."¹⁶⁶ Yet, while the authority cited for this proposition resides in Title 26, at section 6201(a)(4), IRS Counsel has nonetheless contended that because "Congress did not include fines arising under Titles 18 or 31 among the specific exceptions [under 42 U.S.C. 10601(b)(1)]" and because "nothing in the Victims of Crimes Act, Title 18, or Title 31 indicates that Congress intended to exclude fines under Titles 18 or 31 from this requirement." The authority, however, for making an award from all proceeds collected by the government resides in Title 26, namely in Section 7623 itself.¹⁶⁷

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."¹⁶⁸ Prior to the 1996 amendments, section 7623 authorized payment of sums not exceeding amounts appropriated for that purpose, explicitly requiring an appropriation of funds elsewhere.¹⁶⁹ Congress

¹⁶⁶ 77 Fed. Reg. 74801 (Dec. 18, 2012); *see also* PMTA 2012-10 at 9 n.4 ("[b]ecause criminal restitution ordered pursuant to 18 U.S.C. § 3556 goes to the IRS [...] amounts paid as such restitution are 'available' to the IRS for payment of whistleblower awards").

¹⁶⁷ The FCA, as discussed above, does not limit a relator's award in cases where the government pursues criminal sanctions.

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

¹⁶⁹ 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).

indicated it “believe[d] improvements should be made to [the] program,” and therefore “provide[d] that the rewards are to be paid out of the proceeds of amounts (other than interest) collected by reason of the information provided.”¹⁷⁰ When Congress again expanded section 7623 in 2006, it did so intending that the awards should come directly from the proceeds collected from the whistleblower’s disclosure, and did not intend for the IRS to withhold payment to whistleblowers for lack of appropriated funds.

The IRS concedes as much, recognizing a Congressional appropriation need not reside “in an annual appropriations act,” but can take the form of “any provision of law” that “authoriz[es] an *obligation* or expenditure of funds for a specific purpose,” and recognizing as well that in enacting section 7623, “Congress has created a permanent appropriation funded with *collected proceeds*.”¹⁷¹ Because the IRS misconstrues collected proceeds under section 7623, it consequently misconstrues the scope of the appropriated funds. Since the ‘proceeds’ covered by the program include all amounts collected by the government as a result of a whistleblower’s information, and because Congress appropriated such funds for whistleblower awards in section 7623 itself, any section 7623 proceeds are necessarily ‘available’ for payment to whistleblowers regardless of whether they stem from violations outside Title 26.

The Service 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.”¹⁷² Because, however, section 7623 includes Title 31 violations in its sweep, any such ‘proceeds’ from Title 31 penalties that are ‘collected’ by the Treasury, are therefore included in Congress’s ‘permanent appropriation’ for whistleblower awards.

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

¹⁷⁰ H.R. Rep. No. 104-506, 51 (1996).

¹⁷¹ PMTA 2012-10 at 8 (emphasis added).

¹⁷² *Id.* (interpreting 31 U.S.C. 3302(b)).

whistleblower—rendering the ‘availability’ issue moot.

3.4.2 Title 31’s Informant Reward Program Does not Preclude a Whistleblower from Receiving a Reward Under Section 7623(b)

While IRS Counsel contends that recoveries under Title 31 “cannot serve as the basis of an award under section 7623” because “Title 31 separately provides for informant awards,” the existence of another discretionary program does not equate to an award ‘provided by law’ under the meaning of Section 7623(a).¹⁷³ Where the award payment is discretionary, it cannot be said it is ‘provided by law,’ but rather that it is ‘provided’ at the *discretion* of the appropriate official. Moreover, the statutory language and structure of Section 7623 indicate that any such limitation does not apply to subsection (b), but, at most, implicates subsection (a). Consequently, the existence of “independent authority, separate and apart from section 7623, for the payment of rewards for information relating to certain violations of Title 31 or Title 18” is not a valid basis for limiting the definition of “collected proceeds.”¹⁷⁴

31 U.S.C. § 5323(a) does not establish a whistleblower reward program comparable to that established by section 7623. Rather, it establishes a discretionary reward program for informants, providing that “[t]he Secretary *may* pay a reward to an individual who provides original information which leads to a recovery [...] for a violation of this chapter.”¹⁷⁵ Under 31 U.S.C. § 5323(a), the Commissioner has total discretion to determine size of award.¹⁷⁶ The informant reward program therefore differs fundamentally from whistleblower reward programs. Informants have no right of action under section 5323.¹⁷⁷ The award scheme under section 7623(b) is not only explicitly nondiscretionary, but section 7623(b) also explicitly provides

¹⁷³ *Id.* at 4.

¹⁷⁴ 77 Fed. Reg. 74801 (Dec. 18, 2012).

¹⁷⁵ 31 U.S.C. § 5323(a) (emphasis added).

¹⁷⁶ See *Katzberg v. United States*, 36 F. Supp. 1023, 1023 (Ct. Cl. 1941), *cert. denied*, 314 U.S. 620 (1941).

¹⁷⁷ See *Arroyo-Torres v. Ponce Federal Bank, F.B.S.*, 918 F.2d 276 (1st Cir. 1990) (informant who was retaliated against had no recourse under 31 U.S.C. § 5323); see also *Krug v. United States*, 168 F.3d 1307, 1309 (Fed. Cir. 1999) (26 U.S.C. § 7623(a) did not create implied-in-fact contract; enforceable contract arises only after an informant and the Service negotiate and fix a specific award).

whistleblowers a mechanism to enforce their rights under the law.¹⁷⁸ Significantly, section 5253 informant program—unlike section 7623—is dependent solely on appropriated funds. At the time of this writing, there are no funds appropriated for the payment of awards, and the program is inactive.

The IRS can point to no cases where a whistleblower has been precluded from obtaining a nondiscretionary award due to the existence of a discretionary award program. Such discretionary award programs abound throughout the United States Code. The Major Fraud Act 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.”¹⁷⁹ 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.

As is clear from the statutory structure, section 7623’s “not otherwise provided for by law” language applies only to the discretionary award program established by section 7623(a), and does not limit the nondiscretionary award scheme created under section 7623(b). Whereas section 7623(a) provides that “[t]he Secretary [...] is authorized to pay such sums as he deems necessary [...] *in cases where such expenses are not otherwise provided for by law,*” section 7623(b) applies “[i]f the 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.”¹⁸⁰ 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).

* * *

¹⁷⁸ See 26 U.S.C. § 7623(b)(4) (right of appeal to Tax Court).

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

¹⁸⁰ 26 U.S.C. § 7623 (emphasis added).

Considering the structure and language of section 7623's related whistleblower award statutes—the FCA and the Dodd-Frank Act—and how Title 18 and 31 penalties fit not only into section 7623 itself, but also the Service's tax administration activities in general, when Congress amended section 7623 in 2006, it intended to establish a whistleblower program that incentivized whistleblowers to provide all information possible, by guaranteeing awards based on the whole scope and reach of the government's *actions* in response to the information, rather than only confined to Title 26 taxes and Chapter 68 penalties.

(4) Nature and Scope of Authority Being Claimed by IRS

In *Loving*, the Court invoked the Supreme Court's admonition that "courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance."¹⁸¹ Finding that the IRS's proposed rules would "regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry," the Court, was "confident that the enacting Congress did not intend to grow such a large elephant in such a small mousehole."¹⁸²

While the Service's proposed regulations regarding section 7623's whistleblower provisions do not have the same effect as those regulating tax preparers; they alter the size, scope, and functioning of the whistleblower award program in fundamental ways.¹⁸³ Indeed, whereas in *Loving*, the Service's proposed regulations sought to expand the agency's power, here the Service restricting itself and narrowing the scope of a Congressionally-mandated award program. Considering, however, the scope of the Service's rulemaking authority under section 7623, it is doubtful that Congress intended the Service to issue rules having the force of law that would affect which kinds of actions are eligible for an award – directly undermining Congressional policy.

The Service's stated authority for its proposed rules stems from section 7805

¹⁸¹ *Loving*, 742 F.3d at 1021 (citing *Brown & Williamson*, 529 U.S. 120, 160 (2000)).

¹⁸² *Id.*

¹⁸³ For more details, see the comments of the National Whistleblowers Center to the Service's proposed whistleblower regulations, *available at* <http://goo.gl/bSN8ys>.

general grant of rulemaking authority, and from section 7623 itself.¹⁸⁴ The 2006 amendments to section 7623 required Treasury to “issue guidance for the operation of a whistleblower program to be administered by the Internal Revenue Service.”¹⁸⁵ Section 7805, on the other hand, grants authority to issue “all needful rules and regulations for the *enforcement* of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.”¹⁸⁶

Section 7623’s delegation of rulemaking authority is plainly limited to “the *operation*” of the whistleblower program, and there is no indication that Congress intended to authorize rules making important policy decisions as to when an award will be granted. Instead, the ‘operation’ of a whistleblower program plainly relates to administrative procedures for accepting, reviewing, and awarding the claims authorized by statute, rather than altering the parameters of the statutory entitlement itself. The fact that the primary effect of the 2006 amendments was to *remove* discretion as to when awards are granted weights strongly against the Service’s attempt to promulgate rules with the effect of excluding broad categories of award claims. As the *Loving* court put it, “nothing in the statute’s text or the legislative records contemplates that vast expansion of the IRS’s [rulemaking] authority.”¹⁸⁷

(5) The Service’s Past Approach

The *Loving* court also considered how the IRS had interpreted Section 330 from its passage in 1884 “[u]ntil 2011.” In doing so, the court considered previous statements by IRS officials at a congressional hearing, as well as a 2009 guidance document, which contradicted the position taken by the service in its 2011 proposed regulations. The court found that until its 2011 proposed regulations, “the IRS never interpreted the statute to regulate tax-preparers.”¹⁸⁸

While, “[t]he IRS is surely free to change (or refine) its interpretation of a

¹⁸⁴ 77 Fed. Reg. 7804 (amending 26 C.F.R. sec. 301); *see also* 26 C.F.R. sec. 301 (current regulations “also issued under 26 U.S.C. 7623”).

¹⁸⁵ Pub. L. 109-432, § 406(b)(1) (Dec. 20, 2006); 120 Stat. 2959.

¹⁸⁶ 26 U.S.C. 7805 (emphasis added).

¹⁸⁷ *Loving*, 742 F.3d at 1021.

¹⁸⁸ *Id.*

statute it administers, [...] the interpretation, whether old or new, must be consistent with the statute.”¹⁸⁹ The Court found the Service’s about-face “rather telling,” and cited to another case, where the D.C. Circuit found it significant that the SEC’s proposed interpretation of a statute “flout[ed] six decades of consistent SEC understanding of its authority.”¹⁹⁰

Similarly, the IRS’s own last approach and interpretation of section 7623 shows that the law was always considered to reach tax-related criminal violations. Likewise, the FBAR provisions have also been interpreted alongside and applied in a manner consistent with other internal revenue laws.

5.1 Past Approach to Section 7623

Given that the original language of the 1867 law has been retained and forms the basis of the more recent mandatory award provision under section 7623(b), it is instructive to examine how the law was originally interpreted. As this history shows, it was taken for granted that the law applied to the most serious tax-related criminal violations.

5.1.1 Section 7623 Was Interpreted Very Broadly By the Service

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.”¹⁹¹ 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.”¹⁹² 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

¹⁸⁹ *Id.* (internal citations omitted) (citing *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009)).

¹⁹⁰ *Financial Planning Association v. SEC*, 482 F.3d 481, 490 (D.C. Cir. 2007).

¹⁹¹ 15 Op. Atty Gen. 133 (emphasis in original).

¹⁹² *Id.*

encompassed by the statute's language.¹⁹³ 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 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.”¹⁹⁴ 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.”¹⁹⁵ 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.¹⁹⁶ Early application of section

¹⁹³ *Id.*

¹⁹⁴ 24 Decisions of Comp. Gen. 430 (Jan. 26, 1918).

¹⁹⁵ *William’s Case*, 12 Ct. Cl. 192, 193 (1876) (emphasis added) (noting also that “[t]he discretion conferred by this statute is very broad.”).

¹⁹⁶ *See, e.g.*, 40 Stat. 1046 (“War-Time Prohibition Act”).

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.

In 1974, the Service testified to Congress that section 7623 “might be cited as authority for the employment of informants to secure information of violations”—before any action is taken against a taxpayer, and without regard to whether it is successful—although “historically the Service has used this statute and its predecessors as authority for the payment of ‘rewards’ to informants, based on a percentage of the monetary recovery by the Government from the violators.”¹⁹⁷

Perhaps most importantly, prior to the 2006 amendments, the Service routinely awarded discretionary section 7623 awards to informants based on violations outside Title 26. These discretionary awards included payments for information leading to the collection of FBAR penalties and Title 18 violations.¹⁹⁸

Given not only the breadth of the statutory language itself, but also its liberal interpretation, the Service’s limitation of section 7623 to Title 26 tax and penalties only is a significant “about face” that is out of step with past practice. The Secretary’s discretion to grant an award has always been great, and depended primarily on whether the information was in fact useful for tax and revenue purposes.¹⁹⁹ The 2006 amendments did not narrow this already broad scope, but made such awards mandatory if the underlying amounts disputed—or the penalties resulting from the action—meet a statutory threshold.²⁰⁰ To the extent the law was changed, it was broadened and expanded in important ways, expanding the rights of the whistleblower to an award, and to obtain review of an award action in the Tax Court. Congress’s 2006 strengthening and broadening of the whistleblower program contrasts sharply with the Services own proposed regulations, which severely narrow

¹⁹⁷ Congressional Hearings on “Operation Leprechaun” at 204 (1974).

¹⁹⁸ Interview with Robert Gardner, former deputy director of the IRS Whistleblower Office. On file with authors.

¹⁹⁹ *See also* 15 Op. Atty Gen. 88 (March 27, 1876) (whether informant’s services are ‘for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same’ is question of fact).

²⁰⁰ 26 U.S.C. sec. 7623(b)(5)(B) (“if the tax, penalties, interest, additions to tax, and additional amounts in dispute exceed \$2,000,000”).

the scope of the program beyond the Service’s own past practice under—and interpretation of—section 7623.

5.1.2 The Service Has Treated Criminal Penalties Outside Title 26 As Part of Its Tax Administration Activities

The Service itself has explicitly recognized that “some of the criminal sanctions in Title 18, and Title 31 of the [United States Code], also apply to Title 26 matters.”²⁰¹ Because “[t]he criminal statutes in Title 26 of the USC do not include the crime of conspiracy [...] tax-related conspiracies are generally prosecuted under 18 USC §371.”²⁰² Accordingly, Titles 18 and 31 play important roles in the Service’s tax administration activities—roles which the Service has itself recognized.

The Service’s past practice has also connected these broader activities with its informant program under section 7623. Internal IRS guidance in 2006—the year section 7623 was expanded—confirms that informant awards were connected to the broad jurisdiction of the Service’s Criminal Investigation Division. At the time, the Internal Revenue Manual provided that informants who requested an award would be provided with Publication 733 and a Form 211,²⁰³ and that the Service would “process the Form 211 in accordance with the instructions on Form 3949.”²⁰⁴ The instructions to the 2004 revision of Form 211—the form required to claim an award—state that, “[i]f you have information you believe would be valuable to the IRS, you may give it in person or in writing to a representative of the Criminal Investigation Division at a local IRS office.”²⁰⁵ It was clear that the Service contemplated rewarding informants who provided information regarding serious tax crimes. The 2006 IRM guidance is replete with reference to the “criminal potential” of an informant’s information, and for referring the information to the Criminal Investigation division.²⁰⁶

Regarding the disposition of award claims, the 2006 IRM provided that if “[t]he allegation is a violation *enforced by another agency, but not a tax*

²⁰¹ IRM 9.1.3.2.5 (05-15-2008)

²⁰² IRM 9.1.3.4.8 (05-15-2008)

²⁰³ IRM 25.2.1.4.1.1 (2006).

²⁰⁴ IRM 25.2.1.4.1.8 (2006).

²⁰⁵ IRS Pub. 733 (Rev. 10-2004).

²⁰⁶ IRM 25.2.1.8 and 25.2.1.9 (2006).

violation” then the analyst should consult with either a supervisor or the disclosure office regarding the claim’s disposition.²⁰⁷ Where “[t]ax potential exists,” the analyst is instructed to “[r]oute [the claim] to the Examination-Classification Branch in the Service Center having jurisdiction over the alleged tax violator’s tax return.”²⁰⁸ During the pre-screening process, the 2006 IRM instructed analysts to “[f]orward Forms 3949 [generated by informant’s tips] that have tax/revenue potential” along to the appropriate division for further processing.²⁰⁹ If even non-tax violations enforced by other agencies were not categorically denied, then surely tax- and revenue-related violations *investigated and enforced by the Service* could qualify for a discretionary award, even if the specific provisions enforced were Title 18 crimes or Title 31 penalties.

It was against this background—a broad interpretation and application of section 7623’s scope—that Congress legislated against when it expanded the law in 2006. By explicitly tying the new mandatory award program to the language of subsection (a), Congress endorsed the prior practice of broadly interpreting that law, and intended that subsection (b) should have a similarly broad sweep.

5.2 Past Approach to the FBAR

Besides the Service’s expansive approach to section 7623 itself, the FBAR provisions of the BSA have been treated as part and parcel of the Service’s tax administration efforts.

To begin with, the FBAR provisions are themselves comparable to other tax and revenue laws. The Supreme Court has held that “[the FBAR] recordkeeping requirements are scarcely a novelty. The Internal Revenue Code contains a general authorization to the Secretary of Treasury to prescribe by regulation records to be kept by both business and individual taxpayers, 26 U.S.C. § 6001, which has been implemented by the secretary in various regulations.”²¹⁰ Moreover, “[t]he Internal Revenue Code and its regulations [...] contain provisions which require businesses to report income payments to third parties (26 U.S.C. §6041(a)), employers to keep records of

²⁰⁷ IRM 25.2.1.8 (2006).

²⁰⁸ *Id.*

²⁰⁹ IRM 25.2.1.6 (2006) (emphasis added)

²¹⁰ *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 45 (1974) (citing regulations).

certain payments made to employees (Treas. Reg. § 31.6001 *et seq.*), corporations to report dividend payments to third parties (26 U.S.C. § 6042), cooperatives to report patronage dividend payments (26 U.S.C. § 6044), brokers to report customers' gains and losses (26 U.S.C. § 6045), and banks to report payments of interest made to depositors (26 U.S.C. § 6049)."²¹¹ As the Joint Committee on Taxation has reported, the FBAR —along with section 6048—is one of “two categories of reporting requirements designed to curtail the use of [offshore] accounts [...] to facilitate tax evasion by U.S. taxpayers.”²¹²

5.2.1 The FBAR is Part of the Service's Tax Administration Activities

The Service administers the FBAR provisions alongside its other tax administration activities, and has integrated it at all levels: the FBAR is part of the Service's organizational structure, is employed in tax investigations and prosecutions.

IRS has established an office of Fraud/BSA—situated within the SB/SE operating division—specifically to administer the FBAR in conjunction with the Service's other tax fraud prevention actions.²¹³ Recently, the Service has published guidance regarding who must file an FBAR.²¹⁴ The Service itself has said that “[t]he information reported on an FBAR can be used by the IRS for tax compliance purposes.”²¹⁵

Treasury has promulgated regulations explicitly averring to the FBAR's usefulness in tax investigations and proceedings.²¹⁶ While the Secretary has

²¹¹ *Id.* at 47.

²¹² Joint Committee on Taxation, *Selected Issues Relating to Tax Compliance With Respect to Offshore Accounts and Entities* (JCX-65-08), July 23, 2008, 8.

²¹³ See IRM 4.26.2.3.1.

²¹⁴ An IRS notice then extended the FBAR filing date to June 30, 2010, and a second IRS notice later extended the deadline even further to June 30, 2011. See IRS Notice 2009-62, 2009-35 I.R.B. 260, 2009 WL 2414299 (hereafter "Notice 2009-62"); IRS Notice 2010-23, 2010-11 I.R.B. 441, 2010 WL 672300 (hereafter "Notice 2010-23").

²¹⁵ IRS National Phone Forum on FBAR Compliance, Oct. 22, 2007 (“The reporting requirement was intended to discourage the use of foreign accounts by U.S. persons for money laundering and other illegal purposes since the civil and criminal penalties for failing to comply are substantial.”).

²¹⁶ 31 C.F.R. § 1010.301 (“The Secretary hereby determines that the reports required by this chapter have a high degree of usefulness in criminal, tax, or regulatory

“deem[ed] [the FBAR] necessary for [...] detecting underpayments of tax” and violations of “the internal revenue laws,” the FBAR is also useful in prosecuting tax violations. The FBAR has enjoyed a two-way relationship with Title 26 violations: failures to comply with FBAR requirements have been charged under Title 26, and Title 26 violations have been settled under the guise of FBAR penalties. As early as 1979, it was recognized that “the failure to report a foreign bank account that was used to further another violation, *especially tax evasion*, might be cited as an indication of the willfulness of that violation.”²¹⁷ The connection between the FBAR and tax enforcement worked in reverse as well: “a criminal tax investigation could lead the IRS to evidence that a taxpayer has an unreported foreign bank account. This, in turn, could lead to an IRS recommendation that the taxpayer be prosecuted for willfully failing to file the [FBAR].”²¹⁸ Since at least 1977, the Service has been prosecuting—or recommending for prosecution—taxpayers “who did not answer or improperly answered the foreign bank account question [on their income tax return].”²¹⁹

In *Williams* the Fourth Circuit found that the fact that a taxpayer had “signed his [...] federal tax return” was evidence that the taxpayer was on notice of the FBAR requirement, and therefore was sufficient evidence of the taxpayer’s willful failure to file a Form TD F 90-22.1.²²⁰ Additionally, “in criminal tax matters, prosecutors sometimes charge willfully subscribing false returns in violation of 26 U.S.C. § 7206(1) for failing to ‘check the box’ on the Schedule B providing for disclosure of foreign financial accounts.”²²¹ The Service has explained that “[t]he authority for the requirement to answer the Schedule B question about foreign accounts regardless of the amount of interest or dividend income reported on the tax return is in the regulations

investigations or proceedings.”); see also 31 C.F.R. § 1010.401.

²¹⁷ U.S. General Accounting Office, *Better Use of Currency and Foreign Account Reports by Treasury and IRS Needed for Law Enforcement Purposes* (GGD-79-224), at 3 (April 6, 1979), available at <http://archive.gao.gov/f0302/109024.pdf>.

²¹⁸ *Id.* at 25.

²¹⁹ *Id.* at 27 (“During fiscal year 1978, special agents recommended eight such prosecutions.”)

²²⁰ *United States v. Williams*, 489 Fed. Appx. 655, 659 (4th Cir. 2012).

²²¹ 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.”).

under section 5314 of Title 31. Section 5314 provides the authority to require that FBARs be filed and, *although section 5314 is not part of the Internal Revenue Code, it provides clear authority for IRS to ask the question about foreign accounts on Schedule B.*²²²

The usefulness and relatedness of the FBAR to tax administration is demonstrated by FBAR penalties being often charged concurrently with Title 26 violations. Cases involving penalties for failure to file an FBAR commonly involve criminal prosecutions for tax crimes.²²³ Those FBAR cases not involving tax crimes often involve civil tax penalties.²²⁴

During the Service's first Offshore Voluntary Compliance Initiative, "a waiver from Title 31 liability [was granted] to persons who entered into the program, backfiled FBARs, disclosed unreported offshore holdings *and paid back taxes and fines* in accordance with the conditions prescribed by the IRS."²²⁵ As the Secretary of Treasury explained to Congress, "Taxpayers would have been reluctant to settle tax evasion penalties under this Title 26 program, and still face liability for related activities by FinCEN under the

²²² IRS National Phone Forum on FBAR Compliance, Oct. 22, 2007.

²²³ See *Anderson v. Commissioner*, T.C. Memo. 2009-44 (Feb. 24, 2009) (criminal tax evasion); *United States v. Srivastava*, 444 F. Supp. 2d 385 (Dist. Md. 2006) (criminal health-care fraud was impetus for investigation; criminal tax evasion and tax fraud added based on search warrant findings, though the tax crimes evidence was suppressed and defendant was not convicted); *Clines*, 958 F.2d 578 (tax crimes; also involved in providing arms to Nicaraguan contras); *United States v. Holland*, 956 F.2d 990 (10th Cir. 1992) (criminal tax fraud; also involved in money laundering scheme); *United States v. Sturman*, 951 F.2d 1466 (6th Cir. 1991) (tax crimes; also involved in pornography distribution scheme); *United States v. Harvey*, 869 F.2d 1439 (11th Cir. 1989) (failure to report income from proceeds of illegal drug-related activities).

²²⁴ See *Williams v. Commissioner*, 131 T.C. No. 6 (Oct. 2, 2008) (civil tax deficiencies); *United States v. Simonelli*, 614 F. Supp. 2d 241 (D. Conn. 2008) (bankruptcy discharge issues); *Thompson v. United States*, 2008 U.S. Dist. LEXIS 70515 (S.D. Tex. 2008) (civil tax deficiencies); *Heydemann v. United States*, 2008 U.S. Dist. LEXIS 53875 (D. Md. 2008) (civil tax penalties); *Chan v. Commissioner*, T.C. Memo. 1997-154 (Mar. 26, 1997) (civil tax deficiencies and accuracy-related penalties); *Polidori v. Commissioner*, T.C. Memo. 1996-514 (Nov. 19, 1996) (civil tax deficiencies and civil tax fraud; petitioner previously pled guilty to and was convicted of filing false income tax returns); *Lerch v. Commissioner*, T.C. Memo. 1987-295 (June 15, 1987) (civil tax deficiencies and civil tax fraud); *Fisher v. Commissioner*, T.C. Memo. 1986-217 (May 29, 1986) (civil tax deficiencies).

²²⁵ Secretary of the Treasury, *A Report to Congress in Accordance With §361(b) of the USA PATRIOT Act*, at 7 (April 23, 2003) (emphasis added).

BSA.”²²⁶ Importantly, the Service recognized that the FBAR penalties and Title 26 amounts could be considered *together* for settlement purposes—an increase in one of these related amounts could lead to a decrease in the other. In a hypothetical case where, however, the Service formally proceeds under the Title 31 FBAR penalties while waiving Title 26 penalties, a whistleblower whose information led to such an action should still be entitled to an award based on the whole amount regardless of how the Service allocates the settlement between various violations.

5.2.2 Courts Have Interpreted the FBAR as a Tax Law

Courts, too, have recognized that FBAR information “is basic account information that bank customers would customarily keep, in part because they must report it to the IRS every year *as part of the IRS’s regulation of offshore banking*.”²²⁷ In a Seventh Circuit case which treated the FBAR as an internal revenue law, plaintiffs, who “had not disclosed the existence of [foreign] accounts on their federal income tax returns,” sued the bank to recover FBAR and other penalties imposed on them.²²⁸ In rejecting the plaintiff’s argument that the bank breached a duty to inform them of the FBAR, the Court noted that the plaintiffs might have instead attempted to argue “that the accounts themselves were somehow not foreign bank accounts within the meaning of the *tax code*,” or—citing specifically to the FBAR penalty statute—rely on the statutory “grounds for avoiding penalties for admitted *violations of federal tax law*.”²²⁹ Another recent appellate case cited directly to the FBAR penalty provisions, stating that they allowed Treasury to impose civil and criminal penalties “for certain violations of the tax code.”²³⁰

* * *

²²⁶ *Id.*

²²⁷ *M.H. v. United States*, 648 F.3d 1067, 1076 (9th Cir. 2011).

²²⁸ *Thomas v. UBS AG*, 706 F.3d 846, 850 (7th Cir. 2013) (Posner, J.).

²²⁹ *Id.* at 851 (citing 26 U.S.C. sec. 6664(c) and 31 U.S.C. sec. 5321(a)(5)(B)(ii)).

²³⁰ *United States v. Simon*, 727 F.3d 682, 690 n.9 (7th Cir. 2013) (“31 U.S.C. § 5321 (setting forth the power of the Secretary of the Treasury to impose civil fines for certain violations of the tax code); 31 U.S.C. § 5322 (setting forth criminal penalties for violations of the tax code)”).

The FBAR provisions have been treated, used, and interpreted as another arrow in the Service's tax administration quiver. Accordingly, this usage supports a finding that the FBAR—like the tax-related crimes of Title 18—is within the scope of section 7623. If a whistleblower provides the Service with information that leads it to collect FBAR penalties, the whistleblower is entitled to an award based thereon.

Conclusion

Chevron and its progeny--including *Loving*--not only set forth the requirements agencies must meet to have their rulemaking upheld, but, conversely, also serve as a warning to agencies that any deviation in implementing rules may result in their reversal.

The agency decision-maker--in this case the Secretary of the Treasury--must ensure that the Service's proposed rulemaking comports with the unambiguous statutory language, the legislative history of the statute, and Congressional intent. *Loving* is a reminder that, while agencies have discretion regarding how to use their considerable rulemaking authority, that discretion and authority are not limitless, and must carefully follow Congress's intent as it can be discerned through the "traditional tools of statutory construction."

As shown above, the 2006 mandatory whistleblower award program is based on an 1867 informant award law which is very broad. This law has been conserved and expanded, most significantly by the 2006 amendments, whereby Congress, drawing on its experience with other whistleblower laws, such as the FCA, established a policy of encouraging whistleblowers to come forward with valuable information by guaranteeing an award based on the fruits of that information.

The Service's regulations, however, significantly narrow the scope of the program and the size of its awards. The language of section 7623 and its underlying policy, however, are much broader. Just as not all criminal laws are in Title 18 of the United States Code, not all 'internal revenue laws'—as the term is used in section 7623—are in Title 26. The service administers, investigates, and enforces many laws codified elsewhere. Some of these non-Title 26 provisions, like the FBAR in Title 31, carry hefty penalties and have seen increasing enforcement activity on the part of the Service. Prior to 2006,

the IRS used its authority under section 7623(a) to reward informants for information that led to these non-Title 26 provisions, including FBAR penalties.

Given a set of facts, the Service often has a considerable amount of discretion about how to pursue a particular taxpayer, including choosing between violations codified in Title 26 and those outside Title 26. This is particularly true when the government settles with a taxpayer, or with voluntary disclosure programs. Congress did not intend that the Service be able to reduce—or eliminate—a whistleblower’s award simply because the penalty imposed is not in Title 26, or because the government chose to settle a taxpayer’s violations under a Title 18 or 31 provision. Rather, considering the statutory language, history, structure, prior practice and Congressional policy, the Congressionally-mandated award scheme under section 7623 requires that the Service pay a whistleblower an award based on all proceeds collected as a result of information that the Service acts upon.