August 10, 2011

The Honorable Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Ave., NW
Washington, D.C. 20224

Re: IRM Factors For Determining Planned and Initiated Under The IRS Whistleblower Law -- 7623

Dear Mr. Commissioner:

As organizations that are a voice for whistleblowers and dedicated to fighting government waste, fraud and abuse – we are writing to express our strong concern about a provision in the Internal Revenue Manual (IRM) regarding the IRS whistleblower program and factors for determining whether a whistleblower should have a reduced award because the whistleblower "planned and initiated" an action.

The IRM factors for determining whether a whistleblower planned and initiated an action depart significantly from the traditional understanding of the planned and initiated limitation for whistleblower awards as reflected in Congressional intent, the caselaw and the clear language of the statute. The overly broad language included in the IRM will impact negatively on the success of the IRS whistleblower program and efforts to fight tax fraud.

When Senator Grassley (R-IA) wrote the IRS Whistleblower law, he incorporated a limitation for awards for individuals who planned and initiated the action – Section 7623(b)(3). This "planned and initiated" language has a long history and was taken from an amendment that Senator Grassley and Congressman Berman (D-CA) had previously included in a 1988 amendment to the False Claims Act (FCA) that similarly limited a whistleblower award if they planned and initiated the action – Section 3730(d)(3) of the FCA. The use of the "planned and initiated" language for the IRS whistleblower program is understandable given that Senator Grassley has stated repeatedly that the IRS whistleblower program is modeled on the FCA.

The courts have long recognized that in interpreting statutes a court should look to previously enacted statutes (and particularly in the case of statutes on the same subject – *in pari materia*) to help understand Congressional meaning and intent. The Supreme Court has stated:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them, and it is an established rule of law that all acts in pari material are to be taken together, as if they were one law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute; . . ."

United States v. Freeman, 3 How. 556, 564-565 (1845).

Thus, significant weight should be placed on the Congressional intent and caselaw for the limitation of “planned and initiated” in the FCA as the IRS administers the same “planned and initiated” limitation for the IRS whistleblower law.

There is substantial evidence of legislative intent of the term “planned and initiated” when it was added to the FCA in 1988 by Senator Grassley (also author of the IRS whistleblower provision) and other members of Congress.

The legislative intent demonstrates that the drafters of the “planned and initiated” provision under the False Claims Act desired that the amendment would “apply *narrowly to principal wrongdoers*.” 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley); see also 134 Cong. Rec. H10637 (daily ed. Oct. 20, 1988) (statement of Rep. Berman) (stating that the “amendment we are voting on today will allay any criticism that the False Claims Act will encourage *principal wrongdoers* to file false claims actions solely motivated by the desire to profit from their own previous wrongdoing.”). The amendment was designed to prevent those who are the “main force behind a false claims scheme” from recovering. 134 Cong. Rec. S 16697 (daily ed. Oct. 18. 1988) (statement of Sen. DeConcini).

In fact, Senator Grassley said this of his 1988 proposed amendment: “[m]y amendment simply clarifies that in an extreme case where the qui tam plaintiff was a *principal architect* of a scheme to defraud the Government, that plaintiff would not be entitled to any minimum guaranteed share of the proceeds of the action.” 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley).

This very narrow definition of what actors are encompassed by the planned and initiated limitation reflects the drafters recognition that often only the people who participated to an extent in the fraud would have knowledge of its actions. 134 Cong. Rec. S16697 (daily ed. Oct. 18. 1988) (statement of Sen. Grassley). To cast a wide net of whistleblowers to be denied or limited an award would eviscerate the policy of encouraging whistleblowers to come forward. The original False Claims Act (“FCA”), as a whole, was premised on the notion that it requires “a rogue to catch a rogue.” See Cong. Globe, 37th Cong., 3d Sess. 955-56 (1863) (remarks by Senator Howard explaining that the law was meant to provide “a strong temptation to betray his conspirator, and bring him to justice.”).

The Courts in applying the “Planned and Initiated” limitation have understandably looked to the above cited Congressional statements of intent to guide them. See *Barajas v. Northrop Corp.* U.S. Dist. LEXIS 22817 *15-17 (C.D. Cal. May 14, 1992, aff’d 147 F.3d 905 (9th Cir. 1998)(citing statements by Congressman Berman and Congressman Grassley that the “Planned and Initiated” limitation was directed at the principal wrongdoer or the principal architect). The U.S. Government has also cited the Congressional history for determining the intent of “Planned and Initiated.” See *Barajas* at *37-38 – the Department of Justice citing the whistleblower as“the principal wrongdoer”).

The entire relevant statement by the Barajas Court is worth review:

> The legislative history of the 1988 FCA amendment, which added section 3739(d)(3), suggests that "**in an extreme case** where the qui tam plaintiff is a **principal architect** of a scheme to defraud the government," that plaintiff may not be entitled to any share of the proceeds of the action. 134 Cong. Rec. H. 10641 (Oct. 20, 1988(statement of Sen. Grassley). (emphasis added). See * 36-37.

The Barajas Court goes on to embrace the Principal Architect test: "The Court must finally consider the extent to which Barajas can be considered a *principal architect* of the testing fraud . . . (emphasis in original)." See *39.

It is clear from the intent of Congress, as followed by the courts (and in keeping with the plain language of the words of the statute) that the "planned and Initiated" exception is to apply to an extremely narrow group of individuals – the "Principal Architects," or "Principal Wrongdoers" – i.e. the individuals who *both* originated, introduced or started the scheme *and also* designed, drafted and arranged the scheme.

Unfortunately, the IRM has created factors that go directly against the traditional understanding of the "planned and initiated" limitation on whistleblower awards as stated by the Congress and followed by the Courts. The IRS in the Internal Revenue Manual (IRM25.2.2.9.14, Effective June 18, 2010) lists five factors to be used to determine whether the person is subject to the planned and initiated limitation.

These factors provide that not only the sole decision maker, but anyone who contributes or advises could be found to have planned and initiated an action. This is an impossibly wide net that is being cast and goes far beyond the principal architect or principal wrongdoer envisioned by Congress and undermines the whole policy of the whistleblower award program that it takes a rogue to catch a rogue.

Further, the IRM states that if the whistleblower knew or should have known that the activity may lead to tax noncompliance than that is a factor. This sweeping definition would conceivably capture every whistleblower – since all whistleblowers coming forward would hopefully know or have reason to know that the activities led to tax noncompliance. This factor goes directly against IRS directions asking that whistleblowers come forward with detailed knowledge.

Other factors reflect an absolute failure to grasp the key point which is that it is individuals with detailed inside knowledge that will be the most beneficial in bringing forward tax fraud. The factors work directly against encouraging knowledgeable insiders to come forward – stating that those who have played a role in the action or assisted in the action can also be found to have planned and initiated even though they were not the chief architect or chief wrongdoer. Nonsensically, under the IRM an individual who neither planned or initiated a tax fraud could still be found to have found to have met factors of planning and intitiated.

The IRS must recognize that promoters of tax shelters and tax fraud are not surrounded by boy scouts and angels. The IRS needs to realize that the whistleblowers will often not have clean hands – that as Congress recognized it takes a rogue to catch a rogue.

The IRM's factors for "planned and initiated" on its face is directly at odds with the intent of Congress – providing a significantly broader view than what is foreseen by Congressional intent from the False Claims Act (which the IRS Whistleblower Act is based on) and by the interpretation of the courts of "Planned and Initiated." The IRM does not reflect the very narrow view of "planned and initiated" of being for rare situations and solely for the "Chief Architect" or "Chief Wrongdoer."

We respectfully request that the IRM be revised immediately to have the factors for planned and initiated be focused on those individuals who are first found to have been the "Chief Architect" or "Chief Wrongdoer" in keeping with Congressional intent and the rulings of the courts. This revision will do much to ensure that the IRS whistleblower program is a success in assisting the IRS in its efforts to fight tax fraud. Thank you for your consideration.

Sincerely,

Jesselyn Radack
National Security & Human Rights Dir.
Government Accountability Project

Dr. Marsha Coleman-Adebayo
Chariwoman
No FEAR Coalition

Gina C. Green
Chair, Board of Directors
National Whistleblowers Center

cc: Steve Whitlock, Director
IRS Whistleblower Office

Senator Grassley
Congressman Berman