COMMENT

Feigning Willfulness: How *Williams* and *McBride* Extend the Foreign Bank Accounts Disclosure Willfulness Requirement and Why They Should Not Be Followed

I. Introduction

Since being handed enforcement authority from the Financial Crimes Enforcement Network in 2003, the Service has begun a campaign to provide stricter enforcement of the long-neglected Report of Foreign Bank and Financial Accounts (FBAR), which requires disclosure of foreign financial assets through Form TD F 90-22.1. Willful violations were required for any penalty under the pre-2004 law and carry heavy penalties under existing law, so these enforcement efforts rely to a great extent on the interpretation of the willfulness provision.

Williams and *McBride* were the first two cases to address the willfulness requirement for an FBAR civil penalty.[1] In *Williams*, the court held that failing to file an FBAR after signing a tax return constitutes "a conscious effort to avoid learning" about the FBAR requirement, which satisfies the willfulness requirement.[2] In *McBride*, the court held that signing a tax return constitutes knowledge of the duty to comply with FBAR, which satisfies the willfulness requirement.[3] By holding that taxpayers willfully violate the FBAR statute simply by signing a tax return and then failing to file, both *Williams* and *McBride* construe the willfulness requirement more broadly than applicable precedent would have dictated.[4]

This Comment argues that the current text of the statute and precedent require a more narrow reading of the FBAR willfulness requirement. It argues that taxpayers should not be charged with constructive knowledge after signing a tax return. Instead, a court should have to find that the taxpayer is aware of the existence of the FBAR requirement in order to find a willful violation. In addition to being consistent with the text of the statute and precedent, this approach would avoid the liability nightmare created by a combination of the *Williams–McBride* strict liability standard and the ill-defined "other financial account" language in the law.

---

[1] United States v. Williams, 489 F. App'x 655 (4th Cir. 2012); United States v. McBride, 908 F. Supp. 2d 1186 (D. Utah 2012).

[2] *Williams*, 489 F. App'x at 659.

[3] *McBride*, 908 F. Supp. 2d at 1213-14.

[4] *Compare Williams*, 489 F. App'x at 659, *and McBride*, 908 F. Supp. 2d at 1213-14, *with* Ratzlaf v. United States, 510 U.S. 135, 137 (1994).

This Comment will summarize the current state of the law up through the *Williams* and *McBride* cases in Part II, and then argue in Part III that these decisions do not conform to the current language of the statute or the relevant precedent. It will then delineate the liability problems created by the overbroad standard of willfulness from *Williams–McBride* combined with the complex, broad reach of the FBAR requirement. Finally, it will argue for the adoption of a new standard in future FBAR cases that follows the text of the statute and the case law while avoiding the liability issues associated with the *Williams–McBride* strict liability doctrine.

II. Background

This part will briefly summarize the requirements of the FBAR and then walk through the most recent interpretations of its willfulness provision in the *Williams* and *McBride* cases.

A. *Report of Foreign Bank and Financial Accounts (FBAR)*

The FBAR, authorized by 31 U.S.C. § 5314(a), requires taxpayers to report any "financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country" every year on a separate form from the taxpayer's return.[5] Civil penalties for failure to file are authorized in section 5321(a)(5). These penalties are limited to $10,000, with a reasonable cause exception available for non-willful violations. A penalty for willful violation is the greater of $100,000 per unreported account or 50% of the balance of the account.[6] Prior to the 2004 amendment of section 5321(a)(5), only willful violations were penalized and the fines were the greater of the amount in the account (up to $100,000) or $25,000.[7] FBAR reports are filed by submitting Form TD F 90-22.1.[8]

B. *Williams*

The *Williams* case involves a violation of the FBAR reporting requirements in a clear attempt to evade taxes. The court in *Williams* held that failing to file an FBAR after signing a tax return constituted a conscious effort to avoid learning about the FBAR requirement, which satisfies the willfulness requirement.[9] In *Williams*, taxpayer J. Bryan Williams opened two Swiss bank accounts using a British company called ALQI Holdings (ALQI) in 1993.[10] During the 1993–2000 period, he deposited over $7 million in the

---

[5] Reg. § 1010.350(a).

[6] 31 U.S.C.A. § 5321(a)(5)(B)-(D) (West 2014).

[7] 31 U.S.C.A. § 5321(a)(5) (West 2001) (amended 2004).

[8] Michael Sardar, *What Constitutes 'Willfulness' For Purposes of the FBAR Failure-To-File Penalty?*, 113 J. Tax'n 183, 183 (2010).

[9] *Williams*, 489 F. App'x at 659.

[10] *Id.* at 656.

accounts and earned more than $800,000 from those deposits.[11] Williams did not report the accounts as required by section 5314.[12]

The Swiss government became aware of the accounts at some point in 2000 and over the summer (exact date is not specified) asked to meet with Williams.[13] On November 13, 2000, Swiss authorities met with Williams, and the next day the Swiss government froze his accounts at the request of U.S. authorities.[14] After that, Williams filled out his 2000 tax returns with the assistance of his accountant and checked "No" in response to the Form 1040 section which asked whether he had any interests in foreign financial accounts.[15] That section also directed filers to TD F 90-22.1 (the FBAR reporting requirement).[16] However, Williams failed to file his TD F 90-22.1 form by the June 30, 2001 deadline.[17] Williams eventually disclosed his ALQI accounts directly to the Service in a January 2002 meeting and acknowledged them in his 2001 return.[18] In February 2002, he disclosed the accounts again in his application for the Offshore Voluntary Compliance Initiative and amended his returns from 1999 and 2000 to reflect the accounts.[19] Despite pleading guilty to criminal charges of tax fraud and evasion in June 2003 (referred to as *Williams I*), it took until January of 2007 for Williams to finally file his FBARs for 1993 through 2000.[20] After Williams filed, the Service levied two $100,000 penalties against Williams for the missed 2000 FBARs and brought suit when he failed to pay.[21] The statute of limitations had run for the other years.[22]

The key issue in the district court (*Williams II*) was determining whether the FBAR violation was willful. In resolving disputed facts, the court concluded that "Williams had never been advised of the existence of the TD F 90-22.1 form prior to June 30, 2001."[23] The court defined willfulness to include "not only knowing violations of a standard, but reckless ones as well."[24]

The government argued to the district court that Williams' signature on the 2000 tax return was "*prima facie* evidence" that Williams knew of the FBAR

---

[11] *Id.*

[12] *Id.*

[13] United States v. Williams, 2010-2 U.S.T.C. ¶ 50,623, at 3, 106 A.F.T.R.2d 6150, 6151 (E.D. Va. 2010).

[14] *Id.*

[15] *Williams*, 489 F. App'x at 657.

[16] *Id.* at 656.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.* at 657-58.

[22] *Id.* at 657 n.4.

[23] United States v. Williams, 2010-2 U.S.T.C. ¶ 50,623, at 3, 106 A.F.T.R.2d 6150, 6151 (E.D. Va. 2010).

[24] *Id.* at 4, 106 A.F.T.R.2d at 6153 (quoting Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47, 57 (2007)).

requirement and thus violated it willfully.[25] But the district court rejected that argument, quoting the Sixth Circuit's ruling in *United States v. Mohney* that the "taxpayer's signature on a return does not in itself prove his knowledge of the contents, but knowledge may be inferred from the signature along with the surrounding facts and circumstances."[26] Since Williams met with the Swiss in November of 2000 and the accounts were frozen the next day by request of the U.S. government, the court reasoned that he had no incentive to conceal those accounts by failing to file the 2000 FBAR by its June 30, 2001 deadline.[27] Because it found there was no actual knowledge of the FBAR requirement, the court ruled that there was no willfulness.[28]

The Service appealed the district court's decision to the Fourth Circuit (*Williams III*). The Fourth Circuit took a very different approach, overturning the lower court's decision. While assuming that Williams did not actually know about the FBAR reporting requirement,[29] it stated that willfulness "may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information" or "inferred from a conscious effort to avoid learning about reporting requirements."[30] It also accepted the government's assertion, rejected in the lower court, that Williams' signature on the tax return was "prima facie evidence that he knew the contents of the return."[31] Immediately after that assertion, the court quoted Williams saying he "never paid any attention to any of the written words" on his return and concluded that this was "a conscious effort to avoid learning about reporting requirements."[32] Based on that conclusion, the Fourth Circuit overturned the *Williams II* decision as clear error.[33]

C. *McBride*

McBride dealt with the same legal issues as *Williams*. The court in *McBride* held that signing a tax return constitutes knowledge of the duty to comply with FBAR, which satisfies the willfulness requirement.[34] The district court in *McBride* based its ruling primarily on the Fourth Circuit's reasoning from *Williams III*. McBride was a partner in the Clip Company, which made accessories for cell phones.[35] McBride's company received a number of lucrative new contracts in 1999, and McBride contacted a financial management firm called Merrill Scott and Associates (Merrill Scott) to help reduce the resulting

---

[25] *Id.*
[26] *Id.* (quoting United States v. Mohney, 949 F.2d 1397, 1407 (6th Cir. 1991)).
[27] *Id.* at 5, 106 A.F.T.R.2d at 6153.
[28] *Id.* at 5-6, 106 A.F.T.R.2d at 6153-54.
[29] United States v. Williams, 489 F. App'x 655, 659 (4th Cir. 2012).
[30] *Id.* at 658 (quoting United States v. Sturman, 951 F.2d 1466, 1476 (6th Cir. 1991)).
[31] *Id.* at 659 (citing *Mohney*, 949 F.2d at 1407).
[32] *Id.* at 659.
[33] *Id.* at 660.
[34] United States v. McBride, 908 F. Supp. 2d 1186, 1213-14 (D. Utah 2012).
[35] *Id.* at 1188.

tax liabilities.[36] He then met with representatives of Merrill Scott, and after listening to their proposed "Master Financial Plan," he responded that "this is tax evasion."[37] Nevertheless, after being assured of its legality by Merrill Scott employees, and without consulting outside counsel, McBride hired Merrill Scott to develop such a plan for his company.[38]

Merrill Scott set up a system where the Clip Company overpaid its Taiwanese manufacturer, Piao Shang, on every product, and Piao Shang passed the excess funds to foreign corporations set up and controlled by Merrill Scott.[39] These foreign corporations were nominally registered to Merrill Scott employees but were actually controlled by McBride.[40] McBride used the untaxed money (a total of $2.7 million) for a wide variety of purposes, including loans of over $1.2 million back to the Clip Company (counting it as a line of credit for tax purposes), and various personal expenses such as Christmas gifts for his parents.[41] McBride did not file FBARs for 2000 or 2001.[42] Form 1040 Schedule B Line 7a asks whether a taxpayer has any interest or authority over a foreign financial account, and McBride's return answered "No" for both years.[43] McBride never informed his accountant of the foreign assets, and after the Service began investigating him in 2004, he repeatedly lied and initially refused to respond to discovery requests.[44]

As in *Williams*, the focal point of *McBride* was the willfulness requirement, which the district court addressed in two prongs: (1) constructive knowledge and (2) recklessness.[45]

Under the first prong, the court concluded that McBride committed a willful violation because he had knowledge of the FBAR requirement and failed to comply.[46] It began by citing a long string of cases for the proposition that knowledge of the law, particularly for signed tax returns, is always presumed.[47] The court cited *Williams III*, the only direct precedent, for the proposition that signing a tax return is sufficient evidence for a court to conclude that the taxpayer had constructive knowledge of the FBAR filing requirement.[48] After affirming the Fourth Circuit's reading of *Mohney*, the court stated that knowledge of the FBAR requirement was "imputed to McBride."[49] Thus, the court concluded that McBride was "charged with having had knowledge of

---

[36] *Id.* at 1189-90.
[37] *Id.* at 1190.
[38] *Id.* at 1190.
[39] *Id.* at 1192.
[40] *Id.* at 1193-94.
[41] *Id.* at 1194-95.
[42] *Id.* at 1198.
[43] *Id.* at 1198.
[44] *Id.* at 1199.
[45] *Id.* at 1205, 1209.
[46] *Id.* at 1205-09.
[47] *Id.* at 1205-06 (citations omitted).
[48] *Id.* at 1206.
[49] *Id.* at 1206-08.

the FBAR requirement to disclose his interest in any foreign financial or bank accounts, as evidenced by his statement at the time he signed the returns, under penalty of perjury, that he read, reviewed, and signed" them.[50] In other words, McBride's signature on the tax returns was enough evidence to impute his knowledge of the FBAR requirements even though the returns themselves merely refer the taxpayer to the separate FBAR instructions.

Turning to the recklessness prong, the court found two ways that willfulness could be satisfied: reckless disregard and willful blindness.[51] Reckless disregard was found to satisfy the willfulness standard when "the individual recklessly ignores the risk that conduct is illegal by failing to investigate whether the conduct is legal."[52] The court also found that willfulness is present when a person is willfully blind, a state of mind which is defined as a subjective belief "that there is a high probability that a fact exists and the taxpayer must take deliberate actions to avoid learning of that fact."[53]

The court first found that there were "known or obvious risks" of noncompliance with tax laws through his dealings with Merrill Scott, citing, among other facts, his initial response to their proposal as being a form of tax evasion.[54] Second, the court held that McBride showed reckless disregard by engaging Merrill Scott's services without seeking outside counsel or even telling his accountant.[55]

Finally, the court addressed the charges against McBride for failing to file FBARs in 2000 and 2001.[56] The court found that McBride's violation of the FBAR requirement was reckless and willfully blind for both years.[57] But in the end, those conclusions were seemingly unnecessary as the court stated (with a direct citation to *Williams*) that "because McBride signed his tax returns, he is charged with knowledge of the duty to comply with the FBAR requirements," and therefore his failure to do so was willful.[58] If this sentence is taken at face value, then the court is saying that taxpayers can be charged with knowledge of the FBAR provision (and therefore with a willful violation) solely based on a taxpayer's signature on a return.

III. Analysis

The *Williams–McBride* interpretation of the willfulness requirement in 31 U.S.C. § 5321(a)(5) is flawed because it imposes a strict liability standard where both the statute and the case law indicate otherwise. This Part will

---

[50] *Id.* at 1208.

[51] *Id.* at 1209-10.

[52] *Id.* at 1209.

[53] *Id.* at 1210 (quoting Global-Tech Appliances, Inc. v. SEB S.A., 131 S.Ct. 2060, 2070 (2011)).

[54] *Id.* at 1210-11.

[55] *Id.* at 1211.

[56] *See id.* at 1211-14.

[57] *Id.* at 1211.

[58] *Id.* at 1213-14 (citing United States v. Williams, 489 F. App'x 655, 659 (4th Cir. 2012)).

show, first, that the strict liability standard is inconsistent with the statutory language and the relevant precedent. Second, it will discuss the harmful consequences of preserving this line of reasoning in civil FBAR cases. Finally, it will advocate the abandonment of the *Williams–McBride* standard and the adoption of a different standard more suited to the civil FBAR context.

A. *The* Williams–McBride *Willfulness Standard Is Bad Law*

1. Williams–McBride *Does Not Fit the Statutory Language*

Both the Fourth Circuit in *Williams* and the district court in *McBride* concluded that the willfulness standard in section 5321(a)(5) does not actually require that the taxpayer know about the FBAR filing requirement.[59] The conclusion in *McBride*, with its direct cite to *Williams*, confirms that this willfulness standard is met by any taxpayer who files a signed tax return, possesses a reportable asset, and fails to file an FBAR.[60]

Before addressing the ways this standard misapprehends precedent, it must be noted that this standard cannot possibly be applied to the current version of section 5321(a)(5). Under the pre-2004 version applicable in *Williams* and *McBride*, the civil penalty in section 5321(a)(5) could be assessed *only* for willful violations.[61] But under the current version of section 5321(a)(5), there are separate penalties for non-willful violations.[62] Using the *Williams–McBride* standard of willfulness, it is difficult to conceive of how a violation could be nonwillful.

2. Williams *and* McBride *Are Inconsistent*

Yet even for pre-2004 FBAR cases, the *Williams–McBride* willfulness standard is not good law because it ignores the most relevant Supreme Court precedent and misuses the circuit court precedent to arrive at its new strict liability standard for willful violations.

Prior to *Williams* and *McBride*, the Service addressed the proper standard of willfulness for civil FBAR penalties in Chief Counsel Advice memorandum 2006-03-026 (CCA).[63] There, the Service looked to the Supreme Court's decision in *Ratzlaf v. United States* for the proper standard.[64] The taxpayer in *Ratzlaf* was charged with structuring cash transactions to avoid reporting requirements stemming from section 5313 for transactions over $10,000,

---

[59] *Williams*, 489 F. App'x at 659; *McBride*, 908 F. Supp. 2d at 1213.

[60] *See McBride*, 908 F. Supp. 2d at 1206.

[61] 31 U.S.C.A. § 5321(a)(5) (West 2001) (amended 2004).

[62] 31 U.S.C.A. § 5321(a)(5) (West 2014).

[63] C.C.A. 2006-03-026 (Jan. 20, 2006). The Service took pains to distance itself from this CCA during the *Williams* proceedings, citing section 6110's prohibition on using such memoranda as precedent and arguing that it should have no value, a position that the court obviously found persuasive. Hale E. Sheppard, *Government Wins Second Willful FBAR Penalty Case: What McBride Really Means for Taxpayers*, 118 J. TAX'N 187, 196-97 (2013).

[64] *See* C.C.A. 2006-03-026, at 2 (Jan. 20, 2006).

thereby violating section 5324.[65] He was criminally prosecuted under section 5322 for a willful violation of section 5324.[66]

In its CCA, the Service stated that the willfulness standard for the civil penalties in section 5321 was the same as for the criminal penalties in section 5322, explaining that "statutory construction rules would suggest that the same word used in related sections should be consistently construed," which was why the *Ratzlaf* standard should be applied to both.[67] That standard was expressed as "the intentional violation of a known legal duty."[68] The CCA stated that the *Ratzlaf* standard as applied to FBAR civil cases meant that the taxpayer needed "knowledge that he had a duty to file an FBAR," and there is "no willfulness if the accountholder has no knowledge of the duty to file the FBAR."[69]

Yet in *Williams*, the first case to address the civil FBAR penalty for willful violations, neither the district court nor the Fourth Circuit referenced *Ratzlaf*.[70] The *McBride* decision, after asserting the general presumption that taxpayers have knowledge of their returns, included a parenthetical noting that in *Bryan v. United States* the Supreme Court distinguished cases like *Ratzlaf* (which require actual knowledge of a duty) as being limited to "highly technical statutes"[71] which are "involved in criminal tax prosecutions."[72] Here the *McBride* court engaged in a critical sleight of hand.

The "highly technical" classification is a direct quote from *Bryan*, but the "criminal" aspect is not. The text of *Bryan* itself makes no distinction based on a criminal, as opposed to civil, context.[73] Rather, *Bryan* distinguished *Ratzlaf* because the latter involved "highly technical statutes that threatened to ensnare individuals engaged in apparently innocent conduct."[74] Using that distinction, it becomes entirely unclear why *McBride* should distinguish *Ratzlaf* since, as will be shown further in Part III.B below, the FBAR requirement is provided by a "highly technical statute" that threatens "to ensnare individuals engaged in apparently innocent conduct." But it does explain how the Service could conclude in 2006, eight years after *Bryan*, that the *Ratzlaf* standard should apply to the civil FBAR penalty.[75]

Furthermore, *Ratzlaf* actually references section 5314 as a "notable" example of a related statute where willfulness requires that the person have "a

---

[65] Ratzlaf v. United States, 510 U.S. 135, 136-37 (1994).

[66] *Id.*

[67] C.C.A. 2006-03-026 (Jan. 20, 2006).

[68] *Id.*

[69] *Id.*

[70] *See* United States v. Williams, 2010-2 U.S.T.C. ¶ 50,623, 106 A.F.T.R.2d 6150 (E.D. Va. 2010); United States v. Williams, 489 F. App'x 655 (4th Cir. 2012).

[71] United States v. McBride, 908 F. Supp. 2d 1186, 1206 (D. Utah 2012) (quoting Bryan v. United States, 524 U.S. 184, 194-95 (1998)).

[72] *McBride*, 908 F. Supp. 2d at 1206.

[73] *See Bryan*, 524 U.S. at 194-95.

[74] *Id.* at 194.

[75] C.C.A. 2006–03–026 (Jan. 20, 2006).

known legal duty."[76] It uses this interpretation of section 5314, in addition to similar conclusions on section 5316, to support its decision, observing that "a term appearing in several places in a statutory text is generally read the same way each time it appears."[77] *Ratzlaf* also quotes the Sixth Circuit's *Sturman* case (involving a criminal prosecution for an FBAR violation) to support the "known legal duty" standard, while the *Williams–McBride* decisions also base their substantively different conclusion on *Sturman*.[78]

The taxpayer in *Sturman* was prosecuted for a decades-long tax evasion scheme that involved 150 domestic and five foreign corporations, numerous types of fraud, and millions of dollars in assets.[79] After being convicted at trial, the taxpayer argued that his conviction should be overturned because the prosecution had not met its burden of proof in showing that he had actual knowledge of the FBAR requirements.[80] The Sixth Circuit discussed three different formulations of the willfulness standard.

Generally, it asserted that willfulness was a "voluntary, intentional violation of a known legal duty."[81] It then found that the intentional violation "may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information."[82] It also noted that "other circuit courts have concluded that willfulness can be inferred from a conscious effort to avoid learning about reporting requirements."[83]

Applying those principles, the court focused on Sturman's actions in hiding his money and financial activities, finding that those actions "could be adequate for the jury to infer willfulness."[84] But the court went beyond that, observing that Sturman had admitted he knew about the question on Schedule B which asked specifically about foreign bank accounts and referred the taxpayer to a booklet addressing the FBAR requirement.[85] The court concluded that Sturman's knowledge concerning that part of the tax return put him on notice of his duty to file an FBAR and, combined with his other actions, established willfulness.[86]

The crucial break between *Williams* and *Sturman* came when the *Williams* court asserted that the taxpayer made a "conscious effort to avoid learning about reporting requirements," with a direct cite to *Sturman*, after finding

---

[76] Ratzlaf v. United States, 510 U.S. 135, 141-42 (1994) (quoting United States v. Sturman, 951 F.2d 1466, 1476 (6th Cir. 1991)).

[77] *Id.* at 142-43.

[78] *See* United States v. Williams, 489 F. App'x 655, 659 (4th Cir. 2012); United States v. McBride, 908 F. Supp. 2d 1186, 1213 (D. Utah 2012) (relying on the *Williams* conclusion which was attributed to *Sturman*).

[79] *Sturman*, 951 F.2d at 1471-72.

[80] *Id.* at 1476.

[81] *Id.* (quoting Cheek v. United States, 498 U.S. 192, 200 (1991)).

[82] *Id.* at 1476; *see also* Spies v. United States, 317 U.S. 492, 499 (1943).

[83] *Id.*; *see also* United States v. Bank of New Eng., 821 F.2d 844, 855 (1st Cir. 1987).

[84] *Sturman*, 951 F.2d at 1476.

[85] *Id.* at 1477.

[86] *Id.*

that the taxpayer had not read line 7a, which would have directed his attention to the FBAR requirement.[87] Whereas *Sturman* found that the taxpayer had avoided learning of the reporting requirements because he had read the FBAR reference on his tax return, *Williams* found that the taxpayer had avoided learning of the requirements *despite* the fact that he had not read the relevant part of his return. The fact that the *Williams* taxpayer failed to file the FBAR even after his accounts had been discovered by U.S. authorities and he had disclosed his foreign accounts is compelling evidence that he did not have any sort of actual knowledge.[88]

Even after he was seeking to comply in every other way, Williams did not file FBARs.[89] While he was clearly guilty of willful tax evasion and perhaps a willful violation could have been inferred from his conduct, it seems unlikely that he would have been found to have consciously avoided learning about the FBAR requirements under *Sturman*. Similarly, while McBride may still have been convicted under the course of conduct standard from *Sturman*, there is no support for the *McBride* court's conclusion that signing a tax return without filing an FBAR constitutes a willful violation.

B. Williams *and* McBride *Create Rampant Liability Issues*

The Supreme Court in *Bryan* noted that the willfulness standard in *Ratzlaf* was meant to address statutes that were "highly technical" and "presented the danger of ensnaring individuals engaged in apparently innocent conduct."[90] 31 U.S.C. § 5314, as applied in 31 C.F.R. 103.24, is just such a statute. Applying the *Williams–McBride* standard presents a liability nightmare that threatens to blindside vulnerable taxpayers. At present, the Service seems to be focusing its FBAR enforcement efforts on the most egregious tax evaders, such as the taxpayers in *Williams*, *McBride*, and *Sturman*. However, the Service is perfectly capable of enforcing as much or as little as it likes, and its positions are subject to fluctuations, as evidenced by the difference between its 2006 stance on the willfulness issue and its arguments in *Williams*.

While the taxpayers in *Williams* and *McBride* were clearly within the foreign bank account aspect of the FBAR requirement, the full scope of the law includes any "financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country."[91] While the bank and securities account aspects are reasonably straightforward, the "financial interest in" and "other financial account" phrases create a wide variety of difficult scenarios, particularly for immigrants.

An immigrant who moves to the United States with a pension account has no "financial interest" under FBAR as long as the account technically

---

[87] United States v. Williams, 489 F. App'x 655, 659 (4th Cir. 2012).

[88] *See* United States v. Williams, 2010-2 U.S.T.C. ¶ 50,623, at 2, 106 A.F.T.R.2d 6150, 6152 (E.D. Va. 2010).

[89] *Id.*

[90] Bryan v. United States, 524 U.S. 184, 194 (1998).

[91] Reg. § 103.24(a).

belongs to an employer or the government, but if the pension is a 401(k)-style personal account, then the new taxpayer must file an FBAR, assuming the other FBAR requirements are met.[92] Similarly, foreign life insurance policies with cash values higher than the FBAR requirement may be an "other financial account" subject to FBAR reporting.[93] The *Williams–McBride* standard would potentially expose an immigrant to willful violation liability for failing to report a 401(k) or life insurance policy if the immigrant taxpayer signs a return and does not understand the breadth of the FBAR requirements (or even know about them).

The "financial interest in" language has a huge range of potential applications. U.S. persons who hold power of attorney for another person who owns a foreign account would be subject to FBAR, as would the owner.[94] A U.S. person who owns more than 50% of a corporation that has a financial interest in a foreign account would be subject to the FBAR, as would a U.S. person who owns more than 50% of the assets or receives more than 50% of the income from a trust with a foreign account.[95]

Many more examples could be cited, but it should be clear that the breadth of the FBAR provision encompasses a broad array of difficult-to-define financial interests. As practitioners have noted, "there is much confusion surrounding the breadth of the reporting requirement."[96]

Under *Williams–McBride*, the fact that taxpayers sign a return is presumed to give them constructive knowledge of their duty to file an FBAR. Combined with the difficulty in determining which accounts need to be reported, this regime creates a situation where taxpayers who do not even know that the FBAR exists or that they have reportable assets can be held liable for a willful violation.

It might be argued that courts will not find willfulness in cases where taxpayers did not know whether their interests fell within the FBAR reporting requirements. However, such an assumption would be at odds with a framework that attributes willfulness even though a taxpayer is not aware of the duty. If taxpayers are presumed to know the contents of the tax returns they sign, it would be a bizarre outcome to hold that they cannot be presumed to have knowledge of their own finances. By stretching the willfulness requirement, the *Williams–McBride* precedent could subject many unwitting taxpayers to liability for a willful violation. This is surely the situation which the Supreme Court sought to avoid by imposing a standard of willfulness that required actual intent in *Ratzlaf*.

---

[92] Kevin E. Packman & Andrew H. Weinstein, *FBAR—Foreign Bank Account Reporting Obligations: A Primer for the Practitioner*, 106 J. TAX'N 44, 47 (2007).

[93] *Id.* at 46.

[94] *Id.* at 47.

[95] *Id.*

[96] *Id.* at 44.

IV. Conclusion: Future Courts Should Look to *Sturman*

The solution for future courts is to look past the flawed *Williams–McBride* reasoning and adhere to the *Sturman* standard, which looked for an actual intent to violate the FBAR requirement or a course of conduct that would allow a court to infer willfulness. This would clearly avoid the liability problems created by the strict liability of *Williams–McBride* while upholding the relevant Supreme Court precedent and the current version of the statute.

Kyle Niewoehner[97]

[97] Georgetown University Law Center, J.D. Candidate 2015. The author would like to thank Jody Brewster, a Partner at Skadden, Arps, Slate, Meagher & Flom, for her assistance with this Comment. The author would also like to thank Raven Keith, Georgetown University Law Center, J.D. Candidate 2015, for her assistance and contributions.