

By **Jeremy H. Temkin** | January 16, 2019 at 02:45 PM

**Jeremy H. Temkin**

Over the past 10 years, this column has detailed the Internal Revenue Service's aggressive pursuit of taxpayers with undisclosed offshore accounts. In addition to criminal prosecutions, the IRS's efforts have included the imposition of substantial civil penalties on taxpayers who failed to participate in one of its Offshore Voluntary Disclosure Programs. Based on 2004 legislation, the IRS has long taken the position that taxpayers who fail to disclose accounts on a Report of Foreign Bank and Financial Account, commonly referred to as an FBAR, are subject to a maximum penalty of up to 50 percent of the funds in the undisclosed accounts.

Recently, however, four federal trial courts have considered the extent of the IRS's authority to assess FBAR penalties, with two courts holding that a regulation adopted in 1987 caps FBAR penalties at \$100,000 per account. Two other courts, however, have sided with the IRS, upholding the 50 percent maximum penalty even if it exceeds \$100,000; and others are likely to enter the fray. This article analyzes the ongoing debate over the maximum permissible FBAR penalty and its implications.

In 1970, Congress enacted the Bank Secrecy Act to prevent and deter the use of foreign financial accounts to avoid tax obligations. Congress authorized the Secretary of the Treasury to require taxpayers to report information about their relations with and transactions involving foreign financial accounts. See 31 U.S.C.

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§5314. Based on that authority, the Secretary requires taxpayers to file FBARs providing information regarding each foreign account if the aggregate value of all of a taxpayer's foreign accounts exceeds \$10,000 during the calendar year.

Before 2004, Congress limited FBAR penalties to willful violations—where the taxpayer knowingly or recklessly failed to disclose one or more accounts.

The maximum penalty for a violation was the greater of (1) \$25,000 or (2) the balance of the account at the time of the violation, up to a maximum of \$100,000. In 1987, the Treasury Department issued a regulation authorizing the Secretary to assess the maximum penalties provided by the statute. In 2002, the Treasury Secretary delegated the authority to assess FBAR penalties to the Financial Crimes Enforcement Network (FinCEN), but ordered that the FBAR regulations would continue in effect “until superseded or revised.” Approximately six months later, FinCEN delegated the authority to assess FBAR penalties to the IRS.

The American Jobs Creation Act of 2004 significantly changed the FBAR penalty regime. Congress authorized the imposition of penalties for any FBAR violation, whether willful or not. In addition, Congress raised the maximum penalty for willful violations to the greater of (1) \$100,000 or (2) 50 percent of the balance of the account at the time of the violation. See 31 U.S.C. §5321(a)(5)(C).

Notwithstanding the increased statutory penalties, the IRS did not amend the FBAR penalty *regulation*. Thus, the regulation still provides that the Secretary may assess a penalty for a willful FBAR violation “not to exceed the greater amount (not to exceed \$100,000) equal to the balance of the account at the time of the violation, or \$25,000.” 31 C.F.R. §1010.820(g)(2). Since the 2004 amendment, however, the IRS has imposed FBAR penalties exceeding the \$100,000 cap.

#### **‘Colliot’ and ‘Wahdan’**

In *United States v. Colliot*, 2018 WL 2271381 (W.D. Tex. May 15, 2018), the IRS assessed an FBAR penalty of approximately \$550,000 for four accounts that the taxpayer failed to report in 2007. The taxpayer argued that the penalty was arbitrary and capricious because it exceeded the \$100,000 per account limit in the IRS's own regulation. The IRS countered that the 2004 amendment to the FBAR penalty statute superseded or invalidated the regulation.

The district court rejected the IRS's position, holding that the regulation remained binding. Because the rule was passed by notice-and-comment rulemaking—the procedure whereby an agency publishes a proposed rule, solicits comments, and then responds to those comments before finalizing the rule—the IRS was required to conduct another round of notice-and-comment rulemaking to amend it. The court further held that, contrary to the IRS's position, the 2004 FBAR statute did not invalidate the pre-existing FBAR regulation.

It reasoned that Congress's 2004 amendment to the statute set a ceiling for willful FBAR violations by providing that the Secretary “*may* impose a civil penalty” for FBAR violations, 31 U.S.C. §5321(a)(5)(C) (emphasis added), thereby vesting the Secretary with discretion to set FBAR penalties anywhere beneath the ceiling. According to the court, the Secretary exercised that discretion by issuing (and then declining to

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subsequently amend) a regulation capping the penalty at \$100,000 per account, and therefore the regulation is consistent with the discretion granted to the Secretary by the statute.

In *United States v. Wahdan*, 325 F. Supp. 3d 1136 (D. Col. 2018), the court adopted *Colliot's* holding based on the “unambiguous” language of the FBAR statute. The court also made an argument based on the Treasury Secretary’s presumed intent. The court explained that “although the penalty caps in the statute and regulation differ, one cannot assume that the Secretary simply overlooked the differences between them. The difference has existed since 2004—essentially 14 years.”

In addition, after 2004, the Secretary repeatedly increased the regulatory FBAR penalty cap to account for inflation, each time leaving the maximum (pre-inflation adjustment) penalty as \$100,000. In making this point, the court noted that the IRS’s inflation adjustment regulation states that the FBAR penalty “as last amended by statute” is \$100,000, but the regulation fails to acknowledge that the 2004 amendment actually increased the maximum statutory penalty to 50 percent of the balance of the account with no maximum. Nonetheless, in the court’s view, the regulation shows that the Secretary focused on the FBAR penalty regulation and nonetheless “elected to continue to limit the IRS’s authority to impose penalties to \$100,000.”

#### **‘Norman’ and ‘Kimble’**

Two decisions from the Court of Federal Claims reached the opposite result. In *Norman v. United States*, 138 Fed. Cl. 189 (2018), the court rejected *Colliot* based on the plain text of the FBAR statute. While acknowledging that the statute uses discretionary language, the court focused on the specific language used by Congress to raise the maximum penalty: “In the case of any person willfully violating...any provision of section 5314, the maximum penalty under subparagraph (B)(i) *shall be increased* to the greater of” \$100,000 or 50 percent of the account at the time of the violation. 31 U.S.C. §5321 (emphasis added).

The court determined that this language is “unambiguous” and “mandates that the maximum penalty allowable for willful failure to report a foreign bank account be set at a specific point.” Congress did not “merely allow for a higher ‘ceiling’ on penalties while allowing the Treasury Secretary to regulate under that ceiling at his discretion,” but instead “raised the new ceiling itself, and in doing so, removed the Treasury Secretary’s discretion to regulate any other maximum.”

Finally, in *Kimble v. United States*, 2018 WL 6816546 (Fed. Cl. 2018), the Court of Federal Claims followed *Norman*. Notably, the court made a new argument that significantly undermines the contention, made by the court in *Wahdan*, that the Treasury Department knowingly chose to maintain the \$100,000 penalty cap after 2004. Thus, the court in *Kimble* observed that in July 2008, the IRS revised the Internal Revenue Manual, the official source of “policies, authorities, procedures, and organization operations” for the IRS, IRM 1.11.6.1.2 (07-28-2017), to provide that: “[f]or violations occurring after October 22, 2004, the [FBAR penalty] ceiling is the greater of \$100,000 or 50 percent of the balance in the account at the time of the violation. At the time of this writing, the [FBAR penalty] regulations...have not been revised to reflect the change in the willfulness penalty ceiling. However, *the statute is*

*self-executing and the new penalty ceilings apply."* IRM 4.26.16.4.1 (07-01-2008) (emphasis added). Thus, the IRS took the position that it could assess the increased FBAR penalties without amending the regulation.

The IRS's own view, however, is not dispositive. Although courts typically defer to the IRS's interpretation of the Internal Revenue Code, such deference will not be granted where, as in *Colliot* and *Wahdan*, the court determines that the statute is unambiguous. However, the fact that judges themselves are divided on this key issue—indeed, *Norman* and *Kimble* found that the plain text of the statute *unambiguously* supports the IRS's position—clouds the question of the extent of deference due to the IRS's position as set forth in the Internal Revenue Manual.

### Conclusion

Even if the courts ultimately conclude that the IRS is limited by the \$100,000 regulatory cap, this may constitute a pyrrhic victory for taxpayers who neglected to report their offshore accounts. Because the statute of limitations for an FBAR violation is six years, even applying the \$100,000 cap, the penalties for a single account could total \$600,000. While the IRS's current guidance indicates that it will generally limit FBAR penalties to 50 percent of the highest aggregate account value in any one year, the IRS could continue its policy within the limits of the \$100,000 cap by spreading out the penalty over a number of years.

For example, in *United States v. Shinday*, 2018 WL 6330424 (C.D. Ca. 2018), the taxpayer argued that his total aggregate FBAR penalty of \$257,888 exceeded the regulatory \$100,000 cap and was therefore invalid under *Colliot* and *Wahdan*. The court found that the "facts of *Colliot* and *Wahdan* are [] inapposite...because the five penalties assessed against [the taxpayer] are individually all less than \$100,000."

Alternatively, the IRS could revise the FBAR regulation to conform to 2004 amendment. It is unclear why the IRS has not yet done so, but the IRS could be concerned that taxpayers would seize on the amendment as a concession that, contrary to the IRS's litigation position and the Internal Revenue Manual, the \$100,000 penalty cap remains valid.

In the meantime, the *Norman* decision is on appeal before the U.S. Court of Appeals for the Federal Circuit, so a federal appeals court will soon take sides. However, this controversy unfolds, it serves as a vital reminder that the defense bar must carefully scrutinize the precise language of the statutes and regulations relied on by the IRS.

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