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Implications of Recent Foreign Bank Account Reporting Litigation

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ABSTRACT: Foreign Bank Account Reporting (FBAR) has emerged recently as a litigation matter in several federal courts. While past cases primarily focused on the determination of willful versus nonwillful FBAR violations, recent cases bring to light issues that should lead Congress to revisit requirements and legislation specifically related to penalties. This paper examines four specific topics recently discussed in the courts: the assessment of penalties per FBAR form or per account; Eighth Amendment challenges; payment of penalties by an estate; and repatriation of assets to pay penalties. We address what the recent FBAR litigation tells us about compliance, enforcement, and policy and encourage Congress to revisit and make changes to the law.

Keywords: Eighth Amendment; per form or per account; FBAR violations; tax penalties; Bank Secrecy Act.

I. INTRODUCTION

Recently, courts have seen a significant increase in cases related to Foreign Bank Account Reporting (FBAR) requirements. Anecdotally, attorneys are advising clients to stay abreast of the rapidly changing environment regarding FBAR. As early as 2009, Rahimi-Laridjani (2009) noted the increased efforts to "crackdown on offshore tax evasion." The United States government (the government) estimates 10 million taxpayers have foreign reporting obligations, yet less than 20 percent are compliant with filing FBAR forms (Byrnes 2016). The low compliance rate

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provides an opportunity for the government to raise much-needed funds by addressing noncompliance and encouraging increased compliance. Recent cases present issues that are becoming more prevalent for practitioners and taxpayers when dealing with foreign accounts. The lower courts remain split on the issue of whether to apply nonwillful penalties per unfiled form or per account (Mohammad and Gelb 2021), showing a need for revisions and consistency to ensure taxpayer equity. The United States Supreme Court recently granted *certiorari* to hear *Bittner v. Commissioner, No.21-1457* (U.S. June 21, 2022), in October 2022, to specifically address the issue. Congress's penalty intent is also an issue in recent cases. Prior to the recently decided *United States v. Toth*,[1] cases were generally unresolved regarding the question of whether the civil FBAR failure to report penalties is meant to be remedial and/or a retributive, deterrent punishment. The intent of the penalty is important to the question of whether the law applies per form or per account.

In this paper, we ask what the recent FBAR litigation suggests concerning tax policy. We address four major issues from current FBAR cases to highlight the need for policy change and clarification.[2] First, should penalties for nonwillful violations be assessed per form or per account? Second, does the Eighth Amendment apply to FBAR penalties? Third, is an estate responsible for the FBAR penalty after the death of the individual? Finally, can the government require a taxpayer to repatriate assets to pay the assessed FBAR penalty? These questions should encourage current policymakers to revisit the reporting requirements to better address issues that are more likely to develop further as the ease of electronic transactions and the ability to hold foreign assets increases. As discussed in Parnass (2020), noncompliance issues with cryptocurrency are similar to noncompliance issues with FBAR. By addressing inconsistencies in FBAR penalty treatment and laws, the IRS may have a better blueprint for electronic transactions. Additionally, tax practitioners and taxpayers need to be aware of the potential pitfalls and reporting requirements when the taxpayer has foreign accounts.

This paper will show, in general, that the courts seem consistent on three of the four issues: The Eighth Amendment does not apply to the FBAR penalties, collection of the penalties survives death, and assets can be repatriated to satisfy payment of the FBAR penalty. The main issue still unanswered from recent cases is how these penalties should be assessed on nonwillful violations: Should penalties be applied per form or per account? The courts still appear to be split over whether penalties should be applied per account or per form, although recent rulings are applying per account. However, Congress has yet to consider any modifications to the current requirements even though the penalty for nonwillful violations is not clearly defined in current law. This paper provides recommendations for changes to help clarify some of the unsettled issues.

The next section discusses the background of FBAR, followed by a review of other FBAR literature, then a discussion and analysis of the implications of recent FBAR cases related to the four issues. Finally, we conclude with recommendations Congress should consider regarding the issues.

II. FBAR BACKGROUND AND ORIGIN

The Currency and Foreign Transactions Reporting Act of 1970 (commonly referred to as the Bank Secrecy Act (BSA)) was enacted to help the government detect and enforce activity related to financial crimes such as tax fraud, money laundering, international terrorism, and other criminal

[1] *United States v. Toth* 33 F.4th 1 (1st Cir. 2022, Court Opinion 04/29/2022 April 29).

[2] This paper does not discuss the major topic of willful versus nonwillful violation, as that is widely discussed in other research (Wald 2017; Niewoehner 2014; Brown 2014; Toscher and Strachan 2012). The four major issues discussed in this paper appear to be the most recent primary issues of concern with the courts. Mohammad and Gelb (2021) also provide a brief discussion of some of these issues, in addition to the idea of willful and nonwillful.

activity. Part of the 1970 BSA is commonly referred to as the Foreign Bank Account Reporting requirements, or FBAR.[3]

FBAR filing is not an I.R.C. requirement, but instead, it is mandated by the BSA and enforced by the Treasury Department's Financial Crimes Enforcement Network (FinCEN). This separation was created in part to allow for the use of the data obtained beyond tax enforcement.[4] The BSA requires certain documentation that aids in various investigations, such as intelligence, tax, and criminal activity. Congress called on the Secretary of the Treasury to "promulgate rules that require United States citizens, residents, or those doing business in the United States to keep records and file reports when they make a transaction or maintain a relation for any person with a foreign financial agency."[5] Records required include the name on the account, the account number, the name and address of the foreign bank, the type of account, and the maximum value during the year. The FBAR is due April 15 following the calendar year reported, and the records must be kept for five years from the due date of the FBAR (Internal Revenue Service 2021).

FinCEN, when defining the reporting requirement, provides that a "United States person that has a financial interest in or signature authority over foreign financial accounts must file an FBAR if the aggregate value of the foreign financial accounts exceeds $10,000 at any time during the calendar year" (Financial Crimes Enforcement Network 2021). Treas. Reg. §1.6038 D-1 defines the term "specified individual" as one who is a U.S. citizen, resident alien, or nonresident alien under I.R.C. §6013 or §913. A U.S. person can also be a "specified domestic entity," including entities organized under the laws of the United States, U.S. trust, or U.S. estate.[6] Specified foreign financial assets are further defined in Treas. Reg. §1.6038 D-3 as any financial account maintained by a foreign financial institution.

III. PRIOR FBAR LITERATURE

Much of the prior FBAR research in practitioner journals involves policy analysis (Mohammad and Gelb 2021; Sheppard 2018a, 2018b, 2019a, 2019b, 2021a, 2021b).[7] Some academic research exists regarding FBAR and recent litigation.[8] FBAR is sometimes mentioned in other works involving the Foreign Account Tax Compliance Act (FATCA) and within discussions of duplication of reporting requirements (Richardson, Snyder, and Karen 2020; Byrnes and Munro 2017).[9] FATCA generally involves corporate entities, while FBAR is more specific to individuals.

Other studies examine FBAR compliance (e.g., Johannesen, Langetieg, Reck, Risch, and Slemrod 2020). Compliance rates are estimated to be about 20 percent, giving the government room for improvement in collection (De Simone, Lester, and Markle 2020, 112). Johannesen et al. (2020) use FBAR and offshore voluntary disclosure (OVD) program data to discuss increased compliance along with increased enforcement and penalties. Results show most disclosures were outside of the OVD programs, although OVD participant amounts were larger.[10] Byrnes and Munro (2017) also

[3] 31 U.S.C §5311-§5326.
[4] H.R. Rep. No. 91-975, at 13. Second Session (1970), 1971-1 C.B. 559.
[5] 31 U.S.C. §5314(a).
[6] Treas. Reg. §1.6038D-6.
[7] The authors note that Sheppard is a regular author of FBAR articles. The ones provided here are only examples of some of the more recent work.
[8] The authors note that various law review articles have studied FBAR, (for example, Ciraolo 2013; Murray 2015; Melone 2015), but recent litigation (i.e., *U.S. v. Toth*) has superseded many of these articles.
[9] Business entities are subject to FATCA reporting and filing requirements, whereas individual account holders are subject to FBAR reporting and filing requirements.
[10] Other extant literature recommends caution with the OVD program. Sheppard (2019b) suggests that opting out of the OVD program leads to a higher probability of audit. Standard (2021) proposes using the streamlined filing compliance procedures (SFCP) when the failure to report is nonwillful. This is because the SFCP requires the taxpayer to certify that the failure was nonwillful and protects the taxpayer from criminal liability.

discuss concerns regarding compliance, including a statement from the Taxpayer Advocate report in 2014 about a need for better administration regarding penalties and reporting. The recent increase in court cases should encourage Congress and the IRS to address changes in the laws to assist with both compliance and clarity.

Some practitioner articles discuss tips on understanding FBAR and some of the potential pitfalls of penalty application. For example, Lee and Lee (2019) present tips for the application of penalties regarding willful and nonwillful violations, along with a discussion of the Eighth Amendment litigation. They argue that FBAR penalties are violations of the Eighth Amendment and are inappropriate in some cases. In another discussion of both willful penalties and the Eighth Amendment, Toscher and Stein (2018) discuss how the IRS does seem to exercise some constraint on penalties to make sure penalties are "consistent with the Excessive Fines Clause." Our paper updates the discussion of the Eighth Amendment with current case results.

Sheppard (2018a) provides a discussion of the Kelley-Hunter case and gives tips to taxpayers regarding willful penalties. Sheppard also discusses the idea of willfulness and the history of FBAR in multiple other publications (Sheppard 2018b, 2019a, 2019b, 2021a). Willfulness is often addressed by legal professionals as it has been a large area of litigation by the courts regarding FBAR (Wald 2017; Niewoehner 2014; Brown 2014).[11] We do not continue the discussion of willfulness, given the extensive existing literature. Instead, this paper addresses other recent issues not prevalent in the prior literature.

A recent analysis by Brackney and Ryan (2022) discusses repatriation to satisfy FBAR penalties. The article warns taxpayers holding assets in foreign countries about a likely increase in repatriation. Along with repatriation, the authors discuss other tools available for the IRS to reach foreign assets. They highlight the importance of the pending Schwarzbaum case discussed later in our paper.

Parnass (2020) presents a comparison of cryptocurrency compliance to FBAR regulations and compliance. According to Crane (2018), the IRS is treating cryptocurrency as currency for purposes of FBAR (it is treated as property everywhere else) (Crane 2018), which means FBAR regulations will become even more important as the growth of cryptocurrency continues. However, Nylen (2019) discusses the confusion about whether cryptocurrency owners truly are reporting their assets as currency and whether FinCEN rules apply. Regardless of the treatment of cryptocurrency as property or currency, Parnass (2020) argues the history of FBAR enforcement may provide a path to the taxation of cryptocurrency. In particular, Parnass discusses a need for strict and harsh penalties to address cryptocurrency compliance. This reason furthers the need for clarification regarding FBAR rules.

IV. RECENT FBAR LITIGATION

FBAR compliance enforcement differs significantly from income tax enforcement. FinCEN delegated FBAR enforcement authority to the IRS. However, this authority is under Title 31 of the U.S. Code, whereas income tax enforcement falls under Title 26. The authority to assess and collect FBAR penalties lies outside I.R.C. §6201(a), which authorizes the IRS to determine and assess all taxes and penalties imposed by Title 26. Thus, the collection of FBAR penalties deviates from normal IRS tax collection procedures, and, most notably, the U.S. Tax Court lacks jurisdiction to consider FBAR.[12]

[11] We have listed only a few here, as the literature on willfulness is quite extensive and outside the scope of this paper.
[12] *Williams v. Commissioner*, 131 T.C. 54 (2008).

Williams v. Commissioner held that the tax court lacked jurisdiction over FBAR penalties, and its jurisdiction is limited to the extent expressly provided by statute.[13] The Tax Court stated that I.R.C. §6212 authorizes the commissioner to issue a notice of deficiency, and I.R.C. §6213 provides that the tax may not be assessed until such a notice has been issued and that the assessment be delayed pending a possible redetermination by the Tax Court. However, a notice of deficiency must be sent only in cases of a deficiency in respect of specific taxes imposed by Title 26. The court held that FBAR penalties are not within the Tax Court's jurisdiction.[14]

Even though the Tax Court is not mandated to penalize FBAR infractions, other courts have recently observed an increase in FBAR cases. This section discusses the varied cases that the U.S. District and U.S. Appellate courts address and the implications for future Congressional policy.

Initially, the BSA only provided civil penalties for willful violations. However, Congress amended the BSA in 2004 to include penalties for nonwillful FBAR violations and stronger penalties for willful violations. The 2004 legislation stipulated that nonwillful penalties could not exceed $10,000[15] while the maximum for willful penalties was the greater of $100,000 or 50 percent of the amount of the transaction or balance in the account at the time of the violation.[16] An important aspect of the civil penalties prior to 2004 was the idea of willfulness. In *U.S. v. Williams*, the court states that "willfulness may be proven through inference from conduct meant to conceal or mislead sources of income or other financial information, and it can be inferred from a conscious effort to avoid learning about reporting requirements."[17] Similarly, the court found that willful blindness may be inferred where "a defendant was subjectively aware of a high probability of the existence of a tax liability and purposefully avoided learning the facts pointing to such a liability."[18] The courts rely on the Supreme Court case *Cheek v. U.S.* to define willfulness as voluntary, stating specifically that the standard for the statutory willfulness requirement is the voluntary, intentional violation of a known legal duty.[19] Historically, courts have focused primarily on interpreting willful or nonwillful, whereas other recent litigation has begun focusing on four other major issues, which were not as common in past years:

1. Penalties per form versus per account;
2. Eighth Amendment challenges;
3. Surviving death (remedial versus deterrent penalties);
4. Repatriation of assets to pay FBAR penalties.

The following discussion presents recent cases with respect to the above-listed issues and presents an analysis of how the courts are ruling regarding these issues. The issues surrounding these cases are important for both practitioners and taxpayers alike, especially given the low percentage of compliance regarding foreign accounts and the IRS's push for better

[13] *Id*., citing *Breman v. Commissioner*, 66 T.C. 61 (1976). "The Tax Court is a court of limited jurisdiction. We may therefore exercise jurisdiction only to the extent expressly provided by statute. *Breman v. Commissioner*, 66 T.C. 61, 66 (1976). Congress has not conferred jurisdiction on this court to consider the matters that are the subject of the motion."

[14] *Williams v. Commissioner* (2008), *supra* at 8.

[15] 31 USC 5321(a)(5)(B).

[16] 31 USC 5321(a)(5)(C). The 31 U.S.C. §5321(a)(5)(B)(i) $10,000 nonwillful penalty is adjusted for inflation. See 31 CFR section 1010.821, Table 1. Additionally, the willful failure to file penalty of $100,000 (31 U.S.C. §5321(a)(5)(D)) is inflation-adjusted. See 31 CFR section 1010.821, Table 1. On or after, January, 24, 2022, these amounts are inflated to $14,489 and $144,886, respectively.

[17] *United States v. Williams*, 489 F. App'x 655 (Fourth Circuit 2012), citing *United States v. Sturman*, 951 F.2d 1466, 1976 (Sixth Circuit 1991).

[18] *Id*., citing *United States v. Poole* 640 F.3d 114, 122 (Fourth Circuit 2011).

[19] *Cheek v. United States*, 498 U.S. 192 (1991).

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compliance. These issues could provide a blueprint for Congress moving forward to adopt laws for future changes.

Penalties per Form or per Account

The issue of whether FBAR penalties should be applied per account or per form is still an unsettled question within current cases. Section 5321 of Title 31 provides that the Secretary of the Treasury may impose a civil penalty on any person who violates or causes any violation of any provision of §5314 of Title 31.[20] The BSA further imposes different penalties for violating the FBAR reporting requirement depending on whether the violation was willful or nonwillful.[21] "Historically, from 1986 to 2004, §5321 only authorized penalties for willful violations of Section 5314 and capped such penalties at $100,000. In 2004, Congress amended Section 5321 to authorize penalties up to $10,000 for nonwillful violations of Section 5321 and to increase the maximum penalty for willful violations."[22] In 2004, the BSA authorized the IRS to increase the maximum penalty for a willful violation of §5314 to the greater of $100,000 or 50 percent of the foreign-account balance.[23] Unfortunately, the code does not specifically define the term "violation." As a result of the change to the penalty, recent FBAR litigation has addressed the issue of whether the penalty and violation are asserted per the FBAR filing form or per foreign account. The government has consistently taken the stance that the penalty is asserted per account, while the courts have ruled differently. On May 17, 2022, the government filed its respondent brief for *Bittner v. United States* with the Supreme Court to address this split in the circuit courts (Velarde 2022).

The split opinion on application per account or per form is seen in recent FBAR cases. The following discusses these recent cases chronologically.

United States v. Giraldi

In 2021, The U.S. District Court of New Jersey granted defendant Frank Giraldi's motion for summary judgment. Giraldi, a U.S. citizen, resided in New Jersey. During the tax years 2006–2009, he owned four foreign financial accounts. The government proposed a penalty of $160,000 for nonwillful failure to disclose the four accounts on an FBAR form for each of the four relative tax years ($10,000 $\times$ 4 accounts $\times$ 4 years).[24] The government is clearly interpreting the penalty per account rather than per form. The government could be interpreting penalties in this way due to the large size of the accounts[25] or an increased lack of compliance and aggressiveness.

United States v. Boyd

Prior to the Giraldi case, no federal court had addressed the issue of a penalty assessed per form or per account. Three district courts have since ruled on the form or account controversy. First, in *United States v. Boyd*, the U.S. District Court for the Central District of California adopted the government's interpretation of §5321(a)(5)(B)(i) that "each nonwillful FBAR violation relates to a foreign financial account."[26] Jane Boyd, an American citizen, had a financial interest in 14

[20] 31 U.S.C. § 5321(a)(5)(A).
[21] 31 U.S.C. § 5321(a)(5)(C).
[22] *Landa v. United States*, No. 18-365, 2021 BL 142682 (Fed. Cl. Apr. 19, 2021), citing *Norman v. United States*, 942 F.3d 1111, 1114 (2019) (citing 31 U.S.C. 5321(a)(5)(A)–(D)).
[23] *Landa v. United States* (2021), *supra* at 16.
[24] *United States v. Giraldi*, No. 20-2830 (SDW) (LDW), 2021 BL 94338 (D.N.J. Mar. 16, 2021).
[25] While the total of Giraldi's account value is not disclosed in the case, the case does note he was first fined over $2 million for failure to file and was a noted businessman with millions of dollars of investments in real estate and businesses.
[26] *United States v. Boyd*, No. CV 18-803-MWF (JEMx), 2019 BL 144463, 2019 Us Dist Lexis 68863, 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019).

financial accounts in the United Kingdom with an aggregate balance in excess of $10,000. The IRS examined Boyd's income tax return and concluded that she committed 13 FBAR violations (one violation for each account she failed to timely report for the calendar year 2010). The IRS concluded that Boyd's violations were nonwillful, and it assessed a total penalty of $47,279. In 2018, the government sued Boyd to obtain a judgment against her for the $47,279 plus additional late-payment penalties and interest.

Boyd argued before the district court that she had committed only one nonwillful violation, not 13, and that the maximum penalty allowed by the statute for that single nonwillful violation was $10,000. The government declared that the relevant statutes and regulations authorized the IRS to assess one penalty for each nonreported account. The district court agreed with the government.[27]

United States v. Bittner

The next district court to address this issue was the Eastern District Court of Texas. *United States v. Bittner* was also a case of first impression where the court was tasked with interpreting the nonwillful civil penalty provided in 31 U.S.C. §5321 (a)(5)(A) and B(i). The court chose not to follow *Boyd* and assessed penalties by form rather than by account. Mr. Bittner, a U.S. citizen, generated over $70 million in total income through various foreign ventures between 1990 and 2011, and he maintained foreign financial accounts with a balance of over $10,000. The government sought $1,770,000 in penalties due to the number of foreign accounts Mr. Bittner admitted to maintaining. Both Mr. Bittner and the government asked the court to interpret 31 U.S.C. §5321(a)(5)(A) and (B)(i) and answer the following question: Does the civil penalty for nonwillful violations apply per foreign financial account maintained per year but not properly or timely reported on an annual FBAR, or per annual FBAR report not properly or timely filed?[28]

First, the court analyzes the language of 31 U.S.C. §5321(a)(5)(A) and (B)(i) and examines it in light of the willfulness provision. The willfulness provision provides a penalty for willful FBAR violations in an amount equal to the greater of $100,000 or 50 percent of either the transaction amount or the account balance. The court acknowledges that Congress was specific that the penalties for a willful violation were assessed per account rather than per form. The court reasoned that since Congress was specific in terms of willful violations, the fact that they did not reference "account" or "balance in the account" when drafting nonwillful penalties was intentional and concluded that nonwillful violations should be penalized per form, rather than per account.[29]

The government provides two reasons why nonwillful FBAR violations apply to accounts rather than forms. First, the government argues that because the reasonable cause exception forgives the penalty for a nonwillful FBAR violation and references the balance in the account, the nonwillful violation itself must relate to each account. Second, since the penalty for willful violations simply modifies the penalty for nonwillful violations, the underlying violation must also be the same. "The willful variant of the penalty is assessed with reference to each account"; therefore, the nonwillful variant of the penalty should also relate to each account. The court considers but rejects the government's arguments for why nonwillful FBAR violations relate to each foreign financial account.[30]

United States v. Zvi Kaufman

In *United States v. Zvi Kaufman*, in the U.S. District Court for the District of Connecticut, Kaufman argues that the maximum amount of civil monetary penalties that can be imposed for his nonwillful violations is $10,000 for each of three years an FBAR was not filed, for a total of

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[27] *United States v. Boyd*, 999 F.3d 1077 (Ninth Circuit 2021).
[28] *United States v. Bittner*, 469 F. Supp. 3d 709 (E.D. Tex. 2020).
[29] *Id*.
[30] *United States v. Bittner* (2020), *supra* at 22.

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$30,000. The government responds that it would be strange for a willful penalty to be assessed per account, while a nonwillful penalty is assessed only for unfiled forms. The government further argues that a penalty of only $10,000 is negligible and would not usefully serve the purpose of penalizing those with multiple accounts or encouraging those with large amounts to disclose their accounts.[31]

Here, the court rejected the government's argument for two main reasons. First, if penalties are assessed by account instead of by form, similarly situated people could have very different outcomes. Second, the court worried that a nonwillful violation may, in fact, be more heavily penalized than a willful violation.[32] Thus, the court found for the defendant that the penalty is asserted by FBAR form, not account.[33] As a matter of policy, Congress should decide whether the penalty that may be imposed for nonwillful violations should be used as an incentive to report or to punish underreporting.

Appeal of *United States v. Boyd*

The district court decision in *Boyd* was reversed and remanded by the United States Court of Appeals for the Ninth Circuit. The decision was split. The appellate court was tasked with whether 31 U.S.C. §5321 authorizes the IRS to impose multiple nonwillful penalties for the untimely filing of a single FBAR. Boyd argued for a single violation and a maximum penalty of $10,000. The government stands by its argument that penalties for failure to timely file apply to each account.[34]

The court analyzed the language used in the statute and specifically stated it is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."[35] Section 5321(a)(5)(A) provides for the imposition of "a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." Congress, however, did not define the term "provision," therefore the court applied the ordinary meaning of the term provision.[36]

The court looked to the Merriam-Webster dictionary to define the term and found that a provision is "an article or clause (as in a contract) that introduces a condition" or "a condition, requirement, or item specified in a legal instrument."[37] The court found that §5314(a) contains two separate and relevant provisions: (1) filing a report when maintaining a relationship with a foreign financial agency and (2) ensuring the filed report contains specified information. The court focused on the violations of these provisions and looked to the Supreme Court for guidance. The Supreme Court, in *California Bankers Association v. Schultz*, explained that "the act's civil and criminal penalties attach only upon violation of regulations promulgated by the secretary; if the secretary were to do nothing, the act itself would impose no penalties on anyone."[38]

The court, in reaching its decision in this case, focused on two points. First, Boyd must report financial interests in foreign accounts by filing an FBAR (31 C.F.R. §1010.350(a)). Second, the FBAR must be filed in a timely matter (31 C.F.R §1010.306). Boyd had filed an accurate FBAR. However, the report was filed late. The court decided she only violated §1010.306 regarding the

[31] *United States v. Kaufman*, No. 3:18-CV-00787 (KAD), 2021 BL 8108, 2021 US Dist Lexis 4602, 2021 WL 83478 (D. Conn. Jan. 11).
[32] *Id*.
[33] *Id*.
[34] *United States v. Boyd* (2021), *supra* at 20.
[35] *Id*., quoting *FDA v Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct 1291, 146 L. Ed. 2d 121 (2000).
[36] *United States v. Boyd* (2021), *supra* at 20, citing *Metro One Telecomms., Inc. v. Comm'r*, 704 F.3d 1057, 1061 (Ninth Circuit 2012).
[37] *United States v. Boyd* (2021), *supra* at 20.
[38] *Id*., citing *California Bankers Association v Schultz*, 416 U.S. 21, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974).

correct filing deadline. In this case, the court held the violation is a single, nonwillful violation (failure to timely file).[39]

The government made several key arguments, arguing that "the use of the word 'any' before 'violation' in §5321(a)(5)(A) suggests that more than one violation may occur with respect to a particular report required to be filed." The court disagreed, stating that "the language in §5321(a)(5)(A) that '*any* violation of … any provision of section §5314' simply refers to the relevant regulations that prescribe how the provisions in §5314 may be violated."[40]

The government further argued the penalty could be assessed on a per-account basis based on the statutory scheme as a whole and legislative intent. The court, however, disagreed and reasoned that prior to 2004, only willful violators were penalized. When the law was changed to include nonwillful violations in 2004, the law specifically discussed violations by account for willful violations yet did not mention the term "account" in the separate discussion of nonwillful violations.[41] The court specifically stated that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. Thus, we presume that Congress purposely excluded the per-account language from the nonwillful penalty provision in subparagraph (B)(i) because it included such language in the willful penalty provision in subparagraph (D). Where Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[42]

The government also states that the per-account language in the reasonable cause exception to nonwillful violations (which Congress created with the same set of amendments that established nonwillful violations) supports its interpretation. "The government contends that the use of the word 'any' before 'civil penalty' in §5321(a)(5)(B)(i) suggests that multiple potential items are being referenced. The 'any civil penalty' imposed under subparagraph (A) language in §5321(a)(5)(B)(i) simply refers to subsection (a)(5)(A), which provides that the secretary may impose a civil money penalty on any person who violates, or causes any violation of, any provision of Section 5314."[43]

Nonetheless, contrary to the government's argument, the inclusion of per-account language in the reasonable cause exception supports the claim that Congress intentionally omitted per-account language from the nonwillful penalty provision since Congress was aware of that language during the amendment process and left it out of the nonwillful penalty provision. Hence, the court finds that Congress acted intentionally when it drafted the nonwillful civil penalty with no reference to "account" or "balance in that account."[44]

Judge Sandra S. Ikuta dissented, arguing the intent of the BSA was a weapon against "a serious and widespread use of foreign financial institutions, located in jurisdictions with strict laws of secrecy as to bank activity, for the purpose of violating or evading domestic criminal, tax, and regulatory enactments."[45] She further argued the extent of the loss in tax revenues and abuse of offshore accounts by Americans for purposes of tax evasion. The act provides tools such as the FBAR requirement to help the IRS fight evasion. The dissent further acknowledges the use of penalties to deter taxpayers from using offshore accounts to hide revenue.[46]

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[39] *United States v. Boyd* (2021), *supra* at 20.
[40] *Id*.
[41] *Id*.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*.

> Instead of providing an evenhanded interpretation of these statutes, the majority strains to interpret them narrowly. The majority rejects the most natural reading of the statutory language, which requires Americans to report each foreign account and imposes a penalty for each failure to do so. Rather, the majority focuses on the procedure for complying with the law. Because the regulations direct taxpayers to aggregate their reports of foreign accounts on a single reporting form, the majority concludes that it is the failure to provide the reporting form (not the failure to report the individual foreign financial accounts) that constitutes the statutory violation and that the IRS may impose only single penalty for failure to provide the reporting form.[47]

Appeal of *United States v. Bittner*

The Justice Department recently relied on the *Boyd* dissent and filed an appeal to the decision of *United States v. Bittner* that penalties were capped at $10,000 per form, a significant reduction from the $3 million in nonwillful penalties the IRS had calculated (Velarde 2021a). The brief, as summarized by Velarde (2021a), includes a discussion of the importance of Ikuta's dissent, particularly pointing to the interpretation of the BSA as a tool, as opposed to the majority opinion focusing on simply the process and language. The article discusses how "the Justice Department's brief in *Bittner* praises Ikuta's dissent for calling out the majority for conflating the statutory requirement to report an account with the regs that require such reporting. The regs and the statutes do not provide that the FBAR violation that triggers a section 5321 penalty is the failure to file the annual FBAR, the brief asserts. Like the dissent asserted, the account reporting requirement and the filing requirement are separate, and a section 5314 violation that section 5321 references include a failure to report by June 30, the Justice Department asserts" (Velarde 2021a).

In her dissent, Judge Ikuta explained that there is a clear obligation to report each account, and this obligation is separate from the requirement to file a reporting form. The first clause of Section 1010.350(a) states that a person must report a financial interest in a foreign account, while the second clause of Section 1010.350(a) states that the person that has the interest must file the reporting form. The dissent further reasoned that since the report filing requirement is separate from the account reporting, the conclusion is that a person must file a reporting form for each foreign account. In further support of her position, Judge Ikuta stated that §5321 prescribes the civil penalties and establishes the mens rae for a violation of the reporting, and it does not distinguish between willful and nonwillful.

Velarde's discussion also points to how the brief denounces the majority's lack of attention to "Congress's concern over the 'impossible position' that law enforcement was faced with in going after secret foreign accounts. 'Each account creates its own impossible position,' the brief asserts, and that leads to time-consuming investigations. 'The *Boyd* majority's minimizing of this concern ignores that foreign accounts are maintained at not just one foreign bank, or in one foreign country, but are often spread around the world, a fact present in this case'" (Velarde 2021a). Recently, in the *Bittner* appeal[48] and *United States v. Solomon*,[49] the court held the nonwillful penalty does apply to the account and not per form. This result is contrary to prior circuit court decisions and is to be taken to the U.S. Supreme Court, given the disparity. Given the split in the courts, Congress should examine and clarify the law to prevent these issues in the future. With expected increases in foreign accounts and similarities to reporting cryptocurrency, applying penalties by account could generate much revenue, and the larger penalties could serve as a better deterrent against noncompliance.

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47 *Id*.
48 *United States v. Bittner*, No. 20-40597(Fifth Circuit Nov. 30, 2021).
49 *United States v. Solomon*, No 20-82236-CIV-CANNON/Reinhart (S.D. Fla. Oct. 27, 2021).

Given the split in the court's decisions, in June 2022, the U.S. Supreme Court granted certiorari to review the Fifth Circuit's holding that each failure to report a qualifying foreign account on annual FBAR forms constitutes a separate reporting violation subject to penalty, which applies on a per-account, not per-form basis.[50]

Recommendation 1: In October 2022, the Supreme Court of the United States (SCOTUS) rendered a decision on *Bittner*. As is often the case, jurisdiction can result in different tax treatments for similarly situated taxpayers. Given the aforementioned outcomes in courts of original jurisdiction and circuits of appeal, the existing judicial environment results in an unlevel playing field. From a taxpayer equity perspective (both vertical and horizontal) and the wherewithal to pay concept, a per-account approach for nonwillful violations would create a progressive penalty structure. *Ceteris paribus*, a per-form penalty results in a proportionately larger penalty for holders of a single account versus multiple accounts. The per-account methodology would more closely align with a proportionate penalty, ensuring those with larger accounts are subject to higher penalties. The Supreme Court should decide on a per-account penalty.

Eighth Amendment Challenges

The Eighth Amendment to the United States Constitution provides that excessive bail shall not be required, nor *excessive fines* imposed, nor cruel and *unusual punishments* inflicted (emphasis added).[51] Only monetary penalties that function as punishment for some offenses are encompassed by the clause.[52] Therefore, the penalty at issue must qualify, at least in part, as punishment even to implicate the Excessive Fines Clause.

The Supreme Court explained in *Austin v. United States*[53] that there is no *per se* rule that the Excessive Fines Clause only applies to criminal proceedings.[54] What matters is whether that penalty, even if only a civil one, is punishment."[55] The court has also explained that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."[56] We will shortly return to this critical language in Halper, as quoted in Austin in a critical First Circuit Court of Appeals case, *U.S. v. Toth*.[57]

The BSA imposes different penalties contingent upon whether the FBAR reporting violation was willful (greater than $100,000 or 50 percent of the foreign account balance) or nonwillful (capped at $10,000). The central legal issue with FBAR is whether FBAR is intended as a penalty that is a punishment.

In *Landa v. United States*, the IRS assessed $3.1 million in penalties (which represented one-half of the account balance) for the determined willful failure to file an FBAR. The court concluded that the plaintiff acted recklessly for failure to timely file his FBAR. The basis for the decision was that not only was the plaintiff the account owner, but he also had a financial interest in the account.

50 *Bittner v. Commissioner*, No 21-1457 (U.S. June 21, 2022).
51 U.S. Constitution Amendment VIII.
52 *United States v. Bajakajian*, 524 U.S. 321, 327-28, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998) (quoting Browning-*Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265, 109 S. Ct. 2909, 106 L. Ed. 2d 219 (1989)).
53 *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993).
54 *Id*. at 607.
55 *Id*. at 610.
56 *Id*. (quoting *United States v. Halper*, 490 U.S. 435, 448, 109 S. Ct. 1892, 104 L. Ed. 2d 487 (1989)).
57 *United States v. Toth*, 33 F.4th 1 (First Circuit 2022), (04/29/2022).

Because the penalty was 50 percent of the account balance, the plaintiff argued that the amount of the penalty constituted an excessive fine in violation of the Eighth Amendment.

The Court stated that for a fine to be excessive, one must determine the intent of the fine, that is, whether it is punitive/remedial. "The Eighth Amendment protects against punitive actions and affords protection when the penalty at issue 'constitute[s] punishment for an offense.' A nonpunitive penalty, in contrast, 'serve[s] the remedial purpose of compensating the government for a loss' and is not subject to the clause."[58]

Although "the FBAR penalty is not an internal revenue tax, the court deferred to cases involving tax penalties that address, as does the FBAR penalty, behavior related to financial accounts."[59] The court acknowledged that tax penalties are typically remedial in nature, therefore, not subject to the Eighth Amendment Excessive Fines Clause. For example, the 10 percent penalty for a non-qualified individual retirement account withdrawal is not a fine subject to the Eighth Amendment's limitation.

A recent case, *U.S. v. Toth*,[60] a First Circuit U.S. Court of Appeals case, was the first case to directly address the Excessive Fines Clause of the Eighth Amendment as is related to FBAR penalties. The court in *Toth* affirmed a lower court's summary judgment against Toth's willful failure to file and pay a $2.173 million IRS civil assessment based on the maximum FBAR penalty of half the value of her Swiss UBS account at the time of violation.

The essential argument in *Toth* is that, first, FBAR penalties serve as punishment for the failure to comply with the act's reporting requirements, which address the fact that "[i]t has been estimated that hundreds of millions in tax revenues [were] lost" due to the secret use of foreign financial accounts, which Congress characterized as the "largest single tax loophole permitted by American law."[61]

Second, *Toth*, citing the Supreme Court in *Austin v. United States*, 509 US 602 (1993) quoting *United States v. Halper*, 490 U.S. 435,448 (1989), explained that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment."

Two law reviews from 2015, Melone (2015) and Murray (2015), make various arguments utilizing the application of the gross disproportionality test. While Melone and Murray go into various legal arguments, such as the gross disproportionality test, questioning the logic of the FBAR reporting penalty, 50 percent of the foreign assets for willful failure to file, their concerns are superseded by the court's decision in *Toth*.

In *Toth*, the defendant, Monica Toth, asserted that the willful FBAR civil penalty violates the constitutional ban on excessive fines. In contrast, "the government states that the Eighth Amendment is not implicated outside the context of a criminal fine, but even if it were, the penalty is not excessive." The district court ruled via summary judgment that the $3.1 million *Toth* FBAR penalty (which also included failure to pay late fees and penalties) did not violate the Eighth Amendment's Excessive Fines Clause.

The government cites the Supreme Court case, *United States v. Bajakajian*, 524 U.S. 321,118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998), for its position (Velarde 2021c). The Bajakajian case discussed fines as punishment for criminal convictions. "The government notes, *Bajakajian* and additional Supreme Court precedent suggest that an Eighth Amendment analysis may be appropriate

[58] *Landa v. United States* (2021), at 12.
[59] *Id*.
[60] *United States v. Toth*, 33 F.4th 1 (First Circuit 2022), (04/29/2022).
[61] H.R Rep. 91-975, at 4397-98 (1970).

for certain civil fines or forfeiture orders only when they are connected to an underlying criminal offense."[62]

The government uses *Bajakajian* to further argue "that a civil penalty is not punishment and thus not a fine … if it is remedial in compensating the government for its loss. In *Bajakajian*, the Supreme Court held that a punitive forfeiture (fine) is invalid only if it is 'grossly disproportional' to the offense. Bajakajian involved the forfeiture of all of a defendant's $350,000 in currency for failing to report it before transporting it out of the country." [63]

The court in *Toth* also relied on *Austin v. U.S.*, a drug property forfeiture case, which held that the Eighth Amendment's prohibition extends to civil fines.[64] *Toth* argued the purpose of the excessive fines clause is to limit the government's power to punish. The brief does not argue that the penalty for willful violations is a punishment and serves as a deterrence; rather, the brief discusses that the government did not agree and claims the penalty is not a fine and not excessive.

In Austin, the appellate brief discusses the government losses created by the high costs and time involved in FBAR investigations. "All courts to address the question have determined that [section] 5321 civil penalties offset these losses and, therefore, are remedial and not subject to the Excessive Fines Clause" (Velarde 2021c). The government argues in its appellate brief that "even though civil FBAR penalties are not tax penalties, they are 'more analogous to a nonpunitive tax penalty' than to forfeitures involving criminal convictions at issue in *Bajakajian* and *Austin*" (Velarde 2021c).

The court in *Toth* then goes on to cite several other cases in support of the proposition that FBAR penalties are not punishment, are not excessive, and serve an administrative remedial function. Citing *One Lot Emerald Cut Stones and One Ring v. United States*, 409 U.S. 232 (1972), the court found that the fines were considered not as punishment for an offense but rather serving the remedial purpose of reimbursing the government for losses accruing the evasion of custom duties.

In the aforementioned willful violation cases, the courts consider the penalty to be similar to a tax penalty and not a criminal fine. It appears that the courts agree that the Eighth Amendment does not apply to FBAR penalties. Thus, penalty amounts cannot be construed as excessive.

The bottom line, according to *Toth*, is that for all these reasons, the court concludes that "a civil penalty imposed under FBAR is not a fine, and as such, the Excessive Fines Clause of the Eighth Amendment does not apply to it."[65]

Although there is no case law for nonwillful violations, it is doubtful taxpayers would be able to challenge the Eighth Amendment's Excess Fines Clause given the courts' reasoned analogy to tax penalties.

In the aforementioned willful violation cases, the courts consider the penalty to be similar to a tax penalty and not a criminal fine. It appears that the courts agree that the Eighth Amendment does not apply to FBAR penalties. Thus, penalty amounts cannot be construed as excessive. These recent results are similar to other Eighth Amendment challenges discussed by Lee and Lee (2019). The courts do not appear to be willing to change their view that FBAR penalties are not excessive and are appropriate. Although there is no case law for nonwillful violations, it is doubtful taxpayers would be able to challenge the Eighth Amendment's Excess Fines Clause given the courts' reasoned analogy to tax penalties.

Recommendation 2: Although the Eighth Amendment's excessive penalty provision was not explicitly discussed in the aforementioned nonwillful cases, it would seem

[62] *United States v. Toth*, 33 F.4th 1 (First Circuit 2022).
[63] *Id*.
[64] *Id*. p. 16.
[65] *Id*. at 19.

prudent that SCOTUS go ahead and address the Eighth Amendment in its decision and clearly state that the penalties are nonpunitive. This could provide clarification and guidance for future excessive penalty litigation.

Surviving Death: Remedial versus Deterrent Penalties

Many court cases have addressed the issue of FBAR penalties surviving death (see Sheppard (2021b) for a summary). The question of whether the FBAR penalty is remedial or penal is also an issue when determining whether the FBAR penalty survives the death of the violator. The District Court for the Middle District of Florida held in *United States v. Estate of Schoenfeld* that the FBAR penalty survived the death of the taxpayer, with the court also noting that the 50 percent penalty was remedial (relying on *Helvering*) in that the penalties reimburse the government for costs. In its analysis, the court discusses that FBAR rules do not specifically state whether penalties survive death; therefore, one must examine treatment in common law.[66] The analysis of the court is based on whether the FBAR is remedial or penal. "It is well settled that remedial actions survive the death of a party, while penal actions do not. A remedial action compensates an individual for specific harm suffered whereas a penal action imposes damages upon the defendant for a general wrong to the public."[67]

Both parties use the Supreme Court case *Hudson v. United States*[68] in their arguments regarding whether the FBAR penalty is remedial or penal. "The Hudson framework entails (1) asking whether the legislature expressed a preference for labeling the penalizing mechanism as civil or penal and (2) applying the seven Kennedy factors to determine whether the scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. The Kennedy factors include (1) whether the sanction involves an affirmative disability or restraint, (2) whether it has historically been regarded as a punishment, (3) whether it comes into play only on a finding of scienter, (4) whether its operation will promote the traditional aims of punishment (retribution and deterrence), (5) whether the behavior to which it applies is already a crime, (6) whether an alternative purpose to which it may rationally be connected is assignable for it, and (7) whether it appears excessive in relation to the alternative purpose assigned."[69]

In terms of the civil versus penal analysis, "the court notes that Congress expressly indicates its preference that Section 5321 be regarded as civil by titling the statutory section authorizing the imposition of the sanction as civil penalties."[70] The court then analyzed the Kennedy factors and found that the FBAR penalty was intended as a civil penalty remedial in nature, and, therefore, the penalty was found to survive the death of Steven Schoenfeld.

In another case, *United States v. Gill*, the U.S. District Court for the Southern District of Texas held that the nonwillful FBAR penalties survived the death of the nonfiler. The IRS assessed FBAR penalties of $740,848 in what was determined as a nonwillful failure to disclose control and signature authority in numerous foreign bank accounts. As with willful penalties, the court had to determine if the FBAR penalty was remedial or penal.[71]

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66 *United States v. Estate of Schoenfeld*, 344 F. Supp. 3d 1354 (M.D. Fla. 2018).
67 *Id*.
68 *Hudson v. United States*, 522 U.S. 93, 118 S. Ct. 488, 139 L. Ed. 2d 450 (1997).
69 *United States v. Estate of Schoenfeld* (2018), *supra* at 76.
70 *Id*.
71 *United States v. Gill*, No. CIVIL ACTION H- 18-4020, 2021 BL 245429, 2021 U.S. Dist Lexis 122038 (S.D. Tex. June 30, 2021).

"The estate asserts that the penalties provide a recovery to the public, in general, not individual restitution and that they are disproportionate to the alleged harm suffered by the government, which, under the test, the estate contends applies, equates to the statute having a penal rather than remedial primary purpose."[72] It argues that the "question is not whether any aspect of the statute is remedial, but whether the primary purpose is (remedial)." In contrast, the government argues that "FBAR penalties are remedial, that the opinions of other courts that have held that they are remedial are persuasive and well-reasoned, that the penalties compensate the government for harm."[73]

Using the same *Hudson*/*Kennedy* factors to reach its conclusion, the "court finds that the purpose of the statute is primarily remedial and the claim, therefore, survives Mr. Gill's death."[74] Nevertheless, the issue of payment after death could also lead the courts to decide penalties should be assessed per account rather than per form. If penalties were a single penalty per form, the government's collection cost after death would be onerous for a minimal ($10,000) amount.

Recommendation 3: As previously mentioned, a per-account approach would level the playing field and decrease penalty complexity. As well, it would mitigate the government's collection costs after death. Further, trustees and executors should be aware of the potential for litigation and penalty as the decedent's estate is settled. Two simple updates could serve as notice. First, the "what's new" section in the Form 706 instructions should include an alert to trustees, executors, and tax preparers regarding the FBAR penalty's reach after death. Additionally, IRS Pub. 559's (Survivors, Executors, and Administrators) "what's new" could contain the same or similar update.

Repatriation

A final issue we discuss within current FBAR cases involves the repatriation of assets for FBAR violations. A Department of Justice official recently predicted an increase in repatriation orders (Velarde 2021b) to assist compliance and enforcement efforts. While past cases have involved tax evasion and repatriation of assets for other violations, the courts had not involved repatriation specific to FBAR penalties until the recent *Schwarzbaum* case. While the case also involves the question of the definition of "willful" and ultimately decided for the government,[75] the issue at hand has less to do with the willful or nonwillful nature but with whether the court has jurisdiction to repatriate foreign funds to pay for the FBAR penalties.

The District Court for the Southern District of Florida in *United States of America v. Isac Schwarzbaum* determined that Schwarzbaum's violation of the FBAR reporting requirement for the tax year 2006 was nonwillful but that the subsequent FBAR violations for tax years 2007, 2008, and 2009 were willful. The court ordered Mr. Schwarzbaum to pay the government $12 million plus interest and late penalties.[76,77] Since Mr. Schwarzbaum has not paid the amount due, nor does he have sufficient assets in the United States, the government filed a motion to repatriate foreign assets.

Isac Schwarzbaum has challenged the government's request for a repatriation order. He argues that since the assets are located in Switzerland, the United States does not have

[72] *Id*.
[73] *Id*.
[74] *Id*.
[75] *United States v. Schwarzbaum*, No 20-12061 (11th Circuit Jan. 25, 2022).
[76] *United States v. Schwarzbaum*, No. 18-cv-81147-BLOOM/Reinhart, 2020 BL 327679 (S.D. Fla. Aug. 26, 2020).
[77] *United States v. Schwarzbaum*, No. 18-cv-811487-BLOOM/Reinhart (S.D. Fla. Oct. 26, 2021).

jurisdiction to use those assets as payment. The court found the physical location of the assets irrelevant since the court has jurisdiction over Mr. Schwarzbaum himself.[78]

The *Schwarzbaum* case reminds practitioners of the court's reach for FBAR penalty collection. Particularly when dealing with foreign or digital currency, the physical location of the actual assets will not be relevant with respect to payment. The case also further emphasizes the idea of FBAR penalties as remedial in nature.

Recommendation 4: Similar to the previous recommendation, it is about communication between the taxpayer and the tax preparer. This can be addressed via forms, instructions, publications, IRS notices, and tax preparers. The following section details these recommendations.

V. COMMUNICATION AND TRANSPARENCY TO IMPROVE COMPLIANCE

The current FBAR reporting environment is complex. Given the hidden identifiers (e.g., Schedule B check-the-box), the level of communication and education to the taxpayer and tax preparer should be improved. All cases discussed in this manuscript leave the taxpayer with 100 percent of the penalty burden. We, therefore, suggest the addition of a preparer penalty. Perhaps this would encourage the tax preparer to ask more (or better) questions, to include targeted questions on the client intake form, and to have clients sign under penalty of perjury. If preparers can be held complicit in the situation, then there is an incentive for preparers to do their best to obtain foreign account information from the client and ensure it is properly reported. Preparer documentation would also leave an audit trail for failure to report litigation. This triangular approach (forms, instructions/other guidance, and tax preparer) should ensure that the goal of a best effort to report foreign accounts is accomplished.

Most IRS forms include a set of instructions, which include a "what's new" synopsis. This would be an ideal place to offer a reminder about the FBAR requirements. The first improvement for individual taxation is on Form 1040. Previously, we discussed the intersection of cryptocurrency and foreign account reporting. The tax year 2021 included a Form 1040 check-the-box requirement for the following question: "At any time during 2021, did you receive, sell, exchange, or otherwise dispose of any financial interest in any virtual currency?" The 2022 Form 1040 includes a modified question: "At any time during 2022, did you: (a) receive (as a reward, award, or compensation); or (b) sell, exchange, gift, or otherwise dispose of a digital asset (or a financial interest in a digital asset)? (See instructions.)"[79] The addition of an equivalent foreign account question either directly above or below the digital asset questions on Form 1040, page 1, seems to be low-hanging fruit. In fact, Sheppard (2006) recommended this nearly two decades ago.

Failure to complete Schedule B, Part III (Foreign Accounts and Trusts) check-the-box questions has led to willful FBAR penalties.[80] The Schedule B instructions should include a "what's new" FBAR account reporting alert. Additionally, the IRS should issue a notice during the individual tax filing season as a reminder to preparers. This would be an opportunity to revisit specific Form 1040 requirements, the taxpayer failure-to-report penalties, and the (suggested) tax preparer penalties. As well, annual IRS notices unique to estates would serve as a reminder of the failure-to-file penalty's after-death reach.

[78] *Id*.
[79] See https://www.irs.gov/pub/irs-pdf/f1040.pdf
[80] *Horowitz*, 123 AFTR 2d 2019-362 (D.C. MD 1/18/2019).

In addition to the required FBAR filing, Form 8938 (Statement of Specified Foreign Financial Assets) is a required FATCA filing for taxpayers with assets and income above certain thresholds. Although the IRS has provided a roadmap, confusion may arise for filing Form 8938 versus the required FBAR filing.[81] The roadmap has some semblance of a Venn diagram (the overlap of certain information for both filing requirements), as well as mutually exclusive reporting requirements for each. Christians (2014) disclosed that in 2012, the Government Accountability Office emphasized the compliance burden and complexity because of the duplication of information on Form 8938 and FBAR reporting.

Recommendation 5: We also recommend Form 8938 and FBAR reporting requirements be simplified and streamlined. Specifically, using only one form to capture all reporting requirements would ensure taxpayers are prompted for all reportable activities in one place. This should enhance reporting compliance while simultaneously reducing related preparation costs.

VI. CONCLUSION

Current cases have certainly made FBAR penalties more salient. Court findings have been consistent on three of the four issues presented here. Regarding the Eighth Amendment, courts do not agree that the FBAR penalties are overly excessive. FBAR penalties are also interpreted to survive death, making the estate responsible for any payments after the death of the violator. Finally, the courts seem to agree that payments of FBAR penalties should come from worldwide assets, regardless of if the individual is living within or outside of the United States.

In contrast, the issue of whether FBAR penalties should be assessed at a per account or per form level for nonwillful violations is still open to question. Some taxpayers in current cases argue that nonwillful penalties per account are excessive and that the intent of the law was to punish these violations due to costs associated with the collection and investigation process. An additional argument for penalizing per account instead of per form comes from the strongly worded dissent in the *Boyd* case. A minimal penalty of $10,000 would be negligible, regardless of intent, for many individuals with multiple and multijurisdictional accounts.

This issue may not have been considered with the BSA's initial creation. Moreover, BSA's 1970 enactment predates the current technological environment that allows easy and expeditious electronic fund transfers, digital currency, and greater use of foreign countries as places to hold U.S.-earned assets. Congress may want to maintain a minimum penalty of $10,000 but could leave room for higher penalties based on overall account value when multiple accounts exist. The idea of willful versus nonwillful penalties may also be reconsidered since the line between the two is blurry, particularly given the ease of establishing foreign accounts. If Congress and the courts decide on per-account penalties, willful or nonwillful, the penalty assessment could mean more in terms of fairness and equity across violators and eliminate the question of treatment due to willful or nonwillful action.

Rahimi-Laridjani (2009) calls for increased awareness and improved compliance with FBAR requirements. This awareness is still critical more than ten years later. Christians (2014) also calls for changes to FBAR, including criticizing what she refers to as paperwork crimes. We recommend Congress revisit the FBAR penalty rules, particularly in light of the change of penalties for nonwillful violations. Congress should define the penalties as remedial in nature, given the court's decisions on collection after death and from foreign assets. Because of the punitive nature, the law should

[81] See https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements

make clear the penalty is to be applied per account rather than per form. The court has maintained that these penalties do not violate the excessive fine rules of the Eighth Amendment. By creating a harsher, higher potential penalty, Congress would be sending a signal that these types of violations are to be taken seriously, and compliance may improve if the stakes are higher. With expected increases in foreign activity and virtual and cryptocurrency, these issues should become more prevalent, and a need for better compliance will be necessary.

Finally, the instructions and forms for FBAR should be clarified regarding the language and requirements. For example, *Horowitz* suggests constructive knowledge is implied vis-à-vis (1) signing and filing F1040 and (2) failing to check "yes" at the bottom of Schedule B regarding foreign accounts. This led to a willful FBAR violation.[82] Currently, tax preparers do not face penalties specific to FBAR. One suggestion would be to apply separate FBAR penalties on the preparer level to encourage preparers to ask questions surrounding FBAR. Form 1040 and Schedule B instructions need additional clarification for requirements surrounding FBAR. Given low compliance on both FBAR and cryptocurrency, asking the question about foreign accounts should be added to page 1 of Form 1040, as has cryptocurrency. Form 8938 (FATCA) should be simplified with a clarification that FinCEN 114 FBAR filing is a separate filing. Currently, some taxpayers do not realize the two are separate required filings.

Overall, recent litigation shows a need for better communication of expectations and intent regarding FBAR requirements and filing, along with increased awareness by taxpayers and preparers of potential penalties for violation.

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