No. 21-1195

In the
Supreme Court of the United States

ALEXANDRU BITTNER,
Petitioner,
v.
UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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August 24, 2022

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BRIEF OF THE AMERICAN COLLEGE OF TAX COUNSEL

AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of petitioner Alexandru Bittner.[1]

STATEMENT OF INTEREST

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions, and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation

[1] Pursuant to Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel for the College provided timely notice of the College's intent to file this brief, and all parties have consented in writing to its filing.

in continuing legal education programs and seminars;

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and

- To facilitate scholarly discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College. This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.[2]

The College has long supported policies that enhance and encourage voluntary compliance. Compliance depends on transparent, fair, and consistent penalty regimes. Because the enforcement of foreign account reporting requirements under the Bank Secrecy Act of 1970 ("BSA" or the "Act")[3] is delegated

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[2] Scott Michel, Regent of the College, abstained from the decision of the Board of Regents to prepare and file this brief, and did not participate in the preparation or review of this brief.

[3] Pub. L. No. 91-508 (Title II), 84 Stat. 1114 (1970). Currently codified in 31 U.S.C. § 5311 *et seq.*

to the Internal Revenue Service ("IRS"), tax lawyers frequently represent clients in matters involving Reports of Foreign Bank and Financial Accounts ("FBAR").[4]

The College submits this *amicus* brief because of its concern that the Fifth Circuit's reading of the non-willful FBAR penalty provision under the BSA is contrary to the applicable statute, regulations, Congressional intent, and IRS administrative guidance. The Fifth Circuit's position also results in an unwarranted and unreasonable application of sanctions for the non-willful failure to timely and accurately report an interest in foreign bank accounts.

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[4] The provisions governing FBARs were enacted under Title 31 of the United States Code, not Title 26, which contains the Internal Revenue Code. In 2003, the Director of the Financial Crimes Enforcement Network ("FinCEN"), a bureau of the Treasury Department, delegated FBAR civil enforcement authority to the Commissioner of the IRS under a Memorandum of Agreement. *See* 31 C.F.R. § 1010.810(g); Press Release, *IRS and FinCEN Announce Latest Efforts to Crack Down on Tax Avoidance Through Offshore Accounts*, IR-2003-48 (Apr. 10, 2003). The delegated authority includes the authority to "assess and collect civil penalties under 31 U.S.C. § 5321 and 31 C.F.R. § 1010.820." 31 C.F.R. § 1010.810(g). The Secretary of the Treasury ("Secretary") subsequently issued a final rule to reflect that FBAR enforcement authority had been delegated to the IRS. *See* 68 Fed. Reg. 26489 (May 16, 2003) (codified at 31 C.F.R. § 103.56(g)).

SUMMARY OF ARGUMENT

The IRS describes the purpose of the FBAR as follows:

> U.S. persons maintain overseas financial accounts for a variety of legitimate reasons including convenience and access. Foreign financial institutions may not be subject to the same reporting requirements as domestic financial institutions. The FBAR is used by the U.S. government to identify persons who may be using foreign financial accounts to circumvent U.S. law. FBAR information can help identify or trace funds used for illicit purposes or identify unreported income maintained or generated abroad.[5]

This case presents a question that affects millions of individuals and entities with an interest in or signature or other authority over foreign bank or financial accounts that, in the aggregate, exceed $10,000 at any point during the calendar year.[6] That question is whether a *non-willful* failure to timely file

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[5] IRS Pub. 5569, Report of Foreign Bank & Financial Accounts (FBAR) Reference Guide (Rev. 3-2022), at 1 ("2022 FBAR Reference Guide").

[6] U.S. persons who have a financial interest in or signature or other authority over foreign financial accounts with an aggregate balance exceeding $10,000 at any point in a calendar year are required to file an FBAR. *See* 31 U.S.C. § 5314; 31 C.F.R. §§ 1010.306, 1010.350.

an accurate FBAR subjects a U.S. person[7] to a single non-willful penalty for failure to file the FBAR (the per form approach), or to separate non-willful penalties for each account not accurately reported on the FBAR (the per account approach).

The applicable statute and regulations, set forth below, are clear and unambiguous. They require U.S. persons to file a single FBAR each year and impose a single non-willful penalty of no more than $10,000 for failing to timely file an accurate FBAR, no matter how many foreign accounts are, or should have been, reported on that form. In fact, the statutory language imposing the non-willful FBAR penalty never uses the word "account."

Even assuming for purposes of argument that the statute and regulations are ambiguous, established rules of statutory construction dictate that a single civil penalty of no more than $10,000 applies when a U.S. person fails to timely file an accurate FBAR due to non-willful conduct.

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[7] Under the BSA, a U.S. person includes: (i) a citizen of the United States; (ii) a resident of the United States; and (iii) an entity created, organized, or formed under the laws of the United States, including, but not limited to, a corporation, partnership, limited liability company, trust, or estate. 31 C.F.R. § 1010.350(b). A U.S. resident for purposes of the FBAR requirements is a resident alien as defined by 26 U.S.C. § 7701(b), but using the Title 31 definition of the "United States" found at 31 C.F.R. § 1010.100(hhh).

ARGUMENT

AS RECOGNIZED BY THE IRS IN ITS ADMINISTRATIVE GUIDANCE, THE BSA FBAR STATUTES AND REGULATIONS REQUIRE A PER FORM APPROACH

Imposing non-willful penalties under the per account approach advocated by the government and adopted by the Fifth Circuit leads to unjustified disparate treatment among non-willful actors, and incongruous treatment as between non-willful and willful violations. Penalties should encourage compliance. When they are unevenly or inequitably applied, penalties have the opposite effect by undermining confidence in and compliance with the regulatory system.

The IRS has taken inconsistent positions regarding penalties for non-willful FBAR violations in its administrative guidance. However, before 2019, federal authorities, including the IRS in its forms and publications, largely took a per form approach, and this position is consistent with the statutes and regulations.

The Secretary is required to promulgate regulations that impose reporting requirements on U.S. persons who maintain foreign bank and financial accounts:

> Considering the need . . . to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury

> shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, *file reports*, or keep records and *file reports*, when the resident, citizen, or person . . . maintains a relation . . . with a foreign financial agency.[8]

To this end, 31 C.F.R. § 1010.350(a) provides:

> Each United States person having a financial interest in, or signature or other authority over, a bank, securities, or other financial account in a foreign country shall report such relationship to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in *a reporting form* prescribed under 31 U.S.C. 5314 to be filed by such persons. The *form* prescribed under section 5314 is the Report of Foreign Bank and Financial Accounts (TD-F 90-22.1), or any successor form.[9]

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[8] 31 U.S.C. § 5314(a) (emphases added).

[9] 31 C.F.R. § 1010.350(a) (emphases added). While this regulation refers to an account in the singular, the Dictionary Act, 1 U.S.C. § 1, provides that "unless the context indicates otherwise," "words importing the singular include and apply to several persons, parties, or things." In the FBAR context, where multiple accounts are reported on one form, "account" and "relationship" include "accounts" and "relationships."

To satisfy the reporting requirement set forth in 31 C.F.R. § 1010.350(a), U.S. persons must file a single annual report "with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year."[10] The reports required by 31 C.F.R. § 1010.350 must be filed on a form prescribed the Secretary.[11] For the years at issue in this case, Mr. Bittner was required to file an FBAR—a TD F 90-22.1—by June 30 of the year following the year in which he had a relationship with reportable foreign accounts.[12]

Under 31 U.S.C. § 5321(a)(5)(A), the Secretary "may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314."[13] The civil penalty for a *non-willful* violation of the reporting requirements is set forth at 31 U.S.C. § 5321(a)(5)(B), which provides "the

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[10] 31 C.F.R. § 1010.306(c).

[11] 31 C.F.R. § 1010.306(d).

[12] Since 2013, foreign accounts are reported on FinCEN Form 114. *See* Final Notice, 77 Fed. Reg. 12367 (2012) (requiring electronic filing of certain BSA reports, including new FinCEN Form 114, by July 1, 2012). For all taxable years beginning after December 31, 2015, FinCEN Form 114 must be filed by April 15. *See* Surface Transportation and Veterans Health Care Improvement Act of 2015, Pub. L. No. 114-41, § 2006(b)(11), 129 Stat. 443 (changing filing date for FinCEN Form 114 from June 30 to April 15).

[13] 31 U.S.C. § 5321(a)(5)(A). BSA 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." *California Bankers Ass'n v. Shultz,* 416 U.S. 21, 26 (1974).

amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000."

The civil penalty for a *willful* violation of the reporting requirements is set forth in 31 U.S.C. §§ 5321(a)(5)(C) & (D), which provide:

> (C) Willful violations.—In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—
>
> > (i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—
> >
> > > (I) $100,000, or
> >
> > > (II) 50 percent of the amount *determined under subparagraph (D)*.
>
> (D) Amount.—The amount determined under *this subparagraph* is—
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> * * *
>
> > (ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to *an account*, the balance in *the account* at the time of the violation.

(Emphases added). In contrast to the non-willful penalty provision, which makes no reference to an

account, the amount of the willful penalty is tied to the balance in the foreign accounts.[14]

A U.S. person required to file an FBAR is relieved of all civil liability if they can show reasonable cause for failure to timely file an accurate FBAR:

> (ii) Reasonable cause exception.—No penalty shall be imposed under subparagraph (A) with respect to any violation if—
>
> > (I) such violation was due to reasonable cause, and
> >
> > (II) the amount of the transaction or the balance in *the account* at the time of the transaction was properly reported.[15]

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[14] The BSA also imposes criminal sanctions for willful violations of the Act's reporting requirements, including willful failure to timely file an accurate FBAR. *See* 31 U.S.C. § 5322(a).

[15] 31 U.S.C. § 5321(a)(5)(B)(ii) (emphasis added). The IRS has recognized that the reasonable cause exception applies to the failure to file an FBAR, even though 31 U.S.C. § 5321(a)(5)(B)(ii) refers to a "transaction." The Internal Revenue Manual ("IRM") previously provided: "No penalty will be asserted if the IRS determines that the failure to timely file an FBAR was not willful and was due to reasonable cause." IRM 4.26.16.4.11(4) (11-06-2015). Courts have supported this view. *See Jarnagin v. United States*, 134 Fed. Cl. 368, 370 (2017); *United States v. Ott*, No. 18-cv-12174, 2019 WL 3714491, at *2 (E.D. Mich. Aug. 7, 2019); *see also Moore v. United States*, No. 13-cv-2063, 2015 WL 1510007, at *4 (W.D. Wash. Apr. 1, 2015).

Again, unlike the non-willful penalty provision, the reasonable cause exception expressly refers to "the account."

Under the statutory regime and regulations, a U.S. person having reportable foreign accounts with an aggregate value exceeding $10,000 at any time in a calendar year must file an FBAR for that year reporting the names of the financial institutions at which the accounts are held, the addresses of those institutions, the account numbers, and the account balances.[16] The requirement to file one FBAR is unrelated to the number of reportable accounts; instead, the aggregate value of those accounts in a calendar year triggers the filing requirement. All reportable accounts are included on one annual FBAR; a separate form is not required for each account.

"Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another."[17] Thus, Congress is presumed to have intentionally omitted any reference to "an account" in the non-willful FBAR penalty provision, and to have purposefully referred to "an

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[16] *See* 31 C.F.R. § 1010.350(a); Form TD F 90-22.1 (Rev. Jan. 2012), *General Instructions*.

[17] *Fortney v. United States*, 59 F.3d 117, 120 (9th Cir. 1995) (applying this presumption to the Internal Revenue Code). *Accord Republic of Sudan v. Harrison*, __ U.S. __, 139 S. Ct. 1048, 1058 (2019) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (same).

account" in the reasonable cause exception and the willful FBAR penalty provisions. Imposing a non-willful penalty on a per account basis ignores this purposeful construction of the penalty statute.

The history of the BSA lends further support to the position that the non-willful FBAR penalty applies per form, not per account. Initially, the BSA did not punish non-willful violations of the FBAR reporting requirements, and the penalty for willful violations was the greater of $25,000 or 50 percent of the amount in the unreported account(s), with a cap of $100,000.[18] When Congress added the non-willful FBAR penalty in 2004,[19] rather than using the preexisting willful penalty provision as a starting point, Congress enacted undeniably distinct language that does not base the non-willful penalty on the number of or balance in the unreported accounts.

Moreover, in drafting the *non-willful* FBAR penalty provision, Congress took care to expressly distinguish the *willful* FBAR penalty provision: "*Except as provided in subparagraph (C)*, the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000."[20]

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[18] 31 U.S.C. § 5321(a)(5), amended by American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 821(a), 118 Stat. 1418.

[19] *See id.*

[20] 31 U.S.C. § 5321(a)(5)(B)(i) (emphasis added). *See* M. Kummer & S. Mezei, *The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny*, Tax Notes Federal (July 15, 2019) ("In short, Congress's use of 'an account' for penalties for willful violations but not for non-willful violations supports a per-form construction.").

Although the reasonable cause exception at 31 U.S.C. § 5321(a)(5)(B)(ii) requires that "the amount of the transaction or the balance in the account at the time of the transaction . . . [be] properly reported," this does not suggest that the non-willful FBAR penalty should be *imposed* on a per-account basis. Instead, the exception requires anyone seeking to *avoid* the single $10,000 non-willful penalty for failure to timely file an accurate FBAR to show that they had reasonable cause for failing to report, on a single form, each and every account and all related information.[21]

In addition, while 31 C.F.R. § 1010.350 provides that every person who has control over a foreign account shall report "such relationship . . . for each year in which such relationship exists," this does not mean that the related civil penalties are calculated per unreported "relationship." As noted, the core of the Secretary's regulations implementing 31 U.S.C. § 5314 is the filing of a single annual form that requires U.S. persons to report a variety of information regarding each account. The government would not take the position that a single foot fault, such as the inadvertent failure to include the correct account number or proper address of a financial institution on an FBAR, results in a separate non-willful penalty. Instead, the penalty is specifically tied to the violation of the filing obligation under the regulations promulgated to carry out the mandate of 31 U.S.C. § 5314.

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[21] *See supra* note 15.

It is clear from the statutory language that the harm Congress seeks to address is the failure to timely file an accurate FBAR and the civil penalty provisions were not intended to inflict a greater penalty on those who violate the reporting requirement through negligence, inadvertence, or mistake than on those who willfully seek to avoid the reporting obligations. Yet, if the Fifth Circuit's decision is affirmed, a U.S. person who *willfully* violates 31 U.S.C. § 5314 could face lesser penalties than a U.S. person who commits a non-willful violation.

Consider an accountholder who maintains $1,000,000 in a foreign account during the calendar year and willfully fails to timely file an accurate FBAR. Prior to the deadline to file the FBAR, the accountholder closes the account and, as a result, on the date of violation (the filing deadline), the maximum balance in the account is zero and the maximum *willful* penalty is therefore $100,000 under 31 U.S.C. § 5321(a)(5)(C)(i)(I), adjusted for inflation. Compare this to a non-willful actor with a reportable interest in 20 foreign accounts, with an aggregate high balance of $50,000 during the calendar year. Under the government's and the Fifth Circuit's reasoning, the non-willful actor faces aggregate penalties up to $200,000 under 31 U.S.C. § 5321(a)(5)(B)(i). This simply cannot be what Congress intended when it enacted the non-willful penalty in 2004.

The Fifth Circuit's decision also results in disparate treatment among U.S. persons engaged in non-willful conduct. A non-willful actor failing to

report one foreign account with a balance of $1,000,000 would be subject to a single non-willful penalty of up to $10,000, while another actor engaging in the same non-willful conduct but with respect to a dozen foreign accounts with balances less than $1,000 each would be subject to multiple non-willful penalties up to an aggregate of $120,000. This scenario is not theoretical. In fact, in a case filed by the United States in 2019, the IRS assessed separate non-willful FBAR penalties of $10,000 each against an individual for numerous accounts, including those with balances of only $30, $50, $64, $83, $397, $433, and $816 (i.e., $70,000 in non-willful FBAR penalties for accounts with an aggregate high balance of less than $1,500).[22] There is simply no merit in this approach.

Moreover, under the regulations and applicable FBAR instructions, if a U.S. person has a financial interest in 25 or more foreign financial accounts, the filer need only fill in the number of accounts on the FBAR and is not required to list detailed information about those accounts.[23] As a result, if the filer non-

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[22] Answer, *United States v. Patel*, No. 8:19-cv-792 (C.D. Cal. Nov. 29, 2021), Dkt. 8, at 4 (filed on May 3, 2019). *Accord* Order, *United States v. Hadley*, No. 8:21-cv-1357, 2022 WL 899701 (M.D. Fla. Mar. 28, 2022), Dkt. 23, *appeal pending* (the IRS assessed non-willful FBAR penalties totaling $230,000 for 23 unreported accounts over a two-year period).

[23] *See* 31 C.F.R. §§ 1010.350(g)(1) & (2); Form TD F 90-22.1 (Rev. Jan. 2012), *General Instructions, Part II, Item 15 & Part IV*; *BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114)* (Rev. Jan. 2017), at 14 (Part I, Item 14).

willfully fails to timely file an accurate FBAR, the filer faces a single $10,000 penalty, despite the existence of more than two dozen unreported accounts. Thus, under the Fifth Circuit's reasoning, a non-willful filer with more than 24 accounts would face a single $10,000 penalty, while a non-willful filer with two to 24 accounts would face a non-willful penalty up to $240,000. Again, this defies logic and the Ninth Circuit recognized as much when it adopted a per form approach in *United States v. Boyd,* 991 F.3d 1077 (9th Cir. 2021).

Administrative guidance also supports the per form approach. The FBAR instructions effective for 2011 and in place today provide: "A person who is required to file *an FBAR* and *fails to properly file* may be subject to a civil penalty not to exceed $10,000 *per violation*."[24] The term "*violation*" refers back to the requirement "to file *an FBAR*," and not to the specific accounts listed on the FBAR.[25]

Similarly, in 2009, the Staff of the Joint Committee on Taxation ("Joint Committee") endorsed a per form approach:

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[24] Form TD F 90-22.1 (Rev. Jan. 2012), *General Instructions, Penalties* (emphases added); *BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114)* (Rev. Jan. 2017), at 22 (Penalties)*; see also Financial Crimes Enforcement Network; Amendment to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts*, 75 Fed. Reg. 8854 (Feb. 26, 2010) ("A person who is required to file *an FBAR* and *fails to properly file* may be subject to a civil penalty not to exceed $10,000.") (emphasis added).

[25] Form TD F 90-22.1 (Rev. Jan. 2012).

> *Failure to file the FBAR* is subject to ... civil penalties. Since 2004, the civil sanctions have included a penalty of up to $10,000 for *failures* that are not willful[.][26]

A 2016 Report prepared by the Senate Finance Committee ("2016 Committee Report") also supports the view that one civil penalty of up to $10,000 per year is allowed for a non-willful violation of the FBAR filing requirements:

> *Willful* failure to file *an FBAR* may be subject to penalties in amounts not to exceed the greater of $100,000 or 50 percent of the amount in the account at the time of *the violation*. A non-willful, but *negligent, failure to file* is subject to a penalty of $10,000 for *each negligent violation*. The penalty may be waived if (1) there is reasonable cause for the failure to report and (2) the amount of the . . . balance in the account was properly reported.[27]

On June 17, 2008, the IRS issued guidance advising that "[c]ivil and criminal penalties for noncompliance with the *FBAR filing requirements* are severe. Civil penalties for a *non-willful* violation

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[26] Staff of the Joint Comm. on Taxation, Description of Revenue Provisions Contained in the President's Fiscal Year 2010 Budget Proposal (Sept. 2009), JCS-4-09 No. 9, 2009 WL 2996021 (emphases added).

[27] S. Rep. No. 114-298, p. 23 (July 12, 2016) (emphases added).

can range up to $10,000 per violation."[28] Although the IRS updated the Internal Revenue Manual[29] less than a month later, taking the position that "FBAR penalties are determined per account, not per unfiled FBAR,"[30] the IRS reverted back to the per form approach in its FBAR Reference Guide, which the IRS issued "to educate and assist U.S. persons who have the obligation to file the FBAR."[31] For example, the FBAR Reference Guide created on February 28, 2017 ("2017 FBAR Reference Guide") advised: "For those violations occurring on or before November 2, 2015, the IRS may assess a civil penalty not to exceed $10,000 per violation for non-willful violations that

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[28] *IRS Reminds Taxpayers to Report Certain Foreign Bank and Financial Accounts by June 30,* IR-2008-79 (June 17, 2008) (emphases added).

[29] The Internal Revenue Manual "govern[s] the internal affairs of the Internal Revenue Service." *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983); *United States v. Horowitz*, 361 F. Supp. 3d 511, 515 (D. Md. 2019) (citing *Horne*). It is not binding on the IRS and may be used "on a limited basis, to provide guidance in interpreting terms in the regulations." *Horowitz*, 361 F. Supp. 3d at 515 (*quoting Vons Cos. v. United States*, 51 Fed. Cl. 1, 13 n.12 (2001), *modified*, No. 00-234T, 2001 WL 1555306 (Fed. Cl. Nov. 30, 2001), *and abrogated on other grounds by Marriott Intern. Resorts L.P. v. United States*, 437 F.3d 1302 (Fed. Cir. 2006), *as recognized in Alpha 1, L.P. ex rel. Sands v. United States*, 83 Fed. Cl. 279, 288 (2008)).

[30] *See* IRM 4.26.16.4(7) (07-01-2008).

[31] FBAR Reference Guide (created Apr. 23, 2014). The IRS did not date the FBAR Reference Guide prior to issuing the 2022 FBAR Reference Guide. However, the earliest public reference to the FBAR Reference Guide appears to be in February 2011 and the document properties of updated versions reflect the respective creation dates.

are not due to reasonable cause."[32] The 2017 FBAR Reference Guide also included a chart listing "the inflation-adjusted civil and criminal penalties that may be asserted for not complying with the FBAR reporting and requirements."[33] For a "Non-Willful Violation," the chart reflected a civil penalty "[u]p to $12,459 for *each negligent violation*."[34]

Reason dictates that "a violation" is a failure to file an accurate FBAR, not a failure to report every account or, taken to its extreme, a failure to accurately complete every line item on an FBAR.[35] The IRS acknowledged this point in a June 2014 Fact Sheet, *Offshore Income and Filing Information for Taxpayers with Offshore Accounts*, FS-2014-7: "For the FBAR, the penalty may be up to $10,000 *if the failure to file* is non-willful." (emphasis added).

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[32] *See* FBAR Reference Guide (created Feb. 28, 2017), at 8 (hereinafter "2017 FBAR Reference Guide").

[33] Inflation adjustments are required by the Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. § 2461, Statutory Notes and Related Subsidiaries), as amended by Pub. L. No. 114-74 (2015). *See* 31 C.F.R. § 1010.821 (noting that the maximum penalty for amount for non-willful FBAR penalties assessed on or after January 24, 2022 is $14,489).

[34] *See* 2017 FBAR Reference Guide, at 7 (emphasis added).

[35] Following the Fifth Circuit's ruling to its (il)logical extreme, a "violation" of a "reporting requirement" could result in a $10,000 non-willful penalty for every one of the twenty-four items of information required for each account on an FBAR, not just per account. A filer who transposed a number in a zip code or misspelled the name of a financial institution could theoretically be subject to a $10,000 penalty.

Moreover, when the IRS proposes to assess FBAR penalties, it sends a standard Letter 3709, which the Ninth Circuit described as follows:

> The letter explained that the IRS was "proposing a penalty" and included two checked boxes. The first box explained that the IRS was "proposing the assessment of a penalty under 31 U.S.C. § 5321(a)(5) for failing to meet the filing requirements of 31 U.S.C. § 5314. For each calendar year, any U.S. person having one or more foreign accounts with maximum balances aggregating over $10,000 is required to file [the FBAR] with the Internal Revenue Service by June 30th of the following year." The second box explained that "*[f]or the failure to file [the FBAR] due on or after June 30, 2005, the penalty cannot exceed $10,000.*"[36]

The Ninth Circuit found the Letter 3709 to be "consistent with the 2014 Fact Sheet," supporting the per form approach.[37] In short, where the conduct of a filer is non-willful, the number of unreported accounts and the aggregate balance of those accounts are irrelevant.

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[36] *Boyd*, 991 F.3d at 1085 n.11 (emphasis in original).

[37] *Id.*

In 2015, following the issuance of interim guidance for FBAR penalties,[38] the IRS once again took the position that a non-willful FBAR penalty can be applied on a per account basis, but only in unusual cases:

> (1) After May 12, 2015, *in most cases*, examiners will recommend one penalty per open year, regardless of the number of unreported foreign accounts. The penalty for each year is limited to $10,000. Examiners should still use the mitigation guidelines and their discretion in each case to determine whether a lesser penalty amount is appropriate.
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> * * *
>
> (3) For other cases, the facts and circumstances (considering the conduct of the person required to file and the aggregate balance of the unreported foreign financial accounts) may indicate that asserting a separate nonwillful penalty for each unreported foreign financial account, and for each year, is warranted. . . .[39]

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[38] Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, SBSE-04-0515-0025, Attachment 1(3) (May 13, 2015).

[39] *See* IRM 4.26.16.6.4.1 (11-06-2015) (emphasis added).

The current version of the Internal Revenue Manual ambiguously references a "per violation" approach:

> (1) In ascertaining the penalty amount for non-willful violations (assuming the reasonable cause exception does not apply), first determine whether the mitigation criteria in *Exhibit 4.26.16-2* are met.
>
> (2) If the mitigation criteria are met, make a preliminary penalty calculation using the mitigation guidelines in *Exhibit 4.26.16-2*, except limit the total mitigated penalties for each year to the statutory maximum for a single non-willful violation. Allocate the total penalty amount for each year among all violations in that year for which a penalty is recommended. This is the penalty amount, unless, in the examiner's discretion as noted in *IRM 4.26.16.5.2.1*, the facts and circumstances of a case warrant a different penalty amount. . . .
>
> * * *
>
> (4) If the mitigation criteria are not met, or are met but the facts and circumstances of a case warrant a different penalty amount than calculated in paragraph (2), examiners will consider, as appropriate:

> (a) Asserting penalties, totaling (in each year for which non-willful violations are being penalized) no more than the statutory maximum penalty amount for a single violation, regardless of the number of non-willful violations. Since FBAR penalties are determined under the statute on a per-violation basis, the total penalty amount for each year should be allocated among all non-willful violations for which a penalty is recommended.[40]

Most recently, on March 31, 2022, the IRS released a new Fact Sheet "to help filers prepare and file their FBAR."[41] The IRS offered the following limited guidance to filers:

> **Penalties for failure to file an FBAR**
>
> Those who don't file an FBAR when required may be subject to significant civil and criminal penalties. Criminal violations of FBAR rules can result in a fine and/or five years in prison. The U.S. government adjusts the penalty amounts annually for inflation.

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[40] IRM 4.26.16.5.4.1 (06-24-2021) (emphases in original).

[41] *Details on reporting foreign bank and financial accounts*, FS-2022-24 (Mar. 2022).

> The IRS will not penalize those who properly report a foreign financial account on a late-filed FBAR, and the IRS finds they have reasonable cause for late filing.[42]

By titling this section "Penalties for failure to *file an FBAR*" and using the same language in the text, the IRS once again suggests that a single penalty per form, per year, will apply to a non-willful failure to timely file an FBAR.

In considering the aforementioned guidance issued by the IRS, it is important to note that the IRS has limited authority with respect to FBAR penalties. The Secretary delegated to the IRS the authority to:

i. Investigate possible civil violations of the FBAR requirements;

ii. Issue, serve, and recommend enforcement of summonses;

iii. Prepare and file proofs of claims for FBAR penalties and to take any appropriate action to protect the government's interest in bankruptcy, state and federal receiverships, and other state and federal insolvency actions;

iv. Make referrals to the Department of Justice to institute proceedings for

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[42] *Id.*

collection, including bankruptcy proceedings;

v. Issue administrative rulings;

vi. Provide a pre-assessment hearing and make final administrative determinations concerning the existence or amount of an FBAR penalty;

vii. Provide a hearing, receive and review evidence, and review the determination;

viii. Enter into and approve a written agreement with any person relating to the person's civil liability for an FBAR penalty; and

ix. Sign agreements extending the period of limitations on assessment or collection of civil FBAR penalties.[43]

The Delegation Order does not authorize the IRS to issue regulations or interpretations of the penalty provisions.[44]

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[43] *See* IRM 1.2.2.14.13 (04-11-2012), *Delegation Order 25-13 (formerly DO 4-35, Rev. 1), Enforcement of Report of Foreign Bank and Financial Accounts (FBAR) Requirements* (hereinafter "Delegation Order 25-13"); *see also* 31 C.F.R. § 1010.810(g).

[44] *See* Delegation Order 25-13.

Finally, while the language in the Internal Revenue Manual ostensibly provides for the assessment of a separate non-willful FBAR penalty for each unreported account, before 2019 this approach found no support with the courts. For example, in 2016 the U.S. Tax Court noted that, "[a] person who *fails to file a required FBAR* may be assessed a civil monetary penalty…. The amount of the penalty is capped at $10,000 unless the failure was willful."[45] The next year, the Court of Federal Claims wrote that the Secretary may "impose a civil monetary penalty of not more than $10,000 for *failure to file* [a single FBAR]."[46]

There are several district court cases to the same effect. *See*, *e.g.*, *United States v. Shinday,* No. 2:18-cv-06891, 2018 WL 6330424, at *2 (C.D. Cal. Dec. 3, 2018) (in August 2016, "the IRS assessed non-willful FBAR penalties against [the taxpayer who had numerous foreign accounts] for the tax years 2007 to 2011… Each penalty was $10,000, totaling $50,000."); *United States v. Marsteller*, No. 7:17-cv-00441, 2018 WL 4604033, at *2 (W.D. Va. Sept. 25, 2018) (holding that "[t]he penalty for non-willful violations of the reporting requirements cannot exceed $10,000," and noting that, although the taxpayer had more than one foreign account, in 2015 "Marsteller signed an agreement with the Internal Revenue Service consenting to the assessment and

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[45] *Whistleblower 22716–13W v. Commissioner*, 146 T.C. 84, 90 (2016) (emphasis added).

[46] *Jarnagin v. United States*, 134 Fed. Cl. 368, 370 (Ct. Cl. 2017) (emphasis added).

collection of civil penalties in the amount of $10,000 per year for each of the four years at issue, for a total amount of $40,000."); *Kentera v. United States*, No. 2:16-cv-1020, 2017 WL 401228, at *2 (E.D. Wis. Jan. 30, 2017) ("For non-willful violations [of the requirement to file a single FBAR per year], the penalty cannot exceed $10,000."); *Moore v. United States,* No. 13-cv-2063, 2015 WL 1510007 (W.D. Wash. Apr. 1, 2015) (repeatedly describing a non-willful penalty of $40,000 for four years as "the maximum penalty"). *Boyd* appears to be the first case where the IRS made the assertion in court that multiple non-willful FBAR penalties apply to a single accurate, but untimely, FBAR.[47]

To encourage voluntary compliance, the IRS understands that it must assure those subject to filing and reporting requirements that they will be treated fairly.[48] Yet, in the FBAR context, the IRS has assessed exorbitant penalties in cases in which it agrees that the conduct at issue was unintentional and non-willful. Indeed, in this case, the $2.7 million penalty sought by the government represents a *54-fold* increase over the $50,000 penalty that would apply under the per form approach.

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[47] *United States v. Boyd*, No. 2:18-cv-803, 2019 WL 1976472 (C.D. Cal. Apr. 23, 2019), *rev'd and remanded*, 991 F.3d 1077 (9th Cir. 2021).

[48] *See* IRM 20.1.1.2.1(10) (10-25-2011) ("Penalties best aid voluntary compliance if they support belief in the fairness and effectiveness of the tax system."); IRM 20.1.1.1.3(4)(c) (10-19-2020) ("A wrong [penalty] decision, even though eventually corrected, has a negative impact on voluntary compliance.").

CONCLUSION

The applicable statutory and regulatory provisions establish that a non-willful failure to timely file an FBAR exposes a U.S. person with reportable foreign financial accounts to one civil penalty not to exceed $10,000. The IRS correctly supported the per form approach in its administrative guidance, and several courts have concurred.[49] The establishment of a per account approach will lead to unreasonable and grossly inequitable results contrary to the statute, the regulations, and Congressional intent. Accordingly, the College respectfully requests that the Court reverse the decision of the Fifth Circuit and hold that a non-willful penalty for failure to file an FBAR is limited to a maximum of $10,000 per FBAR.

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[49] *See, e.g., United States v. Giraldi*, No. 20-cv-2830, 2021 WL 1016215 (D.N.J. Mar. 16, 2021) (taking a per form approach); *United States v. Kaufman*, No. 18-cv-787, 2021 WL 83478 (D. Conn. Jan. 11, 2021) (same) (government appeal pending); *see also United States v. Horowitz*, 978 F.3d 80, 81 (4th Cir. 2020) (observing but not holding, in a case concerning willful violations, that "[a]ny person who fails to file an FBAR is subject to a maximum civil penalty of not more than $10,000") (citing 31 U.S.C. § 5321(a)(5)).

Respectfully submitted,

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