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 TRUST AND ESTATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The American College of Trust & Estate Counsel ("ACTEC") is a nonprofit organization of more than 2,500 trust and estate lawyers and law professors from throughout the United States, Canada, Central and South America, Europe, and Asia. Fellows of ACTEC are skilled and experienced in trust and estate law and are elected by their peers on the basis of their professional reputation, quality of their work, and their substantial pro bono contributions to the practice and the public, including lecturing, writing, teaching, and drafting court rules and legislation. ACTEC is dedicated to enhancing trust and estate law and practice through research, education, technical advice to governments, and, on rare occasions, offering assistance to courts in understanding this area of the law.

Established in Los Angeles in 1949, ACTEC's office is now located in Washington D.C. and is governed by 39 Fellows who serve on its Board of Regents, six of whom are the officers of ACTEC. Much of the work done by ACTEC is performed by committees, including the Amicus Review Committee.

[1] Counsel for the parties were not in any way involved in authoring this brief. Neither counsel for a party nor a party made a monetary contribution to fund the preparation or submission of this brief. No other monetary contributions were made. Both parties consented to the filing of this brief.

The Amicus Review Committee[2] and the officers of ACTEC voted to approve ACTEC's filing of an amicus brief in this case.[3]

In this case, we believe we can assist the Court in understanding the history and evolution of the statute at issue and the implications of its

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[2] The Amicus Review Committee consists of Jane G. Ditelberg, The Northern Trust Company, Chicago, Illinois (Chair); Gregory N. Barrick, Durham, Jones & Penigar, Salt Lake City, Utah; Turney P. Berry, Wyatt, Tarrant & Combs, LLP, Louisville, Kentucky (Past Regent of ACTEC); Margaret G. Lodise, Sacks, Glazier, Franklin & Lodise LLP, Los Angeles, California (Secretary of ACTEC); Carlyn S. McCaffrey, McDermott Will & Emery LLP, New York, New York (Past President of ACTEC); Steven K. Mignogna, Archer & Greiner, P.C., Voorhees, New Jersey (ACTEC Regent, Chair of Fiduciary Litigation Committee, and State Chair, New Jersey); Professor Robert H. Sitkoff, Harvard Law School, Cambridge, Massachusetts; Bruce M. Stone, Goldman Felcoski & Stone, P.A., Coral Gables, Florida (Past President of ACTEC),; and Margaret Van Houten, West Des Moines, Iowa (Past Regent of ACTEC).

[3] The brief was drafted by an ad hoc committee consisting of Suzanne Shier, Levenfeld, Pearlstein, LLC, Chicago, Illinois (Chair, Chair of International Estate Planning Committee); Jane G. Ditelberg, The Northern Trust Company, Chicago, Illinois; Carlyn S. McCaffrey, McDermott Will & Emery LLP, New York, New York; Michelle B. Graham, Withers Worldwide, San Diego, California; Margaret G. Lodise, Sacks, Glazier, Franklin & Lodise LLP, Los Angeles, California, Patrick W. Martin, Procopio, Cory, Hargreaves & Savich, San Diego, California; Ruth Mattson, Verrill Dana LLP, Boston, Massachusetts; Kevin E. Packman, Holland & Knight LLP, Miami, Florida; David E. Sloan, Fabian VanCott, Salt Lake City, Utah; and Howard M. Zaritsky, Rapidan, Virginia. The committee was assisted by Stephanie Ross, Levenfeld Pearlstein, LLC, Chicago, Illinois.

application, particularly in common trust and estate situations involving principals and agents under financial powers of attorney; trusts, grantors, trustees and beneficiaries of trusts; and executors and beneficiaries of estates (referred to collectively as "fiduciary parties").

SUMMARY OF ARGUMENT

In 1970, in response to concerns regarding the unavailability of foreign account records of persons thought to be engaged in illegal activities, Congress enacted the Bank Records and Foreign Transactions Act, commonly known as the Bank Secrecy Act ("BSA").[4] The BSA presently authorizes a $10,000 civil money penalty for foreign account reporting violations that are not willful (non-willful) and which do not satisfy the reasonable cause exception.[5] The parties frame the question before the Court as whether the non-willful penalty is applied (a) per year per Foreign Bank Account Report ("FBAR") not properly filed by a person, or (b) per year per foreign account maintained by a person and not reported. The case below relates to one person's violation, but, "person" as it relates to fiduciary parties is complex and may change. In order to assist the Court in its consideration of the construction of the statute, ACTEC's brief discusses the evolution of the BSA to include non-willful violations of the BSA; the effect of

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

[5] 31 U.S.C. §5321(a)(5) provides an enhanced civil penalty for "willful" violations. For purposes of this discussion, violations that are not willful are referred to as "non-willful".

the statute on fiduciary parties; the alternative statutory constructions; and the potential constitutional impact of the statute as construed.

ARGUMENT

I. BACKGROUND AND LEGISLATIVE HISTORY

This case involves the interpretation of the BSA provision governing the penalty for the failure to file an FBAR codified in Section 5321(a)(5)(B)(i) of the United States Code, which provides in relevant part "…the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000." 31 U.S.C. §5321(a)(5)(B)(i). The question before the Court is whether the $10,000 penalty is applied on a per-person per-year basis or a per-person per-account per-year basis. Before turning to the statutory interpretation of the BSA provision, we will first outline our understanding of the BSA and the evolution of the penalties which culminated in the addition of the penalty for non-willful failures to report.

When enacted in 1970, the BSA created a network of reporting requirements with the purpose of providing information with a "high degree of usefulness" in "criminal, tax, or regulatory investigations, risk assessments, or proceedings; or in intelligence or counterintelligence activities, including analysis, to protect against terrorism." 31 U.S.C. §5311.

Although the original focus of the BSA was on reporting by financial institutions, it also required residents or citizens of the United States, and persons in, and doing business in, the United States, to keep records of and report their relationship or transactions with foreign financial agencies. 31 U.S.C. §5314(a). This reporting requirement was implemented through regulations issued by the Financial Crimes Enforcement Network of the Department of the Treasury ("FinCEN") that provided for the reporting of foreign bank, securities, or other financial accounts through the filing of an FBAR. 31 U.S.C. §5314(b); Form FinCEN 114. Each United States person ("U.S. person")[6] with an interest in or signatory authority over a foreign account is required to file an FBAR with FinCEN if the aggregate value of all such foreign accounts is over $10,000. 31 C.F.R. §§1010.306(c), 1010.350. A U.S. person who willfully violates the FBAR filing requirement is subject to civil penalties.[7] Initially there were no penalties for non-willful violations.

After the events of September 11, 2001, Congress became especially concerned with money laundering and terrorist funding through secret foreign banking activities. On October 26, 2001, the President signed the USA PATRIOT Act. *See* Uniting and

[6] The FinCEN regulations describe a U.S. person as a citizen of the United States, a resident of the United States, or an entity created, organized, or formed under the laws of the United States, including, for this purpose, a trust. 31 C.F.R. §1010.350(b).

[7] 31 U.S.C. §5321(a)(5) originally provided a civil penalty for willful violations equal to the greater of $25,000 or the balance in the account at the time of the violation, capped at $100,000.

Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, 115 Stat. 272 (2001). The USA PATRIOT Act directed the Treasury to study methods for improving compliance with FBAR reporting and to report to Congress. *See* U.S. Dept of Treasury, A Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act (April 26, 2002). Extrapolating from the limited information available, the initial report stated that the approximate rate of FBAR filing compliance could be less than 20 percent. *Id.*

The Treasury reports to Congress noted the efforts made by the Internal Revenue Service to educate taxpayers on the FBAR filing obligations and on enforcement efforts. Enforcement efforts at that time were low. Statistics indicate that there were relatively few criminal prosecutions and civil enforcement actions initiated for the failure to disclose foreign financial accounts on the FBAR form. The reports cited a number of possible reasons for the limited number of FBAR charges, including the difficulty of obtaining sufficient admissible evidence of undisclosed foreign accounts, and the difficulty in proving intent caused by the filing program's reliance on self-reporting. The report made several administrative recommendations, but no legislative recommendations. *See* U.S. Dept. of Treasury, A Report to Congress in Accordance with Section 361(b) of the USA PATRIOT Act, (years 2002, 2003 and 2004).

Building on the recommendations of the Treasury Department after the USA PATRIOT Act, Congress enacted the American Jobs Creation Act of 2004.[8] This Act increased the penalties for the willful failure to file an FBAR to the larger of 50% of the balance in the unreported accounts and $100,000[9] and introduced a civil money penalty for the non-willful failure to file an FBAR. Congress stated its reasons for adding a "non-willful" penalty: "The Committee believes that imposing a new civil penalty for failure to report an interest in foreign financial accounts that applies (without regard to willfulness) will increase the reporting of foreign financial accounts." House Committee Report H. Rep 108-548, (June 16, 2004). Under the revised BSA, the civil penalty for a non-willful violation of the FBAR filing requirement is an amount not to exceed $10,000 (indexed for inflation).[10] Congress also added a reasonable cause defense for non-willful violations. 31 U.S.C. §5321(a)(5)(B)(ii).

The addition of non-willful penalties to the BSA broadened the class of persons subject to a civil money penalty for failure to file an FBAR.[11]

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[8] Pub. L. No. 108-357, §821(a), 118 Stat. 1418.

[9] 31 U.S.C. §5321(a)(5).

[10] 31 U.S.C. §5321(a)(5)(B). The most recent adjustments for inflation yield a non-willful FBAR penalty limit of $14,489 and a willful FBAR penalty limit of $144,886, almost a 45% increase. 31 C.F.R. §1010.821, Table 1, 87 Fed. Reg. 3434 (Jan. 24, 2022).

[11] See Taxpayer Advocate Service, *2012 Annual Report to Congress*, Vol. One at 134-153, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/Most-Serious-Problems-IRS-Offshore-Voluntary-Disclosure-Programs.pdf ("The IRS's Offshore

II. STATUTORY CONSTRUCTION

In this case, the Court has been asked to construe 31 U.S.C. Section 5321(a)(5)(B)(i). The Ninth and Fifth Circuits differed in their constructions largely on the meaning each gave to the word "violation" (or "violating") in the statute. This resulted in the Ninth Circuit holding that a single $10,000 non-willful FBAR penalty may be imposed per year and the Fifth Circuit holding that a $10,000 non-willful FBAR penalty may be imposed per year for each account not correctly reported. Each Circuit found that its interpretation of "violation" was necessary to avoid an unintended result. The Ninth Circuit found that a per-account, per-year definition of "violation" would lead to excessive penalties unintended by Congress. *United States v. Boyd*, 991 F.3d 1077, 1084 (9th Cir. 2021) (citing *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) and concluding that Congress "intentionally omitted per-account language from the nonwillful penalty provision"). The Fifth Circuit found that a per-year, per-form definition of "violation" would lead to uncertainty in the law, because the Treasury could increase penalties simply by requiring taxpayers to file a separate form for each account. Pet. App. 19a (concluding that Congress did not intend to give the Secretary the discretion "to define the number of violations subject to penalty").

Voluntary Disclosure Programs Discourage Voluntary Compliance by Those Who Inadvertently Failed to Report Foreign Accounts . . . While an estimated five to seven million U.S. citizens reside abroad, and many more U.S. residents have FBAR filing requirements, the IRS received only 741,249 FBAR filings in 2011…" (footnote omitted)).

The Fifth Circuit concluded that such a result was unintended by Congress and therefore must be incorrect. Pet. App. 16a. (citing *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015).

The statute does not require a per-violation FBAR penalty for non-willful failure to file; it simply states that the Secretary may "impose a civil money penalty on *any person* who violates, or causes any violation of, any provision of section 5314." 31 U.S.C. §5321(a)(5)(A) (emphasis added). The phrase "violates or causes any violation of" is adjectival and identifies the person who is liable for the penalty; it does not prescribe how the penalty is to be calculated. The use of the indefinite article "a" prior to "civil money penalty" suggests an intention that only one penalty should be imposed.

Section 5321(a)(5)(B)(i) states that any civil non-willful penalty "shall not exceed $10,000." This relatively modest penalty (compared to the $100,000 penalty for willful violations) reflects the fact that the non-willful penalty can be imposed on inadvertent errors on timely-filed FBARs as well as on inadvertent failures to file. 31 U.S.C. §5321(a)(5)(B)(i). The statute does not expressly state that penalties are imposed per account or per year.

A willful failure to comply with the statute is subject to a penalty equal to $100,000 or, if greater, one-half of the balance in each account not reported correctly. 31 U.S.C. §5321(a)(5)(C)(i). Thus, the penalty for willful violations is substantially increased in size, reflecting the fact that it involves intentional attempts to avoid the FBAR filing requirements. [12]

If the $10,000 maximum non-willful FBAR penalty were applied annually, per account, then the $100,000 maximum willful FBAR penalty logically should also be applied annually, per account. This could produce a penalty equal to many times the account values, regardless of what that value is.[13]

ACTEC believes that Congress did not intend for the statutory provisions at issue here to create the myriad opportunities for multiple non-willful FBAR penalties in routine estate planning transactions, and thus the Court should be particularly attentive to its rule of construction "that interpretations of a statute which would produce absurd results are to be avoided,

[12] The Code links the penalties for willful and non-willful FBAR violations, so any determination regarding non-willful penalties also affects willful penalties. The authorization of the penalty for willful failure to file an FBAR is in the same subparagraph discussing non-willful failures. 31 U.S.C. §5321(a)(5)(A). The provisions for willful failures do not impose a separate penalty, but simply increase the maximum penalty that may apply. 31 U.S.C. §5321(a)(5)(C)(i) (referencing the non-willful penalty in subparagraph (B)(i) and then increasing it).

[13] See *United States v. Schwarzbaum*, 2020 WL 2526500, 125 A.F.T.R. 2d 2020-2109 (S.D. Fl. 2020) (slip copy), *modified*, 2020 WL 5076979, 126 A.F.T.R. 2d 2020-5895 (S.D. Fl. 2020) (slip copy), *vac'd & rem'd*, 24 F.4th 1355 (11th Cir. 2022) ($100,000 willful FBAR penalties assessed on each of three foreign accounts found to have $0 balances, and each of six foreign accounts found to have only estimated balances). See also *United States v. Zwerner*, No. 1:13-cv-22082-CM (S.D.FL entered on FLSD Docket 06/11/2013) (50% of account balance with FBAR penalties assessed four times for a total penalty of 200% of the account balance).

if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982). See also *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 (2002) ("it *is* our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect"); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965) ("Unquestionably the courts, in interpreting a statute, have some 'scope for adopting a restricted rather than a literal or usual meaning of its words where acceptance of that meaning would lead to absurd results * * * or would thwart the obvious purpose of the statute.'" Quoting *Helvering v. Hammel,* 311 U.S. 504, 510-511 (1941)).

The Fifth Circuit's interpretation in the case below can result in assessment of penalties for non-willful violations that far exceed the account balances. The statute of limitations for FBAR violations is six years. Because penalties apply to each open year, the discovery of a non-willful violation can result in penalties being assessed for the five years preceding the year in which the non-willful violation is discovered and the initial penalty assessed. If penalties apply per-account, per-year, they are multiplied further.

The potential for multiplied penalties presents a particular risk for fiduciary parties.[14] By way of

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[14] For instance, trustees are subject to the prudent investor rule, which imposes a duty to diversify investments as a matter of prudent investing. As an example, see Uniform Law

example, in the case of a domestic trust that non-willfully fails to report a foreign account correctly, the FBAR penalty could potentially be assessed against the trust, each trustee who is a U.S. person, and each beneficiary with a certain interest in the account. See discussion in Section III, below.

This result seems inconsistent with the application of the penalty for willful violations or with Congress's intent when adding the penalty for non-willful violations.

III. APPLICATION OF FBAR PENALTIES TO FIDUCIARY PARTIES

ACTEC Fellows have considerable experience advising persons as to non-willful failures to comply with the FBAR reporting requirements. These persons include persons who hold direct interests in foreign accounts, indirect interests in such accounts through trusts of which they are grantors or beneficiaries, and signature authority over such accounts as holders of powers of attorney, trustees or executors. We have seen how the imposition of the civil money penalty for non-willful failures to file on direct and indirect holders of interests in foreign accounts and on those with signature authority over

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Commission, Uniform Prudent Investor Act, (1994). Individual investors are not subject to similar obligations when investing for their own accounts. Consequently, trustees may both feel more compelled to include foreign investments in their portfolios and be more likely to do so through multiple smaller investments with associated foreign financial accounts, increasing their likelihood of FBAR filing requirements.

those accounts can have a multiplier effect. Multiple persons may have reporting obligations for the same account, and the non-willful failure to satisfy these obligations can result in multiple penalties being imposed with respect to those accounts. We understand that the issues presented by duplicative penalties imposed on persons with interests in or signature authority over the same accounts are not before the Court in this case but believe that an understanding of how the penalties work may be relevant when determining whether the number of penalties should be further increased by imposing multiple penalties on each person who has interests in or signature authority over multiple accounts.

The FBAR reporting obligation is imposed on "a resident or citizen of the United States or a *person* in, and doing business in, the United States." Section 5314(b)(1) provides that the Secretary may prescribe "a reasonable classification of *persons* subject to or exempt from a requirement under [Section 5314] or a regulation under [Section 5314]"; and Section 5321(a)(5)(A) authorizes the Secretary of the Treasury to impose a civil money penalty on "any *person*" who violates or causes another to violate any provision of Section 5314 (emphasis added). 31 U.S.C. §§5314(b)(1), 5321(a)(5)(A); See also 31 C.F.R. §§ 1010.350(b), 1010.350(c)(2).

Any U.S. person who has either a "financial interest in" or "signature or other authority over" a foreign financial account is required to file an FBAR. 31 C.F.R. §1010.350(a).

The persons subject to a reporting obligation include account owners and also fiduciary parties in relationships established under common estate planning documents such as financial powers of attorney, trust agreements, and wills, as well as entities held by trusts or estates. See also 31 C.F.R. §§ 1010.350(b)(3), 1010.350(e)(2).

Regulations treat a U.S. person as having a reportable financial interest in a foreign account held in a trust if he or she is the grantor of the trust and is, under the grantor trust income tax rules (26 U.S.C. §§671-679), taxed as the deemed owner of any of the trust assets. 31 C.F.R. §1010.350(e)(2)(iii). The regulations also treat a U.S. person as having a reportable financial interest in a foreign account held by a trust in which the U.S. person has a present beneficial interest in more than 50 percent of the trust assets or from which he or she receives more than 50 percent of the trust income. 31 C.F.R. §1010.350(e)(2)(iv).

Regulations also state that a person has signature or other authority over a foreign account if that person, either alone or in conjunction with another person, controls the disposition of the assets of the account by direct communication with the person maintaining the account. 31 C.F.R. §1010.350(f)(1).

A common estate planning relationship in which these rules present a substantial risk of multiple non-willful FBAR penalties is the relationship created between an individual and the person to whom he or she grants a power of attorney. A financial power of attorney names an agent with authority to act on behalf of the principal with respect to property and financial transactions. The agent typically has the authority to open, close, continue, and control accounts, whether foreign or domestic. Granting this authority to the agent does not relieve the principal of the authority to control the same accounts. The principal is not required to notify the agent of all of the principal's accounts or whether the principal maintains foreign accounts, and typically does not. Restatement (3d) Agency, § 8.13. The agent's signatory authority over foreign accounts may make the agent holding the power of attorney a "person" subject to FBAR reporting requirements. Thus, the relationship between the principal and the agent may double the persons responsible for filing FBAR reports and whose non-willful errors can be subjected to an FBAR penalty.

For example, assume that Principal established two foreign financial accounts in Country A to facilitate the payment of expenses associated with real properties owned by Principal in Country A. In Years 1-6 each account balance is $6,000. Principal names Agent under a power of attorney with power to act with respect to all of Principal's real property and accounts. Principal does not inform Agent that Principal has foreign accounts in Country A, and Agent does not inquire as to the existence of foreign accounts. Agent non-willfully and without reasonable cause fails to file an FBAR in years 1-6. There can be a $10,000 penalty imposed upon Agent in each year, creating a $60,000 total penalty for the 6-year period, which is equal to five times the balance of the accounts.[15] There can also be a similar penalty imposed upon Principal, creating in the aggregate a penalty ten times the total account balances. If the penalty is computed per account rather than per return, there would be an aggregate penalty of $240,000, twenty times the total account balances.[16] These penalty amounts are even greater when the inflation adjustments are taken into account.

Trusts create far more complex FBAR issues with an increased possibility of inadvertent, non-willful failures to file. The potential for multiplier effects of various $10,000 penalties is only increased in the trust context. Trusts are immensely varied in type, structure, and duration. Trusts may be either revocable or irrevocable, either grantor trusts or non-grantor trusts for income tax purposes, and either domestic or foreign trusts for income tax purposes. Each of these statuses may change during the term of the trust. For example, a revocable trust becomes irrevocable when the grantor dies and often divides into multiple trusts at that time. A trust's status as a grantor trust for income tax purposes ends when the grantor dies or upon the lapse, termination or other elimination of certain powers or interests that made the trust a grantor trust. 26 U.S.C. §§ 671-679. A domestic trust becomes a foreign trust when a non-U.S. person becomes the only trustee of the trust. 26 U.S.C. §§7701(a)(30)(E), 7701(a)(31).

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[15] $10,000 statutory penalty x 6 years = $60,000.

[16] ($10,000 x 2 accounts x 6 years) x 2 persons (Principal and Agent) = $240,000.

The trust's grantor may or may not have a continuing administrative role or beneficial interest in a trust. The trustees of the trust possess the legal interest in the trust properties and have the power to administer them, typically including the power to open, close, continue, and control financial accounts. The identity of the trustees may change at any time and from time to time. The grantor may or may not also be a trustee.

A trust may also have an investment advisor or trust protector with specific powers with respect to the trust. These powers may include the power to open, close, continue, and control financial accounts.

The beneficiaries of a trust have the economic benefit of the trust assets, but usually have no power to administer those assets. A beneficiary may have an interest in trust income, principal or both, and her interest may be mandatory or discretionary. The interest may be either present or future, vested or non-vested. Beneficiaries may and commonly do change and the form of their interests may change during the continuation of a trust.

Trusts can be structurally complex, but that complexity does not ordinarily involve a grantor's intention to hide assets.[17] The complexity of trusts is oftentimes the result of the nature of family relationships and business interests as well as the transfer tax and income tax rules applicable to them. Multinational families, immigrants to the United

[17] In the event an intent to hide assets is discovered, the willful violation penalty becomes applicable.

States, and U.S. persons living overseas all may hold foreign accounts in trusts and other estate planning arrangements. This is not in itself an indication of an intent to hide foreign assets or illegal transactions.

Given the various roles and relationships with respect to trusts, a single foreign account owned by a trust can be the basis for a filing requirement by multiple persons, and the changes that occur over time as to the identity of beneficiaries and trustees may easily result in inadvertent, non-willful failures to report.

For example, assume that Grantor, a U.S. person, creates a revocable trust to hold Grantor's assets. Grantor names three U.S. citizens as trustees, requiring that all decisions be made by majority vote. The trustees have authority to make distributions during Grantor's lifetime only to Grantor and Grantor's spouse. Grantor transfers to the trust two foreign financial accounts in Country A, which Grantor established to facilitate the payment of expenses associated with real properties owned by the trust in Country A. In Years 1-6 each account balance is $10,000. Each of the trustees is obligated to file an FBAR reporting the foreign financial accounts. 31 C.F.R. §1010.350(f)(1). On a per account basis, the trustees' non-willful failure to file a timely and correct FBAR could subject the trust or trustees to up to $360,000 of FBAR penalties – eighteen times the size of the account balances.[18] The Grantor's power to revoke the trust makes Grantor the owner of the trust

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[18] [($10,000 x 2 accounts) x 6 years] x 3 trustees = $360,000.

under the grantor trust rules (26 U.S.C. §676) and obligates Grantor to file an FBAR reporting the foreign financial accounts. Grantor's non-willful failure to file an FBAR could, computed per account, also subject Grantor to $120,000 of additional penalties.[19] If Grantor's spouse receives more than 50 percent of the trust income, she also becomes obligated to file an FBAR and her non-willful failure to file an FBAR could result in the imposition of another $120,000 of additional penalties.[20] The aggregate penalties under the per account construction of the statute would thus be $600,000 – 30 times the aggregate balance of the accounts.[21]

The result would be the same if the trust were an irrevocable grantor trust. Assume the same facts as in the prior example, except that the trust is irrevocable. The trustees' power to distribute income to Grantor and Grantor's spouse makes the trust a grantor trust. 26 U.S.C. §677(a). Again, the three trustees, Grantor, and Grantor's spouse would each be required to file an FBAR and could be subjected to non-willful FBAR penalties which on a per account basis could total $600,000.[22]

If the trust holds an interest in an entity which maintains foreign accounts, there are additional entity level reporting obligations and the potential for further upstream reporting requirements. For a

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[19] [($10,000 x 2 accounts) x 6 years] = $120,000.
[20] [($10,000 x 2 accounts) x 6 years] = $120,000.
[21] $360,000 + $120,000 + $120,000 = $600,000.
[22] ($10,000 x 2 accounts) x 5 persons (3 Trustees, Grantor and Grantor's spouse) = $100,000 each year, for up to 6 years.

trust that owns a controlling interest in a corporation which has foreign accounts, each of the persons described in the preceding example could be subject to a$10,000 penalty for each non-willful failure to file an FBAR for each account owned by the business.

IV. EIGHTH AMENDMENT

The district court below discussed whether the non-willful FBAR penalty would violate the prohibition on excessive fines under the Eighth Amendment, which provides that "excessive fines [shall not be] imposed," (the "Excessive Fines Clause"). U.S. Const. amend. VIII. It did not decide the issue because it concluded that its finding that the penalty was imposed per-FBAR, rather than per-account, rendered the issue moot. Pet. App. 57a. The Fifth Circuit did not address this issue.

ACTEC believes that the potential application of the Eighth Amendment is a proper issue for the Court's consideration, particularly as there is no direct guidance by the Court as to whether civil money penalties are covered by the Eighth Amendment and, if so, whether the manner in which they are administered can bring them within the limits of the Eighth Amendment.

In the context of a civil money forfeiture under the BSA, the Court has held that a payment in kind, or forfeiture, is a "fine" within the meaning of the Excessive Fines Clause if it constitutes punishment, even in part, for an offense. The presence of a remedial purpose does not preclude characterization of a payment as a fine if the payment also serves a punitive, retributive, or deterrent purpose. *United States v. Bajakajian*, 524 U.S. 321 (1998), *Austin v. United States*, 509 U.S. 602 (1993), and *Kokesh v. Securities and Exchange Commission*, 137 S. Ct. 1635 (2017). As described in Section I above, Congress intended the penalty for non-willful failures to file to act as a deterrent to non-compliance with the reporting requirements of the BSA.

The Court could conclude that an FBAR civil money penalty for a non-willful reporting violation under the BSA is similar to a civil forfeiture under other provisions of the BSA and that a per account interpretation of the statute could result in penalties that are unrelated to the amounts involved, the revenues lost, or the actions being penalized. This construction would permit the imposition of fines that are many multiples of the amounts involved and the revenue impacted.

Section III above provides numerous examples of scenarios in which fiduciary parties may establish multiple accounts which may give rise to multiple FBAR violations.[23]

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[23] For example, Treasury has imposed a $100,000 penalty on empty accounts where the taxpayer's failure to report the account was willful. See *United States v. Schwarzbaum*, 2020 WL 2526500, 125 A.F.T.R. 2d 2020-2109 (S.D. Fl. 2020) (slip copy), *modified*, 2020 WL 5076979, 126 A.F.T.R. 2d 2020-5895 (S.D. Fl. 2020) (slip copy), *vac'd & rem'd*, 24 F.4th 1355 (11th Cir. 2022).

CONCLUSION

The American College of Trust and Estate Counsel is grateful for the opportunity to bring these issues to the attention of the Court.

Respectfully submitted,

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