What Constitutes a "Willful" FBAR Violation?

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Comprehensive guidance based on eight important cases.

Misinformation about FinCEN Form 114 ("FBAR") and the related penalty standards abounds. Taxpayers, advisors, and even IRS officials throw around the term "willfulness" as if they actually understand what they are saying. Often, they do not. This causes a slew of problems, including questionable decision-making about which voluntary disclosure programs are appropriate for a particular taxpayer, whether a taxpayer would have valid tax/legal positions if he were caught with unreported foreign accounts, which types of FBAR penalties the IRS should assert in the first place, and what strategies a taxpayer should utilize when defending against FBAR penalties during an international tax audit, administrative appeal, or litigation.

In an effort to clarify the issues, this article examines the duties triggered by holding a foreign account, eight important willful FBAR penalty cases, a recent IRS pronouncement professing to contain "authoritative legal opinions" on FBAR matters, and ways in which recent FBAR precedent is affecting taxpayers with pending foreign account problems.

Summary of Information-Reporting Duties

Generally, U.S. individuals have four main duties when they hold a reportable

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interest in a foreign financial account: (i) check the "yes" box in Part III (Foreign Accounts and Trusts) of Schedule B (Interest and Ordinary Dividends) to Form 1040 (U.S. Individual Income Tax Return) to disclose the existence and location of the foreign account; (ii) declare all income generated by the account (such as interest, dividends, and capital gains) on Form 1040; (iii) report the account on a Form 8938 (Statement of Specified Foreign Financial Assets), which is enclosed with Form 1040; and (iv) electronically file an FBAR.[1] Below is additional detail on these normal duties.

Form 1040—Duty to Report Foreign Financial Accounts

Part III of Schedule B to Form 1040 contains an inquiry about foreign accounts. The IRS has slightly modified and expanded this language over the years, with the materials for 2017 stating the following:

> At any time during 2017, did you have a financial interest in or a signature authority over a financial account (such as a bank account, securities account, or brokerage account) located in a foreign country? See instructions.
>
> If "Yes," are you required to file FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR), to report that financial interest or signature authority? See FinCEN Form 114 and its instructions for filing requirements and exceptions to those requirements.
>
> If you are required to file a FinCEN Form 114, enter the name of the foreign country where the financial account is located.

FBAR—Duty to Report Foreign Financial Accounts

Congress enacted the Bank Secrecy Act in 1970.[2] One purpose of this legislation was to require the filing of certain reports, like the FBAR, where doing so would be helpful to the U.S. government in carrying out criminal, tax, and regulatory investigations.[3] The relevant statute, in conjunction with the corresponding regulations and FBAR instructions, generally requires the filing of an annual FBAR in cases where (i) a U.S. person, including U.S. citizens, U.S. residents, and domestic entities, (ii) had a direct financial interest in, had an indirect financial interest in, had signature authority over, or had some other type of authority over (iii) one or more financial accounts (iv) located in a foreign country (v) whose aggregate value exceeded $10,000 (vi) at any point during the year at issue.[4]

Concerned with widespread FBAR non-compliance, the U.S. government has taken certain actions in recent years. Notably, the Treasury Department transferred authority to enforce FBAR duties to the IRS in 2003.[5] The IRS has been empowered since then to investigate potential FBAR violations, issue summonses, assess civil penalties, issue administrative rulings, and take "any other action reasonably necessary" to enforce the FBAR rules.[6]

Congress enacted new FBAR penalty provisions in 2004.[7] The IRS may now penalize any U.S. person who fails to file an FBAR when required, period.[8] In the case of non-willful violations, the maximum penalty is $10,000, but the IRS will waive such penalty if the violation was due to "reasonable cause."[9] Higher penalties apply where willfulness exists. Specifically, in situations where a taxpayer deliberately fails to file an FBAR, the IRS can assert a penalty equal to $100,000 or 50 percent of the balance in the account at the time of the violation, whichever amount is larger.[10] Given the large balances in some unreported accounts, FBAR penalties can be enormous.

Form 8938—Duty to Report Foreign Financial Assets

Section 6038D, which mandates the filing of Form 8938, was enacted as part of the Foreign Account Tax Compliance Act ("FATCA").[11] The general rule can be divided into the following parts: (i) any specified person ("SP"), which now includes U.S. citizens, U.S. residents, certain domestic entities, and others, (ii) who/that hold an interest (iii) during any portion of a taxable year (iv) in a specified foreign financial asset (v) must attach to a timely tax return (vi) a complete and accurate Form 8938 (vii) if the total value of all reportable assets (viii) is more than the applicable filing threshold.[12]

For purposes of Section 6038D, the term "specified foreign financial asset" includes two major categories, one of which is foreign financial accounts.[13]

If an SP fails to file a timely, complete, and accurate Form 8938, then the IRS generally will assert a penalty of $10,000.[14] The penalty increases to a maximum of $50,000 if the SP does not rectify the problem quickly after being contacted by the IRS.[15] An SP can avoid Form 8938 penalties if the violation was due to reasonable cause and not due to willful neglect.[16]

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1 For a detailed analysis of the Form 8938 filing requirement, see Sheppard, "The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance," 38(3) International Tax Journal 11 (2012); Sheppard, "Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules after IRS Issues Final Regulations," 41(2) International Tax Journal 25 (2015); Sheppard, "Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting," 42(3) International Tax Journal 5 (2016); and Sheppard, "Unlimited Assessment-Period for Form 8938 Violations: Ruling Shows IRS's Intent to Attack Multiple Tax Returns," 95(5) Taxes—The Tax Magazine 31 (2017).

2 P.L. 91-508, Title I and Title II, 10/26/1970.

3 Id. at section 202.

4 31 U.S.C. section 5314; 31 CFR section 1010.350(a).

5 68 Fed. Reg. 26489 (2003).

6 31 C.F.R. section 103.56(g), 68 Fed. Reg. 26489 (2003).

7 American Jobs Creation Act. P.L. 108-357, 10/22/2004.

8 31 U.S.C. section 5321(a)(5)(A).

9 31 U.S.C. section 5321(a)(5)(B)(ii).

10 31 U.S.C. section 5321(a)(5)(C)(i). As of May 2018, there is uncertainty regarding the maximum FBAR penalty, because two district courts issued opinions stating that the willful FBAR penalty is capped at $100,000 per violation because the IRS failed to update the operable regulations after Congress amended the law to increase penalties. See U.S. v. Colliot, No. AU-16-CA-01281-SS (DC Tex., 05/16/2018), and U.S. v. Wadhan, No. 17-CV-1287-MSK (DC Colo., 7/18/2018).

11 Hiring Incentives to Restore Employment Act, P.L. 111-147, section 511, 3/18/2010.

12 Section 6038(a).

13 Section 6038D(b)(1); Reg. 1.6038D-3(a)(1).

14 Section 6038D(d)(1); Reg. 1.6038D-8(a).

15 Section 6038D(d)(2); Reg. 1.6038D-8(c).

16 Section 6038D(g); Reg. 1.6038D-8(e)(1).

The Evolving Definition of "Willfulness"—Court Opinions

As indicated above, in order to assert significant penalties against a taxpayer for unfiled FBARs, the government must demonstrate that the violations were "willful." This concept has morphed over the years, and will undoubtedly continue to do so in the future. Problems abound for taxpayers when deciding whether to fight an FBAR penalty, a key one being that neither they nor their legal/tax advisors have a clear, complete picture of the relevant caselaw and IRS pronouncements. Below is a review of the willful FBAR penalty precedent to date.[17]

Generally, U.S. individuals have four main duties when they hold a reportable interest in a foreign financial account.

Williams—First Case

The first case concerning the imposition of a "willful" FBAR penalty was *Williams*, a multi-year, multi-issue case, with stops in the U.S. Tax Court,[18] the U.S. District Court,[19] and, ultimately, the Fourth Circuit Court of Appeals ("*Williams III*").[20] Here, we address only *Williams III*, in an abbreviated fashion, because of its focus on the issue of "willfulness."

The government's arguments. The government's main position on appeal was that the District Court erred in determining which elements must be present to prove "willfulness" in the context of a civil FBAR violation, as opposed to a criminal one.[21] Citing various decisions from the U.S. Supreme Court and appellate courts, the government maintained that, where willfulness is a condition of civil liability, (i) the concept of willfulness is broad enough to cover both reckless and knowing violations; (ii) it is not necessary to prove that the taxpayer had an improper motive or bad purpose to show willfulness; and (iii) evidence of a taxpayer's actions to conceal income, in conjunction with the taxpayer's failure to seek information about foreign account reporting requirements, suffices to show willfulness.[22]

The government argued that the District Court arrived at its conclusion that the taxpayer did not willfully violate the FBAR rules because of its belief that the taxpayer lacked "motivation to willfully conceal" the foreign accounts after November 2000, i.e., after the time that the Swiss authorities had interviewed the taxpayer and frozen the relevant accounts at the request of the U.S. government. According to the government, the issue of whether the taxpayer had an improper motive for not filing a timely FBAR is not determinative of the willfulness question, so the District Court erred in basing its findings on the supposed absence of an improper motivation.[23]

Decision by the Fourth Circuit Court of Appeals. The Fourth Circuit Court of Appeals began its analysis by criticizing the legal standards on which the District Court made its taxpayer-friendly decision. In particular, the Court of Appeals indicated that the District Court should not have focused on the taxpayer's motivation for not filing an FBAR, and, inasmuch as it did, the District Court made an impermissible leap.[24]

Then, noting various judicial precedents in the *criminal* arena, the Court of Appeals went on to explain what it considered the proper legal standard to be applied. The Court of Appeals explained that (i) willfulness can be inferred from taxpayer conduct designed to conceal financial information; and (ii) willfulness can also be inferred from a taxpayer's conscious effort to avoid learning about reporting requirements, i.e., "willful blindness" exists where a taxpayer knew of a high probability of a tax liability, yet intentionally avoided the pertinent facts.[25] In situations where willfulness is a condition for *civil* liability, the Court of Appeals indicated that this covers both knowing violations and reckless violations.[26] It then clarified that the taxpayer's actions or inactions in *Williams III* constituted, at a minimum, "reckless conduct, which satisfies the proof requirement [for civil FBAR violations]."[27]

The Court of Appeals supported its decision on several grounds, including the following. The Court of Appeals pointed out that the taxpayer signed his Form 1040 for 2000 under penalties of perjury, thereby swearing that he had examined the Form 1040, as well as all schedules and statements attached to such Form 1040, and that all items were true, accurate, and complete. The Court of Appeals then explained that taxpayers who execute a Form 1040 are deemed to have constructive knowledge of such Form 1040, and the taxpayer in *Williams III* was no exception to that principle.

According to the Court of Appeals, the instructions in Part III of Schedule B to the 2000 Form 1040 (i.e., "see instructions and exceptions and filing requirements for Form TD F 90-22.1") put the taxpayer on inquiry notice of the FBAR duty.[28] The taxpayer testified that he did not review his 2000 Form 1040 in general or read the information in Schedule B in particular. The Court of Appeals interpreted this inaction as conduct designed to conceal financial information, a conscious effort to avoid learning about reporting requirements, and "willful blindness" to the FBAR requirement.[29]

McBride—Second Case

Williams III sparked much controversy, but the debate over its significance did not last long, because the second case addressing civil "willful" FBAR penalties, *U.S. v McBride*, was decided less than four months later, in November 2012.[30]

The majority of the elements were undisputed, leaving the focus squarely on the question of whether Mr. McBride had "willfully" failed to file FBARs for 2000 and 2001. Indeed, 18 pages of the District Court's 25-page legal analysis were devoted solely to the "willfulness" issue. Breaking this into digestible pieces is thus required.

Standard for determining willfulness in civil FBAR cases. Adhering to a line of reasoning presented earlier by the Fourth Circuit Court of Appeals in *Williams III*, the District Court indicated that "willfulness" in this context includes not only knowing FBAR violations, but also reckless ones.[31] The District Court, citing to precedent from the U.S. Supreme Court as well as *Williams III*, then explained that "willful blindness" satisfies the willfulness standard in both criminal and civil contexts.[32] Finally, the District Court noted that willful intent can be proven by circumstancial evidence, and reasonable inferences can be drawn from the facts because direct proof of a taxpayer's intent is rarely available.[33]

Taxpayer had constructive knowledge of the FBAR requirement. The District Court next turned to Mr. McBride's level of knowledge of the FBAR filing requirement. Its ultimate conclusion on this issue is remarkably clear, but the District Court's analysis meandered somewhat.

The District Court cited the general rule that all taxpayers are charged with knowledge, awareness, and responsibility for all tax returns executed under penalties of perjury and filed with the IRS. The District Court next recognized that several cases stand for the proposition that the taxpayer's signature on a tax return does not, by itself, prove that the taxpayer had knowledge of the contents of the return. The District Court distinguished such cases, though, by emphasizing that the language therein about "knowledge of the contents of the return" refers to the taxpayer's awareness about specific figures/amounts on the return. When dealing with the FBAR situation, the District Court pointed out that "knowledge of what instructions are contained within the form is directly inferable from the contents of the form itself, even if it were blank."[34]

Fortifying its position, the District Court cited and quoted various criminal cases, including a criminal FBAR case, where the courts attributed to the taxpayer knowledge of the contents of a return based solely on the taxpayer's signature on the tax return.[35] The District Court, eliminating any ambiguity about its stance on constructive knowledge, rendered the following holding:

> Knowledge of the law, including knowledge of the FBAR requirements, is imputed to McBride. The knowledge of the law regarding the requirement to file an FBAR is sufficient to inform McBride that he had a duty to file [an FBAR] for any foreign account in which he had a financial interest. McBride signed his federal income tax returns for both the tax year 2000 and 2001. Accordingly, McBride is charged with having reviewed his tax return and having understood that the federal income tax return asked if at any time during the tax year he held any financial interest in a foreign bank or financial account. The federal income tax return contained a plain instruction informing individuals that they have the duty to report their interest in any foreign financial or bank accounts held during the taxable year. McBride is therefore charged with having had knowledge of the FBAR requirement to disclose his interest in any foreign financial or bank accounts, as evidenced by his statement at the time he signed the returns, under penalty of perjury, that he read, reviewed, and signed his own federal income tax returns for the tax years 2000 and 2001, as indicated by his signature on the federal income tax returns for both 2000 and 2001. As a result, McBride's willfulness is supported by evidence of his false statements on his tax returns for both the 2000 and the 2001 tax years, and his signature, under penalty of perjury, that those statements were complete and accurate.[36]

Taxpayer had actual knowledge of the FBAR requirement. More importantly, explained the District Court, Mr. McBride had actual knowledge of the FBAR filing requirement. The District Court identified four items in support of this determination. First, Mr. McBride read pamphlets and other promotional materials, which explained the duty to report his interest in foreign financial accounts. Second, Mr. McBride testified at trial that the purpose of adopting the plan was to

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[17] For more detailed information about the recent court battles regarding "willful" FBAR penalties, please see the following articles by the same author: Sheppard, "Court Holds that Pervasive Ignorance Is No Defense to Willful FBAR Penalties: This and Other Lessons from *United States v. Garrity*," ___ International Tax Journal __ (2018); Sheppard, "Willful FBAR Penalty Case Shows Importance of Protecting Privileged Communications: What *Kelley-Hunter* Adds to the Foreign Account Defense Discussion," 44(1) International Tax Journal 15 (2018); Sheppard, "Analysis of the Reasonable Cause Defense in Non-Willful FBAR Penalty Case: Teachings from *Jarnagin*," 128 JTAX 6 (April 2018); Sheppard, "First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of *Bedrosian* for Future Foreign Account Disputes (Part 1)," 128 JTAX 12 (February 2018); Sheppard, "First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of *Bedrosian* for Future Foreign Account Disputes (Part 2)," 128 JTAX 14 (March 2018); Sheppard, "Can Recent 'Willful' FBAR Penalty Cases against Taxpayers Help Tax Firms Fend Off Malpractice Actions?" 43(4) International Tax Journal 33 (2017); Sheppard, "Government Wins Fourth Straight FBAR Penalty Case: Analyzing *Bohanec* and the Evolution of 'Willfulness,'" 126 JTAX 110 (March 2017); Sheppard, "Government Wins Second Willful FBAR Penalty Case: Analyzing What *McBride* Really Means to Taxpayers," 118 JTAX 187 (April 2013); Sheppard, "Third Time's the Charm: Government Finally Collects 'Willful' FBAR Penalty in *Williams* Case," 117 JTAX 319 (December 2012); Sheppard, "District Court Rules That Where There's (No) Will, There's a Way to Avoid FBAR Penalties," 113 JTAX 293 (November 2010).

[18] Williams v. Commissioner, 131 TC No. 54.

[19] U.S. v. Williams, No. 1:09-cv-437, 2010 WL 347221 (D.C. Va., 9/1/ 2010).

[20] U.S. v. Williams, 489 Fed. Appx. 655 (CA-4, 2012).

[21] U.S. v. Williams, 489 Fed. Appx. 655 (CA-4, 2012), Opening Brief for U.S. Government, filed February 25, 2011, at 33.

[22] Id. at 34-35.

[23] Id. at 35-36.

[24] U.S. v. Williams, 489 Fed. Appx. 655 (CA-4, 2012), at n.5.

[25] U.S. v. Williams, 489 Fed. Appx. 655 (CA-4, 2012).

[26] Id.

[27] Id.

[28] Id.

[29] Id.

[30] U.S. v. McBride, No. 2:09-cv-378 (D.C. Utah), Findings of Fact, Conclusions of Law, and Order (11/8/2012). See also U.S. v. McBride, 908 F. Supp. 2d 1186 (D.C. Utah, 2012).

[31] McBride, slip op. at 32.

[32] Id. at 32-33.

[33] Id. at 33.

[34] Id. at 36-37.

[35] Id. at 37-38.

[36] Id. at 38-39 (internal citations omitted).

avoid disclosure of certain assets and the payment of taxes thereon. Third, Mr. McBride engaged in an evasive course of conduct with the Revenue Agent during the audit, lying about certain facts and withholding information and documentation. Finally, Mr. McBride made statements at trial that contradicted his earlier sworn statements during the discovery phase of the trial.

Taxpayer acted with reckless disregard or willful blindness. The District Court identified a long list of items that, together, supposedly demonstrate that Mr. McBride recklessly disregarded the obvious risk of tax-related problems (including FBAR violations) because of his participation in the plan. These items included the following: (i) Mr. McBride reviewed the memo and enclosed newspaper article from an accountant before the relevant years expressing concern about the validity of the plan; (ii) Mr. McBride was already concerned about the promoters of the plan well before he filed his Form 1040 for 2000; (iii) Mr. McBride knew that the purpose of the plan was to avoid taxation and certain information-reporting requirements; (iv) Mr. McBride knew the plan involved the use of foreign entities held by nominees; (v) Mr. McBride's initial impression of the plan was that it constituted "tax evasion"; (vi) Mr. McBride did not seek a legal opinion or guidance from outside, independent counsel; (vii) Part III of Schedule B to Form 1040 contained a "plain instruction" regarding disclosure of foreign accounts; and (viii) Mr. McBride did not discuss with or provide information to either of his accountants regarding the plan.[37]

Edging toward strict liability. Although not entirely clear, it appears that Mr. McBride argued that he was aware of the FBAR filing requirement, but decided not to comply because of his belief, based to a certain extent on the analysis by his accountant, that he did not possess a sufficient interest in the foreign accounts under the peculiar FBAR attribution rules. As the culmination of its 18-page analysis of the "willfulness" issue, the District Court took an extreme position that, if a taxpayer executes and files his Form 1040, then all failures to file FBARs, regardless of the validity of the taxpayer's rationale for not filing, are willful and vulnerable to maximum sanctions.

> [E]ven if the decision not to disclose McBride's interest in the foreign accounts was based on McBride's belief that he did not hold sufficient interest in those accounts to warrant disclosure, that failure to disclose those interests would constitute willfulness. Because McBride signed his tax returns, he is charged with knowledge of the duty to comply with the FBAR requirements. Whether McBride believed [that his accountant] had determined that a disclosure was not required is irrelevant in light of [the applicable case], which states that the only question is whether the decision not to disclose was voluntary, as opposed to accidental. The government does not dispute that McBride's failure to comply with FBAR [sic.] was the result of his belief that he did not have a reportable financial interest in the foreign accounts. However . . . the FBAR requirements did require that McBride disclose his interest in the foreign accounts during both the 2000 and 2001 tax years. As a result, McBride's failure to do so was willful.[38]

Bussell—Third Case

The third case involving civil willful FBAR penalties was *U.S. v. Bussell*, which was decided in December 2015.[39] In that case, the District Court determined that the U.S. government was entitled to summary judgment because the taxpayer agreed not to dispute the contentions that she willfully failed to file an FBAR for 2006 and she willfully failed to report the existence of the foreign account in Part III of Schedule B of Form 1040 for 2006. As if the concession by the taxpayer were insufficient, the District Court proceeded to explain that the evidence in the case also confirmed willfulness and that, in the context of civil FBAR penalties, the concept of willfulness encompasses "reckless disregard of a statutory duty":

> Moreover, the record demonstrates that Defendant was willful in failing to report her financial interest in the Subject Account. Although § 5321(a)(5) does not define willfulness, courts adjudicating civil tax matters have held that an individual is willful where he/she exhibits a reckless disregard of a statutory duty. *See Safeco Ins. Co. of Am. v. Burr,* 551 U.S. 47, 57 (2007). Here, Defendant clearly acted with reckless disregard. Defendant has been convicted of bankruptcy fraud and tax fraud for her failure to disclose offshore accounts, and Defendant has been subjected to civil penalties for her failure to disclose offshore bank accounts. Defendant is aware of her statutory duty to report offshore accounts. Nevertheless, Defendant filed her 2006 tax return without reporting the Subject Account, and without filing an FBAR Form. Instead of reporting the Subject Account, Defendant liquidated the Subject Account shortly after filing her tax returns [and moved the funds to yet another undisclosed foreign bank]. Accordingly, the Government's Motion is granted to the extent that Defendant willfully failed to report her interest in the Subject Account for 2006.[40]

Bohanec—Fourth Case

The next civil FBAR penalty case, *U.S. v. Bohanec*, was decided in December 2016.[41] The facts of the case, as well as the positions of the parties, have been cobbled together using various sources.[42]

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37 Id. at 42-49.

38 Id. at 48-49 (internal citations omitted).

39 U.S. v. Bussell, 117 AFTR 2d 2016-439 (D.C. Cal., 12/8/2015).

40 Id. at *5.

41 U.S. v. Bohanec, 118 AFTR 2d 2016-5537 (D.C. Cal., 12/8/2016).

42 Complaint by U.S. Government to Reduce FBAR Penalty to Judgment, filed June 9, 2015; Answer by Taxpayers to Complaint to Reduce FBAR Penalty to Judgment, filed July 27, 2015; Memorandum of Contentions of Fact and Law by U.S. Government, filed Oct. 3, 2016; Memorandum of Contentions of Fact and Law by Taxpayers, filed Oct. 3, 2016; Trial Brief by U.S. Government, filed Oct. 25, 2016; Proposed Findings of Fact and Conclusions of Law by U.S. Government, filed Oct. 25, 2016; Exhibit and Witness List by U.S. Government, filed Nov. 1, 2016; Proposed Findings of Fact and Conclusions of Law by Taxpayers, filed Nov. 7, 2016; Supplemental Proposed Findings of Fact and Conclusions of Law by U.S. Government, filed Nov. 7, 2016; and U.S. v. Bohanec, 118 AFTR 2d 2016-5537 (D.C. Cal., 12/8/2016).

Positions advanced by the parties. The legal/tax positions advanced by the Bohanecs and the U.S. government did not contain any surprises, largely adhering to the arguments previously advanced in *Williams III* and *McBride*. For example, the attorneys for the Bohanecs highlighted the following points: (i) the taxpayers are elderly and have little formal education; (ii) they had never even heard of the FBAR filing requirement by June 30, 2008; (iii) the U.S. government must prove, by clear and convincing evidence, and not by merely the preponderance of the evidence, that the Bohanecs committed a "voluntary, intentional violation of a known legal duty"; (iv) because the Bohanecs never filed any Forms 1040 after 1998 until they started participating in the Offshore Voluntary Disclosure Program ("OVDP") over a decade later, they did not affirmatively and inaccurately check the "no" box in response to the foreign-account question in Part III of Schedule B of Form 1040, and they were not placed on some type of constructive or inquiry notice of the FBAR by way of the cross-reference in Part III of Schedule B; (v) *Williams III* and *McBride* were wrongly decided with respect to the proper scope of "willfulness" in the context of FBAR penalties; and (vi) the Bohanecs did not "willfully" violate their FBAR duty for 2007.

The U.S. government seemed to appreciate that the evidence tending to show that the Bohanecs acted willfully was considerably weaker than the proof of the improprieties of the taxpayers in *Williams III*, *McBride*, and *Bussell*. Likely for this reason, the U.S. government did not attempt to argue that the Bohanecs had actual knowledge of the FBAR duty and deliberately chose to ignore it. The government maintained, instead, that the Bohanecs were "reckless" and "willfully blind" about FBARs, stating that they "consciously avoided learning of the obligations of U.S. citizens concerning foreign accounts" and "[i]f the Bohanecs did not understand their obligations under the Bank Secrecy Act of 1970, it is because they chose not to inquire about them and preferred to remain in ignorance in circumstances in which non-reckless individuals would have at least inquired as to the obligations of a U.S. citizen regarding foreign accounts."

Decision by the District Court. The District Court first recited the applicable statutes and regulations mandating FBAR filing. It then underscored that the relevant authorities do not contain a definition of "willfulness," such that one must look to court precedent and other sources. Next, the District Court quickly dispensed with the position advanced by the Bohanecs that willfulness only encompasses intentional violations of known legal duties, because no court had adopted this argument in the civil FBAR penalty context, and because the Bohanecs cited in support of their position only criminal cases (not civil penalty cases) wherein the defendants must have so-called "specific intent" to be convicted. Referencing *Williams III*, *McBride*, and *Bussell*, as well a U.S. Supreme Court decision, the District Court determined that the concept of "willfulness" for civil FBAR penalty purposes extends to reckless disregard of a statutory duty.

The District Court ultimately concluded that the U.S. government had proven, by a preponderance of the evidence, that the Bohanecs were "at least recklessly indifferent to a statutory duty" for the following reasons:

- They were reasonably sophisticated business people, as evidenced by the fact that they negotiated highly favorable deals with the exclusive U.S. distributor of certain camera products; they circumvented supply limitations by making an arrangement with a Canadian distributor; they developed a worldwide reputation and conducted business with customers all over the globe; they always used a return preparer to complete the U.S. tax returns for their camera business; they secured two patents without professional assistance; and they managed the construction of a home in Mexico.
- They were at least reckless, if not willfully blind, about their reporting obligations related to the UBS account, as demonstrated by the fact that they did not provide UBS with their home address in the United States, never told anyone about the account (other than their children), never consulted an attorney, accountant, or banker about potential requirements related to the UBS account, and never used a bookkeeper or otherwise kept organized books once the UBS account had been opened.
- Their claims that they were unaware of or misunderstood their FBAR duties lacked credibility because Part III of Schedule B of their Form 1040 from 1998 put them on notice that they needed to file an FBAR; they deposited pre-tax sales commissions into the UBS account and directed certain foreign customers to do the same; and they made several transfers of funds from the UBS account to other foreign and domestic accounts.
- The Bohanecs made several misrepresentations to the IRS in connection with the 2009 OVDP, including stating that all funds in the UBS account were comprised of after-tax amounts, filing "false" Forms 1040 for 2003 through 2008

The IRS summarized its stance as follows: willfulness, for FBAR purposes, "includes not only knowing violations of the FBAR requirements, but willful blindness to . . . as well as reckless violations of the FBAR requirements."

that omitted income from Internet sales, and filing FBARs for 2003 through 2008 that did not declare foreign accounts in Austria and/or Mexico.

Based on the preceding, the District Court held that the FBAR violation for 2007 was "willful," such that the maximum penalty should apply.

Bedrosian—Fifth Case

The next case in the series, *Bedrosian v. U.S.*, was unique in that it constitutes the only situation thus far in which the taxpayer, as opposed to the government, prevailed on the willfulness issues.[43]

When UBS issued a loan of some $750,000 to the taxpayer, it apparently opened a subaccount ("Large Account") under the existing account ("Small Account"), deposited the funds in the Large Account, and began investing them on behalf of the taxpayer. Much of the case centers on what the taxpayer knew, and when, about the Large Account.

The taxpayer instructed UBS not to send him any mail. He kept abreast of the financial status by meeting periodically with a UBS representative when he was in the United States.

The taxpayer started working in 1972 with an accountant, Seymour Handelman ("Accountant Handelman"). Apparently, Accountant Handelman never specifically asked the taxpayer about foreign accounts, and the taxpayer never unilaterally raised the topic, at least until some point in the 1990s. At that time, Accountant Handelman allegedly advised the taxpayer, incorrectly, that he would not need to report income from the UBS accounts until he repatriated the funds or died. It is unclear whether Accountant Handelman notified the taxpayer of his duty to report the existence of the account on Schedule B of Form 1040 or to file an annual FBAR. What is certain, though, is that these things did not occur until many years later.

Trying to digest all the data about willfulness in the civil FBAR penalty context is, well, hard.

Description of the relevant facts. It is worthwhile to grasp the facts in this case given its importance to taxpayers, but getting a clear understanding was particularly challenging in *Bedrosian.* The information below constitutes a best effort based on the available materials.[44]

The taxpayer started working in the pharmaceutical industry in the late 1960s and he frequently traveled abroad on business early in his career. He opened an account in Switzerland at some point in the 1970s with the predecessor to UBS in order to facilitate payment of expenses during international trips. The balance started very small and grew over the years as a result of three things: (i) periodic deposits of after-tax funds via check and wire transfer from the United States, (ii) a supposed loan that the taxpayer received from UBS of approximately $750,000, and (iii) passive income generated by the accounts.

The taxpayer, who holds an undergraduate degree and a law degree, was the chief executive officer of a large generic pharmaceutical company. He is, by all accounts, a sophisticated and financially savvy businessperson. As head of the company, he manages hundreds of people, routinely reviews and signs complex financial statements, approves corporate contracts, analyzes complex industry regulations, etc.

Accountant Handelman prepared Forms 1040 for the taxpayer from 1972 through 2006, after which he died. The taxpayer, in need of new help, hired another accountant, Sheldon Bransky ("Accountant Bransky"). The content of the discussions with, and the type of documents provided to, Accountant Bransky by the taxpayer are ambiguous, but there is no dispute that he prepared the following: (i) A timely 2007 Form 1040 that omitted the $220,000 in passive income generated by the UBS accounts that year; (ii) a Schedule B to the 2007 Form 1040 answering "yes" to the foreign-account question and identifying "Switzerland" as the location; and (iii) a late 2007 FBAR, filed in October 2008 (instead of by the deadline of June 30, 2008), reporting only the Small Account at UBS and noting that the highest balance in such account ranged from $100,000 to $1 million. The taxpayer did not convey to Accountant Bransky the erroneous advice that he had previously received from Accountant Handelman to the effect that he was not required to report passive income from UBS until repatriation or death. Nevertheless, it is evident that the taxpayer continued to follow this flawed guidance because the UBS income did not appear on the original 2007 Form 1040.

The taxpayer was notified by UBS at some point in 2008 that he must close his accounts, presumably as a result of the criminal investigation by the U.S. government. Therefore, in November 2008, the taxpayer closed the Large Account, with a balance of about $2 million, and transferred the funds to another Swiss bank, Hyposwiss. Soon thereafter, in December 2008, the taxpayer sent another letter to UBS, this time closing the Small Account, with a balance of about $250,000, and domesticating the funds to his Wachovia account.

At some point in 2009, the taxpayer began to question the earlier advice from Accountant Handelman with respect to the UBS accounts. He consulted with his attorney, who, in turn, hired both a forensic accountant, to assist with return preparation, and a Swiss attorney, to obtain all necessary data from UBS. The Swiss attorney learned as part of his project that UBS had already provided data to the IRS about the accounts held by the taxpayer. This did not alter the taxpayer's existing plan, which was to apply to resolve issues with the IRS through the 2009 Offshore Voluntary Disclosure Program ("OVDP").

In connection with his proposed participation in the OVDP, the taxpayer filed with the IRS in August 2010: (i) Forms 1040X from 2003 through 2008, reporting the passive income generated by the UBS accounts that was not shown on the original Forms 1040; and (ii) a 2006 FBAR, an amended 2007 FBAR, and a 2008 FBAR, reporting both the

Small Account and Large Account. The IRS rejected the taxpayer's application for the OVDP because it had already received data directly from UBS about the unreported accounts.

In April 2011, the IRS initiated an audit, starting with 2007. The taxpayer cooperated with the audit, responding to all Information Document Requests ("IDRs") and participating in an interview with the Revenue Agent. The Revenue Agent determined that the FBAR violations were non-willful and presented this finding to the appropriate "panel" within the IRS. The Revenue Agent later exited the scene for unexpected medical leave, during which time the case was reassigned to another Revenue Agent. In June 2013, the second Revenue Agent disagreed with the earlier conclusion about the character of the FBAR violation for 2007 and asserted a "willful" penalty. The second Revenue Agent sought the highest sanction, equal to 50 percent of the highest balance of the Large Account. The highest balance in 2007 was $1,951,578.34, triggering a penalty of $975,789.19.

The taxpayer administratively disputed the penalty, he received notice from the IRS that clemency would not be granted, he made a partial payment of $9,757.89 (representing one percent of the FBAR penalty amount), and then he filed a Suit for Refund in the appropriate District Court. The U.S. Department of Justice ("DOJ") filed a counterclaim, contending that the taxpayer was liable for the remaining amount of the penalty.

Positions by the parties. The taxpayer and the U.S. government, represented by the DOJ, presented legal and tax positions to the District Court primarily through cross-motions for summary judgment, which were denied, followed by briefing before and after a one-day bench trial. Many of these positions are not new; they have been addressed by the courts previously in *Williams*, *McBride*, *Bussell*, and/or *Bohanec*. Therefore, such positions have been abbreviated or excluded below.

Main arguments by the taxpayer. The taxpayer first argued about which standard should apply in a civil FBAR penalty case. Relying on criminal cases (i.e., *Cheek v. U.S.*, 498 U.S. 192 (1991) and *Ratzlaf v. U.S.*, 501 U.S. 135 (1994)), Chief Counsel Advisory 200603026, and the Internal Revenue Manual, the taxpayer tried to convince the court that, in order to sustain a civil willful FBAR penalty, the U.S. government has the burden of proving that the taxpayer intentionally violated a known legal duty—that he had specific intent.

The taxpayer also made considerable noise about the incompleteness and inappropriateness of the review by the second Revenue Agent, who changed the FBAR penalty from nonwillful to willful.

The taxpayer, understandably, focused most of his time and attention on the key issue of whether his failure to report the Large Account on the original 2007 FBAR was willful, negligent, reasonable, or something in between. The taxpayer emphasized a number of points in this regard during the litigation, including the following: (i) he relied on erroneous advice from Accountant Handelman; (ii) he did not closely review the relevant Forms 1040 or FBARs before they were filed; (iii) Schedule B to the 2007 Form 1040 answered "yes" to the foreign-account question and identified "Switzerland" as the relevant country; (iv) at the time of filing the original 2007 FBAR, he was unaware that UBS had created a Small Account and a Large Account, and he simply considered it all to be just one account; (v) he did not have in his possession statements from UBS at the time he filed the original 2007 FBAR; (vi) he did not believe that the loan of approximately $750,000 would be counted as part of the reportable balance, because that money essentially belonged to UBS, not the taxpayer; (vii) he retained legal counsel, a forensic accountant, and a Swiss attorney as part of an effort to voluntarily become compliant through the OVDP, even though his application was rejected; (viii) he filed Forms 1040X, FBARs, and an amended 2007 FBAR in August 2010, before the IRS started an audit; and (ix) he fully cooperated during the IRS audit.

Finally, the taxpayer maintained that, in the worst case scenario, his FBAR penalty should be reduced in accordance with the "penalty mitigation guidelines." The Internal Revenue Manual indicates that the IRS might reduce FBAR penalties if the following four "mitigation threshold conditions" are met in a particular case: (i) the taxpayer has no history of criminal tax or Bank Secrecy Act convictions for the preceding 10 years and no history of FBAR penalty assessments; (ii) no money passing through any of the foreign accounts associated with the taxpayer was from an illegal source or used to further a criminal purpose; (iii) the taxpayer cooperated during the IRS audit; and (iv) the IRS did not determine a fraud penalty against the taxpayer for income tax underpayments related to the foreign account.[45]

Main arguments by the DOJ. The DOJ had a different take on the facts and applicable law, of course.

With respect to the burden of proof and the relevant standard, the DOJ, building on earlier successes in *Williams III*, *McBride*, and *Bohanec*, argued that it only needed to prove the issues by a

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[43] Bedrosian v. U.S., 120 AFTR 2d 2017-5671 (D.C. Pa., 2017).

[44] The author obtained from the District Court and reviewed the following documents: Complaint filed Oct. 27, 2015, Answer and Counterclaim filed Feb. 26, 2016, Reply to Counterclaim filed March 21, 2016, United States' Motion for Summary Judgment filed Nov. 30, 2016, Memorandum of Law in Support of the United States' Motion for Summary Judgment filed Nov. 30, 2016, United States' Statement of Undisputed Material Facts filed Nov. 30, 2016, Plaintiff's Statement of Undisputed Material Facts filed Dec. 5, 2016, Plaintiff's Motion for Summary Judgment filed Dec. 5, 2016, Plaintiff's Response to Defendant's Statement of Undisputed Material Facts filed Dec. 19, 2016, United States' Response to the Plaintiff's Motion for Summary Judgment filed Dec. 19, 2016, Plaintiff's Response to Defendant's Motion for Summary Judgment filed Dec. 19, 2016, United States' Reply to the Plaintiff's Response to Its Motion for Summary Judgment filed Dec. 23, 2016, Order Denying Motions for Summary Judgment dated April 13, 2017, Memorandum Regarding Cross Motions for Summary Judgment dated April 13, 2017, Plaintiff's Trial Memorandum filed Aug. 28, 2017, United States' Trial Brief filed Aug. 28, 2017, Plaintiff's Post-Trial Memorandum and Proposed Findings of Fact and Conclusions of Law filed Sept. 14, 2017, United States' Post-Trial Brief filed Sept. 14, 2017, Order dated Sept. 20, 2017, Findings of Fact and Conclusions of Law dated Sept. 20, 2017.

[45] IRM section 4.26.16.6.6.1 (11/6/2015).

preponderance of the evidence (instead of by clear and convincing evidence), and that it could establish willfulness for purposes of civil FBAR penalties by showing that the taxpayer knowingly violated the law (with either actual or constructive knowledge), recklessly disregarded duties, and/or made himself "willfully blind."

The DOJ gave little credence to the argument that the actions by the second Revenue Agent, upping the penalty to the willful level, were improper or subject to review during a *de novo* trial before the District Court.

The DOJ, like the taxpayer, directed most of its energy to the issue of willfulness. It raised a long list of points through the litigation, many of which are summarized here: (i) the taxpayer is an accomplished, intelligent, experienced professional who understood, or should have taken the necessary steps to understand, his tax duties, FBAR duties, and facts related to funds held with UBS; (ii) because he signed his annual Forms 1040, the taxpayer had at least constructive knowledge of, and was placed on inquiry notice about, his FBAR duties; (iii) the taxpayer cannot claim ignorance of his FBAR duty for 2007, because he actually filed one, even though it was late and incomplete; (iv) the fact that the taxpayer sent two separate letters to UBS to close the Large Account and the Small Account, and the fact that funds from the Large Account were transferred to another Swiss bank, while the funds from the Small Account were repatriated, indicate that the taxpayer knew he had two accounts at UBS, not one; (v) the taxpayer closed the Large Account merely two weeks after filing the original 2007 FBAR, which did not report the Large Account; (vi) the supposed reliance by the taxpayer on erroneous advice from Accountant Handelman is questionable because there is no written evidence or third-party testimony to support it, the advice was limited to income tax issues, not FBAR issues, and the taxpayer did not discuss with his new Accountant Bransky such advice when he took over return preparation starting with 2007; (vii) the taxpayer instructed UBS to hold all mail related to the accounts, and the taxpayer received only oral updates when he met periodically with UBS personnel in the United States; (viii) the taxpayer did not take any steps to voluntarily resolve non-compliance with the IRS until after he learned in 2009 that UBS had already remitted to the U.S. government data about his accounts; (ix) the taxpayer presented no evidence that the $750,000 deposited into the Large Account constituted a "loan," and, even if it were, a loan amount cannot be excluded when calculating the highest balance for FBAR purposes; and (x) the non-compliance by the taxpayer was significant, lasting for several decades, and resulting in approximately $375,000 in passive income from 2003 through 2007 alone.

The DOJ rejected the taxpayer's argument about entitlement to a reduced FBAR sanction under the "penalty mitigation guidelines" on the following grounds. The DOJ conceded that the taxpayer met the four thresholds described in the Internal Revenue Manual, in that he had no previous FBAR penalty assessments before 2007, the funds in the UBS accounts were not derived from illegal sources or used for criminal purposes, the taxpayer fully cooperated during the audit, and the IRS did not assert a civil fraud penalty with respect to the unreported income stemming from the UBS accounts. However, the DOJ underscored that the applicable process has two steps. The first is to meet the four threshold criteria, and the second is to check the highest balance of the relevant account. If it exceeds $1 million, then a taxpayer is still subject to the most severe FBAR penalty, that is, 50 percent of the highest balance in the account. Because the Large Account was not specifically declared on the original 2007 FBAR, and because its balance reached over $1.9 million, the DOJ argued that the "penalty mitigation guidelines" simply do not help the taxpayer.

Analysis by the District Court. The taxpayer and the DOJ each filed a Motion for Summary Judgment, and the District Court, predictably, rejected them. In doing so, the District Court noted that the "precise contours" of the concept of willfulness in the civil FBAR penalty context "have *not* been clearly established by statute or precedent," including CCA 200603026, the Internal Revenue Manual, and three federal cases (i.e., *Williams III*, *McBride*, and *Bohanec*). The District Court also stated that the issue of whether the taxpayer in *Bedrosian* willfully failed to file a timely, accurate, and complete FBAR for 2007 is an "inherently factual question" that is inappropriate for resolution through summary judgment. Thus, the case proceeded to trial.

After holding a one-day bench trial and reviewing the corresponding pre-trial and post-trial briefs, the District Court rendered a taxpayer-favorable decision, the first of its kind. The main points from the District Court are as follows.

In terms of standards, the District Court held that, for civil FBAR purposes, (i) "willful intent is satisfied by a finding that the [taxpayer] knowingly or recklessly violated the statute," (ii) "the government need not prove improper or bad purpose" by the taxpayer, (iii) "willful blindness" by the taxpayer meets the standard, and (iv) the government can prove willfulness through circumstantial evidence and through inference, including the conduct of the taxpayer to conceal or mislead sources of income or other financial data.[46]

The District Court identified some favorable facts for the taxpayer, namely, Schedule B to the 2007 Form 1040 checked the "yes" box in response to the foreign-account question and indicated "Switzerland" as the relevant country, the taxpayer filed an FBAR reporting at

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[46] Findings of Fact and Conclusions of Law, at 7-8 (9/20/2017).

[47] Id. at 13-14.

[48] Id. at 10.

[49] Id. at 10.

[50] Id. at 11-13.

[51] Id. at 13-14.

[52] U.S. v. Kelley-Hunter, 120 AFTR 2d 2017-5566 (D.C. Colo., 12/12/2017).

[53] Complaint filed Dec. 10, 2015; Answer filed Oct. 28, 2016; Motion for Default Judgment as to Estate of Burt Hunter filed July 11, 2017; Order Granting Motion for Default Judgment as to Estate of Burt Hunter filed July 27, 2017; Motion for Summary Judgment against Nancy Kelley-Hunter filed Oct. 16, 2017; Order Granting Motion for Summary Judgment against Nancy Kelley-Hunter filed Dec. 12, 2017; and Memorandum Opinion filed Dec. 12, 2017.

least one account whose balance ranged from $100,000 to $1 million, and the taxpayer approached his attorney to rectify matters with the IRS before he learned that UBS had already supplied his account data to the U.S. government and it had started an investigation.[47]

It was not all positive, though. The District Court expressly acknowledged that the taxpayer is an educated and financially literate businessman, he took a "calculated risk" for many years before 2007 by not reporting the UBS accounts or the income they generated (but such years were not at issue during the trial), there is "no question" that the taxpayer could have easily discovered that UBS had split the funds into a Small Account and Large Account based on the annual statements and/or periodic meetings with UBS personnel, and the taxpayer filed the questionable 2007 FBAR showing one account just two weeks before sending two separate letters to UBS to close two accounts. Despite all this, the court held that the taxpayer's actions "were at most negligent" and the omission of the Large Account from the original 2007 FBAR was an "unintentional oversight or a negligent act" because there "is no indication that he did so with the requisite voluntary or intentional state of mind."[48]

The District Court reached this determination by comparing the facts in *Bedrosian* to those in *Williams*, *McBride*, *Bussell*, and *Bohanec*. It stated the following in this regard: "[W]e cannot conclude, based on a comparison of the facts of this case compared with those of cases in which a willful FBAR penalty was imposed, that the government has proved, by a preponderance of the evidence, that [the taxpayer's] violation of Section 5314 was willful."[49] In distinguishing the facts in *Bedrosian*, the District Court seemed to focus on the fact that the unreported accounts in the other cases were part of a larger or complex "tax evasion scheme," the taxpayers made no efforts to voluntarily disclose matters to the IRS, the taxpayers had already been convicted of a crime, and/or the taxpayers lied or otherwise failed to cooperate with the IRS audit.[50]

The District Court summarized its ultimate holding in the following manner:

> In summary, the only evidence supporting a finding that Bedrosian willfully violated Section 5314 is: (1) the inaccurate [original FBAR for 2007] itself, lacking reference to the [Large Account], (2) the fact that he may have learned of the existence of the [Large Account] at one of his meetings with a UBS representative, which is supported by his having sent two separate letters closing the accounts, (3) Bedrosian's sophistication as a businessman, and (4) [Accountant] Handelman's having told Bedrosian in the mid-1990s that he was breaking the law by not reporting the UBS accounts. None of these indicate "conduct meant to conceal or mislead" or a "conscious effort to avoid learning about reporting requirements," even if they may show negligence.[51]

Certain taxpayers, who possess an exaggerated sense of luck and/or self-delusion, have not made a decision yet about what, if anything, they will do to address their U.S. non-compliance.

Kelley-Hunter—Sixth Case

The spirits of taxpayers with FBAR violations were soaring after the victory in *Bedrosian*, but this euphoria did not last long. The U.S. government claimed another win, in December 2017, in *U.S. v. Kelley-Hunter*.[52] The description of the case below derives from the decision by the court, supplemented by a review of multiple filings by the parties.[53] To enhance readability, certain aspects have been paraphrased or abbreviated.

Summary of the relevant facts. Nancy Kelley-Hunter is a lifelong U.S. citizen. She earned several college degrees and worked various jobs before she married Burt Hunter in 1997. They moved to France the year after the nuptials, in 1998. Nancy and Burt opened certain foreign accounts after moving abroad, including one at Bank Sarasin, in Switzerland, and another at Banque National de Paris, in France. These two accounts were not the subject of the FBAR penalty litigation.

The account on which the IRS and, later, the DOJ focused was held at UBS in Switzerland. The funds in the UBS account, opened in 2006, came from three main sources: proceeds from the sale of Burt's business and sailboat, an inheritance that Nancy received upon the death of her parents, and passive income generated by the investments in the account. Although unclear from the court record, it appears that Nancy and Burt, or one of their advisors, formed an entity to hold the UBS account in order to obscure their true ownership. This entity, established in Mauritius and controlled by just one bearer share, was called Towers International, Inc. The evidence demonstrated that Nancy and Burt controlled the UBS account, despite the existence of Towers International, Inc. For instance, they met periodically in person with UBS representatives, they communicated with them by phone and fax, they directed payment of medical and other bills from the account, and the UBS files included a "Power of Attorney for Management of Assets" identifying them as authorized individuals.

In terms of return preparation, it appears that Nancy and Burt hired accountants when they first moved abroad, continuing this practice until 2003. Things changed at that point, with Nancy assuming the return-preparation responsibilities. The earlier items prepared by Nancy tend to indicate that she understood her U.S. obligations related to foreign accounts. For example, she answered "yes" to the foreign-account question on Schedule B to Forms 1040 for 2004 and 2005 (before the large UBS account was opened), properly listing Switzerland and France as the locations of the accounts. Moreover, Nancy filed an FBAR for 2003.

In February 2009, Nancy and Burt received a notice from UBS that it had disclosed the account to the U.S. government. Four months later, Nancy filed a late FBAR for 2007 and a timely FBAR for 2008, reporting the UBS account.

Imposition of penalties. In June 2013, the IRS sent Nancy and Burt a notice indicating that it was proposing willful FBAR penalties for 2007. They did not dispute or appeal the notice, so the IRS assessed such penalties in December 2013. The balance in the UBS account at the time of the FBAR violation was $3,430,500, and both Nancy and Burt had a reportable interest in the account. Therefore, the IRS originally assessed a penalty of $1,715,250 against each of them; that is, a 50 percent penalty for Nancy, and another 50 percent penalty for Burt. The IRS, in effect, was taking the entire balance in the account as a penalty for filing late FBARs for one year, 2007.

Collection lawsuit by the DOJ. The taxpayers did not pay the FBAR penalties, which resulted in the DOJ filing a collection action with the District Court in December 2015. Burt died soon after, in January 2016, at which point the litigation was focused solely on Nancy, both as the executor of Burt's estate and in her individual capacity as an FBAR violator.

In its Complaint, the DOJ emphasized the fact that, with respect to 2007, the taxpayers (i) held a multi-million dollar account at UBS through a foreign entity, Towers International, Inc.; (ii) did not report the passive income generated by the account on Schedule B of the 2007 Form 1040, despite the fact that an e-mail shows that a UBS representative sent Nancy this data; (iii) did not acknowledge the existence and location of the UBS account in Part III to Schedule B to the 2007 Form 1040; and (iv) did not file a timely FBAR reporting the UBS account. The DOJ also underscored that Nancy self-prepared the 2007 Form 1040, and both Nancy and Burt swore to its accuracy and completeness under penalties of perjury. According to the DOJ, the evidence "presents a quintessential example of willful failure to disclose a foreign bank account."[54]

Citing to the standards of willfulness described in *Williams III*, *McBride*, and *Bohanec*, the DOJ presented a number of positions to the District Court. First, Nancy admitted that she had actual knowledge of the existence of the UBS account and her authority over it starting in 2006. Second, Nancy had actual knowledge of her duty to report foreign accounts, as evidenced by the fact that she filed an FBAR for 2003 and she disclosed the existence of foreign accounts and their locations (i.e., Switzerland and France) on Forms 1040 for 2004 and 2005. Third, proof of her intent to hide the UBS account includes her awareness that the holding of the previous foreign account, at Bank Sarasin in Switzerland, was supposed to be secret, as well as a series of e-mails that she sent her accountant, Peter Kent, in later years revealing her mindset and desire to hide money from the IRS through trusts. Finally, the fact that Nancy took no steps to understand her foreign account reporting obligations constitutes, at a minimum, willful blindness and reckless disregard of U.S. law.

The concept of "willfulness" in the FBAR setting has been controversial for a long time.

Nancy raised some justifications for her FBAR non-compliance in response to interrogatories from the DOJ. For example, she indicated that Burt handled the banking business and thus she was unaware of her financial interest in or authority over the UBS account in 2007, she could not file an FBAR for Burt for 2007 because he was already suffering from advanced dementia at that time, she was taking strong prescription medications in connection with a serious automobile accident, and she was doing her best, alone, without the assistance of an accountant or Burt. Nancy summarized her position in the following manner in response to an interrogatory: "I signed whatever our professional tax preparers prepared for us, and in later years when I tried to do it by myself I made a very ineffective attempt to mimic their work."

Decisions by the court. The District Court records tend to indicate that Nancy and Burt retained at least two reputable U.S. law firms to defend them throughout the FBAR litigation, but they ceased to participate when the taxpayers stopped paying their fees, refused to follow their advice, and/or insisted on disobeying mandates from the District Court regarding discovery and other matters. Ultimately, the DOJ asked the District Court to find in its favor, by filing a Motion for Default Judgment (related to Burt's estate) and a Motion for Summary Judgment (related to Nancy). Nancy never filed any documents opposing the DOJ's requests, so the District Court ruled in favor of the DOJ in both instances.

Unlike the previous civil willful FBAR penalty cases, particularly *Williams III*, *McBride*, and *Bohanec*, *Kelley-Hunter* was not a hard-fought legal battle, characterized by extensive discovery, testimony, and briefing. Accordingly, the District Court had no need to issue a long opinion explaining the law, clarifying conflicting facts, etc. It stated, quite simply, that the key element, willfulness, "can prove challenging to establish, but not here." In deciding that willfulness existed and that the DOJ was entitled to collect the FBAR penalties against both Burt's estate and Nancy, the District Court noted the following: (i) Nancy personally prepared and filed Forms 1040 disclosing foreign accounts, such that she was aware of the obligation; (ii) Nancy sent e-mails to her accountant, Peter Kent, "that display a consciousness of guilt"; and (iii) willful blindness satisfies the required mental state for a willful FBAR violation, and Nancy "certainly acted with at least that degree of intent."

Garrity—Seventh Case

The next willful FBAR penalty case, *U.S. v. Garrity*, is more obscure than its predecessors because it was a jury trial, and thus no lengthy opinion was issued by the District Court in June 2018.[55]

Summary of the key facts. Synthesizing multiple court documents and making some basic assumptions, the key facts in *Garrity* appear to be the following.[56]

Paul G. Garrity, Sr. ("Paul") founded Garrity Industries, Inc. ("Domestic Company") in 1967. It primarily manufactures and sells lighting products. About two decades later, in 1989, Paul established the Lion Rock Foundation, a so-called Stiftung in Liechtenstein ("Foreign Trust"). Paul was named the primary beneficiary of the Foreign Trust from inception, and, during his lifetime, he retained the right to amend or revoke the governing documents. Paul entered into an agreement with BIL Treuhand AG ("Foreign Trustee"), whereby it would appoint the Board of Directors for the Foreign Trust. Among other things, the agreement with the Foreign Trustee expressly mandated that all members of the Board of Directors act in accordance with instructions from Paul or anyone authorized to act on his behalf. For these reasons, the U.S. government takes the position that Paul "exercised complete control" over the Foreign Trust and it should be treated as a foreign grantor trust for U.S. tax purposes, necessitating the filing of an annual Form 3520 and Form 3520-A.

In 1989, Paul also opened an account in Liechtenstein in the name of the Foreign Trust with a predecessor to LGT Bank ("LGT Account").

In 1990, the Foreign Trustee, with assistance, formed a company in the British Virgin Islands ("Foreign Corporation"), whose ownership was memorialized solely by bearer shares. Then, the Foreign Trustee arranged for another company ("Nominee") to act as principal for the Foreign Corporation, holding the bearer shares. Next, the Nominee opened an account at Standard Chartered Bank, presumably in the British Virgin Islands ("Standard Chartered Account"). The U.S. government alleges that all documents related to this international structure were either signed or initialed by Paul.

Later, in 1990, Paul instructed the Foreign Trustee to arrange for "suitable documentation" between the Domestic Company and the Foreign Corporation, showing that the former was supposedly paying the latter "inspection fees." It appears that the money flowed in the following manner: the Foreign Corporation would send invoices to the Domestic Company for "inspection services" rendered; the Domestic Company would send payment of the invoices to the Standard Chartered Account; and the Nominee would cause the funds to be transferred from the Standard Chartered Account to the LGT Account, which was held directly by the Foreign Trust. The U.S. government claims that (i) the Foreign Corporation never performed any "inspection services," and (ii) the purpose of the foreign entities, accounts, and transactions was to "disguise" transfers of pre-tax funds from the Domestic Company to Paul.

In 2004, Paul traveled to Liechtenstein with his three sons, withdrew $100,000 from the LGT Account, kept $25,000 for himself, and divided the remainder equally between his sons. During this trip in 2004, the Foreign Trustee allegedly notified Paul that the arrangement might trigger U.S. tax and information-reporting issues for Paul and suggested that he seek advice from a U.S. tax professional. Paul agreed to act as the U.S. agent for the Foreign Trust during this same trip, likely without appreciating the duties associated with such title.

The DOJ made the following allegations with respect to 2005: (i) Paul did not report the existence of the LGT Account on Schedule B to the 2005 Form 1040 in response to the foreign account question; (ii) Paul did not report any income generated by the Foreign Trust or the LGT Account on his 2005 Form 1040; (iii) Paul executed his 2005 Form 1040 under penalties of perjury; (iv) Paul did not notify his accountant about the LGT Account; (v) Paul failed to file an FBAR disclosing the LGT Account; and (vi) all the preceding actions and inactions by Paul are evidence of his "willfulness."

The DOJ claimed that the balance of the LGT Account on the date of the FBAR violation (i.e., June 30, 2006) was at least $1,873,382. Paul died in February 2008, at the age of 84. In May 2008, just three months after his death, the IRS started a civil audit. In October 2009, one of the personal representatives of Paul's estate filed FBARs for 2003 through 2008, apparently attempting to participate in the OVDP. The court pleadings are unclear, but the important point is that the IRS, predictably, rejected the OVDP application because the audit had already started.

The audit did not go well for Paul's estate. Among other things, the IRS assessed a willful civil FBAR penalty for 2005 related to the LGT Account seeking the maximum penalty of $936,691, and the DOJ later filed a collection lawsuit in District Court demanding $1,061,181 as a result of post-assessment penalties and interest charges.

Decision by the jury. Many FBAR cases are decided by judges, but the representatives of Paul's estate opted for a jury. However, the members of the jury sided with the DOJ on all points, rendering the following decisions: The DOJ established, by a preponderance of the evidence, that (i) Paul had a financial interest in, signature authority over, or some other type of authority over the LGT Account in 2005; (ii) Paul's failure to file the 2005 FBAR by June 30, 2006, was "willful"; and (iii) the amount of the penalty was proper in that it was equal to, or less than, 50 percent of the balance in the LGT Account as of June 30, 2006.

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54 Complaint, at 1.

55 U.S. v. Garrity, Case No. 3:15-cv-243 (D.C. Conn.).

56 Complaint and Jury Demand filed Feb. 20, 2015; Defendant's Answer and Affirmative Defenses filed April 24, 2015; Expert Report by Howard B. Epstein, CPA dated April 28, 2017; Memorandum and Order regarding Standard of Proof filed April 3, 2018; Plaintiff's Motion in Limine to Exclude the Testimony of Howard B. Epstein filed April 3, 2018; Plaintiff's Memorandum in Support of Its Motion in Limine to Exclude Opinion Testimony of Howard B. Epstein filed April 3, 2018; Defendant's Opposition to Plaintiff's Motion in Limine to Exclude Opinion Testimony of Howard B. Epstein filed April 24, 2018; Joint Trial Memorandum filed May 4, 2018; Stipulation regarding Determination of Factual and Legal Issues filed May 30, 2018; Memorandum and Order regarding Proposed Expert Testimony of Howard B. Epstein filed June 1, 2018; Jury Instructions filed June 12, 2018; Verdict Form filed June 13, 2018.

Jury instructions about willfulness standard. Putting aside the verdict, *Garrity* is interesting for the additional guidance it provides regarding "willfulness" in the context of civil FBAR penalties. The Jury Instructions explained the term to the jury in the following manner:

> A person acts willfully if he (1) knows that his conduct violates the requirements to file an FBAR, or (2) recklessly disregards a known or obvious risk that his conduct violates the requirement to file an FBAR. The word "willfully" as it is used here means acting in a way that is voluntary, conscious, or intentional, as opposed to accidental, negligent, or inadvertent. A person acts recklessly when he or she disregards a known or obvious risk that [such] failure to act violates the law. A risk is obvious in this context if the person consciously avoids learning of it by burying his head in the sand or otherwise consciously takes action to avoid confirming a high probability that he is violating the law. Mere carelessness is not enough. The [DOJ] does not have to prove that [Paul] acted with an improper motive or a bad purpose to establish willfulness, though whether a motive is present or absent is a factor that may be considered together with all the evidence in the case. Because willfulness is a state of mind, you can find willfulness or lack of willfulness by drawing reasonable inferences from the available facts.

Markus—Eighth Case

Similar to *Williams III* and *Bussell*, discussed above, the next case, *U.S. v. Markus*, involves a taxpayer who faced criminal prosecution, followed by civil FBAR penalties.[57] It was decided in July 2018.

Summary of the key facts. The taxpayer, a U.S. citizen, was a combat engineer in the U.S. Army from 2002 to 2005, during which time he was deployed to Iraq. He later worked for the Army Corps of Engineers as a project engineer, still in Iraq. He focused on assistance with reconstruction efforts. Apparently, the taxpayer accepted bribes from two Iraqi citizens in exchange for confidential bid information related to oil pipeline projects, and then deposited such bribes in unreported foreign accounts, one in Egypt and at least three in Jordan. The bribes consisted of five percent of the value of each federal contract awarded to the companies connected with the Iraqi citizens.

The taxpayer had foreign accounts from 2002 to 2009, but the bribes only occurred from 2006 through 2009. An Enrolled Agent prepared Forms 1040, and the taxpayer signed them and filed them with the IRS. The taxpayer acknowledged that he never investigated whether he was obliged to report his foreign accounts to the IRS. For 2007 and 2008, the taxpayer filed FBARs reporting only certain accounts. For 2009, he did not file an FBAR at all.

The DOJ filed a 54-count indictment against the taxpayer in 2011, and, in 2012, he pleaded guilty to certain crimes, including receiving bribes and willfully failing to file an FBAR for 2009 (but not 2007 or 2008). In exchange for the guilty plea, the DOJ dropped the remaining criminal charges.

In April 2014, the IRS assessed civil willful penalties for 2007, 2008, and 2009. The taxpayer did not pay such amounts, so the DOJ brought a timely collection action in District Court. The FBAR penalties totaled $948,753.

Decision by the District Court. In light of the previous criminal prosecution, the guilty plea regarding 2009, and the extent of the undisputed evidence, the District Court was disinclined to engage in a long analysis of the "willfulness" issue in the context of FBAR penalties. It began by citing to *McBride* and *Bedrosian* for the proposition that the notion of "willfulness" involves conduct that is voluntary, and not merely accidental or unconscious. The District Court then made the following ruling:

> Markus does not refute the allegations of willfulness, and we see no other way to interpret the record. In 2007, Markus did not file an FBAR. At his plea allocution, he confessed [that] he engaged in a criminal scheme to receive illegal bribe and kickback payments. While he did not confess to willfully failing to file an FBAR for this year, his involvement in a much larger scheme to defraud the United States puts to rest any doubt—and Markus does not refute any of this—that he willfully failed to file an FBAR for 2007.
>
> In 2008, Markus did file an FBAR. But he omitted the [Egyptian] account from that filing. His tax preparer, Dennis Tomsky, has presented unrefuted evidence that Markus never disclosed the existence of the Egyptian account to him. And as Markus filed an FBAR for his Jordanian accounts, the only available inference from these facts is that he was aware of the reporting requirement for his [Egyptian] account but decided not to report it.
>
> Finally, Markus pleaded guilty to willfully failing to file an FBAR for 2009 and does not dispute it now.
>
> Thus, for each year in question [*i.e.*, 2007, 2008, and 2009], the Court finds that the willfulness requirement is satisfied.

The Definition of "Willfulness"—Perspective of the IRS

The IRS, of course, has its own thoughts about "willfulness" and the cases analyzed above. This was publicized in May 2018, in Program Manager Technical Advice ("PMTA") 2018-013. The IRS describes its PMTAs as legal advice from IRS attorneys in the National Office of Chief Counsel, issued to IRS personnel who are national program executives and managers in order to assist them in administering their programs by providing "authoritative legal opinions" on certain matters.[58]

PMTA 2018-013 addresses two issues related to civil willful FBAR penalties, one of which is the proper standard for "willfulness." The IRS summarized its stance as follows: willfulness, for FBAR purposes, "includes not only knowing violations of the FBAR requirements, but willful blindness to the FBAR re-

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[57] U.S. v. Markus, No. 16-2133 (D.C. N.J., 7/17/2018).

[58] See https://www.irs.gov/privacy-disclosure/legal-advice-issued-to-program-managers.

[59] Program Manager Technical Advice 2018-013 (internal citations omitted to enhance readability).

quirements as well as reckless violations of the FBAR requirements."

The IRS goes on to generally distinguish between the idea of willfulness in criminal and civil settings. It then turns to the specific issue, civil FBAR penalties. To avoid any mischaracterization of the message that the IRS is sending to its key personnel, included below is the full guidance in PMTA 2018-013:

> Consistent with the Supreme Court's interpretation of the word "willful" in the civil context, courts have held that the standard for "willfulness" for civil FBAR violations includes recklessness and willful blindness. The Fourth Circuit in *United States v. Williams* reversed for clear error the district court's finding that willfulness had not been established, because the taxpayer's "undisputed actions establish reckless conduct." The district court in *Bedrosian* rejected the argument that in order for the government to sustain a civil willful FBAR penalty, it must meet the standard used in the criminal context and show "that the actions amounted to a voluntary, intentional violation of a known legal duty." The court in *United States v. McBride* held that willfulness for civil FBAR violations includes both recklessness and willful blindness, as did the court in *United States v. Bohanec*. As the court in *Bedrosian* noted, every federal court to have considered the willfulness standard for civil FBAR violations has concluded that the civil standard applies, and the standard includes "willful blindness" and "recklessness." The court in *Garrity* similarly noted that numerous courts have found that "willfulness" in the civil FBAR context includes reckless conduct.[59]

After reading the analysis, earlier in this article, of the eight civil FBAR penalty cases thus far, some might question (i) whether PMTA 2018-013 is sufficiently accurate and comprehensive to be considered an "authoritative legal opinion," or (ii) whether it simply constitutes marching orders (flowing from the National Office attorneys to key IRS executives and managers, down to the foot soldiers, i.e., the Revenue Agents) to assert the largest possible FBAR penalties in all instances of action or inaction by taxpayers that might be classified as intentional, reckless, or willfully blind.

Lessons Learned about Willfulness in the FBAR Context

Trying to digest all the data about willfulness in the civil FBAR penalty context is, well, hard. The rules are complex, the court decisions are not entirely consistent, the IRS and the DOJ take different positions in different cases, etc. In an effort to clarify and consolidate matters, at least as of July 2018, below is a summary of critical issues learned from prior FBAR cases:

- The Tax Court lacks jurisdiction over FBAR penalty matters, in both pre-assessment and post-assessment (i.e., collection) cases. Therefore, FBAR litigation will take place in the appropriate U.S. district court or the U.S. Court of Federal Claims.
- The standard for asserting maximum FBAR penalties is "willfulness."
- The government is only required to prove willfulness by a preponderance of the evidence, not by clear and convincing evidence.
- The government can establish willfulness by showing that a taxpayer either knowingly or recklessly violated the FBAR duty.
- Recklessness might exist where a taxpayer fails to inform his accountant about foreign accounts.
- Recklessness might also exist where a taxpayer is "willfully blind" to his FBAR duties, which can occur when the taxpayer executes but does not read and understand every aspect of a Form 1040, including all Schedules attached to the Form 1040 (like Schedule B containing the foreign-account question) and any separate forms referenced in the Schedules (like the FBAR).
- If the taxpayer makes a damaging admission during a criminal trial, the government will use such statement against him in a later civil FBAR penalty action.
- The taxpayer's motives for not filing an FBAR are irrelevant, because nefarious, specific intent is not necessary to trigger willfulness.
- The government can prove willfulness through circumstantial evidence and inference, including actions by the taxpayer to conceal sources of income or other financial data.
- In determining whether an FBAR violation was willful, courts might consider after-the-fact unprivileged communications between taxpayers and their tax advisors.
- The IRS might adhere to its Interim Guidance, thereby limiting the total willful FBAR penalty to 50 percent of the highest balance of the unreported accounts, spread over all open years.
- The courts review the question of willfulness on a *de novo* basis, which means that taxpayers generally cannot offer evidence at trial related to the IRS's administrative process in conducting the audit, determining whether willfulness existed, etc.
- Courts might reject as irrelevant, in an evidentiary sense, reports and testimony from experts who attempt to make a link between general public unawareness of FBAR duties during a certain period and particular ignorance of the taxpayer under attack.
- Depending on the circumstances, the U.S. government might be able to ensnare a taxpayer in four different, stressful, costly, and time-consuming cases at one time, including those for (i) income taxes, and accuracy-related or civil fraud penalties, in Tax Court, (ii) assessable international information return penalties in district court, (iii) FBAR penalties in district court, and (iv) estate taxes in probate court.
- Courts might give credence to the argument that age-related mental conditions preclude a finding of willfulness.
- Rooted in *U.S. v. Colliot*, *U.S. v. Wadhan*, and other district court cases in which taxpayers are raising similar arguments, courts

> might cap willful FBAR penalties at $100,000 per violation, unless and until the regulations are changed to match current law.

Effect of Willfulness Standard on Taxpayer Decision-Making

The taxpayer losses in *Williams III*, *McBride, Bussell, Bohanec, Kelley-Hunter, Garrity,* and *Markus*, and the related broadening of the willfulness standard over time, will affect many taxpayers, particularly those who are (i) participating in the OVDP and entertaining the idea of "opting-out" to seek reduced penalties, (ii) evaluating whether they are eligible to approach the IRS through the Streamline Foreign Offshore Procedure ("SFOP") or the Streamline Domestic Offshore Procedure ("SDOP"), or (iii) deciding whether they intend to proactively contact the IRS in order to resolve their past U.S. non-compliance or do nothing and hope for the best.

OVDP Opt-Out Standards

Generally, taxpayers participating in the 2014 OVDP must (i) file Forms 1040X for the last eight years; (ii) pay back taxes, 20 percent accuracy penalties, and interest charges with respect to the Forms 1040X; (iii) file all appropriate international information returns, including FBARs, for the last eight years; and (iv) pay a catch-all "offshore" penalty equal to 27.5 percent of the highest aggregate value of the non-compliant foreign financial assets during the eight-year period. The standard "offshore" penalty increases from 27.5 percent to 50 percent if any of the non-compliant foreign financial accounts are held in one of the many "tainted" or "facilitator" banks identified by the IRS.

The IRS released a series of Frequently Asked Questions ("FAQs") to clarify common issues related to the OVDP. FAQ #51 addresses options available to taxpayers who are dissatisfied with the proposed "offshore" penalty. The main path for frustrated taxpayers is to "opt-out" of the OVDP in order to seek reduced penalties, applying the normal standards. Among the risks associated with "opting-out" of the OVDP are facing a full-blown audit for all relevant years and, if the IRS determines during the audit that the FBAR and/or other international information return violations were either willful or unreasonable, then the taxpayer could be hit with overall penalties higher than the original "offshore" penalty.

SFOP and SDOP Standards

When the IRS announced the 2014 OVDP, it also introduced the SFOP and SDOP. Taxpayers participating in either settlement initiative are only required to file U.S. income tax returns for the past three years, U.S. international information returns (other than FBARs) for the past three years, and FBARs for the past six years. The IRS does not impose any penalties whatsoever on those taxpayers who successfully participate in the SFOP. However, the IRS asserts an "offshore" penalty on SDOP participants in the amount of five percent of the highest aggregate balance of the non-compliant foreign financial assets during the past six years.

One key eligibility requirement for the SFOP and SDOP is that the taxpayer must demonstrate to the IRS that his violations were "non-willful." This is often easier said than done. Taxpayers applying for the SFOP must complete and file a Form 14653 (Certification by U.S. Person Residing Outside the United States for Streamlined Domestic Offshore Procedures), while those seeking refuge in the SDOP are obligated to provide a Form 14654 (Certification by U.S. Person Residing in the United States for Streamlined Domestic Offshore Procedures). Each of these documents contains a few passages that should be of concern to taxpayers whose facts and circumstances are not terribly strong:

> My failure to report all income, pay all tax, and submit all required information returns, including FBARs, was due to non-willful conduct. I understand that non-willful conduct is conduct that is due to negligence, inadvertence, or mistake or conduct that is the result of a good faith misunderstanding of the requirements of the law.
>
> I recognize that if the Internal Revenue Service receives or discovers evidence of willfulness, fraud, or criminal conduct, it may open an examination or investigation that could lead to civil fraud penalties, FBAR penalties, information return penalties, or even referral to Criminal Investigation.
>
> Under penalties of perjury, I declare that I have examined this certification and all accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete.

The End of Vacillating

Certain taxpayers, who possess an exaggerated sense of luck and/or self-delusion, have not made a decision yet about what, if anything, they will do to address their U.S. non-compliance in past years, including unreported foreign accounts. Some, of course, will continue to do nothing, and likely will suffer a severe case of remorse when the IRS starts an audit in the future based on information received about the foreign accounts from whistleblowers, a former spouse or business partner, foreign institutions complying with their FATCA duties, etc. Others will manage to find the resilience necessary to face realities and determine whether they meet the eligibility criteria for the SFOP (with a $0 "offshore" penalty) or the SDOP (with a mere five-percent "offshore" penalty), or whether they must now pay the piper (i.e., the IRS) the largest "offshore" penalty under the OVDP, equal to either 27.5 percent or 50 percent of the highest total value of the non-compliant foreign assets depending on the location of the accounts.

The decision by taxpayers of whether and how to act with the IRS now will be dictated, in no small part, by the recent guidance on "willfulness" derived from *Williams III*, *McBride, Bussell, Bohanec, Bedrosian, Kelley-*

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[60] IR-2018-52, 3/13/2018, "IRS to End Offshore Voluntary Disclosure Program; Taxpayers with Undisclosed Foreign Assets Urged to Come Forward Now."

[61] Id.

Hunter, Garrity, and *Markus*. Importantly, the IRS announced that the OVDP would permanently end in September 2018, thereby warning taxpayers with outstanding international issues to rectify them quickly or lose the chance.[60] The IRS, in an effort to create more urgency and public anxiety, reminded everyone in the relevant news release that it intends to continue using a long list of enforcement tools after the close of the OVDP and that it has criminally indicted more than 1,500 taxpayers for international violations since the OVDP began in 2009.[61]

Conclusion

As this article demonstrates, the concept of "willfulness" in the FBAR setting has been controversial for a long time, and the scrapping is bound to increase in the coming years as the OVDP comes to an end, the IRS gets more foreign account data thanks to FATCA, the IRS enhances its ability to cross-check account data on FBARs and Forms 8938, the IRS starts international audits to confirm compliance with the new "repatriation tax" and other aspects of the Tax Cuts and Jobs Act of 2017, etc. In other words, FBAR issues will become even more important in the future, not less. Therefore, taxpayers who have unresolved foreign account matters, who are contemplating opting-out of the OVDP, who are analyzing their eligibility for the SFOP or SDOP, or who have already been caught by the IRS, need to hire experienced international tax professionals and examine all relevant issues, especially the evolving concept of "willfulness."