Docket No. 19-55585

In the

United States Court of Appeals

for the

Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JANE BOYD,
Defendant-Appellant.

On Appeal from the United States District Court for the Central District of California,
Case No. 2:18-cv-00803-MWF-JEM · Honorable Michael W. Fitzgerald

BRIEF OF AMERICAN COLLEGE OF TAX COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

CAROLINE D. CIRAOLO
COUNSEL OF RECORD
CAROLINE RULE
KOSTELANETZ & FINK, LLP
601 New Jersey Avenue, NW
Suite 620
Washington, D.C. 20001
(443) 845-4898 Telephone
cciraolo@kflaw.com
crule@kflaw.com

Counsel for Amicus Curiae,
American College of Tax Counsel

COUNSEL PRESS · (213) 680-2300 PRINTED ON RECYCLED PAPER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

RULES

OTHER AUTHORITIES

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

The American College of Tax Counsel (the "College") respectfully submits this brief as *amicus curiae* in support of appellant Jane Boyd. Jane Boyd and the government have consented to the filing of this brief.[1]

IDENTITY AND STATEMENT OF INTEREST

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

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

[1] Pursuant to Fed. R. App. P. 29, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part, no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate discussion and examination of tax policy issues.

The College is composed of approximately 700 Fellows recognized for their outstanding reputations and contributions to the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring President of the College.

The College has recently filed briefs with the U.S. Supreme Court in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*, __ U.S. __, 139 S. Ct. 2213 (2019), and *Marinello v. United States*, __ U.S. ___, 138 S. Ct. 1101 (2018). This *amicus* brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

Effective tax enforcement requires clear, unambiguous, and reasonable interpretations of penalty statutes, so that similarly situated taxpayers across the country know the standard they are required to meet, and the consequences for failing to meet those standards. The College submits this *amicus* brief because it is deeply concerned that the lower court's broad reading of the non-willful penalty provision under the Bank Secrecy Act is contrary to Congressional intent and

results in an unwarranted and unreasonable application of sanctions for the non-willful failure to timely and accurately report an interest in foreign bank accounts.

SUMMARY OF ARGUMENT

This case presents a novel question that affects U.S. persons who have an interest in or authority over foreign bank and financial accounts: whether one $10,000 civil penalty applies to an accountholder's non-willful failure to timely file an accurate annual Report of Foreign Bank and Financial Accounts ("FBAR"), or, as the government asserts and the District Court held, the $10,000 penalty applies to each and every foreign account that is not reported on that single FBAR. District Court Docket Sheet Entry ("Docket") No. 48, pp. 7, 9.[2]

The District Court erred. The applicable statute and regulations, as set forth below, are unambiguous and clearly require only one FBAR each year, and clearly impose only one non-willful penalty up to $10,000 for the failure to timely file an accurate report no matter how many foreign accounts are or should have been reflected on the report. In fact, the statutory language that imposes the non-willful FBAR penalty does not even use the word "account." Even assuming for the sake of argument that the statutory language is ambiguous, established rules of statutory

[2] *See also United States v. Gardner*, 2019 WL 1767120 at *3 (C.D. Cal. April 4, 2019) ("The IRS is authorized to assess an FBAR penalty not exceeding $10,000 for each foreign account defendant failed to disclose.").

construction and the rule of lenity dictate that only one civil penalty up to $10,000 applies when an accountholder fails to timely file an accurate FBAR due to non-willful conduct. Finally, the District Court's holding will result in inequitable and disparate treatment for similarly situated accountholders who engage in comparable non-willful violations of the FBAR reporting requirements.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE APPLICABLE STATUTES AND REGULATIONS DEMONSTRATE THAT ONLY ONE NON-WILLFUL CIVIL PENALTY MAY BE IMPOSED FOR FAILURE TO TIMELY FILE AN ACCURATE FBAR.

A. The Statutes and Regulations

The requirement to report interests in foreign bank accounts arises under the Bank Secrecy Act of 1970, Pub. L. 91-508, 84 Stat. 1114 and amendments (31 U.S.C. § 5311, *et seq*.).[3] The Secretary of the Treasury is required to promulgate regulations that impose reporting requirements on a U.S. person who maintains foreign financial and bank accounts:

> Considering the need . . . to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or

[3] The FBAR statutes are not part of the Internal Revenue Code but were enacted under Title 31 of the United States Code. However, in 2003, the Secretary of the Treasury delegated FBAR civil enforcement authority to the IRS. *See* 31 C.F.R. § 103.56(g) (April 14, 2010); 31 C.F.R. § 1010.810(g) (March 1, 2011). These regulations were reorganized in 2011. *See* 31 C.F.R. §§ 1010.350(a), 1010.306(c).

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

31 U.S.C. § 5314(a) (emphases added). To this end, the regulations provide, in relevant part:

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

31 C.F.R. § 1010.350(a) (emphases added).[4]

Under 31 C.F.R. § 1010.306(c), one annual report is required by 31 C.F.R. § 1010.350(a), and it must be filed "with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year." Reports required by 31 C.F.R. § 1010.350 must be filed on a form prescribed the Secretary of the Treasury. 31 C.F.R. § 1010.306(d). For the calendar year 2010, the year at

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

issue in this case, Ms. Boyd was required to file an FBAR – Form TD F 90-22.1 – by June 30 of the year following the year in which the foreign accounts were held.[5]

A civil penalty for failure to timely file an accurate FBAR may be imposed pursuant to 31 U.S.C. § 5321(a)(5), which provides:

> (A) Penalty authorized.—
>
> The Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314.

The civil penalty for a *non-willful* violation of the reporting requirements is set forth at 31 U.S.C. § 5321(a)(5)(B), which provides:

> (B) Amount of penalty.—
> (i) In general.—
> *Except as provided in subparagraph (C)* [which applies to willful violations], *the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000*.

(Emphasis added). This provision does not mention the word "account."

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

> (C) Willful violations.—In the case of any person willfully violating, or willfully causing any violation of, any provision of section 5314—
> (i) the maximum penalty under subparagraph (B)(i) shall be increased to the greater of—
> (I) $100,000, or

[5] Since 2013, foreign accounts are reported on Financial Crimes Enforcement Network ("FinCEN") Form 114 and filed by April 15. 31 C.F.R. § 1010.306(c). FinCEN is a bureau within the Department of the Treasury.

> (II) 50 percent of the amount *determined under subparagraph (D)*.
>
> (D) Amount.—The amount determined under *this subparagraph* is—
>
> * * *
>
> (ii) in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to *an account*, the balance in *the account* at the time of the violation.

(Emphases added). In contrast to the non-willful penalty provision, the willful provision ties the amount of the civil penalty to the balance in the foreign accounts.

An accountholder is relieved of all civil liability if he or she can show reasonable cause for failure to file an FBAR:

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

31 U.S.C. § 5321(a)(5)(B)(ii) (emphasis added).[6] Again, unlike the non-willful penalty provision, the reasonable cause exception specifically references "the account."

[6] The IRS recognizes that the reasonable cause exception applies to the failure to file FBARs, even though 31 U.S.C. § 5321(a)(5)(B)(ii) refers, ambiguously, to a "transaction." The Internal Revenue Manual ("IRM") 4.26.16.4.11(4) (11-06-2015), *Delinquent FBAR Filing Procedures*, states: "No penalty will be asserted if the IRS determines that the failure to timely file an FBAR was not willful and was due to reasonable cause." *See* n.9, *post*. Courts have supported this view. *See*

Finally, the Bank Secrecy Act imposes criminal sanctions for willful violations of the Act's reporting requirements, including willful failure to timely file an accurate FBAR:

> A person willfully violating this subchapter or a regulation prescribed or order issued under this subchapter . . . shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

31 U.S.C. § 5322(a).

B. Discussion

Under the aforementioned statutory regime and regulations, the holder of foreign accounts with an aggregate value of $10,000 or more at any time in a year is required to file an annual FBAR reporting the names of the financial institutions at which the accounts are held, the addresses of those institutions, the account numbers, and the account balances. *See* 31 C.F.R. §1010.350(a); Form TD F 90-22.1, *Instructions*. The requirement to file an FBAR is not related to the number of reportable foreign accounts in a given year; instead, the aggregate value of the reportable foreign accounts – $10,000 or more – triggers the requirement to file an FBAR. The FBAR requires that all reportable accounts are included on one annual form; a separate FBAR is not filed for each account.

Jarnagin v. United States, 134 Fed. Cl. 368, 370 (2017); *United States v. Ott*, 2019 WL 3714491, at *2 (E.D. Mich. Aug. 7, 2019); *see also Moore v. United States*, 2015 WL 1510007, at *4 (W.D. Wash. April 1, 2015).

The statutes governing penalties for failure to timely file accurate FBARs, 31 U.S.C. §§ 5321 and 5322, provide for three very different penalties: (1) a non-willful civil penalty that imposes a single $10,000 penalty for failure to timely file an accurate FBAR (and is not based on the number of accounts or balances in accounts), 31 U.S.C. § 5321(a)(5)(B)(i); (2) a civil penalty for willful failure to timely file an accurate FBAR (based on the balance in the foreign account(s) that should have been reported on the FBAR, not on the number of accounts), 31 U.S.C. §§ 5321(a)(5)(C) & (D); and (3) a penalty for criminal violations of the reporting requirements, 31 U.S.C. § 5322. To the extent an accountholder engaged in non-willful conduct and can establish reasonable cause for the violation at issue, no penalty will be imposed. 31 U.S.C. § 5321(a)(5)(B)(ii).

"Congress is presumed to act intentionally and purposely when it includes language in one section but omits it in another." *Fortney v. United States*, 59 F.3d 117, 120 (9th Cir. 1995) (applying this presumption to the Internal Revenue Code). *See also Republic of Sudan v. Harrison*, __ U.S. __, 139 S.Ct. 1048, 1058 (2019) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537 (1994) (same). Therefore, Congress is presumed to have intentionally omitted any reference to an account in the non-willful FBAR penalty

provision, and to have purposefully included a reference to an account in the reasonable cause exception, and in the willful penalty provisions.

The history of the BSA lends further support to the position that the non-willful penalty applies per report, not per account. Initially, the BSA did not even sanction non-willful violations of the FBAR reporting requirements. When Congress added the non-willful penalty in 2004, *see* American Jobs Creation Act of 2004, Pub. L. No. 108-357 § 821(a), 118 Stat. 1586, rather than simply using the willful penalty provision as a starting point, Congress enacted indisputably distinct language – language that does not base the non-willful penalty on the number of or balance in the unreported accounts.

Moreover, in drafting the *non-willful* penalty provision, Congress expressly distinguished the *willful* penalty provision: "Except as provided in subparagraph (C), the amount of any civil penalty imposed under subparagraph (A) shall not exceed $10,000." 31 U.S.C. § 5321(a)(5)(B)(i); *see also* M. Kummer & S. Mezei, *The Non-Willful FBAR Per-Account/Per-Form Issue Deserves Closer Scrutiny*, Tax Notes Federal (July 14, 2019). In short, where the conduct is non-willful, the number of unreported accounts or balances in those accounts are irrelevant. *See United States v. Shinday*, 2018 WL 6330424, at *2 (C.D. Ca. Dec. 3, 2018) (non-willful FBAR penalties of $10,000 assessed for each year); *Moore v. United States*, 2015 WL 1510007 (W.D. Wa. April 1, 2015) (referring to a non-willful penalty of

$40,000 for four years as "the Maximum Penalty"). The Internal Revenue Service ("IRS") acknowledged this point in its Fact Sheet, *Offshore Income and Filing Information for Taxpayers with Offshore Accounts*, FS-2014-7 (June 2014): "For the FBAR, the penalty may be up to $10,000 *if the failure to file* is non-willful." (Emphasis added).

In addition, while the reasonable cause exception set forth at 31 U.S.C. § 5321(a)(5)(B)(ii) requires that "the amount of the transaction or the balance in the account at the time of the transaction was properly reported," this does not suggest that the non-willful penalty should be imposed on a per-account basis. Instead, the exception requires that anyone seeking to avoid the single $10,000 non-willful penalty for failure to timely file an accurate FBAR must show that he or she has reasonable cause for failing to report each and every account.

The District Court conflated the reasonable cause exception with the statutory penalty provisions, relying on the exception's reference to an "account" rather than "accounts," to support its holding that the non-willful penalty is per account, rather than per violation of the requirement to timely and accurately file the FBAR (despite the fact that the non-willful penalty provision does not mention the word "account"). Docket No. 48, at 10. To the extent the District Court hangs its hat on the distinction between "account" and "accounts," its reasoning must fail

in light of 1 U.S.C. § 1, which provides that when a statute is unclear as to whether the singular or plural applies, the singular shall include the plural. *See* n. 4, *ante*.

The District Court's reasoning is also in conflict with a 2002 report that the Secretary of the Treasury filed with Congress, discussing the criminal penalty for failure to file an FBAR: "Under 31 U.S.C. [§] 5322, criminal violations of [31 U.S.C.] § 5314 are punishable by a fine of not more than $250,000 or 5 years in prison or both. *Where the failure to file an FBAR* is part of a pattern of illegal activity, the fine is up to $500,000 and up to 10 years in prison, or both."[7] It cannot be that the non-willful civil penalty is based on each unreported account when the criminal penalty is based on a single report.

II. THE RULE OF LENITY REQUIRES THAT ANY AMBIGUITY BE RESOLVED IN APPELLANT'S FAVOR.

As demonstrated, the statutory FBAR penalty provisions are unambiguous in providing for a single $10,000 penalty for non-willful failure to timely file an accurate FBAR, regardless of the number of accounts. Even assuming, for the sake of argument, that the statutes and regulations are ambiguous, the District Court should be reversed under the rule of lenity.

[7] *A Report to Congress in Accordance with § 361(b) of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA Patriot Act)*, at *7 (emphasis added).

"[T]he rule of lenity . . . applies if, after considering text, structure, history, and purpose, there remains a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended." *Barber v. Thomas*, 560 U.S. 474, 488 (2010). The Supreme Court has held that the rule of lenity applies to ambiguities in the BSA. *Ratzlaf v. United States*, 510 U.S. 135, 148 (1994) (criminal prosecution for structuring to avoid currency reporting).

In *Mohamed v. Commissioner*, T.C. Memo. 2013-255, the U.S. Tax Court noted that, under the rule of lenity, "[a]mbiguity in a statute defining a crime *or imposing a penalty* should be resolved in the defendant's favor." *Id.* at *25 (emphasis added). The court further explained that while the rule of lenity is not always applicable to tax laws, the rule does apply when laws, like the FBAR statutes, which are analogous to tax laws, impose a monetary penalty. *Id*. at *26.

Finally, "[t]he rule of lenity has not been limited to criminal statutes, particularly when the civil sanctions in question are punitive in character." *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1398 (9th Cir. 1995); *see also Joffe v. Google*, 746 F.3d 920 (9th Cir. 2013) ("Although this is a civil suit, the Wiretap Act also carries criminal penalties so Google's reliance on the rule of lenity is not unfounded"). In *Johnson v. United States*, __ U.S. __, 135 S.Ct. 2551 (2015), Justice Thomas, concurring, stated:

> By "penal," I mean laws "authoriz[ing] criminal punishment" as well as those "*authorizing fines . . . that are enforced through civil rather*

> *than criminal process*." Cf. C. Nelson, Statutory Interpretation 108 (2011) (discussing definition of "penal" for purposes of rule of lenity). . . . . [*A] law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal.*

Id. at 2577, n. 1 (emphases added); *see also* J.L. Cummings, Jr., *The Supreme Court's Federal Tax Jurisprudence,* § 11.B (ABA, 2d ed. 2016) ("[S]trict construction akin to the rule of lenity does apply to taxes that are penal such as . . . estimated tax penalties.")

Here, the District Court suggests that the non-willful FBAR penalty provision is *"somewhat unclear* as to whether the $10,000 negligence penalty applies per year or per account," Docket No. 48, p. 7 (emphasis added), and that authorities "support . . . the argument that a rule of lenity should apply here." *Id*. at p. 8. The court cited *Bradley v. United States*, 817 F.2d 1400, 1402-03 (9th Cir. 1987), in which this Court observed that "tax provision[s] which impose[] a penalty [are] to be construed strictly; a penalty cannot be assessed unless the words of the provision plainly impose it." Docket No. 48, p. 8. Nevertheless, the District Court refused to apply the rule of lenity: "In light of the prominence of 'transactions' and 'accounts' in the language of section 5321 [as a whole], the Court determines that the statute contemplates that the relationship with each foreign financial account constitutes the non-willful FBAR violation." *Id.*

While 31 C.F.R. § 1010.350 provides that every person who has control over a foreign account shall report "such relationship" annually, this does not mean that the civil penalties are calculated based on each unreported "relationship." As noted, the core of 31 U.S.C. § 5314 and 31 C.F.R. § 1010.350 is the filing of a single annual report – the FBAR – that requires accountholders to report a variety of information with respect to each account. The government would not take the position that a single foot fault, such as the inadvertent failure to include the correct account number or proper address of the financial institution, would result in a separate non-willful penalty. Instead, the penalty is specifically tied to the violation of the filing obligation under 31 U.S.C. § 5314.

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

For example, consider an accountholder who maintains $1,000,000 in a foreign account during the calendar year and fails to file a timely, accurate FBAR.

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

The District Court's decision also results in disparity among accountholders engaged in non-willful conduct. To illustrate, someone who, through non-willful conduct, fails to report one foreign account with a balance of $1,000,000 would be subject to a single non-willful penalty of up to $10,000, while someone who engages in the same non-willful conduct but with respect to a dozen foreign accounts with balances less than $1,000 each would be subject to multiple non-willful penalties up to an aggregate of $120,000. There is simply no merit in this approach.

For that matter, if an accountholder has a reportable interest in 25 or more foreign financial accounts, she need only fill in the number of accounts on her FBAR and is not required to list detailed information about those accounts. *See* 31

C.F.R. §§ 1010.350(g)(1) & (2); TD F 90-22.1 (Instructions, Part II, Item 15 & Part IV); FinCEN Form 114 (Instructions Item 14). Consequently, if she non-willfully fails to timely file an accurate FBAR, she faces a single $10,000 penalty, despite the existence of more than two dozen unreported accounts. All in all, under the government's position and the District Court's reasoning, a non-willful accountholder with 1 account or with more than 24 accounts would face a single $10,000 penalty, while a non-willful accountholder with 2 to 24 accounts would face a non-willful penalty up to $240,000. Again, this defies logic.

III. SECONDARY AUTHORITIES SUPPORT THE POSITION THAT THE MAXIMUM CIVIL PENALTY FOR NON-WILLFUL FAILURE TO TIMELY FILE AN ACCURATE FBAR IS $10,000.

The FBAR instructions effective for calendar year 2010, and those in place today, provide: "A person who is required to file *an FBAR* and fails to properly file may be subject to a civil penalty not to exceed $10,000 *per violation*." Form TD F 90-22.1; FinCEN Form 114 "Instructions 'Penalties.'" (Emphases added). The term "*violation*" refers back to the requirement "to file *an FBAR*," and not to individual accounts listed on the FBAR. *Id.* This language – drafted by the Department of the Treasury – is in accord with 31 U.S.C. § 5321(a)(5) and confirms that the non-willful violation to which the $10,000 penalty applies is the failure to properly file "an FBAR," not the failure to report each account that should have been listed on the FBAR.

Further support is found in *Financial Crimes Enforcement Network; Amendments to the Bank Secrecy Act Regulations – Reports of Foreign Financial Accounts*, which provides in relevant part:

> A person who is required to file an FBAR and *fails to properly file* may be subject to a civil penalty not to exceed $10,000. If there is reasonable cause for the failure and the balance in the account is properly reported, no penalty will be imposed. A person who willfully fails to report an account . . . may be subject to a civil monetary penalty equal to the greater of $100,000 or 50 percent of the balance in the account at the time of the violation.

75 FR 8844-01, 2010 WL 667290, at *8854 (Feb. 26, 2010). This description comports with the statutory interpretation that failure to properly file an FBAR gives rise to a civil non-willful penalty not to exceed $10,000. The plain meaning of "failure to *properly* file" the FBAR must include failure to report all accounts, but, without willfulness, this failure leads to a maximum penalty of $10,000.

The 2011 *IRS FBAR Reference Guide*, https://www.irs.gov/pub/irs-utl/irsfbarreferenceguide.pdf (last visited 11/13/2019) ("the Guide"), is to similar effect: a violation is the failure to file an FBAR. The Guide includes a chart listing the amounts of civil penalties per year, with inflation adjustments (pp. 7-8),[8] and that chart provides that a "Non-Willful Violation" may lead to a civil penalty of "[u]p to $12,459 for *each negligent violation*." (Emphasis added). For a "Willful . . . Failure to File FBAR or retain records of account," the chart states that the civil

[8] Required by 28 U.S.C. § 2461, amended by Pub. L. 114-74 (2015).

penalty is "[u]p to the greater of $124,588, or 50 percent of the amount in the account at the time of *the violation*." (Emphasis added).

Only the IRS, despite its 2011 Reference Guide, has taken the position that a non-willful penalty can be applied on a per account basis and, then, only in unusual cases:

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

IRM[9] 4.26.16.6.4.1 (11-06-2015) (emphasis added). While this internal guidance purportedly permits the application of the non-willful FBAR penalty to each unreported account, this approach simply is not supported by any statutory or regulatory authority.

[9] The IRM "govern[s] the internal affairs of the Internal Revenue Service." *United States v. Horne*, 714 F.2d 206, 207 (1st Cir. 1983); *United States v. Horowitz*, 361 F. Supp.3d 511, 515 (D. Md. 2019). It is not binding on the IRS and may be used "on a limited basis, to provide guidance in interpreting terms in the regulations," *Horne*, 714 F.2d at 207; *Horowitz*, 361 F. Supp.3d at 515.

Furthermore, the IRS has limited authority with respect to FBAR penalties. Specifically, the Secretary of the Treasury delegated to the IRS only the authority to assess and collect civil FBAR penalties. Delegation Order 25-13; 31 C.F.R. § 1010.810(g). The IRS is not authorized to issue regulations or interpretations of the penalty provisions.

Finally, a 2016 Committee Report prepared by the Staff of the Joint Committee on Taxation ("2016 Committee Report"),[10] is more direct and in accord with the view that one civil penalty of up to $10,000 per year is allowed for a non-willful violation of 31 U.S.C. § 5314:

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

2016 Committee Report, p. 8 (Emphases added).

In sum, there can be only one reasonable interpretation of the statutory FBAR penalty provisions – a non-willful failure to timely file an accurate FBAR exposes an accountholder to one civil penalty not to exceed $10,000. This interpretation is supported by the statutory language, the regulations,

[10] Joint Committee on Taxation, *Description of the Chairman's Mark of the "Taxpayer Protection Act of 2016"* (JCX-30-16) (April 18, 2016).

the principles of statutory construction and, to the extent applicable, the rule of lenity, and the Treasury Department's own administrative guidance.

CONCLUSION

For the foregoing reasons, the College respectfully requests that the Court reverse the decision of the District Court and hold that a non-willful penalty for failure to file an FBAR is limited to $10,000 per FBAR.

Respectfully submitted,

Dated: November 15, 2019

/s/ Caroline D. Ciraolo
CAROLINE D. CIRAOLO
Counsel of Record
CAROLINE RULE

Kostelanetz & Fink, LLP
601 New Jersey Avenue, N.W.
Suite 620
Washington, D.C. 20001
443-845-4898 – Telephone
cciraolo@kflaw.com

Counsel for *Amicus Curiae*
American College of Tax Counsel

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 19-55585

I am the attorney or self-represented party.

This brief contains 4,990 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ◉ is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ○ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ○ it is a joint brief submitted by separately represented parties;
  - ○ a party or parties are filing a single brief in response to multiple briefs; or
  - ○ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated ____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Caroline D. Ciraolo **Date** November 15, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 15, 2019

/s/ Caroline D. Ciraolo
CAROLINE D. CIRAOLO
Counsel of Record