FRAUD & NEGLIGENCE

IRS Giveth and DOJ Taketh Away: Recent Opinion Jeopardizes Retroactive FBAR Relief

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A taxpayer's argument that criminal charges relating to failure to file FBARs should be dismissed in light of the Service's grant of administrative relief from civil FBAR penalties was rejected. In a strict reading of the criminal statute, the district court denied the motion and upheld the right of the Department of Justice to bring criminal charges regardless of the Service's actions.

Talk about international tax compliance, including the need to file an annual Form TD F 90-22.1 (FBAR) to report foreign financial accounts, is now relatively widespread. This has not always been the case; pervasive ignorance of the FBAR filing requirement, by taxpayers and tax practitioners alike, was a serious issue for decades. Significant ambiguity about the relevant law, Regulations, and administrative rules also contributed to the problem.

The IRS has taken several steps to foster FBAR compliance since being delegated considerable authority over FBAR issues in 2003. For instance, in recent years the Service created a revised FBAR form and instructions, introduced a new voluntary compliance program, issued Proposed Regulations, and offered interim taxpayer relief. These last efforts—set forth in Announcements and Notices—contained special treatment (such as FBAR filing extensions, complete FBAR filing exemptions, waiver of civil penalties, etc.) for various categories of taxpayers. Many of these benefits were expressly retroactive, lending support to the notion that taxpayers facing uncertainty should not be inappropriately burdened with tax-compliance obligations or subjected to penalties until clear FBAR ground rules were established.

Now, an obscure criminal FBAR case, *Simon,* 106 AFTR 2d 2010-6739 (DC Ind., 2010), calls into question the validity of the Service's recent guidance. By holding that the Department of Justice may proceed with criminal FBAR prosecution in situations where the IRS has publicly waived certain filing requirements and civil penalties, this case creates a dilemma for those taxpayers, both domestic and foreign, relying on recent IRS Announcements and Notices.

BACKGROUND

To fully appreciate the importance of *Simon,* one must first understand the rules applicable to foreign accounts, as well as the recent administrative guidance issued by the IRS.

Congress enacted the Bank Secrecy Act in 1970. [1] 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. [2] Among the important provisions of the Bank Secrecy Act is 31 U.S.C. section 5314. This statute, in conjunction with the accompanying regulations and FBAR instructions, requires the filing of an annual FBAR where:

(1) A U.S. person
(2) Had a financial interest in, signature authority over, or other authority over
(3) One or more financial accounts
(4) Located in a foreign country
(5) And the aggregate value of the accounts exceeded $10,000
(6) At any time during the calendar year. [3]

The FBAR must be filed with Treasury by June 30 to report foreign financial accounts in existence the previous year. All information called for in the FBAR must be furnished by the taxpayer. [4]

Individuals with reportable foreign financial accounts actually have a three-part obligation:

- They must report all income (such as interest, dividends, and capital gains) generated by the accounts on their annual federal income tax returns, i.e., Forms 1040.
- They also need to check the "yes" box in response to the foreign-account question found in Part III of Schedule B, Form 1040, and specify the country or countries in which the accounts are located. [5]
- Finally, they have a duty to file a separate FBAR with Treasury in Detroit.

Concerned with widespread noncompliance with the FBAR requirement, the U.S. government took certain actions. Notably, Treasury transferred authority to enforce the FBAR provisions from the Financial Crimes Enforcement Network ("FinCEN") to the IRS in 2003. The latter is now empowered to investigate potential violations, issue summonses, assess civil penalties, issue administrative rulings, and take "any other action reasonably necessary" to enforce the FBAR rules. [6]

Congress, for its part, enacted new *civil* FBAR penalty provisions in October 2004 as part of the American Jobs Creation Act (AJCA). [7] Under the old law, the government could assert a civil penalty only where a taxpayer "willfully" violated the FBAR rules. [8] If the government managed to satisfy this high evidentiary standard, it was authorized to assert penalties ranging from $25,000 to $100,000, depending on the highest balance of the relevant account(s). [9]

Thanks to the AJCA, the Service now may impose a civil penalty on any person who fails to file an FBAR when required, period. [10] In the case of unintentional violations, the maximum penalty is $10,000. [11] The IRS cannot assert this penalty, however, if two conditions are met: the violation was due to "reasonable cause" and the balance in the account was properly reported. [12] The AJCA calls for a higher maximum penalty where willfulness exists. Where a taxpayer willfully failed to file an FBAR, the IRS may assert a civil penalty equal to $100,000 or 50% of the balance in the account at the time of the violation, whichever is larger. [13]

The U.S. government can assert *criminal* penalties, too. The law makes it clear that a taxpayer can face two types of FBAR sanctions, stating that "[a] civil money penalty may be imposed ... notwithstanding the fact that a criminal penalty is imposed with respect to the same violation." [14] A person who willfully violates the FBAR filing requirement could be imprisoned for a maximum of five years, fined up to $250,000, or both. [15] The criminal penalties double, reaching ten years in jail and/or a fine as high as $500,000, when the FBAR problem occurs while the taxpayer is violating another U.S. law or it constitutes part of a pattern of certain illegal activity. [16]

RECENT FBAR GUIDANCE

The Service recently issued various items of guidance regarding the FBAR, including two Announcements and two Notices. This guidance, discussed in detail below, became pivotal in *Simon.*

The Two Announcements

One of the key FBAR provisions, 31 U.S.C. section 5314, has broad application if taken at face value. It states, in part, that the Treasury Secretary "shall require a resident or citizen of the United States *or a person in, and doing business in, the United States,* to keep records, file reports [i.e., the FBAR], or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency" (emphasis added). Despite the wide scope of this congressional mandate, Treasury has traditionally construed the provision more narrowly, making it applicable only to "U.S. persons." According to the FBAR in place until recently, "U.S. person" was limited to U.S. citizens, U.S. residents, and domestic entities. [17]

A new FBAR form and instructions were introduced in October 2008. They dramatically expanded the applicability of this reporting requirement, indicating that the definition of "U.S. person" now includes "a person in and doing business in the United States." The new FBAR instructions go on to state that a "branch of a foreign entity that is

doing business in the United States is required to file this report even if not separately incorporated under U.S. law." Treasury made this expansion in an effort to conform more closely to the language of the FBAR's authorizing statute, 31 U.S.C. section 5314. [18]

Predictably, those affected by these new rules inundated the government with questions and comments in the ensuing months. [19] The Service decided to back-peddle, issuing Ann. 2009-51, 2009-25 IRB 1105 . It informed taxpayers that, when it came to determining who was required to file the FBAR for 2008, which was due by 6/30/09, they could rely on the *old* definition of "U.S. person" found in the pre-2008 FBAR instructions and ignore the new definition for the moment. Ann. 2009-51 promised that "[a]dditional guidance will be issued with respect to FBARs due in subsequent years."

Such guidance arrived in the form of Ann. 2010-16, 2010-11 IRB 450 , which noted that, since the issuance of Ann. 2009-51 , certain things had changed. In particular, Treasury had issued FBAR proposed regulations and draft revisions to the FBAR instructions. In light of these developments and the resulting uncertainty, the IRS stated in Ann. 2010-16 that the requirement to file a 2009 FBAR by 6/30/10 was suspended for everyone other than U.S. citizens, U.S. residents, and domestic entities. Ann. 2010-16 also explained that all persons could rely on the old definition of "U.S. person" in deciding whether they had an FBAR filing obligation for 2009 and/or earlier years. In other words, non-U.S. persons, such as foreign individuals and entities operating in the U.S., were relieved of their FBAR filing obligation until further notice to the contrary.

The Two Notices

The IRS announced the most recent offshore voluntary disclosure program on 3/23/09. Soon thereafter, the IRS issued a series of Frequently Asked Questions (FAQs) that indicated certain taxpayers should not be penalized under the program. For instance, FAQ9 and FAQ43 waived penalties where taxpayers reported all income generated by their foreign accounts each year on their Forms 1040, yet failed to file a separate FBAR out of ignorance of this duty. [20]

The Service then issued Notice 2009-62, 2009-35 IRB 260 , because it wanted to provide "additional administrative relief" for two groups. These were U.S. persons with signature or other authority over a foreign financial account but no financial interest in such account, and U.S. persons with a financial interest in or signature authority over a foreign account in which the assets are held in a "commingled fund." Notice 2009-62 clarified why this relief was necessary.

As to the first category, the FBAR instructions, old and new alike, require FBAR filings where a person has an indirect or direct financial interest in, signature authority over, *or* other authority over a foreign account. Notice 2009-62 reveals that the Service's principal focus for the time being is on those persons to whom the unreported funds actually belong, i.e., those with a financial interest. Regarding the second category, the revised FBAR that debuted in October 2008 broadly defines the term "financial account" to encompass "any accounts in which the assets are held in a commingled fund, and the owner holds an equity interest in the fund (including mutual funds)." [21] The Notice contained the following clear statements alleviating the need to file FBARs for those taxpayers falling into the two designated categories:

"[T]his Notice provides that those persons have until June 30, 2010, to file an FBAR for the 2008 and earlier calendar years with respect to these foreign financial accounts. Thus, eligible persons that avail themselves of the administrative relief provided in this Notice may need to file FBARs for the 2008, 2009 and earlier calendar years on or before June 30, 2010, to the extent provided in future guidance.

"The FBAR filing extension provided by this Notice applies to FBARs with respect to 2008 and earlier calendar years."

The Service modified and extended this taxpayer relief the following year when it issued Notice 2010-23, 2010-11 IRB 441 . This most recent IRS guidance contained three key points:

> (1) U.S. persons with signature authority over a foreign financial account but no financial interest therein were granted until 6/30/11 to report accounts in existence in 2010 and prior years.
> (2) Those with a reportable interest in a foreign "commingled fund" must file an FBAR, but the IRS agreed to limit its enforcement to foreign mutual funds, thereby excepting foreign hedge funds and private equity funds. [22]
> (3) The IRS instructed those taxpayers qualifying for a filing exception under Notice 2010-23 to check the "no" box in response to the question on Schedule B of Forms 1040 for 2009 and earlier years inquiring about the existence of a reportable foreign account.

THE *SIMON* CASE THUS FAR

According to the indictment and other documents filed by the government and other documents submitted by the parties, the taxpayer in *Simon* was no newcomer to tax, business, and accounting issues. He graduated from college, earned a master's degree in business administration, worked at an accounting firm, obtained his CPA license, and later taught accounting at two colleges. [23]

From 2003 through 2006, the taxpayer was involved with several businesses located in various places, including Gibraltar and Cyprus. He generally acted as the managing director of the businesses. Either the taxpayer or his family received approximately $1.8 million from these businesses during this four-year period, but the taxpayer did not report this amount as taxable "income" on his Forms 1040. Instead, he treated the funds as nontaxable "loans" or "advances" from the businesses, even though he generally did not sign promissory notes, provide collateral, set a fixed repayment schedule, establish a specific maturity date, make repayments, have the ability to repay, or use the money for business purposes. The taxpayer, through the foreign companies, allegedly had a reportable interest in or authority over accounts at Barclay's Bank in Gibraltar, Cyprus Popular Bank in Cyprus, and Dresdner Bank in Germany.

The Forms 1040 filed by the taxpayer for the relevant years did not include the $1.8 million from the business and did not disclose on Schedule B the existence of the foreign accounts. The U.S. government, therefore, criminally charged the taxpayer with filing false Forms 1040 and failing to file the requisite FBARs. [24] In doing so, the government claimed that the taxpayer acted willfully in skirting the law, as he knew he had a duty to disclose his offshore activities because of his educational and professional background, and because he consulted with tax professionals who properly advised him of his international tax compliance obligations.

Taxpayer Attempts to Jettison FBAR Criminal Penalties

A few months after being indicted, the taxpayer filed a motion to dismiss the FBAR charges. [25] The taxpayer's principal argument was rooted in the following logic:

- The IRS provided administrative relief when it issued Notice 2009-62 and Notice 2010-23 ;
- The FBAR regulations specifically allow for the introduction of such relief in the form of FBAR filing exceptions or exemptions;
- Notice 2009-62 and Notice 2010-23 expressly state that the administrative relief contemplated therein is intended to be retroactive, thereby benefiting taxpayers with respect to violations in previous years;
- The Service has repeatedly indicated that, at least for purposes of avoiding certain civil penalties, taxpayers can rely on various types of IRS guidance, including Announcements and Notices;
- The taxpayer did not have a "financial interest" in the foreign accounts, such that the government's allegations against him as enumerated in the indictment were "identical" to the situations covered by Notice 2009-62 and Notice 2010-23 ;
- The taxpayer, therefore, should not be subject to civil penalties by the IRS, much less criminal charges by the Department of Justice.

The taxpayer's motion to dismiss also posed the following rhetorical question: "The dispositive fact is that the administrative relief provided [by the IRS] is expressly retroactive. Thus, even if [the taxpayer's] actions were not in compliance at the time they occurred, the IRS subsequently provided retroactive administrative relief for all prior years.... If the IRS cannot impose a civil penalty for [the taxpayer's] actions, how then could the United States seek to impose imprisonment for the identical acts?"

In the government's response, [26] it first argued that the taxpayer, as a factual matter, simply did not qualify for the administrative relief described in Notice 2009-62 and Notice 2010-23 because he had a "financial interest" in the foreign accounts and such accounts were regular bank accounts, not foreign "commingled funds."

The government next contended that, even if the taxpayer were to somehow fall within the parameters of the two Notices, he still would be subject to criminal penalties as a legal matter. The government raised a series of arguments in this regard. It contended that an "amendment of a regulation" or a "regulatory modification" (presumably via the issuance of Notice 2009-62 and Notice 2010-23) occurring *after* the taxpayer's conduct has no impact on the criminal charges, provided that the statute authorizing the regulation that the taxpayer violated has not been modified.

The government next maintained that Notice 2009-62 and Notice 2010-23 are "substantive" rather than "interpretive," and as a result must comply with the public-notice-and-comment requirements of the Administrative Procedures Act (APA) to be valid. Since these requirements were not satisfied, the government concluded that any taxpayer relief granted by the IRS in Notice 2009-62 and Notice 2010-23 was necessarily void. To be clear about this: One part of the U.S. government—the Department of Justice—took the position that another part of the same government—Treasury—issued public guidance to taxpayers, yet the taxpayers were not entitled to rely on such guidance in fending off potential FBAR penalties because of a supposed violation of the APA.

The government then suggested that, even if the modifications in Notice 2009-62 and Notice 2010-23 were "interpretive" instead of "substantive," it still would not matter in the taxpayer's case, because agency enforcement policies are non-binding on that agency.

Finally, the government attacked the idea of retroactive taxpayer relief, citing precedent indicating that substantive administrative rules cannot have retroactive effect unless Congress expressly conferred power on the relevant agency to promulgate retroactive rules, and if so, the agency clearly intended the rules to be retroactive. While the IRS undoubtedly desired the relief in the Notice 2009-62 and Notice 2010-23 to be retroactive, the government reasoned that no FBAR-related statute granted the IRS the authority to create retroactive relief.

The Court's Ruling

The court issued a lengthy Opinion and Order addressing several motions raised by the taxpayer. With respect to the motion to dismiss the FBAR charges, the court decided not to decide certain issues, at least for now. The court clarified that the question of whether the taxpayer had a "financial interest" in the accounts located in Gibraltar, Cyprus, and Germany was a matter for trial, not pre-trial motions.

Nevertheless, the court did make two important decisions. First, the court stated that, if the taxpayer committed a crime by failing to file an FBAR during the years that the regulations required him to do so, then a "later regulatory amendment" by the IRS—presumably referring to Notice 2009-62 and Notice 2010-23 —cannot absolve him of the crime without retroactive modification by Congress of the authorizing statute, i.e., 31 U.S.C. section 5314. [27] The court noted that such statute has not been changed by Congress.

Second, the court held more broadly that an administrative agency, like the IRS, essentially lacks the wherewithal to affect criminal prosecutions by the Department of Justice in the FBAR arena. The court stated as follows on this topic: "To agree with [the taxpayer] that a regulation's self-declaration of retroactivity requires a different outcome would be to hold that an agency [like the IRS] acquires the power to forgive crimes already committed by simply declaring its intent [in Notice 2009-62 and Notice 2010-13] to exercise that power. The cited cases teach that even if an agency's regulations becomes [sic] intertwined in a crime's definition, it is Congress [via the enactment of a statute] and not the agency [via the promulgation of regulations or Notices] that creates the crime, and only Congress can forgive the crime."

The court thus denied the taxpayer's motion to dismiss the FBAR charges and advanced this issue to trial.

WHY IS *SIMON* IMPORTANT?

The ultimate trial court opinion in *Simon,* as well as the likely appeal thereof, should generate several interesting points in the FBAR field. Regardless of the final outcome, the case has already raised some noteworthy issues.

Impact on Taxpayers Relying on the Notices

The court's decision places in a quandary all those taxpayers who are currently relying on Notice 2009-62 and Notice 2010-23 . As explained above, the latter piece of IRS guidance, which effectively superseded the former, provided three pivotal instructions. First, the IRS indicated that U.S. persons with signature authority over a foreign financial account but no financial interest in such account have until 6/30/11 to file FBARs to report accounts in existence in 2010 and prior years.

Second, the IRS clarified that U.S. persons with a reportable interest in a foreign "commingled fund" must file an FBAR with respect to 2009 and prior years. Notice 2010-23 confirmed, however, that the Service will limit reporting requirements and penalties in this context, expressly stating that interests in foreign hedge funds and foreign private equity funds continue to be outside the FBAR filing requirement:

"[T]he IRS has determined that it *will not apply its enforcement authority adversely* in the case of persons with a financial interest in, or signature authority over, any other foreign commingled fund with respect to that account for calendar year 2009 and earlier calendar years. A ... *foreign hedge fund or private equity fund is included in th[is] administrative relief...*" (emphasis added).

Finally, Notice 2010-23 explained that those taxpayers qualifying for one of the filing exceptions described above should check the "no" box in response to the question in Part III of Schedule B, Form 1040, for 2009 and earlier years inquiring about the existence of a reportable foreign account.

Pursuant to Notice 2010-23 , U.S. persons with signature authority over but no financial interest in foreign accounts will not be filing FBARs for 2010 and earlier years until 6/30/11, will not be filing amended tax returns (i.e., Forms

1040X) for earlier years to check the "yes" box in Schedule B to report the foreign accounts or identify the foreign country or countries in which the accounts are located, and will not be expecting civil penalties from the IRS. Also in accordance with Notice 2010-23 , U.S. persons with a financial interest in or signature authority over a foreign hedge fund or private equity fund will not be filing FBARs for previous years, will not be filing Forms 1040X for earlier years to check the "yes" box in Schedule B, and will not be anticipating civil sanctions.

The recent *Simon* opinion casts considerable uncertainty (and surely raises tremendous anxiety) for taxpayers falling into these two categories. The relevant law, 31 U.S.C. section 5314, clearly states that Treasury "shall require a resident or citizen of the United States ... to keep records, file reports, or keep records and file reports when the resident, citizen, or person makes a transaction with or maintains a relation for any person with a foreign financial agency." The implementing regulation, 31 C.F.R. section 103.24, elaborates on the statutory requirement, as follows:

"Each person subject to the jurisdiction of the United States ... 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 [IRS] for each year in which such relationship exists, and shall provide such information as shall be specified in a reporting form prescribed by the Secretary to be filed by such persons."

At this point, Congress has not changed 31 U.S.C. section 5314, and no mention of retroactive statutory modifications has been heard. Therefore, if one were to follow the court's reasoning in *Simon,* those taxpayers relying on the guidance in Notice 2010-23 (including FBAR filing extensions, FBAR filing exemptions, Form 1040X exemptions, and, presumably, civil penalty waivers for those in the specified categories) potentially could face criminal charges from the Department of Justice for failing to file an FBAR or filing a false tax return. The Department of Justice would need to prove willfulness by the taxpayer, of course, but that is another matter. [28]

Impact on Taxpayers Relying on the Announcements

If, according to the logic in *Simon,* those taxpayers depending on the IRS instructions found in Notice 2009-62 and Notice 2010-23 may nonetheless be charged criminally by the Department of Justice, then those taxpayers seeking refuge under Ann. 2009-51 and Ann. 2010-16 could share the same fate. These items of administrative guidance expressly "suspended" the FBAR filing requirement for 2009 and all earlier years for anyone other than U.S. citizens, U.S. residents, and domestic entities. Consequently, foreign persons (individuals or entities) located in the U.S. and doing business here have been excused by the IRS from the FBAR requirement for all prior years. The applicable law, 31 U.S.C. section 5314, is unambiguous about its scope; it expressly creates an FBAR filing obligation for "a person in, and doing business in, the United States."

As explained above, Congress has not changed 31 U.S.C. section 5314, retroactively or even prospectively. Following the precedent recently set in *Simon,* therefore, those foreign taxpayers relying on the guidance in Ann. 2009-51 and Ann. 2010-16 (including FBAR filing exemptions for all non-U.S. persons located in and conducting business in the U.S.) could conceivably be criminally charged by the Department of Justice in the event of willful violations.

CONCLUSION

Taxpayers, both domestic and foreign, always hope that the IRS and Department of Justice will exercise considerable discretion in determining which cases warrant civil and criminal FBAR penalties. Now, in light of the recent holding in *Simon,* those taxpayers that have either taken action or adopted inaction in reliance on the Service's guidance in Notice 2009-62 , Notice 2010-23 , Ann. 2009-51 , or Ann. 2010-16 , will need to boost their optimism levels (and pray for a taxpayer-favorable reversal on appeal). Tax practitioners, for their part, must be mindful of this ruling as they continue to advise clients in the ever-changing world of FBAR compliance and disputes.

Practice Notes

All those taxpayers who are currently relying on Notice 2009-62 and Notice 2010-23 and who have not filed an FBAR or answered "yes" to the foreign account question on Form 1040, Schedule B, have been thrown into a quandary by the court's decision. In effect, the court has held that Treasury and the IRS lack the authority to offer administrative relief that would be binding on the Department of Justice, should the latter choose to bring criminal charges under the statute. Practitioners and taxpayers will be anxiously following further developments in this case.

[1]

P.L. 91-508, 10/26/70, Title I and Title II.

[2]

Id., section 202; 31 U.S.C. section 5311.

[3]

See also 31 C.F.R. section 103.24. As explained later in this article, the filing obligation may apply to certain non-U.S. persons as well.

[4]

31 C.F.R. sections 103.27(c) and (d).

[5]

The foreign-account question asks the following: "At any time [during the relevant year], did you have an interest in or signature or other authority over a financial account in a foreign country, such as a bank account, securities account, or other financial account? If 'yes,' enter the name of the foreign country."

[6]

31 C.F.R. section 103.56(g), 68 Fed. Reg. 26489 (5/16/03).

[7]

P.L. 108-357, 10/22/04.

[8]

31 U.S.C. section 5321(a)(5)(A) (as in effect before 10/23/04).

[9]

31 U.S.C. sections 5321(a)(5)(B)(i) and (ii) (as in effect before 10/23/04).

[10]

31 U.S.C. section 5321(a)(5)(A) (as in effect after 10/22/04).

[11]

31 U.S.C. section 5321(a)(5)(B)(i) (as in effect after 10/22/04).

[12]

31 U.S.C. section 5321(a)(5)(B)(ii) (as in effect after 10/22/04). The second condition means that the taxpayer agrees to file delinquent FBARs with the revenue agent as part of the audit; see IRM 4.26.16.4.4 (7/1/08).

[13]

31 U.S.C. sections 5321(a)(5)(C)(i) and (D)(ii) (as in effect after 10/22/04).

[14]

31 U.S.C. section 5321(d).

[15]

31 U.S.C. section 5322(a).

[16]

31 U.S.C. section 5322(b).

[17]

Instructions to Form TD F 90-22.1 (Rev. 7/00).

[18]

FBAR proposed regulations., 75 Fed. Reg. 8845 (2/26/10).

[19]

Id.

[20]

"IRS Revises FAQ on Voluntary Disclosure Program for Offshore Accounts," 2009 TNT 120-8.

[21]

Instructions to Form TD F 90-22.1 (Rev. October 2008).
22

The guidance in Notice 2010-23, 2010-11 IRB 441 , regarding the proper treatment of "foreign commingled funds" is consistent with the information contained in the FBAR proposed regulations. The Preamble to the proposed regulations confirms that Treasury has determined that foreign private equity funds, venture capital funds, and hedge funds should not be considered "financial accounts" for FBAR purposes because their characteristics vary greatly and pending legislative proposals exist that contemplate additional regulation and oversight of these funds. The Preamble notes, however, that Treasury remains concerned about the use of such funds to evade taxes and plans to continue studying the issue. See 75 Fed. Reg. 8846 (2/26/10).
23

The alleged facts in Simon are derived from the Indictment filed 4/15/10, the taxpayer's Motion to Dismiss Reports of Foreign Bank Accounts Counts filed 8/27/10, the Response of United States to Defendant's Motion to Dismiss FBAR Counts filed 8/30/10, Defendant's Reply to the Government's Response to Defendant's Motion to Dismiss Reports of Foreign Bank Accounts Counts filed 9/9/10, and the Opinion and Order issued by the court on 10/8/10. Each of the preceding documents is on file with the author.
24

The U.S. also charged Simon with engaging in fraud involving private financial aid under 18 U.S.C. section 1341 and fraud involving federal financial aid under 20 U.S.C. section 1097 because of allegedly false statements made on financial-aid applications to various schools. Those charges are beyond the scope of this article.
25

Motion to Dismiss Reports of Foreign Bank Accounts Counts filed 8/27/10.
26

Response of United States to Defendant's Motion to Dismiss FBAR Counts filed 8/30/10.
27

Opinion and Order issued by the court on October 8, 2010, at p. 33.
28

See generally Sardar, "What Constitutes 'Willfulness' for Purposes of the FBAR Failure-to-File Penalty?," 113 JTAX 183 (September 2010) ; and Sheppard, "District Court Rules That Where There's No Will, There's a Way to Avoid FBAR Penalties," 113 JTAX 293 (November 2010) .