Flume, *Boyd*, and *Cohen*: Three Recent FBAR Cases Yielding Important New Lessons

*By Hale E. Sheppard**

I. Introduction

Many people have grown weary of cases focused on penalties for failing to declare foreign accounts on FinCEN Form 114 ("FBAR"), which is understandable given all the attention heaped on this topic since 2008. However, the reality is that the Internal Revenue Service ("IRS") continues to aggressively impose severe FBAR penalties, while the Department of Justice ("DOJ") regularly files lawsuits in District Courts to collect them. These governmental actions, coupled with the colorful defenses raised by taxpayers, have created a significant amount of precedent in recent years. Court decisions are inconsistent, the IRS is capricious in following its own published guidance, and the key concept of "willfulness" is constantly evolving. Taxpayers who do not stay abreast of the evolution diminish their chances of success in fending off FBAR penalties. In an effort to keep taxpayers and their advisors updated, this article analyzes three recent FBAR cases, *Flume*, *Boyd*, and *Cohen*, which contribute new material to the dialogue.[1]

HALE E. SHEPPARD, Esq. (B.S., M.A., J.D., LL.M., LL.M.T.) is a Shareholder in the Tax Controversy Section of Chamberlain Hrdlicka and Chair of the International Tax Group.

II. Duties Related to Foreign Accounts

To understand the significance of three cases discussed in this article, one must first have a basic understanding of the obligations triggered by holding an interest in, or having some type of power over, a foreign account.

The relevant law mandates the filing of an FBAR in situations 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 relevant year.[2]

U.S. individuals have several duties when they hold a reportable interest in a foreign financial account, in addition to electronically filing an FBAR. These include the following:

- Checking 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 of the foreign account,
- Identifying the foreign country in which the account is located, also in Part III of Schedule B to Form 1040,
- Declaring all income generated by the account (such as interest, dividends, and capital gains) on Form 1040, and
- Reporting the account on Form 8938 *(Statement of Specified Foreign Financial Assets*), which is enclosed with Form 1040.[3]

Congress enacted stringent FBAR penalty provisions in 2004.[4] Since then, the IRS has been able to penalize any U.S. person who fails to file an FBAR when required.[5] 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."[6] Higher penalties apply where "willfulness" exists. Specifically, in situations where a taxpayer willfully fails to declare all accounts on a timely 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.[7] Given the large balances in some unreported accounts, FBAR penalties can be enormous.

III. Lessons Learned from Three Recent FBAR Cases

The themes might be similar, but every FBAR case is unique. Below are three recent cases that have contributed to the evolving dialogue over international tax disputes.

A. *Flume*

1. Key Facts of the Case

The key facts in this case derive from multiple sources.[8] Mr. Flume ("Husband") and Mrs. Flume ("Wife") are U.S. citizens who moved to Mexico in 1993. Before heading south, Husband worked as an urban planner and real estate developer in the United States. Husband was engaged in the same type of activities in Mexico, operating a real estate company that developed land, sold lots, and built high-end homes.

In 1995, Husband and another U.S. individual formed a corporation in Mexico called Franchise Food Service de Mexico S.A. de C.V. ("Franchise Food"). They started as equals, each owning 50 percent. Husband was also the president. Franchise Food was created in order to operate Mexican locations of Whataburger and Fanny Ice Cream. These establishments were sold in 1998, but Franchise Food remained in existence. Husband claimed that he sold more than half of his shares in Franchise Food in February 2002 to a Mexican citizen. The sale had the effect of reducing Husband's ownership in Franchise Foods to nine percent. Husband presumably engaged in this stock sale to avoid the duty to file Forms 5471 for Franchise Food after 2002; he likely took the position that he was not required to file Forms 5471 because he had fallen below the applicable ownership threshold of 10 percent.

In addition to Franchise Food, Husband and Wife formed at least two other foreign corporations, one of which was Wilshire Holdings, Inc. ("Wilshire"). This entity was originally formed in the Bahamas in 2000 and then reincorporated in Belize the following year, 2001. Ownership was reflected by two bearer shares. Certificate 1, worth 25,000 shares, was assigned to Husband. Certificate 2, also worth 25,000 shares, pertained to Wife. Husband denied this ownership throughout the tax dispute, alleging that on the same day that Wilshire was formed, "amended" Articles of Association took effect, which changed the original ownership structure such that Husband and Wife, again, had fallen below the applicable ownership threshold of 10 percent and did not need to file annual Forms 5471. Husband offered no proof of this new ownership structure, other than the "amended" Articles of Association, which he ultimately admitted had been "backdated."

In 2005, Wilshire opened an account at UBS in Switzerland. A number of documents and communications related to such account undermined Husband's position that he was just a minor owner of Wilshire. For instance, Husband and Wife opened the Swiss account using the original Articles of Association (showing Husband and Wife as 50/50 owners) and not the "amended" Articles of Association described above, Husband and Wife were listed as the "beneficial owners" of the account, Husband signed account-related documents in his capacity as "First Director" of Wilshire, Husband and Wife controlled the investment activity in the account, Husband instructed UBS not to invest in U.S. securities, ostensibly because he was worried about the stability of U.S. banks at the time, and Husband and Wife signed the wire-transfer orders in 2008 and 2009, as "Directors" of Wilshire, to empty the Swiss account and remit all funds to a U.S. account.

2. Additional Facts Gleaned from Summary Judgment Proceedings

While the IRS was seeking Form 5471 penalties in Tax Court, the DOJ attorneys were busy initiating a collection action in District Court to recoup "willful" FBAR penalties for 2007 and 2008.[9]

The DOJ filed a Motion for Summary Judgment, asking the District Court to rule that Husband willfully violated his duty to file FBARs for 2007 and 2008, because he (i) knowingly disregarded the FBAR duty, or (ii) recklessly ignored a high probability that he was breaking the law, even if he lacked specific knowledge about his FBAR duty. The filings and hearing triggered by the Motion for Summary Judgment produced certain facts, which supplement those learned from the earlier Form 5471 penalty battle. They are set forth below.

In the early 2000s, Husband hired Leonard Purcell, a U.S. return preparer with offices in the United States and Mexico, and his partner, Adriana Bautista Luna, to prepare his Forms 1040 (*Mexican Accountants*). They prepared the Forms 1040 for the relevant years, 2007 and 2008, disclosing only the existence of Husband's account in Mexico, but not the larger account at UBS in Switzerland. Moreover, Husband did not file timely FBARs for 2007 or 2008. He filed them late, in June 2010, and even then, he seriously understated the value of the UBS account, missing the mark by approximately $600,000 one year. At trial, Husband attributed these inaccuracies to the fact that, in June 2010, he lacked access to his UBS records and was obligated to "cobble together" estimates from his notes and memory.

There was conflicting testimony about whether, or precisely when, Husband told the Mexican Accountants about the UBS account, but they all agreed that Husband never supplied any documents regarding such account. The Mexican Accountants said that they first notified Husband about his FBAR obligation around 2003 or 2004, and sent him an annual letter thereafter reminding him. Husband, on the other hand, claimed that the Mexican Accountants never informed him of FBAR duties until many years later, in 2010.

Husband acknowledged to the District Court that he was not particularly diligent about his tax considerations. Indeed, he did not read his Form 1040 "word for word" and he did not take the time to read the instructions from the IRS, expressly referenced in Schedule B, about FBAR filing requirements. He simply checked the income amount, which seemed appropriate, signed the Forms 1040, and trusted that the Mexican Accountants had prepared them accurately. Husband signed the Form 1040 each year, indicating that he had reviewed it, and it was true, correct, and accurate.

Husband had a personal account executive at UBS ("Swiss Bank Representative"), with whom he corresponded regularly about the account, and with whom he met at his house in Mexico to discuss the account. In early 2008, Husband instructed Swiss Bank Representative to send certain funds from UBS to the account in Mexico, before sending the remainder to the Fidelity account in the United States. The notes of Swiss Bank Representative indicate that Husband's main concern was the investigation by the IRS of UBS and the need to maintain the account confidential. Husband denied this at trial, of course.

3. Analysis by District Court in Summary Judgment Proceeding

The District Court indicated that the definition of "willfulness" in the civil FBAR context is an issue of first impression in the Fifth Circuit, and emphasized that only a limited number of cases have thoroughly analyzed the issue. The District Court then went on to examine the concept of "willfulness" under three different legal theories.

a. Actual Knowledge—First Legal Theory. The District Court identified several pieces of evidence tending to show that Husband tried to hide his UBS account: (i) He only disclosed the Mexican account, and not the Swiss account, on Schedule B to his Forms 1040; (ii) The Mexican Accountants testified that Husband never disclosed the UBS account to them and never supplied any account statements to them; (iii) The Swiss Bank Representative explained that Husband's main worries during their meeting in Mexico consisted of maintaining the account confidential and the IRS's investigation of UBS; (iv) The Swiss Bank Representative told Husband of the importance of disclosing the Swiss account on Schedule B to his Form 1040; (v) Husband instructed UBS not to invest any funds in U.S. securities; (vi) Husband opened the account under the name of a foreign corporation, Wilshire; and (vii) When Husband filed the late FBARs in 2010, he seriously understated the value of the UBS account.

All this evidence notwithstanding, the District Court found that a reasonable factfinder could still conclude the Husband did not have actual knowledge of his FBAR duty. The District Court first focused on the testimony of Husband during pre-trial depositions. He claimed that he informed the Mexican Accountants about his UBS account soon after it was opened in 2005, he did not learn of his FBAR duty until 2010, he never saw Schedule B of Forms 1040 because he only did a cursory review and depended on his Mexican Accountants, he never expressed concern about keeping the UBS account confidential during his meeting in Mexico with the Swiss Bank Representative, he opted not to invest funds from the UBS account in U.S. securities because he was concerned about bank failure in the United States, and he opened the account in the name of Wilshire solely to "legally postpone" payment of income taxes. The District Court explained that, even though the statements by Husband were "self-serving," it was not permitted to make credibility determinations in ruling on a Motion for Summary Judgment.

The District Court went on to explain that, even if the District Court were to ignore the testimony of Husband, as the DOJ urged it to do, a genuine dispute of fact about Husband's actual knowledge about the FBAR duty would still exist for several reasons. First, a factfinder could infer that Husband was ignorant of the FBAR duty because he did not file an FBAR for the Mexican account either, and it was reported on Schedule B to Form 1040. Second, a factfinder could discredit the testimony of the Mexican Accountants as self-serving because admitting that they failed to properly notify Husband of FBAR duties could expose them to malpractice claims. Third, the fact that Husband transferred the funds in the UBS account to a Fidelity account in the United States might be considered evidence that he was not attempting to hide the account from the IRS. Finally, a factfinder might conclude that Husband learned about the FBAR obligation in 2010 from the fact that he filed the late FBARs for 2007 and 2008 in June 2010.

The District Court made several interesting observations in this regard: (i) Husband's "freely disclosing" of the UBS account in 2010, some two years before the IRS audit began in 2012, suggests that he did not try to hide it from the IRS in June 2008 (when the 2007 FBAR was due) or June 2009 (when the 2008 FBAR was due); (ii) Finding willfulness in situations where taxpayers act promptly to rectify errors would create "a perverse incentive" in that it would "encourage taxpayer who have not filed FBARs on time to never file them at all in hope that the IRS does not discover their foreign accounts"; and (iii) While it is possible that Husband knowingly hid the UBS account earlier and then had a change of heart in 2010, the DOJ failed to identify any event in 2010 that would have triggered this decision.

Based on the preceding, the District Court ruled that, "with or without [Husband's] testimony, there is a genuine dispute as to [his] actual knowledge of this FBAR reporting obligations."

b. Constructive Knowledge—Second Legal Theory. Relying largely on *McBride*, the DOJ argued that Husband at least had constructive knowledge of his FBAR duty, because he signed his Forms 1040, which contained instructions to consult the FBAR filing requirements.[10]

i. Flashback to the Origins. To comprehend the significance of this issue, it is imperative to understand the root of the DOJ's argument and the judicial support that it received years ago in *McBride*.

The District Court examined Mr. McBride's level of knowledge of the FBAR filing requirement. It began by citing 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. However, the District Court recognized that several cases stand for the proposition that a 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 there about "knowledge of the contents of the return" referred to the taxpayer's awareness about specific figures/numbers 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."[11] Fortifying its position, the District Court went on to cite and quote various criminal cases, including a criminal FBAR case, where the courts attributed knowledge of the contents of a tax return to the taxpayer based solely on the taxpayer's signature on the return.[12] The District Court, eliminating any ambiguity about it stance on constructive knowledge in the FBAR arena, 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 the 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.[13]

The District Court expanded on this perspective later in the opinion. Mr. McBride seemed to argue that he was aware of the FBAR filing requirement, but decided not to comply because of his belief, based 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 to its analysis of the "willfulness" issue, the District Court repeated its extreme position that, if a taxpayer executes and files a Form 1040, then all FBAR violations, regardless of the validity of a 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.[14]

ii. Rejecting Earlier Judicial Reasoning. In rendering its decision about the Motion for Summary Judgment in *Flume*, the District Court refused to follow *McBride* for three reasons.

First, the District Court indicated that the constructive-knowledge theory ignores the distinction that Congress drew between willful and non-willful FBAR violations: "If every taxpayer, merely by signing a tax return, is presumed to know the need to file an FBAR, it is difficult to conceive of how a violation could be non-willful."

Second, the District Court warned that it would exceed its authority if it were to conclude the case on summary judgment because, while Husband admittedly signed his Form 1040 for 2007 in 2008, and thus would be charged with FBAR knowledge as of that time under the constructive-knowledge theory, Husband later testified during a deposition that he was unaware of the FBAR duty until years later, in 2010. The District Court pointed out that a factfinder must decide which of these two conflicting items carries more weight.

Third, and most importantly, the District Court announced that the constructive-knowledge theory is "rooted in faulty policy arguments." The DOJ argued that ruling in favor of Husband would encourage taxpayers to sign tax returns without reading them in hopes of later avoiding any negative consequences from inaccuracies and would permit taxpayers to escape liability by simply claiming that they did not read what they were signing. The District Court flatly rejected the DOJ's position, calling it "incorrect," because the IRS can still impose a $10,000 penalty for each non-willful FBAR violation and the IRS can still pursue taxpayers under a reckless-disregard theory. The District Court ended its comments on this issue as follows:

> [T]here is no policy need to treat constructive knowledge as a substitute for actual knowledge … Accordingly, the Court will not hold that [Husband] had constructive knowledge—and that he owes the Government more than half a million dollars—merely because he signed his tax returns under penalties of perjury. The Government has thus failed to

> conclusively establish that [Husband] was willful on the ground that he knowingly disregarded his FBAR obligations.

c. Reckless Disregard of Duty—Third Legal Theory. The DOJ argued that, even if Husband did not have actual knowledge of his FBAR duty, and even if he did not have constructive knowledge of the same, he still deserved a willful penalty because he "recklessly disregarded" the risk that he was violating the law.

The District Court first explained that, when dealing with civil FBAR penalty cases, recklessness means conduct that creates an unjustifiably high risk of violating the law, which is either known by the taxpayer or so obvious that it should have been known, and it is substantially greater than "merely careless" behavior by the taxpayer.

The District Court then pointed out that the most factually similar case to *Flume* is *Bedrosian*, and it set a "high bar" in terms of what actions or inactions by a taxpayer constitute recklessness. After reciting a long list of questionable behaviors by the taxpayer in *Bedrosian*, the District Court emphasized that its judicial colleagues determined, after hearing all the evidence at trial, that the taxpayer in *Bedrosian* did not meet the recklessness standard and was, at most, negligent.

The DOJ argued in *Flume* that Husband actively tried to hide the UBS account, which equates to awareness of a significant risk that he was breaking the law. The DOJ further suggested that Husband's "conscious decision" not to consult the FBAR instructions, even though Schedule B on Form 1040 directs taxpayers to do so, constitutes recklessness. The Husband's sophistication as a businessperson might also constitute evidence that the FBAR violations were reckless, but, as the District Court pointed out in a footnote, the DOJ did not raise the argument, and it would not have been a strong one because Husband testified that he relied on the sophistication of the Mexican Accountants, not his own, to ensure that he maintained full U.S. compliance.[15]

The arguments by the DOJ fell flat. First, the District Court explained that there was a genuine factual dispute about whether Husband attempted to hide the UBS account from the IRS. Second, because Husband hired a return-preparer (*i.e.*, the Mexican Accountants), the District Court explained that it might not have been reckless for Husband not to read the FBAR instructions. Indeed, Husband testified that he relied on the competence of the Mexican Accountants, and if this were the case, then it is not clear that Husband was taking an "unjustifiably high risk" in not reading everything closely. Moreover, explained the District Court, the warning on Schedule B to consult the separate FBAR instructions explicitly states that exceptions exist, and Husband might "understandably have reasoned" that he had no FBAR filing duty because the Mexican Accountants had already determined that an exception applied to him. Finally, in a footnote, the District Court emphasized that Line 7b of Schedule B to Form 1040, which was drafted by the IRS, creates ambiguity because it instructs taxpayers to write the name of the "foreign country" not "foreign countries" in which taxpayers have an account. As a result, Husband "might reasonably have thought that he was not required to list both Mexico and Switzerland."[16] The District Court thus concluded that a reasonable factfinder could determine that Husband did not recklessly disregard his FBAR duties, such that a genuine factual dispute remains, and dispensing with the case *via* summary judgment is improper.

4. Ultimate Decision by District Court After Trial

Husband's victory in surviving the Motion for Summary Judgment was brief. Indeed, after a two-day trial, the District Court changed course, determining that Husband had willfully violated his FBAR duties and upholding large FBAR penalties asserted by the IRS. Details follow.

Although most of the relevant facts had already been developed through the Tax Court case regarding unfiled Forms 5471, pre-trial discovery, and the evidence presented to the District Court in connection with the Motion for Summary Judgment, the trial offered additional information. The Mexican Accountants explained to the District Court that (i) Husband never disclosed the UBS account to them, (ii) Husband never showed them the general ledgers of Wilshire, which listed the UBS account, (iii) they sent to all their clients, including Husband, an annual form letter reminding them of their FBAR obligations, (iv) many of their clients complete their own FBARs in order to avoid the preparation fee, and (v) they assumed that Husband was doing the same.

The District Court determined that Husband's FBAR violations were willful for the following reasons. First, it indicated that Husband's testimony was "not credible," contained "numerous contradictions," and "raised serious doubts about his veracity." Several examples were provided to support this skepticism. The District Court explained that Husband's supposed rationale for opening the UBS account in 2005 was to avoid bank failures in the United States.

The problem with this, explained the District Court, is that no U.S. banks collapsed until later, in 2007 and 2008. The District Court also noted that, despite his supposed concern over the U.S. financial system, Husband had personal bank accounts, investments accounts, and a trust account in the United States throughout the relevant years. The District Court also underscored that Husband changed his story several times about when, exactly, he learned about his FBAR duty, claiming that this occurred in 2008 or 2009, or when Mexican Accountants supposedly informed him for the first time in 2010, or when he attended a seminar for expatriate taxation in 2010. Finally, the District Court challenged Husband's excuse for seriously underreporting the values of the UBS account on his late FBARs. Husband indicated that he was forced to rely on incomplete records and his memory, yet he admitted at trial that he had electronic access to all UBS statements and the general ledgers for Wilshire, which showed the correct balances.

Second, the District Court characterized the financial structured used by Husband as a "sophisticated tax evasion scheme." It pointed to the following in this regard: (i) He successfully operated business in Mexico for nearly three decades; (ii) He knew that the Federal Deposit Insurance Corporation insured U.S. accounts up to $100,000; (iii) He instructed UBS not to invest in U.S. securities; (iv) He transferred Wilshire from the Bahamas to Belize in an effort to avoid government oversight; (v) He did not file tax returns in Mexico for Franchise Foods since the 1990s; and (vi) He did not file personal tax returns in Mexico.

Third, the Mexican Accountants sent Husband an annual reminder of his FBAR duties.

Fourth, the fact that Husband disclosed the existence of a Mexican account on Schedule B to his Forms 1040 shows that he was aware of the requirement and "made a conscious choice" not to similarly disclose the UBS account.

Fifth, the client-contact records from UBS, combined with Husband's testimony, show that Husband learned of the IRS's investigation into UBS by mid-2008, but opted not to file any FBARs until after UBS announced that it planned to submit its records to the IRS. According to the District Court, "[t]his timing strongly suggests that [Husband] knew he was breaking the law but continued to believe that he could get away with it until it became clear that the U.S. authorities would learn of his Swiss account."

Sixth, Husband acted with "extreme recklessness" by failing to review his Forms 1040 before signing them. The District Court acknowledged that leniency might be proper in situations involving unsophisticated taxpayers, but Husband is a businessman with more than 30 years of experience managing complex projects, in the United States and Mexico. Harkening back to *McBride*, the District Court stated the following:

> Schedule B's question about foreign bank accounts is simple and straightforward and requires no financial or legal training to understand. Even the most cursory review of his tax return would have altered [Husband] to the foreign account reporting requirement.

This ruling is interesting, as it demonstrates that the District Court is walking a thin line, trying to classify the FBAR violations as willful, while not reversing its earlier holding, described above, in response to the Motion for Summary Judgment filed by the DOJ. The District Court seems acutely aware of its predicament, explaining the following in a footnote:

> *McBride* and *Williams* both accepted a "constructive knowledge" theory for proving knowing violations. Under this view, "every taxpayer, merely by singing a tax return, is presumed to know of the need to file an FBAR." The Court rejected this theory in its summary-judgment Order, and the parties did not urge it again at trial … Citations to *McBride* and *Williams* in this Order *should not be understood as a reversal of the Court's [earlier] position that "[t]he constructive knowledge theory is unpersuasive" as a justification for penalties based on knowing conduct*.[17]

Seventh, the District Court claimed that it was "reckless" for Husband to place total reliance on Mexican Accountants, particularly because he did not conduct any research on their educational backgrounds and credentials, and did not confirm whether they are licensed accountants, which they are not. The District Court concluded that, taking into account his large international holdings and complex business arrangements, Husband was reckless by "failing to investigate the credentials of the people he claims to have entrusted with his tax liability."

B. *Boyd*

Another noteworthy, recent FBAR case is *Boyd*.[18]

1. Overview of the Facts

The taxpayer is a U.S. citizen who had a reportable interest in 14 financial accounts in the United Kingdom in

2010. Such accounts generated dividends and interest, which taxpayer did not report on her Form 1040. The taxpayer also failed to disclosure existence of the U.K. accounts, either on Schedule B to her Form 1040 or on an FBAR.

Recognizing her non-compliance, the taxpayer filed an application in 2012 to resolve matters through the Offshore Voluntary Disclosure Program ("OVDP"). She later filed a Form 1040X reporting all U.K. income, along with an FBAR reporting all U.K. accounts. Then, in 2014, the taxpayer exercised her right to "opt-out" of the OVDP to seek penalty waiver or reduction. An audit ensued, as expected.

The IRS concluded at the end of the audit that the FBAR violations were non-willful and that the taxpayer met all four criteria for penalty mitigation. These consist of the following: (i) The taxpayer had 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 unreported foreign accounts was from an illegal source or used to further a criminal purpose; (iii) The taxpayer cooperated during the examination, which means that the IRS was not obligated to issue a Summons, the taxpayer responded to reasonable requests for documents, meetings, and interviews, and the taxpayer filed all necessary returns and FBARs; and (iv) The IRS did not determine a civil fraud penalty against the taxpayer for an income tax underpayment for the year in question due to the failure to report income related to a foreign account.[19]

The "penalty mitigation guidelines" indicated that the FBAR penalty would be calculated using the following three levels:

- The Level I penalty applies in situations where the maximum aggregate balance for all unreported foreign accounts did not exceed $50,000 at any time during the relevant year. The Level I penalty equals $500 per violation, not to exceed $5,000 for all FBAR violations for a particular year.[20]
- The Level II penalty applies to each unreported foreign account whose balance did not exceed $250,000 during the relevant year. The Level II penalty equals 10 percent of the highest balance in the unreported account during the year, not to exceed $5,000.[21]
- The Level III penalty applies in to each unreported foreign account whose balance was more than $250,000 during the relevant year. The Level III penalty equals $10,000 per account.[22]
- In summary, according to the "penalty mitigation guidelines" for non-willful FBAR violations in the Internal Revenue Manual ("IRM"), the penalty could be (i) $500 per account (with a maximum of $5,000 in penalties for the year), (ii) somewhere between $0 and $5,000 per account, or (iii) $10,000 per account, depending whether penalties under Level I, Level II, or Level III are appropriate.

The IRS concluded that the taxpayer's accounts should be subjected to a Level II penalty. Therefore, in June 2016, the IRS asserted 14 separate FBAR penalties consisting of 10 percent of the highest balance of each unreported account in 2010, with a maximum of $5,000 per account. To put this into perspective, the combined balance of all the unreported accounts in 2010 was $790,726, and the IRS only asserted a penalty of $47,279. This equals a penalty of less than six percent of the unreported funds.

Many would consider this a bargain, particularly considering that (i) the standard "offshore" penalty under the 2012 OVDP was 25 percent of the total unreported funds, and (ii) even if the taxpayer had applied to resolve matters during a time that the Streamline Domestic Offshore Procedure were in existence, the "offshore" penalty would have been five percent of the highest combined value of all non-compliant foreign assets. The taxpayer did not share this opinion about the reasonableness of the penalties and did not pay them.

2. Collection Lawsuit and Position of the Parties

The DOJ filed a collection lawsuit in District Court in January 2018.

The parties then filed Cross Motions for Summary Judgment in an effort to resolve the issue without a trial. The DOJ argued that the relevant law, 31 USC §5321(a)(5)(B), imposes an FBAR penalty for each separate unreported account. By contrast, the taxpayer maintained that the penalty cannot exceed $10,000, regardless of the number of accounts not reported on a single FBAR.

To understand both perspectives, one must first review the relevant provisions. The first is 31 USC §5314(a), which contains the general rule that the Treasury Department shall require that all U.S. persons keep records and/or file reports when such persons make a transaction or maintain a relation with a foreign financial agency.

Next, 31 USC §5321(a)(5)(A) broadly authorizes penalties, stating that the Treasury Department "may impose a civil money penalty on any person who violates, or causes any violation of, any provision of Section 5314."

This is later refined by 31 USC §5321(a)(5)(B), which explains the following regarding the amount of an FBAR penalty. Except in cases involving willful penalties, "the amount of any civil penalty imposed under [31 U.S.C. §5321(a)(5)(A)] shall not exceed $10,000."

The taxpayer argued that the plain language of 31 USC §5321(a)(5)(B) indicates that the maximum non-willful FBAR for one year is $10,000, irrespective of the number of foreign accounts that should have been reported on such FBAR. The taxpayer then suggests that, if Congress had intended to approve a $10,000-per-account penalty, then it could have done so with explicit language.

The DOJ disagreed, contending that the relevant authorities demonstrate that the FBAR penalty applies on a per-year-per-unreported-account basis. To fortify its position, the DOJ cited 31 USC §5321(a)(5)(B)(ii), which contains the "reasonable cause" exception to the non-willful penalty. It states the following:

> No penalty shall be imposed … 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.

The DOJ also pointed to similar language in the provision focused on the appropriate penalty amount for willful FBAR violations, 31 USC §5321(a)(5)(D)(ii). It provides:

> [I]n 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 amount on which the penalty will be based is] the balance *in the account* at the time of the violation.

3. Ruling by the District Court

The District Court acknowledged that 31 USC §5321 is "somewhat unclear," but believed that the DOJ advanced "the more reasonable interpretation." In other words, the District Court found that the IRS can assess the non-willful FBAR penalty on a per-unreported-account-per-year basis.

C. Cohen

Another interesting FBAR case, which received remarkably little public attention, is *Cohen*.[23]

1. Overview of the Facts

In 1989, the taxpayer married her spouse ("Spouse"). In 2004, the taxpayer and Spouse formed a corporation in American Samoa ("Samoan Company"), each owning 50 percent. Soon thereafter, in 2005, they opened a bank account for Samoan Company with Bank Leumi in Luxembourg and granted themselves authority over it. This happened through a meeting with a representative of Bank Leumi in a Beverly Hills hotel. The opening balance was approximately $1.4 million.

The attorney who assisted the taxpayer and Spouse from Samoan Company warned them, in writing, about the related U.S. tax and international information return obligations. Apparently, he sent a letter in February 2005 raising the obligations and "strongly recommending" that the taxpayer and Spouse contact their accountant or tax advisor, give details about foreign assets, and have them prepare all necessary returns.

Cohen focuses solely on the FBAR violation for 2008, though the District Court suggests that the offenses occurred from 2004 through 2011. The taxpayer and Spouse checked "no" in response to the foreign-account question on Schedule B of their Form 1040 for 2008, and they did not file an FBAR for 2008.

In October 2009, taxpayer and Spouse filed for divorce. At some point in 2011, they applied for the OVDP. They filed Forms 1040X for various years as part of the OVDP process. The 2008 Form 1040 reported a tax liability of $523,444, while the 2008 Form 1040X showed a liability of $3,643,193, an omission of over $3 million. The taxpayer and Spouse also filed FBARs for various years. The 2008 FBAR showed accounts at Bank Leumi, with a highest aggregate balance of $14,123,172. The balance as of the date of the violation for the 2008 FBAR, June 30, 2009, the balance in the accounts had decreased to $6,199,395.

In December 2011, the taxpayer requested to "opt-out" of the OVDP. Apparently, the opt-out did not go well, because the IRS assessed a "willful" penalty against her. The penalty was calculated as follows: (i) the account balance as of the date of the violation was $6,199,395, (ii) half of this balance is attributable to the taxpayer as a co-owner of the account, yielding $3,099,698, and (iii) multiplying this amount by 50 percent yields a penalty of $1,549,849.

2. Collection Lawsuit and Position of the Parties

The taxpayer did not voluntarily pay the willful FBAR penalty, so the DOJ filed a collection lawsuit in District Court.

One paragraph in the Complaint filed by the DOJ stated that the FBAR penalty was assessed on March 5, 2015; however, the DOJ attached to its Complaint a Penalty Assessment Certification dated May 22, 2014. The true date on which the FBAR penalty was assessed is the key to *Cohen*.

The relevant provision, 31 USC §5321(b)(2)(A), indicates that the DOJ must file the Complaint within two years of the date on which the FBAR penalty was assessed. In *Cohen*, the DOJ filed its Complaint on March 1, 2017, which was within two years of March 5, 2015, but not within two years of May 22, 2014. Therefore, the taxpayer filed a Motion for Judgment on the Pleadings, arguing that the Complaint should be barred by the statute of limitations because the DOJ filed it two years and 283 days after the assessment date.

The DOJ could not simply ignore the existence of the Penalty Assessment Certification dated May 22, 2014. Accordingly, the DOJ maintained that the IRS had actually assessed two separate penalties against the taxpayer, but the DOJ was only seeking to reduce the second one to judgment through the Complaint. In support of this argument, the DOJ produced another Penalty Assessment Certification, which was dated March 5, 2015.

The taxpayer argued that the assessments improperly doubled the liability or the IRS improperly assessed the same penalty twice through a redundant recording.

3. Rulings by the District Court

The District Court rejected both contentions advanced by the taxpayer, as seen below.

a. Double Assessment Theory. The taxpayer maintained that accepting the DOJ's theory would effectively allow the IRS to impose two penalties, one in the amount of $1,549,849 against her personally, and another in the same amount for her former Spouse. The taxpayer underscored that doing so would also violate the IRM, which provides the following guidance about unreported foreign accounts with multiple owners:

> If an account is co-owned by more than one person, a penalty determination must be made separately for each co-owner. *The penalty against each co-owner will be based on his her percentage of ownership of the highest balance in the account*. If the examiner cannot determine each owner's percentage of ownership, the highest balance will be divided equally among each of the co-owners.[24]

Giving little credence to the IRM, the District Court pointed to the governing provision, 31 USC §5321(a)(5)(C)(i), which "clearly permits" the IRS to assess penalties of 50 percent of "the balance in the account at the time of the violation." The District Court went on to say that the provision "does not limit FBAR penalties to only [the taxpayer's] interest" in the unreported accounts. Because the account had a balance of $6,199,395 on the date of the violation, the IRS had the right to assess a penalty of $3,099,698 against the taxpayer.

The District Court concluded this issue with a couple points. First, "the IRS assessed penalties in the amount of $1,549,849, or half of Defendant's interest. But the IRS may assess more, and in fact did, up to the statutory ceiling as noted above." Second, the IRS has ample discretion when determining the appropriate amount of an FBAR penalty:

> In other words, Section 5321(a)(5)(C)(i) sets forth the statutory ceiling for penalties against [the taxpayer] based on the balance of an unreported account (or $6,199,395) while the IRM advises examiners to consider co-ownership of an unreported account (or $3,099,698) when assessing penalties. But examiners may still choose to assess as penalties the statutory ceiling. The IRM guidance reflects an examiner's wide latitude in assessing penalties.

b. Redundant Recording Theory. The taxpayer argued that, because an assessment is essentially a bookkeeping notation used to record the liability of a taxpayer, the second assessment on March 5, 2015, should be considered a "legal nullity with no significance." The taxpayer also raised the slippery slope position, urging the District Court to understand that if the IRS is allowed to assess an FBAR penalty more than once, then this would effectively abolish 31 USC §5321(b)(2)(A), which mandates that the DOJ file is Complaint within two years of the assessment.

The District Court, again, rejected the taxpayer's contentions. It said that (i) the law allows for a maximum penalty against the taxpayer of $3,099,698, not $1,549,849, (ii) the IRS made two valid assessments in the same amount, one on May 22, 2014, and another on March 5, 2015, and (iii) the DOJ filed the Complaint for purposes of only reducing the second assessment to a judgment, which it is entitled to do.

c. Effect of Rulings. The District Court denied the taxpayer's Motion for Judgment on the Pleadings, thereby holding that the DOJ filed its Complaint in a timely manner. However, the District Court did not make a substantive ruling on the key legal/tax issue in the case;

that is, whether the taxpayer willfully violated her FBAR duties. That issue will be resolved in future proceedings.

IV. Conclusion

Before the three cases addressed in this article were issued, several courts examined what constitutes "willfulness" in the context of FBAR penalties.[25] Notable decisions include *Williams* in 2012,[26] *McBride* in 2012,[27] *Bussell* in 2015,[28] *Bohanec* in 2016,[29] *Bedrosian* in 2017,[30] *Kelley-Hunter* in 2017,[31] *Garrity* in 2018,[32] and *Markus* in 2018,[33] and *Horowitz* in 2019.[34] These previous cases teach the following lessons:

- The Tax Court lacks jurisdiction over FBAR penalty matters, in both pre-assessment and post-assessment (*i.e.*, collection) cases, so FBAR litigation takes place in District Court or the Court of Federal Claims.
- 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" of 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 courts review the question of willfulness on a *de novo* basis, meaning 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 link general unawareness of FBAR duties by the public to ignorance of the specific taxpayer under attack.
- Courts might give credence to the argument that age-related mental conditions preclude a finding of willfulness.

The cases examined in this article, *Flume*, *Boyd*, and *Cohen*, augment the existing FBAR lessons in several ways. First, they indicate that not reading the entire Form 1040 before signing it constitutes "extreme recklessness" by taxpayers, primarily because the foreign-account question on Schedule B is "simple and straightforward and requires no financial or legal training." Second, it is "reckless" for taxpayers not to research the educational and professional credentials of the tax professionals on whom they are relying to prepare their U.S. returns. Third, the IRS may impose FBAR penalties on a per-unreported-account-per-year basis, and it is not limited to just one penalty per FBAR. Fourth, the IRS may assess multiple, separate FBAR penalties against a taxpayer for the same transgression, provided that the penalties are imposed during the assessment-period and they do not exceed the statutory limit of 50 percent of the account balance. Finally, in assessing FBAR penalties, the IRS can disregard its published guidance in the IRM, such as the instructions about equitably allocating penalties related to foreign accounts with two or more co-owners. As the IRS and DOJ continue to aggressively attack FBAR and other international violations, more lessons are undoubtedly on their way.

ENDNOTES

* Hale specializes in tax audits, tax appeals, tax litigation, and international tax compliance. You can reach Hale by phone at (404) 658-5441 or by email at *hale.sheppard@chamberlainlaw.com*.

1 *Flume*, 123 AFTR 2d 2019-XXXX (S.D. Texas, June 11, 2019); *Boyd*, 123 AFTR 2d 2019-1651 (D.C. California, Apr. 23, 2019); *Cohen*, 2018 WL 6318837 (C.D. California, Oct. 23, 2018).

2 31 USC §5314; 31 CFR §1010.350(a).

3 For a detailed analysis of the Form 8938 filing requirement, *see* Hale E. Sheppard, *The New Duty to Report Foreign Financial Assets on Form 8938: Demystifying the Complex Rules and Severe Consequences of Noncompliance,*

INT'L TAX J., 2012, at 11; Hale E. Sheppard, *Form 8938 and Foreign Financial Assets: A Comprehensive Analysis of the Reporting Rules After IRS Issues Final Regulations*, INT'L TAX J.2015, at 25; Hale E. Sheppard, *Specified Domestic Entities Must Now File Form 8938: Section 6038D, New Regulations in 2016, and Expanded Foreign Financial Asset Reporting*, INT'L TAX J., 2016, at 5; and Hale E. Sheppard, *Unlimited Assessment-Period for Form 8938 Violations: Ruling Shows IRS's Intent to Attack Multiple Tax Returns*, TAXES, 2017, at 31.

4 American Jobs Creation Act, P.L. 108-357 (Oct. 22, 2004).

5 31 USC §5321(a)(5)(A).

6 31 USC §5321(a)(5)(B)(ii).

7 31 USC §5321(a)(5)(C)(i). As of July 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 Colliot*, Cause No. AU-16-CA-01281-SS (W.D. Texas, May 16, 2018), and *Wadhan*, Civ. Action No. 17-CV-1287-MSK (Colo., July 18, 2018).

8 *E.S. Flume*, 113 TCM 1097, Dec. 60,822(M), TC Memo. 2017-21 (Tax Court case focused on civil penalties for unfiled Forms 5471 to disclose ownership of foreign corporations); *Flume*, Civil Action No. 516-CV-73 (S.D. Texas, Aug. 22, 2018) (Order in response to Motion for Summary Judgment filed by the U.S. government); *Flume*, 123 AFTR 2d 2019-XXXX (S.D. Texas, June 11, 2019) (Verdict by District Court regarding FBAR penalties).

9 *Flume*, Civil Action No. 516-CV-73 (S.D. Texas, Aug. 22, 2018), Order.

10 *McBride*, 110 AFTR 2d 2012-6600 (Nov. 8, 2012); *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, *Findings of Fact, Conclusions of Law, and Order* (Nov. 8, 2012) at 38–39 (internal citations omitted); *J. McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.

11 *McBride*, 110 AFTR 2d 2012-6600 (Nov. 8, 2012); *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, *Findings of Fact, Conclusions of Law, and Order* (Nov. 8, 2012) at 36–37; *McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.

12 *McBride*, 110 AFTR 2d 2012-6600 (Nov. 8, 2012); *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, *Findings of Fact, Conclusions of Law, and Order* (Nov. 8, 2012) at 37–38; *McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.

13 *McBride*, 110 AFTR 2d 2012-6600 (Nov. 8, 2012); *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, *Findings of Fact, Conclusions of Law, and Order* (Nov. 8, 2012) at 38–39 (internal citations omitted); *McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.

14 *McBride*, 110 AFTR 2d 2012-6600 (Nov. 8, 2012); *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, *Findings of Fact, Conclusions of Law, and Order* (Nov. 8, 2012) at 48–49 (internal citations omitted); *McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.

15 *Flume*, Civil Action No. 516-CV-73 (S.D. Texas, Aug. 22, 2018), Memorandum and Order, Footnote 16.

16 *Flume*, Civil Action No. 516-CV-73 (S.D. Texas, Aug. 22, 2018), Memorandum and Order, Footnote 17.

17 *Flume*, Civil Action No. 516-CV-73 (S.D. Texas, Aug. 22, 2018), Memorandum and Order, Footnote 11 (internal citations omitted) (emphasis added).

18 *Boyd*, 123 AFTR 2d 2019-1651 (D.C. California, Apr. 23, 2019).

19 IRM §4.26.16.6.6.1 (Nov. 6, 2015).

20 IRM Exhibit 4.26.16-2 (July 1, 2008).

21 IRM Exhibit 4.26.16-2 (July 1, 2008).

22 IRM Exhibit 4.26.16-2 (July 1, 2008).

23 *Cohen*, 2018 WL 6318837 (C.D. California, Oct. 23, 2018).

24 IRM §4.26.16.6.5.3 (Nov. 6, 2015).

25 For more detailed information about the recent court battles regarding "willful" FBAR penalties, *please see* the following articles by the same author: Hale E. Sheppard, *United States v. Horowitz: Sixth Case Analyzing Constructive Knowledge as Determinant of FBAR Penalties*, INT'L TAX J., 2019, at 23; Hale E. Sheppard, *Constructive Knowledge and FBAR Penalties: Does Merely Filing a Form 1040 Suffice to Establish "Willfulness?"* INT'L TAX J., 2019, at 35; Hale E. Sheppard, *Appellate Court Jeopardizes First Holding of Non-Willfulness in FBAR Penalty Case: Round Three of the Bedrosian Battle*, *30 J. INT'L TAXATION 37 (2019);* Hale E. Sheppard, *Court Bucks the Trend in Willful FBAR Penalty Cases: Merely Signing Tax Returns Does Not Establish Willfulness*, TAXES, 2019, at 23; Hale E. Sheppard, *What Constitutes a "Willful" FBAR Violation? Comprehensive Guidance Based on Eight Important Cases*, 129 *J. TAXATION* 24 (2018); Hale E. Sheppard, *Court Holds that Pervasive Ignorance Is No Defense to Willful FBAR Penalties: This and Other Lessons from United States v. Garrity*, INT'L TAX J., 2018, at 51; Hale E. Sheppard, *Willful FBAR Penalty Case Shows Importance of Protecting Privileged Communications: What Kelley-Hunter Adds to the Foreign Account Defense Discussion*, INT'L TAX J.*, 2018, at 15; Hale E. Sheppard, Analysis of the Reasonable Cause Defense in Non-Willful FBAR Penalty Case: Teachings from Jarnagin*, 128 *J. TAXATION* 6 (2018); Hale E. Sheppard, *First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of Bedrosian for Future Foreign Account Disputes (Part 1)*, 128 *J. TAXATION* 12 (2018); Hale E. Sheppard, *First Taxpayer Victory in a Willful FBAR Penalty Case: Analyzing the Significance of Bedrosian for Future Foreign Account Disputes (Part 2)*, 128 *J. TAXATION* 14 (2018); Hale E. Sheppard, *Can Recent "Willful" FBAR Penalty Cases Against Taxpayers Help Tax Firms Fend Off Malpractice Actions?* INT'L TAX J., 2017, at 33; Hale E. Sheppard, *Government Wins Fourth Straight FBAR Penalty Case: Analyzing Bohanec and the Evolution of "Willfulness,"* 126 *J. TAXATION* 110 (2017); Hale E. Shepard, *Government Wins Second Willful FBAR Penalty Case: Analyzing What McBride Really Means to Taxpayers*, 118 *J. TAXATION* 187 (2013); Hale E. Sheppard, *Third Time's the Charm: Government Finally Collects "Willful" FBAR Penalty in Williams Case*, 117 *J. TAXATION* 319 (2012); Hale E. Sheppard, *District Court Rules That Where There's (No) Will, There's a Way to Avoid FBAR Penalties*, 113 *J. TAXATION* 293 (2010).

26 *J.B. Williams III*, 131 TC 54, Dec. 57,547 (2008); *Williams*, No. 1:09-cv-437, 2010 WL 347221 (E.D. Va., Sept. 1, 2010); *J.B. Williams*, CA-4, 2012-2 USTC ¶50,475, 489 FedAppx 655.

27 *McBride*, U.S. District Court for the District of Utah Central Division, Case No. 2:09-cv-378, *Findings of Fact, Conclusions of Law, and Order* (Nov. 8, 2012). *See also McBride*, DC-UT, 2012-2 USTC ¶50,666, 908 FSupp2d 1186.

28 *Bussell*, 117 AFTR 2d 2016-439 (District Court, C.D. California, Dec. 8, 2015).

29 *Bohanec*, 118 AFTR 2d 2016-5537 (District Court, C.D. Cal., Dec. 8, 2016).

30 *Bedrosian*, 120 AFTR 2d 2017-5671 (D.C. PA, 2017).

31 *Kelley-Hunter*, 120 AFTR 2d 2017-5566 (D.C. Dist. Col, Dec. 12, 2017).

32 *Garrity*, Case No. 3:15-cv-243 (D.C. Conn.).

33 *Markus*, D.C. New Jersey, Civil No. 16-2133, Opinion, July 17, 2018.

34 *Horowitz*, 123 AFTR 2d 2019-500 (D.C. Maryland, Jan. 18, 2019).