

December 2015

The Eighth Amendment and Tax Evasion: Whether FATCA Non-Compliance Fines and FBAR Penalties Are Excessive

Tyler R. Murray

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Commercial Law Commons](#), [Constitutional Law Commons](#), and the [Tax Law Commons](#)

Repository Citation

Tyler R. Murray, *The Eighth Amendment and Tax Evasion: Whether FATCA Non-Compliance Fines and FBAR Penalties Are Excessive*, 24 Wm. & Mary Bill Rts. J. 553 (2015), <https://scholarship.law.wm.edu/wmborj/vol24/iss2/8>

Copyright c 2015 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

THE EIGHTH AMENDMENT AND TAX EVASION: WHETHER FATCA NON-COMPLIANCE FINES AND FBAR PENALTIES ARE EXCESSIVE

Tyler R. Murray*

INTRODUCTION

Globalization and technological development have contributed to one of the most pressing issues in the United States—offshore tax evasion.¹ Although it is difficult to estimate the exact amount of revenue losses from offshore tax abuses, the United States loses approximately \$100 billion per year from offshore tax evasion.² The problem was highlighted in 2008 when the United States Department of Justice’s Tax Division investigated Switzerland’s largest bank, UBS AG.³ In 2009, UBS AG admitted to defrauding the United States by impeding the Internal Revenue Service’s (IRS) collection of tax revenues from U.S. taxpayers and paid \$780 million in fines, penalties, interest, and restitution to the United States.⁴ More recent than the UBS AG scandal, the Tax Division has assisted the investigation of many other prominent banks throughout the world that have conspired to defraud the United States.⁵ As of the

* J.D., William & Mary Law School, 2016; M.S.Ed., University of Pennsylvania, 2013; B.B.A., Southern Methodist University, 2012. I would like to thank my family and friends for their unconditional support. Also, I must express my sincere gratitude to the wonderful editors of the *William & Mary Bill of Rights Journal* for the amount of time they devote to each Article and Note.

¹ See *Offshore Compliance Initiative*, U.S. DEP’T JUST., http://www.justice.gov/tax/offshore_compliance_initiative [<http://perma.cc/U56J-R58J>] (“One of the Tax Division’s top litigation priorities is combatting the serious problem of non-compliance with our tax laws by U.S. taxpayers using secret offshore bank accounts.”); see also Tracy A. Kaye, *Innovations in the War on Tax Evasion*, 2014 BYU L. REV. 363, 364–65 (2014).

² JANE G. GRAVELLE, CONG. RESEARCH SERV., R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION 1 (2015); Frederic Behrens, *Using a Sledgehammer to Crack a Nut: Why FATCA Will Not Stand*, 2013 WIS. L. REV. 205, 211 (2013).

³ *Offshore Compliance Initiative*, *supra* note 1.

⁴ *Id.*

⁵ See *id.* (“The Tax Division has opened investigations into numerous additional offshore banks located in Switzerland, India, Israel and elsewhere. From 2008 through April 2013, the Tax Division has charged over 30 banking professionals and 60 account holders, thus far resulting in five convictions after trial and 55 guilty pleas, including 2 trial convictions and 16 guilty pleas in the first four months of 2013 alone.”); *Credit Suisse Sentenced for Conspiracy to Help U.S. Taxpayers Hide Offshore Accounts from Internal Revenue Service*, U.S. DEP’T JUST. (Nov. 21, 2014), <http://www.justice.gov/opa/pr/credit-suisse-sentenced-conspiracy-help-us-taxpayers-hide-offshore-accounts-internal-revenue> [<http://perma.cc/RSL6-VT97>] [hereinafter *Credit Suisse Sentenced*] (explaining that on November 21, 2014, Credit Suisse AG, a Swiss

end of August 2015, more than twenty major Swiss banks reached non-prosecution agreements with the Department of Justice.⁶

Despite successful attempts at reigning in foreign banks, however, the United States unilaterally responded to the global problem. Congress enacted the Foreign Account Tax Compliance Act (FATCA) in 2010,⁷ veiled as the funding mechanism for the Hiring Incentives to Restore Employment Act (HIRE Act).⁸ FATCA enlists foreign financial institutions to provide specific information directly to the IRS regarding financial accounts that are held by either U.S. taxpayers or foreign entities in which U.S. taxpayers hold a substantial ownership interest.⁹ Moreover, foreign financial institutions that fail to comply with the reporting obligations incur a withholding tax on a variety of withholdable payments from the United States.¹⁰ IRS Commissioner John Koskinen recently stated that the IRS “owe[s] it to the vast majority of honest U.S. taxpayers to tirelessly search for and prosecute those who dodge paying their fair share and the unprincipled professionals who assist them.”¹¹

bank, was sentenced for conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the Internal Revenue Service, penalties for which totaled approximately \$2.6 billion).

⁶ *Swiss Bank Program*, U.S. DEP’T JUST., <http://www.justice.gov/tax/swiss-bank-program> [<http://perma.cc/97B5-LGWH>].

⁷ See Kaye, *supra* note 1, at 364 (explaining that the Swiss bank scandal brought attention to offshore tax evasion as a global problem that requires a global solution; however, the United States chose a unilateral response by enacting FATCA in 2010).

⁸ MARNIN J. MICHAELS, INTERNATIONAL TAXATION ¶ 6.01[1] (2014).

⁹ See I.R.C. § 1471(b) (requiring that a foreign financial institution report the following information: “[t]he name, address, and TIN of each account holder which is a specified United States person and, in the case of any account holder which is a United States owned foreign entity, the name, address, and TIN of each substantial United States owner of such entity”). A foreign financial institution must also report the account number, account balance, and gross receipts and withdrawals. *Id.* § 1471(c)(1)(A)–(D) (2012).

¹⁰ Under I.R.C. § 1471(a), a withholding agent “shall deduct and withhold a tax equal to 30 percent of the amount of such payment” if the foreign financial institution receives a withholdable payment and does not comply with the requirements of I.R.C. § 1471(b).

¹¹ *Credit Suisse Sentenced*, *supra* note 5 (responding to the outcome of the Credit Suisse AG scandal). It is estimated that the United States loses at least \$100 billion annually in tax revenues due to offshore tax abuses, which represents a substantial portion of the annual U.S. tax gap. STAFF OF S. SUBCOMM. ON INVESTIGATIONS, 110TH CONG., REP. ON TAX HAVEN BANKS AND U.S. TAX COMPLIANCE 77, at 77 n.1 (Comm. Print 2008) (deriving the \$100 billion estimate from a variety of tax experts). The tax gap is “the difference between what U.S. taxpayers owe and what they pay.” *Id.* at 97. Additionally, the Tax Justice Network estimates that between \$21 trillion and \$32 trillion of private financial wealth was held in unreported offshore accounts at the end of 2010. Kaye, *supra* note 1, at 364 n.1 (citing JAMES S. HENRY, TAX JUST. NETWORK, THE PRICE OF OFFSHORE REVISITED 36 (2012), http://www.taxjustice.net/wp-content/uploads/2014/04/Price_of_Offshore_Revisited_120722.pdf [<http://perma.cc/6JCV-SN6B>]).

FATCA serves as an important weapon that is necessary to combat offshore tax evasion;¹² however, it teeters on the edge of constitutionality like many other powerful policy mechanisms.¹³ FATCA's admirable purpose is undermined by its questionably blatant disregard for the U.S. Constitution.¹⁴ An essential part of FATCA is to encourage voluntary compliance with U.S. tax laws,¹⁵ yet it aims to deter offshore tax evasion via substantial penalties relative to the assets that U.S. taxpayers must disclose on Form 8938,¹⁶ regardless of willfulness.¹⁷ Andrew Quinlan stated that "FATCA remains both politically and legally vulnerable, and ultimately represents a doomed effort to treat the symptoms of the tax code's many inadequacies rather than root causes."¹⁸ Quinlan cited three constitutional objections to FATCA that U.S.

¹² Melissa A. Dizdarevic, Comment, *The FATCA Provisions of the HIRE Act: Boldly Going Where No Withholding Has Gone Before*, 79 *FORDHAM L. REV.* 2967, 2989 (2011) ("FATCA presents a new direction in U.S. tax law. Though its goals of increasing revenue and bringing offshore tax evasion to a halt are arguably similar to regimes past, the method for implementing those goals departs significantly from [previously failed] systems" (footnotes omitted)).

¹³ A prominent policy issue that has required strong policy objectives includes President Obama's approach to universal health care. The Affordable Care Act has yielded many controversial debates regarding its constitutionality. *See, e.g.*, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

¹⁴ Until the Supreme Court is able to determine whether FATCA violates the U.S. Constitution, the political support of the policy will diminish as it affects more taxpayers.

¹⁵ *Offshore Voluntary Disclosure Program Frequently Asked Questions and Answers 2014*, IRS, <http://www.irs.gov/Individuals/International-Taxpayers/Offshore-Voluntary-Disclosure-Program-Frequently-Asked-Questions-and-Answers-2012-Revised> [<http://perma.cc/3V7A-LKU5>] [hereinafter *Offshore Disclosure Program FAQs*] (explaining that the purpose of the offshore voluntary disclosure is to allow taxpayers to come forward "voluntarily and report their previously undisclosed foreign accounts and assets"); *Offshore Compliance Initiative*, *supra* note 1 ("The publicity surrounding the Tax Division's enforcement efforts, operating alongside the Internal Revenue Service's Offshore Voluntary Disclosure Initiatives, have resulted in an unprecedented number of taxpayers—over 38,000 since 2009—voluntarily disclosing to the IRS their previously hidden foreign accounts and agreeing to pay billions of dollars in back taxes, interest and penalties to the U.S. Treasury. As a result, these enforcement efforts not only remedy past wrongdoing, but also bring into the system tax revenue from taxpayers who become compliant going forward.").

¹⁶ INTERNAL REVENUE SERV., 2015 INSTRUCTIONS FOR FORM 8938, <http://www.irs.gov/pub/irs-pdf/i8938.pdf> [<http://perma.cc/LNL9-3QWT>] [hereinafter 2015 INSTRUCTIONS].

¹⁷ The penalty for failure to disclose an asset under Form 8938 has a ceiling at \$50,000; however, U.S. individuals must also disclose essentially the same information under FBAR, which does not have a ceiling. *Compare id.*, with U.S. DEP'T OF TREASURY, REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS, http://www.fincen.gov/forms/files/f9022-1_fbar.pdf [<http://perma.cc/H5XH-CBWF>]. FATCA requires disclosing obligations that are in addition to FBAR requirements; thus, the U.S. individual may face a penalty for essentially the same failure twice. *See* I.R.C. § 1471 (2012). This could make the penalties assessed under FATCA unconstitutional in the aggregate because it may increase the overall penalty.

¹⁸ Andrew F. Quinlan, *FATCA Remains Vulnerable Despite Implementation*, *FORBES* (July 17, 2014), <http://www.forbes.com/sites/realspin/2014/07/17/fatca-remains-vulnerable-despite-implementation/> [<http://perma.cc/N9T8-6WHD>] (referring to a potential legal challenge that could reopen debate on the law's overall viability and effectiveness on three

attorney Jim Bopp has now argued,¹⁹ one of which is that both FATCA and FBAR violate the Eighth Amendment's Excessive Fines Clause.²⁰ On July 14, 2015, attorneys Jim Bopp and Justin McAdam filed a complaint in the United States District Court for the Southern District of Ohio seeking declaratory and injunctive relief.²¹ The complaint, however, did not address the argument that FATCA may be unconstitutional under the Eighth Amendment with regard to individuals; rather, it focused on the penalties imposed on foreign financial institutions and passthrough entities.²² Although FATCA is the most recent policy tool for combating tax evasion, the Report of Foreign Bank and Financial Accounts (FBAR)²³ also serves as a powerful tool.

Pursuant to the Currency and Foreign Transactions Reporting Act of 1970, which is commonly referred to as the Bank Secrecy Act (BSA), all United States financial institutions must assist the U.S. government in detecting and preventing money laundering and tax evasion.²⁴ Under the BSA, U.S. financial institutions must retain records of cash purchases of negotiable instruments, file reports of cash transactions that exceed \$10,000 (daily aggregate amount), and report suspicious activity that might signify money laundering, tax evasion, or other criminal activities.²⁵ Moreover, the BSA requires a U.S. person to report foreign financial accounts that he or she has financial interest in, or signature authority over, if the aggregate maximum values of such accounts exceeds \$10,000 at any time during the calendar year.²⁶ The U.S. person must report such accounts by filing Financial Crimes Enforcement Network (FinCEN) Form 114, otherwise known as the FBAR.²⁷ Although Form 114 is not filed directly with the IRS, FinCEN delegated FBAR enforcement authority to the IRS in April 2003.²⁸ Currently, the IRS is responsible for investigating possible civil

points—“[n]amely, that [the] Treasury’s unilateral intergovernmental agreements violate the Senate’s treaty power, that FATCA’s excessive penalties violate the 8th Amendment, and that its privacy invasions violate the 4th Amendment.”)

¹⁹ Alison Bennet, *Attorneys Clash at Hearing on FATCA Injunctive Relief*, BLOOMBERG BNA (Sept. 4, 2015), <http://www.bna.com/attorneys-clash-hearing-n17179935671> [<http://perma.cc/GF6B-LQJC>]; see also *The Bopp Law Firm’s Takedown of FATCA*, BOPPL. FIRM, <http://www.bopplaw.com/fatca-takedown> [<http://perma.cc/5387-73Z6>].

²⁰ Quinlan, *supra* note 18.

²¹ Complaint for Declaratory and Injunctive Relief, *Crawford v. U.S. Dep’t of the Treasury*, No. 15-250, 2015 WL 4571443 (S.D. Ohio July 14, 2015) [hereinafter Complaint].

²² See *id.* *19–21 (arguing counts four and five).

²³ Dizdarevic, *supra* note 12, at 2977–78.

²⁴ Bank Secrecy Act, 31 U.S.C. § 5311 (2012); see also *FinCEN’s Mandate From Congress*, FINCEN, http://www.fincen.gov/statutes_regs/bsa/ [<http://perma.cc/MA6D-5VUN>] [hereinafter *FinCEN’s Mandate*].

²⁵ *FinCEN’s Mandate*, *supra* note 24; see also 31 U.S.C. §§ 5311–5318.

²⁶ INTERNAL REVENUE SERV., IRS FBAR REFERENCE GUIDE, http://www.irs.gov/pub/irs-utl/IRS_FBAR_Reference_Guide.pdf [<http://perma.cc/C4FA-XYSE>] [hereinafter IRS GUIDE].

²⁷ *Report of Foreign Bank and Financial Accounts*, U.S. DEP’T TREASURY, <http://www.treasury.gov/services/Pages/TD-F-90-22.1-Report-of-Foreign-Bank-and-Financial-Accounts.aspx> [<http://perma.cc/LP4T-RRF4>].

²⁸ IRS GUIDE, *supra* note 26; see Treas. Reg. § 1010.810(g).

violations, assessing and collecting civil penalties, and issuing administrative rulings and guidance with regard to FBAR.²⁹ In the complaint filed by attorneys Jim Bopp and Justin McAdam, the penalties that the IRS enforces pursuant to FBAR are also challenged.³⁰ Thus, the purpose of this Note is to evaluate the penalties that both FATCA and FBAR could impose on individuals through the lens of the Eighth Amendment and determine whether they fall within the jurisprudential limitations of the Excessive Fines Clause.

The Eighth Amendment to the U.S. Constitution places a limit on government power,³¹ precluding the imposition of excessive fines.³² At the time of its ratification, delegates of the Massachusetts and Virginia Conventions were concerned that the Constitution would not provide adequate protection for persons convicted of crimes³³ and based the Eighth Amendment directly upon the Virginia Declaration of Rights in order to curb the government's prosecutorial power.³⁴ Despite its original intention, historical derivation is not the only indication of the extent of cases to which it applies.³⁵ For instance, in *Trop v. Dulles*,³⁶ the plurality opinion states that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."³⁷ Although the Supreme Court has interpreted the Excessive Fines Clause in only very limited situations,³⁸ it has provided highly instructive insight for understanding its meaning.³⁹

²⁹ IRS GUIDE, *supra* note 26; see Treas. Reg. § 1010.810(g).

³⁰ See Complaint, *supra* note 21, at *21.

³¹ See *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266 (1989) ("The Eighth Amendment clearly was adopted with the particular intent of placing limits on the powers of the new Government.").

³² U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

³³ *Browning-Ferris*, 492 U.S. at 266 (citing *Ingraham v. Wright*, 430 U.S. 651, 666 (1977)).

³⁴ See VA. DECLARATION OF RIGHTS art. I, § 9 (1776). After accession, William and Mary adopted the language of the English Bill of Rights of 1689, which "was intended to curb the excesses of English judges under the reign of James II." *Browning-Ferris*, 492 U.S. at 267 (quoting *Ingraham*, 430 U.S. at 664).

³⁵ In *Browning-Ferris*, the Supreme Court challenged the approach that the Court in *Ingraham* used. 492 U.S. at 286. In *Ingraham*, "[t]he applicability of the Eighth Amendment always has turned on its original meaning, as demonstrated by its historical derivation." 430 U.S. at 670–71 n.39. Such historical emphasis, however, only concerns when the Eighth Amendment shall apply, rather than its scope. *Browning-Ferris*, 492 U.S. at 264 n.4.

³⁶ 356 U.S. 86 (1958).

³⁷ *Id.* at 101.

³⁸ The Supreme Court has interpreted the meaning and application of the Excessive Fines Clause in two prominent Eighth Amendment cases: *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), and *United States v. Bajakajian*, 524 U.S. 321 (1998).

³⁹ *Browning-Ferris*, 492 U.S. at 262 ("Although this Court has never considered an application of the Excessive Fines Clause, it has interpreted the Amendment in its entirety . . ."); *id.* at 263 n.3 ("*Ingraham*, like most of our Eighth Amendment cases, involved the Cruel and Unusual Punishment Clause, and it therefore is not directly controlling in this Excessive Fines

This Note evaluates the meaning and scope of the Eighth Amendment in order to establish a framework best used for determining whether the Foreign Account Tax Compliance Act and the Report of Foreign Bank and Financial Accounts fall within the scope of the Excessive Fines Clause. To effectively analyze the constitutionality of FATCA, this Note is divided into three parts. Part I both discusses the existing constitutional limits on excessive fines and details some of the looming puzzles created by the Supreme Court's most recent decisions regarding the Excessive Fines Clause. Part II explores the evolution of FATCA, providing a detailed understanding of both its purpose and requirements. This Part also details the FBAR requirements, focusing primarily on its penalty structure for both willful and non-willful violations. Part III applies the constitutional limits to FATCA and FBAR under the Eighth Amendment's Excessive Fines Clause, particularly highlighting the fact that courts may enforce multiple penalties to punish the same conduct so long as the aggregate punishment is within the scope of the Eighth Amendment. Furthermore, this Note concludes with the assessment that FATCA and FBAR have purposeful objectives, yet each may over penalize non-compliance for certain U.S. individuals to the extent that the Supreme Court may hold that they are in part unconstitutional.

I. EIGHTH AMENDMENT JURISPRUDENCE

The Eighth Amendment to the U.S. Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁴⁰ Otherwise known in part as the Excessive Fines Clause, this Amendment functions as a limitation to the Government's power to punish through the extraction of payments, whether in cash or in kind.⁴¹ Under FATCA, a U.S. taxpayer's non-compliance, willful or non-willful, yields automatic penalties, which are “fines”⁴²

Clause case. The insights into the meaning of the Eighth Amendment reached in *Ingraham* and similar cases, however, are highly instructive.”)

⁴⁰ U.S. CONST. amend. VIII.

⁴¹ *Austin v. United States*, 509 U.S. 602, 609–10 (1993); see also *Browning-Ferris*, 492 U.S. at 275 (“We think it clear, from both the language of the Excessive Fines Clause and the nature of our constitutional framework, that the Eighth Amendment places limits on the steps a government may take against an individual . . .”).

⁴² Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 164 (1995) (“The Court also set out in *Halper* and *Austin* a viable framework for determining which civil sanctions are ‘punishment’ subject to both double jeopardy and Eighth Amendment limits. Once again, the Court’s test starts with a presumption: sanctions denoted as civil or administrative by the legislature are presumptively nonpunitive. This presumption can be rebutted in two ways. A civil sanction is punitive if the defendant can demonstrate either (1) that the statute authorizing the sanction cannot ‘fairly be said to serve’ any remedial goal, or (2) assuming the statute does make some attempt to calibrate sanctions to a remedial purpose, that the particular sanction in question was imposed in a form or amount unrelated to that purpose. A remedial purpose is anything other than deterrence and retribution, the two quintessential goals of criminal punishment.” (footnotes omitted)).

within the scope of the Eighth Amendment.⁴³ The purpose of this Part, however, is to provide a thorough understanding of both the Eighth Amendment's Excessive Fines Clause and touchstone cases that address its application.

Although the Supreme Court has not addressed many cases regarding the Eighth Amendment's Excessive Fines Clause, the Court's analysis in *United States v. Bajakajian*⁴⁴ provides detailed guidance.⁴⁵ In *Bajakajian*, Respondent Hosep Bajakajian attempted to leave the United States without reporting that he had \$357,144 in cash.⁴⁶ Federal law required Bajakajian to report that he was transporting currency in excess of \$10,000.⁴⁷ Title 18, Section 982(a)(1) of the United States Code required that any person convicted of willfully violating the reporting requirement shall forfeit "any property . . . involved in such offense."⁴⁸ Bajakajian, therefore, forfeited all \$357,144 to the United States for failure to report, and then the Court addressed whether the forfeiture of the entire \$357,144 violated the Excessive Fines Clause of the Eighth Amendment.⁴⁹ The Court held that the forfeiture violated the Eighth Amendment because it was "grossly disproportional to the gravity" of Bajakajian's offense.⁵⁰

The Court held that any forfeiture must fulfill two conditions to satisfy the Excessive Fines Clause.⁵¹ First, any property forfeited must be an "instrumentality" of the crime committed.⁵² Second, the value of the property forfeited must be proportional to the culpability of the owner.⁵³ An "instrumentality" of the crime may be currency, because "without the currency, there can be no offense."⁵⁴ Additionally, for forfeiture to fall within the scope of the Eighth Amendment, it would need to constitute a "fine" under the Excessive Fines Clause.⁵⁵ According to the Court, "[f]orfeitures—payments in kind—are . . . 'fines' if they constitute punishment for an offense."⁵⁶ Thus, the Court had little difficulty classifying the forfeiture of cash as a fine.⁵⁷ The

⁴³ A strict, textual interpretation of the Eighth Amendment requires that a penalty must be a "fine" to fall within the colloquial umbrella of the Eighth Amendment. *Cf.* U.S. CONST. amend. VIII. For instance, the Eighth Amendment says no "excessive fines." *Id.* In the case of FATCA, a penalty is equivalent to a fine because it functions as one.

⁴⁴ 524 U.S. 321 (1998).

⁴⁵ *Id.* at 327–28 ("This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause. We have, however, explained that at the time the Constitution was adopted, 'the word "fine" was understood to mean a payment to a sovereign as punishment for some offense.'" (quoting *Browning-Ferris*, 492 U.S. at 265)).

⁴⁶ *Id.* at 324–25.

⁴⁷ *Id.* at 324.

⁴⁸ *Id.* at 325 (quoting 18 U.S.C. § 982(a)(1)).

⁴⁹ *Id.* at 324–25.

⁵⁰ *Id.* at 324.

⁵¹ *Id.* at 326.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 327 (quoting *United States v. Bajakajian*, 84 F.3d 334, 339 (9th Cir. 1996)).

⁵⁵ *Id.* at 327–28.

⁵⁶ *Id.* at 328.

⁵⁷ *Id.*

Bajakajian Court cited another landmark case, *Austin v. United States*,⁵⁸ in order to further discuss whether the forfeiture was a “fine.”⁵⁹ A forfeiture becomes a fine only when it is “imposed at the culmination of a criminal proceeding and requires conviction of an underlying felony, and it cannot be imposed upon an innocent owner of unreported currency.”⁶⁰

Although the Foreign Account Tax Compliance Act does not require forfeiture of an asset that is held in a foreign financial institution,⁶¹ the *Bajakajian* case provides necessary guidance to interpreting the fines (in other words, the penalties) that FATCA does impose on non-compliant U.S. taxpayers. For instance, on appeal, the United States argued that imposing the entire forfeiture served important remedial purposes—it served “an overriding sovereign interest in controlling what property leaves and enters the country.”⁶² By analogy, this is of remarkable similarity to the underlying goals of FATCA—to “detect, deter, and discourage offshore tax evasion” by U.S. persons through the use of financial institutions outside of the United States, as well as to close certain information reporting loopholes that allowed U.S. persons to avoid disclosure of offshore assets and income.⁶³ Essentially, the goal is to both control the amount of currency that leaves the country and increase revenue from unreported currency that is no longer within the country.⁶⁴

Moreover, the Government claimed that the fine, or forfeiture, in *Bajakajian* served as a function of deterrence.⁶⁵ The United States wanted to make an example out of *Bajakajian*’s willful violation of the law so that other persons would no longer aid the illicit movement of cash without the government’s knowledge.⁶⁶ As punishment, the United States sought remedial action for the purpose of compensating itself for a loss; however, remedial action is more generally used to compensate for lost revenues, not movement of cash that did not cause a loss in revenue.⁶⁷ Any loss of information from the unreported movement of cash would not be remedied by the confiscation of *Bajakajian*’s \$357,144.⁶⁸ Although the loss of tax revenue from a

⁵⁸ 509 U.S. 602 (1993).

⁵⁹ *Bajakajian*, 524 U.S. at 328 (citing *Austin*, 509 U.S. at 619 (holding that a “fine” is generally something that looks like punishment)).

⁶⁰ *Id.* at 328.

⁶¹ See, e.g., 2015 INSTRUCTIONS, *supra* note 16 (explaining different penalties to FATCA offenses, which does not include forfeiture of assets from foreign financial institutions).

⁶² *Bajakajian*, 524 U.S. at 329.

⁶³ MICHAELS, *supra* note 8, ¶ 6.01[1] (footnote omitted).

⁶⁴ See *id.* ¶ 996.01[1].

⁶⁵ *Bajakajian*, 524 U.S. at 329.

⁶⁶ *Id.*

⁶⁷ See *id.*

⁶⁸ If *Bajakajian* reported that he was taking the money out of the country, the United States would not have received any portion of the money; thus, the United States does not lose anything besides the knowledge that *Bajakajian* took the money out of the United States. This means that forfeiture of the money does not remedy the United States for money lost.

U.S. taxpayer's failure to disclose foreign assets should be prevented, the penalties under FATCA and FBAR do not remedy the loss of revenue—the IRS may still levy on the taxes owed.⁶⁹

Remedial action is useful for the government when punishing a U.S. person who violates the Internal Revenue Code of 1986, as amended (the Code or I.R.C.). For instance, Section 61 of the Code provides that “gross income means all income from whatever source derived,” unless otherwise provided.⁷⁰ Although this definitional provision does not provide clear guidance for determining income,⁷¹ it at least requires a U.S. person to report worldwide income.⁷² Most important, the government has the power to penalize any person who is non-compliant with the Code, so that the government may recover lost revenue from that person's failure to pay income taxes on worldwide income.⁷³ Thus, the statutory penalty under FATCA constitutes punishment and is a “fine,” subjecting the amount of the penalty to review under the Eighth Amendment's Excessive Fines Clause.⁷⁴ Similarly, the penalties assessed by the IRS for failure to comply with FBAR reporting requirements fall within the scope of the Eighth Amendment.

Under *Bajakajian*, “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality,” which means that the amount of the penalty must “bear some relationship to the gravity of the offense that it is designed to punish.”⁷⁵ Until *Bajakajian*, there had not been a bright-line standard

This provides a difference between the loss of tax revenue which may be remedial via fines and penalties; however, the payment of back taxes in this situation recompenses the government, and the payment of fines or penalties serves as punishment.

⁶⁹ Although the FATCA regime takes a hard stance against offshore tax evasion, and it rightfully seeks to recover the taxes that are owed by non-compliant U.S. taxpayers, the penalties for non-compliance are not the only tool used. The United States may recover the owed taxes within the statute of limitations period, as it continues to process the information that foreign financial institutions provide. See generally U.S. DEP'T OF TREASURY, JOINT STATEMENT FROM THE UNITED STATES AND SWITZERLAND REGARDING A FRAMEWORK FOR COOPERATION TO FACILITATE THE IMPLEMENTATION OF FATCA (2012), <http://www.treasury.gov/press-center/press-releases/Documents/FATCA%20Joint%20Statement%20US-Switzerland.pdf> [<http://perma.cc/63W3-MFPG>] (showing the cooperation between the United States and Switzerland to enforce FATCA through an intergovernmental approach).

⁷⁰ I.R.C. § 61(a) (2012); see also Treas. Reg. § 1.61-1 (1986).

⁷¹ See I.R.C. § 61(a) (explaining that “gross income means all income from whatever source derived,” which renders income essentially undefined).

⁷² See *id.* (“[A]ll income from whatever source derived . . .” (emphasis added)).

⁷³ See I.R.C. § 7201 (declaring monetary penalty for tax evasion).

⁷⁴ See *United States v. Bajakajian*, 524 U.S. 321, 331 n.6 (1998) (citing *Austin v. United States*, 509 U.S. 602, 621–22 (1993)).

⁷⁵ *Id.* at 334 (citing *Austin*, 509 U.S. at 622–23 (explaining that the government exacted too high a penalty relative to the committed offense)); see also *Alexander v. United States*, 509 U.S. 544, 558 (1993) (“It is in the light of the extensive criminal activities which petitioner apparently conducted . . . that the question whether the forfeiture was ‘excessive’ must be considered.”).

for assessing whether a punitive fine violated the Excessive Fines Clause;⁷⁶ thus, the Court established that such a fine violates the Excessive Fines Clause if it is “grossly disproportional to the gravity of a defendant’s offense.”⁷⁷ This, however, creates a level of complexity that is somewhat meaningless.⁷⁸ Without a bright-line standard, there is virtually no way to predict or define what is grossly disproportional.⁷⁹ Despite knowing that the rule requires the fine to be proportional to the gravity of the offense, the court in *Moore v. United States*, incorrectly applied the rule in a FBAR penalty case.⁸⁰ For instance, the court stated, “[a]dmittedly, the Government has wholly failed to point out the harm that Mr. Moore’s failure to report caused, and has given the court no basis to compare the severity of Mr. Moore’s offense to similar violations,” yet it determined that the penalty was not excessive.⁸¹ The court solely relied on the calculation that the penalty equaled about 10% of the value of Mr. Moore’s account, which was much lower than the magnitude of the forfeiture in *Bajakajian*.⁸² This means that the court failed to actually consider whether the fine itself was proportional to the harm created by Mr. Moore’s offense, despite accurately citing the rule from *Bajakajian*.

Although it may be difficult to apply in practice, the *Bajakajian* Court did at least provide some guidance for interpreting the Excessive Fines Clause for the first time with regard to a punitive forfeiture.⁸³ The Court’s analysis for whether such forfeiture is “excessive” yields a rather imprecise proportionality test for evaluating the fine within the scope of the Eighth Amendment: “Excessive means surpassing the usual, the proper, or a normal measure of proportion.”⁸⁴ Although this definition provides some guidance, it is not entirely helpful because it creates a subjective test, rather than a clear, distinct bright-line test for determining whether a fine is excessive.

⁷⁶ See generally *Bajakajian*, 524 U.S. at 321 (creating the first bright-line standard for assessing punitive fines in light of the Excessive Fines Clause).

⁷⁷ *Id.* at 334.

⁷⁸ Although it is clear that the fine must be proportional to the gravity of the offense, it is not clear how to determine whether a fine is proportional. This has led to recent confusion. See *Moore v. United States*, No. C13-2063-RAJ, 2015 WL 1510007, at *10 (W.D. Wash. 2015) (explaining that “no rigid inquiry governs the court’s proportionality inquiry,” but providing that a court should consider the severity of the offense, the harm caused by the offense, and the maximum penalty that may be assessed for such offense).

⁷⁹ See *King*, *supra* note 42, at 151 n.143 (“As the Court itself has stated, ‘no penalty is *per se* constitutional.’” (citing *Solem v. Helm*, 463 U.S. 277, 290 (1983))).

⁸⁰ *Moore*, 2015 WL 1510007, at *10 (“Even the Maximum Penalty the IRS Assessed Does Not Violate the Eighth Amendment.”).

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Bajakajian*, 524 U.S. at 334–35 (explaining that the Court has not articulated a standard for determining whether a punitive forfeiture is constitutionally excessive and that the text of the Excessive Fines Clause does not provide guidance).

⁸⁴ *Id.* at 335.

When confronted with the question of whether an amount is disproportional to the gravity of an offense committed, the answer is unclear.⁸⁵

In *Bajakajian*, the Court determined that a forfeiture of \$357,144 violated the Excessive Fines Clause because it was “grossly disproportionate to the gravity” of Bajakajian’s offense.⁸⁶ Unless another case with similar facts arises, it may be difficult to apply the test. An important understanding of the rule, though, is that courts don’t generally look to a person’s ability to pay as a reason that a fine may be grossly disproportional: “These courts have generally not regarded a defendant’s inability to pay a fine as a relevant consideration in the context of the Eighth Amendment.”⁸⁷

There is currently an uncertainty regarding the constitutional limits on punishment in cases where defendants face cumulative or successive penalties for the same conduct.⁸⁸ For instance, if there are multiple penalties for non-compliance of the same federal tax requirements for reporting foreign financial assets, there is no guidance on whether such penalties aggregate to an excessive amount. In past cases dealing with excessiveness, “defendants have balked, arguing that legislators and the juries, judges, prosecutors, and regulators who apply legislatively authorized sanctions have overstepped the bounds of punishment permitted by the Constitution.”⁸⁹ Nancy J. King has argued that there is a solution to such uncertainty, which “recognizes that the various guarantees of the Fifth, Eighth, and Fourteenth Amendments must be considered together, as a forest rather than as separate free-standing trees.”⁹⁰ King explained that to reign in the prosecutorial power of the federal government and prevent the government from extracting as many separate penalties as it wishes,⁹¹

⁸⁵ King, *supra* note 42, at 173 n.209 (“[S]tating that examining whether the tax exceeds rough compensation would be ‘inappropriate’ on the facts, since the tax statute serves entirely different purposes.” (citing *Dep’t of Revenue of Mont. v. Kurth Ranch*, 114 S. Ct. 1937, 1948)).

Tax statutes need not be based on any benefit accorded to the taxpayer or on any damage or cost incurred by the Government as a result of the taxpayer’s activities. Thus, in analyzing the instant tax statute, the inquiry into the State’s “damages caused by [Kurth’s] wrongful conduct” . . . is unduly restrictive.

Id. (quoting *Kurth Ranch*, 114 S. Ct. at 1950 (Rehnquist, C.J., dissenting)). Form 8938, however, differs from *Kurth Ranch*. Form 8938 establishes penalties for non-disclosure. Although the penalties are due to a tax-related issue, they are not necessarily tax penalties for failure to file taxes or pay taxes. They are instead punitive, rather than compensatory for failure to disclose assets.

⁸⁶ *Bajakajian*, 524 U.S. at 324.

⁸⁷ Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 834–35 (2013); *see also* *United States v. Beras*, 183 F.3d 22, 28 (1st Cir. 1999) (discussing the application of *Bajakajian* to a much lower dollar amount—a forfeiture of \$135,794).

⁸⁸ King, *supra* note 42, at 104.

⁸⁹ *Id.* at 103–04.

⁹⁰ *Id.* at 104.

⁹¹ *See id.* at 105 (“The need for some sort of ‘cumulative excessiveness’ review thus varies inversely with the degree of protection against multiple penalties for the same conduct:

the successive penalties for the same conduct should be considered together.⁹² This is an important perspective because if the federal government assessed five different penalties for the same conduct, and each penalty was not excessive by itself, then the penalized would have to pay each penalty. If, however, the penalties were grouped by the action that they intended to punish and were excessive in the aggregate it would prevent abuse by the government.

Although it is important to prevent the government from assessing multiple penalties for the same conduct that are not aggregated, this analysis does not provide the constitutional threshold for when such penalties in the aggregate become excessive. One of the most difficult issues is determining when punishment is unconstitutionally disproportionate. For instance, how much is too much? One would assume that Congress fairly and accurately determined the correct fines and penalties for each action that it prohibits; however, the debates are pervasive on this issue.⁹³

In the past, the Supreme Court of the United States has recognized that the Eighth Amendment to the U.S. Constitution contains a limitation that requires that punishment be proportionate to the wrong punished, but it is profoundly reluctant to provide any more guidance.⁹⁴ Looking to past Supreme Court decisions, it becomes even clearer how inconsistent its approach to determining disproportionality.⁹⁵ For instance, in *United States v. United Mine Workers*,⁹⁶ the Court reduced a \$3.5 million criminal contempt fine to \$700,000 because the Court believed that the original fine was excessive relative to the defendant's ability to pay.⁹⁷ In another case, the Court concluded that the Eighth Amendment "does not require strict proportionality between crime and sentence," because it "forbids only extreme sentences that are 'grossly disproportionate' to the crime," making "intra-jurisdictional and inter-jurisdictional analyses . . . appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."⁹⁸ Today, defendants still have little hope of success in combating "punitive overkill" from successive fines and penalties.⁹⁹ For instance, defendants who face overlapping

the less vigorous the protection against multiple penalties, the more vigorous proportionality review must become, and vice versa.").

⁹² *See id.* at 105.

⁹³ *Id.* at 106 ("These debates, however, usually enjoy a well-accepted body of precedent that establishes rudimentary boundaries of scope and purpose for at least one of the doctrinal options, providing a settled pivot around which a debate can revolve. Because of the Court's limited or inconsistent declarations about the scope of constitutional prohibitions on excessively severe or duplicative penalties, no such pivot exists.").

⁹⁴ *See United States v. Bajakajian*, 524 U.S. 321, 327–28 (1997); King, *supra* note 42, at 106.

⁹⁵ *See King*, *supra* note 42, at 106.

⁹⁶ 330 U.S. 258 (1947).

⁹⁷ *Id.* at 304–05; *see also King*, *supra* note 42, at 108 n.11.

⁹⁸ King, *supra* note 42, at 111 n.24 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 1005 (1991) (Kennedy, J., concurring)).

⁹⁹ *Id.* at 112–13, 113 n. 31.

civil or criminal sanctions remain unable to predict their exposure to penalties and whether they will be excessive, especially when a penalty is assessed regardless of willfulness.¹⁰⁰ More important, despite attorney Jim Bopp's confidence in overruling FATCA based on constitutional principles, "prosecutors and legislatures cannot predict whether their enforcement efforts will survive constitutional challenge; and judges' interpretative pronouncements about these several constitutional provisions vary widely."¹⁰¹ For instance, despite Judge Thomas M. Rose's recent ruling that the parties to *Crawford v. U.S. Department of the Treasury* do not have standing to challenge parts of FATCA, Jim Bopp is prepared for "a long fight."¹⁰² Before applying the Supreme Court's approach to excessive fines, it is important to further discuss both FATCA and FBAR.

II. THE FOREIGN ACCOUNT TAX COMPLIANCE ACT AND THE REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS

A. FATCA

Congress enacted the Foreign Account Tax Compliance Act (FATCA) as part of the funding mechanism for the Hiring Incentives to Restore Employment Act (HIRE Act),¹⁰³ which President Obama signed into law on March 18, 2010.¹⁰⁴ The HIRE Act added a new chapter to Subtitle A of the Internal Revenue Code—Chapter 4, which is comprised of Sections 1471 through 1474 of the Code.¹⁰⁵ Generally, FATCA targets non-compliance by U.S. taxpayers through foreign accounts by

requir[ing] U.S. withholding agents to withhold tax on certain payments to foreign financial institutions (FFIs) that do not agree to report certain information to the Internal Revenue Service (IRS) regarding their United States accounts (U.S. accounts), and on certain payments to certain nonfinancial foreign entities (NFFEs)

¹⁰⁰ *Id.* at 125.

¹⁰¹ *Id.*

¹⁰² Alison Bennett, *Attorney Predicts 'Long Fight' After Effort to Block FATCA Is Rejected*, BLOOMBERG BNA (Sept. 30, 2015) <http://www.bna.com/attorney-predicts-long-n57982058952> [<http://perma.cc/NN9T-QLFL>] (noting that the judge explained that the parties did not have standing and that the harms claimed were "remote and speculative harms, most of which are caused by third parties, illusory, or self-inflicted" (quoting *Crawford v. U.S. Dep't of the Treasury*, No. 3:15-cv-250 (S.D. Ohio Sept. 29, 2015))).

¹⁰³ MICHAELS, *supra* note 8, ¶ 6.01.

¹⁰⁴ *Id.* (explaining that the purpose of FATCA is to offset revenue loss of the HIRE Act, which aimed to provide "businesses with tax incentives to help finance the hiring and retention of new employees").

¹⁰⁵ T.D. 9610, 26 Treas. Dec. Int. Rev. 2 (2013); *see* I.R.S. Notice 2011-34, 2011-19 I.R.B. 765; I.R.S. Notice 2011-53, 2011-32 I.R.B. 124; I.R.S. Notice 2010-60, 2010-37 I.R.B. 329.

that do not provide information on their substantial United States owners (substantial U.S. owners) to withholding agents.¹⁰⁶

This essentially means that the United States has equipped itself with an important weapon that is seemingly necessary for combating offshore tax evasion—FATCA.¹⁰⁷

An essential part of FATCA is to encourage voluntary compliance with U.S. tax laws,¹⁰⁸ yet it aims to coerce non-compliant U.S. taxpayers and foreign financial institutions to voluntarily come into compliance.¹⁰⁹ As Andrew Quinlan stated, “FATCA remains both politically and legally vulnerable.”¹¹⁰ The issue with Quinlan’s statement, however, is that he does not provide an in-depth explanation as to why FATCA remains vulnerable. Although attorney Jim Bopp has provided three constitutional objections regarding FATCA, he has not provided an explanation as to why FATCA is problematic with regard to individuals.¹¹¹ As this Note discusses, one of the cited constitutional issues is that FATCA violates the Eighth Amendment’s Excessive Fines Clause.¹¹² The purpose of this Part is to provide an in-depth understanding of FATCA before evaluating it through the lens of the Eighth Amendment.

Senator Max Baucus, Chair of the Senate Committee on Finance, stated that “[t]he purpose of FATCA is to ‘detect, deter, and discourage offshore tax evasion’ by U.S. persons through the use of financial institutions outside of the United States, as well as to close certain information reporting loopholes that allowed U.S. persons to avoid disclosure of offshore assets and income.”¹¹³ Additionally, FATCA is useful for regulating the “abuses concerning the use for the benefit of U.S. persons of property held in trust that were identified by the U.S. Senate Subcommittee on Investigations in its 2006 report on tax haven abuses.”¹¹⁴

¹⁰⁶ T.D. 9610, 26 Treas. Dec. Int. Rev. 2 (2013).

¹⁰⁷ Behrens, *supra* note 2, at 211 (“Tax evasion is a concern of any government that imposes an income tax on its citizens. Because the United States’ federal income tax is based on a system of ‘voluntary compliance,’ it is essential that taxpayers are given an incentive to comply with tax laws.” (footnote omitted)); Peter Nelson, Note, *Conflicts of Interest: Resolving Legal Barriers to the Implementation of the Foreign Account Tax Compliance Act*, 32 VA. TAX REV. 387, 388 (2012) (“FATCA provides U.S. authorities with a potent tool to penetrate the banking secrecy laws that enable tax evasion.”).

¹⁰⁸ See *Offshore Disclosure Program FAQs*, *supra* note 15.

¹⁰⁹ Nelson, *supra* note 107, at 389 (“FATCA latches onto the cross-border payments associated with this investment activity and offers a choice to foreign financial institutions: report information about the recipients of such payments to the Internal Revenue Service (Service), or face significant penalties.”). Substantial penalties also exist for U.S. individuals who fail to disclose foreign financial assets. Under Form 8938, a penalty may outweigh the value of the asset.

¹¹⁰ Quinlan, *supra* note 18.

¹¹¹ *The Bopp Law Firm’s Takedown of FATCA*, *supra* note 19.

¹¹² Quinlan, *supra* note 18.

¹¹³ MICHAELS, *supra* note 8, ¶ 6.01 (quoting 155 CONG. REC. S10,785 (daily ed. Oct. 27, 2009) (statement of Sen. Max Baucus, Chair, S. Comm. on Finance)).

¹¹⁴ *Id.*; see also T.D. 9657, 26 Treas. Dec. Int. Rev. 2 (2014) (“Chapter 4 [of the Code] generally requires U.S. withholding agents to withhold tax on certain payments to foreign

FATCA went into effect on July 1, 2014, and its regulations will not be in full effect until 2017.¹¹⁵ Although it may be common practice for laws to phase into complete effect, it is troublesome for the non-willful.¹¹⁶ While it is currently being implemented, many groups are harboring strong political and legal animosity toward FATCA, despite the Treasury Department's promise to "go easy" on enforcement for the first two years.¹¹⁷ The animosity is more likely due to the fact that the mechanisms that FATCA uses to go after non-compliant U.S. persons are highly questionable. For instance:

FATCA has greatly increased global concern over the use of foreign offshore bank accounts to evade government taxation, yet there is still conversation as to whether this is the correct solution to solve the problem or if it will just cause more damage to the United States and innocent, tax abiding Americans.¹¹⁸

Under the Internal Revenue Code, FATCA creates a duty upon foreign financial institutions to either report certain information or incur a withholding tax of 30% when withholdable payments are made from the United States to foreign financial institutions.¹¹⁹ Moreover, Section 1471 of the Code provides information regarding financial institutions deemed to meet requirements in certain cases and elections to be withheld upon rather than withhold on payments to recalcitrant account holders and nonparticipating FFIs.¹²⁰ Such information to be reported is the account number, TIN number, name of the U.S. taxpayer, and account balance.¹²¹ This Section of the Code also provides the unique definitions of the specific terms that are used to describe various parts of FATCA, such as U.S. account, financial account, U.S. owned

financial institutions . . . that do not agree to report certain information to the Internal Revenue Service (IRS) regarding their U.S. accounts, and on certain payments to certain nonfinancial foreign entities . . . that do not provide information on their substantial United States owners . . . to withholding agents.”)

¹¹⁵ I.R.S. Notice 2014-33, 2014-21 I.R.B. 1033.

¹¹⁶ FATCA serves as a strict liability act, and, despite willfulness, a taxpayer may still owe penalties if he or she did not know about the new FATCA requirements. *See id.*

¹¹⁷ Jeffrey S. Freeman, *FATCA Implemented, but Not Strong*, FREEMAN TAX L., (Aug. 21, 2014), <http://www.freemantaxlaw.com/blog/fatca-implemented-strong/> [<http://perma.cc/789D-BVZE>].

¹¹⁸ *Id.*

¹¹⁹ I.R.C. § 1471(a) (2012) (“In the case of any withholdable payment to a foreign financial institution which does not meet the requirements of subsection (b), the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment.”).

¹²⁰ *See id.* § 1471.

¹²¹ *Id.* § 1471(c).

foreign entity, foreign financial institution, financial institution, recalcitrant account holder, and passthrough payment.¹²²

Most important, the Code does not limit itself to the definition of foreign financial institutions for requiring reporting of withholdable payments and U.S. taxpayer information.¹²³ Section 1472 of the Code provides that withholdable payments to “other foreign entities” also meet the demand for reporting, but it also provides information for waiver withholding, and exceptions.¹²⁴

In the case of any withholdable payment to a non-financial foreign entity, if—(1) the beneficial owner of such payment is such entity or any other non-financial foreign entity, and (2) the requirements of subsection (b) are not met with respect to such beneficial owner, then the withholding agent with respect to such payment shall deduct and withhold from such payment a tax equal to 30 percent of the amount of such payment.¹²⁵

Section 1473 of the Code defines some of the general terms used throughout Chapter 4 of the Code.¹²⁶ It defines withholdable payment, substantial U.S. owner, specified U.S. person, withholding agent, and foreign entity.¹²⁷ Section 1474 of the Code incorporates special obligations created by FATCA.¹²⁸ For instance, there is a liability for withheld tax such that “[e]very person required to deduct and withhold any tax under this chapter is hereby made liable for such tax and is hereby indemnified against the claims and demands of any person for the amount of any payments made in accordance with the provisions of this chapter.”¹²⁹ Another similar obligation is created by credits and refunds such that “the determination of whether any tax deducted and withheld under this chapter results in an overpayment by the beneficial owner of the payment to which such tax is attributable shall be made as if such tax had been deducted and withheld under subchapter A of chapter 3.”¹³⁰

With regard to complex sections of the Code, there has been a misperception that FATCA applies to only banks or insurance companies; however, FATCA broadly defined foreign financial institution (FFI).¹³¹ According to I.R.C. § 1471(d)(4), “[t]he

¹²² *Id.* § 1471(d).

¹²³ *See id.* § 1472.

¹²⁴ *Id.*

¹²⁵ *Id.* § 1472(a).

¹²⁶ *See id.* § 1473.

¹²⁷ *See id.*

¹²⁸ *See id.* § 1474.

¹²⁹ *Id.* § 1474(a).

¹³⁰ *Id.* § 1474(b)(1).

¹³¹ John C. Taylor, *The Full Impact of FATCA*, LAW 360 (Mar. 21, 2013), <http://www.law360.com/articles/426106/the-full-impact-of-fatca> [<http://perma.cc/A6YC-Y7BG>].

term ‘foreign financial institution’ means any financial institution which is a foreign entity. . . . [S]uch term shall not include a financial institution which is organized under the laws of any possession of the United States.’¹³² Moreover, I.R.C. § 1471(d)(5) defines financial institution as

any entity that—(A) accepts deposits in the ordinary course of a banking or similar business, (B) as a substantial portion of its business, holds financial assets for the account of others, or (C) is engaged (or holding itself out as being engaged) primarily in the business of investing, reinvesting, or trading in securities (as defined in section 475(c)(2) without regard to the last sentence thereof), partnership interests, commodities (as defined in section 475(e)(2)), or any interest (including a futures or forward contract or option) in such securities, partnership interests, or commodities.¹³³

For FATCA purposes, a foreign financial institution includes non-U.S. banks, investment funds, and investment managers.¹³⁴

Under FATCA,

[t]he initial penalty for failing to report is the greater of \$10,000 and one of the following: (1) 5 percent of the value of the portion of a grantor trust owned by a U.S. person who fails to cause an annual return to be filed for the trust by the trustee; (2) 35 percent of the value of the property transferred to a foreign trust by the U.S. person who then fails to report the creation of the trust or the transfer to it; or (3) 35 percent of the amount distributed to a distributee who fails to report distributions.¹³⁵

The important thing to consider when determining the importance of the fines is that “FATCA was enacted in 2010 by Congress to target non-compliance by U.S. taxpayers using foreign accounts.”¹³⁶ The largest penalty associated with FATCA is that it requires greater reporting obligations than under FBAR filing obligations, but still requires U.S. taxpayers to file under both.¹³⁷ Although FATCA does not replace a

¹³² I.R.C. § 1471(d)(4).

¹³³ *Id.* § 1471(d)(5).

¹³⁴ Taylor, *supra* note 131.

¹³⁵ MICHAELS, *supra* note 8, ¶ 6.15[3][c] (citations omitted).

¹³⁶ *Resource Center on FATCA*, U.S. DEP’T TREASURY, <http://www.treasury.gov/resource-center/tax-policy/treaties/Pages/FATCA.aspx> [<http://perma.cc/8GAY-Z2CX>].

¹³⁷ Robert W. Wood, *Court Upholds Record FBAR Penalties, Exceeding Offshore Account Balance*, FORBES (May 29, 2014, 1:53 AM), <http://www.forbes.com/sites/robertwood/2014>

taxpayer's obligation to file the FBAR, it does increase a taxpayer's obligations to file additional forms disclosing the same information.¹³⁸ The issue is that, in doing so, FATCA makes it more difficult for a taxpayer to properly file all of the forms required.¹³⁹ Also, requiring multiple forms to disclose the same assets makes compliance more difficult and more than likely increases the errors surrounding compliance.¹⁴⁰ Although it may be common practice for laws to phase into effect, it is troublesome for the non-willful U.S. taxpayer who does not accurately comply with reporting requirements associated with FATCA.¹⁴¹ Although FATCA went into effect on July 1, 2014, and its regulations will not be in full effect until 2017,¹⁴² it is a strict liability regime that provides little time for taxpayers to learn how to comply with its very specific requirements.¹⁴³ Moreover, "U.S. persons must report their worldwide income on their taxes."¹⁴⁴ This is important because it justifies the need for a penalty.

Section 61 of the Code provides that "gross income means all income from whatever source derived," unless otherwise provided.¹⁴⁵ The House Ways and Means Committee Report of 1954 states that this all-encompassing definition corresponds to Section 22(a) of the Internal Revenue Code of 1939,¹⁴⁶ which stated that "'[g]ross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid . . . or gains or profits and income derived from any source whatever."¹⁴⁷

Additionally, the House Report of 1954 states that I.R.C. § 61(a) is "based upon the 16th Amendment and [that] the word 'income' is used in its constitutional sense,"¹⁴⁸ rather than defining its legal maxims. This omission of a clear, concise

/05/29/on-heels-of-credit-suisse-plea-court-upholds-record-fbar-penalties-consuming-offshore-account/ [http://perma.cc/2EU4-R6QJ].

¹³⁸ *Id.*

¹³⁹ *See id.*

¹⁴⁰ *See id.*

¹⁴¹ *See Freeman, supra* note 117.

¹⁴² I.R.S. Notice 2014-33, 2014-21 I.R.B. 1033.

¹⁴³ *See Freeman, supra* note 117 ("FATCA has been implemented, but it is not strong many groups still harboring strong political and legal animosity. FATCA is now legally in force, but the Treasury department is promising 'to go easy' on enforcement for the first two years since delays and high costs leave many areas of the world still unable to fully comply with FATCA. FATCA has greatly increased global concern over the use of foreign offshore bank accounts to evade government taxation, yet there is still conversation as to whether this is the correct solution to solve the problem or if it will just cause more damage to the United States and innocent, tax abiding Americans.").

¹⁴⁴ Wood, *supra* note 137.

¹⁴⁵ I.R.C. § 61(a) (2012); Treas. Reg. § 1.61-1 (1986).

¹⁴⁶ H.R. REP. NO. 1337, pt. 1, at 4223 (1954).

¹⁴⁷ *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429 (1955) (emphasis omitted) (quoting I.R.C. § 22(a) (1939)).

¹⁴⁸ H.R. REP. NO. 1337, pt.1, at 4223.

definition of income has led to inconsistent judicial interpretations of the word,¹⁴⁹ but reference must be made to judicial guidance to define the outer limits for income because Congress did not.¹⁵⁰ In *Eisner v. Macomber*, the Court held that income is “the gain derived from capital, from labor, or from both combined,”¹⁵¹ while the Court in *Glenshaw Glass* held that the *Eisner* Court’s definition “was not meant to provide a touchstone to all future gross income questions.”¹⁵² Moreover, the *Glenshaw Glass* Court defined income more appropriately as taxable when there are “instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”¹⁵³

Although the Code does not directly define income itself,¹⁵⁴ it does provide guidance for answering whether a particular accession to wealth is income that Congress has the power to tax.¹⁵⁵ Congress expressly provided both inclusions and exclusions to gross income within the Code as interpretive tools for determining which accessions to wealth should be classified as income.¹⁵⁶ Moreover, judicial interpretation of income, subsequent to the *Eisner* era of cases, upheld the assumption that Congress intended to exert fully the power to tax income.¹⁵⁷ Pursuant to the House Ways and Means Committee Report of 1954, the *Glenshaw Glass* Court affirmed that Section 61(a) of the Code should be interpreted as broad as Section 22(a) of the 1939 Code.¹⁵⁸ The phraseology that gross income includes “all income from whatever source derived,” was viewed as all-encompassing,¹⁵⁹ thus, the *Glenshaw Glass* Court defined income as an undeniable accession to wealth that must be both clearly realized, and under the complete dominion and control of the taxpayer, before it can be taxable.¹⁶⁰ The judicial interpretations along with the inclusions and exclusions to gross income that Congress provided in the Code, when coupled together, establish the legal maxims of both what income is and when it is taxable by

¹⁴⁹ Compare *Eisner v. Macomber*, 252 U.S. 189 (1920), with *Glenshaw Glass*, 348 U.S. 426.

¹⁵⁰ See generally U.S. CONST. amend. XVI.

¹⁵¹ *Eisner*, 252 U.S. at 207.

¹⁵² *Glenshaw Glass*, 348 U.S. at 431.

¹⁵³ *Id.*

¹⁵⁴ See I.R.C. § 61(a) (2012).

¹⁵⁵ For items specifically included, see I.R.C. § 61; however, the list is not limiting.

¹⁵⁶ I.R.C. § 61(a)(1)–(15) are the specific inclusions, and I.R.C. § 61(b) provides the necessary cross-references for additional inclusions and specific exclusions from gross income. Some of the inclusions under I.R.C. § 61(a)(1)–(15) are compensation for services, including fees, commissions, fringe benefits, gross income derived from business, gains derived from dealings in property, interest, rents, royalties, annuities, pensions, distributive share of partnership gross income, and income from an interest in an estate or trust.

¹⁵⁷ See generally *Glenshaw Glass*, 348 U.S. at 426.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 430.

¹⁶⁰ *Id.* at 431.

Congress.¹⁶¹ If a particular item is an accession to wealth that is not expressly excluded from gross income has been realized, and under which the taxpayer has complete dominion and control, then Congress has the power to classify that particular item as taxable income.¹⁶²

When a person does not appropriately include within income assets held in foreign financial institutions that qualify as income under the Code, it provides a basic justification to assert penalties for non-compliance;¹⁶³ however, should a statutory penalty ever outweigh the value of the asset? In addition to this, taxpayers must file an FBAR annually if their offshore accounts total over \$10,000 at any time.¹⁶⁴ If a U.S. taxpayer fails to do both, the IRS wants the U.S. taxpayer to go into the Offshore Voluntary Disclosure Program (OVDP).¹⁶⁵ The OVDP requires a U.S. taxpayer to reopen the past eight tax years to pay taxes, interest, and penalties without prosecution.¹⁶⁶ However, the penalties associated with OVDP can be substantial and excessive.¹⁶⁷ For instance, there is a penalty of up to 27.5% of the highest balance of the asset within an offshore account.¹⁶⁸ Thus, some people will amend their taxes and file FBARs outside the OVDP in order to avoid the excessive penalties.¹⁶⁹ These taxpayers are generally non-willful violators of tax compliance laws and want to pay the taxes that they owe;¹⁷⁰ thus, the 27.5% penalty may be too much, encouraging them to continue skirting the issue by filing “quiet disclosures.”¹⁷¹ Where the government recovers taxes owed, including interest, it strikes the conscience that a person should be penalized for coming forward.

The problem with “quiet disclosure” is that the IRS has said that it will seek out taxpayers who try it, despite the fact that they are paying the taxes that were owed.¹⁷² A similar situation recently occurred. In 2009, Mr. Zwerner, a U.S. taxpayer, tried to come forward before the IRS had the OVDP, yet the IRS went after him.¹⁷³ The IRS “went after Mr. Zwerner for \$3,488,609.33 in penalties for FBAR violations,” which was “50% of the highest balance in the account each year.”¹⁷⁴ Ultimately, “[t]hat meant FBAR penalties of \$2,241,809 for an account worth \$1,691,054, less

¹⁶¹ See generally *id.*; I.R.C. § 61.

¹⁶² See generally *Glenshaw Glass*, 348 U.S. at 426 (applying I.R.C. § 61).

¹⁶³ See, e.g., I.R.C. § 61(a).

¹⁶⁴ Wood, *supra* note 137.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

than the penalties.”¹⁷⁵ Along with the fines associated with FATCA, it is important to discuss the structure of FBAR before applying Eighth Amendment analysis.

B. FBAR

The Bank Secrecy Act (BSA) was enacted in 1970 to combat money laundering and tax evasion,¹⁷⁶ and FBAR serves as a strong policy mechanism for furthering such goals. Congress codified the BSA within Title 31 of the United States Code in order to create strict reporting requirements for U.S. persons with financial interest in, or signature authority over, foreign financial accounts.¹⁷⁷ This means that FBAR is not governed by the IRS, rather by the BSA. Failure to comply with the reporting requirements, however, justifies IRS examination that could lead to “[s]evere civil and criminal penalties for failure to comply.”¹⁷⁸ Title 31 responsibility is delegated to FinCEN, which is a bureau of the U.S. Department of the Treasury, and FinCEN can delegate FBAR examination and enforcement to the IRS.¹⁷⁹ Additionally, in-depth FBAR guidance was provided in March 2011 in 31 C.F.R. § 1010.350. The Preamble to 31 C.F.R. § 1010.350 provides that the new rule

addresses the scope of the persons that are required to file reports of foreign financial accounts. The rule further specifies the types of accounts that are reportable, and provides filing relief in the form of exemptions for certain persons with signature or other authority over foreign financial accounts. Finally, the rule adopts provisions intended to prevent persons subject to the rule from avoiding their reporting requirement.¹⁸⁰

According to the *IRS FBAR Reference Guide*, the FBAR must be filed, in addition to serving as “a tool used by the United States government to identify persons who may be using foreign financial accounts to circumvent United States law,” because “foreign financial institutions may not be subject to the same reporting requirements as domestic financial institutions.”¹⁸¹ In furtherance of these goals, each individual who meets the following four basic elements of FBAR filing must file the FBAR: (1) a

¹⁷⁵ *Id.*

¹⁷⁶ See 31 U.S.C. § 310 (2012); see also *Internal Revenue Service Webinar: Reporting of Foreign Financial Accounts on the Electronic FBAR*, IRS.GOV (June 4, 2014), <http://www.irsvideos.gov/ElectronicFBAR/> [<http://perma.cc/4PFL-DYBK>] [hereinafter *IRS Webinar*] (explaining that FBAR is designed to track hidden money and the use of foreign financial accounts for illicit purposes).

¹⁷⁷ 31 U.S.C. §§ 5311–5332.

¹⁷⁸ *IRS Webinar*, *supra* note 176.

¹⁷⁹ Treas. Order 180-01 (July 1, 2014).

¹⁸⁰ Financial Crimes Enforcement Network, 76 Fed. Reg. 10234 (Feb. 24, 2011) (to be codified at 31 C.F.R. pt. 1010).

¹⁸¹ IRS GUIDE, *supra* note 26.

United States person that (2) has a financial interest in, or signature authority over, (3) foreign financial accounts must file an FBAR if (4) the aggregate value of such accounts exceeds \$10,000 at any time during the calendar year.¹⁸²

1. A United States Person

Under 31 C.F.R. § 1010.350(b)(1)–(3), “United States person” means any of the following: a citizen of the United States, a resident of the United States, or an entity formed under the laws of the United States, any State, the District of Columbia, the Territories and insular Possessions in the United States, or the Indian Tribes.¹⁸³ 31 C.F.R. § 1010.350(b)(1) provides that “[a] citizen of the United States” is a U.S. person, which means that if a United States citizen meets all of the elements of FBAR filing, such person must file an FBAR, regardless of age, residence, or location.¹⁸⁴ The IRS posed a question near the end of its webinar on June 4, 2014, regarding electronic FBAR filing that supports this analysis.¹⁸⁵ The IRS asked: “Do I need to file an FBAR for my infant son who is a US citizen and has foreign financial accounts, but is not required to file a tax return?”¹⁸⁶ The correct answer was: “Yes. There are no age limitations on FBAR filing. An FBAR should be filed on behalf of your son if he has reportable foreign financial accounts. Remember [that] tax filing status is not a consideration for FBAR.”¹⁸⁷ Although the IRS stated that the guidance it provided during its webinar may not be relied upon,¹⁸⁸ it is reasonable to assume that such guidance is not misleading.

For FBAR purposes, it is also important to note that the definition of “United States” found in 26 C.F.R. § 301.7701(b)-1(c)(2)(ii) does not apply. A resident of the “United States” is “an individual who is a resident alien under 26 U.S.C. § 7701(b) and the regulations thereunder but using the definition of ‘United States’ provided in 31 C.F.R. § 1010.100(hhh)”¹⁸⁹ Under 31 C.F.R. § 1010.100(hhh), “United States” means “[t]he States of the United States, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and the

¹⁸² FIN. CRIMES ENF’T NETWORK, BSA ELECTRONIC FILING REQUIREMENTS FOR REPORT OF FOREIGN BANK AND FINANCIAL ACCOUNTS (FINCEN FORM 114) (2014), <http://www.fincen.gov/forms/files/FBAR%20Line%20Item%20Filing%20Instructions.pdf> [<http://perma.cc/FZ9U-LWYZ>] [hereinafter FORM 114 INSTRUCTIONS].

¹⁸³ United States Territories and Possessions include the Commonwealth of the Northern Mariana Islands, District of Columbia, American Samoa, Guam, Commonwealth of Puerto Rico, United States Virgin Islands, and Trust Territories of the Pacific Islands. *See* IRS GUIDE, *supra* note 26.

¹⁸⁴ *Id.* (explaining that a U.S. citizen must file an FBAR if he or she meets all of the necessary elements, no matter where he or she resides).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ 31 C.F.R. § 1010.350(b)(2) (2014).

Territories and Insular Possessions of the United States.”¹⁹⁰ Section 2703(4)(A)–(B) of the Indian Gaming Regulatory Act defines “Indian lands” as

all lands within the limits of any Indian reservation; and any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.¹⁹¹

Moreover, a U.S. person must be a resident alien of the United States.¹⁹² Section 7701(b)(1)(A)–(B) of the Code provides the test for whether an individual is a resident alien. An individual shall be treated as a resident of the United States with respect to any calendar year if, and only if, such individual is lawfully admitted for permanent residence of the United States at any time during such calendar year (described as the “Green Card” test in the IRS’s Webinar on June 4, 2014), such individual meets the substantial presence test, or such individual makes the election to be a resident alien.¹⁹³ Any individual who is neither a citizen of the United States nor a resident of the United States within the meaning of 26 U.S.C. § 7701(b)(1)(A) is defined as a nonresident alien.¹⁹⁴

Under 31 C.F.R. § 1010.350(b)(3), “[a]n entity, including but not limited to, a corporation, partnership, trust, or limited liability company created, organized, or formed under the laws of the United States, any State, the District of Columbia, the Territories and insular Possessions in the United States, or the Indian Tribes” is a U.S. person.¹⁹⁵ Even though an entity may be disregarded for tax purposes, it is still treated as a U.S. person and it must file its own FBAR if it meets the remaining filing requirements—whether the entity files a U.S. tax return does not determine the entity’s FBAR filing requirements.¹⁹⁶

2. Financial Interest In or Signature Authority Over

A U.S. person has a financial interest in a financial account if such person is the record owner or holds title directly, another person or entity holds title for the benefit of such U.S. person, or the U.S. person is the record owner or holds title

¹⁹⁰ *Id.* § 1010.100(hhh).

¹⁹¹ 25 U.S.C. § 2703(4)(A)–(B) (2012).

¹⁹² I.R.C. § 7701(b)(A) (2012).

¹⁹³ *Id.*; *IRS Webinar*, *supra* note 176.

¹⁹⁴ I.R.C. § 7701(b)(B).

¹⁹⁵ 31 C.F.R. § 1010.350(b)(3).

¹⁹⁶ *IRS Webinar*, *supra* note 176.

indirectly.¹⁹⁷ Generally, if a U.S. person is the owner of record or is named on the financial account, regardless of if the account is held for such person's benefit, such person has a financial interest in the account. Under 31 C.F.R. § 1010.350(e)(1), "[a] United States person has a financial interest in each bank, securities or other financial account in a foreign country for which he is the owner of record or has legal title whether the account is maintained for his own benefit or for the benefit of others."¹⁹⁸ Even if multiple U.S. persons are on the account, each U.S. person may have to file an FBAR if they satisfy the additional FBAR requirements.¹⁹⁹ The IRS provided the following example in its FBAR webinar on June 4, 2014:

Is the FBAR required by a U.S. resident with power of attorney over his parents' reportable financial accounts in Canada, even when that authority has never been exercised? Yes. The person holding power of attorney is a U.S. person who is required to file FBARs on the reportable accounts, as long as the authorization remains in force. Whether that authority has ever been exercised is not relevant to the FBAR filing requirement.²⁰⁰

Additionally, 31 C.F.R. § 1010.350(e)(2) provides information regarding other financial interests that a U.S. person may have over a financial account. A U.S. person has a financial interest in each bank, securities, or other foreign financial account for which the owner of record, or holder of legal title is

- (i) A person acting as an agent, nominee, attorney or in some other capacity on behalf of the United States person with respect to the account;

- (ii) A corporation in which the United States person owns directly or indirectly more than 50 percent of the voting power or the total value of the shares, a partnership in which the United States person owns directly or indirectly more than 50 percent of the interest in profits or capital, or any other entity (other than an entity in paragraphs (e)(2)(iii) through (iv) of this section) in which the United States person owns directly or indirectly more than 50 percent of the voting power, total value of the equity interest or assets, or interest in profits;

¹⁹⁷ *Id.*

¹⁹⁸ 31 C.F.R. § 1010.350(e)(1).

¹⁹⁹ *Id.*

²⁰⁰ *IRS Webinar, supra* note 176.

(iii) A trust, if the United States person is the trust grantor and has an ownership interest in the trust for United States Federal tax purposes. See 26 U.S.C. 671–679 and the regulations thereunder to determine if a grantor has an ownership interest in the trust for the year; or

(iv) A trust in which the United States person either has a present beneficial interest in more than 50 percent of the assets or from which such person receives more than 50 percent of the current income.²⁰¹

If a U.S. person is the record owner or holds title indirectly, including for grantor trusts, the U.S. person must file an FBAR if the U.S. person owns greater than 50% of the entity that holds title, even if it is a tiered entity.²⁰² For instance, if a U.S. person is a 60% shareholder of a corporation that holds foreign financial accounts, that U.S. person is deemed to have an indirect financial interest in such accounts for FBAR purposes. Moreover, if a U.S. person causes an entity to be created for the purpose of evading 31 C.F.R. § 1010.350(e), such person will be said to have a financial interest in “any bank, securities, or other financial account in a foreign country for which the entity is the owner of record or holder of legal title.”²⁰³

If, however, a U.S. person has a financial interest in twenty-five (25) or more foreign financial accounts, such person does not need to complete the entire FBAR.²⁰⁴ Pursuant to 31 C.F.R. § 1010.350(g)(1), a U.S. person with “a financial interest in 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.”²⁰⁵ Although the U.S. person does not need to provide in-depth details about each account, it is highly recommended that attorneys encourage their clients not only to provide the number of accounts to FinCEN, but also to use the Adobe PDF option, rather than the online form, to complete the entire FBAR for personal reference.²⁰⁶ If the client allows the attorney to file as a third party filer, the same advice

²⁰¹ 31 C.F.R. § 1010.350(e)(2)(i)–(iv).

²⁰² *IRS Webinar*, *supra* note 176.

²⁰³ 31 C.F.R. § 1010.350(e)(3). According to the Preamble to 31 C.F.R. § 1010.350 (2011), this is a rule adopted for the purpose of preventing persons subject to the reporting requirement from avoiding such requirement.

²⁰⁴ *Id.* § 1010.350(g)(1).

²⁰⁵ *Id.*

²⁰⁶ See *FinCEN Provides Additional E-Filing Method for FBAR Individual Filers*, FINCEN (May 8, 2015), <http://fincen.gov/whatsnew/pdf/20150511.pdf> [<http://perma.cc/UHQ9-QH5X>] (“The BSA E-Filing System now provides an alternative E-Filing method for Individuals filing the Report of Foreign Bank and Financial Accounts (FBAR). Filers can now choose

applies. This will ensure that if the IRS chooses to further examine the client's FBAR, the attorney already has all of the necessary information compiled into one document.

The IRS stated that signature authority over an account means "the authority of an individual, alone or in conjunction with another individual, to control the disposition of assets held in a foreign financial account by direct communication, whether in writing or otherwise, to the bank or other financial institution that maintains the financial account."²⁰⁷ This definition makes clear that if a person's signature can cause any disposition of assets, such person shall be considered as having signature authority. An individual, alone or in conjunction with another, may control the disposition of account assets by direct communication—oral or written; however, this is "[n]ot applicable to business entities, just people."²⁰⁸ An individual, whether an officer or employee, has signature authority over the business entity's financial account(s).²⁰⁹

There are, however, a few exceptions. If an officer or employee needs supervisory approval within the business entity, such individual does not have signature authority and is not responsible for filing a FBAR.²¹⁰ For instance, is an individual required to file an FBAR if such individual has the power to direct how an account is invested, but cannot make dispositions from the account? The IRS says: "No. The FBAR is not required because the person who cannot make dispositions from an account is not considered to have signature authority over the account."²¹¹ Additionally, the IRS stated that an officer or employee has no financial interest in the accounts if such individual works at the following²¹²: a bank examined by U.S. federal regulators, a Securities and Exchange Commission (SEC) or Commodity Futures Trading Commission (CFTC) registered institution, an Authorized Service Provider²¹³ that is registered under the SEC, a U.S. listed domestic or foreign entity, a U.S. subsidiary of a U.S. listed entity that does not have a financial interest in the accounts of the U.S. parent,²¹⁴ or an

between the current method of filing using an Adobe PDF or use the new online form that only requires an Internet browser to file.").

²⁰⁷ *IRS Webinar*, *supra* note 176; *see* 31 C.F.R. § 1010.350(f)(1) ("Signature or other authority means the authority of an individual (alone or in conjunction with another) to control the disposition of money, funds or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.").

²⁰⁸ *IRS Webinar*, *supra* note 176.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*; *see* 31 C.F.R. § 1010.350(f)(2)(i)–(v).

²¹³ For FBAR purposes, "Authorized Service Provider" means "an entity that is registered with and examined by the Securities and Exchange Commission and that provides services to an investment company registered under the Investment Company Act of 1940." 31 C.F.R. § 1010.350(f)(2)(iii).

²¹⁴ *Id.* § 1010.350(f)(2)(iv) ("An officer or employee of a United States subsidiary of a United States entity with a class of equity securities listed on a United States national

entity registered under Section 12(g) of the Securities Exchange Act.²¹⁵ This list should not be read as exhaustive, though; refer to 31 C.F.R. § 1010.350(f)(2)(i)–(v) for the full list of exceptions. Under FBAR, consolidated filing allows multiple tiered entities to file on one consolidated form so long as the interests of each tier are identified.²¹⁶ 31 C.F.R. § 1010.350(g)(3) provides that “[a]n entity that is a United States person and which owns directly or indirectly more than a 50 percent interest in one or more other entities required to report under this section will be permitted to file a consolidated report on behalf of itself and such other entities.”

As with the “financial interest in” requirements, if a U.S. person has signature or other authority over twenty-five (25) or more foreign financial accounts, such person does not need to complete the entire FBAR.²¹⁷ Pursuant to 31 C.F.R. § 1010.350(g)(2), a U.S. person with “signature or other authority over 25 or more foreign financial accounts need only provide the number of financial accounts and certain other basic information on the report, but will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate.” Although the U.S. person need only provide minimal details, it is highly recommended that the attorney encourage the client to complete all of the normal FBAR requirements to retain for their information. If the client allows the attorney to file as a third party filer, the same advice applies.

3. Foreign Financial Account(s)

As mentioned above, FBAR reporting requirements applies to only “foreign financial accounts.” For instance, if a U.S. person has financial interest in or signature authority over a domestic financial account, such account is not factored into FBAR analysis. This Section identifies the three-factored test for determining whether an account is a foreign financial account: it must be “foreign,” “financial,” and an “account” as defined for FBAR purposes.

For FBAR purposes, “foreign” means outside of the United States, and the definition of “United States” found in 26 C.F.R. § 301.7701(b)-1(c)(2)(ii) does not apply.²¹⁸ Under 31 C.F.R. § 1010.100(hhh), “United States” means “[t]he States of

securities exchange need not file a report concerning signature or other authority over a foreign financial account of the subsidiary if he has no financial interest in the account and the United States subsidiary is included in a consolidated report of the parent filed under this section.”).

²¹⁵ *Id.* (“An officer or employee of an entity that has a class of equity securities registered under section 12(g) of the Securities Exchanged Act need not report that he has signature or other authority over the foreign financial accounts of such entity or if he has no financial interest in the accounts.”).

²¹⁶ *See* IRS GUIDE, *supra* note 26 (noting that entities covered by a consolidated report need to identify the account owners).

²¹⁷ 31 C.F.R. § 1010.350(g)(2).

²¹⁸ *Id.* § 1010.350(d) (“A foreign country includes all geographical areas located outside of the United States as defined in 31 C.F.R. 1010.100(hhh).”).

the United States, the District of Columbia, the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and the Territories and Insular Possessions of the United States.” The physical location of the account(s) governs, rather than the nationality of the financial institution.²¹⁹ For instance, if a U.S. person has an account with a foreign bank that has a branch within the United States and that person’s account is held by the U.S. branch, the account is not a foreign account. Because a person holds a Deutsche account does not mean that it is *per se* foreign. If the Deutsche account is in New York City, it is not a foreign account. Additionally, if a U.S. person holds an account with a U.S. bank and that account is held in a foreign country, that account is a foreign account. For instance, if the U.S. person’s account is with Citi, but the account is held in Hong Kong, the account is foreign.

The term “financial” is rather straightforward and includes accounts with financial institutions.²²⁰ Both monetary and non-monetary assets may be defined as “financial,” which means that an asset may be cash or non-cash.²²¹ Real and personal property, however, are not generally included within the definition of “financial.”²²² Interests in personal property, real estate, like jewels, collectibles, or precious metals like gold or silver do not fall within the scope of “financial” for FBAR purposes.²²³ The IRS has stated that the following may be considered financial accounts: (a) Bank, brokerage, and investment accounts; (b) Insurance and annuity policies that have cash values; (c) Mutual funds; and (d) Accounts with brokers or dealers with commodity options or futures contracts.²²⁴ This list, however, is not exhaustive, and further analysis must be done to determine if the account is reportable under FBAR requirements.²²⁵

An “account” is

an established relationship with a financial institution, or a person acting as a financial institution, that constitutes an account relationship. For this reason, the value of stocks held in a brokerage account is reportable, but shares held directly by a U.S. person are not reportable, because the directly held shares are not maintained in an account with a financial institution.²²⁶

Although an account relationship may exist, not all foreign financial accounts are reportable under FBAR.²²⁷ Pursuant to 31 C.F.R. § 1010.350(c), the various types

²¹⁹ *IRS Webinar*, *supra* note 176.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *See, e.g.*, FORM 114 INSTRUCTIONS, *supra* note 182; *see also* IRS GUIDE, *supra* note 26 (providing examples of situations where a U.S. person has a financial interest in an account).

²²⁶ *IRS Webinar*, *supra* note 176.

²²⁷ 31 C.F.R. § 1010.350(c)(1)–(4) (2014).

of reportable accounts are bank accounts, securities accounts, and certain other financial accounts. For FBAR purposes, a “bank account” means “a savings deposit, demand deposit, checking, or any other account maintained with a person engaged in the business of banking.”²²⁸ With regard to Certificate of Deposit (CD) bank accounts, see the question and answer provided by the IRS below:

How is a Certificate of Deposit (CD) account reported when it acquires a new account number upon each renewal? The issuance of a new certificate with a new account number upon each renewal, by itself, is not treated as a transfer of funds to a new financial account for FBAR reporting purposes. The funds are considered to be deposited in only one financial account, a CD with the bank.²²⁹

Moreover, a “securities account” means “an account with a person engaged in the business of buying, selling, holding or trading stock or other securities.”²³⁰ The term “other financial account” is rather encompassing of extraneous financial accounts that fall outside of the scope of bank and securities accounts; however, the government reserves the right to determine whether other investment funds not listed are includable on an FBAR.²³¹

“Other financial account” means (i) An account with a person that is in the business of accepting deposits as a financial agency; (ii) An account that is an insurance or annuity policy with a cash value; (iii) An account with a person that acts as a broker or dealer for futures or options transactions in any commodity on or subject to the rules of a commodity exchange or association; or (iv) an account with—(A) A mutual fund or similar pooled fund which issues shares available to the general public that have a regular net asset value determination and regular redemptions; or (B) Other investment fund.²³²

It is important to understand the definition of mutual fund, because a foreign financial institution may title an account a “mutual fund,” but the account’s function does not actually meet the definition of “mutual fund” for FBAR purposes. A “mutual fund” as defined is a fund that “issues shares available to the general public that has

²²⁸ *Id.* § 1010.350(c)(1).

²²⁹ *IRS Webinar*, *supra* note 176.

²³⁰ 31 C.F.R. § 1010.350(c)(2).

²³¹ FinCEN reserved treatment of foreign hedge funds and private equity funds, which means that, in the instant cases, such funds are not reportable. *See id.* § 1010.350(c)(3)(iv)(B) (“Reserved”).

²³² *Id.* § 1010.350(c)(3)(i)–(iv).

a regular net asset value determination and regular redemptions.”²³³ To answer a common question regarding accounts similar to U.S. IRAs, the IRS provided the following question and answer during its webinar on June 4, 2014:

Are Canadian RRSP and TFSA accounts reportable on the FBAR? Are accounts administered by Mexico’s AFORE? Yes. Even though they are similar to the U.S. IRA and Roth IRA, the exemption provided in the new regulations for IRAs is for U.S. accounts. It does not extend to similar foreign accounts. In general, foreign defined contribution retirement accounts are reportable on the FBAR.²³⁴

Although the Canadian RRSP and TFSA accounts and the Mexican AFORE are reportable on an FBAR, there are a few exceptions to the reporting requirements of other accounts.²³⁵ Exceptions to reportable accounts include: U.S. military banking facilities, accounts of U.S. governmental entities, international financial institutions, correspondent or “nostro” accounts maintained for clearing purposes by banks, and assets held in either a U.S. IRA (if owner or beneficiary) or a tax-qualified retirement plan (if participant or beneficiary).²³⁶

Additionally, custodial accounts, or “omnibus” accounts, are “foreign accounts held by U.S. banks or other financial institutions to hold investments of multiple people.”²³⁷ Although this type of account is not listed within 31 C.F.R. § 1010.350(c)(4), the IRS stated that persons with investments in these accounts would not be expected to report these on an FBAR, provided that person cannot directly access such foreign account.²³⁸ This follows the general rule that if a U.S. person can only access an account through a U.S. entity and cannot directly access the foreign account, no FBAR reporting is required.

4. Aggregate Value Greater than \$10,000

After identifying that either someone or an entity is a U.S. person who has either financial interest in or signature authority over a foreign financial account(s), such

²³³ *Id.* § 1010.350(c)(3)(iv).

²³⁴ *IRS Webinar*, *supra* note 176.

²³⁵ *Id.*

²³⁶ *Id.*; *see also* 31 C.F.R. § 1010.350(g)(4) (“*Participants and beneficiaries in certain retirement plans.* Participants and beneficiaries in retirement plans under sections 401(a), 403(a) or 403(b) of the Internal Revenue Code as well as owners and beneficiaries of individual retirement accounts under section 408 of the Internal Revenue Code or Roth IRAs under section 408A of the Internal Revenue Code are not required to file an FBAR with respect to a foreign financial account held by or on behalf of the retirement plan or IRA.”). *See id.* § 1010.350(c)(4) for more detail.

²³⁷ *IRS Webinar*, *supra* note 176.

²³⁸ *Id.*

person or entity is only required to file an FBAR if the value of the account is greater than \$10,000 or if the aggregate value of the accounts is greater than \$10,000.²³⁹ If a U.S. person has only one foreign financial account, and that account had a value greater than \$10,000 at any point during the reportable year, such person must file an FBAR. The analysis becomes a little more complex if the U.S. person has multiple foreign financial accounts. In order to determine the aggregate value of all accounts, each account must be valued separately at its highest value during the reportable year, in the currency in which the accounts are denominated. For reporting purposes, periodic account statements may be relied upon so long as they provide a reasonable approximation of the greatest value during the reportable calendar year. If the person has reason to believe that the periodic statements don't provide a reasonable approximation, then such person must use another method that does provide a reasonable approximation. The value in local currency is converted to U.S. dollars at the conversion rate on December 31st of the reportable year based upon the United States Treasury's Bureau of the Fiscal Service. When calculating the aggregate value, it is important to trace the flow of money and to ensure that double counting does not occur.

As with most requirements, there must be an enforcement mechanism in order to ensure compliance with the laws and regulations set forth by the government. The United States Department of the Treasury delegated "authority for enforcement and compliance, including coordination and direction of procedures and activities of all other agencies exercising delegated authority under this chapter, is delegated to the Director, FinCEN."²⁴⁰ The authority to enforce the provisions of 31 U.S.C. § 5314 and 31 C.F.R. §§ 1010.350 and 1010.420, however, was redelegated to the IRS.²⁴¹ 31 C.F.R. § 1010.810(g) provides:

The authority to enforce the provisions of 31 U.S.C. 5314 and §§ 1010.350 and 1010.420 of this chapter has been redelegated from FinCEN to the Commissioner of Internal Revenue by means of a Memorandum of Agreement between FinCEN and IRS. Such authority includes, with respect to 31 U.S.C. 5314 and 1010.350 and 1010.420 of this chapter, the authority to: assess and collect civil penalties under 31 U.S.C. 5321 and 31 CFR 1010.820; investigate possible civil violations of these provisions (in addition to the authority already provided at paragraph (c)(2) of this section); employ the summons power of subpart I of this part 1010; issue administrative rulings under subpart G of this

²³⁹ 31 C.F.R. § 1010.306(c) ("Reports required to be filed by § 1010.350 shall be filed with the Commissioner of Internal Revenue on or before June 30 of each calendar year with respect to foreign financial accounts exceeding \$10,000 maintained during the previous calendar year.").

²⁴⁰ *Id.* § 1010.810(a).

²⁴¹ *Id.* § 1010.810(g).

part 1010; and take any other action reasonably necessary for the enforcement of these and related provisions, including pursuit of injunctions.²⁴²

Given its authority to assess and collect penalties, the IRS cautions U.S. persons that there are “[s]evere civil and criminal penalties for failure to comply” with FBAR requirements.²⁴³ This means that each individual who may be required to file an FBAR should closely examine the reporting requirements, particularly because there are penalties for both willful and non-willful violations. Although the IRS recently stated that it will address reporting violations fairly,²⁴⁴ the IRS failed to provide an in-depth explanation that improved upon the already inconsistent principles found within the Internal Revenue Manual (IRM) for assigning penalties for willful and non-willful violations.

Under the BSA, the IRS may impose a civil monetary penalty on any person who violates, or causes any violation of, any provision of 31 U.S.C. § 5314.²⁴⁵ Section 5321 of Title 31 of the United States Code details the amount of the penalties that may be assessed. Under 31 U.S.C. § 5321(a)(5)(B), the amount of any civil penalty imposed shall not exceed \$10,000, unless the U.S. person willfully violated the provisions. Although the civil non-willful penalty may be applied for each year that a U.S. person violated the FBAR reporting requirements, the IRS provided guidance suggesting that certain facts and circumstances may indicate that asserting such penalties for each year is not warranted.²⁴⁶ Under this same section, a “reasonable cause” exception exists. This means that no penalty shall be imposed with respect to any violation if such violation was due to reasonable cause, and the amount of the transaction, or the balance in the account at the time of the transaction, was properly reported.²⁴⁷ In *Moore v. United States*, the court held that “reasonable cause” requires a U.S. person to exercise “ordinary business care and prudence” as under *United States v. Boyle*. The court specifically stated:

There is no reason to think that Congress intended the meaning of “reasonable cause” in the Bank Secrecy Act to differ from the

²⁴² *Id.*

²⁴³ *IRS Webinar*, *supra* note 176.

²⁴⁴ Memorandum for All LB&I, SB/SE, and TE/GE Employees: Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties, SBSE04-0515-0025 (May 13, 2015) [hereinafter *IRS Memorandum*].

²⁴⁵ See 31 U.S.C. § 5321(a)(5)(A) (2012); *id.* § 5321(a)(5)(D)(ii) (“The amount determined for purposes of this subparagraph is . . . 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.”).

²⁴⁶ *IRS Memorandum*, *supra* note 244.

²⁴⁷ 31 U.S.C. § 5321(a)(5)(B)(ii). Please note that these penalties apply to the violation of 31 U.S.C. § 5321(a)(5)(A).

meaning ascribed to it in tax statutes. As with the tax statutes, Congress entrusted enforcement of the Bank Secrecy Act to the Treasury Department. If it intended Treasury to interpret “reasonable cause” differently in the newer statute, it left no clues to which any party has pointed. The court thus takes guidance from tax statutes and authority interpreting them, and concludes that a person has “reasonable cause” for an FBAR violation when he committed that violation despite an exercise of ordinary business care and prudence.²⁴⁸

If a person willfully violates FBAR filing requirements, however, such person will face a much more severe penalty.²⁴⁹ The IRS may impose a penalty in the case of any person willfully violating, or willfully causing any violation of, any provision of 31 U.S.C. § 5314.²⁵⁰ The maximum penalty is the greater of \$100,000, or 50% of the amount determined based on the balance in the account at the time of the violation.²⁵¹ This willfulness penalty is now capped in most cases, based on a facts and circumstances test, at 50% of the highest aggregate balance of all unreported foreign financial accounts during the years under examination, and it will never exceed 100% of such balance.²⁵² Moreover, the reasonable cause exception for non-willful violations does not apply.²⁵³ In addition to the above penalties, the IRS may also impose a penalty for negligence.²⁵⁴ Under 31 U.S.C. § 5321(a)(6)(A), the IRS may “impose a civil money penalty of not more than \$500 on any financial institution or nonfinancial trade or business which negligently violates any provision of this subchapter or any regulation prescribed under this subchapter.” Moreover, criminal penalties may be imposed under 31 U.S.C. § 5322. Refer to the following chart, which highlights the civil and criminal penalties that may be asserted for willfully or negligently not complying with the FBAR reporting and record-keeping requirements²⁵⁵:

²⁴⁸ Moore v. United States, 115 No. C13-2063-RAJ, 2015 WL 1510007, at *4 (W.D. Wash. 2015).

²⁴⁹ See 31 U.S.C. § 5321(a)(5)(C).

²⁵⁰ *Id.*

²⁵¹ *Id.* § 5321(a)(5)(C)(i); see also 31 C.F.R. § 1010.820 (“In the case of a violation of § 1010.350 or § 1010.420 involving a failure to report the existence of an account or any identifying information required to be provided with respect to such account, a civil penalty not to exceed the greater of the amount (not to exceed \$100,000) equal to the balance in the account at the time of the violation, or \$25,000.”).

²⁵² IRS Memorandum, *supra* note 244.

²⁵³ 31 U.S.C. § 5321(a)(5)(C)(ii).

²⁵⁴ IRS GUIDE, *supra* note 26.

²⁵⁵ The original version of this chart appears in the “Penalties” section of the IRS GUIDE, *supra* note 26, but it has been amended to reflect changes made by the IRS. See IRS Memorandum, *supra* note 244. Such changes are noted by an asterisk (*).

Violation	Civil Penalties	Criminal Penalties	Comments
Negligent Violation	Up to \$500.	N/A.	<i>See</i> 31 U.S.C. § 5321(a)(6)(A). This does not apply to individuals.
Non-Willful Violation	Up to \$10,000 for each negligent violation.	N/A.	<i>See</i> 31 U.S.C. § 5321(a)(5)(B).
Pattern of Negligent Activity	In addition to the penalty under 31 U.S.C. § 5321(a)(6)(A), with respect to any such violation, not more than \$50,000.	N/A.	<i>See</i> 31 U.S.C. § 5321(a)(6)(B). This, however, does not apply to individuals.
Willful— Failure to File FBAR or Retain Records of Account	Up to the greater of \$100,000, or 50 percent (50%) of the amount in the account at the time of the violation. *From May 13, 2015–May 13, 2016, most cases will be limited to 50 percent (50%) of the highest aggregate balance of all unreported foreign financial accounts during the years under examination. In no event will the penalty exceed 100 percent (100%) of the highest aggregate balance of all unreported foreign financial accounts.	Up to \$250,000 or 5 years, or both.	<i>See</i> 31 U.S.C. § 5321(a)(5)(C); 31 U.S.C. § 5322(a). This penalty applies to all U.S. persons.
Willful— Failure to File FBAR or Retain Records of Account While Violating Certain Other Laws	Up to the greater of \$100,000, or 50 percent (50%) of the amount in the account at the time of the violation.	Up to \$500,000 or 10 years, or both.	<i>See</i> 31 U.S.C. § 5322(b) for criminal. This penalty applies to all U.S. persons.
Knowingly and Willfully Filing False FBAR	Up to the greater of \$100,000, or 50 percent (50%) of the amount in the account at the time of the violation.	\$10,000 or 5 years, or both.	<i>See</i> 18 U.S.C. § 1001. This penalty applies to all U.S. persons.
Civil and Criminal Penalties may be imposed together. 31 U.S.C. § 5321(d).			

III. APPLYING THE EIGHTH AMENDMENT TO THE FOREIGN ACCOUNT
TAX COMPLIANCE ACT AND THE REPORT OF FOREIGN BANK AND
FINANCIAL ACCOUNTS: DO FATCA AND FBAR PENALTIES
TRIGGER THE EIGHTH AMENDMENT?

At first glance, both FBAR and FATCA seem like normal, constitutional statutory provisions to combat tax evasion; however, it is important to look beyond the textual interpretation of the Code and focus on the functionality of the provisions. FATCA imposes hefty fines on U.S. persons who are non-compliant with its regulations. As discussed in Part II.A, FATCA imposes the same fines on U.S. persons who non-willfully violate its disclosure requirements as those who are willful violators. This means that the statutory penalties are objective, and apply to all U.S. persons who are non-compliant. Moreover, as discussed in Part II.B, it is clear that FBAR penalties are prone to being excessive and the IRS has left room for assessing such fines, despite explaining that “in most cases,” it will cap willful penalties at 50%. The IRS’s *Interim Guidance for Report of Foreign Bank and Financial Accounts (FBAR) Penalties* provides that the new procedures to cap the willful failure to report offshore accounts were “developed to ensure consistency and effectiveness in the administration of FBAR penalties,” and that “[t]hey will help ensure FBAR penalty determinations are adequately supported and penalties are asserted in a fair and consistent manner.”²⁵⁶ This suggests that FBAR penalties may be inconsistent and possibly excessive; in other words, unfair.²⁵⁷ Although practitioners have alluded to the rationale that the previous penalties were excessive, the IRS never admitted within the guidance that it changed the procedures due to Eighth Amendment concerns. The Kiplinger Tax document that states that the “IRS is capping the penalties for willful nonreporting of offshore accounts, after some tax pros claimed the fines over multiple years can be excessive and violate the Eighth Amendment,” is somewhat misleading.²⁵⁸ Yes, the new procedures did come after the tax professionals made

²⁵⁶ *IRS Memorandum, supra* note 244.

²⁵⁷ See Andrew Velarde, *FBAR Penalty Cap Reflects Sensitivity to 8th Amendment Concerns*, TAX ANALYSTS, June 2, 2015 (explaining that “[i]n a memorandum for all IRS Large Business and International Division, Small Business/Self-Employed Division, and Tax-Exempt and Government Entities Division employees issued on May 13, the commissioners from all three divisions provided instruction on the issuance of penalties for both willful and non-willful FBAR violations.”). Velarde stated that “[p]ractitioners welcomed recent guidance from the IRS on taxpayer penalties for failure to file foreign bank account reports, noting that it *could* reflect a concern that penalty amounts that had previously been possible might run afoul of the Eighth Amendment.” *Id.* (emphasis added). Within the article, Velarde quotes Scott D. Michel of Caplin & Drysdale, Chartered as saying: “It appears to reflect some sensitivities concerning the Eighth Amendment argument against excessive fines and penalties and may make it more likely that non-[offshore voluntary disclosure program] penalty cases will settle prior to the court action necessary for the government to collect the Title 31 penalty.” *Id.*

²⁵⁸ Kiplinger Tax Document (2015) (on file with author).

these claims, but there is no reason to believe that those tax professionals caused the IRS to change its procedures—it is merely correlation, rather than causation. The IRS did not say that the new procedures were due to claims that the penalty regime was excessive, rather that the IRS needed to provide more consistent, effective, and fair penalty determinations.²⁵⁹

Under the Eighth Amendment, the United States cannot impose an excessive fine on a U.S. person.²⁶⁰ The test that has consistently been applied since *United States v. Bajakajian*, provides that a fine must be proportional to the gravity of the crime committed. Given the incredibly high indiscriminate penalties that FATCA and FBAR impose on both willful and non-willful violators, it is important to determine whether the penalties are excessive under the Eighth Amendment. This Section determines that FATCA imposes harsh penalties that are excessive with regard to both willful and non-willful violators of the provision. The strongest argument is that the loss of revenue for many of the assets of U.S. persons who have evaded paying taxes on assets held within foreign financial institutions is substantial. For instance, in *Bajakajian*,

[t]he harm that respondent caused was [] minimal. Failure to report his currency affected only one party, the Government There was no fraud on the United States, and respondent caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived only of the information that \$357,144 had left the country.²⁶¹

Another troubling issue about the argument made by the *Bajakajian* Court was that the Court distinguished forfeitures as distinct from punishments that served as remedial for reimbursing the Government for losses accruing from the evasion of customs duties.²⁶² Framing the tax penalties as punitive, rather than as a monetary penalty equal to the value of lost revenue, i.e., a remedial sanction, is the most appropriate way to classify the penalties that FATCA imposes as discussed in Parts I and II. When framed like a penalty, FATCA is more analogous to *Bajakajian* than the customs cases, because a penalty that results in the full value, or more, of a defendant's currency would be incredibly similar to forfeiture and would violate the Excessive Fines Clause. It goes without saying that the penalties assessed for non-compliance are more than remedial.

²⁵⁹ See *IRS Memorandum*, *supra* note 244.

²⁶⁰ U.S. CONST. amend VIII.

²⁶¹ *United States v. Bajakajian*, 524 U.S. 321, 339 (1997).

²⁶² *Id.* at 342 (“It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value Double the value may not be more than complete indemnity.” (quoting *Stockwell v. United States*, 80 U.S. 531, 547 (1871))).

Under the FATCA regime, a U.S. taxpayer's failure to file Form 8938 could result in a penalty of up to \$60,000 for an asset valued at less than that amount.²⁶³ It is important to note that the tax value for the asset is much lower than the asset's value, and there is no possible way that the penalty would not be perceived as punitive. For instance, a taxpayer who has at least \$50,000 held in a foreign financial institution is required to file a Form 8938.²⁶⁴ There is up to a \$10,000 fine for failure to disclose the value.²⁶⁵ Additionally, there is an additional \$10,000 fine for each thirty-day period of non-filing after the Internal Revenue Service notifies the U.S. person of the failure to disclose for a potential maximum penalty of \$60,000.²⁶⁶ These are civil penalties, and criminal penalties may apply.²⁶⁷

Accordingly, this means that the taxpayer could pay \$10,000 more than the value of the foreign financial account. The income tax would have been no greater than 40% (assuming that the top bracket is at a high of 39.6%) for one year of inclusion within taxable income, which would be \$20,000 using 40% for simplicity right now. However, the penalty of \$60,000 is equivalent to a tax rate of 120%. This is clearly punitive, rather than a remedial action. Moreover, the fines for one year of complete non-compliance completely sap the investor or U.S. person of the entire asset.

Although FATCA does not replace a taxpayer's obligation to file the FBAR, it does increase a taxpayer's obligations to file additional forms disclosing the same information.²⁶⁸ The issue is that, in doing so, FATCA makes it more difficult for a taxpayer to properly file all of the forms required. Also, requiring multiple forms to disclose the same thing makes compliance more difficult, and more than likely increases the errors surrounding compliance.

U.S. persons must report their worldwide income on their taxes. Plus, they must file an FBAR annually if their offshore accounts total over \$10,000 at any time. If you have both failures, the IRS wants you to go into the Offshore Voluntary Disclosure Program, also known as the OVDP. It involves reopening 8 tax years, and paying taxes, interest and penalties, but no prosecution. But the penalties can be painful, especially the one equal to 27.5% of the highest balance in the offshore accounts. As a result, some people want to amend their taxes and file FBARs *outside* the OVDP. Some people are willing to pay the taxes they owe, but not the

²⁶³ *Comparison of Form 8938 and FBAR Requirements*, IRS, <http://www.irs.gov/Businesses/Comparison-of-Form-8938-and-FBAR-Requirements> [<http://perma.cc/38SQ-VU42>].

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

27.5% penalty. The IRS calls this a “quiet disclosure” and says it will come after you if you try it. That might include prosecution or large civil FBAR penalties.²⁶⁹

Additionally, the fines for not disclosing certain foreign trusts is even greater than failure to properly disclose foreign financial assets. The initial penalty for failing to report is the greater of \$10,000, and either 5% of the value of the portion of a grantor trust, 35% of the value of the property transferred to a foreign trust, or 35% of the amount distributed to a distributee who fails to report distributions.²⁷⁰ Moreover, FBAR requires U.S. persons to report similar information, which means that a taxpayer may incur multiple penalties for the same failure to disclose information, both on the Form 8938 and FinCEN 114. Without aggregating the two, FBAR penalties may also be excessively egregious. Section 5321 of Title 31 of the United States Code provides that the greater of a maximum penalty of \$100,000 or 50% of the balance of the account at the time of violation applies for willful failures to file an FBAR. Although willfulness deserves greater punishment than a non-willful act, the penalty is grossly disproportionate to the gravity of the offense. The only harm to the U.S. government is the lost tax revenue and interest that it could have earned for the past years. The willful actor, once caught, must pay the taxes owed, plus interest for those years of non-compliance. This is punishment enough, particularly when the actor may face criminal punishment as well. In no case should someone pay a penalty that exceeds the value of that person’s account.

CONCLUSION

In order to ensure that FATCA continues to serve as an important tax equalizer and funding mechanism for the HIRE Act, it is vital that Congress incorporate policy changes that would prevent disproportionate penalties and bring FATCA within the constitutional umbrella. The changes necessary are simple.

First, with regard to the penalties for not filing the appropriate form, add a clause that states “unless the maximum fine of \$60,000 exceeds the value of the asset, then the fine shall be reduced to the value of the asset.” This may still be excessive, but less excessive. The best practice would be going further than this and possibly changing the fine to capture the amount of tax that would have been owed on the asset for the year disclosure was not provided. This does not create the same problem that the FBAR form has (i.e., the 50% penalty for each year of non-compliance) because the FATCA disclosure requirements did not go into effect until July 2014. However, there may be an implementation issue for FATCA overall with regard to the strategic enacting. FATCA essentially scares tax evaders into compliance, and it is fair to say

²⁶⁹ Wood, *supra* note 137.

²⁷⁰ MICHAELS, *supra* note 8, ¶ 6.15[3][c].

that many taxpayers will not comply with the reporting requirements unless there are, for lack of a better word, excessive penalties. This creates a tension between the policy and the U.S. Constitution. Which is more important? Probably not the policy, which means that the U.S. government should be limited to either the actual amount of revenue it could have collected on an asset for each year of non-compliance or for the tax owed in the first year of non-compliance, and then the interest that the government would have been able to accrue based on inflation throughout the years since non-compliance? This could still produce a substantial fine, but would be proportional to the gravity of the non-willful violator, and then the government could impose an additional standard fine on those who are willful violators.

For now, the above examples serve as suggested alternatives, which are outside the scope of this Note. And even though FBAR penalties may be more unconstitutional than the FATCA penalties, FATCA is a requirement that is in addition to FBAR and imposes fines in addition to the FBAR fines if the person forgets to file two separate forms.²⁷¹ It is important to remember that FATCA's goal is admirable, and that the policy objectives are sound. Offshore tax evasion continues to be a pressing issue. As cited by Peter Nelson, "[i]n her remarks to the New York State Bar Association, Assistant Secretary McMahon said: 'Ultimately, we believe that our efforts to implement FATCA and to resolve the challenges it poses can and should advance the important work already begun'"²⁷² While this Note highlights some detrimental flaws of FATCA, it is important to do so. Without acknowledging the flaws, FATCA's ability to combat offshore tax evasion could subside. It is better to recognize the shortcomings early on so that they may be resolved, and FATCA can continue to "detect, deter, and discourage."

Although FATCA's purpose is admirable, it does not comport with the requirements of the U.S. Constitution, nor does the FBAR. The Eighth Amendment requires that the Government not impose an "excessive fine," yet FATCA requires U.S. persons to pay excessive civil penalties if they are non-compliant.²⁷³ As Andrew Quinlan said, "FATCA remains both politically and legally vulnerable."²⁷⁴ Even though this Note only analyzes FATCA with regard to the Eighth Amendment, it is still vulnerable under both the Fourth Amendment and Senate's treaty power.²⁷⁵ Although the Treasury has pledged to gradually enforce the requirements,²⁷⁶ it does not change the fact that the penalties are excessive. Given the recent crackdown on offshore tax evasion, U.S. officials continue to increase their reach.²⁷⁷

²⁷¹ Kaye, *supra* note 1, at 363–64.

²⁷² Nelson, *supra* note 107, at 423.

²⁷³ Kaye, *supra* note 1, at 363.

²⁷⁴ Quinlan, *supra* note 18.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Laura Saunders, *When Are Tax Penalties Excessive? Does a \$3.5 Million Fine on a Secret \$1.7 Million Swiss Account Violate the Eighth Amendment's Prohibition of Excessive*

After the recent outcome of *United States v. Zwerner*, there must be a limit to the madness surrounding excessive penalties.²⁷⁸ In this civil lawsuit the government wanted to collect nearly \$3.5 million in penalties from a taxpayer who had a secret Swiss account although the account balance was never higher than \$1.7 million.²⁷⁹ Although these penalties were strictly for FBAR, the government may be becoming too powerful. “Since 2009, the Justice Department has filed more than 75 criminal cases against U.S. taxpayers involving the alleged failure to declare offshore financial accounts,” and the prosecutors have singled out the large penalty of fifty percent of the offshore financial account’s maximum balance.²⁸⁰ With regard to *United States v. Beras*,²⁸¹ the court ruled that “the forfeiture of \$ 135,794 for the crime of failing to report currency would violate the Excessive Fines Clause”; it does not appear to make sense that penalties greater than the value of an asset would fall within the Excessive Fines Clause.²⁸² The purpose of a penalty is to punish, not deplete a taxpayer. From a business perspective, if the taxpayer is fined an amount that is greater than the value of the asset, the taxpayer may become insolvent, or incapable of paying the owed back taxes. Then the penalty becomes a remedial payment, rather than serving as a method of discouragement for U.S. taxpayers. From the constitutional perspective, though, depletion becomes synonymous to overtly excessive. Regardless of the confusion about the “grossly disproportionate” test, any reasonable person would find the depletion unconscionable.

Moreover, with the absence of further guidance from the Supreme Court, lower courts have struggled with determining which penalties are within the scope of the Excessive Fines Clause;²⁸³ thus, if anything this Note is a call for more guidance.²⁸⁴ The Foreign Account Tax Compliance Act is a purposeful act that deserves respect, because it has provided the IRS with an appropriate tool to combat tax evasion. While it may not be the most popular tool amongst those who have hidden many assets in foreign financial accounts, it does provide more fairness within the tax system,

Fines?, WALL ST. J. (July 12, 2013), <http://www.wsj.com/articles/SB10001424127887324694904578598230978458720> [<http://perma.cc/2X5Y-DX95>].

²⁷⁸ *Id.*; Wood, *supra* note 137.

²⁷⁹ Saunders, *supra* note 277.

²⁸⁰ *Id.*

²⁸¹ 183 F.3d 22 (1st Cir. 1999).

²⁸² Eric C. Surette, *When Does Forfeiture of Currency, Bank Account, or Cash Equivalent Violate Excessive Fines Clause of Eighth Amendment*, 164 A.L.R. Fed. 591 (2000).

²⁸³ See, e.g., McLean, *supra* note 87, at 834–35 (“In the years since *Bajakajian*, lower courts have (in the absence of further guidance from the Supreme Court) grappled with a variety of issues associated with Excessive Fines Clause doctrine. . . . These courts have generally not regarded a defendant’s inability to pay a fine as a relevant consideration in the context of the Eighth Amendment.”).

²⁸⁴ See, e.g., King, *supra* note 42, at 151–52. Although King’s analysis pre-dated *Bajakajian*, it still remains relevant given that the Court did not provide true guidance in terms of determining whether a penalty is excessive.

thereby limiting the escape routes available to the wealthy. It is important to remember, however, that this should not be perceived as a war on the wealthy, rather a war on the illegal accessions to wealth that unduly burden those who play by the rules. The only problem is that the penalties for failure to report foreign financial assets may be excessive in some situations.²⁸⁵ While this does not provide enough justification to render the entire policy unconstitutional, it may be enough to render it partially unconstitutional. If the Supreme Court had provided more guidance regarding disproportionate penalties,²⁸⁶ this situation would more than likely not have occurred. Congress and the IRS would have been able to determine more appropriate penalties by accurately determining that FBAR and Form 8938 penalties when grouped together can be excessive; thus providing a bright-line or ceiling on such penalties that took into consideration the proportionality of a penalty relative to the value of the unreported assets.²⁸⁷

²⁸⁵ Susan C. Morse, *Tax Compliance and Norm Formation Under High-Penalty Regimes*, 44 CONN. L. REV. 675, 679–80 (2012).

²⁸⁶ See King, *supra* note 42, at 146 (“The Court would do better to confront the risk of disproportionate penalties directly, under the Eighth Amendment, than to employ the clumsy proxy of mandatory joinder under the Double Jeopardy Clause.”).

²⁸⁷ See *id.* at 149 n.140 (“Yet because of the variety of congressional controls over agency action, Congress is more likely to become aware of the overlap between criminal and administrative penalties than to understand the overlap between certain nonadministrative penalties. Professor Lear has argued, however, that one particular agency cannot be trusted to speak the will of Congress. She maintains that the statements of the United States Sentencing Commission cannot provide the necessary congressional intent to override the *Blockburger* presumption.”).