

## [Court Finds FBAR Penalty Can Exceed \\$ 100,000](#)

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### **Body**

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by Kristen Parillo

In a departure from two district [court](#) opinions, the Court of Federal Claims held that the IRS's authority to impose penalties for willful failure to file foreign bank account reports is not capped at \$ [100,000](#).

"We now have a split at the trial [court](#) level on the application of the [FBAR penalty](#)," said Josh O. Ungerman of Meadows, Collier, Reed, Cousins, Crouch & Ungerman LLP, noting two earlier taxpayer-favorable decisions in *United States v. Colliot*, No. 16-cv-01281 (2018-21241), and *United States v. Wahdan*, No. 17-cv-1287 (2018-29772). Ungerman predicted the issue (2018-29803) will eventually reach the circuit [courts](#) and could potentially be decided by the Supreme [Court](#).

In the July 31 [Court](#) of Federal Claims decision in *Norman v. United States*, No. 1:15-cv-00872 (2018-31641), Senior Judge Edward J. Damich held that Congress clearly expressed its intent to raise the maximum [FBAR penalty](#) amounts when it amended the Bank Secrecy Act in 2004. Before those changes, the [penalty](#) was limited to the greater of \$ 25,000 or the account balance at the time of the violation, up to a maximum of \$ 100,000 per violation. Post-amendment, the maximum [penalty](#) for willful violations is the greater of \$ [100,000](#) or 50 percent of the account balance per violation.

Damich concluded that Congress's amendments superseded Treasury's implementing regulation, which was never updated to reflect the 2004 amendments and still parallels the pre-2004 law capping [penalties](#) at \$ [100,000](#). The regulation is no longer consistent with the amended statute and is therefore invalid, Damich said.

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Damich rejected the reasoning used in *Colliot* and *Wahdan*, that the 2004 amendments didn't mandate that Treasury adopt the higher maximum **penalty**, and that Congress merely gave the department discretion to impose a bigger **penalty** than was previously possible.

"It is true that the statute vested the Treasury Secretary with discretion to determine a **penalty's** amount," Damich wrote. "However, this statement mischaracterizes the language of section 5321(a)(5)(C), by ignoring the mandate created by the amendment in 2004."

That Congress stated that the maximum **penalty** "shall" be increased, rather than "may," meant that Congress raised the new ceiling itself and removed Treasury's discretion to regulate any other maximum amount, Damich explained.

### More Uncertainty - But Ammunition for IRS

While the latest decision will create even more taxpayer uncertainty and procedural headaches for the IRS, Ungerman said, it does give the government leverage to argue at the trial **court** level and when appealing any new adverse decisions that the 2004 amendments superseded the regulation.

Bryan C. Skarlatos of Kostelanetz & Fink LLP said the issue will likely be dealt with in many other district **courts**, "so I'm sure there will be plenty of other **court** decisions to weigh in on this."

All three cases have raised interesting questions of statutory construction, Skarlatos said.

"Do you look at just the specific language in the specific provision to determine consistency?" Skarlatos asked. "Or do you look at the broader statutory scheme to determine whether, in the context of the scheme, the regulation and statute **can** be read consistently?"

Similarly, Zhanna A. Ziering of Caplin & Drysdale Chtd said the heart of the cases is whether the regulation is inconsistent with the amended statute, and therefore is superseded.

"As this issue is now pending before other district **courts**, we anticipate it ultimately going up to the circuit **courts**," Ziering said, adding that in the meantime, the IRS "continues to have litigation hazards."

Lawrence M. Hill of Winston & Strawn LLP said *Norman* "will be a tough decision to swallow" for taxpayers who were hoping to limit their maximum exposure to \$ **100,000** for willful **FBAR** violations.

"I do think it is likely that when the circuit **courts** of appeal weigh in, they will arrive at a consistent interpretation on the issue of how the statute is to be construed vis-à-vis the regs," Hill said, adding that "the incongruity of the code and reg provisions is anomalous and requires clarification."

*Emily Foster contributed to this article.*

## References

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Subject Areas:

Information Reporting;

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