

Foreign Bank Accounts: The Third Circuit Rules that a Summons For Foreign Bank Records Does Not Violate the Fifth Amendment.

Over the past several years, the federal government has stepped up enforcement of the reporting requirements for foreign bank accounts under the Bank Secrecy Act. The IRS has had several voluntary disclosure initiatives, and there have been some prominent criminal prosecutions for willful non-reporting accountholders.

Because of the potential for criminal prosecution, a basic question arises when the IRS issues a summons for foreign bank records: can the accountholder refuse to turn over records by invoking his Fifth Amendment privilege against self-incrimination? Last week, the Third Circuit joined the growing number of appellate courts holding that the required records exception to the Fifth Amendment applies to the records an accountholder is required to maintain under 31 C.F.R. § 1010.420. *United States v Chabot*, 2015 U.S. App. LEXIS 12367 (3d Cir. July 17, 2015).

Chabot was a summons enforcement case: the IRS had issued a summons to obtain records of a foreign bank account, and the Chabots refused to comply, citing their Fifth Amendment privilege against self-incrimination. *Chabot*, 2015 U.S. App. LEXIS 12367, slip op. at *2-*3. Ultimately, the IRS narrowed its summons to the information required by 31 C.F.R. § 1010.420 and sought to enforce the summons. The Chabots argued that the act of producing the records was protected under the Fifth Amendment, but the district court ruled that the required records exception applied. *Chabot*, slip op. at *3.

The Third Circuit affirmed. The court began by reviewing the basic principle that the act of production of documents can qualify for protection under the Fifth Amendment because the act of producing documents has testimonial elements. *Id.*, slip op. at *5. The Third Circuit then reviewed the development of the required records exception to the Fifth Amendment privilege against self-incrimination, noting that it involved three core elements:

- a reporting or recordkeeping scheme with a regulatory (not a criminal enforcement) purpose;
- those subject to the recordkeeping requirement must customarily keep the records that are subject to the requirement; and
- the records have to have “public aspects.”

Id., slip op. at *6 (quoting *Grosso v. United States*, 390 U.S. 62, 67-68 (1968)).

The Third Circuit had little difficulty determining that the required records exception applied. Initially, it concluded that the recordkeeping requirement served noncriminal purposes since the data was used for tax collection and other purposes, including monetary policy and foreign intelligence. *Id.*, slip op. at *10 (citations omitted). In that context, the Third Circuit rejected the Chabot’s argument that the recordkeeping requirement had a criminal enforcement purpose, reasoning that the requirement also served other regulatory purposes, which was sufficient. A key factor here was that the relevant recordkeeping requirement did not target a class of individuals who were engaged in criminal activity; instead it applied to accountholders who had legitimate purposes for foreign accounts as well as those engaged in criminal activity. *Id.*, slip op. at *13-*17.

Next, the Third Circuit examined the records that were required to be maintained under 31 C.F.R. § 1010.420, and concluded the requirement that accountholders maintain data such as

the name on the account, the account number, the name and address of the bank, the type of account and the highest annual balance were routinely kept. Consequently, the Third Circuit concluded that the second prong of the *Grosso* test was satisfied. *Chabot*, slip op. at *17-*20.

Turning to the third prong, the Third Circuit held that the records that were the subject of the summons had public aspects. The court first reasoned that engaging in foreign banking operated as a waiver of the Fifth Amendment privilege with respect to the relevant account records. *Id.*, slip op. at *20-*21. Given the fact that the relevant records are circulated internally by the government for a variety of regulatory purposes, the Third Circuit was satisfied that the relevant records had public aspects within the meaning of *Grosso*. *Chabot*, slip op. at *21-*22.

Here are the other appellate opinions that have addressed this issue: *In re Grand Jury Subpoena Dated Feb. 2, 2012*, 741 F.3d 339 (2d Cir. 2013); *United States v. Under Seal*, 737 F.3d 330 (4th Cir. 2013); *In re Grand Jury Proceedings*, 707 F.3d 1262 (11th Cir. 2013); *In re Grand Jury Subpoena*, 696 F.3d 428 (5th Cir. 2012); *In re Special Feb. 2011-1 Grand Jury Subpoena Dated Sept. 12, 2011*, 691 F.3d 903 (7th Cir. 2012); *In re Grand Jury Investigation M.H.*, 648 F.3d 1067 (9th Cir. 2011).

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