Emory Bankruptcy Developments Journal

Volume 33
Issue 1 *A Tribute to Professor Grant W. Newton*

2016

# To Discharge or Not to Discharge: Tax Is the Question

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# TO DISCHARGE OR NOT TO DISCHARGE: TAX IS THE QUESTION


## ABSTRACT

*Prior to Congress passing BAPCPA in 2005, an individual was able to discharge debt related to a tax return filed after April 15th as long as that individual satisfied the* Beard *test and certain statutory requirements. Courts applied the* Beard *test, which consists of four factors, to determine when a document qualified as a valid tax return. Of these four factors, the fourth factor, which requires that the debtor make an honest and reasonable attempt to comply with the tax law, led to disputes among courts. All circuit courts adopted the* Beard *test, and the major issue prior to the 2005 amendments turned on whether an individual can satisfy the fourth factor of the* Beard *test if that individual failed to file a tax return until after the IRS had already filed a tax return on that individual's behalf.*

*In an attempt to clarify the language of the Bankruptcy Code, Congress defined the term "return" in its 2005 amendments. The definition appears in the hanging paragraph of § 523(a). Importantly, Congress stated that a document is a return if the document "satisfies the requirements of applicable bankruptcy law (including applicable filing requirements)." In 2012, the Fifth Circuit found in* In re McCoy *that the date on which a tax form is filed is one of the "applicable filing requirements" that Congress was referencing in the hanging paragraph. Thus, the Fifth Circuit created the "one-day-late rule" when it held that a tax form filed one day late is not a valid tax return because the filer has failed to satisfy applicable filing requirements. The result of the one-day-late interpretation is that an individual who files a tax form late cannot receive a discharge of debt stemming from that late-filed form. The Tenth and First Circuits subsequently adopted the Fifth Circuit's interpretation.*

*Conversely, the Ninth Circuit, bankruptcy courts, academics, and the IRS oppose the one-day-late interpretation and have offered an alternative viewpoint. Courts opposing the one-day-late rule are concerned with the harsh impact that the one-day-late interpretation has on honest debtors who file tax forms late for reasons beyond the debtor's control. While various courts opposing the one-day-late rule have interpreted the hanging paragraph in*

*slightly different ways, the common theme among these opinions is that a late-filed tax form can still qualify as a return if the filer satisfied the* Beard *test and statutory requirements. Courts opposing the one-day-late rule maintain that Congress did not intend for the hanging paragraph to displace the* Beard *test.*

*This Comment argues that Congress intended to codify the* Beard *test through the BAPCPA amendments. Under this interpretation, the fourth element of the* Beard *test requires that a court must always review a late-filed tax form and make a subjective determination as to whether that form is a return. The court must evaluate all relevant factors, including when the form was filed, why it was filed late, and whether the IRS has filed a substitute return on behalf of the individual who failed to file a timely return. This interpretation allows the debtor an opportunity to show a reason for filing late tax forms, and gives the court the opportunity to make a determination as to the validity of the debtor's reasoning. Ultimately, this interpretation allows debtors to receive a fresh start without compromising the IRS's ability to collect taxes.*

## INTRODUCTION

April 15th, also known as "Tax Day" to most Americans, has been the date by which individuals earning an income are expected to file their income tax returns since 1955. Depending on whom you ask, Congress changed tax day from its original February date to March, and finally April, in an effort to either spread out the IRS's workload or as a means of avoiding paying interest on tax returns.[1] While April 15th is technically tax day, this date is often not the final date by which an individual must file his or her tax return without penalty. The IRS has moved tax day for various reasons including extensions, natural disasters, and holidays,[2] and the IRS has the discretion to waive penalties related to late-filed tax forms.[3] Whether an individual does so

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[1] *See* Jessica Sung, *Why is Tax Day April 15?*, FORTUNE (Apr. 15, 2002), at 64, http://archive.fortune.com/magazines/fortune/fortune_archive/2002/04/15/321414/index.htm.

[2] *See* Kelly Phillips Erb, *IRS Announces 2016 Filing Season Start Date – and a Delayed Tax Day*, FORBES (Dec. 21, 2015, 2:44 PM), http://www.forbes.com/sites/kellyphillipserb/2015/12/21/irs-announces-2016-filing-season-start-date-and-a-delayed-tax-day/#314e3802336a (noting tax day is on April 18, 2016 due to emancipation day); *Tax Relief in Disaster Situations*, IRS, https://www.irs.gov/uac/Tax-Relief-in-Disaster-Situations (last updated Aug. 15, 2016) (outlining the IRS's list of natural disasters that have affected tax day).

[3] 26 U.S.C. § 6651(a)(1) (2012) ("In case of failure to file any return . . . on the date prescribed therefor, *unless it is shown that such failure is due to reasonable cause and not due to willful neglect*, there shall be added to the amount required. . . .") (emphasis added).

strategically, unintentionally, or out of desperation, the late-filing of tax forms are a common occurrence in America.[4] Since Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005, the question of whether debt arising from these late-filed tax forms is dischargeable in chapter 7 has become an issue.

This Comment will analyze the one-day-late rule, which states that tax debt arising from a late-filed tax form is nondischargeable in bankruptcy.[5] Further, this analysis will show that the one-day-late rule is a flawed interpretation of § 523(a) of the Bankruptcy Code (the "Code"). Section 523(a) states: "*A discharge under section 727* . . . of this title *does not discharge* an individual debtor from any debt—*for a tax* . . . *with respect to which a return*, or equivalent report or notice, *if required—was not filed or given*."[6] This issue, therefore, turns on whether a late-filed tax form can be considered a valid tax return because an individual can only receive a discharge for tax debt if the individual filed a valid tax return.

Prior to the passage of BAPCPA, the term "return," as used in § 523(a), was left undefined by the statute.[7] Inconsistencies regarding various courts' definitions of "return" led to the development of the four-part *Beard* test.[8] The *Beard* test classified a document as a return when the document: "(1) purported to be a return; (2) [was] executed by the debtor under penalty of perjury; (3) contain[ed] sufficient data to allow calculation of the tax; and (4) represent[ed] an honest and reasonable attempt to satisfy the requirements of the tax law."[9] Of these factors, the fourth factor was the most important, leading to disputes among the circuit courts.[10] Although courts reached varying conclusions on

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[4] *See* Brian O'Connell, *Why Do So Many People Fall Behind On Their Taxes?*, INVESTOPEDIA (Feb. 12, 2014, 7:04 AM), http://www.investopedia.com/articles/personal-finance/021214/why-do-so-many-people-fall-behind-their-taxes.asp ("In 2009 a spokesperson for the U.S. Internal Revenue Service estimated that 8.2 million Americans owed over $83 billion in back taxes, penalties and interest.").

[5] *See* Fahey v. Mass. Dep't of Revenue (*In re* Fahey), 779 F.3d 1, 10–11 (1st Cir. 2015); Mallo v. IRS (*In re* Mallo), 774 F.3d 1313, 1328 (10th Cir. 2014); McCoy v. Miss. State Tax Comm'n (*In re* McCoy), 666 F.3d 924, 932 (5th Cir. 2012).

[6] 11 U.S.C. § 523(a)(1)(B)(i) (2012) (emphasis added).

[7] *See* Maitland v. N.J., Div. of Taxation (*In re* Maitland), 531 B.R. 516, 518 (Bankr. D.N.J. 2015).

[8] *See* Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934); Beard v. Comm'r, 793 F.2d 139, 139 (6th Cir. 1986) (per curiam), *aff'g* 82 T.C. 766 (1984); *see also* Hamer v. IRS (*In re* Hamer), 328 B.R. 825, 828, 832 (Bankr. N.D. Ala. 2005).

[9] *See In re* Maitland, 531 B.R. at 518, 526 n.13 (citing *Beard*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986)).

[10] *In re* Payne, 431 F.3d 1055, 1058–59 (7th Cir. 2005) (identifying the issues with the "honest and reasonable" standard).

what constituted "an honest and reasonable attempt" to satisfy the tax law requirements, all circuits adopted the *Beard* test for determining when a chapter 7 debtor's late-filed tax forms were a return.[11]

Congress's decision to define the term "return" in the BAPCPA amendments, however, threatened the future of the *Beard* test.[12] This definition appears after § 523(a)(19)(B), and the majority of courts refer to the definition as the "hanging paragraph."[13] The hanging paragraph states:

> For purposes of this subsection, the term "return" means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements). Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986, or a similar state or local law.[14]

Although Congress did not clarify which filing requirements are "applicable," debtors who have outstanding tax debt at the time they file a chapter 7 petition are the parties that this legislation has truly affected.[15]

Congress's definition of "return" led courts to reach two different conclusions when interpreting what constitutes a return for dischargeability purposes. The courts following the Fifth Circuit's holding in *McCoy v.*

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[11] *See, e.g.*, *id.* at 1057; Moroney v. United States (*In re* Moroney), 352 F.3d 902, 905 (4th Cir. 2003); United States v. Hindenlang (*In re* Hindenlang), 164 F.3d 1029, 1034 (6th Cir. 1999).

[12] 11 COLLIER ON BANKRUPTCY ¶ TX12.039[2][a][ii] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

[13] *See* 11 U.S.C. § 523(a)(*). Many courts have adopted the * to refer to the hanging paragraph, and I will use this identifying language throughout this Comment. Furthermore, the term "hanging paragraph" in this Comment will refer to § 523(a)(*), not the other "hanging paragraph," which follows and addresses § 1325(a)(9): whether a debtor can strip down the lien of a secured creditor under the terms of § 1325(a)(9) when the collateral is a motor vehicle purchased by the debtor for personal use within 910 days of the filing of the petition. *See id.* § 1325(a)(9); *In re* Johnson, 337 B.R. 269, 271 (Bankr. M.D.N.C. 2006).

[14] 11 U.S.C. § 523(a)(*). "Section 6020(a) returns are those in which a taxpayer who has failed to file his or her returns on time nonetheless discloses all information necessary for the IRS to prepare a substitute return that the taxpayer can then sign and submit." *In re* McCoy, 666 F.3d 924, 928 (5th Cir. 2012). "[A] § 6020(b) return is one in which the taxpayer submits either no information or fraudulent information, and the IRS prepares a substitute [for] return ['SFR'] based on the best information it can collect independently." *Id.*

[15] 11 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ TX12.039[2][a][ii].

*Mississippi State Tax Commission (In re McCoy)*[16] found that a tax debt resulting from a tax form filed even one day late is not dischargeable because timely filing is a part of the "applicable filing requirements" discussed in the hanging paragraph.[17] Proponents of the one-day-late rule are not concerned with the reason that the debtor filed his tax forms late because, under this view, a late-filed tax form can never be a valid return for dischargeability purposes unless the form is "prepared pursuant to section 6020(a)."[18] A § 6020(a) return is a late-filed tax form prepared by the IRS *with* the assistance of the individual who failed to file a timely return.[19] Unlike a § 6020(b) return, which is prepared by the IRS *without* assistance from the filer and will be discussed later, Congress stated in the hanging paragraph that § 6020(a) forms are still valid despite the fact that they are always filed after April 15th.[20] Additionally, the IRS has full discretion to allow or deny an individual the opportunity to file a return under § 6020(a) if that individual has failed to file a timely return.[21]

The practical result of the one-day-late rule is that an individual cannot receive a discharge on any tax debt resulting from a late-filed tax form unless the IRS chooses to allow the individual to file a § 6020(a) return.[22] While the First, Fifth, and Tenth Circuits have all issued opinions subscribing to this view, the logic behind the one-day-late rule has led to questions about the seemingly harsh impact that this policy has on many debtors.[23] For example, in *Mallo v. IRS (In re Mallo)*, the Tenth Circuit specifically held that courts do not need to evaluate whether a debtor made an honest and reasonable attempt to satisfy the requirements of the tax law because filing deadline dates are part

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[16] 666 F.3d at 932 (holding that because the debtor's 1998 and 1998 returns were filed late, they did not constitute "returns" for discharge purposes). The rule established in *In re McCoy* will be hereinafter referred to as the "one-day-late rule."

[17] *See, e.g.*, *In re* Fahey, 779 F.3d 1, 10–11 (1st Cir. 2015); *In re* Mallo, 774 F.3d 1313, 1328 (10th Cir. 2014). *See generally In re* McCoy, 666 F.3d at 932 ("[The debtor's] 1998 and 1999 returns did not comply with the filing requirements of applicable Mississippi tax law and were, therefore, not 'returns' for discharge purposes.").

[18] 11 U.S.C. § 523(a)(*).

[19] *See In re* McCoy, 666 F.3d at 928 ("Section 6020(a) returns are those in which a taxpayer who has failed to file his or her returns on time nonetheless discloses all information necessary for the IRS to prepare a substitute return that the taxpayer can then sign and submit.").

[20] 11 U.S.C. § 523(a)(*).

[21] *See* 26 U.S.C. § 6020(a) (2012).

[22] *See, e.g.*, *In re* Mallo, 774 F.3d at 1328 (holding that debt resulting from a late-filed 1040 federal tax return was not dischargeable in bankruptcy); *In re* McCoy, 666 F.3d at 932 (holding that debt resulting from a late-filed state tax return was not dischargeable in bankruptcy).

[23] *See In re* Fahey, 779 F.3d 1, 10–11 (1st Cir. 2015); *In re* Mallo, 774 F.3d at 1327; *In re* McCoy, 666 F.3d at 931.

of the applicable filing requirements that Congress discussed in the hanging paragraph.[24] While Congress never mentioned displacing the *Beard* test in the BAPCPA amendments, the one-day-late rule is, in effect, a complete departure from the *Beard* test.[25]

The second group of courts, which includes the Ninth Circuit, various district courts, and bankruptcy courts, have held that a late-filed tax form can be a return, and the debt can be dischargeable as long as the *Beard* test and applicable Code requirements have been met.[26] Two further splits exist among the courts holding that a late-filed tax form can be a return. While some courts opposing the one-day-late rule have held that a debt resulting from a late-filed tax form is only dischargeable if the individual seeking a discharge filed tax forms prior to the IRS filing a § 6020(b) substitute return[27] on the taxpayer's behalf, other courts have held that a debt stemming from a late-filed return may be dischargeable even after the IRS files a § 6020(b) substitute return.[28] Additionally, the latter group of courts is further split regarding what additional factors a court must look at to determine if an individual has complied with the fourth prong of the *Beard* test.[29]

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[24] *In re* Mallo, 774 F.3d at 1320.

[25] *See In re* Maitland, 531 B.R. 516, 521, 522 (Bankr. D.N.J. 2015).

[26] *See* Smith v. IRS (*In re* Smith), 828 F.3d 1094, 1097 (9th Cir. 2016), *petition for cert. filed*, (U.S. Oct. 13, 2016) (No. 16-497); *In re* Maitland, 531 B.R. at 521; McBride v. City of Kettering (*In re* McBride), 534 B.R. 326, 336 (Bankr. S.D. Ohio 2015); Martin v. IRS (*In re* Martin) (*Martin I*), 508 B.R. 717, 736 (Bankr. E.D. Cal. 2014), *vacated on other grounds*, 542 B.R. 479 (B.A.P. 9th Cir. 2015); Rhodes v. United States (*In re* Rhodes), 498 B.R. 357, 370 (Bankr. N.D. Ga. 2013). At the time of publication, the Supreme Court had not yet accepted or rejected the petition for certiorari in *In re Smith*.

[27] *See* 26 U.S.C. § 6020(b)(1) (2012). Section 6020(b) forms are late-filed tax forms *filed by the IRS on behalf of an individual* with no confirmation or signature from the individual filer. *See id.*

[28] *Compare* Pitts v. United States (*In re* Pitts), 497 B.R. 73, 81 (Bankr. C.D. Cal. 2013) (holding that "if the late return was filed prior to any assessment by the IRS, then the taxes would be dischargeable under § 523(a)(1)(B)"), *aff'd*, 515 B.R. 317 (C.D. Cal. 2014), *with Martin I*, 508 B.R. at 731 ("[T]he Court is persuaded that the most reasonable and consistent interpretation of the hanging paragraph comes from the minority no time-limit-approach, derived from the Eighth Circuit's Pre-BAPCPA decision in *Colsen* also applying the *Beard* test.").

[29] *Compare* United States v. Martin (*In re* Martin) (*Martin II*), 542 B.R. 479, 491 (B.A.P. 9th Cir. 2015) (holding that the court must look at the "number of missing returns, the length of the delay, the reasons for the delay, and any other circumstances reasonably pertaining to the honesty and reasonableness of the [debtor's] efforts"), *with* Briggs v. IRS (*In re* Briggs), 511 B.R. 707, 719 (Bankr. N.D. GA. 2014) ("The focus on the 'honest and reasonable' inquiry under the *Beard* test should therefore be whether the debtor's filing represents his honest attempt to reasonably convey accurate information regarding the debtor's wages, deductions, and allowances.").

Therefore, three viewpoints exist among the courts opposing the one-day-late rule: (1) a late filed tax form can only be a return if the form is filed prior to the IRS filing a § 6020(b) substitute return on the filer's behalf;[30] (2) the IRS filing a § 6020(b) return is one of many factors that a court *must* consider when determining if a late filed form is a return;[31] and (3) the IRS filing a § 6020(b) return has no effect on this determination, and a late-filed form is a return if the document is useful to the IRS at the time of filing.[32]

The three viewpoints opposing the one-day-late rule center around the ideas that the BAPCPA amendments should not displace the *Beard* test, and that Congress's definition of "return" is harmonious with the pre-BAPCPA *Beard* test.[33] These courts agree that a late-filed tax form can meet the definition of a return in certain situations. For example, in *Maitland v. New Jersey, Division of Taxation (In re Maitland)*, the New Jersey Bankruptcy Court held that a debtor's tax documents, which were filed one year late, constituted a return because the debtor satisfied the four elements of the *Beard* test.[34] The court based its opinion on both the rules of statutory interpretation and Judge Easterbrook's dissent in the Seventh Circuit's decision in *In re Payne*.[35] While the majority in *In re Payne* did not rely on the language in the hanging paragraph (because the debt in question arose prior to the effective date of BAPCPA),[36] Judge Easterbrook used his dissent to explain that late-filed forms are still "returns" before he correctly predicted that the language in the BAPCPA amendments will lead courts to preclude debts arising from these returns from dischargeability.[37] Following *In re Payne*, many courts opposing the one-day-late rule have relied on Judge Easterbrook's idea that "[j]udges

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30 *See In re* Pitts, 497 B.R. at 83–84.

31 *See Martin II*, 542 B.R. at 490–91.

32 *See In re* Briggs, 511 B.R. at 715, 719.

33 *See In re* Maitland, 531 B.R. 516, 522 (Bankr. D.N.J. 2015); *see also Martin I*, 508 B.R. at 731; *In re* Rhodes, 498 B.R. 357, 370 (Bankr. N.D. Ga. 2013).

34 *See In re* Maitland, 531 B.R. at 520.

35 *See id.* (discussing Judge Easterbrook's dissent from the Seventh Circuit's decision in *In re Payne*, 431 F.3d 1055, 1060 (7th Cir. 2005) (Easterbrook, J., dissenting)).

36 When evaluating the various court decisions on this topic, it is important to remember that any holding involving a bankruptcy petition filed before the effective date of BAPCPA (October 17, 2005) was not analyzed under the language of the hanging paragraph.

37 *See In re* Payne, 431 F.3d at 1060 (Easterbrook, J., dissenting) ("After the 2005 legislation, an untimely return can not lead to a discharge—recall that the new language refers to 'applicable nonbankruptcy law (including applicable filing requirements).' But to say that a document came too late to allow a discharge in cases commenced after October 2005 (when the amendment took effect) is not to say that it wasn't a 'return' in 1992, when [a debtor] filed it, or for that matter today.").

should not fiddle with the definition of 'return' so that one word covers *all* important steps in a system of self-assessment"[38] to support the notion that Congress intended for the hanging paragraph's definition of "return" to be a codified version of the long-standing *Beard* test.[39]

Although Congress passed the BAPCPA amendments in an effort to clarify certain ambiguities within the Code, there is no evidence that Congress intended to impose a strict temporal deadline that would cost struggling Americans the ability to discharge their income tax debts in bankruptcy. Ultimately, the one-day-late interpretation is flawed, largely due to the unnecessarily harsh result that it has on honest, law-abiding debtors. Courts following the one-day-late interpretation are punishing debtors, who previously would have had access to a discharge, without any consideration as to the reasoning behind the debtor's late filing. It is commonly understood that the purpose of bankruptcy is "to grant a fresh start to the 'honest but unfortunate debtor.'"[40] "When a dispute [regarding § 523] arises, these exceptions to discharge should be strictly construed against the creditor in light of the 'fresh start' policy underlying the Code."[41] Although it may not be possible in every debtor's case, American courts have long applied these principles when interpreting the Code.[42]

The issue that this Comment addresses should be resolved through an evaluation of Congress's intent in light of the purpose of bankruptcy in America. As a result, this Comment argues that the court's analysis in *United States v. Martin (In re Martin)* ("*Martin II*"), which was recently adopted by the Ninth Circuit in *Smith v. IRS (In re Smith)*, is the correct interpretation of the hanging paragraph and proposes an amendment to § 523(a)(*) that will help clarify Congress's definition of "return."[43]

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[38] *Id.* at 1061.

[39] *See* Colsen v. United States (*In re* Colsen), 446 F.3d 836, 840 (8th Cir. 2006); *In re* Maitland, 531 B.R. at 520; *In re* McBride, 534 B.R. 326, 336 (Bankr. S.D. Ohio 2015).

[40] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934) ("[Bankruptcy law] gives to the honest but unfortunate debtor . . . a new opportunity in life and a clear field for the future, unhampered by the pressure and discouragement of preexisting debt."); *In re Maitlan*d, 531 B.R. at 521 (citing Marrama v. Citizens Bank of Mass., 549 U.S. 365, 373 (2007)).

[41] *Martin I*, 508 B.R. 717, 722–23 (Bankr. E.D. Cal 2014), *vacated on other grounds*, 542 B.R. 479 (B.A.P. 9th Cir. 2015); *see also In re* Riso, 978 F.2d 1151, 1154 (9th Cir. 1992).

[42] *See Local Loan Co.*, 292 U.S. at 244–45.

[43] *See Martin II*, 542 B.R. 479, 488–91 (B.A.P. 9th Cir. 2015) (holding that the *Beard* test still applies following the BAPCPA amendments); *see also In re* Smith, 828 F.3d 1094, 1096–97 (9th Cir. 2016), *petition for cert. filed*, (U.S. Oct. 13, 2016) (No. 16-497).

## BACKGROUND

### I. DISCHARGEABILITY OF DEBT STEMMING FROM LATE-FILED TAX FORMS PRIOR TO BAPCPA

Prior to BAPCPA, many debtors were able to discharge tax debt in chapter 7 as long as they satisfied certain rules. Under the pre-BAPCPA rules, the majority of courts allowed for an individual to discharge debt resulting from a late-filed, non-fraudulent tax form when the *Beard* test[44] and the following four statutory requirements were met: (1) three years had passed from the time that the tax return leading to the debt was due;[45] (2) the tax return was filed more than two years prior to the debtor's bankruptcy petition;[46] (3) at least 240 days had passed since the date of an IRS assessment;[47] and (4) the individual filing the return had not engaged in a willful attempt to evade the tax law.[48] The central issue before the BAPCPA amendments turned on the question of whether an individual's late-filed tax forms could comply with the fourth prong of the *Beard* test, which required an honest attempt to satisfy the requirements of the tax law, if the individual filed the form after the IRS already assessed that individual's tax liability.[49]

#### *A. The Post-Assessment Issue*

Before Congress passed the BAPCPA amendments in 2005, the majority of courts agreed that a late-filed tax form could be a "return" for § 523(a) purposes if the *Beard* test was satisfied.[50] Further, the majority of courts found

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[44] *See In re* Maitland, 531 B.R. at 518 (stating that the *Beard* test classified a document as a return when the document "(1) purport[ed] to be a return; (2) [was] executed by the debtor under penalty of perjury; (3) contain[ed] sufficient data to allow calculation of the tax; and (4) represent[ed] an honest and reasonable attempt to satisfy the requirements of the tax law").

[45] *See* 11 U.S.C. § 523(a)(7)(B) (2012).

[46] *See id.* § 523(a)(1)(B)(ii).

[47] *See id*. § 523(a)(1)(A).

[48] *See id*. § 523(a)(1)(C); *see also* Donald A. Ariail et al., *Discharging Taxes in Bankruptcy*, J. ACCOUNTANCY, Aug. 2010, at 58, http://www.journalofaccountancy.com/issues/2010/aug/20102591.html.

[49] *See, e.g.*, United States v. Klein (*In re* Klein), 312 B.R. 443, 447 (S.D. Fla. 2004) ("The question considered by the Bankruptcy Court here relates to the [h]onest and [r]easonable [a]ttempt prong of the *Beard* test. The narrow issue is whether Appellee's 1990 and 1991 1040 Forms, filed after the IRS prepared SFRs and assessed taxes ('post-assessment'), constitute an honest and reasonable attempt by Appellee to satisfy the requirements of the tax law."); United States v. Ralph (*In re* Ralph), 266 B.R. 217, 220 (M.D. Fla. 2001) ("The dispute in this case revolves around whether the Forms 1040EZ filed by Debtor Donna Ralph in 1995 constitute an honest and genuine endeavor to satisfy the law.").

[50] *In re* Payne, 431 F.3d 1055, 1057 (7th Cir. 2005) (listing circuits that have adopted the *Beard* test).

that debt arising from a late-filed return was dischargeable in cases where the debtor made an honest and reasonable attempt to file his or her own return *prior* to the IRS filing a substitute return on the debtor's behalf.[51] Circuit courts that dealt with late-filed tax forms filed prior to an assessment disagreed, however, as to when a debtor's late-filed return constituted an honest and reasonable attempt to satisfy the tax law.[52] Further, a split exists among circuit courts regarding whether tax debt stemming from a tax form filed *after* the IRS already assessed a debtor's liability constituted as an honest and reasonable attempt.

An IRS assessment is a determination of how much an individual taxpayer owes in taxes and penalties.[53] This assessment typically occurs immediately after an individual files his or her own tax return.[54] In cases where an individual has failed to file a timely return, the IRS will send a notice alerting the individual of his or her failure to file.[55] If the individual responds to the notice, the IRS has discretion to allow the individual, with assistance of the IRS, to file a § 6020(a) return.[56] If the individual does not respond to the notice, the IRS will eventually prepare a § 6020(b) substitute return on behalf of that individual.[57] The IRS will then notify the individual of the § 6020(b) substitute return.[58] At this point, the IRS recommends that the debtor file tax forms even after a § 6020(b) form is filed on the debtor's behalf because "[t]he IRS will generally adjust your account to reflect the correct figures."[59] Finally, if the individual does not respond to the notice or execute the § 6020(b) substitute return the IRS prepared, the IRS will assess the individual's liability based on any data that the IRS has access to at that time.[60] Following

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[51] *See In re* Moroney, 352 F.3d 902, 906 (4th Cir. 2004) ("We hold then that income tax forms unjustifiably filed years late, where the IRS has already prepared substitute returns and assessed taxes, do not constitute 'returns' for purposes of 11 U.S.C. § 523(a)(1)(B)(i)."); *In re* Hindenlang, 164 F.3d 1029, 1034 (6th Cir. 1999).

[52] *See, e.g.*, *In re* Hindenlang, 164 F.3d at 1034 (explaining the further circuit split).

[53] *See* Vince Bethel, *The IRS Assessment and Demand Process*, HOUS. CHRON., http://smallbusiness.chron.com/irs-assessment-demand-process-22721.html (last visited Aug. 26, 2016).

[54] *Id.*

[55] *Id.*

[56] *See* 26 U.S.C. § 6020(a) (2012).

[57] *Filing Past Due Tax Returns*, IRS, https://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Filing-Past-Due-Tax-Returns (last updated June 9, 2016).

[58] *Id.*

[59] *Id.*

[60] *See* Bethel, *supra* note 53.

confirmation of the individual's liability, the IRS will continue to seek payment on the original tax liability and any penalties that may have accrued.[61]

While the *Beard* test contains four elements, the fourth element, which states that a tax form must represent an honest and reasonable attempt to satisfy the requirements of the tax law,[62] is the element that has led to the most disagreement among courts.[63] This disagreement stems from each court's effort to determine what constitutes an honest and reasonable attempt to satisfy the requirements of the tax law.

### *B. The Minority View of the Post-Assessment Issue*

Prior to the BAPCPA amendments, post-assessment tax forms were evaluated based on the court's analysis of the debtor's compliance with the fourth element of the *Beard* test.[64] This methodology led some courts to conclude that late-filed post-assessment tax forms are returns (and thus dischargeable) if they meet both the *Beard* test and applicable Code requirements,[65] because "[t]o be a return, a form is required to 'evince' an honest and genuine attempt to satisfy the laws [and] [t]his does not require inquiry into the circumstances under which a document was filed."[66] Under this view, courts examined whether the filer included the necessary information in his tax forms, as opposed to the time or manner in which the forms were filed.[67]

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61 *Filing Past Due Tax Returns*, *supra* note 57.

62 *See* 26 U.S.C. § 6011(a) (2012) ("When required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.").

63 *See In re* Maitland, 531 B.R. 516, 518 (Bankr. D.N.J. 2015).

64 *See, e.g.*, *In re* Klein, 312 B.R. 443, 447 (S.D. Fla. 2004) ("The question considered by the Bankruptcy Court here relates to the [h]onest and [r]easonable [a]ttempt prong of the *Beard* test. The narrow issue is whether Appellee's 1990 and 1991 1040 Forms, filed after the IRS prepared SFRs and assessed taxes ('post-assessment'), constitute an honest and reasonable attempt by Appellee to satisfy the requirements of the tax law."); *In re* Ralph, 266 B.R. 217, 220 (M.D. Fla. 2001) ("The dispute in this case revolves around whether the Forms 1040EZ filed by Debtor Donna Ralph in 1995 constitute an honest and genuine endeavor to satisfy the law.").

65 *See supra* text accompanying notes 36–39.

66 *In re* Colsen, 446 F.3d 836, 840 (8th Cir. 2006).

67 *See In re* Rhodes, 498 B.R. 357, 370 (Bankr. N.D. Ga. 2013) (citing *In re* Colsen, 446 F.3d at 840; and then citing *In re* Payne, 431 F.3d 1055, 1061 (7th Cir. 2005) (Easterbrook, J., dissenting)).

Courts opposing the one-day-late rule have consistently cited language from the Eighth Circuit's decision in *Colsen v. United States (In re Colsen)* and Judge Easterbrook's dissent in *In re Payne* to support the idea that Congress never intended to restrict what constitutes a return based on a strict time-based deadline.[68] *In re Payne* involved an individual's failure to file a tax return between 1986 and 1992.[69] In 1990, the IRS assessed Payne's liability for his 1986 income. Payne finally filed his 1986 return in 1992 and later sought to have his 1986 debt discharged through a 1997 bankruptcy filing.[70] While the majority in *In re Payne* held that the debtor's late-filed form did not comply with the *Beard* test, Judge Easterbrook used his dissent to show why a late-filed form should still be considered a return.[71]

Judge Easterbrook's concern with the majority's opinion in *In re Payne* centered around the majority's view that a document "filed after the authorities have borne [the] burden [of calculating the amount due] does not serve the purpose of the filing requirement."[72] As Judge Easterbrook noted, the IRS does not agree with the majority's view: "Any taxpayer who wants to propose a compromise of his tax liabilities *must* file a return, even if the Service already has gone to the trouble of calculating and assessing the tax without his help."[73] The Treasury Department, therefore, must believe that a late-filed post-assessment filing has some use, or the department would not have gone through the trouble to include this requirement within the Treasury Regulations.[74] Judge Easterbrook explained that a form filed post-assessment can still be useful because it provides concrete facts regarding the filer's tax information, and these facts can then replace the estimates that the IRS *must rely on* when filing a § 6020(b) substitute return on behalf of an individual who filed no return at all.[75]

While Judge Easterbrook primarily attacked the courts that support the notion that a tax form filed after an IRS assessment is useless and therefore not a return, he also correctly predicted that courts would likely interpret BAPCPA

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68 *See In re* Maitland, 531 B.R. at 520; *In re* Briggs, 511 B.R. 707, 718 (Bankr. N.D. Ga. 2014).
69 431 F.3d 1055, 1056 (7th Cir. 2005).
70 *Id.*
71 *See id.* at 1060–61 (Easterbrook, J., dissenting).
72 *Id.* at 1057 (majority opinion).
73 *Id.* at 1060 (Easterbrook, J., dissenting) (citing 26 C.F.R § 301.7122-1(d)).
74 *Id.*
75 *Id.*

to preclude discharging any debt resulting from a late-filed tax form.[76] Despite Judge Easterbrook's correct prediction, his explanation of why a post-assessment tax form is still useful lends support to the idea that a tax form filed after April 15th should be considered a return, because the form remains useful to the IRS regardless of the date on which the form was filed.[77]

*In re Colsen*, a 2006 Eighth Circuit decision, was the last circuit court decision that relied on the pre-BAPCPA language to form its opinion.[78] *In re Colsen* involved an individual who failed to file his income tax returns from 1992 through 1996.[79] The IRS assessed his liability in 1999, and Mr. Colsen filed his returns a few months after the assessment. Mr. Colsen eventually filed a bankruptcy petition in 2003 and sought to have his debt resulting from these late-filed forms discharged.[80]

The Eighth Circuit concluded that timely filing is not relevant when determining if a document is a return[81] and relied heavily on Judge Easterbrook's dissent from *In re Payne*.[82] Specifically, the court based its holding on Judge Easterbrook's two suggestions that (1) timely filing and satisfaction of one's financial obligations are requirements distinct from the definition of a "return," and (2) "the relevant legal provisions were the ones that required the taxpayers yield all financial information necessary for calculation of their tax liabilities."[83] The relevant legal provision prior to BAPCPA was the *Beard* test, and the court determined that "it had been offered no persuasive reason to create a more subjective definition of 'return' that is dependent on the facts and circumstances of a taxpayer's filing."[84] Judge Easterbrook's notion that courts should focus on the content of the tax forms led the Eighth Circuit to hold that the fourth factor of the *Beard* test, which

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[76] *See id.* at 1060–61.

[77] *See In re* Maitland, 531 B.R. 516, 520 (Bankr. D.N.J. 2015) ("Judge Easterbrook noted that 'timely filing and satisfaction of one's financial obligations are requirements distinct from the definition of a "return"' and he argued that the relevant legal provisions were the ones that require taxpayers yield all financial information necessary for calculation of their tax liabilities.") (quoting *In re* Payne, 431 F.3d at 1061) (Easterbrook, J., dissenting)).

[78] 446 F.3d 836, 839 (8th Cir. 2006) ("But we do not apply that [BAPCPA] language here because Mr. Colsen's bankruptcy petition was filed before the Act's effective date.").

[79] *See id.* at 838.

[80] *See id.*

[81] *Id.* at 840.

[82] *See id.* (citing *In re* Payne, 431 F.3d at 1060–63 (Easterbrook, J., dissenting)).

[83] *Id.* (citing *In re* Payne, 431 F.3d at 1060–61 (Easterbrook, J., dissenting)).

[84] *Id.*

requires that a filer's tax forms must represent an honest and reasonable attempt to comply with tax law, should be evaluated based on whether the individual filer's tax forms provide accurate and necessary information, regardless of the time that the individual filed his forms.[85]

Additionally, the court in *In re Colsen* rejected the argument that a late-filed form can never be useful to the IRS.[86] The reason that a post-assessment, late-filed form is useful is because the form still helps the IRS accurately calculate the filer's liability.[87] If an individual never files a tax form, the IRS must calculate that individual's liability without having access to that individual's complete financial records. Even though the late-filed form in *In re Colsen* did not allow the IRS to collect more taxes, the IRS still had a role in determining the debtor's liability following the late-filed forms because the court considered "the accurate calculation of a taxpayer's obligations . . . to be a valid purpose that satisfies the tax laws."[88]

### *C. The Majority View of the Post-Assessment Issue*

Conversely, the majority of courts reached the conclusion that, absent extreme extenuating circumstances, late-filed tax forms are not returns once the IRS has assessed a penalty because a late-filed return serves no purpose once the IRS has assessed a debtor's liability.[89] The result of the majority view is that an individual who misses the April 15th filing date and fails to file tax forms before the IRS assesses a penalty against that individual is barred from receiving a discharge of the tax debt related to the late-filed forms. Courts following this view focused primarily on the debtor's act of filing late, as opposed to the content of the tax forms, and made a blanket determination that an assessment is essentially the last time that the IRS has any use for an individual's tax forms.[90]

The Fourth,[91] Sixth,[92] Seventh,[93] and Ninth Circuits[94] issued opinions following this majority view. These circuits held that the fourth prong of the

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85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.* at 841.

89 *See In re* Payne, 431 F.3d at 1058; *In re* Moroney, 352 F.3d 902, 904 (4th Cir. 2003); *In re* Hindenlang, 164 F.3d 1029, 1034 (6th Cir. 1999).

90 *In re* Payne, 431 F.3d at 1058; *In re* Moroney, 352 F.3d at 904; *In re* Hindenlang, 164 F.3d at 1034.

91 *In re* Moroney, 352 F.3d at 904.

*Beard* test turns on the subjective intent of the debtor in attempting to comply with the tax laws, as opposed to the usefulness of the late-filed document.[95] Under the majority view, a tax form filed after the IRS performed an assessment is not dischargeable because "forms filed after an involuntary assessment do not serve the purposes of the tax system."[96]

The majority view originated in *United States v. Hindenlang (In re Hindenlang)*, a 1999 Sixth Circuit decision where the court presented the view that the fourth factor of the *Beard* test creates a strong presumption that tax forms filed after an IRS assessment are not returns.[97] *In re Hindenlang* involved an individual who failed to file his income tax returns for the years 1985 through 1988.[98] The IRS prepared substitute returns in 1990 and received no response from Mr. Hindenlang.[99] Finally, the IRS assessed Mr. Hindelang's liability in 1991. Mr. Hindenlang filed his missing returns in 1993 and later filed a bankruptcy petition in 1996.[100] Mr. Hindenlang sought to have his debt resulting from the 1985 through 1988 tax years discharged.[101]

The Sixth Circuit evaluated the fourth prong of the *Beard* test and found that "[i]f a document purporting to be a tax return serves no purpose at all under the Internal Revenue Code, such a document cannot, as a matter of law, qualify as an honest and reasonable attempt to satisfy the requirements of the tax law."[102] This opinion is interesting, however, in that the court first raised a hypothetical situation where a debtor's post-assessment filing could possibly comply with the *Beard* test, before declaring that it would "save resolution of that hypothetical case for another day."[103] The court's hypothetical involved a situation where a debtor's form filed post-assessment actually showed an increase in the debtor's liability when compared to the IRS's assessment

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92 *In re* Hindenlang, 164 F.3d at 1034.

93 *In re* Payne, 431 F.3d at 1058.

94 United States v. Hatton (*In re* Hatton), 220 F.3d 1057, 1061 (9th Cir. 2000).

95 *See In re* Payne, 431 F.3d at 1057; *In re* Moroney, 352 F.3d at 906; *In re* Hatton, 220 F.3d at 1061; *In re* Hindenlang, 164 F.3d at 1029.

96 *In re* Moroney, 352 F.3d at 905; *see In re* Payne, 431 F.3d at 1057; *In re* Hatton, 220 F.3d at 1061; *In re* Hindenlang, 164 F.3d at 1035.

97 *In re* Hindenlang, 164 F.3d at 1035.

98 *See id.* at 1031.

99 *See id.*

100 *See id.*

101 *See id.*

102 *Id.* at 1035.

103 *Id.* at 1035 n.7.

estimates.[104] While the court did not fully evaluate the scenario, the debt in this hypothetical seems to be dischargeable under the Sixth Circuit's interpretation because the taxpayer made an honest and reasonable attempt to comply with the law regarding the additional liability.[105] "[W]hether [the debtor's] eventual effort had some effect on his tax liability," therefore, is irrelevant in cases where the debtor fails to file a return until after the IRS has assessed that individual's liability because tax forms were only considered to be a return if the debtor "made an honest and reasonable effort to comply with the tax laws."[106]

While the Fourth and Ninth Circuit's holdings in *Moroney v. IRS (In re Moroney)* and *United States v. Hatton (In re Hatton)* did preclude the possibility of discharging a tax debt in most cases involving post-assessment tax forms, both the Ninth and Fourth Circuits followed *In re Hindenlang* and left open the possibility that a post-assessment filing could qualify as a return for dischargeability purposes under extenuating circumstances.[107] What, if any, extenuating circumstances would allow for this possibility was never fully analyzed prior to the passage of BAPCPA.

## II. THE ONE-DAY-LATE RULE: AN OVERVIEW OF RELEVANT CIRCUIT COURT DECISIONS FOLLOWING BAPCPA

Following the 2005 BAPCPA amendments, a split developed among the circuit courts as to the proper interpretation of the hanging paragraph. While the Fifth, Tenth, and First Circuits held that a tax form filed after April 15th cannot qualify as a return for dischargeability purposes, the Ninth Circuit recently held that the pre-BAPCPA *Beard* test was still the correct method for determining whether a late-filed tax form qualifies as a return.[108]

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104 *See id.* at 1034 n.5.

105 *Id.*

106 *In re* Moroney, 352 F.3d 902, 906 (4th Cir. 2003).

107 *See id.* at 907 ("Circumstances not presented in this case might demonstrate that the debtor, despite his delinquency, had attempted in good faith to comply with the laws."); *In re* Hatton, 220 F.3d 1057, 1061 (9th Cir. 2000).

108 *See In re* Fahey, 779 F.3d 1, 10 (1st Cir. 2015); *In re* Mallo, 774 F.3d 1313, 1325 (10th Cir. 2014) (finding it was not necessary to resolve whether a post-assessment Form 1040 could be an honest and reasonable attempt to satisfy the requirements of the tax law for purposes of the *Beard* test because under § 523(a) a "return" had to comply with applicable filing requirements); *In re* McCoy, 666 F.3d 924, 932 (5th Cir. 2012) ("[A] state income tax return that is filed late under the applicable nonbankruptcy state law is not a 'return' for bankruptcy discharge purposes under § 523(a)."). *But see In re* Smith, 828 F.3d 1094, 1097 (9th Cir. 2016) (determining that "*Hatton* applies to the bankruptcy code as amended, and that [the debtor's] tax

While Congress intended for the BAPCPA amendments to clarify certain inconsistencies in the Code, courts have split on the proper interpretation of the hanging paragraph, and the assessment issue has not been fully resolved.[109] The First, Fifth, and Tenth Circuits follow the one-day-late rule, holding that filing deadlines are part of the "applicable filing requirements" that Congress mentions in the hanging paragraph.[110] Proponents of the one-day-late rule, which the Fifth Circuit first discussed in *In re McCoy*, maintain that a tax form filed even one day late is not a return, and any debt arising from a late form is not dischargeable in bankruptcy.[111] On the other hand, the Ninth Circuit,[112] bankruptcy courts,[113] the IRS,[114] and dicta by the Eighth Circuit[115] have rejected the one-day-late rule and presented alternative interpretations of the hanging paragraph.

### *A.* In re McCoy*: The First Appearance of the One-Day-Late Interpretation*

In *In re McCoy*, the Fifth Circuit held that late-filed tax forms are not returns unless the form was filed with the assistance of the IRS under

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filing, made seven years late and three years after the IRS assessed a deficiency against him, was not an 'honest and reasonable' attempt to comply with the tax code"), *petition for cert. filed*, (U.S. Oct. 13, 2016) (No. 16-497).

109 *Compare In re* McCoy, 666 F.3d at 932 ("[A] state income tax return that is filed late under the applicable nonbankruptcy state law is not a 'return' for bankruptcy discharge purposes under § 523(a)."), *with In re* Smith, 828 F.3d at 1097 (determining that "*Hatton* applies to the bankruptcy code as amended, and that [the debtor's] tax filing, made seven years late and three years after the IRS assessed a deficiency against him, was not an 'honest and reasonable' attempt to comply with the tax code"). *See generally* Stephen J. Csontos, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: Impact on Federal Taxes*, 54 U.S. ATTY'S BULL., no. 4, July 2006, at 16.

110 *See In re* Fahey, 779 F.3d at 10; *In re* Mallo, 774 F.3d at 1325; *In re* McCoy, 666 F.3d at 932.

111 *See In re* McCoy, 666 F.3d at 932 (holding that the debtor's failure to file in the time required under Mississippi's tax law was a failure to satisfy the applicable nonbankruptcy law § 523(a), meaning the debtor's late-filed returns could not be considered tax returns for bankruptcy discharge purposes under the plain language of the statute).

112 *See In re* Smith, 828 F.3d at 1096.

113 *See In re* Maitland, 531 B.R. 516, 522 (Bankr. D.N.J. 2015); *In re* McBride, 534 B.R. 326, 336 (Bankr. S.D. Ohio 2015); *Martin I*, 508 B.R. 717, 731 (Bankr. E.D. Cal. 2014), *vacated on other grounds*, 542 B.R. 479 (B.A.P. 9th Cir. 2015); *In re* Rhodes, 498 B.R. 357, 370 (Bankr. N.D. Ga. 2013).

114 *See* I.R.S. Notice CC-2010-016 (Sept. 2, 2010) (stating that a late-filed tax debt can be discharged); I.R.S. Chief Counsel Advice No. 201044008 (Nov. 5, 2010).

115 *In re* Colsen, 446 F.3d 836, 840 (8th Cir. 2006). Although the court did not rely directly on the BAPCPA language because the debtor filed his petition prior to the act's effective date, the Court agreed with Judge Easterbrook's dissent in *In re Payne* and stated, "[w]e have been offered no persuasive reason to create a more subjective definition of "return" that is dependent on the facts and circumstances of a taxpayer's filing." *Id.*

§ 6020(a).[116] *In re McCoy* involved a debtor, who was granted a chapter 7 discharge in early 2008, suing the Mississippi State Tax Commission. This debtor sought to have the court declare that the debtor's pre-petition debt arising from late-filed state tax forms was discharged when her chapter 7 discharge was granted.[117] The court interpreted the hanging paragraph to mean that the Mississippi Tax Code is an "applicable filing requirement" for determining the dischargeability of a tax debt.[118] The practical result is that April 15th, which is mentioned in the Mississippi Tax Code, is the deadline by which a tax return must be filed. Thus, the one-day-late rule stems from the Fifth Circuit's understanding that Congress clearly and unambiguously intended for the phrase "applicable non-bankruptcy law (including applicable filing requirements)" in the hanging paragraph to include the date on which a tax form is filed.

While the consequence of *In re McCoy* is that debt resulting from a late-filed tax form is basically nondischargeable, the court maintained that the one-day-late rule is consistent "with the [*Beard*] test's emphasis 'that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax . . . can be computed,' a proper return has been filed."[119] The Fifth Circuit did not clarify, however, how the one-day-late rule can be consistent with the *Beard* test when a tax form filed in a jurisdiction following the *Beard* test is valid in situations where the debtor filed the form in good faith and provided all the information necessary to assess the tax.[120] Additionally, the Fifth Circuit claimed that the House Report discussing BAPCPA, which mentioned a desire to close loopholes in the Code, provided support for the one-day-late interpretation.[121] The legislative history, however, does not appear to support the Fifth Circuit's position, and the one-day-late rule actually creates a new loophole in the Code.[122]

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116 *See In re* McCoy, 666 F.at 932.

117 *See id.* at 925.

118 *Id.* at 928 (discussing MISS. CODE ANN. § 27-7-41, which states that taxes should be filed either by April 15th or the 15th day of the fourth month of the year).

119 *Id.* at 931 (citing *In re* Hindenlang, 164 F.3d 1029, 1033 (6th Cir. 1999) (internal citation omitted)).

120 *See* 11 U.S.C. § 523(a)(*) (2012).

121 *See In re* McCoy, 666 F.3d at 931 ("BAPCPA was passed, in part, to address the problem of the 'bankruptcy system hav[ing] loopholes and incentives that allow–and–sometimes even encourage opportunistic personal filings and abuse.'").

122 *See* discussion *infra* Section II.C.

### *B. IRS Opposition to the One-Day-Late Rule and the Tenth Circuit's Response*

In 2010, the IRS Office of Chief Counsel released a Notice that addressed the topic of dischargeability that stated: "A form 1040 is not disqualified as a 'return' under section 523(a) solely because it was filed late."[123] The IRS reasoned that a debt does not actually arise until an individual has failed to file a return, *and* the IRS has filed an assessment.[124] This simple-to-apply viewpoint would allow for the discharge of debt resulting from late-filed tax forms in cases where a debtor filed his or her own tax forms prior to the IRS assessing the debtor's liability. The IRS contended that Congress did not intend for its definition of "return" to include a strict temporal element.[125]

After the Fifth Circuit established the one-day-late rule in *In re McCoy*, the Tenth Circuit's 2014 *In re Mallo* decision directly addressed the IRS's position.[126] In *In re Mallo*, the Tenth Circuit dismissed the IRS's position and maintained that the assessment process is irrelevant for determining whether a debt arising from a late-filed return is dischargeable because, "if Congress wished to make the process relevant to discharge of tax debts, it could have easily done so."[127] Although courts are bound by statutory language and the role of a judge is not to legislate, the Tenth Circuit's entire interpretation is built on reading into § 523(a) a temporal element that Congress never discussed in its amendments.[128] Numerous bankruptcy courts have properly rejected the Tenth Circuit's interpretation of the hanging paragraph, and this disagreement will be discussed further in the analysis below.[129]

### *C. Judge Thompson's* In re Fahey *Dissent*

The next major discussion regarding the hanging paragraph appeared in the First Circuit's 2015 decision, *Fahey v. Massachusetts Department of Revenue (In re Fahey)*.[130] While the majority in *In re Fahey* did little more than agree

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123 I.R.S. Notice, *supra* note 114.

124 *Id.*

125 *Id.*

126 774 F.3d 1313, 1326 (10th Cir. 2014).

127 *Id.*

128 *See id.* at 1321–22.

129 *See In re* Maitland, 531 B.R. 516, 521 (Bankr. D.N.J. 2015) ("Congress could have easily excluded a late return, but it did not do so. In fact, there is no temporal element in the definition.").

130 779 F.3d 1, 10 (1st Cir. 2015).

with the Fifth and Tenth Circuits, Judge Thompson's dissent addressed issues regarding the one-day-late rule that may alter the course of future discussions on this topic.[131] *In re Fahey* involved a debt resulting from a state tax, and the First Circuit, like the Fifth Circuit in *In re McCoy*, held that a tax document filed after April 15th cannot be a valid tax return.[132] The majority found that:

> [I]t is more plausible that Congress intended to settle the dispute over late-filed tax returns against the debtor (who both fails to pay taxes and fails to file a return as required by law) than it is that Congress sought to settle some version of the unsettled four-pronged *Beard* test.[133]

The First Circuit therefore agreed with the Fifth Circuit and held that a tax form filed one day late can never qualify as a return *unless* it was filed with the assistance of the IRS under § 6020(a).

Judge Thompson dissented, detailing his issues with both the harsh effect that the one-day-late interpretation has on debtors, and the fact that the majority ignored the surrounding language of the statute to reach its conclusion. Judge Thompson maintained that the one-day-late rule leads to an absurd result because the rule punishes many law-abiding, honest individuals regardless of the individual's reason for filing late.[134] Judge Thompson thought that filing a tax form late should not automatically make debt stemming from that form non-dischargeable because, "[i]f the statute's language is plain, the sole function of the courts . . . is to enforce it according to its terms. In so doing, however, we only apply plain meaning if the statutory language is not ambiguous and would not 'lead to absurd results.'"[135]

Under the First Circuit's one-day-late analysis, he argued, the disposition required by the text would be absurd because individuals who are attempting to provide the IRS with relevant, valuable information regarding tax liability are being punished regardless of the reason for the late filing.[136] While the majority

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131 *See id.* at 13 (Thompson, J., dissenting).

132 *See id.* at 10.

133 *Id.*

134 *See id.* at 11 (Thompson, J., dissenting) ("[The majority's holding] simultaneously takes too academic and literal of an approach to its reading of one of the code's definitional provisions, leading to a result that defies common sense, while also conveniently ignoring the plain meaning of other words in the very same paragraph, in order to reach a certain outcome.").

135 *Id.* (quoting Morse v. Rudler (*In re* Rudler), 576 F.3d 37, 44 (1st Cir. 2009)).

136 *Id.* at 19.

claimed to rely on the "plain meaning" of the statute, Judge Thompson pointed out that in enforcing statutes according to their plain meaning, "we only apply plain meaning if the statutory language is not ambiguous and would not lead to absurd results."[137]

In addition to the absurdity of punishing every individual who files a tax form one day late regardless of the reason for filing late, Judge Thompson explained that the majority's interpretation requiring complete, perfect compliance with all the applicable filing requirements will only lead to more illogical results in situations—situations where it is unlikely Congress intended to preclude the possibility of a discharge.[138] These illogical results are impossible to avoid under the strict one-day-late interpretation because any individual who has failed to comply with every specific filing requirement will be barred from the possibility of receiving a discharge on a tax debt.

Additionally, Judge Thompson questioned why Congress would choose not to alter the language of § 523(a)(B)(ii),[139] which allows for the discharge of late-filed taxes as long as those returns were not filed within two years prior to the debtor's bankruptcy petition, if Congress intended to eliminate the possibility of discharging debt stemming from a late-filed return. "As the debtors appropriately urge, there would be no point in leaving Subsection (ii) the specific exception that deals with late filers–if Congress meant for the hanging paragraph to penalize everyone who misses filing deadlines."[140] As a result, Judge Thompson reasoned, it is not possible to accurately ascertain the plain meaning of one specific phrase within a subsection of a statute without looking at the surrounding sections of the statute.[141] Therefore, the majority's interpretation must be incorrect because the majority entirely ignored § 523(a)(B)(ii) when it determined that Congress intended for the phrase "includes a return prepared pursuant to section 6020(a),"[142] which appears in

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137 *Id.*

138 *See id.* at 11 n.16 (identifying that seemingly irrelevant issues, such as failing to properly staple documents, would ultimately have to preclude the possibility of a discharge because the document did not comply with the applicable filing requirements).

139 11 U.S.C. § 523(a)(B)(ii) (2012) ("A discharge under § 727 . . . does not discharge an individual from any debt – for a tax or a customs duty . . . with respect to which a return, or equivalent report or notice, if required . . . was filed or given after the date on which such return, report, or notice was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition . . . .").

140 *In re* Fahey, 779 F.3d at 13 (Thompson, J., dissenting).

141 *Id.* at 13–14.

142 *See* 11 U.S.C. § 523(a)(*).

the hanging paragraph, to be an exhaustive list of all the types of late-filed documents that may be considered returns for the purpose of discharge.[143] Judge Thompson explained that even by solely looking at the plain meaning, the logical interpretation of the word "includes" would not create an exhaustive list.[144]

Finally, the majority's interpretation rewards individuals who intentionally fail to file returns, are caught by the IRS, and agree to file forms with assistance of the IRS under § 6020(a).[145] While these individuals are still eligible for a discharge of this debt, a debtor who unintentionally missed the filing deadline and filed his own taxes one day late will never be able to receive a discharge.[146] As a result, the majority's interpretation appears to create a system that leaves open a loophole for individuals to exploit the bankruptcy discharge system. Judge Thompson's dissent succinctly raises the flaws in the First, Fifth, and Tenth Circuits' interpretations of the hanging paragraph, and his arguments will be further analyzed below.

### *D. The Ninth Circuit Declines to Adopt the One-Day-Late Rule*

Unlike the circuits following the one-day-late rule, the Ninth Circuit, in *IRS v. Smith (In re Smith)*, affirmed a district court's decision to apply the *Beard* test as opposed to the one-day-late rule.[147] Although the Ninth Circuit did not directly address the one-day-late late rule, the decision to continue using the *Beard* test as it had been applied prior to 2005 necessarily implies that the one-day-late rule cannot be the correct interpretation of the BAPCPA amendments. As a result, a split now exists among the circuit courts following the Ninth Circuit's holding.

In *In re Smith*, the District Court for the Northern District of California originally held that a late-filed form could be a return as long as the statutory requirements are satisfied, and the court has made a determination that the filer satisfied the *Beard* test.[148] The court reached this conclusion after finding that

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143 *In re* Fahey, 779 F.3d at 13 (Thompson, J., dissenting).

144 *Id.* at 14 ("If Congress intended the outcome espoused by the majority, it would have used different language (e.g., 'is limited to')—not the word includes.").

145 *Id.* at 18.

146 *Id.* at 13.

147 828 F.3d 1094, 1096 (9th Cir. 2016).

148 Smith v. IRS (*In re* Smith), 527 B.R. 14, 23 (N.D. Cal. 2014), *aff'd*, 828 F.3d 1094 (9th Cir. 2016), *petition for cert. filed*, (U.S. Oct. 13, 2016) (No. 16-497).

the *Beard* test requires courts to analyze all of the facts surrounding the late filing when determining whether a late-filed form qualifies as a return.[149] As a result, the *In re Smith* decision mirrors the Ninth Circuit Bankruptcy Appellate Panel's holding in *Martin II*, which is discussed in the following section. In affirming the district court's opinion, the Ninth Circuit undertook a subjective investigation of the facts surrounding the debtor's late filing and held that the debtor's tax forms were not a return because they were filed years after the IRS had already assessed the debtor's taxes.[150] Notably, the court also chose not to answer whether a tax return filed after an IRS assessment can ever be a return; thus, the post-assessment dispute has not been resolved.[151]

## III. BANKRUPTCY COURTS OPPOSING THE ONE-DAY-LATE RULE

In addition to the Ninth Circuit's reasoning in *In re Smith*, bankruptcy courts declining to follow the one-day-late rule have provided alternative interpretations of § 523(a) that appear to create an effective system that balances Congress's interest in passing the BAPCPA amendments with the general interests of American bankruptcy law. While the First, Fifth, and Tenth Circuits all reached the same conclusion—that debt resulting from a late-filed tax form is never dischargeable—numerous bankruptcy courts, academic papers, the Ninth Circuit, and the IRS[152] have expressed their displeasure with the one-day-late interpretation of the hanging paragraph. These bankruptcy courts and the IRS maintain that a debt resulting from a late-filed return is dischargeable if the debtor satisfies the various pre-BAPCPA requirements for a discharge.[153]

Although the post-assessment issue was not relevant in *In re Maitland* because the IRS had not yet assessed a penalty against the debtor at the time when the debtor filed a bankruptcy petition, numerous courts declining to

149 *See infra* Section III.A.

150 *See In re* Smith, 828 F.3d at 1097.

151 *See id.* ("We need not decide the close question of whether *any* post-assessment filing could be 'honest and reasonable' because these are not close facts; the IRS communicated with Smith for years before assessing a deficiency, and Smith waited several more years before responding to the IRS or reporting his 2001 financial information.").

152 *See supra* Section II.B; *see also In re* Smith, 828 F.3d at 1097.

153 *See In re* Maitland, 531 B.R. 516, 520 (Bankr. D.N.J. 2015); *Martin I*, 508 B.R. 717, 726 (Bankr. E.D. Cal. 2014), *vacated on other grounds*, 542 B.R. 479 (B.A.P. 9th Cir. 2015); *In re* Rhodes, 498 B.R. 357, 370 (Bankr. N.D. Ga. 2013) ("The Court concludes that § 523(a)(*)'s requirement that a return satisfy 'applicable bankruptcy law (including applicable filing requirements)' does not include a timeliness requirement and, therefore, does not exclude the Debtor's late-filed post-assessment returns.").

follow the *In re McCoy* logic have held that an IRS assessment does not inherently preclude a discharge as long as the debtor has satisfied all of the *Beard* and statutory requirements.[154]

Although all courts declining to follow the one-day-late rule maintain that a late-filed tax return can be valid as long as the *Beard* test is satisfied, a split does exist among the courts that oppose the one-day-late rule. While some courts maintain that the fourth prong of the *Beard* test involves only looking at whether an individual has filed a tax form that is of use to the IRS,[155] other courts, including the Ninth Circuit, have held that the fourth prong of the *Beard* test involves looking at all relevant factors, including when the form was filed, why it was filed late, and whether it was useful to the IRS.[156]

Courts opposing the one-day-late rule are largely concerned with three major issues: (1) the harsh result of the one-day-late interpretation; (2) the inconsistency between the one-day-late interpretation and the surrounding language of § 523; and (3) a lack of legislative history supporting the notion that Congress intended to displace the *Beard* test.[157] The center of the argument opposing the one-day-late rule is that the Fifth Circuit's "draconian interpretation" of the hanging paragraph "is inconsistent with the oft-stated policy of the Code that its principal purpose is to grant a fresh start to the 'honest, but unfortunate debtor.'"[158] Given that a majority of courts allowed for the dischargeability of debts arising from late-filed tax forms prior to BAPCPA, courts opposing the one-day-late rule have used this policy argument, coupled with a lack of legislative history supporting the one-day-late rule, as a basis for the idea that Congress did not intend to exclude late-filed tax forms from being returns.[159]

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[154] *See Martin II*, 542 B.R. 479, 480, 492 (B.A.P. 9th Cir. 2015); *In re* Briggs, 511 B.R. 707, 718 (Bankr. N.D. Ga. 2014); *In re* Rhodes, 498 B.R. at 370.

[155] *See In re* Davis, No. 14-26507 (CMG), 2015 Bankr. LEXIS 3331, at *14 (Bankr. D.N.J. Sept. 29, 2015).

[156] *See Martin II*, 542 B.R. at 492; *In re* Smith, 527 B.R. 14, 24 (N.D. Cal. 2014), *aff'd*, 828 F.3d 1094 (9th Cir. 2016), *petition for cert. filed*, (U.S. Oct. 13, 2016) (No. 16-497).

[157] *See, e.g.*, *Martin II*, 542 B.R. at 479–80, 489–90; *In re* Davis, 2015 Bankr. LEXIS 3331, at *13.

[158] *In re* Maitland, 531 B.R. at 521; *see also Martin I*, 508 B.R. at 726–27; *In re* Briggs, 511 B.R. at 714–16.

[159] *See* Brown v. Mass. Dep't of Revenue (*In re* Brown), 489 B.R. 1, 5 (Bankr. D. Mass. 2013), *aff'd sub nom. In re* Gonzalez, 506 B.R. 317 (B.A.P. 1st Cir. 2014), *rev'd sub nom. In re* Fahey, 779 F.3d 1 (1st Cir. 2015), *and aff'd*, No. ADV 11-04150-MSH, 2014 WL 1815393 (B.A.P. 1st Cir. Apr. 3, 2014), *and rev'd sub nom. In re* Fahey, 779 F.3d 1 (1st Cir. 2015).

The one-day-late rule is grounded in the idea that, because "the applicable filing requirements include filing deadlines, § 523(a)(*) plainly excludes late-filed Form 1040s from the definition of a return."[160] While the *In re McCoy* plain-language interpretation is an easy-to-apply rule, courts opposing the one-day-late rule worry that "the one-day-late interpretation of the hanging paragraph yields a potentially absurd result."[161] As a result, recent bankruptcy court decisions have adopted and expanded on Judge Thompson's dissent in *In re Fahey*.[162] Bankruptcy courts opposing the one-day-late rule explain that relevant nonbankruptcy law does not support the notion that a tax form filed after the deadline can never qualify as a return. As the Bankruptcy Court for the Eastern District of California found in *United States v. Martin (In re Martin)* ("*Martin I*"), provisions of the Internal Revenue Code support this proposition:

> The only temporal consideration that this court could locate in the tax law is the April 15 filing deadline under IRC § 6072(a). However, unlike other requirements imposed by applicable tax law, a taxpayer's failure to timely file a return by this statutory deadline does not defeat the purpose of the return or render it a nullity; the late filing is simply grounds to impose additional penalties and interest on the taxpayer. A return filed on April 16 is still accepted as a return by the IRS.[163]

If courts look to the *Beard* test when interpreting the applicable nonbankruptcy law discussed in § 523(a), courts opposing the one-day-late rule suggest that the policy behind bankruptcy could be satisfied, and the harsh result of the one-day-late rule could be avoided.[164]

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160 *In re* Mallo, 774 F.3d 1313, 1321 (10th Cir. 2014).

161 *Martin I*, 508 B.R. at 729.

162 *See In re* Maitland, 531 B.R. at 519–20 ("[Judge Thompson] criticized the [*In re Fahey*] majority for being 'unfairly dismissive of the debtor's logical interpretation of the statutory provisions at issue.' This court agrees that the majority's result in *Fahey* 'defies common sense.'") (quoting *In re* Fahey, 779 F.3d 1, 11 (1st Cir. 2015) (Thompson, J., dissenting)).

163 *Martin I*, 508 B.R. at 732 (footnote omitted) (citation omitted).

164 *See, e.g.*, Pendergast v. Mass. Dep't of Revenue (*In re* Pendergast), 494 B.R. 8, 14 (Bankr. D. Mass. 2013), *aff'd in part, rev'd in part*, 510 B.R. 1 (B.A.P. 1st Cir. 2014), *aff'd in part, rev'd in part*, No. 14-9004, 2015 WL 3388354 (1st Cir. May 1, 2015) (noting the "unsavory" result of this interpretation).

### *A. The Split: Is a Court Determination Always Required to Determine If a Late-Filed Form Is a Return?*

Recently, the Bankruptcy Appellate Panel for the Ninth Circuit vacated the *Martin I* decision on the grounds that it was too narrow, concluding that the more expansive pre-BAPCPA minority approach for the *Beard* test[165] must be applied when evaluating if a late-filed tax form is a return.[166] While the Bankruptcy Court in *Martin I* originally held that a late-filed tax form is a return whenever the form is objectively useful to the IRS, the Bankruptcy Appellate Panel vacated this ruling in *Martin II* and held that the fourth element of the *Beard* test must involve an actual determination by the court as to whether an individual has made an honest and reasonable attempt to comply with the tax law.[167]

Although the court in both *Martin I* and *Martin II* maintained that a late-filed tax form can qualify as a return, the *Martin II* court argued that courts must always evaluate all relevant factors, including the "number of missing returns, the length of the delay, the reasons for the delay, and any other circumstances reasonably pertaining to the honesty and reasonableness of the [debtors'] efforts."[168] Thus, an individual's failure to file his or her tax forms until after an IRS assessment does not preclude a discharge when the court finds that the individual actually filed his or her own tax form and has complied with the *Beard* test. The *Martin II* holding stands for the idea that the fourth prong of the *Beard* test requires a determination by the court based on all the relevant facts whenever the test is applied.[169] Therefore, the *Martin II* holding mirrors the recent Ninth Circuit opinion on the issue, *In re Smith*.[170]

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165 *See In re* Colsen, 446 F.3d 836, 840 (8th Cir. 2006) ("[T]he honesty and genuineness of the filer's attempt to satisfy the tax law should be determined from the face of the form itself, not from the filer's delinquency or the reasons for it.").

166 *See Martin II*, 542 B.R. 479, 492 (B.A.P. 9th Cir. 2015).

167 *See id.* at 491.

168 *Id.*

169 *See id.* ("[W]e furthermore believe that the determination of whether all of the relevant facts and circumstances constitute an honest and reasonable effort to comply with the applicable tax laws is best made, in the first instance, by the bankruptcy court.").

170 *Compare In re* Smith, 828 F.3d 1094, 1097 (9th Cir. 2016) ("Here, Smith failed to make a tax filing until seven years after his return was due and three years after the IRS went to the trouble of calculating a deficiency and issuing an assessment. Under these circumstances, Smith's 'belated acceptance of responsibility' was not a reasonable attempt to comply with the tax code."), *petition for cert. filed*, (U.S. Oct. 13, 2016) (No. 16-497), *with Martin II*, 542 B.R. at 491 ("[W]e furthermore believe that the determination of whether all of the relevant facts and circumstances constitute an honest and reasonable effort to comply with the applicable tax laws is best made, in the first instance, by the bankruptcy court.").

Importantly, both the court in *Martin I* and the court in *Martin II* support the notion that Congress did not intend for the hanging paragraph to impose a strict temporal deadline in the definition of "return." Additionally, the Ninth Circuit's finding that the *Martin II* reasoning was correct has led to further confusion as to what exactly Congress intended with the BAPCPA amendments. Ultimately, this issue needs to be resolved to determine whether the *Martin I* interpretation, the *Martin II/In re* Smith interpretation, the one-day-late rule, or some alternate interpretation of the hanging paragraph is the correct interpretation that Congress intended when it passed the BAPCPA amendments.

### *B. The Future of the Discussion Regarding the One-Day-Late Rule*

The Ninth Circuit's decision in *In re Smith* created a split among the circuit courts that has yet to be resolved. While the Fifth Circuit's logic supporting the one-day-late rule was popular among courts immediately following the passage of the BAPCPA amendments, recent court opinions appear to be shifting away from the hardline rule in favor of the more flexible *Beard* test.[171] This shift is sensible, given the fact the one-day-late interpretation does not fully account for the problems that Congress sought to resolve in passing the BAPCPA amendments.

Additionally, courts opposing the one-day-late rule note that the Fifth Circuit's interpretation in *In re McCoy* is unfounded when considering not only the harsh practical effect of the rule, but also the fact that the one-day-late rule is a large departure from the way in which the majority of courts treated late-filed tax documents prior to the BAPCPA amendments.[172] Various courts and scholars have raised both plain language and statutory construction arguments;[173] the remainder of this Comment will analyze the flaws of the one-day-late interpretation in light of these criticisms.

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171 *See, e.g.*, Justice v. United States (*In re* Justice), 817 F.3d 738, 743 (11th Cir. 2016); *In re* Smith, 828 F.3d at 1096–97.

172 *Martin I*, 508 B.R. 717, 726–27 (Bankr. E.D. Cal. 2014), *vacated on other grounds*, 542 B.R. 479 (B.A.P. 9th Cir. 2015) (identifying other courts and the IRS as critics of the Fifth Circuit's interpretation).

173 *See, e.g.*, *Martin II*, 542 B.R. at 492; Morgan D. King, *Tolstoy, Discharging Taxes, and the Fifth Circuit*, 4 NORTON BANKR. L. ADVISER, Apr. 2012, Westlaw, 2012 No. 4 Norton Bankr. L. Adviser 3.

## ANALYSIS

### I. PLAIN MEANING ANALYSIS

The hanging paragraph is ambiguous because the plain language of the statute does not provide definitive support for either the one-day-late rule or alternative interpretations of the hanging paragraph.[174] Courts following the one-day-late interpretation ignore this ambiguity while seeking to achieve a specific result. While proponents of the one-day-late rule base their view on the notion that "the plain language meaning of the [Bankruptcy] Code should rarely be trumped,"[175] the one-day-late rule approach fails to resolve two major issues related to the plain meaning of the statute. First, the hanging paragraph requires individuals to comply with "applicable filing requirements,"[176] and courts following the one-day-late rule fail to explain how the strict one-day-late rule could apply to trivial filing requirements. Second, the language surrounding the hanging paragraph cannot be ignored when interpreting the phrase "applicable filing requirements."

In conducting its plain language analysis, the Fifth Circuit in *In re McCoy* concluded, "[the debtor's] failure to file in the time required under Mississippi's tax law is a failure to satisfy the applicable nonbankruptcy law referenced in § 523(a)."[177] To support this conclusion, the Fifth Circuit relied on the notion that "[although] the Code at times is 'awkward and even ungrammatical . . . that does not make it ambiguous.'"[178] This interpretation fails to answer either of the aforementioned concerns and leaves two important questions unanswered: First, is the phrase "applicable filing requirements" more ambiguous than the proponents of the one-day-late interpretation suggest? Second, do the proponents of the one-day-late interpretation ignore this ambiguity in favor of reaching a desired conclusion?

In general, courts do not offer their own interpretation of a statute unless the language of that statute is vague or ambiguous.[179] The one-day-late

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174 *See supra* text accompanying notes 16–43.

175 *See In re* McCoy, 666 F.3d 924, 929 (5th Cir. 2012) (alteration in original) (quoting DaimlerChrysler Fin. Servs. Ams. LLC v. Miller (*In re* Miller), 570 F.3d 633, 638 (5th Cir. 2009)).

176 *See* 11 U.S.C. § 523(a)(*) (2012) ("For purposes of this subsection, the term 'return' means a return that satisfies the requirements of applicable nonbankruptcy law (including applicable filing requirements.")).

177 *See In re* McCoy, 666 F.3d at 928.

178 *See id.* at 929 (citation omitted).

179 *See, e.g.*, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002).

interpretation, therefore, would be a correct interpretation of the hanging paragraph if the language of the hanging paragraph were clear and unambiguous. The language of the hanging paragraph, however, *is* vague, and additional tools of interpretation are necessary to properly apply the statute as Congress intended. Ultimately, the courts following the one-day-late rule "gloss over one of the most important rules of plain meaning statutory construction: that the meaning of a statutory term is only considered plain and unambiguous if the term is clearly understood in the context of the words surrounding it and in the context of the larger statutory scheme."[180]

### *A. The Phrase "Applicable Filing Requirements" Is Ambiguous*

In the First Circuit case *In re Fahey*, the court provided an effective hypothetical example where the one-day-late rule would be difficult to uniformly apply.[181] As the First Circuit noted, "Perhaps the term 'applicable filing requirements' may acquire vagueness at the outer boundaries of its possible application."[182] In defining "vagueness," the First Circuit relied on Justice Scalia's explanation that vagueness exists where a phrase's "unquestionable meaning has uncertain application to various factual situations."[183] The First Circuit's hypothetical involved an improperly stapled tax form, which appears to serve as the court's example for where the term "applicable filing requirements" might be vague. Unfortunately, the court decided not to deal with this issue and declined to address whether an individual failing to properly staple his tax forms would constitute a failure to satisfy applicable filing requirements.[184] By choosing not to fully analyze this issue, the court ignored the complexities involved in interpreting the vagueness of the hanging paragraph in favor of adopting the bright line one-day-late rule.[185]

In *In re Mallo*, the Tenth Circuit considered the dictionary definitions of the individual terms "applicable," "filing," and "requirement" before

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180 *Martin II*, 542 B.R. 479, 486 (B.A.P. 9th Cir. 2015).

181 779 F.3d 1, 5 (1st Cir. 2015) ("For example, is an instruction on an official form that the filer not staple the return together, or staple the check to the return, an 'applicable filing requirement'?").

182 *Id.*

183 ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 31–32 (2012).

184 *In re* Fahey, 779 F.3d at 5.

185 *Id.* ("Particularly noteworthy is the fact that Congress's chosen test called for satisfying the filing requirements of applicable law, not merely making an 'honest attempt' to do so.").

concluding that "the plain language of the phrase ['applicable filing requirement'] means something that must be done with respect to filing a tax return."[186] This definition is offered by the court to support the idea that a debtor's failure to satisfy any and all applicable nonbankruptcy legal requirements related to filing a tax return precludes that debtor's tax forms from being a valid return for dischargeability purposes. The Tenth Circuit's approach does little, if anything, to address situations where it is unclear how the court would apply the one-day-late rule, such as when the debtor fails to properly staple a tax form.

The plain language analysis conducted by the First and Tenth Circuits has led proponents of the one-day-late rule to prematurely conclude that "any type of return not filed in accord with applicable filing requirements is not a 'return' under our reading of the statute."[187] No circuit court has addressed the uncertainty surrounding the phrase "applicable filing requirements" or explained how exactly the one-day-late rule would apply in a situation where an individual has failed to comply with a trivial filing requirement. If a late-filed form is not a return because the filer has failed to comply with applicable filing requirements, it would seem to follow that an individual who mistakenly fills out part of his tax form incorrectly has also not filed a valid return for the same reason.[188]

Unless Congress desired to create a system requiring perfection when filing a tax form, the strict one-day-late interpretation of the phrase "applicable filing requirements" is problematic when it is applied to requirements other than the date of filing. The hanging paragraph is therefore ambiguous because the one-day-late interpretation cannot be uniformly applied to situations involving other trivial "filing requirements." Given this ambiguity, courts must consult additional tools of statutory interpretation beyond the plain meaning of the statute to interpret the hanging paragraph properly.

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186 774 F.3d 1313, 1321 (10th Cir. 2014).

187 *In re* Fahey, 779 F.3d at 6.

188 *See* Jay Hancock, *After 94 Years, Filing Taxes Still a Process of Trivial Tyranny*, BALT. SUN (Apr. 15, 2007), http://articles.baltimoresun.com/2007-04-15/business/0704150161_1_earned-income-credit-qualifying-child-eic ("There are 77 boxes to complete on [2007]'s Form 1040, each a trap door of potential perjury and fraud prosecution.").

### *B. The One-Day-Late Interpretation Ignores the Language Surrounding the Phrase "Applicable Filing Requirements"*

Under the one-day-late interpretation, the only types of late-filed tax forms that can ever qualify as "returns" are § 6020(a) forms[189] because § 6020(a) forms are the only types of acceptable late-filed tax forms that Congress explicitly mentions in the hanging paragraph.[190] The courts following the one-day-late rule suggest that Congress intended for § 6020(a) to be a narrow exception to the general rule that a late-filed tax form is not a return.[191] If, however, Congress considered § 6020(a) forms to be valid returns for dischargeability purposes, it is unclear why other late-filed forms could not also be valid if the individual filing the forms provided the IRS with necessary information.

In contrast, a plain language reading suggests that Congress intended for the language regarding § 6020(a) to be *one* example of a type of late-filed form that can still be a "return," as opposed to the *sole* example. This point is evidenced by the fact that Congress chose to use the term "includes" as opposed to a term that would more clearly express that § 6020(a) is the only acceptable late-filed return.[192] Congress's decision to use "includes" in the final draft of the hanging paragraph, as opposed to a limiting term such as "only" or "is limited to," must be viewed as an intentional decision and cannot be ignored. Congress's choice not to explicitly clarify whether a § 6020(a) form is the only example of a late-filed form that can be a return for dischargeability purposes is one example of an ambiguity present in the hanging paragraph because the plain language of the statute does not provide definitive support for either the one-day-late interpretation or an opposing view.

Further, the specific language regarding § 6020(b) forms[193] would be irrelevant if the one-day-late interpretation is correct in concluding that § 6020(a) forms are the only acceptable type of late-filed returns. There would

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189 Section 6020(a) forms are late-filed tax forms *drafted* by the IRS and *confirmed* by the individual filer. 26 U.S.C. § 6020(a) (2012). Section 6020(b) forms are late-filed tax forms *filed* by the IRS on behalf of an individual *with no confirmation or signature* from the individual filer. *Id.* § 6020(b)(1).

190 *See* 11 U.S.C. § 523(a)(*) (2012) ("Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986 . . . .").

191 *See In re* McCoy, 666 F.3d 924, 928–29 (5th Cir. 2012).

192 *See* 11 U.S.C. § 523(a)(*) ("Such term includes a return prepared pursuant to section 6020(a) . . . .").

193 *See supra* note 138 and accompanying text.

be no reason for Congress to specifically discuss § 6020(b) forms because a § 6020(b) form can only be filed after the original filing deadline. Interestingly, the majority in *In re Fahey* admitted that the one-day-late interpretation does render the language regarding § 6020(b) superfluous before claiming that "[w]hatever one thinks of this redundancy, it offers too little to parry the force of the observation that a requirement to file on time is a filing requirement."[194] Ignoring this "redundancy" results in an overly simplified interpretation that does not fully reflect the language that Congress chose to use in the statute.

Courts following the one-day-late interpretation also have failed to address the issue that if a § 6020(a) form is the only type of return that is accepted after the filing deadline, then it logically must follow that a § 6020(b) form would be the only type of return that would not be accepted.[195] This failure to evaluate the entire statute constitutes a "fail[ure] to substantively address why the absurd conclusion we must draw from [the one-day-late rule] reading of the statute does not require consideration of what Congress actually meant when it added the § 6020 language to the statute."[196] The debate among courts over the meaning of this clause suggests that there is an ambiguity in the statute and that courts should consult other relevant tools of interpretation to determine what Congress intended to do when it passed the BAPCPA amendments.

Finally, Congress used the term "return" to describe § 6020(b) forms in the hanging paragraph.[197] Congress must have therefore considered § 6020(b) forms to be returns and likely sought to use the hanging paragraph as a vehicle for explaining that debt stemming from these returns is not dischargeable in bankruptcy. A § 6020(b) return is one in which the IRS prepares the return without any assistance from the individual.[198] The difference between § 6020(a) and § 6020(b) returns is that an individual agrees to cooperate with the IRS and sign the return under the former.[199] As many courts have noted, Congress likely intended to reward individuals who comply with the IRS and

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194 *In re* Fahey, 779 F.3d 1, 7 (1st Cir. 2015) (citing *In re* McCoy, 666 F.3d at 931).

195 *See* 11 U.S.C. § 523(a)(*) ("Such term includes a return prepared pursuant to section 6020(a) of the Internal Revenue Code of 1986, or similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal, but does not include a return made pursuant to section 6020(b) of the Internal Revenue Code of 1986 . . . ."); *In re* Fahey, 779 F.3d at 7.

196 *In re* Fahey, 779 F.3d at 15 (Thompson, J., dissenting).

197 *See* 11 U.S.C. § 523(a)(*).

198 *See* 26 U.S.C. § 6020(b) (2012).

199 *See id.* § 6020(a)–(b).

punish those who do not.[200] The validity of a § 6020(a) or § 6020(b) return never hinges on the date that the return is filed because both forms are always filed after the filing deadline. Under this alternative interpretation, late-filed forms in which the individual provides relevant tax information to the IRS, such as § 6020(a) forms, would be valid returns as long as the *Beard* test and any other relevant statutory provisions (i.e., the two-year rule) are satisfied. Late-filed forms, in which the individual either provided no information or false information, would never be returns for dischargeability purposes.

This interpretation would also not run afoul of the majority's worry in *In re Fahey* that "we would be left without any textual basis for distinguishing those filing requirements that count from those that do not."[201] Those "applicable filing requirements" would include requirements involving situations where an individual has not filed a return (like § 6020(b)) or situations where an individual has done something to impede the IRS from calculating his taxes (like intentionally providing false information on a late-filed 1040 form).

Further analysis beyond the plain language of the statute is therefore necessary because of ambiguities in the language of the hanging paragraph and the discrepancies with regards to the surrounding language of the statute. The courts following the one-day-late rule rely solely on the plain language of the statute and "gloss over one of the most important rules of plain meaning statutory construction: that the meaning of a statutory term is only considered plain and unambiguous if the term is clearly understood in the context of the words surrounding it and in the context of the larger statutory scheme."[202] The phrase "applicable filing requirements" in the hanging paragraph is ambiguous because it must be considered in the context of the language surrounding the phrase. "The clarity of statutory language only can be measured in 'the specific context in which that language is used, and the broader context of the statute as a whole.'"[203] The ambiguities in the statute cause the one-day-late interpretation to be an incomplete exercise in statutory interpretation, and it is

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200 *See, e.g.*, *In re* McCoy, 666 F.3d 924, 931 (5th Cir. 2012).

201 779 F.3d at 7.

202 *Martin II*, 542 B.R. 479, 486 (B.A.P. 9th Cir. 2015).

203 *Id.* (quoting Yates v. United States, 135 S. Ct. 1074, 1081 (2015) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997))).

necessary to evaluate the statute in light of Congress's intent and the relevant canons of statutory interpretation.[204]

## II. CONGRESS DID NOT INTEND FOR BAPCPA TO DISPLACE THE *BEARD* TEST

Although courts following the one-day-late rule do not see the rule as a departure from pre-BAPCPA practices,[205] the practical outcome of this rule has altered the dischargeability of tax debt resulting from late-filed forms in a major way. The real issues with the one-day-late interpretation are twofold. First, Congress never mentioned a desire to replace the *Beard* test. Second, the one-day-late interpretation creates a new loophole in the Code. At its most basic, the one-day-late interpretation runs afoul of the Supreme Court's notion that "[p]re-BAPCPA bankruptcy practice is telling because 'we will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'"[206] Additionally, "[the] Court has been reluctant to accept arguments that would interpret the Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history."[207]

The Fifth Circuit stated in *In re McCoy* that the one-day-late rule "is consonant with the pre-BAPCPA test's emphasis 'that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax . . . can be computed,' a proper return has been filed."[208] The Fifth Circuit failed to explain, however, how the one-day-late rule could possibly operate in harmony with the *Beard* test when the rule explicitly bars individuals who, in good faith, disclose all of the necessary information regarding their taxes a day late from receiving a discharge. While the one-day-late approach may be similar to the *Beard* test in that both provide

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[204] YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 3 (2008), http://research.policyarchive.org/19279.pdf.

[205] *See In re* McCoy, 666 F.3d at 931 ("We see no 'major change' from pre-BAPCPA practices by reading § 523(a)(*) to generally exclude late state tax returns from the definition of return for bankruptcy discharge purposes, while differentiating between § 6020(a) and § 6020(b) returns.").

[206] Hamilton v. Lanning, 560 U.S. 505, 517 (2010) (citing Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co., 549 U.S. 443 (2007)).

[207] Dewsnup v. Timm, 502 U.S. 410, 419 (1992). *See generally* Lawrence Ponoroff, *Hey the Sun is Hot and the Water's Fine: Why Not Strip Off That Lien*, 30 EMORY BANKR. DEV. J. 13 (2013).

[208] *In re* McCoy, 666 F.3d at 931.

interpretations of the term "return," the result of the *In re McCoy* temporal requirement alters the Code in a way that Congress never explicitly intended.[209]

### *A. The BAPCPA Legislative History Contains No Clear Indication That Congress Sought to Impose a Strict Temporal Deadline*

Proponents of the one-day-late rule support the Fifth Circuit's assertion that Congress intended for BAPCPA to preclude late-filed tax forms from being returns within the meaning of the Code, in part because these individuals claim that the BAPCPA legislative history favors this result.[210] In contrast, courts and academics opposing the one-day-late rule maintain the *In re McCoy* analysis fails to address the lack of any "clear indication" by Congress to dramatically alter the pre-BAPCPA *Beard* test.[211] The main issue that courts struggled with prior to BAPCPA was determining if a tax form filed after an IRS assessment can be a return.[212] This assessment issue is likely what Congress desired to clarify through its definition of "return."[213] If Congress sought to impose a new temporal requirement, it could have explicitly stated this desire in either the BAPCPA text or legislative history. As Judge Thompson explains, "[i]n trying to discern legislative intent, we look to the historical content of the statute (i.e. prior case law), the legislative history of the statutory provision, and the policy underlying the statute."[214]

While interpreting the hanging paragraph, courts following the one-day-late rule focus on the fact that Congress did not include language in the hanging paragraph that specifically allows for a late-filed tax form to be a return.[215] These courts suggest that Congress's failure to include this specific language

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209 *See* H.R. REP. NO. 109-31, pt.1 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88.

210 *See In re* McCoy, 666 F.3d at 927 (citing H.R. REP. NO. 109-31, pt. 1 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 90–92) ("[The House Report explains] that BAPCPA was motivated by four factors: the 'recent escalation of consumer bankruptcy filings,' the 'significant losses . . . associated with bankruptcy filings,' the fact that the 'bankruptcy system has loopholes that allow and–sometimes–even encourage opportunistic personal filings and abuse,' and 'the fact that some bankruptcy debtors are able to repay a significant portion of their debts.'").

211 *See Martin II*, 542 B.R. 479, 485–86 (B.A.P. 9th Cir. 2015).

212 *See In re* Moroney, 352 F.3d 902, 907 (4th Cir. 2003); *In re* Hindenlang, 164 F.3d 1029, 1034 (6th Cir. 1999).

213 *See* 11 U.S.C. § 523(a)(*) (2012).

214 *In re* Fahey, 779 F.3d 1, 15 (Thompson, J., dissenting) (citation omitted).

215 *See In re* Mallo, 774 F.3d 1313, 1325 (10th Cir. 2014) ("Congress could have expressly stated a document is a return if it 'satisfies the requirements of applicable nonbankruptcy law (including applicable *substantive* filing requirements)' or '(including applicable filing requirements, *except the date the filing is due*).'").

somehow implies that Congress intended to displace the pre-BAPCPA caselaw. This argument is unsupported by the legislative history and difficult to accept because prior to BAPCPA, no circuit court ever held that a tax form was not a return solely because it was filed late.[216] Congress did not need to include explicit language allowing for the dischargeability of this type of debt because of the long-standing presumption that Congress, when legislating, is aware of both existing caselaw and the tools of statutory interpretation courts employ.[217] As a result, courts following the one-day-late rule ignore the notion that "[w]hen Congress amends the bankruptcy laws, it does not write on a clean slate."[218]

### *B. The BAPCPA Legislative History Does Not Support the Idea that Filing a Tax Form Late Constitutes an Act of Wrongdoing*

The BAPCPA legislative history does not support the Fifth Circuit's one-day-late interpretation in *In re McCoy*. The committee report discussing the BAPCPA amendments only briefly mentions the hanging paragraph.[219] This Report states:

> Section 714 of the Act amends section 523(a) of the Bankruptcy Code to provide that a return prepared pursuant to section 6020(a) of the Internal Revenue Code, or similar State or local law, constitutes filing a return (and the debt can be discharged), but that a return filed on behalf of a taxpayer pursuant to section 6020(b) of the Internal Revenue Code, or similar state or local law, does not constitute filing a return (and the debt cannot be discharged).[220]

In addressing this legislative history, the Fifth Circuit concluded that "Congress, when later drafting § 523(a)(*) to differentiate between § 6020(a) and § 6020(b) returns, likely wanted to reward taxpayers who cooperated with

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[216] *See In re* Payne, 431 F.3d 1055, 1060 (7th Cir. 2005) (holding that the court would not adopt a rule that a tax form filed after an assessment can never be a return because "[t]here might . . . be circumstances beyond a taxpayer's control that prevented him from filing a timely return, or even from asking for an extension of the time to file, before the tax was assessed"); *In re* Hindenlang, 164 F.3d at 1034 ("The Bankruptcy Code does permit debtors who have filed late returns to obtain discharges of tax liability in certain situations.").

[217] *See* KIM, *supra* note 204, at 3 (citing McNary v. Haitian Refugee Ctr., 498 U.S. 479, 496 (1991)).

[218] *In re* Fahey, 779 F.3d at 17 (Thompson, J., dissenting) (citing Dewsnupp v. Timm, 502 U.S. 410, 419 (1992)).

[219] H.R. Rep No. 109-31, pt. 1, at 102–03 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 166–67.

[220] *Id.*

the IRS."[221] The court supported its conclusion by turning to a 1978 Senate Report discussing the passage of § 523(a), which, in relevant part, states: "[I]n general, tax claims which are nondischargeable, despite a lack of priority, are those to whose staleness the debtor contributed by some wrong-doing or serious fault."[222] The Fifth Circuit failed, however, to mention that the only example of a nondischargeable tax claim that Congress addressed in the Senate Report was a situation where an individual files a fraudulent return.[223] Although filing a tax form late may lead to monetary penalties,[224] the act of filing a fraudulent return is a serious criminal offense that creates major problems for the IRS and the individual who filed the false return.[225] While the Fifth Circuit is likely correct in suggesting that Congress wanted to reward taxpayers who cooperated with the IRS, neither the legislative history nor the *In re McCoy* decision explains how filing a tax form one day late constitutes wrongdoing or serious fault on behalf of the individual filing the forms.

The IRS does not support the notion that such a strict temporal requirement should be read into the statute.[226] The IRS maintains that the pre-BAPCPA majority approach to the post-assessment issue, which precludes a discharge in cases where an individual has not filed a return by the time that the IRS assesses that individual's liability, is the correct interpretation of the hanging paragraph.[227] Further, the IRS does not suggest that filing a return late automatically constitutes an act of wrongdoing because they do not even apply a penalty on late-filed returns where the filer "can show reasonable cause for not filing or paying on time."[228]

Confusingly, the courts following the one-day-late rule suggest that the IRS interpretation is wrong because "if Congress wished to make the assessment

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221 *In re* McCoy, 666 F.3d 924, 931 (5th Cir. 2012) (citation omitted).

222 *Id.* (citation omitted).

223 *See* S. REP. NO. 95-989, at 14 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5800 ("In general, tax claims which are nondischargeable, despite a lack of priority, are those to whose staleness the debtor contributed by some wrong-doing or serious fault as, for example, taxes with respect to which the debtor filed a fraudulent return.").

224 *See* IRS Tax Tip 2013-58 (Apr. 18, 2013), https://www.irs.gov/uac/Newsroom/Eight-Facts-on-Late-Filing-and-Late-Payment-Penalties ("A failure-to-file penalty *may* apply if you did not file by the tax filing deadline.") (emphasis added).

225 *See* 26 U.S.C. § 7206(1) (2012) (stating that an individual who makes willful fraudulent statements on a tax return is guilty of a felony).

226 I.R.S. Notice, *supra* note 114.

227 IRS Tax Tip 2013-58, *supra* note 224.

228 *Id.*

process relevant to discharge of tax debts, it could have easily done so."[229] Congress has never mentioned a temporal requirement with regard to discharging debt resulting from late-filed tax forms and, given that the legislative history does not allude to this conclusion, it is unlikely that Congress intended to overhaul the existing caselaw in such a drastic way. If Congress intended to codify the one-day-late rule, it could have done so in the text of the statute or documented its intention within the legislative history.

### *C. The One-Day-Late Interpretation Creates a New Loophole in the Code*

More importantly, the one-day-late interpretation appears to be directly at odds with the BAPCPA legislative history. The House Report from the session discussing BAPCPA contains language stating that the legislation was passed, in part, to close "loopholes and incentives that allow and—sometimes—even encourage opportunistic personal filings and abuse."[230] Courts following the one-day-late rule use this language to argue that allowing individuals to discharge debt resulting from late-filed tax forms is the incentive that Congress sought to stop.[231] This does not make sense considering that the major issue regarding dischargeability of tax debt prior to BAPCPA was the issue of post-assessment filings.[232] The loophole in the hanging paragraph that Congress likely sought to address was the pre-BAPCPA split where an individual in certain circuits could simply not file a return until years after the original deadline and roll the dice on eventually receiving a discharge.[233] Presumably, Congress did not like the idea that the ability to discharge tax debt could hinge on the randomness of the IRS actually having had the time and resources to

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229 *See In re* Mallo, 774 F.3d 1313, 1326 (10th Cir. 2014).

230 H.R. REP. NO. 109-31, pt. 1, at 5 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 92.

231 *See In re* McCoy, 666 F.3d 924, 931 (5th Cir. 2012).

232 *Compare In re* Hindenlang, 164 F.3d 1029, 1034–35 (6th Cir. 1999) ("[W]hen the debtor has failed to respond to . . . deficiency letters sent by the IRS, and the government has assessed the deficiency, then . . . the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law."), *with In re* Colsen, 446 F.3d 836, 840 (8th Cir. 2006) ("To be a return, a form is required to 'evince' an honest and genuine attempt to satisfy the laws. This does not require inquiry into the circumstances under which a document was filed.").

233 *Compare* Colsen v. United States (*In re* Colsen), 311 B.R. 765, 767 (Bankr. N.D. Iowa 2004) ("By reading into the statute a requirement that is not in the text, the *Hindenlang* line of cases would find tax liabilities nondischargeable regardless of their age and regardless of the debtor's subjective intent when the tax returns were filed."), *aff'd*, 322 B.R. 118 (B.A.P. 8th Cir. 2005), *aff'd*, 446 F.3d 836 (8th Cir. 2006), *with In re* Moroney, 352 F.3d 902, 905 (4th Cir. 2003) ("Debtors like Moroney cannot seek the safe haven of bankruptcy by failing to file tax returns, waiting to see if the IRS assesses taxes on its own, and then submitting statements long after the IRS has been put to its costly proof.").

assess an individual's liability prior to that individual filing a bankruptcy petition.

Ironically, the one-day-late rule creates a new loophole that is similar to the loophole created by the assessment split. Under the one-day-late interpretation, struggling taxpayers who are already late on filing taxes have an incentive to further delay filing their tax forms "with the hope that they would be some of the lucky few for whom the taxing authorities decide to prepare returns [under § 6020(a)] on the taxpayer's behalf."[234] The one-day-late interpretation therefore simply trades in one loophole that hinged on the IRS having enough resources and time to actually assess the liability of every individual who failed to file a timely return for a new loophole that hinges on the IRS having enough resources and time to assist individuals in filing under § 6020(a). The IRS is understaffed and received $1.8 billion dollars less than requested for 2015.[235] Very few people are able to file a return under § 6020(a), largely because the IRS has bigger issues to deal with than helping individual debtors file late tax forms.[236]

Congress likely did not intend for BAPCPA to completely eviscerate the *Beard* test in favor of a system where honest debtors are prevented from receiving a discharge largely because the IRS is too busy to assist people in filing under § 6020(a). The more likely conclusion is that Congress intended for the hanging paragraph to render the post-assessment issue irrelevant by codifying the *Beard* test. The fourth element of the *Beard* test involves a case-by-case evaluation, and the fact that an individual failed to file until after the IRS notified that individual of his liability would be one fact the court would consider when determining if the late-filed form was a return. Under this view, a discharge will hinge on whether a debtor made an honest and reasonable

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234 *Martin II*, 542 B.R. 479, 487 (B.A.P. 9th Cir. 2015).

235 *See* Owen Davis, *Tax Season 2015: IRS Cutbacks Cripple Taxpayer Services for Poor, Elderly*, INT'L BUS. TIMES (Apr. 7, 2015, 1:20 PM), http://www.ibtimes.com/tax-season-2015-irs-cutbacks-cripple-taxpayer-services-poor-elderly-1871896 ("The number of employees assigned to phones has dropped by 26 percent, and they answer fewer than four in ten calls. For the lucky few who do connect with a human, wait times are up 70 percent from five years ago, and only the most basic tax questions will be answered.").

236 *See* Robert McKenzie, *7 Million Taxpayers Fail to File Their Income Taxes*, FORBES (Aug. 27, 2014, 2:37 AM), http://www.forbes.com/sites/irswatch/2014/08/27/7-million-taxpayers-fail-to-file-their-income-taxes/#3870d10045af ("Although the IRS makes efforts to force non-filers into compliance, the continuing improvident cutting of the IRS budget allows more taxpayers to duck their filing obligations because the IRS has fewer resources to pursue non-compliant taxpayers.").

attempt to comply with the tax law as opposed to whether the IRS can get around to allowing an individual to file under § 6020(a).

## III. INTERPRETING THE AMBIGUITIES OF § 523(A)(*)

Although courts following the one-day-late rule have determined that the phrase "applicable filing requirements" includes the act of late filing, this rule is so harsh on debtors that it seems implausible that Congress intended for the hanging paragraph to be construed in such a broad manner.

> [F]requently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act.[237]

The unnecessarily harsh result of the one-day-late interpretation in light of the entire statute, which includes the language discussing § 6020(a) and § 6020(b), suggests that further analysis beyond the plain language of the statute is necessary to actually discern the purpose of the hanging paragraph. It is therefore necessary to consult relevant tools of statutory construction before it is possible to ascertain a proper interpretation of the hanging paragraph.

### *A. Avoidance of Absurdity*

The one-day-late interpretation leads to the absurd result whereby an individual who fails to mail in his or her return until April 16th due to some unforeseen illness is punished in the same way that an individual who knowingly files a fraudulent return is punished.[238] If the oft-stated policy behind bankruptcy is to provide a fresh start to the unfortunate debtor, it seems unlikely that Congress intended for BAPCPA to preclude debtors who have engaged in no willful wrongdoing from receiving a discharge.

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[237] Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 454 (1989) (quoting Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892)).

[238] *See In re* Maitland, 531 B.R. 516, 522 (Bankr. D.N.J. 2015) ("The *McCoy* reading of the definition of 'return' would impose the same penalty for blameless failure to file a timely return, such as a debtor who was prevented from mailing his return on April 15th because of illness, as would be imposed on a debtor who committed an intentional tort.").

Courts following the one-day-late rule claim that Congress's decision to keep the language regarding § 6020(a) tax returns does not render the language of the hanging paragraph ambiguous because Congress wanted to offer a method for the IRS to encourage uncooperative individuals to file their tax returns.[239] As the Fifth Circuit suggested in *In re McCoy*, the reason that Congress allowed § 6020(a) forms to be returns for the purpose of this statute was presumably to "reward taxpayers who cooperated with the IRS."[240] The Fifth Circuit failed to explain, however, how an individual who files accurate tax forms one day late is not cooperating with the IRS. In fact, no court following the one-day-late interpretation has provided any explanation supporting the idea that the hanging paragraph was designed to punish every individual who filed late while simultaneously rewarding the small number of people whom the IRS decides to allow to file a § 6020(a) return.[241]

On a similar note, another confusing result of the one-day-late rule is that

> the scofflaw who sits on his hands at tax time, doesn't bother to file a return, and then, after getting caught, cooperates with the authorities and lets the government file the substitute return for him, would be the *only* late filer who would be allowed to discharge his tax debt.[242]

Both the IRS and state taxing authorities have the discretion to accept late-filed forms without imposing a penalty on the filer.[243] Assuming the late filer actually provides necessary information to the IRS, which is essential to complying with the fourth prong of the *Beard* test, it does not make sense to conclude that the individual has not cooperated with the IRS solely because the IRS chose not to allow the filer to file the tax forms under § 6020(a).

### *B. Avoid Rendering Other Provisions in the Act Superfluous*

A plain language analysis of § 523(a) should not be restricted solely to the language of the hanging paragraph.[244] Courts following the one-day-late rule

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239 *See In re* Fahey, 779 F.3d 1, 15 (1st Cir. 2015) (Thompson, J., dissenting); *In re* Mallo, 774 F.3d 1313, 1324 (10th Cir. 2014); *In re* McCoy, 666 F.3d 924, 931 (5th Cir. 2012).

240 *In re* McCoy, 666 F.3d at 931.

241 *See In re* Fahey, 779 F.3d at 15 (Thompson, J., dissenting).

242 *Id.* at 7 (majority opinion). The First Circuit, which is a one-day-late court, admitted that "[§6020(a)] returns are rare, and are allowed only at the IRS's behest." *Id.*

243 *See* IRS Tax Tip 2013-58, *supra* note 224 ("By law, the IRS *may* assess penalties to taxpayers for both failing to file a tax return . . . .") (emphasis added).

244 KIM, *supra* note 204, at 3.

appear to rely almost exclusively on the language of the hanging paragraph, however, in reaching the conclusion that late-filed tax forms are not returns.[245] Although the restrictive nature of this analysis is understandable if the court was attempting to make a bright-line rule regarding this issue, courts following this interpretation fail to take into account the fact that Congress chose not to alter § 523(a)(1)(B)(ii), which is known as the "two-year rule."[246] The two-year rule allows an individual to discharge a tax debt resulting from a late-filed tax form as long as the individual files the tax form more than two years prior to filing a bankruptcy petition.[247] Adherence to the notion that a court's plain language analysis of a statute must involve analyzing the entire statute also makes it difficult to reconcile the one-day-late rule with the fact that Congress chose to specifically explain in the hanging paragraph that tax forms filed under § 6020(b), which are always filed late, are not returns for dischargeability purposes.[248]

### *1. The One-Day-Late Interpretation Renders the Two-Year Rule Nearly Meaningless*

The two-year rule, which appears in § 523(a)(1)(B)(ii) and has long been considered a statutory requirement for receiving a discharge of income tax debt, "continues to provide a discharge exception for people who filed their taxes late, as long as those debtors did not file [tax forms] within the two years just prior to filing for bankruptcy."[249] Prior to BAPCPA, this clause was understood to grant debtors the ability to discharge their debt resulting from late-filed tax returns as long as the debtor filed the return at least two years prior to filing a bankruptcy petition.[250] One of the primary interpretative tools that courts opposing the one-day-late rule maintain must be consulted is the canon that every word in a statute has meaning.[251] The majority in *In re Mallo* even noted that, "we construe statutes 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'"[252] The issue with courts following the one-day-late

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245 *See In re* Fahey, 779 F.3d at 7–10 (majority opinion); *In re* McCoy, 666 F.3d at 928–30.

246 *See* 11 U.S.C. § 523(a)(1)(B)(ii) (2012).

247 *See id.*

248 *See id.* § 523(a)(*).

249 *See In re* Fahey, 779 F.3d at 13 (Thompson, J., dissenting).

250 *See In re* Hindenlang, 164 F.3d 1029, 1032 (6th Cir. 1999) ("Furthermore, only taxes for which a return was filed more than two years before the petition for bankruptcy are dischargeable.").

251 *See Martin II*, 542 B.R. 479, 488 (B.A.P. 9th Cir. 2015).

252 *In re* Mallo, 774 F.3d 1313, 1317 (10th Cir. 2014).

interpretation is that "[i]n adopting the simple rule that a return filed late fails the test for dischargeability, we have to ask what happened to the language of § 523(a)(1)(B) that contains not one but two elements to cause a tax, for which a return was filed, to be excepted from discharge . . . ."[253] While Congress could have easily removed or amended the language in § 523(a)(1)(B), the decision not to amend this section must be accounted for because courts presume that Congress intentionally included every word that appears in a statute. The one-day-late rule, therefore, does not appear to be the correct interpretation of the hanging paragraph because it renders the two-year rule superfluous.

Prior to BAPCPA, the two-year rule was considered to be expansive and courts generally concluded that the rule was designed to include late-filed tax forms.[254] The Tenth Circuit in *In re Mallo* attempted to reconcile the hanging paragraph with the two-year rule and concluded that Congress left the two-year language in the statute to explain that tax forms filed under § 6020(a) will only be returns for dischargeability purposes if they are filed two years prior to an individual filing for bankruptcy.[255] Under the one-day-late interpretation, the hanging paragraph causes the two-year rule to be almost entirely meaningless because so few individuals are allowed to file under § 6020(a). Courts following the one-day-late rule even admit that this interpretation renders the two-year rule almost meaningless.[256] These courts claim, however, that this is acceptable because "while [rendering language] 'meaningless' is not okay under the cardinal rule disfavoring interpretations that render part of a statute superfluous, 'all but meaningless' is fine."[257] Courts following the one-day-late rule are willing to accept that the two-year rule is rendered almost meaningless and that the language concerning § 6020(b) is superfluous so that a bright-line rule can be achieved. Thus, the real issue is that the one-day-late interpretation simply does too much harm to the plain language of the statute.

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253 King, *supra* note 173.
254 4 COLLIER ON BANKRUPTCY, *supra* note 12, ¶ 523.07.
255 774 F.3d at 1324.
256 *See In re* Fahey, 779 F.3d 1, 6–7 (1st Cir. 2015); *In re* Mallo, 774 F.3d at 1323–24.
257 *Martin II*, 542 B.R. 479, 489 (B.A.P. 9th Cir. 2015).

*2. The One-Day-Late Interpretation Renders the Language in the Hanging Paragraph Regarding § 6020(a) and § 6020(b) Superfluous*

The hanging paragraph specifically differentiates between § 6020(a) tax forms, which are late-filed forms filed by the IRS with the assistance of the individual filer, and § 6020(b) tax forms, which are forms filed by the IRS on behalf of an individual filer without any assistance from the individual. Under the one-day-late rule, § 6020(b) tax forms would clearly not be returns because the IRS only files forms on behalf of an individual under § 6020(b) if that individual missed the filing deadline and failed to respond to subsequent requests from the IRS. As the IRS stated in its notice opposing the one-day-late rule,

> [i]f the parenthetical "(including applicable filing requirements)" . . . created the rule that no late-filed return could qualify as a return, the provision in the same paragraph that returns made pursuant to section 6020(b) are not returns for discharge purposes would be entirely superfluous because a section 6020(b) return is always prepared after the due date.[258]

Courts following the one-day-late rule dismiss this redundancy as irrelevant and suggest that Congress included the language regarding § 6020(b) to clarify the statute.[259] This interpretation cuts directly against the Supreme Court's idea that "we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law."[260]

Further, if a § 6020(a) form is the only type of acceptable late-filed form under the plain language of the statute, then it would necessarily follow that a § 6020(b) form would have to be the only type of unacceptable late-filed form.[261] Thus, the only possibilities that do not render the language superfluous are either (1) Congress included language regarding § 6020(b) as an example of the *only* type of late-filed form that is not a return; or (2) Congress sought to explain that tax forms filed by an individual with the assistance of the IRS (like a § 6020(a) form) can be a return, while a tax form filed by the IRS on behalf of a non-compliant individual (like a § 6020(b) form) cannot be a return. If the one-day-late interpretation is correct, then the first option must be correct or

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258 I.R.S. Notice, *supra* note 114.

259 *See In re* Fahey, 779 F.3d at 7 (citation omitted) ("[W]hatever one thinks of this redundancy, it offers too little to parry the force of the observation that a requirement to file on time is a filing requirement").

260 Kawaauhau v. Geiger, 523 U.S. 57, 62 (1998) (citation omitted).

261 *See supra* I.B.

the language regarding § 6020(b) will be superfluous. The alternative interpretation, which states that late-filed forms can still be a return, is therefore likely correct because it allows every word in the statute to have meaning and does not render any aspect of the statute superfluous.

Additionally, the IRS has full discretion to allow individuals to file a § 6020(a) tax form.[262] While the majority in *In re Fahey* found "such [§ 6020(a)] returns are rare," the court provided one example where a debtor filed a § 6020(a) return as proof that the one-day-late interpretation is correct.[263] One example of the IRS allowing an individual to file a § 6020(a) return is hardly convincing evidence that Congress intended to make § 6020(a) forms the only type of acceptable late-filed returns. Absent any indication within the statutory text or the legislative history, it seems strange to conclude that Congress intended to leave debtors at the mercy of the IRS in such a way.

## IV. AMENDING THE STATUTE

Congress could resolve this debate by amending the language of the hanging paragraph to clarify which filing requirements are applicable. One possible amendment involves substituting the phrase "including an honest and reasonable attempt to satisfy the requirements of the tax law" in place of the phrase "(including applicable filing requirements)."[264] By codifying the fourth element of the *Beard* test, an individual's debt stemming from a late-filed return can only be dischargeable if that individual has met all statutory requirements and has not attempted to defraud the IRS in any way. This would relieve the *In re McCoy* court's worry that individuals are seeking to exploit a loophole by filing late because courts would be required to review every case where an individual seeks a discharge to ensure that the individual complied with the necessary requirements. Filing a form late would therefore not inherently be an act of wrongdoing, and an individual would be given an opportunity to provide a reason for the failure to file the tax forms in a timely manner. This interpretation is more in line with the IRS's model as well

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262 *See In re* Fahey, 779 F.3d at 7 ("Section 6020(a) is a tool for the IRS, invoked solely at its discretion, when it decides obtaining help from the late filing taxpayer is to the IRS's advantage.").

263 *See id.*

264 11 U.S.C. § 523(a)(*) (2012).

because the IRS waives penalties for late filing if the filer can show a reason for the late filing.[265]

This amendment would not cause issues with the language regarding § 6020(a) and (b) forms because § 6020(b) tax forms involve an act of wrongdoing on behalf of the debtor. The IRS only files a § 6020(b) form if an individual fails to respond to a notice of deficiency.[266] A § 6020(a) form is therefore an acceptable type of return because an individual responds to the IRS's request and assists the IRS in filing the § 6020(a) form. A § 6020(b) form can never be a return because an individual is refusing to help the IRS file his return, so he should not be eligible to benefit from this decision.

I believe that the notice of deficiency and ability to file § 6020(b) forms are the "carrots" that Congress sought to give the IRS to collect unpaid taxes. The notice of deficiency is essentially a warning that an individual is about to run out of chances to file a tax form without the possibility of further penalties. Thus, an individual's failure to respond to a deficiency notice will lead to the IRS filing a § 6020(b) form on behalf of that individual and will preclude that individual from receiving a future discharge on his tax debt.

My interpretation is the inverse of the one-day-late interpretation. Courts following the one-day-late rule maintain that the § 6020(a) form should be a mechanism by which the IRS chooses who can file their taxes late and still receive a discharge.[267] It is unclear, however, why the IRS, as opposed to the courts, should have this level of power. Leaving this discretion solely to the IRS will mainly harm debtors who deserve the opportunity to receive a discharge but cannot receive one due to the IRS's lack of resources.

Flipping the interpretation so that an individual's failure to respond to the notice of deficiency constitutes an act of wrongdoing, thus precluding a discharge, would explain why Congress chose to include the language regarding § 6020(a) and (b). The issue Congress wanted to avoid was individuals exploiting loopholes in the Code and this interpretation, unlike the

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265 *See* 26 U.S.C. § 6651(a)(1) (2012) ("In case of failure to file any return . . . on the date prescribed therefor . . ., *unless it is shown that such failure is due to reasonable cause and not due to willful neglect*, there shall be added to the amount required . . . .") (emphasis added).

266 *See supra* text accompanying notes 41–45.

267 *See In re* Fahey, 779 F.3d at 7 ("Section 6020(a) is a tool for the I.R.S. invoked solely at its discretion, when it decides obtaining help from the late filing taxpayer is to the I.R.S.'s advantage. That Congress left the I.R.S. a carrot to offer a taxpayer in such infrequent cases . . . .").

one-day-late rule, gives courts the power to determine when an individual has actually committed some act of wrongdoing. Under this interpretation, the language regarding § 6020(a) and (b) is necessary in the hanging paragraph because it explains that tax forms like § 6020(a), which implicate no act of wrongdoing by the filer, are acceptable returns, while tax forms like § 6020(b), which implicate failures to respond to the notice of deficiency, are never returns. Congress provided an example of a late-filed form where the filer did nothing wrong to highlight that late-filed forms can be returns and provided an example where a filer committed an act of wrongdoing to show that not all late-filed forms will be accepted as returns. Congress did not want to punish otherwise honest debtors who file on April 16th. Congress wanted to punish debtors who file fraudulent tax forms; file no tax return; or refuse to assist the IRS in filing a tax return when given the opportunity.

## CONCLUSION

Individual debtors should not be precluded from receiving a discharge solely because they filed a valid tax return late. Although the one-day-late interpretation sets up an easy-to-apply framework for determining when a late-filed tax form is a return, statutory interpretation is not about reaching an easy answer. Consequently, a case-by-case analysis is necessary to determine when an individual's late-filed tax form meets the requirements to be a return.[268] Requiring a case-by-case analysis allows a debtor who filed tax forms late to still receive a discharge if the debtor can provide evidence that he or she attempted to comply with the tax law and prevents a discharge in situations where an individual either had no reason to file late or never filed. This interpretation balances the IRS's interest to collect unpaid taxes with both the debtor's interest to receive a fresh start and Congress's desire to close existing loopholes in the Code. Given the numerous ambiguities in the hanging paragraph and the policy reasons behind bankruptcy in general, an amendment to the statute would help clarify Congress's intent.

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[268] *See Martin II*, 542 B.R. 479, 491 (B.A.P. 9th Cir. 2015).

Further, the one-day-late interpretation does too much damage to the language of the statute and runs contrary to the principles of bankruptcy law. Ignoring the facts that the one-day-late rule renders the § 6020(b) language superfluous and eviscerates the two-year rule, the rule is too harsh on honest debtors for no justifiable reason. Barring a discharge in situations where an individual files a tax form containing all the relevant information one day late is an extreme departure from the vast majority of courts' pre-BAPCPA treatment of discharges. Congress never discussed a strict temporal element, and courts following the one-day-late rule have gone too far in their plain meaning analysis to reach a desired conclusion.

The IRS's goal is to accurately assess individuals' liabilities and collect unpaid taxes, while the goal of the Code is to protect creditors and allow honest debtors to have a fresh start. Presumably, Congress sought to draft the hanging paragraph so that neither debtors nor creditors were put at an inherent disadvantage. The one-day-late interpretation is far too harsh on debtors while an interpretation suggesting that late filing is completely irrelevant would be too favorable to debtors. As a result, courts should factor the debtor's reason for filing late into its analysis of the entire circumstance surrounding the debtor's attempt to comply with the tax laws.[269]

Congress wants the IRS to be able to accurately assess taxpayer liability and this is best accomplished through a system encouraging individuals to file returns even if they miss the original deadline. Additionally, the time at which a debtor files a valid tax return has no real effect on the IRS's ability to achieve its goals.[270] At the very least, a late-filed form allows the IRS to confirm an individual's liability with complete accuracy. Unlike the one-day-late interpretation, which leaves debtors waiting to file in hope that the IRS will extend them the chance to file a § 6020(a) return, this alternative interpretation addresses the reality of the situation that not all late-filers are created equal.[271] The correct interpretation of the hanging paragraph is therefore that Congress intended to codify the *Beard* test and that every case must be evaluated by the

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269 *See id.*

270 *See In re* Maitland, 531 B.R. 516, 520 (Bankr. D.N.J. 2015).

271 *Compare In re* Davis, No. 14-26507 (CMG), 2015 LEXIS 3331, at *1 (Bankr. D.N.J. Sept. 29, 2015) (noting that a debtor failed to file a tax return in 2005 or 2006; the IRS prepared substitute § 6020(b) forms; and the debtor did not sign the substitute form and later filed his own returns in 2010), *with In re* Maitland, 531 B.R. at 517 (noting that a debtor failed to file a tax return in 2008; filed the missing return in 2010; and the IRS had not filed a substitute return prior to the debtor's 2010 filing).

courts on a case-by-case basis to determine if an individual's late-filed tax form meets the requirements to be a return.[272]

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[272] *See Martin II*, 542 B.R. at 491 (B.A.P. 9th Cir. 2015).

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