




DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

SMALL BUSINESS/SELF-EMPLOYED DIVISION

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4.26.17

MEMORANDUM FOR: ALL SB/SE FIELD AND SPECIALTY EXAMINATION EMPLOYEES;
DIRECTOR, WITHHOLDING, EXCHANGE AND INTERNATIONAL INDIVIDUAL COMPLIANCE, LB&I;
DIRECTOR, WESTERN COMPLIANCE, LB&I;
DIRECTOR, PASS-THROUGH ENTITIES, LB&I;
DIRECTOR, ENTERPRISE ACTIVITIES, LB&I;
DIRECTOR, CROSS BORDER ACTIVITIES, LB&I;
DIRECTOR, EASTERN COMPLIANCE, LB&I;
DIRECTOR, TREATY & TRANSFER PRICING OPERATIONS, LB&I;
DIRECTOR, NORTHEASTERN COMPLIANCE, LB&I;
DIRECTOR, EXEMPT ORGANIZATIONS/GOVERNMENT ENTITIES, TE/GE; AND
DIRECTOR, SPECIALIZED EXAMINATION PROGRAMS AND REFERRALS, APPEALS

FROM: Daniel R. Lauer Lauer  Digitally signed by Daniel R. Lauer
Date: 2023.07.06 09:58:15 -0400
Director, Examination Headquarters, SB/SE

SUBJECT: Interim Guidance on FBAR Examination Case Procedures Due to Supreme Court Decision (Bittner v. US)

This memorandum issues guidance updating Report of Foreign Bank and Financial Accounts (FBAR) examination procedures as a result of the Supreme Court's recent decision in *Bittner v. United States*¹ until [IRM 4.26.16, Report of Foreign Bank and Financial Accounts \(FBAR\)](#), and [IRM 4.26.17, Report of Foreign Bank and Financial Accounts \(FBAR\) Procedures](#), are updated. Please ensure this information is distributed to all affected employees within your organization.

¹ 143 S.Ct. 713 (2023), available at https://www.supremecourt.gov/opinions/22pdf/21-1195_h3ci.pdf.

Purpose

This memorandum issues guidance on policy and procedural changes for FBAR examination cases. These changes are necessary due to the recent Supreme Court decision in *Bittner v. United States*. In the decision, the Supreme Court held that the failure to file a legally compliant FBAR constitutes a single violation of [31 USC Section 5314](#), regardless of the number of unreported or incorrectly reported accounts, and that penalties for non-willful reporting violations “accrue on a per-report, not a per-account, basis.” In other words, the non-willful failure to file a legally compliant FBAR for a specific calendar year is a single violation subject to a single penalty. The Court’s holding is contrary to guidance in IRM 4.26.16 and IRM 4.26.17 related to non-willful reporting penalties.

While the Court’s holding pertained only to the calculation of penalties for non-willful reporting violations, the Court noted²:

The statute then adds an even more specific rule for a subclass of willful violations—those that involve “a failure to report the existence of an account or any identifying information required to be provided with respect to an account.” In cases like that, the law authorizes the Secretary to impose a maximum penalty of either \$100,000 or 50% of the “balance in the account at time of the violation”—whichever is greater. So here, at last, the law *does* tailor penalties to accounts.”

Penalties for willful reporting violations apply per-account and guidance in IRM 4.26.16 regarding the calculation of penalties for willful reporting violations remains unchanged. The Court’s decision does not address FBAR recordkeeping violations.

Background

Pursuant to the Bank Secrecy Act and its implementing regulations, a United States person having a financial interest in, or signature or other authority over, one or more foreign financial accounts must file an annual reporting form known as an FBAR if the aggregate value of such account(s) exceeds \$10,000 at any time during the calendar year. As the Court notes in its decision, this reporting is “designed to help the government ‘trace funds’ that may be used for ‘illicit purposes’ and identify ‘unreported income’ that may be subject to taxation.”³

² Id., at 721 (citations omitted, emphasis in original)

³ Id., at 718

The FBAR penalty statute, [31 USC Section 5321\(a\)\(5\)](#), authorizes the Secretary to impose a penalty on any person who violates a provision of the FBAR reporting statute, 31 USC 5314. For the amount of the penalty, the statute⁴ provides for a maximum penalty of \$10,000 or, in the case of a willful violation: the greater of \$100,000 or 50% of the balance in the account at the time of the violation⁵. “Violation” for purposes of 31 USC 5321(a)(5) is not defined in the statute. The IRS has historically interpreted “violation” to mean the failure to report a given account properly. The Supreme Court, however, held that the failure to file a legally compliant FBAR constitutes a single violation, regardless of the number of unreported or improperly reported accounts.

Procedural Change:

Each reference to “violation” as used in 31 USC 5321(a)(5) to refer to a failure to comply with the reporting requirements of 31 USC 5314 should be read to mean: a failure to file an FBAR report, in the way and to the extent the Secretary prescribes. To the extent IRM 4.26.16 and IRM 4.26.17 are inconsistent with the Court’s holding in *Bittner v. United States*, they will be revised as described in the attachments.

Additionally, mitigation provisions are eliminated for non-willful FBAR violations. They should no longer be considered in calculating penalties for non-willful violations.

This memorandum revises IRM 4.26.16 and IRM 4.26.17 ([Attachment 1](#)) and provides specific guidance regarding actions in non-willful reporting violation cases:

- Preparing Form 13449 ([Attachment 2](#))
- Preparing Form 13448 ([Attachment 3](#))
- Required Coordination ([Attachment 4](#))

Effect on Other Documents: Guidance in this memorandum will be incorporated into the IRM within 2 years.

Effective Date: This guidance is effective immediately.

Contact: Email BSA Policy at # [REDACTED] #.

Attachments (4)

- Revisions to IRM 4.26.16 and IRM 4.26.17 (Attachment 1)
- Preparing Form 13449 (Attachment 2)
- Preparing Form 13448 (Attachment 3)
- Required Coordination (Attachment 4)

Distribution: Chief Counsel
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⁴ 31 USC 5321(a)(5)(B), (C), (D)

⁵ The \$10,000 and \$100,000 limitations are adjusted for inflation as discussed in [IRM 4.26.16.5.4\(5\)](#) and [IRM 4.26.16.5.5\(4\)](#).

The following changes are effective immediately for [IRM 4.26.16 \(06-24-2021\), Bank Secrecy Act, Report of Foreign Bank and Financial Accounts \(FBAR\)](#):

[IRM 4.26.16.1.6, Terms](#)

Revise paragraph (3) to read as follows:

Whenever the term ‘violation’ is used in this IRM it includes any reporting or recordkeeping violation of 31 USC 5314, Records and Reports on Foreign Financial Agency Transactions, or its implementing regulations. The failure to file a legally compliant FBAR constitutes a single reporting violation. Under 31 USC 5321(a)(5)(B)(i), penalties for non-willful violations apply on a per-violation basis, capped at \$10,000 for each violation. However, under 31 USC 5321(a)(5)(C) and (a)(5)(D)(ii), penalties for willful reporting violations apply on a per-account basis. Consequently, a single non-willful reporting violation can only result in a single penalty, but a single willful reporting violation can result in multiple penalties depending on the number of accounts which were not properly reported.

[IRM 4.26.16.5, FBAR Penalties](#)

Revise paragraph (4) to read as follows:

There may be multiple civil FBAR penalties if more than one person is required to file an FBAR reporting their interest in, or signature or other authority over, an account, such as if a person other than the account owner has signature or other authority over the foreign account. Each person responsible for filing an FBAR reporting the account can be liable for the full amount of the penalty for failing to file an FBAR.

[IRM 4.26.16.5.2, FBAR Penalty Structure](#)

Revise paragraph (4) to read as follows:

There may be both reporting and recordkeeping violations for a given year. Examiner discretion applies in determining whether to penalize both violations, but examiners must consult with Counsel before making a final decision to assert penalties for both violations.”

[IRM 4.26.16.5.4.1, Penalty for Non-willful Violations – Calculation](#)

Delete paragraphs (1) through (3).

Renumber previous paragraph (4) as paragraph (1) and revise to read as follows:

In most cases of non-willful violations, examiners will recommend one \$10,000 penalty (adjusted for inflation as described in IRM 4.26.16.5.4(5)) per violation. In ascertaining the penalty amount for non-willful violations (assuming the reasonable cause exception does not apply), examiners should use their discretion to calculate a penalty commensurate with the facts and circumstances of a case. See IRM 4.26.16.5.2.1 for more information about examiner discretion. The provisions in paragraph (4) below apply to this paragraph.

Renumber previous paragraph (5) as paragraph (2) and revise to read as follows:

The examiner's workpapers must support each penalty determination and document group manager approval and operating division FBAR Coordinator concurrence.

Renumber previous paragraph (6) as paragraph (3) and revise to read as follows:

Where there are multiple owners of an unreported foreign financial account, examiners must make a separate determination with respect to each co-owner of the foreign financial account as to whether there was a violation and, if so, whether the violation was willful or non-willful. See IRM 4.26.16.5.2 for additional information.

Renumber previous paragraph (7) as paragraph (4) and revise to read as follows:

In no event will the total amount of the penalties for non-willful violations (among all open years) exceed 50 percent of the highest aggregate balance of all foreign financial accounts to which the violations relate for the years under examination. The "highest aggregate balance" is calculated as described in IRM 4.26.16.1.6.

[IRM Exhibit 4.26.16-2, FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004](#)

Revise the paragraph beginning "If the filer qualifies for mitigation," to read:

If the filer qualifies for mitigation, calculate the mitigated penalty amount using the applicable mitigation guidelines in this Exhibit. Use the computed mitigated penalty amount in conjunction with guidance in [IRM 4.26.16.5.5](#) to complete the penalty determination for willful violations.

Delete the following:

The following table contains FBAR penalty mitigation guidelines for penalties per filer per year for non-willful (NW) violations.

Mitigation Level	If the maximum aggregate balance (per IRM 4.26.16.2.6) for all accounts to which the violations relate	The Mitigated Penalty Amount Is
Level I-NW	Did not exceed \$50,000 at any time during the calendar year, then Level I – NW applies to all violations, and	\$500 per non-willful violation. Total non-willful penalties cannot exceed \$5,000 per year.
Level II-NW	exceeds \$50,000, but does not exceed \$250,000, then Level II-NW applies to all violations, and	\$5,000 per non-willful violation.
Level III-NW	exceeds \$250,000, then Level III-NW applies to all violations, and	the statutory maximum per non-willful violation.

The following changes are effective immediately for [IRM 4.26.17 \(11-22-2021\)](#), [Report of Foreign Bank and Financial Accounts \(FBAR\) Procedures](#):

[IRM 4.26.17.4, Closing the FBAR Case](#)

Revise paragraph (2)(a) as it pertains to mitigation to read as follows:

Prepare a written summary of the examination results. This may be a summary memorandum, [Form 886-A](#), Explanation of Items, or FBAR Leadsheet. The determination should be fully supported and include references to the work papers. At a minimum, it should contain the following sections: Facts & History, Law, Analysis/Government's Position, Reasonable Cause, Penalty Computation, Mitigation (if penalties proposed are for willful violations), Taxpayer's Position, and Conclusion. Supporting documents should be clearly defined as attachments. The summary should show all FBAR years opened for examination and the determination reached for each year. If several years are opened but a penalty is asserted only with respect to one year, the summary should provide an explanation. If the FBAR Leadsheet is used, the audit steps should be removed before being sent to the filer and representative.

[IRM 4.26.17.4.3, Closing the FBAR Case with Penalties](#)

Revise paragraph (1) as it pertains to mitigation to read as follows:

If the examiner, after discussion with the group manager, determines that it is appropriate to assert an FBAR penalty and that a referral to Criminal Investigation is not appropriate or has been declined, the examiner will compute penalties in accordance with the FBAR penalty guidelines. See IRM 4.26.16.5, FBAR Penalties, for the FBAR penalty computation rules and, for willful violations, penalty mitigation guidelines.

Attachment 2, SBSE-04-0723-0034: Preparing Form 13449

When preparing [Form 13449, Agreement to Assessment and Collection of Penalties Under 31 USC 5321\(a\)\(5\) and 5321\(a\)\(6\)](#), for only non-willful reporting violations, prepare one form per calendar year, as follows:

General Preparation

The following table details how to complete general information on Form 13449:

<u>Field</u>	<u>Input</u>
Name of Account Holder	Only 1 individual or entity name
Social security number (SSN) or employer identification number (EIN)	Only 1 individual SSN or entity EIN
Address of account holder	Street address, city, state, and zip code
TOTAL proposed penalty	Autofills from page 2
Your signature	Leave blank, for US Person's action
Date Signed	Leave blank, for US Person's action
Representative's signature	Leave blank, for US Person's action
Date Signed	Leave blank, for US Person's action
Name of entity	Leave blank, for US Person's action
Signature of authorized officer	Leave blank, for US Person's action
Title	Leave blank, for US Person's action
Date signed	Leave blank, for US Person's action
Signature of authorized officer	Leave blank, for US Person's action
Title	Leave blank, for US Person's action
Date (mmdyyyyy)	Leave blank, for US Person's action
Name of examiner	Examiner or Appeals Officer's name
Employee ID number	Examiner or Appeals Officer's employee identification number
Date (mmdyyyyy)	Date form is completed by examiner or Appeals Officer
Office of examiner	Examiner or Appeals Officer's office location
Name of supervisor	Supervisor's name
Employee ID number	Supervisor's employee identification number
Date signed	Date form is signed by supervisor
Office of supervisor	Supervisor's office location
Name of account holder	Autofills from page 1
Account holder ID	Autofills from page 1
TOTAL proposed penalty (Enter here and on Page 1 of 2)	Manually enter the total penalty proposed for the year. A warning will pop up about modifying the field; select 'Yes'.

IMPORTANT: Only 1 calendar year per Form 13449. Do not list multiple years on a single Form 13449 when there are only non-willful reporting violations.

Attachment 2, SBSE-04-0723-0034: Preparing Form 13449

Account Information

List on Form 13449 each unreported or improperly reported foreign account with a blank penalty amount (do not enter \$0). The following table details how to record each account’s information on Form 13449 in each “Foreign Account [Number]” section:

<u>Field</u>	<u>Input</u>
Calendar year	The year for which the violation is being penalized. Only 1 calendar year per Form 13449.
Foreign Bank, Institution, or Agent(s)	The unreported or improperly reported item. Do not enter generic words, such as “various”, “multiple”, or “see attached”.
Proposed penalty per “Definition of Penalty Statutes”	Check the appropriate number box (box 3 for non-willful reporting violation)
Maximum value of account	The maximum value of the account during the year listed above
Foreign account number(s)	The account number. Do not enter generic words, such as “various”, “multiple”, or “see attached.”
Amount of penalty	Leave BLANK. Do not enter \$0.00.

See an example of this account information presentation in the figure below.

Foreign Account 1		
Calendar year 2020	Foreign Bank, Institution, or Agent(s) ABC Bank	Proposed penalty per “Definition of Penalty Statutes” (Check applicable box(es)) <input type="checkbox"/> (1) <input type="checkbox"/> (2) <input checked="" type="checkbox"/> (3) <input type="checkbox"/> (4) <input type="checkbox"/> (5) <input type="checkbox"/> (6) <input type="checkbox"/> (7)
Maximum value of account \$ 100,000	Foreign account number(s) 123456789	Amount of penalty \$
Foreign Account 2		
Calendar year 2020	Foreign Bank, Institution, or Agent(s) A BCD Bank	Proposed penalty per “Definition of Penalty Statutes” (Check applicable box(es)) <input type="checkbox"/> (1) <input type="checkbox"/> (2) <input checked="" type="checkbox"/> (3) <input type="checkbox"/> (4) <input type="checkbox"/> (5) <input type="checkbox"/> (6) <input type="checkbox"/> (7)
Maximum value of account \$ 200,000	Foreign account number(s) 987654321	Amount of penalty \$

If, for a single year, 1) a penalty for a non-willful reporting violation is proposed and 2) a penalty for any other type of violation is proposed, then [SB/SE HQ-INTL Counsel](#) coordination and multiple Forms 13449 are required.

Attachment 3, SBSE-04-0723-0034: Preparing Form 13448

When preparing Form 13448, Penalty Assessment Certification Summary (Title 31 “FBAR”), for only non-willful reporting violations, prepare one form per calendar year with a summary entry and account information, as follows:

Summary Entry

Create a summary entry for the non-willful reporting violation penalty that lists the penalty amount. The following table details how to complete the summary entry on Form 13448:

<u>Field</u>	<u>Input</u>
Foreign Bank, Institution, or Agent	“FinCEN Form 114”
Foreign Account Number	“BSA ID: XXXXXXXXXXXXXXXX”, where XXXXXXXXXXXXXXXX is the 14 digit BSA ID of the legally non-compliant FBAR being penalized. If no FBAR has been filed at the time penalties are proposed, input “not filed.”
Penalty Class	Indicate a penalty for a non-willful reporting violation applies
Penalty Amount	Penalty amount assessed for non-willful reporting violation

Account Information

List on Form 13448 each unreported or improperly reported foreign account with a blank penalty amount (do not enter \$0). The following table details how to record each account’s information on Form 13448:

<u>Field</u>	<u>Input</u>
Foreign Bank, Institution, or Agent	The unreported or improperly reported item. Do not enter generic words, such as “various”, “multiple”, or “see attached”.
Foreign Account Number	The account number. Do not enter generic words, such as “various”, “multiple”, or “see attached”.
Penalty Class	Indicate a penalty for non-willful reporting violation applies
Penalty Amount	Leave BLANK. Do not enter \$0.00.

Attachment 4, SBSE-04-0723-0034: Required Coordination

To ensure consistency, special coordination is required in certain situations as described below.

- If a request for FBAR abatement, refund or audit reconsideration is received, contact [SB/SE HQ-INTL Counsel](#) for case-specific guidance.
- For any FBAR case involving non-willful reporting violations 1) open in Exam, 2) where Form 13449 has been prepared (whether issued or not), and 3) where Form 13449 either: a) contains penalties for non-willful reporting violations that exceed the \$10,000 statutory maximum penalty (adjusted for inflation) for a given calendar year; or b) contains penalties for non-willful reporting violations that are allocated on a per-account basis to more than one account for a given calendar year, contact your [Business Operating Division FBAR Coordinator](#) and [SB/SE HQ-INTL Counsel](#) for case-specific guidance.