



INDEPENDENT OFFICE  
OF APPEALS

DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, DC 20224

September 26, 2023

Control No. AP-08-0923-0010  
Expiration Date: 9/26/2025  
Affected IRM: IRM 8.11.6

MEMORANDUM FOR IRS INDEPENDENT OFFICE OF APPEALS (APPEALS)  
EMPLOYEES

FROM: John E. Hinding /s/ *John E. Hinding*  
Director, Specialized Examination Programs and Referrals

SUBJECT: FBAR Case Procedures Due to the Bittner v. United States  
Supreme Court Decision

**Purpose:** This interim guidance (IG) provides revised Appeals procedures due to the recent U.S. Supreme Court decision in Bittner v. United States<sup>1</sup>, updated payment processing procedures, and a temporary case shipping pause.

**Background:** The Supreme Court held in Bittner that the failure to file a legally compliant Report of Foreign Bank and Financial Accounts (FBAR) constitutes a single violation of 31 U.S.C. 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".<sup>2</sup>

The IRS has been delegated FBAR enforcement authority, including authority to assess and collect FBAR civil penalties. Pursuant to Delegation Order 25-13, Enforcement of Report of Foreign Bank and Financial Accounts (FBAR) Requirements, these responsibilities are performed by the Small Business/Self-Employed Division (SB/SE) as well as other IRS divisions, including the IRS Independent Office of Appeals (Appeals). SB/SE issued IG memorandum SBSE-04-0723-0034 and IG memorandum SBSE-04-0823-0046 with policy and procedural changes due to the Bittner decision.

**Procedural Change:** See Attachment.

[Temporary change] Due to temporary facilities issues, **do not ship case files to CTR Operations in Detroit, Michigan at this time**. As described in IG memorandum SBSE-04-0823-0046, hold the physical case file until instructed that it

<sup>1</sup> Bittner v. U.S., 143 S. Ct. 713 (2023)

<sup>2</sup> Id. at 720, 725.

is permissible to once again send physical mail to CTR Operations. Further instructions will come from your Appeals Team Manager or assigned FBAR coordinator.

**Effect on Other Documents:** This guidance, with the exception of the temporary pause on shipping cases to CTR Operations, will be incorporated into IRM 8.11.6, FBAR Penalties, within two years from the date of this memorandum.

**Effective Date:** This guidance is effective as of the date of this memorandum.

**Contact:** Appeals employees should follow existing procedures to elevate questions through their management chain and follow established procedures on [How to Contact an Analyst](#).

Attachment: FBAR Case Procedures Due to [Bittner v. United States Supreme Court Decision](#), and Other Updated Procedures

cc: [www.irs.gov](http://www.irs.gov)



- Filer 's protest. The protested years should be the same as the years on the case summary card (CSC).

**Caution:** The years listed on the CSC must match the years on the Letter 3709, Form 13449, and the years protested by the filer. If they do not, seek guidance from the assigned Appeals FBAR coordinator.

- [Form 13536](#), FBAR Monitoring Document. Used to start an FBAR examination that did not originate from a Title 26 examination, and for the exam group to update the FBAR database. Also used to provide updates to CTR/BSA including to close the case from Exam.
- The file may also contain:
  - [Form 13448](#), Penalty Assessment Certification Summary (Title 31 "FBAR"). If a post-assessed penalty case, this form includes the date that the IRS designated official stamps this assessment certification form, certifying the penalty assessment occurred on that date.
  - [Letter 3708](#) is issued by CTR/BSA to the filer after the penalty has been assessed. Therefore, it will only be available for post-assessed penalty cases and is only issued if the penalty has not been paid in full at the time of assessment. If Letter 3708 should be in the case file but it is not, it must be requested by the Appeals Team Managers. To request a copy of Letter 3708 issued by CTR/BSA:
    - Email <#> [REDACTED] <#>, copy to <#> [REDACTED] <#>,
    - Use email subject line "Demand Letter Request" and
    - In the email message include the filer's full name, TIN and year(s) for which the letter is requested.
  - [Form 2848](#), Power of Attorney and Declaration of Representative, or a general power of attorney form which is valid under state law, if applicable. The authorization must specify it applies to FBAR, Title 31 FBAR Penalties, or otherwise comply with the requirements found in [IRM 4.26.17.3.2](#), Power of Attorney in FBAR Examinations.
  - IRS Counsel Opinion memo approving willful FBAR penalties (required for a willful violation penalty). <#> [REDACTED] <#>
  - FBAR consent to extend the statute of limitations, if applicable.

**Caution:** A consent to extend the statute of limitations for the Title 26 examination will not extend the statute of limitations on the FBAR examination.

- [Form 13535](#), Report of Foreign Bank and Financial Accounts Related Statute Memorandum, signed by the designated official identified in IRM [4.26.17.2.1\(6\)](#), documenting a good faith determination, based on the facts and circumstances, that potential FBAR violation was in furtherance of a potential Title 26 violation. Required if the FBAR examination originates from a Title 26 examination or Title 26 data is accessed.

#### **IRM 8.11.6.6**

#### **Appeals Technical Employee (ATE) Procedures for FBAR Penalty Cases**

##### **MODIFY (4)(m):**

(4)(m) For pre-assessed penalty cases, update per the amounts on Forms 13449.

##### **MODIFY (9) AND NOTE IN (9) AND ADD NOTE IN (9):**

(9) ATE will mail [Letter 5834](#), Foreign Bank and Financial Accounts Report (FBAR) Agreement Form Transmittal, with Forms 13449 for the filer to sign and return.

**Note:** ATE must prepare new Forms 13449 and not use the Forms 13449 prepared by Compliance. When preparing Forms 13449, for both non-willful and willful reporting violations, prepare one form per calendar year. ATE should follow the drafting procedures found at [SBSE-04-0723-0034, Interim Guidance on FBAR Examination Case Procedures Due to Supreme Court Decision \(Bittner v. US\)](#) (Attachment 2), with the exception for willful violations noted below.

**Note:** Penalties for willful violations must be allocated to each violations/account on Forms 13449 and the “Amount of penalty” field cannot be blank as required for non-willful violations. Therefore, do not manually enter the total penalty proposed for the year in the “TOTAL proposed penalty” field of the form.

##### **MODIFY (10):**

(10) ATE will have the ATM sign the Forms 13449 prior to submitting for assessment at CTR/BSA.

a. For agreed pre-assessed FBAR cases, the ATM will sign the Forms 13449 indicating that the case should be closed for assessment as stated by the Forms 13449, after the filer has signed indicating a waiver of certain rights, as stated by the Forms 13449. These signed forms are sent with closing [Letter 5080](#), FBAR Penalty Agreed Closing Letter, to the filer.

b. For unagreed pre-assessed FBAR cases, the ATM will sign Forms 13449 prior to requesting the assessment of penalties from CTR/BSA.

#### **IRM 8.11.6.7**

#### **Payment Procedures for FBAR Case**

##### **MODIFY (1):**

(1) FBAR filers should be encouraged to mail payments after the filer receives correspondence from CTR/BSA, e.g., in response to Letter 3708/3708A. Those letters include payment instructions. For any FBAR payment related questions, contact the assigned Appeals FBAR coordinator.

##### **MODIFY (2):**

(2) If payment is received on an FBAR penalty case (both pre-assessed and post-assessed), follow IRM 4.26.17.4.4(5), Closing the FBAR Case – Payment and Collection, procedures as modified by [SBSE-04-0823-0046](#) (Attachment 2) to submit payment to the Ogden Campus payment processing Teller Unit.

##### **MODIFY (3) AND NOTE IN (3):**

(3) It is **critical** that within one business day of shipping the payment package to Ogden for processing, the ATE email a copy of all documents sent (check/money order, Form(s) [3244-A](#), Form 3210) to CTR/BSA at [# \[REDACTED\] #](#) (copy to BSA Policy at [# \[REDACTED\] #](#)) with an email subject line “FBAR Payment Sent to Ogden – Record in Database.”

**Note:** This step is the only way for FBAR payments to be recorded in the FBAR Database, by which FBAR liabilities are monitored for collection enforcement action. FBAR transactions are not recorded on the Masterfile and this email is the only notification CTR/BSA will have to record the payment in the FBAR Database.

##### **MODIFY (4):**

(4) If an FBAR payment is erroneously posted to a non-FBAR module, see [IRM 8.11.6.8](#), Problems Related to FBAR Case Payment Posting, to resolve the problem.

##### **ADD (5)**

(5) DO NOT submit Form 13449 when submitting a payment for processing.

#### **8.11.6.8**

#### **Problems Related to FBAR Case Payment Posting**

## **MODIFY (1):**

(1) If FBAR payments have been misposted, such as to a Title 26 module, follow the instructions for misposted FBAR payments found at [IRM 4.26.17.4.4.1](#), Instructions for Misposted FBAR Payments.

## **MODIFY (2):**

(2) If an ATE discovers a misposted FBAR payment they must discuss the payment issue with their assigned FBAR coordinator to ensure that a payment posting correction is done correctly, as well as informing their ATM of the situation. The ATE is responsible for ensuring that the payment is correctly posted and also that the filer receives credit for the payment in the FBAR Database.

## **IRM 8.11.6.9.2**

### **FBAR Closing - Pre-Assessment Case**

## **MODIFY (4):**

(4) There are two types of agreed FBAR penalty cases:

- Agreed — Signed Forms 13449 and itemized statement/penalty calculation attached to Forms 13449, if required to explain the penalty amounts.
- No-change case — FBAR penalty is not sustained and signed Form 13449 is not required.

## **MODIFY (5) AND NOTE IN (5) AND ADD NOTE IN (5):**

(5) An unagreed case is when the FBAR penalty is fully or partially sustained and the filer does not agree. Appeals will prepare new Forms 13449, secure the ATM signature, and send to CTR/BSA via email to have the penalty assessed. The CTR/BSA email address: # [REDACTED] #. In the body of the message:

- Filer name and TIN,
- FBAR period(s) ready for assessment and the statute date of each, and
- Non willful cases: for each year with only non-willful reporting violations: The 14-digit BSA ID of each legally non-compliant FBAR being penalized (or identify as “not filed”). This is so Form 13448 can be prepared in accordance with [SBSE-04-0723-0034, Interim Guidance on FBAR Examination Case Procedures Due to Supreme Court Decision \(Bittner v. US\)](#).

**Note:** The 14-digit BSA ID for each non-compliant FBAR filing should be in the file received in Appeals. This information is typically found on the digital copy of the filed FBAR. If a thorough review of the physical case file did not result in its discovery, contact the assigned FBAR coordinator for assistance.

**Note:** If no filer signature is secured, then the penalty is sustained in full. The filer should be notified that the penalty will be assessed using Letter 5834 or equivalent language.

**MODIFY (6):**

(6) ATE will prepare and send Letter 5834 and Forms 13449 with penalty calculation to solicit filer signature.

**MODIFY (7) AND NOTE IN (7):**

(7) For unagreed cases, ATE will prepare Forms 13449 to obtain ATM signature, then send to CTR/BSA for posting prior to close. CTR/BSA will send to the ATE Form 13448 for verification of the assessment. This verification should be put in the case file.

**Note:** A signed Form 13449 is not required to be sent to the filer in an unagreed case when issuing Letter 5143.

**MODIFY (8):**

(8) Contact information for the FBAR Penalty Coordinator at CTR/BSA is via e-mail at: # [REDACTED] #.

**IRM 8.11.6.9.3**

**FBAR Closing - Post-Assessment Case**

**MODIFY (6), NOTE IN (6) AND CAUTION IN (6):**

(6) Revision to assessed penalties - If there is a revision to the assessed penalties and appropriate authority (see IRM 8.11.6.12) has been received to abate the assessed penalties, then the ATE will prepare Forms 13449, obtain ATM signature, then send to CTR/BSA to revise the penalties prior to closing the case. CTR/BSA will send to the ATE Form 13448 for verification of the revised amount to include in the case file. The ATE will send the agreed closing letter and Letter 5080 to the filer, and include a copy of the Forms 13449 signed by the ATM.

**Note:** If the filer does not sign the Form 13449, then the assessed penalties are not revised upon closure. The full amount of the penalties is sustained.

**Caution:** Once an FBAR penalty has been assessed by CTR/BSA at the request of Exam or Appeals, the penalty may not be reversed unless it is approved by an ATM or DOJ, as appropriate. See IRM 8.11.6.12 (2).

**MODIFY NOTE IN (7):**



(7) If there is no concession of the assessed penalties, do not prepare or send Form 13449 to CTR/BSA.

**Note:** A signed Form 13449 is not required to be sent to the filer in an unagreed case when issuing Letter 5143.

**MODIFY (8):**

(8) The FBAR Coordinator at CTR/BSA may be contacted via email at # [REDACTED] #. The assigned Appeals FBAR Coordinator can also be contacted for assistance.

**IRM 8.11.6.10  
FBAR Administrative File**

**MODIFY (1) AND NOTE IN (1):**

(1) The following documents should be included in the administrative file and uploaded to ACDS by the ATE/ATM:

- Form 5402, signed by ATM

**Note:** If the case was received with both pre-assessed and post-assessed penalties, close all penalties together on the same Form 5402. Use the closing code for the post-assessed year on the Form 5402

- Appeals Case Memorandum (ACM)
- Schedule of Adjustments (SOA)
- Letter 5834, Foreign Banking and Financial Accounts Report Agreement Form Transmittal, or letter with equivalent language sent to filer
- Forms 13449 prepared by Appeals
- Form 13448 or other documentation received from CTR/BSA to confirm the penalty has been assessed
- If payment received while case is open in Appeals, copy of check(s) received, Form(s) 3244-A, Form(s) 3210, and email to CTR/BSA sent per IRM 8.11.6.7(3)
- Appropriate closing letter dated and signed by the ATM:

For agreed cases — Letter 5080

For unagreed cases — Letter 5143

For no-change cases — Letter 913

- FBAR Penalty computation spreadsheet/worksheet