



## Supreme Court: FBAR maximum penalty for non-willful failure to file accrues on a per-report basis

### Global Information Reporting

On February 28, 2023, the Supreme Court of the United States issued a decision in [Bittner v. United States](#), holding that the maximum civil penalty for a non-willful failure to file Form 114, *Report of Foreign Bank and Financial Accounts* (FBAR) accrues on a per-report basis and not on a per-account basis. As a result of this decision, the maximum civil penalty for a non-willful failure to file a complete and timely FBAR is limited to \$10,000, adjusted for inflation.

The Bank Secrecy Act (BSA) and its implementing regulations require a US person that has a financial interest in, or signature authority over, one or more foreign financial accounts during a calendar year to file an FBAR if the aggregate value of the foreign financial account or accounts exceeds \$10,000 at any time during the calendar year. A single FBAR filing (or “a report”) may contain information on multiple accounts. The FBAR is filed with the Financial Crimes Enforcement Network (“FinCEN”) and enforcement authority is delegated to the Internal Revenue Service (IRS). The IRS is responsible for investigating possible civil violations, assessing and collecting civil penalties, and issuing administrative rulings. A maximum \$10,000 civil penalty is imposed for non-willful violations of the FBAR filing requirement; the civil penalty is adjusted for inflation.

In *Bittner*, the Petitioner, Alexandru Bittner, filed late FBARs for 2007–2011 that the IRS deemed deficient because they did not address all accounts as to which Mr. Bittner had either signatory authority or a qualifying interest. Mr. Bittner filed corrected FBARs for each year in question and collectively reported 272 foreign financial accounts. The IRS did not consider either set of late submissions to be a willful violation and did not question the accuracy and completeness of Mr. Bittner’s corrected FBARs. However, the IRS imposed a penalty of \$2.72 million, taking the view that non-willful penalties apply to each

account not accurately or timely reported. Mr. Bittner challenged that penalty in court, arguing that the BSA authorizes a maximum penalty for non-willful violations of \$10,000 per report, not \$10,000 per account. The District Court agreed with Mr. Bittner's argument, but the Fifth Circuit Court of Appeals reversed the decision and upheld the government's position that the non-willful penalty applied on a per-account basis and not per report. This created a circuit split with the Ninth Circuit Court of Appeals, which had previously held in *United States v. Boyd* that the non-willful penalty applied on a per-report basis. Mr. Bittner filed for, and was granted, *certiorari* with the Supreme Court.

In the decision issued on February 28, the Supreme Court held that the civil penalty for a non-willful failure to file an FBAR accrues on a per-report basis and not per account. In analyzing the statutory purpose and prior administrative guidance, the Supreme Court concluded that the BSA treats the failure to file a legally compliant report as one violation carrying a maximum penalty of \$10,000, not a cascade of such penalties calculated on a per-account basis. Therefore, the Supreme Court ruled that the BSA's \$10,000 maximum penalty for the non-willful failure to file a complete and timely FBAR accrues per report, not per account.

Taxpayers who have paid FBAR penalties for a non-willful failure on a per-account basis may be interested in whether this ruling creates opportunities to claim refunds of penalties paid. FBAR refund procedures are complex and should be discussed with a tax controversy specialist or referred to taxpayer's legal counsel. Taxpayers also need to be aware of significant potential penalties relating to willful failure to timely file FBAR.

### Get in touch

[Susan Segar](#)

[Jonathan Cutler](#)

[Peter Larsen](#)

[Matt Cooper](#)

[Jennifer O'Brien](#)



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30 Rockefeller Plaza  
New York, NY 10112-0015  
United States

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