



# GMS Flash Alert

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## United States - Updates to FBAR Exam Procedures

The U.S. Internal Revenue Service (“IRS”) recently issued interim guidance updating Report of Foreign Bank and Financial Accounts (“FBAR”) examination policy and procedures.<sup>1</sup> This interim guidance, which was issued in response to a recent ruling from the Supreme Court of the United States<sup>2</sup> (“the Court”), updates the Internal Revenue Manual (“IRM”) to be consistent with the Court’s holding and eliminates the FBAR penalty mitigation guidelines for non-willful FBAR violations. Going forward, penalty mitigation for non-willful violations is left to the discretion of IRS examiners.

### WHY THIS MATTERS

International assignees entering the United States (who often maintain financial accounts in their home country) and U.S. persons on assignment outside the United States (who often open financial accounts in their host country) may be required to report certain foreign (i.e., non-U.S.) financial accounts annually on the FBAR, an information filing that is separate from the U.S. tax return. However, assignees are often unaware of the FBAR requirement and may fail to timely report their foreign financial accounts, potentially subjecting themselves to substantial penalties.

The civil penalty for failure to file the FBAR has been capped at \$10,000 per form. However, assignees who fail to properly report their foreign financial accounts on the FBAR may find themselves subject to higher penalties for their unintentional FBAR violations due to the elimination of the penalty mitigation procedures.

### Background

Prior to the Court’s recent decision in *Bittner v. United States*, the IRS imposed the \$10,000 civil penalty for non-willful failure to file the FBAR on a “per account” basis.<sup>3</sup> However, if a filer with a non-willful violation satisfied certain criteria (e.g., FBAR compliance history, no evidence of criminal or fraudulent activity, cooperation with examination), the IRM directed examiners to mitigate the penalty amount assessed based on the maximum aggregate balance for all accounts

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to which the violation related. For example, if the IRS found that a filer failed to report three accounts with an aggregate balance for all accounts of less than \$50,000 on the FBAR, the IRS could assess a maximum civil penalty of \$30,000 (\$10,000 x 3 unreported accounts) for a non-willful failure to file the FBAR. However, if the filer satisfied the mitigation criteria, the IRM directed IRS examiners to assess a penalty of only \$1,500 (\$500 per non-willful violation).<sup>4</sup>

However, the Court recently held that the penalty for non-willful failure to file the FBAR applied on a “per form” basis. Therefore, the maximum civil penalty the IRS may now impose for a non-willful violation is \$10,000, regardless of the number of missing accounts. (For prior coverage see, [GMS Flash Alert 2023-48](#), March 1, 2023.)

## Policy and Procedure Changes for FBAR Examinations

A recent IRS memorandum announced changes to the FBAR examination policy and procedure as a result of the *Bittner* decision. The memorandum provides that the IRM will be updated so that it is consistent with the Court’s holding in *Bittner*. However, the memorandum also eliminates the FBAR penalty mitigation guidelines in the IRM for non-willful FBAR violations. Under the new policy, FBAR penalty mitigation for non-willful violations is left to the examiner’s discretion.

The guidance in this memorandum will be incorporated into the IRM within the next two years but is effective as of July 6, 2023.

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## KPMG INSIGHTS

Although the IRS will no longer consider the IRM’s non-willful violation penalty mitigation procedures, these updates do not impact the “reasonable cause penalty” exception. When determining whether the reasonable cause exception applies, the IRS considers all relevant facts, including the filer’s experience, knowledge, and extent of the filer’s efforts to comply with the requirement. As a general matter, assignees unaware of their FBAR requirement and who take steps to come into compliance prior to examination often qualify for this exception.

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## FOOTNOTES:

1 [IRS Memorandum SBSE-04-0723-0034 \(July 6, 2023\)](#) issued to the IRS Small Business/Self-Employment (“SB/SE”) Division by Daniel R. Lauer (Director, IRS SB/SE Division).

2 *Bittner v. United States*, 143 S. Ct. 713 (2023), available at [https://www.supremecourt.gov/opinions/22pdf/21-1195\\_h3ci.pdf](https://www.supremecourt.gov/opinions/22pdf/21-1195_h3ci.pdf).

3 See Y. Sohn, "[Non-Willful FBAR Violation and Compliance Through Various IRS Programs](#)," published in *Mobility Matters*, a publication of KPMG LLP in the United States.

4 See I.R.M. 4.26.16.5.4.1 and Exhibit 4.26.16-2.

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