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Recent FBAR Cases Provide Important Takeaways for Taxpayers

By Ted R. Batson, Jr., Partner and Tax Counsel, and Colette Karam, Tax Counsel

Two recent court cases related to FinCEN Form 114, *Report of Foreign Bank & Financial Accounts* (FBAR), highlight several key issues that are important for taxpayers with non-U.S. financial accounts.

First, a little background: Under the Currency and Foreign Transactions Reporting Act of 1970, commonly known as the Bank Secrecy Act (BSA), "U.S. persons" with a "financial interest in" or "signature authority" over non-U.S. financial accounts[1] that exceed $10,000 at **any time** during the calendar year[2] are required to file an annual FinCEN Form 114.[3]

A common misconception is that an international account with less than $10,000 does not need to be reported. On its face, that statement may be true. However, if the combined highest value of all foreign accounts **on any day in the tax year** exceeds $10,000, then **all accounts, even those whose balance did not exceed $10,000 on any day**, must be reported on the FBAR.

The BSA imposes separate penalties for non-willful failure to file an FBAR and willful failure to file an FBAR. The penalty for non-willful failure to file is an amount not to exceed $10,000.[4] The penalty for willful failure to file is the greater of:

(i) $100,000, or

(ii) 50% of the account balances involved.[5]

Knowingly filing a false or fraudulent FBAR or willfully failing to file an FBAR can also trigger criminal penalties.[6]

Insight from Recent Court Rulings

An open question has been whether the $10,000 penalty for non-willful failure to file an FBAR applied to each account that had not been included on an FBAR or to each unfiled FBAR. On February 28, 2023, the U.S. Supreme Court resolved the question in *Bittner v. United States*, announcing that the $10,000 non-willful foreign bank account reporting penalty applies on a **per-form** — not a per-account — basis.[7] This case was a win for taxpayers whose failure to file was non-willful. The Court did note that the statute does apply the penalty for willful violations of the FBAR reporting requirement on a per-account basis.

Also in February 2023, a U.S. District Court in *United States v. Manafort*[8] found defendant Paul Manafort guilty of several charges, including failing to report foreign bank accounts (i.e., failing to file FBARs). In this case, there were many foreign financial accounts owned by companies that Manafort didn't nominally have any role in or express signature authority over.

Manafort illustrates that signature authority is significantly broader than merely determining whether you've signed the bank signature card.[9] Generally, signature authority means an individual who, alone or in conjunction with another, can **control** the disposition of money, funds, or other assets held in a financial account by direct communication (whether in writing or otherwise) to the person with whom the financial account is maintained.[10] For example, if you can call a bank that maintains a foreign financial account and the bank would disburse funds based on your direction, you may have an FBAR filing obligation. This is exactly the type of control that caused issues for Manafort.

Critically, the IRS had emails showing that Manafort instructed payments from the foreign accounts and the payments were then executed. This implies that Manafort had control over these accounts and therefore should have filed an FBAR. On February 23, 2023, the

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U.S. District Court for the Southern District of Florida entered a consent judgment in the Department of Justice's suit against Manafort, awarding the government $3.2 million.[11]

There are several inferences that can be drawn from the *Manafort* case. If an individual can send an email or make a phone call (to a bank, broker, trustee, etc.) instructing that a payment be made from a foreign financial account, that individual may also have an FBAR filing obligation. In contrast, if the individual merely has the ability to direct investments in the account, without the ability to effect distributions, there is likely no signature authority, and those facts would not trigger an FBAR filing requirement.

As with many rules, there are exceptions, and FinCEN Form 114 provides several examples. The most common for nonprofit entities and their employees would likely be:

- Certain accounts jointly owned by spouses – For these accounts, the spouse of an individual who files an FBAR is not required to file a separate FBAR if (1) all the financial accounts that the non-filing spouse is required to report are jointly owned with the filing spouse; (2) the filing spouse reports the jointly owned accounts on a timely filed FBAR that is electronically signed; and (3) the filers have completed and signed Form 114a, *Record of Authorization to Electronically File FBARs*.
- Consolidated FBAR – U.S. persons who are entities included in a consolidated FBAR filed by a greater-than-50% owner are not required to file a separate FBAR. This applies to organizations that may have shared ownership of an account or cases where there are parent/subsidiary relationships.

One main distinction for the FBAR as opposed to other international information reporting forms is that U.S. persons may have to file an FBAR even if they don't have a tax return filing obligation and even if they do not have any interest in the account.

The recent Supreme Court decision generally does not impact penalties for willful compliance failures, such as those found in the *Manafort* case. The IRS and some courts have recently taken the position that **recklessness can give rise to a willful violation even where the taxpayer does not have actual knowledge of an obligation to file**.[12]

The standard for willfulness continues to evolve through case law but the IRS regularly pursues both willful and non-willful FBAR penalties. While the *Manafort* case may be an example of a willful violation, its broad definition of what constitutes "signatory authority" over an account can still impact taxpayers, even with the best of intentions.

Taxpayer Takeaways

While *Bittner* resolves a significant question regarding the proper calculation of **non-willful** penalties, it also serves as a reminder of the hefty fees associated with non-compliance. Taxpayers and tax preparers must exercise reasonable care to ensure compliance with applicable reporting obligations and limit exposure to IRS penalties.

Filing an FBAR does not increase a taxpayer's payment obligation and the increasing penalties for non-compliance have heightened the risks of an inadvertent error leading to significant financial losses. Taxpayers who have compliance gaps should take steps to regularize their tax reporting immediately. Excessive delays in resolving noncompliance can weaken a taxpayer's position that failure to comply was non-willful or that there was a reasonable cause justification.[13]

The most recent FBAR filing deadline was April 17, 2023; however, an automatic six-month extension to October 16, 2023, is available without a requirement to apply for the extension. Note that filing an extension for your U.S. income tax return does not extend the FBAR filing deadline. The FBAR is a separate requirement with a different due date, so it's crucial to file it on time to avoid penalties.

The IRS provides information about submitting delinquent FBAR filings on its website at irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures.

If you have questions about your filing obligations, please contact us for guidance regarding your specific facts.

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A certified public accountant and licensed attorney, Ted advises exempt organizations of all sizes on a wide range of tax matters, including representation before state and federal tax authorities and assistance with firm audit or advisory engagements to formulate advice and counsel on important operating and tax issues. In addition to tax advisory services, Ted leads the firm's tax preparation practice, including IRS Forms 990 and 990-T and related state forms. He also serves as an Advisor-at-Large for Church Law & Tax and as a member of the Missio Nexus Mission Finance and Administration Planning Committee.

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Colette has over 16 years of experience handling tax controversy matters at the federal and state levels. Prior to joining CapinCrouse, Colette spent most of her career with a Big Four accounting firm as a specialist in the firm's Federal Tax Controversy group, and she continues to handle tax disputes. She has handled large-case IRS examinations and appeals with international and cross-border issues, audits, administrative hearings, settlements, and appeals. Colette also has handled state apportionment and unitary business analysis, research and development tax credit defense, and a wide variety of other issues.

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[1]"BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114)," *available at* https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf, 4 (last accessed April 10, 2023) (defining a "foreign financial account" as "a financial account located outside of the United States. For example, an account maintained with a branch of a United States bank that is physically located outside of the United States is a foreign financial account. An account maintained with a branch of a foreign bank that is physically located in the United States is not a foreign financial account.").

[2]31 U.S.C. § 5314, 31 C.F.R. § 1010.350, I.R.M. 4.26.16.2.2.2. Note that offshore accounts valued at $50,000 or more will trigger additional Foreign Account Tax Compliance Act (FATCA) obligations, specifically the requirement to file Form 8938, *Statement of Specified Foreign Financial Assets*. Failure to file a Form 8938 could also result in a $10,000 penalty.

[3]For additional information and line item instructions for completing the FBAR, *see* BSA Electronic Filing Requirements For Report of Foreign Bank and Financial Accounts (FinCEN Form 114), *available at* https://www.fincen.gov/sites/default/files/shared/FBAR%20Line%20Item%20Filing%20Instructions.pdf (last accessed April 10, 2023).

[4]31 U.S.C. § 5321(a)(5)(B). Note, since 2016, this penalty amount has been subject to adjustment for inflation and at January 2023 the inflation-adjusted amount was $15,611. 31 C.F.R. § 1010.821.

[5]31 U.S.C. § 5321(a)(5)(C). Note, since 2016, the $100,000 penalty amount has been subject to adjustment for inflation and at January 2023 the inflation-adjusted amount was $156,107. 31 C.F.R. § 1010.821.

[6]Knowingly and Willfully Filing False FBAR - Up to $10,000 or 5 years or both. 18 U.S.C. § 1001; 31 C.F.R. § 1010.840(d); Failure to File FBAR or Retain Required Records - Up to $250,000 or 5 years or both. 31 U.S.C. 5322(a); 31 C.F.R. 1010.840(b). If violating certain other laws too, this penalty increases to up to $500,000 or 10 years, or both. 31 U.S.C. § 5322(b); 31 C.F.R. § 1010.840(c).

[7]*Bittner v. United States*, No. 21-1195 (U.S. Feb. 28, 2023).

[8]*United States v. Manafort*, 131 AFTR 2d 2023-776 (February 23, 2023).

[9]A bank signature card is a document that financial institutions use to authenticate a customer's signature for personal and business bank accounts.

[10]*See* 31 CFR § 1010.350(f)(1) and IRM 4.26.16.3.4.1 (11-06-2015) (noting several signature authority exceptions).

[11]*United States v. Manafort*, 131 AFTR 2d 2023-776 (February 23, 2023).

[12]*See* e.g., *Kimble v. United States*, 991 F.3d 1238 (Fed Cir. 2021).

[13]*See* Treas. Reg. § 301.6724-1 for circumstances that may justify reasonable cause.