

August 28, 2023

## FBARs, FATCA, and Foreign Nationals: Where are We Headed?

By: [Daniel C. Silva](#) and [Agustin Ceballos](#)

### Recent FBAR Developments

There has been a legal shakeup this summer in the world of “FBARs”—Reports of Foreign Bank and Financial Accounts. New developments have been popping up nearly every week, whether from a court decision, as a result of a policy revision by the Internal Revenue Service (“IRS”) or the Department of Justice (“DOJ”), or some other change in litigation and enforcement against taxpayers.

The disruption began in February with the U.S. Supreme Court case *Bittner v. United States*,<sup>1</sup> which held that the \$10,000 penalty for not filing FBARs only applied on a “per year” basis. The Court rejected the government’s argument that taxpayers should be punished with a separate \$10,000 penalty for each account that went unreported. Mr. Bittner and taxpayers welcomed the favorable holding. Indeed, Mr. Bittner’s penalties dropped from \$2.72 million on 272 unreported accounts, to \$50,000 for five years of failed FBAR filings.

In the wake of *Bittner*, taxpayers across the U.S. are seeking to reduce their own penalties. In July, a woman in Florida asked a court to slash the amounts due for her FBAR violations from \$710,000 (on 71 accounts) to \$90,000 (for nine years of unreported accounts).<sup>2</sup> The DOJ dismissed a separate FBAR suit against a customs broker in Texas, because he had already satisfied the now-reduced penalties on his Mexico-based accounts.<sup>3</sup>

*Bittner* also forced the IRS to update those sections of its “Internal Revenue Manual” that deal with FBAR violations.<sup>4</sup> As expected, the IRS will now impose FBAR penalties only on a “per-year” basis. As a counterbalance, however, the IRS eliminated “mitigation provisions” on non-willful FBAR violations, which it had previously used as an equitable mechanism to reduce FBAR penalties. This move suggests that the IRS will seek the maximum per-year penalty for each FBAR violation, while pursuing every “person responsible for filing an FBAR.”<sup>5</sup>

<sup>1</sup> 598 U.S. 85 (2023).

<sup>2</sup> *United States v. Larach de Canahuati*, 22-cv-23411 (S.D.Fla., July 12, 2023—Doc. No. 14) (ultimately denying the defendant’s motion for relief from judgment, at Doc. No. 16, for lack of any sufficiently “extraordinary circumstances”).

<sup>3</sup> *United States v. Mireles*, 21-cv-138 (S.D.Tx., July 6, 2023—Doc. No. 28, Stipulation for Dismissal).

<sup>4</sup> Dept. of the Treas., Memo re: *Interim Guidance on FBAR Examination Case Procedures Due to Supreme Court Decision (Bittner v. US)*, Control No. SBSE-04-0723-0034, July 6, 2023 (available at <https://www.irs.gov/pub/foia/ig/sbse/sbse-04-0723-0034-redacted.pdf>, expires July 25, 2025).

<sup>5</sup> *Id.*, see also Internal Rev. Manual, 4.26.16.5.

So while post-*Bittner* penalties may shrink, the IRS or DOJ are unlikely to reduce their interest in FBAR enforcement. For example, the DOJ recently filed civil complaints against a woman in New York for more than \$530,000 in FBAR penalties,<sup>6</sup> and elsewhere against a woman and her children seeking more than \$1.4 million in penalties for FBAR violations and fraudulent transfers.<sup>7</sup> Even the Supreme Court declined to reconsider an FBAR penalty that exceeded \$3.1 million, despite the taxpayer's claim that the judgement violated the "Excessive Fines" clause of the 8th Amendment of the U.S. Constitution.<sup>8</sup>

A man in Hawaii is defending himself from the government's claim that he owes more than \$10 million in FBAR penalties for failing to report business accounts in Japan.<sup>9</sup> Meanwhile, the U.S.'s continued prosecution of tax shelters appears to be a fertile source of potential FBAR violations—most staggeringly in a recent \$120 million claim by the IRS.<sup>10</sup>

This all indicates a steadfast pursuit of tax and anti-money laundering ("AML") violations. It may come as a surprise to taxpayers, but FBAR filing obligations, regulations, and enforcement are all part of America's AML regime—commonly known as the "Bank Secrecy Act". This is the same body of laws that requires financial institutions to file "Suspicious Activity Reports" on customers and transactions, and for individuals to submit "Currency and Monetary Instrument Reports" on cash imports or exports that exceed \$10,000.<sup>11</sup>

With tax havens reported to cost governments approximately \$4.7 trillion over the next decade,<sup>12</sup> the U.S. is showing every sign that it remains committed to enforcing these laws and collect associated penalties—whether through civil litigation, forfeitures, criminal prosecutions, or a combination of all three. The post-*Bittner* legal environment will be uncertain for some time. The authors continue to monitor novel arguments, with mixed results, by both taxpayers and the government.<sup>13</sup>

Enforcement actions will also be difficult to predict in the middle of all this disruption. The IRS has indicated it will end unannounced visits by revenue officers.<sup>14</sup> This announcement may not, on deeper scrutiny, offer taxpayers much comfort. For instance, this prohibition against unannounced visits does not apply to the entire IRS. IRS-Criminal Investigation special agents, which lead financial crime prosecutions

---

<sup>6</sup> *United States v. Wolfe*, 23-cv-4253 (E.D.N.Y., June 8, 2023—Doc. No. 1).

<sup>7</sup> *United States v. Shiffman, et al.*, 23-cv-1043 (M.D.Fla., June 5, 2023—Doc. No. 1).

<sup>8</sup> *Toth v. United States*, No. 22-177 (U.S. June 5, 2023).

<sup>9</sup> *Osamu Kurotaki v. United States*, 22-cv-00063 (D.Haw., July 14, 2023—Doc. No. 40-1).

<sup>10</sup> *United States v. Burga*, 19-cv-3246 (N.D.Cal., July 21, 2023—Doc. No. 34).

<sup>11</sup> See 31 U.S.C. § 5318(g) and 31 U.S.C. § 5316.

<sup>12</sup> Tax Justice Network, *World to lose \$4.7 trillion to tax havens over next decade unless UN tax convention adopted, countries warned*, July 25, 2023 (available at <https://taxjustice.net/press/world-to-lose-4-7-trillion-to-tax-havens-over-next-decade-unless-un-tax-convention-adopted-countries-warned>).

<sup>13</sup> See, e.g., *Aroeste v. United States*, 22-cv-682 (S.D.Cal, August 9, 2023—Doc. No. 70) (arguing that a non-resident cannot be subject to FBAR reporting obligations under tax treaties between the U.S. and Mexico), and *United States v. Kelly*, 21-cv-12570 (E.D.Mich., July 10, 2023—Doc. No. 69) (U.S. requesting an order compelling a taxpayer to bring assets back to the U.S., for eventual satisfaction of FBAR penalties).

<sup>14</sup> IRS News Release, *IRS ends unannounced revenue officer visits to taxpayers; major change to end confusion, enhance safety as part of larger agency transformation efforts*, July 24, 2023 (available at <https://www.irs.gov/newsroom/irs-ends-unannounced-revenue-officer-visits-to-taxpayers-major-change-to-end-confusion-enhance-safety-as-part-of-larger-agency-transformation-efforts>).

and forfeitures (including for FBAR violations), will continue to use unannounced “knock-and-talks” as a key tool in their investigations.

### Recent FATCA Developments

The evolution of the Foreign Account Tax Compliance Act, or “FATCA”, will further impact FBAR enforcement. FATCA was enacted in 2010 to combat tax evasion by U.S. persons holding offshore investments in foreign accounts.<sup>15</sup> In general, FATCA requires foreign—i.e., non-U.S.—financial institutions to report back to the U.S. any “specified United States Person”<sup>16</sup> that has a foreign bank account. FATCA non-compliance, like FBAR violations, carry large penalties; most significantly, a 30% withholding tax on U.S.-source payments and income (with certain limitations and exemptions).<sup>17</sup>

To implement FATCA, the U.S. negotiated intergovernmental agreements, or “IGAs”, with foreign countries. Currently, 113 foreign countries have entered into IGAs with the U.S.<sup>18</sup> IGAs compel foreign governments to report the tax information of U.S. persons to the U.S. government. Naturally, financial reporting via IGAs often produces evidence of foreign bank accounts that U.S. taxpayers do not disclose on FBARs. And IGAs are largely reciprocal. This means that the U.S. frequently shares information with foreign governments on their citizens’ U.S.-based financial holdings.

Although the U.S. Joint Committee on Taxation estimated FATCA would bring in around \$1 billion dollars per year by 2019,<sup>19</sup> recent reports show that FATCA enforcement has cost the U.S. \$573 million and resulted in penalty assessments<sup>20</sup> of only \$14 million.<sup>21</sup> The Treasury Inspector General for Tax Administration consequently recommended that the IRS, through its Large Business and International Division, increase examinations of—and penalties for—FATCA non-compliance.<sup>22</sup>

As an additional way of implementing FATCA and “making it work”, the IRS publicly encouraged foreign IGA signatories to make “good faith efforts” to enforce and implement FATCA.<sup>23</sup> Beyond emphasizing the IRS’s focus on FATCA compliance, these statements indicate that the IRS is searching for FBAR violations. The IRS has all the resources necessary to accomplish this. It received nearly \$80 billion to hire approximately 20,000 new employees, deploy new technology, and, among other things over the next two years, “improve tax enforcement”.<sup>24</sup> Indeed, the IRS is rapidly hiring special agents at IRS-Criminal Investigation<sup>25</sup> and revenue agents in all areas and locations, including its Large Business and

<sup>15</sup> FATCA was enacted as part of the Hiring Incentives to Restore Employment Act, P.L. 111-147.

<sup>16</sup> IRC § 7701(a)(30) and Treas. Reg. § 1471-1(b)(141)(i).

<sup>17</sup> See IRC §§ 1471-1474, inclusive, and applicable Treasury Regulations.

<sup>18</sup> The list of foreign jurisdictions with an IGA is available at <https://home.treasury.gov/policy-issues/tax-policy/foreign-account-tax-compliance-act>.

<sup>19</sup> <https://crsreports.congress.gov/product/pdf/IF/IF12166>.

<sup>20</sup> IRC § 6038D(d).

<sup>21</sup> Report number 2022-30-019 by the Treasury Inspector General for Tax Administration, titled “Additional Actions Are Needed to Address Non-Filing and Non-Reporting Compliance Under the Foreign Account Tax Compliance Act,” (available at <https://www.oversight.gov/sites/default/files/oig-reports/TIGTA/202230019fr.pdf>).

<sup>22</sup> *Id.*

<sup>23</sup> IRS Notice 2023-11 available at [https://www.irs.gov/irb/2023-11\\_IRB](https://www.irs.gov/irb/2023-11_IRB)

<sup>24</sup> Lawder, David, Reuters, *U.S. IRS to hire nearly 20,000 staff over two years with \$80 billion in new funds*, Apr. 10, 2023 (available at <https://www.reuters.com/world/us/us-irs-hire-30000-staff-over-two-years-it-deploys-80-blm-new-funding-2023-04-06>).

<sup>25</sup> See, e.g., <https://www.jobs.irs.gov/resources/job-descriptions/irs-criminal-investigation-special-agent>.

International Division.<sup>26</sup> There are also proposals for the IRS to deploy machine learning across its vast amounts of data “to achieve more targeted and productive enforcement actions.”<sup>27</sup>

### **Conclusion**

Tax matters can be daunting, especially where the issues involve unreported offshore accounts (and foreign income) or FATCA compliance. The authors specialize in risk assessments for international tax, FBAR and FATCA reporting, offshore disclosure of foreign bank accounts and unreported income, and AML violations. We have seen these cases from both the taxpayer’s and the government’s perspective. Contact Buchalter today for assistance.



**[Daniel C. Silva](#)**  
Shareholder  
(619) 219-6339  
[dsilva@buchalter.com](mailto:dsilva@buchalter.com)



**[Agustin Ceballos](#)**  
Shareholder  
(619) 219-6326  
[aceballos@buchalter.com](mailto:aceballos@buchalter.com)

---

<sup>26</sup> <https://www.jobs.irs.gov/careers>.

<sup>27</sup> Janet Holtzblatt and Alex Engler, *Machine Learning and Tax Enforcement*, Tax Policy Center at the Urban Institute & Brookings Institution, June 22, 2022 (available at [https://www.taxpolicycenter.org/sites/default/files/publication/163980/machine\\_learning\\_and\\_tax\\_enforcement.pdf](https://www.taxpolicycenter.org/sites/default/files/publication/163980/machine_learning_and_tax_enforcement.pdf)).